A PRACTITIONER'S GUIDE TO THE LAND AND ENVIRONMENT COURT

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THE ENVIRONMENT AND
PLANNING LAW COMMITTEE

THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

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PREFACE

This is the fourth edition of this guide. It presents, in plain language, tips on how to commence an action; what to expect when you go to court; what happens in the courtroom; how to source and present evidence and submissions; and it details the risks associated with costs.

While the NSW Land and Environment Court itself is somewhat less formal than other NSW Courts, understanding how to engage with judicial officers, court processes and opponents is essential in ensuring that justice is served in an efficient and effective manner.

This edition includes updated reference to the new sections and Schedules within the *Environmental Planning and Assessment Act 1979* following the commencement of a significant suite of amendments on 1 March 2018, and refers to the most recent set of Practice Notes published by the Court.

The Committee once again extends its thanks to the Chief Judge of the Court, Justice Preston for His Honour's comments on and foreword to the Guide, the NSW Young Lawyers for funding the Guide's publication and the administrative staff and office bearers of NSW Young Lawyers for their efforts in assisting the Committee with this update.

This guide does not constitute legal advice. It has been designed to help both practitioners and self-represented litigants navigate their way through the legal machinations of the NSW Land and Environment Court.

May 2019

FOREWORD

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

A Practitioner's Guide to the Land and Environment Court of NSW is a valuable source of such information on the Court, and will facilitate access to justice. Since the first edition of the Guide in 2000, there have been many changes to planning and environment law, the Court's practice and procedure and the dispute resolution services offered by the Court. The Court's jurisdiction to deal with planning and environmental matters continues to expand. The Court has adopted, for the most part, the uniform civil procedure common to other courts in New South Wales, whilst still preserving its particular practice and procedure for types of matters unique to the Court. The Court has wholly revised its Practice Notes for various types of matters. The Court has extended the range of dispute resolution services available, particularly conciliation and mediation, and increased their accessibility and utilisation. The manner in which adjudicative hearings proceed has been reformed, including increased use of on-site hearings, joint conferencing and concurrent evidence of experts.

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

The Guide will assist practitioners, litigants in person, and other uses of the Court to be better informed and, by those persons being better informed, assist the Court in the administration of justice.

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

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

ABOUT NSW YOUNG LAWYERS

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

Some of the goals of NSWYL are:

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

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

The Committee focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

For further information about the Committee, feel free to visit our website or contact the NSW Young Lawyers office on (02) 9926 0333. Alternatively, you can email the Committee Secretary directly at envirolaw.secretary@committee.younglawers.com.au

ACKNOWLEDGMENTS

This edition has been a team effort in every sense. A team of young lawyers have volunteered to write, edit and research the content; a team has taken the role of managing editor at various steps along the way and the administrative team and office bearers at NSW Young Lawyers, which supports the Committee, have provided invaluable assistance to give life to this document.

Special thanks must go to chapter editors: Peter Clarke, Matthew Baker, James Conroy, Emily Davies, Jane Dillon, James Fan, Sarah Hedberg, Alistair Knox, Jennifer Luo, Max Newman, Emilija Rupsys and Tom White.

The managing editorship of this edition has been shared between Jane Dillon and Elizabeth Sivell, under the watch of Committee Chairs Katharine Huxley, Alistair Knox, Ross Mackay and Emily Ryan.

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INTRODUCTION

THIS GUIDE

The purpose of this Guide is to provide legal practitioners with a practical understanding of the Land and Environment Court of New South Wales (**the Court**). It has been prepared by volunteer members of the NSW Young Lawyers Environment and Planning Law Committee.

BACKGROUND OF THE COURT

In 1979 five Acts were passed by the New South Wales Parliament:

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

The Court was established in 1980 as a superior court of record. Jim McClelland, the first Chief Judge of the Court, is reported to have said the role of the Court was "to draw the line somewhere between those who wanted high-rise buildings in the Botanic Gardens and those who wanted to turn Pitt Street into a rainforest".[1]

1 Michael Pelly, 'Stepping in when acquisitions get ugly: land acquisition' Business Review, The Australian (national), January 28 2011.

The Court hears environmental, development, building and planning disputes, and comprises judicial officers, decision makers and administrative personnel. A list of the current Judges and Commissioners is available on the Court's website.[2]

Judges have the same rank, title, status and precedence as the Judges of the Supreme Court of New South Wales. Judges preside over all Class 3 (Aboriginal land claims) matters, most Class 3 (land tenure and compensation) matters, Class 4, 5, 6 and 7 matters, and can hear matters in all other classes of the Court's jurisdiction. The Court is made up of five Judges and one Chief Judge.

Decision makers of the Court include Commissioners, whose primary functions are to adjudicate, conciliate or mediate merit review appeals in Classes 1, 2, and 3 of the Court's jurisdiction. On occasion the Chief Judge may direct that a Commissioner sit with a Judge, or that two or more Commissioners sit together to hear Class 1, 2 and 3 matters.

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).

The Registrar has the day to day running of the Court and may exercise quasi-judicial powers such as conducting directions hearings and mediations at the direction of the Chief Judge.

2 www.lec.justice.nsw.gov.au/Pages/contact_us/contact_us.aspx.

CHAPTER 1: JURISDICTION OF THE COURT

The Court is a court of limited statutory jurisdiction. Its jurisdiction is governed by the *Land and Environment Court Act 1979*. It is vested with the power to determine matters, including interlocutory matters, arising from environmental and planning statutes. The Court does not have the power to determine every issue of contention between litigants. It does have, however, an ancillary jurisdiction,[3] which allows it to determine matters ancillary to a point of claim within its jurisdiction. This power does not allow the Court to adjudicate a point of claim outside its jurisdiction.[4]

Pursuant to Part 3 of the *Land and Environment Court Act 1979*, the jurisdiction of the Court is divided into the following eight classes of proceedings:

Class 1 – Environmental planning and protection appeals	Class 1 proceedings include: merit appeals against refusals, or deemed refusals, of development consent or development consent conditions; third party appeals against designated development; and appeals against council orders issued under the *Environmental Planning and Assessment Act 1979*.

3 *Land and Environment Court Act 1979* s 16(1A).
4 National Parks and Wildlife Service v Stables Perisher Pty Ltd (1990) 20 NSWLR 573.

Class 2 – Local government and miscellaneous appeals and applications	Class 2 proceedings include: • appeals against building and other approvals under the Local Government Act 1993; • tree and hedge disputes between neighbours; • applications under other miscellaneous environment and planning legislation; • Strata development related matters, excluding plans for collective sale; and • appeals against council orders issued under the Local Government Act 1979.
Class 3 – Land tenure, valuation, rating and compensation matters	Class 3 proceedings include: • appeals involving compensation for compulsory acquisition; • appeals involving the determination of property boundaries; • encroachment matters; • Aboriginal land claims; and • applications for an order seeking a collective sale or redevelopment under the Strata Schemes Development Act 2015.
Class 4 – Environmental planning protection and civil enforcement and development contract civil enforcement	Class 4 proceedings include: • civil enforcement for breaches of planning law (e.g. carrying out a development without consent) or breaches of conditions of development consent; and • proceedings which question the legal validity of consents or refusals of consent by consent authorities.
Class 5 – Environmental planning and protection summary criminal enforcement	Class 5 proceedings include: • criminal proceedings for environmental offences, such as pollution offences. Part 5 of Chapter 4 of the Criminal Procedure Act 1986 applies to proceedings in Class 5 of the Court's jurisdiction. • The Court only has jurisdiction to dispose of the prosecutions in a summary manner. The prosecution has a choice as to which court the offence may be brought. Generally speaking, it is in the interests of justice that these kinds of offences are brought in the Local Court rather than the Court, if the alleged offence and offending is of a lesser gravity and complexity.

Class 6 – Appeals from convictions relating to environmental offences	Both the prosecuting authority and defendant have an appeal by right to the Court. This means that neither party has to seek leave to appeal in relation to matters contained within this class. Appeals in this class include appeals against stays, summary dismissals, and costs.
Class 7 Other appeals relating to environmental offences	Class 7 appeals concern appeals against committal proceedings and a special kind of interlocutory order. Whereas Class 6 appeals do not require leave of the Court, Class 7 appeals do require the leave of the Court. Part 4 of the *Crimes (Appeal and Review) Act 2001* outlines the procedure generally for Class 6 and Class 7 appeals to the Court.
Class 8 Mining matters	Class 8 includes matters arising out of the *Mining Act 1992* or the *Petroleum (Onshore) Act 1991* but not prosecutions brought under those Acts.

In Class 1, 2 and 3 proceedings, the Court exercises original jurisdiction. The Court places itself in the position of the original decision-maker and determines the matter on its merits.

In Class 4 proceedings, the Court is vested with, amongst other things, the power 'to enforce any right, obligation or duty conferred or imposed by a planning or environmental law'[5], inclusive of applications for contempt of Court. The relevant 'planning or environmental law' is specified in s 20(3) of the *Land and Environment Court Act 1979*.

Class 5 proceedings constitute the criminal jurisdiction of the Court. Class 6 and 7 proceedings are the appellate jurisdiction of the Court.

5 *Land and Environment Court Act 1979 s 20(2A).*

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

• Environmental Planning and Assessment Act 1979	• Local Government Act 1993	• Protection of the Environment Operations Act 1997
• Heritage Act 1977	• Roads Act 1993	• Land Acquisition (Just Terms Compensation) Act 1991
• Contaminated Land Management Act 1997	• Valuation of Land Act 1916	• Water Management Act 2000
• Trees (Disputes Between Neighbours) Act 2006	• Fisheries Management Act 1994	• Pesticides Act 1999
• Environmentally Hazardous Chemicals Act 1985	• Pipelines Act 1967	• National Parks and Wildlife Act 1974
• Forestry Act 2012	• Aboriginal Land Rights Act 1983	• Biodiversity Conservation Act 2016
• Rural Fires Act 1997	• Biosecurity Act 2015	• Strata Schemes Development Act 2015
• Local Land Services Act 2013		

In addition, there is a plethora of environmental planning instruments under the *Environmental Planning and Assessment Act 1979* that regulate various planning and environmental matters at both a State and local level.

The main types of claim are listed in the Schedule of Approved Forms released by the Court (available on the Court's website), grouped by subject, and are reproduced below:

Aboriginal and Aboriginal land rights law	Appeal concerning Aboriginal land claim (s 36(7) *Aboriginal Land Rights Act 1983*)
	Disputed election or return (s 125 *Aboriginal Land Rights Act 1983*)
	Reference concerning Register of Aboriginal Owners (s 175 *Aboriginal Land Rights Act 1983*)
Appeals	Appeal from decision of Commissioner on question of law (s 56A *Land and Environment Court Act 1979*)
Compensation and valuation law	Objection against amount of compensation (s 66 *Land Acquisition (Just Terms Compensation) Act 1991*)
	Determination of compensation for acquisition of land for road on private application (Div 2 of Pt 12 *Roads Act 1993*)
	Compensation and valuation law – appeal against Valuer-General's determination (Div 1 of Pt 4 *Valuation of Land Act 1916*)
Easements	Application for easement (s 40 *Land and Environment Court Act 1979*)
Environmental law	Protection of the environment appeals (Pt 9.2 *Protection of the Environment Operations Act 1997*)
	Civil enforcement (Pt 8.4 *Protection of the Environment Operations Act 1997*)
	Judicial review (Pt 8.4 *Protection of the Environment Operations Act 1997*)
Local government law	Appeal concerning an approval (s 176 *Local Government Act 1993*)
	Appeal by an applicant as to whether a "deferred commencement" approval operates (s 177 *Local Government Act 1993*)
	Appeal against the revocation or modification of an approval (s 178 *Local Government Act 1993*)
	Appeal concerning an order (s 180 *Local Government Act 1993*)
	Appeal concerning particulars of work submitted to council (s 182 *Local Government Act 1993*)
	Appeal concerning rates or charges (Ch 15 *Local Government Act 1993*)
	Civil enforcement (Ch 17 *Local Government Act 1993*)
	Judicial review (Ch 17 *Local Government Act 1993*)
Mining law	Proceedings under *Mining Act 1992 or Petroleum (Onshore) Act 1991*
National parks and threatened species law	Appeal or proceedings concerning national parks
	Appeal or proceedings concerning threatened species
	Civil enforcement
	Judicial review

Native vegetation and biodiversity conservation law	Appeal against a licensing decision (s 2.16 *Biodiversity Conservation Act 2016*)
	Appeals with respect of biodiversity credit decisions (s 6.26 *Biodiversity Conservation Act 2016*)
	Appeal against decision of Minister made in relation to failures to comply with conservation measures (s 8.15 *Biodiversity Conservation Act 2016*)
	Appeal against decision by Minister to suspend, revoke, modify biodiversity certification/agreement (s 8.23 *Biodiversity Conservation Act 2016*)
	Appeal against stop work order (s 11.6 *Biodiversity Conservation Act 2016*)
	Appeal against interim protection order (s 11.13 *Biodiversity Conservation Act 2016*)
	Appeal against remediation order (s 11.23 *Biodiversity Conservation Act 2016*)
	Appeal against biodiversity offsets enforcement order (s 11.28 *Biodiversity Conservation Act 2016*)
	Criminal enforcement for native vegetation offence (s 13.2 *Biodiversity Conservation Act 2016*)
	Civil enforcement and judicial review (ss 13.14 – 13.17 *Biodiversity Conservation Act 2016*)
	Application for an enforcement order relating to an enforceable undertaking (s 13.27 *Biodiversity Conservation Act 2016*)
	Appeal against categorisation of land on a native vegetation regulatory map (s 60M *Local Land Services Act 2013*)
	Appeal against an approval relating to a biodiversity development assessment report (s 60ZJ *Local Land Services Act 2013*)
Planning law	Appeal against deemed or actual refusal of development application (s 8.7(1) *Environmental Planning and Assessment Act 1979*)
	Appeal against deemed or actual refusal of application to modify development consent (s 8.9 *Environmental Planning and Assessment Act 1979*)
	Application to modify a development consent granted by the Court (s 4.55(8) *Environmental Planning and Assessment Act 1979*)
	Appeal by objector dissatisfied with the determination of a consent authority to grant consent to a development application for designated development (s 8.8(1) of the *Environmental Planning and Assessment Act 1979*)
	Appeal against deemed or actual state of satisfaction about deferred commencement conditions of development consent (s 8.7(3) *Environmental Planning and Assessment Act 1979*)

Planning law	Appeal against deemed or actual state of satisfaction about ancillary aspects of development (s 8.7(2) *Environmental Planning and Assessment Act 1979*)
	Appeal against revocation or modification of development consent (s 8.23(5) *Environmental Planning and Assessment Act 1979*)
	Appeal against deemed or actual refusal by consent authority to extend lapsing period of development consent (s 8.22 *Environmental Planning and Assessment Act 1979*)
	Appeal concerning condition about or release of security (s 8.21 *Environmental Planning and Assessment Act 1979*)
	Appeal against failure of refusal to issue Pt4A certificate (s 8.16 *Environmental Planning and Assessment Act 1979*)
	Appeal concerning an order (ss 8.18 and 8.19 *Environmental Planning and Assessment Act 1979*)
	Appeal with respect to building certificate (s 8.25 *Environmental Planning and Assessment Act 1979*)
	Civil enforcement (s 9.45 *Environmental Planning and Assessment Act 1979*)
	Judicial review (s 9.45 *Environmental Planning and Assessment Act 1979*)
Specific Acts	Other appeals and proceedings
	Other civil enforcement
	Other judicial review
Trees	Application concerning a tree (ss 7, 14B or 14D *Trees (Disputes Between Neighbours) Act 2006*)

CHAPTER 2: PREPARING FOR COURT

PRACTICE NOTES

The Court has issued Practice Notes that set out the practice and procedure for different classes of proceedings. Before commencing proceedings, it is important to familiarise yourself with the Practice Note relevant to your matter.[6]

COMMENCING PROCEEDINGS

Form

The application form you will need to commence proceedings will depend on the class and type of proceedings. These forms can be found under the 'Forms and Fees' part of the Court's website.[7]

The general Form A can be used in all classes of the Court's jurisdiction, except where a form is specified by the *Uniform Civil Procedure Rues 2005* (UCPR) or otherwise.

6 Practice Notes are available at www.lec.justice.nsw.gov.au/Pages/practice_procedure/practice_notes.aspx.

7 www.lec.justice.nsw.gov.au/Pages/forms_fees/forms_fees.aspx. In addition to the Land and Environment Court Rules 2007, the *Civil Procedure Act 2005* and the *Uniform Civil Procedure Rules 2005* apply to the Court. Under the Civil Procedure Act 2005, copies of the approved forms are to be made available for public inspection at the Registry and on the Court's website: *Civil Procedure Act 2005* s 17(2).
The Chief Judge may also approve forms for documents to be used in connection with proceedings: *Land and Environment Court Act 1979* s77A. If a form is approved under s 17 of the *Uniform Civil Procedure Rules 2005* in relation to the same matter as that for which a form is approved by the Chief Judge, the form to be used is the form approved by the Chief Judge: see *Land and Environment Court Act 1979* s 77A(4).

Refer to the chapters dealing with each class for information on how to commence proceedings in that class.

Time

Certain applications to the Court must be made within a prescribed time period. The time period varies from application to application; for example, Class 4 judicial review proceedings must be commenced within three months of the decision to be challenged, while Class 1 development appeals must ordinarily be commenced within six months of the decision date or 'deemed refusal' date (see Chapter 11 for further detail on deemed refusals).

Once you have completed the relevant form[8], ensure that your application is filed within the relevant time period. Applications should be complete at the time of lodgement, otherwise they may not be accepted by the Court Registry. You should always keep an original copy of your application.

Once an application is lodged, a receipt will be issued for the filing fee and a matter number allocated. The matter number will typically be in the following format: *(year)/(application number).*

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

What needs to be attached to the application?

The relevant Practice Note sets out what needs to be attached to the application. As a rule of thumb, however, it is appropriate in most cases to attach all documentation to the application relevant to the decision being appealed (such as, for example, all plans and reports lodged alongside a development application that is refused by council) or to the case being prosecuted.

8 Approved forms are available from the Court's website - www.lec.justice.nsw.gov.au/

CHAPTER 3: ONLINE COURT

ONLINE COURT

The Online Court is a service that is able to be used for all civil matters listed in the Court as a way of interacting and corresponding with the Court and other parties to the proceedings. It cannot be used in criminal proceedings in the Court.

The Online Court is generally only suitable for consent matters, although it is possible to use this online service in place of a physical appearance before the Registrar of the Court. Any party seeking to make an application using Online Court should contact the other parties in the relevant matter in an attempt to provide the Court with a consent position.

The Online Court is available to parties or their legal representatives who are registered in the Online Registry and have matters with a future listing date in the Court.

When you have a matter listed in the Court, you will automatically be able to use the Online Court to make a request. The decision maker (most commonly the Registrar of the Court) will review requests made through Online Court and make orders. The recording of an order in Online Court can result in:

- the vacation of the next listing, and the scheduling of a new listing date; and/or
- the recording of the orders you sought, or the decision maker's preferred orders.

If a party seeks to make a request for orders through the Online Court without obtaining the consent of the other side, the Online Court system gives the other party an opportunity to respond by either consenting to the request or offering a 'counter' request.

If the orders sought in the Online Court are opposed, then submissions may be required to be made by both parties. If a decision is unable to be made based on those submissions, then a physical directions hearing in court may be required.

The Online Court allows you to make the following requests of the Court:

- For an adjournment of or future listing for the following:
    - Aboriginal Land Claims List
    - Class 3, 4 or 8 Directions Hearing
    - Land Valuation and Compensation List
    - Registrar Directions Hearing
    - Return of Subpoena
    - Tree Directions Conference

- For a listing for the following:
    - Case Management Conference
    - Costs Hearing
    - Hearing
    - Mediation
    - Notice to Produce List
    - Online court – Request required
    - S34 Conciliation Conference
    - S34AA Conciliation and Hearing
    - S41A Conciliation and Hearing
- Other orders, including applications to vary the timetable or for a slip rule amendment.

Once you are registered for the Online Court, you will be notified by email when:

- A request is submitted via the Online Court;
- A response to an Online Court request is made (consent or counter request); and/or
- The decision maker has responded to a request and made an order

At any time during Online Court:

- You may send a message to the decision maker;
- The decision maker may send messages to you and the legal representatives for the other parties (if represented); and
- Messages will be visible to all parties in the Online Court Record.

All actions including requests, consents, counter requests, reasons, messages, documents, commentary and orders made in Online Court will be recorded in either the Online Court Record or on the Online Registry website and will be visible to all parties.

ONLINE REGISTRY

The Online Registry allows you to:

- file online forms;
- publish probate notices;
- check case details;
- check which documents have been filed for a case;
- download court sealed documents; and
- request copies of judgments and orders.

Sealed documents ordered by way of the Online Registry are provided to you in electronic format almost instantly.

You are also able to use the Online Registry to check the presiding officer assigned to your matter to facilitate the conciliation conference and, if required, to adjudicate at a contested hearing. Usually the presiding officer is shown on Online Registry under the Court Dates tab approximately one week before the listing date.

Further information relating to the Online Registry can be found in Chapter 3: Online Court.

ECOURT

The former eCourt online service is no longer authorised for use to file documents online or make online requests for court orders. eCourt is only available to access historical case information. eCourt records will no longer be updated, and new cases are not put on eCourt.

Instead, eCourt has been replaced by JusticeLink, Online Registry and Online Court. Online Registry and Online Court[9] will is commonly used by self-represented litigants, legal practitioners and the public.

9 www.lec.justice.nsw.gov.au/Pages/ecourt/ecallover.aspx.

CHAPTER 4: DIRECTIONS HEARINGS

A directions hearing is a short hearing in a courtroom, by telephone or through Online Court before the Registrar for Class 1 and 2 matters, and in a courtroom before the List Judge for matters in Classes 3 to 7. Directions hearings for matters in Class 8 are usually conducted by a Commissioner who exercises powers under the *Mining Act 1992*.[10]

The primary purpose of the directions hearing is to determine whether a matter should be listed for a conciliation conference, mediation or a hearing. At the directions hearing, the Registrar or Judge will also make directions to prepare a matter for hearing, such as directions for the filing of evidence, the filing of a key document known as a Statement of Facts and Contentions (**SOFAC**) or other pleadings, return of subpoenas, notices to produce, and notices of motion. Usual directions are available on the Court's website[11] in the form of Short Minutes of Order (**SMO**).

Sometimes a Commissioner or a Judge may conduct a directions hearing in the form of a case management conference, particularly if the Commissioner or Judge has already been involved in that matter.

PRIOR TO THE DIRECTIONS HEARING

In Class 1 and 2 proceedings the Respondent (often a council) is required to file and serve the SOFAC by the third last working day before the first directions hearing.

10 *Mining Act 1992*, s 293.

11 www.lec.justice.nsw.gov.au/Pages/practice_procedure/directions.aspx.

If the proceedings are an appeal against an order or a condition of development consent, or an objector appeal, the applicant must prepare the SOFAC.[12] The SOFAC outlines the issues for determination by the Court and must be sufficiently detailed to enable the opposing party to understand the case it has to meet.

This is outlined in further detail in Chapter 11: Class 1 Proceedings.

PREPARING FOR A DIRECTIONS HEARING

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

Depending on the nature and class of the proceedings, different methods may be applied to narrow issues in dispute.

Practitioners should refer to the relevant Practice Note for the class of proceedings and apply the methods set out within. For example, in Class 1 development proceedings the respondent would normally prepare a SOFAC. That document is to focus on issues genuinely in dispute and raise contentions that have a reasonable basis.

The applicant must prepare a Statement of Facts and Contentions in Reply, which must not repeat any facts not in dispute.

Failure to narrow the issues in dispute, or raising matters that have no basis in merit or in law, may result in the imposition of an adverse costs order, depending on the relevant costs rules applicable to those proceedings. The imposition of an order for costs may also be the subject of "apportionment" where a successful party has raised other grounds that were not fairly arguable[13]. Generally, in the Class 1 jurisdiction each party pays its own costs.[14]

Practitioners should familiarise themselves prior to the directions hearing with the Court Rules and Practice Notes relevant to any application which they will be making. A useful reference in this respect is the loose-leaf service titled *Land and Environment Court Law and Practice in New South Wales*, published by the Lawbook Company. The Court Rules and Practice Notes can also be found on the Court website.[15]

Prior to the directions hearing, you should find out who is appearing on behalf of your opponent so that you can discuss proposed directions, with a view to reaching agreement prior to appearing before the Registrar or List Judge. If you can agree on the orders that you seek, you may be able to mention your matter earlier, as the Registrar usually

12 Practice Note – Class 1 Development Appeals (3 April 2018) at page 4.

13 *see Roswiak v Government Insurance Office* (1997) 41 NSWLR 608 and applied in *Council of City of Sydney v Wilson Parking Australia* [2015] NSWLEC 84.

14 *Land and Environment Court Rules 2007 r 3.7(1).*

15 www.lec.justice.nsw.gov.au/Pages/practice_procedure/practice_procedure.aspx

calls for matters to be dealt with by consent first before contested matters.

It is usual practice for both parties to have filled in the SMO prior to attending a directions hearing to provide to the Court at the hearing. Parties may delete or amend the directions stated, change the time specified for a direction, or propose alternative directions, if they have a reasonable basis for considering that the amended or alternative directions will better facilitate the just, quick and cheap resolution of the proceedings.

Parties to Class 1 residential appeals, development appeals and Class 1, 2 or 3 miscellaneous appeals are also expected to complete forms available online that detail if expert witnesses will be called and on what matters they will be presenting.

Check the Court list the day before a directions hearing (usually available on the Court's website from 4:00pm) or alternatively arrive at Court early to determine where in the list your matter appears. A copy of the daily list is posted outside the courtroom and is also available at the bar table and on the Court's website.[16]

A PRACTITIONER'S MOST COMMON MISTAKES?

- Failing to get proper instructions from the client and/or the instructing partner. Practitioners need to familiarise themselves with the case, its history and timetable (at least in brief), so that if the preferred option fails, an alternative position and relevant dates can be fixed.
- Not considering the appropriateness of the directions or orders sought. The practitioner should carefully consider the Court's Practice Notes and usual directions, which is the normally the basis for the 'just, quick, and cheap' resolution of the dispute. If there is any deviation from the usual directions, the practitioner should inform the Court of the facts which provide the basis for not applying the usual directions, and how the directions sought achieve the interests of the parties.

PROCEDURE FOR REGISTRAR'S DIRECTIONS HEARINGS

The Registrar will usually deal with matters by consent first and, where the parties do not agree upon the directions sought, will then hear matters in the order that they are listed.

The Registrar's list is usually broken up in the following manner:

- Delivery of judgments (on behalf of Commissioners of the Court);
- Return of subpoenas and notices to produce;
- Directions hearings (with residential development appeals being heard first); and
- Notices of motion.

Directions hearings commence daily from Tuesday to Friday at 9:00am before the Registrar on Level 1 of the Court.

16 www.lec.justice.nsw.gov.au/Pages/court_lists/court_lists.aspx

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

In Class 1 development matters (except for those appeals concerning residential development pursuant to s 34AA of the *Land and Environment Court Act 1979*), the matter is expected to be set down for a conciliation conference at the first directions hearing, unless the parties have a reason otherwise. If the matter is to be listed for a conciliation or hearing, a Hearing Information Sheet[17] should be completed by the parties. This form identifies, amongst other things:

- the issues to be argued;
- an estimation of how long the case will take; and
- how many witnesses are to be called, their names and their field of expertise.

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

- (for non-residential development appeals) whether the matter is appropriate for a conciliation conference pursuant to s 34 of the *Land and Environment Court Act 1979*;[18]
- whether the parties wish to raise an issue of fact or law that it contends precludes the grant of consent or approval to the application;
- whether the matter is suitable for mediation; and
- the issues requiring expert evidence and the reasons (if any) why a Parties' Single Expert (previously known as a Court Appointed Expert) should not be engaged by the parties for this purpose.

At the first directions hearing, if the parties are not ready to list the matter for conciliation or hearing, they may mutually agree to the case being stood over to another directions hearing, or the Registrar may nominate a further directions hearing date. However, the Registrar has the discretion as to whether to grant such an adjournment and the party seeking the adjournment needs to satisfy the Court why it is in the parties' interests.

An Online Court request may be lodged in respect of any matters that remain outstanding following a directions hearing, such as the provision of a Hearing Information Sheet or the specific details and dates for the filing and service of Joint Expert Reports.

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

Hand up the SMO to the Registrar. Variations to the usual directions should be noted to the Court, with an explanation as to why it assists in the 'just, quick and cheap' res-

17 Practice Note – Class 1 Development Appeals (3 April 2018), Schedule F.
18 Practice Note – Class 1 Development Appeals (3 April 2018), at page 7.

olution of the matter.

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

Other important things to remember at the directions hearing:

- bring a copy of the relevant Practice Notes;
- have the file or all the relevant documents/correspondence on hand;
- bring your mobile phone and relevant contact numbers, in case you need instructions or need to confirm the availability of barristers and/or experts. Always turn your phone to silent before entering the courtroom;
- have a pen and a paper ready to record the Registrar's directions;
- dress in attire appropriate for Court;
- always bow to the Registrar when entering and leaving the courtroom;
- never bring food or drink into the Courtroom other than in your bag;
- never place your bag or drink bottle on the bar table;
- ensure that you have sufficient knowledge of the matter to assist the Court in making all the necessary directions and always have short minutes of order prepared;
- if you are the last person at the bar table, always remain seated until you have been excused by the Registrar and always ensure that someone is at the bar table when the Registrar enters the Court; and
- when within the precincts of the Court, keep your voice low so as not to disturb any Court proceedings – the Court has meeting rooms on various floors which may be in use.

DIRECTIONS HEARINGS BY TELEPHONE

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

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

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

Sometimes documents must be sent to the Court prior to the directions hearing e.g. affidavits, Hearing Information Sheets. These can be provided to the Court either in person at the Court Registry or, as is becoming more common, via the Online Registry (particularly for documents such as affidavits that must be filed).

Further information on the telephone hearing procedures and telephone numbers are

available on the Court's website.[19]

PROCEDURE FOR DIRECTIONS BEFORE THE LIST JUDGE

The procedure for directions hearings before the List Judge is largely the same as that before the Registrar.

Usually, the matters before the List Judge are split into their respective classes and given a 'not before' time.

Matters are usually dealt with in order but contentious matters, including where a direction or order will be subject to long argument, may be referred to the Duty Judge or stood down in the list. The typical procedure for Duty Judge matters is addressed in Chapter 6: Interlocutory proceedings.

Land valuation and compulsory acquisition matters in the Court's Class 3 jurisdiction are heard in a list on Friday.

ONLINE COURT REQUESTS IN PLACE OF DIRECTIONS HEARINGS

As discussed in Chapter 2: Preparing for Court, litigants may elect to make an appearance via an Online Court request if they find this more convenient than appearing in Court. By becoming a registered user of the Online Court and Registry, parties will be able to participate in directions hearings on the internet, as well as receive and upload documents to the Court. The Court generally only makes directions through the Online Court where the directions are not in dispute between the parties, however in certain circumstances it may be possible to conduct disputed directions hearings via this platform.

Litigants may wish to attach to their Online Court request any supporting documentation for the directions hearing, e.g. notice of appearance, SOFAC and Hearing Information Form. This can be done through the Online Court request system.

Litigants should conduct themselves in Online Court correspondence in a manner equivalent to that in an actual courtroom, and for the sake of clarity, a formal style should be maintained (in particular, abbreviations should not be used). Further, the parties should set out whether the Online Court communication is by consent. Where the communication is not by consent, the communication should set out the views or position of each party.

The Registrar may require attendance of the litigants at an actual Court directions hearing at any time, particularly where there is a dispute as to the directions sought.

Further information on Online Court requests can be found in Chapter 3: Online Court.

19 www.lec.justice.nsw.gov.au/Documents/ecourt_usermanual.pdf

CHAPTER 5: ALTERNATIVE DISPUTE RESOLUTION

The Court offers a range of alternative methods for resolving disputes. This is an alternative to a proceeding determined by an adjudicated hearing before a Judge or a Commissioner. The Court offers the following alternative dispute resolution (also known as *ADR*) methods:

- conciliation;
- mediation;
- neutral evaluation; and
- referral to a referee.

CONCILIATION AND SECTION 34 CONFERENCES

The most common form of conciliation in the Court are commonly known as 'section 34 conferences' or 'section 34AA conferences'.

SECTION 34 CONFERENCES

Section 34 of the *Land and Environment Court Act 1979* provides for conciliation conferences between parties in proceedings in Class 1, 2 or 3 of the Court's jurisdiction (see Chapter 1 for a description of the Classes).

Section 34 conferences provide for:

> *a combined or hybrid dispute resolution process involving first, conciliation and then, if*

the parties agree, adjudication. The conciliation involves a Commissioner with technical expertise on issues relevant to the case acting as a conciliator in a conference between the parties. The conciliator facilitates negotiation between the parties with a view to their achieving agreement as to the resolution of the dispute.

If the parties are able to reach agreement, the conciliator, being a Commissioner of the Court, is able to dispose of the proceedings in accordance with the parties' agreement. Alternatively, even if the parties are not able to decide the substantive outcome of the dispute, they can nevertheless agree to the Commissioner adjudicating and disposing of the proceedings.

If the parties are not able to agree either about the substantive outcome or that the Commissioner should dispose of the proceedings, the proceedings are referred back to the Court for the purpose of being fixed for a hearing before another Commissioner. In that event, the conciliation Commissioner makes a written report to the Court setting out that fact as well as stating the Commissioner's views as to the issues in dispute between the parties to the proceedings. This is still a useful outcome, as it scopes the issues and often will result in the proceedings being able to be heard and determined expeditiously, in less time and with less cost. [20]

The Court will often encourage parties to engage in a section 34 conference, but the process is not mandatory unless the proceedings are a type to which section 34AA of the *Land and Environment Court Act 1979* applies (see below).

A policy about section 34 conferences can be found in the *Practice and Procedure* section of the Court's website.[21] This policy makes some important points in relation to the 'general requirements' for section 34 conferences and what happens 'if consensus is not reached' (see below).

The Court has also issued a direction about the provision of documents for conciliation conferences and mediations. This direction can be found in the *Practice and Procedure* section of the Court's website.[22]

GENERAL REQUIREMENTS

The Court's Practice Notes encourage parties to consider using section 34 conferences to resolve disputes or narrow the scope of issues in dispute. The parties should properly prepare for each conference with this purpose in mind. Parties should not attend any conference assuming that it is 'preliminary' to the hearing or that the conference may be adjourned due to inadequate preparation and/or instructions, as this will increase costs.

20 Chief Judge Preston, *'The Land and Environment Court of NSW: Moving Towards a Multi-Door Court House – Part II'* (2008) 19 Australasian Dispute Resolution Journal 72, 14.

21 www.lec.justice.nsw.gov.au/Documents/Policies/Conciliation%20Conference%20Policy.pdf

22 www.lec.justice.nsw.gov.au/Documents/documents for conciliation conference or a mediation.doc

The Court also expects all parties to be prepared and to have sufficient instructions and authority to engage in meaningful conciliation at the conference whether or not they agree to the Commissioner resolving the dispute if consensus is not reached.

The Court's policy highlights other practical considerations of the conciliation conference process that can assist parties in preparing for a conciliation conference, such as providing full access to the relevant properties.

It is the duty of each party to proceedings to participate, in good faith, at the conciliation conference.[23] Further, the parties should note that matters discussed at section 34 conferences are, unless otherwise expressly agreed to, dealt with on a 'without prejudice' basis, meaning that evidence of such discussions cannot be relied upon at the final hearing (should the matter not resolve at the section 34 conference).

WHAT IF CONSENSUS IS NOT REACHED?

The Court does not expect parties in every matter to agree to the Commissioner disposing of the proceedings if consensus is not reached. However, the Court encourages parties to give serious consideration to this option, as it provides a potentially quick, cost effective and proportionate option for dispute resolution. Accordingly, legal practitioners and parties should consider this option before the first directions hearing and be able to inform the Court about their respective positions. If the parties agree to this course, then they should ensure that they have available draft SMO available at the directions hearing appropriate to enable the conference to proceed in the agreed manner. In appropriate matters this would include ensuring that draft conditions of development consent are available before the conference commences. It is the parties' responsibility to select and amend as appropriate the usual directions in the relevant Practice Note to achieve the agreed purpose.

If the parties do not reach an agreement after a conciliation conference, then the Commissioner will terminate it and, if the parties consent, determine the matter with the parties' consent.[24] The parties have a discretion as to whether to consent to the Commissioner determining the matter. If the parties provide their consent, the Commissioner may determine the matter by considering what has occurred in the conciliation conference (if the parties agree) or hold a hearing forthwith or a later date.

ATTENDANCE AT THE CONFERENCE

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

23 *Land and Environment Court Act 1979* s 34(1A).
24 *Land and Environment Court Act 1979* s 34(4)(b).

who have provided evidence for the proceedings should be available at the conference, unless excused by the Court.

People who object to the proposed development may also attend section 34 conferences. Although objectors are commonly given the opportunity to speak in the initial phase of these conferences, they do not participate in the next phase of the conference where only the parties negotiate, unless they have been joined as a party to the proceedings (such as under s 8.15(2) of the *Environmental Planning and Assessment Act 1979*.

MANDATORY CONCILIATION AND ARBITRATION – SECTION 34AA

Section 34AA of the *Land and Environment Court Act 1979* prescribes, in certain circumstances that:

- a conciliation conference *must* occur between the parties and their representatives, with or without their consent; and,
- if no agreement is reached, the Commissioner who presided over the conciliation conference *must* terminate the conciliation conference and dispose of the proceedings, unless the Court orders otherwise.

The matter then returns to the Court and is the subject of a contested hearing. For further information on hearings in the Court, see Chapter 7: The Hearing.

Broadly speaking, this mandatory conciliation conference and arbitration process applies to Class 1 proceedings concerning development applications, or modifications to development consents for:

- detached single dwellings;
- dual occupancies (including subdivisions);
- alterations or additions to such dwellings or dual occupancies; and
- developments of a kind prescribed in the Regulation.

The Court may also order section 34AA conferences in other cases, either at the request of a party to the proceedings or of its own motion.

MEDIATION

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

Mediation is sometimes undertaken in accordance with Part 4 of the *Civil Procedure Act 2005* and is available for all proceedings in Classes 1, 2, 3, 4 and 8 of the Court's jurisdiction (see Chapter 1 above for a description of the Classes).

The Court may refer proceedings (or any part of proceedings) for mediation with a mediator who is either agreed to by the parties or otherwise appointed by the Court. Mediation may be conducted internally by the Registrar, or the Assistant Registrar, or

a Commissioner who is an accredited as a mediator. Parties may also, by agreement, choose to have the dispute mediated by an external court-appointed mediator. Anything said or done during mediation is privileged, and cannot be taken into account in a hearing if the matter later goes to Court, unless the parties agree otherwise.

It is more common, particularly in Class 1 proceedings, for a matter to proceed straight to a s34 or s34AA conference without a mediation being held.

NEUTRAL EVALUATION

In the neutral evaluation process, an impartial evaluator is engaged to seek to identify and reduce issues of fact and law in a dispute. The evaluator assesses the strengths and weaknesses of each party's case and may provide an opinion on the likely outcome of the proceedings, including likely findings of liability or award of damages. The neutral evaluator's opinion is not binding on the parties. The Court may refer the dispute to neutral evaluation is available for proceedings in Classes 1, 2, 3, 4 and 8 matters, with or without the parties' consent of the Court's jurisdiction. Neutral evaluation is conducted by either a Commissioner or an external evaluator agreed by the parties. It is the duty of each party to proceedings to participate, in good faith, at the neutral evaluation.[25]

The costs of the neutral evaluation are payable either in accordance with a Court order nominating each parties' costs or by agreement between the parties.[26]

REFERRAL TO REFEREE

The Court may refer proceedings, or any question arising in proceedings, to a person (**referee**) to inquire into the matter and report back to the Court.

A referral to a referee is available for proceedings in Classes 1, 2, 3, 4 and 8 of the Court's jurisdiction.[27]

The Court may also direct an inquiry or report on any issue or matter in relation to Class 3 proceedings, to be made by a single Commissioner.[28]

FURTHER INFORMATION

For more information on alternative dispute resolution in the Court see the alternative dispute resolution section of the Court's website, titled *Resolving Disputes*, and speeches and papers by the Chief Judge.[29]

25 *Land and Environment Court Rules 2007* r 6.2 (4).
26 *Land and Environment Court Rules 2007* r 6.2 (5).
27 *Uniform Civil Procedure Rules 2005* Part 30, Division 3.
28 *Land and Environment Court Act 1979* s 35.
29 www.lec.justice.nsw.gov.au/Pages/publications/speeches_papers.aspx#Justice_Preston%2c_Chi

CHAPTER 6: INTERLOCUTORY PROCEEDINGS

Prior to the final hearing, the Registrar may direct that the matter be referred to the Duty Judge. Depending on the urgency of interlocutory matters, they can be listed at very short notice, or immediately if necessary. Interlocutory is a legal term which can refer to an order, sentence, decree, or judgment, given in an intermediate stage between the commencement and termination of a cause of action, used to provide a temporary or provisional decision on an issue.

INTERLOCUTORY INJUNCTIONS

An injunction is an order made by the Court that operates to prevent a person from doing something (a prohibitory injunction) or compels them to do something (a mandatory injunction).

An application for an interlocutory injunction seeks to preserve the status quo until the determination of the hearing for final relief. You will need to commence proceedings by way of Summons or a Notice of Motion. Usually, the applicant for the motion will need to give an undertaking as to damages.[30] This means that the applicant will be required by the Court to submit to any order that it may consider to be reasonable to compensate any individual (not necessarily the other party or parties to the proceedings) affected by the interlocutory application in the event that the applicant is unsuccessful in the proceedings. This measure exists to protect an innocent party (or third party) from

30 r 25.8 UCPR.

having to stop carrying out an activity which may cause the individual to suffer quantifiable loss, such as builder's delay fees for the construction of a building the subject of a prohibitory injunction. An undertaking as to damages may not be required if the proceedings are brought in the public interest.[31]

The respondent to an interlocutory application may be able to seek an order for security for costs if the Court can be satisfied that the applicant may not be able to pay the respondent's legal costs.[32] Security for costs is not required in judicial review proceedings, except in exceptional circumstances.[33] Security for costs may not be required in public interest proceedings.[34]

The Urgent Applications Practice Note on the Court's website sets out the process to follow in filing for injunctive relief.[35] Usually an application will be made before the Duty Judge in Court.

The Urgent Applications Practice Note sets out the items which you must have prepared before making contact with the Court, being:

- the name of the applicant (i.e. you);
- the name of the counsel or solicitor who is to make the application;
- the nature of the application;
- the degree of urgency; and
- contact telephone numbers for the persons involved in the application.

As is the case in all Court proceedings, careful consideration must be given before applying for an interlocutory injunction. If you are unsuccessful, in addition to the undertaking as to damages, you may be required to pay:

- the legal costs of the other parties;
- the costs that might arise from the injunction and any variation to the injunction; and
- the costs incurred in having any eventual costs orders made by the Court sent for assessment by a costs assessor.

JOINDER APPLICATIONS

An application to join a person as a party to Class 1 proceedings (such as an objector)[36] is to be brought as an interlocutory proceeding. It is important that if you are considering making an interlocutory application to be joined to existing proceedings, such as

31 *Land and Environment Court Rules 2007* r 4.2(3).
32 r 42.21 UCPR.
33 r 59.11 UCPR.
34 *Land and Environment Court Rules 2007* r 4.2(2). .
35 *Practice Note – Urgent Applications* (11 May 2015).
36 *Environmental Planning and Assessment Act 1979* s 8.15(2) for joinder to proceedings under the Environmental Planning and Assessment Act 1979; Uniform Civil Procure Rules 2005 r 6.27 for joinder to other proceedings.

on the basis of protecting your interest that may not be protected if the matter proceeds between the parties without your involvement, that you confirm that the relief that you seek is available to you as a remedy.

The *Uniform Civil Procedure Rules 2005* (**UCPR**) contain the relevant powers for making a joinder application.[37] Further, you may have the ability to be heard as if a party to proceedings due to the Court's power concerning rules of evidence found in sections 38 of the *Land and Environment Court Act 1979*.

DUTY JUDGE

The Duty Judge is a position rotated on a monthly basis amongst the Judges of the Court. Generally the Duty Judge deals only with urgent applications to the Court. For example, the Duty Judge determines notices of motion seeking interlocutory relief, such as injunctions or applications to be joined as a party to a proceeding. In addition, a Duty Judge hears consent orders, mentions and other urgent or short matters (less than five minutes). The Duty Judge sits daily at 9.30am.

Urgent matters typically involve one party seeking interlocutory relief to prevent works proceeding before, for instance, a Class 4 Judicial Review challenge is heard, or to stop works being carried out in contravention of a development consent. Urgent applications are governed by the Court's Practice Note for Urgent Applications.

Consent orders, mentions and other short matters may be dealt with by the Duty Judge where, for instance, parties are seeking relief or orders that cannot be made by a Registrar.

Prior to the commencement of a Class 5 matter, the Duty Judge hears the prosecutor's oral application for the summons claiming an order under s 246(1) of the Criminal Procedure Act 1986 to be heard before a Judge. Usually this application is dealt with in the Duty Judge's chambers with the legal representative of the prosecutor in attendance.

Before appearing before the Duty Judge make sure you have prepared draft short minutes of order to hand up to the Judge which articulates the orders you want the Court to make. Junior lawyers should make sure that they have also obtained sufficient instructions from their client e.g. instructions about any undertakings as to damages.

Unlike the List Judge, the Duty Judge does not determine pleas.

37 Division 5 of Part 6 of UCPR

CHAPTER 7: THE HEARING

EVIDENCE AND DOCUMENTATION

Prior to the commencement of the hearing, all the evidence should be filed with the Court and served on all parties. The timetable for the filing and serving of evidence is normally set down by the Court at the first directions hearing of a matter. Practice Direction No 2 of 2005 details how electronic files and documents are to be prepared for use in the Court; for more details on electronic filing, refer to Chapter 3 of this Guide.

Prior to the final hearing of the matter, the Court will convene a directions hearing which all parties must attend. A directions hearing allows the parties to identify the number and types of expert witnesses they wish to call and seek directions from the Court to enable them to call those expert witnesses and allows the Court to determine how long should be allocated to the hearing.

Routine directions of the Court will include orders such as:

- A date by which all parties need to file and serve their Statements of Facts and Contentions;
- Hearing information sheets (for Class 1 proceedings) outlining the issues in the matter and the related expert/s;
- Seeking leave of the Court to adduce expert evidence from relevant experts[38] (noting that expert evidence cannot be called if leave is not granted by the Court);

38 R 31.19 UCPR

- How joint expert evidence reports are to be produced; and
- The timetable leading up to and including conciliation conferences (if appropriate for the proceedings) and the final hearing, including duration of hearing.

CRIMINAL MATTERS

As discussed in Chapter 14, other rules apply in criminal matters in addition to the *Land and Environment Court Act 1979* and the *Land and Environment Court Rules 2007*. In Class 5 proceedings, Chapter 4 Part 5 of the *Criminal Procedure Act 1986* applies, including the case management provisions in Division 2A requiring the prosecutor and defendant to make pre-trial disclosures. Further, certain provisions of the *Supreme Court Rules 1970* and UCPR apply to matters in Classes 5 to 7.

ON-SITE HEARINGS AND SITE INSPECTIONS

This section relates specifically to merits appeals (Classes 1 to 3).

On-site hearings

Certain merits appeal matters can be heard on-site and dealt with under section 34B of the *Land and Environment Court Act 1979*. For example, the Registrar has the power to determine that the following Class 1 development appeals are to be dealt with as on-site hearings:

- where the proposed development has an estimated value that is less than half the median sale price for dwellings in the local government area;
- the proposed development will have little or no impact beyond neighbouring properties; and
- the proposed development does not involve any significant issue of public interest beyond any impact on neighbouring properties.

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

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

Filing and service

The NSW Online Registry is an approved electronic case management system for the purpose of filing documents in the Court. Online filing is detailed in Chapter 3: Online Court.

Site inspections

Other matters can be heard by way of a court hearing and dealt with under section 34C of the *Land and Environment Court Act 1979*. Before disposing of a court hearing mat-

ter, the Court must make an inspection of the site of the proposed development, unless:

- the parties agree to dispense with an inspection; or
- the Court considers that an inspection is unnecessary.[39]

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

Parties may want to agree on an appropriate meeting place for the site inspection, and consider providing the Judge's Associate or the Commissioner with a mobile phone number so that they are contactable in case of delay, or if alternative arrangements need to be made.

To ensure that Court time is efficiently utilised, the parties may provide to the Court an agreed itinerary for a site inspection, identifying the order in which relevant sites or areas of a site are to be visited and the time this will take. The number of people attending a site inspection should be kept to a minimum. In addition to clients and their lawyers, only those experts who will be of direct assistance to the Court should be invited to attend. It should also be made known to those in attendance that only the lawyers of the parties should directly address the Judge or Commissioner during the inspection.

Where to go?

Unless otherwise directed, hearings usually commence at 9:30am or 10am on the first day, regardless of whether the hearing is 'on-site', there is a site inspection, or the matter is to be heard in a courtroom.

The Court's website contains the daily Court list (uploaded the afternoon before) for the name of the presiding judicial officer, the courtroom number and the time of commencement of the hearing. This information is also contained in the daily Court list posted outside the Registry on level 4, the ground floor, and outside each of the courtrooms in the building. Note that courtrooms are numbered by floor, e.g. Courtroom 5A is on the 5th floor.

LIST OF AUTHORITIES

Merits hearings

In hearings on the merits (Class 1 to 3) it is not common practice for parties to rely on case law as the issues normally relate to questions of fact rather than questions of law. However, it is common practice for parties to file and serve a list of the case law authorities, if they intend to rely on them during a hearing.

39 *Land and Environment Court Act 1979*, s 34D

Commissioners in previous cases may have outlined relevant principles for determining questions of fact. Since 2003, all Commissioners' decisions have been published and are available on the Court's website. Accordingly, parties can refer to principles made by Commissioners on previous occasions (for further details see Chapter 11: Class 1 Proceedings).

Other hearings

In Class 4 or 5 proceedings, parties are required to provide a list of authorities and legislation to the trial Judge the day before the hearing.

Reported and unreported judgments

Judges and Commissioners can access commonly used reports such as *Local Government and Environmental Reports of Australia* (**LGERA**), *NSW Law Reports* (**NSWLR**),[40] *Commonwealth Law Reports* (**CLR**), *Australian Criminal Reports* (**ACrimR**), *Australian Law Reports* (**ALR**), *Federal Court Reports* (**FCR**), *Federal Law Reports* (**FLR**), and the leading Victorian, South Australian, English and New Zealand reports.

Copies of unreported judgments and superseded legislation or instruments must be provided to the Court. Cases from more obscure reports should also be provided. It is court etiquette to serve copies of authorities on the other parties.

Citation of authorities

The following points should be kept in mind when citing authorities:

- The authorised report of a judgment should be cited if practicable, that is, from the CLR, FCR, or NSWLR.
- Electronic citations should only be provided if the case is not reported at all.
- Refer to relevant page and paragraph numbers, for example *Hutchison 3G Australia Pty Ltd v Waverley Council* (2002) 123 LGERA 75 at 83 [40];
- draw the Court's attention to any relevant authority not cited by an opponent which is adverse to the case being advanced; and
- the proposition of law which a case demonstrates and the parts of the judgment supporting that proposition should be stated. If more than one case is cited in support of a proposition, the reason for taking that course should be identified.

Refer to the *Australian Guide to Legal Citation* for further guidance.[41]

40 Previous authorised reports were known as the NSW Reports and NSW State Reports
41 www.law.unimelb.edu.au/mulr/aglc

WHAT HAPPENS IN THE COURTROOM?

Prior to the hearing

The applicant/prosecutor generally sits on the left side of the bar table, facing the Court.

Before the judicial officer enters the courtroom, appearances should be recorded on the appearance sheet located on the bar table. The Court officer will give copies of the appearance sheet to the Court monitors, the judicial officer and their Tipstaff/Associate.

When all the parties are present and ready to proceed, the Court officer informs the judicial officer.

As in other jurisdictions, advocates stand before the judicial officer enters the room, bow as a sign of respect to the Court and remain standing until the judicial officer sits down. The case will then be called and the parties announce their appearance.

DURING THE HEARING

Generally, the applicant/prosecutor opens their case first, except in merits hearings where a council is the respondent. The rationale for this exception is that the council knows the most about the case in terms of its planning instruments, codes and policies and the actions it has taken as the consent authority.

ADJOURNMENT OF THE HEARING

When proceedings are adjourned, the process of standing and bowing is repeated.

In the Friday list of mentions and directions hearings, it is a sign of respect not to leave the bar table 'vacant' while a judicial officer is sitting at the bench. The next advocate should be ready to sit down at the bar table before the previous person leaves. If the judicial officer is still sitting when the last advocate has completed their matter, the advocate should remain seated until they are excused by the Court, or once the judicial officer has vacated the courtroom.

COMMISSIONERS AND JUDGES – DIFFERENCES DURING THE HEARINGS

Merits appeals

Commissioners generally hear merits appeals. However, Judges may also hear merits appeals if the merits appeal relates to a significant development or raise a question of law. This is determined at the Chief Judge's discretion. In some complex cases, such as valuations or compulsory acquisitions, a Commissioner may sit with a Judge to provide additional technical expertise. Two Commissioners (or one if the Chief Judge directs)

are required to sit with a Judge in Aboriginal land rights matters.[42]

In merits appeals the Court places itself in the shoes of the original decision-maker, taking into account all relevant considerations. The Court can therefore 'remake' the decision on the merits of the evidence before the Court. This is called a hearing *de novo*.

Parties need not be legally represented (but usually are). While parties are not required to stand to address a Commissioner, this has become usual practice out of courtesy. A Commissioner is addressed as 'Commissioner' or 'Senior Commissioner'.

The *Land and Environment Court Act 1979* requires that merits appeals be conducted with as little formality and technicality as possible so as to resolve all issues in dispute expeditiously.[43] Such proceedings are not governed by the rules of evidence, although some of the underlying principles are nevertheless relevant. For instance, while hearsay evidence is admissible it is usually given less weight and considered less relevant to the decision-making process than first hand evidence.

In merits appeals generally, the Court may adopt a flexible procedural approach if the circumstances of the case require it. For example, in the s 8.7 appeal case of *Lanlite Pty Ltd v North Sydney Municipal Council*[44], Justice Talbot at the request of the parties, heard oral evidence of eight expert witnesses whilst viewing the site of the proposed development.

Proceedings before a Commissioner may be referred or removed for hearing and determination by a Judge.[45]

OTHER MATTERS

Judges alone hear matters in Classes 4 to 8. Formal rules of evidence and practice and procedure apply in these proceedings.

Parties and/or their advocates must stand to address a Judge. When addressing a Judge directly, use 'Your Honour'. 'Her Honour' or 'His Honour' is preferred in the third person. 'Judge' or 'Chief Judge' can be used in both first and third person. Where using the Judge's name it's prefixed with Justice, including the Chief Judge (in writing he would be [The Hon.] Justice Preston, Chief Judge). He would not be called Chief Justice.

The Court is a superior court of record. The Judges have the powers of Supreme Court Judges and can:

- make declarations;

42 *Land and Environment Court Act 1979* s 37(2). Note: The Chief Judge may direct that only one Commissioner is required to sit with a Judge.

43 *Land and Environment Court Act 1979* s 38.

44 (1993) 79 LGERA 230

45 *Land and Environment Court Act 1979* s 36(5).

- grant injunctions restraining the continuation of certain acts;
- conduct judicial review;
- hear summary criminal proceedings; and
- enforce its own orders in cases of contempt.

WRITTEN SUBMISSIONS

Written submissions are invaluable in clarifying a party's arguments and can supplement oral submissions. They should focus on what the real issues are. If facts or areas of law are accepted by both sides, they do not need to be canvassed in detail and can be touched on briefly before reaching the issues in dispute.

Cite the most authoritative cases. Often one case will do if the point is uncontentious.

The Practice Notes may require parties to file and serve written submissions in hard copy and/or in electronic form. Providing Judges and Commissioners with written submissions is helpful both to the Court and your case even where the Practice Notes are silent.

LITIGANTS WITHOUT LEGAL REPRESENTATION

A party may appear without a lawyer or an agent,[46] but where an agent is used, leave of the Court is required. Refer to Chapter 18: Self-represented litigants for more information.

ROBING

The Court Attire Policy is available on the Court's website. Barristers must robe (without wigs) in Classes 4 to 8.

Robing is not required for mentions or appearing before the List Judge. It can be helpful to check whether the Judge is robing where parties are unsure, particularly when a Judge is sitting with a Commissioner as he/she may elect not to robe.

In ceremonial sittings, for example when new Judges are sworn in, robing is required.

46 *Land and Environment Court Act 1979* s 63; Land and Environment Court Rules 2007 r 7.7.

CHAPTER 8: COSTS

Costs are at the Court's discretion, subject to any applicable rules or legislation including the *Land and Environment Court Act 1979* and *Land and Environment Court Rules 2007*. Costs are awarded to compensate a successful party, not to penalise the losing party. In civil proceedings, the discretion is also subject to the *Civil Procedure Act 2005* (**CP Act**).[47] The usual rule is that costs follow the event unless the Court considers another order should be made.[48] In criminal proceedings, this discretion is subject to the *Criminal Procedure Act 1985*, or the *Crimes (Appeal and Review) Act 2001*.

CLASSES 1, 2 AND 3

In Class 1, 2 or 3 proceedings, the usual rule mentioned above may not apply.[49] Costs orders must not be made in these (other than certain Class 3 proceedings), unless it is 'fair and reasonable' in the circumstances to do so.[50] Examples of the circumstances in which it may be 'fair and reasonable' to award costs are:

- the proceedings involved the determination of a question which finalised the proceedings, before or without a consideration of the merits;
- a party acted unreasonably in the proceedings;
- a party commenced or defended proceedings for an improper purpose; or

47 *Civil Procedure Act 2005* s 98 and Schedule 1.
48 *Uniform Civil Procedure Rules 2005* r 42.1.
49 Ibid Schedule 1
50 *Land and Environment Court Rules 2007* r 3.7(2)

- a party commenced proceedings or maintained a defence which had no reasonable prospects of success.[51]

The listed circumstances may overlap, and a party may rely on more than one of the circumstances. Ultimately what is 'fair and reasonable' will depend on the circumstances of each case.

The Class 3 proceedings to which rule 3.7 applies are identified in sub-rule 3.7(1) of the Court Rules. In other Class 3 proceedings, because the usual rule mentioned above also does not apply, the award of costs is discretionary.

Commissioners do not have the jurisdiction to award costs, other than costs pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*. Costs thrown away are payable by the applicant in class 1 proceedings where the proposal is amended pursuant to cl 55 of the *Environmental Planning and Assessment Regulation 2000* and the amendment is more than minor. Section 8.15(3) costs are not payable for modification applications or matters heard pursuant to s 34AA of the *Land and Environment Court Act 1979*.

Parties seeking costs in certain proceedings before Commissioners should file a notice of motion, with a supporting affidavit. The notice of motion will be heard by either the Registrar or a Judge. Refer to the Practice Notes for more information, including the timeframe for filing such notice.

The most recent decision on costs in the merit review jurisdiction of significant authority is *Community Association DP270253 v Woollahra Municipal Council*[52]. In upholding a decision not to award costs, Barrett JA stated (with whom Emmett and Leeming JJA agreed) that, whilst the invalidity of the impugned condition was due to unreasonableness in a *Wednesbury* sense in an administrative law context, that the conduct to impose the condition and defend the appeal was not so unreasonable for the purposes of r 3.7(2) of the *Land and Environment Court Rules 2007*.

SECTION 56A APPEALS

Costs in s 56A appeals, being those appeals from proceedings in Class 1, 2, 3 and 8 of the Court, are handled differently to the proceedings listed immediately above.[53] In these proceedings, the usual costs order applies, being that the Court will award costs to the successful party unless it appears to the Court that some other order in respect of costs ought to be made in whole or in part.[54]

51 Ibid r 3.7(3)
52 [2015] NSWCA 80
53 *Land and Environment Court Rules 2007* r 3.7(1)
54 *Uniform Civil Procedure Rules* 2005 r 42.1

CLASSES 4 AND 8

As with s 56A appeals the usual rule mentioned above applies in Class 4 or 8 proceedings.[55] The purpose of awarding costs is to compensate the successful party. Therefore, a dispute about costs will often involve an argument over whether and to what extent the party claiming costs has actually succeeded.

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

Where Class 4 proceedings are brought in the public interest, r 4.2(1) of the Rules displaces the usual rule. The Court can decide not to make a costs order against an unsuccessful applicant if satisfied that the proceedings were brought in the public interest. Importantly, the 'public interest' character of the proceedings is not sufficient to depart from the usual rule. Something more is required to constitute special circumstances, such as:

- the proceedings involved no private gain; or
- the proceedings contributed to the proper understanding of the law in question; or
- the basis of the challenge was arguable; or
- the purpose was clearly to protect the environment.[56]

There is no equivalent rule for Class 8 proceedings, so the usual rule applies regardless of whether the proceedings were brought in the public interest.

CLASS 5

The Court's discretion to award costs in Class 5 matters is subject to Part 5 Division 4 of the *Criminal Procedure Act 1986*. 'Costs' refers to those relating to professional expenses and disbursements including witnesses' expenses, not Court costs.[57]

Costs normally follow the event. Where the Court convicts a defendant of an offence or makes an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999*, the Court may order the defendant to pay the costs of the prosecutor.[58] By virtue of the conviction, the defendant may also be liable under the *Criminal Procedure Act 1986* to pay a levy to the Court in addition to any penalty imposed for the offence.[59] The levy is also considered a fine under the *Fines Act 1996*.

55 Land and Environment Court Rules 2007 r 4.1, Civil Procedure Act 2005 Schedule 1, *Uniform Civil Procedure Rules 2005* Schedule 1.

56 Oshlack v Richmond River Council (1998) 193 CLR 72; Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3) (2010) 173 LGERA 280.

57 *Criminal Procedure Act 1986* s 257A.

58 Ibid s 257B.

59 Ibid s 211A.

Section 4 of the *Fines Act 1996* includes all levies imposed by the Court following the conviction of a defendant under the definition of 'fine'. This has implications in cases where payment is not made to the Court within 28 days, as the amount is then referred by the Court on to Revenue NSW.

Where a charge is dismissed or withdrawn, the Court may order the prosecutor to pay costs to the defendant.[60] However where a prosecutor is acting in a public capacity, the defendant must establish that one or more of the circumstances in section 257D(1) of the *Criminal Procedure Act 1986* apply in order to receive costs. For example, that the investigation was conducted in an unreasonable manner.

Also, where a defendant is acquitted or discharged, the Court may grant a certificate under section 2 of the *Costs in Criminal Cases Act 1967* specifying that:

- if the prosecution had the evidence of all the relevant facts before the proceedings were commenced it would not have been reasonable to institute the proceedings; and
- any act or omission of the defendant in contributing to the institution or continuation of the proceedings was reasonable.

Further evidence may be adduced in order to determine whether a certificate should be granted. Where a certificate is granted, a defendant may apply to the Director-General of the Attorney-General's Department for costs from the consolidated fund of costs.

Costs may also be awarded where a matter is adjourned if one party has incurred additional costs as a result of another party's unreasonable conduct or delays. Such costs are to be in a sum agreed between the parties, or if no agreement can be reached, as assessed by a Court-appointed assessor.[61]

CLASSES 6 AND 7

On appeal from a Local Court matter, the Court may make any costs order it thinks just.[62] However where a conviction is set aside and the prosecutor is acting in a public capacity, the power to award costs is limited. The appellant must establish that one or more of the circumstances in s 70(1) of the *Crimes (Appeal and Review) Act 2001* apply. For example, that the investigation was conducted in an unreasonable manner.

Where a sentence has been varied or set aside on appeal in Class 6 proceedings, the Court has generally made orders that parties pay their own costs of the appeal.

Where a defendant is acquitted or discharged, the Court may grant a certificate under s 2 of the *Costs in Criminal Cases Act 1967*.

60 Ibid s 257C.
61 *Criminal Procedure Act 1986* s 257G.
62 *Crimes (Appeal and Review) Act 2001* s 49(4).

CHAPTER 9: APPEALING FROM A DECISION OF THE COURT

APPEALING A COMMISSIONER'S DECISION

Section 56A of the *Land and Environment Court Act 1979* provides a right of appeal from the decision of a Commissioner to a Judge. Such an appeal may only be made in relation to a question of law and must be initiated within 28 days of the order or decision being handed down.[63] A s 56A appeal is commenced by way of a summons[64] and must contain a statement:[65]

- whether the appeal relates to the whole or part only, and what part, of the decision of the Court below;
- what decision the Applicant seeks in place of the decision of the Court below; and
- setting out briefly but specifically the grounds relied on in support of the appeal including, in particular, any grounds on which it is contended that there is an error of law in the decision of the Court below.

The appeal documents must include an affidavit that annexes or exhibits a copy of:[66]

- the reasons for the decision of the Court below, unless the court below has not given, and does not intend to give, written reasons;

63 *Uniform Civil Procedure Rules 2005* r 3 .
64 Ibid Form 84.
65 *Uniform Civil Procedure Rules 2005* r 4.
66 *Uniform Civil Procedure Rules 2005* r 14.

- the transcript of the proceedings in the Court below, unless a transcript cannot be obtained in respect of proceedings of that type; and
- any exhibit, affidavit or other document from the proceedings in the Court below that the Applicant wishes to be considered at the hearing of the appeal or proposed appeal.

APPEALING A REGISTRAR'S DECISION

Rule 49.19 of the UCPR provides review powers to the Court for a Registrar's decision on application by "any party". Case law has determined that the construction of "any party" clearly distinguishes parties to an action from non-parties.[67]

APPEALING A JUDGE'S DECISION

The decision of a Judge in Classes 1, 2 and 3 proceedings may be appealed to the Court of Appeal on a question of law only.[68] Leave from the Court of Appeal is required to appeal against any of the following orders or decisions of the Court:[69]

- a decision on a question of law determined by a Judge pursuant to a reference under section 36(5) of the *Land and Environment Court Act 1979*;
- a decision of a Commissioner or Commissioners made after a Judge's determination referred to in the paragraph above, where the Judge's determination is itself the subject of an appeal to the Supreme Court;
- an order or decision made on an appeal under section 56A of the *Land and Environment Court Act 1979*;
- an interlocutory order or decision;
- an order made with the consent of the parties; and
- an order or decision as to costs.

APPEALING CLASS 4 DECISIONS

Proceedings in Class 4 are able to be appealed to the Court of Appeal.[70] Such an appeal is not limited to questions of law and is, instead, by way of rehearing.[71] However, leave of the Court of Appeal is required for an appeal in relation to an interlocutory order or an order for costs.[72]

67 Quakers Hill SPV Pty Limited v Blacktown City Council [2012] NSWLEC 200
68 *Land and Environment Court Act 1979* ss 56A and 57.
69 *Land and Environment Court Act 1979* s 57(4).
70 *Land and Environment Court Act 1979* s 58.
71 Parramatta City Council v Hale and Ors (1982) 47 LGRA 319 at 338.
72 *Land and Environment Court Act 1979* s 58(3).

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

APPEALING CLASS 5 DECISIONS

In the Court's Class 5 jurisdiction, a party convicted or ordered to pay costs may appeal to the Court of Criminal Appeal against conviction or costs.[73]

An application by the defendant for an appeal should be lodged within 28 days of the Court handing down its decision.[74]

In Class 5 proceedings, only the Crown as prosecutor, may appeal the quashing of an application to proceed.[75] If the prosecutor is the Environment Protection Authority, it may appeal against a sentence imposed by the Court.[76] There is no statutory time limit for a prosecutor wishing to file an appeal against a sentence imposed by a Judge of the Court.

Prior to the completion of Class 5 proceedings, the Judge may, or if requested by the Crown, must, submit any question of law arising at or in reference to the proceedings, to the Court of Criminal Appeal.[77] Such matters are known as 'stated cases'.

73 Criminal Appeal Act 1912 s 5AB.
74 Criminal Appeal Act 1912 s 10.
75 Ibid s 5C.
76 Ibid s 5D(1A).
77 Ibid s 5AE.

CHAPTER 10: JUDGMENTS, ORDERS AND TRANSCRIPTS

A judgment is given at the conclusion of the hearing; it is the Court's statement of the outcome on the matters before the Court. The judgment will state the decision and the orders, for example, the Court might uphold an appeal, or it might dismiss an appeal. The judgment will give reasons for the decision. A judgment will usually outline the facts of the case, discuss the evidence and refer to legislation and case law upon which the decision is based.

At the conclusion of a hearing, parties and the public have various options to obtain a record of the proceedings.

Proceedings in the Court are recorded except for:

- section 34 conferences; and
- on-site hearings (excluding the judgment).

This Chapter sets out the Court's services that offered in relation to obtaining judgments, transcripts and orders made during a hearing.

JUDGMENTS

Judgments of the Court state the reasons for a decision and can be delivered in one of two ways:

- ***ex tempore*** – the decision of the Court is delivered orally at the conclusion of the hearing. An *ex tempore* judgment will be written up later and given to the parties.

Ex tempore judgments are published on the NSW Caselaw website.

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

In accordance with the Court's *Delays in Reserved Judgments Policy*[78] if you become concerned that a reserved judgment has been outstanding for a period in excess of the Court's standard of three months, you may direct a written inquiry to the Chief Judge. The inquiry should include the following details:

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

Judgments delivered by Judges of the Court since 1999 and Commissioners from 2011 can be viewed on the Court's webpage.[79]

Reserved judgments usually appear on the web page the day they are delivered. Decisions of the Court are also available on the Austlii website dating back to 1988.[80]

Parties can view any judgments in their proceedings via the Online Court.

TRANSCRIPTS

A transcript refers to the official written record of what was said during the proceedings.

Audio recordings are taken in Court by Court reporters or sound recorders. These recordings are kept for three years after a court case (for civil cases) and five years (for criminal cases). A party to proceedings or the Court can request that the audio recordings be transcribed by the Reporting Services Branch of the NSW Department of Justice. There is a fee for the transcript that the requesting party needs to pay, which, depending on the length of the hearing, can be quite expensive. The Registrar may also approve a request in writing from a non-party to obtain a copy of the transcript so long as sufficient reasons are provided.

Recordings are not permitted in any court, therefore good note taking may be required.

78 www.lec.justice.nsw.gov.au/Documents/delays_in_reserved_judgments.pdf - 2/11/07.
79 www.lawlink.nsw.gov.au/caselaw/lec.
80 www.austlii.edu.au/au/cases/nsw/NSWlec/.

The requirements and processes for obtaining transcripts varies depending on whether the matter is a civil or criminal matter.

CIVIL MATTERS

For civil matters, a party may request a copy of transcripts directly from the Reporting Services Branch of the NSW Department of Justice. The Court Registry no longer handles these requests.

If a party wishes to obtain a daily transcript of civil proceedings, this request needs to be made prior to the commencement of the hearing. It is no longer the case that a daily transcript will automatically be prepared for the Judge hearing the matter.

The fee for obtaining a transcript depends upon if a party is ordering a "daily" transcript (used to obtain a transcript each day in an ongoing hearing) or a "back" transcript. The current fees are set out on the civil transcript order form, available on the Court's website.

CRIMINAL MATTERS

For criminal matters, the request for a transcript should still be made to the Registry using the transcript order form (which is not the same form used for civil transcripts) available on the Court's web site. The fees for obtaining a transcript are listed on the Court's Schedule of Court Fees.

ORDERS

Judgments of the Court will generally contain orders which specify the decision of the Court. For example, final Court orders might dismiss proceedings or grant specific relief which is being sought such as declare certain conduct to be unauthorised or illegal.

Court orders are binding on the parties to the proceedings.

A judgment or order in the Court is taken to be entered when it is entered into the court's computerised court record system.[81] Sealed orders can be requested via the online court. A filing fee is payable.

81 *Uniform Civil Procedure Rules 2005* r 36.11(2).

CHAPTER 11: CLASS 1 PROCEEDINGS

Class 1 is the most commonly litigated Class in the Court's jurisdiction. This Chapter deals with the practice and procedure of Class 1 proceedings and should be read in conjunction with Chapters 2–10.

CLASS 1 PROCEEDINGS

Class 1 proceedings are appeals on the merits of an administrative decision made by a local council or other body and brought by someone dissatisfied with that decision, known as the applicant. In Class 1 proceedings, the Court stands in the shoes of the original decision-maker and exercises the decision-maker's power.

There are three categories of Class 1 proceedings, each with a separate Practice Note providing further detail about the conduct of the proceedings:

- development appeals – *Class 1 Development Appeals Practice Note* (**Development Appeals Practice Note**);[82]
- residential development appeals – *Class 1 Residential Development Appeals Practice Note* (**Residential Appeals Practice Note**);[83] and
- miscellaneous appeals – *Classes 1, 2 and 3 Miscellaneous Appeals Practice Note* (**Miscellaneous Practice Note**).[84]

The Residential Appeals Practice Note applies to proceedings referred to in s 34AA

82 Land and Environment Court Practice Note – Class 1 Development Appeals, 3 April 2018.
83 Land and Environment Court Practice Note – Class 1 Residential Development Appeals, 3 April 2018.
84 Land and Environment Court Classes 1, 2 and 3 Miscellaneous Appeals Practice Note, 3 April 2018.

(mandatory conciliation and arbitration) of the *Land and Environment Court Act 1979*, that is, proceedings concerning development applications (**DAs**) or modifications to development consents for development for the purposes of, or alterations and additions to, certain residential buildings, mainly detached single dwelling and dual occupancies (including subdivisions).

The Court can also order particular proceedings to be dealt with under s 34AA.

Approximately 65% of the Court's finalised caseload is Class 1 proceedings.[85] The most common Class 1 proceedings are against decisions by local councils to:

- refuse (actual or deemed) to grant development consent;[86] or
- refuse (actual or deemed) to consent to an application to modify a development consent;[87] or
- issue an order for the applicant to do/not do something;[88] or
- refuse to issue a building or subdivision certificate.[89]

Importantly, however, anyone who objects to a development application for development declared as 'designated development' or 'State significant development' may also lodge an appeal.[90] This is known as an 'objector appeal'.

A DA will be deemed to have been refused by a local council if the council has not determined the DA (including those seeking to modify an existing development consent) within:

- 40 days;[91]
- 60 days for designated development and integrated development;[92] or
- 90 days for State significant development.[93]

Neither the day on which a development application is lodged with the consent authority nor the following day are to be taken into consideration in calculating the number of days in any of the assessment periods.[94]

Certain requests for further information made by local council can constitute 'stop the clock' communications that prolong the deemed refusal period.[95]

85 Land and Environment Court, The Land and Environment Court of NSW Annual Review 2017, www.lec.justice.nsw.gov.au/Documents/Annual%20Reviews/2017%20Annual%20Review.pdf

86 *Environmental Planning and Assessment Act 1979* s 8.7.

87 Ibid s 8.9.

88 Ibid s 8.18.

89 Ibid s 8.16.

90 *Environment Planning and Assessment Act 1979* s 8.8.

91 *Environmental Planning and Assessment Act 1979* ss 8.11 and 4.55. Environmental Planning and Assessment Regulation 2000 cll 113(1)(a) and 122A.

92 *Environmental Planning and Assessment Regulation 2000* cl 113(1)(b).

93 *Environmental Planning and Assessment Regulation 2000* cl 113(1)(c).

94 *Environmental Planning and Assessment Regulation 2000* cl 107.

95 *Environmental Planning and Assessment Regulation 2000* cll 109, 110, 112

BEFORE COMMENCING THE APPEAL

Before drafting an application to commence Class 1 proceedings, you need to thoroughly review the file to ensure that the appeal is ready to be commenced, in particular that:

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

If the appeal is against an actual or deemed refusal of a DA by a local council, you will need to ensure that:

- the correct application fee was paid to the council;
- the appropriate documents accompanying the DA were provided to the council,[96] including any written requests to vary a development standard[97];
- you have copies of all the updated material (especially the plans) that have been lodged with the council since the original DA (and supporting information/documentation);
- any procedural requirements which must be satisfied prior to the grant of development consent have occurred, such as public notification or an assessment of the DA by an independent hearing and assessment panel;
- the plans lodged with the DA meet the requirements set out in Schedule A to the Development Appeals Practice Note (or Schedule A to the Residential Appeals Practice Note). This is a requirement of the Court (see below);
- if the appeal is against an actual refusal, you have a copy of the council's notice of determination refusing the DA;
- if the appeal is against a deemed refusal, you have a copy of the invoice for payment of the application fee for the DA; and
- you have copies of all the internal memoranda documentation and images that the council has relied upon or generated as part of its decision-making process (even for a deemed refusal).

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

- the development consent is in operation and has not lapsed; and
- you have a copy of the development consent (known as a notice of determination) and all associated documentation (including plans and accompanying reports).

Further information on lodging a Class 1 application is available on the *Practice and Procedure* section of the Court's website.

96 *Environmental Planning and Assessment Act 1979* s 4.12; Environmental Planning and Assessment Regulation 2000 cl 50 and Schedule 1.

97 *Standard Instrument - Principal Local Environmental Plan*, cl 4.6

THE PLANS

A DA must be lodged with plans and specifications that clearly and adequately depict the proposed development. Depending upon the proposal, plans may be prepared by an architect, engineer, landscape designer and/or land surveyor. Plans are often prepared in consultation with other experts such as a traffic expert, ecologist, arborist, building surveyor, bush fire expert, heritage consultant and/or geotechnical engineer. Plans are normally incorporated as part of any development consent granted by either a consent authority or the Court on appeal. Consequently, it is essential that plans clearly and accurately convey sufficient detail of the proposed development. Note that plans usually scale at A3 or A1 and the correct size should be included with the application to ensure that the dimensions can be read correctly.

ENVIRONMENTAL PLANNING AND ASSESSMENT REGULATION 2000

Schedule 1 item 1 of the Regulation provides a mandatory guide to the information that must be included in a DA and item 2 sets out the documents that must accompany a DA.

Unfortunately, DAs are often submitted to local councils without adequate plans. This deficiency is often the catalyst for refusal of consent and a subsequent appeal to the Court. Plans should also be drawn to an appropriate standard. Plans should also be compared to the Australian Standard *AS 1100.301–2008* Technical and Architectural Drawing for quality purposes.

COMMON PITFALLS ASSOCIATED WITH PLANS

Unfortunately, non-compliance with the Regulation and subsequently the Practice Notes are commonplace. The most common problems to avoid are:

- incorrect north point;
- incorrect plan names and version numbers;
- plans that involve numerous sheets with inconsistent scales;
- plans that do not colour code proposed versus existing approved structures;
- where multi storey developments are proposed, inaccurate plans as between the different levels of the building design;
- adoption of different survey datum or reduced levels (**RL**) as between architectural, engineering (drainage) and landscape plans;
- no correlation between architectural, drainage and landscape plans;
- shadow diagrams that have not taken into account topographic and existing built structures when depicting existing and proposed shadows;
- no RLs on cross sections, elevations, and floor plans depicting existing and proposed RLs at critical points; and
- survey plans that fail to show adequate RLs, all existing buildings including dwellings, sheds, fences and adjacent buildings and spot levels.

THE BENEFIT OF ACCURATE PLANS

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

COMMENCING THE APPEAL

Proceedings may be commenced either in person or by a solicitor acting on behalf of an applicant.

An up-to-date version of the Class 1 application form can be found on the Court's website under *Forms and Fees*.[98]

The following information must be provided in the application under the headings specified in the Court's Form B:

TITLE OF PROCEEDINGS

The applicant to the proceedings must bear the same name/title as the applicant whose name/title appears on the DA originally lodged with the local council. Commonly, the applicant to the proceedings will be the owner of the property for which the DA is sought, but the DA was lodged by the owner's architect, planning consultant or other agent. In such circumstances, a letter of agency should be provided to the Registry at the point of filing which states that the person who lodged the DA consents to the applicant commencing Class 1 proceedings.

The applicant must be a natural person or company, or in some circumstances may be a company director.[99] If the applicant is a company, the Australian company name (**ACN**) should also be supplied.

It is to be noted that the filing fee for an individual is substantially lower than the fee for an incorporated company, and accordingly it is worth balancing the higher exposure to financial risk for an individual against the lower filing fee. This is due to the fact that in the limited circumstances where in Class 1 proceedings the unsuccessful party may be subject to an adverse costs order, an individual may therefore be liable for the successful council's legal fees. For more information on costs in the Court, please see Chapter 8: Costs.

98 www.lec.justice.nsw.gov.au/Pages/forms_fees/forms_fees.aspx.
99 *Uniform Civil Procedure Rules 2005* Pt 7, r 7.1(2).

The respondent must also be a natural person or company, and in many cases will be a local council.[100]

Type of claim

Insert the type of claim from the *Approval of Forms* list available on the Court's website.[101]

The list of claims applicable to Court proceedings is also available at the Court Registry.

Details of application

Include in this section the relevant provisions of the legislation which enables the appeal to be brought, as this more clearly defines for the respondent and the Court what type of proceedings have been commenced. Section 17 of the *Land and Environment Court Act 1979* sets out the relevant Acts under which Class 1 appeals can be commenced.

This section also requires you to detail the relevant cause of action.

For instance, if it is an appeal brought under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* against a local council's actual determination to refuse to grant development consent, then you could state the following:

Appeal against council's determination to refuse to grant development consent for Development Application [Insert development application Number] on [Insert date of Notice of Determination]

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

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

Relevant material

It may also be helpful to annex to the application all the relevant material (e.g. reports, surveys and plans), including any updated or amended material, that was before the local council at the time it made its determination. However, you should always check the requirements on the Court's website prior to lodging your application to ensure that you do not include any superfluous or irrelevant documentation. It is important to list on the application the annexed documents and plans (preferably in a separate Schedule in table form), in order of the date they were prepared.

100 *Local Government Act 1993* (N3weSW) s 220.

101 www.lec.justice.nsw.gov.au/Documents/approval%20under%20s77%20current.pdf

If, for example, you are appealing an Order issued by the council to do/not do something, you will include in your application to the Court a completed Form B, a true copy of council's Order and any other additional or supporting material, such as the council's Notice of Intention to Issue an Order, and any submissions made in response to that notice.

If the appeal is against the council's determination to refuse development consent, the following documents should be included (where relevant):

- the DA lodged with the council (and, in deemed refusal proceedings, a copy of the invoice for the application fee paid to prove the lodgement date);
- plans (architectural, landscape), ensuring that any plans accompanying a residential development appeal application are to satisfy the requirements in Schedule A to the Residential Practice Note;[102]
- stormwater management plans;
- bushfire hazard assessment plan;
- statement of environmental effects;
- Building Sustainability Index (BASIX) or Nationwide House Energy Rating Scheme (NatHERS) certificate;
- all relevant documentation (town planning, acoustic, car parking reports etc) that the Applicant relied upon to support its position as to why the development consent should be granted;
- all relevant material that the council officers have relied upon / prepared as part of their decision-making process (such as town planning, acoustic, car parking and heritage reports prepared by them); and
- the notice of determination.

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

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

You should also confirm the correct filing fees the Court Registry for the lodgement of a Class 1 application. See the *Forms and Fees* section of the Court's website.[103] For proceedings commenced pursuant to council's actual or deemed refusal of a DA pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979*, it is important to note the range of filing fees that are calculated based on the value of the development or

102 NSW Land and Environment Court Practice Note – Class 1 Residential Development Appeals, 3 April 2018 at pages 24.
103 www.lec.justice.nsw.gov.au/Pages/forms_fees/fees/feesschedule.aspx

building *as determined or confirmed by council*. An inaccurate estimate by the individual or company of the value of the development will not be capable of being relied upon to determine the filing fee in such cases.

Note that:

- a local council is considered a 'company' for the purposes of the Court's filing fees; and
- an application must be served within seven days of filing,[104] unless it is a residential development appeal, in which case the application must be served within three working days of filing.[105]

Orders sought

Specify in this section of Form B what orders you wish the Court to make.

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

While of little value to self-represented litigants, it is to be noted that Class 1 proceedings in relation to s 8.18 appeals against council Orders can be easily commenced via the Online Registry. The relative lack of supporting documentation at A3 size (such as plans and drawings) enables an applicant to lodge all required documents and have them electronically sealed in preparation for service upon the respondent without attending the Court Registry.

NOTICE OF APPEARANCE

A respondent must enter an appearance in the proceedings before taking any steps (including appearing at Court).[106] This is done by filing a notice of appearance.

The notice of appearance form is available on the Court's website.[107] This form is self-explanatory and should normally be filed with the Court within 14 days of being served with the Class 1 application.

STATEMENT OF FACTS AND CONTENTIONS

The respondent is required to file and serve a Statement of Facts and Contentions (**SOFAC**) on or before 4:00pm on the third last working day before the first directions hearing listed for the proceedings, unless the appeal is a Class 1 residential development

104 Practice Note – Class 1 Development Appeals, 3 April 2018, para [13].
105 Practice Note – Class 1 Residential Development Appeals, 3 April 2018, para [14].
106 *Uniform Civil Procedure Rules 2005*, r 6.1.
107 Land and Environment Court, Forms (12 January 2015) www.lec.justice.nsw.gov.au/Pages/forms_fees/forms.aspx.

appeal, in which case the SOFAC must be served on or before the *second* last working day,[108] or is an objector appeal.

If the Class 1 appeal is in relation to the granting of consent subject to conditions, the applicant must prepare the SOFAC.[109]

A SOFAC is divided into Part A – Facts, and Part B – Contentions. The Development Appeals Practice Note and the Residential Appeals Practice Note provide considerable detail as to the form and content of the SOFAC.

The SOFAC is usually prepared by an authorised officer of the local council (most commonly, a town planner who assessed the DA or their immediate supervisor).

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

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

- zoning extract map (coloured version);
- aerial photo of the site;
- resident map highlighting those who were notified of the proposal; and
- photographs of the existing site.

Part B of the SOFAC sets out the key issues in dispute between the parties, according to the party drafting the document.

Before preparing the SOFAC

Regardless of which side is preparing the SOFAC, prior to its preparation, parties should answer the following questions:

108 Practice Note – Class 1 Residential Development Appeals, 3 April 2018, para [18].

109 Practice Note – Class 1 Residential Development Appeals, 3 April 2018, para [19]; Practice Note – Class 1 Development Appeals, 3 April 2018, para [19].

What are the main issues in dispute?	Accurately identifying planning issues allows the other party and the Court to focus on the issues truly in dispute leading to a resolution of the proceedings in a costly and time effective manner. Parties will not get any bonus points for coming up with more (irrelevant) contentions. One good contention is enough to knock out an unworthy proposal, five irrelevant ones will not. Have a look at the relevant planning principles[110] (as well as the council's notice of determination in the case of an actual refusal) to assist with identifying the potential contentions.
Can the issue be supported with authority?	Does the proposed contention refer to a requirement in a State environmental planning policy (**SEPP**), regional or local environmental plan (**LEP**), or council development control plan (**DCP**) or policy?
Can the issue be resolved by way of a condition of development consent?	Are any of the identified issues resolvable by way of an appropriate condition of development consent?[111] For example, if a local council raises landscaping as a contention but only has concerns with how the landscape is being treated rather than the area set aside for landscaping, this is an issue that is resolvable by a condition of development consent and is not a planning issue justifying refusal of the application. This scenario can be compared to the situation where there is an issue with the area set aside for landscaping which constitutes a legitimate planning problem that can be dealt with in an appeal.
Can the issue be resolved by providing further information?	If the applicant provided further information in support of its application, would that lead to the resolution of any issues? If so, create a list of the further information that should be provided.

PREPARING A SOFAC

As the purpose of the SOFAC is to succinctly articulate the key issues in dispute so that the other party knows the case it has to meet, ensure you comply with the requirements of Schedules B and C to the Development Appeals Practice Note.

In addition, whichever party is preparing the SOFAC, ensure that:

- there is no duplication of the issues;
- the issues are listed in order of decreasing importance; and

110 www.lec.justice.nsw.gov.au/Pages/practice_procedure/principles/planning_principles.aspx

111 Practice Note – Class 1 Development Appeals, 3 April 2018, Schedule B, 6(h); Practice Note – Class 1 Residential Development Appeals, 3 April 2018 at pages 3, 19, and Schedule B.

- the issues are written in plain English and explicitly state what the contentions are (for example, the proposed building height is five storeys, yet the council's controls specify a three-storey maximum).

Where one of the issues purely relates to a question of law, it may be possible to have a preliminary hearing on that issue alone, to avoid incurring unnecessary costs arguing the merits[112]. Assess whether there will be a true saving of time and expense, which would warrant the departure from the general presumption that all issues should be heard at the same time. The procedure for having a question of law heard in advance of the hearing of the merits of the development appeal is specified in paragraphs 76-78 of the Development Appeals Practice Note, and paragraphs 71-74 of the Residential Appeals Practice Note.

RESPONDING TO A SOFAC

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

Explain to your client the Court's approach to the issues in dispute, especially where you can see that an issue is capable of being resolved or at least ameliorated.

Amending plans in accordance with the council's suggestions, before the involvement of any expert evidence, is always preferable as this will reduce the amount of costs to be paid to the council under s 8.15(3) of the *Environmental Planning and Assessment Act 1979*. In accordance with s 8.15(3), the Court is to make an order that the applicant pay the council's costs 'thrown away' where the Court has allowed the applicant to file amended plans. Section 8.15(3) does not apply to minor amendments, or to Class 1 residential development appeals dealt with under s 34AA of the *Land and Environment Court Act 1979*.

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

Leave to rely on an amended appeal, including amended plans, should be sought in accordance with the respective Practice Notes, which includes a requirement for particulars sufficient to indicate the precise nature of the amendments proposed.

112 Practice Note – Class 1 Development Appeals, 3 April 2018, paras [76]-[78]; Practice Note – Class 1 Residential Development Appeals, 3 April 2018, paras [71]-[74]

The Practice Notes contain the usual directions where an applicant seeks leave to rely on an amended DA, including a direction that the parties have leave to amend their SOFACs.[113]

NOTICE TO PRODUCE

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

Previously, many Class 1 applications would be accompanied by a notice to produce a local council's file at the first return date.

However, now the practice is for the parties to arrange informal discovery of documents between themselves. Councils are required to produce, if requested, the documents relevant to the subject application within 14 days of the request.[114]

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

A formal notice to produce can be filed and served if you require the production of documents beyond the council's DA files. For example, if the council granted consent to similar developments on neighbouring properties, you may wish to serve a notice to produce upon the council to inspect the DA files for other those properties. This would allow you to examine the council's decision-making process and reasons for granting development consent in those situations.

However, many councils are now in the habit of only providing DA files for the property the subject of the Class 1 appeal proceedings as opposed to neighbouring developments, given that the application documentation itself only makes reference to the subject proceedings.[115] You would therefore need to make a formal or informal request pursuant to the *Government Information (Public Access) Act 2009* to obtain the DA files for the neighbouring developments.

A notice to produce is also very useful for investigating the history of a site by obtaining council's files for prior consents in relation to the subject site. It is noted that many councils now have a considerable amount of information available online via the "DA Tracking" websites.

113 NSW Land and Environment Court Practice Note – Class 1 Development Appeals, 3 April 2018, at Schedule I.

114 NSW Land and Environment Court Practice Note – Class 1 Development Appeals, 3 April 2018, at pages 3, 11; NSW Land and Environment Court Practice Note – Class 1 Residential Development Appeals, 3 April 2018, at pages 3, 19.

115 Pursuant to the *Uniform Civil Procedure Rules 2005* r 21.10

You will be required to particularise exactly which documents or materials (such as photographs or plans) you wish to inspect. Generally, it is expected that, if you wish to inspect the council's files of neighbouring properties, you list the DA number, title references such as Lot and DP details, and street address.

SUBPOENAS

There are three types of subpoenas to compel a person to provide information to the issuing party: to produce a document or a thing, to attend to give evidence, or to do both.[116]

A subpoena must comply with Part 33, r 33.3(3) of the UCPR.[117] The relevant Practice Note for subpoenas to produce and notices to produce is "Practice Note – Subpoena Practices" dated 7 May 2015.[118]

Take care in identifying the appropriate addressee of the subpoena to produce, as the documents and things must be in the possession, custody and control of the addressee.[119] A subpoena to attend to give evidence may be issued to a natural person to give evidence of his or her knowledge (e.g. government employees).[120]

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

The document or thing must be particularised sufficiently, otherwise the subpoena may be set aside.[121] A subpoena is not commonly used in Class 1 proceedings and rarely in Residential Development Appeal proceedings, and must not be used as a substitute for discovery.

Only a person represented by a solicitor may attend the Registry to issue a subpoena without the Court's leave. The subpoena must be accompanied by the appropriate Court fee. A current list of Court fees can be found on the Court's website.[122]

A subpoena to produce must also be accompanied by conduct money, which is an amount sufficient to meet the reasonable expenses of the addressee attending Court to produce the document or thing.[123] Each council or organisation should be contacted prior to serving the Subpoena to ensure sufficient conduct money is provided.

116 UCPR r 33.2(1).
117 The Practice Note sets out some exceptions for Classes 5, 6 & 7.
118 www.lec.justice.nsw.gov.au/Documents/practice_note_subpoena_practices.pdf
119 Rochfort v Trade Practices Commission (1982) 153 CLR 134.
120 This is rarely necessary in judicial review: see Martin v State of New South Wales (No 3) [2011] NSWLEC 88.
121 Lane v Registrar, Supreme Court of NSW (1981) 148 CLR 245 at [257], *Uniform Civil Procedure Rules 2005* Pt 33 r 33.4.
122 Land and Environment Court, Schedule of Fees www.lec.justice.nsw.gov.au/Pages/forms_fees/fees/feesschedule.aspx
123 *Uniform Civil Procedure Rules 2005* Pt 33, r 33.6.

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

In many cases, the Court may order the party issuing the subpoena to pay any reasonable loss or expense incurred by the subpoenaed party that is over and above the conduct money provided pursuant to r 33.11. Requests for documents that are overly broad or would result in substantial expense will likely attract such a costs order.

A subpoena for production must be served personally on the addressee.

THE FIRST DIRECTIONS HEARING

Approximately 28 days after the Class 1 application is filed, the matter is listed for its first directions hearing or telephone callover, usually before the Registrar. All telephone callovers are conducted by the Registrar on a Monday. Appeals involving regional councils are automatically placed in the Monday list. If the Class 1 application can be served on the day it is filed, an applicant can request that the Court Registry list the matter for the first directions hearing within 21 days from the date of service. Residential development appeals will usually be given a return date 21 days after the application is filed.[124]

The parties who attend the directions hearing at the Court must be aware of the facts of the matter, the issues in dispute and have sufficient instructions to enable orders or directions to be made in a prompt and cost-effective manner.[125]

The section titled 'Procedure for Registrar's directions hearings' in Chapter 4: Directions hearings contains further information in respect of the first directions hearing for Class 1 proceedings.

ADDUCING EXPERT EVIDENCE

It is a requirement that the parties seek the leave of the Court to adduce expert evidence.[126] The names of the experts and areas of expertise should be specified in the requested orders. Leave is usually sought for expert evidence following termination of a section 34 conference or at the first directions hearing where a matter is listed for a section 34AA conciliation conference and hearing. Expert evidence is usually adduced by way of joint report in Class 1 proceedings.

The Court's rationale in requiring directions to this effect to be sought by the parties to Class 1 proceedings is to ensure that procedural fairness is afforded to each party (given the ordinary costs rule for Class 1 proceedings is that each party is to bear its own costs, including expert costs) and for achieving the overriding purpose of civil proceedings,

124 Practice Note – Class 1 Residential Development Appeals 3 April 2018 at paragraph [15].
125 Ibid 20, Practice Note – Class 1 Development Appeals, 3 April 2018 at paragraphs [4], [31].
126 *Uniform Civil Procedure Rules 2005* Pt 31, r 31.9.

being the facilitation of the just, quick and cheap resolution of the proceedings.[127]

The requirement of the Court for directions to be sought pursuant to rules 31.19 and 31.20 of the UCPR applies to both individual expert reports and joint expert reports (discussed below), as well as to the rarely used parties' single expert reports.

Parties' single experts

A parties' single expert is an expert whom both parties nominate to assess and report on one or more of the issues in dispute. The parties' single expert is required to write a final report (called a statement of evidence), which the Commissioner will consider as evidence in the hearing. The parties' single expert is not bound by the rules of evidence when giving evidence at a hearing in Class 1 proceedings.

Whether or not the parties retain their own experts or agree on a parties' single expert is one that will largely be contingent on the area in dispute (for example acoustics, planning and urban design). When considering the engagement of a parties' single expert, the Court requires the parties to take into account prescribed matters in the Development Appeals Practice Note.[128]

However, it is to be noted that in current practice it is extremely rare for parties to seek directions from the Court for the appointment of a single expert. It is far more common, instead, for parties to prepare joint expert reports following the section 34 conciliation conference (for Class 1 Development Appeal proceedings) or prior to the section 34AA hearing (for Class 1 Residential Development Appeal proceedings).

Individual expert reports

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

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

The information relied upon by an expert is also relevant to assessing the evidence provided in the expert report. Accordingly, experts should list in their reports what documentation and plans they have relied upon in forming their opinion. For instance, one expert may have had access to a draft planning instrument to which the other party's

127 *Civil Procedure Act 2005*, s 56
128 Practice Note – Class 1 Development Appeals, 3 April 2018, Schedule F

expert may not have had access as it was not yet in the public domain. In this circumstance, it may be useful for the draft planning instrument to be provided to both parties and the experts to jointly confer in relation to its relevance.

Expert opinions should be provided in a clear and concise form and be supported by reasoning. Expert reports should also provide a clear statement that the expert has read and agrees to be bound by the expert witness code of conduct in Schedule 7 to the UCPR.[129]

Experts need to be made aware of the requirements contained within Part 31 rules 31.22 and 31.27 of the UCPR in relation to the disclosure of contingency fees or deferred payment schemes and the mandatory information to be included in their reports.

More detailed information and tips regarding the briefing of experts can be found in NSW Young Lawyers' separate publication, *The Practitioner's Guide to Briefing Experts*.

Joint experts' reports

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

It is very important to remember that the legal representatives must not get involved in the drafting of the document, be present at the joint conference, or coach the experts in any way with respect to the production of the report.

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

Experts engaged in the preparation of joint reports should be provided with and prepare their expert evidence in joint reports in accordance with the Court's Joint Expert Report Policy[130] and the Conference of Expert Witnesses Policy[131].

SECTION 34 AND SECTION 34AA CONFERENCES

For information about section 34 conferences, see Chapter 5: Alternative dispute resolution.

129 *Uniform Civil Procedure Rules 2005* Pt 31, r 31.23.
130 Joint Expert Report Policy, 12 June 2015.
131 Conference of Expert Witnesses Policy, 12 June 2015.

THE HEARING

For information about hearings, see Chapter 7: The hearing.

THE COURT'S 'PLANNING PRINCIPLES'

In September 2003 the Court instituted a major change to the way in which judgments in Class 1 merits appeals were decided and published by Commissioners.

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

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

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

- there is a gap in policy; or
- policies expressed in qualitative terms allow for more than one interpretation; or
- policies lack clarity.[132]

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

- the scale and character of the street;
- whether or not it is in a conservation area;
- the setback of the proposed house in relation to other houses; and
- the likelihood that one day the existing houses might also be extended to two-storeys.[133]

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

132 NSW Land and Environment Court, Annual Review 2007 (2007) at page 22.

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

All relevant judgments and explanatory material concerning planning principles and their use can be found on the Court's website.[134]

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

For more information on planning principles also see Roseth SC, *Developing planning principles*, NEERG Seminar on Planning Principles, 27 July 2005, available on the Court's website.[135]

MISCELLANEOUS APPEALS

The Class 1 Miscellaneous Appeals Practice Note can be downloaded from the Court's website.[136] As it covers miscellaneous appeals across three different classes, the Class 1 Miscellaneous Appeals Practice Note is quite general. The appropriate practice and procedure will vary depending on the type of appeal and the complexity of the matter.

Most of the above sections on practice and procedure for Class 1 Development Appeals and Class 1 Residential Development Appeals are applicable to Miscellaneous Appeals. For example, Class 1 Miscellaneous Appeals will be usually be listed for a first directions hearing before the Registrar 28 days after proceedings are commenced and are to be served within 7 days of filing.

Unlike in Class 1 Development Appeals and Class 1 Residential Development Appeals, in Class 1 Miscellaneous Appeals it is the applicant who is required to file and serve its SOFAC on or before 4.00pm on the third last working day before the first directions hearing listed for the proceedings, unless the appeal involves proceedings brought under s 8.18 of the *Environmental Planning and Assessment Act 1979* (appeal against an issue of an Order by council). In this situation, the respondent must prepare the SOFAC.[137]

134 Land and Environment Court, Planning Principles www.lec.justice.nsw.gov.au/Pages/practice_procedure/principles/planning_principles.aspx

135 www.lec.justice.nsw.gov.au/Documents/speech_05jul05_rosethsc_neerg.pdf

136 Practice Note – Class 1, 2 and 3 Development Appeals, 3 April 2018

137 ibid, para. [17]

CHAPTER 12: CLASS 2 PROCEEDINGS

The Court's Class 2 jurisdiction can be divided up into three broad categories:

- tree and hedge disputes under the *Trees (Disputes Between Neighbours) Act 2006* (**Trees Act**);
- Strata Scheme Development proceedings brought in relation to strata certificates, contracts and schemes under the *Strata Schemes Development Act 2015* (**Strata Act**); and
- miscellaneous appeals under a range of other Acts, for example the *Local Government Act 1993* and the *Swimming Pools Act 1992*.

A full list of miscellaneous appeals that may be commenced in the Class 2 jurisdiction are set out in s 18 of the *Land and Environment Court Act 1979*. The most common types of miscellaneous appeals are likely to be:

- under ss 176, 178, 180, 182 and 611 of the *Local Government Act 1993*, including appeals regarding applications for approval, revocation or modification of an approval, or orders; or
- under s 26 of the *Swimming Pools Act 1992*, including appeals regarding decisions of a local authority in relation to a swimming pool.

The Court's procedures that apply to Class 1 appeals discussed in Chapter 11: Class 1 Proceedings also apply to Class 2 appeals.

APPEALS UNDER THE TREES ACT

Tree and hedge disputes under the Trees Act are likely to be brought by self-represented litigants.

An owner of land may apply to the Court for an order to remedy, restrain or prevent damage to property on their land, or prevent injury to any person, as a consequence of a tree that is located on adjoining land.[138]

An owner of the land may also apply to the Court for an order to remedy, restrain or prevent a severe obstruction of sunlight to a window of a dwelling situated on the land, or any view from a dwelling situated on the land, if the obstruction is caused by a hedge.[139]

What is a hedge?

A hedge, for the purposes of the Trees Act, is a group of two or more trees that are planted to form a hedge and rise to a height of at least 2.5 metres above existing ground level.[140]

Only an owner or occupier of land that adjoins the land upon which the tree or hedge is situated may make an application to the Court under the Trees Act. The tree or hedge must be on privately owned land in an urban zone to which the Trees Act applies. Proceedings are mainly brought if:

- the tree has caused, is causing, or is likely in the near future to cause, damage to the affected neighbour's property, or likely to cause an injury to a person, or
- in the case of hedge, is severely obstructing sunlight to a window of a dwelling situated on the affected neighbour's land or is severely obstructing a view.

COMMENCING PROCEEDINGS

Prior to commencing proceedings, an owner of land must engage in negotiations with their neighbour regarding the problematic tree or hedge and make reasonable efforts to reach agreement. The owner must also give notice to the neighbour if they plan to commence proceedings in accordance with s 8 of the Act.[141]

Tree dispute proceedings are commenced by paying the filing fee and filing with the Court:

- four copies of a completed tree disputes application form; and
- the relevant tree dispute claims details form.

138 *Trees (Disputes Between Neighbours) Act 2006*, s 7.
139 *Trees (Disputes Between Neighbours) Act 2006*, s 14B.
140 *Trees (Disputes Between Neighbours) Act 2006*, s 14A.
141 *Trees (Disputes Between Neighbours) Act 2006*, ss 10, 14E.

There are different claim details forms for disputes involving trees and disputes involving hedges. The forms can be found on the Court's website. Applicants are encouraged to review the relevant sections of the Practice Note – Class 2 Tree Applications[142] to ensure that the correct tree dispute application form has been filled out for the type of tree dispute.

Applications may be filed in person at the Court Registry or posted to the Court's GPO box.

Alternatively, Local Courts throughout NSW act as agents for the Court, and applications under the Trees Act may be filed with any Local Court registry.

SERVING THE APPLICATION

Once the tree disputes application is filed with the Court, the applicant has 21 days to serve a filed copy of the application on:

- the neighbour upon whose land the tree is located; and
- the local council.

The Court may also direct that the application be served on other people. The Court has prepared a guide for service documents which appears on the Court's website.

RESPONDING TO AN APPLICATION

A person who receives a tree disputes application about a tree on their property and seeks to contest the proceedings must file a notice of appearance with the Court. This form is available on the Court's website and sets out the contact details and address for service for a party to legal proceedings.

MATTERS TO BE SATISFIED PRIOR TO COURT MAKING ORDERS

A person who is contemplating commencing proceedings in Class 2 should be aware of the matters of which the Court must be satisfied before making an order which are specified in the Trees Act. The Court may not make an order unless it is satisfied that the applicant has made a reasonable effort to reach an agreement with the owner of the land upon which the tree is situated and the applicant has given notice of the application in accordance with s 8 of the Trees Act.[143]

For further information refer to the Court's useful guide to the Trees Act entitled 'Tree Disputes: Understanding the Law'. The Court has also published an annotated version of the Trees Act which can assist self-represented litigants in referring to key authorities on each of these matters, and in respect of judicial consideration of various terms found in key sections of the Trees Act.[144]

142 1 December 2018, paragraphs [10] – [11]
143 *Trees (Disputes Between Neighbours) Act 2006*, ss 10, 14E.
144 Such as, for example, "damage" under s 7 of the *Trees Act* and "satisfied" under s 10 of the *Trees Act*.

THE PRELIMINARY HEARING

A tree disputes application will usually be listed for a preliminary hearing four to six weeks after it is filed. A preliminary hearing will usually be listed before the Registrar. Parties to tree disputes should be prepared for the Court to make the usual directions attached to the Practice Note at the preliminary hearing.[145]

These are standard directions concerning a timetable for the filing of any evidence, the services of subpoenas, and for other bodies such as the local council, and the NSW Heritage Council if relevant, to file their evidence in the proceedings. The final hearing date will usually be set no more than six weeks after the preliminary hearing.

Before a preliminary hearing, the parties should consider whether expert evidence is required. The Court will ask the parties this question at the preliminary hearing.

Tree disputes are usually listed before a Commissioner who has qualifications in arboriculture or horticulture, so expert witnesses may not be required.

The Court also expects that the parties will discuss the proposed timetable and available dates for a final hearing prior to the preliminary hearing. If an agreement cannot be reached, each party should prepare its own proposed orders and timetable.

THE FINAL HEARING

A final hearing of proceedings will usually commence on the site where the tree or hedge is located with a view of the site. The Court will usually allocate a maximum of three hours for a final hearing. If the hearing is not finalised after the site visit, the matter may return to Court on that day or be relisted for another day.

FURTHER RESOURCES

Further information about tree disputes can be found on the Court's website.[146] The Class 2 Practice Note for tree disputes can be downloaded.[147]

STRATA SCHEME DEVELOPMENT PROCEEDINGS UNDER THE STRATA ACT

An appeal by an individual or owners corporations under ss 66, 85, 86 and 92 of the Strata Act (**Strata Scheme Development Proceedings**) is commenced by filing the relevant Class 2 application with the Court Registry and paying the required filing fee.

It is important that an applicant carefully considers the schedule of required documents that are to accompany the Class 2 application at lodgement for each type of proceedings

145 Practice Note – Class 2 Tree Applications (1 December 2018) Schedule A
146 www.lec.justice.nsw.gov.au/lec/types_of_disputes/class_2/trees_and_hedges.html
147 Practice Note – Class 2 Tree Applications (1 December 2018)

under the Strata Act.[148]

There are also a specific set of instructions in the Strata Schemes Development Practice Note in relation to the identity of the respondent to Strata Scheme Development Proceedings,[149] and for the service of the Class 2 application upon the respondent/s.[150]

Strata Scheme Development Proceedings will usually be listed for a first directions hearing before the Registrar at least 35 days after proceedings are commenced. It is important to note that the Court requires standard directions in accordance with Pt 31 r 31.19 of the *Uniform Civil Procedure Rules 2005* permitting the adducing of expert evidence[151] (see Chapter 11: Class 1 proceedings for additional details in relation to this requirement), and that such directions are to be sought by way of a Notice of Motion accompanied by an affidavit as to why expert evidence is required in the proceedings rather than at the first directions hearing.[152]

SECTION 34 CONCILIATION CONFERENCE OR MEDIATION

For Strata Scheme Development Proceedings commenced under ss 66 and 85, the parties are to inform the Court at the first directions hearing whether the matter should not be listed for a section 34 conciliation conference (see Chapter 5: Alternative dispute resolution).[153]

Proceedings commenced under ss 86 and 82 may seek directions for Strata Scheme Development Proceedings to be listed for mediation pursuant to s 26 of the *Civil Procedure Act 2005*.

Strata Scheme Development Proceedings otherwise proceed in a similar manner to miscellaneous appeals. The Court's practice and procedure, therefore, is largely the same as the procedure in the Class 1 jurisdiction which is discussed in Chapter 11: Class 1 proceedings.

MISCELLANEOUS APPEALS

Miscellaneous appeals in Class 2 are commenced by filing the relevant Class 2 application form with the Court Registry and paying the relevant filing fee. The application form and the filing fees payable are on the Court's website.

The Miscellaneous Practice Note can be downloaded from the Court's website.

148 Practice Note – Strata Schemes Development Proceedings (30 November 2016), para [11]
149 Practice Note – Strata Schemes Development Proceedings (30 November 2016), para [12]
150 Practice Note – Strata Schemes Development Proceedings (30 November 2016), paras [16] – [17]
151 Practice Note – Strata Schemes Development Proceedings (30 November 2016), para [39]
152 Practice Note – Strata Schemes Development Proceedings (30 November 2016), para [40]
153 Practice Note – Strata Schemes Development Proceedings (30 November 2016), para [32]

Miscellaneous appeals will usually be listed for a first directions hearing before the Registrar 28 days after proceedings are commenced.

The Court's practice and procedure in a Class 2 miscellaneous appeal is largely the same as the procedure in the Class 1 jurisdiction which is discussed in Chapter 11: Class 1 proceedings.

CHAPTER 13: CLASS 3 PROCEEDINGS

THE TYPES OF PROCEEDINGS THAT FALL WITHIN CLASS 3 ARE:

- land valuation objections under the *Valuation of Land Act 1916* (**Valuation Act**);
- claims for compensation by reason of the compulsory acquisition of land, under the *Land Acquisition (Just Terms Compensation) Act 1991* (**Just Terms Act**) or the *Roads Act 1993* (**Roads Act**);
- Aboriginal land claims under the *Aboriginal Land Rights Act 1983* (**ALR Act**);
- proceedings for approval of a strata renewal plan for collective sale or redevelopment under s 179 of the *Strata Schemes Development Act 2015* (**Strata Scheme Development Proceedings**)*;* and
- miscellaneous appeals.

Each of the above types of proceedings has a separate Practice Note. Although the procedures overlap to an extent, it is important to be familiar with the Practice Note applicable to the particular type of proceedings.

VALUATION OBJECTIONS

Commencing proceedings

Valuation objections concern the land value attributed to a property, as determined by the Valuer-General under the Valuation Act.

Appeals to the Court are commenced[154] against the Valuer-General by people who are dissatisfied with the Valuer-General's determination of an objection lodged by them in relation to the land value pursuant to Part 3 of the Valuation Act.[155]

Appeals to the Court may be commenced:

- against the Valuer-General's determination of an objection;
- if an objection lodged with the Valuer-General has not been determined within time on the basis that the objection is taken to have been refused.[156] If this option is pursued, the person must first give the Valuer-General written notice of their intention to appeal on that basis, at least 14 days before commencing proceedings in the Court.

Proceedings are commenced by filing a Class 3 application, using Form B (version 2) and paying the relevant filing fee. The application is to attach a copy of:

- the valuation notice issued by the Valuer-General;
- the objection lodged with the Valuer-General by the applicant; and,
- any response by the Valuer-General's to the objection.

The appeal must be commenced within 60 days from the date of issue of the notice of the Valuer-General's determination of the objection.[157] If proceedings are to be commenced outside this period, the leave of the Court must be obtained.[158]

A stamped copy of the application must be served on the Valuer-General within seven days of filing. The Valuer-General will then file an appearance.

Once the appeal has been commenced, the Practice Note sets out the procedural steps to be followed. The Practice Note explains the steps to be taken prior to the first directions hearing, at the first and second directions hearings, and before and at the final hearing. It also sets out the opportunities for conciliation, mediation and other means of resolving the proceedings without a hearing. You should ensure you have an up-to-date version of the Practice Note and refer to it regularly.

The first directions hearing

The appeal will be listed before a Judge in the Class 3 list, which is usually on each Friday. The Practice Note specifies that, unless there are interlocutory applications, there should only be first and second directions hearings, prior to the hearing.

Prior to the first directions hearing, the Valuer-General must provide the applicant with access to documents within the possession, custody or control of the Valuer-Gener-

154 *Valuation of Land Act* 1916 s 37.
155 *Valuation of Land Act* 1916 Pt 4.
156 *Valuation of Land Act* 1916 s 35C(4).
157 *Valuation of Land Act* 1916 s 38(1).
158 *Valuation of Land Act* 1916 s 38(2).

al that were relevant to the Valuer-General's determination. Often, the applicant will already have the relevant documents. Generally, the documents include a valuation report, or 'objection report', prepared by a valuer engaged by the Valuer-General to reconsider the land value.

Also, before the first directions hearing, the applicant is to notify the Valuer-General of the land value that the applicant contends on appeal.

At the first directions hearing, the parties should expect that the usual directions set out in Schedule B to the Practice Note will be made. The parties should attempt to reach agreement prior to the directions hearing and have either agreed or competing proposed short minutes of order to hand to the Court.

The Practice Note specifies that the valuation objections information sheet (Schedule A) is to be completed and filed at the first directions hearing. This is not done in practice, although the parties should be prepared to answer such questions if necessary.

The Court will ask, at the first directions hearing, whether the parties have agreed to participate in either informal mediation or a conciliation conference under section 34 of the *Land and Environment Court Act 1979.* Parties usually participate in a section 34 conference instead of informal mediation. If the parties do not propose to proceed to a section 34 conference, the Court will need to be satisfied of the reasons why.

If the matter is to be fixed for a section 34 conference, the Court will either allocate a date at the first directions hearing, or make an order that the parties are to approach the Registrar for a date. If the Registrar is sitting at the time, the Court may provide the parties with the file, in order to take it to the Registrar and ask for a date to be allocated. Usually the section 34 conference will be listed within two weeks from the first directions hearing.

Informal mediation or preliminary conference

The usual directions made at the first directions hearing[159] require the Valuer-General to file a statement of facts prior to the section 34 conference. The statement of facts sets out the details of the relevant land and the land value contended by the Valuer-General. It generally contains a schedule of comparable sales which are relied on to support the Valuer-General's valuation.

Also, before the section 34 conference, the applicant is to file and serve a statement outlining the applicant's grounds of objection to the valuation, which also usually includes a schedule of comparable sales relied on to support the applicant's valuation.

If an informal mediation is to be carried out, it is a matter for the parties to make their

159 Practice Note – Class 3 Valuation Objections (14 May 2007), Schedule B.

own arrangements. Usually this involves the parties and their representatives meeting informally to discuss the issues. Generally, an expert valuer engaged by the Valuer-General would attend. The process may be helpful if the applicant is self-represented, to clarify the issues in dispute.

If the matter is listed for a section 34 conference, it will be allocated to a Commissioner, usually with expertise in the valuation of land. Expert valuers and legal representatives may also attend the conference. Each side will be given an opportunity to present their views. The Commissioner will attempt to narrow the issues in dispute with the aim of reaching a resolution.

If the parties are able to reach agreement, the Commissioner can dispose of the proceedings and set out in writing the terms of the decision. This is usually called a 'section 34 agreement'.

If the parties are not able to reach agreement, the Commissioner will terminate the conference and refer the proceedings back to the Court for the purpose of being fixed for hearing before a different Commissioner or a Judge. The Commissioner writes a report to the Court stating that no agreement was reached and that the conciliation conference was terminated. The Commissioner who conducted the conference is disqualified from hearing or further participating in the proceedings, unless the parties otherwise agree.[160]

The second directions hearing

The usual directions made at the second directions hearing are set out in Schedule C to the Practice Note. They provide for the matter to be listed for hearing and for evidence and submissions, including expert evidence, to be filed and served. In valuation objections, parties will usually rely on expert valuation evidence and may also rely on non-valuation expert evidence, such as town planning expert evidence. If each party engages an expert, the usual directions provide for the experts (in the same discipline) to confer and prepare a joint report.

The hearing

Valuation objections are heard either by a Judge or a Commissioner, usually with expertise in the valuation of land. The hearing may be conducted wholly in Court, but usually will include an inspection of the subject property and other comparable properties. The hearing is not limited to the grounds of the objection.[161]

The usual directions made at the second directions hearing require the parties to confer and agree on a joint schedule of comparable sales to be inspected at the hearing and to

160 *Land and Environment Court Act 1979* s 34(13).
161 *Valuation of Land Act* 1916 s 39.

prepare a map setting out the location of the subject property and each of the comparable sales. If the hearing is to be conducted on site, this may form an informal itinerary for the hearing.

Only those experts who need to attend the site inspection should do so. They should be prepared to speak in relation to each of the comparable sales as they are inspected. Any experts who are not required to attend can be given a time period in which they should attend the hearing in Court.

If there are many people attending the site inspection, give consideration to transport arrangements. Often, it may be worthwhile for the parties to arrange one vehicle, such as a mini-bus, to transport everyone together. If such arrangements are made, the parties should notify the associate of the Judge or Commissioner hearing the matter.

The hearing usually commences at 10am. If the hearing is on site, the second directions hearing should provide for a meeting place, usually at the subject property. Take notes as if the matter were being heard in Court. The matter may then resume in Court, for the parties' witnesses to be cross-examined if necessary, and the submissions to be made. Alternatively, the matter may commence in Court and then proceed to the site inspections. Judgment will generally be reserved.

COMPENSATION CLAIMS FOR COMPULSORY ACQUISITION OF LAND

Commencing proceedings

Claims for compensation arising from the compulsory acquisition of land by State and local government authorities may be made in accordance with:

- the *Land Acquisition (Just Terms Compensation) Act 1991* (Just Terms Act);
- the *Roads Act 1993* (Roads Act), Division 2 of Part 12; and
- any other Act providing for compensation as a result of the compulsory acquisition of land.[162]

The authority acquiring the land is required to give written notice to the person of the acquisition of their land, their entitlement to compensation and the amount of compensation offered. Under the Just Terms Act, the Valuer-General is required to determine the amount of compensation to be offered. Negotiations may then take place between the acquiring authority and the person whose land is being acquired, to agree the amount of compensation payable.

Under the Just Terms Act, proceedings may be commenced in the Court if:

- a person has been offered compensation by the acquiring authority but is dissatis-

162 *Land and Environment Court Act 1979* s 24(1).

fied with the amount of compensation offered;[163] or
- a person has not been given a compensation notice and their claim for compensation has been rejected by the acquiring authority.[164]

The person must commence proceedings within 90 days of either:

- receiving a compensation notice;[165] or
- the rejection of the claim.[166]

If the objection is lodged outside of that time period, the Court will need to be satisfied that there is good cause for the person's failure to lodge the objection in time.[167]

Under the Roads Act, a person may commence proceedings if the person's land is acquired and the person's claim of an interest in the land is rejected.[168] People who may commence proceedings include the claimant for compensation, applicant for acquisition and the Minister.[169]

The proceedings must be commenced within 28 days after the date on which the person's claim of an interest was rejected[170] or, if the application is for the determination of compensation, within 12 weeks after service of the notice to interest holders.[171]

The Court also has power to make orders joining other people as parties to the proceedings, if they claim to have had, or may have, an interest in the land acquired.[172]

The appeal is commenced in the Court by filing a Class 3 application, using Form B (version 2). The application is to attach:

- the notice of intention to acquire the land issued by the acquiring authority;
- the claim for compensation lodged with the acquiring authority;
- the compensation notice (if any) issued by the acquiring authority;
- the acquisition notice published in the Government Gazette173;
- a schedule of losses attributable to disturbance under s 59(a) to (e) of the Just Terms Act;
- a schedule of disturbance loss heads of claim which may arise under s 59(f); and,
- all lay (i.e. non-expert) evidence on which the applicant proposes to rely.

163 *Land Acquisition (Just Terms Compensation) Act 1991* s 66(1).
164 *Land Acquisition (Just Terms Compensation) Act 1991* s 67(1).
165 *Land Acquisition (Just Terms Compensation) Act 1991* s 66(1).
166 *Land Acquisition (Just Terms Compensation) Act 1991* s 67(2).
167 *Land Acquisition (Just Terms Compensation) Act 1991* s 66(3).
168 *Roads Act 1993* s 188(1).
169 *Roads Act 1993* s 193(1).
170 *Roads Act 1993* s 188(2).
171 *Roads Act 1993* s 193(1).
172 *Land and Environment Court Act 1979* s 25(2).
173 Found at https://www.legislation.nsw.gov.au/#/notifications

A filing fee must be paid to commence the proceedings. A stamped copy of the application must be served on the acquiring authority within seven days of filing, attaching:

- a schedule of losses attributable to disturbance under s 59(a) to (e) of the Just Terms Act;
- a schedule of disturbance loss heads of claim which may arise under s 59(f) of the Just Terms Act; and,
- all lay (i.e. non-expert) evidence on which the applicant proposes to rely.

The acquiring authority will then file an appearance.

The first directions hearing

Once the appeal has been commenced, the relevant Practice Note[174] sets out the procedural steps to be followed. The Practice Note specifies that, unless there are interlocutory applications, only two directions hearings, and a pre-hearing mention, should occur prior to the hearing.

The matter will be listed for the first directions hearing before a Judge in the Class 3 list, which is usually on each Friday. The parties should expect that the usual directions set out in Schedule A to the Practice Note will be made. The parties should attempt to reach agreement prior to the directions hearing and have either agreed or competing proposed short minutes to hand to the Court.

At the first directions hearing, the acquiring authority hands up to the Judge a statement as to whether or not it accepts the Valuer-General's determination of compensation. The parties hand up an agreed statement, or separate statements, as to the expert evidence proposed to be called.

The usual directions in Schedule A provide a timetable for the parties to file and serve evidence, including expert evidence. If the parties will rely on expert evidence, the experts are to confer and prepare a joint report. If the parties intend to rely on non-valuation experts, the usual directions will need to provide for this.

The evidence is to be served, but is not to be filed with the Court, as the timetable progresses. The served evidence will form part of a 'court book' filed at the pre-hearing mention. At the hearing, the court book may be tendered as an exhibit, subject to any objections to evidence. The court book also includes a copy of the original application and pleadings.

The usual directions provide for the service of points of claim and points of defence, and the contents to be included in each.

174 Practice Note – Class 3 Compensation Claims, 15 March 2019

Settlement or conciliation conference

The usual directions provide for a settlement or conciliation conference to be held prior to the second directions hearing. The parties may, at any time, refer the matter or separate questions to a mediator, conciliator or neutral evaluator.

The second directions hearing

Prior to the second directions hearing, the parties should confer and attempt to agree estimates of the hearing time required, including a breakdown of time likely to be taken for:

- opening submissions;
- tender of documents and evidence including any objections to evidence;
- inspection of properties by the Court;
- cross-examination of witnesses; and
- closing submissions.

The Practice Note requires the parties to hand these estimates, whether agreed or separate, up to the Judge at the second directions hearing.

The usual directions made at the second directions hearing are set out in Schedule B to the Practice Note. They provide for the matter to be listed for hearing and for directions to be made for the filing of the court book, chronologies, schedules of comparable sales and skeleton opening submissions.

The matter will be listed for a pre-hearing mention. Prior to the pre-hearing mention, parties must give notice to any witnesses required for cross-examination.

Pre-hearing mention

The matter will be listed for a pre-hearing mention, usually on the second last Friday before the hearing. If possible, the matter will be listed before the Judge who is to hear the matter.

At the pre-hearing mention, the parties will file the court book and schedule of comparable sales. The schedule should include a map setting out the location of the subject property and each of the comparable sales. If the hearing is to be conducted on site, this may form an informal itinerary for the hearing.

The hearing

Compensation claims are usually heard by a Judge, but at times the Judge will be assisted by a Commissioner with special knowledge and expertise in valuation of land. The hearing may be conducted wholly in Court, but usually will include an inspection of the subject property and other comparable properties.

If the hearing is to be carried out on site, the second directions hearing should provide for a meeting place, usually at the subject property. Take notes as if the matter were being heard in Court. The matter may then resume in Court, for cross-examination, if necessary, and submissions. Alternatively, the matter may commence in Court and then proceed to the site inspections. Judgment will generally be reserved.

ABORIGINAL LAND CLAIMS

Commencing proceedings

Under the ALR Act, Aboriginal Land Councils in NSW have the right to make a claim for Crown land. In deciding a claim, the Crown Lands Minister[175] determines whether the whole or any part of the lands claimed is 'claimable' Crown lands. If the Minister determines that the whole or any part of the lands claimed is not 'claimable' Crown lands, the Minister can refuse all or part of the claim.[176]

Aboriginal land claims are appeals made to the Court by Aboriginal Land Councils in NSW against the refusal by the Crown Lands Minister to grant an Aboriginal land rights claim.[177]

The Aboriginal Land Council is to commence the appeal against the refusal of a claim under s 36 of the ALR Act within four months after the refusal.[178] The appeal is to be commenced by a Class 3 application using Form B (version 2). The application form should attach a copy of the refusal by the Crown Lands Minister. A filing fee must be paid to commence the proceedings.

A stamped copy of the application needs to be served on the Crown Lands Minister within seven days of filing. The Crown Lands Minister will then file an appearance. The NSW Aboriginal Land Council is also given notice of the proceedings.

Prior to the first directions hearing

Once the appeal has been commenced, the relevant Practice Note[179] sets out the procedural steps. The Practice Note specifies that, unless there are interlocutory applications, generally no more than three directions hearings should occur prior to the hearing. In complex matters, there may also be a pre-hearing mention.

Prior to the directions hearing, and within 14 days of being served with the application,

175 *Aboriginal Land Rights Act 1983* s 36 (the Crown Lands Minister means the Minister for the time being administering any provisions of the Crown Lands Consolidation Act 1913 or the Western Lands Act 1901 under which lands are able to be sold or leased).

176 *Aboriginal Land Rights Act 1983* s 36(5)(b).

177 *Aboriginal Land Rights Act 1983* s 36(6).

178 *Land and Environment Court Rules 2007* r 7.1(1)(b).

179 Practice Note – Class 3 Aboriginal Land Claims, 10 December 2012.

the Crown Lands Minister must issue subpoenas to relevant public authorities, public officials or other people for documents relevant to whether or not the lands claimed are claimable Crown lands. Having reviewed the documents provided under subpoena, the Crown Lands Minister should then come to the first directions hearing with a list of any other bodies or persons it intends to subpoena.

The Aboriginal Land Council may issue a request to the Crown Lands Minister for the Minister's decision and reasons for making the decision, and a copy of all documents relevant to the decision. The Crown Lands Minister must consider the grounds upon which its decision was based, including whether it intends to rely on the grounds on which the original decision was made and whether any further grounds are relied upon.

The parties should also discuss and agree upon a descriptive name to be allocated to the proceedings, so that they can be distinguished from other proceedings with the same parties.

The first directions hearing

The matter will be listed for the first directions hearing before a Judge in the Class 3 list, which is usually on each Friday. At the first directions hearing, the parties should expect that the Court will make the usual directions set out in Schedule A to the Practice Note. The parties should attempt to reach agreement prior to the directions hearing and have either agreed or competing proposed short minutes to hand to the Court.

At the first directions hearing, the Crown Lands Minister must inform the Court of the public authorities, public officials or other people to whom the Minister has already issued subpoenas, and the responses to those subpoenas. The Minister is to hand to the Court a list of further persons to whom the Minister wishes to issue subpoenas.

The usual directions made at the first directions hearing provide for the Minister to issue further subpoenas, to file and serve a Statement of Facts and Contentions, and to file and serve evidence in chief, including affidavits and a bundle of documents.

Directions for formal discovery and interrogatories will only be made in exceptional circumstances and will generally be confined to particular issues. A party seeking such directions must provide the Court with a draft list of categories of documents to be discovered or draft interrogatories.

Prior to the second directions hearing

Within 21 days of serving its Statement of Facts and Contentions, the Minister provides to the applicant copies of any further documents relevant to the grounds for refusing the claim.

In light of this material, the applicant should consider, prior to the second directions hearing, which people it wishes to subpoena and come to the second directions hearing with a list to be handed to the Court.

This is a good opportunity to discuss whether conciliation, mediation or other means of resolving the appeal without a hearing may be appropriate.

The second directions hearing

The second directions hearing will again be conducted on a Friday by the List Judge. The parties should expect the Court to make the usual directions set out in Schedule B to the Practice Note. The parties should attempt to reach agreement prior to the directions hearing and have either agreed or competing proposed short minutes to hand to the Court.

At the second directions hearing, the applicant hands to the Court a list of people to whom the applicant wishes to issue subpoenas. If applicable, the applicant also hands to the Court a statement of the disciplines of expert evidence on which the applicant intends to rely. The Court may wish to be satisfied of the appropriateness of calling the evidence, including why it is reasonably required to resolve the proceedings.

The usual directions made at the second directions hearing provide for the applicant to issue subpoenas, to file and serve a Statement of Facts and Contentions and to file and serve evidence in chief, including affidavits and a bundle of documents.

The Court may also wish to discuss with the parties whether the matter is appropriate for conciliation, mediation or other means of resolving the appeal without a hearing. Most Aboriginal land claims are resolved by hearing.

PRIOR TO THE THIRD DIRECTIONS HEARING

Prior to the third directions hearing, the Minister should consider whether it intends to file any evidence in reply. The parties should also discuss the expert evidence to be relied on and arrangements for the experts to confer and produce a joint report, if appropriate. The parties should also prepare an estimate, whether agreed or separate, of the hearing time. This will require the parties to consider which witnesses will be required for cross-examination at the hearing.

THE THIRD DIRECTIONS HEARING

The third directions hearing will be conducted on a Friday by the List Judge. The parties should expect that the Court will make the usual directions set out in Schedule C to the Practice Note. The parties should attempt to reach agreement prior to the directions hearing and have either agreed or competing proposed short minutes to hand to the Court. The parties are to hand to the Court an estimate of the hearing time, broken down into components.

The usual directions made at the third directions hearing provide for the Minister to serve any evidence in reply, and for any experts to confer and prepare a joint report, if

appropriate. The Court will also make directions for the parties to:

- prepare an agreed list of issues for determination and a statement of agreed facts;
- give notice of witnesses to be cross-examined; and
- file and serve a court book and 'evidence book'.

The matter will be listed for hearing and, if the matter is particularly complex or is expected to exceed three days hearing time, it may also be listed for a pre-hearing mention.

PRE-HEARING MENTION

If there is a pre-hearing mention, it will be held before the Judge who is to hear the matter, if possible, on the second last Friday before the hearing. Counsel or solicitors briefed to appear at the final hearing are expected to attend. The purpose of the pre-hearing mention is to ensure readiness for hearing, including making any final directions necessary to be made.

THE HEARING

Aboriginal land claims are heard by a Judge, assisted by one or more Commissioners with relevant expertise and knowledge of matters concerning land rights for Aboriginal people. Hearings usually commence at 10:00am. Judgment will generally be reserved.

STRATA SCHEME DEVELOPMENT PROCEEDINGS

Commencing proceedings

The practices and procedures applicable to Strata Scheme Development Proceedings are largely the same as those for miscellaneous appeals as detailed below, and are dealt with by the Court under the Strata Schemes Development Proceedings Practice Note.

If you are, or are acting for, a dissenting owner in s 179 Strata Act proceedings, you should be aware of the requirement to file the objection to the strata scheme renewal within 21 days of notice of the application,[180] and of the specific requirements for the objection.[181]

The first directions hearing

The first directions hearing in Strata Scheme Development Proceedings will usually be conducted by the Registrar. The Court will discuss with the parties whether the matter is suitable to be listed for mediation pursuant to s 26 of the *Civil Procedure Act 2005*.

The usual directions made at the first hearing provide for the matter to be listed for

180 Practice Note – Strata Schemes Development Proceedings (30 November 2016), para [23]
181 Practice Note – Strata Schemes Development Proceedings (30 November 2016), para [24]

mediation shortly after the parties have filed their respective Statement of Facts and Contentions.[182] It is preferable for mediation to occur before the parties prepare, file and serve their respective bundles of evidence in an attempt to narrow the scope of issues present in the matter and to better facilitate the just, quick and cheap resolution of the proceedings.

THE MEDIATION

The mediation is generally conducted by a Commissioner, usually with knowledge and expertise in the issues raised by the applicant.

If the parties are able to reach agreement, the Commissioner can dispose of the proceedings in accordance with the decision and set out in writing the terms of the decision. This is usually called a 'section 34 agreement'. This cannot occur for s 179 proceedings: see s 181(3A) of the *Strata Schemes Management Act 2015*.

If the parties are not able to reach agreement, the proceedings progress towards the final hearing listed at first directions.

THE HEARING

Either a Judge or a Commissioner may conduct the final hearing. The hearing will usually commence at 10:00am. Judgment is most commonly reserved.

See 'Chapter 7: The hearing' for more detail.

MISCELLANEOUS APPEALS

Commencing proceedings

Miscellaneous appeals falling within Class 3 are those set out in section 19 of the *Land and Environment Court Act 1979* which do not otherwise fall into the above types of proceedings, including the following proceedings regarding property boundaries, encroachments and access under:

- Part 14A of the *Real Property Act 1900*;
- the *Encroachment of Buildings Act 1922*;
- proceedings under ss 29, 30 or 31 of the *Access to Neighbouring Land Act 2000*; and,
- proceedings under ss 526 and 574 of the *Local Government Act 1993*.

Miscellaneous appeals in Class 3 are commenced by filing a Class 3 application using Form B (version 2), and paying the relevant filing fee.

The applicant will need to check the legislation under which the original decision was

182 Practice Note – Strata Schemes Development Proceedings (30 November 2016), Schedule E

made to find out the rights of appeal, including:

- who may appeal;
- the circumstances in which an appeal may be made; and
- the time within which an appeal must be filed in the Court.

The applicant should also check the formalities of commencing an appeal, such as which relevant documents are to be attached to the application. Usually, at a minimum, this will include a copy of the decision or order being appealed against. A filing fee must be paid to commence the appeal.

A stamped copy of the application must be served on the respondent to the appeal within seven days of filing. It is important to check that the correct respondent is listed; usually this will be the public authority whose decision is being appealed. The respondent will then file an appearance.

The practices and procedures applicable to miscellaneous appeals are dealt with by the Court under the Miscellaneous Practice Note.

THE FIRST DIRECTIONS HEARING

Before the first directions hearing, the applicant may request that the respondent provide a copy of the documents relevant to the application and decision (if any). The respondent must provide any such documents within 14 days of receiving the request.

The parties should also complete the Classes 1, 2 and 3 Miscellaneous Appeals Information Sheet (in Schedule B to the Practice Note), to hand to the Court at the first directions hearing.

The first directions hearing in Class 3 miscellaneous appeals will usually be conducted by the List Judge. The Court will discuss with the parties whether the matter is suitable to be listed for a conciliation conference under section 34 of the *Land and Environment Court Act 1979*. Many miscellaneous appeals are suitable to be resolved through conciliation rather than a hearing.

The usual directions made at the first hearing provide for the matter to be listed for a section 34 conference within 14 days, and for the parties to file and serve Statements of Facts and Contentions in accordance with Schedule C to the Practice Note.

CONCILIATION CONFERENCE

If the matter is listed for a section 34 conference, the parties are generally required to file their Statements of Facts and Contentions prior to the conference. The conference is generally conducted by a Commissioner, usually with knowledge and expertise in the issues raised by the appeal.

If the parties are able to reach agreement, the Commissioner can dispose of the proceedings in accordance with the decision and set out in writing the terms of the decision. This is usually called a 'section 34 agreement'.

If the parties are not able to reach agreement, the Commissioner terminates the conference and refers the proceedings back to the Court for the purpose of being fixed for hearing before a different Commissioner or a Judge. The Commissioner writes a report to the Court stating that no agreement was reached and that the conciliation conference was terminated. The Commissioner who conducted the conference is disqualified from hearing or further participating in the proceedings, unless the parties otherwise agree.[183]

THE SECOND DIRECTIONS HEARING

If the matter is not resolved at the section 34 conference, the matter will be listed for a second directions hearing, at which the Court will make directions for the matter to be prepared for hearing. The List Judge usually conducts the second directions hearing.

The parties should expect that the usual directions will be made based on those set out in Schedule A to the Practice Note, to the extent that those directions were not made at the first directions hearing. The parties should attempt to reach agreement prior to the directions hearing, and should have either agreed or competing proposed short minutes to hand to the Court.

THE HEARING

Either a Judge or a Commissioner may conduct the final hearing. The hearing will usually commence at 10:00am. Judgment will generally be reserved.

See Chapter 7: The hearing for more detail.

183 *Land and Environment Court Act 1979* s 34(13).

CHAPTER 14: CLASS 4 PROCEEDINGS

Section 20 of the *Land and Environment Court Act 1979* gives the Court jurisdiction to hear and dispose of proceedings under a range of NSW Acts, including the following:

- *Aboriginal Land Rights Act 1983;*
- *Contaminated Land Management Act 1997*;
- *Environmental Planning and Assessment Act 1979*;
- *Heritage Act 1977*;
- *Local Government Act 1993*;
- *National Parks and Wildlife Act 1974*;
- *Strata Schemes Development Act 2015*;
- *Protection of the Environment Operations Act 1997*;
- *Biodiversity Conservation Act 2016*; and
- *Local Land Services Act 2013.*[184]

There are two types of proceedings in the Class 4 jurisdiction:

- civil enforcement of obligations and duties under environment and planning laws; and
- judicial review of administrative conduct or decisions made under environment and planning laws.[185]

184 *Land and Environment Court Act 1979* s 20.
185 Ibid.

CIVIL ENFORCEMENT PROCEEDINGS

Civil enforcement proceedings are brought to remedy or restrain a breach of an act by a person's failure to do, or refrain from doing, something.[186] These proceedings are usually brought by government authorities to enforce an order, direction or notice which they have previously issued to a person to do something or not to do something and that person has breached the order, direction or notice. Examples of these are:

- orders to stop work under the *Environmental Planning and Assessment Act 1979*,[187] *Heritage Act 1977*,[188] *Biodiversity Conservation Act 2016* [189] or *National Parks and Wildlife Act 1974;*[190]
- notices requiring clean-up or prevention of pollution under the *Protection of the Environment Operations Act 1997*;[191]
- orders to maintain or repair under the *Heritage Act 1977;*[192] or
- directions to do remedial work under the *National Parks and Wildlife Act 1974*.[193]

The person commencing the action (the applicant) brings the case against the person who they allege has breached environment and planning law (the respondent).

JUDICIAL REVIEW PROCEEDINGS

Judicial review proceedings may be commenced by a person with appropriate standing who wishes to challenge the validity of a decision or conduct of an administrative body, such as a Minister or local council.[194]

Under section 20(2) of the *Land and Environment Court Act 1979*, the Court generally has the same civil jurisdiction as the Supreme Court would have to hear and dispose of proceedings to:

- enforce any right, obligation or duty conferred or imposed by a 'planning or environmental law',[195] a 'development contract'[196] or a 'strata renewal plan'[197];
- review or command, the exercise of a function conferred or imposed by a planning or environmental law, a development contract or a strata renewal plan;

186 For example, Environmental Planning and Assessment Act 1979 s 9.45; Protection of the Environment Operations Act 1997 s 252, *Heritage Act 1977* s 153; National Parks and Wildlife Act 1974 s 193; *Biodiversity Conservation Act 2016* s 13.14.
187 *Environmental Planning and Assessment Act 1979* s 9.45.
188 *Heritage Act 1977* s 79C.
189 *Biodiversity Conservation Act 2016* s 11.3.
190 *National Parks and Wildlife Act 1974* s 91AA.
191 *Protection of the Environment Operations Act 1997* s 91.
192 *Heritage Act 1977* s 120.
193 *National Parks and Wildlife Act 1974* ss 91K-91L.
194 *Environmental Planning and Assessment Act 1979* s 9.45
195 *Land and Environment Court Act 1979* s 20(3).
196 Ibid, s 20(5).
197 Ibid.

- make declarations of right in relation to any such right, obligation or duty or the exercise of any such function; and
- award damages for a breach of a development contract, whether or not as provided by s 68 of the *Supreme Court Act 1970*.

For example, a person who has been aggrieved by a decision of a consent authority to approve a development application may commence proceedings on the grounds that the consent authority took into account irrelevant considerations when assessing the application.[198]

The Practice Note – Class 4 Proceedings describes the practice and procedure in Class 4 proceedings.

Part 59 of the UCPR applies to Class 4 judicial review proceedings.[199] Parties must conduct proceedings in a manner so as to achieve the 'just, quick and cheap resolution' of the proceedings.[200]

BEFORE COMMENCING THE PROCEEDINGS

Standing

The relevant piece of legislation under which the action is brought usually specifies who may commence proceedings in the Court.

Civil enforcement	Often 'any person' is allowed to bring the proceedings even if the breach or threatened breach has not infringed or may not infringe any right of their own.[201]
Judicial review	If the statute does not specify who may bring proceedings, the common law test for standing applies. That is, the applicant will need to show that they have a 'special interest' in the subject matter.[202]

Time for commencement of proceedings

The relevant piece of legislation may specify the time within which civil enforcement proceedings must be brought. Proceedings for judicial review of a decision must be commenced within three months of the date of the decision, unless the Court extends the time.[203]

198 *Millers Point Fund Incorporated v Lendlease (Millers Point) Pty Ltd* [2016] NSWLEC 166.

199 Land and Environment Court, Practice Note – Class 4 Proceedings (13 January 2014), 2 [8].

200 *Civil Procedure Act 2005* s 56.

201 See e.g. Environmental Planning and Assessment Act 1979 s 9.45(1); Protection of the Environment Operations Act 1997 s 252(1); Local Government Act 1993 s 674(1); and *National Parks and Wildlife Act 1974* s 193(1).

202 Australian Conservation Foundation v Commonwealth [1980] HCA 53; Onus v Alcoa (1981) 149 CLR 27 and Yates *Security Services Pty Ltd v Keating* (1990) 77 LGRA 165.

203 *Uniform Civil Procedure Rules 2005* r 59.10.

COMMENCING PROCEEDINGS

Class 4 proceedings are commenced by summons filed in the Court Registry. The form of summons can be found on the Court's website.[204]

The first directions hearing will be before the List Judge and will usually occur on the fourth Friday after the summons is filed.[205]

Unless there are interlocutory applications, the matter is particularly complex or is expected to exceed three days hearing time, there should only be two directions hearings before trial.[206]

Civil enforcement proceedings

Who is joined as a respondent in civil enforcement proceedings depends on the type of breach or threatened breach. For example, where a government authority commences civil enforcement proceedings for a person's failure to comply with an order, direction or notice, proceedings are commenced against the person issued with the order, direction or notice. However, proceedings can also be commenced against other people such as a government authority.

Judicial review proceedings

In judicial review proceedings, the following people must be joined as respondents:

- if a decision to be reviewed arose in the course of a dispute between parties, each party who is interested in maintaining the decision (such as the owner of the subject land);[207]
- if the proceedings seek to prohibit, injunct or mandate a step that has not been taken, each body or person who may be directly affected by the relief sought;[208] and
- the body or person responsible for a decision to be reviewed.[209]

The summons must state:[210]

- the orders sought;
- if there is a decision in respect of which relief is sought:
    - the identity of the decision-maker;
    - the terms of the decision to be reviewed; and
    - whether relief is sought in respect of the whole or part only of the decision

204 www.lec.justice.nsw.gov.au/Pages/forms_fees/forms.aspx.
205 Practice Note – Class 4 Proceedings (commenced 13 January 2014), para [10].
206 Ibid, [14]-[15].
207 *Uniform Civil Procedure Rules 2005* r 59.3(2).
208 Ibid, r 59.3(3).
209 Ibid, r 59.3(4).
210 Ibid, r 59.4.

and, if part only, which part; and
- with specificity, the grounds on which the relief is sought.

The applicant must serve the summons within five days of filing the summons.[211]

The respondent must file and serve a response within 21 days stating whether they oppose the relief sought and, if so, on what grounds.[212]

THE FIRST DIRECTIONS HEARING

Before the first directions hearing the parties should try to agree on: [213]

- the directions that the Court should make at the first directions hearing;
- in the case of civil enforcement proceedings, whether there should be points of claim, points of defence or points of reply; and
- whether expert evidence is required, and if so a statement outlining:
    - the disciplines of the experts;
    - the issues to which the proposed expert evidence relates; and
    - the reasons why expert evidence is reasonably required to resolve the proceedings, having regard to the just, quick and cheap requirement.

If parties cannot agree on proposed directions, they should prepare their own competing proposed directions or statement regarding expert evidence.[214]

At the first directions hearing, the parties should hand up to the Court:

- agreed or competing short minutes of order of the directions they propose the Court should make; and
- if one or both parties intend to rely on expert evidence, the agreed statement or separate statements regarding experts' evidence.[215]

At the first directions hearing, the Court will generally make the usual directions set out in Schedule A of the Class 4 Practice Note, including directions for the parties to serve pleadings and evidence. Usually, the applicant is directed to serve its affidavits in chief within two weeks.[216] Therefore, if a party intends to adduce expert evidence at the hearing, or it becomes apparent that another party may adduce expert evidence, the first party must promptly seek directions from the Court.[217]

211 Ibid, r 59.5.
212 Ibid, r 59.6.
213 Practice Note – Class 4 Proceedings (13 January 2014), para [16].
214 Ibid, 3 [17].
215 Ibid, 4 [19].
216 Ibid, 4 [21].
217 *Uniform Civil Procedure Rules 2005* r 31.19(1).

In judicial review proceedings, where cross-examination is only permissible with leave of the Court, the party seeking leave to cross-examine should communicate its intention to cross-examine to the other parties prior to the second directions hearing.[218]

THE SECOND DIRECTIONS HEARING

Before the second directions hearing, parties should endeavour to agree on:[219]

- whether conciliation, mediation or other means of resolving the matter without a trial is appropriate;
- the estimated duration of the trial; and
- the directions the Court should make at the second directions hearing.

If a party has been given notice that it intends to seek leave to cross-examine, the other parties must notify that party whether they consent to or oppose the grant of leave prior to the second directions hearing.[220]

The second directions hearing will usually be conducted on a Friday by the List Judge on a date fixed at the first directions hearing.[221]

At the second directions hearing, parties should hand up to the Court:

- agreed or competing estimates of the duration of the trial; and
- agreed or competing short minutes of orders containing the directions they propose the Court should make.

At the second directions hearing, the Court will usually make directions in accordance with Schedule B to the Class 4 Practice Note.[222] These directions for the parties to confer and prepare a Court Book, Evidence Book and summary of argument and argument in reply.[223]

EVIDENCE

Evidence is to be given by way of affidavit, unless the Court directs otherwise.[224]

Cross-examination of witnesses is permitted only by leave of the Court.[225]

A party may not, without the leave of the Court, seek discovery from, or interrogate, another party to the proceedings. An application for leave is to include a draft list of

218 Ibid.
219 Practice Note – Class 4 Proceedings (13 January 2014), paras. 23]-[25].
220 Ibid, 5 [26].
221 Ibid, 5 [27].
222 Ibid, 6 [30].
223 Ibid.
224 *Uniform Civil Procedure Rules 2005* r 59.7(1).
225 Ibid, r 59.7(3).

categories of documents to be discovered or draft interrogatories.[226]

At the trial, expert evidence may only be adduced where directions have been sought, and only in accordance with those directions made by the Court.[227]

Evidence to be relied upon at the trial should not be filed until the Evidence Book has been prepared and filed along with a list of the evidence.[228]

EXPERT EVIDENCE

Please refer to Chapter 11 of this Guide (Class 1 Proceedings – see pp. 55-56 - Adducing Expert Evidence) for further information and discussion on expert evidence, particularly in relation to the requirement for any party intending to adduce expert evidence in Class 1 proceedings to seek directions from the Court pursuant to Rule 31.19 of the UCPR. The Practice Note for Class 4 proceedings indicates that the parties must also seek directions from the Court if expert evidence is intended to be adduced at trial.[229]

ALTERNATIVE DISPUTE RESOLUTION AND SETTLEMENT

Please refer to Chapter 5 of this Guide (Alternative dispute resolution) for further details on the alternative dispute resolution process and settlement.

THE TRIAL

Before the trial parties need to:

- prepare a Court Book;[230]
- file a summary of arguments;[231]
- for judicial review proceedings, follow the special procedure in rule 59.9 of the UCPR; and
- provide a list of authorities and legislation to be relied on.[232]

For further details on the trial process, please refer to Chapter 7 of this Guide (The hearing).

226 Ibid, r 59.7(4).
227 Ibid, r 31.19(3).
228 Practice Note – Class 4 Proceedings (13 January 2014), paras [48]-[49].
229 *Practice Note – Class 4 Proceedings* (13 January 2014), para [16].
230 Practice Note – Class 4 Proceedings (13 January 2014), para [30]; *Uniform Civil Procedure Rules 2005* r 59.8.
231 Ibid.
232 Practice Note – Class 4 Proceedings (13 January 2014), para [34].

CHAPTER 15: CLASS 5 PROCEEDINGS

The Court exercises its summary criminal jurisdiction in Class 5. Government authorities prosecute offences under planning or environmental laws in this class. Prosecutions are heard by a Judge without a jury. The most common prosecutions in the Court are for breaches of:

- *Protection of the Environment Operations Act 1997*;
- *Environmental Planning and Assessment Act 1979*;
- *Local Government Act 1993*;
- *Local Land Services Act 2016*; and
- *Biodiversity Conservation Act 2016.*

Summary proceedings in the Court are heard pursuant to Part 5 of Chapter 4 of the *Criminal Procedure Act 1986*.

COMMENCING PROCEEDINGS

The legislation proscribing offences will usually state:

- who can commence proceedings for an offence; and
- the time period, within which proceedings must be commenced.

Documents required	The prosecutor needs to prepare: • the summons to commence the proceedings including an order that the defendant appear before the Court at a specified date, time and place to answer to the offence charged in the order. • a draft minute of order requiring the defendant to appear before the Court. • affidavits establishing prima facie proof of the offence charged.[233]
Procedure for obtaining an order	In order to commence proceedings, the prosecutor must contact the Court Registry and make arrangements for a short hearing before the Duty Judge to establish that, prima facie, an offence occurred. This process must be completed so that the Court can make an order for the defendant to appear before the Court. The prosecutor should take enough copies of each document so that it can later serve the defendant with an original sealed copy. This hearing is usually done within a Judge's chambers with the legal representatives of the prosecutor. Once the Judge is satisfied that it is appropriate to order the defendant to appear, the prosecutor may file the documents commencing the proceedings with the Court Registry upon paying the appropriate fee. The Court will process the summons and confirm the date and time of the matter's first mention.
Service of the documents	The sealed order requiring the defendant's attendance, the summons and supporting affidavits need to be served, usually personally unless ordered otherwise, on the defendant.

PROCEDURE

The Practice Note[234], which is drafted with reference to Part 5 of Chapter 4 of the *Criminal Procedure Act 1986*, sets out the steps that need to be undertaken before directions hearing, and at the trial or sentencing hearing.

In particular, the Court's practice requires practitioners to consider Division 2A of the *Criminal Procedure Act* 1986, which seeks to reduce delays by narrowing the scope of disputed issues to those that are 'genuinely in dispute', so that the 'real issues in dispute are determined without undue delay or expense'.[235]

THE FIRST MENTION AND NOTICE OF CASE

The first mention will take place before the Friday Class 5 List Judge about six weeks after the filing of the summons.

233 Land and Environment Court Rules Pt 5 r 5.3 (2)
234 Practice Note – Class 5 Proceedings, 3 April 2018.
235 See Attorney General's 'Statement in Principle' speech 24 November 2011, Hansard.

The defendant should notify the Court of whether it is in a position to enter a plea, and if so enter a plea.

The Court may order that a preliminary hearing[236] or preliminary conference[237] be held.

In preparing for the first mention, the parties should consider the time required to comply with the disclosure provisions. The parties should also prepare for the Court, whether agreed or otherwise, a copy of the requested minutes of proposed direction.

A timetable for the 'first round' of disclosure orders is made at the first mention of proceedings.[238] Disclosure orders require the prosecution to give 'notice of the prosecution case'[239] and for the defendant to give 'notice of the defence response'.[240] It has been said that these notices are 'a heavy obligation' on the prosecution as well as a 'mild abrogation on the defendant's right to silence'.[241]

The 'first round' disclosures are largely an obligation for the prosecutor to give to the defendant documents such as:

- a statement of facts;
- a copy of the affidavit or statement of each witness whose evidence the prosecutor proposes to adduce at the hearing of the proceedings; and
- a copy of any exhibit that the prosecutor proposes to adduce at the hearing of the proceedings.

The 'second round' of disclosure orders requires the prosecutor to give the defendant a 'prosecution's notice', the defendant to give the prosecutor a 'notice of the defence response' to the prosecution's notice.[242] This is said to be 'a substantial abridgment of the defendant's right to silence'.[243]

An order for 'second round' disclosures is only made if the Court is of the opinion that it would be in the interests of justice to do so.[244] This is because it requires the defendant to give notice of matters such as:

- the matters required to be included in a notice under s 247F;
- a statement, in relation to each fact set out in the statement of facts provided by the prosecutor, as to whether the defendant agrees to[245] or the defendant disputes the fact;

236 *Criminal Procedure Act 1986* s 247G.
237 *Criminal Procedure Act 1986* s 247H.
238 *Criminal Procedure Act 1986* s 247D.
239 *Criminal Procedure Act 1986* s 247E.
240 *Criminal Procedure Act 1986* s 247F.
241 See *Sutherland Shire Council v Benedict Industries Pty Ltd* [2013] NSWLEC 121 at [9].
242 *Criminal Procedure Act 1986* ss 247I, 247J, 247K.
243 See *Sutherland Shire Council v Benedict Industries Pty Ltd* [2013] NSWLEC 121 at [11]
244 *Criminal Procedure Act 1986* s 247I.
245 *Evidence Act 1995* s 191.

- a statement, in relation to each matter and circumstance set out in the statement of facts provided by the prosecutor, as to whether the defendant takes issue with the matter or circumstance as set out;
- notice as to whether the defendant proposes to dispute the admissibility of any proposed evidence disclosed by the prosecutor and the basis for the objection;
- if the prosecutor disclosed an intention to adduce expert evidence at the hearing of the proceedings, notice as to whether the defendant disputes any of the expert evidence and which evidence is disputed; and
- a copy of any report, relevant to the proceedings, that has been prepared by a person whom the defendant intends to call as an expert witness at the hearing of the proceedings,

Practitioners should be particularly cautious when complying with the disclosure requirements bearing in mind the potential sanctions for non-compliance with preliminary disclosure requirements including the exclusion of evidence not properly disclosed[246].

THE PRELIMINARY HEARING

Class 5 matters of a certain level of complexity will be listed for a preliminary hearing. The preliminary hearing will again take place before the Friday Class 5 List Judge at a date set by the list Judge at the first mention.

The objective of the preliminary hearing is for the Court to facilitate the efficient management and conduct of the proceedings. There may be one or more preliminary hearings and/or preliminary conferences held.

If the defendant has not already entered a plea, the defendant should enter a plea at the preliminary hearing.

At the preliminary hearing the Court may do any of the things listed in s 247G of the *Criminal Procedure Act 1986.*

The Court may order that a preliminary conference be held in order to determine whether the defendant and the prosecutor are able to reach agreement regarding the evidence to be admitted at the trial or sentencing hearing.

The Court may make orders for preliminary disclosure in accordance with ss 247J, 247K and/or 247L of the *Criminal Procedure Act 1986*.

Once the Court is satisfied that the matter is ready to progress to a determination it will either set a timetable for trial (if plea of not guilty entered) or sentencing hearing (if plea of guilty entered),

246 *Criminal Procedure Act 1986* s 247N.

TRIAL OR SENTENCING HEARING

Prosecution proceedings are resolved by trial or sentencing hearing, depending on any plea entered or a finding of guilt. The trial or sentencing hearing will take place at the Court building before a Judge and normally commence at 10:00am.

The parties are to provide a list of authorities and legislation to be relied upon to the allocated Judge's associate one day before the trial or sentencing hearing. The Court will also be assisted by a skeleton of opening submissions and a written outline of closing submissions. The submissions should be provided to the allocated Judge in person and electronically to the allocated Judge's Associate.

Any application to vacate a trial or sentencing hearing should be made by way of notice of motion explaining the circumstances and reasons for the application.

The hearing otherwise generally follows the structure detailed in Chapter 7: The hearing.

CHAPTER 16: CLASS 6 AND 7 PROCEEDINGS

CLASS 6 AND 7 PROCEEDINGS

The Court exercises its appellate criminal jurisdiction in Classes 6 and 7 in relation to appeals against decisions made in the Local Court regarding environmental offences.[247]

Class 6 matters concern appeals as of right:

- by prosecutors against sentence, and other orders such as the dismissal of proceedings in certain circumstances[248]; and
- by defendants against:
    - a conviction made by the local court, except where:
        - the defendant entered a plea of guilty; or
        - the defendant was absent at the time of conviction;
    - a sentence imposed by the local court.

Class 7 matters concern appeals requiring the Court's leave:

- by prosecutors against certain orders[249]; and
- by defendants against:
    - a conviction made by the Local Court where:
        - the defendant entered a plea of guilty; or

247 Crimes (Appeal and Review) Act 2001 Pt 4, *Land and Environment Court Act 1979* ss 21A, 21B.
248 *Crimes (Appeal and Review) Act 2001* s 42.
249 *Crimes (Appeal and Review) Act 2001* s 43.

- the defendant was absent at the time of conviction;
- other orders.[250]

Appeals in Class 7 must be on a ground that involves a question of law alone.

COMMENCING PROCEEDINGS

Appeals are commenced by summons, which should set out the details of the decision appealed against. This should include the date of the conviction, sentence or dismissal, the Local Court's case number, and which Local Court made the decision.

If leave to appeal is required, the summons should state the general grounds of the application for leave to appeal and, if late application is made for leave, it should state the reasons why an appeal or application for leave to appeal was not made within the time allowed.

On commencing the proceedings, the Court will obtain a transcript of the decision below which will be provided to the parties, as well as the lower court file.

TIME FOR COMMENCEMENT OF PROCEEDINGS

Appeals must generally be lodged within 28 days after a sentence is imposed or order is made.

A defendant who does not appeal within time can apply for leave to appeal against a Local Court decision within three months after the conviction, sentence or order was imposed.[251]

PROCEDURE

Matters in Classes 6 and 7 are heard by a Judge without a jury.

The Court does not have a Practice Note on the conduct of such proceedings. They are heard pursuant to the *Crimes (Appeal and Review) Act 2001* and in accordance with the rules specified in r 5.2 of the *Land and Environment Court Rules 2007* (which in turn refer to the *Supreme Court Rules 1970* and the *Uniform Procedure Rules 2005*).

THE FIRST MENTION

The first mention will take place before the Friday List Judge about 6 weeks after the filing of the Summons.

If leave is required for any reason (i.e. out of time or new evidence to be adduced) the List Judge may list the matter for a further mention or defer the issue for determination at the hearing.

250 *Crimes (Appeal and Review) Act 2001* s 32(2).
251 *Crimes (Appeal and Review) Act 2001* s 33.

THE HEARING

Appeals are heard by way of rehearing on the basis of evidence given in the original Local Court proceedings unless leave of the Court is granted to adduce further evidence.[252]

The Court will be assisted by a written outline of submissions. The submissions should be provided to the allocated Judge in person and electronically to the allocated Judge's associate.

The Court may determine the appeal by:

- setting aside the conviction and/or sentence;
- varying the sentence;
- dismissing the appeal; or
- in the case of an appeal made with leave under s 32(1) – setting aside the conviction and remitting the matter to the original Local Court for redetermination.

252 *Crimes (Appeal and Review) Act 2001* ss 37, 47.

CHAPTER 17: CLASS 8 PROCEEDINGS

The Court has jurisdiction under the Mining Act 1992 (Mining Act) and the Petroleum (Onshore) Act 1991 (Petroleum Act).253

Class 8 matters represent a relatively small percentage of the Court's caseload. Most of the matters involve judicial review of a governmental or ministerial decision concerning an application for an exploration licence or mining lease.254

Helpful materials for mining matters can be accessed through the Court's website.255

Mining matters involving judicial review follow the Court's Class 4 practice and procedure. Chapter 14: Class 4 Proceedings provides further detail.

TYPES OF CLAIMS HEARD UNDER CLASS 8

Class 8 of the Court's jurisdiction can only be exercised by Judges or by Commissioners who are Australian lawyers.[256]

A Commissioner in the Class 8 jurisdiction may be referred to as a 'Commissioner for Mining'.[257]

253 *Land and Environment Court Act 1979* s 21C.

254 Land and Environment Court, Class 8 Mining (2015) www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_8/Mining-matters-the-process/MiningMattershelpfulmaterials/court_decisions_mining.aspx

255 www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_8/mining_process.aspx

256 *Land and Environment Court Act 1979* ss 30(2C), 33(2A).

257 Ibid s 12(2AC).

The Class 8 jurisdiction does not extend to offences under the Mining Act or the Petroleum Act. Certain Mining Act and Petroleum Act offences are dealt with in the Court's Class 5 jurisdiction.

Class 8 matters are subject to the procedures dictated by the *Land and Environment Court Rules 2007*, the *Civil Procedure Act 2005* and the UCPR. Part 4 Division 6 of the *Land and Environment Court Act 1979* contains special provisions respecting Class 8 proceedings, dealing with delegation to and assistance by Commissioners and alternative dispute resolution methods.

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

POWERS OF THE COURT IN CLASS 8

Mining Act

The Court's powers under the Mining Act are contained in Part 15 of that Act with a list of specific matters at s 293.

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

- the area, dimensions or boundaries of land subject to an authority or mineral claim;
- the right to possession or occupation of land by virtue of an authority or mineral claim;
- a right of way, right of access to water, or right of entry under the Mining Act;
- trespass or encroachment on land that is subject to an authority or mineral claim;
- any demands for debt or damages arising out of prospecting or mining;
- demands for specific performance of a contract relating to any authority or mineral claim, or interference with, or injury to, any mining improvement;
- rights to any mineral in, or to be recovered from, any land subject to an authority or mineral claim;
- any transfer or disposition of, or charge on, land being subject to a mineral claim;
- any partnership relating to an authority or mineral claim;
- trespass or encroachment on, or injury to, land as a result of prospecting or mining or to any other property constructed, held or occupied under the Mining Act;
- the management of land subject to an authority or mineral claim;
- legal or equitable interests in, or affecting, an authority or mineral claim;
- any matter related to a compensation agreement under the Mining Act;
- an arbitrator's determination under Division 2 of Part 8 of the Mining Act, which relates to access arrangements for prospecting titles;
- any matter arising as a consequence of an access arrangement;
- any matter relating to a dwelling-house, garden or significant improvement as de-

fined by the Mining Act; and
- the validity of an authority, mineral claim or opal prospecting licence or the decision of a decision-maker in relation to an authority, mineral claim or opal prospecting licence.

Petroleum Act

A list of specific powers for the Class 8 Jurisdiction can be found at Part 12 of the Petroleum Act.

Under the Petroleum Act, the Court's Class 8 jurisdiction includes (but is not limited to):

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

COMMENCING PROCEEDINGS

The matter must be:

- a matter of a type stated in the Mining Act or the Petroleum Act; and
- brought within the time stated by the Mining Act or the Petroleum Act.

Part 6 of the UCPR specifies how civil proceedings, including Class 8 proceedings, are to be commenced.

The fees for filing an originating process in the Class 8 Jurisdiction are listed on the

Court's website.[258]A person may not appear before the Court by an agent in Class 8 proceedings except with the leave of the Court.[259]

The matter will be listed for a directions hearing to set a timetable leading up to the hearing. As there are currently no standard directions for Class 8 mining matters, you may refer to the standard directions in Practice Note – Class 4 Proceedings. See Chapter 14: Class 4 Proceedings for more details.

APPEAL RIGHTS

Only questions of law invoke a right of appeal in Class 8. An appeal against a decision of the Commissioner for Mining is to be made to a Judge.[260] An appeal against an order of a Judge in the Court is to be made to the Supreme Court.[261]

258 www.lec.justice.nsw.gov.au/Pages/forms_fees/fees/feesschedule.aspxl.
259 *Land and Environment Court Act 1979* s 63.
260 Ibid s 56A.
261 Ibid s 57.

CHAPTER 18: SELF-REPRESENTED LITIGANTS

WHO IS A SELF-REPRESENTED LITIGANT?

A self-represented litigant is a person who appears in Court without the representation of a lawyer. The help available for self-represented litigants tends to be for procedural rather than substantive aspects of a case. However, there are a number of support services available to help self-represented litigants prepare for Court. The importance of thorough preparation and organisation for anyone facing Court cannot be overstated.

Environmental Defender's Office of NSW (EDO NSW) is a community legal centre specialising in public interest environmental law and provides free legal advice and legal education to members of the community interested in protecting the environment through the law. EDO NSW runs a free environment and planning law advice line: 1800 626 239. The EDO NSW website contains numerous practical resources and fact sheets, including information about objecting to development applications and consents and bringing proceedings in the Court. For more information go to www.edonsw.org.au.

DUTY LAWYER PILOT SCHEME

In 2018, the Court trialled a duty lawyer scheme to assist self-represented litigants.

The pilot scheme is the result of a collaboration between the Environment and Planning Law Association of NSW (EPLA), EDO NSW , NSW Young Lawyers Environment and Planning Committee, Macquarie University Law School and practitioners from the Court Users Group.

In 2019, the scheme continued to provide advice to self-represented litigants in **current** proceedings in classes 4 to 7 of the Court's jurisdiction (excluding judicial review).

A duty lawyer will be available on Level 4 between 9am and 12 noon each Friday to provide preliminary advice to self-represented litigants with a view to guiding them through the Court process and referring them to appropriate services.

THE COURT REGISTRAR

The Court Registrar may be able to assist self-represented litigants with questions of process and procedure. They will not be able to provide legal advice or instruction about the self-represented litigant's matter or allow the self-represented litigant to speak with the judicial officer assigned to their matter. The Court Registrar may check a self-represented litigant's forms for completeness (e.g. checking they have signed each relevant page) but they will not assist a self-represented litigant with filling in the forms or provide advice about what should be submitted.

WHY DO PEOPLE CHOOSE SELF-REPRESENTATION?

There are many reasons why people opt to represent themselves in litigation, including:

- legal representation is inaccessible e.g. financial reasons;
- lawyers may be reluctant to represent the litigant if their case is perceived as having little merit, utility, or prospects of success;
- self-represented litigants may believe themselves to be the best person to put forward their case;
- the litigant may be a representative of a community or environmental group and is part of a greater support network; and
- the litigant may be relying on legal advice for part of the legal process but choosing to self-represent in court.

WHAT TYPES OF MATTERS MOST COMMONLY INVOLVE SELF-REPRESENTED LITIGANTS?

Self-represented litigants in the Court tend to raise the following matters:

- asking the Court to make an order concerning a tree that may be causing damage or posing a threat to people or property, or a hedge impacting on sunlight or views;
- challenging a development consent by way of merits appeal, for example on the ground of amenity issues like noise, dust, traffic impacts, etc;
- judicial review proceedings, challenging an administrative decision or conduct under planning or environmental laws, for example where a development consent might be challenged for failure to comply with the requirements of the *Environmental Planning and Assessment Act 1979*; and
- bringing third party civil enforcement action to remedy or restrain a breach of en-

vironmental law, for example where a person causes pollution without an environment protection licence or in excess of the limit permitted by that licence, or where a developer breaches the conditions of their development consent.

Self-represented litigants often choose to defend themselves in the following types of proceedings:

- Class 5 proceedings in which a landowner is being prosecuted under various planning and environmental laws and seek to oppose the prosecution without understanding the legal nature of the alleged offence; and
- Class 4 civil enforcement proceedings brought by neighbours or councils for breaches of the *Environmental Planning and Assessment Act 1979*, failure to comply with a development control order or to comply with a condition of development consent.

TIME LIMITS

Most environmental laws contain strict time limits for commencing a case in the Court. Time limits apply to merits appeals, civil enforcement and judicial review proceedings, and criminal proceedings. The time limits differ depending on who is bringing the appeal, and in which class the case will be heard. The specific time limit for each type of appeal or proceeding is usually set out in the legislation under which the decision was made that the applicant wishes to appeal against. Where no appeal period is specified, a period of 60 days is applied.[262]

You should therefore act quickly if you are contemplating an appeal to the Court.

STANDING IN THE PUBLIC INTEREST

The right of a person or community environmental group to bring proceedings in the Court based on 'public interest' is broad in scope, particularly when it comes to civil proceedings to enforce compliance with environmental legislation. Section 9.45 of the *Environmental Planning and Assessment Act 1979* is an 'open standing' provision which gives any person a right to bring proceedings in the Court for an order to remedy or restrain a breach or threatened breach of the Act, regardless of whether that person has been or may be affected as a consequence of that breach. Similarly, s 253 of the *Protection of the Environment Operations Act 1997* enables anyone to bring an action in the Court to restrain (but not remedy) a breach of any New South Wales legislation if the breach is causing, or likely to cause, harm to the environment. Other statutes, such as the *Biodiversity Conservation Act 2016*, contain similar provisions that allow anyone to commence litigation in the public interest to remedy a breach of the Act.

262 *Land and Environment Court Rules 2007* r 7.1(1)(a).

COMMENCING PROCEEDINGS

To initiate proceedings in the Court, litigants must use the correct form and pay the appropriate fee or file an application for the fee to be waived. Information about forms and fees can be accessed through the Court's webpage titled 'Forms and Fees'. These forms correspond to the forms governed by the *Uniform Civil Procedure Rules 2005*, known as the 'UCPR forms'.

The Court has helpfully compiled the application, administrative and court forms most usually used in simple proceedings. The forms can be found here http://www.lec.justice.nsw.gov.au/Pages/forms_fees/forms.aspx

The Court offers the Online Court and Online Registry, which are services that enable people involved in Court proceedings to conduct a number of tasks online. Such tasks include: initiating proceedings; filing documents; obtaining hearing dates and adjournments; accessing documents filed online; and checking electronic records relating to your matter. See Chapter 3: Online Court for more information about these services and how to use and access electronic filing.

AFTER A HEARING

At the conclusion of litigation proceedings, the Court's judgment or final orders must be complied with. Failure to comply with an order of the Court can result in a finding of contempt under Part 55 of the *Supreme Court Rules 1970*. The process for appeals against decisions of the Court depends upon the type of proceedings, the nature of the orders, and whether the decision was made by a Judge or a Commissioner. Further information is available on the Court website and Chapter 2 of this Guide.

COSTS AND EXPENSES

Even without legal representation, the costs of engaging in litigation can be significant and it is important that litigants are aware of the possible costs involved. For example, in order to commence proceedings documents must be filed with the Court and a filing fee is usually charged.

The general rule of law relating to costs is that "costs follow the event." This means that the unsuccessful party has to pay the legal costs of the successful party.

However the Court has broad discretion to not award costs in certain matters[263] unless it considers that the making of a costs order is, in the circumstances of the particular

263 See proceedings under ss 95A, 4.55, 97, 98, 109K, 121ZK, 121ZM and 8.25 of the Environmental Planning and Assessment Act 1979; proceedings under ss 176, 177, 178, 182 and 611 of the Local Government Act 1993; proceedings under s 37 of the *Valuation of Land Act* 1916; proceedings under s 38A of the Land Tax Management Act 1956 and proceedings under s 96 of the Taxation Administration Act 1996.

case, fair and reasonable.

Circumstances in which the Court may consider it is fair and reasonable to make a costs order include:

> (*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.*[264]

Chapter 8 details different costs for different classes, however it is important to note up front that litigation can be expensive. Even if you "win" costs, ordinary costs only cover lawyer to lawyer costs (it does not cover travel or accommodation costs, or your time) and it usually works out at about 70% of what you will actually spend.

If you lose a case, the way that costs are assigned to the parties depends on the type of proceedings, namely whether the case is a merits appeal, judicial review or civil enforcement matter. In merits appeals, each party usually pays their own costs, whether they win or lose, although there are exceptions to this rule. For Class 1, 2 and 3 proceedings in the Court, the making of a costs order must be 'fair and reasonable in the circum-

264 *Land and Environment Court Rules 2007*, Part 3, r 3.7 and *Maurici v Chief Commissioner of State Revenue* (2001) 51 NSWLR 673.

stances', but the fact that a party is unable to meet a costs order is not reason enough for the order not to be made.[265]

In judicial review or civil enforcement proceedings, the loser usually pays both their own and the winner's costs. The 'loser pays' rule is a major disincentive to many community members who wish to take a Court action as many people are unwilling to take the risk of losing the case and having to pay unknown costs to the other side.

However, in public interest cases the Court has the discretion not to award costs. Public interest litigation is when the applicant's concern represents a much broader community concern or when the consequences of the decision will be important for other developments or legal proceedings. An applicant is most likely to succeed on this point if they have no financial stake in the litigation, but are simply seeking to ensure environmental laws are obeyed.

More information

A helpful starting point is the Court's webpage titled, 'Representing Yourself in Court'. Documents under the 'Useful Information' tab on this webpage include:

- 'Litigants in Person Guide';
- 'Service of Documents – A Guide for Self –Represented Litigants';
- 'Subpoenas and Notices to Produce – A Guide for Self Represented Litigants';
- 'A Practitioner's Guide to the Land and Environment Court'; and
- 'Practice Notes and Practice Directions'.

For a general overview of self-representation, the NSW Government's 'Law Access' website[266] contains a section called 'Representing Yourself', which covers basic information such as what to expect at Court, gathering evidence and writing affidavits.

EDO NSW has a number of fact sheets and practical information for self-represented litigants on its website: www.edonsw.org.au.

The Community Litigant's Handbook is a publication prepared by EDO Qld and, although it applies to the Queensland system, it contains helpful information about preparing for and appearing in Court that can be used for NSW litigants.

265 Kennedy v NSW Planning Minister [2010] NSWLEC 269.
266 www.lawaccess.nsw.gov.au/Pages/representing/Representing-yourself.aspx

DICTIONARY

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

Applicant – the party who commences proceedings in Classes 1 to 4 of the Court's jurisdiction. Under the UCPR, the terms 'plaintiff' is used instead of 'applicant'.

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

Construction certificate – a certificate that is required prior to commencing building works pursuant to a development consent (Division 6.3 of the EP&A Act). This was formerly known as a 'building application' or 'building approval'.

the Court – the Land and Environment Court of New South Wales.

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

Court Rules – regulations governing the procedures of a court and how various matters pending before court are handled and processed.

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

DCP – stands for development control plan which provides detailed planning and design guidelines to support the planning controls in the local environmental plan (LEP). DCPs are created by councils and are specific to that local government area.

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

Designated development – development declared as such in the EPA Regulation or in an environmental planning instrument.

Development application or **DA** – an application for development that is lodged with a consent authority (e.g. council) in order to obtain development consent. A development application is often accompanied by other supporting documents, such as a statement of environmental effects.

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

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

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

Filing fee – fee paid when lodging certain documents with the Court, for example, a Class 1 application or notice of motion. Always check the Court's website for any changes in the fees before you file a document.

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

Floor space ratio (FSR) – the total building area divided by the site size area.

Floor Space Ratio = Total covered area on all floors of all buildings on a certain site

Area of the site

Thus, an FSR of 2.0 would indicate that the total floor area of a building is two times the gross area of the site on which it is constructed, as would be found in a multiple-story building. When calculating the FSR for a particular site it is important to first check the definition of FSR and gross floor area in the relevant council's LEP or DCP as these definitions may differ from council to council.

Integrated development – a development that requires both development consent and at least one of the approvals listed in section 4.46 of the *Environmental Planning and Assessment Act 1979* before it can be carried out.

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

Local environmental plan or **LEP** – a plan that regulates development within the relevant local government area. For example, a LEP regulates development in the local government area by outlining what development is prohibited or permissible with or without consent. LEPs are available on the NSW legislation website.

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

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

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

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

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

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

Respondent – the party who has proceedings commenced against them in Classes 1 to 4 and 8 of the Court's jurisdiction. Under the UCPR, the term 'defendant' is used instead of 'respondent'.

Parties' single expert witness – one expert witness engaged by both parties to provide expert evidence on an issue to the Court (previously known as a court appointed expert or CAE).

Regulation – the *Environmental Planning and Assessment Regulation 2000*.

Section 34 conference – a conference between the parties arranged by the Court under s 34 of the *Land and Environment Court Act 1979* involving a Commissioner of the Court with technical expertise on issues relevant to the case acting as a conciliator. The conference provides for a combined resolution process involving first, conciliation and then, if the parties agree, adjudication.

Section 34AA conference – an integrated conciliation conference and Court hearing which is listed over two days in Class 1 Residential Development Appeal proceedings.

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

Short minutes of order or **SMO** – a minute of the court orders that the parties ask the court to make for the preparation for the hearing or conciliation of the proceedings.

Summons – the form of originating process for Class 4 (judicial review), Class 4 (civil enforcement) Class 5 proceedings and Class 6 appeals setting out the grounds of the claim or prosecution and the prayers for relief.

Stood-over – a term used by the Court when directing that a matter is to be adjourned

or 'stood-over' to another day.

SEPP – a State environmental planning policy.

State significant development – development declared as such by the *Environmental Planning and Assessment Act 1979*, by order published in the Gazette by the Minister, or by a State environmental planning policy.

Statement of environmental effects or **SEE** – a report prepared by the applicant or the applicant's town planner identifying the environmental impacts of a proposed development that is not designated development. A development application must be accompanied by a SEE.

Statement of facts and contentions or **SOFAC** – a statement generally prepared by the council's town planner but can also be by applicant in certain appeals in merit review proceedings which outlines the background facts and matters in dispute between the parties. The Statement is divided into two parts – Part A Facts and Part B Contentions.

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

Transcripts – the official written record of a hearing normally transcribed from an audio file recorded during the hearing. The recording is retained by the Reporting Services Branch for three years after the court case (five years for criminal matters).

UCPR – the *Uniform Civil Procedure Rules 2005*.

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

Usual directions – the standard directions as to how a matter will progress and are contained in the Practice Notes of the Court.

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