



**Land and Environment
Court**
of New South Wales

PRACTICE NOTE

CLASS 5 PROCEEDINGS

Name and commencement of Practice Note

1. This practice note is to be known as Practice Note - Class 5 Proceedings. It commences on 10 December 2020. It replaces the Practice Note – Class 5 Proceedings made on 3 April 2018.

Application of Practice Note

2. This practice note applies to all criminal proceedings in Class 5 of the Court's jurisdiction referred to in s 21 of the *Land and Environment Court Act 1979*.

Purpose of Practice Note

3. The purpose of this practice note is to:
 - (a) reduce delays in criminal proceedings before the Court by implementing the preliminary disclosure and case management provisions in Chapter 4, Part 5, Division 2A of the *Criminal Procedure Act 1986*;
 - (b) set out the case management procedures and the process for the preparation for, and conduct of, trials and sentencing hearings to ensure that criminal proceedings are dealt with in a just and timely way; and
 - (c) assist the defendant to take advantage of legislation which provides for a discount in sentence for an early plea of guilty.

Statutory Context

4. Case management provisions and other provisions to reduce delays in criminal proceedings are set out in Division 2A (ss 247A – 247Y) of Part 5 of Chapter 4 of the *Criminal Procedure Act*. Part 5 of Chapter 4 also applies generally to Class 5 proceedings (s 41 of the *Land and Environment Court Act*) as does Part 5 of the *Land and Environment Court Rules 2007*, which adopts certain provisions of the *Supreme Court Rules 1970* and the *Uniform Civil Procedure Rules 2005*.



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5. Case management measures available to the Court include the ordering of preliminary hearings, preliminary conferences and further preliminary disclosure. The Court has a discretion in determining which (if any) of those measures are suitable in the criminal proceedings concerned.

Responsibility of parties, legal practitioners and agents

6. 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 ensure that criminal proceedings are dealt with in a timely way.
7. If a party reasonably considers that compliance with this practice note will not be possible, or will not be conducive to timely dealing with 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.

Legal practitioners and agents of parties to be prepared

8. Each party not appearing in person shall be represented before the Court by a legal practitioner familiar with the subject matter of the proceedings and with instructions sufficient to enable all appropriate orders and directions to be made.
9. Parties are to confer prior to any attendance before the Court with a view to reaching agreement on directions to propose to the Court and preparation of agreed or competing short minutes recording the proposed directions.

Commencing a Class 5 proceeding

10. *Form to commence proceedings:* Proceedings for an offence in Class 5 of the Court's jurisdiction are to be commenced by summons. The summons is to claim an order under s 246(1) of the Criminal Procedure Act in respect of the offence and claim that the defendant be dealt with according to law for commission of the offence (Pt 5 r 5.3(1) of the Land and Environment Court



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Rules). An order under s 246(1) of the Criminal Procedure Act is that the defendant appear before the Court at a specified date, time and place to answer to the offence charged in the order, or for the apprehension of the defendant for the purpose of being brought before a judge of the Court to answer to the offence charged in the order.

11. *Minute of order in summons:* When filing the summons, the prosecutor is to lodge copies of a minute of the order under s 246(1) of the Criminal Procedure Act claimed by the prosecutor.
12. *Affidavits accompanying summons:* A summons seeking an order under s 246 of the Criminal Procedure Act is to be accompanied by the affidavits intended to be relied on by the prosecutor as establishing prima facie proof of the offence charged (Pt 5 r 5.3(2) of the Land and Environment Court Rules).
13. *Procedure for obtaining an order:* Before filing the summons, the prosecutor is to apply to the Court's registrar for the prosecutor's summons claiming an order under s 246(1) of the Criminal Procedure Act to be heard before a judge, usually the duty judge. A date, time and place will be organised. The application may be dealt with in person in a courtroom or the judge's chambers, with the legal representatives of the prosecutor in attendance, or remotely by telephone, AVL or MS Teams. The Court will advise of the method by which the application will be dealt with by the judge.
14. The prosecutor needs to establish that it is appropriate for the judge to exercise the coercive power for which s 246(1) provides. If so satisfied, the judge will make an order under s 246(1), either that the defendant appear before the Court at the date, time and place specified or that the defendant be apprehended for the purpose of being brought before a judge to answer to the offence charged in the order.
15. If the application was heard in person in court or chambers, and the judge makes the order sought, the prosecutor will proceed immediately to the Court's registry at level 4, 225 Macquarie Street, Sydney for the purpose of formally filing the summons and affidavits and paying the filing fee and having the order made by the judge entered. The prosecutor needs three copies of each of the summons, order and affidavits, if there is one defendant, and an additional copy for each additional defendant.



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16. If the application was heard remotely by telephone, AVL or MS Teams, as soon as practicable after the judge has made the order, the prosecutor is to file the summons and affidavits and pay the filing fee and have the order made by the judge entered.
17. *Processing the summons and order.* The Court will process the summons and order at the Court's registry. The summons will be recorded in the Court's record system and stamped as having been filed with the Court. The order under s 246(1) of the *Criminal Procedure Act* made by the judge will be entered. The date, time and place for the defendant to answer to the offence charged in the order will be specified in the order and the copies.
18. The Court's registry will keep one copy of the summons, order and affidavits for the Court's file and return the other copies to the prosecutor. One of the returned copies is for the prosecutor to keep and the other sets of copies are to be served on each defendant.

Service

19. The sealed order and stamped copy of the summons and affidavits are to be served on the defendant within 7 days of commencement of the proceedings.

The date, time and place for the defendant to answer the offence charged

20. The order under s 246(1) of the *Criminal Procedure Act* will usually specify the date, time and place for the defendant to answer the offence charged in the order. Usually this will be the first mention of the proceeding. It will be about 6 weeks after the proceedings were commenced and the order was made. The first mention will occur before the List Judge.

Class 5 List

21. There is a Class 5 List which will be managed by the List Judge, usually each Friday.
22. In the Class 5 List the Court:



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- (a) gives directions and conducts the first mention as a preliminary hearing; and
 - (b) hears or manages any notice of motion or other interlocutory application.
23. Matters in the Class 5 List will be listed in blocks on a “not before” a specified time basis. Parties should check the daily court lists as published prior to attendance at Court in order to determine the “not before” time that their matter is listed.

Number of pre-trial or pre-sentencing hearing attendances

24. Unless there are interlocutory applications or more than one preliminary hearing is required, a Class 5 proceeding should normally appear in Court before the trial or sentencing hearing on no more than two occasions as follows:
- (a) at the first mention in the Friday list when the defendant may enter a plea and the Court gives directions;
 - (b) at a preliminary hearing in the Friday list when a date for the trial or sentencing hearing will be fixed and the Court gives directions.

Before the first mention

25. In preparation for the first mention and to enable the Court to make appropriate directions, the parties are to take the following steps before the first mention:
- (a) they should endeavour to identify their counsel or their solicitor who will be appearing for them, in order to allow meaningful and binding decisions to be taken about evidence and other matters;
 - (b) the defendant is to consider the plea the defendant intends to make in answer to the offence charged in the order. Usually, the pleas are either guilty or not guilty of the offence charged. A defendant may be given a discount on the penalties imposed for an offence if a defendant enters an early plea of guilty, which may be at the first mention;



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- (c) the prosecutor is to consider the time by which notice of the prosecution case could be given by the prosecutor under s 247E of the Criminal Procedure Act;
- (d) the defendant is to consider the time by which notice of the defence response could be given by the defendant under s 247F of the Criminal Procedure Act;
- (e) the prosecutor and the defendant are to consider whether the Court at the first mention should order one or more preliminary hearings before the Court under s 247G of the Criminal Procedure Act. At preliminary hearings, the Court may make directions for the efficient management and conduct of the proceedings, and hear and determine and make rulings or findings on objections, submissions and questions of law (see s 247G(2) and s 247G(3));
- (f) the prosecutor and the defendant are to consider whether the Court at the first mention should order that a preliminary conference be held under s 247H of the Criminal Procedure Act. The purpose of a preliminary conference is to determine whether the defendant and the prosecutor are able to reach agreement regarding the evidence to be admitted at the trial or sentencing hearing (see s 247H(4));
- (g) the prosecutor and the defendant are to consider whether the Court at the first mention should order preliminary disclosure by the prosecutor under s 247J of the Criminal Procedure Act, by the defendant under s 247K of the Criminal Procedure Act, and by the prosecutor in response to the defence response under s 247L of the Criminal Procedure Act; and
- (h) the prosecutor and the defendant are to discuss and endeavour to agree on the directions that the Court should make at the first mention. If the parties do not agree, each party should prepare their own version of the directions they propose.

At the first mention

26. *Date, time and place:* The first mention will usually be on a Friday about 6 weeks after commencement of the proceedings. It will be conducted by the List



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Judge, in a courtroom in the Court's building at 225 Macquarie Street, Sydney. The location of the courtroom and the precise time of the day first mention will occur will be shown on the Court Lists posted on a notice board in the foyer of the building and on the Court's website under Court Lists in the afternoon of the day before the directions hearing. The Sydney Morning Herald may also (but does not always) publish the Court Lists on the morning of the date set for the first mention.

27. *Defendant's plea:* The defendant should advise the Court whether the defendant is in a position and is willing to enter a plea of not guilty or guilty to the offence charged and, if so, enter the plea.
28. *Restorative justice:* If the defendant enters a plea of guilty, the prosecutor and defendant are to advise the Court of any proposal for, and timing of, any restorative justice process in which the defendant and victims (people and the environment) of the offence committed by the defendant are willing to participate and any proposed order for a restorative justice activity that the defendant has agreed to carry out.
29. *Time for notices of prosecution case and defence response:* The prosecutor and the defendant are to advise the Court of the time by which notice of the prosecution case is to be given under s 247E and notice of the defence response is to be given under s 247F of the Criminal Procedure Act.
30. *Short minutes of proposed directions:* The prosecutor and the defendant are to hand to the Court an agreed or their own versions of short minutes of the directions they propose the Court should make, including:
 - (a) the time by which notice of the prosecution case and notice of the defence response under s 247E and s 247F of the Criminal Procedure Act should be given;
 - (b) ordering a preliminary hearing under s 247G of the Criminal Procedure Act;
 - (c) ordering a preliminary conference under s 247H of the Criminal Procedure Act;
 - (d) ordering the prosecutor to give to the defendant notice in accordance with s 247J of the Criminal Procedure Act (if appropriate);



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- (e) ordering the defendant to give to the prosecutor notice of the defence response to the prosecution's notice in accordance with s 247K of the Criminal Procedure Act (if appropriate);
 - (f) ordering the prosecutor to give to the defendant notice of the prosecution's response to the defence response in accordance with s 247L of the Criminal Procedure Act (if appropriate);
 - (g) whether the Court should waive any of the requirements of Division 2A, Part 5, Chapter 4 of the Criminal Procedure Act under s 247P of the Act;
 - (h) if the defendant enters a plea of guilty, directing the preparation of an agreed statement of facts and bundle of documents;
 - (i) if the defendant enters a plea of guilty, directing the prosecutor to give to the defendant notice and details of any orders in connection with the offence that the prosecutor will be seeking for the Court to make (such as orders under Part 8.3 of the *Protection of the Environment Operations Act 1997*) if the Court finds the offence proved; and
 - (j) other directions for the efficient management and conduct of the proceedings.
31. *Making and recording directions:* The List Judge will make directions, usually orally, including fixing times for various notices to be given and dates for any preliminary hearings or preliminary conferences or agreed statement of facts and bundle of documents that might be ordered as well as a date for the second directions hearing. It is important that the parties record the directions the List Judge makes. A written copy of the directions made is not usually sent to the parties.

Before the first preliminary hearing

32. In preparing for the first preliminary hearing and to enable the Court to make appropriate directions, the prosecutor and the defendant need to take certain steps before the first preliminary hearing:



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- (a) if the defendant has not already entered a plea at the first mention of the proceedings, the defendant should consider the plea the defendant intends to make at the first preliminary hearing in answer to the offence charged in the order;
- (b) the prosecutor and the defendant should consider whether, in light of the matters raised in the notices of the prosecution case and defence response and any notices for preliminary disclosure by the prosecutor and the defendant ordered by the Court, which have been given, a further preliminary hearing under s 247G or a further preliminary conference under s 247H of the Criminal Procedure Act should be ordered;
- (c) the prosecutor and the defendant are to consider whether they wish to apply for directions under s 247M of the Criminal Procedure Act, including dispensing with formal proof of a fact, matter or circumstance, dispensing with the application of certain provisions of the *Evidence Act 1995*, and permitting evidence of two or more witnesses in the form of a summary;
- (d) the prosecutor and the defendant are to discuss and endeavour to agree on the estimated hearing time for the trial or sentencing hearing, broken down into the elements of the trial or sentencing hearing. If the parties are unable to agree, each party should prepare their own version of the estimated hearing time; and
- (e) the prosecutor and the defendant are to discuss and endeavour to agree on the directions the Court should make at the first preliminary hearing. If the parties do not agree, each party should prepare their own version of the directions they propose. Each party should find out the available dates of themselves and their witnesses, including experts, for the trial or sentencing hearing.

At the first preliminary hearing

33. *Date, time and place:* The first preliminary hearing will again be conducted on a Friday by the List Judge on the date fixed at the first directions hearing, in a courtroom in the Court's building at 225 Macquarie Street, Sydney. The location of the court and the precise time of the day will be published on the Court Lists on a notice board in the foyer of the Court's building and on the Court's website in the afternoon of the day before the first preliminary hearing.



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The Sydney Morning Herald may also (but does not always) publish the Court Lists on the morning of the date set for the preliminary hearing.

34. *Defendant's plea*: If the defendant has not already entered a plea at the first mention of the proceedings, the defendant should enter a plea at the first preliminary hearing of not guilty or guilty to the offence charged.
35. *Estimate of hearing time*: The prosecutor and the defendant are to hand to the Court a realistic agreed estimate or their own versions of an estimate of the hearing time, broken down into the elements of the trial or sentencing hearing.
36. *Completed minute of proposed directions*: The prosecutor and the defendant are to hand to the Court an agreed or their own versions of a minute of the directions they propose the Court should make, which may include:
 - (a) ordering a further preliminary hearing under s 247G of the Criminal Procedure Act (if appropriate);
 - (b) ordering a further preliminary conference under s 247H of the Criminal Procedure Act (if appropriate);
 - (c) making any directions under s 247M of the Criminal Procedure Act (if appropriate);
 - (d) whether the Court should waive any of the requirements of Division 2A, Part 5, Chapter 4 of the Criminal Procedure Act under s 247P of the Act;
 - (e) if the defendant enters a plea of guilty, directing the preparation of an agreed statement of facts and bundle of documents;
 - (f) if the defendant enters a plea of guilty, directing the prosecutor to give to the defendant notice and details of any orders in connection with the offence that the prosecutor will be seeking for the Court to make (such as orders under Part 8.3 of the *Protection of the Environment Operations Act 1997*) if the Court finds the offence proved; and
 - (g) other directions for the efficient management and conduct of the proceedings.



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37. *Making and recording directions:* The List Judge will make directions, usually orally, including fixing a date for the trial or sentencing hearing. The parties should record the directions made, including importantly the date, time and venue of the trial or sentencing hearing. A written copy of the directions made is not usually sent to the parties.

Expert evidence

38. An expert called to give evidence at a trial or sentencing hearing and the expert's evidentiary statement are to comply with the requirements of Division 2 of Pt 31 and the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules.

The trial or sentencing hearing

39. The trial or sentencing hearing of the proceedings will take place in a courtroom in the Court's building at 225 Macquarie Street, Sydney or possibly, for country matters, in a court in regional New South Wales. The Court's direction fixing the trial or sentencing hearing will state the venue. The venue will also be stated on the Court Lists posted on the notice board in the foyer of the Court's building and on the Court's website on the afternoon of the day before the trial or sentencing hearing is to occur. The Online Registry also publishes the Court Lists up to three weeks prior to the listing.
40. The usual commencing time is 10.00 am. A judge will conduct the trial or sentencing hearing.

Hearing of all issues

41. Evidence and submissions at the trial or sentencing hearing are to address all issues the subject of the proceedings. No issue will be separately determined unless the Court so orders. Any application for separate determination of an issue should be made prior to the trial or sentencing hearing and be determined at a preliminary hearing ordered under s 247G(3) of the Criminal Procedure Act.



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Submissions

42. The Court is assisted by parties providing skeleton opening submissions before the trial (where appropriate) or sentencing hearing. Skeleton opening submissions are to be provided by the third working day prior to the date of the trial or sentencing hearing.
43. Skeleton opening submissions generally are not a substitute for a written outline of closing submissions. The Court will usually be assisted by a written outline of closing submissions, provided at the trial or sentencing hearing, which includes references to the evidence.
44. The skeleton opening submissions and outline of closing submissions should be provided to the hearing judge in hard copy (with an extra working copy) and electronically to the hearing judge's associate.

Authorities and legislation

45. Each party is to provide a list of authorities and legislation to be relied on to the hearing judge's associate one working day before the trial or sentencing hearing is to commence.
46. If any unreported authorities or superseded legislation are to be relied on, copies are to be provided to the hearing judge at the trial or sentencing hearing.

Notices of motion returnable in the Class 5 list

47. Any notice of motion is to be returnable in the Class 5 List unless the circumstances are so urgent as to justify an earlier listing. Parties and legal practitioners should endeavour to arrange evidence and outline of submissions so that, if practicable, the motion may be heard on the return date. Any outline of submissions is to be emailed to the List Judge's Associate two working days before the notice of motion is returnable.



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Breach of the Court's directions

48. If there is any significant breach of the Court's directions sufficient to cause slippage in a timetable, the parties must promptly, by e-Court communication or fax to the Registrar, restore the matter to the next Friday list before the List Judge. The party in breach or a legal practitioner with knowledge of the reasons for the breach must serve an affidavit no later than 4:00pm on the preceding day (Thursday) which identifies the breach, explains the reasons for the breach and proposes directions to be made in consequence of the breach.

Variation of timetables

49. If proposed directions vary an existing timetable, they must include a direction to vacate any previous directions that can no longer be maintained, including for dates for directions hearings or the hearing of motions.

Liberty to restore

50. Parties have general liberty to restore to the Friday list on three working days' notice, or less if urgency requires it. A party seeking to do so is to make prior arrangement with, or give appropriate notice to, any other party, and send an eCourt communication or fax to the Registrar.

Adjournments

51. Proceedings will not be adjourned generally. They will only be adjourned to a specific date.

Applications to vacate hearings

52. Dates for trials or sentencing hearings will not be vacated merely because the parties consent. Applications to vacate hearing dates are to be by notice of



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motion with an affidavit in support explaining the circumstances of the application and the reasons the hearing date should be vacated.

Co-operation

53. The Court expects parties, legal practitioners and experts to work together to implement this practice note in a practical and sensible way which ensures that it achieves its intended purpose.

Compliance

54. Parties and legal practitioners should note s 247N of the Criminal Procedure Act which provides for procedural sanctions against parties for non-compliance with the requirements of Division 2A, Part 5, Chapter 4 of the Criminal Procedure Act.
55. Any failure by one party to comply with the Court's directions will not normally 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.

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

10 December 2020