



Delays, stoppages and appeals: An empirical evaluation of the adverse impacts of environmental citizen suits in the New South Wales land and environment court



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ABSTRACT

Environmental impact assessment (EIA) promotes considered and participatory decision-making, which can delay development and, at times, lead to projects being temporarily halted or permanently discontinued. Over the past decade, governments in a number of jurisdictions have proposed ‘streamlining’ reforms to eliminate perceived causes of unnecessary delays and stoppages. A target of these reforms has been environmental citizen suits (ECS): legal or merits-review proceedings initiated by private parties to uphold public environmental rights or interests for predominantly public purposes in order to generate public environmental benefits. This article reports the results of an empirical analysis of delays and stoppages attributable to ECSs in the NSW Land & Environment Court over the period 2008 to 2015. Key findings include: 109 finalised ECSs were identified over the period; 33 of the determined ECSs were successful (broadly defined); in 27 of the 33 successful ECSs, the activity that was the subject of the proceedings was subsequently approved or otherwise allowed to proceed; and the median major project delay caused by ECSs was 4.4 months. The results suggest the claims ECSs significantly hinder economic growth by delaying and stopping development are largely baseless. ECSs were relatively uncommon, rarely stopped development, and rarely caused major project delays.

1. Introduction

The potential for environmental impact assessment (EIA) processes to cause project delays and stoppages has been a persistent concern since EIA was first introduced almost 50 years ago. EIA-induced delays and stoppages can reduce the private and social returns from development and, in the worst cases, lead to the abandonment of projects that enhance social wellbeing (BIE, 1990; APC, 2009; Macintosh, 2010).

To some extent, project delays and stoppages are an unavoidable aspect of EIA. Amongst other things, EIA seeks to promote considered and participatory decision-making, which inherently involves delays (Bond et al., 2014). While most stakeholders are willing to accept some EIA-related holdups, tensions arise about their extent and causes. In response to pressure from business interests, governments in a number of jurisdictions have proposed ‘streamlining’ reforms in recent years to eliminate perceived causes of unnecessary delays and stoppages (Noble, 2009; Bond et al., 2014; Suwanteep et al., 2016; Loomis and Dziedzic, 2018).

Environmental citizen suits (ECS) have been a target of these

streamlining proposals. ECSs are legal or merits-review proceedings initiated by private parties to uphold public environmental rights or interests for predominantly public purposes in order to generate public environmental benefits (Macintosh et al., 2017). These proceedings come in three general forms: judicial review (involving challenges to the legality of purported exercises of power by administrative decision-makers before a court of law); civil enforcement (action before a court of law for a civil remedy to prevent or punish an alleged infringement of the law); and merits review (review of the substantive merits of an administrative decision by an appeal body) (Cane, 2000, 2009). Over the period 1970–2010, a range of measures were introduced across developed countries to promote ECS activity, including expanding the rules of standing governing access to courts and tribunals and establishing rules to ensure ECS applicants do not bear the full costs of unsuccessful cases (ALRC, 1996; May, 2003; Sadeleer et al., 2005). The support for ECSs has been based on the belief they improve the quality of EIA decision-making (both procedurally and substantively) by exposing development proponents and administrative decision-makers to increased judicial and quasi-judicial scrutiny (Sax, 1971; ALRC, 1985; Hodas, 1995; APC, 2014).

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Table 1
Eight classes into which the jurisdiction of the NSW L&E Court is divided.

Class	Type	Comment
1	Merits review – environmental planning and protection appeals	Merits review of administrative decisions of local and state government authorities under 14 planning and environment statutes
2	Merits review – tree disputes and local government appeals	Proceedings under the <i>Trees (Disputes Between Neighbours) Act 2006</i> and miscellaneous merits review proceedings of decisions of local government authorities made under nine planning and environment statutes
3	Merits review – land tenure, valuation, compensation and Aboriginal land claim cases	Includes applications for easements (in particular circumstances), land valuation objections under the <i>Valuation of Land Act 1916</i> , claims for compensation following compulsory acquisition of land under various statutes (mainly the <i>Land Acquisition (Just Terms Compensation) Act 1991</i>) and Aboriginal land claims under the <i>Aboriginal Land Rights Act 1983</i>
4	Judicial review and civil enforcement – general planning and environment	Judicial review of administrative decisions made under, and civil enforcement to remedy and restrain breaches of, 33 planning and environment statutes
5	Summary criminal enforcement – general planning and environment, and mining, oil and gas	Summary criminal enforcement proceedings for offences under 18 planning and environment statutes
6	Appeals as of right against convictions or sentences relating to environmental offences from the NSW Local Court	Criminal appeals as of right from the NSW Local Court under ss 31 or 42 of the <i>Crimes (Appeal and Review) Act 2001</i>
7	Appeals requiring leave against convictions or sentences relating to environmental offences from the NSW Local Court	Criminal appeals requiring leave from the NSW Local Court under ss 32 or 43 of the <i>Crimes (Appeal and Review) Act 2001</i>
8	Merits review, judicial review and civil enforcement – mining, oil and gas	Appeals made under the <i>Mining Act 1992</i> and the <i>Petroleum (Onshore) Act 1991</i>

Source: *Land and Environment Court Act 1979* (NSW), Pt 3, Div 1.

While offering manifest benefits, ECS can be a source of additional delays and stoppages in EIA processes (Hilson and Cram, 1996; Adler, 2001). This has prompted business interests to seek changes to wind-back the scope for ECS activity. There has been anti-ECS campaigns and associated reform proposals in a number of Australian jurisdictions over the past decade, including New South Wales (NSW) (Galilee, 2012; Williams, 2012; QDNRM, 2014; APPEA, 2015; Wild, 2016; Brandis, 2017). The driving force behind the push for ECS reforms has been the mining and oil and gas sectors, who have reacted to a series of high profile ECSs concerning major projects (Galilee, 2012; Williams, 2012; QDNRM, 2014; APPEA, 2015). The industry's concerns stem from the capital-intensive nature of coal and gas developments, and the price volatility in relevant commodity markets, which makes them acutely sensitive to delays and stoppages (APC, 2009).

As is so often the case with claims about the adverse impacts of EIA (Loomis and Dzedzic, 2018), debates about the delays and stoppages associated with ECSs have largely occurred in the absence of empirical data. The majority of the empirical literature on ECSs focuses exclusively on ECS frequency and applicant success rates (defined in legal rather than substantive terms) (Sax and DiMento, 1974; Sandler, 1981; Environmental Law Institute, 1984; Fadil, 1985; GACE, 2002; May, 2003; Sadeleer et al., 2005; Tolsma et al., 2009). The only known studies that touch on the issue of appeal-related delays in EIA processes are Middle and Middle (2010) and Macintosh et al. (2017). Middle and Middle (2010) looked at the length of EIA appeals rather than the extent of the associated project delays. Their study also did not separate ECSs from proponent and other third party appeals. Macintosh et al. (2017) evaluated the extent of ECS-related delays and stoppages in the Australian Government's EIA regime. They found that few ECSs were initiated under the regime and, where they were, they generally caused few stoppages and had negligible effects on project timelines.

This article adds to the empirical literature by reporting the results of an analysis of the extent to which ECSs in the *NSW Land & Environment Court (L&E Court) 2008-2015* caused project delays and stoppages. The evaluation was confined to the period January 2008 to December 2015 ('study period'). It is the first detailed empirical study of ECS activity in NSW and one of the largest empirical analyses of ECSs ever conducted. The remainder of the article is set out as follows. Section 2 provides background information on NSW and the L&E Court. Section 3 details the methods. Section 4 provides the results. Section 5 discusses the Results and Section 6 concludes.

2. Context on NSW and the Land & Environment Court

NSW is Australia's most populous state and has the largest economy of the country's six states and two self-governing territories, accounting for almost 1/3 of Australia's Gross Domestic Product (GDP) (ABS, 2016). The state's formal EIA regime is contained in its principal land-use planning statute, the *Environmental Planning & Assessment Act 1979* (NSW) (EP&A Act). However, there are several other statutory regimes that work in tandem (or applied during the study period) with the EP&A Act and that form part of the state's broader regulatory framework concerning environment and planning issues, including the *Threatened Species Conservation Act 1995* (NSW), *Protection of the Environment Operations Act 1997* (NSW), *Local Government Act 1993* (NSW), *Mining Act 1992* (NSW) and *Crown Lands Act 1989* (NSW). ECSs in the L&E Court are generally made under the EP&A Act (suits initiated under the EP&A Act accounted for 84% of the ECSs identified in the study). However, ECS applicants also occasionally utilise other statutory levers to challenge projects. To avoid the artificial exclusion of relevant cases, the analysis included all ECSs in the L&E Court over the study period, regardless of what statute the appeals were made under.

The L&E Court is a specialist environment court (the world's first) with exclusive jurisdiction to determine disputes arising under NSW planning and environmental legislation (Preston, 2008). The jurisdiction of the Court is specialised but broad in scope, covering merit appeals, judicial review, civil enforcement and summary criminal enforcement of specified offences. For the majority of the study period, the jurisdiction of the L&E Court was divided into the eight classes summarised in Table 1.

The caseload of the L&E Court was reasonably stable over the study period, with finalisations (matters disposed of pre-trial or at trial) averaging 1280 per annum. Most of these matters (80%) were class 1, 2 and 3 merits appeals (Fig. 1).

NSW has introduced a number of measures since the 1970s to promote ECS activity. Open standing provisions were included in its heritage legislation in 1977 and have been a feature of the EP&A Act since its introduction in 1979 (Preston, 1991; Mossop, 1995). Similar open standing provisions were included in its pollution laws in 1991 (Mossop, 1995). Measures have also been introduced to lessen the barriers to ECSs posed by costs orders, including giving the L&E Court the power to make protective costs orders so as to cap the exposure of ECS applicants prior to the commencement of proceedings (Preston, 2008, 2012, 2013; Pain, 2014). In addition, since 1985, the NSW

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