

THE HON T F BATHURST

CHIEF JUSTICE OF NEW SOUTH WALES

SPECIALISED COURTS/COURT TRACKS – THE WAY TO GO?

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Introduction

1. It is a pleasure to address such a distinguished audience as this and to have the opportunity to offer a few remarks on specialised courts, court tracks and the ‘way to go’. I am aware that I, along with my fellow panellists, am a generalist. While this may make you question my ability to offer anything more than a superficial insight on this subject, let me assure you that as a generalist judge, I am highly adept at feigning expertise on a range of topics that I know little about.
2. Today I will offer a few thoughts on the merits and drawbacks of specialised courts, using examples from the Australian context to highlight the ways in which specialised bodies can both encourage innovation and efficiency and lead to insularity, jurisdictional conflict and fragmentation. In addressing the question of the ‘way to go’, I must admit that despite being a generalist judge, I do not have all the answers. Indeed, it is difficult to assess the ‘success’ of any court or adjudicative body. That being said, what I will do is outline some ways in which insularity, jurisdictional conflict and fragmentation can be reduced.

The Generalist / Specialist Divide

3. Before I speak about the merits and drawbacks of specialised courts, let me say something briefly about the specialist / generalist divide.
4. Traditionally, specialised courts refer to bodies which have limited jurisdiction in one or more specified fields. However, the distinction

* I express my thanks to my Research Director, Ms Sarah Schwartz, for her assistance in the preparation of this address.

between specialist and generalist courts is not so black and white. Specialisation can come in the form of separate courts, as well as divisions or lists within a generalist court.¹ Take for example the court that I preside over, the Supreme Court of New South Wales, commonly considered a generalist court.

5. The Supreme Court has two divisions, a Common Law Division and an Equity Division. There are also lists for particular types of matters, including a corporations, family provision and possession list. Each list has its own practical guidelines for practitioners and involves, to some extent, a degree of judicial specialisation. Only a few months ago, the Court released a practice note regarding adoptions, which sets out that adoptions are to be case-managed by an 'Adoptions List Judge', who will sit on certain dates.²
6. Even in the Court of Appeal, the preferences and skills of each judge are considered when allocating work, particularly in relation to constitutional and commercial matters. These comments are not an attempt to draw the discussion away from specialised courts, they are simply to emphasise that generalism and specialisation are not distinct positions; rather, they exist on a spectrum.
7. Another thing to keep in mind is that perceptions of what constitutes specialisation fluctuate over time. The Federal Court of Australia provides an unlikely example. The Federal Court was established in 1977 as a court of limited jurisdiction. Its original jurisdiction was generally limited to bankruptcy, industrial and trade practices matters, as well as judicial review of administrative decisions.³ When it started sitting, it was widely perceived as a specialist body that was at best unnecessary and at worst a threat to the integrity of the legal system. Indeed, the then Chief Justice of New South Wales, Sir Laurence Street, criticised the Court, stating that the "system of justice is too precious an inheritance to be allowed to become a

¹ For a further discussion see *Kirk v Industrial Relations Commission* (2010) 239 CLR 531 at [122].

² Supreme Court Practice Note SC EQ 13, 'Supreme Court – Adoptions' (24 May 2016).

³ The Hon Justice Susan Kenny, 'The evolving jurisdiction of the Federal Court of Australia – administering justice in a federal system' (Speech, Seminar on the Jurisdiction of the Federal Courts, National Judicial Institute, Ottawa, Ontario, Canada, 28 October 2011) pp 4-5.

pawn in a power struggle between Commonwealth and State.”⁴ However, during the 80s and 90s, the Australian government slowly expanded the jurisdiction of the Federal Court so that it is now a court of general federal law.⁵ As such, although the court still derives its jurisdiction from a number of statutes and does not have, for practical purposes, criminal jurisdiction, today it is considered to be a court of general jurisdiction.

The Merits and Drawbacks of Specialised Courts

8. Having put in place these two provisos, that generalisation and specialisation is a scale and that perceptions of specialisation can fluctuate over time, let me say something about a few of the merits and drawbacks of specialised courts.

The Merits of Specialised Courts

9. The main benefit associated with specialisation is that specialised courts foster improved decision making by enabling judges and practitioners to develop expertise in a particular field. Specialised courts can also improve case management by adopting practices and procedures which are more appropriate to the class of matters that they deal with. This can improve their efficiency and capacity to respond to complex issues arising within their jurisdiction.
10. One example is the New South Wales Land and Environment Court, which I will refer to as the LEC. The commissioners of the LEC have specialised and practical knowledge on a range of subjects including planning, environmental science, land valuation, architecture and land rights.⁶ The Court makes use of their expertise by enabling commissioners to sit with judges in certain circumstances, and by considering their knowledge and experience when allocating work.⁷ The judges of the LEC also have expertise on topics peculiar to the Court’s work, such as ecologically sustainable development and intergenerational equity. They also become

⁴ The Hon Sir L Street, ‘The Consequences of a Dual System of State and Federal Courts’ (1978) 52 *Australian Law Journal* 434, 437.

⁵ Kenny, above n 3, p 6.

⁶ *Land and Environment Court Act 1979* (NSW) s 12(2).

⁷ *Land and Environment Court Act* s 30(2).

adept at weighing and balancing the various environmental, social and economic impacts of a particular project.

11. The expertise of the judges and commissioners of the LEC has fostered innovation in the Court's development of principles on merits review of planning decisions. The Court began developing planning principles in 2003 with the aim of improving the consistency of decisions in merits review appeals. Its website now boasts 39 such principles.⁸

12. I hasten to add that the expertise of judges does not, and certainly should not, lead to different legal reasoning processes. An adjudicator will be assisted by familiarity with specific legal and scientific concepts, as well as similar cases that have been resolved previously. However, that knowledge merely assists in interpreting and applying the law. Indeed, as the Chief Judge of the LEC, Justice Preston, has emphasised, adjudicating such cases "involves the same technique and logic as judging other disputes."⁹

13. Another benefit associated with specialisation is that specialised courts can lead to better outcomes in areas where existing procedures are not sufficiently flexible or appropriate for a particular type of offender. In Australia, specialised courts exist for children, persons with mental disabilities and drug-users.

14. One example is the Drug Court of New South Wales, which handles certain offences committed by those who are dependent on drugs. The Court exercises the jurisdiction of the Local and District Court, however, it incorporates procedures for treatment and rehabilitation into its jurisdiction. Similar to drug courts in other jurisdictions, it was established to reduce the risk of re-offending by drug-dependent offenders who are often caught in a predictable cycle of arrest, conviction, incarceration and release.¹⁰ The basic procedure is that if the Court determines that an offender is eligible for the drug court program, they are invited to plead guilty. The Drug Court then convicts and sentences the offender. However, the sentence is

⁸ Land and Environment Court, 'Planning Principles', available at <http://www.lec.justice.nsw.gov.au/Pages/practice_procedure/principles/planning_principles.aspx>.

⁹ The Hon Justice B Preston, 'The art of judgment environmental disputes' (2008) 12 *Southern Cross University Law Review* 103, 127.

¹⁰ Drug Court, 'Our role', available at <http://www.drugcourt.justice.nsw.gov.au/Pages/dc_role.aspx>.

suspended while the offender participates in a treatment and rehabilitation program, with substantial supervision and control.

15. From the time of its establishment in 1999, the Drug Court has developed innovative procedures directed at the particular type of offenders that come before it. The Court's judges, as well as the prosecutors and defenders who appear before it, have become attuned to the particular issues faced by drug-dependent offenders and with appropriate treatment and rehabilitative responses.

16. According to the most recent evaluation, the Drug Court is "more cost-effective than prison in reducing the rate of re-offending among offenders whose crime is drug-related."¹¹ Compared to other drug-offenders, those accepted into the drug court program were 58% less likely to be reconvicted of a drug offence, 37% less likely to be convicted of any offence, 65% less likely to be convicted of an offence against a person and 35% less likely to be convicted of a property offence.¹²

The Drawbacks of Specialised Courts

17. While specialised courts such as the LEC and Drug Court of New South Wales can lead to better outcomes in specific types of matters or for specific types of offenders, they run the risk of creating insularity, jurisdictional overlap and fragmentation. As the Chief Justice of Australia has warned, there is a risk that specialised courts will "evolve into a kind of archipelago of islands of expertise separated by a sea of unknowing."¹³ A consequence of such insularity is that by focusing on a specific subset of legal issues, specialised courts can become removed from the mainstream of judicial thought and can become disparate bodies of precedent.

18. Related to this concern is that if the jurisdiction of specialised bodies is ill-defined or is too broad, there may be jurisdictional conflict and uncertainty.

¹¹ New South Wales Government, Bureau of Crime Statistics and Research, 'Drug Court Re-evaluation' (media release, 18 November 2008) available at http://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2008/bocsar_mr_cjb121.aspx.

¹² NSW Bureau of Crime Statistics and Research, 'The NSW Drug Court: A re-evaluation of its effectiveness' (September 2008) 121 *Contemporary Issues in Crime and Justice* 1.

¹³ The Hon R French, 'In praise of breadth – A reflection on the virtues of generalist lawyering' (Speech, Law Summer School 2009, University of Western Australia, 20 February 2009).

Further, the fragmentation of courts and tribunals can weaken the fabric of what should be considered an integrated legal system. As stated by a former Federal Court judge, Michael Moore,

“a fragmented network of specialist courts and tribunals can make the system susceptible to external pressures in a manner destructive to the impartiality and integrity that the community expects from its courts. This is particularly so if specialist courts are continually formed or abolished according to the prevailing political views of those commanding a majority in parliament.”¹⁴

19. An example of the potential for insularity, jurisdictional uncertainty and fragmentation can be found in the New South Wales Industrial Relations Court, established in 1996. The Court was vested with jurisdiction in both industrial matters concerning employment conditions, pay and the like, as well as criminal jurisdiction in matters involving occupational health and safety. It also had jurisdiction to set aside or vary work-related contracts which were found to be unfair.¹⁵ The Court ended up taking a very liberal interpretation of its own jurisdiction. So much so that it assumed jurisdiction over all manner of commercial disputes, including those which bore only the faintest resemblance to a dispute of an industrial character.

20. In one instance, this led to it assuming jurisdiction over a dispute concerning dealership agreements for the sale and servicing of Caterpillar construction equipment at various locations across Australia. The cause of the dispute was that Caterpillar had purported to terminate the arrangement.¹⁶ The problem with the court assuming jurisdiction over such a matter was that in doing so, it applied principles that were seen as inappropriate in large commercial disputes. Similar issues were also raised in regard to the Court's criminal jurisdiction. As stated by one High Court Justice, in a case concerning the criminal jurisdiction of the Industrial Court,

...a major difficulty in setting up a particular court, like the Industrial Court, to deal with specific categories of work, one of which is a

¹⁴ Justice Michael Moore, 'The role of specialist courts – an Australian perspective' (FCA) (2001) *Federal Judicial Scholarship* 11, 15.

¹⁵ *Industrial Relations Act 1996* (NSW) s 106.

¹⁶ *Caterpillar of Australia Pty Ltd v Industrial Court of New South Wales* (2009) 78 NSWLR 43 at [99].

criminal jurisdiction in relation to a very important matter like industrial safety, is that the separate court tends to lose touch with the traditions, standards and mores of the wider profession and judiciary. It thus forgets fundamental matters like the incapacity of the prosecution to call the accused as a witness even if the accused consents. Another difficulty in setting up specialist courts is that they tend to become over-enthusiastic about vindicating the purposes for which they were set up.¹⁷

Ultimately, the Court of Appeal, the High Court and the legislature effectively wound back the Court's jurisdiction.¹⁸ Now, workplace health and safety has moved into the mainstream of the criminal law, which I would suggest has produced a far more efficient process for litigants.

The Way to Go

21. Now that I have discussed some of the merits and drawbacks of specialised courts, let me move on to the more difficult question of the 'way to go'. While there are no hard and fast solutions, I will put forward a few ways in which the risk of insularity and fragmentation can be avoided.

22. First, judges working in specialised courts must keep abreast of changes in other fields of law which may impact the determination of disputes in their court. The design of a specialised body, and also the way in which it operates, should assist specialist judges to focus on their own field of expertise while remaining abreast of changes in other areas of law. This can occur through information sharing and exchanges with generalist courts. For example, the Chief Justice of the LEC, Justice Preston, can act as an additional judge of the Court of Appeal.¹⁹ In addition, New South Wales Supreme Court judges can act as additional judges of the LEC.²⁰ In the Drug Court of New South Wales, all cases are heard by judges who are also judges of the District Court of New South Wales.

23. Another way to reduce insularity is through the provision of avenues of appeal. For instance, in certain circumstances, appeals lie from the LEC to

¹⁷ *Kirk* at [122].

¹⁸ See eg *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180.

¹⁹ *Supreme Court Act 1970* (NSW) s 37A.

²⁰ *Land and Environment Court Act* s 11A.

the Court of Appeal and Court of Criminal Appeal of New South Wales.²¹ From these courts, parties may then apply to appeal to the High Court of Australia. Similarly, offenders in the Drug Court can appeal their final sentence to the Court of Criminal Appeal. To some extent, this oversight encourages coherence in the decisions of lower courts, both specialist and generalist.

24. In order to avoid insularity, jurisdictional overlap and fragmentation, if possible, it may be of benefit for specialist bodies to be structured as divisions or lists of a generalist court. The environmental divisions of the Supreme Court and Administrative Courts of Thailand are examples of such an approach.

25. Some in the room may suggest, perhaps fairly, that this is the generalist trying to shore up support for generalist courts. I would respond by saying that there are benefits to structuring some specialist bodies as specialist divisions or separate streams in a general tribunal. An example of the latter is the Environmental Chamber of the First Tier Tribunal, established in England and Wales in 2010.²² Such a divisional structure permits flexibility. The division or stream can establish its own procedures and importantly, judges can be transferred in and out of the division to utilise expertise while maintaining experience in other areas of the law. In addition, at a basic level, a divisional structure also allows specialists and generalists to work and share ideas in the same environment.

26. In saying that, I do acknowledge that in some situations, a separate body with its own specific procedures may be necessary. However, care must be exercised in determining the jurisdiction of such bodies. For example, there seems to be little justification for generalist and specialist bodies exercising the same criminal jurisdiction, particularly if they each apply the same or similar sentencing legislation.

27. I am mindful of the view that the success of a specialist court will depend on the breadth of its jurisdiction. Bodies with a narrow area of responsibility

²¹ *Land and Environment Court Act* Divs 1 and 2 of Pt 5; *Criminal Appeal Act 1912* (NSW) s 5AB.

²² Discussed in R Macrory, 'The Long and Winding Road – Towards an Environmental Court in England and Wales' (2013) *Journal of Environmental Law* 1.

will have a smaller case load and are less able to create a body of jurisprudence. However, a balance must be struck. If it is to exist, a specialist court should be invested with sufficient jurisdiction to capture matters which require its specialised knowledge and procedures. In the LEC, planning appeals and cases with complex scientific evidence provide examples. However, as a rule, I do not think that general cases, such as those which loosely concern the environment, should be directed to a specialist court simply because of their subject matter. As former Australian High Court Justice Michael Kirby commented in relation to tax legislation, “[i]t is hubris on the part of specialised lawyers to consider that ‘their Act’ is special and distinct from general movements in statutory construction.”²³

28. As a final note, it should also be kept in mind that failings in relation to the accessibility of, costs involved in, or delays associated with bringing proceedings in a generalist court, are not of themselves sound reasons for establishing specialist bodies. Accepting such a rationale consigns specialist courts to being a band-aid to existing problems in the system. To the extent that there are issues with litigation, they should be dealt with. It would be unfortunate if significant failings in generalist courts came to be seen as a sound reason for creating specialist courts and tribunals. As I have said, the focus should be kept firmly on the benefits of expertise and innovation.

29. Ultimately, when establishing any forum to deal with specialised issues – be it a separate court or tribunal, or a division or list within an existing body – care must be taken to maintain the law’s coherence and to ensure that specialisation does not lead to separation. Importantly for us generalists, the creation of specialist bodies does not absolve the need to evolve and to address problems that exist in our own court processes.

²³ *Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at [84].