

# **Assisting self-represented litigants – particularly for cases with on-site hearings or on-site conciliation conferences – in the NSW Land and Environment Court**

## **Introduction to the Court**

The Land and Environment Court of New South Wales is a superior court of record that exercises judicial and administrative decision-making functions. The Court's jurisdiction is divided into eight separate Classes.

The Court comprises a Chief Judge; five Judges; a Senior Commissioner and eight Commissioners, all being full time members of the Court. The Judges have the rank and status of Judges of the Supreme Court and the Commissioners are drawn from a variety of professional backgrounds such as the law, engineering, town planning and architecture.

The Judges of the Court can exercise the jurisdiction of the Court in all its Classes. The Commissioners do not exercise the jurisdiction of the Court in all its Classes but do so, relevant to the frequent appearance of self-represented litigants, in the three Classes (Classes 1, 2 and 3) that are merit review proceedings, being proceedings primarily involving planning, local government or valuation appeals. Only Commissioners may conduct on-site hearings or conciliation conferences.

There are also a number of Acting Commissioners who are brought in on a case-by-case basis for their particular and more highly specialised areas of expertise and sit (sometimes by themselves and other times with another member of the Court depending on the nature of the case involved) to exercise the Court's merit decision making functions.

All Commissioners, whether full-time or part-time, also conduct our appropriate dispute resolution (ADR) processes as part of operating what our Chief Judge describes as a multi-door Courthouse.

## **Objectives of the paper**

This paper explores the steps that the Court takes, generally, to provide assistance to self-represented litigants in all its merit review jurisdictions but will focus on the particular steps necessary to ensure that there is a proper, effective and procedurally fair basis upon which the self-represented litigants can participate in the on-site hearing process from the time of filing of an application through to the conduct of an on-site hearing or conciliation conference. The particular difficulties of dealing with self-represented litigants during site inspections or where the totality of the proceedings is conducted on-site are also explored.

## **The scope of and drivers for assistance to self-represented parties**

Whilst the Court does provide assistance, as will be later discussed, for self-represented litigants who are participating in what might be described as conventional judicial proceedings, the nature of the Court's merit review jurisdictions coupled with the extensive use of ADR options pose particular challenges for providing assistance to self-represented litigants. Whilst this paper, in its initial stages, deals with broader information provision to assist those who wish to represent themselves in proceedings before the Court, a significant emphasis has been placed on those aspects of the Court's activities that are less conventional than those of the more structured solely courtroom-based proceedings.

Although the Court has endeavoured, for many years, to provide assistance to self-represented litigants, in the past seven years or so, two events have added significant impetus to and necessity for us to respond more intensely in this area.

At the broader structural level, the Land and Environment Court was an early adopter of the *International Framework for Court Excellence* (the Framework) and became a pilot project for its implementation in Australia.

The Court has undertaken a wide range of internal reforms in aspiring to meet the seven broad objectives of the framework.

One of those broad objectives, contained in Chapter 7 of the 2013 revision of the Framework, deals with establishing and maintaining *Public Trust & Confidence* in the operation of a court. Our approach to this concept is to place particular emphasis on endeavouring to assist self-represented parties to bring their matters to the Court when their dispute with (usually) their local council or some other governmental decision-making body is comparatively uncontroversial and does not require the expenditure of the tens of thousands of dollars for lawyers and expert witnesses normally attendant on preparing for and running even a modestly simple matter.

At the more particular level, the enactment of the *Trees (Disputes Between Neighbours) Act 2006* (the Trees Act) and its coming into effect in early 2007 meant that we anticipated we would be faced with a significant surge of cases involving difficult issues of jurisdictional facts; matters of causation and a wide range of discretionary factors requiring to be considered as part of the decision-making process. The expected surge was realised and, although cases of this type (as discussed in more detail at several points in this paper) have now levelled off, the experience that we have derived from the high proportion of self-representation in cases in this aspect of our jurisdiction has provided us with further valuable insights for how we might assist self-represented litigants in other areas of the Court's merit jurisdictions.

I observe that, in the vast majority of the cases for on-site proceedings (whether a site view or an on-site hearing to finality or a conciliation conference) these are conducted by a single Commissioner who attends the site unaccompanied. Whilst the *Land and Environment Court Act 1979* (the Court Act) makes provision for benches of two Commissioners, this is not the norm in our decision-making processes.

There is a significant opportunity, in my view, for courts to ensure that self-represented litigants, even if unsuccessful in the proceedings in which they are involved, are at least left with some degree of satisfaction that the process has been a fair one.

## **Particularly relevant aspects of the Court's jurisdictions**

There are three areas of the Court's merit jurisdiction where it is likely that we will see self-represented litigants. These are, in ascending order of frequency,

- Development appeals (particularly residential development appeals);
- Statutory valuation appeals; and
- Tree disputes between neighbours.

To set the scene, it is appropriate to describe, briefly, the nature of each of these aspects of the Court's jurisdiction.

### **Development appeals**

The Court's development appeal jurisdiction encompasses the full range of potential developments from simple additions and/or alterations to a single residence through significant mid-scale industrial/commercial development right up to major developments such as coalmines, multi-thousand allotment residential developments or large wind farms.

In all of these matters, the Court is not the original consent authority but an appeal has come to the Court after the original consent authority has either determined the manner in a fashion unacceptable to a party entitled to appeal or has failed to determine the application within the statutory timeframe set for it to be dealt with.

Although such proceedings are described as appeals, they are not reviews of merit findings of the decision maker nor an examination of the decision-making process. They are a reconsideration of the matter, on the merits, with the Court standing in the shoes of the original decision maker and having all the powers and functions attendant on that. New material not available to the original decision-maker is permitted.

Obviously, it is unlikely that there will be self-representation in any major development appeal and, almost inevitably, self-representation in such matters is

confined to small-scale development proposals (almost but not exclusively residential development appeals).

### **Statutory valuation appeals**

For the purposes of local council rating, land tax and other revenue related matters, parcels of land in New South Wales are valued by the Valuer-General and given a statutory valuation. This valuation process is undertaken on an ongoing cycle and the landholder has a right of objection and appeal against the determined statutory valuation. That right of appeal is to the Land and Environment Court.

The nature of the statutory valuation appeals brought by self-represented appellants is entirely at the small-scale residential or single commercial premises level.

It is appropriate to note, at this point, as it is significant in explaining statutory valuation appeals to self-represented applicants, that s 40(2) of the *Valuation of Land Act* 1916 expressly places the burden of proof, to the civil standard, on the landholder/appellant to demonstrate that the statutory value is incorrect.

### **Tree disputes between neighbours**

In its original form, which operated until 2011, the Trees Act permitted an owner of property (deemed to include any occupier of a property) to seek a remedy through the Land and Environment Court where a tree on an adjoining property had caused, is causing or is likely to cause damage to the applicant's property or was a likely risk of injury.

Although a number of legally interesting jurisdictional points have arisen concerning the original terms of this legislation (for example bamboo, although a grass botanically, was deemed to be a tree but a vine was not so deemed), it is not necessary to explore them in detail – save to note that the jurisdictional scope of the legislation does regularly give rise to some confusion, confusion not confined solely to self-represented applicants.

Following a review of the Trees Act two years after it originally came into effect, an additional area was added to the Court's jurisdiction. The new Part 2A in the Trees

Act permits applications to be made concerning hedges that severely obstruct a view from a dwelling or severely obstruct sunlight to windows of a dwelling on the applicant's property.

As with damage/injury applications, there are a number of (different) jurisdictional tests that have to be satisfied (there must be two or more trees planted so as to form a hedge and being more than 2.5 m in height being the major tests), but, again it is not necessary to deal with those tests in detail save to note that they, too, give rise to confusion and uncertainty. The part of this legislation dealing with hedge disputes is currently subject to a review after its first two years of operation.

The Trees Act extends to trees on land owned by the Commonwealth or State Government but does not extend to trees on land owned or managed by Local Government bodies.

The legislation abolished the common law action in nuisance for trees to which the legislation applies.

The scope of the order-making power under this legislation is extraordinarily wide and includes, for example, an unlimited jurisdiction to award compensation for rectification costs or to order permanent, ongoing pruning regimes for hedges to ensure that a specified view protection or solar access outcome is maintained into the future.

We average some 150 or so tree dispute cases per annum – the peak being over 250 in the early years. In nearly 75% of these matters neither party is represented by a lawyer. Of the remainder, 10% or so have legal representation for one side with the remaining 15% or so having lawyers on both sides.

A singular aspect of the Court's trees jurisdiction is that virtually all of these hearings are held entirely on-site and involve not merely a site inspection of both the applicant's and the respondent's property but also taking all evidence and hearing all submissions on-site with, in the vast majority of the cases, a decision being delivered

orally on-site, recorded and subsequently transcribed with a copy provided to the parties and published through the New South Wales Caselaw website.

### **Representation by agents**

The Court Act, by s 63, permits a party to be represented, with the leave of the Court, by an agent. Such appearance is subject to satisfaction of matters contained in the section and in Part 7 r 7 of the *Land and Environment Court Rules 2007* (the Court Rules).


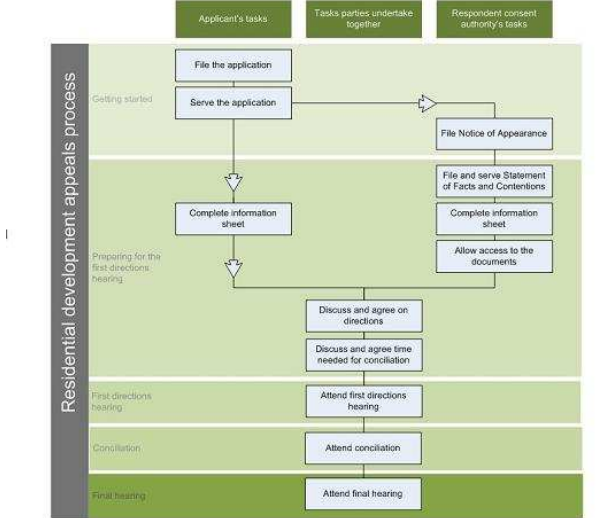
It is also not unusual for parties to tree dispute applications to have an agent (son or daughter, for example, advocating for elderly parents with limited English) appear for them. Such agency arrangements are able to be dealt with on-site, in a facultative, informal fashion so that the statutory matters noted above do not act as an insurmountable barrier to such representation.

For the purpose of this paper, representation by agents in such circumstances, is effectively self-representation and we apply the measures described to such appearances.


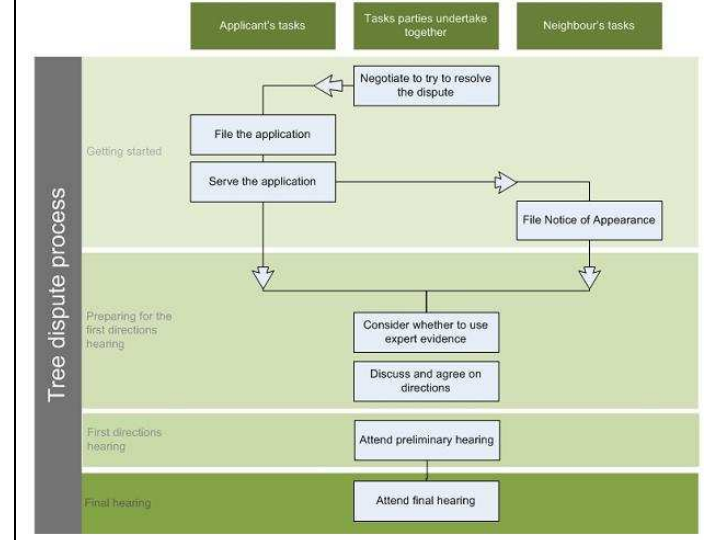
### **The extensive suite of material on the Court's website designed to help self-represented litigants**

The Court's website is designed to be easy to read for a lay person and to provide specific guidance on a wide range of procedural and other matters including, specifically, a handbook for self-represented litigants and a guide to the service of documents for self-represented parties. In particular, for two areas within the Court's jurisdiction where we have, as the earlier noted, high or higher self-represented litigants (residential development appeals and tree dispute applications), we have prepared plain English guides that step a person through the whole process from preliminary considerations prior to and at the commencement of proceedings through to the disposition of the proceedings and the making of orders. The access to and nature of each of these step through documents is shown below:

# Residential development appeals

<p><b>Types of cases</b></p> <ul style="list-style-type: none"> <li>Class 1: environmental planning and protection appeals</li> <li>Development appeals process</li> <li><b>Residential development appeals process</b></li> <li>Miscellaneous appeals process</li> <li>Class 2: tree disputes and local government appeals</li> <li>Class 3: valuation, compensation and Aboriginal land matters</li> <li>Class 4: judicial review and civil enforcement</li> <li>Class 5: criminal proceedings</li> <li>Class 6 and 7: criminal appeals from the NSW Local Court</li> <li>Class 8: mining</li> <li>Cross-vested jurisdiction</li> <li>Appeals against Land and Environment Court decisions</li> </ul>	<p><b>Residential development appeals process</b></p> <p>These pages describe appeals that can be made to the Court against a consent authority's determination concerning certain kinds of residential development and other developments that are referred to in s. 154A of the Land and Environment Court Act 1979.</p>  <p>Development types covered here are:</p> <ul style="list-style-type: none"> <li>development of detached single dwellings (houses) and dual occupancies (including subdivisions);</li> <li>alterations or additions to detached single dwellings (houses) or dual occupancies or other developments described by the regulations.</li> </ul> <p>The Court refers to these types of development as residential development appeals concerning residential development and deals with by a particular process. This involves two steps: first, a conciliation between the parties and second, if the parties cannot resolve the matter by conciliation, a hearing and a decision by the Court.</p> <p>The Court can also order proceedings in other classes to be dealt with in this way (see s. 24A(1)(3)). These pages outline:</p> <ul style="list-style-type: none"> <li>appeals that can be made in this class;</li> <li>who has rights of appeal;</li> <li>when the appeal must be made;</li> <li>how to file an appeal;</li> <li>what to expect during the course of the appeal.</li> </ul> <p>See a map of the residential development appeals process</p>	<p><b>Fast facts</b></p> <p>Read fast facts on residential development appeals.</p> <p>Residential development appeals — home</p> <p>What is a residential development appeal?</p> <p>Who can make a residential development appeal?</p> <p>When can a residential development appeal be made?</p> <p>How to start the appeal</p> <p>Practice and procedure for residential development appeals</p> <p>Preparing for the first directions hearing</p> <p>At the first directions hearing</p> <p>At the conciliation conference and final hearing</p> <p>Residential development appeals: outcomes and orders</p> <p>Residential development appeals: helpful materials</p> <p>Residential development appeals: case studies</p>	
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# Tree dispute applications

<p><b>Types of cases</b></p> <ul style="list-style-type: none"> <li>Class 1: environmental planning and protection appeals</li> <li>Class 2: tree disputes and local government appeals</li> <li><b>Trees or hedge dispute processes</b></li> <li>Miscellaneous appeals process</li> <li>Class 3: valuation, compensation and Aboriginal land matters</li> <li>Class 4: judicial review and civil enforcement</li> <li>Class 5: criminal proceedings</li> <li>Class 6 and 7: criminal appeals from the NSW Local Court</li> <li>Class 8: mining</li> <li>Cross-vested jurisdiction</li> <li>Appeals against Land and Environment Court decisions</li> </ul>	<p><b>Trees or hedge disputes process</b></p> <p>These pages describe the process for dealing with disputes about trees and hedges in the NSW Land and Environment Court.</p>  <p>The Court has jurisdiction, in Class 2, to resolve applications under the Trees (Disputes Between Neighbours) Act 2005 (the Trees Act).</p> <p>The Court has prepared notes explaining how the Trees Act works, what the court can do, how to make an application, how the application will be dealt with, and what orders the Court can make.</p> <p>These pages outline:</p> <ul style="list-style-type: none"> <li>appeals that can be made in this Class;</li> <li>who has rights of appeal;</li> <li>when the appeal must be made;</li> <li>how to file an appeal;</li> <li>what to expect during the process of the appeal.</li> </ul>	<p>Tree or hedge disputes process — home</p> <p>What is a tree dispute?</p> <p>Who can make an application? When can it be made?</p> <p>How to start the application</p> <p>Practice and procedure for tree disputes</p> <p>Tree disputes: preparing for the preliminary hearing</p> <p>Tree disputes: at the preliminary hearing</p> <p>Tree disputes: at the final hearing</p> <p>Tree disputes: outcomes and orders</p> <p>Tree disputes: helpful materials</p>	
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Whilst, at the present time, material for our third comparatively high volume self-represented litigant area (statutory valuation appeals) is not yet available, a first draft of a comprehensive new section for the Court's website dealing with this area of our jurisdictions is currently being reviewed by me and by the Chief Judge after its preparation by one of our Acting Commissioners who is an experienced valuer. We anticipate that this material will be published by the end of the first half of this year.

All of this material is prepared in-house by members of the Court. We have no dedicated research staff or Web authoring staff and the material has been prepared



and is maintained by us as we are committed to promoting accessibility to and affordability of the processes of our Court.

### **The annotated Trees Act**

As will be obvious from what is set out throughout this paper, quite significant and groundbreaking work has been undertaken by us to provide assistance to self-represented litigants in tree dispute cases because of the extraordinarily high percentage of self-represented parties in such proceedings. As a consequence, much of the material that follows in this paper is illustrated by examples drawn from our experience in this jurisdiction.

One area of which we are particularly proud is our preparation and initial publication of an annotated version of the Trees Act with a commentary prepared by those of us actively involved in the implementation of this legislation. This annotated Trees Act includes hyperlinks to cases that are published on the Caselaw website and which illustrate the particular point that is being made. The commentary is written in as plain English as is possible and is regularly updated. The introduction of Part 2A, high hedges, in 2011 meant that there needed to be a major revision of what we provided but that has been undertaken and is available on our website. An example page from each of Part 2 (property damage or risk of injury) and Part 2A (high hedges) is reproduced below.

<p><b>Grinding of trip hazards</b></p> <p>The Court has also ordered the grinding of trip hazards in order to eliminate the likelihood of future injury to people (see, for example, <i>Tomasetta v Gregory</i> [2007] NSWLEC 420).</p>	<p><b>"Planted"</b></p> <p>The use of the word 'planted' in this section is not interchangeable with 'situated' or 'located'. The word 'situated' is used elsewhere in this act to refer to the location of the tree on the land. The word 'planted' has been used deliberately here to differentiate what is required in this section from situations where a tree's location on land need be identified.</p>
<p>(g) authorise land to be entered for the purposes of carrying out an order under this section (including for the purposes of obtaining quotations for the carrying out of work on the land), or</p>	<p>A tree will be seen to have been planted, or be identified as planted, when it has been put or set in the ground by human agency, in tree form, or, in the form of seeds, seedlings or young trees. A self-sown seed has not been planted.</p>
<p><b>Orders for access to an applicant's property for the purposes of carrying out work required by orders of the court</b></p> <p>It is usual for the Court to order access to an applicant's property to enable a tree owner to permit effective pruning or safe removal of tree. Access will also be ordered if this is a more cost effective way of carrying out the Court's orders.</p>	<p>A self-sown tree cannot be a 'planted' tree as an unintentionally sown seed, by definition, cannot be found to have been sown purposefully 'so as to form a hedge' with other trees. To satisfy the requirements of this section, trees need to have been planted with the purpose of forming a hedge and this state of affairs needs to continue to the present (<i>Johnson v Angus</i> [2012] NSWLEC 192 paras [31]-[39]).</p>
<p>Access may be ordered not merely for the purposes of carrying out work on a tree but also to permit work on other structures such as fences or retaining walls. Access may also be ordered for the purpose of obtaining quotes for work to trees and/or structures.</p>	<p><b>Criteria relevant to a determination that trees form a hedge, and were planted 'so as to form a hedge'</b></p>
<p>Such access may be needed simply because pruning or cutting needs to take place in the airspace over the applicant's property (see, for example, <i>Bentley v Hitchen</i> [2008] NSWLEC 1348) or access from the applicant's property enables the work to be completed in a safer and more efficient manner (<i>Owners Corporation SP11222 v Jones</i> [2010] NSWLEC 1327).</p> <p>If the Court orders access, it will require that any access:</p>	<p>Being sufficiently close is relevant to determining whether the trees are planted so as to form a hedge. What is sufficiently close will depend upon the species, the age of the tree, the health and growth of the tree, and the scale of the landscape (<i>Johnson v Angus</i> [2012] NSWLEC 192 at para [40]). The age of the tree is relevant as a tree planted a number of years before other trees could not have been planted so as to form a hedge with such trees as they were not in existence (<i>Johnson v Angus</i> [2012] NSWLEC 192 para [43]).</p>
<ul style="list-style-type: none"> <li>• is on reasonable notice to the person whose property is to be visited;</li> <li>• is at a reasonable hour of the day; and</li> <li>• the person whose property is to be visited has the right to supervise that access.</li> </ul>	<p>In <i>Johnson v Angus</i> [2012] NSWLEC 192 at para [41], Preston CJ states:</p>
<p><b>Refusal to permit access when ordered to do so</b></p> <p>When the Court has made orders under the Trees Act, the Court retains its general supervisory jurisdiction concerning such orders. This means that the Court has the power to suspend (stay) or rescind orders if, for example, a successful applicant who is ordered to provide access to their property for the purpose of undertaking work on a tree on their neighbour's property refuses to permit such access (see <i>Vierra v Kaleski</i> [2008] NSWLEC 159).</p>	<p>41 But the criterion of sufficient proximity does not exhaust the relevant criteria to be considered in determining whether trees are planted so as to form a hedge. Section 14A(1)(a) construed in its own terms and in the context of Part 2A, does not so circumscribe the criteria that may be considered in determining whether the trees are planted so as to form a hedge. Other criteria are relevant, including the species of trees planted; whether the trees are all of one species or different species and, if different species, the similarity or dissimilarity and compatibility or incompatibility of the different species in terms of morphology (the form and structure of the trees), function and growth of the trees; the planting arrangement of the trees, such as whether the trees are planted in a linear, curvilinear, or another spatial relationship conducive to the trees forming a hedge.</p>
<p><b>Pre-hearing access</b></p> <p>The Court has ordered access for the purpose of enabling inspections by experts retained by the parties to prepare their evidence. Such orders are made prior to a hearing as part of the preliminary hearing process.</p>	<p>The Court has generally taken a purposive approach in its interpretation of s 14A(1)(a). In <i>Wisdom v Pavn</i> [2011] NSWLEC 1012 at para [45], Moore SC and Hewett AC state:</p>
<p>This access provision is contained in Direction 13 of the Court's <a href="#">Standard Directions</a> for tree applications. This direction requires that any access:</p> <ul style="list-style-type: none"> <li>• is on reasonable notice to the person whose property is to be visited;</li> <li>• is at a reasonable hour of the day; and</li> <li>• the person whose property is to be visited has the right to supervise that access.</li> </ul>	<p>45... We are satisfied that the words <i>forming a hedge</i> mean that there must be a degree of regularity and arrangement, in a linear fashion, of the trees being considered. Whilst such an arrangement may be more than one tree deep and does not need to be in a perfectly straight line, the impression that is given by the planted arrangement of the trees must be one that, in an ordinary English understanding of the word, would be perceived as a hedge.</p>
<p>It should be noted that pre-hearing inspection access by an expert is made available to both the applicant and the tree owner by these directions. This is because a need for pre-hearing expert inspection can include a need for access to the applicant's property when, for example, structural damage is claimed by the applicant to have occurred to the applicant's dwelling.</p>	<p>The trees subject to the application may be planted in containers however the containers must be arranged in a manner that forms a hedge and continue to form a hedge at the time of the hearing (<i>Bew v Levi</i> [2010] NSWLEC 1371).</p> <p>What may be considered a tree that can form a hedge is wide ranging. A hedge may comprise one or many species. As in Part 2, bamboo is a 'tree' for the purpose of the Act</p>

We are unaware of any other Court that provides and maintains, through its decision-makers, a service of this nature to assist potential and actual self-represented litigants.

Self-evidently, it is not appropriate for us to quiz those involved in our tree dispute proceedings about the extent to which they have found this annotated Trees Act and our other explanatory tree dispute material of use in their preparation of or responding to a tree dispute application. However, from the nature of the often voluminous material in support of or in response to applications, it is obvious that there is a very high usage of this material. That is also borne out, anecdotally, by conversations that several of my colleagues have had with arborists who have been retained to provide expert advice. Parenthetically, I might add, that that expert advice, itself, also regularly draws heavily on material on the Court's website when that advice is provided to assist a self-represented applicant or respondent in

understanding the legal/arboricultural issues likely to be dealt with in such proceedings.

### **Publication of merit guidance decisions involving the setting of planning or tree dispute principles**

In 2003, for planning merit decisions, the then Commissioners of the Court (led by my predecessor as Senior Commissioner) concluded that there were a range of gaps in the planning assessment processes that were being dealt with on appeal to the Court. We concluded that, in appropriate circumstances, we should publish planning principles, written in plain English, to provide guidance concerning these gaps in approach.

The principles are written in a fashion designed to assist not only planning professionals engaged in assessment processes but also to assist potential lay litigants in understanding the principles that the Court would bring to bear on particular topics. There are now more than thirty (30) of these planning principles published through the Court's website. It is our experience that these are relied upon, in appropriate instances, by self-represented litigants.

Perhaps, more particularly, after the commencement of the Trees Act, one of my colleagues (a former head teacher in arboriculture in the TAFE system; then an Acting Commissioner and now one of my full-time colleagues) and I were charged by our Chief Judge, Justice Brian Preston, with the implementation of this legislation.

My colleague and I concluded, after hearing the first half-dozen or so cases – all involving self-represented applicants requesting us to order the removal of trees on a neighbouring property – that two approaches were essential:

- First, we concluded that a proper construction of the Act effectively created a presumption in favour of the tree rather than a presumption in favour of its removal; and
- Second, and more importantly in this context, we decided that the planning principle approach should be adopted for tree disputes.

The first tree dispute principle that we published was in the case of *Barker v Kyriakides* [2007] NSWLEC 292. It is in the following terms:

*For people who live in urban environments, it is appropriate to expect that some degree of house exterior and grounds maintenance will be required in order to appreciate and retain the aesthetic and environmental benefits of having trees in such an urban environment. In particular, it is reasonable to expect people living in such an environment might need to clean the gutters and the surrounds of their houses on a regular basis.*

*The dropping of leaves, flowers, fruit, seeds or small elements of deadwood by urban trees ordinarily will not provide the basis for ordering removal of or intervention with an urban tree.*

This principle has been applied consistently by the Court in several hundred cases that have arisen since its publication in the first half of 2007. Importantly, in the context of this paper, it is not the application of the principle by the Court that is of interest but more the fact that tree owners, when researching how to respond to an application lodged seeking an order for the removal of their trees research the approach taken by the Court in tree disputes and raise this tree dispute principle as, as it were, a pleaded defence in the material that they file in response to the tree dispute application.

A similar position applies with respect to a number of other tree dispute principles that we have published, thus demonstrating the utility of that approach and the accessibility that our website provides for that information in assisting self-represented litigants (primarily respondents) in this area of our jurisdiction.

### **Comprehensive, step by step, plain English application forms**

Whilst the vast majority of the forms that the Court is required to utilise are common, standard forms from the *Uniform Civil Procedure Rules 2005*, in the tree dispute jurisdiction, we have been able to draft and have adopted our own idiosyncratic forms for the commencement of proceedings. There are three of them.

The first is the tree dispute application that is of comparatively confined compass but is designed to ensure that all the basic information that is necessary for the initiation

of proceedings and valid service of the application is contained in the document. The front page of a Tree Dispute Application is shown below:

Form C (version 3)  
Trees (Disputes Between Neighbours) Act 2006 s 7 or s 14B

**TREE DISPUTE APPLICATION**

Tree dispute information (including the Practice Note – Class 2 Tree Applications) is available on the Court's website at [www.lawlink.nsw.gov.au/leg](http://www.lawlink.nsw.gov.au/leg) or at the Court registry.

COURT DETAILS	
Court	Land and Environment Court of New South Wales
Class	2
Case number <small>[The Court will complete this.]</small>	
APPLICANT'S DETAILS	
Full name	
Residential address	
Postal address	
Telephone	
<b>IF THE APPLICANT IS REPRESENTED BY A LEGAL REPRESENTATIVE, AGENT OR AUTHORISED OFFICER:</b> <small>[The representative will also need to complete the section entitled "Further Details about Applicant's Representative".]</small>	
#Legal representative	<small>[solicitor on record] [firm]</small>
#Authorised agent name	
#Authorised officer name	
#Contact name and telephone	
Contact email	
DETAILS OF THE PROPERTY WHERE TREES ARE LOCATED	
Property address	
Lot & Deposited Plan Number	
Local council	
Zoning of property <small>[state name of zone and environmental planning instrument under which property is zoned]</small>	
Full name of all owners of the property <small>(Respondent)</small>	1. .... 2. .... 3. ....
Property owners' address <small>[state address or write "same as above"]</small>	
Property owners' telephone	
#Occupier's name <small>(Respondent)</small> <small>[Complete if property owner does not live at the address where tree is located.]</small>	
#Occupier's telephone	

The other two forms are ones designed to elicit the necessary supporting information required to be considered for either an application under Part 2 (property damage or risk of injury) and Part 2A (high hedges). These forms are 14 and 16 pages long respectively.

Each of these documents is laid out as a step by step questionnaire designed to elicit responses to each of the relevant statutory provisions that require to be

considered in the exercise of our jurisdiction in each of these instances. It is appropriate, to understand the nature of these forms, to set out example pages from each of them.

**For Part 2 applications, this is a sample page:**

5 **For each tree you say has caused, is causing or is likely to cause damage, is there anything, other than the tree, that has contributed, or is contributing, to any such damage, including any act or omission by you and the impact of any trees owned by you? [If appropriate, please attach photographs to illustrate your answer].**

Yes

No

If Yes, please specify including referring to each item identified for (e) on the diagram drawn for Q 2

6 **Has the owner or occupier (if not the owner) of the land on which the tree is situated taken any steps to prevent or rectify any such damage?**

Yes

No

If Yes, please specify those steps:

**For Part 2A applications, this is a sample page:**

**QUESTION 3 CONCERNS THE TIMING OF THE TREE, THE PURCHASE OR OCCUPATION OF THE PROPERTY AND CONSTRUCTION OF THE DWELLING**

**3 Information sheet(s) to be completed about the trees in the hedge.**

If all of the trees in the hedge are of the same species and height above ground level and were planted at the same time, you only need fill in one copy of this sheet.

If the trees in the hedge are of different species or different heights above ground level or were planted at different times, you must fill in more than one copy of this sheet – extra sheets should be completed for each additional species or group of trees of the same height above ground level or group of trees that were planted at the same time.

<b>Tree(s)</b> ..... [refer to the number(s) on the diagram drawn for Q 2]	
<b>What is the species of the tree ?</b>	
a) Was the tree planted?	YES/NO
b) How high is the tree above existing ground level (in metres) today?	
c) When did you purchase your property or occupy your property?	
d) Was the tree already there when you occupied or purchased your property?	YES/NO
e) If the tree was not there when you purchased or occupied your property, when was the tree planted?	
f) If the tree was there when you purchased or occupied your property, how high was the tree above existing ground level at that time?	
g) Did your dwelling (which is the subject of this application) exist when you purchased or occupied your property?	YES/NO
h) If your dwelling was constructed after you purchased or occupied your property, when was your dwelling constructed?	
i) When your dwelling was constructed, was the tree already there?	YES/NO
j) If the tree was there when your dwelling was constructed, how high was the tree above existing ground level at that time?	

Not only do these two forms ensure that each self-represented applicant effectively has their attention drawn to all of the relevant statutory matters requiring to be addressed in the adjudication of such an application, but they also, for the self-represented respondent to a tree dispute application, give them the relevant cues of matters to which they need to turn their minds in responding to the application that has been served on them.

Whilst it is, at least in my opinion, not necessary to contemplate (at this time) seeking to be able to produce other idiosyncratic applications for self-represented litigants in other areas of the Court's jurisdictions, the very high incidence of self-represented parties in tree dispute litigation and the responses that we have had from the parties to this approach has undoubtedly validated our early decision to embark on a comprehensive, step-by-step plain English approach to these forms – rather than adopting the briefer and more formulaic approaches embodied in the formal summons or application used to commence other proceedings.

### **Assistance at the Registry**

We endeavour, in the Court's Registry, to provide facilities to enable research into the Court's procedures and access to other electronic materials. We do this by providing a public workspace, including a computer terminal, in the area immediately adjacent to the Registry counter. A small conference room is also available, on request, for those who might need more space to spread out or who need to have some form of group discussion.

It is long accepted that courts have a responsibility to assist self-represented litigants with procedural matters whilst not straying into the area of giving legal advice. In addition to the plain English explanatory materials and application forms earlier discussed, the Registry staff at the Court regularly provide assistance to self-represented litigants seeking to commence proceedings (or file material in response to proceedings that might have been commenced and in which they are the respondents). This includes checking the completeness of the papers that are proposed to be lodged as well as indicating the availability of the research and meeting facilities (if appropriate) referred to above.

The Registry also handles a significant volume of telephone enquiries by persons contemplating commencing proceedings on their own behalf with the vast majority of these relating to possible applications under the Trees Act.



## **First directions hearing – residential development appeals and tree dispute applications**

The second critical element in trying to demystify court proceedings for self-represented litigants is, in our experience, conducting the first directions hearing, on the first return date, in a fashion that is procedurally appropriate but is not legalistically confronting.

Whilst it is not always possible for this to be the case in all types of proceedings, for two of the areas where the Court regularly has self-represented applicants or respondents, special steps have been taken to make the first directions hearing (expected, indeed, to be the only directions hearing in such matters) user-friendly. This means that, for residential development appeals and tree dispute applications, the Court's Registrars run separate lists so that time is available to explain the nature of the proceedings and the processes that require to be followed leading up to the hearing and disposal of the matter.

For tree dispute applications, this means giving a separate allocated timeslot for the directions hearings (ones which are also conducted as telephone conference calls for outer urban or regional-based parties) so that those participating have an opportunity, after the Registrar has given her explanation of the processes and has been through the standard plain English directions (discussed below), to ask procedural questions in order to deal with matters that might otherwise delay or cause problems at the final hearing.

For tree disputes, from the beginning of having this jurisdiction, we concluded that it was necessary to have plain English directions, in standard form, with only idiosyncratic matters such as times and dates applicable to the individual application being filled in. A copy of the first page of these standard directions is reproduced below:

## Schedule A

Usual directions on the preliminary hearing for tree applications [blanks will be completed at the preliminary hearing, relevant directions ticked and directions not needed will be crossed out].

<input type="checkbox"/>	1	<p><b>Time and place of final hearing</b></p> <p>(a) The matter is fixed for an on-site hearing/a court hearing commencing on site on [date]..... at ..... am/pm.</p> <p>(b) The hearing will continue in Court at [location] ..... at ..... am/pm.</p>
<input type="checkbox"/>	2	<p><b>Notice of appearance</b></p> <p>The applicant's legal representative/respondent's legal representative/respondent is to lodge a Notice of Appearance with the Court and give a copy to the respondent/applicant, by 4.30pm on .....</p>
<input type="checkbox"/>	3	<p><b>Service of directions</b></p> <p>(a) The applicant is to serve a copy of these directions on the respondent and on the local council by 4.30 pm on .....</p> <p>(b) The applicant is to serve a copy of these directions on the Heritage Council of NSW by 4.30 pm on .....</p>
<input type="checkbox"/>	4	<p><b>Proof of service</b></p> <p>The applicant is to file with the Court a statutory declaration or an affidavit of service demonstrating service of the tree application and/or compliance with direction 3 for service of directions by 4.30 pm on .....</p>
<input type="checkbox"/>	5	<p><b>Issue of subpoenas to produce documents</b></p> <p>Leave is granted to all parties to issue subpoenas to produce documents by not later than ..... with such subpoenas to be returnable before the Court not later than .....</p>
<input type="checkbox"/>	6	<p><b>Applicant's evidence</b></p> <p>The applicant is to file with the Court and serve a copy on the respondent, the local council and the Heritage Council of NSW, by 4.30pm on ....., any further statements, reports, affidavits, photographs or any other documents upon which the applicant intends to rely at the hearing.</p> <p>Note: When an application is made for an order to prevent injury to any person and the "injury" is an illness, allergy or similar medical condition, specific supplementary directions [see Schedule B] will be made concerning evidence in such cases.</p>
<input type="checkbox"/>	7	<p>For all Part 2 claims seeking orders for compensation for damage to property or orders to rectify damage to property, the applicant's documents provided pursuant to direction 6 are to provide details of:</p> <ul style="list-style-type: none"> <li>• when and how the damage was brought to the attention of the respondent including copies of any correspondence (if this information has not been provided as part of the application); and</li> <li>• the basis of any amount claimed for past damage (including all relevant receipts and/or invoices) and any quotations for proposed works which the applicant requests the Court to require to be undertaken (whether such proposed works are to the applicant's property or to the property where the tree is located);</li> </ul>

A combination of providing an explanation to the parties of the process and procedural matters when coupled with simplified directions and the approach later described to distinguishing between evidence and submissions or dealing with questions of relevance means that there are comparatively few occasions when a second directions hearing is needed in such matters or significant procedural difficulties arise during the course of an on-site hearing involving self-represented litigants.

## **The use of appropriate dispute resolution (ADR)**

The Court has available to it four processes to seek to assist the parties to reach a resolution to their dispute without the need for an adjudication. These are mediation, neutral evaluation, conciliation with the option of determination by the conciliator if unsuccessful and a conciliation followed by mandatory determination if conciliation is unsuccessful. Of these techniques, mediation and neutral evaluation are carried out using their respective classic models and we provide no idiosyncratic twist to these that would set us apart from any other court using such techniques.

As a consequence, the Court exercises an extensive conciliation function in merit review proceedings including those involving self-represented litigants. For conciliation processes undertaken in the Court's planning and local government jurisdictions, such conciliation conferences will commence on-site and may be conducted entirely on-site. Such conciliation processes, if unsuccessful in reaching an agreed resolution of the dispute, may also proceed to determination forthwith with any subsequent hearing likely being conducted on-site if this occurs.

However, conciliation gives the Commissioners an opportunity to utilise their particular skills to intervene and assist the parties consider options for resolution that might not have previously emerged in any discussions that might have taken place. The process, under either model, effectively enables a self-represented litigant to have available an expert point of view that they might not earlier have either been able to afford or appreciated might have been of assistance in resolving their dispute. The conciliation process does not ordinarily (unless invited by the parties to do so) involve expressing an opinion on the likely outcome of an adjudication of the dispute. The process involves testing propositions through the posing of questions such as "*Have you considered .....?; Why do you want ...[a particular aspect of a proposal]?; Is there an alternative that achieves the desired outcome?*"

These questions, in our experience, assist engage a development proponent (particularly a self-represented one) in endeavouring to address the concerns of a consent authority that has not approved a development proposal.

However, given that we have a wide ranging ability to permit, by Court Order in appropriate circumstances, amendments to development proposals provided that the amended proposal remains generally consistent with that for which approval was originally sought, there is one fundamental question we pose – at the commencement of a conciliation process – concerning a development proposal. That question is both the icebreaker and, in about 60% of the cases, a game changer to enable an agreed resolution of the dispute. That question is addressed to the representative of the consent authority and is to the following effect:

***Do you say that the proposal can be approved if it is modified to address your concerns and, if so, what are the changes you say are needed?***

As I have just noted, in about 60% of the cases, the response is a positive one; a range of possible modifications will be listed and then, through the conciliation process, we will work through those issues. The conciliation process in these circumstances usually results in an agreed outcome and orders made by consent.

I should add that, almost inevitably, the response to the consent authority indicating that a modified proposal was capable of being given consent is usually met by a question in reply, a question in near identical terms whether the development proponent is self-represented or is represented by a lawyer. That question is:

***Why the ....., ....., ....., didn't you tell me that ..... months ago and we could've sorted this out then?***

The only variations on this theme arise from the vehemence with which it is said and the “fruitiness” of the expletives inserted in the question!

If the conciliation phase fails, the alternative paths for the two conciliation models nonetheless lead to determination. In the conventional model (utilised for larger residential development projects, non-residential development projects, compliance orders and statutory valuation and compulsory acquisition compensation claims) in addition to the confidentiality required of the conciliation phase also gives the

participants the right to veto the conciliating Commissioner acting as the determining member of the Court.

For matters that are statutorily brought within the conciliation followed by mandatory determination model (smaller-scale residential development appeals), if conciliation is unsuccessful, the conciliating Commissioner is required to proceed to determine the matter.

In each of these conciliation models, any determination phase undertaken by the conciliating Commissioner requires the Commissioner to disregard anything said during conciliation (including any modification or amendment propositions discussed) unless all parties agree that this should occur.

There are fundamental benefits for self-represented litigants in utilising the conciliation process. In addition to bringing an independent mind with appropriate expertise to stimulate the possibility of resolution, the informality of the process also enables, in the vast majority of instances, issues between the parties to be narrowed even if resolution is unable to be achieved. No matter what the outcome, conciliation will lead to a lesser cost to the parties and a greater likelihood of satisfaction with participation in the Court's processes for a self-represented litigant even if the desired outcome is not achieved.

As part of the web-based information that the Court makes available, we provide a plain English step through explanation for each of the conciliation processes I have outlined. Whilst these are not specifically targeted at self-represented litigants (as they are also an essential tool for explaining to other lay participants such as objectors to a development proposal how these processes work), they nonetheless are also of value to a self-represented litigant who will participate in a conciliation process in the Court.

The one disadvantage of conciliation processes is that, given that any agreed outcome will almost inevitably require some modification to the parties' original position, conciliation frequently (although not inevitably) takes a little more time to reach finalisation of the proceedings (whether by agreement or determination) than

would be the case if the matter proceeded straight to a timetable setting it down for hearing.

Conciliation processes are not engaged for the purposes of tree disputes because of the nature of the conflicts that are involved and the desire of the Court to deal with and dispose of such matters in as expeditious a fashion as is possible.

## **Procedural aspects of the Court's on-site processes**

### **Commencement on-site**

As the vast majority of the Court's merit appeals involve an inspection of the site to which the dispute relates (including statutory valuation property locations), an important element of this process is explaining the nature of what is to be conducted on-site. Whilst this is a process that needs to be followed universally if there are lay participants (objectors to a development appeal, for example), the process is also designed to assist self-represented litigants.

At this point, it should be observed that Commissioners hear the vast majority of such matters. It is comparatively rare for self-represented litigants to appear for themselves in proceedings being dealt with by a Judge (with the possible exception of the case management process in the weekly valuation list).

At the commencement of an on-site inspection or hearing, each of us makes some introductory remarks prior to the commencement of the process. A slightly more expansive version is given if the site visit is for the purposes of a conciliation process of either type as described earlier. Each of us, of course, has an idiosyncratic style of delivery but the fundamental message that we seek to impart is the same. Although doing so is, for the most part, designed to explain to lay witnesses that which will unfold, it also provides significant assistance to self-represented parties to understand what is to be dealt with.

The giving of appropriate cues commences at the time of getting out of the car after arriving at the site. I, personally, find it useful to be holding the file or some documents in my right hand so that it is obvious that handshakes are not appropriate

and thus avoiding the difficulty of having to explain in what some would see as a rejecting fashion, the fact that that which is being undertaken is nonetheless the proceedings of a court.

It is my experience that explaining the elements of a site inspection or on-site hearing in a light fashion conveys the relevant messages appropriately without sounding pompous in doing so.

It is essential, given the comparative informality of the setting that those participating understand that they are, in fact, participating in proceedings of a court. Hence, I commence my introductory remarks by introducing myself and explaining that the Chief Judge has appointed me to conduct the proceedings. If either party has a legal representative (as is certainly customarily the case for respondent consent authorities), I will introduce those representatives and they will often introduce those who are advising and instructing them.

After the introductions, I then explain that I will not be producing any holy book from my back pocket to swear people in but that, to the extent that it is relevant in the proceedings, what is said during the course of the site inspection is as much evidence as if it were given under the obligation of an oath or affirmation in the witness box in a courtroom. I remind those participating that they thus have the same obligations as if they were in a witness box.

I explain the nature of the site inspection (and, if necessary, other locations such as neighbouring properties) that will be visited. I also explain that it is necessary that those speaking on behalf of the parties (whether lawyers, agents or a self-represented litigant) must be able to hear everything that is said to me and that bilateral discussion or “off the record” conversations are not permitted.

Having undertaken that introductory phase, I then explain the conduct of the site inspection or on-site hearing. For the latter process, more detail is required given that it is likely that, at the conclusion of the on-site hearing, I will be giving an extempore decision. It is therefore necessary to explain that, if I were to do so, the decision would be recorded and transcribed and provided to the parties to the

proceedings (and published on the Caselaw website) within 10 days or so of the hearing.

After this, I explain how we are going to conduct the inspection. It is my habit to describe the basic rules as being what I describe in my introductory homily as “kindergarten rules”. These are:

- Everybody is polite to each other;
- One person speaks at a time; and
- If teacher (that’s me) speaks, everybody else is to be quiet until I have dealt with whatever matter has arisen.

When there are self-represented litigants involved, I will also usually explain the difference (discussed in more detail later) between evidence and submissions.

As a general observation, it is my experience that, for lay participants in proceedings whether they are representing themselves (or are objectors to or supporters of a proposed development), giving evidence on-site in circumstances where they are able to point out particular matters of concern to them is a far less confronting process than doing so in the witness box by reference to a written statement and photographs. The ability to illustrate a particular concern by pointing things out should not lightly be undervalued.

A bonus for those lay participants in dealing with matters on-site is that the temptation for forensic dissection through aggressive cross-examination is lessened by the surroundings when one is standing on a grassed road verge or on a development site. Those advocates who relish “rip the wings off butterflies” cross-examination (and there are one or two who regularly appear in our jurisdictions who occasionally need/desire to do so) generally feel inhibited by the informality of their surroundings and, when it does happen (as is the case comparatively rarely), it is far less intimidating than in the formality of a courtroom.

At this point, I should observe that it is customary for notes to be taken by one of the legal representatives (except in tree disputes where, as earlier observed, most proceedings do not involve any legal representatives at all) with those notes



subsequently to be settled between the parties and tendered as notes of the informal evidence given on-site. This includes providing any self-represented party with the opportunity to check and propose changes to such notes before they are tendered.

### **Carrying out the hearing or conciliation on-site**

When we conduct either a hearing on-site or a conciliation process on-site, it is conducted in entirely informal surroundings. We will sit at a dining room table or a picnic table in the garden to enable us to work through the various documents that might be involved or to spread out and consider plans for a proposed development. This deliberative process follows on from the inspection that will have taken place not only of the location but of other relevant properties or locations in the vicinity as raised by the parties to the proceedings.

At the end of any conciliation process, if the matter has not resolved, any documents that are brought into being solely for the purposes of the conciliation process are returned to the party who provided them. No regard will be paid to such documents in any subsequent determination process unless they are tendered in that determinative process. When we are conducting a determinative process (whether an on-site hearing or a determination process following unsuccessful conciliation) what transpires is conducted, albeit in an informal setting, in exactly the same fashion as if it were a courtroom with the sole exception that witnesses are not sworn or affirmed but nonetheless are given the stricture, earlier described in the context of the introductory remarks at the commencement of the site visit, about the giving of their evidence.

However, documents are tendered and become exhibits; exhibits are marked and an exhibit list is maintained. Witnesses give evidence and are subject to cross-examination if required. Expert witnesses will give, as appropriate, concurrent evidence as if they were in the witness box in a courtroom.

Although the informality may, depending on the circumstances, extend to working in shirtsleeves or wearing hats (if the climatic circumstances demand this),

nonetheless, if all the visual cues are disregarded, the process is the same as that which would transpire in a courtroom.

At the conclusion of such a determinative process on-site, the decision will either be reserved or the Commissioner will retire for a period prior to delivering an extempore decision. Although there are no intrinsic differences between conducting a determinative process on-site or conducting it in a court room, the comparative visual informality of the setting, particularly as it is likely to be happening in their personal comfort zone, makes the determinative process a lot less confronting and stressful for self-represented litigants.

### **Use of aids**

To assist in our decision-making in tree dispute cases primarily (although also used from time to time in planning merit appeals), we use two particular aids that assist us in the decision-making process and also help the parties understand the process that we are undertaking.

The first of these is a high-quality SLR digital camera. This is used not only for the purposes of taking photographs on-site and providing them to the parties in circumstances where they will be invited to tender them when the particular elements captured in the image are not already appropriately depicted in other evidence but also for the purposes of assisting in the order making process as discussed later in this paper.

The second invaluable item of equipment for tree disputes is a retractable height pole. This is used to enable us to measure heights of trees and hedges in tree disputes but also to be held to provide, as best as is able to be estimated on-site, a height location indication for proposed ridgelines, eaves and other elements of a development proposal. This latter use is of particular importance in development appeals when issues of view loss are involved and proper structured and surveyed height poles and string lines have not been provided by the proponent of the development. The use of a height pole on-site in these circumstances is particularly valuable in enabling self-represented participants (and objecting neighbours) to be

able to visualise what might be the impacts of the proposed development on a particular outlook.

### **Male chauvinism at on-site hearings**

By now, you will understand that many of the matters that face us that arise for assisting self-represented parties during the course of on-site hearings arise in the socially unusual tree dispute jurisdiction that the Court “enjoys”. Many of the applications in such matters have couples as the applicants and/or respondent property owners. From time to time, generally by men of my vintage or older, the male member of the couple seeks to dominate the presentation and, occasionally, cuts their partner out of the discourse in a quite chauvinistic fashion – although their partner is a party to the proceedings as much as they are.

In order to ensure that all participating have an equal opportunity to inform me of matters that they consider to be of relevance, I remark, in a jocular fashion, that following the passage of the *Married Women's Property Act 1882*, an Act of the Imperial Parliament, it has been certain that women have, in their own right, the ability to speak concerning their own property interests. This, usually, is accepted in good spirit and the proceedings continue in a more participative fashion.

### **Giving a decision on-site**

The assistance that it is appropriate to provide to self-represented parties extends to the judgment giving and order making functions of the Court. In common with any other decision giver, we have the responsibility to express the terms of our decision with as little legalism and technical jargon as is possible consistent with the matters required to be covered. However, there are several ways that we approach the decision giving and order making process that are designed to make it easier for self-represented participants to understand and be engaged by these finalising elements of litigation. There are three specific matters that I wish to mention, briefly.

First, as much as it is possible to do so, we endeavour to give extempore decisions, particularly when the matter has been conducted as an on-site hearing. Giving an extempore decision on-site often involves us using even less formal contexts than

sitting at the backyard picnic table for this purpose. It is not unusual to use the boot or bonnet of a car as the resting place for the papers while a decision is given and, even, from time to time, needing to use a large wheelie bin for this purpose.

On this aspect of decision giving, I should note that we usually position ourselves for a quick getaway at the conclusion of setting out the outcome of a proceedings lest there be a hostile reaction from an unsuccessful party. Although this is very rarely the case, on one occasion I have had to threaten to call the police when an unsuccessful applicant ran up and aggressively grabbed the door of the court car whilst indicating that he wished to dispute the outcome with me.

This also means that it is necessary, prior to giving such a decision, to explain to those present that that which will follow is the decision of the Court incorporating the Final Orders disposing of the matter and that, at the conclusion of giving the decision, the Commissioner will depart and that there will be no discussion of the outcome.

Some of my colleagues retire for half an hour or so to handwrite a detailed outline prior to delivering judgment whilst others of us (me included) will prepare short summary notes from which we will speak. If the first approach is taken, the decision will be typed up and provided the parties and, in the second instance, the decision will be recorded as it is delivered, transcribed and delivered to the parties and published on Caselaw. As an aside, the full-time Commissioners of the Court use voice recognition software as part of our productivity approach. So when I deliver an extempore decision on-site, it is recorded on a hand held digital machine that is subsequently plugged into my computer with the voice recognition software then producing a first draft of the written decision. That draft, together with the digital sound file, is emailed to our Commissioners' Support Officer who corrects the computer produced transcript against the sound file.

The second way that we endeavour to make our judgments more accessible (whether for self-represented litigants or more generally) is the use of images in them. This includes not only the incorporation of photographs that are extracted from expert reports or have been tendered during the course of proceedings but

also, particularly in tree dispute cases, involves us using a photo (taken during the course of the site inspection) that has been tendered as part of the evidence and marking it up, digitally, to explain a particular point.

The example that is reproduced below was incorporated in a judgment to explain to the parties (both sides being unrepresented) a particular conclusion about the obstruction of a view arising because of the location of the ridgeline of a subsidiary roof on an adjacent property (the ridgeline is at the red horizontal marking – this photo was part of a set taken on-site by us, provided to the parties and subsequently tendered by one of the parties with support of the other).



The final way that we endeavour to make our decisions understandable (particularly for self-represented parties) also regularly arises in tree dispute matters where an order for pruning of a tree or a hedge is made and we wish to provide greater clarity of the required outcome than would be available in the circumstances by mere description in words. In such circumstances, we will incorporate, by reference in the text of the Final Orders, a marked up digital photograph that makes it clear what work is to be undertaken to the tree or the hedge. For example:

## APPENDIX A



The terms of the Final Orders where this photograph is incorporated by reference are reproduced as an addendum to this paper.

### **General procedural matters**

#### **Dealing with the question of relevance and irrelevance**

There is a tendency, in the written material provided to the Court by self-represented parties, for a very large volume of documentation being included with applications. The sheer volume of such material and, particularly, questions of provenance and accuracy that arise from the ability to source supporting almost any alleged truthful proposition by typing the relevant words into an internet search algorithm compounds problems of dealing with such material.

It is almost enough to evoke nostalgic yearnings for the days when the documents relied upon were confined to the *Magna Carta* 1215; the *Act of Union* 1707; the *Imperial Acts Applications Act* 1969 or the *Bill of Rights* 1688!

The fact that the Court Act provides a much looser framework within which the reception of material is to be evaluated is, when dealing with self-represented litigants, somewhat of a two-edged sword!

The strict rules of evidence do not apply in the merit review proceedings of the Court. This is the result of a provision in the Court Act that is in the following terms:

**38 Procedure**

- (1) Proceedings in Class 1, 2 or 3 of the Court's jurisdiction shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and as the proper consideration of the matters before the Court permit.
- (2) In proceedings in Class 1, 2 or 3 of the Court's jurisdiction, the Court is not bound by the rules of evidence
- (3) .....
- (4) .....
- (5) .....

As a consequence, there is a very wide discretion on the admission of material making it, effectively, subject only to a test of relevance and, if even marginally potentially relevant, an assessment of what weight might be given to it. Unless the material is obviously entirely and self-evidently irrelevant, we tend to take a permissive view on admissibility for self-represented parties and deal with such material on its weight.

**Explaining the difference between evidence and submissions**

An important aspect of giving an self-represented litigant an understanding of how what they put before the decision-maker in either their written material or commentary that takes place during the course of a site inspection or the inspection element of an on-site hearing is explaining the difference between evidence and submissions in a fashion that is able to be understood.

Whilst, to regular Court practitioners (including expert witnesses), the difference between evidence and submissions is clear, it is our experience that this is not the case for those unfamiliar with the concept.

Explaining the difference is, perhaps, easier when one is on-site and visual cues can be engaged for that purpose, but the types of analogy that are utilised can be equally applicable in the courtroom.

As I have earlier observed, the Land and Environment Court deals with a large number of tree disputes each year where there is no legal representation. The nature of the matters that are in dispute provide frequent opportunities for metaphor to explain the difference between evidence and submissions. It is often as simple as pointing to a large branch that overhangs, perhaps, a pathway or a driveway and explaining that that which we can see (the existence of the branch and its location) is evidence whilst the proposition that, if the branch were to fall on somebody walking along the pathway, they would likely be severely injured because of the size of the branch, is a submission asking the finder of facts to endorse the conclusion contained in the proposition.

Similarly, in the wide range of other merit appeals earlier instanced where there is the not infrequent occurrence of self-represented litigants, an appropriate metaphor consistent with the nature of the matters in dispute in the case will usually be available during the course of the site inspection or the on-site hearing.

Whilst, perhaps, a little more difficult in a Courtroom situation, with care the tree branch or other appropriate example can usually be explained in a fashion that enables visualisation followed by comprehension of the distinction that is being made.

Following the explanation of this distinction, we find it appropriate to observe, subject to any objection that might be raised (and it is rare that there is such an objection), that it is not necessary for the unrepresented party to endeavour to compartmentalise the material that they are placing before us. It is sufficient that they understand the distinction between the concepts and that they understand that we will treat evidence as evidence and submissions as submissions as appropriate.

Given the often voluminous written material that is supplied in support of applications or in response to evidence put on by another party, managing the difference



between evidence and submissions in this fashion is, as earlier discussed when dealing with the topic of relevance, an essential element of efficient time management during a hearing involving self-represented parties. As also earlier discussed in the context of relevance, we strongly resist suggestions by lawyers involved in the proceedings that we should embark on any painstaking and detailed forensic dissection of such material.

### **Cost issues for self-represented litigants**

Quite apart from the expensive nature of litigation when lawyers and expert witnesses are involved, self-represented litigants also face two other financial disincentives to approaching Courts for remedies to which they consider they are entitled. These financial disincentives are:

- The filing fee for lodging the application; and
- The risk of exposure to costs orders if they are unsuccessful in the proceedings.

The Land and Environment Court has partially addressed the first of those issues (confined, at present time, to our tree dispute jurisdiction) by making the filing fee for an application equivalent to the cost of filing an application in the Local Court. This means that, unlike our minimum development appeal filing fee (currently \$850), the filing fee for a tree dispute application is set at the level of an application to the Local Court (currently \$222).

In addition, the Registrar has the power to waive or grant remission or postponement of fees for applications. The guidelines for dealing with such applications are common to all courts in New South Wales and these are published on our website (accessible through the fees page).

More importantly, with respect to the exposure to the risk of an adverse costs order in merit appeals in the Court, the Court Rules specifically set aside the presumption that would otherwise arise under the *Uniform Civil Procedure Rules 2005* (Part 42 r

1) or the decision of the High Court in *Latoudis v Casey* [1990] HCA 59; 170 CLR 534.

The Court Rules impose a different test (Part 3 r 7), namely that an order for costs will not be made unless the Court considers that the making of such an order is fair and reasonable in the circumstances. The Rules set out nine elements appropriately to be considered as possibly giving rise to circumstances where such a costs order might be fair and reasonable to be made (however, the list is not exhaustive). The approach to be taken by the Court in exercising this discretion was discussed by Preston CJ in *Grant v Kiama Municipal Council* [2006] NSWLEC 70.

I also note that Commissioners do not have the power, in merit review appeals, to make orders for costs. A separate Notice of Motion needs to be filed which is dealt with by either a Registrar of the Court (subject to a financial delegation limit) or by a Judge of the Court.

It is comparatively rare for costs orders to be made against an unsuccessful party in a merit review appeal thus removing, in almost all cases, any costs exposure disincentive for a self-represented litigant contemplating initiating proceedings when they have some at least half rational basis for doing so.

## **Conclusion – the less serious**

In addition to the serious material that I have earlier discussed about the processes by which the Land and Environment Court seeks to engage with and provide procedural assistance to self-represented litigants, I would like to share with you a range of unusual and challenging self-represented litigant scenarios that arise, particularly, from the jurisdiction we exercise under the *Trees (Disputes Between Neighbours) Act* 2006. There are four of these I wish to outline to you.

### **Aggressive/passive tree behaviour**

The number of instances we see where there is anthropocentric attribution of characteristics to trees is surprising. For those of you who may be fans of the

second film in the Lord of the Rings trilogy, you will be familiar with Tree Beard and the other Ents who are humanoid vegetative beings.

From submissions that are made to us, regularly, in tree dispute cases, many trees have similar characteristics but are imbued with a hitherto undiscovered streak of malevolence. The frequency with which trees are described as having aggressive roots or deliberately dropping quantities of leaves, twigs, nuts or berries so as to cause blockage of gutters is astounding. Although we might be tempted, occasionally, to contemplate ordering anger management training for such vegetation, it is a temptation that we have managed to resist (at least so far).

### **The Shakespearean problem**

The Shakespearean problem arises by analogy to the feud between the Montagues and the Capulets that gave rise to the tragedy of Romeo and Juliet. It is also reflective of the legendary feud between the Hatfields and the McCoys who lived along the Tug Fork of the Big Sandy River in the West Virginia–Kentucky area on the eastern seaboard of the United States.

In a very small number of tree dispute cases, it is clear that the self-represented protagonists in the proceedings:

- hate each other;
- have hated each other for some time;
- know that they presently wish to give vent to that hatred; and
- a tree is a current opportunity to create litigation and express that hatred anew.

After the tree dispute litigation is adjudicated by me or one of my colleagues, one suspects that, in this small minority of cases, there will soon be a dispute under the *Dividing Fences Act* 1991, a late night noise complaint or some other fruitful and satisfying opportunity for the suburban battle to continue.

### **Colourful identities as parties to the proceedings**

There has only been one instance of this, to my certain knowledge, in the many hundreds of cases that the Court has dealt with under this legislation.

In the particular instance, one of the parties was a member of one of the outlaw motorcycle gangs (OMG) (it not being appropriate to name the specific OMG involved) whilst the neighbouring property owner upon whose land the tree was located was also a Harley-Davidson enthusiast but belonged to a rival OMG (also not appropriate to be named).

One of the major elements in the dispute between the parties was to what extent, if any, the tree had caused damage to a 1.8 m high, paling dividing fence separating the two properties.

The matter was set down for an on-site hearing before two of my colleagues, both being taller than the 1.8 metres of the fence in dispute.

Upon arrival at the site and discovering what might be described, loosely, as the incompatible cultural identifications of the protagonists, my colleagues decided that the matter could be heard in a fashion that satisfied the necessary requirements for procedural fairness and natural justice to each of the parties by having one Commissioner with the applicant on one side of the fence whilst the other Commissioner would be with the respondent on the other side of the fence.

As all four of them were sufficiently tall to be able to make the necessary evidentiary observation of matters on the adjoining property by peering over the top of the fence, the proceedings were able to be concluded without risk of flare-up.

### **Apprehended Violence Orders**

As you would be aware, it is within the jurisdiction of the Local Court in this State to make what are called Apprehended Violence Orders so as to provide what might be regarded as court designated security zones and other conditions for an individual who is able to demonstrate that some other person is a real or potential threat to their safety.

From time to time, we encounter circumstances where one or other of the protagonists in tree dispute litigation has an Apprehended Violence Order that has been taken out against them by an opposing party to the application.

I want to describe to you, to give a flavour of what we occasionally confront, one particular instance where three Commissioners – me, one of my arborist colleagues and a third Commissioner (an engineer who was being exposed to the tree dispute legislation for training purposes) – attended a suburban site to be met by the parties to the tree dispute application standing on the street verge at some considerable distance from each other.

We indicated to the parties that we required them to come close to us so that both could hear what we were saying at the commencement of the proceedings and to make our usual introductory remarks.

It was at this time that the applicant indicated that he and his wife had Apprehended Violence Orders against the respondent and his wife and that the respondent had just completed a good behaviour bond for assaulting the applicant's daughter.

In reply to this, the respondent indicated that he and his wife had Apprehended Violence Orders against the applicant, his wife and the applicant's sister and that he (the respondent) had just finished six months in a wheelchair after the applicant's sister had run him down in the street.

They both expressed the view that the Apprehended Violence Orders precluded them from participating in the hearing in a fashion that had them in each other's company. In response, I asserted that the Land and Environment Court, as a superior court of record, had the power to require them to do so solely for the purposes of the effective exercise of our jurisdiction (a proposition, as I am sure you would appreciate, of at least extremely doubtful legal validity). Having secured their cooperation, we then proceeded to hear and dispose of the matter.

This was quite easy to do so because, when we went to inspect the trees in the rear yard of the respondent's property, they had already been removed to ground level as a consequence of what the respondents said was his fear that he would be further attacked if he did not do so. As the trees were gone, there was no merit assessment to be undertaken nor any orders potentially to be made and the application was thus dismissed.

## **Appreciation**

On the other hand, lest we think that our endeavours to assist self-represented litigants are unappreciated, I would like to share with you the terms of a short email sent to the Court by a self-represented participant in a recent tree dispute hearing. Before reading the terms of the email, I should indicate that this party was an applicant in the proceedings and one who did not succeed in obtaining remedies in the terms sought but who did have some modest partial success:

*I recently had a Judgement from the Court (File # 13/.....) regarding a Tree Disputed between Neighbours.*

*Not being represented by a Lawyer and having no real experience with the law I want to commend the Court on the process and the fairly straightforward way I was able to present my case. The template documentation was straightforward and easy to follow.*

*Your staff, particularly ..... I think her name was, were very helpful in putting me on the right track and ensuring I had properly completed the documentation and knew how to serve them on the respondents.*

*The hearing itself, conducted by Commissioner ....., was clear and easy for us to understand the process. And having a decision on the spot was impressive.*

## **Real conclusion**

Whilst the Land and Environment Court considers that it has taken a wide range of constructive steps, both in information provision and in hearing procedural steps, to provide assistance to self-represented litigants (within the proper permitted scope without providing legal advice or assistance with the merits of a case), we appreciate that more can be done.

In particular, opportunities exist, in my assessment, for us to explore the use of Facebook and YouTube to provide access to video information on procedural

matters. We are aware that the Local Court in NSW has done this without any controversy arising.

In a time of constricting budget pressures on court systems, pressures from which we are not immune, it may take some time to continue this evolution but we are committed to continuing to encourage those who need to engage various of the Court's merit jurisdictions to do so without needing to engage the services of the legal profession.

**Tim Moore**  
Senior Commissioner  
Land and Environment Court of NSW

14 April 2014

## ATTACHMENT A

16. With respect to the more northerly of the two Turpentines, the orders of the Court are that:
1. the two branches shown in the marked digital photographs appended to these orders as Appendices A and B are to be pruned to the point marked on each of those photographs;
  2. the pruning is to be carried out by an AQF level 3 arborist with appropriate WorkCover insurances
  3. the pruning is to be carried out at cost to the first respondent;
  4. at the time of removal of those branches, the arborist is to undertake a pruning of all dead wood in the canopy of the second Turpentine to remove all dead wood of greater than 20 mm at the point of attachment to the nearest live branch.
17. This work was the subject of submissions, as to timing, the applicant having indicated that three months, was in his opinion, a reasonable period, whilst the son of the executrix of the estate of the late owner, indicated that six months would be an appropriate period of time.
18. Given the comparatively modest amount of the work that it is required, the further order of the Court is that:
1. the work is to be carried out within three months of the date of these orders .

