



PRACTICE NOTE

CLASSES 1, 2 AND 3 MISCELLANEOUS APPEALS

Name and commencement

1. This Practice Note is to be known as Practice Note – Miscellaneous Appeals. It commences on 3 April 2018. It replaces the Practice Note – Miscellaneous Appeals made on 22 March 2017.

Application of Practice Note

2. This practice note applies to:
 - (a) Class 1 appeals other than those under ss 8.7, 8.8, 8.9 and 8.23 and applications under s 4.55(8) of the *Environmental Planning and Assessment Act 1979*, which are subject to Practice Note – Class 1 Development Appeals;
 - (b) Class 2 appeals and applications other than:
 - (i) proceedings under the *Trees (Disputes Between Neighbours) Act 2006*, which are subject to the Practice Note – Class 2 Tree Applications;
 - (ii) proceedings under ss 66, 85, 86 and 92 of the *Strata Schemes Development Act 2015*, which are subject to the Practice Note – Strata Schemes Development Proceedings; and
 - (c) Class 3 appeals and applications other than:
 - (i) proceedings for approval of a strata renewal plan under s 179 of the *Strata Schemes Development Act 2015*, which are subject to the Practice Note – Strata Schemes Development Proceedings;
 - (ii) claims for compensation by reason of the acquisition of land, which are subject to Practice Note – Class 3 Compensation Claims;

- (iii) objections to valuation under the *Valuation of Land Act 1916*, which are subject to Practice Note – Class 3 Valuation Objections respectively; and
- (iv) appeals and references under the *Aboriginal Land Rights Act 1983*, which are subject to Practice Note – Class 3 Aboriginal Land Claims.

The appeals subject to this practice note are referred to as “miscellaneous appeals”.

Purpose of Practice Note

- 3. The purpose of this practice note is to set out the case management procedures for the just, quick and cheap resolution of miscellaneous appeals.

Responsibility of parties, legal practitioners and agents

- 4. It is the responsibility of each party, its legal representatives and agents (as applicable) to consider the directions appropriate to be made in the particular case to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
- 5. If a party reasonably considers that compliance with this practice note will not be possible, or will not be conducive to the just, quick and cheap resolution of the proceedings, the party should apply to be relieved from compliance on the basis that an alternative proposed regime will be more conducive to such resolution. In that event, the party is to notify other parties of the proposed alternative regime as soon as practicable and is to provide the Court with short minutes of proposed directions reflecting that alternative regime.
- 6. Parties are to ensure that all directions which they seek with respect to miscellaneous appeals will assist in enabling such appeals to be dealt with at the hearing 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 permits (see s 38 of the *Land and Environment Court Act 1979*).

Legal practitioners and agents of parties to be prepared

7. Each party not appearing in person shall be represented before the Court by a legal practitioner (or an agent authorised by the party in writing to whom leave of the Court has been granted to appear for the party) familiar with the subject matter of the proceedings and with instructions sufficient to enable all appropriate orders and directions to be made.
8. Any person seeking to perform the role of an agent should make themselves aware of the obligations of an agent and the requirement to obtain the leave of the Court to appear on someone's behalf in the proceedings. An application for leave to appear as an agent in the proceedings may be made at the time of commencing the proceedings by letter to the Registrar, or orally at the first directions hearing. The application must be supported by evidence that rule 7.7 of the Land and Environment Court Rules 2007 has been complied with.

Note: More information regarding the obligations of agents can be found on the Court's website (<http://www.lec.justice.nsw.gov.au>) and then accessed through "Coming to the Court" and then "Having someone represent you."

9. Legal practitioners and agents for each party should communicate prior to any attendance before the Court with a view to reaching agreement on directions to propose to the Court and on preparation of short minutes recording the directions.

Commencing a miscellaneous appeal

10. A miscellaneous appeal is to be commenced by filing in the Registry of the Court, by mail, over the counter or through the NSW Online Registry a completed Class 1, 2, 3 Application Form (Form B).

Note: the application form can be found on the Court's website (<http://www.lec.justice.nsw.gov.au>) and then accessed through "Forms & Fees" on the right hand menu.

Service of the miscellaneous appeal application

11. Miscellaneous appeal applications are to be served within 7 days of filing.

The return date of the miscellaneous appeal

12. Miscellaneous appeals will usually be given a return date before the Court 28 days after the date on which they are filed. On the return date, the first directions hearing will occur. The first directions hearing will usually be before the Registrar on a weekday from Tuesday to Friday.
13. If the miscellaneous appeal concerns a site that is located outside of metropolitan Sydney, the first directions hearing will occur by telephone in the telephone directions hearing list conducted before the Registrar on Mondays.
14. Applications to extend the period for the return of the application before the Court may be granted if the applicant demonstrates that service cannot be achieved within the time required. The Registrar may also extend the period if circumstances, such as public holidays, make it appropriate that a longer period be allowed for parties to take the action required by this practice note before or by the return of the proceedings.

Access to documents

15. On request, a respondent who is a public authority or public official is to provide the other party with access to the documents relevant to the application and its decision (if any) with respect to the miscellaneous appeal, within 14 days of the request.

Identifying the issues in dispute

16. If any party seeks to raise an issue of fact or law that it contends precludes the determination of the proceedings one way or another, then the party raising that issue is to identify it in its statement of facts and contentions prepared in accordance with Schedule A.
17. The applicant is to file and serve a statement of facts and contentions in accordance with **Schedule A** before 4.00pm on the third last working day before the first return of the proceedings unless the proceedings involve an appeal against a development control order under s 8.18 of the *Environmental Planning and Assessment Act 1979*.

18. If the proceedings involve an appeal against a development control order under s 8.18, the respondent is to file and serve a statement of facts and contentions in accordance with Schedule A before 4.00pm on the third last working day before the first return of the proceedings.

Number of pre-hearing attendances

19. Unless there are interlocutory applications, a miscellaneous appeal is normally in court before the hearing on no more than three occasions:
 - (a) at the first directions hearing,
 - (b) at the conciliation conference, and
 - (c) at the second directions hearing.

Before the first directions hearing

20. Before the directions hearing, the parties are to discuss and endeavour to agree upon:
 - (a) whether the proceedings are suitable for a conciliation conference;
 - (b) the directions that the Court should make at the first directions hearing;
 - (c) the proposed dates for hearing or conciliation conference, being usually the dates in the range of available dates published at the top of the court list; and
 - (d) if any party intends to adduce expert evidence at a hearing of the proceedings, a statement of the disciplines in respect of which they propose to call expert evidence, the names of the experts, the issues to which the proposed expert evidence relates, and the reasons why the proposed expert evidence is reasonably required to resolve the proceedings having regard to the requirement for the just, quick and cheap resolution of the issues in dispute.
21. If the parties do not agree, each party should prepare their own written version of the directions they propose.

Parties to seek directions before adducing expert evidence

22. Parties are encouraged to consider whether expert evidence is genuinely necessary to resolve the issues in dispute in miscellaneous appeals. Unnecessary expert evidence substantially increases the time and cost of appeals. Parties are encouraged to consider whether the proceedings can appropriately be fixed for hearing before a Commissioner or Commissioners with special knowledge and experience in relation to the issues in dispute.
23. A party intending to adduce expert evidence at the hearing of any miscellaneous appeal must apply for directions from the Court under Pt 31 r 31.19 of the Uniform Civil Procedure Rules 2005 permitting the adducing of expert evidence.
24. The application for directions is to be made at a directions hearing at which the miscellaneous appeal is listed for hearing. The application is to be supported by a completed information sheet in the form of Schedule D, outlining the issues in the proceedings, the experts whose opinion is sought to be adduced as evidence in the proceedings, and the areas of expertise of the expert. The application is also to be accompanied by the proposed directions under r 31.20 of the Uniform Civil Procedure Rules 2005.
25. If practicable, the Court will determine the application for directions at the directions hearing or otherwise it will fix a date for hearing the application. At the hearing of the application for directions, the party seeking directions is to explain the expert evidence sought to be adduced and why the use of that expert evidence should be permitted, including why that expert evidence relates to a real issue in the proceedings and is reasonably required to resolve that issue.
26. A party may not adduce expert evidence at the hearing of any miscellaneous appeal unless the Court has given directions permitting the adducing of that expert evidence and the adducing of that expert evidence is in accordance with those directions (see r 31.19(3) of the Uniform Civil Procedure Rules 2005).
27. Any directions for the filing of experts' reports and joint expert reports made by the Court will specify the name of each expert required to comply with the directions.

28. If either party seeks to adduce the evidence of any expert not named in the directions made, that party is required to seek additional directions for the filing of evidence by that expert, either through Online Court or by exercising liberty to restore. Any application for additional directions is to be supported by an updated hearing information sheet in the form of Schedule D, and provide the information and explanation referred to in paragraphs 24 and 25 of this practice note.

At directions hearings

29. Unless good reason is demonstrated, the parties are to be sufficiently prepared at the first directions hearing to assist the Court in making and to accept a timetable up to and including the conciliation conference or hearing date. Legal practitioners and other representatives of the parties are to advise the parties of their obligation to be ready to agree to a timetable up to and including the hearing date and are to obtain full and timely instructions to ensure the parties comply with this obligation.
30. At the first directions hearing, the parties are to inform the Court if there is any reason for the miscellaneous appeal not to be fixed for a conciliation conference under s 34 of the *Land and Environment Court Act 1979*. If the miscellaneous appeal is fixed for a conciliation conference, then the parties should expect that the usual directions in **Schedule B** will be made.
31. If the parties do not satisfy the Court that there is a good reason why the miscellaneous appeal should not be fixed for a conciliation conference under s 34 of the *Land and Environment Court Act 1979*, then, in the ordinary course, the miscellaneous appeal will be fixed for a conciliation conference as follows:
- (a) for short matters not requiring a site view, before the Duty Commissioner on the next available Friday; or
 - (b) for other matters, within 28 days, subject to the availability of the Court.
32. If the parties satisfy the Court that there is a good reason why the miscellaneous appeal should not be fixed for a conciliation conference but instead should be fixed for a hearing, the parties should expect that the usual directions set out in **Schedule C** will be made and should have either agreed or competing proposed short minutes to hand to the Court.

33. Following any termination of the conciliation conference, the parties are to be sufficiently prepared at the second directions hearing to assist the Court in making and to accept a timetable up to and including the hearing date, and to make any application for directions to adduce expert evidence in accordance with paragraphs 24 and 25 of this practice note. The parties should expect that the usual directions set out in Schedule C will be made and should have either agreed or competing proposed short minutes to hand to the Court.
34. In preparing the short minutes, parties may delete, amend or abridge any part of the usual directions to facilitate the just, quick and cheap resolution of the proceedings.
35. Parties may also propose alternative directions if they have a reasonable basis for considering that alternative directions will better facilitate the just, quick and cheap resolution of the proceedings. If alternative directions are proposed, the party seeking those directions is to notify the other party before the directions hearing and ensure that proposed short minutes are available to be handed to the Court.
36. To enable the usual directions in Schedule C to be made, when the miscellaneous appeal is to be fixed for hearing, the parties are to hand to the Court at the directions hearing a completed information sheet in the form of **Schedule D**.

Use of Online Court

37. Online Court allows parties to seek directions online rather than appearing at a directions hearing in court. Any of the usual directions, including fixing a date for a hearing or conciliation conference and the making of directions for expert evidence, can be made through Online Court.
38. Any application by Online Court to adduce expert evidence must be supported by a completed hearing information sheet (Schedule D) as well as the information and explanation referred to in paragraphs 24 and 25 of this practice note.
39. Parties can apply for directions to be made online by submitting an Online Court request before 12noon on the day prior to the directions hearing. The Court will endeavour to respond to the request by 4:30pm. If the parties do not

receive a response there must be an appearance on their behalf at the directions hearing.

40. Any party seeking to make an application using Online Court must first contact the other parties in an attempt to provide the Court with a consent position. If the parties reach consent as to the appropriate directions to be made and the date for a hearing or conciliation conference, the party lodging the request may mention the appearance of the other party and indicate that the directions are sought by consent.
41. If a party makes a request for orders through the Online Court without the consent of the other side, the Online Court system gives the other party an opportunity to respond by either consenting to the request or offering a 'counter' request. The other party is required to respond to the request by 2pm. If no response is received, appearances are required on behalf of all parties at the directions hearing.
42. If, by reason of a party's failure to respond to an Online Court request, another party is unnecessarily put to the cost of attending a directions hearing, the Court may make a costs order against that party for the cost of the other party's appearance in court unless there is some reasonable excuse for the failure to respond.

Conduct of conciliation conference

43. A conciliation conference arranged by the Court will be conducted in accordance with the Conciliation Conference Policy.

Note: the Conciliation Conference Policy can be found on the Court's website (<http://www.lec.justice.nsw.gov.au>) and then accessed through "Practice and Procedure" on the top menu.

44. The parties are to participate, in good faith, in the conciliation conference (see s 34(1A) of the *Land and Environment Court Act 1979*), including preparing to be able to fully and meaningfully participate, having authority or the ready means of obtaining authority to reach agreement and genuinely endeavouring to reach agreement at the conciliation conference.

45. Any amended documents or additional information proposed by the applicant to be the subject of without prejudice discussions at a conciliation conference are to be provided to the respondent 14 days before the conciliation conference.
46. The respondent is to provide to the applicant any response to the amended documents or additional information, as well as draft without prejudice conditions of approval (if applicable), 7 days before the conciliation conference.
47. The conciliation conference will not be adjourned to another time and place (fixed in consultation with the Registrar) by the Commissioner presiding over the conciliation conference unless the Commissioner is satisfied that there is good reason to do so (see s 34(6) of the *Land and Environment Court Act 1979*).
48. The failure of a party to attend with adequate instructions (such as not having authority to reach agreement or the ability to respond to a proposed outcome), or the failure of a party to be sufficiently prepared to negotiate an outcome (for example, by reliance on inadequate plans or supporting material, or by not having experts in attendance to assist with negotiations), will not generally constitute a good reason for the adjournment of a conciliation conference.
49. In general, the conciliation conference will be adjourned only in circumstances where the parties have reached an agreement in principle as to the terms of a decision in the proceedings that would be acceptable to the parties and the adjournment is required to finalise that agreement.
50. If an adjournment is given, the conciliation may be listed before the Commissioner after 4pm on a future date not more than 3 weeks after the conciliation conference. The Commissioner may conduct the adjourned conciliation by telephone or by requiring the parties to attend in person. If the time or date of the listing changes due to other duties of the Commissioner, the parties will be notified in writing by email.
51. If a conciliation conference is terminated, the miscellaneous appeal will be listed for a second directions hearing 7 days after the conciliation conference is terminated. At the second directions hearing following the termination of the conciliation conference, the parties are expected to be in a position to take a date for the final hearing of the proceedings and for the usual directions in Schedule C to be made.

Conduct of hearing

52. Generally, miscellaneous appeals should commence at 9.30am on site for the hearing view unless, in the particular circumstances of the case, it would be inappropriate to do so.
53. The hearing view will be conducted in accordance with the Site Inspections Policy.

Note: the Site Inspections Policy can be found on the Court's website (<http://www.lec.justice.nsw.gov.au>) and then accessed through "Practice and Procedure" on the top menu.

Expert evidence

54. Any directions made concerning the filing of expert evidence must be provided to the experts within 3 business days of being made, together with the statements of facts and contentions, Division 2 of Pt 31 of the Uniform Civil Procedure Rules, the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules, and the Court policies on Joint Reports and on Conference of Expert Witnesses.
55. An expert (including a parties' single expert) and the expert's report are to comply with the requirements of Division 2 of Pt 31 of the Uniform Civil Procedure Rules and the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules.
56. An expert witness should identify any pre-existing relationship between the expert witness, or their firm or company, and a party to the litigation.
57. It is not the role of any expert to opine whether an appeal should be upheld or dismissed. That is the role of the consent authority and, on appeal, the Court exercising the functions of the consent authority. Expert opinions in reports and joint reports are to deal with the contentions raised by the parties. Any other matter relevant to the expert's expertise, which the expert feels obliged to draw to the attention of the parties and the Court, may also be noted.
58. Experts' reports are not to repeat matters in Part A Facts of the statements of facts and contentions. Wherever possible, an expert should state that Part A

Facts has been adopted as correct. If this cannot be stated, the expert should identify the matters which are disputed and state his or her position in relation to those matters.

59. If experts are directed by the Court to confer, experts are to ensure that their joint conference is a genuine dialogue between experts in a common effort to reach agreement with the other expert witness about the relevant facts and issues. Any joint report is to be a product of this genuine dialogue and is not to be a mere summary or compilation of the pre-existing positions of the experts.
60. Legal representatives are not to attend joint conferences of experts or be involved in the preparation of joint reports without the leave of the Court.
61. Where expert evidence from more than one expert in the same discipline is to be given in Court, the experts will give such evidence concurrently (subject to any order by the hearing Judge or Commissioner to the contrary).
62. If a party requires any expert for cross-examination, notice is to be given at least 7 days before the hearing.

Parties' single expert

63. Where expert evidence is necessary to be called in relation to an issue, the Court encourages parties to use a parties' single expert. The use of a parties' single expert in an appropriate case can reduce costs and ensure the Court has the benefit of evidence from a person who is not engaged by only one party. In determining whether a parties' single expert might be appropriate in a particular case, consideration should be given to:
 - (a) the importance and complexity of the subject matter in dispute in the proceedings;
 - (b) the likely cost of obtaining expert evidence from a parties' single expert compared to the alternative of obtaining expert evidence from individual experts engaged by each of the parties;
 - (c) the proportionality of the cost in (b) to the importance and complexity of the subject matter in (a);

- (d) whether the use of a parties' single expert in relation to an issue is reasonably likely either to narrow the scope of the issue or resolve the issue;
- (e) the nature of the issue, including:
 - (i) whether the issue is capable of being answered in an objectively verifiable manner;
 - (ii) whether the issue involves the application of accepted criteria (such as Australian Standards) to ascertainable facts;
 - (iii) whether the issue is likely to involve a genuine division of expert opinion on methodology, or schools of thought in the discipline; and
 - (iv) whether the issue relates to the adequacy or sufficiency of information provided in the miscellaneous appeal application;
- (f) whether the evidence of the parties' single expert involves the provision of aids to assist in the assessment of a miscellaneous appeal application.
- (g) whether the parties' single expert would be required independently to obtain further information or to undertake monitoring, surveys or other means of obtaining data before being able to provide expert evidence;
- (h) whether the parties are prepared at the time to proceed to hearing on the basis of a parties' single expert report about the issue and no other expert evidence about that issue;
- (i) whether the integrity of expert evidence on the issue is likely to be enhanced by evidence being provided by a parties' single expert instead of by individual experts engaged by the parties; and
- (j) whether the Court is likely to be better assisted by expert evidence on the issue being provided by a parties' single expert instead of by individual experts engaged by the parties.

64. The Court will not usually accept the appointment of a parties' single expert if that expert is unable to provide a report within 5 weeks of receiving the brief or is unable to attend a hearing within a further 28 days thereafter.

65. The usual directions in **Schedule E** provide for a parties' single expert to file and serve one expert report only. Without leave of the Court, a parties' single expert is not to provide parties with preliminary reports or opinions.

Note: Under Pt 31.41 of the Uniform Civil Procedure Rules a party may seek clarification of the report of a parties' single expert on one occasion only.

66. The parties' are not to provide a parties' single expert with any expert report brought into existence for the purpose of the proceedings addressing any matter the subject of instructions to the parties' single expert, without leave of the Court.
67. Where a parties' single expert has been appointed to give evidence in relation to any issue, the parties may not rely on any other expert evidence about that issue without leave. Any application for leave is to be made as soon as reasonably possible and usually no later than five days after receiving the report of the parties' single expert.
68. Leave is to be sought by notice of motion, with an affidavit in support explaining:
- (a) the name, qualifications and expertise of the expert proposed to be called;
 - (b) the matters proposed to be addressed by the expert;
 - (c) the date on which the expert was first retained and the date or dates of any expert report the expert has already prepared;
 - (d) the reasons for the need to call an additional expert to give that evidence, rather than having the parties' single expert address the matters further or in cross examination;
 - (e) how calling the additional expert at all, or at the particular stage in the preparation of the proceedings, promotes the just, quick and cheap resolution of the proceedings; and
 - (f) the party's position in relation to any additional costs that might be caused by the calling of the expert.

If practicable, the affidavit should not exceed three pages in length (excluding annexures).

69. It is the responsibility of the parties to agree the remuneration to be paid to a parties' single expert. This includes making provision with respect to the

amount of the expert's fees and the frequency with which the expert renders accounts. The Court will fix the remuneration of a parties' single expert only where the parties are unable to agree that remuneration.

Note: See Pt 31.45 of the Uniform Civil Procedure Rules.

Short matters

70. Parties may request short matters (less than 2 hours) to be fixed for hearing before a Duty Commissioner or Duty Judge on a Friday.
71. If the request is by consent, the parties may file the request with the Registry before the first directions hearing. Parties will be notified if the hearing can be listed on a Friday before the first directions hearing, in which event the first directions hearing will be amended to be the hearing date.

Application for separate determination of an issue

72. In the ordinary course, all issues (including issues requiring findings on questions of law) should be heard together unless an issue genuinely capable of separate determination is likely to be determinative of the appeal.

Note: A Judge or a Commissioner who is an Australian Lawyer may be appointed to conduct the final hearing to facilitate the objective of having all issues heard together.

73. If any party seeks to raise an issue of fact or law that the party contends precludes or demands the determination of the miscellaneous appeal in a particular way or otherwise seeks to have an issue dealt with separately before the final hearing in accordance with Part 28 Division 2 of the Uniform Civil Procedure Rules 2005, the party must apply to do so by notice of motion supported by a short affidavit setting out the issue and the reasons why it should be dealt with separately. If possible, the notice of motion is to be returnable at the first directions hearing.
74. If an order is made for a hearing of a separate question:
 - (a) short matters (less than 2 hours) may be listed on the first available Friday before the Duty Judge or Duty Commissioner for issues of law or fact respectively; and
 - (b) other matters will be listed for hearing in the ordinary course,

and the usual directions in **Schedule F** will apply.

Expedition

75. Any party may seek expedition of a miscellaneous appeal by notice of motion, with a short affidavit in support setting out the reasons in support of expedition.

Breach of the Court's directions

76. If any party fails to comply with a direction of the Court that some action be taken by a specified time, and the defaulting party is not able to take that action within two days of the specified time, the defaulting party is to:
- (a) relist the matter before the Court within three days of the specified time; and
 - (b) provide to the Court on the relisting an affidavit explaining the non-compliance, the reason for the non-compliance and what action the party proposes to take and when the party proposes to take action to comply with the direction.
77. If any party fails to comply with a direction of the Court or this practice note, the Court will usually order that the defaulting party pay the costs of the other party of and occasioned by the non-compliance and any relisting required unless it appears to the Court that some other order should be made as to the whole or any part of the costs.

Variation of timetables

78. If either party becomes aware of circumstances that will necessitate a variation to the timetable, an application to vary the timetable can be made by Online Court request. Any party seeking to make an application to vary the timetable using Online Court must first contact the other parties in an attempt to provide the Court with a consent position.
79. If a party makes a request for orders through the Online Court without the consent of the other side, the Online Court system gives the other party an opportunity to respond by either consenting to the request or offering a 'counter'

request. If no response is received within 2 days of the request or such other time as the Registrar determines, the proceedings may be listed for further directions.

80. If, by reason of a party's failure to respond to an Online Court request, another party is unnecessarily put to the cost of attending a directions hearing, an order for the payment of costs of the appearance may be made unless there is some reasonable excuse for the failure to respond.
81. If proposed directions vary an existing timetable, they must include the vacation of any date for a directions hearing or mention of for the hearing of motions that can no longer be maintained.

Liberty to restore

82. Parties have liberty to approach the Court without a notice of motion on three working days' notice or earlier if urgency requires. A party seeking to make urgent application should, if possible, make prior arrangement with, or give appropriate notice to, any other party, and should send an Online Court request.
83. The Court expects that prior to exercising liberty to restore, the parties confer with a view to reaching an agreement on any proposed variation to the timetable and if an agreement is reached, request the variation to the timetable through Online Court.

Amendments to applications and to statements of facts and contentions

84. An applicant requires leave of the Court to amend a miscellaneous appeal application.
85. Parties require leave of the Court to amend their statements of facts and contentions.
86. Other than amendments sought during the hearing of the appeal, leave to amend is to be sought by notice of motion accompanied by a short affidavit in support explaining the reasons for leave to amend being sought.

Applications to vacate hearings and for adjournments

87. Miscellaneous appeals will not be adjourned generally.
88. Miscellaneous appeals usually will not be adjourned because of failure to comply with this practice note or Court directions or because of lack of preparedness for any attendance before the Court. If failure to comply or lack of preparedness nevertheless does cause the adjournment of the proceedings, the defaulting parties or legal practitioners may be ordered to pay costs.
89. Applications to vacate hearing dates are to be by notice of motion, with an affidavit in support explaining the circumstances of the application and the reasons the hearing date should be vacated.

Application for final orders by consent of parties

90. Any application for consent final orders in a miscellaneous appeal will be listed before the Court for determination. The parties will be required to present such evidence as is necessary to allow the Court to determine whether it is lawful and appropriate to make the consent final orders.

Costs and compliance

91. If a breach of the Court's directions or of this practice note causes costs to be thrown away, a party or legal practitioner responsible for the breach may be ordered to pay those costs.
92. The cost of unnecessary photocopying and assembly of documents is unacceptable. Legal practitioners for the parties are to consider carefully the documents necessary to be tendered. Unnecessary documents may attract adverse costs orders.
93. Any failure by one party to comply with the Court's directions will not be considered an adequate excuse for any failure to comply by the other party. Both parties are responsible for ensuring that they comply with directions.

Applications for a cost order

94. Where a Commissioner has heard and determined a miscellaneous appeal, any party seeking an order for costs of the proceedings must apply for costs by notice of motion filed within 28 days of the making of the final orders in the proceedings.

Note: Pt 3 r 3.7 of the Land and Environment Court Rules 2007 provides that for certain proceedings in Classes 1-3 of the Court's jurisdiction, the Court "is not to make an order of the payment of costs unless the Court considers that the making of an order as to the whole or any part of the costs is fair and reasonable in the circumstances": Pt 3 r 3.7(2). Some of the circumstances in which the Court might consider the making of a costs order to be fair and reasonable are listed in Pt 3 r 3.7(3). 70.

95. The notice of motion for costs will be heard and determined by either the Registrar or a Judge of the Court.

***The Honourable Justice Brian J Preston
Chief Judge***

29 March 2018

Schedule A

Requirements for statement of facts and contentions

1. The statement is to be as brief as reasonably possible.
2. The statement is to be divided into two parts – Part A Facts and Part B Contentions.
3. An authorised officer of the relevant party is to sign and date the statement.
4. In Part A Facts, the party is to identify:
 - (a) **The subject of the appeal:** a brief description of the subject matter of the appeal.
 - (b) **The statutory context:** a brief description of the relevant statutory provisions under which the miscellaneous appeal is brought.
 - (c) **The circumstances:** a brief description of the circumstances leading to the miscellaneous appeal.
 - (d) **The land:** if relevant, a brief description of any relevant land.
 - (e) **Actions of the party:** as relevant, a brief description of any relevant actions of the party, including date any application was lodged, application number, notification and its results, decision and date of decision.

Part A Facts is not to include matters of opinion.

5. In Part B Contentions the party is to identify each fact, matter and circumstance that the party contends require or should cause the Court to uphold or dismiss the appeal.
6. In Part B Contentions, the party is to:
 - (a) focus its contentions on issues genuinely in dispute;
 - (b) have a reasonable basis for its contentions;
 - (c) present its contentions clearly and succinctly, without repetition;
 - (d) where it contends that the appeal must be upheld or dismissed, identify the factual and/or legal basis for that contention. Any such contention is

to be made at the beginning of Part B contentions and is to be clearly identified as a contention that the appeal must be upheld or refused;

- (e) where the party contends there is insufficient information to assess any relevant matter, list the information the party contends is required;
- (f) if applicable, identify the nature and extent of each environmental impact relied upon to support any contention and, if practicable, quantify that impact; and
- (g) identify any contentions that may be resolved by conditions.

SCHEDULE B

Usual directions for arranging a conciliation conference

The Court directs that:

1. A conciliation conference under s34 of the *Land and Environment Court Act 1979* ('the Court Act') is arranged for [date] commencing at [time] at [place].
2. The conciliation conference will not be adjourned to another time and place (fixed in consultation with the Registrar) by the Commissioner presiding over the conciliation conference unless the Commissioner is satisfied that there is good reason to do so (see s 34(6) of the Court Act).
3. The [applicant or respondent] is to file and serve its statements of facts and contentions in accordance with Schedule A of Practice Note – Classes 1, 2 and 3 Miscellaneous Appeals by [insert date having regard to date of conciliation conference].
4. The [respondent or applicant] is to file and serve its statements of facts and contentions in reply in accordance with Schedule A of Practice Note – Classes 1, 2 and 3 Miscellaneous Appeals by [insert date having regard to date of conciliation conference]. This statement is not to repeat any facts not in dispute.
5. The parties are to participate, in good faith, in the conciliation conference (see s 34(1A) of the Court Act), including preparing to be able to fully and meaningfully participate, having authority or the ready means of obtaining authority to reach agreement and genuinely endeavouring to reach agreement at the conciliation conference.
6. Any amended documents or additional information proposed by the applicant to be the subject of without prejudice discussions at a conciliation conference are to be provided to the respondent 14 days before the conciliation conference.
7. The respondent is to provide to the applicant any response to the amended documents or additional information, and draft without prejudice conditions of approval (if applicable), 7 days before the conciliation conference.

8. Any documents proposed to be relied upon by a party for the purposes of without prejudice discussions at a conciliation conference may be lodged with the Court in a sealed envelope and marked for the attention of the Commissioner who is to preside over the conciliation conference. Such documents should not be filed and will not be recorded in the Court's records.
9. A copy of any documents so lodged is also to be provided, at the time of lodgment, to the other party to the proceedings with the notation that it has been brought into existence for the purposes of, and proposed to be relied upon by a party at, the conciliation conference.
10. If no agreement is reached at or after the conciliation conference, the proceedings are listed for a second directions hearing on [insert date 7 days after the conference].
11. Each party is to notify the other party in writing of the name of any expert upon which they propose to rely, the area of expertise of the expert and the issues to be addressed by each expert 2 business days prior to the second directions hearing.

Schedule C

Usual directions for a hearing

The Court directs that:

1. The proceedings are fixed for hearing on [insert date as soon as reasonably possible and usually within 12 weeks from the first directions hearing].
2. The hearing is to commence [on site at 9.30am] or [in Court at 10.00am]. If the parties consider the site may be difficult to find, they are to file an agreed map showing the proposed location for the commencement of any hearing on site at 9.30am two working days before the hearing.

Note: If a matter is fixed for an on site hearing or is otherwise to involve substantial time or taking of evidence on site, the parties should ensure that appropriate facilities are available for that purpose, including a table and chairs and bathroom facilities, and that the hearing will be open to the public and will be able to be observed and heard by all persons attending the hearing.

3. The [respondent or applicant] is to file and serve its statements of facts and contentions in accordance with Schedule A of Practice Note – Classes 1, 2 and 3 Miscellaneous Appeals by [insert date having regard to date of conciliation conference].
4. The [respondent or applicant] is to file and serve its statements of facts and contentions in reply in accordance with Schedule A of Practice Note – Classes 1, 2 and 3 Miscellaneous Appeals by [insert date having regard to date of conciliation conference]. This statement is not to repeat any facts not in dispute.
5. Under rr 31.19 and 31.20 of the Uniform Civil Procedure Rules 2005 ('UCPR'), the Court makes the following directions regarding expert evidence:
 - [name of the expert witness] may prepare an individual expert's report on [specified issues];
 - [the named experts] are to confer in relation to [specified issues] under UCPR r 31.24 and prepare a joint expert report;
 - the individual expert's report of [named expert] is to be filed and served by [date];

- the joint expert report of [named experts] is to be filed and served by [date].

Note: The above directions may be duplicated for each area of expertise required.

6. Unless the Court otherwise orders, expert evidence may not be adduced at the hearing otherwise than in accordance with the directions made by the Court in accordance with UCPR rr 31.19 and 31.20, including compliance with directions as to the time for service and filing of experts' reports and joint expert reports.
7. Parties are to serve a copy of these directions, the statements of facts and contentions, Division 2 of Pt 31 of the Uniform Civil Procedure Rules and the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules, and the Court policies on Joint Reports and on Conference of Expert Witnesses on all experts upon whose evidence they propose to rely within 3 business days of these orders being made, or, for a statement of facts and contentions (or reply) filed after the making of these orders, within 3 business days of them being filed or served.
8. Experts are directed to give written notice to the Court and the party instructing them if for any reason they anticipate that they cannot comply with these directions. In that case, or if the experts have failed to comply with these directions, the parties will promptly list the matter before the Court for directions and give written notice to the other parties.
9. Experts are to ensure that a joint conference is a genuine dialogue between experts in a common effort to reach agreement with the other expert witness about the relevant facts and issues. Any joint report is to be a product of this genuine dialogue and is not to be a mere summary or compilation of the pre-existing positions of the experts.
10. A joint report is to identify the experts involved in its preparation, the date of their joint conferences, the matters they agreed about, the matters they disagreed about and reasons for agreement and disagreement. A joint report should avoid repetition and be organised to facilitate a clear understanding of the final position of the experts about the matters in issue and the reasoning process they used to reach those positions. Each expert is to sign and date the joint report.

11. Legal representatives are not to attend joint conferences of experts or be involved in the preparation of joint reports without the leave of the Court.
12. At the hearing the evidence of experts is to be given by way of concurrent evidence, unless the hearing judge or commissioner directs otherwise.
13. A party calling a witness may not, without the leave of the Court, lead evidence from the witness the substance of which is not included in a document served in accordance with the Court's directions.
14. If any witness is required for cross-examination, notice is to be given at least 7 days before the hearing.
15. A party who proposes to object to any part of an affidavit, statement or report is to file and serve notice of its objections, including the grounds in support, at least seven days before the hearing.
16. If the applicant or respondent contends that, if the appeal is upheld, conditions should be imposed, that party is to file and serve draft conditions (in both hard copy and electronic form) 14 days before the hearing.
17. If any party fails to comply with a direction of the Court that some action be taken by a specified time, and the defaulting party is not able to take that action within two days of the specified time, the defaulting party is to:
 - (a) relist the matter before the Court within three days of the specified time; and
 - (b) provide to the Court on the relisting an affidavit explaining the non-compliance, the reason for the non-compliance and what action the party proposes to take and when the party proposes to take action to comply with the direction.

Note: The Court will usually order that the defaulting party pay the costs of the other party of and occasioned by the non-compliance and the relisting unless it appears to the Court that some other order should be made as to the whole or any part of the costs.

18. The parties have liberty to restore on three working days' notice.

Schedule D

Classes 1, 2 and 3 Miscellaneous Appeals - Information Sheet

Applicant:			
Respondent(s):			
Proceedings no:			
1.	Is any expert evidence required? If so, nominate general issues on which expert evidence is required, the areas of expertise and the names of the experts whose evidence leave is sought to be relied upon (with a new line for each area of expertise)		
Issues	Area of expertise	Applicant Expert	Respondent Expert
2.	Could any of the above issues be better dealt with by a parties' single expert? If so, what is the proposal for engaging the expert?		
3.	Are there any experts who should prepare an individual report before proceeding to a joint conference and joint report and, if so, identify the expert, the area of expertise and provide reasons supporting the report being necessary or appropriate [point form only]?		

4.	Should a Commissioner or Commissioners with special knowledge and experience in particular disciplines hear the appeal? If so, specify the relevant disciplines.
5.	If the appeal concerns land outside of the Sydney metropolitan region, should the appeal be heard in the local area? If not, why not?
6.	Is the appeal appropriate to be heard as an on site hearing under s 34A of the Environmental Planning and Assessment Act 1979? If so, will adequate facilities be available? Will the hearing be able to be observed and heard by the public?
7.	Is there any reason that the hearing should not commence at 9.30am on site?
8.	Identify any lay witnesses, if any
Applicant:	
Respondent:	
9.	Estimate of the length of hearing.
Applicant:	
Respondent:	
10.	Identify hearing dates sought:
Applicant:	
Respondent:	

SCHEDULE E

Usual directions on the appointment of a parties' single expert:

The Court orders:

1. The Court notes the agreement between the parties to engage [insert name] as a parties' single expert and that the parties have agreed the remuneration to be paid to that expert as being [insert details of remuneration].

Or, failing agreement about the identity and/or remuneration of the parties' single expert:

- 1A.
 - (a) The parties are to agree on a parties' single expert and their remuneration and are to notify the Court of the expert's name and that the expert's remuneration has been agreed by [insert date 7 days after the first/second directions hearing].
 - (b) Failing agreement, the parties are to file and serve the names, CVs and fee estimates of three appropriately qualified experts by [insert date 10 days after the first/second directions hearing]. The Court will make order 2 below in Chambers and notify the parties accordingly.
2.
 - (a) The Court orders the parties to engage jointly [insert name] as a parties' single expert.
 - (b) The Court fixes the remuneration of the parties' single expert at [insert details of remuneration].
3. A parties' single expert is not to incur fees or disbursements additional to the remuneration agreed by the parties or fixed by the Court without written agreement of both parties or, absent such agreement, the leave of the Court.
4. The parties are to brief the parties' single expert with agreed instructions and an agreed bundle of documents by [insert date within 7 days of direction 2 being made].
5. The parties' single expert is to file and serve their expert report by [insert date within 6 weeks of direction 2 being made]. Without leave of the Court, the

parties' single expert is not to provide the parties with a preliminary expert report or preliminary opinion.

6. The parties' single expert is to comply with the requirements of Division 2 of Pt 31 of the Uniform Civil Procedure Rules and the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules, including the requirements for experts' reports.
7. If the Court has ordered that a parties' single expert address any issue, no expert report addressing the same issue other than the report of the parties' single expert may be relied upon at the hearing, without leave.
8. The parties' are not to provide a parties' single expert with any expert report brought into existence for the purpose of the proceedings addressing any matter the subject of instructions to the parties' single expert, without leave of the Court.

SCHEDULE F

Usual directions for separate determination of questions

The Court orders that:

1. Pursuant to r 28.2 of the Uniform Civil Procedure Rules 2005, the following question is to be determined separately from any other question in the proceedings:

[insert separate question]

2. The parties are to file and serve any affidavits, reports or statements on which they wish to rely by [insert date within 14 days of the separation of the question].
3. The parties are to file and serve any affidavits, reports or statements in reply by [insert date within 28 days of the separation of the question].
4. The parties are to file an agreed bundle of documents by [insert date within 5 weeks of the separation of the question].
5. The party raising the question is to file and serve an outline of submissions by [insert date two working days before the hearing of the separate question].
6. The other party is to file and serve an outline of submissions by [insert date one working day before the hearing].
7. The question is listed for hearing in court on [insert date] at 10:00am.
8. Parties are to notify promptly the Court if there is any material slippage in the timetable.
9. The parties have liberty to restore on three working days' notice.