

SCIENTIFIC EXPERTS IN THE LAND AND ENVIRONMENT COURT

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1. In the Land and Environment Court expert evidence, both scientific and non-scientific, is common.
2. That is because of the nature of the Court's wide jurisdiction. It includes, for example, matters such as merit appeals from refusals of development applications requiring environmental impact assessments, environmental offences such as pollution and unauthorised development, and compensation for compulsory acquisition of land. Expert evidence in the Land and Environment Court include evidence from ecologists, engineers, chemists, surveyors, planners, valuers, and experts in acoustics, visual impact, heritage, safety, traffic and parking.
3. The primary function of a scientific witness is to explain the application of matters of scientific knowledge to a particular question which is before the Court for Decision. The scientific witness has to state the material facts he has observed or assumed, the principles or theories which he considers to apply, and the conclusion or opinion which he reaches by applying them.¹
4. The expert's difficulty is that he must do so to a judge, lawyers and parties whose element is not science.
5. In any case involving science, it is important that the scientific witness be able to educate the judge. The scientific expert who is able to give the judge a good grasp of the subject will earn the judge's gratitude and facilitate the expert's task as witness. Sound technical knowledge, hard work, intelligence

¹ 1. Sir Owen Dixon, *The Law and the Scientific Expert* (1934); collected in Woinarski, *Jesting Pilate*.

and good written and verbal communication skills are the tools to achieve that goal.

6. Parties may call such experts as they choose but, when chosen, an expert is not the advocate of a party but an independent witness who is under duty to assist the Court impartially. If the scientific witness does this, he will have the confidence of the Court.
7. It has been held that if evidence tendered as expert opinion evidence is to be admissible;
 - (a) it must be agreed or demonstrated that there is a field of specialised knowledge;
 - (b) there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert;
 - (c) the opinion proffered must be wholly or substantially based on the witness's expert knowledge;
 - (d) so far as the opinion is based on facts observed by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on assumed or accepted facts, they must be identified and proved in some other way;
 - (e) it must be established that the facts on which the opinion is based form a proper foundation for it;
 - (f) the expert must explain how the field of specialised knowledge in which the witness is expert, and on which the opinion is wholly or substantially based, applies to the facts assumed or observed so as to produce the opinion or conclusion propounded.²

² *Makita (Australia) Pty Ltd v Spowles* [2001] NSWCA 305, 52 NSWLR 705 at [85] per Heydon JA.

8. The Land and Environment Court is concerned expert witnesses set out in its Practice Notes relating to various matters within its civil jurisdiction. The Court's practice is:

- (a) to encourage the use of a parties' single expert. That is often appropriate in matters where a conclusion should be capable of objective ascertainment, for example, noise impact and surveying;
- (b) otherwise, to require parties experts to confer before the hearing and produce a joint report in which they set out the matters agreed, the matters on which they disagree and the reasons for disagreement. Lawyers are not allowed to attend conferences of experts or be involved in the preparation of joint reports without the leave of the Court;
- (c) at the hearing, to require experts in the same discipline to give their evidence concurrently. That is, they are in the witness box at the same time. Counsel are encouraged to produce an agenda of issues on which questions may be asked. This process allows all experts to be questioned by counsel or the Court on an issue by issue basis before moving on the next issue. Experts even have the opportunity to question each other.

9. In the Land and Environment Court, the evidence of expert witnesses is regulated by Rules of Court and Practice Notes. Copies of the following are attached:

- A. the Expert Witness Code of Conduct in Schedule 7 to the Uniform Civil Procedure Rules 2005. Expert witnesses must comply with that Code: UCPR 31.23
- B. the Uniform Civil Procedure Rules 2005 Pt 31 Division 2 (rr 31.17 – 31.54) entitled "Provisions applicable to Expert Evidence Generally".

- C. the current Practice Note relating to Class 1 development applications (the Practice Notes are currently under revision).

[Sch 7] SCHEDULE 7 — EXPERT WITNESS CODE OF CONDUCT
(cf SCR Schedule K)

(Rule 31.23)

[Sch 7 subst Amendment 12 of 2006 r 2 and Sch 1[4], opn 8 Dec 2006]

Application of code

- 1** 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.

General duty to the court

- 2** (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.

Duty to comply with court's directions

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

Duty to work co-operatively with other expert witnesses

- 4** 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.

Experts' reports

- 5** (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.

Experts' conference

6 (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.

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“B”**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 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.

"C"



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

PRACTICE NOTE

CLASS 1 DEVELOPMENT APPEALS

Commencement

1. This practice note commences on 14 May 2007.

Application of Practice Note

2. This practice note applies to appeals under ss 97 and 98, and applications under ss 96, 96AA and 96A of the *Environmental Planning and Assessment Act 1979* in Class 1 of the Court's jurisdiction ("development appeals"). This practice note is to be known as *Practice Note – Class 1 Development Appeals*.

Purpose of Practice Note

3. The purpose of this practice note is to set out case management procedures for the just, quick and cheap resolution of development appeals.

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.

Expert evidence

42. Parties are encouraged to consider whether expert evidence is genuinely necessary to resolve the issues in dispute in development appeals. Unnecessary expert evidence substantially increases the time and cost of appeals. Parties are encouraged to consider whether the proceedings can appropriately be fixed for hearing before a Commissioner or Commissioners with special knowledge and experience in relation to the issues in dispute.
43. 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;

- (iii) whether the issue is likely to involve a genuine division of expert opinion on methodology, or schools of thought in the discipline; and
 - (iv) whether the issue relates to the adequacy or sufficiency of information provided in the development appeal application;
- (f) whether the evidence of the parties' single expert involves the provision of aids to assist in the assessment of a development appeal application (such as shadow diagrams, view lines or photo montages).
- (g) whether the parties' single expert would be required independently to obtain further information or to undertake monitoring, surveys or other means of obtaining data before being able to provide expert evidence;
- (h) 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;
- (i) 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
- (j) 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.
44. The Court will not usually accept the appointment of a parties' single expert if that expert is unable to provide a report within 5 weeks of receiving the brief or is unable to attend a hearing within a further 28 days thereafter.
45. The usual directions in **Schedule D** provide for a parties' single expert 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.
46. 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.

47. 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.
48. 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).

49. It is not the role of any expert to opine whether a development appeal should be upheld or dismissed. That is the role of the consent authority and, on appeal, the Court exercising the functions of the consent authority. Expert opinions in reports and joint reports are to deal with the contentions raised by the parties. Any other matter relevant to the expert's expertise, which the expert feels obliged to draw to the attention of the parties and the Court, may also be noted.

50. 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.
51. An expert witness should identify any pre-existing relationship between the expert witness, or their firm or company, and a party to the litigation.
52. 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.

53. Experts' reports are not to repeat matters in Part A Facts of the statements of facts and contentions. Wherever possible, an expert should state that Part A Facts has been adopted as correct. If this cannot be stated, the expert should identify the matters which are disputed and state his or her position in relation to those matters.
54. If experts are directed by the Court to confer, experts are to ensure that their 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.
55. 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.
56. 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).
57. If a party requires any expert for cross-examination, notice is to be given at least seven days before the hearing.

58. 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.

Costs and compliance

59. 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.

60. 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. Unnecessary documents may attract adverse costs orders.

61. 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 D

Usual directions at the first directions hearing for development appeal applications

Note: Strike through/amend as required.

A. ~~If the parties agree or the Court requires the proceedings to be fixed for a preliminary conference under s 34 of the *Land and Environment Court Act 1979*~~

1. The appeal is listed for a preliminary conference under s 34 of the *Land and Environment Court Act 1979* on #.
2. The [respondent/applicant for consent or objector] is to file and serve its statements of facts and contentions in accordance with Schedule [B/C] of *Practice Note – Class 1 Development Appeals* by # [insert date having regard to date of preliminary conference].

Note: This direction may be unnecessary for short matters.

3. The [applicant for consent or objector/respondent] is to file and serve its statements of facts and contentions in reply in accordance with Schedule [B or C] of *Practice Note – Class 1 Development Appeals* by # [insert date having regard to date of preliminary conference]. This statement is not to repeat any facts not in dispute.

Note: This direction may be unnecessary for short matters.

4. The proceedings are listed for a second directions hearing on # [+ 14 days after the preliminary conference].
5. (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 # [seven days after the preliminary conference].

(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 # [no later than 11 days after the preliminary conference].

- (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.

Note: If the proceedings are resolved at the preliminary conference, these directions will not need to be followed.

6. If the proceedings are resolved after the preliminary conference, the parties are to notify the Court at least 48 hours before the date of the second directions hearing. If the proceedings have been resolved, the second directions hearing may be vacated.

B. If the parties do not agree or the Court does not requires the proceedings to be fixed for a preliminary conference under s 34 of the *Land and Environment Court Act 1979*.

1. The [respondent/applicant for consent or objector] is to file and serve its statements of facts and contentions in accordance with Schedule [B or C] of *Practice Note – Class 1 Development Appeals* by # [insert date having regard to date of preliminary conference].

Note: This direction may be unnecessary for short matters.

2. The [applicant for consent or objector/respondent] is to file and serve its statements of facts and contentions in reply in accordance with Schedule [B or C] of *Practice Note – Class 1 Development Appeals* by # [insert date having regard to date of preliminary conference]. This statement is not to repeat any facts not in dispute.

Note: This direction may be unnecessary for short matters.

Note: The usual directions in the following 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 G below should usually be made.

C. 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.
 - (i) The parties are to agree on a parties' single expert and their remuneration and are to notify the Court of the expert's name and that the expert's remuneration has been agreed by # [+ 7 days of the first/second directions hearing].
 - (ii) Failing agreement, the parties are to file and serve the names, CVs and fee estimates of three appropriately qualified experts by # [+ 10 days of the first/second directions hearing]. The Court will make orders (iii) and (iv) below in Chambers and notify the parties accordingly.
 - (iii) The Court orders the parties to engage # [insert name] as a parties' single expert.
 - (iv) 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 first/second directions hearing].
4. The parties' single expert is to file and serve their expert report by # [within 6 weeks of the first/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.

D. If the contentions are that there is insufficient information to assess the application, or any other circumstance makes it appropriate for one party to file and serve its evidence before the other, the following directions may be considered appropriate:

1. The [applicants'/respondents'] experts are to file and serve their individual expert reports by # [within + 28 days of the first/second directions hearing].

2. The [respondents'/applicants'] experts are to file and serve their individual expert reports by # [within + 6 weeks of the of the first/second directions hearing].

3. 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, which is to include any evidence in reply, by # [within + 8 weeks of the first/second directions hearing].

E. If the contentions do not involve inadequate information or any other circumstance does not make it appropriate for one party to file and serve its evidence before the other, the following directions may be considered appropriate:

1. The applicants' and respondents' experts are to file and serve their individual expert reports by # [within + 28 days of the first/second directions hearing].

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, which is to include any evidence in reply, by # [within + 6 weeks of the first/second directions hearing].

F. 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 first/second directions hearing].
3. No expert reports, other than the joint reports, may be relied upon at the hearing, without leave.

G. For all matters

1. The proceedings are fixed for hearing on # [in all cases as soon as reasonably possible and usually within + 12 weeks from the return date].
2. The hearing is to be [an on site hearing] or [a Court hearing] and is to commence [on site at 9.30am] or [in Court at 10.00am]. If the parties consider the site may be difficult to find, they are to file an agreed map showing the proposed location for the commencement of any hearing on site at 9.30am two working days before the hearing.

Note: If a matter is fixed for an on site hearing or is otherwise to involve substantial time or taking of evidence on site, the parties should ensure that appropriate facilities are available for that purpose, including a table and chairs and bathroom facilities, and that the hearing will be

open to the public and will be able to be observed and heard by all persons attending the hearing.

3. Parties are to serve a copy of these directions, the statements of facts and contentions, 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.
4. 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.
5. 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.
6. 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.
7. 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.
8. 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.

9. 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.
10. If any witness is required for cross-examination, notice is to be given at least seven days before the hearing.
11. 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.
12. The respondent consent authority is to file and serve a bundle of documents by # [14 days before the hearing]. The bundle is to contain copies of relevant environmental planning instruments, relevant extracts from development control plans and policies, and documents evidencing the lodgement, processing and determination of the application by the consent authority, including all submissions from objectors, and the decision of the consent authority but is not to otherwise include copies of any documents annexed to the development appeal. Unnecessary copying and duplication of documents is to be avoided. The bundle is to be subdivided into relevant divisions, paginated and have a table of contents.
13. The respondent consent authority is to file and serve a notice of objectors who wish to give evidence in the hearing, of whom the consent authority is aware, by # [7 days before the hearing]. The notice is to identify the objector, their address, where they wish to give evidence (on site or in Court) and whether they made a written submission about the application (in which event, the notice is to provide the page number of that submission in the key bundle). If there is no submission, the respondent consent authority should, if possible, file and serve a short statement identifying the topics about which the objector wishes to give evidence.
14. The respondent consent authority is to file and serve draft conditions of consent (in both hard copy and electronic form) by # [14 days before the hearing].
15. The applicant for consent is to file and serve its draft conditions in response (in both hard copy and electronic form) by # [7 days before the hearing].

- 16 Parties are to notify promptly the Court if there is any material slippage in the timetable.
- 17 The parties have liberty to restore on three working days' notice.
- 18 At the hearing the evidence of experts is to be given by way of concurrent evidence, unless the hearing judge or commissioner directs otherwise.

H. If issues of fact or law precluding the grant of consent are raised:

~~If necessary~~ [Strike through/amend as required]:

1. The parties are to file and serve any affidavits, reports or statements on which they wish to rely by # [within + 14 days of the first directions hearing].
2. The parties are to file and serve any affidavits, reports or statements in reply by # [within + 28 days of the first directions hearing].

Note: Directions 1 and 2 may be unnecessary depending on the nature of the issue raised.
3. The parties are to file an agreed bundle of documents by # [within + 5 weeks of the first directions hearing].
4. The party raising the issue is to file and serve an outline of submissions by # [two working days before the hearing].
5. The other party is to file and serve an outline of submissions by # [one working day before the hearing].
6. The issue is listed for hearing separately from any other issues in the proceedings on #.
7. Parties are to notify promptly the Court if there is any material slippage in the timetable.
8. The parties have liberty to restore on three working days' notice.

Or for small matters, where there is no requirement for affidavits, reports or statements, bundles of documents or outlines of submissions:

1. The issue is listed for hearing separately from any other issues in the proceedings before the [Duty Judge/Duty Commissioner] on # (usually a Friday).

Date: # [insert date]