NSW GOVERNMENT | Transport for NSW

31 May 2017

Ms Peta Dixon
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Our Ref: CSD17/06316

RE: Review of the Class 3 Compensation Claims Practice Note

Dear Ms Dixon,

Thank you for the opportunity to respond to the Court's questions in relation to the Class 3 Compensation Claims Practice Note.

This letter sets out a combined response covering all NSW Government agencies which undertake property acquisition activity including Transport for NSW and Roads and Maritime Services which are together responsible for approximately 90% of all property acquisitions by the Government of NSW.

The co-ordination of this submission has been undertaken by the Centre for Property Acquisition, which is a new entity created as part of the Government's response to the Russell and Pratt reviews. The Centre for Property Acquisition has a whole of government responsibility for ensuring operational compliance with prescribed standards and practices by acquiring agencies in relation to property acquisition under the Land Acquisition (Just Terms Compensation) Act 1991.

We respond to each question as follows:

1. We respectfully consider that the Court's existing practice of hearing the parties' submissions as to, and also itself evaluating, the likely complexity of matters, and the consequent time likely to be involved in their preparation for the section 34 conference and trial, at the first (and where warranted, a subsequent) directions hearing works well. As such, we does not perceive any especial need formally to create two streams of matters. However, if there were to be two streams, we respectfully consider that the prima facie criteria used to determine the less complex stream could be the number of expert disciplines required and the quantum by which the compensation claimed exceeds the statutory offer. Alternatively, a useful test for the less complex stream could be if the issues in

dispute are limited to valuation only and comparable sales are readily available.

We do suggest that there may be benefit in determining at the initial directions hearing for each matter whether case management is likely to be warranted. The criteria for such a determination, it is respectfully suggested, could include the amount by which the quantum claimed as compensation exceeds the statutory offer, the number of expert disciplines from which evidence is proposed to be adduced by the parties, and whether there are multiple interest holders in the same parcel of land, each claiming relief from the Court in proceedings that are either running together or joined.

2. If there were to be two streams, we respectfully agree that the appropriate stream should be reviewed or determined as appropriate by the LVC Judge at the first directions hearing.

3. We respectfully consider that the Court's existing practice in respect of the allocation of dates for early conciliation conferences in some matters is effective, and would welcome that practice continuing in respect of the less complex matter stream, should there be one. However, for the reasons further explained in response to questions 4, 5 and 6, we respectfully submit that a conciliation conference in less complex matters should not be scheduled before the date on which the Applicant has been directed to serve its disturbance evidence and established its preliminary valuation position.

4. If there were to be two streams, we agree that it would be sufficient to mandate the documentation for the conciliation conference be confined to position papers exchanged prior to the conference in less complex matters. It is respectfully suggested that exchange of position papers should be required two weeks prior to the conciliation conference with any position papers in response served three days prior.

5. We suggest that in all matters an appendix to the Practice Direction providing guidance as to the content of a position paper would be useful to aid identification of the Applicant's claim and issues in dispute. It has been our experience that the likelihood of settlement at a section 34 conference is significantly higher in circumstances where the parties have exchanged position papers which fully articulate their respective positions on the items claimed.

   In our respectful submission, an appendix would set benchmarks for an appropriate level of detail, will provide transparency and will help ensure that relevant supporting information is provided in respect of market value and disturbance claim, facilitating a more meaningful discussion of the issues for conciliation. In relation to the example provided, we consider that it may be useful to limit the parties' valuers to their five best comparable sales. If the parties perceive that additional detail is required, this could be included in a position paper provided by way of response.

6. If there were to be two streams, we suggest that:

   a. in relation to the more complex stream, the conciliation conference should

remain at the present point in the timetable (i.e. after points of claim and points of defence have been served). However, we respectfully suggest that the Usual Directions could contain an indicative range of periods following the first directions hearing within which the conciliation conference should be convened, to accommodate a range of matters running from those of "ordinary" complexity (as it were) to those of "extraordinary" complexity where, for example, the valuation evidence turns on one or more town planning propositions, the evidence for which in turn depends on other expert evidence such as in relation to contamination, flooding or some other aspect of the land in question, and more than one expert is required to give evidence in relation to disturbance compensation – in such matters it would be expected to take longer to prepare for a conciliation conference than usual, to the extent that the present 16 week time frame may not always accommodate the parties;

b. in relation to the less complex stream, we respectfully suggest that the Usual Direction could be amended to include only items 1, 2, 5 and 6 of the Usual Directions prior to a conciliation conference and if the conciliation conference is unsuccessful, the parties could then return for a second directions hearing to establish the timetable for all remaining steps prior to hearing.

Regarding the requirement to attend the first directions hearing ready to discuss with the LVC Judge the expected length of the hearing if the matter does not settle, we do not consider it beneficial for such a requirement to be imposed, especially for the more complex matters. This is because we are with a degree of regularity - together with applicants in the same proceedings, it should be said - not in a position to assist the Court in light of the "unknown quantities" regarding matters such as the amount of evidence likely to be actually adduced at the hearing, and of that evidence, how much could reasonably be expected to be common ground between the parties.

7. We agree that it would be appropriate for matters to return to the LVC List on the Friday following an unsuccessful s 34 conference. Even if unsuccessful in settling the entire matter, the s34 conference may have been successful in confining the issues in dispute or identifying issues which require additional expert evidence. As such, We consider that it makes sense to revisit any timetabling orders made before the s34 conference.

8. We suggest that it is appropriate for the preparation of an agreed bundle of documents to be required; it is further suggested that the requirement should fall on the parties to file the bundle with the Court (assuming this would meet with the Court's convenience), at some point shortly (for example, 3 - 7 days) before the pre-trial mention.

9. Our respectful observation in this regard is that applicants mostly struggle to comply with this requirement, irrespective of the nature of the claim. It is suggested that the timetable for the filing of this evidence be fixed by reference to the conciliation conference instead of the first directions hearing, since it would normally need to be finalised by that conference to aid in settlement negotiations.

Specifically, applicants could be required to file and serve lay evidence by the date, say, four weeks prior to the conciliation conference, and the respondents two weeks prior to the conference.

10. We consider that not only is there a role for the trial judge in a case management sense earlier than the presently scheduled pre-trial mention, such a role would ideally become the norm rather than the exception, as timetable slippages could be said to occur with regrettably relative frequency and not insignificant costs are incurred in the relisting of matters and the preparation of affidavits in connection with same – and such costs are often incurred by the party not responsible for the slippage (model litigant obligations influence this phenomenon). Also, the utility of leading certain expert evidence could be determined at an earlier stage to save the parties cost and the Court time where it is established at an early juncture that expert evidence from certain disciplines would not assist the Court in the disposition of the matter. We suggest that this additional role for the trial judge should be in addition to the pre-trial mention.

11. We consider that it would be helpful to retain the pre-trial mention.

12. We consider that the Points of Defence already performs this function and, respectfully, sees no significant utility in any further document along the lines conveyed in the question.

13. We consider that a mandated form for a joint table of s 59(1)(f) claims would indeed assist the Court, and the parties.

14. We consider that the necessity for and scope of a site and comparable sales inspection be identified after completion of the joint report of the parties' valuers.

15. We respectfully suggest that:

    a. paragraph 16(a) of the Practice Note be deleted on the basis that it arguably has not, in the final analysis, assisted the Court to a degree warranting its retention. That paragraph relates to the handing of a notice to the Court at the first directions hearing (a juncture at which each party's evidence tends to be inchoate) as to whether or not the respondent accepts the Valuer-General determination of compensation;

    b. consideration be given to amending clause 34 to require only written correspondence between the parties to be exchanged prior to the date of re-listing (as opposed to an affidavit duly sworn or affirmed), and appear before the List Judge ready to give a detailed oral explanation of the slippage, so as to save costs while retaining a strict obligation on the parties to address and rectify timetable slippages;

    c. if there were to be two streams, the standard directions from the more complex stream should include a requirement for points of claim and points of defence to be filed early in the proceedings. In making this suggestion, Transport for NSW notes that:

        i. because of the new requirement for a minimum of 6 months

negotiation prior to the issuance of any Proposed Acquisition Notice (which minimum period is often exceeded in an endeavour to reach a negotiated outcome), applicants usually will have had up to 12 – 18 months to consider and seek advice regarding their entitlements, sought expert advice and engaged legal counsel - all prior to commencing proceedings;

ii. an articulation of the applicant's claim (and the components of which that are uncontested) early in the proceedings could facilitate earlier settlement, reduce or avoid the need for expert evidence on certain aspects of the claim or identify aspects of the claim that would be appropriate for single expert evidence. This could reduce both the length and cost of the proceedings.

Thank you again for the opportunity to provide this submission which we hope will be of assistance. Our designated contact officer for queries arising from the above submission is George O'Keeffe within the Centre for Property Acquisition. He can be contacted on (02) 8202 3401 or via email at george.o'keeffe@transport.nsw.gov.au.

Yours sincerely

Tony Braxton-Smith
Deputy Secretary
Customer Services