

THE LAND AND ENVIRONMENT COURT RULES 2007

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1. It is a pleasure to be invited to speak at this EPLA seminar on the Land and Environment Court Rules 2007 (LEC Rules 2007). They constitute, however, only a minority of the rules of court that now apply in Classes 1 to 4 of the Land and Environment Court's jurisdiction. The majority is in the Uniform Civil Procedure Rules 2005.
2. On 28 January 2008 the Land and Environment Court (LEC) joined the mainstream of NSW courts by coming under the Civil Procedure Act 2005 (CPA) and the Uniform Civil Procedure Rules 2005 (UCPR). On the same day the Land and Environment Court Rules 2007 (LECR 2007) came into force. So too did amendments to the Land and Environment Court Act 1979 (LEC Act), which were effected by the Courts Legislation Amendment Act 2007 and the Courts and Other Legislation Amendment Act 2007. So too did the Delegation by the Chief Judge to the Registrar under s 13 of the CPA, which prescribed the functions that the Registrar may exercise under the CPA, UCPR, LEC Act and LEC Rules 2007. Reference may also be made to the Transactions (ECM Court) Amendment (Land and Environment Court) Order 2007 which authorises the use of e-court (an electronic case management system established under s 14B of the Electronic Transactions Act 2000) in relation to proceedings before the LEC. Currently, there is a bill before Parliament which, when enacted will permit works vesting between the LEC and the Supreme Court almost as simply as transferring cases between Divisions of the Supreme Court.
3. The CPA and the UCPR are the culmination of a process which has transformed civil procedure in NSW. Under this system, control of litigation is taken away from the parties and entrusted to the Court. The system demands efficient use of the Court's and litigants' resources and expedition in resolving disputes. The LEC has been moving in the same direction by a different route for several years. In some areas, such as expert evidence, it was a leader in the field. But it was

isolated from the mainstream, which was undesirable. The LEC is now fully integrated into the uniform rules process. The Chief Judge of the LEC is an ex officio member of the Uniform Rules Committee which makes the rules: CPA ss 8 and 9. As well, the LEC has a representative (Biscoe J) on the Civil Procedure Working Party which does the legwork in formulating and amending rules. Thus, there are two formal channels for LEC rules proposals and participation.

Pivotal Provisions

4. The pivotal provisions of the CPA are ss 56 and 57 which provide:

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.

57 Objects of case management

- (1) For the purpose of furthering the overriding purpose referred to in section 56 (1), proceedings in any court are to be managed having regard to the following objects:
 - (a) the just determination of the proceedings,
 - (b) the efficient disposal of the business of the court,
 - (c) the efficient use of available judicial and administrative resources,
 - (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.
- (2) This Act and any rules of court are to be so construed and applied, and the practice and procedure of the courts are to be so regulated, as best to ensure the attainment of the objects referred to in subsection (1).

5. Behind those provisions lies a fundamental change in litigation culture. Part of the new culture is intolerance of failure to comply with the rules, including those covering time limits.

How does the LEC come under the CPA?

6. The machinery provisions whereby the LEC comes under the CPA are as follows. CPA s 4(1) and (2) provides:

- (1) Subject to this section, Parts 3–9 apply to each court referred to in Schedule 1 in relation to civil proceedings of a kind referred to in that Schedule in respect of that court.
- (2) The uniform rules may exclude any class of civil proceedings from the operation of all or any of the provisions of Parts 3–9.

7. CPA Schedule 1 provides that Parts 3 to 9 (ie all the substantive Parts) of the CPA apply to all proceedings in Classes 1 to 4 of the LEC’s jurisdiction. The subject matter of those Parts are:

- Part 3 Commencing and carrying on proceedings generally
- Part 4 Mediation of proceedings
- Part 5 Arbitration of proceedings
- Part 6 Case management and interlocutory matters
- Part 7 Judgments and orders
- Part 8 Enforcement of judgments and orders
- Part 9 Transfer of proceedings between courts

8. Pursuant to CPA s 4(2), UCPR 1.6 provides that proceedings of a kind referred to Column 2 of Schedule 1 of the UCPR are excluded from the operation of Parts 3 to 9 of the CPA. However, no proceedings in the LEC are excluded from the operation of Parts 3 to 9 of the CPA.

How does the LEC come under the UCPR?

9. The machinery provisions whereby the LEC comes under the UCPR are as follows. UCPR 1.5(1) provides for the application of the UCPR in these terms:
 - (1) Subject to subrule (2), these rules apply to each court referred to in Column 1 of Schedule 1 in relation to civil proceedings of a kind referred to in Column 2 of that Schedule.
10. UCPR Schedule 1 is entitled "Application of Rules". It provides that the UCPR applies, without any exclusions, to all proceedings in Class 4 of the LEC's jurisdiction. It also provides that the UCPR applies, with some exclusions, to proceedings in Classes 1, 2 and 3 of the LEC's jurisdiction. Those exclusions fall into three groups.
11. First, the provisions of UCPR Part 6 Division 2 (Originating Process) and Division 4 (Contents of Statement of Claim and Summons) are wholly excluded from proceedings in Classes 1, 2 and 3. The intention is that in those classes the originating process will continue to be the traditional application. In contrast, in Class 4 the new originating process will be the summons or statement of claim prescribed by the UCPR. Very soon, it is anticipated, the only prescribed LEC forms which will differ from UCPR forms will be the application, for use in proceedings in Classes 1, 2 and 3, and the remarkably simple tree jurisdiction forms. This will come about when the Chief Judge approves forms pursuant to s 77A of the LEC Act. There are likely to be some minor changes to the current form of application. Appeals from Commissioners to the LEC under s 56A of the LEC Act 1979 are now governed by UCPR Part 50: UCPR 50.2. It is a requirement of part 50 that a s 56A appeal from a Commissioner be commenced by summons: UCPR 50.3. The summons therefore replaces the old procedure of a notice of motion for a s 56A appeal. The object is to equate procedures in the LEC more closely with procedures in the Supreme Court. The Chief Judge's anticipated s 77A approval of forms is also likely to prescribe that where leave of the Court is required to commence proceedings, a notice of motion seeking leave to commence proceedings (in the form of UCPR Form 20) is to be used annexing a draft originating process in the approved form.

12. Secondly, UCPR Schedule 1 excludes the provisions of UCPR Part 20 Division 4 (Compromise) and Part 42 Division 3 (Offers of Compromise) from most proceedings in Classes 1, 2 and 3 of the LEC's jurisdiction. However, those provisions apply in relation to compulsory acquisition proceedings, which bear a somewhat closer resemblance to conventional litigation.
13. Thirdly, UCPR Schedule 1 excludes the general UCPR rule that costs follow the event (r 42.1) and other costs provisions from proceedings in Classes 1, 2 and 3. The other excluded costs provisions include provisions that a party amending must pay the costs of amendment (UCPR 42.6) and the costs of disputed facts subsequently proved or admitted (UCPR 42.8). The result is that costs in Classes 1, 2 and 3 are governed by the LEC Rules 2007 and not by the UCPR provisions.

LEC Rules Prevail over UCPR

14. It is important to understand that the LEC Rules 2007 prevail over the UCPR to the extent of any inconsistency. That has come about through the following machinery provisions of the CPA and the UCPR. CPA s 11 provides:

11 Relationship between uniform rules and local rules

- (1) The uniform rules prevail over any provision of any local rules unless the uniform rules expressly provide that the provision of the local rules is to prevail.
- (2) One rule prevails over another, as referred to in subsection (1), to the extent only of any inconsistency between them.

15. UCPR 1.7 provides:

The rules of court specified in Schedule 2 prevail over these rules.

16. UCPR Schedule 2 is entitled "Local Rules that Prevail over These Rules". It provides that all rules in the LEC Rules 2007 prevail over the UCPR.

The LEC Rules 2007

17. The LEC Rules 2007 are heavily pruned compared with the old LEC Rules 1996. The surviving rules in the LEC Rules 2007 are those not appropriately covered by the UCPR because of peculiarities of the LEC jurisdiction or which are needed

for matters in Classes 5, 6 and 7 which are criminal proceedings to which the UCPR (and the CPA) are not expressed to be applicable.

18. Part 1 “Preliminary” and Part 2 “Administration” are virtually unchanged from provisions of the old rules.

19. Part 3 “Proceedings in Classes 1, 2 or 3” contains familiar provisions but others provisions are new. Rule 3.2 provides that the originating process in Classes 1, 2 or 3 proceedings is an application in the approved form. Rule 3.5 provides for particulars – something which is absent from the UCPR. Rule 3.7(2) contains the critical costs provision governing costs in Classes 1 and 2 and many proceedings in Class 3. It provides:

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

20. This rule differs in one respect from the former Part 16 r 4(2) of the LEC Rules 1996 which provided that in proceedings in Classes 1, 2 and 3: “No order for the payment of costs will be made in proceedings to which this Rule applies unless the Court considers that the making of a costs order is, in the circumstances of the particular case, fair and reasonable”. In the new rule the words “in the circumstances of the particular case” are absent. The significance of the exclusion of these words in the new rule is that in *Hunter Development Brokerage Pty Ltd v Cessnock City Council (No 2)* [2006] NSWCA 292 at [4] Bryson JA took the view that they excluded generalised approaches. The old rule excited a great deal of litigation, culminating in the unanimous decisions of a five bench Court of Appeal last year in *Port Stephens Council v Sansom* (2007) 156 LGERA 125 and *Thaina Town (On Goulbourn) Pty Ltd v Sydney City Council* (2007) 156 LGERA 150.

21. Rule 3.7(3) of the Land and Environment Court Rules 2007 is new and provides a non-exhaustive list of circumstances in which the Court might consider the making of a costs order to be fair and reasonable:

It provides:

- (3) Circumstances in which the Court might consider the making of a costs order to be fair and reasonable include (without limitation) the following:
 - (a) that the proceedings involve, as a central issue, a question of law, a question of fact or a question of mixed fact and law, and the determination of such question:
 - (i) in one way was, or was potentially, determinative of the proceedings, and
 - (ii) was preliminary to, or otherwise has not involved, an evaluation of the merits of any application the subject of the proceedings,
 - (b) that a party has failed to provide, or has unreasonably delayed in providing, information or documents:
 - (i) that are required by law to be provided in relation to any application the subject of the proceedings, or
 - (ii) that are necessary to enable a consent authority to gain a proper understanding of, and give proper consideration to, the application,
 - (c) that a party has acted unreasonably in circumstances leading up to the commencement of the proceedings,
 - (d) that a party has acted unreasonably in the conduct of the proceedings,
 - (e) that a party has commenced or defended the proceedings for an improper purpose,
 - (f) that a party has commenced or continued a claim in the proceedings, or maintained a defence to the proceedings, where:
 - (i) the claim or defence (as appropriate) did not have reasonable prospects of success, or
 - (ii) to commence or continue the claim, or to maintain the defence, was otherwise unreasonable.

22. This new rule essentially adopts the list of circumstances set out in *Grant v Kiama Municipal Council* [2006] NSWLEC 70 at [15] (Preston CJ).

23. Rule 3.8 provides for neutral evaluation. There is no provision for neutral evaluation in the UCPR. Neutral evaluation is thought to be worth retaining in the LEC Rules as part of the Court's alternative dispute resolution armoury even if it seldom used.

24. Rule 3.9 provides that Part 55 (Contempt) of the Supreme Court Rules 1970 apply so far as applicable. That means the Supreme Court Rules as amended from time. The ridiculous situation under the old LEC Rules whereby references to the Supreme Court Rules meant those rules frozen at a particular point in time some years ago has been swept away.

Class 4

25. Part 4 concerns proceedings in Class 4 of the Court's jurisdiction. It includes some important innovations. For example, Rule 4.2 deals with proceedings brought in the public interest in three respects: costs, security for costs and undertakings as to damages. It provides:

4.2 Proceedings brought in the public interest

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

26. Rule 4.3 is also innovative. It provides that in proceedings for the review of a public authority's decision the Court may direct the public authority to make available relevant documents and provide a statement of reasons. A similar provision formerly appeared in an LEC Practice Note. There are no equivalent provisions in the UCPR although similar provisions appear in a Supreme Court Practice Note. Rule 4.3 provides:

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

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

(c) an order for particulars, discovery or interrogatories.

27. Rules 4.4 and 4.5 respectively provide for neutral evaluation and application of Part 55 (Contempt) of the Supreme Court Rules in Class 4 proceedings (corresponding with rr 3.8 and 3.9 which make the same provision in relation to Classes 3).

Classes 5, 6 and 7

28. Part 5 applies to proceedings in Classes 5, 6 and 7 of the Court's jurisdiction. The CPA and the UCPR do not, in terms, purport to apply to Classes 5, 6 and 7 of the LEC's jurisdiction which are criminal proceedings.

29. Rule 5.2 specifies the provisions of the Supreme Court Rules and the UCPR which apply. Rule 5.3 is familiar. It provides that proceedings are to be commenced by summons seeking an order pursuant to s 246 of the Criminal Procedure Act 1986, accompanied by affidavits intended to be relied on in establishing prima facie proof of the offence charged. The leading case on what this means is *McConnell Dowell Constructors (Aust) Pty Ltd v Environment Protection Authority* (2000) 50 NSWLR 127 (CA).

30. Finally, Part 6 deals with miscellaneous matters. Rules 6.1 to 6.4 are time provisions. Rule 6.5 requires the Court, if it imposes a fine, to order the person fined to pay it to the Registrar.

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