



EXPERT EVIDENCE IN THE LAND AND ENVIRONMENT COURT: DUTIES OF THE EXPERT WITNESS

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1. The Land and Environment Court of New South Wales ("the Court") was established by legislation in 1979 as a superior court of record: *Land and Environment Court Act 1979*. The Court was introduced together with the far reaching, (and at that time ground breaking) *Environmental Planning and Assessment Act 1979*. The Court absorbed the functions of various courts and tribunals such as the Land and Valuation Court and the Local Government Appeals Tribunal.
2. The Court was the first court in the world exercising specialist jurisdiction over matters of town planning, environment, valuation of land and many other related areas.
3. Being a superior court of record, there are various practices and procedures which must be followed in the conduct of the matters before the Court.

Overview of the Court

4. The Court exercises appellant and original jurisdiction and determines those matters by a variety of methods, depending on the type of matter and the parties' request. These include:

- **Merits review:**

When an appeal is made in respect of an environmental, town planning or other administrative decision and the applicant is dissatisfied with the determination;

- **Judicial review:**

When the Court is requested to determine the lawfulness of an administrative decision (including those such as private certifiers who exercise such powers) and is requested to declare such a decision or action to be invalid;

- **Civil enforcement:**

When the Court is requested to make orders restraining a breach of environmental or town planning legislation;

- **Criminal proceedings:**

When the Court is asked to punish an offender, when an offence is proven.

5. Judicial review and civil enforcement proceedings can only be determined by way of hearing, but can be the subject of mediation between the parties. On the other hand, merits review proceedings before the court can be determined by way of hearing, court-ordered conciliation, or be the subject of mediation.
6. Criminal proceedings can only be determined by way of a hearing.
7. Typical examples of expert evidence in the Land and Environment Court include:
 - In appeals against refusal of development consent, where an expert witness town planner is engaged by each of the parties to give evidence as to compliance with development standards, controls, amenity impacts and other statutory requirements under s 79C of the EP&A Act.
 - In civil enforcement proceedings, where the Court is being asked to make orders to restrain a breach of the EP&A Act (usually in the terms of unlawful building work). An expert witness may be called by one of the parties to demonstrate that the building work does not cause environmental harm, or inappropriate amenity impacts, if it were permitted to remain.
 - In criminal proceedings, where the carrying out of works in breach of the EP&A Act was necessary because of the need to rectify or demolish part of a structure which was unsafe. In such an instance, a civil engineer may be called to give evidence.

Restrictions on Expert Evidence

8. The fundamental premise in giving evidence in any court proceedings is that the expert evidence must be relevant. Evidence is relevant if:

"... [it] could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings".

9. Notwithstanding that the evidence may be relevant, the general rule is that an opinion given in evidence is not permissible. However there are circumstances in which an opinion may be permitted if given by a lay person (although the weight of that lay opinion would be given little weight in most circumstances).

10. Expert opinion evidence may be given if a person *"has specialised knowledge based on the person's training, study or experience"*.

11. In the comments of Justice Heydon in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 729, his Honour stated the following in refusing to allow expert evidence:

"For [the expert evidence] to be to be useful it was necessary for it to comply with the prime duty of experts in getting opinion evidence; to furnish the trier of fact with criteria enabling the evaluation of the validity of the expert's conclusions".

12. Justice Heydon continued that:

"... not only must the appropriate information be supplied, but that the expert must reveal the whole of the manner in which it was dealt with in arriving at the formation of the expert's conclusions".

13. The giving of expert evidence requires leave of the Court.

14. Depending on the type of proceedings, leave is generally assumed, particularly in merits review proceedings where the Court is trying find the best possible outcome. However, in judicial review proceedings, where the role of the Court is not to come to the best decision but rather to decide whether a decision was lawful, a high threshold has been set before the Court will permit expert evidence.

15. Various court proceedings have dealt with an application for leave to adduce expert evidence.
16. The expert witness evidence must be “*reasonably required*” before the Court will allow expert evidence: see *Shellharbour City Council v Minister for Planning* [2011] NSWCA 195.

Duty of the Expert Witness

17. The role of the expert witness is to assist the Court. Their overriding duty is to the Court and not to his or her client.
18. Expert witnesses should advise their client (or the party engaging them) that their views may change depending on the information provided to them. Importantly, the expert witness is not to be an advocate for a party.
19. In drafting an expert witness report, or giving other statements of evidence, the expert witness must include:
- The person's qualifications and experience as an expert;
 - The assumptions from which the opinions in the report are based;
 - Any examinations, tests or investigations relied upon;
 - Any literature or other material utilised; and
 - The person's willingness to be bound by the Expert Witness Code of Conduct;
20. The Expert Witness Code of Conduct, contained at Schedule 7 of the Uniform Civil Procedure Rules sets out the duties of the expert witness when giving evidence in court and/or when providing evidence in a report or statement.
21. Key concepts within Expert Witness Code of Conduct include:
- Overriding duty to assist the court impartially on matters relevant to expertise;

- Duty is to the court and not to any party;
- Not advocate for a party;
- Duty to work cooperatively with other experts;
- Exercise independent and professional judgment;
- Endeavour to reach agreement with other experts;
- Must not act on an instruction or request to withhold agreement;

Examples of Expert Evidence Being Rejected

22. In a recent decision of the Land and Environment Court *235 Spit Road Pty Ltd v Mosman Municipal Council* [2016] NSWLEC 1274, the impartiality of an expert witness was called into question. In proceedings before Commissioner Brown which concerned an application to expand a sailing marina from 3 berths to 17 berths, evidence was given in response to contentions regarding navigation and safety of boats on the water. The applicant's expert witness on the issues of navigation and safety was a seasoned and experienced sailor. He was otherwise suitably qualified. However, he was also the Chief Executive Officer of the Boating Industry Association. The Association, prior to appointing the witness as its CEO, had written a letter to the Council in support of the proposal.
23. Notwithstanding the fact that the Commissioner did not agree with this expert witness' ultimate conclusions, the court could not be satisfied as to expert witnesses overriding duty to assist the court in partially.
24. In *Willoughby City Council v Transport Infrastructure Development Corporation (No 2)* [2008] NSWLEC 238, an issue arose as to the impartiality of an expert witness employed by the Council. Those proceedings concerned an appeal arising from the compulsory acquisition of the Council's land for the Chatswood Transport Interchange.
25. In deciding to exclude the evidence of the Council's expert witness, Justice Lloyd noted that the Council, through the expert witness, had been involved in proposals to develop the land prior to its acquisition for the interchange.

Accordingly, her involvement in the potential redevelopment of the land and her employment with the Council meant that the Court could not be satisfied as to her independence and impartiality.