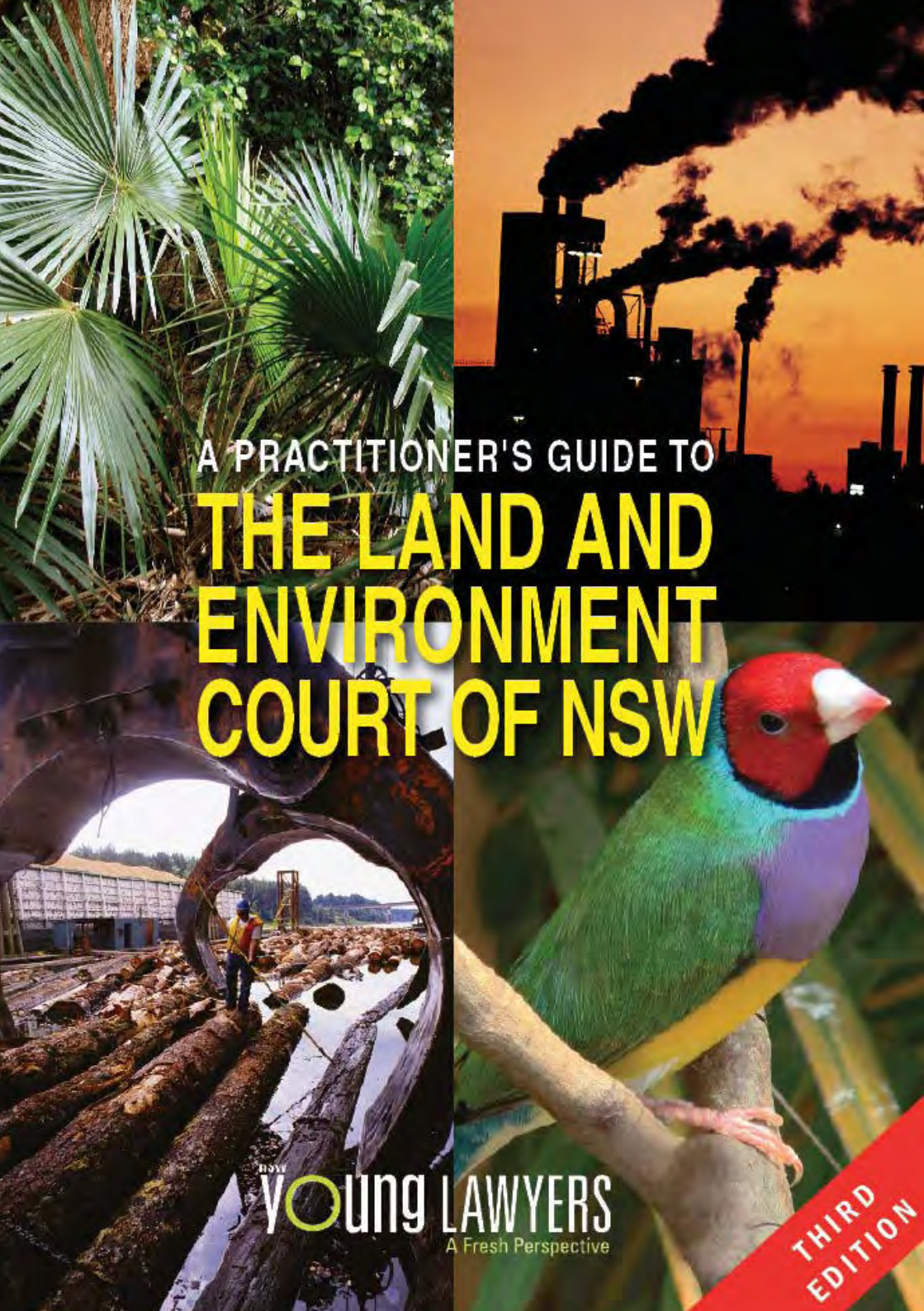

A PRACTITIONER'S GUIDE TO

THE LAND AND ENVIRONMENT COURT OF NSW

NSW Young Lawyers
A Fresh Perspective

THIRD EDITION

A PRACTITIONER'S GUIDE TO THE LAND AND ENVIRONMENT COURT OF NSW

nsw YOUNG LAWYERS
A Fresh Perspective

A Project of the NSW Young Lawyers Environmental Law Committee
http://www.younglawyers.com.au

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Table of Contents

Preface to the Third Edition

A Practitioner's Guide to the Land and Environment Court of NSW is a publication of the Environmental Law Committee of NSW Young Lawyers.

The Land and Environment Court is a specialist environmental and planning court with limited statutory jurisdiction that has developed a particular system of rules and practice notes to address the variety of processes within its jurisdiction.

The objective of the First and Second Editions of the Guide, was to demystify and make more accessible to newly admitted practitioners, and practitioners unfamiliar with this jurisdiction, the unique operation and practice of the Court… *because the Earth needs a good lawyer*[1] and good lawyers need to know the procedures of their Court.

We hope that the Third Edition of the Guide will continue to perform the function as a first point of reference for young lawyers seeking information on key aspects of the operation of the Court.

Our thanks go to the Chief Judge of the Court, Justice Preston, Justice Jagot and Senior Commissioner Roseth for their comments on the Guide, the NSW Law Society for funding the Guide's publication and the administrative staff of NSW Young Lawyers for all their efforts in assisting the Committee to complete this project.

A copy of the Guide can be downloaded from the Committee's website: www.environmental.younglawyers.com.au. A link to the Guide can also be found on the Court's website: www.agd.nsw.gov.au/lec.

If any person has any comments or recommendations for how this Guide can be improved, please contact the Young Lawyers office by telephone: (02) 9926 0269 or email Kim Glassborow the current Chair of the Environmental Law Committee at enviro.chair@younglawyers.com.au

Dr. James Smith

Executive Councillor (2005 – 2008)

NSW Young Lawyers

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[1] Earthjustice http://www.earthjustice.org/

Foreword

The Land and Environment Court strives to ensure access to justice with respect to environmental disputes within its jurisdiction. The Court facilitates access to justice by being accessible. Accessibility involves the provision of comprehensible information about the court, its jurisdiction and officers; the variety of dispute resolution processes offered by the Court; the court's practice and procedure, and the results of cases heard by it. This information should be readily accessible to legal practitioners as well as to other users of the Court.

A Practitioner's Guide to the Land and Environment Court of NSW is a valuable source of such information on the Court, and will facilitate access to justice. The first edition was published in October 2000, and the second edition in April 2004. Since then, considerable changes have occurred to the Court's practice and procedure and the dispute resolution services offered by the Court. The Court has adopted, for the most part, the uniform civil procedure common to other courts in New South Wales, whilst still preserving its particular practice and procedure for types of matters unique to the Court. The Court has wholly revised its practice notes for various types of matters. The Court has extended the range of dispute resolution services available and increased their accessibility and utilisation. The manner in which adjudicative hearings proceed has been reformed, including increased use of on site hearing and concurrent evidence.

The third edition of the Guide incorporates all of these reforms. It not only is an up-to-date source of information on the Court, but also provides references and links to other sources of information.

The Third edition will assist practitioners and other users of the Court, and by those persons being better informed, assist the Court in the administration of justice.

I commend and thank the NSW Young Lawyers Environmental Law Committee for publishing this Third edition of *A Practitioner's Guide to the Land and Environment Court of NSW*.

The Hon. Justice Brian J Preston

Chief Judge of the Land and Environment Court of NSW

About NSW Young Lawyers

New South Wales Young Lawyers (**NSWYL**) is a professional organisation and division of the Law Society of New South Wales. It represents lawyers who are under 36 years of age or who have been admitted to practice for less than five years, and law students. All lawyers in New South Wales fitting this description are automatically members of New South Wales Young Lawyers.

Some of the goals of NSWYL are:

- To further the interests and objectives of lawyers generally, and in particular, young lawyers in New South Wales;
- To stimulate the interest of, and promote the participation of young lawyers in the activities of lawyers in general; and
- To promote the benefit of the community and disadvantaged groups in general.

NSWYL is comprised of a number of committees. This book has been written by members of the NSWYL Environmental Law Committee. The Committee is made up of lawyers, barristers and students who have an interest in environment and planning law.

For further information on the NSWYL Environmental Law Committee, feel free to visit our website: http://environmental.younglawyers.com.au or contact Poppy Drekis on (02) 9926 0269 or at ptd@lawsocnsw.asn.au; or the current Chair of the Environmental Law Committee, Kim Glassborow at enviro.chair@younglawyers.com.au.

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Disclaimer

This book is prepared as a Guide only. It is not intended to provide or substitute for legal advice.

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Introduction

The Land and Environment Court of New South Wales (**Court**) was established in 1980 as a superior court of record, replacing the Local Government Appeals Tribunal, the Land and Valuation Court, the Clean Waters Appeal Board and the Valuation Boards of Review. In addition, certain jurisdictions formerly exercised by the District Court were also transferred to the new Court.

Jim McClelland was appointed the first Chief Judge of the Court. When asked how he saw his role, he said *'it was to draw the line somewhere between those who wanted high-rise buildings in the Botanic Gardens and those who wanted to turn Pitt St into a rainforest'.*

Previously, the legislative framework for environmental and planning law was governed by the *Local Government Act 1919* (NSW) (**LG Act**) which contained rudimentary provisions for town planning. In 1945 town and country planning amendments were first introduced in NSW (Part XIIA to the LG Act). These amendments were modelled on earlier British enactments, in particular the *Town and Country Planning Act 1932*.

With the enactment of the *New South Wales Planning and Environment Commission Act 1974*, it was perceived that there was a need to integrate land use planning and environmental assessment and appraisal techniques. A further attempt to achieve such integration was made with an *Environmental Planning Bill 1976* however this was never introduced.

In 1979 five Acts were assented to by the New South Wales Parliament:-

- *Environmental Planning and Assessment Act 1979* (NSW)
- *Land and Environment Court Act 1979* (NSW)
- *Miscellaneous Acts (Planning) Repeal and Amendment Act 1979* (NSW)
- *Heritage (Amendment) Act 1979* (NSW)
- *Height of Buildings (Amendment) Act 1979* (NSW)

The new legislation transferred powers to the Court, which were formerly exercised by the Equity Division of the Supreme Court. These powers related to enforcement by way of the injunction of rights, obligations and duties imposed by planning or environmental law, and the power to make declarations in relation to such rights, obligations and duties.

Chapter 1

Jurisdiction of the Court

(i) Jurisdiction of the Court

The jurisdiction of the Court is governed by the *Land and Environment Court Act 1979* (NSW) (**Court Act**) being a Court of limited statutory jurisdiction. In a broad sense, the Court is vested with the power to determine matters, including interlocutory matters, arising from environmental and planning statutes. The Court does not have the power to determine every issue of contention between litigants. It does have, however, an ancillary jurisdiction (Section 16(1A) of the Court Act), which allows it to determine matters ancillary to a point of claim within its jurisdiction. This power does not allow the Court to adjudicate a point of claim outside its jurisdiction (see *National Parks and Wildlife Service v Stables Perisher Pty Ltd* (1990) 20 NSWLR 573).

Pursuant to Part 3 of the Court Act, the jurisdiction of the Court is divided into seven Classes of proceedings:

Class 1 Environmental planning and protection appeals

Includes appeals on the merits only against refusals, or deemed refusals, of development consents or conditions of development consents, third party appeals against designated development, and appeals against Council orders.

Class 2 Local government and miscellaneous appeals and applications

Includes appeals against building and other such approvals under the LG Act, tree disputes between neighbours, and other miscellaneous environment and planning legislation.

Class 3 Land tenure, valuation, rating and compensation matters

Includes appeals involving compensation for compulsory acquisition, valuation of land, the determination of property boundaries, encroachment matters and Aboriginal land claims.

Class 4 Environmental planning protection and civil enforcement

Includes proceedings for breaches of planning law (e.g. carrying out a development without consent), or breaches of conditions of development consent, and proceedings which question the legal validity of consents or refusals of consent by consent authorities.

Class 5 Environmental planning and protection summary criminal enforcement

Includes prosecutions for environmental offences, for example prosecutions by the Department of Environment and Climate Change (which incorporates the Environmental Protection Authority) for pollution offences and prosecutions by local Councils for carrying out development without development consent.

Class 6 Appeals by defendants from convictions relating to environmental offences imposed by magistrates in the Local Court.

Class 7 Appeals from magistrates in respect of environmental prosecutions which previously would have been heard by the Supreme Court.

A Commissioner generally hears proceedings in Classes 1 and 2 and some in Class 3. A Judge always hears proceedings in Classes 4, 5, 6 and 7. Sometimes Judges and Commissioners sit together, typically when a hearing involves questions of both fact and law.

In Classes 1, 2 and 3 the Court exercises original jurisdiction. The Court places itself in the position of the original decision-maker and determines the matter on its merits. In Class 4, the Court is vested, among other things, with the power '*to enforce any right, obligation or duty conferred or imposed by a planning or environmental law'*, inclusive of applications for contempt of Court. The relevant 'planning or environmental law' is specified in Section 20(3) of the Court Act. Class 5 constitutes the criminal jurisdiction of the Court. Classes 6 and 7 are the appellate jurisdiction of the Court.

The main legislative instruments which grant the Court jurisdiction to hear and determine matters are:

- *Environmental Planning & Assessment Act 1979* (NSW)
- *Local Government Act 1993* (NSW)
- *Protection of the Environment Operations Act 1997* (NSW)
- *Heritage Act 1977* (NSW)
- *Threatened Species Conservation Act 1995* (NSW)
- *Native Vegetation Act 2003* (NSW)
- *Contaminated Land Management Act 1997* (NSW)
- *Roads Act 1993* (NSW)
- *Land Acquisition (Just Terms Compensation) Act 1991* (NSW)

- *Trees (Disputes Between Neighbours) Act 2006* (NSW)
- *Noxious Weeds Act 1993* (NSW)
- *Water Management Act 2000* (NSW)
- *Environmentally Hazardous Chemicals Act 1985* (NSW)
- *Fisheries Management Act 1994* (NSW)
- *Pesticides Act 1999* (NSW)
- *Forestry and National Park Estate Act 1998* (NSW)
- *Pipelines Act 1967* (NSW)
- *National Parks and Wildlife Act 1974* (NSW)
- *Aboriginal Land Rights Act 1983* (NSW)

In addition, there are a plethora of environmental planning instruments under the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) that regulate various planning and environmental matters at both a State and local level.

(ii) Types of claims heard by the Court

Below is a summary of the main types of claims, grouped by subject area, which can be brought under the Court's jurisdiction (see Schedule 2 of the Chief Judge's Approval of Forms under Section 77A(1) of the Court Act made on 18 June 2008).

(a) Aboriginal and Aboriginal land rights law

- Appeal concerning Aboriginal land claim (Section 36(7) of the *Aboriginal Land Rights Act 1983* (NSW) (**ALR Act**))
- Disputed election or return (Section 125 of the ALR Act)
- Reference concerning Register of Aboriginal Owners (Section 127 of the ALR Act)

(b) Appeals

- Appeal from decision of Commissioner on question of law (Section 56A of the Court Act)

(c) Compensation and valuation law

- Objection against amount of compensation (Section 66 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW))

- Determination of compensation for acquisition of land for road on private application (Division 2 of Part 12 of the *Roads Act 1993* (NSW))
- Appeal against Valuer-General's determination (Division 1 of Part 4 of the *Valuation of Land Act 1916* (NSW))

(d) Easements

- Application for easement (Section 40 of the Court Act)

(e) Environmental law

- Protection of the environment appeals (Part 9.2 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**))
- Civil enforcement (Part 8.4 of the POEO Act)
- Judicial review (Part 8.4 of the POEO Act)

(f) Local government law

- Appeal concerning an approval (Section 176 of the LG Act)
- Appeal by an applicant as to whether a "deferred commencement" approval operates (Section 177 of the LG Act)
- Appeal against the revocation or modification of an approval (Section 178 of the LG Act)
- Appeal concerning an order (Section 180 of the LG Act)
- Appeal concerning particulars of work submitted to Council (Section 182 of the LG Act)
- Appeal concerning rates or charges (Chapter 15 of the LG Act)
- Civil enforcement and judicial review proceedings (Chapter 17 of the LG Act)

(g) National parks and threatened species law

- Appeal or proceedings concerning national parks
- Appeal or proceedings concerning threatened species
- Civil enforcement and judicial review proceedings

(h) Native vegetation law

- Appeal against order or direction
  (Section 39 of the *Native Vegetation Act 2003* (NSW) (**NV Act**))
- Civil enforcement and judicial review proceedings
  (Section 41 of the NV Act)

(i) Planning law

- Appeal against deemed or actual refusal of development application (Section 97(1) of the EP&A Act)
- Appeal against deemed or actual refusal of application to modify development consent (Section 96(6) of the EP&A Act)
- Application to modify a development consent granted by the Court (Section 96(8) of the EP&A Act)
- Appeal against deemed or actual refusal of application to modify development consent granted by the Court
  (Section 96AA(3) of the EP&A Act)
- Application for leave to appeal by person who made submission in respect of application to modify development consent granted by the Court (Section 96AA(4) of the EP&A Act)
- Appeal by objector dissatisfied with the determination of a consent authority to grant consent to a development application for designated development (Section 98(1) of the EP&A Act)
- Appeal against deemed or actual state of satisfaction about deferred commencement conditions of development consent (Section 97(3) of the EP&A Act)
- Appeal against deemed or actual state of satisfaction about ancillary aspects of development (Section 97(2) of the EP&A Act)
- Appeal against revocation or modification of development consent (Section 96A(5) of the EP&A Act)
- Appeal against deemed or actual refusal by consent authority to extend lapsing period of development consent
  (Section 95A of the EP&A Act)
- Appeal concerning condition about or release of security
  (Section 98A of the EP&A Act)
- Appeal by proponent of Part 3A project
  (Section 75K of the EP&A Act)

- Appeal by objector to Part 3A project
  (Section 75L of the EP&A Act)
- Appeal by proponent of concept plan for Part 3A project
  (Section 75Q of the EP&A Act)
- Appeal against failure or refusal to issue Part 4A certificate
  (Section 109K of the EP&A Act)
- Appeal concerning an order
  (Sections 121ZK, 121ZL and 121ZM of the EP&A Act)
- Appeal with respect to building certificate
  (Section 149F of the EP&A Act)
- Civil enforcement and judicial review proceedings
  (Section 123 of the EP&A Act)

(j) Specific Acts

- Specific Acts – other appeals and proceedings
- Specific Acts – other civil enforcement
- Specific Acts – other judicial review

(k) Trees

- Application concerning a tree (Section 7 of the *Trees (Disputes Between Neighbours) Act 2006* (NSW))

Chapter 2

Officers of the Court

(i) Judges

The Honourable Justice Brian Preston, Chief Judge,
Appointed 14 November 2005

The Honourable Justice David Lloyd,
Appointed 5 February 1997

The Honourable Justice Terence Sheahan, AO,
Appointed 9 April 1997

The Honourable Justice Dr. Nicola Pain,
Appointed 18 March 2002

The Honourable Justice Peter Biscoe,
Appointed 13 March 2006

(ii) Past Chief Judges

The Honourable Justice Peter McClellan,
Term of Appointment 25 *August 2003 – 1 September 2005*

The Honourable Justice Mahla Pearlman, AM,
Term of Appointment 6 April 1992 – 3 July 2003

The Honourable Justice Jerrold Cripps,
Term of Appointment 3 June 1985 – 1 April 1992

The Honourable Justice Jim McClelland,
Term of Appointment 14 April 1980 – 2 June 1985

(iii) Commissioners

Senior Commissioner Dr. John Roseth

Commissioner Trevor Bly

Commissioner Robert Hussey

Commissioner Kevin Hoffman

Commissioner Graham Brown

Commissioner Janette Murrell

Commissioner Tim Moore

Commissioner Annelise Tuor

Commissioner Dr. Mark Taylor

(iv) Acting Commissioners

Associate Professor Dr. Paul Adam
Botanist and ecologist

Professor Dr. Larissa Behrendt
Lawyer and member of the Aboriginal community

Dr. Mary Edmunds
Anthropologist and accredited mediator

Ms. Judy Fakes
Arborist

Dr. David Goldney
Ecologist

Ms. Rhonda Jacobsen
Lawyer and member of the Aboriginal community

Mr. Craig Miller
Registered valuer and accredited mediator

Mr. David Parker
Registered valuer and licensed real estate agent

Mr. John Sheehan
Registered valuer, Chartered Surveyor and Town Planner

Ms. Sharon Sullivan AO
Heritage consultant

Mr. Peter Thyer
Arborist

Mr. Michael Whelan
Surveyor and accredited mediator and arbitrator

(v) Registrar and Assistant Registrar

Registrar Susan Dixon

Assistant Registrar Lesley Hourigan

Chapter 3

Preparing for Court

(i) Making and Filing an Application

(a) What form must the Application be in?

Effective 28 January 2008 the *Land and Environment Court Rules 2007* (**Rules**), which repealed the *Land and Environment Court Rules* 1996, resulted in the extension to the Court of the *Civil Procedure Act 2005* (**CP Act**) and the *Uniform Civil Procedure Rules 2005* (**UCPR**). Section 17(2) of the CP Act provides that:

> "*copies of the approved forms are to be made available for public inspection at each registry of the court concerned and on the court's internet website"*.

Section 77A of the Court Act also provides that the Chief Judge may approve forms for documents to be used in connection with proceedings. If a form is approved under Section 17 of the UCPR in relation to the same matter as that for which a form is approved by the Chief Judge, the form to be used is the form approved by the Chief Judge.

On 18 June 2008 the Chief Judge approved new forms for use in the Court. From 1 July 2008, for proceedings in all Classes of the Court's jurisdiction, except where a form is otherwise specified, by the UCPR or otherwise, *FORM A* is to be used. The Court's forms are available over the counter from the Court's Registry or on the Attorney General's Department website under the *Civil Forms - Land and Environment Court* section:

http://www.lawlink.nsw.gov.au/lawlink/spu/ll_ucpr.nsf/pages/ucpr_forms#lec

Certain applications to the Court must be made within a prescribed time period. The time period varies from application to application. Once you have completed the relevant form ensure that your application is filed within the relevant time period.

Classes 1, 2 and 3 proceedings are commenced by the filing of an original application, together with the appropriate number of copies in accordance with the Rules and the Form prescribed by the Court. When applying the CP Act and UCPR to proceedings in Class 1, 2 and 3 a plaintiff under the CP Act and UCPR is referred to as an applicant under the Rules and a defendant under these rules as a respondent. Further details are provided in Chapter 11.

Applications in Classes 1, 2 and 3 (except those under Section 56A of the Court Act) are to be commenced using *FORM B.* When completing *FORM B*, it is important to note that:

- References to "Division" are to be completed as if they referred to the Class of the proceedings.
- References to "List" may be struck out.

Appeals against decisions of Commissioners under Section 56A of the Court Act are to be commenced by way of a summons with *UCPR Form 84*.

In relation to proceedings commenced under the *Trees (Disputes Between Neighbours) Act 2006* (NSW) the following forms are to be used:

- Tree Dispute Application (for all claims): *FORM C*
- where a compensation claim is made: *FORM D*
- where a claim includes damage to property: *FORM E*
- where a claim includes risk of injury to property: *FORM F*

Class 4 proceedings are to be commenced by a statement of claim (*UCPR Forms 3A or 3B*) or by summons (*UCPR Forms 4A or 4B*) consistent with Part 4 of the UCPR. As with Classes 1, 2 and 3 for the purposes of Class 4 proceedings a plaintiff under the CP Act and UCPR is referred to as an applicant under the Rules and a defendant under these rules as a respondent. The references to "List" on *Forms 3A, 3B, 4A* and *4B*, may be struck out and the references to "Division" are to be completed as if they referred to the Class of the proceedings.

Class 5 proceedings are commenced by a summons (*UCPR Form 4A*) claiming an order that the defendant be dealt with according to law for the commission of the offence. A summons is to be accompanied by the affidavits intended to be relied on as establishing prima facie proof of the offence charged. Three copies of the orders you are seeking must also be lodged with the Court (one copy is retained by the Court, one is to be served on the defendant and the other is retained by you).

Classes 6 and 7 proceedings are commenced in accordance with Part 5 of the Rules with the relevant UCPR form.

Applications should be complete at the time of lodgement otherwise they may not be accepted by the Registry.

Once an application is lodged, a receipt will be issued for the filing fee and a matter number allocated. The matter number will typically be in the following format: *(class)(application number) of (year).* For example an application issued with the matter number: *10183 of 2008* would represent the 183rd Class 1 application filed with the Court in 2008.

A date will be assigned by which the application must be served on the other party, typically within seven days. The first directions hearing will usually be between 14 and 28 days from the filing date, depending upon the Class in which the proceedings are brought (for further details see the Court's relevant Practice Note. All of the Court's Practice Notes are available on the Court's website:

http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/lec_practicedirections

(b) What needs to be attached to the Application?

Classes 1 & 2 - To lodge an appeal against a consent authority's determination of a Development, Modification or Construction Certificate Application, the following must be submitted:

- Three copies of the application form;
- Three copies of the original Application to the consent authority;
- Three copies of the plans;
- Three copies of the consent authority's letter either stating the conditions of consent or the reasons for refusal (unless it is a deemed refusal);
- Filing fee (see Appendix B).

Further details are provided in Chapter 11.

Always check the Court's website prior to lodging your application to ensure that you have the correct form and accompanying documents for your application.

Class 3 - To lodge an appeal against a valuation assessment, it is necessary to submit the following:

- Three copies of the application form;
- Three copies of the Valuation Notice or Assessment;
- Three copies of the initial objection and the Valuer General's or Office of State Revenue's letter of determination of the objection;
- Filing fee (see Appendix B).

To lodge an appeal against the categorisation of land within a particular ratings category, the following should be submitted:

- Three copies of the application form;
- Three copies of the notice of declaration of category or notification of decision on an application to change the category;
- Filing fee (see Appendix B).

To lodge an appeal against whether land is rateable or subject to change it is necessary to provide the following:

- Three copies of the application form;
- Three copies of the rates and charges notice;

- Filing fee (see Appendix B).

To lodge an appeal against a compensation determination arising from a compulsory acquisition of land, the following should be submitted:

- Three copies of the application form;
- Three copies of Form 1, Section 11, Proposed Acquisition Notice;
- Three copies of Form 2, Section 39, Claim for Compensation;
- Three copies of Form 3, Section 42(2), Compensation Notice;
- Three copies of the Government Gazette Notice;
- Filing fee (see Appendix B).

(ii) eCourt

The Court's electronic filing and information management system is called ***eCourt***. eCourt, amongst other things, permits in Classes 1, 2, 3 or 4:

a) electronic filing of documents and commencement of proceedings;

b) parties to access information electronically as to the status of and documents filed in the proceedings;

c) viewing of documents filed electronically and judgments;

d) eCallover - the callover system which has been operating since April 2001 has been transferred to the eCourt system. This allows parties to conduct callovers electronically if this is more convenient for them; and

e) eCourt Communications – allows the Court and parties to formally communicate information to each other instead of relisting the matter for a directions hearing.

Parties must first become registered users for their proceedings before they can utilise the eCourt system. If specified, a registered user can agree to be served with documents in proceedings to which he/she is a party, via email. If so, the user should specify on the application or on a Notice of Appearance the registered user's account identification for the purposes of eCourt.

Once registered for eCourt, a party can file or create documents in relation to the proceedings for which the user is registered. The documents can be served by email on another party, only if the other party has agreed to be served electronically. If not, service must occur in the normal fashion.

In some cases, paper copies of documents will still have to be filed within 2 days of the electronic filing (eg documents requiring signatures that have not been scanned and accompanying documents that cannot be emailed).

For further information see the eCourt Users Manual on the Court's website at: http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_publication

Chapter 4

Directions Hearings

(i) Introduction

A directions hearing is a short hearing in a courtroom before the Registrar, in relation to Class 1 and 2 matters, and before the List Judge in relation to Class 3, 4 and 5 matters. The primary purpose of the directions hearing is to determine whether a matter should be listed for a conference, mediation or a hearing. At the directions hearing, the Registrar or Judge will also make directions to prepare a matter for hearing, such as directions for the filing of evidence, the filing of a Statement of Facts and Contentions, Return of Subpoenas, Notices to Produce and Notices of Motion.

Sometimes a Commissioner may conduct a directions hearing, particularly if they have been involved in the case management of a matter.

(ii) Preparing for a directions hearing

The Court prides itself on efficient case management, and it is common for the Registrar to expect the litigants to be ready to have the matter set down for hearing at a matter's first directions hearing.

Opportunities for settlement should be explored at each stage of the proceedings, including the period before the first directions hearing.

Litigants should attempt to narrow the issues in dispute as early as possible.

Practitioners should familiarise themselves prior to the directions hearing with the Court Rules and Practice Notes relevant to any application which they will be making. A useful reference in this respect is the looseleaf service titled *Land and Environment Court Law and Practice in New South Wales*, published by the Lawbook Company. The Court Rules and Practice Notes can also be found on the Court website:

http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/lec_practice_procedure.

(iii) Prior to the directions hearing

In Class 1 and 2 proceedings the Respondent (often a council) is required to file at Court and serve on the other parties a Statement of Facts and Contentions by the third last working day before the first directions hearing. If the application relates to an appeal against an order or a condition of development consent or an objector appeal, the Applicant must prepare the Statement of Facts and Contentions (see the Court's *Practice Note – Class 1 Development Appeals (2007)* (**Class 1 Practice Note**)). The Statement of Facts and Contentions outlines the issues for determination by the Court and must be sufficiently detailed to enable the opposing party to understand the case it has to meet. This is outlined in further detail in Chapter 11 of this Guide.

(iv) A Practitioner's most common mistake

A junior practitioner's most common mistake is the failure to get proper instructions from the client and/or the instructing partner.

Practitioners need to familiarise themselves with the case, its history and timetable (at least in brief), so that if the preferred option fails, an alternative position and relevant dates can be fixed.

(v) Procedure for directions hearings

Directions hearings commence daily from Tuesday to Friday at 9.30 am before the Registrar on Level 1 of the Court.

In Class 1 matters, the matter is expected to be set down for hearing at the first directions hearing. If the matter is ready to be listed for a hearing, a Hearing Information Form (found on the website in a schedule to the appropriate Practice Note and in the courtroom on Level 1) should be completed by each party which requires the parties to, amongst other things, identify the issues to be argued; give an estimate of how long the case will take and identify how many witnesses are to be called, their names and their field of expertise.

At the first directions hearing the parties must advise the Court:

- whether the matter is appropriate for a Section 34 Conference (if either party wishes for the matter to proceed directly to hearing, the Class 1 Practice Note, for example, requires that party to justify to the Court why the matter should not first be listed for a Section 34 Conference – see Chapter 5(ii) below for an explanation of Section 34 Conferences);
- whether the matter is suitable for mediation; and
- of the issues requiring expert evidence and the reasons (if any) why a Parties' Single Expert (previously known as a Court Appointed Expert) should not be engaged by the parties for this purpose.

At the first directions hearing, if the parties are not ready to list the matter for hearing, they may mutually agree to the case being stood over to another directions hearing or the Registrar may nominate a further directions hearing date. However, the Registrar has the discretion as to whether to grant such an adjournment.

The names of matters listed for a directions hearing on a particular day are published in the *Sydney Morning Herald,* Law Notices, on that date. A copy of the daily list is posted outside the courtroom and is also available at the Bar Table and on the internet at: www.lawlink.nsw.gov.au/lec.

It is also a good idea to check the Court list the day before a directions hearing (usually available on the Court's website from 4:00pm) or alternatively arrive at Court early to determine where in the list your matter appears. The Registrar will usually deal with matters by consent first and will then hear cases in the order that they are listed.

On busy days, the Court's list may be broken up into two sessions, namely, matters from 9:30am and matters not before 10am.

You should find out who is appearing on behalf of your opponent so that you can discuss proposed directions, with a view to reaching agreement prior to the mention of the proceedings before the Registrar. If you can agree on the orders that you seek, you may be able to mention your matter earlier, as the Registrar usually calls for matters to be dealt with by consent first before contested matters.

You should always prepare Short Minutes of Order to hand up to the Registrar which articulate the directions you are seeking. As a starting point you should consider the *usual directions* in the Court's relevant Practice Note and tailor them to the particular needs of your matter.

When you first appear before the Court, announce your 'appearance' by stating your name, whether you are a solicitor and the party for which you appear. For the benefit of the sound reporter and the Registrar, announce your appearance and all your submissions to the Court clearly as a recording is made of the directions hearing.

After the first directions hearing, if there are no further directions hearings prior to the hearing of a matter, any party can, if necessary, request in writing (and copy to the other party) that the proceedings be restored to the Court's list for further directions.

Other important things to remember at the directions hearing:

- Bring a copy of the relevant Practice Notes;
- Have the file or all the relevant documents/correspondence on hand;
- Bring your mobile phone and relevant contact numbers, in case you need instructions or need to confirm the availability of barristers and/or experts. Always turn your phone off before entering the courtroom;
- Have a pen and a paper ready to record the Registrar's directions;
- Dress in attire appropriate for Court;
- Always bow to the Registrar when entering and leaving the courtroom;

- Ensure that you have sufficient knowledge of the matter to assist the Court in making all the necessary directions and always have Short Minutes of Order prepared;
- If you are the last person at the Bar Table, always remain seated until you have been excused by the Registrar and always ensure that someone is at the Bar Table when the Registrar enters the Court; and
- When within proximity of the courtroom, keep your voice low so as not to disturb any Court proceedings.

(vi) Directions hearings by telephone

For matters where one or more of the parties to the proceedings are not located in metropolitan Sydney, the Court may designate that the proceedings be dealt with via telephone.

Directions hearings over the telephone occur every Monday morning or by alternative arrangement.

Parties can transfer proceedings to or from the telephone list with the consent of all parties or at the direction of the Registrar.

Sometimes documents must be sent to the Court prior to the directions hearing eg affidavits and Hearing Information Forms.

Further information on the telephone hearing procedures and telephone numbers is available on the Court's website:

http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/lec_telephonecallover

(vii) eCallovers and eCourt communications

As discussed in Chapter 3(ii) of the Guide above, litigants may elect to make an appearance via an eCourt callover if they find this more convenient in all the circumstances than appearing in Court. By becoming a registered user of the eCourt system parties will be able to conduct callovers on the internet.

At an eCourt callover, litigants file their appearances (litigants can also mention the appearance of the other side) and make requests for directions by e-mail prior to 2pm on the afternoon before the callover. The Registrar will ensure a response to these applications by 9am on the day of the callover and parties will not be required to organise an appearance on that date unless directed to do so by the Registrar.

Parties submitting eCallover applications after 2pm the afternoon before the callover will not be responded to by the Registrar prior to the callover taking place. In this instance, parties will be required to attend Court and

appear at the callover as a non-appearance may result in orders being made in the absence of the missing party.

Matters must proceed to a future date (either a further directions hearing, case management, Section 34 Conference or hearing) as the Court does not stand matters over generally.

Litigants may wish to attach to their eCourt callover application supporting documentation for the eCallover, e.g. Notice of Appearance, Statement of Facts and Contentions and Hearing Information Form. This can be done through the eCourt system.

Litigants should conduct themselves in an eCallover in a manner equivalent to that in an actual courtroom, and for the sake of clarity, a formal style should be maintained (in particular, abbreviations should not be used).

The Registrar may require attendance of the litigants at an actual Court callover at any time.

The Court has an eCourt callover protocol which should be adhered to. This is available on the Court's website:

http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/lec_ecallover_protocol .

Also see the Court's eCourt Users Manual which can also be found on the Court's website:

http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_publication

Chapter 5

Alternative Dispute Resolution

(i) Mediation

Mediation is a process by which a neutral third party helps the litigants to find their own solution to the dispute. The mediator does not impose a decision on the litigants but assists them to identify their concerns and options and work towards an agreement.

Mediation may be conducted by the Registrar or the Assistant Registrar or a Commissioner accredited as a mediator. Litigants may also, by agreement, choose to have the dispute mediated by a court-appointed mediator.

Anything said or done during mediation is privileged, and cannot be taken into account in a hearing if the matter later goes to Court.

(ii) Section 34 Conferences

Conciliation in the Court is undertaken in accordance with Section 34 of the Court Act (otherwise known as a *Section 34 Conference*). Section 34 Conferences are only available in relation to Class 1, 2 and 3 of the Court's jurisdiction (see Chapter 1 above for a description of the Classes).

Section 34 Conferences, as articulated by the Chief Judge in (2008) 19 ADRJ 72, provide:

> *"for a combined or hybrid dispute resolution process involving first, conciliation and then, if the parties agree, adjudication. The conciliation involves a Commissioner with technical expertise on issues relevant to the case acting as a conciliator in a conference between the parties. The conciliator facilitates negotiation between the parties with a view to their achieving agreement as to the resolution of the dispute.*
>
> *If the parties are able to reach agreement, the conciliator, being a Commissioner of the Court, is able to dispose of the proceedings in accordance with the parties' agreement. Alternatively, even if the parties are not able to decide the substantive outcome of the dispute, they can nevertheless agree to the Commissioner adjudicating and disposing of the proceedings.*
>
> *If the parties are not able to agree either about the substantive outcome or that the Commissioner should dispose of the proceedings, the proceedings are referred back to the Court for the purpose of being fixed for a hearing before another Commissioner. In that event, the conciliation Commissioner makes a written report to the Court setting out that fact as well as stating the Commissioner's views as to the issues in dispute between the parties to the proceedings. This is still a useful outcome, as it scopes the issues and often will result in the*

proceedings being able to be heard and determined expeditiously, in less time and with less cost".

A *note* to parties and practitioners in relation to Section 34 Conferences can be found in the *Practice and Procedure* section of the Court's website:

http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_practice_procedure

This *practice note* makes a number of important points in relation to the "general requirements" for Section 34 Conferences and what happens "if consensus is not reached" (see below):

(a) General requirements

The Court's *practice note* encourages parties to consider using Section 34 Conferences to resolve disputes or narrow the scope of issues in dispute. The parties should properly prepare for each conference with this purpose in mind. Parties should not attend any conference assuming that it is "preliminary" to the conference proper or that the conference may be adjourned due to inadequate preparation and/or instructions, as this will increase (rather than reduce) costs. The Court also expects all parties to be prepared and have *sufficient instructions and authority* to engage in meaningful conciliation at the conference whether or not they agree to the Commissioner resolving the dispute if consensus is not reached.

To this end, the *practice note* identifies that the Court will be making an additional usual direction where a preliminary conference is fixed as follows, which parties should include in their draft short minutes of order:

All parties must be prepared and have sufficient instructions and authority to engage in meaningful conciliation at the preliminary conference.

Further, parties should note that in accordance with Section 34(1A) of the Court Act it is the duty of each party to proceedings where a conciliation conference has been arranged to participate, in good faith, in the conciliation conference.

(b) What if consensus is not reached?

The Court's *practice note* identifies that the Court does not expect parties, in each and every matter, to agree to the Commissioner disposing of the proceedings if consensus is not reached. The Court encourages parties to give serious consideration to this option, as it provides a potentially quick, cost effective and proportionate option for dispute resolution. Accordingly,

legal practitioners and parties should consider this option before the first directions hearing and be able to inform the Court about their respective positions. If the parties agree to this course, then they should ensure that they have available draft Short Minutes of Order available at the directions hearing appropriate to enable the conference to proceed in the agreed manner. In appropriate matters this would include ensuring that draft conditions of development consent are available before the conference commences. It is the responsibility of the parties in the first instance to select and amend as appropriate the *usual directions* in the relevant Practice Note to achieve the agreed purpose.

(c) Attendance at the conference

Litigants may choose to have their solicitors or any experts (such as architects, town planners or engineers) present at the conference to help and advise them.

Objectors may also attend Section 34 Conferences. However, they do not have a right to be heard at these conferences unless they have been joined as a party to the proceedings under Section 39A of the Court Act.

For more information on alternative dispute resolution in the Land and Environment Court see the speeches and papers by the Chief Judge at:

http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/lec_speeches_and_papers#cj

1. *The Land and Environment Court of NSW: Moving Towards a Multi-Door Courthouse*.

   Keynote address presented by The Honourable Brian J Preston, Chief Judge, to the LEADR NSW Chapter Annual Dinner, 15 November 2007.

   Published in (2008) 19 Australasian Dispute Resolution Journal 72 (Part 1) and (2008) 19 ADRJ 144 (Part 2).

2. *Conciliation in the Land and Environment Court of NSW: History, Nature and Benefits*.

   Presentation by The Honourable Brian J Preston, Chief Judge at the ACDC Training Program 3 August 2007.

   Published in (2007) Local Government Law Journal 110.

3. *Consultation: One aspect of procedural propriety in administrative decision-making.*

Presented at the Australian Institute of Administrative Law 2008 Seminar Series: Administrative Law: Musings from the Bench.

Published in (2008) 16 Australian Journal of Administrative Law.

4. The alternative dispute resolution section of the Court's website:
    - What is Alternative Dispute Resolution?
    - Frequently Asked Questions about Mediation

    http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/lec_adrsummary

Chapter 6

Interlocutory Proceedings

(i) Interlocutory Proceedings

Prior to the final hearing of proceedings the Registrar may direct that the matter be referred to the Duty Judge.

The Duty Judge is a position rotated on a monthly basis amongst the Judges of the Court and they determine Notices of Motion seeking interlocutory relief, such as injunctions or applications to be joined as a party to a proceeding. In addition, a Duty Judge hears consent orders, mentions and other urgent or short matters.

Before appearing before the Duty Judge, make sure you have prepared draft Short Minutes of Order to hand up to the Judge which articulate the Orders you want the Court to make. Make sure you have also obtained sufficient instructions about any undertakings as to damages.

The List Judge of the Court determines applications for the vacation of hearing dates, pleas in Class 5 proceedings and Class 3 and 4 matters on the Friday of each week. The List Judge sits daily at 9.30am, but may sit earlier depending on the number of matters in the list.

Under Section 39A of the Court Act, the Court has the power to join a person as a party to Class 1 proceedings (such as an objector) if it is of the opinion:

a) *that the person is able to raise an issue that should be considered in the appeal but which may not be sufficiently addressed if the person were not joined as a party; or*

b) *that:*

(i) it is in the interests of justice; or

(ii) it is in the public interest;

that the person be joined as a party to the appeal.

Such an application would be brought as an interlocutory proceeding.

The lists for mentions before the List and Duty Judges also appear daily in the *Sydney Morning Herald,* Law Notices and on the internet:

http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/lec_court_lists

It is advisable to arrive early to determine your position on the list and to meet your opponent. If you are able to agree on orders sought from the Judge (i.e. by consent) your matter is likely to be heard first before the longer contested matters, which are generally stood down to the bottom of the list.

Chapter 7

The Hearing

(i) Evidence and Documentation

Prior to the commencement of the hearing all the evidence should be filed with the Court and served on all parties. The timetable for the filing and serving of evidence should normally be set down by the Court at the first directions hearing of a matter. The Court's various Practice Notes set out the *Usual Directions* to be made by the Court at the first directions hearing. In relation to Class 1 proceedings these directions include, for example, a requirement that all joint expert witness statement(s) are to be filed and served 28 days before the hearing and for the Respondent to file and serve, at least 14 days before the hearing, a set of draft conditions the Respondent would seek to be imposed in the event the appeal is upheld.

(ii) On-site Hearings

Under the Court Act the Registrar has the power to determine that the following Class 1 development appeals are to be dealt with as an "on-site hearing":

a) where the proposed development has an estimated value that is less than half the median sale price for dwellings in the local government area;

b) the proposed development will have little or no impact beyond neighbouring properties; and

c) the proposed development does not involve any significant issue of public interest beyond any impact on neighbouring properties.

Alternatively, the parties can agree to have an on-site hearing.

The Court website has a list of the median sale prices for dwellings in NSW local government areas in order to ascertain whether the appeal may be dealt with by way of an on-site hearing.

A Commissioner (or Commissioners) may hear the appeal on-site with or without a further hearing. Generally expert witness statements will not be required for on-site hearings, however if a party intends to rely on a statement, it must be served and filed in accordance with the Court Rules.

(iii) Where to go?

Unless otherwise directed, Class 1 and 2 hearings will commence on-site at 9:30am on the first day of a hearing, regardless of whether the hearing is an "on-site" hearing or is to be heard in a courtroom.

Check the Law Notices in the *Sydney Morning Herald on* the day of the hearing under the heading "Land and Environment Court". This tells you the name of the Judge or Commissioner hearing your case, the courtroom number and the time of commencement of the hearing (generally

10:00am). This information is also contained in the daily court lists posted outside the Registry on level 4, the ground floor, outside each of the Court rooms in the building and on the Court's website (which is updated daily around 4pm). courtrooms are numbered by floor e.g. Court Room 5A is on the 5th floor.

(iv) List of authorities

In Class 1 and 2 hearings on the merits it is not common practice for parties to rely on caselaw as the issues normally relate to questions of fact not law. However, the Commissioners in previous cases may have outlined relevant principles for determining questions of fact. Since 2003, all Commissioners' decisions have been published and are available on the Court's website. Accordingly, parties may seek to refer to principles made by Commissioners on previous occasions (for further details see Chapter 11 of this Guide).

Although not part of the Usual Direction in Schedule D of the Court's Class 1 Practice Note, it is common practice for parties to file and serve a list of the authorities they intend to rely on during a Class 1 hearing. In Class 4 proceedings your list of authorities is usually required to be delivered to the trial judge and served by 4pm on the second last working day before the hearing.

Judges and Commissioners have easy access in their chambers to the more commonly used reports, such as the LGERA, the NSWLR and the CLR. The Judges' Tipstaves and Commissioners can obtain from the Court library other reports, such as the Victorian and South Australian State Reports, the ALR, and the leading English reports.

If you intend to rely on cases from more obscure reports, you should bring photocopies of them to Court. It is also a good idea to bring extra copies of unreported judgments, because copies of unreported decisions should be handed up to the Judge and it is Court etiquette to provide the other party with a copy.

In relation to the citation of authorities, the following points should be kept in mind:

(a) the authorised report of a judgment should be cited if practicable. The authorised reports for the High Court are the CLR, the authorised report for the Supreme Court of New South Wales is the NSWLR and the authorised report for the Land and Environment Court is the LGERA;

(b) citation of judgments in electronic format should only be provided if they are not in any published series of reports and copies should be provided to the Court and the other parties;

(c) citations should refer to the page and paragraph number that will be referred to for example: *Hutchison 3G Australia Pty Ltd v Waverley Council* (2002) 123 LGERA 75 at 83 [40];

(d) advocates should draw to the attention of the Court any relevant authority not cited by an opponent which is adverse to the case being advanced; and

(e) advocates should state, in respect of each case, the proposition of law which the case demonstrates and the parts of the judgment that support that proposition. If it is sought to cite more than one case in support of a given proposition, advocates must state the reason for taking that course.

(v) What happens in the courtroom prior to the hearing?

The Applicant/Prosecutor generally sits on the left as you face the Court.

Before the Judge or Commissioner enters the courtroom, record your appearance on the appearance sheet located on the Bar Table. The Court officer will give copies of the appearance sheet to the Court monitors, the Judge or Commissioner and the Judge's Tipstaff.

When all the parties are present and ready to proceed, the Court officer informs the Judge's Tipstaff or Commissioner.

As in other jurisdictions, you are expected to stand when the Judge, Commissioner or Registrar enters the room, to bow as a sign of respect to the Court and to remain standing until the Judge, Commissioner or Registrar sits down. The case will then be called and the parties announce their appearance. The process of standing and bowing is repeated when the Judge, Commissioner or Registrar adjourns.

It is also a sign of respect not to leave the Bar Table "vacant" while a judicial officer is sitting at the Bench. If you are the last person at the Bar Table, you should remain seated unless you are otherwise excused by the Court.

Generally, the Applicant opens its case first, except in Class 1 proceedings, where, by convention, the Respondent begins if it is a Council. The rationale for this exception is that the Council knows the most about the case in terms of the Council's planning instruments, codes and policies and the actions of the consent authority at first instance.

(vi) Commissioners and Judges - differences during the hearings

Commissioners generally hear cases of merit in Classes 1, 2 and some Class 3 matters where they place themselves in the shoes of the original decision maker taking into account all relevant considerations and can therefore "remake" the decision on the merits of the evidence before the Court. This is called a hearing *'de novo'*. Parties need not be legally represented (but almost invariably are) and are also not required to stand to address the Commissioner. The Commissioner is addressed as “Commissioner” (or “Senior Commissioner” if you are appearing before the Senior Commissioner).

Parties and/or their advocates must stand when addressing a Judge. Parties should address the Judge as "Your Honour".

The Court Act requires that proceedings before a Commissioner be conducted with as little formality and technicality as possible so as to resolve all issues in dispute expeditiously. Such proceedings are not governed by the rules of evidence, although some of the underlying principles are nevertheless relevant. For instance, while hearsay evidence is admissible it is usually given less weight and considered less relevant to the decision-making process than first hand evidence.

In these matters generally, the Court may adopt a flexible procedural approach if the circumstances of the case require it. For example, in the case of *Lanlite Pty Ltd v North Sydney Municipal Council* (1993) 79 LGRA 230, Talbot J, at the request of the parties, heard oral evidence of eight expert witnesses whilst viewing the site of the proposed development.

In some complex cases a Commissioner may sit with a Judge to provide additional technical expertise.

Proceedings that are before a Commissioner may be referred or removed for hearing and determination by a Judge in the same way as proceedings before an Associate Judge may be referred or removed for hearing and determination by a Judge in the Supreme Court (see Section 36(5) of the Court Act).

Judges alone hear matters in Classes 4, 5, 6 and 7. Formal rules of evidence and practice and procedure apply in these proceedings. Judges may also hear matters in Classes 1, 2 and 3 where necessary, and particularly if the case relates to a significant development. This is always determined at the Chief Judge's discretion.

The Court has the status of a superior court of record. The Judges have all the powers of a judge of the Supreme Court, that is a Judge has the power to make declarations, grant injunctions restraining the continuation of

certain acts, to conduct judicial review and to hear summary criminal proceedings, and to enforce its own orders in cases of contempt.

(vii) Site inspections

In accordance with Section 34D of the Court Act, before disposing of a court hearing matter the Court must make an inspection of the site of the proposed development, unless:

(a) all the parties agree to dispense with an inspection; or

(b) the Court (or the persons exercising the functions of the Court) considers that the matter can be properly determined without the need for an inspection.

A site inspection does not eliminate the need for evidence to be adduced in court and any conclusions or inferences a party would like the Judge or Commissioner to draw from what was seen during the view needs to be raised in court.

All Class 1 and 2 hearings will commence on-site at 9:30am on the first day of a hearing for the site view. You may want to liaise with your opponent and agree on an appropriate meeting place for the site inspection. The parties' legal representatives may consider providing the Judge's Tipstaff or the Commissioner with a mobile phone number so that the legal representatives are contactable in case of delay or in case alternative arrangements need to be made. To ensure that Court time is efficiently utilised, an agreed itinerary for a site inspection may sometimes be provided to the Court. Such an itinerary should identify the order in which relevant sites or areas of a site are to be visited and the time this will take. The number of people attending a site inspection should be kept to a minimum. In addition to the legal representatives of the parties, only those experts that will be of direct assistance to the Court should be invited to attend. It should also be made known to those in attendance that only the legal representatives of the parties should directly address the Judge or Commissioner during the inspection.

(viii) Written submissions

Written submissions are an invaluable tool both for the Court and for the parties in clarifying a party's arguments and can supplement oral submissions.

However the key, as with all submissions, is to focus on what the real issues are. If areas of law are accepted by both sides and are not in dispute then the need to canvas them thoroughly is negated, even though logically it may be necessary to pass through them before the issues in

dispute are reached. Such issues can often be reduced to no more than a passing reference. This practice should also be followed when it comes to citing cases. There is no need to cite every case on the subject, just the most authoritative, and often one case will do if the point is uncontentious.

(ix) Litigants without Legal Representation

Section 63 of the Court Act entitles a party to proceedings in the Court to appear without legal representation if he or she chooses. Such cases generally follow the conventional conduct of proceedings, with commonsense allowances made according to the level of experience and/or understanding of the unrepresented litigant. It is advisable to adopt a generous and accommodating approach in these cases, although other litigants are not obliged to assist the unrepresented opponent run their case.

Associations such as the NSW Bar Association and the NSW Legal Aid Commission offer free legal advice and representation. Applications for their services can be restricted to an area of law and may also be subject to a means and merit test. It is best to contact the organisations directly to make specific enquiries.

An extensive list of other agencies that may be able to provide legal representation to litigants who could not otherwise afford to be represented is available on the Court's website:

http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/lec_legal_ref_guide

This list also includes references to agencies that can provide you with contact details for solicitors and other practitioners.

(x) Robing

Robing occurs in selected Classes of the Court's jurisdiction heard by a Judge. Only Barristers are expected to robe when the Judges do. These Classes are:

- Class 4;
- Class 5;
- Class 6; and
- Class 7.

Robing also occurs for the following matters in Class 3:

a) objections to the determinations of boundaries;

b) encroachment of buildings; and

c) claims for compensation by reason of the acquisition of land.

Please note that robing is not required for mentions.

Barristers are expected to wear robes for all ceremonial sittings of the Land and Environment Court.

The Court Attire Policy is also available on the Court's website:

http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/lec_court_attire_policy

Chapter 8

Costs

(i) Classes 1, 2 and 3

Rule 3.7 of the *Land and Environment Court Rules 2007* (NSW) (**Court Rules**) provides for orders for costs in Classes 1, 2 and 3 proceedings.

Rule 3.7(2) provides that:

> *"The Court is not to make an order for the payment of costs unless the Court considers that the making of an order as to the whole or any part of the costs is fair and reasonable in the circumstances"*.

Circumstances in which the Court considers it to be 'fair and reasonable' to award costs are identified in Rule 3.7(3) and include (without limitation) the following:

"(a) that the proceedings involve, as a central issue, a question of law, a question of fact or a question of mixed fact and law, and the determination of such question:

(i) in one way was, or was potentially, determinative of the proceedings, and

(ii) was preliminary to, or otherwise has not involved, an evaluation of the merits of any application the subject of the proceedings,

(b) that a party has failed to provide, or has unreasonably delayed in providing, information or documents:

(i) that are required by law to be provided in relation to any application the subject of the proceedings, or

(ii) that are necessary to enable a consent authority to gain a proper understanding of, and give proper consideration to, the application,

(c) that a party has acted unreasonably in circumstances leading up to the commencement of the proceedings,

(d) that a party has acted unreasonably in the conduct of the proceedings,

(e) that a party has commenced or defended the proceedings for an improper purpose,

(f) that a party has commenced or continued a claim in the proceedings, or maintained a defence to the proceedings, where:

(i) the claim or defence (as appropriate) did not have reasonable prospects of success, or

(ii) to commence or continue the claim, or to maintain the defence, was otherwise unreasonable."

Ultimately what is 'fair and reasonable' will depend very much on the circumstances of each individual case. For more information see:

- *Port Stephens Council v Samson* (2007) 156 LGERA 125 [2007] NSWCA 299;
- *Hunter Development Brokerage Pty Limited v Cessnock City Council (No 2)* (2006) 68 NSWLR 177; [2006] NSWCA 292;
- *Thaina Town (On Goulburn) Pty Limited v City of Sydney Council* (2007) 156 LGERA 150; [2007] NSWCA 300; and
- *Grant v Kiama Municipal Council* [2006] NSWLEC 70.

Commissioners do not have the power to award a payment of costs. Parties seeking an order for costs in proceedings before a Commissioner should file a Notice of Motion, with supporting affidavit, within 14 days from the date which gave rise to the need for the order.

(ii) Class 4

Rule 4.1 of the Court Rules provides that Class 4 proceedings are subject to the provisions of the CP Act and UCPR. Accordingly under Part 42 Rule 1 of the UCPR the general rule is that costs follow the event, that is:

> *"if the court makes any order as to costs, the court is to order that the costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs".*

A dispute about costs in Class 4 proceedings will therefore often involve an argument over whether the party claiming costs has actually achieved "success" or to what extent it has succeeded in the proceedings. (see *F & D Bonaccorso Pty Limited v City of Canada Bay Council (No 4)* [2007] NSWLEC 649).

However, the Court will also consider a wide variety of factors that may suggest that the ordinary rule should not be followed, such as evidence of some sort of "disentitling" conduct on the part of the successful party, such as unnecessarily bringing the action, or the "public interest" nature of the litigation.

Rule 4.2(1) of the Court Rules provides, in relation to proceedings brought in Class 4 of the Court's jurisdiction, which are in the public interest, that:

"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".

It is important to note that the "public interest" character of the proceedings does not of itself necessarily amount to special circumstances that would displace the ordinary principle that costs follow the event. Something more is required to constitute special circumstances, such as the fact that the proceedings involved no private gain, or contributed to the proper understanding of the law in question or that the basis of the challenge was arguable or that the purpose was clearly to protect the environment (see *Oshlack v Richmond River Council* (1998) 193 CLR 72).

(iii) Class 5

Part 5 Division 4 of the *Criminal Procedure Act 1986* (NSW) governs the award of costs in Class 5 matters.

Essentially, it provides that costs normally follow the event, so that where a Judge convicts any person of an offence, that person will usually be ordered to pay the costs of the prosecutor, and where a Judge dismisses a charge, the defendant will usually be entitled to their costs. Such costs are to be in a sum agreed between the parties, or if no agreement can be reached, as assessed by a Court-appointed assessor.

Chapter 9

Appealing from a Decision of the Court

(i) Appealing from a Decision of the Court

Section 56A of the Court Act provides a right of appeal from the decision of a Commissioner to a Judge. Such an appeal may only be made in relation to a question of law and must be initiated within 28 days of the order or decision being handed down (Part 50 Rule 3 of the UCPR). A Section 56A appeal is commenced by way of a summons - Form 84 under the UCPR (see Part 50 Rule 4 of the UCPR) and must contain a statement:

(a) as to whether the appeal relates to the whole or part only, and what part, of the decision of the court below, and

(b) as to what decision the Applicant seeks in place of the decision of the court below, and

(c) setting out briefly but specifically the grounds relied on in support of the appeal including, in particular, any grounds on which it is contended that there is an error of law in the decision of the court below.

In accordance with Part 50 Rule 14 of the UCPR the appeal documents must include an affidavit that annexes or exhibits a copy of:

(a) the reasons for the decision of the court below, unless the court below has not given, and does not intend to give, written reasons, and

(b) the transcript of the proceedings in the court below, unless a transcript cannot be obtained in respect of proceedings of that type, and

(c) any exhibit, affidavit or other document from the proceedings in the court below that the Applicant wishes to be considered at the hearing of the appeal or proposed appeal.

The decision of a Judge in proceedings in Classes 1, 2 and 3 may be appealed to the Supreme Court pursuant to Section 57 of the Court Act on a question of law only. The hearing of such an appeal is by the Court of Appeal. In accordance with Section 57(4) of the Court Act leave is required from the Supreme Court to appeal against any of the following orders or decisions of the Court:

- a decision on a question of law determined by a judge pursuant to a reference under Section 36(5) of the Court Act;

- a decision of a Commissioner or Commissioners made after a Judge's determination referred to in paragraph (a), where the Judge's determination is itself the subject of an appeal to the Supreme Court;
- an order or decision made on an appeal under section 56A;
- an interlocutory order or decision;
- an order made with the consent of the parties; or
- an order or decision as to costs.

Proceedings in Class 4 are appealable to the Supreme Court pursuant to Section 58 of the Court Act, and similarly, are heard by the Court of Appeal. Such an appeal is not limited to questions of law and by way of rehearing (see *Parramatta City Council v Hale and Ors* (1982) 47 LGRA 319 at 338), however the leave of the Supreme Court is required for an appeal in relation to an interlocutory order or an order for costs (Section 58(3) of the Court Act).

The timing and procedure for appeals to the Court of Appeal are governed by Part 51 of the UCPR. Generally, the time limit for lodging an appeal is 28 days from the date of determination. However, this time limit may be extended to three months if a Notice of Intention to Appeal is filed.

In the Court's Class 5 jurisdiction, a party convicted or ordered to pay costs may appeal to the Court of Criminal Appeal against conviction or costs pursuant to Section 5AB of the *Criminal Appeal Act 1912* (**Criminal Appeal Act**).

Pursuant to Section 10 of the Criminal Appeal Act, an application by the defendant for an appeal should be lodged within 28 days of the Court handing down its decision.

In Class 5 proceedings, only the Crown as prosecutor may appeal the quashing of an application to proceed, pursuant to Section 5C of the Criminal Appeal Act. If the prosecutor is the Environment Protection Authority, it may appeal against a sentence imposed by the Court pursuant to Section 5D(1A) of the Criminal Appeal Act. There is no statutory time limit for a prosecutor wishing to file an appeal against a sentence imposed by a Judge of the Court.

Prior to the completion of Class 5 proceedings, the Judge may, or if requested by the Crown, must, submit any question of law arising at or in reference to the proceedings, to the Court of Criminal Appeal pursuant to Section 5AE of the Criminal Appeal Act. Such matters are known as "stated cases".

Chapter 10

Judgments, Transcripts and Cassette Tapes

(i) Introduction

At the conclusion of a hearing, various options may be available for parties to the proceedings and members of the public to obtain a record of the proceedings.

Proceedings in the Court are recorded except for:

(i) Section 34 Conferences; and

(ii) on-site hearings (excluding the judgment).

The information detailed below clarifies the services that the Registry offers in relation to obtaining judgments, transcripts and cassette tape recordings of a hearing.

(ii) Judgments

Judgments of the Court can be delivered in one of two ways:

(a) a judgment may be delivered "ex-tempore" which means that the decision of the Court is delivered verbally at the conclusion of the hearing. A party to the proceedings may request that a copy of this judgment be transcribed. A written request is required and the judgment may take 3-4 weeks to issue. See the administrative forms on the Court web page:

http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/lec_courtforms

Charges apply for the provision of a transcript (see Appendix B).

(b) the Commissioner or Judge may reserve their decision at the conclusion of the hearing. The decision will then be written up and delivered usually between 2-12 weeks after the hearing is concluded, depending on the workload of the Commissioner or Judge. The parties will then be advised when a reserved judgment is to be handed down and they may attend the Court to hear the orders made at the specified time. When a reserved judgment is delivered, copies are provided to the litigants free of charge. The general public can purchase reserved judgments over the Registry counter.

In accordance with the Court's *Delays in Reserved Judgments Policy,* if a party becomes concerned that a reserved judgment has been outstanding for a period in excess of the Court's standard of three months, a written inquiry should be directed to the Chief Judge. The inquiry should include the following details:

- the name of the proceedings and the case number;

- your role in the proceedings (e.g. applicant/respondent; legal representative for the first applicant/second respondent); and
- the date upon which the Judge or Commissioner reserved judgment.

Judgments delivered by Judges of the Court (but not Commissioners) since 1999 can be viewed on the Court's web page at:

http://www.lawlink.nsw.gov.au/caselaw/lec.

Reserved judgments usually appear on the web page the day they are delivered. Decisions of the Court are also available on the Austlii website dating back to 1988 at:

http://www.austlii.edu.au/au/cases/nsw/NSWlec/.

Ex-tempore judgments may (depending on the Judge) only be published if a transcript is ordered, and usually appear 3-4 weeks after the hearing date.

Parties can view any judgments in their proceedings via eCourt.

(iii) Transcripts

"Transcript" refers to the official written record of the proceedings. These are transcribed from cassette tapes at the Reporting Services Branch of the NSW Attorney General's Department. The following is important information in relation to transcripts:

(a) they are available only to parties to the proceedings or their legal representatives but the Court's Registrar may permit non-parties to obtain a copy if sufficient means have been proved in writing;

(b) transcripts are important to be made available when:

  (i) the case is to be appealed (see Part 50 Rule 14 of the UCPR). A transcript is obligatory and in the case of an appeal under Section 56A, the transcript must be paid for by the party lodging the appeal; or

  (ii) a Judge orders a transcript. Parties must then purchase copies in the manner described below:

    - When ordering a transcript on behalf of a party, the Registry requires a written application where the person requesting the form agrees to pay all costs associated with the request. See administrative forms on the Court website at:

      http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/lec_courtforms

- A deposit of $70 must also accompany this request. Any outstanding balances must be paid upon collection of the transcript. Currently the cost of a transcript is $8.50 per page (minimum fee of $70) or $9.70 per page (minimum fee of $80) if the matter being transcribed is 3 months or older. A transcript normally takes at least 10 days to produce, though arrangements can be made through a Judge in special circumstances for a transcript to be made available earlier;

(c) Transcripts for proceedings and audio recordings are not produced from hearings that are held on-site. Judgments delivered at an on-site hearing are prepared and made available upon publication via the Court's website.

(iv) Cassette Tapes

Cassette tapes which are dubbed copies of original recordings made in Court can be purchased from the Registry. The following is important information in relation to the availability of cassette tapes:

(a) available only to parties or third parties with the Registrar's consent;

(b) if a judgment is delivered ex-tempore at the conclusion of the hearing, this is not available for purchase on cassette tape (a request for transcription can be made as described above); and

(c) once a transcript has been ordered, cassette tapes are no longer available for purchase.

When ordering cassette tapes on behalf of a party, the Registry requires a deposit of $38. Any balance will be paid upon collection of the tapes. Currently, cassette tapes cost $38 per tape (approximately 90 minutes per tape) to purchase. Cassette tape orders usually take approximately one week.

If you have any further enquiries about the above please contact the Registry counter staff on (02) 9113 8200.

Chapter 11

Class 1 Practice and Procedure

(i) Introduction

As Class 1 is the most commonly litigated Class in the Court's jurisdiction, we have included in this Edition of the Guide an additional Chapter dealing purely with the practice and procedure of Class 1 merit appeals. Various commentary and practical hints have been included to assist practitioners in preparing Class 1 appeals and running matters before Commissioners.

(ii) Class 1 Proceedings

Approximately 58% of the Court's finalised caseload is Class 1 planning appeals (Land and Environment Court NSW Annual Review 2007, Page 27).

Class 1 proceedings are essentially merit appeals brought by an "Applicant", mostly against their local Council in response to a decision made by the Council on a development application or some action the Council has taken against them (such as asking them to do/not do something).

The most common Class 1 proceedings brought by Applicants are against their local Council for the following reasons:

- Council's refusal (actual or deemed) to grant development consent (Section 97 of the EP&A Act); or
- Council's refusal (actual or deemed) to consent to an application to modify a previous development consent (Section 97(2) of the *Environmental Planning and Assessment Amendment Act 2008* (NSW)); or
- Council's issue of an order for the Applicant to do/not do something (Section 121ZK of the EP&A Act).

Importantly, however, objectors to a development application for a particular type of development (designated development) who are dissatisfied with Council's determination to grant consent, may also lodge an appeal (Section 98 of the EP&A Act).

A development application will be "deemed" to have been refused by Council if the Council has not determined the development application (including those seeking to modify a previous development consent) within 40 days (Sections 82 and 96 of the EP&A Act respectively) or 60 days for designated development and integrated development (see Clause 113 of the *Environmental Planning and Assessment Regulation 2000* (NSW) (**Regulation**)).

(iii) Before commencement of the appeal

Before drafting an application to commence Class 1 proceedings it is imperative that your file is thoroughly reviewed to ensure that the appeal is ready to be commenced.

In particular, review the file to ensure that:

- the time within which you can lodge an appeal has not lapsed; and
- there are reasonable prospects of success.

If the appeal is against an actual or deemed refusal by Council of a development application you will need to ensure that:

- the correct application fee was paid to Council;
- the appropriate documents accompanying the development application were provided to Council (Section 78A EP&A Act, clause 50 and Schedule 1 of the Regulations);
- that you have copies of all the updated material (especially the plans and any supporting documentation) that have been lodged with the Council since the original development application was lodged;
- that any procedural requirements which are conditions precedent to development consent being granted have occurred, such as public notification or an assessment of the development application by an Independent Hearing & Assessment Panel;
- that the plans lodged with the development application meet the requirements set out in Schedule A to the Class 1 Practice Note (this is a requirement of the Court), and should not be overlooked (see below);
- if the appeal is against an actual refusal ensure you have a copy of the Council's Notice of Determination refusing the development application; and
- it is also preferable to have copies of all the internal memoranda documentation and images that Council has relied upon or generated as part of its decision-making process (even for a deemed refusal).

If the appeal is against an actual or deemed refusal of an application to modify an existing consent, in addition to all the requirements listed above, you will also need to ensure that:

- the consent the application is seeking to modify is an operative consent and has not lapsed; and
- you have a copy of the original operative consent (Notice of Determination) and all associated documentation (including plans and accompanying reports).

For further information on lodging a Class 1 Application, visit the Practice and Procedure Section of the Court's website.

(iv) The plans

A development application must be accompanied by plans and specifications sufficient to clearly and adequately depict the proposed development. Depending upon the proposal, plans may be prepared by an architect, engineer, landscape designer and/or land surveyor. Plans are often prepared in consultation with other experts such as a traffic expert, ecologist, arborist, building surveyor, bush fire expert, heritage consultant and/or geotechnical engineer. Plans are normally incorporated as part of any consent granted by either a consent authority or the Court on appeal. Consequently, it is essential that plans clearly and accurately convey the detail of proposed development.

(a) Environmental Planning and Assessment Regulation 2000

The Regulation, at Schedule 1, provides a mandatory guide to the information that must accompany a development application. This information is as follows:

- *the location, boundary dimensions, site area and north point of the land;*
- *existing vegetation and trees on the land;*
- *the location and uses of existing buildings on the land;*
- *existing levels of the land in relation to buildings and roads;*
- *the location and uses of buildings on sites adjoining the land;*
- *the location of any proposed buildings or works (including extensions or additions to existing buildings or works) in relation to the land's boundaries and adjoining development;*
- *floor plans of any proposed buildings showing layout, partitioning, room sizes and intended uses of each part of the building;*

- *elevations and sections showing proposed external finishes and heights of any proposed buildings;*
- *proposed finished levels of the land in relation to existing and proposed buildings and roads;*
- *proposed parking arrangements, entry and exit points for vehicles, and provision for movement of vehicles within the site (including dimensions where appropriate);*
- *proposed landscaping and treatment of the land (indicating plant types and their height and maturity); and*
- *proposed methods of draining the land.*

State Environmental Planning Policy No 65 – Design Quality of Residential Flat Development sets out further specific requirements applying to development applications (**DAs**) for the erection of residential flat buildings.

Notwithstanding the detailed requirements of the Regulation, DAs are often submitted to consent authorities without adequate plans. This deficiency is often the catalyst for refusal of consent and a subsequent appeal to the Court. Plans should also be drawn to an appropriate standard. Australian Standard *AS 1100.301 – 1985* is the relevant Australian Standard for Technical and Architectural Drawing. Plans should also be compared to this Australian Standard for quality purposes.

(b) Common pitfalls associated with plans

Unfortunately, non-compliance with the Regulation and subsequently the Class 1 Practice Note are common place. However, the most common problems to avoid are:

- Incorrect North Point;
- Incorrect plan names and version numbers;
- Plans that involve numerous sheets with inconsistent scales;
- Plans that do not colour code proposed versus existing approved structures;
- Where multi-storey developments are proposed, inaccurate plans as between the different levels of the building design;
- Adoption of different survey datum or reduced levels (**RL**) as between architectural, engineering (drainage) and landscape plans;

- No correlation between architectural, drainage and landscape plans;
- Shadow diagrams that have not taken into account topographic and existing built structures when depicting existing and proposed shadows;
- No RLs on cross sections, elevations, and floor plans depicting existing and proposed RLs at critical points; and
- Survey plans that fail to show adequate RLs, all existing buildings including dwellings, sheds, fences and adjacent buildings and spot levels.

The above is not meant to be an exhaustive account of deficiencies in plans commonly before the Court, merely some of the most common issues.

(c) The benefit of accurate plans

Clear and accurate plans avoid confusion as to the proposed development at development application assessment stage, on appeal and during the certification stage for the purpose of obtaining a construction certificate. In litigated matters, good plans *may* limit the issues raised by a respondent consent authority before the Court. If the issues are limited, the number of experts involved will normally be limited, the length of the hearing is reduced and ultimately the cost of litigation is reduced for both parties.

(v) The Class 1 Application

Proceedings may be commenced either in person or by a solicitor (acting on behalf of an Applicant), although that solicitor cannot be a party to the proceedings (unless they are one and the same). An up-to-date version of the Class 1 Application form may be found on the Court's website (Section 17(2) of the CP Act):

http://www.lawlink.nsw.gov.au/lawlink/spu/ll_ucpr.nsf/pages/ucpr_forms#lec

The following information must be provided in the Application under the headings specified in the Court's *FORM B*:

- **Title of Proceedings**

The Applicant to the proceedings must bear the same name/title as the Applicant whose name/title appears on the development application originally lodged with the Council.

The Applicant must be a natural person or company, or in some circumstances may be a company director (Part 7 Rule 2 UCPR). If the

Applicant is a company, the Australian Company Name (**ACN**) should also be supplied.

The Respondent must also be a natural person or company, and in many cases will be a Council (Councils are body corporates: Section 220 *Local Government Act 1993* (NSW)).

- **Type of Claim**

Insert the type of claim from the list available on the Court's website at:

www.lawlink.nsw.gov.au/lec

The list of claims applicable to Land and Environment Court proceedings is also available at the Court's Registry and the main types have been summarised above in Chapter 1(ii) of this Guide.

- **Details of Application**

You should include in this section the relevant provisions of the Act or instrument which enables the appeal to be brought (in addition to the relevant Act or instrument) as it more clearly defines for the Respondent and the Court what type of proceedings have been commenced. Section 17 of the Court Act sets out the relevant Acts in which Class 1 appeals can be commenced.

This section also requires you (bearing the relevant provision in mind) to detail the relevant cause of action.

For instance, if it is an appeal against Council's actual determination to refuse to grant development consent which is being brought pursuant to the right conferred by Section 97(1)(a) of the EP&A Act, then you could state the following:

> *"Appeal against Council's determination to refuse to grant development consent for Development Application [Insert development application Number] on [Insert date of Notice of Determination]".*

In an appeal against Council's deemed refusal to grant development consent, you could write the following:

> *"Appeal against Council's deemed refusal to grant development consent for Development Application [Insert development application Number] lodged with Council on [Insert date]."*

It may also be advantageous to annex to the Application all the material (e.g. reports, surveys and plans), including any updated or amended material that was before the Council at the time it made its determination. However, always check the requirements on the Court's website prior to

lodging your application to ensure that you have not included any superfluous or irrelevant documentation with your application.

It is important to list on the Application the documents and plans (preferably in a table) in order of the date they were prepared.

If, for example, you are appealing an Order issued by the Council for you to do/not do something, you will include in your Application to the Court a completed *FORM B* and a true copy of the Council Order. If there is any other additional or supporting material, such as the Council's Notice of Intention to Give an Order or any submissions made in response to that Notice, you should also attach that material to your Application.

If the appeal is against Council's actual refusal to grant development consent, the following documents should be included (where relevant):

- The development application lodged with the consent authority;
- Plans (architectural, landscape);
- Stormwater Management Plans;
- Bushfire Hazard Assessment Plan;
- Statement of Environmental Effects;
- BASIX certificate or NatHERS certificate;
- All relevant documentation (town planning, acoustic, car parking reports etc) that the Applicant relied upon to support its position as to why the development consent should be granted;
- All relevant material that the Council officers have relied upon/prepared as part of their decision-making process (such as town planning, acoustic, car parking and heritage reports prepared by them); and
- Notice of Determination.

Applications in relation to more substantial developments, or development in ecologically sensitive areas, may be accompanied by a number of expert reports, including shadow diagrams, heritage assessments, Species Impact Statements and bushfire management plans.

Once again, always check for any updated information on the Court's website prior to lodging your application, as the above requirements may change as the Court moves toward reducing the amount of paper used in proceedings.

The correct filing fees should be checked with the Registry for the lodgement of a Class 1 application. See the "Forms and Fees" section of the Court's website. Note that a local council is considered a "person" and not a "company" for the purposes of the Court's filing fees.

Note that Applications must be served within seven days of filing (Paragraph 5, Class 1 Practice Note).

- **Orders Sought**

You should specify in this section of *FORM B* what orders you wish the Court to make.

For example, in relation to an application appealing against a Council's determination to refuse the grant of development consent, you would be seeking an order from the Court that the Appeal is "upheld" and that Consent is granted to the subject development application.

(vi) Notice of Appearance

In accordance with Rule 6.1 of the UCPR a party may not take any steps in proceedings before the Court (including any appearance in Court) unless the party has entered an appearance in the proceedings. This is done by filing a Notice of Appearance.

The Notice of Appearance form is available on the Court's website (*FORM 6*). This form is self-explanatory and should normally be filed with the Court within 14 days of being served with the Class 1 Application.

(vii) Statement of Facts and Contentions

A Statement of Facts and Contentions (**Statement**) is divided into Part A - Facts and Part B - Contentions. The Class 1 Practice Note provides considerable detail as to the form and content of the Statement.

The Statement is to be prepared by an authorised officer of the respondent consent authority (commonly the Council's town planner).

Part A of the Statement should include basic details concerning the proposal, the site, the locality, the statutory controls and the actions of the respondent (and by necessary implication all other relevant statutory approval bodies) in relation to their consideration of the proposal.

It is often useful to annex relevant documentation to the Statement which may include any of the following for the purpose of understanding the development proposal:

- Zoning extract map (coloured version);

- Aerial photo of the site;
- Resident map highlighting those who were notified of the proposal; and
- Photographs of the existing site.

Part B of the Statement should set out the key issues in dispute between the parties, as determined by the party drafting the document.

In accordance with paragraph 9 of the Class 1 Practice Note, the Respondent is required to file and serve the Statement on or before 4pm on the third last working day before the appeal's first directions hearing, unless the appeal involves proceedings brought under:

- Sections 96, 96AA or 97 of the EP&A Act (appeal against conditions of development consent); or
- Section 98(1) of the EP&A Act (objector appeal).

In those situations, the Applicant must prepare the Statement in accordance with Schedule C of the Class 1 Practice Note.

(a) Before preparing the Statement

Irrespective of which side is preparing the Statement, prior to its preparation, you should answer the following questions:

1. ***What are the main issues in dispute?***

   You should try to limit the number of contentions to **three** if possible. You will not get any bonus points for coming up with more (irrelevant) contentions. One good contention is enough to knock out an unworthy proposal, five irrelevant ones will not.

   For example, if the Council, for argument's sake, raises landscaping as a contention but really only has a problem with respect to how the landscape is being treated rather than the area set aside for landscaping, this is an issue that is resolvable by a condition of consent rather than a planning issue. This scenario can be compared to the situation where there is a legitimate issue with the area set aside for landscaping which constitutes a legitimate planning problem.

   As a practical hint, have a look at the relevant planning principles (as well as the Council's Notice of Determination in the case of an actual refusal) to assist with identifying the potential contentions.

2. ***Can the issue be supported with authority?***

   Does the proposed contention make reference to a requirement in

a relevant State Environmental Planning Policy, Regional or Local Environmental Plan, or Council Development Control Plan or policy?

3. ***Can the issue be resolved by way of a condition?***

   Of the main issues that can be substantiated, are there any which are still resolvable by way of an appropriate condition of consent (see Schedule B, paragraph 6(h) of the Class 1 Practice Note). This allows the other side and the Court to focus on the issue(s) truly in dispute leading to a resolution of the proceedings in a costly and time effective manner.

4. ***Can the issue be resolved by providing further information?***

   If the Applicant provided further information in support of its application, would that lead to the resolution of any issues? If so, create a list of the further information that should be provided.

(b) Preparing a Statement

As the purpose of the Statement is to succinctly articulate the key issues in dispute so that the other party knows the case it has to meet, due attention must be given to compliance with the requirements of Schedules B and C of the Class 1 Practice Note.

In addition, whichever party is preparing the Statement, care should be given to:

- ensure that there is no duplication of the issues;
- the issues are listed in order of decreasing importance; and
- the issues are written in plain English and explicitly state what the contention(s) are (for example, the proposed building height is five storeys yet Council's controls specify a three storey maximum).

Where one of the issues purely relates to a question of law, it *may* be possible to have a preliminary hearing on that issue alone first, to avoid any unnecessary costs being incurred arguing the facts of the case. An assessment as to whether there will be a true saving of time and expense, which would warrant the departure from the general presumption that all issues should be heard at the same time, will need to be made. For a summary of the relevant principles dealing with hearings on preliminary questions of law, see her Honour Justice Jagot's decisions in:

- *Greg Young v Parramatta City Council* (2006) 144 LGERA 193; [2006] NSWLEC 116; and

- *Metropolitan Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (2006) 145 LGERA 276; [2006] NSWLEC 57.

Paragraph 16 of the Class 1 Practice Note sets out the procedure for having a question of law heard in advance of the hearing of the merits of the development appeal.

(c) Upon receipt of the Statement

If acting on behalf of the Applicant, it is advisable to discuss what the Applicant can do to reduce the issues in dispute (for example, seeking the leave of the Court to lodge amended plans which address the issues raised).

It is worth taking the time to explain to a client the Court's approach to the issues in dispute especially where you can see that an issue is capable of being resolved or at least ameliorated.

Amending plans to change what Council has suggested before the involvement of any expert evidence is always preferable as this will reduce the amount of costs to be paid to Council under Section 97B of the EP&A Act. From 1 September 2008, in accordance with 97B, the Court is to make an order that the Applicant pay the consent authority's costs 'thrown away' where the Court has allowed the Applicant to file amended plans. Section 97B does not apply to minor amendments. As the provisions of the *Environmental Planning and Assessment Amendment Act 2008* (NSW), which introduced Section 97B, are not retrospective, it will only apply to appeals under Section 97 which were commenced on or after 1 September 2008.

Accordingly, an Applicant who chooses to amend plans at a much later stage of the proceedings (potentially on account of a Parties' Single Expert's reasonably foreseeable opinion) after considerable (and unnecessary) expense has been incurred by the Council, is likely to be faced with a greater cost order, if leave is granted to file the amended plans.

(viii) Notice to Produce

Previously, many Class 1 Applications would be accompanied by a Notice to Produce the Council's file at the first return date.

However, now the practice is for the parties to arrange informal discovery of documents between themselves. In accordance with paragraph 11 of the Class 1 Practice Note, Councils are required to produce, if requested, the

documents relevant to the subject application within 14 days of the request.

Requesting the production of documents can be a useful mechanism in preparing a case for hearing as you may be able to discover material which was previously unknown to you.

A formal Notice to Produce can be filed and served if you require the production of documents beyond the Council's development application files. For example, you may wish to serve a Notice to Produce upon Council to inspect the development assessment files for other neighbouring properties if Council granted consent to similar developments on those properties. This would allow you to examine the Council's decision making process and reasons for granting consent in those situations. A Notice to Produce is also very useful in investigating the history of a site by obtaining Council's files for prior consents in relation to the subject site.

Of course, you will be required to particularise exactly what documents, materials, photographs and plans etc you wish to inspect. Generally, it is expected that if you wish to inspect the Council files of neighbouring properties, that you list the Development Application number, Deposited Plan and Lot details, and residential street address.

If informal production of documents is not forthcoming, it is advisable to file with the Court Registry and serve upon the other side a sealed copy of a Notice to Produce and to re-list the matter for determination before the Registrar.

(ix) Subpoena for Production

Another mechanism for discovery, if information is required from a person or organisation which is not a party to the proceedings, is to lodge a Subpoena for Production.

The information required to be produced may be a document, or it may be knowledge held by a particular person and therefore requires them to attend and give evidence.

If the addressee is an organisation or company, the Subpoena must be addressed to the "Proper Officer" (Part 33, Rule 33.3(3) UCPR). The documents and things must be in the "custody and control" of the addressee, so care must be taken in identifying the appropriate addressee of the Subpoena.

The Subpoena must identify the document or thing to produce and the time, date and place of production. The date is usually the date of the hearing, unless leave is granted to require production at another date.

The document or thing must be particularised sufficiently, otherwise the Subpoena may be set aside (*Lane v Registrar, Supreme Court of NSW* (1981) 148 CLR 245 at 257, see Part 33 Rule 33.4 UCPR). This procedure is not commonly used in Class 1 proceedings and should not be used as a substitute for discovery.

Only a person represented by a solicitor may attend the Registry to issue a Subpoena without the Court's leave. The Subpoena must be accompanied by the appropriate Court fee as prescribed in Schedule 1 of the *Land and Environment Court Amendment (Fees) Regulation 2005.* A current list of Court fees can be found on the Court website.

A Subpoena for Production must be accompanied by conduct money, which is an amount sufficient to meet the reasonable expenses of the addressee attending Court to produce the document or thing (Part 33 Rule 33.6 UCPR). Each Council or organisation should be contacted prior to serving the Subpoena to ensure sufficient conduct money is provided.

Alternatively, many professional process service companies provide the conduct money as part of their service and will invoice the amount accordingly.

A Subpoena for Production must be served personally on the addressee.

(x) First directions hearing

Approximately 28 days after the Class 1 Application is filed, the matter is listed for its first directions hearing or telephone callover (All telephone callovers are conducted by the Registrar on a Monday, and are primarily for those appeals involving regional Councils in NSW) usually before the Registrar of the Court. If the Class 1 Application can be served on the day it is filed, an Applicant can request from the Registry that the matter be listed for the first directions hearing within 21 days from the date of service.

The parties who attend the directions hearing at the Court must be aware of the facts of the matter, the issues in dispute and have sufficient instructions to enable orders or directions to be made in a prompt and cost effective manner (Paragraph 4 and 40 of the Class 1 Practice Note).

The parties should have considered the most expeditious way of the proceedings being heard and, be able to inform the Court of the following (Paragraph 41 of the Class 1 Practice Note):

(a) the size of the proposed development;

(b) the likely cost of the development;

(c) when the development application was lodged with Council;

(d) whether or not it is a deemed or actual Council refusal;

(e) why it was refused by Council;

(f) the number and complexity of the issues;

(g) which issues require expert evidence, in particular, the appointment of a Parties' Single Expert;

(h) the likely number of witnesses (that is, the number of objectors to the development proposal);

(i) whether the matter is suitable for mediation, neutral evaluation, or case management;

(j) whether the matter should be heard by way of an on-site hearing;

(k) the likely length of the hearing; and

(l) whether there is any other previous litigation history with your appeal, for example, was it previously dealt with by another Commissioner.

In accordance with paragraph 15 of the Class 1 Practice Note the above information should be included where required in the Schedule E *Class 1 Development Appeals – Information Sheet* and filed in Court at the first directions hearing.

(xi) Expert evidence

(a) Parties' Single Experts

A Parties' Single Expert is exactly what the name implies. It is a single expert which both parties nominate to assess and report on one or more of the issues in dispute between the parties. The Parties' Single Expert is required to write a final report (called a Statement of Evidence), which the Commissioner will consider as evidence in the hearing. The Parties' Single Expert is not bound by the rules of evidence when giving evidence at a hearing in Class 1 proceedings.

More than one Parties' Single Expert may be appointed to assess one or more issues. This will very much depend on how many different issues are raised in the proceedings and the expert's field of expertise.

The decision as to whether or not the parties retain their own experts or agree on a Parties' Single Expert is one that will largely be contingent on the area in dispute (for example acoustics, planning and urban design). Paragraphs 42 – 44 of the Class 1 Practice Note sets out the precise matters the Court requires the parties to take into account when considering the engagement of a Parties' Single Expert.

Matters which would be most suitable (and less controversial) for a Parties' Single Expert are those involving more objective areas of expertise such as acoustics, traffic, contamination and other engineering issues.

One might think that areas such as flora and fauna would be fairly objective (either the plant or animal is present and it will be impacted upon or it won't). However, practice indicates that there is much variation between experts in this area of expertise and it is potentially worthwhile retaining your own expert.

Areas which are more suitable for both sides to retain their own experts (but which parties, for the sake of resolving the issue, might also engage a Parties' Single Expert) are, for example, the more subjective areas such as urban design, heritage and more complex planning matters.

If the parties cannot agree on a suitable expert, they should confidently express their opinions to the Court. There is no point "agreeing" on a biased or inexperienced Parties' Single Expert which the parties do not have confidence in and will seek to tender evidence against at a later stage, thereby incurring further costs.

It is not uncommon for parties to retain their own experts, so as to inform their legal representatives whether or not the Parties' Single Expert's opinion is reasonable and hence how best to argue the client's case. However, the competing consideration is the resultant increased cost of both parties retaining the experts on the one issue.

(b) Deciding to proceed with a Parties' Single Expert

Agreement should be reached, if possible, on the names of suitable experts prior to the first directions hearing. If there is no agreement then the Court will choose the appropriate Parties' Single Expert from a list of experts (including the experts' fee estimates and CVs) provided by the parties.

The Parties' Single Expert must have been contacted prior to the first directions hearing to confirm their estimate of fees and their capacity to produce an expert report within 5 weeks from receiving the brief. The expert must also be available to attend a hearing within approximately 28 days after completing their report (Paragraph 44 of the Class 1 Practice Note).

Where a Parties' Single Expert is required, the timetable set out in Schedule D of the Class 1 Practice Note should be adopted. The Court will not generally indulge any substantial departure from the usual directions unless there is a reasonable basis for doing so.

(c) Parties' Single Expert Reports

Once the Court has directed that a Parties' Single Expert be engaged, it is imperative that the Parties' Single Expert be properly briefed. The Court will direct that the parties jointly prepare a bundle of relevant documents for the Parties' Single Expert to review and assess. There has been recent criticism directed towards parties who prepare separate briefs to a Parties' Single Expert, which results not only in the doubling up of basic material, but also causes unnecessary confusion for the Parties' Single Expert who ends up wasting time attempting to locate the more relevant documents for assessment. In particular, paragraph 46 of the Class 1 Practice Note provides that:

> *"The parties are not to provide a Parties' Single Expert with any expert report brought into existence for the purpose of the proceedings addressing any matter the subject of instructions to the Parties' Single Expert, without leave of the Court".*

As a basic rule, a copy of the following documents should be provided to the Parties' Single Expert(s) in an appeal:

- the Court Directions (timetable and directions including any questions and communications should be copied to both the Applicant and Respondent in the proceedings);
- the Class 1 Application;
- the Statement of Facts and Contentions;
- Notice of Determination;
- letters of objections from residents to the proposal;
- any amended plans relied upon for the hearing;
- the Council Officer's assessment report;
- Division 2 of Part 31 of the UCPR; and
- the Expert Witness Code of Conduct in Schedule 7 of the UCPR.

Any subsequent amended plans or amended Statements of Facts and Contentions must be provided to the Parties' Single Expert promptly to enable them to fulfil their duties to the Court.

Should the Parties' Single Expert identify an additional issue, which appears to have been overlooked by the parties, then it is recommended that the Parties' Single Expert contact the Registrar to discuss how the matter should be appropriately case managed (Part 31, Rule 39 UCPR).

(d) Individual Expert Reports

The material contained within Expert Witness Reports is often the most crucial evidence before the Court in Class 1 proceedings. It is, therefore, important that the reports comply with the technical requirements of the Court and, in particular, the requirement to provide impartial expert advice to the Court.

The professional expertise and qualifications of an expert are relevant to the weight that the Court will give their evidence. The expert must be careful not to provide evidence which is outside of his or her expertise. Any qualifications to the expert's opinion should be identified clearly.

The information relied upon by an expert is also relevant in assessing the evidence provided in the expert report.

Hence, experts should list in their reports what documentation and plans they have relied upon in forming their opinion. For instance, one expert may have had access to a draft planning instrument to which the other party's expert may not have access as it was not yet in the public domain. In this circumstance, it may be useful for the draft planning instrument to be provided to both parties and the experts to jointly confer in relation to its relevance.

Expert opinions should be provided in a clear and concise form and be supported by reasoning. Expert reports should also provide a clear statement that the expert has read and agrees to be bound by the Expert Witness Code of Conduct in Schedule 7 of the UCPR (see Part 31 Rule 23 of the UCPR).

You should also ensure that your experts are aware of the requirements contained within Part 31 Rules 22 and 27 of the UCPR in relation to the disclosure of contingency fees or deferred payment schemes and the mandatory information to be included in their reports.

(e) Joint Experts' Reports

Corresponding experts for each side are typically directed by the Court to prepare a joint expert witness report setting out the issues upon which they agree or disagree. Where the experts disagree the report should also set out in detail the reasons for disagreement. In certain circumstances it might be appropriate for the Parties' Single Expert (or even experts from different disciplines for each side) to prepare a joint report with the parties' other experts where the issues in dispute overlap (for example town planning and urban design).

What is very important to remember at this stage is that the legal representatives must not get involved in the drafting of the document, be

present at the joint conference or coach the experts in any way with respect to the production of the report.

The parties' legal representatives can assist the experts by filing a copy of the joint report with the Court, but this should only be done once the report is in its final form and signed by all the experts. A draft copy of the report should never be circulated by the expert to the parties' legal representatives for their review or otherwise.

(xii) The Court's 'Planning Principles'

In September 2003 the Court instituted a major change to the way in which judgments in Class 1 appeals were decided, written and made public by Commissioners.

For the first time Commissioners' decisions were, where applicable, to contain clearly identifiable planning principles to achieve the following objectives:

- greater consistency of decision making by Commissioners of the Court;
- a greater level of guidance for decision making by providing a common reference point, which Commissioners are at least obliged to consider when their case involves similar issues;
- improve the quality of individual decisions; and
- assist Councils and other decision-makers.

A planning principle can be defined as a statement of a desirable outcome from, a chain of reasoning aimed at reaching, or a list of appropriate matters to be considered in making, a planning decision. While planning principles are stated in general terms, they may be applied to particular cases to promote consistency. Planning principles are not legally binding and they do not prevail over environmental planning instruments and development control plans. Planning principles assist when making a planning decision, including:

- where there is a void in policy; or
- where policies expressed in qualitative terms allow for more than one interpretation; or
- where policies lack clarity.

(see Land and Environment Court NSW Annual Review 2007, Page 22).

For example, a planning principle might be formulated in relation to the planning issue of "streetscape". This principle may develop from a situation where a Commissioner is presented with a proposed two-storey dwelling which detrimentally impacts on the streetscape (in a street consisting of single-storey dwellings). In that situation, the Commissioner may take into account factors such as:

- the scale and character of the street;
- whether or not it is in a conservation area;
- the setback of the proposed house in relation to other houses; and
- the likelihood that one day the existing houses might also be extended to two-storeys.

(see Roseth SC *Planning Principles and Consistency of Decisions* Law Society's Local Government and Planning Law Seminar 15 February 2005).

As a result of this decision, a planning principle could be articulated to provide guidance to legal practitioners, expert witnesses and other Commissioners when faced with a similar factual situation.

All relevant judgments and explanatory material concerning planning principles and their use can be found at the following website:

http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/lec_planningprinciples

Each planning principle, although originating from a given Commissioner's decision, is formulated following extensive discussion with all the Commissioners of the Court.

It is important to note that the Court's planning principles are not meant to supersede or override a Council's planning controls. The principles are intended to, amongst other things, "fill the gaps" where a Council's planning controls do not provide sufficient information or guidance.

For more information on planning principles also see Roseth SC *Developing planning principles* NEERG Seminar on Planning Principles, 27 July 2005 which is available on the Court's website at:

http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_speeches_and_papers

Chapter 12

Class 8 Proceedings in the Land and Environment Court

(i) A new jurisdiction for the Court

On 7 April 2009 the Land and Environment Court acquired a new jurisdiction under the *Mining Act 1992* (**Mining Act**) and the *Petroleum (Onshore) Act 1991* **Petroleum Act**). This jurisdiction is commonly known as the Class 8 Jurisdiction (or "Mining Jurisdiction") and is conferred through section 21C of the Court Act.

The Court's mining jurisdiction practice collection can be accessed through the following link: http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_mining_jurisdictions

(ii) Types of claim heard under Class 8

Class 8 of the Court's jurisdiction can only be exercised by Judges or by Commissioners of the Court who are Australian Lawyers (sections 33 (2A) and 30 (2C) of the Court Act). A Commissioner in the Class 8 Jurisdiction will be referred to as a 'Commissioner for Mining' (section 12(2AC) of the Court Act). The Class 8 Jurisdiction does not extend to offences under the Mining Act or the Petroleum Act.

The Class 8 Jurisdiction is subject to the procedures dictated by the Rules, CP Act and UCPR.

The Land and Environment Court has introduced a 'Class 8 Mining List' where the summons commencing proceedings will be returnable at a directions hearing.

(iii) Powers of the Court under the Class 8 Jurisdiction

(a) Mining Act

The powers of the Court under the Mining Act are contained in Part 15 of that Act (sections 293-296) with a list of specific matters at section 293 of the Mining Act. Sections 294 – 296 of the Mining Act confer additional powers to the Class 8 Jurisdiction including injunctive relief.

The Class 8 Jurisdiction under the Mining Act includes (but is not limited to) the hearing and determination of disputes in relation to the following:

- the area, dimensions or boundaries of land subject to an authority or mineral claim

- possession or occupation of land that is subject to an authority or mineral claim
- a right of way, right of access to water or right of entry conferred by the Mining Act
- trespass or encroachment on land that is subject to an authority or mineral claim
- any demands for debt or damages arising out of prospecting or mining
- rights to any mineral in any land subject to an authority or mineral claim
- any transfers of land being subject to a mineral claim
- any partnership relating to an authority or mineral claim
- the management of land subject to an authority or mineral claim
- the validity of an authority, mineral claim or opal prospecting licence.

(b) Petroleum Act

A list of specific powers for the Class 8 Jurisdiction can be found at section 115 of the Petroleum Act.

The Class 8 Jurisdiction under the Petroleum Act includes (but is not limited to) the following:

- any demand concerning the ascertainment and adjustment of boundaries of land held under a petroleum title, or occupied by virtue of
- an easement or right of way granted under the Petroleum Act
- the right to the occupation of areas of land comprised in a petroleum title and the right to or ownership of petroleum and other materials obtained from them
- the right to the use of areas of land comprised in an easement or right of way granted under the Petroleum Act
- any encroachments on, infringements of or damage to any land comprised in a petroleum title, easement or right of way granted under the Petroleum Act
- any demand for debt or damages or both arising out of or made in respect of any contract whatever relating to the search for or mining of petroleum
- the right to any petroleum in or to be taken out of any land comprised in a petroleum title.

(iv) Appeal rights under Class 8

Only questions of law invoke a right of appeal under the Class 8 Jurisdiction. An appeal against a decision of a Commissioner for Mining is to be made to a Judge under section 56A of the Court Act. An appeal against an order of a Judge in the Court is to be made to the Supreme Court under section 57 of the Court Act.

(v) Fees

The fees for filing an originating process in the Class 8 Jurisdiction are currently $197 (standard) and $394 (corporations).

(vi) Who can represent parties in Class 8 proceedings?

A person may not appear before the Court by an agent in proceedings in the Class 8 Jurisdiction except with the leave of the Court (section 63 of the Court Act).

(vii) Case law

(a) Proceedings challenging grants and refusals of exploration licences

Under section 137 of the Mining Act there is a three month time limit (beginning on the day of gazettal) on commencing proceedings challenging grants and refusals of exploration licences. If the pleadings do not manifest an error of law and the three months has not yet expired, the Court may prefer to dismiss proceedings and encourage new proceedings to be commenced, instead of ordering that the summons be amended to cure the omission in the pleadings.

For more information, see *Martin v NSW Department of Primary Industries & Ors* [2010] NSWLEC 21. This was an appeal against the decision of Commissioner Dixon (as she now is) to dismiss an application under r 13.4 of the UCPR: *Martin v New South Wales Department of Industry and Investment* [2009] NSWLEC 1447 (as Commissioner for Mining).

(b) Review of an Arbitrator's determination

Under section 155 of the Mining Act a party aggrieved by the final determination of an arbitrator may apply to the Court for a review of the determination.

For more information, see *Rosane Pty Limited v T & P Clarke; N Perry & R Armstrong v T & P Clarke* [2009] NSWLEC 1282. The Court (Senior Commissioner Moore and Commissioner Dixon) under section 155 of the Mining Act reviewed and amended determinations made by an arbitrator. The Court supported the approach in *Botany Bay City Council v Premier Custom Services* [2009] NSWCA 226, that it is not appropriate in merit review jurisdictions to 'approach an interpretation and understanding of the reasons of a Commissioner with a fine toothcomb', but demonstrated the importance of arbitrators being 'required to give sufficient reasons for any decision' for the purposes of procedural fairness and natural justice. The Court also clarified the application of sections 383C, 141 and 263 of the Mining Act.

(c) Proceedings challenging the validity of an exploration licence

The case of *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources (No 2)* [2010] NSWLEC 1 was a challenge to the validity of an exploration licence.

The Chief Judge held that the Applicant did not make out any of the grounds of its challenge to the validity of an exploration licence (EL6505) granted to Coal Mines Australia Pty Ltd (a subsidiary of BHP Billiton). The members of the Applicant included landholders in the Caroona district whose properties were within the area of the licence.

Prepared by: Phillip Couch, James Fan, Jenny Liu, Kylie Maxwell, Melanie McIntyre, Alyssa Munn and Katherine Stevenson.

This Chapter inserted on 30 June 2010.

Appendix A

Administration

The Land and Environment Court is situated at Windeyer Chambers, 225 Macquarie Street, Sydney. The Registry is located on level 4, where the daily Court lists are displayed (as well as on the Ground Floor) and where all applications and documents can be filed and processed. The Registry is open 8.30am to 4:30pm Monday to Friday.

The Court's contact numbers are:

Enquiries	(02) 9113 8200
Facsimile	(02) 9113 8222
Mobile	0418 261 958 (for urgent applications after 5pm on weekdays or on weekends).

The Court's email address is **lecourt@agd.nsw.gov.au**.

Directions hearings before the Registrar are conducted at 9:30am on level 1, Tuesday to Friday. Duty and List Judge matters and mentions are generally listed for 9.30am but can be listed as early as 8:45am, with hearings commencing at 10:00am.

During hearings, morning tea adjournments are normally at 11.30am and the luncheon adjournment is between 1pm and 2pm, with the final adjournment at 4pm. However, these times are subject to the Judge's or Commissioner's discretion.

Appendix B

Land and Environment Court Fees

Land and Environment Court Fees are determined pursuant to the *Land and Environment Court Regulation 2005* (NSW). The current fees came into effect on 1 July 2008.

Always check the Court's website for the current Court Fees:

http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_courtfees

Schedule 1 Court fees

Initiating Process		Standard	Corporation
1	Filing an originating process in Class 1 of the Court's jurisdiction (other than an originating process referred to in item 2)	$718	$1,436
2	Filing an originating process in Class 1 of the Court's jurisdiction under Section 97 of the Environmental Planning and Assessment Act 1979 where the matter relates to a development application (other than a development application relating to the subdivision of land) or to a building application, and where the value of the development or building:		
	(a) is less than $500,000	$718	$1,436
	(b) is $500,000 or more but less than $1,000,000	$3,286	$4,362
	(c) is $1,000,000 or more	$4,104	$5,452
3	Filing an originating process in Class 2 of the Court's jurisdiction (Other than an originating process referred to in item 4)	$718	$1,436

4	Filing an originating process in Class 2 of the Court's jurisdiction where the matter relates to an application under the Trees (Disputes Between Neighbours) Act 2006	$189	$378
5	Filing an originating process in Class 3 of the Court's jurisdiction (other than an originating process referred to in item 6 or 7)	$718	$1,436
6	Filing an originating process in Class 3 of the Court's jurisdiction where the matter relates to an appeal or objection against a valuation of land, and where the value of the land, as determined by the respondent valuing authority:		
	(a) is less than $500,000	$252	$504
	(b) is $500,000 or more but less than $1,000,000	$397	$794
	(c) is $1,000,000 or more	$718	$1,436
7	Filing an originating process in Class 3 of the Court's jurisdiction where the matter relates to a claim for compensation for the compulsory acquisition of land, as referred to in Section 24 of the Land and Environment Court Act 1979, and where the amount offered as compensation by the resuming or constructing authority:		
	(a) is less than $500,000	$718	$1,436
	(b) is $500,000 or more but less than $1,000,000	$3,286	$4,362
	(c) is $1,000,000 or more	$4,104	$5,452
8	Filing an originating process in Class 4 of the Court's jurisdiction	$718	$1,436
9	Filing an originating process in Class 5 of the Court's jurisdiction	$718	
10	Filing an originating process in Class 6 or 7 of the Court's jurisdiction	$718	

11	Filing a process to commence an appeal to the Court under Section 56A of the Land and Environment Court Act 1979	$1,678	$3,355
12	Filing a notice of motion	$166	$332
Documents			
13	Issuing a subpoena (for production, to give evidence, or both)	$64	$128
14	Receipt by the Registrar of a document or thing produced in compliance with a notice to produce under Part 34 of the Uniform Civil Procedure Rules 2005	$64	$128
15	Filing or registering a copy or certificate of a judgment, order, determination, decree, adjudication or award of any other court or person under Section 133 of the Civil Procedure Act 2005	$72	$144
Copies			
16	Furnishing a sealed or certified copy of the written opinion or reasons for opinion of a Judge or of a Commissioner or other officer of the Court. Note: A party to proceedings before the Court is entitled to one copy of the opinion or reasons for opinion without charge.	$48	
17	Retrieving, providing access to and furnishing a copy of any document (otherwise than as provided for by item 18)	$10, plus $5 for each 10 pages (or part thereof) after the first 20 pages	
18	Retrieving and providing access to, but not furnishing a copy of, any document	Nil	
19	Supplying a duplicate tape recording of sound-recorded evidence	$40 per cassette	
20	Supplying a transcript of any proceedings:		
	(a) where the matter being transcribed is under 3 months old	$73, plus an additional $8.90 for each page after the first 8 pages	

	(b) where the matter being transcribed is 3 months old or older	$89, plus an additional $10.20 for each page after the first 8 pages	
Other			
21	Requesting production to the court of documents held by another court	$48	$96
22	Providing any service for which a fee is not otherwise imposed by this Schedule	$34	$68
After Hours			
23	Opening, or keeping open, the office of the registrar: (a) on a Saturday, Sunday or public holiday, or (b) on any other day before 8.30 am or after 5pm	$566	$1,132

In certain situations you may be able to obtain a waiver, postponement or remission of a scheduled Court fee: See guidelines contained in Part 4 of the *Civil Procedure Regulation 2005* (NSW) or for matters in Classes 5, 6 and 7 see the *Criminal Procedure Regulation 2005* (NSW).

You will need to complete a *Request for Waiver, Postponement or Remission of Fees* and forward the completed form to the Registry office who will contact you once a decision has been made by the Registrar.

A copy of the *Request for Waiver, Postponement or Remission of Fees* form can be downloaded from the Court's website at:

http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_courtfees

Appendix C

Websites/Useful Looseleaf Services

Land and Environment Court Website

http://www.lawlink.nsw.gov.au/lec

The Court's website contains the following:

1. Daily Court Lists
2. Consolidated Practice Notes
3. Procedure for taking reserved judgments
4. Court Rules
5. Information update: Judgments, Transcripts and Cassette Tapes
6. Land and Environment Schedule of Fees
7. Court Legislation
8. Court Judgments
9. Guide to Court Forms
10. Court Information Updates
11. Court Directory
12. Judgments from 1999 till present
13. Speeches

NSW Young Lawyers Environmental Law Committee website

http://www.lawsocnsw.asn.au/yl/committees/environmental/

At the Committee's website you can discover the Committee's general aims and objectives, read about its current and past projects, discover useful links and information on how to become involved in the Committee.

NSW legislation website

www.legislation.nsw.gov.au

The NSW legislation website is the official NSW Government site for the online publication of legislation, and is provided and maintained by the Parliamentary Counsel's Office.

Austlii

http://www.austlii.edu.au

At Austlii it is possible to obtain copies of decisions of all the Judges of the Court from 1988 to the present. In addition, it is possible to obtain Court of Appeal and Court of Criminal Appeal judgments in relation to decisions of the Court from 1999 to the present, as well as decisions of the High Court of Australia.

Land and Environment Court Law and Practice - NSW

Published by the Law Book Company it is an invaluable guide to the Court and its rules, practice directions, etc, containing both the relevant legislation and commentary on relevant cases.

Local Government Planning and Environment - NSW

Published by Butterworths in four volumes it is an invaluable guide and contains all the relevant local government, planning and environment legislation, as well as providing commentary.

Environmental Responsibilities Law - NSW

Published by The Law Book Company in two volumes it is an essential guide containing all the relevant environmental legislation in the field, with commentary.

CCH New South Wales and Australian Pollution Law

An invaluable guide to pollution law and legislation as it affects the Court.

Appendix D

Dictionary

Alternative Dispute Resolution (ADR) – a process, other than adjudication by the Court, in which an impartial person assists the parties to resolve the issues in dispute. The methods of ADR available through the Court are conciliation, mediation, and neutral evaluation.

Applicant – the party who commences proceedings in Classes 1 - 4 of the Court's jurisdiction. Under the UCPR, the terms plaintiff/prosecutor are used instead of 'Applicant'.

Conditions of consent – conditions attached to a development consent that must be complied with when carrying out the development the subject of the consent.

Construction Certificate – a certificate that is required prior to commencing building works pursuant to a development consent (Part 4A of the EP&A Act). This was formerly known as a building application/ building approval.

Court Registry – administration centre of the Court. Located on level 4 of Windeyer Chambers, 225 Macquarie Street, Sydney NSW.

Crown land – land that is the property of the Commonwealth, State or Territory.

Deferred development consent – where a development consent does not operate until a specified condition or requirement has been satisfied.

Development Application – an application for development that is lodged with a consent authority (e.g. Council) in order to obtain development consent. A development application is often accompanied by other supporting documents, such as a Statement of Environmental Effects.

Development Consent – an approval granted to a development application. A development consent may include conditions (conditions of consent). In addition, any documents which are referred to within the development consent or the conditions of consent may be incorporated into the development consent.

Directions hearing – a short Court appearance, usually before the Registrar, to provide directions and case management prior to the final hearing of a matter (previously known as a 'call-over').

eCourt – the Court's electronic and filing and information management system.

Filing fee – fee paid when lodging certain documents with the Court, for example, a Class 1 Application or Notice of Motion. See Annexure B (always check the Court's web site for any changes in the fees before you file a document).

First access – a direction made by the Registrar in relation to documents to produce under a Subpoena for Production. First access is normally given to the party who filed the subpoena, however, access may be granted to another party if they can convince the Court that such access should be granted. This situation may arise for example where the documents to produce may be privileged and need to be reviewed by the opposing party.

Floor Space Ratio (FSR) – is the total building area divided by the site size area. As a formula: Floor Space Ratio = (Total covered area on all floors of all buildings on a certain site)/(Area of the site). Thus, an FSR of 2.0 would indicate that the total floor area of a building is two times the gross area of the site on which it is constructed, as would be found in a multiple-story building. When calculating the FSR for a particular site it is important to first check the definition of FSR and gross floor area in the relevant Council's LEP or Development Control Plan as these definitions may differ from Council to Council.

Integrated development – a development that requires both development consent and at least one of the approvals listed in Section 91 of the EP&A Act before it can be carried out.

Liberty to restore – allows a party to request that the proceedings be relisted before the Court for further directions. This liberty is normally granted on the basis that the parties contact the Court at least 1 - 3 days before the day that they need the matter to be relisted.

Local Environmental Plan (LEP) – regulates development within the relevant local government area (LGA). For example, a LEP regulates development in the Local Government Area by outlining what development is prohibited or permissible with or without consent.

Mediation – an alternative dispute resolution where a neutral third party assists the parties to find a solution to the dispute.

Modification Application – an application made by the applicant or person relying on the development consent to modify the subject consent.

On-site hearings – where the hearing is heard at the site (on-site) of the proposed development.

Planning principle – originating from a Commissioner's decision, a planning principle is a statement of a desirable outcome from, a chain of reasoning aimed at reaching, or a list of appropriate matters to be considered in making, a planning decision. The principles can be found on the Court's website.

Photocopy access – in relation to Subpoenas for Production, the Registrar may order that a party is permitted access to photocopy the documents produced, at the photocopier within the Court Registry.

Practice Notes – guidelines provided by the Court to set out case management procedures for the just, quick and cheap resolution of proceedings (Previously known as Practice Directions).

Respondent – the party who has proceedings commenced against them in Classes 1 - 4 of the Court's jurisdiction. Under the UCPR, the term defendant is used instead of 'Respondent'.

Section 34 Conference – involves a Commissioner of the Court with technical expertise on issues relevant to the case acting as a conciliator in a conference between the parties. The Conference provides for a combined resolution process involving first, conciliation and then, if the parties agree, adjudication.

Parties' Single Expert Witness – where both/all parties engage the one expert witness to provide expert evidence on an issue to the Court (previously known as a Court Appointed Expert or CAE).

Site inspections – where the Court inspects the site the subject of the proceedings. Site inspections are usually undertaken at 9:30 am on the first day of the hearing.

Summons – a form of originating process which claims an order that the defendant be dealt with according to the law for the commissioning of the offence.

Stood-over – a term used by the Court when directing that a matter is to be adjourned or "stood-over" to another day.

Statement of Environmental Effects (SEE) – a report prepared by the Applicant or the Applicant's town planner identifying the environmental impacts of a proposed development. A development application must be accompanied by a SEE.

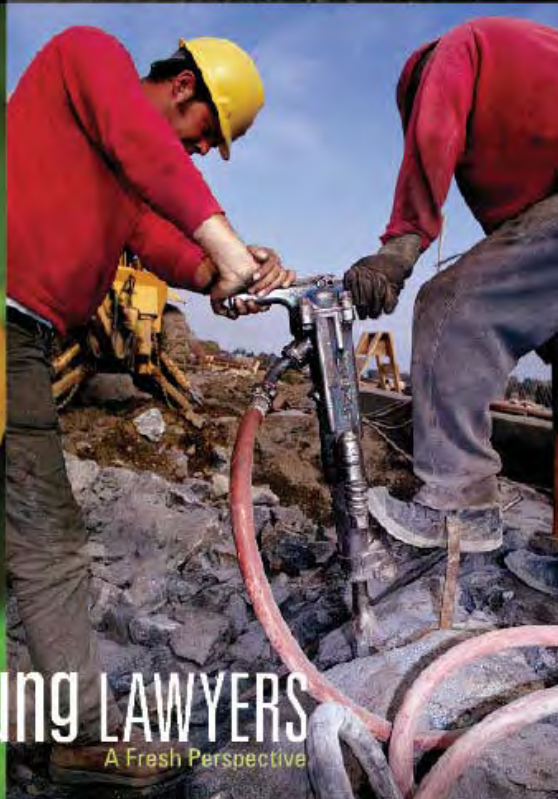
Statement of Facts and Contentions – a statement prepared by the Council's town planner in merit review proceedings which outlines the background facts and matters in dispute between the parties. The Statement is divided into two parts – Part A Facts and Part B Contentions.

Previously known as the Statement of Issues and the Statement of Basic Facts.

Telephone directions hearings – where a directions hearing is conducted via telephone with the Registrar/Judge. Telephone direction hearings are normally conducted where the Applicant is located outside of the Sydney metropolitan area.

Transcripts – the official written record of a hearing normally transcribed from cassette tape recordings taking during the hearing.

Uplift – a direction made by the Registrar to allow a party to remove documents from the Court Registrar which have been produced under a Subpoena for Production. A letter of consent is required from the person who produced the documents. If uplift is allowed the documents are usually required to be returned to the Court within 24 hours.



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