

LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES: PRACTICE AND PROCEDURE

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1. Generally, the same procedural legislation and rules of court apply to the Land and Environment Court of New South Wales as apply to all courts in NSW. In civil proceedings, they are the *Civil Procedure Act 2005* (CPA) and the *Uniform Civil Procedure Rules 2005* (UCPR).
2. The general position is subject to two qualifications. First, due to the the Land and Environment Court's specialist jurisdiction, it is necessary to have special legislation and rules which prevail to a limited extent. They are the *Land and Environment Court Act 1979* (LEC Act) and the *Land and Environment Court Rules 2007*(LEC Rules). Secondly, the classes of matters within the Court's jurisdiction are so diverse that its practice and procedure necessarily varies according to whether the Court is exercising its civil or criminal jurisdiction and according to the class of matter. These variations are to some extent found in the LEC Act and Rules, but are largely fleshed out in the Court's published practice notes.
3. The LEC Act defines eight classes of matters within the Court's jurisdiction. Most matters coming before the Court in those classes may be summarised as conventional civil litigation comprising judicial review, civil enforcement and mining matters; merit appeals from a governmental person or body (such as appeals from refusals of development consent or from conditions of development consent, appeals from determinations of compensation for compulsory acquisition of land and valuation appeals) and tree disputes; criminal prosecutions for environmental and planning offences; and appeals from Local Court convictions and sentences for more minor environmental and planning offences.

Civil Proceedings

4. In civil proceedings, the Land and Environment Court's overriding object is to facilitate the just, quick and cheap resolution of the real issues in dispute. To achieve that object, it has adopted rigorous case management procedures.
5. This philosophy has been endorsed by the NSW Parliament in ss 56-60 of the CPA, which mandates in civil proceedings a rigorous regime which may require the hacking away of technicalities and excuses for delay put forward by less than diligent litigants¹. This statutory regime includes the following:
 - (a) the court, when exercising its powers, must seek to facilitate the overriding purpose of the just, quick and cheap resolution of the real issues in dispute;
 - (b) the parties are under a duty to assist the court to further that overriding purpose;
 - (c) the parties' lawyers are forbidden from causing their clients to be in breach of that duty;
 - (d) the court is obliged to manage proceedings having regard to four stated objects of case management, namely:
 - the just determination of the proceedings;
 - the efficient disposal of the business of the court;
 - the efficient use of available judicial and administrative resources; and
 - the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable to the respective parties;

¹ *Hans Pet Constructions Pty Ltd v Cassar* [2009] NSWCA 230 at [47]; see also *Aon Risk Services Australia Ltd v Australian University* [2009] HCA 27 at [113] – [114].

- (e) in deciding whether to make any order for the direction or management of the proceedings, the court must seek to act in accordance with the dictates of justice, including the overriding purpose and objects of case management;
 - (f) the practices and procedures of the court are to be implemented with the aim of resolving the issues in such a way that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute.
6. To these ends, significant powers of case management have been placed in the hands of the courts which, if exercised, can have sharp and even fatal effects on claims. For example, if a party fails to comply with a direction, the court has power to dismiss the proceedings, strike out a defence and give judgment accordingly, reject evidence, or order a party to pay costs².

Special provisions re merit appeals

7. In addition, the legislature has made special provision for merit appeals in the Land and Environment Court, because of their nature³:
- first, they are to be conducted with as little formality and technicality, and with as much expedition as statutory requirements and the proper consideration of the matters before the Court permit;
 - secondly, the Court is not bound by the rules of evidence but may inform itself in such manner as it thinks appropriate and as a proper consideration of the matters before the Court permits.

Case management

8. The Land and Environment Court's case management practice and procedure in civil matters are set out in its published practice notes. They are aimed at ensuring that the parties have adequately considered

² S 61 CPA

³ s 38 LEC Act

settlement and alternative dispute resolution; that the real issues are defined; that the number and duration of attendance before the Court are minimised; that the parties know what is expected of them each time they attend before the Court, including by usual pre-trial directions attached to the Practice Notes; and that attendances before the Court are minimised and conducted as quickly and cheaply as is reasonably practicable and consistent with justice.

9. The practice notes contain provisions common to all classes of the Court's civil jurisdiction and provisions only applicable to particular classes. The provisions common to all classes include the following:
- (a) each party not appearing in person shall be represented before the Court by a legal practitioner or authorised agent familiar with the subject matter of the proceedings and with sufficient instructions to enable all appropriate orders and directions to be made;
 - (b) legal practitioners and agents for parties should communicate prior to any attendance before the Court with a view to reaching agreement on directions;
 - (c) it is the responsibility of each party and their representative to consider the orders and directions appropriate to be made to facilitate the just, quick and cheap resolution of the real issues;
 - (d) the Court may at any stage refer the proceedings to alternative dispute resolution (such as mediation, neutral evaluation or conciliation) where the Court considers that to be appropriate;
 - (e) if there is any significant breach of the Court's directions, including a breach sufficient to cause slippage in a pre-trial timetable, the parties must notify the Court in writing and provide a written explanation. Parties or their legal representatives may be at risk of being ordered to pay costs if their conduct unnecessarily or

unreasonably increases the number of attendances in Court or causes costs to be thrown away;

(f) unnecessary photocopying is to be avoided. This is not a small thing. Experience has shown that unnecessary photocopying can greatly add to the cost of litigation;

(g) provisions concerning expert witnesses.

Directions hearings

10. Matters heard by judges are listed for pre-hearing directions before the list judge, normally on Fridays. Matters in the published list are given a “not before” marking to minimise practitioners and parties wasting time waiting for their matter to be called. As many as about eighty matters may be in the list. The only way that such a large list can be disposed of efficiently within the day is by annexing “usual directions” to the practice notes, and by requiring the parties or their lawyers to confer with each other before the directions hearing in an endeavour to agree on the directions that they seek and to hand to the list judge at the directions hearing their agreed or competing “short minutes” of the directions sought. Thanks to this practice, it commonly takes only a few minutes to make even quite long and complex directions in a particular matter.

11. When a matter is ready to be given a hearing date, the list judge directs the parties, at a directions hearing, to proceed forthwith to the registrar to obtain a hearing date.

12. Matters heard by commissioners are listed for pre-hearing directions before the registrar.

Notices of motion

13. Notices of motion are usually made returnable on Fridays before the list judge. If the notice of motion is short and the motion is ready to proceed, it

will be heard, if possible, on the return date either by the list judge or the duty judge.

Urgent matters

14. Urgent matters, such as applications for urgent interlocutory injunctions, can be listed before the duty judge at any time on short notice or, if necessary, immediately. If the hearing of an urgent interlocutory injunction is likely to be lengthy, the parties are encouraged to consider whether, if the Court can allocate dates for an early final hearing, any necessary restraint can be put in place until then by consent and without prejudice and without having to take up Court time hearing the application for the urgent interlocutory injunction.

Reasons for administrative decisions and access to documents

15. In judicial review matters, r 4.3 of the LEC Rules is significant because it empowers the Court to make an order which will inform the applicant of the reasons for an administrative decision and provide the applicant with access to relevant documents:

4.3 Proceedings for the review of public authority's decision

In any proceedings in which a public authority's decision is challenged or called into question, the Court may make one or more of the following orders:

- (a) an order directing the public authority to make available to any other party any document that records matters relevant to the decision,
- (b) an order directing the public authority to furnish to any other party a written statement setting out the public authority's reasons for the decision, being a statement that includes:
 - (i) the public authority's findings on any material questions of fact, and
 - (ii) the evidence on which any such findings were based, and
 - (iii) the public authority's understanding of the applicable law, and

- (iv) the reasoning process that led to the decision,
- (c) an order for particulars, discovery or interrogatories.

Public interest litigation costs rule

16. Rule 4.2 of the LEC Rules is a unique costs rule applicable to judicial review and civil enforcement matters. It provides that an applicant in proceedings that the Court is satisfied have been brought in the public interest may not be ordered to pay costs if it loses, or may not be ordered to provide security for costs or an undertaking as to damages in support of an interlocutory injunction or order:

4.2 Proceedings brought in the public interest

- (1) The Court may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest.
- (2) The Court may decide not to make an order requiring an applicant in any proceedings to give security for the respondent's costs if it is satisfied that the proceedings have been brought in the public interest.
- (3) In any proceedings on an application for an interlocutory injunction or interlocutory order, the Court may decide not to require the applicant to give any undertaking as to damages in relation to:
 - (a) the injunction or order sought by the applicant, or
 - (b) an undertaking offered by the respondent in response to the application,if it is satisfied that the proceedings have been brought in the public interest.

Expert evidence

17. Expert witnesses must comply with a statutory Expert Witness Code of Conduct, which (among other things) imposes on them an overriding duty to assist the Court impartially; stipulates that their paramount duty is to the Court and not to any party and that they are not an advocate for a party; and obliges them to work cooperatively with other experts when complying with a direction to confer with them.

18. The Land and Environment Court's practice notes require the parties to consider whether expert evidence is genuinely necessary to resolve the issues in dispute. That is because unnecessary expert evidence substantially increases the time and cost of proceedings. Parties are also required to confer in an endeavour to jointly retain a single expert in relation to an issue or to minimise the number of experts. For example, the evidence of surveyors, quantity surveyors, engineers and arborists are often likely to satisfy the criteria for appointment as a parties' single expert.
19. The efficient identification, investigation and resolution of the real issues in contest between experts is greatly facilitated by two requirements:
 - (a) the Court directs experts to confer before the hearing to produce a joint report setting out the matters on which they agree, the matters on which they disagree and the reasons for any disagreement;
 - (b) at the hearing, experts in the same discipline give their evidence concurrently. That is, they are in the witness box at the same time and can each be questioned on a topic before moving on to another topic. There is even opportunity for them to ask questions of each other.

Alternative dispute resolution

20. The Court actively encourages parties to consider alternative dispute resolution mechanisms, such as mediation, arbitration, neutral evaluation and conciliation.
21. In development appeals it is usual for the Court to direct that the parties participate in a conciliation conference soon after the proceedings are commenced. This is an effective procedure in development appeals for it often results in the matter settling.⁴

⁴ The machinery for conciliation conferences is in s 34 of the LEC Act

22. The conciliation involves a commissioner of the Court acting as a conciliator in a conference between the parties. The conciliator facilitates negotiations between the parties with a view to their achieving agreement as to resolution of the dispute. If they are able to reach agreement, the commissioner can dispose of the proceedings in accordance with the agreement. Even if they are not able to reach agreement, they can nevertheless agree to the same commissioner adjudicating and disposing of the proceedings. If neither agreement is forthcoming, the proceedings are referred back to the Court for the purpose of fixing a final hearing before another commissioner. In that event, the conciliation commissioner makes a written report to the Court setting out that fact and the commissioner's view as to what are the issues in dispute. That is still a useful outcome as it may result in the proceedings being heard and determined more quickly and with less cost.

Criminal prosecutions

23. Prosecutions for criminal offences are heard by judges and are usually case managed by the list judge on Fridays. As many environmental offences are strict liability offences, there is a high proportion of guilty pleas, which are usually entered at a pre-trial directions hearing.
24. Criminal prosecutions have traditionally been governed by less rigorous case management than civil proceedings. That may be rationalised on the basis that the accused has a right of silence, criminal proceedings involve the stigma of conviction, and the liberty (or pocket) of the subject are at risk. This hands off philosophy helps to explain why the Court has so far not published practice notes relating to such prosecutions.
25. This is about to radically change, largely because of legislation that is expected to be introduced into the NSW Parliament in late 2009. The legislation is expected to adopt the recommendations of the Report of the Trial Efficiency Working Group, which was formed in 2008 to examine inefficiencies in criminal trials. The Working Group was chaired by a former Chief Judge of the Land and Environment Court, Justice McClellan,

who is now the Chief Judge of the Common Law Division of the Supreme Court.

26. On 30 April 2009 the NSW Attorney-General announced that the new legislation would give the Court the power to order parties to meet before trial and identify the key issues for determination. He said that the amendments will relax the requirements of the Evidence Act and dispense with formal proof requirements where the issues are not in dispute. The Attorney-General noted that the recommendations of the Trial Efficiency Working Group included:

- requiring prosecution and defence to exchange information immediately following committal;
- allowing the court to order a pre-trial conference to determine if the prosecution and defence can agree on the evidence to be admitted;
- allowing a party to provide a summary of the evidence from a witness where it would not prejudice the other party;
- making it easier for the court to order intensive pre-trial case management and disclosure of the facts and matters in dispute between the parties;
- giving the court the power to order the parties to identify the issues for determination at trial.