LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

JURISDICTION, STRUCTURE AND CIVIL PRACTICE AND PROCEDURE

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A. OVERVIEW

1. The Land and Environment Court of New South Wales was established in 1980 by the *Land and Environment Court Act* 1979 ("the Court Act") as the world's first specialist environmental "superior court of record".[1] As such, the Court has equal standing with the Supreme Court of New South Wales.

Structure

2. The Court presently has six Judges, including the Chief Judge, who are appointed to the age of 72; nine Commissioners, including the Senior Commissioner, who are appointed for seven year terms; sixteen acting Commissioners who are appointed for a time not exceeding twelve months;[2] a Registrar and an Assistant Registrar.

3. A person is qualified to be appointed as a Commissioner if the person has special knowledge, qualifications or experience in one of a number of prescribed non legal areas or is a lawyer.[3] Most of the Commissioners are not lawyers. The prescribed non-legal areas include local government, planning, environmental science or protection, land valuation, architecture, engineering, surveying, building construction, natural resources, land rights for Aborigines and urban design or heritage.

[1] s 5 Court Act
[2] ss 7, 12, 13, Schedule 1 Court Act
[3] s 12 Court Act

4. The Court is composed of the Judges only.[4] Commissioners do not comprise the Court but exercise merits review functions of the Court in its civil jurisdiction delegated to them by the Chief Judge. A Judge exercising a merits review function may be assisted by a Commissioner.[5]

Jurisdiction

5. The Land and Environment Court is a court of limited jurisdiction, only having the jurisdiction vested in it by the Court Act or any other Act.[6]

6. The creation of the Court and the subsequent extension of its jurisdiction rationalised and replaced the diversified jurisdictions of a number of courts and tribunals pertaining to the use and development of land, the enforcement of planning and development laws, land values and taxes, and related matters.[7]

7. The concept of the Court brings together in one body the functions of a traditional court and merits review functions. The Court has a civil jurisdiction and a criminal jurisdiction. The civil jurisdiction includes merits review, judicial review, civil enforcement and mining and trees matters. The criminal jurisdiction comprises summary prosecutions of planning and environmental offences and appeals from the Local Court against convictions and sentences for more minor planning and environmental offences.

8. More precisely, the Court Act divides the Court's jurisdiction into eight classes. Classes 1 to 4 and 8 comprise the civil jurisdiction. Classes 1, 2 and 3 mostly involve merits review of administrative decisions as well as a trees jurisdiction, and may be exercised by a Judge or a Commissioner. In practice, Commissioners hear most of the merits review cases except for compensation claims for compulsory acquisition of land which are heard by Judges. Class 4 involves judicial review and civil enforcement and may only be exercised by a Judge. Class 8 is a wide mining jurisdiction (vested in the Court in 2009) which may be exercised by a Judge or by a Commissioner who is a lawyer. Class 5 is the summary criminal prosecution jurisdiction. Classes 6 and 7 comprise the criminal appeal jurisdiction from the Local Court. The criminal jurisdiction may be exercised only by a Judge.

9. The distinction between judicial review and merits review is important. Judicial review is a traditional judicial function concerned only with the lawfulness of an administrative decision, not with its merits. The rules of evidence apply. In contrast, in merits review the Court stands in the shoes of the original decision-makers and re-exercises the original decision-making functions but with reasons, and the rules of evidence do not apply.[8]

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[4] s 7 Court Act
[5] s 37 Court Act
[6] s 16(1) Court Act
[7] Those diversified jurisdictions included certain jurisdictions formerly exercisable by the Supreme Court and the District Court, as well as the jurisdictions exercisable by the now abolished Land and Valuation Court, Local Government Appeals Tribunal, Valuation Board of Review and Mining Wardens' Courts.
[8] s 38 Court Act

10. Open standing is a feature of much of the legislation administered by the Court in its civil jurisdiction. Any member of the public may bring proceedings to remedy or restrain a breach of such legislation. Doom-laden forecasts that open standing would swamp the Court with unworthy litigation have been proved wrong. Most litigation by environmental activists has been discerning, and has often made a significant contribution to the jurisprudence of the Court.

Civil Practice and Procedure

11. Civil practice and procedure are regulated by the *Civil Procedure Act* 2005 (CPA), the *Uniform Civil Procedure Rules* 2005 (UCPR), the *Land and Environment Court Act* 1979 (Court Act), the *Land and Environment Court Rules* 2007 (Court Rules) and Practice Notes published by the Court. The CPA and UCPR apply to all courts in New South Wales but in the Land and Environment Court the Court Act and Court Rules prevail to the extent of any inconsistency. The Court Act and Court Rules supplement or depart from the CPA and UCPR where appropriate to accommodate the specialist nature of the Land and Environment Court.

12. Hamlet criticised "the law's delay". If his spirit is still with us, I think he would approve of the rigorous guiding principles in ss 56 to 61 of the CPA. The central plank is the overriding purpose expressed in s 56:

> "56 Overriding purpose
>
> (1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
>
> (2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.
>
> (3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.
>
> (4) A solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of the duty identified in subsection (3).
>
> (5) The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs."

13. A notable feature of s 56(2) is that it imposes an obligation on the Court – it does not merely empower or exhort the Court – to seek to give effect to the overriding purpose.

14. Section 61 empowers the Court to give such directions as it thinks fit for the speedy determination of the real issues in the proceedings.

15. Section 62 arms the Court with wide power to control the conduct of any hearing including by directions limiting the time taken in the examination, cross-examination or re-examination of a witness; limiting the number of witnesses a party may call and the number of documents they may tender; limiting the time for submissions; and limiting the time of a hearing. However, such directions must not detract from the principle that a party is entitled to a fair hearing and must be given a reasonable opportunity to lead evidence, make submissions, present a case, and cross-examine: s 62(1).

16. In proceedings in classes 1 to 3 of the court's jurisdiction, which cover the entire merits review jurisdiction, s 38 of the Court Act contains two important additional provisions:

    (a) they are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of the Court Act and of every other relevant enactment and as the proper consideration of the matters before the Court permit;

    (b) the Court is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits.

17. Close case management is a feature of the Court's practice. Case management occurs whenever a matter is before the Court for directions. Sometimes special case management conference may be fixed; for example, to sort out the real issues in dispute or evidentiary complications. The case management regimes differ according to the class of matter and are spelt out in some detail in the Court's Practice Notes, which cover the main areas of its jurisdiction. They aim to progress cases to finalisation as quickly and cheaply as possible. They emphasise the need to crystallize the real issues in dispute and encourage consideration of alternative dispute resolution mechanisms: particularly conciliation, mediation and neutral evaluation.

18. Every case comes before the Court for directions one or more times before the hearing. The Practice Notes include usual directions which may be made at each directions hearing, which can be adapted to meet the circumstances of the particular case. Legal representatives are required to confer and to hand to the Court at a directions hearing their agreed or competing proposed directions. Mostly, the usual directions attached to the Practice Notes are agreed.

19. Matters to be heard by Judges are listed for directions before the List Judge each Friday. Matters to be heard by Commissioners are listed before the Registrar for directions. The Practice Notes and their usual directions have greatly facilitated the efficient management of matters in the directions lists.

20. In merits development appeals, a Practice Note provides for two mechanisms which have proved to be effective. First, at the first directions hearing they are normally referred to a conciliation conference before a Commissioner pursuant to

s 34 of the Court Act. Many development appeals settle at the conciliation conference. Secondly, the hearing of a development appeal normally commences on site where any objectors have an opportunity to have their say.

Appeals from Judges and Commissioners

21. A decision of the Court in its civil jurisdiction is final except for appeals on questions of law. In the civil jurisdiction, appeals on questions of law from a decision of a Judge of the Court lie to the Court of Appeal; and appeals on questions of law from a Commissioner lie to a Judge of the Court. In the criminal jurisdiction, appeals from a Judge of the Court lie to the Court of Criminal Appeal.

Costs

22. The Court has different costs rules according to the nature of the proceedings. In merits appeals and other matters in Classes 1 to 3 of the Court's jurisdiction, no order for costs is made unless the Court considers it to be "fair and reasonable in the circumstances".[9] This means, for example, that in merits development appeals there is usually no order for costs.

23. In contrast, in Classes 4 and 8 of the Court's civil jurisdiction, the conventional costs rule applies that costs generally follow the result.[10] This is subject to an interesting public interest qualification. If the Court is satisfied that proceedings to remedy or restrain a breach of legislation or other proceedings in Class 4 have been brought in the public interest, the Court has power not to order costs against the unsuccessful applicant; and at an earlier stage may decide not to order security for costs or to require the usual undertaking as to damages where an interlocutory injunction is sought.[11]

Expert Evidence

24. Expert evidence is very common in civil proceedings in the Court. Expert witnesses are required to comply with a statutory code of conduct, which includes the following provisions:[12]

> "**2 General duty to the court**
>
> (1) An expert witness has an overriding duty to assist the court impartially on matters relevant to the expert witness's area of expertise.
> (2) An expert witness's paramount duty is to the court and not to any party to the proceedings (including the person retaining the expert witness).
> (3) An expert witness is not an advocate for a party.
>
> **3 Duty to comply with court's directions**
>
> An expert witness must abide by any direction of the court.

[9] Court Rules 3.7(2)
[10] s 98 Civil Procedure Act 2005
[11] Court Rules 4.2
[12] Uniform Civil Procedure Rules 2007 Schedule 7

4 Duty to work co-operatively with other expert witnesses

An expert witness, when complying with any direction of the court to confer with another expert witness or to prepare a parties' expert's report with another expert witness in relation to any issue:

(a) must exercise his or her independent, professional judgment in relation to that issue, and
(b) must endeavour to reach agreement with the other expert witness on that issue, and
(c) must not act on any instruction or request to withhold or avoid agreement with the other expert witness.

…

6 Experts' conference

(1) Without limiting clause 3, an expert witness must abide by any direction of the court:

(a) to confer with any other expert witness, or

(b) to endeavour to reach agreement on any matters in issue, or

(c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, or

(d) to base any joint report on specified facts or assumptions of fact.

(2) An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement."

25. The Court encourages the appointment of a single expert jointly retained by the parties to address particular issues where appropriate. For example, where there is likely to be little or no controversy as to the right answer; or in order to keep costs proportionate to what is at stake.

26. Otherwise, each party is generally restricted to one expert per specialty (for example, in relation to planning, ecology, engineering or valuation).

27. Where there is more than one expert on an issue, concurrent evidence has been the norm in the Land and Environment Court for the best part of a decade. It has since become the norm in the Supreme Court of New South Wales Common Law Division.[13]

[13] See Supreme Court Common Law Division Practice Note SC CL 5 at par 37, which was introduced in 2006 after a former Chief Judge of the land and Environment Court, Justice McClellan, became Chief Judge of the Common Law Division of the Supreme Court

28. Concurrent evidence, sometimes called the “hot tub” method, generally works in this way. After service of the individual reports of a particular expert’s issue, the experts are directed to confer and produce prior to the hearing a joint report identifying the matters on which they agree, the matters on which they disagree and the reasons for any disagreement. Lawyers are not permitted to be involved in the joint conference and report (except with leave of the Court). Experts are required to ensure that their joint conference is a genuine dialogue in a common effort to reach agreement and that their joint report is a product of the genuine dialogue, not a mere summary of their pre-existing positions.

29. If the conclusions in the experts’ earlier individual reports are based on different assumptions, then in the joint report they should express their conclusions based on each other’s assumptions. This will reveal whether the real dispute lies not in their conclusions but in their different assumptions.

30. At the hearing, concurrent evidence may proceed along the following lines (or a variant preferred by the presiding Judge):

    (a) the experts are seated together in the witness box if it is big enough, otherwise at a table (preferably with only one microphone);

    (b) the experts may be invited to briefly summarise the principal issues on which they agree and disagree and their competing positions. If one expert does this, the others may simply agree with the summary or have little to add;

    (b) counsel (having conferred beforehand) are then invited to hand the Court and the experts their agreed list of topics on which they propose to question the experts;

    (c) questioning of all experts on each topic is exhausted before moving on to the next topic. Experts can be asked what they say about the answer of another expert and may ask questions of each other.

31. To assist later reading of the transcript of experts’ oral evidence, my practice is to request the Court reporter to insert the name of each topic as an upper case heading in the transcript as the topic is reached.

32. Concurrent evidence is akin to an intellectually rigorous discussion chaired by the Court in which everyone is on the same page at the same time. The experts have a fair opportunity to explain and defend their views. It is a world away from the traditional form of cross-examination where there may be days between hearing witnesses for each party on a particular issue, and which I think is better suited to non-expert witnesses of fact. However, the concurrent evidence process is flexible enough to permit traditional cross-examination where appropriate.

33. The benefits of concurrent evidence compared with traditional cross-examination include the following:

    (a) it is efficient, disciplined and generally saves much Court time and costs;

(b) it assists experts to reach agreement and encourages them to be accurate and precise because they are subject to close scrutiny and questioning by each other;

(c) it clarifies or diffuses immediately any lack of understanding of the Court or the lawyers.

34. An example of how concurrent evidence works can be seen in a DVD in a case in the Land and Environment Court entitled "Concurrent Evidence - New Methods with Experts" produced by the Judicial Commission of NSW and the Australian Institute of Judicial Administration.

35. I now turn to consider the jurisdiction, structure and civil practice and procedure of the Court in more detail.

B. JURISDICTION

36. As stated earlier, the Court is a court of limited jurisdiction, only having the jurisdiction vested in it by the Court Act or any other Act.[14]

Classes of Jurisdiction

37. The Court has a civil and criminal jurisdiction. The Court Act divides the jurisdiction into eight classes.[15] Classes 1 to 4 and 8 comprise the civil jurisdiction. Classes 1, 2 and 3 mostly involve merits review of administrative decisions which may be exercised by a Judge or a Commissioner. Commissioners hear the vast bulk of merits review cases except for compensation for compulsory acquisition of land. Class 4 involves judicial review and civil enforcement and may only be exercised by a Judge. Class 8 is a wide mining jurisdiction which may be exercised by a Judge or by a Commissioner who is a lawyer.[16] Classes 5 to 7 comprise the criminal jurisdiction.

Class 1 proceedings

38. Proceedings in Class 1 involve merits review of administrative decisions of local or State government under the planning or environmental laws specified in s 17 of the Court Act. The Court in hearing and disposing of the appeal sits in the place of the original decision-maker and re-exercises the administrative decision-making functions. The decision of the Court is final and binding and becomes that of the original decision-maker.[17] Proceedings in Class 1 include:

- Appeals, objections and applications under the *Environmental Planning and Assessment Act* 1979, such as against a decision to refuse an

[14] s 16(1) Court Act; *National Parks and Wildlife Service v Stables Perisher Pty Ltd* (1990) 20 NSWLR 573
[15] s 16(2) and ss 17-21C Court Act
[16] s 30(2C) Court Act
[17] s 39(5) Court Act

application for, or to grant on unacceptable conditions, a development consent or a modification of a development consent.

- Appeals under the *Protection of the Environment Operations Act* 1997, such as against a decision to refuse an application for, or to vary or revoke, an environment protection licence.

- Appeals under the *Native Vegetation Act* 2003.

Class 2 proceedings

39. Proceedings in Class 2 fall into two broad categories: first, merits review of administrative decisions of local or State government under the planning or environmental laws specified in s 18 of the Court Act and, secondly, applications under the *Trees (Disputes Between Neighbours) Act* 2006.

Merits review proceedings in Class 2 include:

- Appeals or objections under the *Local Government Act* 1993.
- Appeals under the *Water Management Act* 2000.
- Appeals and proceedings under the *Strata Schemes (Freehold Development) Act* 1973, *Strata Schemes (Leasehold Development) Act* 1986 and *Community Land Management Act* 1989.

Applications under the *Trees (Disputes Between Neighbours) Act* 2006 are original civil proceedings and are of two types:

- Applications for orders in relation to trees causing damage to property or risk of injury to persons and for compensation for damage to property.
- Applications for orders in relation to high hedges.

Class 3 proceedings

40. Proceedings in Class 3 mostly involve merits review of decisions of the State government but some involve original proceedings in the Court.[18] Proceedings in Class 3 include:

- Appeals, references and proceedings concerning land title and interests, such as boundary determinations under the *Real Property Act* 1900; encroachment of buildings over boundaries under the *Encroachment of Buildings Act* 1922; easements over land under s 40(2) of the Court Act which adopts s 88K of the *Conveyancing Act* 1919; and access to neighbouring land under the *Access to Neighbouring Land Act* 2000.

- Appeals concerning the valuation of land for land taxation and rating purposes under the *Valuation of Land Act* 1916.

[18] s 19 Court Act

- Appeals concerning the compensation payable for the compulsory acquisition of land by government under the *Land Acquisition (Just Terms Compensation) Act* 1991 and the *Roads Act* 1993.

- Appeals concerning refusal of Aboriginal land claims or other references under the *Aboriginal Land Rights Act* 1983.

- Miscellaneous appeals, references or other matters not referred to elsewhere in the Court Act.

Class 4 proceedings

41. Proceedings in Class 4 involve the civil enforcement of planning or environmental laws (eg carrying out a development without a consent) and judicial review of administrative decisions and conduct under planning or environmental laws. The applicable planning or environmental laws are those specified in s 20(1) and (3) of the Court Act. They include:

    - *Environmental Planning and Assessment Act* 1979;
    - *Local Government Act* 1993;
    - *Protection of the Environment Operations Act* 1997;
    - *Environmentally Hazardous Chemicals Act* 1985;
    - *Contaminated Land Management Act* 1997;
    - *Pesticides Act* 1999;
    - *Waste Avoidance and Resource Recovery Act* 2001;
    - *Heritage Act* 1977;
    - *Threatened Species Conservation Act* 1995;
    - *National Parks and Wildlife Act* 1974;
    - *Native Vegetation Act* 2003;
    - *Wilderness Act* 1987; and
    - *Water Management Act* 2000.

42. The Court has the same civil jurisdiction as the Supreme Court to hear and dispose of proceedings and grant equitable and prerogative relief in relation to the specified planning or environmental laws.[19]

43. Judicial review is not concerned with the merits of an administrative decision, only with its lawfulness. A decision may be unlawful because, for example, it is beyond power, procedurally unfair or manifestly unreasonable. In judicial review proceedings the Court can declare that a decision, such as a development

[19] s 20(2) Court Act

approval, by government is invalid because it is unlawful in some respect, and restrain the developer from proceeding with the development.

44. Open standing is a distinguishing feature of much of the legislation administered by the Court in Class 4. At common law the question is whether a complainant has sufficient "special interest" to have standing to sue.[20] Much of the legislation administered by the Court, however, allows "any person" to bring proceedings in the Court for an order to remedy or restrain any breach of the law, whether or not any right of that person has been or may be infringed by or in consequence of the breach.[21] Proceedings under these provisions may be brought by any person on their own behalf, or on behalf of themselves and other persons with their consent, or on behalf of a body corporate or unincorporated (with the consent of its committee or controlling or governing body) having like or common interest in the proceedings.

Class 5 proceedings

45. Proceedings in Class 5 involve prosecutions for offences against planning or environmental laws specified in s 21 of the Court Act. The Court hears and disposes of these proceedings in a summary manner (that is by a judge alone without a jury). The Court has a wide range of sentencing options depending on the offence.

Classes 6 and 7 proceedings

46. Proceedings in Classes 6 and 7 involve appeals against convictions or sentences relating to environmental offences from the Local Courts under the *Crimes (Appeal and Review) Act* 2001.

Class 8 proceedings

47. Proceedings in Class 8 are civil proceedings under the *Mining Act* 1992 and the *Petroleum (Onshore) Act* 1991. The Court exercises the jurisdiction formerly exercised by the Mining Wardens' Courts.

Ancillary jurisdiction

48. In addition to the jurisdiction expressly vested in the Court by the Court Act or any other Act, the Court has jurisdiction to hear and dispose of "a matter that is ancillary to a matter that falls within its jurisdiction" under the Court Act or any other Act.[22] A matter is "ancillary" if it is "incidental", "accessory" or "auxiliary" to a matter falling within the Court's jurisdiction.[23]

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[20] *Onus v Alcoa of Australia Limited* (1981) 149 CLR 27 at 42
[21] s 123 *Environmental Planning and Assessment Act* 1979, s 674 *Local Government Act* 1993, s 141F *Threatened Species Conservation Act* 1995
[22] s 16(1A) Court Act
[23] *Scharer v State of NSW* [2001] NSWCA 360, 53 NSWLR 299 at 308 [51]

Cross-vested jurisdiction

49. Proceedings may be transferred between the Supreme Court and the Land and Environment Court. In the case of civil proceedings, there is capacity for either the Supreme Court or the Land and Environment Court to transfer proceedings to the other court if it is more appropriate for the proceedings to be heard by the other court.[24] The court to which the proceedings are transferred is vested by the transfer with all of the jurisdiction of the transferor court in relation to the proceedings.[25]

50. For proceedings that would not fall within Classes 1-4 or 8 of the Court's jurisdiction, the Supreme Court also has power to transfer any proceedings commenced or purporting to have been commenced in the Supreme Court to the Land and Environment Court if the Supreme Court is of the opinion that the proceedings could or should have been commenced in the Land and Environment Court.[26]

Appeals from Commissioners

51. The Court also has appellate jurisdiction under s 56A of the Court Act to hear and determine appeals from orders or decisions of Commissioners in proceedings in Classes 1-3 and 8 of the Court's jurisdiction. This appellate jurisdiction was originally exercised by the Court of Appeal of New South Wales but was transferred to the Court by legislative amendment of the Court Act. The appeal under s 56A is limited to "a question of law".[27] Only Judges can exercise this appellate jurisdiction.

C. STRUCTURE OF THE COURT

52. The Court's jurisdiction is exercised variously by the Judges, Commissioners and Registrars.

The Judges

53. Judges of the Court have the same rank, title, status and precedence as the Judges of the Supreme Court of New South Wales.[28]

54. Judges of the Court are eligible to act as judges of the Supreme Court,[29] and have done so. Judges of the Supreme Court are eligible to act as judges of the Land and Environment Court.[30]

55. The Chief Judge of the Court may also act as an additional Judge of Appeal in relation to proceedings in the Court of Appeal of NSW[31] (and has done so), and

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[24] s 149B *Civil Procedure Act*
[25] s 149E *Civil Procedure Act*
[26] s 72 Court Act
[27] s 56A(1) Court Act
[28] s 9(2) Court Act
[29] s 37B *Supreme Court Act* 1970
[30] s 11A Court Act

as a Judge of the Court of Criminal Appeal in relation to proceedings of that Court.[32]

56. Judges preside over all Class 3 (land tenure and compensation), 4, 5, 6 and 7 matters, and can hear matters in all other classes of the Court's jurisdiction.

The Commissioners

57. Suitably qualified persons may be appointed as Commissioners of the Court. The qualifications and experience required for a Commissioner are specified in s 12 of the Court Act and include the areas of:

- administration of local government or town planning;
- town, country or environmental planning;
- environmental science, protection of the environment or environmental assessment;
- land valuation;
- architecture, engineering, surveying or building construction;
- management of natural resources or Crown Lands;
- urban design or heritage;
- land rights for Aborigines or disputes involving Aborigines; and
- law.

58. Persons may be appointed as full-time or part-time Commissioners for a term of 7 years.[33] Persons may also be appointed as an Acting Commissioner for a term of up to 12 months.[34] Acting Commissioners are called upon on a casual basis to exercise the functions of a Commissioner as the need arises.

59. The primary function of Commissioners is to adjudicate, conciliate or mediate merits review appeals in Class 1, 2, and 3 of the Court's jurisdiction. On occasion the Chief Judge may direct that a Commissioner sit with a Judge,[35] or that two or more Commissioners sit together to hear Class 1, 2 and 3 matters.[36]

60. A Commissioner who is an Australian lawyer may also hear and determine proceedings in Class 8 of the Court's jurisdiction (when they are called a Commissioner for Mining).[37]

The Registrars

61. The Registrar has the overall administrative responsibility for the Court, as well as exercising quasi-judicial powers such as conducting directions hearings and

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[31] s 37A *Supreme Court Act* 1970
[32] s 3(1A) *Criminal Appeal Act* 1912
[33] s 12(4) and Schedule 1, cl 1(1) Court Act
[34] s 13(1) Court Act
[35] s 37(1) and s 34C(1)(c) Court Act
[36] s 30(1) and s 34C(1)(c) Court Act
[37] s 12(2AC) and s 30(2C) Court Act

mediations. The Chief Judge directs the Registrar on the day to day running of the Court.

62. The Court is a business centre within the Department of Justice and Attorney General. The Registrar, as Business Centre Manager, has reporting and budgetary responsibilities to the Director General of that department.

Judges' functions

63. The Court is composed of the Chief Judge and the other Judges of the Court.[38] A single judge constitutes the Court.[39] The Judges may exercise the Court's jurisdiction in all eight classes and any function under the Court Act.

64. The Chief Judge makes arrangements as to the particular judge who is to exercise the Court's jurisdiction in particular matters or to exercise any other function under the Court Act.[40]

65. Judges cannot preside at conciliation conferences arranged under s 34 of the Court Act (only Commissioners can).

66. Judges also cannot deal with proceedings in Classes 1 or 2 by means of an on-site hearing under s 34B of the Court Act (again only Commissioners can).

Commissioners' functions

67. Commissioners do not constitute the Court (only Judges do)[41] and are not judicial officers (again only Judges are).[42] However, Commissioners can exercise the jurisdiction of the Court or any other function under the Court Act by delegation from the Chief Judge.[43] In practice, this involves the Chief Judge allocating to a Commissioner a case to be heard and determined (such as an on-site hearing under s 34B or a court hearing under s 34C of the Court Act) or a function under the Court Act to be exercised (such as a conciliation conference under s 34 of the Court Act). The Commissioner only has jurisdiction to exercise the allocated function and no more.

68. In determining the Commissioner who is to exercise the jurisdiction of the Court or any other function under the Court Act in relation to any proceedings, the Chief Judge is required to have regard to the knowledge, experience and qualifications of the Commissioners and the nature of the matters and issues involved in the proceedings.[44]

[38] s 7 Court Act
[39] s 6(1) Court Act
[40] s 30(1) Court Act
[41] ss 6(1) and 7 Court Act
[42] s 3(1) *Judicial Officers Act* 1986
[43] ss 6(2), 30 and 36 Court Act
[44] s 30(2) Court Act

69. Proceedings that are before a Commissioner for conciliation under s 34, or for hearing and determination under s 36 of the Court Act, may be referred or removed for hearing and determination by a Judge.[45]

Restrictions on Commissioners' exercise of Court functions

70. A Commissioner can only exercise the Court's jurisdiction in some of the classes. These are Classes 1, 2 and 3[46] and, for those Commissioners who are lawyers, Class 8.[47] A Commissioner may not exercise the Court's jurisdiction in Classes 4, 5, 6 and 7, which can only be exercised by Judges.[48]

71. The Court Act, the Court Rules, the Civil Procedure Act and the UCPR contain other restrictions on Commissioners exercising the Court's jurisdiction, even in Classes 1-3 and 8.

72. The Court Act permits only Commissioners whose appointment was a qualification referred to in s 12(2)(g) (relating to land rights for Aborigines or disputes involving Aborigines) to 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.[49] Conversely, a Commissioner whose only qualification for appointment was a qualification referred to in s 12(2)(g) of the Court Act cannot exercise the jurisdiction of the Court or any other function under the Court Act in relation to any proceedings other than proceedings arising under the *Aboriginal Land Rights Act* 1983.[50]

73. Where a Commissioner is allocated to sit with a Judge in proceedings in Classes 1, 2, 3 and 8, the Commissioner does not constitute the Court and may only assist and advise the Judge, but not adjudicate on any matter before the Court.[51]

74. The Court Rules specify certain Court functions not exercisable by Commissioners, including the power to order costs.

75. The *Civil Procedure Act* prescribes the procedure for civil proceedings in courts in New South Wales. The *Civil Procedure Act* applies to all civil proceedings in Classes 1, 2, 3, 4 and 8 of the Land and Environment Court's jurisdiction.[52] The UCPR also apply to civil proceedings in the Court.[53] However, certain rules have been excluded or apply in a modified form to proceedings in Classes 1, 2 and 3 of the Court's jurisdiction.[54]

[45] s 36(5) Court Act
[46] s 33(1) Court Act
[47] s 33(2A) Court Act
[48] s 33(2) Court Act
[49] s 30(2A) Court Act
[50] s 30(2B) Court Act
[51] ss 6(1) and 37(3) Court Act
[52] s 4(1) and Sch 1 *Civil Procedure Act*
[53] UCPR r 1.5 and Sch 1
[54] UCPR r 1.6 and Sch 1

Types of functions exercised by Commissioners

76. The Commissioners exercise three types of functions under the Court Act in relation to proceedings in Classes 1, 2, 3 and 8:

    (a) **adjudication**: hearing and determining proceedings allocated to the Commissioner by the Chief Judge under s 30(1)(a) of the Court Act;

    (b) **conciliation**: presiding at a conciliation conference arranged under s 34 of the Court Act and allocated to the Commissioner by the Chief Judge under s 30(1)(a) of the Court Act;

    (c) **case management**: presiding at a case management conference or directions hearing in proceedings allocated to the Commissioner by the Chief Judge under s 30(1)(b) of the Court Act.

Commissioner acting as conciliator

77. The Court has power under s 34 of the Court Act to arrange a conciliation conference between the parties or their representatives. The power is frequently exercised in development appeals and often achieves settlement.

78. Conciliation is a process in which the parties to a dispute, with the assistance of an impartial conciliator, identify the issues in dispute, develop options, consider alternatives and endeavour to reach agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the parties to reach agreement.

79. A conciliation conference under s 34 of the Court Act is a combined or hybrid process. 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.

80. If the parties are able to reach agreement, the conciliator Commissioner is able to dispose of the proceedings in accordance with the parties' agreement, if it is a decision that the Court could have made in the proper exercise of its functions.[55] 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.[56]

81. If the parties are not able to agree either about the substantive outcome or that the Commissioner should dispose of the proceedings, the Commissioner terminates the conciliation conference and refers the proceedings back to the Court for the purpose of being fixed for a hearing before another Commissioner. In that event,

[55] s 34(3) Court Act
[56] s 34(4) Court Act

the conciliation Commissioner makes a written report to the Court stating that no agreement has been reached and the conference has been terminated and setting out what in the Commissioner's view are the issues in dispute between the parties.[57] The Commissioner should return any documents handed to the Commissioner during the conciliation conference. The only document that should be retained on the Court file is the s 34(4)(a) report. A copy of the s 34(4)(a) report is provided to the parties.[58]

82. This result of a conciliation conference 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.

83. The conciliation Commissioner is disqualified from further participation in the proceedings, unless the parties otherwise agree.[59] For the same reason, evidence of anything said or any admission made in, or a document prepared for or in the course of, or as a result of, a conciliation conference is not admissible in evidence in any proceedings in a court.[60]

Commissioner acting as a mediator

84. The Court has power under s 26 of the *Civil Procedure Act* to refer any proceedings, or part of any proceedings before it, for mediation by a mediator.

85. Mediation is a process in which the parties to a dispute, with the assistance of an impartial mediator, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

86. A Commissioner of the Court can act as a mediator in relation to proceedings referred for mediation under this section. The proceedings could be any type of civil proceedings in Classes 1, 2, 3, 4 or 8 of the Court's jurisdiction. When appointed as a mediator under s 26 of the *Civil Procedure Act*, the Commissioner is not acting as a Commissioner exercising the Court's jurisdiction in the proceedings or exercising functions of the Court under the Court Act but rather only as a mediator under s 26 of the *Civil Procedure Act*.

87. The Court has a policy of only referring proceedings for mediation to a Commissioner who holds current qualifications as a nationally accredited mediator.

Commissioner acting as a neutral evaluator

88. The Court has power under Part 6 r 6.2 of the Court Rules to refer any proceedings in Classes 1, 2, 3, 4 or 8 of the Court's jurisdiction for neutral evaluation.

[57] s 34(4)(a) Court Act
[58] s 34(9) Court Act
[59] s 34(13) Court Act
[60] s 34(11) Court Act

89. Neutral evaluation is a process of evaluation of a dispute in which an impartial evaluator seeks to identify and reduce the issues of fact and law in dispute. The evaluator's role includes assessing the relative strengths and weaknesses of each party's case and offering an opinion as to the likely outcome of the proceedings, including any likely findings of liability or the award of damages.

90. A Commissioner of the Court can act as a neutral evaluator in relation to proceedings in Classes 1, 2, 3 or 8.

Registrars' functions

91. Registrars of the Court are authorised to exercise certain of the Court's functions by an instrument of delegation from the Chief Judge under s 13 of the *Civil Procedure Act*. The Registrars' powers include the power to award costs up to $30,000.

92. The Registrars conduct directions hearings, telephone callovers and case management conferences, mostly for proceedings in Classes 1 and 2, and hear and determine motions on matters within the instrument of delegation.

93. The Registrars also may preside at a conciliation conference arranged under s 34[61] and act as a mediator under s 26 of the *Civil Procedure Act*. Only Registrars who have current national accreditation as a mediator will be allocated these functions as a conciliator or mediator.

94. The Registrars are also in charge of the management and operation of the Registry.

D. CIVIL PRACTICE AND PROCEDURE

Acts and Rules

95. The civil practice and procedure in the Court varies depending on the class of jurisdiction and the types of matters in a class.

96. For civil proceedings in Classes 1-4 and 8 of the Court's jurisdiction, the practice and procedure is regulated by the Court Act, Court Rules, *Civil Procedure Act*, UCPR and the Court's Practice Notes.

97. Delay and undue expense are features of litigation intended to be eliminated as far as possible by the enactment of the rigorous statutory regime in ss 56-60 of the *Civil Procedure Act*. Section 56 is central and vital to understanding how civil litigation is to be conducted in New South Wales. It provides for an overriding purpose in s 56(1) as follows:

> "The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings."[62]

[61] s 34(14) of the Court Act

[62] See *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27, 239 CLR 175 at [113]–[114].

98. This statutory regime includes the following:

(a) the court, when exercising its powers, must seek to facilitate the overriding purpose of the just, quick and cheap resolution of the real issues in dispute;

(b) the parties are under a duty to assist the court to further that overriding purpose;

(c) the parties' lawyers are forbidden from causing their clients to be in breach of that duty;

(d) the court is obliged to manage proceedings having regard to four stated objects of case management, namely:

- the just determination of the proceedings;
- the efficient disposal of the business of the court;
- the efficient use of available judicial and administrative resources; and
- the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable to the respective parties;

(e) in deciding whether to make any order for the direction or management of the proceedings, the court must seek to act in accordance with the dictates of justice, including the overriding purpose and objects of case management;

(f) the practices and procedures of the court are to be implemented with the aim of resolving the issues in such a way that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute.

99. To these ends, significant powers of case management have been placed in the hands of the courts which, if exercised, can have sharp and even fatal effects on claims. For example, if a party fails to comply with a direction, the court has power to dismiss the proceedings, strike out a defence and give judgment accordingly, reject evidence, or order a party to pay costs.[63]

Court practice notes

100. Under s 76 of the Court Act, the Chief Judge may issue practice notes. Currently, seven practice notes have been issued:

- Class 1 - Development Appeals
- Class 2 – Tree Applications
- Classes 1, 2 and 3 – Miscellaneous Appeals

[63] s 61 *Civil Procedure Act*

- Class 3 – Compensation Claims
- Class 3 – Valuation Objections
- Class 4 – Proceedings
- Pre-judgment interest rates

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

102. The practice notes contain provisions common to all classes of the Court's civil jurisdiction and provisions only applicable to particular classes. The provisions common to all classes include the following:

    (a) each party not appearing in person shall be represented before the Court by a legal practitioner or authorised agent familiar with the subject matter of the proceedings and with sufficient instructions to enable all appropriate orders and directions to be made;

    (b) legal practitioners and agents for parties should communicate prior to any attendance before the Court with a view to reaching agreement on directions;

    (c) it is the responsibility of each party and their representatives to consider the orders and directions appropriate to be made to facilitate the just, quick and cheap resolution of the real issues;

    (d) the Court may at any stage refer the proceedings to alternative dispute resolution (such as mediation, neutral evaluation or conciliation) where the Court considers that to be appropriate;

    (e) if there is any significant breach of the Court's directions, including a breach sufficient to cause slippage in a pre-trial timetable, the parties must notify the Court in writing and provide a written explanation. Parties or their legal representatives may be at risk of being ordered to pay costs if their conduct unnecessarily or unreasonably increases the number of attendances in Court or causes costs to be thrown away;

    (f) unnecessary photocopying is to be avoided: it can greatly add to the cost of litigation;

    (g) provisions concerning expert witnesses (supplementing the UCPR provisions).

Court policies

103. The Court has also issued external and internal policies to provide guidance as to certain matters. External, publicly available policies include policies on:

- Case management;
- Commissioner Mentoring;
- Commissioners' Code of Conduct;
- Commissioners' Performance Appraisal;
- Complaints against Commissioners;
- Continuing professional development;
- Court Attire;
- Delays in reserved judgments;
- Guidelines for fee waiver, postponement and remittance of court fees;
- Site Inspections; and
- Identify theft prevention and anonymisation.

Planning and tree dispute principles

104. To ensure consistency of decision making in merits review appeals, the Chief Judge has encouraged the Judges and Commissioners to develop planning principles in their judgments in appropriate cases or to refine existing planning principles published in earlier judgments of the Court.

105. 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. 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 statutes, regulations, environmental planning instruments or development control plans.

106. 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.

107. In a similar fashion, the Court has developed principles or provided guidance in decisions under the *Trees (Disputes Between Neighbours) Act* 2006.

The originating process

108. A court file is created when proceedings are commenced in the Court. Proceedings are commenced in the Court by filing the originating process (such as an application or summons) that is approved for the relevant class of the

Court's jurisdiction. The Chief Judge has approved forms for documents, including the originating process, to be used in connection with proceedings.[64]

Service of originating process

109. On filing the originating process, the Court Registry assigns a date by which it must be served on the other party, typically within seven days. The first directions hearing (which is the return of the originating process before the Court) will usually be between 14 and 28 days from the filing date, depending on the class in which the proceedings are brought.[65]

110. The Court has published a plain English guide to the service of documents designed to assist self-represented litigants. It is entitled "Service of Documents: A Guide for Self Represented Litigants".

Pleadings and particulars

111. Although the Court is not a court of pleading, there is a need for the parties to identify the claim and the defence and the issues of fact and law to be determined by the Court. To an extent, the originating process can serve this purpose but there is usually a need for better articulation of the issues. Pleadings and particulars enable this better articulation. The form of pleading and particularisation varies depending on the type and class of proceedings.

eCourt

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

    (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.

113. 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.

[64] Under s 77A(1) Court Act
[65] See the practice notes for the various classes and types of proceedings

114. 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.

115. 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).

Differential case management

116. The Court manages the flow of proceedings from filing to finalisation in a number of ways and having regard to the type or class of proceeding.

117. The Chief Judge determines the day-to-day caseflow management strategy of the Court. This strategy is reflected in the Court Act, Court Rules, the *Civil Procedure Act*, the UCPR, and the Practice Notes and Case Management Policy. The Judges, Commissioners and Registrars work to ensure cases are resolved in a just, timely and cost-efficient manner.

Class 1 and 2 proceedings

118. Proceedings in Class 1 are allocated a date for a directions hearing before the Registrar when the proceedings are filed with the Court. The directions hearing may take the form of an in court hearing, a telephone hearing or an eCourt hearing (see modes of pre-hearing attendances below).

119. At the directions hearing, the Registrar will review the matter and make directions for the orderly, efficient and proper preparation of the matter for resolution by the appropriate dispute resolution process. The appropriate dispute resolution process may be a consensual process such as conciliation (a conference under s 34 of the Court Act), mediation or neutral evaluation or an adjudicative process by the Court hearing and disposing of the matter either at an on-site hearing or a court hearing.

120. If an issue arises that falls outside the specified powers of a Registrar or the Registrar otherwise considers it appropriate, the Registrar may refer the case to a Judge.

121. The practice and procedure governing Class 1 appeals are described in the Practice Notes for Class 1 Development Appeals or Classes 1, 2 and 3 Miscellaneous Appeals (depending on the type of appeal).

Class 2 tree disputes

122. Proceedings under the *Trees (Disputes Between Neighbours) Act* 2006 involve applications to the Court to remedy, restrain or prevent damage caused, being caused or likely to be caused to property or to prevent a risk of injury to any person as a consequence of a tree, or in relation to high hedges.

123. The Court manages a separate list for tree disputes. About 75 per cent of the parties are self-represented. The application is returnable before the Registrar assigned to manage the list. This first court attendance can be either a telephone conference or in court. The Registrar explains the process of preparation for and hearing of the application.

124. The Registrar explores whether the parties may be able to resolve the dispute between themselves without court orders authorising interference with or removal of any tree. If the parties are not able to resolve the dispute, or propose consent orders authorising removal of or interference with a tree, the Registrar will fix a final hearing date, usually not more that four to five weeks after the first court attendance. The Registrar will make directions in preparation for the final hearing, such as for the provision of information by the parties to each other.

125. The final hearing will usually be held on site. A Commissioner or Commissioners will preside at the hearing. Usually, one of the Commissioners will have special knowledge and expertise in arboriculture. The practice and procedure for tree disputes is described in the Practice Note Class 2 Tree Applications. Additional information is available in the special pages for tree disputes on the Court's website.

Class 3 proceedings

126. Proceedings in Class 3 are of different types. One type involves claims for compensation by reason of the compulsory acquisition of land. Another type involves valuation objections under s 37 of the *Valuation of Land Act* 1916.

127. The Practice Note Class 3 Compensation Claims and Practice Note Class 3 Valuation Objections establish Lists for these matters. The Class 3 Lists are managed by the List Judge in Court each Friday. The practice notes specify the directions hearings which are to be held in preparation for hearing and the directions that will usually be made at these directions hearings. The purpose of the practice notes is to set out the case management practices for the just, quick and cheap resolution of the proceedings.

128. Valuation objections are usually heard by Commissioners, mostly persons with special knowledge and expertise in the valuation of land. Compensation claims are usually heard by a Judge, but at times assisted by a Commissioner with special knowledge and expertise in the valuation of land.

129. Other matters assigned to Class 3, such as Aboriginal land claims, are also case managed by the Class 3 List Judge. Such matters are heard by a Judge, assisted by one or more Commissioners appointed with qualifications under s 12(2)(g) of the Court Act including in relation to land rights for Aborigines.

Class 4 proceedings

130. Proceedings in Class 4 are of two types: civil enforcement, usually by government authorities, of planning or environmental laws to remedy or restrain breaches and judicial review of administrative decisions and conduct under planning or environmental laws.

131. Class 4 proceedings are case managed in a Class 4 List by the List Judge on a Friday. The List Judge makes appropriate directions for the orderly, efficient and proper preparation for trial. Applications for urgent or interlocutory relief can be dealt with at any time by the Duty Judge.

132. The practice and procedure governing Class 4 proceedings is described in the Practice Note Class 4 Applications.

Class 8 proceedings

133. Proceedings in Class 8 are disputes under the *Mining Act* 1992 and the *Petroleum (Onshore) Act* 1991. Class 8 proceedings are case managed in a Class 8 List by a Commissioner for Mining on every second Monday morning. The Commissioner for Mining makes directions for the orderly, efficient and proper preparation for trial. Class 8 proceedings must be heard by a Judge or a Commissioner for Mining.

Types of pre-hearing attendances

134. The Court conducts various types of attendances before the hearing of proceedings. These fall into two categories: directions hearings and case management conferences.

Directions hearings

135. Directions hearings are held, first, on the return of the application or other originating process before the Court, then on such other occasions as may be necessary for the preparation of the matter for hearing and sometimes at a final pre-hearing directions hearing a week or two before the hearing to check readiness for hearing. At a directions hearing, the Court will make directions to facilitate the just, quick and cheap resolution of the real issues in the proceedings.[66] In making directions, the Court is to be mindful of the costs involved in complying with the directions and seeks to ensure that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute.[67]

136. The directions should facilitate the speedy determination of the real issues between the parties. This includes fixing the matter for hearing, conciliation or mediation so as to avoid delay between filing and finalisation of the proceedings.

137. If a party to whom such a direction has been given fails to comply with the direction, the court may, by order, do any one or more of the following:[68]

(a) it may dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim,

(b) it may strike out or limit any claim made by a plaintiff,

[66] s 56(1) and (2) *Civil Procedure Act*
[67] s 60 *Civil Procedure Act*
[68] s 61(3) *Civil Procedure Act*

(c) it may strike out any defence filed by a defendant, and give judgment accordingly,

(d) it may strike out or amend any document filed by the party, either in whole or in part,

(e) it may strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,

(f) it may direct the party to pay the whole or part of the costs of another party,

(g) it may make such other order or give such other direction as it considers appropriate.

138. The Court may, by order, give directions as to the conduct of any hearing, including directions as to the order in which evidence is to be given and addresses made, and as to the order in which questions of fact are to be tried.[69] Such directions include the following at any time before or during the hearing:[70]

(a) a direction limiting the time that may be taken in the examination, cross-examination or re-examination of a witness,

(b) a direction limiting the number of witnesses (including expert witnesses) that a party may call,

(c) a direction limiting the number of documents that a party may tender in evidence,

(d) a direction limiting the time that may be taken in making any oral submissions,

(e) a direction that all or any part of any submissions be in writing,

(f) a direction limiting the time that may be taken by a party in presenting his or her case,

(g) a direction limiting the time that may be taken by the hearing.

139. However, such a direction must not detract from the principle that each party is entitled to a fair hearing, and must be given a reasonable opportunity to lead evidence, to make submissions, to present a case, and at trial to cross-examine witnesses.[71]

140. In deciding whether to make a direction under this section, the court may have regard to the following matters in addition to any other matters that the court considers relevant:[72]

(a) the subject-matter, and the complexity or simplicity, of the case,

[69] s 62(1) and (2) *Civil Procedure Act*
[70] s 62(3) *Civil Procedure Act*
[71] s 62(4) *Civil Procedure Act*
[72] s 62(5) *Civil Procedure Act*

(b) the number of witnesses to be called,

(c) the volume and character of the evidence to be led,

(d) the need to place a reasonable limit on the time allowed for any hearing,

(e) the efficient administration of the court lists,

(f) the interests of parties to other proceedings before the court,

(g) the costs that are likely to be incurred by the parties compared with the quantum of the subject-matter in dispute,

(h) the court's estimate of the length of the hearing.

141. Matters heard by Judges are listed for pre-hearing directions before the List Judge, normally on Fridays. Matters in the published list are given a "not before" marking to minimise practitioners and parties wasting time waiting for their matter to be called. As many as about eighty matters may be in the list. The only way that such a large list can be disposed of efficiently within the day is by annexing "usual directions" to the Practice Notes, and by requiring the parties or their lawyers to confer with each other before the directions hearing and to hand to the List Judge at the directions hearing their agreed or competing "short minutes" of proposed directions. Thanks to this practice, it commonly takes only a few minutes to make even long and complex directions.

Case management conferences

142. Particular matters, by reason of their nature, the difficulty or complexity of the issues involved, or the likely length of hearing, may benefit from case management in a specially fixed conference. Case management conferences may be conducted by Registrars, Commissioners or Judges depending on the type and class of matter.

Modes of conducting pre-hearing attendances

143. The Court can conduct a pre-hearing attendance by three modes:

- ***In court****:* the parties and/or their representatives attend in person before the Court.
- ***Telephone conference:*** the parties and/or their representatives talk with the Court in a conference call.
- ***eCourt:*** authorised users of the parties or their representatives post electronic requests to the Registry and the Registrar responds. Access to eCourt is obtained using the internet.

Objects of case management

144. Proceedings are managed in directions hearings and case management conferences having regard to four objects:

(a) the just determination of proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of available judicial and administrative resources; and

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.[73]

Case management policy

145. The Chief Judge has issued a Case Management Policy to provide guidance on conducting case management and in particular case management conferences.

Dispute resolution

146. The Court promotes different methods of dispute resolution. This involves matching the appropriate dispute resolution process with the particular dispute involved in each proceeding. The Court offers the following dispute resolution processes:

- ***Adjudication:*** the hearing and the determination of proceedings by a Judge or Commissioner. The hearing may be a court hearing or, for certain types of matters in Classes 1 and 2, an on-site hearing.
- ***Conciliation:*** conciliation in the Court is undertaken pursuant to s 34 of the Court Act, which provides for a combined or hybrid process involving first, conciliation and then, if the parties agree, adjudication.
- ***Mediation:*** mediation is undertaken under s 26 of the *Civil Procedure Act.*
- ***Neutral evaluation:*** neutral evaluation is undertaken pursuant to Pt 6 r 6.2 of the Court Rules.
- ***Reference to referees:*** the Court may refer proceedings, or any question arising in the proceedings, to an expert external referee for inquiry and report back to the Court under Pt 20 r 20.14 of the UCPR.[74]

Allocation of matters

147. The Chief Judge allocates the Judges and Commissioners who are to resolve matters, by one of the dispute resolution processes offered by the Court, such as by adjudicative hearing or conciliation conference. Allocation is usually made for a week at a time. The settled weekly hearing roster is usually provided to all Judges and Commissioners by the close of business on the Wednesday prior to the week covered by the roster. Longer notice is usually able to be provided for regional hearings.

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[73] s 57(1) *Civil Procedure Act*

[74] For an explanation of how the Court operates its dispute resolution processes, see Justice B J Preston, "The Land and Environment Court NSW: Moving Towards a Multi-Door Courthouse" (2008) 19 *Australasian Dispute Resolution Journal* 72 (Part 1) and (2008) 19 *Australasian Dispute Resolution Journal* 144 (Part 2)

148. A daily court list is also published the afternoon before on the Court's website (under "Court Lists") and usually in the Sydney Morning Herald on the day of the hearing.

Hearings

149. The nature of the hearing will vary depending on the class of jurisdiction and type of matter involved.

Hearings in Classes 1 – 3

150. Hearings of proceedings in Classes 1, 2 and 3 are by way of rehearing. Fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision the subject of the appeal may be given at the hearing.[75]

151. In addition to any other functions and discretions that the Court might otherwise have, the Court has, for the purposes of hearing and disposing of the appeal, all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.[76]

152. In making its decision in respect of the proceedings, the Court is to have regard to the Court Act and any other relevant Act, any instrument made under any such Act, the circumstances of the case and the public interest.[77]

153. The hearing of the proceedings is also to be conducted with as little formality and technicality, and with as much expedition, as the requirements of the Court Act and of every other Act and as the proper consideration of the matters before the Court permit.[78]

154. In hearing proceedings in Class 1, 2 and 3 of the Court's jurisdiction, the Court is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits.[79]

On-site hearings

155. The hearing may be by way of an on-site conference under s 34B of the Court Act for certain proceedings in Classes 1 and 2 of the Court's jurisdiction.[80]

156. Proceedings of the type listed in s 34A(1) of the Court Act may be dealt with by means of an on-site conference if the parties agree or the Registrar determines that:

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[75] s 39(3) Court Act
[76] s 39(2) Court Act
[77] s 39(4) Court Act
[78] s 38(1) Court Act
[79] s 38(2) Court Act
[80] s 34A(1) Court Act, being proceedings in Class 1 under ss 96, 96AA, 97, 121ZK and 149F of the *Environmental Planning and Assessment Act* 1979 and proceedings in Class 2 under s 7 of the *Trees (Disputes Between Neighbours) Act* 2006

(a) for proceedings under s 97 of the *Environmental Planning and Assessment Act* 1979, the proposed development has the prescribed estimated value;[81]

(b) for all proceedings, the proposed development or the proceedings:

(i) would have little or no impact beyond neighbouring properties and

(ii) does not involve any significant issue of public interest beyond any impact on neighbouring properties.[82]

157. However even if the proceedings meet these criteria for having an on-site hearing, the Court may nevertheless determine that the proceedings should be dealt with by means of a court hearing under s 34C of the Court Act instead of an on-site conference under s 34B.[83]

158. The on-site conference is held at the site of the proposed development unless the Commissioner allocated to hear the matter is of the opinion that:

(a) it would be unfair to the interests of one or more of the parties to hold the on-site conference there, or

(b) the lack of facilities at that site make it impracticable to hold the on-site conference there.[84]

159. If the Commissioner forms this opinion about the unsuitability of the site of the proposed development, the Commissioner could specify that the on-site conference should take place at an alternative venue (such as the local council chambers) or could determine under s 34A(6) of the Court Act that the proceedings should be dealt with by means of a court hearing under s 34C instead of an on-site conference under s 34B.

160. The procedure for conducting an on-site hearing is set out in the Court's Site Inspections Policy which can be accessed on the Court's website under "Policies".

Hearings in Class 4

161. Proceedings in Class 4 involve civil enforcement or judicial review of decisions and conduct under specified planning or environmental laws. They are traditional civil litigation of an adversarial nature. The hearing is governed by the civil procedure under the *Civil Procedure Act* and UCPR and the rules of evidence under the *Evidence Act* 1995 apply. The applicant bears the civil onus of establishing its claim on the balance of probabilities. The hearing is conducted as a court hearing. A view by the Court is occasionally conducted, although evidence will not usually be taken on site but rather the purpose of the view is for the Court to understand the evidence given in court.

[81] s 34A(2)(a) Court Act
[82] s 34A(2) and (2A) Court Act
[83] s 34A(6) Court Act
[84] s 34B(2) Court Act

Hearings in Class 8

162. Proceedings in Class 8 involve different types of civil litigation and hearings differ according to the type of proceedings concerned. For example, proceedings involving a review of a determination made by an arbitrator concerning access arrangements are by way of rehearing. Fresh material or material in addition to, or in substitution for, the material considered on the making of the determination by the arbitrator may be given on the review and taken into consideration by the Court.[85] In contrast, proceedings which involve judicial review of decisions under the mining legislation[86] are adversarial civil litigation. The hearing is conducted in the same manner as for Class 4 proceedings and is regulated by the *Civil Procedure Act* and UCPR. The rules of evidence under the *Evidence Act* 1995 apply.

Conduct and management of hearings

163. The Court member (whether Judge or Commissioner) allocated to hear proceedings has the responsibility for the conduct and management of the hearing and for ensuring the just, quick and cheap resolution of the real issues in the proceedings.

Evidence at the hearing

164. The evidence, and the manner of presentation of the evidence, will vary depending on the type and class of proceedings.

165. The evidence may be given by witnesses (whether orally or in writing such as an affidavit, witness statement or expert report of various kinds) or in documentary form (whether documents, plans, maps or photographs). The evidence may be evidence of facts or opinion evidence given by experts.

Expert evidence

166. For hearings of proceedings in Classes 1, 2 and 3 of the Court's jurisdiction, the rules of evidence do not apply and the Court may inform itself of any matters in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permit.[87] This enables Commissioners with special knowledge, experience and qualifications in particular fields of knowledge, to use that knowledge and experience in understanding and determining issues concerning those fields of knowledge raised in the proceedings. Any such use, however, must conform to the rules of procedural fairness, including disclosure to the parties and providing an opportunity for the parties to be heard, such as by adducing evidence and making submissions, on the matters disclosed by the Commissioner.

[85] s 155(6A) *Mining Act* 1992
[86] s 293 *Mining Act* 1992
[87] s 38(2) Court Act

167. In proceedings in Classes 1-4 and 8 of the Court's jurisdiction, where expert evidence is to be called in relation to an issue, the evidence may be given by a single expert (whether a parties' single expert or court appointed expert) or by individual experts engaged by the parties. The procedure for hearing expert evidence is specified in Part 31 of the UCPR (as applicable). Specific provision is made in Division 2 of Part 31 in relation to expert evidence.

168. An expert witness is required to comply with the code of conduct in Schedule 7 to the UCPR which (among other things) imposes on them an overriding duty to assist the Court impartially; stipulates that their paramount duty is to the Court and not to any party and that they are not an advocate for a party; and obliges them to work cooperatively with other experts when complying with a direction to confer with them.

169. The Land and Environment Court's practice notes require the parties to consider whether expert evidence is genuinely necessary to resolve the issues in dispute. Unnecessary expert evidence substantially increases the time and cost of proceedings. Parties are also required to confer in an endeavour to jointly retain a single expert in relation to an issue or to minimise the number of experts. For example, the evidence of surveyors, quantity surveyors, engineers and arborists are often likely to satisfy the criteria for appointment as a parties' single expert.

170. The procedure for the evidence of a parties' single expert, including the tender of the parties' single expert's report, cross-examination and the prohibition on other expert evidence, is specified in Subdivision 4 of Division 2 of Part 31 of the UCPR (rr 31.37 – 31.45). The slightly different procedure for the evidence of Court appointed experts is given in Subdivision 5 of Division 2 of Part 31 of the UCPR (rr 31.46 – 31.54).

171. The procedure for the evidence of individual experts engaged by the parties is specified in Subdivisions 2 and 3 of Division 2 of Part 31 of the UCPR (rr 31.19-31.36).

172. The Court usually directs joint conferencing of the experts in relation to specified matters and the preparation of a joint report specifying the matters agreed and matters not agreed and the reasons for any disagreement (see UCPR r 31.24). The joint report usually provides the foundation for the evidence of the experts to be given concurrently at the hearing. The Court usually directs concurrent evidence of experts (see UCPR r 31.35).

173. Concurrent evidence is an effective and efficient means for expert evidence to be given and for the resolution of differences in conflicting expert opinions.[88]

[88] See further the paper by Justice P D McClellan, "Expert Witnesses – the experience of the Land and Environment Court of New South Wales", XIX Biennial LAWASIA Conference 2005, Gold Coast, 20-24 March 2005, at pp 17-20, accessible on the Court's website under "Speeches and Papers" then under McClellan CJ. The Judicial Commission of New South Wales has also produced an excellent video "Concurrent Evidence" based on Class 3 compensation claims in the Court

Lay evidence

174. In hearings of proceedings in Classes 1-3 of the Court's jurisdiction, evidence of lay witnesses is usually given orally, although a statement of evidence may be available. In proceedings in Classes 1 and 2, evidence of laypersons such as residents who object to the proposal, is usually given on or nearby to the site of the dispute. Although the evidence is not recorded, notes of the evidence may be taken, usually by the legal representatives of the parties, or the witness may be speaking from their own notes. Either way, the notes may be tendered later in evidence. Cross-examination of lay witnesses is permitted, but often not undertaken in practice.

175. In proceedings in Classes 4 and 8 of the Court's jurisdiction, evidence of lay witnesses of fact will be given by affidavit unless the Court otherwise orders.[89] Cross-examination is allowed.

Evidence by telephone, video link or other communication

176. If the Court so orders, evidence and submissions may be received by telephone, video link or other form of communication.

[89] UCPR r 31.2