



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: MM;ljb

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17 September 2010

The Hon. John Hatzistergos MLC

Attorney General
Level 33 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2001

Dear Attorney General

Appearances by non-practitioner advocates in the Land and Environment Court

I am writing to you at the request of the Law Society's Environmental Planning and Development Committee (Committee). The Committee's members regularly appear for clients in proceedings in the Land and Environment Court.

The Committee has serious concerns that instances of practices demonstrated by advocates who are not Australian legal practitioners (agents) representing parties to proceedings in that Court have significantly prejudiced the administration of justice and the interests of parties in that jurisdiction.

In one case which illustrates the issues concerning the Committee a legal practitioner, who is also a committee member, acted for the former client of an agent in proceedings brought by the agent in the Local Court to recover outstanding fees. It became apparent in the course of taking instructions in relation to the Local Court matter that the agent had provided undertakings from his client in the Land and Environment Court to cease use of business. It was clear to the legal practitioner that the client did not have a sufficient grasp of the English language to enable him to understand the consequences of giving such an undertaking.

The same agent reportedly advised another client that the client could obtain approval in the Land and Environment Court for a business operated by the client in an area zoned to prohibit such use. At the time this advice was given the relevant Council had issued a number of Penalty Infringements for the unauthorised use, which was continuing. There was no costs disclosure by the agent and the bill presented to the client by the agent was, in the committee member's view, excessive to the extent that it would not have been approved by a costs assessor on assessment.

The experiences of other committee members suggest that these were not isolated instances.

These cases illustrate the types of issues which can and do occur if there is no level of sanction or guidance for non-practitioner advocates in the Land and Environment Court.

It has been suggested through the Court Users Group of the Court that a Practice Direction could be issued by the Chief Judge which would prescribe a code of conduct and require undertakings to be provided as follows:

- a. that the non-practitioner advocate has advised the client as to the likely costs of proceedings, including their own costs and the risk of costs being awarded against a party to the proceedings;
- b. that there are reasonable prospects of success having regard to the knowledge and experience of the non-practitioner advocate (e.g. Town Planner, Architect); and
- c. that the non-practitioner advocate has complied with the Code of Conduct or any relevant Practice Directions.

A Code of Conduct would allow the Court, other practitioners and parties to proceedings to have some level of comfort in relation to the probity of any representations made by agents on behalf of parties to proceedings. This level of comfort does not, of course, equate with the strict regime which governs Australian legal practitioners.

In order to issue such a Practice Direction it may be necessary to amend section 63 of *The Land and Environment Court Act 1979* along the lines set out below:

63 Right of appearance

- (1) *A person entitled to appear before the Court may appear in person, or by an Australian legal practitioner, or (except in proceedings in Class 5, 6 or 7 of the Court's jurisdiction) by an agent authorised by the person in writing.*
- (2) *Despite subsection (1), a person may not appear before the Court by an agent in proceedings in Class 8 of the Court's jurisdiction except with the leave of the Court.*


(amend by adding paragraph 3)

- (3) *Any agent so authorised in writing to appear on behalf of a person in accordance with this section shall comply with any Code of Conduct or Practice Direction published by the Court to regulate the conduct and practice of any such agent'.*

The Committee does not suggest that there is not a place for agents in Land and Environment Court proceedings. The Court is a specialist forum where experts in other disciplines such as Town Planners routinely supply valuable assistance to the Court. However, both the Court and parties appearing before it need to be satisfied that there is probity in representations made to the Court. The clients for whom the agents act also need to be protected by putting appropriate sanctions and safeguards in place and providing any necessary guidance.

The Committee would appreciate the opportunity to discuss these issues further.
Please contact Ms Liza Booth, Executive Member, Environmental Planning and
Development Committee on (02) 9926 0202 or by email to
liza.booth@lawsociety.com.au if you wish to discuss the Committee's comments.

Yours sincerely,


Mary Macken
President