THE LAW SOCIETY OF NEW SOUTH WALES
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# Submission on the Class 3 Compensation Claims Practice Note

## 22 May 2017

The Land and Environment Court of NSW

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# The NSW Young Lawyers Environment and Planning Law Committee makes the following submission in response to the Class 3 Compensation Claims Practice Note Review

## NSW Young Lawyers

NSW Young Lawyers is a division of the Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Environment and Planning Law Committee (**Committee**) is comprised of a group of approximately 640 members interested in our environment. The Committee focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

## Introduction

The Committee welcomes the opportunity to comment on review of the Class 3 Compensation Claims Practice Note.

In summary, the Committee is of the view that there is an opportunity to improve efficiency of class 3 compensation claims matters through refined case management procedures and the introduction of a two stream system. However, the Committee is also of the opinion that the scope and complexity of the issues cannot be determined by any quantitative or qualitative criteria and should be subject to agreement or direction by the List Judge.

Further, the Committee notes that Class 3 compensation claims relate to an area of law which contradicts the principle of indefeasibility of title. The appeal rights exist to ensure that a dispossessed owner has their land acquired on just terms. A mandatory fast stream would have the potential to limit the dispossessed owner's opportunity to be heard. A dispossessed owner should be given the opportunity to be heard as to the stream in which the case proceeds. A mandatory fast stream may be cheap and quick, but it would not necessarily be just.

The Committee's answers to the questions posed by the Court are as follows:

**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?**

The Committee is of the opinion that there is no qualitative or quantitative criteria which could be applied at the time of lodgement of the appeal to determine which stream a particular matter should be assigned. The appropriate stream should correspond to the number and complexity of issues in dispute, which is not necessarily known at the time of lodgement and does not necessarily correlate to the quantum of the compensation claim.

**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?**

The Committee agrees that the appropriate stream should be agreed before, or determined at, the first directions hearing. The parties should be given the opportunity to be heard as to the appropriate stream. The Court should be very cautious when allocating a matter to a stream despite a request to the contrary by a dispossessed owner.

**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?**

The Committee is of the opinion that four weeks is an appropriate timeframe for preparation for a conciliation conference in less complex matters.

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

The Committee agrees that it would be appropriate that only position papers need be exchanged prior to the conciliation conference for less complex matters.

**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)?**

The Committee is of the opinion that a guide for length and structure of position papers would be

helpful. However, there should be no restriction on content as this would restrict the scope for lateral thinking which can be particularly important in the conciliation process.

**6. If there were to be two streams, would the present standard directions table 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 the time, rather than waiting until the second directions hearing?**

The Committee is of the opinion that the time at which the conciliation/mediation conference occurs should be shortened, particularly for less complex matters.

The Committee does not believe parties will necessarily be in a position to inform the Court of the scope and complexity of the issues at the first directions hearing, and therefore it may not be possible to estimate the length of the hearing at that first directions hearing.

**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 Section 34 conference?**

The Committee is of the opinion that more time should be allowed for the settlement/conciliation process to progress as parties (particularly government authorities) often require time to obtain formal instructions to enter into an agreement. Adjournments of two to three weeks after a Section 34 conference are appropriate to finalise an agreement. The Practice Note could include a maximum period for adjournment, similar to the new Class 1 Practice Note.

**8. The current practice note does not specify that the parties should settle and file an agreed Bundle of Documents. It is appropriate to incorporate such a requirement in the timetable and, if so, at what point?**

The Committee is of the opinion that the Practice Note should incorporate a provision for parties to file an agreed Bundle of Documents. The provision should recommend that a direction be made at the second directions hearing for the agreed Bundle of Documents to be filed shortly before the pre-hearing mention.

**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 the respondent's lay evidence in reply to 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 alterations should be made to the timetable in Schedule A?**

The Committee is of the opinion that this direction is appropriate, unless an alternative direction is agreed between the parties which would still allow for a conciliation conference within the appropriate timeframes.

**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 schedule pre-trial mention? If so, should this be in lieu of, or in addition to, the pre-trial mention?**

The Committee agrees that there is scope for case management to occur after the filing of individual expert evidence but before the joint valuation report. This additional case management ought to be in addition to the pre-trial mention.

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

The Committee is of the opinion that the pre-trial mention would not be necessary for all matters, for example less complex matters, but that the pre-trial mention is a useful case management process for more complex matters.

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

The Committee is of the opinion that a short statement of matters which will be uncontested would assist in narrowing the issues, and that it should be filed at the pre-trial mention.

**13. Should there be a mandated form for a joint table of s59(1)(f) claims setting out the amounts claimed, the basis for each, if disputed, the reasons for rejecting the item?**

The Committee agrees that a mandated form for section 59(1)(f) claims would be appropriate.

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

The Committee is of the opinion that the necessity for an inspection should be identified at the second directions hearing.

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

The Committee is of the opinion that a savings provision should be incorporated in the new Practice Note, providing that it only applies to proceedings lodged after the commencement of the Practice Note. This allows practitioners to fully advise their clients as to current procedure prior to commencing proceedings.

The Committee is also of the opinion that provision could be made in the Practice Note for an online Court communication to be sent the day before the directions hearing to inform the Court if the directions sought are agreed. If they are agreed, the list could be coordinated so that those agreed matters are heard at the start of the list.

## Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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