

THE LEC IN 2011: REVIEWING CASES & NEW PROCEDURES

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Overview of the Appeal Process

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Introduction

- 1 For well over a century, commentators have been both reflecting upon the shortcomings of the traditional court system for resolution of disputes and propounding various means by which these shortcomings might be redressed. A state of nirvana has not yet been reached in this context. It may be implicit in the term “dispute” that there is no universal consensus as to the means by which a disputes may be resolved in a cheap and pain-free way.
- 2 Nonetheless, it has long been accepted in modern times that the traditional system requires significant improvement. One model for improvement emanated from the Harvard Law School. It posits the establishment of what might be described as a dispute resolution centre or multi-door courthouse. This hypothetical legal facility would be one in which, upon engagement of its services, a diagnostic process would be undertaken whereby the most appropriate means by which the dispute might be resolved can be identified. The facility would then offer the various mechanisms for resolution. These would include mediation, conciliation, fact finding, administrative hearings, ombudsperson and adjudication. By proposing such a model, with its diverse processes for resolution, it is one that enables “the forum to fit the fuss” rather than the traditional court where the “fuss is required to fit the forum”.

3 The diagnostic process posited enables the mechanism for solution to be identified which best meets the goals of the disputants. Those goals will vary from disputant to disputant and from dispute to dispute. However, common among those identified are -

- minimising costs
- speed
- privacy
- maintaining and improving relationships
- vindication
- neutral opinion
- precedent
- maximising or minimising recovery

4 By way of example, a process of mediation would not generally be satisfactory if vindication, precedent setting or maximising recovery was required. Conversely, adjudication will often not satisfy an objective of maintaining relationships between disputants nor will it optimally achieve a minimisation of costs, speed (at least in a relative sense) or privacy.

The Land and Environment Court – Generally

5 It was in the context of concerns for change and improvement that I have just identified that, in 1979, the legislature enacted the *Land and Environment Court Act 1979 (the Court Act)*. It established the Land and Environment Court as one that, in many respects, could be described as a multi-door court. Upon its establishment under that Act, it fulfilled dual objectives of rationalisation and specialisation.

6 Prior to the commencement of the Court on 1 September 1980, there was an “uncoordinated miscellany of tribunals and courts” dealing with environmental laws. With the enactment of the legislation, all of those tribunals and courts were

brought together providing the Court with a wide jurisdiction in environmental, planning and land matters. Moreover, the jurisdiction of the Court to deal with very many environmental laws or laws dealing with planning and land management were made exclusive to the Court.

- 7 Further, the legislation, so far as it related to court personnel, was directed to achieving a level of specialisation in the Court to determine matters that fell within the jurisdiction of the Court. This better enabled address to be made to these various matters given the polycentric and multidisciplinary nature of many of the disputes that arise under the legislation engaging the Court's jurisdiction.

Jurisdiction

- 8 There are three broad categories of jurisdiction given to the Court. They are –
- (i) merit review,
 - (ii) enforcement, both civil and criminal, and
 - (iii) appellate.
- 9 Merit review involves the re-exercise by the Court of the administrative power previously exercised (or deemed to have been exercised) by a decision maker appointed to do so under identified legislation. In undertaking this task the Court has the same functions and discretions as the original decision maker. As a consequence, new evidence in addition to or in substitution for that provided to the original decision maker can and is usually received by the Court. It is upon all of the material before it rather than the material before the original decision maker that the Court relies in order to make its determination.
- 10 As the present Chief Judge has written, extra-judicially, benefits of merit review include –

“providing a forum for full and open consideration of issues of importance; increasing accountability of decision makers; clarifying meaning of legislation; ensuring adherence to legislative principles and objects; focussing attention on the accuracy and quality of policy documents, guidelines and planning instruments; and highlighting problems that should be addressed by law reform.”

Merit review generally arises in matters falling within Classes 1, 2, 3 and 8 of the Court’s jurisdiction.

- 11 The civil enforcement of environmental laws falls within Class 4 of the Court’s jurisdiction. Civil enforcement, strictly so called, generally involves application by government agencies or local authorities seeking orders by way of mandatory or prohibitory injunction for breaches of planning and environmental laws. The other common form of proceedings falling within the general rubric of “civil enforcement” are proceedings for judicial review, whereby it is claimed that the decision of a statutory decision maker has been made unlawfully. Such a claim can be founded upon failure to observe some statutory prerequisite; it can be founded upon the failure of the decision maker to consider a matter that the decision maker is bound to consider or it may be founded upon a claim that the decision maker took into account a matter that was irrelevant to the decision to be made. It can also be founded on a claim that the decision made is manifestly unreasonable. These are not exhaustive statements of grounds for judicial review. However, no ground permits merit review.
- 12 The criminal enforcement powers of the Court are exercised within Class 5 of its jurisdiction. A number of environmental statutes enable a breach of those statutes to be prosecuted as a criminal offence to which fines attach or, in a given case, for which some other form of sentence may be imposed.
- 13 Finally, the appellate jurisdiction of the Court takes two forms. Internal appeals are available from Commissioners of the Court to judges on questions of law.

Otherwise, the judges hear appeals from Local Courts against conviction or sentence where persons have been charged in those Courts with offences against environmental laws.

The multi-door Court

- 14 Within its rules and procedures, the Court has the capacity to provide or require a number of mechanisms for dispute resolution. Clearly enough, in all its classes of jurisdiction, the process of adjudication is available. This might be categorised as the traditional function of a court. However, of importance are the other means by which resolution of disputes falling within the Court's jurisdiction may be determined. These alternate means can apply to all matters other than those that involve prosecution for criminal offences or in appeals from a Local Court.
- 15 The importance of dispute resolution processes, other than adjudication, has been given additional emphasis with the enactment of the *Civil Procedure Act* 2005 and its express application to proceedings in the Land and Environment Court. By s 56 of that Act, the Land and Environment Court is enjoined to give effect to the overriding purpose of the *Civil Procedure Act* which, in the context of civil proceedings, is to "facilitate the just, quick and cheap resolution of the real issues in the dispute."
- 16 The processes available for resolution of disputes, apart from adjudication, which receive express sanction under legislation or court rules are –
- conciliation (Classes 1 – 3: s 34 of the Court Act)
 - mediation (Classes 1 – 4 & 8: s 26 Civil Procedure Act)
 - neutral evaluation (Classes 1 – 4 & 8: LECR 6.2)
 - referee (Classes 1 – 4 & 8: UCPR 20.14).

- 17 Of these processes, by far the most often utilised and statistically the most successful is the process of conciliation. It is appropriate to make some observations about this process.

Conciliation

- 18 The process of conciliation has been described by the National Alternative Dispute Resolution Advisory Council in its *Dispute Resolution Terms* (2003) as –

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

- 19 As a process, conciliation is not only the subject of detailed provisions in s 34 of the Court Act, but also is a process that is generally required to be undertaken in accordance with the Court’s Practice Notes pertaining to the conduct of Class 1, 2 and 3 proceedings. The effect of that Practice Note is that conciliation is to be undertaken unless good reason can be shown why a conciliation conference should not be held.
- 20 The provisions of s 34 need to be noticed in order to appreciate their importance in the process of dispute resolution. First, while the Court endeavours to have such a conference conducted by agreement between the parties, it does not require their consent for the purpose of making an order that such a conference take place. Once a conference is directed to be held, subsection (1A) imposes a duty on each party to participate in the conference “in good faith”. That

requirement is important. It involves more than mere attendance at the conference; it goes towards the conduct of the parties. The essential content of an obligation to negotiate or conciliate in good faith involves, first, to undertake to subject oneself to the process of negotiation or conciliation and, secondly, in subjecting oneself to that process, to have an open mind in the sense of a willingness to consider such options for the resolution of the dispute as may be propounded by the other party or by the conciliator, as appropriate, and a willingness to give consideration to putting forward options for the resolution of the dispute. The parties must also be in a position to reach agreement by having the necessary authority. Attendance by a party at such a conference with only a “listening brief” and no capacity to offer anything that might result in the limiting of issues or resolution of the matter is, so it seems to me, inconsistent with the duty to participate in good faith and therefore contravenes s 34(1A).

- 21 Conciliation conferences are presided over by a single Commissioner. Importantly, the section provides that if agreement is reached “between the parties or their representatives” as to the terms of a decision acceptable to them and that decision is one that the Court has power to make, then the presiding Commissioner “must dispose of the proceedings in accordance with the decision: s 34(3)”. Such an agreement which a Commissioner is bound to implement may be reached at the initial conference or any adjourned conference. As long as the conference has not been terminated and agreement is reached, the presiding Commissioner is bound to make the decision that the parties have agreed (*Presrod Pty Ltd v Wollongong City Council* [2010] NSWLEC 192).
- 22 If no agreement is reached at a conciliation conference, the Commissioner is bound to terminate the conference and then put the parties to an election. They may consent to the Commissioner determining the proceedings either following a further hearing, then or at some later point in time, or they may consent to the Commissioner determining the proceedings on the basis of what has been put before the Commissioner at the conciliation conference. Should the parties not consent then the Commissioner refers to the matter to the Court, reporting that

no agreement has been reached and indicating what the Commissioner considers to be the issues between the parties. That Commissioner would not then adjudicate upon the proceedings.

- 23 The provision last mentioned does not apply universally. Under the new provisions of s 34AA, dealing with “small” residential appeals, the Commissioner conducting the conciliation conference (which is compulsory) is also required to dispose of the proceedings unless it is otherwise determined to be inappropriate to do so. This process of compulsory conciliation and determination by the one Commissioner is undoubtedly informed by the concept reflected in the Civil Procedure Act for “just, quick and cheap” resolution of disputes.
- 24 From the perspective of the Court, the s 34 conference is considered to be an essential component of the dispute resolution service that it provides. The Court’s records reveal that at or following a conciliation conference 32% of proceedings commenced in Classes 1, 2 or 3 of the Court’s jurisdiction have resolved without a hearing. It is to be regretted that, at times, a party will be represented at a conciliation conference without instructions, and therefore capacity, to conciliate any aspect of the dispute. Not only does this offend the provisions of the section but defeats the worthy purpose sought to be achieved by the section.

Mediation

- 25 The facility of mediation is, as I have earlier indicated, available in all proceedings in Classes 1 to 4 and 8. Once again, while it is desired that taking such a course be consensual, referral of proceedings by the Court to a mediator is not dependant upon the consent of the parties (*Civil Procedure Act*, s 26(1)).
- 26 The National Alternative Dispute Resolution Advisory Council refers to mediation as –

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

This process can be compared to the process earlier described for conciliation.

- 27 A number of Commissioners of the Court are trained mediators and consequently referral to one of them is available at no cost. Alternatively, an external mediator may be nominated, but obviously that mediator will need to be one agreed to by and paid for by the parties.

Neutral evaluation

- 28 Neutral evaluation is described as a process of evaluation of a dispute in which an impartial evaluator seeks to identify and reduce the issues of fact and law in dispute. The evaluator’s role includes assessing the relative strengths and weaknesses of each parties case and offering an opinion as to the likely outcome of proceedings, including, if relevant, any likely findings of liability.
- 29 Neutral evaluation is available in all matters falling within the Court’s civil jurisdiction. Once again, the Court has the power to refer any matter for neutral evaluation with or without the consent of the parties. Reference may be made to a Commissioner or to an external person agreed to by the parties.
- 30 I recently had experience of the benefit to be derived from neutral evaluation. In the context of an appeal to the Court following the Council’s refusal of an application to modify a development consent, I was required to determinate a legal issue prior to determination of the appeal proper. That legal issue was

determined in a way that maintained the proceedings and left the merits of the application for determination. The essential question left was the quantum of a s 94 contribution. The parties sensibly referred the matter to a consultant planner, each making submissions to him and each ultimately accepting his evaluation of the likely outcome of the proceedings, including the quantum of the contribution. In the result, orders determining the appeal were made by consent.

Referee

- 31 By UCPR 20.14(1) the Court is empowered to refer the whole or any part of the proceedings or any question arising in the proceedings to a referee appointed by the Court. A referee so appointed will be external to the Court and will be a person with special knowledge or expertise relevant to the matter or question being referred. A referee conducts an enquiry into the referred matter and reports to the Court.
- 32 I am only aware of one matter in which such a reference has been made. The expertise held among Commissioners and Acting Commissioners is such as to comprehend a large number of expert disciplines likely to be encountered in resolving disputes that come before the Court. This fact might well explain why reference to a referee is rare. A Commissioner with appropriate expertise can be appointed to sit on a case calling for expert determination.

Conclusion

- 33 At the outset, I identified what might be called “the Harvard paradigm” for a dispute resolution centre, likely to serve the interests of disputants and the community in providing a facility for the resolution of disputes that inevitably arise in society. Whether both the constitution of and manner of operation of the Land and Environment Court meets that paradigm can legitimately be debated. However, the operation of the Court Act together with coordinate legislation and rules pertaining to the conduct of proceedings before the Court certainly facilitate

the resolution of disputes falling within the Court's jurisdiction by a number of processes. These processes extend well beyond the traditional mechanism of adjudication, important though that process is to resolve some disputes. More focussed utilisation of these other mechanisms for resolution will, I suggest, in a large number of cases, better serve the purpose of ensuring the just, quick and cheap resolution of those disputes.
