

LAND AND ENVIRONMENT COURT PRACTICE DIRECTIONS

— HOW THEY RELATE TO COMPENSATION CASES

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1. Since 28 January 2008 the Land and Environment Court has come within the provisions of the Civil Procedure Act 2005 (CPA) and the Uniform Civil Procedure Rules 2005 (UCPR). The Land and Environment Court Act 1979 and the Land and Environment Court Rules 2007 also apply and prevail to the extent of any inconsistency. Section 15(1) of the CPA provides:

- (1) Subject to rules of court, the senior judicial officer of the court may issue practice notes for that court in relation to civil proceedings to which this Act applies.

2. Currently the Land and Environment Court has five practice notes covering its civil jurisdiction, all of which commenced on 14 May 2007:

Practice Note – Class 1 Development Appeals
Practice Note – Classes 1, 2 and 3 Miscellaneous Appeals
Practice Note – Class 3 Compensation Claims
Practice Note – Class 3 Valuation Objections
Practice Note – Class 4 Proceedings

3. The philosophy behind the drafting of these practice notes is to have only one practice note relating to a particular Class, or category of Class, of the Court's jurisdiction. That is thought to be convenient for those appearing in a particular matter. The price of the philosophy is that there is duplication of matters which are common to all the practice notes. Thus, there is duplication of statements as to the purpose of the practice note (which is to set out case management procedures for the just, quick and cheap resolution of matters); the responsibilities of parties, legal practitioners and agents; expedition; breaches of the

Court's directions; variation of timetables; liberty to restore; expert witnesses; and so on. Such common matters could, alternatively, be located in one general practice note, thus truncating the specific practice notes.

Case management: the statutory context

4. A practice note is a case management tool. In New South Wales, the context in which it exists is Part 6 Division 1 of the CPA (ss 56 – 60) which deals with case management. It does not exist in isolation. Part 6 Division 1 imposes important obligations on the courts when exercising case management functions. Some knowledge of these provisions is essential in order to understand the purpose of practice notes and the directions made by the courts.
5. Section 56 states the overriding purpose of the CPA and of rules of court; imposes an obligation on the court to give effect to the overriding purpose; imposes a duty on parties to assist the court to do so; imposes a related duty on lawyers; and obliges the court to take into account any failure to comply with those duties of parties and lawyers when exercising the discretion with respect to costs. Section 56 provides:
 - (1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
 - (2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.
 - (3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.
 - (4) A solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of the duty identified in subsection (3).
 - (5) The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs.

6. The overriding purpose is reflected in paragraph 3 of the Practice Note – Class 3 Compensation Claims:

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.

7. For the purpose of fulfilling that overriding purpose the courts are obliged to manage proceedings having regard to the objects set out in s 57, which provides:

- (1) For the purpose of furthering the overriding purpose referred to in section 56 (1), proceedings in any court are to be managed having regard to the following objects:
 - (a) the just determination of the proceedings,
 - (b) the efficient disposal of the business of the court,
 - (c) the efficient use of available judicial and administrative resources,
 - (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.
- (2) This Act and any rules of court are to be so construed and applied, and the practice and procedure of the courts are to be so regulated, as best to ensure the attainment of the objects referred to in subsection (1).

8. Further, in deciding whether to make any order or direction for the management of proceedings, the Court is obliged by s 58 “to act in accordance with the dictates of justice”. For the purposes of determining what are the dictates of justice in a particular case, s 58(2) mandates that the Court must have regard to the provisions of ss 56 and 57 and that it may have regard to the following matters to the extent to which it considers them relevant:

- (i) the degree of difficulty or complexity to which the issues in the proceedings give rise,
- (ii) the degree of expedition with which the respective parties have approached the proceedings, including the degree to which they have been timely in their interlocutory activities,

- (iii) the degree to which any lack of expedition in approaching the proceedings has arisen from circumstances beyond the control of the respective parties,
- (iv) the degree to which the respective parties have fulfilled their duties under section 56 (3),
- (v) the use that any party has made, or could have made, of any opportunity that has been available to the party in the course of the proceedings, whether under rules of court, the practice of the court or any direction of a procedural nature given in the proceedings,
- (vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction,
- (vii) such other matters as the court considers relevant in the circumstances of the case.

9. An objective that is fundamentally important to the judicial process is elimination of avoidable delay. Avoidable delay is justice denied. This objective is expressed in s 59 of the CPA as follows:

In any proceedings, the practice and procedure of the court should be implemented with the object of eliminating any lapse of time between the commencement of the proceedings and their final determination beyond that reasonably required for the interlocutory activities necessary for the fair and just determination of the issues in dispute between the parties and the preparation of the case for trial.

10. Section 60 provides that the courts should exercise their case management and directions powers so as to ensure that costs are proportionate to the importance and complexity of the matter in dispute.

Practice Note – Class 3 Compensation Claims

11. Annexed and marked “**A**” is a copy of the Land and Environment Court’s Practice Note – Class 3 Compensation Claims.

12. An outstanding feature of the practice note is its streamlining of pre-hearing practice and procedure, including standard directions which allow for various possibilities. As a result, quite complex directions at directions hearings can often be made in a few minutes on the basis of drafts discussed by the parties beforehand and handed to the Court.

Standard directions also form part of the practice notes in other classes of the Court's civil jurisdiction. The effect of all these practice notes is that directions hearings for numerous matters – which are normally listed on Fridays before the List Judge – across the spectrum of the Court's jurisdiction can be disposed of efficiently in a fraction of the time that would be necessary if the practice notes did not exist.

13. One of the provisions of the practice notes is that if there is any significant breach of the Court's directions, including a breach sufficient to cause slippage in a timetable, the parties must restore the matter to the next Friday list before the List Judge and the party in breach must explain the reasons for the breach by affidavit (par 11). Not infrequently, the explanation is that an expert appointed by one of the parties has not furnished the expert's report within the time prescribed by a direction. Too often there is no explanation provided by that expert as to the reason. That is unsatisfactory. More importantly, it is also a breach of the duty of an expert witness to comply with the Court's directions (UCPR Schedule 7 Expert witness code of conduct).

Expert evidence

14. Expert evidence is addressed in the Class 3 Compensation Claims Practice Note in pars 28 – 41. A parties' single expert may be appointed. Otherwise, generally, experts on each side in a particular discipline are required to confer and to produce a joint report which sets out the matters on which they agree, the matters on which they disagree and the reasons for any disagreement. Normally, such experts give evidence concurrently (par 39). The Land and Environment Court pioneered the routine use of the joint report and concurrent evidence, a routine practice which has begun to spread to some other jurisdictions.
15. Schedule B to the practice note contains the usual directions at the second directions hearing. It imposes obligations on experts to comply with the requirements of Division 2 of Part 31 of the UCPR and the

Expert Witness Code of Conduct in Schedule 7 to the UCPR. Copies of those important documents are annexed and marked as follows:

“**B**” Schedule 7 to the UCPR – Expert Witness Code of Conduct.

“**C**” Division 2 of Part 31 of the UCPR entitled “Provisions applicable to expert evidence generally”.

16. By agreeing to be bound by the Expert Witness Code of Conduct, the expert witness comes under a number of important duties:

- (a) an overriding duty to assist the Court impartially. The expert witness’ paramount duty is to the Court and not to any party and the expert is not an advocate for a party;
- (b) a duty to comply with the Court’s directions;
- (c) a duty to work cooperatively with other expert witnesses.

17. The Code of Conduct also sets out requirements for expert reports.

18. The UCPR Part 31 Division 2 distinguishes between parties’ single experts (Subdivision 4) and court-appointed experts (Subdivision 5). In order to avoid confusion, it should be noted that the former is what the Land and Environment Court used to call a court-appointed expert. In consequence of this distinction, the parties’ single expert, where appropriate, is now the norm and not the court-appointed expert.

The proposed new practice notes

19. It is anticipated that new practice notes will be introduced before the end of 2008. The new Practice Note Class 3 Compensation Claims may include the following new features:

- (a) reduction of the number of directions hearings from three to two;
- (b) the creation of a General Practice Note which contains all matters common to all Practice Notes across the spectrum of the Court’s civil jurisdiction, thus truncating the specific practice notes relating to a particular Class, or class of matter within a Class, of the Court’s

jurisdiction. For ease of access, the general Practice Note may be included as a schedule to the specific Practice Note.

“A”

PRACTICE NOTE
CLASS 3 COMPENSATION CLAIMS

Commencement

1. This practice note commences on 14 May 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”). 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, their legal practitioners and agents (as applicable) to consider the orders and 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 any 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 with respect to Class 3 Compensation Claims will assist in enabling such claims to be

dealt with at the hearing 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 permits (see s 38 of the *Land and Environment Court Act 1979*).

Class 3 compensation list

5. There will be a Class 3 List which includes all new and existing Class 3 Compensation Claims. The Class 3 List will usually be managed in Court each Friday.
6. Unless there are interlocutory applications, a Class 3 Compensation Claim normally should appear in Court (before the hearing) on no more than four occasions as follows, of which the first three will be in the Friday list:
 - (a) at the **first directions hearing** when the “*Usual Directions at First Directions Hearing*” will usually be made in the form of **Schedule A**.
 - (b) at the **second directions hearing**, when the “*Usual Directions at Second Directions Hearing*” will usually be made in the form of **Schedule B**.
 - (c) at the **third directions hearing**, when usually, if the matter is ready or virtually ready for hearing, a hearing date will be fixed and the “*Usual Directions for Hearing*” will be made in the form of **Schedule C**. On this occasion parties or their legal practitioners will be expected to inform the Court that the matter is ready for hearing; or alternatively to inform the Court of any matters that need to be attended to for the matter to be ready for hearing; and whether there are any issues which may be suitable for preliminary determination. The Court should be provided with a realistic estimate of the hearing time.
 - (d) at the **pre-hearing mention** on the second Friday before the hearing commences, if possible before the hearing judge.
7. In addition to the directions in these usual orders, other directions may be given with a view to the just, quick and cheap disposal of the

proceedings. However, directions relating to the provision of particulars, the filing of lists of documents and the administration of interrogatories will only be made upon demonstrated need being established.

8. Any motion relating to a Class 3 Compensation Claim is to be made 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 of the motion.
9. Matters in a Friday list will be listed in blocks on a “*not before*” a specified time basis. Practitioners 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.

Expedition

10. Any party may seek expedition of a Class 3 Compensation Claim by notice of motion, with a short affidavit in support setting out the reasons in support of expedition.

Breach of the Court’s directions

11. If there is any significant breach of the Court’s directions, including a breach 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 reason or reasons for the breach and submits what directions should be made in consequence of the breach.

Variation of timetables

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

Liberty to restore

13. Parties have general liberty to restore on a Friday on three working days' notice, or earlier 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 e-Court communication or fax to the Registrar.

Amendments

14. Parties require leave of the Court to amend their points of claim and points of defence.
15. 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.

Applications to vacate hearings and for adjournments

16. Class 3 Compensation Claims will not be adjourned generally.
17. Class 3 Compensation Claims usually will not be adjourned because of failure to comply with this practice note or Court 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 the proceedings, the defaulting parties or legal practitioners may be ordered to pay costs.
18. 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.

Applications for final orders by consent

19. If proceedings settle, it is necessary to have the Court make orders finalising the litigation, rather than filing terms with the registry.
20. If the parties have agreed to final orders by consent, they are to exercise the liberty to restore and are to file proposed consent orders signed by all parties before the return date pursuant to the liberty.

21. The representatives of the parties attending for the purpose of the making of final orders by consent 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

22. The former practice of filing evidence as case preparation occurs is to cease, with the exception of evidence in support of interlocutory applications.
23. Evidence to be relied upon at hearing is to be filed seven days before the pre-hearing mention, unless otherwise directed by the Court.
24. Evidence to be relied upon in support of interlocutory applications is to be filed and served on the other parties. Timetables for preparation of such applications should include provision for that process.

Legal practitioners and agents of parties to be prepared

25. 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.
26. Legal practitioners and agents for each party should communicate prior to any attendance before the Court with a view to reaching agreement on directions to propose to the Court and on preparation of short minutes recording the directions.

Evidence for hearing

27. Evidence for the hearing is to address all issues the subject of the proceedings. No issue will be separately determined unless the Court so orders.

Expert evidence

28. Where expert evidence is necessary to be called in relation to an issue, 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.

29. 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 31.41 of the Uniform Civil Procedure Rules a party may seek clarification of the report of a parties' single expert on one occasion only.

30. 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.

31. 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.

32. 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).

33. 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.

34. 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.
35. An expert witness should identify any pre-existing relationship between the expert witness, or their firm or company, and a party to the litigation.
36. 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 31.45 of the Uniform Civil Procedure Rules.
37. 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.
38. 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.
39. 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 hearing Judge or Commissioner to the contrary).
40. If a party requires any expert for cross-examination, notice is to be given at least seven days before the hearing.
41. 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, neutral evaluation and reference

42. Consideration should be given prior to and throughout the course of the proceedings to whether the proceedings or any questions are appropriate for mediation or neutral evaluation or for reference to a referee.
43. It is expected that legal practitioners, or litigants if not legally represented, will be in a position to advise the Court at any directions hearing or mention:
 - (a) whether the parties have attempted mediation or neutral evaluation; and
 - (b) whether the parties are willing to proceed to mediation or neutral evaluation at an appropriate time.
44. At a mediation or neutral evaluation, the parties are to ensure that a person who is able to make a decision as to whether the matter settles is present personally or by an authorised nominee.
45. Where questions are appropriate to be referred to a mediator 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) the name of an agreed mediator, neutral evaluator or referee or, if no agreement can be reached, the person each suggests;
 - (ii) the date on which the mediator, neutral evaluator or referee can commence the mediation, neutral evaluation or reference;
 - (iii) the 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.
46. Proposed consent orders for amendment to the questions referred to a mediator, neutral evaluator or referee may be filed with the List Judge's Associate in writing 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

47. 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.
48. 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.
49. 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 Honourable Justice Brian J Preston
Chief Judge***

30 April 2007

SCHEDULE A
Class 3 Compensation Claims
Usual Directions at First Directions Hearing

Note: Strike through/amend as required.

1. The applicant is to file and serve points of claim setting out the following matters by # [within 7 days of the first directions hearing]:
 - (a) the amount of compensation claimed;
 - (b) the components of the claim by reference to each relevant matter enumerated in section 55 of the *Land Acquisition (Just Terms Compensation) Act 1991*;
 - (c) the basis of the valuation in support of the claim; and
 - (d) particulars of comparable sales, if any, upon which the valuation was based.
2. The respondent is to file and serve points of defence in answer to each of the components of the applicant's claim and raising any matter relied upon to offset the claim by # [within 14 days of the first directions hearing].
3.
 - (a) Each party is to notify the other party and the Court in writing of the name of the experts upon which they propose to rely and the issues to be addressed by each expert or the name of any expert they propose to nominate as a parties' single expert by # [within 14 days of the first directions hearing].
 - (b) If the parties agree or the Court requires a parties' single expert, the parties are to agree the identity and remuneration of the parties' single expert by # [within 21 days of the first directions hearing].
 - (c) Failing agreement, the parties are to seek orders from the Court at the second directions hearing that the parties engage a named parties' single expert and to fix the remuneration of the parties' single expert. For that purpose, each party is to file and serve the names, CVs and fee estimates of three appropriately qualified experts at least three days before the second directions hearing.

4. Before the second directions hearing, the parties are to confer to consider whether it is appropriate for the matter or individual issues to be referred to mediation, neutral evaluation or to a referee and are to inform the Court as to those issues at the second directions hearing.
5. The applicant is to serve all lay witness statements, including evidence with respect to disturbance claims, and a schedule of losses attributable to disturbance by # [within 14 days of the first directions hearing].
6. The respondent is to serve all lay witness statements, including evidence with respect to disturbance claims, and a schedule of its response to the applicant's schedule of losses attributable to disturbance by # [the day before the second directions hearing].
7. The proceedings are listed for a second directions hearing on # [28 days after the first directions hearing].
8. All evidence for the hearing other than reports is to be filed 7 days' before the pre-hearing mention, unless otherwise directed by the Court.

Note: The parties may seek all directions necessary for the matter to proceed to hearing at a single directions hearing. In that event, parties should consider seeking the additional directions in Schedules B and C below.

SCHEDULE B
Class 3 Compensation Claims
Usual Directions at Second Directions Hearing

Note: Strike through/amend as required.

Any appropriate directions in respect of mediation, neutral evaluation or appointment of a referee.

Note: The usual directions in these paragraphs are intended to operate on an issue-by-issue basis. It is the responsibility of the parties to consider the most appropriate combination of directions for the particular case having regard to the real issues requiring resolution.

The directions in Part E below should usually be made.

A 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 a parties' single expert and that the parties have agreed the remuneration to be paid to that expert as being [insert details of remuneration].

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

1A. (a) The Court orders the parties to engage # [insert name] as a parties' single expert.

(b) The Court fixes the remuneration of the parties' single expert at # [insert details of remuneration].

2. 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.

3. The parties are to brief the parties' single expert with agreed instructions and an agreed bundle of documents by # [within 7 days of the second directions hearing].

4. The parties' single expert is to file and serve their expert report by # [within 6 weeks of the second directions hearing]. Without leave of the

Court, the parties' single expert is not to provide the parties with a preliminary expert report or preliminary opinion.

5. 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.
6. 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.

B If the parties agree on or the Court requires reports of **non-valuation** experts **to be served before** reports of **valuation** experts:

1. Individual reports of non-valuation experts are to be served by # [within 21 days of the second directions hearing].
2. Non-valuation experts, grouped in areas of expertise, are to confer in accordance 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 and are to file and serve their joint report, which is to include any evidence in reply, by # [within 5 weeks of the second directions hearing].
3. The parties are to serve on the expert valuers a copy of all non-valuation expert reports, including joint reports, and lay witness statements as relevant to valuation issues by # [within 6 weeks of the second directions hearing].
4. Individual expert valuation reports are to be served by # [within 10 weeks of the second directions hearing].
5. Expert valuers are to confer in accordance 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 and are to file and serve their joint report by # [within 12 weeks of the second directions hearing].
6. The joint report is to include any evidence in reply. In preparing their joint report, expert valuers should consider the matters in **Annexure 1**

to the *Usual Directions at Second Directions Hearing* insofar as relevant to matters agreed and not agreed.

C. If the parties agree on or the Court requires reports of **non-valuation** experts **not to be** served before reports of **valuation** experts:

1. The parties are to serve individual expert reports by # [within 28 days of the second directions hearing] and any expert reports in reply by # [within 6 weeks of the second directions hearing].

Note: A respondent may seek directions that the applicant serves their expert evidence first. In that event, the directions should be adjusted to enable the applicant to serve their expert reports usually within 28 days of the directions hearing, the respondent to serve its expert reports usually within 8 weeks of the directions hearing and the applicant to serve any expert reports in reply usually within 11 weeks of the directions hearing.

Parties should also consider whether it would be more appropriate for any evidence in reply to be dealt with through the joint conference process.

2. Experts, grouped in areas of expertise, are to confer in accordance 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 and are to file and serve their joint report by # [within 8 weeks of the second directions hearing].

D. If the parties agree or the Court requires that **any** experts may proceed directly to joint conferences and joint reports, without having prepared an individual expert report:

1. The parties are not to instruct experts on # [insert areas of expertise] to prepare individual expert reports.
2. The experts, grouped in areas of expertise, are to confer in accordance 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 and are to file and serve their joint report by # [within + 28 days of the second directions hearing].
3. No expert reports, other than the joint reports, may be relied upon at the hearing, without leave.

E. For all matters:

1. Parties are to serve a copy of these directions, the points of claim and points of defence, 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 all experts upon whose evidence they propose to rely.
2. 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.
3. Experts are directed 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.
4. 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.
5. A joint report is to identify the experts involved in its preparation, the date of their joint conferences, the matters they agreed about, the matters they disagreed about and reasons for agreement and 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.
6. 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.

7. 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.
8. At the third directions hearing, the parties are to hand to the Court a summary, if possible on one page, of the valuation assessments of the subject land by each valuer. If the differences in valuation assessments are large, the parties are to confer beforehand as to whether it is appropriate to appoint a parties' single expert and, if so, are to agree that person's identity and remuneration and are to be prepared to address the Court on that issue at the third directions hearing
9. The parties have liberty to restore on three working days' notice.

Date: # [insert date]

ANNEXURE 1

To Usual Directions at Second 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 to be used.
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 sqm if relevant;
 - (d) sale price adjusted for any condition of sale expressed as a total and as a \$ rate per sqm 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. Confirm agreed matters.
5. Identify matters not agreed and give reasons for disagreement.

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 the 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.

Date: # [insert date]

SCHEDULE C
Class 3 Compensation Matters
Usual Directions at Third Directions Hearing

1. The hearing is fixed for # [state number] days commencing on the first available date after 21 days from today.
2. List the proceedings for a pre-hearing mention, if possible before the hearing judge, on the second last Friday before the commencement of the hearing.
3. The parties are to proceed forthwith to the Registrar to obtain the dates referred to in 1 and 2.
4. The parties are to confer and agree upon a schedule of the comparable sales to be inspected and upon a location map showing the subject site and comparable sales and the filing of that schedule and map by # [7 days before hearing].
5. If any witness is required for cross-examination, notice is to be given at least seven days before the hearing.
6. A party who proposes to object to any part of an affidavit, statement or report is to file and serve notice of its objections, including the grounds in support, at least seven days before the hearing.
7. The parties are to confer and prepare a bundle of copy documents on which the parties seek to rely. The bundle is to include a table of contents and be paginated. The bundle is not to include documents annexed or exhibited to an affidavit unless there are good reasons for it to do so. Unnecessary copying and duplication of documents is to be avoided. Any party objecting to the tender of a document within the bundle is to notify the other party of the objection and the grounds in support at least three working days before the bundle is to be filed. The documents subject to objection are to be included in the bundle, but the objection and grounds in support, as well as the party tendering the document and the party objecting to the tender, are to be noted in the table of contents to the bundle. The bundle is to be filed at least seven days before the hearing.

8. By 4:00pm on the second last working day before the hearing the parties are to cause to be delivered to the hearing judge and served:
 - (a) an outline of submissions and issues for hearing;
 - (b) a list of authorities;
 - (c) a chronology of relevant events;
 - (d) where the number of persons who feature warrants it, a list of relevant characters; and
 - (e) a list of affidavits, statements and reports to be relied upon at the hearing setting out:
 - (i) in alphabetical order the name of the deponent or maker;
 - (ii) their dates; and
 - (iii) the role of the deponent or the maker.
9. Parties are to promptly notify the Court if there is any material slippage in the timetable.
10. Liberty to restore on three working days' notice.
11. At the hearing the evidence of experts is to be given by way of concurrent evidence, unless the hearing judge directs otherwise.

Date: # [insert date]

“B”

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.

“C”

Uniform Civil Procedure Rules 2005

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
Rule 31.26	Rule 31.35
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).

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

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

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

- (1) This rule applies to proceedings in the District Court or a 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.