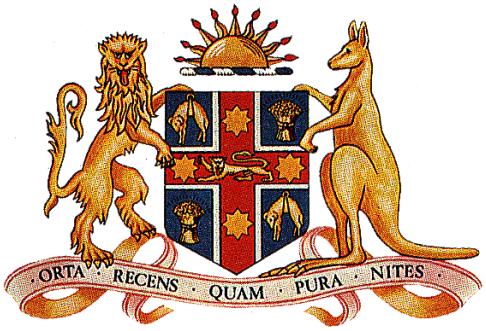

Government Gazette

of the State of

New South Wales

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Friday, 24 March 2023

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DISTRICT COURT ACT 1973

District Court of New South Wales

Direction

Pursuant to section 173 of the District Court Act 1973, I direct that the District Court shall sit in its Criminal jurisdiction at the place and time shown as follows:-

Coffs Harbour	10.00am	3rd of October 2023 (3-4 week) **Criminal**

Dated this 15th of March 2023

Justice D Price AO
Chief Judge

DISTRICT COURT ACT 1973

District Court of New South Wales

Direction

Pursuant to section 173 of the District Court Act 1973, I direct that the District Court shall sit in its Criminal jurisdiction at the place and time shown as follows:-

Armidale	10.00am	13th of November 2023 (1 week) **Criminal**

Dated this 15th of March 2023

Justice D Price AO
Chief Judge

DISTRICT COURT ACT 1973

District Court of New South Wales

Direction

Pursuant to section 173 of the District Court Act 1973, I direct that the District Court shall sit in its Criminal jurisdiction at the place and time shown as follows:-

Grafton	10.00am	6th of November 2023 (1 week) **Criminal**

Dated this 15th of March 2023

Justice D Price AO
Chief Judge

DISTRICT COURT ACT 1973

District Court of New South Wales

Direction

Pursuant to section 32 of the District Court Act 1973, I direct that the District Court shall sit in its civil jurisdiction at the place and time shown as follows:-

Taree	10.00am	20th of March 2023 (1 week) **Sittings Cancelled**

Dated this 16th of March 2023

Justice D Price AO
Chief Judge

The Chief Justice
New South Wales

PRACTICE NOTE SC Eq 3

Supreme Court Equity Division - Commercial List and Technology and Construction List

Commencement

1. This Practice Note was issued on 22 March 2023 and commences on 4 April 2023.

Application

2. This Practice Note applies to new and existing proceedings in, or to be entered in, the Commercial List or the Technology and Construction List in the Equity Division.

Definitions

3. In this Practice Note:

Court Book means the documents that a party intends to rely upon at the trial or hearing of an application
CPA means the *Civil Procedure Act* 2005
UCPR means the *Uniform Civil Procedure Rules* 2005
SCR means the *Supreme Court Rules* 1970
Lists mean the Commercial List or the Technology and Construction List
List Judge means a judge of the Equity Division assigned to administer the Lists and
Document has the same meaning as in the *Evidence Act 1995 (NSW)*.

Introduction

4. The purpose of this Practice Note is to set out the case management procedures employed in the Lists for the just, quick and cheap disposal of proceedings.

5. Practice Note SC Eq 1 shall not apply to proceedings in the Lists.

6. It is expected that this Practice Note will be observed for the conduct of proceedings entered in either of the Lists.

7. A party who considers that compliance with this Practice Note will not be possible, or will not be conducive to the just, quick and cheap disposal of the proceedings, may apply to be relieved from compliance on the basis that an alternative proposed regime will be more conducive to such disposal.

Pleadings and Entry in the Lists

8. A matter in the Lists shall be commenced in the general form of Summons prescribed under the UCPR. There is to be filed with the Summons a List Statement, for the Commercial List a "Commercial List Statement" and for the Technology and Construction List a "Technology and Construction List Statement", setting out, in summary form, in the form of Annexure 1:
   (a) the nature of the dispute;
   (b) the issues which the plaintiff believes are likely to arise;
   (c) the plaintiff's contentions;
   (d) the questions (if any) the plaintiff considers are appropriate to be referred to a referee for inquiry and report; and
   (e) a statement as to whether the parties have attempted to mediate ***and*** whether the plaintiff is willing to proceed to mediation at an appropriate time.

9. The plaintiff's contentions should:
   (a) avoid formality;
   (b) state the allegations the plaintiff makes with adequate particulars; and
   (c) identify the legal grounds for the relief claimed.

10. A defendant shall file and serve a List Response, in the Commercial List a "Commercial List Response" or in the Technology and Construction List a "Technology and Construction List Response", setting out, in summary form in the form of Annexure 1:
   (a) the nature of the dispute;
   (b) the issues which the defendant believes are likely to arise;
   (c) the defendant's response to the plaintiff's contentions including the legal grounds for opposition to the relief claimed in the Summons;
   (d) the questions (if any) the defendant considers are appropriate to be referred to a referee for inquiry and report; and
   (e) a statement as to whether the parties have attempted to mediate ***and*** whether the defendant is willing to proceed to mediation at an appropriate time.

11. The defendant's contentions should:
   (a) avoid formality;
   (b) admit or deny the allegations the plaintiff makes;
   (c) in so far as they do not already appear state the allegations the defendant makes including adequate particulars of those allegations; and
   (d) identify the legal grounds for opposition to the relief claimed in the Summons.

12. Any Cross-Claim shall be made in the general form of Cross-Summons prescribed under the UCPR. There is to be filed and served with any Cross-Summons a List Cross-Claim Statement, in the Commercial List a "Commercial List Cross-Claim Statement" or, in the Technology and Construction List a "Technology and Construction List Cross-Claim Statement" setting out the matters listed in paragraphs 8 and 9 above in the form of Annexure 1.

13. A Cross-Defendant shall file and serve a List Cross-Claim Response, in the Commercial List a "Commercial List Cross-Claim Response" or, in the Technology and Construction List, a "Technology and Construction List Cross-Claim Response" setting out the matters listed in paragraphs 10 and 11 above in the form of Annexure 1.

14. At the time of service of any Cross-Summons the Cross-Claimant is to serve on the Cross-Defendant copies of the Summons and any other Cross-Summons together with any relevant List Statement and List Response and any List Cross-Claim Statement and List Cross-Claim Response that have been served on or by the Cross-Claimant.

15. Any party moving for an order for entry of any proceedings in either of the Lists shall move by Notice of Motion at the earliest possible time and shall file and serve with the Notice of Motion a relevant List Statement or List Response.

16. Any motion for an order for entry of proceedings in either of the Lists shall be made returnable before the List Judge on a Friday.

17. For ease of reference all List Statements and Responses (including in relation to Cross-Claims) must include a Front Sheet identifying the names of the parties and their designation as plaintiff or defendant or Cross-Claimant or Cross-Defendant. This paragraph does not apply to a Summons or Cross-Summons.

Removal from the Lists

18. Upon an order being made removing proceedings from either of the Lists and subject to paragraph 19, this Practice Note shall not apply to the proceedings from the making of that order.

19. The Court may direct that this Practice Note shall continue to apply to the proceedings to the extent stated in the direction.

20. The making of an order removing proceedings from either of the Lists shall not affect any orders made or directions given prior to such removal.

Motions and Directions

21. All proceedings in the Lists are case managed by the List Judge with the aim of ensuring a speedy resolution of the real issues between the parties. The Lists are administered in Court on Friday of each week. Motions are listed at 9.15 am and are called through for the purpose of ascertaining the length of the hearing and allocating a time for hearing on that or some other day. All matters for directions will be listed for live hearings in groups of 10 in half hourly intervals commencing at 10.00 am. Directions in the Technology and Construction List will follow immediately after directions in the Commercial List. The times for the commencement of the Motions and Directions hearings may change and Practitioners should always check the daily court lists as published prior to attendance at Court on a Friday

22. The Court's expectation of Practitioners appearing in the Lists includes that:
    (a) careful review of the case will be made as early as practicable for the purpose of informing the Court of its suitability for mediation, for reference out of all or some of the issues, and/or for the use of a single expert, or a Court Appointed Expert or the use of an appropriate concurrent evidence process;
    (b) at the time the matter is set down for hearing trial counsel will provide to the Court: (1) a considered opinion of the realistic estimate of the time required for

trial; and (2) the allocation of time for their client's evidence and submissions in the stopwatch system for trial;

(c) agreement will be reached on a timetable for the preparation of matters for trial and/or reference and/or mediation and Consent Orders will be handed up during the directions hearing;
(d) if there is slippage in an agreed timetable, further agreement will be reached without the need for the intervention of the Court; and
(e) requests for Court intervention in relation to timetabling will only be sought rarely when, for good reason, agreement has proved to be impossible.

23. To facilitate the just, quick and cheap resolution of matters Consent Orders will be made by the List Judge in Chambers on days other than Friday by application in writing to the List Judge's Associate. When Consent Orders are to be made either in Chambers or in Court varying a timetable, it is imperative that those Orders include the vacation of any date for directions hearings or the hearing of Motions that the parties no longer wish to maintain. If the proceedings settle, it is necessary to have the List Judge make Orders finalising the litigation, rather than filing Terms or Orders with the Registry. Those Orders may also be made by consent in Chambers.

24. The Lists close at 12 noon on Thursday. Any application to add a matter to the List or remove a matter from the List must be made prior to 12 noon on Thursday. Such applications are to be made in writing to the List Judge's Associate.

25. At the first and/or subsequent directions hearings orders will be made and directions given with a view to the just, quick and cheap disposal of the proceedings. The orders or directions may relate to:
(a) the filing of a Summons, List Statements, List Responses or other documents;
(b) the filing of a Cross-Summons, List Cross-Claim Statements or Responses;
(c) the filing of a statement of agreed issues and the result in the proceedings according to the determination of those issues;
(d) the provision of any essential further particulars that are not contained in the List Statements or Responses;
(e) the making of admissions, pursuant to a notice to admit facts or otherwise;
(f) the appointment of a single expert or a Court Appointed Expert;
(g) the holding of conferences of experts including with a view to providing joint reports and/or agendas for use in the concurrent evidence method at trial;
(h) the filing of lists of documents either generally or with respect to specific matters;
(i) the preparation of a Scott Schedule;
(j) the provision of copies of documents;
(k) the administration and answering of interrogatories either generally or with respect to specific matters;
(l) the service and***/or*** filing of affidavits or statements of evidence by a specified date or dates;
(m) the reference to a referee for inquiry and report of the whole of the proceedings or any question arising therein; and
(n) the obtaining of the assistance of any person specially qualified to advise on any matter arising in the proceedings.

26. Orders or directions relating to the provision of particulars, the filing of lists of documents and the administration of interrogatories will be made only upon proof of necessity.

Discovery

27. The Court endorses a flexible rather than prescriptive approach to discovery to facilitate the making of orders to best suit each case.

28. Subject to an order of the Court or unless otherwise agreed between the parties, discovery of electronically stored documents and information is to be made electronically. Discoverable documents and information that are not stored electronically should only be discovered electronically if it is more cost effective to do so.

29. Practitioners must advise their opponents at an early stage of the proceedings of potentially discoverable electronically stored information and meet to agree upon matters including:
    (a) the format of the electronic database for the electronic discovery;
    (b) the protocol to be used for the electronic discovery including electronically stored information;
    (c) the type and extent of the electronically stored information that is to be discovered; and
    (d) whether electronically stored information is to be discovered on an agreed without prejudice basis:-
        (i) without the need to go through the information in detail to categorise it into privileged and non-privileged information; and
        (ii) without prejudice to an entitlement to subsequently claim privilege over any information that has been discovered and is claimed to be privileged under s 118 and/or s 119 of the *Evidence Act 1995* and/or at common law.

30. At any hearing relating to discovery (including its form and extent), the Court expects practitioners to have:
    (a) ascertained the probable extent of discoverable documents
    (b) conferred with their opponents about any issues concerning the preservation and production of discoverable documents including electronically stored information
    (c) given notice to their opponents of any problems reasonably expected to arise in connection with the discovery of electronically stored information, including difficulty in the recovery of deleted or lost data
    (d) given consideration to and conferred in relation to the particular issues involved in the collection, retention and protection of electronically stored information, including:
        (i) whether the burden and cost involved in discovering a particular document or class of documents is justified having regard to the cost of accessing the document or class of documents and the importance or likely importance of the document or class of documents to the proceedings;
        (ii) whether particular software or other supporting resources may be required to access electronically stored information;

(iii) the manner in which documents are to be electronically formatted so that the integrity of the documents is protected;
(iv) whether particular documents need to be discovered in hard copy form (such as original documents or documents larger than A3 in size);
(v) how privileged documents should be appropriately protected;

(e) given consideration to preparing and, if agreed, prepared a Joint Memorandum signed by the senior practitioners who attended the discovery meeting (and who are to attend the discovery hearing) identifying:
(i) areas of agreement on proposed discovery;
(ii) areas of disagreement with a brief statement of the reasons therefore; and
(iii) respective best estimates of the cost of discovery.

31. The Court will make orders for discovery having regard to the overriding purpose of the just, quick and cheap resolution of the disputes between the parties.

32. For the purposes of ensuring that the most cost efficient method of discovery is adopted by the parties, on the application of any party or of its own motion, the Court may limit the amount of costs of discovery that are able to be recovered by any party.

Evidence

33. With the exception of evidence in support of interlocutory applications, the former practice of filing evidence as case preparation occurs is to cease. Timetables for case preparation should include provision for the serving of evidence on the other parties but not filing it with the Court. Evidence to be relied upon at trial will only be filed with the Court at the time provided for in the Usual Order for Hearing.

34. Evidence to be relied upon in support of interlocutory applications is to be served on the other parties and filed with the Court. Timetables for preparation of such applications should include provision for that process.

35. The former practice of annexing or exhibiting documents to affidavits or statements will only be permitted in interlocutory applications and otherwise with the leave of the Court or pursuant to agreement between the parties.

36. In the preparation of evidence to be relied upon at trial any documents referred to in any statement or affidavit are to be placed into the proposed Court Book in chronological order.

37. Subject to an order of the Court or unless otherwise agreed between the parties, the Proposed Court Book is to be established in electronic form.

38. Prior to the preparation of a timetable for the serving of evidence the parties are to agree on the manner in which the electronic form of Court Book (the Electronic Court Book) is to be established including, where it is to be established; which party/parties (or third party) will manage it and its format. Such agreement should be recorded in the Short Minutes of Order for the preparation of the evidence in the proceedings.

39. Electronic Court Book is to be produced at trial. A hard copy of only those parts of the Electronic Court Book that will be essential for the Court to consider in determining the dispute between the parties is also to be produced at trial.

Orders for reference

40. Consideration should be given throughout the course of proceedings as to whether any questions are appropriate for referral to a referee for inquiry and report.

41. Where questions are appropriate to be referred to a referee for inquiry and report, the parties should:
    (a) formulate the questions with precision and
    (b) inform the Court of:
        (i) the identity of an agreed referee or, if no agreement can be reached, the referee each suggests
        (ii) the date on which the referee can commence the reference
        (iii) the expected duration of the reference and
        (iv) the anticipated date for delivery of the report.

42. An order made for reference to a referee for inquiry and report will normally be in the form of the Usual Order for Reference set out in Annexure 2.

43. Consent Orders for amendment to the matters referred to the Referee in the Schedule to the Usual Order for Reference may be filed with the List Judge's Associate in writing for the making of such order in Chambers. Any contested amendments are to be heard in the Motions List on Fridays.

Representation

44. Each party not appearing in person shall be represented at any directions hearing by a barrister or a solicitor familiar with the subject matter of the proceedings and with instructions sufficient to enable all appropriate orders and directions to be made.

45. Practitioners should have communicated prior to the directions hearing with a view to agreement on directions to propose to the Court and preparation of short minutes recording the directions.

Urgent applications and liberty to apply

46. A party seeking ex parte or urgent orders or directions prior to the commencement of proceedings or in the course of the proceedings should telephone the Commercial List Judge's Associate, who will advise the party of the Judge to whom application should be made.

47. Parties have general liberty to apply and may cause proceedings to be listed at a directions hearing prior to a specified future directions hearing. A party seeking to do so should make prior arrangement with, or give appropriate notice to, any other party, and should send a fax to the List Judge's Associate who will advise the date for listing.

Listing for hearing

48. Where the whole, or any part, of the proceedings is/are to be heard by the Court, a date for hearing may be fixed prior to completion of interlocutory steps.

49. Proceedings will be fixed for hearing during a directions hearing in the Lists on Friday at which time the Court should be provided with a realistic estimate of the hearing time required and where there is to be an application for a stopwatch hearing, paragraphs 50 to 53 are applicable. Upon fixing a date for hearing the Court will normally direct that the Usual Order for Hearing set out in Annexure 3 shall apply, with or without modification.

Stopwatch Hearings

50. An option for matters that are heard by the Court and/or referred to Referees is the stopwatch method of trial or reference hearing. In advance of the trial or reference, the Court will make orders in respect of the estimated length of the trial or reference and the amount of time each party is permitted to utilise. The orders will allocate blocks of time to the aspects of the respective cases for examination in chief, cross-examination, re-examination and submissions. If it is in the interests of justice, the allocation of time will be adjusted by the Court or the Referee to accommodate developments in the trial or reference.

51. This method of hearing is aimed at achieving a more cost effective resolution of the real issues between the parties. It will require more intensive planning by counsel and solicitors prior to trial including conferring with opposing solicitors and counsel to ascertain estimates of time for cross-examination of witnesses and submissions to be built in to the estimate for hearing.

52. Any party wishing to have a stopwatch hearing must notify the other party/parties in writing prior to the matter being set down for hearing or reference out. At the time the matter is set down for hearing or referred out to a Referee it is expected that solicitors or counsel briefed on hearing will be able to advise the Court:
    (a) whether there is consent to a stopwatch hearing; and
    (b) if there is no consent, the reasons why there should not be a stopwatch hearing.

53. If there is consent to a stopwatch hearing counsel and/or solicitors must be in a position to advise the Court of:
    (a) the joint estimate of the time for the hearing of the matter; and
    (b) the way in which the time is to be allocated to each party and for what aspect of the case.

Experts

54. The use of a single expert or a Court Appointed Expert and/or the concurrent evidence of experts is encouraged in suitable cases. The parties are to confer as early as practicable with a view to reaching agreement as to whether the use of such an expert or the concurrent evidence of experts is appropriate and, if agreed, the inclusion of such appointment and/or adoption of concurrent evidence should be accommodated in the timetable for the preparation for hearing.

55. Where experts' reports have been or are to be served (whether or not pursuant to an order or direction of the Court) the Court will, unless otherwise persuaded, direct, upon such terms as it thinks fit, that the parties cause the experts or some of them to confer with a view to identification of and a proper understanding of any points of difference between them and the reasons therefore and a narrowing of such points of difference. The Court may, at the same time or subsequently, direct that the parties and/or the experts prepare an agreed statement of the points of agreement, and of difference remaining, between experts following such conference and the reasons therefore (see Schedule 7 of the UCPR).

Proportionate Liability

56. Any party in proceedings involving an apportionable claim, who has reasonable grounds to believe that a particular person may be a concurrent wrongdoer in relation to the claim(s) must, as soon as practicable, give written notice to all other parties to the proceedings of:
    (a) the identity of that person and
    (b) the alleged circumstances that may make that person a concurrent wrongdoer.

Costs

57. otherwise ordered, a party in whose favour an order for costs is made may proceed to assessment of such costs forthwith.

58. The cost of unnecessary photocopying and assembly of documents is unacceptable. It is incumbent on the lawyers for the parties to carefully consider the documents necessary to be included in the tender bundle. Excessive documents may attract adverse costs orders.

Mediation

59. The parties should be aware of the provisions of Part 4 of the CPA and relevant parts of the UCPR relating to mediation.

60. It is expected that prior to the commencement of proceedings in the Lists, the parties will have considered referral of their disputes to mediation. It is also expected that the lawyers, or the litigant if not legally represented, will be in a position to advise the Court on the first return date of the Summons whether:
    (a) the parties have attempted mediation; and
    (b) their respective clients are willing to proceed to mediation at an appropriate time.

61. If a matter is referred to mediation by consent and/or by an order pursuant to the section 26 of the CPA, the parties are to ensure that the person(s) who is (are) able to make a decision as to whether the matter settles is present personally or by authorised nominee(s) at the mediation.

Summary judgment

62. As a general rule applications to strike out or for summary judgment will not be entertained. Sometimes applications are appropriate, but Practitioners should expect strictness in declining to entertain such applications.

Use of technology

63. The use is encouraged, where appropriate, of technology permitting the taking of evidence in, or other conduct of, proceedings by video link or conference telephone and the management of documents and transcript. Practitioners should propose the use of such technology when appropriate, and the Court may give directions involving its use: for example, in major cases with a view to statements, documents and transcript being available to all concerned on a common data base.

The Hon. A S Bell
Chief Justice of New South Wales
22 March 2023

Related Information

See also:
Supreme Court Practice Note SC Gen 1 – Application of Practice Notes
Supreme Court Practice Note SC Gen 6 - Mediation
Supreme Court Practice Note SC Gen 7 – Use of technology
Supreme Court Practice Note SC Gen 10 – Single expert witness
Supreme Court Practice Note SC Gen 11 – Joint conferences of expert witnesses
Civil Procedure Act 2005
Uniform Civil Procedure Rules 2005
Supreme Court Rules 1970

Amendment History
22 March 2023: This Practice Note replaces the previous version of SC Eq 3 that was issued on 23 September 2019.
23 September 2019: This Practice Note replaces the previous version of SC Eq 3 that was issued on 10 December 2008.
10 December 2008: This Practice Note replaces Practice Note SC Eq 3 issued on 20 July 2007.
Practice Note SC Eq 3 issued on 20 July 2007 replaced the Note issued 1 September 2006.
Practice Note SC Eq 3 issued on 1 September 2006 replaced the Note issued on 17 August 2005.
Practice Note SC Eq 3 issued on 17 August 2005 replaced Former Practice Note No. 100.

ANNEXURE 1

[LIST] STATEMENT [OR] LIST CROSS CLAIM STATEMENT

[LIST] RESPONSE [OR] LIST CROSS CLAIM RESPONSE

A. NATURE OF DISPUTE

B. ISSUES LIKELY TO ARISE

C. PLAINTIFF'S [or CROSS CLAIMANT'S] CONTENTIONS
[or C DEFENDANT'S [or CROSS DEFENDANT'S] RESPONSES TO CONTENTIONS which should include reference to any relief claimed in the Summons or Cross Summons that are admitted, not admitted or denied.

D. QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE

E. A STATEMENT AS TO WHETHER THE PARTIES HAVE ATTEMPTED MEDIATION; WHETHER THE PARTY IS WILLING TO PROCEED TO MEDIATION AT AN APPROPRIATE TIME.

ANNEXURE 2

USUAL ORDER FOR REFERENCE

1. Pursuant to Part 20 rule 14 of the Uniform Civil Procedure Rules (the "UCPR"), refer to *[state name of referee]* for enquiry and report the matter in the Schedule hereto.

2. Direct that (without affecting the powers of the Court as to costs) the parties, namely *[state relevant parties]*, be jointly and severally liable to the referee for the fees payable to him.

3. Direct that the parties deliver to the referee forthwith a copy of this order together with a copy of Division 3 of Part 20 of the UCPR.

4. Direct that:
   - 4.1 subject to paras 4.2 and 4.3 hereof, the provisions of Pt 20 r 20 shall apply to the conduct of proceedings under the reference;
   - 4.2 the reference will commence on *[date]* unless otherwise ordered by the referee;
   - 4.3 the referee consider and implement such manner of conducting proceedings under the reference as will, without undue formality or delay, enable a just determination to be made including, if the referee thinks fit:
     - 4.3.1 the making of inquiries by telephone;
     - 4.3.2 site inspection;
     - 4.3.3 inspection of plant and equipment; and
     - 4.3.4 communication with experts retained on behalf of the party

4.4 any evidence in chief before the referee shall, unless the referee otherwise permits, be by way of written statements signed by the maker of the statement;

4.5 the referee submit the report to the Court in accordance with Pt 20 r 23 addressed to the Equity Division Registrar on or before [date].

5. Amendments to the Schedule, whether by agreement or on a contested basis, are to be the subject of an order made by the Court.

6. If for any reason the Referee is unable to comply with the Order for delivery of the report to the Court by the date in this Usual Order for Reference, the Referee is to provide to the List Judge an Interim Report setting out the reasons for such inability and an application to extend the time within which to deliver the report to the Court to a date when the Referee will be able to provide the Report.

7. Grant liberty to the referee or any party to seek directions with respect to any matter arising in proceedings under the reference upon application made on 24 hours' notice or such less notice ordered by the Court.

8. Reserve costs of the proceedings.

9. Stand the proceedings over for further directions on [date].

SCHEDULE

The whole of the proceedings; or

The following questions arising in the proceedings, namely *[state the questions].*

ANNEXURE 3

USUAL ORDER FOR HEARING

Experts' Reports

1. In any case in which there is expert evidence to be relied upon by the parties, the experts are to meet no later than three weeks before trial for the purpose of reaching agreement on as many issues as possible and producing:
   1.1 a joint report; and
   1.2 any separate report(s) dealing with those matters that are unable to be agreed.

2. The joint report and any separate report(s) are to be filed and served no later than five working days before trial.

3. In cases in which expert evidence is to be given concurrently, the experts are to meet no later than three weeks prior to trial for the purpose of producing:
   3.1 a joint report;

3.2 any separate report(s) dealing with those matters that are unable to be agreed; and

3.3 a draft agenda for discussion of the contested issues in the concurrent evidence session at trial.

4. The joint report and any separate report(s) and the draft agenda are to be filed and served no later than 5 working days before trial.

Affidavits and Statements

5. Where no directions have been given for the service of affidavits or statements of evidence, each party shall, not less than 28 days before the date fixed for hearing, serve on each other party a statement of the evidence proposed to be led from each witness to be called by that party, signed by the proposed witness, unless the Court otherwise orders.

6. Where directions have been given for the service of affidavits or statements of evidence, or where paragraph 2 of this order applies:

6.1 a party who fails to comply with an order made for the service of affidavits or statements of evidence, or with paragraph 2 of this order, may not adduce evidence to which the order, or paragraph 2 of this order, applies without the leave of the Court;

6.2 at least 14 days before the date fixed for hearing each party shall, by notice in writing to each other party, state whether he or she proposes to object to the whole or any part of any affidavit or statement of evidence and the grounds for the objections;

6.3 the Court may, on such terms as it thinks fit, direct that the statement of evidence served, or part of it, stand as the evidence in chief of the witness, or as part of such evidence;

6.4 if the affidavit is not read or the maker of the statement of evidence is not called as a witness, no other party may put the affidavit or statement in evidence without the leave of the Court;

6.5 if the affidavit is read or the maker of the statement of evidence called as a witness, then save in relation to new matters which have arisen in the course of the trial, the party serving the affidavit or statement may not lead evidence from the deponent or the maker of the statement of evidence (as the case may be), the substance of which is not included in the affidavit or statement of evidence served without the leave of the Court;

6.6 whether or not the affidavit or statement of evidence or any part of it is used in evidence by the party calling the witness, if the deponent or the maker of the statement of evidence is called as a witness any other party may use the affidavit or statement of evidence or any part of it in cross-examination of the witness unless the Court otherwise orders; and

6.7 nothing in this order shall otherwise deprive any party of any proper objection to the admissibility of evidence.

Documents –Court Book

7. In preparing evidence for trial the plaintiff/cross-claimant is to place into the Electronic Court Book in chronological order all documents referred to in any affidavit or

statement proposed to be relied upon at trial. The method of numbering of documents in the Electronic Court Book must ensure that the numbers allocated to documents do not change.

8. In responding to the plaintiff's/cross-claimant's evidence, the defendant/cross-defendant is to place into the Electronic Court Book all documents not already included that are referred to in any affidavits or statements proposed to be relied upon at trial.

9. By no later than six weeks before the date fixed for hearing each party must notify each other party in writing of any additional documents that party proposes should be included in the Electronic Court Book.

10. Within 10 working days thereafter each party shall advise each other party in writing:
    10.1 which of the specified additional documents may be included in the Electronic Court Book by consent;
    10.2 whether the authenticity of any document, and if so which, is disputed; and
    10.3 insofar as any document (already included and/or proposed to be included) may not be included in the Electronic Court Book by consent the grounds for the objection to its inclusion.

11. Not later than three weeks prior to the date fixed for hearing all documents, whether by consent or otherwise, sought to be relied upon by all parties are to be included in the proposed Electronic Court Book in chronological order.

12. If any party requires the tender of an original document, notice in writing should be given to all other parties no later than four weeks before the date fixed for hearing.

Filing with the Court

13. No later than five working days before the hearing the plaintiff shall file, paginated and indexed, a Court Book in electronic form with two physical copies, intended to be tendered at the hearing by any party. Any party may apply to the Court for an order limiting the documents to be included in the hard copy version of the Court Book. The index of documents should indicate documents the tender of which is agreed and, in relation to the documents as to which there is no agreement, which documents they are and whether lodged on behalf of the plaintiff or on behalf of any other party to the proceedings and, if so, which party.

14. No later than two working days before the hearing all parties' barristers or solicitors shall cause to be file a folder of all affidavits, statements and reports to be relied upon at trial with an index setting out in alphabetical order:
    14.1 the name of the deponent or maker of the statement or report;
    14.2 the date of the affidavit, statement or report; and
    14.3 a short statement identifying the role of the deponent or the maker of the statement or report.

Each lay affidavit which refers to documents must include cross references to where those documents can be found in the court book

15. No later than two working days before the hearing each barrister or solicitor shall cause to be filed and served a short outline of submissions; a statement of the real issues for determination; a list of authorities; and a chronology of relevant events.

16. Compliance with orders 13, 14 and 15 is to be by delivery to the trial Judge's Associate or, if the identity of the trial Judge is unknown at the time for compliance, by delivery to the List Judge's Associate.

The Chief Justice
New South Wales

SUPREME COURT PRACTICE NOTE SC EQ 13

Supreme Court – Adoptions

Commencement

1. This Practice Note was issued on 16 March 2023 and, subject to paragraph 63 below, commences on 3 April 2023.

Application

2. This Practice Note applies to proceedings under the *Adoption Act 2000* (NSW) ("the *Adoption Act*"), and proceedings under the *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998 (Cth)* ("the Hague Convention Regulations") ("adoption proceedings").

List Management

3. Adoption proceedings are case-managed by the Adoptions List Judge ("Adoptions Judge"). The registry functions are performed by the Registrar in Equity ("Registrar"), assisted by the Adoptions Clerk.

4. The List Judge sits on the first Wednesday of each month during term at 9:00 AM to deal with applications that are allocated a return date and directions hearings. In a case of urgency, an earlier return date may be obtained by arrangement with the List Judge's Associate.

General obligations, including candour

5. In all adoption proceedings, the Court expects that:

   (a) each party not appearing in person shall be represented at any hearing by a legal practitioner familiar with the subject matter of the proceedings and with instructions sufficient to enable all appropriate orders and directions to be made;

   (b) legal practitioners will have communicated with each other with a view to reaching agreement on consent orders recording the directions to be made in accordance with this Practice Note; and

   (c) each party will abide by their duty to make known fully and frankly all matters relevant to the making of an adoption order, whether those matters tend to support or tend not to support the making of the order.[1]

Applications for adoption orders

6. **Initiating proceedings.** Applications for adoption orders under the *Adoption Act* ("adoption applications") may be commenced by the Secretary, Department of Communities and Justice (or

[1] See Uniform Civil Procedure Rules (UCPR) r 56.3.

the Principal Officer of an accredited adoption service provider in NSW)[2] on behalf of the proposed adoptive parent or parents, or the proposed adoptive parent or parents with the consent of the Secretary, or a child who is 18 or more years of age for his or her own adoption.[3] However, the consent of the Secretary to an application for an adoption order is not required if the applicant is a step parent or relative of the child, or if the application relates to an intercountry adoption.[4]

7. An application for an adoption order is commenced by summons, naming as the plaintiff(s) the Secretary, the Principal Officer or the proposed adoptive parent/s, according to the circumstances of the case ("the plaintiff"). Applications for the adoption of more than one child by the same proposed adoptive parents may be joined in one summons; however, the summons should claim a separate order for adoption in respect of each child. The summons may also include in an appropriate case claims for consent dispense orders and orders dispensing with notice. Where a child's birth certificate does not correctly identify a child's parent, a claim may be included for a declaration of parentage under the *Status of Children Act 1996.* Where registration of an adoption plan is sought, a claim may be included for an order that the adoption plan be registered.[5]

8. Where appropriate in accordance with the *Adoption Act* s 80, *Adoption Regulation 2015* cl 89, and Uniform Civil Procedure Rules (UCPR) r 56.6, the summons may include a claim for orders or directions to be sought at a preliminary hearing, in which case the summons must contain an appointment for hearing.[6] The appointment will be allocated at the time of filing and, unless special arrangements have been made with the Associate to the List Judge, will ordinarily be the first list day to occur after 14 days from the date of filing.

9. The summons should not name any defendant(s), unless a declaration of parentage under the *Status of Children Act 1996* is also sought in the summons, in which case the alleged parent in respect of whom the declaration is sought must be joined as a defendant. Unless the summons names a defendant or includes claims for orders or directions to be made at a preliminary hearing, the summons shall not contain an appointment for hearing.[7] If the plaintiff and/or proposed adoptive parents and/or child wish to be present when the adoption order is made if the matter is uncontested, the summons should include a statement to that effect.

10. **Documents to be filed by plaintiff**. The plaintiff must file the following documents with the summons or as soon as practicable thereafter:

    (a) an affidavit of the plaintiff in support of the application (made by a delegate of the Secretary, Principal Officer, or the proposed adoptive parent/s, according to the circumstances of the case), addressing the matters outlined in UCPR r 56.8, so far as they are relevant.[8]

    (b) an affidavit made by the author of the s 91 report, annexing a copy of the report prepared pursuant to s 91 of the *Adoption Act*. The deponent must state, in the affidavit, that he/she has read and agrees to be bound by the expert code of conduct contained UCPR Sch 7, and annex a copy of his/her curriculum vitae. The s 91 report must have been prepared or updated no more than six months prior to the filing of the adoption application.[9]

    (c) an affidavit of each of the proposed adoptive parents, made not more than 60 days before it is filed.[10]

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[2] Principal Officers of accredited adoption service providers are able to commence the application in their own right. In some circumstances, Barnardos commence applications as delegate of the Secretary in circumstances where the exercise of aspects of parental responsibility for the child has been delegated to the Principal Officer.

[3] If the subject child is over 18 years of age, the application may be commenced by any person named in s. 87, noting those persons are listed in the alternative.

[4] *Adoption Act* s 87.

[5] A precedent form of summons is available on the Court's website.

[6] See UCPR r 56.5.

[7] See UCPR r 56.2.

[8] A precedent form of affidavit is available on the Court's website.

[9] A precedent form of affidavit is available on the Court's website.

[10] A precedent form of affidavit is available on the Court's website.

(d) at least two affidavits made by referees for the proposed adoptive parents, annexing a handwritten referee certificate, made not more than six months before it is filed. The referees must not be related to the proposed adoptive parents and must have known the proposed adoptive parents for a period greater than two years.[11]

(e) a draft minute of each proposed adoption order, in duplicate. A separate adoption order is required for each child the subject of the proceedings. Where a consent dispense order and/or an order dispensing with notice is sought, those orders must be included in the draft minute. The draft minute of order should also annex copies of any adoptions plans which are to be approved by the court. If an adoption plan is, at any stage of the proceedings, updated, a revised order annexing the most current version of the adoption plan should be filed prior to any orders being made and a request made for the previous version held on the court file to be removed. The adoption plan should also clearly indicate the date on which it was prepared, to avoid any confusion about which plan is most up to date. [12]

(f) a draft order granting leave for the plaintiff to provide copies of the final adoption plan (whether approved or registered) to the parent/s, defendants or other significant persons in the plan (such as sibling/s, grandparent/s, or culturally significant person).

(g) a memorandum of adoption order, printed double sided and in the format required by the Registry of Births, Deaths and Marriages.[13]

(h) affidavits of service made by the person/s who personally served notice on a parent/s (or person with parental responsibility for a child), annexing a copy of the notice served (under the *Adoption Act* ss 54(3)(a), 72(1) or 88(1)), or if personal service is not effected, an affidavit of postal service which also explains why that course of service has been adopted.[14]

(i) in the event that notice cannot be served in accordance with (g) above and an order dispensing with the giving of notice is sought, an affidavit explaining what attempts have been made to effect service, why they have been unsuccessful, and evidence of any reasonable inquiries made to locate the person.

(j) if the plaintiff is seeking a consent dispense order (under s 67), and/or an order dispensing with the requirement to give notice of the proceedings (under s 88(4)), or to be relieved from notifying a person that an application to dispense with their consent is being made (under s 72(2)), brief written submissions showing why the grounds for such an order are established. The court requires strict proof of the matters upon which such orders can be made.[15] Brief written submissions can also be filed in relation to any other issues that the plaintiff considers it appropriate to address.

(k) an Adoption Matter Summary form providing relevant high-level information.[16]

11. **Appearance.** A birth parent (or other person having parental responsibility for the child, or other interested person) who wishes to oppose an adoption application must file an appearance in the Registry within 14 days after being served with notice of the proceedings.[17]

12. **Uncontested adoption applications.** After 14 days have elapsed since the parent/s (or person with parental responsibility) have been served with notice of the proceedings, and no appearance has been filed, the plaintiff must request the Adoptions Clerk to refer the application to a Judge,

[11] A precedent form of affidavit and format of the referee certificate is available on the Court's website.

[12] A precedent form of minute is available on the Court's website.

[13] A precedent form of a memorandum in the required form is available on the Court's website. Since November 2020, Births Deaths and Marriages have provided two birth certificates to an adopted person, once the adoption order is made, the second being an integrated birth certificate. For further information see: https://www.service.nsw.gov.au/transaction/apply-adoption-information-andor-integrated-birth-certificate.

[14] A precedent form of affidavit of service is available on the Court's website.

[15] See paragraphs 32 and 33.

[16] A precedent Adoption Matter Summary Form is available on the Court's website.

[17] See *Adoption Act* ss 54(3), 72(1) and 88(1).

and the Adoptions Clerk will then refer the matter to a Judge to be dealt with in conformity with UCPR r 56.4, which provides that unless the Court orders otherwise, adoption applications are to be dealt with in the absence of the public and without attendance by or on behalf of the plaintiff. However, if the plaintiff has included in the summons (as referred to in paragraph 9), or in the request for referral to a judge, a statement that the plaintiff and/or proposed adoptive parents and/or child wish to be present when the adoption order is made, then if the Court decides that an adoption order should be made, the judge will sit in court to make the order, having given reasonable notice to the plaintiff. The Court will always endeavour to accommodate the convenience of the plaintiff/proposed adoptive parents in this respect.

13. **Contested applications – directions hearing.** Where an appearance is filed, the Adoptions Clerk will refer the matter to the List Judge for case management. The judge will, pursuant to UCPR r 56.4, order that the matter not proceed in the absence of the plaintiff, will list the matter for a directions hearing, and will give the parties at least five days' notice of the appointment. The matter may not appear in the public list or, if it does, may be identified by a pseudonym or de-identified information, in which case the Court will inform the parties of the court room the day prior to the directions hearing.

14. At the directions hearing, if the person(s) who has filed an appearance wishes to oppose the application, the Court will usually make an order, pursuant to the *Adoption Act* s 118, joining that person as a defendant. The court may also, in an appropriate case, make orders for the joinder of the proposed adoptive parents if they are not already a party (see paragraph 27), the appointment of a guardian ad litem for a parent or a child, or of a legal representative for the child (see paragraphs 25 and 26), or may defer consideration of making such orders to the preliminary hearing.

15. The Court will also make orders for the service and filing of evidence and/or directions about making information available to the parties. Evidence is to be filed electronically, and the court will ensure copies are retained in a manner which maintains that confidentiality. If, for any reason, a party is not able to file material electronically, the Plaintiff is to assist in the filing of the evidence.

16. At the directions hearing, the parties are expected to have conferred for the purpose of providing a timetable to the Court for this to occur. Ordinarily, this will include:

    (a) service of the plaintiff's documents on the defendant(s). If the plaintiff intends to seek the leave of the Court to make redactions to that evidence the plaintiff should be prepared to tender evidence in support of the application at the directions hearing, and provide prior notice of intention to make such application to the other parties;[18]

    (b) service and filing of an affidavit or affidavits by the defendants, setting out their responses to the plaintiff's evidence, their proposals for the care of the child, and matters pertaining to their parenting capacity and their relationship with the child.

17. The court will also ordinarily make an order under the *Adoption Act* s 194(2) that all parties to the proceedings (and the proposed adoptive parents, if they are not the plaintiff) may inspect and receive a copy of the s 91 report. If such an order is to be opposed, the plaintiff should notify the other parties prior to the directions hearing.

18. Directions for additional expert evidence and evidence of other lay witnesses will not normally be made at the directions hearing. The Court will adjourn the proceedings for a preliminary hearing, to take place following the completion of the timetable, where practicable within three months of the first directions hearing.

19. **Contested applications – preliminary hearing.** A date for the preliminary hearing will generally be allocated at the monthly directions hearing referred to in paragraph 4 above. If it is considered necessary to vary the appointment for the preliminary hearing, the parties are expected to lodge with the List Judge's Associate draft consent orders adjusting the timetable for the making of

[18] This evidence is usually in the form of a risk assessment which is guided by the provisions in the *Children and Young Persons (Care and Protection) Act 1998* Ch 8, Part 2, Div 1A

orders in chambers, or if there is no consent or it is otherwise appropriate, to arrange with the List Judge's Associate for the matter to be relisted.

20. Prior to the preliminary hearing, the parties are expected to have conferred, to have considered what further lay and expert evidence is required, whether the matter would benefit from mediation, whether the child should be separately represented, and whether the proposed adoptive parents (if they are not the plaintiff) should be joined, and to have prepared a draft list of the real issues in dispute. At the commencement of the preliminary hearing, the plaintiff must provide to the Adoptions Judge:

    (a) a copy of any affidavits which have been served since the directions hearing;

    (b) a draft list of the real issues in dispute; and

    (c) a draft minute of directions.

21. The Court expects the parties to attend the preliminary hearing in person, subject to any prevailing COVID protocols. If a party is unable to appear in person, that party should contact the Associate to the Adoptions Judge to arrange alternative means of appearing.

22. The aim of the preliminary hearing is to give the parents and the proposed adoptive parents of the child an opportunity to explain to each other, and to the Court, the matters they wish the Court to consider when making a decision about the child's proposed adoption. The preliminary hearing is to be conducted with as little formality as the judge thinks appropriate and with the object of encouraging the participants to understand each other's position, to identify their real issues and concerns and to enable the Court to emphasise directly to the participants the child focussed nature of the inquiry and the paramountcy of the interests of the child

23. The Court may settle the list of issues and will make such orders as may be appropriate including in respect of:

    (a) any further lay and expert evidence, if necessary, which will generally be confined to the real issues in dispute as settled (see paragraph 24);

    (b) appointment of a guardian ad litem for a parent or a child, or of a legal representative for the child (see paragraphs 25 and 26);

    (c) joinder of the proposed adoptive parents, if they are not the plaintiff (see paragraph 27);

    (d) referral for mediation (see paragraph 28);

    (e) return of subpoenas (see paragraph 29); and

    (f) setting the matter down for hearing, or adjournment of the matter for further directions (see paragraph 34).

24. **Expert Evidence**. The plaintiff is required to file a report under the *Adoption Act* s 91 (see paragraph 10b). Where a party considers that further expert evidence may be appropriate, Practice Note SC Eq 5 – *Expert Evidence in the Equity Division* applies, provided that applications for expert evidence directions should ordinarily be made at the preliminary hearing.

25. **Appointment of a guardian ad litem.** At any stage of the proceedings, including at a preliminary hearing, the court may under the *Adoption Act* s 123 determine that it is appropriate to appoint a guardian ad litem for a child if there are special circumstances that warrant the appointment (such as the child has special needs because of age, disability or illness), and the child will benefit from the appointment, to safeguard and represent the interests of the child and to instruct a legal practitioner representing the child.[19] The court may determine that it is appropriate to appoint a

[19] If the court appoints a guardian under s 123, the court must appoint a legal practitioner to represent the child pursuant to s 122(2)(a) of the Adoption Act, as to which see paragraph 26.

guardian ad litem for a parent under the *Adoption Act* s 124 if it is of the opinion that the parent is incapable of giving proper instructions to his or her legal practitioner. Where the court considers it appropriate to appoint a guardian ad litem:

(a) after making an order under s 123 or 124 appointing a guardian ad litem (which per 124AA need not name a particular person), the Court will direct the Registrar, within 48 hours of such order, to notify Justice Legal in the Department of Communities and Justice by email (guardian-ad-litem-panel-co-ordinator@justice.nsw.gov.au) of the name of the person in respect of whom a guardian ad litem has been appointed, whether the person is a child or parent and what their involvement is in the proceedings, the details of the proceedings including court number and child's name, the jurisdiction and court location, the date and time the matter is next listed and the nature of the listing, and whether a legal representative acts for the person and if so the contact details of the legal representative.

(b) after Justice Legal has been notified by the Court of the appointment of a guardian ad litem,[20] Justice Legal will notify the Registrar in Equity within three working days of the nominee, and provide a letter of confirmation to the Registrar and the guardian.[21]

26. **Appointment of a legal practitioner to represent a child.** At any stage of the proceedings, including at a preliminary hearing, the court may under the *Adoption Act* s 122(2)(b) appoint a legal practitioner to represent a child if it appears to the court that the child needs to be represented in the proceedings. When considering an application to have a legal practitioner appointed to represent a child, the court may have regard to whether the child's views have been adequately placed before the court, whether it appears that all relevant evidence has been filed, whether there is some unusual circumstance or issue in the proceedings, and whether the defendants are legally represented. If the Court forms the view that a legal practitioner should be appointed:

(a) the court will direct the Registrar, within 48 hours of such directions, to notify the Legal Aid Commission by email (CRSYD@legalaid.nsw.gov.au) of the name of the child, the details of the proceedings including court number, jurisdiction, location and date and time the matter is next listed and the nature of the listing.

(b) After the Legal Aid Commission has been notified by the Court of the intention to appoint a legal representative for the child, the Legal Aid Commission will notify the Registry of the Supreme Court and Associate to the List Judge, within three working days of the nominee, and provide a letter of confirmation to the Registrar, Associate and lawyer. The List Judge will make orders in Chambers appointing the lawyer at the earliest possible opportunity and advise the parties.

27. **Joinder of parties.** At any stage of the proceedings, including at a preliminary hearing, the court may make orders under the *Adoption Act* s 118 joining parties to the proceedings. Except where they are the plaintiffs, proposed adoptive parents are not ordinarily parties to the proceedings. However, they have a significant interest in the proceedings, and the court expects that the plaintiff will consult with them and keep them informed of the issues and the evidence as they develop, and if it appears that their interests and those of the plaintiff might diverge, recommend that they seek independent advice. If they wish to be separately represented, proposed adoptive parents may apply to be joined as parties pursuant to s 118.

28. **Mediation.** At any stage of the proceedings, including at a preliminary hearing, at the request of the parties, or of its own motion, the Court may refer the parties to mediation generally, or in respect of a particular issue in the case, to be conducted by an appropriately qualified mediator.

29. **Return of Subpoenas.** If the Court issues a subpoena for production at the request of a party, the Court will list the matter for return of subpoena during the next monthly Adoption List before

[20] Justice Legal will not act on a notification unless it comes from the court, although legal representatives involved in the proceedings can draw the appointment to Justice Legal's attention.

[21] Per s 124AA the individual appointed as guardian ad litem is taken to be appointed when the court receives written notice of the appointment from the administrator of the Guardian Ad Litem Panel naming the person.

the List Judge. Any party causing a subpoena to be issued must give reasonable notice to the other parties of the return date and a copy of the subpoena. Upon return of the subpoena the court will ordinarily grant access to the parties to the documents produced, unless there is an objection. Where a self-represented party seeks leave to issue subpoenas, application should be made in writing to the List Judge, via the Adoptions Clerk, setting out the reasons for issuing the subpoena and enclosing a draft of the subpoena(s).

30. Once access orders have been granted by the Adoptions Judge, the Registry will ensure, where possible, that parties are able to access the relevant material via the online portal. The remainder of the court file will not be accessible to any party, given the supressed nature of the case.

31. **Transfer of Children's Court file**. UCPR r 33.13 provides for requests to be made to the Registrar for the transfer of files from other courts. Any request must be made by way of formal application[22] and requires the applicant to notify the parties from the proceedings which relate to the request so that those parties can either consent or object to the file being accessed. Upon receiving the court file, the Registrar will list the matter in the subpoena list and confirm that all relevant parties have been made aware of the request to access the file. The Registrar will ordinarily grant access to the court file to the parties unless there is an objection.

32. **Orders dispensing with the requirement for consent.** UCPR r 56.6 indicates that applications for orders dispensing with the requirement of a person's consent may be appropriate for a preliminary hearing. However, the question whether it is in the child's best interests that the requirement for a person's consent be dispensed with (particularly where s 67(1)(d) is relied upon) is closely connected with whether an adoption order should be made, and it is often preferable to consider the application for a consent dispense order concurrently with the adoption order and not at a preliminary hearing. On the other hand, there are circumstances in which it is desirable to deal with the issue of dispensing with the requirement for consent before a child is placed with proposed adoptive parents, and where sought, the court will allocate a date for preliminary hearing. Dispensing with the requirement for a person's consent is a grave step, not lightly to be taken. The court requires strict proof of the grounds upon which such an order can be made.

33. **Orders dispensing with notice.** UCPR r 56.6 indicates that applications for dispensing with notice under the *Adoption Act* s 88(4) may be appropriate for a preliminary hearing. The provisions of the *Adoption Act* requiring the giving of notice of adoption applications are important safeguards and requirements of procedural fairness. The court will not lightly dispense with the notices required by and under the *Adoption Act*.

34. **Setting down for hearing.** The court aims to set contested matters down for hearing within three months of the preliminary hearing and expects the parties to be ready for a hearing within that time. When setting the matter down for hearing, the Court will normally make the usual order for hearing contained in Annexure A to this Practice Note.

35. **Hearing.** In contested matters, evidence at the hearing is to be on affidavit and the hearing is otherwise to be conducted in such manner, and with such formality, as the judge hearing the matter considers appropriate in the circumstances of the case. Uncontested matters are to be conducted with as little formality as the judge hearing the matter considers appropriate. Pursuant to the *Adoption Act* s 119, the hearing is in closed court. The court ordinarily accedes to requests that persons (in addition to the parties and their lawyers) who have a legitimate interest in the proceedings, and in particular proposed adoptive parents where they are not a party, may be present during the hearing.

36. Any original affidavits, copies of which have been served during the course of the proceedings and which are contained in the Court Book, are to be filed in court at the commencement of the final hearing.

37. **Evidence.** Under the *Adoption Act* s 126, the Court has a discretion to act on any statement, document, information, or matter that may, in its opinion, assist it, whether or not it would be admissible in evidence. In relation to an Aboriginal child or a Torres Strait Islander child, such

[22] The application form is available on the Court's website.

material may include, but is not limited to documented oral statements of community Elders, of community organisations, and of Aboriginal corporations or family members, reports of self-identification and historical materials dependent on oral tradition.

38. **Reasons for Decision.** The Court's practice in each case, whether contested or uncontested, is to give short reasons for the decisions, especially where an application is made to dispense consent of the parents.

39. **Orders**. Where an adoption order is made (whether uncontested, or after a contested hearing), the Adoptions Clerk will arrange for the adoption order and memorandum of adoption to be provided to the Registry of Births, Deaths and Marriages. The Adoptions Clerk will also provide an original copy of the adoption order to:

    (a) the Adoption Information Unit in the Department of Communities and Justice ("Community Services");

    (b) the legal representative of the plaintiff (or the plaintiff, if self-represented); and

    (c) any adoption agency involved in the application.

40. Birth parents (and other defendants or significant persons such as siblings, grandparents and culturally significant persons)) do not automatically receive a copy of the adoption order annexing the relevant adoption plan/s; however they will, at the conclusion of proceedings, whether contested or uncontested, be provided with a copy of the adoption plan in accordance with [10(f)] above.

Adoption Plans

41. **Registration of adoption plans.** An application under the *Adoption Act* s 50 for registration of an adoption plan may be included in the summons for an adoption order. The application should be supported by affidavit evidence annexing a verified copy of the executed adoption plan and establishing that the plan does not contravene the adoption principles, that the parties to the adoption understand the provisions of the plan and have freely entered into it, and that the provisions of the plan are in the child's best interests and proper in the circumstances.

42. The plan is registered by the Court making an order that it be registered. A copy of the registered plan must remain on the court file. A copy will also be annexed to the final orders and a copy of the plan provided to any person named in the adoption plan once an order to that effect has been made by the Court under para 10(f) and 39 above. As an adoption plan that is registered has effect, on the making of the relevant adoption order, as if it were part of the order, it is important that its provisions be drafted in precise and enforceable terms and contains all the requisite particulars.[23]

43. **Review of adoption plans**. An application under the *Adoption Act* s 51 for review of an adoption plan is to be made by motion in the proceedings in which the adoption order was made. The motion will ordinarily be made returnable on the first list day occurring after 14 days from the filing of the motion, unless special arrangements have been made with the List Judge's Associate. Unless the court otherwise orders, the motion must be served on every party to the adoption who agreed to the adoption plan.

Reports prepared in accordance with s. 78 of the *Adoption Act*

44. If a report is required to be filed pursuant to s 78 of the Adoption Act, and there is no extant proceeding regarding the child, the report can be filed with a cover letter requesting that the Registry create a court file number. Once the adoption application is ready, the Secretary can subsequently file the summons under the same proceedings number, created for the s. 78 report.[24]

[23] For the requisite particulars see *Adoption Regulation 2015* cl 75.

[24] See *Adoption of G* [2022] NSWSC 631

Hague convention applications

45. Applications for adoption orders in respect of adoptions of children from countries who are party to the Hague Convention on Intercountry Adoption are instituted by the proposed adoptive parents ("the plaintiffs") by Application in Form 3 under the Hague Convention Regulations. The plaintiff(s) should attach to the application a verified copy of each of the reports referred to in Article 15 and Article 16 of the Convention. The application must contain an appointment for hearing, which will be allocated upon filing and will ordinarily be the first list day occurring after 14 days from the filing of the application, unless special arrangements have been made with the List Judge's Associate.

46. The application must be supported by an affidavit in Form 2 referred to in the Hague Convention Regulations. The affidavit must annex verified copies of official documentation so as to show that:

    (a) the child was habitually resident in the Convention country;

    (b) the application has been made in accordance with the Convention, the laws of the Commonwealth and of New South Wales, and the laws of the Convention country in question. This involves showing that the NSW Central Authority has prepared and transmitted to the central authority of the Convention country the report referred to in Article 15 of the Convention, and that the Central Authority of the Convention country has prepared and transmitted to the NSW central Authority the report referred to in Article 16 of the Convention. Those reports should be annexed to the Form 3 application.

    (c) the Central Authority of the Convention country has agreed to the adoption;

    (d) the NSW Central Authority (being the Secretary) has agreed to the adoption;

    (e) the child is in Australia; and

    (f) the child is allowed to reside permanently in Australia (for which purpose evidence of a visa is required).

47. The plaintiffs must file with the application:

    (a) a draft minute of each proposed adoption order, in duplicate, in Form 8 referred to in the Hague Convention Regulations. A separate adoption order is required for each child the subject of the proceedings;

    (b) a memorandum of adoption order, printed double sided and in the format required by the Registry of Births, Deaths and Marriages.[25]

48. The plaintiffs must serve the application on the Secretary at least ten days before the appointed hearing. The Secretary may be served by delivery of the application to the Director, Open Adoption and Permanency Services, 6 Parramatta Square, 10 Darcy Street Parramatta NSW 2150 or Locked Bag 5000, Parramatta NSW 2124 (Attention: Intercountry Adoptions), or email to IntercountryAdoption@facs.nsw.gov.au. The plaintiffs must file at or before the hearing an affidavit proving that a copy of the application has been served on the Secretary.

49. On the return date, the application will be heard and determined, unless it is controversial, in which case directions may be made for the further conduct of the application.

50. If the plaintiffs file an affidavit of service before the hearing, and the Secretary has not by five days before the date appointed for the hearing filed a statement in accordance with Form 5 referred to in the Hague Convention Regulations in accordance with reg 15(2C), the Court may on the plaintiff's written request to the Adoption Judge's Associate vacate the hearing and deal with the matter in private chambers.

[25] A precedent form of a memorandum in the required form is available on the Court's website.

Applications for declarations of validity

51. Applications under the *Adoption Act* s 117 for declarations of validity under s 116 of an adoption order made in a country other than Australia that is not a party to the Hague Convention on Intercountry Adoption may be instituted by any of the parties to the adoption. Proceedings are instituted by summons claiming a declaration to the effect that the order is one that complies with s 116. The summons must include particulars of the child and the overseas adoption order.[26] Unless the court otherwise orders, it is not necessary to join a defendant. The application must contain an appointment for hearing, which will be allocated at the time of filing and will ordinarily be the first list day occurring after 14 days from the filing of the summons, unless special arrangements have been made with the List Judge's Associate.

52. The plaintiff must file with the summons affidavits by each of the adoptive parents, which must:

    (a) annex a true copy of the overseas adoption order and state when and where it was made;

    (b) prove that at the time when the legal steps that resulted in the adoption were commenced, the adoptive parent or parents had been resident in that country for 12 months or more, or were domiciled in that country.

    (c) describe the course of the overseas adoption proceedings, annexing true copies of any application, affidavits, judgments or other official documents, to show that no denial of natural justice was involved in the making of the order.[27]

53. Ordinarily, where the matters referred to in 46a and b are established, the court will not require evidence, but will presume (as authorised by s 116(5)), that the adoption is in accordance with and has not been rescinded under the law of the overseas country; that in consequence of the adoption, the adoptive parent or parents, under the law of that country, have a right superior to that of the adopted person's birth parents in relation to the custody of the adopted person; and that under the law of that country the adoptive parent or parents were, because of the adoption, placed generally in relation to the adopted person in the position of a parent or parents.[28] However, evidence of those matters may be required where there is any doubt.

54. The plaintiffs must lodge with the summons a draft minute of the order.[29]

55. The plaintiffs must serve a copy of the summons and supporting affidavits on the Secretary.[30] The Secretary may be served by delivery of the summons to the Director, Open Adoption and Permanency Services, 6 Parramatta Square, 10 Darcy Street Parramatta NSW 2150 or Locked Bag 5000, Parramatta NSW 2124 (attention: Intercountry Adoptions), or email to IntercountryAdoption@facs.nsw.gov.au. The plaintiffs must file at or before the hearing an affidavit proving that a copy of the summons has been served on the Secretary, at least five clear days – in effect, a week – before the appointed hearing.

56. On the return date, the application will be heard and determined, unless it is controversial, in which case directions may be made for the further conduct of the application.

Access to Court files

57. The Court file in adoption proceedings is not open to inspection by, or made available to, any person – including parties to the proceedings - unless so ordered by the Court. Applications under the *Adoption Act* s 194(2) to inspect or copy documents held on the Court file may be made orally in the course of proceedings before the court, or in writing to the Registrar, who may refer the application to a judge. If in the course of adoption proceedings a party or other interested person,

[26] A precedent form of summons is available on the Court's website.

[27] A precedent form of affidavit is available on the Court's website.

[28] Although on the face of s 116(5) the presumptions it founds are in respect of s 116(1), it is clear that they are intended to relate to s 116(2): see *Adoption of MSAT* [2014] NSWSC 1950 at [17].

[29] A precedent form of order is available on the Court's website

[30] See UCPR r 56.10.

including proposed adoptive parents, wishes to have access to the Court file or any particular documents on it, application should be made to the Judge dealing with the matter.

58. Ordinarily, parties to proceedings will be granted access to all documents on the court file relevant to the proceedings, except to the extent that to do so would unacceptably jeopardise the safety, welfare or privacy of a child or a proposed adoptive parent. Proposed adoptive parents who are not parties will ordinarily be permitted access to particular documents to enable the plaintiff to obtain instructions or to address issues in the proceedings.

Applications for access to prescribed information in Court files

59. Applications under the *Adoption Act* s 143(2) for the supply of prescribed information from records of proceedings in the Court may be made in writing to the Registrar. When making such an application, the applicant should, so far as practicable:[31]

    (a) identify the proceedings in the Supreme Court to which the application relates, by file number and name;

    (b) specify the status of the applicant (adoptee, parent, adoptive parent, or non-adopted sibling);

    (c) specify the prescribed information that is sought;[32] and

    (d) produce evidence of the facts on which the application is based showing the basis on which and reason for which the applicant claims to be entitled to the information.

60. An application may be dealt with informally by correspondence, or by personal attendance of the applicant, without conducting a formal hearing.[33] In considering any application, the Court applies the guidelines referred to in the *Adoption Act* s 142 and contained in *Adoption Regulation,* cll 105 – 110.

61. The Registrar may decide to supply the information which is the subject of the request if satisfied that it is prescribed information to which the applicant is entitled and that it is in accordance with the guidelines and otherwise appropriate to do so, or may refer the matter to a judge for consideration.

62. When deciding to supply prescribed information, the court may require that it be supplied by or in the presence of an appropriate person, such as a registrar or counsellor.

Transitional provisions

63. This Practice Note applies to proceedings commenced after 3 April 2023. However:

    (a) the Practice Note is not intended to require that work already done in connection with anticipated proceedings not yet commenced by that date be duplicated; and

    (b) some flexibility will be accepted in the transitional period.

[31] See UCPR r 56.12(3).

[32] For what information may be sought by the various classes of applicant, see *Adoption Regulation 2015* Part 6.

[33] See UCPR r 56.12.

64. While this Practice Note does not formally apply to proceedings commenced before 3 April 2023, all pending adoption proceedings should, as a matter of best practice, comply with this Practice Note, to the extent it is practicable to do so.

The Hon. A S Bell
Chief Justice of New South Wales
16 March 2023

Related Information
Practice Note SC Eq 5 – Expert Evidence in the Equity Division

Amendment history
16 March 2023: This Practice Note replaces the previous version of SC EQ 13 that was issued on 4 May 2016.

ANNEXURE A

USUAL ORDER FOR HEARING

1. **By no later than three working days before the trial date the parties are to provide to the Associate to the Trial Judge a Court Book containing the pleadings, affidavits to be relied on, documentary evidence to be tendered, any objections thereto (limited to those that are essential having regard in particular to s 190(3) of the *Evidence Act 1995*), and a short outline of submissions.**