UPDATE ON JURISDICTION AND PRACTICE AND PROCEDURE

by
The Hon. Justice Brian J Preston
Chief Judge
Land and Environment Court of NSW

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UPDATE ON JURISDICTION AND PRACTICE AND PROCEDURE

This session will discuss changes in the Court's jurisdiction and practice and procedure, including legislation, rules, practice notes and policies, which have occurred over the last year and are expected to occur in the near future.

Introduction

The last year has seen a number of changes to the Land and Environment Court's jurisdiction and practice and procedure for proceedings in the Court. Key changes to the Court's jurisdiction include the introduction of a 'fit and proper person' ground for decisions relating to mining or petroleum rights or titles, new jurisdiction for proceedings relating to elections for members of local boards, and a new regulation for native vegetation. New procedures involve changes to the rules governing electronic case management, changes to the rules governing security for costs and new judicial review procedures.

The Court has an overriding duty to ensure the just, quick and cheap resolution of the real issues in all civil proceedings in the Court. In many areas of its work, the Court has been able to improve its performance in achieving this overriding objective. A new practice note has been issued for Class 4 proceedings, replacing Practice Note – Class 4 Proceedings dated 30 April 2007. Revisions have been made to the Site Inspections Policy and the Court Attire Policy, and a new Conciliation Conferences Policy has been introduced. Three new standard directions have been issued.

This paper summarises these changes to the Court's jurisdiction and practice and procedure in the last year.

Looking forward to the forthcoming year, there are a number of further legislative amendments being considered. This paper also canvasses these legislative amendments.

JURISDICTION

Fit and proper person consideration for decisions relating to mining or petroleum rights or titles

The Mining and Petroleum Legislation Amendment Bill 2014 commenced on assent on 14 May 2014. The Bill amended the *Mining Act* 1992 and the *Petroleum (Onshore) Act* 1991 to allow certain decisions relating to mining or petroleum rights or titles to be made on the ground that a person is or is not a 'fit and proper' person.

Under s 21C of the *Land and Environment Court Act* 1979 ("the Court Act"), the Court has jurisdiction to hear and dispose of proceedings arising under the *Mining Act* 1992 or the *Petroleum (Onshore) Act* 1991 in its Class 8 jurisdiction. The Court's jurisdiction includes, but is not limited to, the determination of any question or dispute as to:

- the validity of a mining right or petroleum title;[1]

- the decision of a decision-maker in relation to an application for the granting, renewal or transfer of a mining right or petroleum title;[2] and

- the decision of a decision-maker to cancel a mining right or petroleum title.[3]

The Mining and Petroleum Legislation Amendment (Public Interest) Bill 2013, which commenced on assent on 27 November 2013, had amended the *Mining Act* 1992 and the *Petroleum (Onshore) Act* 1991 to make the public interest a ground for certain decisions relating to mining or petroleum rights or titles. New sections 380A of the *Mining Act* 1992 and 24A of the *Petroleum (Onshore) Act* 1991 provided that the public interest was a ground on which the following decisions may be made:

- a decision to refuse to grant, renew or transfer a mining right or a petroleum title;[4]

- a decision to refuse a tender for a mining right;[5]

- a decision to cancel or suspend operations under a mining right or a petroleum title;[6] and

- a decision to restrict operations under a mining right or a petroleum title by the imposition or variation of conditions of a mining right.[7]

The Mining and Petroleum Legislation Amendment Bill 2014 removed this public interest ground. The Bill omitted sections 380A and 24A, and inserted instead sections providing that certain decisions about mining rights[8] or petroleum titles[9] may be made on the ground that a relevant person is not a 'fit and proper person'.[10]

In determining whether a relevant person is fit and proper, the decision-maker can take into account numerous factors including:

- whether the person or (in the case of a body corporate) a director of the body corporate has compliance or criminal conduct issues;

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[1] *Mining Act* 1992 (NSW), s 293(1)(q)(i); *Petroleum (Onshore) Act* 1991 (NSW), s 115(1)(m)(i).
[2] *Mining Act* 1992 (NSW), s 293(1)(q)(ii); *Petroleum (Onshore) Act* 1991 (NSW), s 115(1)(m)(ii).
[3] *Mining Act* 1992 (NSW), s 293(1)(q)(iii); *Petroleum (Onshore) Act* 1991 (NSW), s 115(1)(m)(iii).
[4] *Mining Act* 1992 (NSW), ss 380A(2)(a); *Petroleum (Onshore) Act* 1991 (NSW), ss 24A(1)(a).
[5] *Mining Act* 1992 (NSW), ss 380A(2)(b).
[6] *Mining Act* 1992 (NSW), ss 380A(2)(c); *Petroleum (Onshore) Act* 1991 (NSW), ss 24A(1)(b).
[7] *Mining Act* 1992 (NSW), ss 380A(2)(d); *Petroleum (Onshore) Act* 1991 (NSW), ss 24A(1)(c).
[8] Such as to refuse to grant, renew or transfer a mining right, to cancel or suspend operations under a mining right, or to restrict operations under a mining right by the imposition or variation of conditions of a mining right: ss 380A(1)(a)-(d), inserted by the Mining and Petroleum Legislation Amendment Bill 2014 (NSW).
[9] Such as to refuse to grant, renew or transfer a petroleum title, to cancel or suspend operations under a petroleum title, or to restrict operations under a petroleum title by the imposition or variation of conditions of a petroleum title: ss 24A(1)(a)-(d), inserted by the Mining and Petroleum Legislation Amendment Bill 2014 (NSW).
[10] *Mining Act* 1992 (NSW), s 380A(1); *Petroleum (Onshore) Act* 1991 (NSW), 24A(1).

- the person's record of compliance with relevant legislation;
- whether the management of the activities or works to be authorised are not or will be in the hands of a technically competent person;
- whether the person is not of good character;
- whether the person, during the previous three years, was an undischarged bankrupt;
- whether the person has financial capacity to comply;
- whether the person is in partnership with a person who is not a fit and proper person; and
- any other matters prescribed by the regulations.[11]

A relevant person who is aggrieved by a decision about a mining right or a petroleum title made on the ground that, in the opinion of the decision-maker, the person is not a fit and proper person may apply to the Land and Environment Court for a review of the decision-maker's opinion.[12] The Court will conduct the review in Class 8 of the Court's jurisdiction.[13] The following provisions apply to the review:

- the review is to be by way of redetermination of the question of whether the relevant person is a fit and proper person, and fresh material or material in addition to, or in substitution for, the material considered by the decision-maker in the determination of that question may be given on the review and taken into consideration by the Court;
- on a review the Court is to decide whether or not the relevant person is a fit and proper person;
- the decision of the Court on a review is final and is to be given effect to by the decision-maker; and
- the decision-maker is to take whatever action may be necessary to give effect to the Court's decision including action to revoke and remake any decision referred to in subsection (1).[14]

[11] *Mining Act* 1992 (NSW), s 380A(2); *Petroleum (Onshore) Act* 1991 (NSW), 24A(2).
[12] *Mining Act* 1992 (NSW), s 380A(6); *Petroleum (Onshore) Act* 1991 (NSW), 24A(6).
[13] *Land and Environment Court Act* 1979 (NSW), s 21C.
[14] *Mining Act* 1992 (NSW), ss 380A(6)(a)-(d); *Petroleum (Onshore) Act* 1991 (NSW), ss 24A(6)(a)-(d).

New jurisdiction for proceedings relating to elections for members of local boards

The *Local Land Services Act* 2013, which commenced on 1 July 2013, amended s 20 of the Court Act.

The *Local Land Services Act* 2013 omitted s 20(1)(cn) of the Court Act conferring jurisdiction on the Court in Class 4 to hear matters under the *Rural Lands Protection Act* 1998*,* and introduced a new s 20(1)(cn) conferring jurisdiction on the Court to hear proceedings relating to elections for members of local boards (including relating to enrolment) under the *Local Land Services Regulation* 2014*.*[15]

The *Local Land Services Regulation* 2014 provides that a person may dispute the validity of an election by an application made to the Land and Environment Court if they are dissatisfied with the conduct of the election, or any decision of an enrolment officer made under pt 3 of the Regulation.[16] An application to the Court must set out the facts relied on to invalidate the election.[17] Any person may make an application to the Court within 28 days after the result has been publicly declared.[18]

In determining the application, the Land and Environment Court has the same powers as are conferred on the Court of Disputed Returns by s 161 of the *Parliamentary Electorates and Elections Act* 1912.[19] These powers include the following:

- to adjourn;
- to compel the attendance of witnesses and the production of documents;
- to grant leave to inspect the rolls and other documents;
- to examine witnesses;
- to declare that any person was not duly elected;
- to declare any candidate duly elected who was not returned as elected;
- to declare an election void;
- to dismiss or uphold the petition in whole or in part;
- to award costs; and
- to punish any contempt of its authority by fine or imprisonment.[20]

[15] *Local Land Services Act 2013* (NSW), sch 7 item 24.
[16] *Local Land Services Regulation* 2014 (NSW), reg 36(1).
[17] *Local Land Services Regulation* 2014 (NSW), reg 36(2).
[18] *Local Land Services Regulation* 2014 (NSW), reg 36(3).
[19] *Local Land Services Regulation* 2014 (NSW), reg 37.
[20] *Parliamentary Electorates and Elections Act* 1912 (NSW), s 161(1).

So far, no matters concerning the new s 20(1)(cn) of the Court Act have come before the Court.

New native vegetation regulation

The *Native Vegetation Regulation* 2013 commenced on 23 September 2013, and repealed and remade with some amendments the *Native Vegetation Regulation* 2005.

Under s 12 of the *Native Vegetation Act* 2003, native vegetation must not be cleared except in accordance with development consent granted under the Act, or in accordance with a property vegetation plan ("PVP").[21] Prosecutions for offences against this section are a common type of prosecution in the Court's Class 5 jurisdiction relating to environmental planning and protection summary enforcement. The *Native Vegetation Regulation* 2013 provides for the form and content of PVPs, the variation and termination of PVPs and a register of PVPs.[22]

The Regulation also provides for:

- development consent for clearing of native vegetation;[23]
- the assessment of broadscale clearing;[24]
- clearing under a PVP for private native forestry;[25]
- routine agricultural management activities;[26]
- special provisions for vulnerable land;[27] and
- miscellaneous and savings and transitional matters.[28]

Key changes include:

- requiring a PVP to include details of any proposals for the protection and management of native vegetation;[29]
- the insertion of pt 5 providing for clearing under a PVP for the purposes of private native forestry; and

[21] *Native Vegetation Act* 2003 (NSW), s 12(1).
[22] *Native Vegetation Regulation* 2013 (NSW), pt 3.
[23] *Native Vegetation Regulation* 2013 (NSW), pt 2.
[24] *Native Vegetation Regulation* 2013 (NSW), pt 4.
[25] *Native Vegetation Regulation* 2013 (NSW), pt 5.
[26] *Native Vegetation Regulation* 2013 (NSW), pt 6.
[27] *Native Vegetation Regulation* 2013 (NSW), pt 7.
[28] *Native Vegetation Regulation* 2013 (NSW), pt 8.
[29] *Native Vegetation Regulation* 2013 (NSW), reg 9(1)(i).

- the insertion of a new penalty for failing to notify the Minister of proposed clearing at least fourteen days before carrying out the clearing of vegetation in accordance with an order under pt 6 div 3.[30]

PRACTICE AND PROCEDURE

Commissioners hearing aboriginal land rights matters

The *Courts and Other Legislation Amendment Act* 2014, commenced on assent on 20 May 2014, and amended numerous Acts including the Court Act.

One of the objectives of the Act is to provide for the qualifications required to be held by Commissioners of the Land and Environment Court with respect to matters under the *Aboriginal Land Rights Act* 1983.

Previously, a Commissioner could only exercise the jurisdiction of the Court or any other function under the Court Act in relation to any proceedings arising under the *Aboriginal Land Rights Act* 1983 if the qualification for the Commissioner's appointment was a qualification referred to in s 12(2)(g) of the Court Act, namely, suitable knowledge of matters concerning land rights for Aborigines and qualifications and experience suitable for the determination of disputes involving Aborigines.[31]

Conversely, a Commissioner whose only qualification for appointment was a qualification referred to in s 12(2)(g) was precluded from exercising the jurisdiction of the Court or any other function under the Court Act in relation to proceedings other than proceedings arising under the *Aboriginal Land Rights Act* 1983.[32]

These provisions were restrictive in that the qualifications recognised at the time of appointment of a Commissioner determined for all time the capacity of the Commissioner to exercise different jurisdictions and functions of the Court, rather than whether the Commissioner has the relevant qualifications.

Schedule 5 of the Bill amended s 30(2A) of the Court Act to remove the requirement for the qualification under s 12(2)(g) to exist at the time of appointment and replaced it with a requirement that the Commissioner have a qualification under s 12(2)(g) at the time the Chief Judge allocates the matter.

Section 30(2B) was amended so that only a Commissioner whose only qualification under s 12(2) or 12(2AA) is a qualification under s 12(2)(g) is restricted from exercising the jurisdiction or functions under the Court Act in relation to proceedings other than proceedings under the *Aboriginal Land Rights Act* 1983. [33]

These amendments will expand the range of Commissioners who can exercise different jurisdictions and functions of the Court.

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[30] *Native Vegetation Regulation* 2013 (NSW), reg 43.
[31] *Land and Environment Court Act* 1979 (NSW), s 30(2A).
[32] *Land and Environment Court Act* 1979 (NSW), s 30(2B).
[33] Courts and Other Legislation Amendment Bill 2014 (NSW), sch 5 item 3.

Changes to the rules governing electronic case management

The *Uniform Civil Procedure Rules (Amendment No 63)* 2013 commenced on 10 February 2014, and amended rr 3.1 – 3.10 of the *Uniform Civil Procedure Rules* 2005 ("the UCPR"). A new div 4 was inserted under pt 3 of the UCPR providing for filing documents using the Online Registry.

Part 3 of the UCPR has governed electronic case management for the Land and Environment Court, the Supreme, District and Local Courts for some time. In late 2013, the Uniform Rules Committee decided to review and refresh the UCPR to reflect the increased range of documents available for filing online in the Supreme, District and Local Courts.

Key changes include:

- the formal establishment of the Online Registry as the applicable Electronic Case Management System in Supreme, District and Local Courts;[34]
- confirmation of the availability of electronic filing in these Courts;[35]
- clarification of the process for requesting a certified copy of a judgement via the Online Registry;[36] and
- clarification of how listing dates assigned via the Online Registry will be communicated.[37]

In the Land and Environment Court, e-Court continues to be the applicable electronic case management system under pt 3 of the UCPR.[38] Accordingly, Schedule 4 of the UCPR (Documents relating to proceedings in the Land and Environment Court), has been updated.

Payment of Court fees in criminal proceedings

Schedule 5 of the *Courts and Other Legislation Amendment Act* 2012 commenced 1 January 2014, and amended the *Criminal Procedure Act* 1986 relating to the payment of Court fees in criminal proceedings prosecuted by certain NSW Government agencies and statutory bodies representing the Crown.

A new subsection 2A was introduced into section 4A of *Criminal Procedure Act* 1986 which states that '[d]espite subsection (2), such fees are payable by any NSW Government agency or statutory body representing the Crown prescribed by the regulations'.

The *Criminal Procedure Amendment (Court Fees Payable by Government Agencies) Regulation* 2013, published 20 December 2013, prescribed the NSW Government

[34] *Uniform Civil Procedure Rules* 2005 (NSW), r 3.1(1)
[35] *Uniform Civil Procedure Rules* 2005 (NSW), rr 3.4-3.5.
[36] *Uniform Civil Procedure Rules* 2005 (NSW), r 3.10.
[37] *Uniform Civil Procedure Rules* 2005 (NSW), rr 3.9, 3.15.
[38] *Uniform Civil Procedure Rules* 2005 (NSW), r 3.4(1)(b).

agencies and statutory bodies required to pay Court fees in Schedule 2A of the *Criminal Procedure Regulation* 2010. Some bodies (including Roads and Maritime Services) are prescribed only in relation to some offences that they prosecute.

Changes to the rules governing security for costs

The *Uniform Civil Procedure Rules (Amendment No 61)* 2013, published 9 August 2013, amended the UCPR to give effect to certain recommendations made by the NSW Law Reform Commission[39] regarding Court orders for security for costs.

Rule 42.21 of the UCPR is the main legislative provision dealing with security for costs. It contains a list of situations where Courts have discretion to order security for costs. Rule 42.21 has been amended:

- to limit the power of a Court to order security for costs because the plaintiff is not ordinarily a resident of NSW to circumstances where the plaintiff resides outside of Australia;[40]

- to enable a Court to order security for costs where there is reason to believe that the plaintiff has divested assets with the intention of avoiding the consequences of the proceedings;[41] and

- to include a non-exhaustive list of matters to which the Court may have regard in determining whether to order security for costs.[42]

This non-exhaustive list includes:

- the prospects of success or merits of the proceedings;

- the genuineness of the proceedings;

- the impecuniosity of the plaintiff;

- whether the proceedings involve a matter of public importance;

- whether any delay by the plaintiff has prejudiced the defendant;

- the costs of proceedings; and

- the enforceability of an order for security for costs.[43]

[39] NSW Law Reform Commission, 'Security for costs and associated costs orders', Report No 137 (2012).
[40] *Uniform Civil Procedure Rules* 2005 (NSW), r 42.21(1)(a).
[41] *Uniform Civil Procedure Rules* 2005 (NSW), r 42.21(1)(f).
[42] *Uniform Civil Procedure Rules* 2005 (NSW), r 42.21(1A).
[43] *Uniform Civil Procedure Rules* 2005 (NSW), rr 42.21(1A)(a)-(n).

Rules 50.8 and 51.50 have been amended to enable a Court to which pt 50 applies (including the Land and Environment Court) and the Court of Appeal respectively, to dismiss an appeal or cross-appeal for failure to provide security for costs.

A new r 7.3A has been inserted into the UCPR which requires a party who changes his or her address during the course of the proceedings to file a notice of the change within a reasonable time.

Increase in Court fees

Court fees increased on 1 July 2013, as set out in the *Civil Procedure Amendment (Fees) Regulation* 2013, published 28 June 2013, and the *Criminal Procedure Amendment (Fees and Court Costs Levy) Regulation* 2013, published 21 June 2013.

Changes to judicial review proceedings

The *Uniform Civil Procedure Rules (Amendment No 58)* 2013, published 15 March 2013, added pt 59 to the UCPR. Part 59 applies to proceedings made under sections 65 and 69 of the *Supreme Court Act* 1970*,* and judicial review proceedings in the Class 4 or Class 8 jurisdiction of the Land and Environment Court.[44] Part 59 has brought fundamental changes to the conduct of judicial review proceedings in NSW.[45]

Firstly, pt 59 has introduced a time limit for the commencement of judicial review proceedings. Rule 59.10 provides that proceedings for judicial review must be commenced no later than three months from the date of the decision.[46] This rule does not apply to proceedings in which there is a statutory limitation period for commencing the proceedings.[47] However, the Court can extend the time limit under r 59.10.

In considering whether to extend the time the Court is to take into account:

- any particular interest of the plaintiff in challenging the decision;
- possible prejudice to other persons caused by the passage of time;
- the time at which the plaintiff became or, by exercising reasonable diligence, should have become aware of the decision; and
- any relevant public interest.[48]

[44] *Uniform Civil Procedure Rules 2005* (NSW), r 59.1(1)(b).
[45] Mark Robinson, 'Conducting an Administrative Law Case in New South Wales and the New Rule 59 of the *Uniform Civil Procedure Rules 2005* (NSW)' (a paper delivered by Mark Robinson SC to the NSW Bar Association's seminar organized by the New Barristers' Committee, 6 March 2014) 12.
[46] *Uniform Civil Procedure Rules* 2005 (NSW), r 59.10(1).
[47] *Uniform Civil Procedure Rules* 2005 (NSW), r 59.10(4). For example, the *Environmental Planning and Assessment Act* 1979 (NSW), ss 35 and 101, contain a three month limitation period within which to commence judicial review proceedings challenging the validity of an environmental planning instrument and development consent respectively.
[48] *Uniform Civil Procedure Rules* 2005 (NSW), r 59.10(3).

Secondly, pt 59 mandates the procedure for commencing judicial review proceedings. Proceedings are to be commenced by summons.[49] The content of the summons is mandated by r 59.4. The summons must state:

- the orders sought;[50]
- if there is a decision in respect of which relief is sought:
    - the identity of the decision-maker;
    - the terms of the decision to be reviewed; and
    - whether relief is sought in respect of the whole or part of the decision; and
- with specificity, the grounds on which relief is sought.[51]

The new form for a summons for judicial review is Form 85 which makes provision for the information that must be included in accordance with UCPR r 59.4.

Under r 59.5, a plaintiff has five days to serve the summons. The defendant must file and serve a response within 21 days.[52]

Thirdly, pt 59 establishes the procedure for judicial review hearings. Under r 59.7(1), evidence is to be given by affidavit unless the Court says otherwise. Cross-examination is permitted only with leave of the Court.[53]

Fourthly, r 59.8 sets out a detailed procedure for the production by the parties of a 'Court Book' containing:

- the summons and response to summons;
- a summary of the plaintiff's argument;
- the decision under review and the statement of reasons;
- an agreed chronology or respective chronologies;
- an agreed schedule of any relevant legislative provisions; and
- each party's list of objections to evidence.[54]

The Court Book must be filed and served by the plaintiff at least seven working days before the hearing.[55] The defendant must, at least four working days before the

[49] *Uniform Civil Procedure Rules* 2005 (NSW), r 59.3.
[50] *Uniform Civil Procedure Rules* 2005 (NSW), r 59.4(a).
[51] *Uniform Civil Procedure Rules* 2005 (NSW), r 59.4.
[52] *Uniform Civil Procedure Rules* 2005 (NSW), r 59.6.
[53] *Uniform Civil Procedure Rules* 2005 (NSW), r 59.7(3).
[54] *Uniform Civil Procedure Rules* 2005 (NSW), r 59.8(1).

hearing, file and serve a summary of the defendant's argument.[56] If the plaintiff considers a reply is needed, the argument in reply must be served at least one working day before the hearing.[57]

Fifthly, r 59.9 provides special procedures where the defendant is a public authority. In such proceedings the plaintiff may, within 21 days of commencing proceedings against a public authority or within such other time as the Court may direct, serve on the public authority a notice requiring the authority to provide to the plaintiff a copy of the decision, and a statement of reasons.[58]

Lastly, r 59.11 states that a plaintiff is not required to provide security for costs in respect of judicial review proceedings except in exceptional circumstances. This specific rule prevails over the general rule for security for costs in r 42.21.

So far, most of the cases considering part 59 have considered its application, and whether it applies retrospectively. These cases have held that part 59 does not apply retrospectively to statutory or executive decisions made before 15 March 2013.[59]

In the recent case of *Toth v Director of Public Prosecutions (NSW)*, [60] the NSW Court of Appeal considered the operation of r 59.10 providing a three month limitation period within which to commence judicial review proceedings.

Mr Toth was convicted of an offence under s 7(1)(b) of the *Surveillance Devices Act* 2007, namely that he used a listening device to record a 'private conversation' to which he was a party. A bond under s 9 of the *Crimes (Sentencing Procedure) Act* 1999 was imposed for a period of 18 months. Mr Toth lodged a notice of appeal to the District Court. Madgwick J dismissed the appeal, and held that the applicant was guilty of the offence charged. He did not proceed to conviction, but imposed a bond under s 9 of the *Crimes (Sentencing Procedure) Act* 1999. The terms of the bond varied from the terms imposed by the magistrate.

Mr Toth commenced judicial review proceedings in the Court of Appeal to challenge the finding of guilt. The application was not filed until more than 12 months after the judgment in the District Court, and one month before the expiration of the bond. The application exceeded the three month limitation in UCPR r 59.10(1). The applicant sought an extension of time under r 59.10(3). Basten JA noted three obstacles in the application for an extension of time. Firstly, the application was not only delayed, but came too late to have any practical consequence in terms of the offending.[61] Secondly, the applicant provided no explanation as to the delay.[62] Thirdly, the proceedings lacked merit.[63]

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[55] *Uniform Civil Procedure Rules* 2005 (NSW), r 59.8(2).
[56] *Uniform Civil Procedure Rules* 2005 (NSW), r 59.8(3).
[57] *Uniform Civil Procedure Rules* 2005 (NSW), r 59.8(4).
[58] *Uniform Civil Procedure Rules* 2005 (NSW), r 59.9(2).
[59] See, eg, *Mauger v Wingecarribee Shire Council* [2013] NSWSC 1587; *Regional Express Holdings Limited v Dubbo City Council (No 2)* [2013] NSWLEC 113; *Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd* [2013] NSWLEC 122.
[60] [2014] NSWCA 113.
[61] Ibid [9].
[62] Ibid.
[63] Ibid.

The complaint of procedural fairness was, in substance, that the trial judge did not take enough time in considering the matter to have properly addressed the applicant's arguments on appeal. Basten JA rejected this ground, stating that the transcript of the hearing left no doubt that the judge was fully acquainted with the substance of the argument.[64] Furthermore, the transcript did not disclose any lack of a reasonable opportunity to present the appeal.[65] The applicant also alleged a failure to take account of relevant considerations, by declining to listen to the audio recording. Basten JA rejected this ground, stating that this evidence was not critical to the finding of guilt.[66]

His Honour concluded that the lack of merit of the application, combined with the unexplained delay and the expiration of the bond, made it inappropriate to grant an extension of time.[67] The amended summons was dismissed.

Changes to rules relating to agents

The *Land and Environment Court Rules (Amendment No 1)* 2013, published 15 February 2013, amended the *Land and Environment Court Rules* 2007 to specify the information that an agent wishing to appear on behalf of a person in proceedings before the Court must provide to the person.[68] Section 63(3) of the Court Act provides that, in determining whether to grant leave for the person to appear by an agent, the Court is to consider whether the agent has provided this information to the person.

For the purposes of s 63(3) of the Court Act, the following information is required to be provided by an agent to the person for whom the agent wishes to appear:

- that the person is under a duty to assist the Court to further the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings;

- that the person is under a duty to take reasonable steps to resolve or narrow the issues in the proceedings;

- that the agent must not cause the person to be in breach of a duty;

- that the Court may take into account any failure to comply with a duty in exercising a discretion with respect to costs;

- that the Court may make a costs order against the person if the Court considers it fair and reasonable;

- the knowledge and experience of the agent with respect to the type of matter that is the subject of the proceedings; and

[64] Ibid [11].
[65] Ibid [12].
[66] Ibid [16].
[67] Ibid [19].
[68] *Land and Environment Court Rules* 2007 (NSW), r 7.7.

- whether the agent proposes to charge for the agent's services and, if so, the agent's proposed written costs agreement and a written estimate of the likely total of the agent's charges.[69]

The operation of the amendment to r 7.7 of the *Land and Environment Court Rules* 2007 has been considered in two decisions of Commissioners of the Land and Environment Court.[70] In *Davies v Penrith City Council*,[71] the Senior Commissioner commented that the matters mandated to be considered by s 63(3) were not exhaustive, and stated that it would be relevant in any proceedings where such leave was sought, to consider the competence of the proposed agent.[72]

The case of *Salameh v Bankstown*[73] involved a different factual scenario to that in *Davies.* Thus, the Commissioner did not consider it necessary to determine whether the matters listed in s 63(3) of the Court Act were exhaustive. In this case, Mr Creighton had had leave to appear as agent up to the date of the hearing. The applicant also engaged legal representation for the hearing. Commissioner Pearson considered that to permit Mr Creighton to appear would simply add to the costs incurred by the applicant, and would not aid the just, quick and cheap resolution of the issues raised by the appeal.[74]

Changes to rules relating to Commissioners

The *Courts and Other Legislation Further Amendment Act* 2013 commenced on 28 February 2013, and amended the Court Act to provide that a Commissioner or Acting Commissioner of the Land and Environment Court whose term of appointment has expired can complete or otherwise continue to deal with any matters relating to proceedings or conciliation conferences that have been heard or partly heard, or conducted or partly conducted, before the expiry of the Commissioner's or Acting Commissioner's term.[75]

Revised Class 4 practice note

Civil enforcement and judicial review

In response to the introduction of part 59 to the UCPR, a new Practice Note (Practice Note – Class 4 Proceedings) has been issued for civil enforcement and judicial review of decisions under planning or environmental laws. The Practice Note commenced on 13 January 2014, and replaced the Practice Note – Class 4 Proceedings dated 30 April 2007.

The Practice Note applies to proceedings in Class 4 of the Court's jurisdiction referred to in s 20 of the Court Act.

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[69] *Land and Environment Court Rules* 2007 (NSW), rr 7.7(1)(a)-(g).
[70] See, eg, *Davies v Penrith City Council* [2013] NSWLEC 1141; *Salameh v Bankstown City Council* [2013] NSWLEC 1171.
[71] [2013] NSWLEC 1141.
[72] Ibid [21]-[22].
[73] [2013] NSWLEC 1171.
[74] Ibid.
[75] *Land and Environment Court Act* 1979 (NSW), ss 12(2C), 13(6)(7).

Class 4 proceedings are to be commenced by summons.[76] Judicial review proceedings are to be commenced using the form of summons prescribed for judicial review proceedings (Form 85) and non-judicial review proceedings are to be commenced by the usual form of summons (Form 4A or 4B). The summons will be given a return date before the Court, usually on the fourth Friday after it is filed.[77] On the return date, the first directions hearing will occur before the List Judge.[78] Usually, a Class 4 proceeding will only appear in Court at the first and second directions hearings.

Prior to the first directions hearing, the parties are to discuss and endeavour to agree upon any proposed directions, any expert evidence proposed, and, in the case of non-judicial review proceedings, any points of claim, points of defence or points of reply.[79] If the parties do not agree, each party should prepare their own written version of the directions they propose.[80]

At the first directions hearing the parties are to hand their agreed or competing short minutes of the directions they propose, and, if applicable, an agreed statement or separate statements regarding any proposed expert evidence.[81]

Schedule A provides the usual directions made at the first directions hearing. The usual directions made at the second directions hearing are contained in Schedule B.

At the first directions hearing, the Court will usually make directions as to the following:

- directing the respondent to serve its response to the summons within one week, pursuant to UCPR r 59.6;

- directing the applicant to serve its affidavits in chief, bundle of documents and, if applicable, any points of claim within two weeks, in accordance with UCPR r 59.7(2);

- directing the respondent to serve any affidavits and a bundle of any additional tender documents and, if applicable, points of defence within five weeks;

- directing the applicant to serve any affidavits in reply and a bundle of any additional tender documents and, if applicable, points of reply within 7 weeks;

- directing that there will be a second directions hearing in 8 weeks;

- in judicial review proceedings where cross-examination is only permissible with leave of the Court (UCPR r 59.7(3)), directing that a party seeking leave to cross-examine must inform the other parties prior to the second directions hearing; and

[76] Land and Environment Court, Practice Note – Class 4 Proceedings, [9].
[77] Land and Environment Court, Practice Note – Class 4 Proceedings, [10].
[78] Land and Environment Court, Practice Note – Class 4 Proceedings, [10].
[79] Land and Environment Court, Practice Note – Class 4 Proceedings, [16].
[80] Land and Environment Court, Practice Note – Class 4 Proceedings, [17].
[81] Land and Environment Court, Practice Note – Class 4 Proceedings, [21].

- directing the parties to hand to the Court an agreed or competing estimates of the duration of the trial.[82]

If a party is absent when directions are made, the party who is present is to serve a copy of the directions on the absent party within three working days.[83]

Prior to the second directions hearing, the parties are to discuss and endeavour to agree on whether conciliation, mediation or other means of resolution would be appropriate, the estimated duration of the trial, and any proposed directions.[84] If a party intends to seek leave to cross-examine, the other parties are to notify that party whether they will consent to or oppose the grant of leave.[85]

At the second directions hearing, the parties are to hand to the Court realistic agreed or competing estimates of the duration of the trial, and agreed or competing short minutes of the proposed directions.[86]

The Court will usually make directions as to the following:

- fixing the matter for hearing;

- directing the parties to prepare a Court Book in accordance with UCPR r 59.8(1) and an Evidence Book;

- directing the defendant to file and serve a summary of their argument at least four working days before the hearing, in accordance with UCPR r 59.8(3); and

- directing the applicant to file and serve a summary of their argument in reply at least one day before the hearing, in accordance with UCPR r 59.8(4).[87]

Prior to trial, each party is to provide a list of authorities and legislation to be relied on to the trial judge one working day before the trial is to commence.[88]

The Court encourages parties to use a single expert. In circumstances where experts are directed to confer, the Practice Note identifies the procedure for the preparation of a joint report.[89] Where expert evidence from more than one expert in the same discipline is to be given in Court, the experts will give such evidence concurrently.[90]

[82] Land and Environment Court, Practice Note – Class 4 Proceedings, [21].
[83] Land and Environment Court, Practice Note – Class 4 Proceedings, [31].
[84] Land and Environment Court, Practice Note – Class 4 Proceedings, [23]-[25].
[85] Land and Environment Court, Practice Note – Class 4 Proceedings, [26].
[86] Land and Environment Court, Practice Note – Class 4 Proceedings, [28]-[29].
[87] Land and Environment Court, Practice Note – Class 4 Proceedings, [30].
[88] Land and Environment Court, Practice Note – Class 4 Proceedings, [34].
[89] Land and Environment Court, Practice Note – Class 4 Proceedings, [61]-67].
[90] Land and Environment Court, Practice Note – Class 4 Proceedings, [69].

The Practice Note also encourages parties to consider whether alternative dispute resolution ("ADR") is appropriate, and outlines the procedure for situations in which issues are referred to a mediator, conciliator, neutral evaluator or referee.[91]

New and updated Court policies

A new policy has been issued for conciliation conferences under ss 34 and 34AA of the Court Act, which commenced on 1 November 2013. Revisions were also made to the Site Inspections Policy and the Court Attire Policy, effective from 1 November 2013.

Conciliation Conference Policy

The previous Site Inspections Policy was split into two policies, one dealing with conciliation conferences of certain matters in Classes 1 and 2, and the other with site inspections as part of an on-site hearing or a court hearing of certain matters in Classes 1 and 2.

The purpose of the Conciliation Conference Policy is to guide the conduct of conciliation conferences in certain matters in Classes 1 and 2 of the Court's jurisdiction.[92]

The policy applies to:

- conciliation conferences (including site inspections and any subsequent hearings) under s 34 of the Court Act; and

- conciliation conferences (including site inspections and any subsequent hearings) for residential developments dealt with under s 34AA of the Court Act.[93]

The policy states the usual commencement time of a conciliation conference, and outlines the nature and structure of a conciliation conference.[94] The Commissioner will make an introductory statement to the parties and other attendees explaining who constitutes the Court, the reasons for and the nature of the conference, and the future conduct of the matter after the site inspection.[95]

The policy provides for residents and other non-expert participants giving evidence on-site and outlines the Council's obligations in relation to notifying local residents of the site inspection and ensuring residents understand their obligations to the Court.[96]

The policy contains provisions relating to expert evidence, documentary evidence, access to relevant properties and the assessment of the impacts of a proposed

[91] Land and Environment Court, Practice Note – Class 4 Proceedings, [70]-[74].
[92] Land and Environment Court, Conciliation Conference Policy, [2].
[93] Land and Environment Court, Conciliation Conference Policy, [3].
[94] Land and Environment Court, Conciliation Conference Policy, [4]-[5].
[95] Land and Environment Court, Conciliation Conference Policy, [7].
[96] Land and Environment Court, Conciliation Conference Policy, [10]-[14].

development.[97] The policy also contains requirements for the safety of the site,[98] and allows for the conference to be held at an alternative location in certain circumstances.[99]

If an agreement is reached during the conciliation phase, the Commissioner is to dispose of the proceedings in accordance with the decision.[100] If the conciliation does not result in an agreement, the Commissioner may with the consent of the parties (for s 34 conciliation conferences) and must (for s 34AA conferences) proceed to determine the matter.[101] If the parties consent, the Commissioner may determine the matter on the basis of what occurred in the conference, or may determine the matter following a hearing held forthwith.[102]

Site Inspections Policy

The purpose of this policy is to guide the conduct of site inspections in certain matters in Classes 1 and 2 of the Court's jurisdiction.[103]

This policy has been revised to apply only to on-site hearings and Court hearings under ss 34B and 34D of the Court Act.[104] The policy formerly applied to site inspections conducted in conjunction with residential development conciliations/hearing provisions under s 34AA of the Court Act.

Court Attire Policy

The purpose of this policy is to ensure that barristers appear before the Court in attire that meets the Court's expectations.[105] This policy was revised to delete the requirement for barristers to robe in Class 3 hearings.

New standard directions

The Court has adopted three new standard directions that may be made where appropriate at directions hearings or case management conferences.

Consolidated conditions of development consent to be provided in modification application proceedings

The Court has introduced new standard directions for consolidating conditions of development consent in modification application proceedings, which commenced 14 October 2013.

The standard directions seek to address issues concerning the conditions that are applicable to an existing consent where the proposal has previously been subject to

[97] Land and Environment Court, Conciliation Conference Policy, [15]-[22].
[98] Land and Environment Court, Conciliation Conference Policy, [25].
[99] Land and Environment Court, Conciliation Conference Policy, [27]-[28].
[100] Land and Environment Court, Conciliation Conference Policy, [29].
[101] Land and Environment Court, Conciliation Conference Policy, [32].
[102] Land and Environment Court, Conciliation Conference Policy, [32].
[103] Land and Environment Court, Site Inspections Policy, [2].
[104] Land and Environment Court, Site Inspections Policy, [3].
[105] Land and Environment Court, Court Attire Policy, [2].

one or more earlier modifications. In some cases, new conditions or amended conditions were not incorporated into a consolidated set of conditions. This resulted in uncertainty over the final state of conditions.

The Court noted that there is a need to ensure that if a modification appeal is upheld, what emerges from the Court proceedings is a document that incorporates all applicable conditions, in the interests of certainty for the parties and clarity for any member of the public.

The standard directions provide the terms for orders in proceedings commenced on or after 1 November 2013, where a modification appeal is upheld.[106] Where the proceedings involve a proposed modification to an existing development consent, the respondent consent authority is to prepare any new conditions proposed to be added and any existing conditions to be altered or deleted.[107] If modification is approved, the consent authority is to provide, in both electronic and hard copy, a consolidated set of conditions of development consent.[108]

Photomontage policy

A new standard direction has been adopted for the use of photomontages as part of expert evidence in Class 1 appeals, which commenced on or after 1 October 2013. The purpose of this standard direction is to ensure the quality and accuracy of photomontages used as part of expert evidence.

Any montage is to be accompanied by an existing photograph, and confirmation that accurate survey data has been used to prepare the photomontages.[109]

Provision of documents for conciliation conferences or mediations

A new standard direction has also been adopted for the provision of documents for matters set down for a conciliation conference pursuant to s 34 or s 34AA of the Court Act, or mediation pursuant to s 26 of the *Civil Procedure Act* 2005*.* This standard direction commenced on 15 July 2013, and seeks to ensure the confidentiality of documents created for the purpose of a conciliation conference or mediation.

The standard direction provides that documents for a conciliation conference or mediation are not to be filed electronically, and should be lodged with the Court and marked for the attention of the Commissioner or Mediator.[110]

[106] Land and Environment Court, Consolidated conditions of development consent to be provided in modification application proceedings, 1 [4].
[107] Land and Environment Court, Consolidated conditions of development consent to be provided in modification application proceedings, 2 [1].
[108] Land and Environment Court, Consolidated conditions of development consent to be provided in modification application proceedings, 2 [2].
[109] Land and Environment Court, Photomontage policy, [1].
[110] Land and Environment Court, Provision of Documents for conciliation conferences or mediations, [1]-[3].

Amended delegation to the Registrar

On 14 May 2014, the Chief Judge amended the delegation to the Registrar in two respects. First, the Registrar is empowered to make an order for costs, including charges and expenses, under any legislative provision where it is unlikely in the opinion of the Registrar that the costs will exceed $30,000. The change is to expand the category of costs to include charges and expenses and to clarify that the power may be under legislative provision. An issue had arisen as to whether the previous delegation of the power to order costs extended to the power under s 14 of the *Encroachment of Buildings Act* 1922 to order payment of 'costs charges and expenses'. The amended delegation should resolve this issue.

Secondly, the Registrar is empowered to make an order to set aside a notice to produce issued under pt 21 or pt 34 of the UCPR. An issue had arisen as to whether the previous delegation regarding pts 21 and 34 extended to empower the Registrar to set aside notices to produce issued under those parts. It was argued that as those parts do not contain statutory powers to set aside notices to produce, the power must be an inherent power of the Court. However, the previous delegation did not expressly delegate such inherent power. The new delegation expressly delegates the power to set aside notices to produce.

New web pages on compulsory acquisition of land

New pages have been created on the Court's website in relation to compulsory acquisition of land, to be found on the Court's home page under 'Publications and Resources' then 'Issues in focus' on the left hand menu.

PROPOSED LEGISLATIVE AMENDMENTS

Review of the land access arbitration process

On 15 May 2014, the Minister for Resources and Energy announced an independent examination of the arbitration process across NSW in relation to land access agreements for mining and petroleum prospecting or production. The review seeks to address community concerns that the land arbitration process lacks transparency and consistency, and concerns about arbitrators and perceived conflicts of interest.[111] Brett Walker SC has been appointed as the legal counsel to oversee the analysis.

Holders of prospecting titles under the *Mining Act* 1992 and the *Petroleum (Onshore) Act* 1991 must not commence prospecting operations until an access arrangement is in place with the landholder(s).[112] When the parties cannot agree on an access arrangement, the agreement is determined by an arbitrator by agreement, or in

[111] The Hon. Anthony Roberts MP, Minister for Resources and Energy, Special Minister of State, 'Land Access Arbitration Process To Be Examined' (Media Release, 15 April 2014) http://www.resourcesandenergy.nsw.gov.au/__data/assets/pdf_file/0006/513393/Anthony-Roberts-med-rel-Land-Access-Arbitration-Process-to-be-Examined.pdf.

[112] *Mining Act 1992* (NSW), s 140(1); *Petroleum (Onshore) Act* 1991 (NSW), s 69C.

default of agreement.[113] Following the determination by the arbitrator, a party may apply to the Land and Environment Court for a review of the determination.[114]

The Land and Environment Court has jurisdiction to review the determination under Class 8 of its jurisdiction concerning mining matters.[115]

The independent examination will review the land access arbitration process, including corporate governance arrangements under the *Mining Act* 1992 and the *Petroleum (Onshore) Act* 1991. The findings of the review may affect the Court's jurisdiction in relation to mining matters.

Submissions on the land access arbitration process closed on 23 May 2014. The final report and recommendations are expected to be completed by approximately late July 2014.

New jurisdiction under petroleum legislation

The Petroleum (Onshore) Amendment Bill 2013, introduced on 22 May 2013, and passed on 28 May 2013 in the Legislative Assembly, will amend the *Petroleum (Onshore) Act* 1991, the *Mining Act* 1992, and other Acts including the Court Act. The Bill was introduced in the Legislative Council for concurrence on 28 May 2013 but is yet to be considered in detail by the Legislative Council.

Schedule 2.3 of the Bill will amend the Court Act to confer jurisdiction under Class 1 of the Court's jurisdiction to hear appeals against an environmental or rehabilitation direction given by the Director-General or an inspector to the holder of an authorisation.[116] Under the amended s 17 of the Court Act, the Court will be able to hear and determine appeals under s 240EA of the *Mining Act* 1992, and appeals under s 79D of the *Petroleum (Onshore) Act* 1991.

The Bill will also implement the following changes:

- increasing the penalty for mining petroleum otherwise than in accordance with a petroleum title;[117]
- enabling directions relating to compliance with conditions of petroleum titles;[118]
- providing for audits of prospecting or mining for petroleum;[119]
- extending the legal costs that holders of mining authorities or petroleum titles must pay for landholders relating to arrangements for access to land and to make other provision with respect to access;[120] and

[113] *Mining Act 1992* (NSW), ss 143, 144; *Petroleum (Onshore) Act* 1991 (NSW), ss 69F, 69G.
[114] *Mining Act 1992* (NSW), s 155; *Petroleum (Onshore) Act* 1991 (NSW) s 69R.
[115] *Land and Environment Court Act* 1979 (NSW), s 21C.
[116] Petroleum (Onshore) Amendment Bill 2013 (NSW), sch 2.3 item 7.
[117] Petroleum (Onshore) Amendment Bill 2013 (NSW), sch 1 item 2.
[118] Petroleum (Onshore) Amendment Bill 2013 (NSW), sch 1 item 8.
[119] Petroleum (Onshore) Amendment Bill 2013 (NSW), sch 1 item 9.

- enabling publication of certain environmental information.[121]

Progress of the Planning Bill 2013

The NSW Government has deferred the debate of the amended Planning Bill 2013 until sometime after March 2014.

The Bill was introduced in the Legislative Assembly on 22 October 2013. After being formally read it passed to the Legislative Council where it was the subject of intense debate, with over eighty amendments proposed. The Bill was passed with amendments by the Legislative Council on 27 November 2013 and sent to the Legislative Assembly for concurrence on that day. There has been no indication of what course the Government will now take after the change of Premier and Minister for Planning.

[120] Petroleum (Onshore) Amendment Bill 2013 (NSW), sch 1 item 6.
[121] Petroleum (Onshore) Amendment Bill 2013 (NSW), sch 1 item 14.