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BY EMAIL peta.dixon@courts.nsw.gov.au
Associate to the Hon. Justice Tim Moore
Land and Environment Court of New South Wales
225 Macquarie Street
Windeyer Chambers
Sydney NSW 2000
Attention: Ms Peter Dixon

Dear Madam Associate

Submission on the Class 3 Compensation Claims Practice Note by the Environment and Planning Law Association (NSW) Inc. (EPLA)

1. EPLA welcomes the opportunity to comment on the Court's review of the Class 3 Compensation Claims Practice Note. Thank you for allowing us the extra time to put together the collation of our members' comments in this letter.

2. As you know, EPLA is an organisation whose members are drawn from many environmental disciplines including the fields of planning, environment, architecture, local government and the legal profession. Its membership is drawn from city and country regions, in government and private enterprise. Many of EPLA's members regularly practice in the Court's Class 3 Compensation Claims jurisdiction as advocates, solicitors or expert witnesses.

3. On 11 May 2017, EPLA hosted a twilight seminar to discuss the Class 3 Compensation Claims Practice Note and the questions posed by Justice Moore. Approximately 50 people attended and a great number of them actively contributed to the discussion of the issues.

4. This submission does not seek to convey the views of individual members, but rather records either the general consensus of the members who attended the twilight seminar (where apparent), or contrary viewpoints if there was not consensus.

5. EPLA notes the amendments to the *Land Acquisition (Just Terms Compensation) Act 1991* (the **Act**) that commenced on 1 March 2017. The Court's review of the Class 3 Compensation Claims Practice Note should be considered in the context of those legislative amendments. For example, one broad observation that may be made is that the mandatory period of negotiation between an acquiring authority

and the owner of the relevant interest in land (in s 10A) may justify an assumption that by the time of commencement of any proceedings, the parties will have at least a basic – and perhaps a well-developed – appreciation of the extent of the differences between them and the grounds or reasons for the differences. This has implications for what is and is not reasonable to expect parties to do in the early stages of the litigation.

6. Each of the questions posed by Justice Moore is addressed in turn below.

1. Should matters in the LVC List be divided into two streams (one estimated to be less complex and requiring less time and procedural complication compared to the other)? If there was to be such a division, what should be the prima facie criteria to be applied to determine to which stream a particular matter should be assigned?

7. There was a general consensus in support of the division of the LVC List into two streams. The current "one size fits all" approach does not always most efficiently facilitate the quick, just and cheap resolution of the proceedings. Like any other procedure, an inflexible application of a two stream approach would create its own inefficiencies, but there seems to be great value in identifying the smaller or less complex matters and then adopting a procedure designed to resolve them very promptly without procedural or evidentiary formality or delay, thereby avoiding the problem where legal costs and expert retainer fees become an inappropriately high proportion of the amount in dispute between the parties.

8. Smaller value and less complex matters would benefit from an early conciliation conference while larger or more complex matters would benefit from case management and a staggered timetable for the preparation of evidence. EPLA notes that the current practice of the Court already adopts a flexible approach when timetabling matters to account for the needs of each particular matter. It would be useful to reduce that approach to writing to confirm the Court's expectation about the way that various types of claim will be dealt with in the ordinary course.

9. Various options for defining the streams were discussed. If two streams are adopted, prima facie criteria which could be applied to determine which stream a particular matter should be assigned may include the following:

Smaller / less complex stream	Larger / more complex stream
Less than $500,000 difference between the Valuer General's determination of compensation and the Applicant's claim	More than $500,000 difference between the Valuer General's determination of compensation and the Applicant's claim
Whole or partial acquisition of residential zoned land	If there is a complicated question of law - e.g. whether the Applicant has an interest in land
One or two areas of expert evidence required (e.g. valuation and planning)	More than two areas of expert evidence required

10. The amount of money in dispute may be the most appropriate defining feature of the streams, since the money that parties are prepared to spend to assert or defend

a claim is likely to be (or should be) influenced by the amount in dispute. Parties are unlikely to wish to commit resources to prepare for a full hearing, including the preparation of expert reports, where there is a relatively small amount separating the parties' respective positions. This approach is also consistent with the public interest in, and Court's expectation of, the adoption of procedures that control and limit the cost of litigation, particularly in smaller claims.

11. However, difficulties arise in applying financial criteria when an Applicant's claim is not formulated at the time of commencing proceedings (e.g. where the Class 3 Application seeks an order such as "market value in accordance with the Applicant's valuation evidence" or "compensation under section 59(1)(f) in accordance with the Applicant's evidence to be filed in the proceedings").

12. Although not a complete consensus, many of the participants at the seminar considered that it would be appropriate to require the Applicant to nominate an amount of compensation sought upon commencement of the proceedings. The prior 6 month period of negotiation with the acquiring authority (under s 10A) would put all but the most unsophisticated applicants in a position to know the general ambit of his, her or its claim. Further, I note the new practice of the Valuer General when assessing compensation, which is to prepare a draft report and then invite comment upon it from the dispossessed owner and the acquiring authority. Those two significant changes have increased the level of engagement of the parties with the question of the value of the acquired land before the commencement of any proceedings. An applicant should be in a position to nominate an amount, at least as an initial quantification of the claim.

13. Alternatively, the date for initial nomination of the amount sought could be one week prior to the first directions hearing.

14. Practitioners with experience in compulsory acquisition cases acknowledge that one reason that applicants are sometimes hesitant to nominate a particular figure is that they wish to avoid the situation (whether real or perceived) that there will be forensic disadvantage in doing so. This could be avoided by an indication in the practice note that, for example, in the ordinary case there will be leave to amend the quantum of the claim (if necessary) once expert evidence has been prepared.

2. If there were to be two streams, should determination of the appropriate stream assigned be agreed between the parties prior to the first return date and reviewed (or determined if there was no agreement between the parties) by the LVC Judge at the first directions hearing?

15. The most efficient approach would be for the parties to seek to agree the stream to which their matter should be assigned, with such agreement to be approved by the LVC Judge. The Practice Note could require the parties to file an agreed schedule before or at the first directions hearing which nominates the stream in which their matter should be assigned.

16. If the parties cannot agree, one option could be for the LVC Judge to direct which stream the matter should be assigned to. An alternative might be for the matter to be automatically assigned to the more complex stream.

3. If there were to be two streams, how soon after the first return date would it be appropriate to schedule a conciliation conference for less complex matters?

17. Less complex matters may be easily resolved at a conciliation conference. Thus, on one view, it may be preferable for the conciliation conference to be scheduled as soon as possible to avoid the costs associated with delay.

18. On the other hand, it may take the parties some time to obtain expert and legal advice that will enable them to be in a position to settle a matter at a conciliation conference.

19. The consensus of the meeting was that it would be appropriate for the conciliation conference to be scheduled a number of weeks (say, four or six weeks) after the first return date. This would allow the parties adequate time to prepare, whilst not being a protracted delay.

20. It is noted that parties would not be precluded from participating in informal settlement discussions or without prejudice correspondence seeking to settle the matter prior to the conciliation conference. The Court may wish to consider including an encouragement in the Practice Note for the parties to meet informally, on a without prejudice basis, prior to the conciliation conference where appropriate.

4. If there were to be two streams, would it be sufficient to mandate, for the less complex matters that the documentation for the conciliation conference ordinarily be confined to position papers exchanged by the parties prior to the conciliation conference?

21. The consensus of the seminar participants was that the Practice Note should require that the following be filed and exchanged two weeks prior to the conciliation conference:

    (a) without prejudice position papers; and

    (b) the Applicant's evidence in relation to their claim under s59(1)(a) to (e) of the Act – that is, the supporting documents that prove the amounts incurred and paid, and that show how those amounts are within those subsections.

22. As to (b) above, there was a general acceptance at the seminar that acquiring authorities will not be in a position to agree to disturbance claims if the invoices and other evidence in support of those claims have not been produced prior to the conciliation conference.

23. It is considered inappropriate, and productive of cost and delay, to require evidence in relation to a claim under s59(1)(f) of the Act or any expert evidence to be prepared prior to the conciliation conference.

5. If the documentation is so confined, should there be an appendix to the Practice Direction providing guidance as to length, structure and content of such position papers (including, for example, requiring the parties' valuers to deal with no more than what they regarded as their three best comparable sales)?

24. The consensus of the seminar was that without prejudice position papers should be limited in length (for example, to no more than five pages) and should identify a limited number (for example, three or five) best comparable sales upon which each party relies and an indication how, if at all, those sales are adjusted or relied on. That guidance can be provided in the body of the Practice Note.

25. A position paper should be required to identify the issues that each party contends are the substantial cause of the dispute between them, and then set out their position on those issues. It may also be appropriate to (i) require of the applicant an indication why the valuer general's amount is not acceptable; and (ii) require of the acquiring authority an indication whether the valuer general's amount is contended not to be the appropriate compensation, and if so why. It is considered unnecessary to include an appendix to the Practice Note with further guidance as to structure and content of the position papers.

6. If there were to be two streams, would the present standard directions timetable remain appropriate or should it be changed:

- **to specify that the conciliation/mediation conference should happen at a point in the timetable earlier than the present 16 weeks after the first directions hearing as contemplated by (3)? Or**
- **to require the parties to attend the first directions hearing prepared to discuss with the LVC Judge the expected length of the hearing if the matter does not settle, with a view to taking hearing dates at that time, rather than waiting until the second directions hearing?**

26. For the less complex stream, the parties should expect the standard directions contained in paragraphs 3 to 11 and 14 to 25 of Schedule A of the Practice Note to be made at a directions hearing on the second Friday after the conciliation conference if they are unable to settle the matter at the conciliation conference.

27. For the more complex stream, the consensus of the seminar was that the standard directions do not presently provide parties with sufficient time to prepare their case and more time should be allowed. This is particularly the case where an Applicant's claim may not be properly articulated at the commencement of proceedings.

28. In the more complex stream, the parties are unlikely to be in a position to discuss effectively with the LVC Judge the expected length of hearing at the first directions hearing. Often, solicitors are not engaged until just prior to the first directions hearing and will not have had the opportunity to identify fully the nature of the issues in dispute and brief the relevant experts before the first directions hearing.

29. If matters in the more complex stream will be subject to case management, in particular in a 'docket judge' system, the parties and the case managing Judge should endeavour to allocate hearing dates at the earliest practical opportunity.

30. EPLA considers that there may be merit in requiring points of claim and points of defence to be prepared early in the timetable in the more complex stream. This may provide incentive for the parties to seek to agree to be placed in the less complex stream and attend an early conciliation conference. For matters that remain in the more complex stream, points of claim and points of defence should cause the parties to consider carefully what the relevant facts are and what is genuinely in dispute, which will help to identify and narrow the issues. Parties should be given an automatic or default right in the usual case to amend their pleadings after the preparation of expert and lay evidence (so that the 'pleading' reflects the party's reliance on that evidence) and prior to the pre-hearing mention, to avoid a practice of heavily caveated initial pleadings.

7. If the timing of the settlement/conciliation conference is brought forward to a point earlier in the timetable in Schedule A, should it be mandated that the matter return to the LVC List the Friday following an unsuccessful s 34 conference?

31. For less complex matters which are subject to an early conciliation conference, the matter should return to the LVC List on the second Friday following an unsuccessful conciliation conference. This will allow enough time for the parties to consider an appropriate timetable for the continuation of the matter at the directions hearing.

8. The current Practice Note does not specify that the parties should settle and file an agreed bundle of documents. Is it appropriate to incorporate such a requirement in the timetable and, if so, at what point?

32. The Practice Note should provide that an agreed bundle of documents should be filed at the pre-hearing mention, which will usually occur on the second Friday prior to the hearing.

9. The current Practice Note specifies that the Applicant's lay evidence is to be filed and served within one week of the First Directions hearing and that the Respondent's lay evidence in reply be filed and served by the end of the following week (Schedule A(1) and (2)). Does this remain appropriate timing and, if not, what alteration should be made to the timetable in Schedule A?

33. In less complex matters, the Applicant's lay evidence relating to a claim under s59(1)(a) to (e) of the Act should be filed and served two weeks prior to the conciliation conference. The Respondent's lay evidence (if any) in reply should be filed and served one week prior to the conciliation conference.

34. In more complex matters, the Applicant's lay evidence relating to a claim under s59(1)(a) to (e) of the Act should be filed and served four weeks after the first directions hearing. The Respondent's evidence (if any) in reply should be filed and served two weeks later.

35. The Applicant should be given eight weeks after the first directions hearing to file and serve the evidence relating to their claim under s59(1)(f) of the Act. The Respondent's evidence (if any) in reply should be filed and served four weeks later.

10. For matters that are to be significantly contested, is there a potential role for case management by the trial judge at a time earlier than the presently scheduled pre-trial mention? If so, should this be in lieu of, or in addition to, the pre-trial mention?

36. Yes, case management (similar to the practice in the Federal Court) should be required for the larger, more complex matters where the hearing is likely to take more than two weeks. This would:

    (a) assist with the facilitation of early site inspections where the site is going to be altered due to the progression of the project for which the land was acquired; and

    (b) enable the hearing judge to obtain information/insight about the matter early and help to provide guidance in respect of the issues in dispute.

37. A pre-hearing mention should also be held to finalise arrangements for the hearing and any enable any last-minute directions to be made.

11. Does a pre-trial mention remain necessary or, for example, could the provision of the various documents presently provided at the pre-trial mention be dealt with by the requirement to file and serve them at a specified time?

38. A pre-hearing mention is considered appropriate as it is often the first time that counsel briefed in the matter appear. The pre-hearing mention also presents a good opportunity for any last-minute directions to be made. In certain circumstances, particularly if the matter is being case managed, the pre-hearing mention could be dispensed with. This could be determined on a case by case basis.

12. Would there be utility in the respondent providing a short statement of those matters respondent proposes should be uncontested for the trial and, if so, what would be the appropriate timing for such a document?

39. No, the points of claim and points of defence should already deal with what is agreed between the parties.

13. Should there be a mandated form for a joint table of s 59(1)(f) claims setting out the amounts claimed, the basis for each and, if disputed, the reasons for rejecting the item?

40. It would be useful for the parties to hand up, on the first day of the hearing, a schedule outlining what components of the Applicant's s59(1)(a) to (e) and s59(1)(f) claim are agreed, and what is still contested.

41. The mechanism should be as follows:

(a) one week prior to the hearing, the Applicant is to serve on the Respondent an electronic word document schedule outlining the components of their disturbance claim still pressed;

(b) the Respondent is to complete their part of the schedule, indicating which matters are agreed and which are in dispute, and return to the Applicant one day prior to the hearing;

(c) the parties are to hand up the consolidated schedule on the first day of the hearing.

42. The Practice Note could provide a form for the consolidated schedule of disturbance costs as an appendix.

14. When should the necessity for and scope of a site and comparable sales (and any other relevant issues) inspection be identified?

43. The Practice Note should, as it presently does at paragraph 6 of the usual directions made at the second directions hearing, require the parties to hand up an agreed schedule for the site and comparable sales inspection at the pre-hearing mention.

15. What other changes might be considered to the Class 3 Compensation Claims Practice Note?

44. A number of EPLA's members have suggested that less complex matters might benefit from a dual-path approach to the preparation of evidence whereby:

(a) the Respondent is required to prepare their evidence relating to market value and injurious affection first;

(b) the Applicant is required to prepare their evidence relating to disturbance items first;

(c) once (a) and (b) have been completed, the paths swap over so that the Applicant prepares the evidence in reply relating to market value and injurious affection and the Respondent prepares the evidence in reply relating to disturbance items; and

(d) once (c) has been completed, joint reports are prepared.

45. While this idea may warrant further consideration at a later point in time, it is not considered an appropriate approach in all less complex matters for at least the following reasons:

(a) the proceedings are commenced because the Applicant does not accept the Valuer General's determination of compensation. It is the Applicant's case and the Applicant should be required to set out its claim first. If this does not occur, a practice may develop whereby Applicants commence proceedings in the hope that the Respondent's position is more favourable that the Valuer General's determination;

(b) the Respondent is required to engage a different expert to that used by the Valuer General and may not be in a position to prepare expert valuation evidence quickly, whereas the Applicant will often use the same expert who advised on pre-acquisition valuation matters; and

(c) there is an opportunity for different directions to be made in cases where those different directions are warranted.

46. The following changes to the Practice Notice note were raised at the EPLA twilight seminar and might also be considered:

(a) clarifying whether expert and lay evidence should be filed and served or just served (or exchanged) with all evidence to be included in a Court Book filed at the pre-hearing mention;

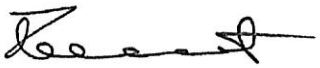
(b) clarifying whether without prejudice position papers should be filed prior to a conciliation conference or handed up at the commencement of a conciliation conference. EPLA suggests that there would be utility in requiring position papers to be filed as it will enable the presiding Commissioner to obtain a background and understanding of the key issues in dispute prior to the commencement of the conciliation conference, thereby reducing the length of conciliation conferences which are often attended by counsel, solicitors and numerous experts;

(c) the requirement for the Respondent to provide a statement with respect to the Valuer General's determination (para 16(a) of the Practice Note) could be removed as the Respondent will seldom be in a position to accept the Valuer General's determination given the Respondent is required to engage a different expert to that used by the Valuer General;

(d) the requirement to prepare an affidavit explaining the reasons for a breach of the Court's directions and proposing directions to be made (para 34 of the Practice Note) is an expensive exercise that may cause a party to "lock in" to a position with respect to proposed directions rather than engage with their counterpart to identify directions that suit both parties. A simpler approach may be to require an Online Court request (agreed if possible) to be lodged within 3 days of a party breaching the Court's directions. If the parties cannot agree on directions to rectify the slippage in the Court timetable, both parties should be required to appear in the LVC List to obtain appropriate directions from the Court. If the particular circumstances are considered by the Court to require explanation on affidavit, the relevant party can be told that either in the Court's response to the online request or at the directions hearing;

(e) encouragement in the Practice Note for a single parties expert to be used for disciplines such as quantity surveying, where there is often not much separating the experts.

47. Please do not hesitate to contact me if you would like to discuss any aspect of EPLA's comments. EPLA would be pleased to provide further comments if that would be of assistance to the Court.



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