

HOW CAN VALUERS PROVIDE REPORTS THAT MEET THE NEEDS OF THE COURT IN COMPULSORY ACQUISITION COMPENSATION CASES?

Justice Peter Biscoe*

1. How can valuers provide reports that meet the needs of the Land and Environment Court in compulsory acquisition compensation cases? In such cases expert valuation evidence is invariably given. The Land and Environment Court's usual procedure is to direct that, after all other evidence is complete, the parties are to serve individual valuation reports, the valuers are then to confer and produce a joint report that identifies the matters agreed and not agreed and the reasons for any disagreement, and they are to give concurrent evidence at the hearing.
2. An "expert's report" is defined in the Uniform Civil Procedure Rules 2005 (UCPR) as a written statement by an expert that sets out the expert's opinion and the facts, and assumptions of fact, on which the opinion is based.¹ An expert valuation report is of fundamental importance for at least three reasons. First, unless the Court otherwise orders, an expert witness's evidence in chief must be given by the tender of one or more expert's reports.² Secondly, a usual direction of the Land and Environment Court provided for in its Practice Note – Class 3 Compensation Claims (**Practice Note**) is that a party calling a witness may not, without leave of the Court, lead evidence from a witness the substance of which is not included in a document served in accordance with the Court's directions.³ Schedules A and B to the Practice Note contain the usual directions made at the first and second directions hearings. Thirdly, the Practice Note provides for a usual direction that the parties formally plead the amount of compensation for which they contend after the valuation evidence is

* A Judge of the Land and Environment Court of New South Wales. A paper presented at a seminar of the Australian Property Institute, New South Wales Division, in Sydney on 18 April 2013.

¹ UCPR, r 31.18.

² UCPR, r 31.21.

³ Practice Note Schedule A Direction 24.

complete,⁴ (the opposite of the practice in conventional civil proceedings where the pleadings come first).

3. A valuer's report must comply with Division 2 (entitled "Provisions applicable to Expert Evidence Generally") of Part 31 of the UCPR and the Practice Note. The main purposes of Part 31 Division 2 are "to ensure the Court has control over the giving of expert evidence" and "to restrict expert evidence in proceedings to that which is reasonably required to resolve the proceedings" having regard to the overriding purpose of facilitating the just, quick and cheap resolution of the proceedings.⁵ It is not sufficient that the expert evidence is admissible and relevant.⁶ Part 31 r 31.23(1) provides that an expert witness must comply with the Code of Conduct set out in Schedule 7 to the UCPR. UCPR r 31.23(3) is very important:

Unless the court otherwise orders, an expert's report may not be admitted in evidence unless the report contains an acknowledgment by the expert witness by whom it was prepared that he or she has read the code of conduct and agrees to be bound by it.

4. Thus, valuation witnesses should be familiar with the following, copies of which are annexed and marked as follows:

- A Division 2 Part 31 of the UCPR
- B The Code of Conduct
- C The Practice Note

Land and Environment Court's Compensation Jurisdiction

5. Compulsory acquisition compensation cases come before the Land and Environment Court in this way. Under the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW) (Just Terms Act)*, where an authority of the State compulsorily acquires someone's land, the authority must offer in

⁴ Practice Note [19], Schedule A Directions 10, 11.

⁵ UCPR, r 31.17(a) and (b); *Civil Procedure Act 2005*, s 56.

⁶ *Shellharbour City Council v Minister for Planning* [2011] NSWCA 195 at [35]; *Friends of King Edward Park Inc v Newcastle City Council* [2012] NSWLEC 113 at [71]; *Bright v Acrocort Pty Ltd* [2012] NSWLEC 173.

a "compensation notice" an amount of compensation determined by the Valuer-General in accordance with the *Just Terms Act*.⁷ The dispossessed owner may accept the offer. He is deemed to have accepted the offer if he does not, within 90 days of being given written notice of the offer, lodge with the Land and Environment Court an objection to the amount of compensation offered: s 44. If he lodges an objection, the Land and Environment Court then has exclusive jurisdiction to hear and dispose of the matter.⁸ In such proceedings, the parties are not bound by or constrained by the Valuer-General's statutory determination of the amount of compensation.

6. Proceedings for compensation by reason of acquisition of land are within Class 3 of the Court's jurisdiction.⁹ Section 38 of the *Land and Environment Court Act* 1979 prescribes relatively informal procedures for proceedings in Classes 1, 2 and 3 of its jurisdiction (i.e. the whole of its merit review jurisdiction):

38 Procedure

- (1) Proceedings in Class 1, 2 or 3 of the Court's jurisdiction shall be conducted 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 permit.
- (2) In proceedings in Class 1, 2 or 3 of the Court's jurisdiction, the Court is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits.
- (3) Subject to the rules, and without limiting the generality of subsection (2), the Court may, in relation to proceedings in Class 1, 2 or 3 of the Court's jurisdiction, obtain the assistance of any person having professional or other qualifications relevant to any issue arising for determination in the proceedings and may receive in evidence the certificate of any such person.

...

⁷ *Just Terms Act*, ss 41, 42, 47.

⁸ *Land Environment Court Act* 1979, ss 19(e), 24, 25.

⁹ *Land and Environment Court Act* 1979, s 19(e).

7. Although s 38(2) of the Land and Environment Court Act provides that the Court is not bound by the rules of evidence, in the case of expert reports the Court's practice is to adhere to fundamental rules of evidence, such as proof that the witness has relevant expertise, identification of the facts and assumptions upon which the expert evidence is based, and exposure of the expert's reasoning.¹⁰
8. Under s 38(3) of the Land and Environment Court Act, the Court could itself obtain assistance from an independent valuer not retained by either party, although I am not aware of it ever having done so. Were it ever to do so, presumably an order would have to be made for the parties to pay the independent valuer's fees.
9. The Court is a "judicial valuer".¹¹ The Court must engage with and evaluate competing valuation experts. Only then may it be open to the Court to adopt the general principle that in determining compensation doubts should be resolved in favour of a more liberal estimate.¹²

Summary of the Court's needs

10. The Court needs valuation reports that satisfy the following criteria:
 - (a) impartiality;
 - (b) contents that comply with the requirements of the UCPR and Practice Note;
 - (c) assessment of compensation having regard only to the compensation for which the *Just Terms Act* provides; and
 - (d) commonsense.

¹⁰ cf *Dasreef Pty Ltd v Hawchar* [2011] HCA 21, (2011) 243 CLR 588.

¹¹ *Sydney Water Corporation v Caruso* [2009] NSWCA 391, (2009) 170 LGERA 298 at [3], [35], [37], [146], [150]; *Yates Property Corporation Pty Ltd (in liq) v Darling Harbour Authority* (1991) 24 NSWLR 156 (CA) at 182G.

¹² *Sydney Water Corporation v Caruso* at [3] – [4] per Allsop P, Sackville AJA agreeing at [190].

Impartiality

11. In many cases, the dispossessed owner supported by its valuer contends for an amount that is much more than the Valuer-General's determination; and the resuming authority supported by its valuer contends for an amount that is much less than the Valuer-General's determination. This unfortunate scenario is sometimes due to different assumptions in the valuation evidence, such as the highest and best use of the land according to conflicting evidence of planning witnesses. Sometimes it may be due to different assessments of comparable sales. Sometimes it may be the consequence of an instructing lawyer limiting the material briefed to the valuer or the lawyer's involvement in settling the report.¹³ The role of a lawyer in settling an expert report should be limited to checking that it includes all prescribed matters, is on point and is clear. In the Land and Environment Court, lawyers normally have no role in settling joint reports because a standard direction of the Court is that 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.¹⁴
12. Sometimes, however, the different opinions of valuers may be due to bias. Bias may be categorised as selection bias (selecting a valuer whose known views suit a party's case), the valuer's unconscious partisanship or – the worst and rarest category – the valuer's deliberate partisanship.
13. The elimination of bias and assurance of impartiality in litigation are the primary aims of the Code of Conduct, which provides that an expert has an overriding duty to assist the court impartially, his paramount duty is to the court and not to his client, and he is not an advocate for a party. The expert witness has this in common with a lawyer: in both cases their paramount duty is to the court and not to their client.

¹³ Stowe H, 'Preparing expert witnesses: the search for ethical boundaries' (2007) 72 *Law Society Journal* 71.

¹⁴ Practice Note Schedule A Direction 23.

14. As soon as practicable after an expert is engaged, the party engaging the expert must provide the expert with a copy of the Code of Conduct.¹⁵
15. Where an expert commits a sufficiently grave breach of the Code, the Court may be justified in exercising its discretion to exclude the evidence.¹⁶
16. Unless the Court otherwise orders, a valuation report may not be admitted in evidence unless it contains an acknowledgment by the valuer that he or she has read the Code of Conduct and agrees to be bound by it.¹⁷ The intention is to keep out expert evidence unless it can be seen that the expert has conducted himself or herself in the way required by the Code of Conduct in relation to the preparation of the report and the formation of the opinion stated in it. The concern is a quality assurance concern. Nevertheless, a report is not necessarily inadmissible as a result of it not containing this acknowledgment. If a valuer has not read the Code of Conduct when his report was prepared, but reads it subsequently and swears that he did abide by it and agrees to be bound by it and affirms his report, the Court may “otherwise order” and admit it into evidence.¹⁸ If a report does not contain the acknowledgement but the expert later acknowledges that he was aware of it when preparing his report and agreed to be bound by it, the court may admit it.¹⁹ It may be that an expert statement of opinion prepared in non-litigious circumstances may be admitted even where the Code of Conduct has not been considered since a motive to be partial may be absent.²⁰ However, each case should be treated on its merits in order to determine whether the objectives sought to

¹⁵ UCPR, r 31.23(2).

¹⁶ *Wood v R* [2012] NSWCCA 21 at [729].

¹⁷ UCPR, r 31.23.

¹⁸ *Hodder Rook & Associates Pty Ltd v Gemworth Financial Mortgage Insurance Pty Ltd* [2011] NSWCA 279 at [61] – [65].

¹⁹ *Barak Pty Ltd v WTH Pty Ltd* [2002] NSWSC 649 at [5].

²⁰ The Hon Justice Richard White, ‘Overview of the Evidence Act’ (2010) 34 *Australian Bar Review* 71, 100. In *NM Rural Enterprises Pty Ltd v Rimanui Farms Ltd* [2010] NSWSC 945, the tendered report was effectively cut and pasted from a report produced some five years earlier. Although the tendered report referred to the Code, the earlier report had been prepared for the client and not the court prior to the case commencing, and contained no acknowledgment of, and presumably had no regard to, the Code. No objection was made to the report until after the expert had given oral evidence. The report was considered to be useful and reliable, and was admitted into evidence.

be secured by UCPR r 31.23 have been affected by the non-compliance. Those circumstances may include the nature of the instructions given to the expert, the extent to which the report on its face appears to comply with the Code, and the evidence subsequently given by the expert concerning whether the expert complied with the Code at the time and whether the expert's opinions have been affected by not adverting to the Code.²¹

17. The Code of Conduct also aims to promote the just, quick and (relatively) cheap conduct of proceedings. Thus, it requires an expert to comply with and abide by any direction of the Court, for example, as to the time when a valuation report is to be served.²²
18. This modern regime has radically altered the legal landscape. Previously, expert witnesses were quite often criticised for being deliberately biased and mere advocates for their clients.²³ Today, this blight has been largely eradicated. A valuation expert who breaches the Code of Conduct, by which he or she is bound, will quickly lose the trust and confidence of the Court.
19. This does not mean that a valuer cannot firmly advance or defend opinions that he holds. It does mean that he cannot advance or defend opinions that he does not hold, even if the opinions assist his client.
20. Where a valuation expert has given a commitment that he will be available to attend a hearing in respect of a report, failure to honour the commitment may be regarded as a breach of the expert's duty to the Court unless the circumstances are exceptional (usually, beyond the expert's control).²⁴

Contents of a Report

21. The Court needs to readily understand a valuation report. The report should be clear, logical, succinct and avoid repetition. A valuation report

²¹ *Welker v Rinehart (No 6)* [2012] NSWSC 160 at [34] – [36] (Ball J).

²² Code of Conduct at [3].

²³ *Dasreef Pty Ltd v Hawchar* [2011] HCA 21, (2011) 243 CLR 588 at [56].

²⁴ *Vilro Pty Ltd v Roads and Traffic Authority of NSW* [2010] NSWLEC 141 at [37].

should not fail to consider material facts that could detract from its concluded opinion.

22. The cover page should state the name and court number of the proceedings, the name of the valuer, the date of the report and the party for whom the report has been prepared.
23. Next, as mentioned above at [3], the report should contain an acknowledgement by the valuer that he or she has read the Code of Conduct and agrees to be bound by it. This is because unless the court otherwise orders, an expert's report may not be admitted in evidence unless the report contains an acknowledgement by the expert witness by whom it was prepared that he or she has read the Code of Conduct and agrees to be bound by it.²⁵
24. The Code of Conduct requires an expert report to include the following (in the body of the report or in an annexure to it):²⁶
 - (a) in the case of a report that is lengthy or complex, a brief summary of the report, to be located at the beginning of the report;
 - (b) the expert's qualifications as an expert on the issue the subject of the report. It is necessary to demonstrate that the person has specialised knowledge based on the person's training, study or experience and that the opinions expressed in the report are wholly or substantially based on that knowledge;²⁷
 - (c) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed). This is important because differing opinions of valuation experts are quite often explained by the different facts or assumptions on which they

²⁵ UCPR r 31.23.

²⁶ Code of Conduct at [5].

²⁷ Evidence Act 1995, s 79.

have proceeded; for example, as to the land's development potential;

- (d) the expert's reasons for each opinion expressed;
- (e) if applicable, that a particular issue falls outside the expert's field of expertise;
- (f) any literature or other materials utilised in support of the opinions;
and
- (g) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out

25. In addition, paragraph 5 of the Code of Conduct requires that:

- (a) If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report.
- (b) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
- (c) If an expert witness changes his or her opinion on a material matter after providing an expert's report to the party engaging him or her (or that party's legal representative), the expert witness must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in subclause (1) as is appropriate.

26. In *INL Group Ltd v Director-General, New South Wales Department of Planning*,²⁸ the Court rejected a town planner's report because it transgressed the Code of Conduct in several respects: it did not state the facts and assumptions upon which it was based; it did not state the reasons for the opinions expressed in it; it contained legal opinions; and, being lengthy, it did not contain a summary. It also was rejected because it contained intemperate and inflammatory language, was apt to mislead on critical issues, often referred to irrelevant material and overall could be characterised as amounting to a submission on behalf of the party calling the witness.
27. The contents of a valuation report must also comply with the Practice Note. One of the Court's usual directions is that in preparing a joint report, expert valuers should consider the matters listed in annexure 2 to the Practice Note insofar as they are relevant to matters agreed or not agreed: Practice Note schedule A direction 18. The matters listed in annexure 2 cover identification of the method of valuation; disclosure of full workings and calculations; identification of comparable sales including a range of specified matters; matters agreed and not agreed and reasons; and consideration of highest and best use, alternative facts and assumptions the Court may accept, factors to be taken into consideration in applying a comparable sale, and comparable sales that should be inspected by the Court.
28. For ease of reference at the hearing, it is helpful if copies of documents briefed to the valuer and to which the valuer has had regard in preparing his report are annexed to the report in a paginated bundle with a table of contents. Each comparable sale relied on should be described and accompanied by a photograph and plan. The valuer should endeavour to be selective in the number of comparable sales.
29. The Code of Conduct provides that if directed to confer with another expert or prepare a joint expert report, the valuer must exercise independent and

²⁸ [2011] NSWLEC 256.

professional judgment, endeavour to reach agreement with the other expert and not act on any instruction or request to withhold or avoid such agreement. This is supplemented by the following standard direction:

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.²⁹

30. The Practice Note provides for a usual direction that 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”.³⁰
31. When preparing a joint report, both valuers should have access to the same material and each should state whether, if he accepted the other valuer’s different facts or assumptions of fact, his valuation would be the same as the other valuer or different and the reasons for any difference. For example, if valuer A’s opinion of market value is \$5 million based on a highest and best residential use, and valuer B’s opinion is \$10 million based on a highest and best industrial use, then each should state, when considering the other’s report, whether or not he would agree with the other’s opinion if he adopted the other’s highest and best use assumption. If not, he should explain why he disagrees and what his opinion would be based on the other’s assumption.
32. The contents of discussions between the experts cannot be disclosed at the hearing unless the parties agree or bad faith is alleged: r 31.24(6) UCPR.

²⁹ Practice Note Schedule A Direction 21.

³⁰ Practice Note Schedule A Direction 22.

The Amount of Compensation

33. In expressing an opinion in the valuation report as to the amount of compensation, the valuer must have regard only to the matters listed in s 55 of the *Just Terms Act*, which provides:

55 Relevant matters to be considered in determining amount of compensation

In determining the amount of compensation to which a person is entitled, regard must be had to the following matters only (as assessed in accordance with this Division):

- (a) the market value of the land on the date of its acquisition,
- (b) any special value of the land to the person on the date of its acquisition,
- (c) any loss attributable to severance,
- (d) any loss attributable to disturbance,
- (e) solatium,
- (f) any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.

34. In having regard to the s 55 matters, the valuation report must be true to the definitions in ss 56 to 59 of the s 55 terms “market value”, “special value”, “loss attributable to severance” and “loss attributable to disturbance”:

56 Market value

- (1) In this Act:

market value of land at any time means the amount that would have been paid for the land if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer, disregarding (for the purpose of determining the amount that would have been paid):

- (a) any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired, and
- (b) any increase in the value of the land caused by the carrying out by the authority of the State, before the land is acquired, of improvements for the public purpose for which the land is to be acquired, and
- (c) any increase in the value of the land caused by its use in a manner or for a purpose contrary to law.

- (2) When assessing the market value of land for the purpose of paying compensation to a number of former owners of the land, the sum of the market values of each interest in the land must not (except with the approval of the Minister responsible for the authority of the State) exceed the market value of the land at the date of acquisition.

57 Special value

In this Act:

special value of land means the financial value of any advantage, in addition to market value, to the person entitled to compensation which is incidental to the person's use of the land.

58 Loss attributable to severance

In this Act:

loss attributable to severance of land means the amount of any reduction in the market value of any other land of the person entitled to compensation which is caused by that other land being severed from other land of that person.

59 Loss attributable to disturbance

In this Act:

loss attributable to disturbance of land means any of the following:

- (a) legal costs reasonably incurred by the persons entitled to compensation in connection with the compulsory acquisition of the land,
- (b) valuation fees reasonably incurred by those persons in connection with the compulsory acquisition of the land,
- (c) financial costs reasonably incurred in connection with the relocation of those persons (including legal costs but not including stamp duty or mortgage costs),
- (d) stamp duty costs reasonably incurred (or that might reasonably be incurred) by those persons in connection with the purchase of land for relocation (but not exceeding the amount that would be incurred for the purchase of land of equivalent value to the land compulsorily acquired),
- (e) financial costs reasonably incurred (or that might reasonably be incurred) by those persons in connection with the discharge of a mortgage and the execution of a new mortgage resulting from the relocation (but not exceeding the amount that would be incurred if the new mortgage secured the repayment of the balance owing in respect of the discharged mortgage),
- (f) any other financial costs reasonably incurred (or that might reasonably be incurred), relating to the actual use of the land, as a direct and natural consequence of the acquisition.

35. The application of the s 56(1)(a) market value disregard is sometimes controversial. It requires disregard of any increase or decrease in the value of land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired. Such proposal must be that of the resuming authority; anterior discussions or agitations by others must therefore be put aside; and in this way there is effected in s 56(1) a policy to require a disregard only of that increase or decrease in value for which the resuming authority is responsible.³¹ If market value is assessed on the basis that the land has potential to be used for a purpose other than that for which it is currently used, the valuation report must take into account that compensation is not payable in respect of the matters referred to in s 61, which provides:

61 Special provision relating to market value assessed on potential of land

If the market value of land is assessed on the basis that the land had potential to be used for a purpose other than that for which it is currently used, compensation is not payable in respect of:

- (a) any financial advantage that would necessarily have been forgone in realising that potential, and
 - (b) any financial loss that would necessarily have been incurred in realising that potential.
36. The relationship between ss 59 and 61 was analysed in *McDonald v Roads and Traffic Authority (NSW)*³² in the following terms (which were approved by the Court of Appeal in *Sydney Water Corporation v Caruso*³³):
94. The market value of land in s 55(a) and any loss attributable to disturbance in s 55(d) are separate components of compensation. The former is assessed in accordance with the hypothetical exercise required by the definition of market value in s 56(1)(a). The latter is assessed by reference to the actual costs and fees specified in s 59, which are qualified by a

³¹ *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2008] HCA 5, (2008) 233 CLR 259 at [53] – [55]. This case concerned the saga over the compensation for compulsory acquisition of the Caltex oil refinery at Ballast Point, Balmain. The proceedings travelled several times from the Land and Environment Court to the Court of Appeal and once to the High Court. The case was heard in the Land and Environment Court three times before the amount of compensation was finalised: *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2009] NSWLEC 219, (2009) 173 LGERA 155.

³² [2009] NSWLEC 105, (2009) 169 LGERA 352 at [94], [123], [124], [126] (Biscoe J).

³³ [2009] NSWCA 391, (2009) 170 LGERA 296 at [180].

reasonableness requirement and subject to the limitations on the recovery of loss in s 61...

...

123. Section 61(b) precludes a claim for disturbance costs to the extent that it is inconsistent with a claim for market value based on the potential use of the land. Otherwise the applicant would be unjustly compensated. Thus, s 61(b) precludes compensation for financial loss based on the existing use if that use would necessarily be terminated in realising that potential...
124. This principle of excluding inconsistent claims is a longstanding one in resumption legislation. The decision of a majority of the English Court of Appeal in *Horn v Sunderland Corporation* [1941] 2 KB 26 has been influential. In that case a resumed farm was worth \$X as building land but much less as agricultural land. The Court of Appeal held, by a majority, that the dispossessed owner farmer was entitled to no more than \$X unless the value of the land as agricultural land together with the amount of the disturbance costs exceeded \$X, in which case he was entitled to \$X and the amount of the excess. The decision was based on the view that in order to realise the value of \$X, it would have been necessary for the farmer to sell the farm and go out of possession...

...

126. Some examples (adapted from examples given in *Horn* at 36) illustrate the meaning of "financial loss" in s 61(b). Assume that the applicant is voluntarily selling her land for its existing rural use for \$500,000, that it will cost her \$100,000 to move to replacement property, and that the replacement property costs \$500,000. She will have suffered a financial loss of \$100,000. If the case were one of compulsory purchase, it would be obvious that unless she receives \$100,000 for disturbance, she would, to that extent, have suffered financial loss. To take an example within s 61(b), now assume that she sells the land for its potential as residential subdivision land for \$900,000, that it will cost her \$100,000 to move, and that she purchases the replacement property for \$500,000. She is \$300,000 better off than she would have been if she had continued to farm on the land. She has suffered no financial loss. If the purchase were a compulsory one, and she was awarded \$100,000 for disturbance in addition to the \$900,000, she would be \$400,000 better off. In such a case, the \$100,000 is not an element of financial "loss" within s 61(b), but merely a diminution of the profit which she obtains by giving up an inferior economic use of the land and realising its higher economic value. The extra value which she could realise could only be realised by ceasing the existing rural use and would more than compensate her for the cost of relocating to another property.

37. The determination of compensation is subject to a just compensation override, which is referred to as an object of the *Just Terms Act* in s 3(1)(b) and as an entitlement in s 54(1). They provide:

3 Objects of Act

- (1) The objects of this Act are:
- ...
- (b) to ensure compensation on just terms for the owners of land that is acquired by an authority of the State when the land is not available for public sale, and

54 Entitlement to just compensation

- (1) The amount of compensation to which a person is entitled under this Part is such amount as, having regard to all relevant matters under this Part, will justly compensate the person for the acquisition of the land.

38. Thus, although the s 55 matters are the only matters to which regard can be had when determining the amount of compensation, they do not constitute a mathematical formula because the dominant test is that contained in s 54; that is, to determine the amount that will justly compensate the person for acquisition of the land.³⁴

39. There is an important guarantee in s 3(1)(a), reiterated in s 10(1)(a), that the minimum amount of compensation will be not less than the market value of the land (unaffected by the proposal) at the date of acquisition:

3 Objects of Act

- (1) The objects of this Act are:
- (a) to guarantee that, when land affected by a proposal for acquisition by an authority of the State is eventually acquired, the amount of compensation will be not less than the market value of the land (unaffected by the proposal) at the date of acquisition

10 Statement of guaranteed acquisition at market value

- (1) When, on request by or on behalf of an owner or prospective purchaser of land, an authority of the State gives a person written notice to the effect that the land is affected by a proposal for acquisition by the authority, the notice must contain the following:

³⁴ *Leichhardt Council v Roads & Traffic Authority* (NSW) [2006] NSWCA 353, (2006) 149 LGERA 439 at [37].

- (a) a statement that the Land Acquisition (Just Terms Compensation) Act 1991 guarantees that, if and when the land is acquired by (insert name of authority) under that Act, the amount of compensation will not be less than market value (assessed under that Act) unaffected by the proposal,

Commonsense

40. A valuation opinion will not be helpful to the Court if it clearly conflicts with commonsense. This was emphasised in the judgment of Hodgson JA in *Roads and Traffic Authority (NSW) v Collex Pty Ltd.*³⁵ His Honour considered that the compensation awarded under the *Just Terms Act* was “utterly contrary to commonsense”.³⁶ He explained why he came to this view as follows:

Collex was awarded about \$7 million as compensation for the acquisition of about 13 per cent of land which it had purchased about two years earlier for \$7.2 million. A simply extrapolation of the rate at which Collex was compensated would give a value for the whole of Lot 1, as at the date of the compulsory acquisition, of about \$55.4 million; that is, nearly eight times what Collex had paid for it only two years earlier.

This was the simplistic calculation that originally led me to think the result grossly conflicted with commonsense. A closer examination of the problem suggests only a very slight amelioration of this incongruity.³⁷

41. His Honour thought that a gross error had occurred but that it was not possible to say whether it was due to a mistake of the valuers, a mistake of the lawyers, misunderstandings in communication between them, or misunderstandings as to the effect of a deed and a contract.³⁸ His Honour concluded:

I would comment finally that this case shows that it is sometimes wrong for lawyers and the court to defer uncritically to the opinions of experts, particularly where those opinions are about matters affected by somewhat complex factual and legal issues. It is generally desirable, where possible, to engage in commonsense reality checks on what the experts are saying, if only to ensure that their views are

³⁵ [2009] NSWCA 101, (2009) 165 LGERA 419.

³⁶ at [156].

³⁷ at [175] – [176].

³⁸ at [193].

not distorted by mutual misunderstandings in a complex legal and factual situation.³⁹

Concurrent Evidence

42. The Land and Environment Court's routine practice has been to direct that that at the hearing experts in the same discipline give evidence concurrently (sometimes colloquially called the "hot tub"). This process tests the evidence in the experts' reports. In years gone by, this was done by conventional cross-examination of the applicant's valuer and later, after the applicant's case was closed, by conventional cross-examination of the respondent's valuer.
43. The usual procedure in the Land and Environment Court for concurrent evidence by experts is similar to that of the Federal Court and is along the following lines:⁴⁰
- (a) having each been sworn, the experts are seated together in the witness box, or at a table in the Court if the witness box is not sufficiently large to accommodate them.
 - (b) each witness is invited to briefly summarise the principal issues between the experts. They may comment on each other's summary;
 - (c) counsel are then required to provide the Court and the experts with a list of topics upon which they propose to question the experts;

³⁹ at [231].

⁴⁰ The Hon Justice Rares, 'Using the 'hot tub': how concurrent evidence aids understanding issues' (Summer 2010-2011) *Bar News* 64; the Hon Justice Craig, 'Expert Evidence in the Land and Environment Court of NSW: a Synopsis' (2012) 27 *Australian Environment Review* 269. See also Justice Peter Garling 'Concurrent Expert Evidence: Reflections and Development' (2011) 49 (10) *Law Society Journal* 59, 60; The Hon Justice Rachel Pepper, 'Expert Evidence in the Land and Environment Court', a paper presented to a seminar of the Australian Property Institute, Sydney, 21 March 2012, at [67]; The Hon Judge M E Rackemann, 'The Management of Experts' (2012) 21 *Journal of Judicial Administration* 168, 176.

- (d) the experts are questioned on each of those topics in turn, with all questions related to a particular topic being exhausted before questions commence on the next topic. In the course of this process, each expert can be asked to comment upon the response of the other expert to questions asked, and the experts may ask questions of each other.
44. The procedure is flexible enough to allow, in an appropriate case, the traditional method of cross-examining a witness.
45. The advantages generally perceived from the giving of evidence concurrently compared with the traditional adversarial process include:
- (a) It assists the experts, through intellectual interaction with each other, to explain and defend their views without the rigidity of the traditional adversarial process.
 - (b) Because each expert knows that the other expert can immediately expose an inappropriate answer or reinforce an appropriate answer, their answers tend to be precise, accurate and focussed helpfully on the real points of difference between the experts. This also tends to minimise argumentativeness and subconscious bias.
 - (c) It generally results in a substantial saving of Court time and costs.
 - (d) It provides a convenient transcript for the parties' closing submissions and judgment writing in that all of the evidence directed to the expert issue is contained within the one passage of evidence.

Conclusion

46. This paper has summarised the Court's needs in respect of valuation reports according to four criteria: (a) impartiality; (b) content that complies with the UCPR and Practice Note; (c) assessment of compensation having regard only to the compensation for which the Just Terms Act provides;

and (d) commonsense. It has outlined the reasons for these needs and the ways in which the Court attempts to ensure that they are met. The process of concurrent evidence at the hearing has also been analysed. By addressing whether the needs of the Court in relation to valuation reports have been adequately addressed, valuers will assist the Court to deal with compulsory acquisition compensation cases justly and in a timely and efficient manner.

ANNEXURE A

DIVISION 2 PART 31

UNIFORM CIVIL PROCEDURE RULES 2005

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Division 2 Provisions applicable to expert evidence generally

Note. The provisions of this Division replace those of former Divisions 2 and 3, as in force immediately before 8 December 2006. The numbering of the individual provisions of this Division varies considerably from that of the provisions of the former Divisions. The following Table identifies the new rules corresponding to former rules 31.17–31.35.

Table

Former rule	New rule
Rule 31.17	Rule 31.18
Rule 31.18	Rule 31.28
Rule 31.18A	Rule 31.29
Rule 31.19	Rule 31.30
Rule 31.20	Rule 31.31
Rule 31.21	Rule 31.32
Rule 31.22	Rule 31.33
Rule 31.23	Rule 31.27
Rule 31.24	Rule 31.34
Rule 31.25	Rules 31.24 and 31.26
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Rule 31.27	Rule 31.36
Rule 31.28	Rule 31.18
Rule 31.29	Rule 31.46
Rule 31.30	Rule 31.23
Rule 31.31	Rule 31.49
Rule 31.32	Rule 31.51
Rule 31.33	Rule 31.52
Rule 31.34	Rule 31.53
Rule 31.35	Rule 31.54

Subdivision 1 Preliminary

31.17 Main purposes of Division

(cf Queensland *Uniform Civil Procedure Rules 1999*, rule 423; United Kingdom *Civil Procedure Rules 1998*, rule 35.1)

The main purposes of this Division are as follows:

- (a) to ensure that the court has control over the giving of expert evidence,
- (b) to restrict expert evidence in proceedings to that which is reasonably required to resolve the proceedings,
- (c) to avoid unnecessary costs associated with parties to proceedings retaining different experts,
- (d) if it is practicable to do so without compromising the interests of justice, to enable expert evidence to be given on an issue in proceedings by a single

expert engaged by the parties or appointed by the court,

- (e) if it is necessary to do so to ensure a fair trial of proceedings, to allow for more than one expert (but no more than are necessary) to give evidence on an issue in the proceedings,
- (f) to declare the duty of an expert witness in relation to the court and the parties to proceedings.

31.18 Definitions

(cf SCR Part 36, rules 13A and 13C; DCR Part 28, rule 8; LCR Part 23, rule 1D)

In this Division:

court-appointed expert means an expert appointed pursuant to rule 31.46.

expert, in relation to any issue, means a person who has such knowledge or experience of, or in connection with, that issue, or issues of the character of that issue, that his or her opinion on that issue would be admissible in evidence.

expert witness means an expert engaged or appointed for the purpose of:

- (a) providing an expert's report for use as evidence in proceedings or proposed proceedings, or
- (b) giving opinion evidence in proceedings or proposed proceedings.

expert's report means a written statement by an expert (whether or not an expert witness in the proceedings concerned) that sets out the expert's opinion and the facts, and assumptions of fact, on which the opinion is based.

hospital report means a written statement concerning a patient, made by or on behalf of a hospital, that the party serving the statement intends to adduce in evidence in chief at the trial.

parties' single expert means an expert engaged pursuant to rule 31.37.

Subdivision 2 Expert witnesses generally

31.19 Parties to seek directions before calling expert witnesses

(1) Any party:

- (a) intending to adduce expert evidence at trial, or
- (b) to whom it becomes apparent that he or she, or any other party, may adduce expert evidence at trial,

must promptly seek directions from the court in that regard.

(2) Directions under this rule may be sought at any directions hearing or case management conference or, if no such hearing or conference has been fixed or is imminent, by notice of motion or pursuant to liberty to restore.

(3) Unless the court otherwise orders, expert evidence may not be adduced at trial:

- (a) unless directions have been sought in accordance with this rule,

and

- (b) if any such directions have been given by the court, otherwise than in accordance with those directions.
- (4) This rule does not apply to proceedings with respect to a professional negligence claim.

31.20 Court may give directions regarding expert witnesses

- (1) Without limiting its other powers to give directions, the court may at any time give such directions as it considers appropriate in relation to the use of expert evidence in proceedings.
- (2) Directions under this rule may include any of the following:
 - (a) a direction as to the time for service of experts' reports,
 - (b) a direction that expert evidence may not be adduced on a specified issue,
 - (c) a direction that expert evidence may not be adduced on a specified issue except by leave of the court,
 - (d) a direction that expert evidence may be adduced on specified issues only,
 - (e) a direction limiting the number of expert witnesses who may be called to give evidence on a specified issue,
 - (f) a direction providing for the engagement and instruction of a parties' single expert in relation to a specified issue,
 - (g) a direction providing for the appointment and instruction of a court-appointed expert in relation to a specified issue,
 - (h) a direction requiring experts in relation to the same issue to confer, either before or after preparing experts' reports in relation to a specified issue,
 - (i) any other direction that may assist an expert in the exercise of the expert's functions,
 - (j) a direction that an expert who has prepared more than one expert's report in relation to any proceedings is to prepare a single report that reflects his or her evidence in chief.

31.21 Expert evidence in chief to be given by way of experts' reports

Unless the court otherwise orders, an expert witness's evidence in chief must be given by the tender of one or more expert's reports.

31.22 Expert witness to provide details of contingency fees or deferred payment schemes

- (1) A person who is engaged as an expert witness in relation to any proceedings must include information as to any arrangements under which:
 - (a) the charging of fees or costs by the expert witness is contingent on the outcome of the proceedings, or

(b) the payment of any fees or costs to the expert witness is to be deferred,

in, or in an annexure to, any report that he or she prepares for the purposes of the proceedings.

(2) If a report referred to in subrule (1) indicates the existence of any such arrangements, the court may direct disclosure of the terms of the engagement (including as to fees and costs).

31.23 Code of conduct

(cf SCR Part 39, rule 2; DCR Part 28A, rule 2; LCR Part 38B, rule 2)

(1) An expert witness must comply with the code of conduct set out in Schedule 7.

(2) As soon as practicable after an expert witness is engaged or appointed:

(a) in the case of an expert witness engaged by one or more parties, the engaging parties, or one of them as they may agree, or

(b) in the case of an expert witness appointed by the court, such of the affected parties as the court may direct,

must provide the expert witness with a copy of the code of conduct.

(3) Unless the court otherwise orders, an expert's report may not be admitted in evidence unless the report contains an acknowledgment by the expert witness by whom it was prepared that he or she has read the code of conduct and agrees to be bound by it.

(4) Unless the court otherwise orders, oral evidence may not be received from an expert witness unless the court is satisfied that the expert witness has acknowledged, whether in an expert's report prepared in relation to the proceedings or otherwise in relation to the proceedings, that he or she has read the code of conduct and agrees to be bound by it.

31.24 Conference between expert witnesses

(cf SCR Part 36, rule 13CA; DCR Part 28, rule 9D; LCR Part 23, rule 1E)

(1) The court may direct expert witnesses:

(a) to confer, either generally or in relation to specified matters, and

(b) to endeavour to reach agreement on any matters in issue, and

(c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, and

(d) to base any joint report on specified facts or assumptions of fact,

and may do so at any time, whether before or after the expert witnesses have furnished their experts' reports.

(2) The court may direct that a conference be held:

(a) with or without the attendance of the parties affected or their legal representatives, or

- (b) with or without the attendance of the parties affected or their legal representatives, at the option of the parties, or
 - (c) with or without the attendance of a facilitator (that is, a person who is independent of the parties and who may or may not be an expert in relation to the matters in issue).
- (3) An expert witness so directed may apply to the court for further directions to assist the expert witness in the performance of his or her functions in any respect.
 - (4) Any such application must be made by sending a written request for directions to the court, specifying the matter in relation to which directions are sought.
 - (5) An expert witness who makes such an application must send a copy of the request to the other expert witnesses and to the parties affected.
 - (6) Unless the parties affected agree, the content of the conference between the expert witnesses must not be referred to at any hearing.

31.25 Instructions to expert witnesses where conference ordered before report furnished

If a direction to confer is given under rule 31.24 (1) (a) before the expert witnesses have furnished their reports, the court may give directions as to:

- (a) the issues to be dealt with in a joint report by the expert witnesses, and
 - (b) the facts, and assumptions of fact, on which the report is to be based,
- including a direction that the parties affected must endeavour to agree on the instructions to be provided to the expert witnesses.

31.26 Joint report arising from conference between expert witnesses

(cf SCR Part 36, rule 13CA; DCR Part 28, rule 9D; LCR Part 23, rule 1E)

- (1) This rule applies if expert witnesses prepare a joint report as referred to in rule 31.24 (1) (c).
- (2) The joint report must specify matters agreed and matters not agreed and the reasons for any disagreement.
- (3) The joint report may be tendered at the trial as evidence of any matters agreed.
- (4) In relation to any matters not agreed, the joint report may be used or tendered at the trial only in accordance with the rules of evidence and the practices of the court.
- (5) Except by leave of the court, a party affected may not adduce evidence from any other expert witness on the issues dealt with in the joint report.

Subdivision 3 Experts' reports and expert evidence

31.27 Experts' reports

(cf SCR Part 36, rule 13C; DCR Part 28, rule 9C; LCR Part 23, rule 1D)

- (1) An expert's report must (in the body of the report or in an annexure to it) include the following:
 - (a) the expert's qualifications as an expert on the issue the subject of the report,
 - (b) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed),
 - (c) the expert's reasons for each opinion expressed,
 - (d) if applicable, that a particular issue falls outside the expert's field of expertise,
 - (e) any literature or other materials utilised in support of the opinions,
 - (f) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out,
 - (g) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).
- (2) If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report.
- (3) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
- (4) If an expert witness changes his or her opinion on a material matter after providing an expert's report to the party engaging him or her (or that party's legal representative), the expert witness must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in subrule (1) as is appropriate.

31.28 Disclosure of experts' reports and hospital reports

(cf SCR Part 36, rule 13A; DCR Part 28, rule 8; LCR Part 23, rule 3)

- (1) Each party must serve experts' reports and hospital reports on each other active party:
 - (a) in accordance with any order of the court, or
 - (b) if no such order is in force, in accordance with any relevant practice note, or
 - (c) if no such order or practice note is in force, not later than 28 days before the date of the hearing at which the report is to be used.
- (2) An application to the court for an order under subrule (1) (other than an order solely for abridgment or extension of time) may be made without serving notice of motion.

- (3) Except by leave of the court, or by consent of the parties:
- (a) an expert's report or hospital report is not admissible unless it has been served in accordance with this rule, and
 - (b) without limiting paragraph (a), an expert's report or hospital report, when tendered under section 63, 64 or 69 of the *Evidence Act 1995*, is not admissible unless it has been served in accordance with this rule, and
 - (c) the oral expert evidence in chief of any expert is not admissible unless an expert's report or hospital report served in accordance with this rule contains the substance of the matters sought to be adduced in evidence.
- (4) Leave is not to be given as referred to in subrule (3) unless the court is satisfied:
- (a) that there are exceptional circumstances that warrant the granting of leave, or
 - (b) that the report concerned merely updates an earlier version of a report that has been served in accordance with subrule (1).

31.29 Admissibility of expert's report

(cf SCR Part 36, rule 13B)

- (1) If an expert's report is served in accordance with rule 31.28 or in accordance with an order of the court, the report is admissible:
 - (a) as evidence of the expert's opinion, and
 - (b) if the expert's direct oral evidence of a fact on which the opinion was based would be admissible, as evidence of that fact, without further evidence, oral or otherwise.
- (2) Unless the court otherwise orders, a party may require the attendance for cross-examination of the expert by whom the report was prepared by notice served on the party by whom the report was served.
- (3) Unless the court otherwise orders, such a requirement may not be made later than:
 - (a) in the case of proceedings for which the court has fixed a date for trial, 35 days before the date so fixed, or
 - (b) in any other case, 7 days before the date on which the court fixes a date for trial.
- (4) The parties may not by consent abridge the time fixed by or under subrule (3).
- (5) If the expert's attendance for cross-examination is required under subrule (2), the report may not be tendered under section 63, 64 or 69 of the *Evidence Act 1995* or otherwise used unless the expert attends or is dead or the court grants leave to use it.
- (6) The party using the report may re-examine the expert if the expert attends for cross-examination pursuant to a requirement under subrule (2).

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- (7) This rule does not apply to proceedings in the District Court or the Local Court or to proceedings on a trial with a jury.

31.30 Admissibility of expert's report in District Court and Local Court

(cf DCR Part 28, rule 9; LCR Part 23, rule 2)

- (1) This rule applies to proceedings in the District Court or the Local Court.
- (2) If an expert's report is served in accordance with rule 31.28 or in accordance with an order of the court, the report is admissible:
 - (a) as evidence of the expert's opinion, and
 - (b) if the expert's direct oral evidence of a fact on which the opinion was based would be admissible, as evidence of that fact, without further evidence, oral or otherwise.
- (3) Unless the court orders otherwise:
 - (a) it is the responsibility of the party requiring the attendance for cross-examination of the expert by whom an expert's report has been prepared to procure that attendance, and
 - (b) the party requiring the expert's attendance must notify the expert at least 28 days before the date on which attendance is required.
- (4) Except for the purpose of determining any liability for conduct money or witness expenses, an expert does not become the witness for the party requiring his or her attendance merely because his or her attendance at court has been procured by that party.
- (5) A party who requires the attendance of a person as referred to in subrule (2):
 - (a) must inform all other parties to the proceedings that the party has done so at least 28 days before the date fixed for hearing, and
 - (b) must pay to the person whose attendance is required (whether before or after the attendance) an amount sufficient to meet the person's reasonable expenses (including any standby fees) in complying with the requirement.
- (6) If the attendance of an expert is required under subrule (2), the report may not be tendered under section 63, 64 or 69 of the *Evidence Act 1995* or otherwise used unless the expert attends or is dead or the court grants leave to use it.
- (7) The party using an expert's report may re-examine an expert who attends for cross-examination under a requirement under subrule (2).
- (8) This rule does not apply to proceedings on a trial with a jury.

31.31 Fees for medical expert for compliance with subpoena

(cf SCR Part 36, rule 13BA)

- (1) If a subpoena is served on a medical expert who is to give evidence of

medical matters but is not called as a witness, the expert is, unless the court orders otherwise, entitled to be paid, in addition to any other amount payable to the expert, the amount specified in item 2 of Schedule 3.

- (2) The amount payable under subrule (1) must be paid to the expert by the issuing party within 28 days after the date for the expert's attendance.
- (3) A party that requires an expert's attendance under rule 31.29 (2), but subsequently revokes it, must pay to the issuing party any amount paid by the issuing party under subrule (2), but otherwise such an amount is not recoverable by the issuing party from any other party unless the court so orders.
- (4) In this rule, *issuing party* means the party at whose request a subpoena is issued.

31.32 Service of subpoena on medical expert

(cf SCR Part 36, rule 13BB)

- (1) Service of a subpoena on a medical expert may be effected, at any place at which the expert's practice is carried on, by handing it over to a person who is apparently engaged in the practice (whether as an employee or otherwise) and is apparently of or above the age of 16 years.
- (2) If a person refuses to accept a subpoena when it is handed over, the subpoena may be served by putting it down in the person's presence after he or she has been told of its nature.
- (3) If a subpoena requires a medical expert to attend court on a specified date for the purpose of giving evidence on medical matters, it must be served on the expert not later than 21 days before the date so specified unless the court orders otherwise.
- (4) The parties may not by consent abridge the time fixed by or under subrule (3).

31.33 Subpoena requiring production of medical records

(cf SCR Part 36, rule 13BC)

- (1) A subpoena for production may require a medical expert to produce medical records or copies of them.
- (2) A person is not required to comply with a subpoena for production referred to in subrule (1) unless the amount specified in item 3 of Schedule 3 is paid or tendered to the person at the time of service of the subpoena or a reasonable time before the date on which production is required.
- (3) Rule 33.6 (Compliance with subpoena) does not apply to a subpoena to which subrule (1) applies.
- (4) Rule 33.7 (Production otherwise than on attendance) applies to the photocopies in the same way as it applies to the records.
- (5) If, after service of a subpoena for production referred to in subrule (1), the party who requested the issue of the subpoena requires production of the original medical records without the option of producing copies of them,

the party must request the issue of, and serve, another subpoena requiring production of the original medical records.

31.34 Supplementary reports by expert witness

(cf SCR Part 36, rule 13C; DCR Part 28, rule 9C; LCR Part 23, rule 1D)

(1) If an expert witness provides a supplementary report to the party by whom he or she has been engaged, neither the engaging party nor any other party having the same interest as the engaging party may use:

(a) the supplementary report, or

(b) any earlier report affected by the supplementary report,

unless all of those reports have been served on all parties affected.

(2) For the purposes of this rule, *supplementary report*, in relation to an earlier report provided by an expert witness, includes any report by the expert witness that indicates that he or she has changed his or her opinion on a material matter expressed in the earlier report.

(3) This rule does not apply to a report prepared by a court-appointed expert.

31.35 Opinion evidence by expert witnesses

(cf *Federal Court Rules*, Order 34A, rule 3)

In any proceedings in which two or more parties call expert witnesses to give opinion evidence about the same issue or similar issues, or indicate to the court an intention to call expert witnesses for that purpose, the court may give any one or more of the following directions:

(a) a direction that, at trial:

(i) the expert witnesses give evidence after all factual evidence relevant to the issue or issues concerned, or such evidence as may be specified by the court, has been adduced, or

(ii) the expert witnesses give evidence at any stage of the trial, whether before or after the plaintiff has closed his or her case, or

(iii) each party intending to call one or more expert witnesses close that party's case in relation to the issue or issues concerned, subject only to adducing evidence of the expert witnesses later in the trial,

(b) a direction that, after all factual evidence relevant to the issue, or such evidence as may be specified by the court, has been adduced, each expert witness file an affidavit or statement indicating:

(i) whether the expert witness adheres to any opinion earlier given, or

(ii) whether, in the light of any such evidence, the expert witness wishes to modify any opinion earlier given,

(c) a direction that the expert witnesses:

(i) be sworn one immediately after another (so as to be capable of

- making statements, and being examined and cross-examined, in accordance with paragraphs (d), (e), (f), (g) and (h)), and
- (ii) when giving evidence, occupy a position in the courtroom (not necessarily the witness box) that is appropriate to the giving of evidence,
 - (d) a direction that each expert witness give an oral exposition of his or her opinion, or opinions, on the issue or issues concerned,
 - (e) a direction that each expert witness give his or her opinion about the opinion or opinions given by another expert witness,
 - (f) a direction that each expert witness be cross-examined in a particular manner or sequence,
 - (g) a direction that cross-examination or re-examination of the expert witnesses giving evidence in the circumstances referred to in paragraph (c) be conducted:
 - (i) by completing the cross-examination or re-examination of one expert witness before starting the cross-examination or re-examination of another, or
 - (ii) by putting to each expert witness, in turn, each issue relevant to one matter or issue at a time, until the cross-examination or re-examination of all of the expert witnesses is complete,
 - (h) a direction that any expert witness giving evidence in the circumstances referred to in paragraph (c) be permitted to ask questions of any other expert witness together with whom he or she is giving evidence as so referred to,
 - (i) such other directions as to the giving of evidence in the circumstances referred to in paragraph (c) as the court thinks fit.

31.36 Service of experts' reports in professional negligence claims

(cf SCR Part 14C, rules 1 and 6; DCR Part 28, rule 9B)

- (1) Unless the court orders otherwise, a person commencing a professional negligence claim (other than a claim against a legal practitioner) must file and serve, with the statement of claim commencing the professional negligence claim, an expert's report that includes an opinion supporting:
 - (a) the breach of duty of care, or contractual obligation, alleged against each person sued for professional negligence, and
 - (b) the general nature and extent of damage alleged (including death, injury or other loss or harm and prognosis, as the case may require), and
 - (c) the causal relationship alleged between such breach of duty or obligation and the damage alleged.
- (2) In the case of a professional negligence claim against a legal practitioner, the court may order the plaintiff to file and serve an expert's report or experts' reports supporting the claim.
- (3) If a party fails to comply with subrule (1) or (2), the court may by order

made on the application of a party or of its own motion dismiss the whole or any part of the proceedings, as may be appropriate.

- (4) Without limiting subrule (1) or (2), the court may, on the application of any of the parties, give directions as to the expert evidence to be adduced at trial.
- (5) Directions under subrule (4) may be sought at any directions hearing or case management conference or by notice of motion.
- (6) Unless the court otherwise orders, no party may adduce any expert evidence at trial unless the evidence:
 - (a) has been filed and served under subrule (1) or (2), or
 - (b) has been served pursuant to directions given under subrule (4).

Subdivision 4 Parties' single experts

31.37 Selection and engagement

- (1) If an issue for an expert arises in any proceedings, the court may, at any stage of the proceedings, order that an expert be engaged jointly by the parties affected.
- (2) A parties' single expert is to be selected by agreement between the parties affected or, failing agreement, by, or in accordance with the directions of, the court.
- (3) A person may not be engaged as a parties' single expert unless he or she consents to the engagement.
- (4) If any party affected knows that a person is under consideration for engagement as a parties' single expert:
 - (a) the party affected must not, prior to the engagement, communicate with the person for the purpose of eliciting the person's opinion as to the issue or issues concerned, and
 - (b) if the party affected has previously communicated with the person for that purpose, he or she must notify the other parties affected as to the substance of those communications.

31.38 Instructions to parties' single expert

- (1) The parties affected must endeavour to agree on written instructions to be provided to the parties' single expert concerning the issues arising for the expert's opinion and concerning the facts, and assumptions of fact, on which the report is to be based.
- (2) If the parties affected cannot so agree, they must seek directions from the court.

31.39 Parties' single expert may apply to court for directions

- (1) The parties' single expert may apply to the court for directions to assist the expert in the performance of the expert's functions in any respect.
- (2) Any such application must be made by sending a written request for

directions to the court, specifying the matter in relation to which directions are sought.

- (3) A parties' single expert who makes such an application must send a copy of the request to the parties affected.

31.40 Parties' single expert's report to be sent to parties

- (1) The parties' single expert must send a signed copy of his or her report to each of the parties affected.
- (2) Each copy must be sent on the same day and must be endorsed with the date on which it is sent.

31.41 Parties may seek clarification of report

- (1) Within 14 days after the parties' single expert's report is sent to the parties affected, and before the report is tendered in evidence, a party affected may, by notice in writing sent to the expert, seek clarification of any aspect of the report.
- (2) Unless the court orders otherwise, a party affected may send no more than one such notice.
- (3) Unless the court orders otherwise, the notice must be in the form of questions, no more than 10 in number.
- (4) The party sending the notice must, on the same day as it is sent to the parties' single expert, send a copy of it to each of the other parties affected.
- (5) Each notice sent under this rule must be endorsed with the date on which it is sent.
- (6) Within 28 days after the notice is sent, the parties' single expert must send a signed copy of his or her response to the notice to each of the parties affected.

31.42 Tender of reports and of answers to questions

- (1) Subject to rule 31.23 (3) and unless the court orders otherwise, the parties' single expert's report may be tendered in evidence by any of the parties affected.
- (2) Unless the court orders otherwise, any or all of the parties' single expert's answers in response to a request for clarification under rule 31.41 may be tendered in evidence by any of the parties affected.

31.43 Cross-examination of parties' single expert

Any party affected may cross-examine a parties' single expert, and the expert must attend court for examination or cross-examination if so requested on reasonable notice by a party affected.

31.44 Prohibition of other expert evidence

Except by leave of the court, a party to proceedings may not adduce evidence of any other expert on any issue arising in proceedings if a parties' single expert has been

engaged under this Division in relation to that issue.

31.45 Remuneration of parties' single expert

- (1) The remuneration of a parties' single expert is to be fixed by agreement between the parties affected and the expert or, failing agreement, by, or in accordance with the directions of, the court.
- (2) Subject to subrule (3), the parties affected are jointly and severally liable to a parties' single expert for his or her remuneration.
- (3) The court may direct when and by whom a parties' single expert is to be paid.
- (4) Subrules (2) and (3) do not affect the powers of the court as to costs.

Subdivision 5 Court-appointed experts

31.46 Selection and appointment

(cf SCR Part 39, rule 1; DCR Part 28A, rule 1; LCR Part 38B, rule 1)

- (1) If an issue for an expert arises in any proceedings the court may, at any stage of the proceedings:
 - (a) appoint an expert to inquire into and report on the issue, and
 - (b) authorise the expert to inquire into and report on any facts relevant to the inquiry, and
 - (c) direct the expert to make a further or supplemental report or inquiry and report, and
 - (d) give such instructions (including instructions concerning any examination, inspection, experiment or test) as the court thinks fit relating to any inquiry or report of the expert or give directions concerning the giving of such instructions.
- (2) The court may appoint as a court-appointed expert a person selected by the parties affected, a person selected by the court or a person selected in a manner directed by the court.
- (3) A person must not be appointed as a court-appointed expert unless he or she consents to the appointment.
- (4) If any party affected knows that a person is under consideration for appointment as a court-appointed expert:
 - (a) the party affected must not, prior to the appointment, communicate with the person for the purpose of eliciting the person's opinion as to the issue or issues concerned, and
 - (b) if the party affected has previously communicated with the person for that purpose, he or she must notify the court as to the substance of those communications.

31.47 Instructions to court-appointed expert

The court may give directions as to:

- (a) the issues to be dealt with in a report by a court-appointed expert, and
 - (b) the facts, and assumptions of fact, on which the report is to be based,
- including a direction that the parties affected must endeavour to agree on the instructions to be provided to the expert.

31.48 Court-appointed expert may apply to court for directions

- (1) A court-appointed expert may apply to the court for directions to assist the expert in the performance of the expert's functions in any respect.
- (2) Any such application must be made by sending a written request for directions to the court, specifying the matter in relation to which directions are sought.
- (3) A court-appointed expert who makes such an application must send a copy of the request to the parties affected.

31.49 Court-appointed expert's report to be sent to registrar

(cf SCR Part 39, rule 3; DCR Part 28A, rule 3; LCR Part 38B, rule 3)

- (1) The court-appointed expert must send his or her report to the registrar, and a copy of the report to each party affected.
- (2) Subject to rule 31.23 (3) and unless the court orders otherwise, a report that has been received by the registrar is taken to be in evidence in any hearing concerning a matter to which it relates.
- (3) A court-appointed expert who, after sending a report to the registrar, changes his or her opinion on a material matter must forthwith provide the registrar with a supplementary report to that effect.

31.50 Parties may seek clarification of court-appointed expert's report

Any party affected may apply to the court for leave to seek clarification of any aspect of the court-appointed expert's report.

31.51 Cross-examination of court-appointed expert

(cf SCR Part 39, rule 4; DCR Part 28A, rule 4; LCR Part 38B, rule 4)

Any party affected may cross-examine a court-appointed expert, and the expert must attend court for examination or cross-examination if so requested on reasonable notice by a party affected.

31.52 Prohibition of other expert evidence

(cf SCR Part 39, rule 6; DCR Part 28A, rule 6; LCR Part 38B, rule 6)

Except by leave of the court, a party to proceedings may not adduce evidence of any expert on any issue arising in proceedings if a court-appointed expert has been appointed under this Division in relation to that issue.

31.53 Remuneration of court-appointed expert

(cf SCR Part 39, rule 5; DCR Part 28A, rule 5; LCR Part 38B, rule 5)

- (1) The remuneration of a court-appointed expert is to be fixed by agreement between the parties affected and the expert or, failing agreement, by, or in accordance with the directions of, the court.
- (2) Subject to subrule (3), the parties affected are jointly and severally liable to a court-appointed witness for his or her remuneration.
- (3) The court may direct when and by whom a court-appointed expert is to be paid.
- (4) Subrules (2) and (3) do not affect the powers of the court as to costs.

31.54 Assistance to court by other persons

(cf SCR Part 39, rule 7; DCR Part 28A, rule 7; LCR Part 38B, rule 7)

- (1) In any proceedings, the court may obtain the assistance of any person specially qualified to advise on any matter arising in the proceedings and may act on the adviser's opinion.
- (2) Rule 31.53 applies to and in respect of a person referred to in subrule (1) in the same way as it applies to and in respect of a court-appointed witness.
- (3) This rule does not apply to proceedings in the Admiralty List of the Supreme Court or to proceedings that are tried before a jury.

ANNEXURE B

SCHEDULE 7 EXPERT WITNESS CODE OF CONDUCT

UNIFORM CIVIL PROCEDURE RULES 2005

Schedule 7 Expert witness code of conduct

(Rule 31.23)

(cf SCR Schedule K)

1 Application of code

This code of conduct applies to any expert witness engaged or appointed:

- (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings, or
- (b) to give opinion evidence in proceedings or proposed proceedings.

2 General duty to the court

- (1) An expert witness has an overriding duty to assist the court impartially on matters relevant to the expert witness's area of expertise.
- (2) An expert witness's paramount duty is to the court and not to any party to the proceedings (including the person retaining the expert witness).
- (3) An expert witness is not an advocate for a party.

3 Duty to comply with court's directions

An expert witness must abide by any direction of the court.

4 Duty to work co-operatively with other expert witnesses

An expert witness, when complying with any direction of the court to confer with another expert witness or to prepare a parties' expert's report with another expert witness in relation to any issue:

- (a) must exercise his or her independent, professional judgment in relation to that issue, and
- (b) must endeavour to reach agreement with the other expert witness on that issue, and
- (c) must not act on any instruction or request to withhold or avoid agreement with the other expert witness.

5 Experts' reports

- (1) An expert's report must (in the body of the report or in an annexure to it) include the following:
 - (a) the expert's qualifications as an expert on the issue the subject of the report,
 - (b) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed),
 - (c) the expert's reasons for each opinion expressed,
 - (d) if applicable, that a particular issue falls outside the expert's field of expertise,

- (e) any literature or other materials utilised in support of the opinions,
 - (f) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out,
 - (g) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).
- (2) If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report.
 - (3) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
 - (4) If an expert witness changes his or her opinion on a material matter after providing an expert's report to the party engaging him or her (or that party's legal representative), the expert witness must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in subclause (1) as is appropriate.

6 Experts' conference

- (1) Without limiting clause 3, an expert witness must abide by any direction of the court:
 - (a) to confer with any other expert witness, or
 - (b) to endeavour to reach agreement on any matters in issue, or
 - (c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, or
 - (d) to base any joint report on specified facts or assumptions of fact.
- (2) An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.

ANNEXURE C

LAND AND ENVIRONMENT COURT PRACTICE NOTE

CLASS 3 COMPENSATION CLAIMS



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

**PRACTICE NOTE
CLASS 3 COMPENSATION CLAIMS**

Commencement

1. This practice note commences on 15 July 2011 and replaces the Practice Note - Class 3 Compensation Claims dated 30 April 2007.

Application of Practice Note

2. This practice note applies to Class 3 claims for compensation by reason of the acquisition of land ("Class 3 Compensation Claims"), including claims under the *Land Acquisition (Just Terms Compensation) Act 1991* ("Just Terms Act"). This practice note is to be known as Practice Note Class 3 Compensation Claims.

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 Class 3 Compensation Claims.

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. 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 make available to the Court short minutes reflecting that alternative regime. Parties are to ensure that all directions which they seek will assist in enabling claims to be dealt with at the hearing with as little formality and technicality, and with as much expedition, as the requirements of the *Land and Environment Court Act 1979* and of every other relevant enactment and as the proper consideration of the matters before the Court permits (see s 38 *Land and Environment Court Act 1979*).

Legal practitioners and agents of parties to be prepared

5. Each party not appearing in person shall be represented before the Court by a legal practitioner or duly authorised agent familiar with the

subject matter of the proceedings and with instructions sufficient to enable all appropriate orders and directions to be made.

6. Legal practitioners and agents for the parties are to communicate 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 3 Compensation Claim

7. A Class 3 Compensation Claim is to be commenced by filing in the Registry of the Court a completed Class 3 Application Form (Form B (Version 1)).

Service of originating application

8. The originating application for a Class 3 Compensation Claim is to be served within 7 days of filing.

Documents to be served with originating application

9. The applicant is to serve with its originating application:
 - (a) a schedule of losses attributable to disturbance under s 59(a) to (e) of the Just Terms Act;
 - (b) a schedule of disturbance loss heads of claim which may arise under s 59(f);
 - (c) all lay evidence.

The return of the originating application before the Court

10. The originating application will usually be given a return date before the Court about 4 weeks after the application was filed. On the return, the first directions hearing will occur before the List Judge of the Class 3 Compensation List.

Class 3 Compensation List

11. There is a Class 3 Compensation List which will be managed by the List Judge, usually each Friday.
12. The Class 3 Compensation List will conduct:
 - (a) the first directions hearing;
 - (b) the second directions hearing; and

- (c) the return of any notice of motion and other interlocutory applications.
13. Matters in a Friday 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 on a Friday in order to determine the "not before" time that their matter is listed.

Number of pre-hearing attendances

14. Unless there are interlocutory applications, a Class 3 Compensation Claim normally should appear in Court before the final hearing on no more than three occasions as follows:
- (a) at the first directions hearing in the Friday list;
 - (b) at the second directions hearing in the Friday list;
 - (c) a pre-hearing mention on the second last Friday before the hearing commences, if possible before the hearing judge.

At the first directions hearing

15. The first directions hearing will be on the return date of the originating application and will usually be about four weeks after the application is filed.
16. At the first directions hearing, the parties having conferred beforehand:
- (a) the respondent is to hand to the Court a statement as to whether or not the respondent accepts the Valuer-General's determination under the Just Terms Act of compensation to be offered to the applicant;
 - (b) the parties are to hand to the Court an agreed statement or separate statements as to the disciplines in respect of which the parties respectively propose to call expert evidence.
17. At each directions hearing the parties, having conferred beforehand, are to hand to the Court agreed or competing short minutes of proposed directions.
18. At the first directions hearing, the parties should expect that the Court will usually make the "Usual Directions at First Directions Hearing" in **Schedule A**.
19. The usual directions will be that the following documents be served or exchanged or the following events occur within the following times thereafter (see Schedule A):

(a)	respondent's schedule and evidence of losses attributable to disturbance under s 59(a) to (e) of the <i>Just Terms Act</i> , and all lay evidence	1 week
(b)	applicant's evidence in reply re loss attributable to disturbance under s 59(a) to (e) of the <i>Just Terms Act</i> , and lay evidence in reply	2 weeks
(c)	each party's expert evidence other than valuation evidence	4 weeks
(d)	joint experts' reports other than valuation report	6 weeks
(e)	applicant's schedule and evidence of losses attributable to disturbance under s 59(f)	6 weeks
(f)	respondent's schedule and evidence of losses attributable to disturbance under s 59(f)	8 weeks
(g)	joint report of experts on losses attributable to disturbance	10 weeks
(h)	each party's valuation evidence	11 weeks
(i)	joint valuation experts' report	13 weeks
(j)	applicant's points of claim	14 weeks
(k)	respondent's points of defence	15 weeks
(l)	settlement or conciliation conference	16 weeks
(m)	second directions hearing	17 weeks

20. Joint experts' reports are to include any reply evidence.

21. In some complex matters it may be necessary for these usual directions to be modified to allow for expert non-valuation evidence to be obtained and served sequentially rather than simultaneously (eg ecological evidence which may impact on hydrological evidence and consequently planning evidence).

22. In addition, other directions may be given with a view to the just, quick and cheap disposal of the proceedings. However, directions for formal discovery and interrogatories will only be made in exceptional circumstances and will generally be confined to particular issues.

At the second directions hearing

23. At the second directions hearing, the parties should expect that the Court will usually fix the hearing dates and a pre-hearing mention, if possible before the hearing judge, on the second Friday before the hearing and make the "Usual Directions at the Second Directions Hearing" in **Schedule B**.

24. At the second directions hearing, the parties, having conferred beforehand, are to hand to the Court realistic agreed or competing estimates of the hearing time on half a page broken down by the following elements:

- (a) opening addresses;
- (b) tender of documents and written evidence and any objections;
- (c) any inspection of properties by the Court;
- (d) cross-examination (grouping experts by categories);
- (e) closing submissions.

25. The usual directions will be that the parties file as follows at the pre-hearing mention or file and serve as follows by no later than the following business days before the commencement of the hearing (see Schedule B):

- (a) a paginated Court Book containing a table of contents, a copy of the application and pleadings, the evidence and any objections to evidence. Expert reports are to be grouped by discipline. At the pre-hearing mention
- (b) an agreed schedule – At the pre-hearing mention
 - (i) containing a brief description of the subject property and any comparable sales properties that it is proposed the Court should inspect;
 - (ii) noting which party relies on each comparable sale;
 - (iii) including a map showing the location of each property;
 - (iv) proposing a time when the judge should inspect the properties and the arrangements for the inspection.
- (c) skeleton opening submissions, agreed or competing chronology and (where warranted by the number of persons involved) a list of characters. 4 days
- (d) skeleton reply submissions. 1 day

At the pre-hearing mention

26. The pre-hearing mention will be on the second last Friday before the hearing. If possible, it will be before the judge allocated to hear the

proceedings. Counsel or solicitors briefed to appear on the hearing should attend.

27. The purpose of the pre-hearing mention is to ensure readiness for hearing and to give directions as to the conduct of the hearing and of any inspection of the subject property and comparable sales properties.
28. At the pre-hearing mention, the parties, having conferred beforehand, are to file:
 - (a) the Court Book; and
 - (b) an agreed schedule
 - (i) containing a brief description of the subject property and each comparable sales property that it is proposed the Court should inspect;
 - (ii) noting which party relies on each comparable sale;
 - (iii) including a map showing the location of each property;
 - (iv) proposing a time when the judge should inspect the properties and the arrangements for inspection.
29. If any witness is required for cross-examination, notice is to be given before the pre-hearing mention.

Notices of motion returnable in the Friday list

30. Any notice of motion is to be returnable on a Friday unless the circumstances are so urgent as to justify an earlier listing. Parties and legal practitioners should endeavour to arrange evidence so that, if practicable, the motion may be heard on the return date.

Pleadings

31. Points of claim and points of defence are to include:
 - (a) the amount of compensation payable;
 - (b) the components thereof by reference to each relevant matter enumerated in s 55 of the Just Terms Act;
 - (c) the basis of the valuation;
 - (d) particulars of any comparable sales upon which the valuation is based;
 - (e) a schedule of any hypothetical development calculations;
 - (f) in the points of defence, any matter relied upon to offset the claim;

- (g) a list of the witnesses proposed to be called at the hearing including the dates of their affidavits or reports and, in the case of experts, their discipline.

Amendment of pleadings

32. Parties require leave of the court to amend their points of claim and points of defence.
33. Other than amendments sought during the hearing or where the other party consents, leave to amend is to be sought by notice of motion accompanied by a short affidavit in support explaining the reasons for leave being sought.

Breach of the Court's directions

34. 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

35. If proposed directions vary an existing timetable, they must include the vacation of previous directions that can no longer be maintained including any dates for directions hearings or mention of for the hearing of motions.

Liberty to restore

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

Applications to vacate hearings and for adjournments

37. Proceedings will not be adjourned generally.
38. Proceedings usually will not be adjourned because of failure to comply with this practice note or 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 proceedings, the defaulting parties or legal practitioners may be ordered to pay costs.

39. 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.

Settlement of proceedings

40. If proceedings settle, it is necessary to have the Court make orders finalising the litigation, rather than merely filing terms with the registry.
41. If proceedings settle, the parties are to arrange for the proceedings to be listed in the Friday list by written request to the Registrar accompanied by a copy of the proposed final consent orders signed by all parties.
42. Representatives of the parties attending for the purpose of the making of final consent orders must be familiar with the subject matter of the proceedings and have instructions sufficient to inform the Court about the terms of the proposed orders.

Filing and service of evidence

43. Evidence to be relied upon at the final hearing should not be filed as case preparation occurs, with the exception of evidence in support of interlocutory applications.
44. The evidence to be relied upon at the final hearing is to be included in the Court Book to be filed at the pre-hearing mention: see [25] above.
45. Evidence to be relied upon in support of interlocutory applications is to be filed and served. Timetables for preparation of such applications should include provision for that process.

Expert evidence

46. Where expert evidence is necessary to be called in relation to an issue, the parties are to confer before the first directions hearing to see if they can agree on the appointment of a parties' single expert and, if so, the identity and remuneration of the expert. Failing agreement, directions may be sought at the first directions hearing concerning the appointment of a parties' single expert. Such directions will require adaptation of the usual directions in Schedule A.
47. 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; and
 - (iii) whether the issue is likely to involve a genuine division of expert opinion on methodology, or schools of thought in the discipline.
 - (f) 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;
 - (g) 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
 - (h) 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.
48. A parties' single expert is 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 r 41 of the Uniform Civil Procedure Rules 2005 a party may seek clarification of the report of a parties' single expert on one occasion only.

49. 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.
50. 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. 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).

51. If there are large differences in the amount of compensation for which the parties or their experts contend, the Court may appoint a parties' single expert.
52. 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.
53. An expert witness should identify any pre-existing relationship between the expert witness, or their firm or company, and a party to the litigation.
54. 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 r 45 of the Uniform Civil Procedure Rules.

55. If experts are directed by the Court to confer, experts are to ensure that any 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.

56. 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.
57. 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 Court to the contrary).
58. If a party requires any expert for cross-examination, notice is to be given at least seven days before the hearing.

Co-operation

59. The Court expects 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.

Mediation, conciliation, neutral evaluation, reference and settlement conference

60. Consideration should be given prior to and throughout the course of the proceedings to whether the proceedings or any questions are appropriate for mediation, conciliation, neutral evaluation, reference to a referee or a settlement conference.
61. It is expected that legal practitioners, or parties not legally represented, will be in a position to advise the Court at any directions hearing or mention:
 - (i) whether the parties have attempted mediation, conciliation, neutral evaluation or a settlement conference; and
 - (ii) whether the parties are willing to proceed to mediation, conciliation, neutral evaluation or a settlement conference at an appropriate time.
62. At a mediation, conciliation, neutral evaluation or settlement conference, the parties are to ensure that a person who is able to make a decision as to whether the proceedings and particular issues settle or are resolved is present personally or by an authorised nominee.
63. Where questions are appropriate to be referred to a mediator, conciliator or neutral evaluator or to a referee for inquiry and report, the parties should prepare proposed short minutes to be handed to the Court which:-
 - (a) formulate the questions with precision; and
 - (b) state:-

- (i) that the matter is to be mediated by an in-court mediator or conciliator, or the name of an agreed external mediator, neutral evaluator or referee or, if no agreement can be reached, the person each party suggests;
- (ii) the date on which the mediator, neutral evaluator or referee can commence the mediation, neutral evaluation or reference;
- (iii) expected duration of the mediation, neutral evaluation or reference; and
- (iv) the anticipated date for finalisation of the mediation or neutral evaluation, or for delivery to the Court of the referee's report.

64. Proposed consent orders for amendment to the questions referred to a mediator, neutral evaluator or referee may be filed with the Class 3 Compensation List Judge's Associate and the List Judge may make such orders in chambers. Any contested amendments and amendments in respect of which the List Judge wishes to hear the parties, will be heard on a Friday by the List Judge.

Costs

- 65. 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.
- 66. 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. Excessive documents may attract adverse costs orders.
- 67. 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.

The hearing

68. Evidence and submissions at the hearing are to address all issues the subject of the proceedings. No issue will be separately determined unless the Court so orders.

Note: Application for separate determination of questions, under s 62(2) of the *Civil Procedure Act 2005* or Pt 28 r 28.2 of the *Uniform Civil Procedure Rules*, should be made by notice of motion with supporting affidavit.

69. At the hearing, the Court Book may be tendered as an exhibit containing all the written evidence in the case, subject to any objections.

70. At the commencement of oral evidence of any witness, counsel are to hand to the presiding judge agreed or separate lists of the topics on which they propose to cross-examine.
71. Skeleton opening submissions should not generally be a substitute for a written outline of closing submissions. The Court will usually be assisted by a written outline of closing submissions which includes references to evidence in the Court Book and oral evidence. The written outline of closing submissions should be provided to the presiding judge electronically and in hard copy.

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

29 June 2011

SCHEDULE A

Usual Directions at First Directions Hearing

1. The respondent is to serve a schedule and evidence of disturbance losses under s 59(a) to (e) of the *Land Acquisition (Just Terms) Compensation Act 1991*, and all lay evidence by [insert date: 1 week].
2. The applicant is to serve its evidence in reply of disturbance losses under s 59(a) to (e), and all lay evidence in reply by [insert date: 2 weeks].
3. The parties are to exchange their expert evidence, other than expert valuation evidence and expert evidence of disturbance losses under s 59(f), by [insert date: 4 weeks].
4. Joint experts' reports, other than joint experts' valuation report and joint experts' report of disturbance losses under s 59(f), are to be served by the experts on the parties by [insert date: 6 weeks].
5. The applicant is to serve a schedule and evidence of disturbance losses under s 59(f) by [insert date: 6 weeks].
6. The respondent is to serve its schedule and evidence of disturbance losses under s 59(f) by [insert date: 8 weeks].
7. Joint experts' report on disturbance losses under s 59(f) is to be served by the experts on the parties by [insert date: 10 weeks].
8. The parties are to exchange their expert valuation evidence by [insert date: 11 weeks].
9. Joint valuation experts' report is to be served by the experts on the parties by [insert date: 13 weeks].
10. The applicant is to serve its points of claim by [insert date: 14 weeks].
11. The respondent is to serve its points of defence by [insert date: 15 weeks].
12. The parties are to have a settlement or conciliation conference by [insert date: 16 weeks].
13. There will be a second directions hearing on [insert date: 17 weeks].
14. Points of claim and points of defence are to include:
 - (a) the amount of compensation to which it is said the applicant is entitled;

- (b) the components of the claim by reference to each relevant matter enumerated in s 55 of the *Land Acquisition (Just Terms Compensation) Act 1991*;
 - (c) the basis of the valuation in support of the claim;
 - (d) particulars of comparable sales, if any, upon which the valuation is based;
 - (e) a schedule of any hypothetical development calculations;
 - (f) in the points of defence, any matter relied upon to offset the applicant's claim.
 - (g) a list of the witnesses proposed to be called at the hearing including the dates of their affidavits and reports and, in the case of experts, their discipline.
15. The parties are to serve a copy of these directions, 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 on their experts when retaining the experts. Experts are to comply with those provisions.
16. The parties are to serve on their respective expert valuers a copy of all non-valuation expert reports, including joint reports, and lay witness statements as relevant to valuation issues promptly after they become available.
17. A joint report of experts is to include any evidence in reply.
18. In preparing their joint report, expert valuers should consider the matters in Annexure 2 to the Usual Directions at First Directions Hearing insofar as relevant to matters agreed and not agreed.
19. 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.
20. Experts are 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. Default without leave of the Court can result in the imposition of sanctions.
21. 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.

22. A joint report of experts is to identify the experts involved in its preparation, the dates of their joint conferences, the matters on which they agree, the matters on which they disagree and the reasons for any 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.
23. 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.
24. 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.
25. Liberty to restore on three working days' notice.

**ANNEXURE 1 TO USUAL DIRECTIONS AT FIRST DIRECTIONS HEARING
PARTIES' SINGLE EXPERT USUAL DIRECTIONS**

If a parties' single expert is to be appointed, the usual directions at the first direction hearing will require adaptation, including by the following alternative usual directions:

If the parties agree on or the Court requires the appointment of a parties' single expert to address any issue:

1. The court notes the agreement between the parties to engage [insert name] as the parties' single expert on the issue of [insert issue] and that the parties have agreed the remuneration to be paid to that expert.

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

1.
 - (a) The Court orders the parties to engage [insert name] as a parties' single expert on the issue of [insert issue].
 - (b) The Court fixes the remuneration of the parties' single expert at [insert details of remuneration].
 - (c) 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.
 - (d) The parties are to brief the parties' single expert with agreed instructions and an agreed bundle of documents by [within 7 days of the first directions hearing].
 - (e) The parties' single expert is to file and serve their expert report by [insert date]. Without leave of the Court, the parties single expert is not to provide the parties with a preliminary expert report or preliminary opinion.
 - (f) 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.

In all cases

2. 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 of the Court.

Date: [insert date]

ANNEXURE 2 TO USUAL DIRECTIONS AT FIRST DIRECTIONS HEARING

In conferring and preparing their joint report, expert valuers should consider the issues set out below insofar as relevant to the matters agreed and not agreed.

1. Identify the method of valuation adopted including the primary method and any check method.
2. Disclose full workings and calculations.
3. Identify comparable sales including:
 - (a) property address and title details of each comparable sale to be adopted by the Court;
 - (b) sale date;
 - (c) sale price absent any adjustments expressed as a total and as a \$ rate per sq m if relevant;
 - (d) sale price adjusted for any condition of sale expressed as a total and as a \$ rate per sq m where relevant;
 - (e) area of land of each comparable sale;
 - (f) zoning of each comparable sale at the relevant date;
 - (g) any other relevant planning controls applicable to the comparable sale as at the relevant date; and
 - (h) floor space area of any buildings on the comparable sales sites which may be relevant.
4. State agreed matters.
5. State matters not agreed and give reasons for disagreement.
6. Consider:
 - (a) highest and best use adopted for assessment of market value of land at the date of acquisition and the reasons;
 - (b) alternative facts and assumptions which the Court may accept, including alternative facts and assumptions based on non valuation expert reports;
 - (c) factors which should be taken into consideration in applying a comparable sale to the subject site including but not limited to time, location, site area, site configuration, conditions of sale; and
 - (d) comparable sales which should be inspected by the Court.

SCHEDULE B

Usual Directions at Second Directions Hearing

1. The hearing is fixed for [insert number] days commencing on [insert date to be obtained from the Registry].
2. The parties are to prepare, file and serve a paginated Court Book with a table of contents, a copy of the originating application and pleadings, the evidence (with expert evidence grouped by discipline) and any objections to evidence at the pre-hearing mention.
3. The parties are to exchange and deliver electronically and in hard copy to the hearing judge's Associate their skeleton opening submissions, an agreed or competing chronology and (where warranted by the number of persons involved) a list of relevant characters by [insert date: 4 business days before the hearing].
4. The parties are to exchange and deliver electronically and in hard copy to the hearing judge's Associate any skeleton opening submissions in reply by [insert date: 1 business day before the hearing].
5. There will be a pre-hearing mention, if possible before the hearing judge, which counsel or solicitors briefed to appear on the hearing should attend, on [insert date: second last Friday before the hearing].
6. At the pre-hearing mention the parties, having conferred beforehand, are to file:
 - (a) the Court Book; and
 - (b) an agreed schedule
 - (i) containing a brief description of the subject property and each comparable sales property that it is proposed the Court should inspect;
 - (ii) noting which party relies on each comparable sale;
 - (iii) including a map showing the location of each property;
 - (iv) proposing a time when the judge should inspect the properties and the arrangements for inspection.
7. If any witness is required for cross-examination, notice is to be given before the pre-hearing mention.
8. At the hearing the evidence of experts is to be given by way of concurrent evidence, unless the hearing judge directs otherwise.
9. At the commencement of oral evidence of any witness, counsel, having conferred beforehand, are to hand to the Court an agreed list or competing lists of the topics on which it is proposed to cross-examine.

10. Parties are to promptly notify the Court if there is any material slippage in the timetable.