

Specialist Accreditation Scheme



2020 Planning and Environment Law Assessment Requirements



THE LAW SOCIETY
OF NEW SOUTH WALES



These notes should be read in conjunction with the **2020 Guide to Application and Assessment**. They will assist practitioners interested in becoming accredited in Planning and Environment Law to understand and prepare for the assessment process.

Included are:

- The performance standard which is the benchmark for competent practice in this area;
- The performance criteria which form the basis for the assessment;
- A list of the core skills and areas of knowledge; and
- The methods and dates of assessment which applicants are required to undertake.



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Timetable

The shaded area below shows the core assessment period including the dates associated with each assessment.

Candidates need to focus on this core assessment timeframe, planning their workload well in advance, accordingly.

Based on feedback reports from previous years, candidates are encouraged to dedicate and manage their time during this period to optimise their performance across all assessment tasks. Candidates are reminded that participating in the Specialist Accreditation program requires a considerable level of commitment if candidates are to achieve their desired outcome.

Activity	Date
Question & Answer sessions for potential candidates	3 – 5 March 2020
Applications for Specialist Accreditation close	27 March 2020
Candidature confirmed	Week commencing 4 May 2020
Take Home Assignment & Mock File	Released: 13 May 2020 Due: 3 June 2020
Peer Interview	Sunday, 9 August 2020
Results released to candidates	Early October 2020
Reassessment and/or Appeal applications close	14 days from notification of results
Reassessment results released	December 2020
Appeal results released	December 2020



A. Performance standard

Standard of Accredited Specialist

The Standard of an Accredited Specialist in Planning and Environment Law is that of a **'specially competent practitioner'** in the core skills and practical capabilities in the selected area of practice, as assessed against the spectrum of capability of all practitioners in that area of practice. This standard is to be distinguished from the idea that the Scheme requires the highest technical legal knowledge across all aspects of the selected area of practice.

B. Core skills and knowledge areas

Solicitors wishing to be accredited in Planning and Environment Law should be able to:

- Display knowledge of the current law and procedure which underpins the performance of tasks in this area of practice.
- Demonstrate the core skills listed to the level of a specially competent solicitor.
- In all tasks, and at all times, the accredited solicitor:
 - Acts in a timely and competent manner;
 - Keeps the client fully informed, using plain language; and
 - Demonstrates professional and ethical responsibility.

B.1 Core skills

1. The solicitor gathers information by:

1.1 Taking initial instructions

The solicitor:

- 1.1.1 Establishes the legal status and capacity of the client, the client's intentions and expectations and the issues to be addressed.
- 1.1.2 Assists the client in addressing the issues by identifying appropriate outcomes and the best means of achieving them.
- 1.1.3 Elicits information from the client and ascertains the client's objectives by:
 - Observing the client, asking effective questions, listening carefully and confirming mutual understanding; and
 - Guiding the process by knowledge of the current law and procedures and by giving appropriate advice.
- 1.1.4 Discusses the question of costs and identifies the party who is to be responsible for costs and fees.

Note:

The client may be:

- A property owner, occupier or developer.
- An objector to development.
- A public interest group.
- A local council or councillor.
- A statutory authority or a government department.
- A commercial rival to an applicant for development consent.
- An Accredited Certifier.

1.2 Gathering information from external sources

The solicitor:

- 1.2.1 Conducts the appropriate searches and makes the appropriate requests for documents and information to verify and add to information obtained from the client.
- 1.2.2 Knows the procedures for obtaining the documents and information required and conducts the inquiries with attention to detail and a concern for accuracy.
- 1.2.3 Liaises with other experts to obtain information.

Note:

Information from external sources may include:

- Notices, certificates and correspondence from a local government or other authority.
- Relevant environmental planning instruments, development control plans, government policies, codes and plans of management.
- Reports, meeting minutes and resolutions of consent authorities.
- Applications to the authority for approvals, certificates or information including plans, application forms, and associated documents.
- Advice from specialist consultants including architects, town planners, ecologists, engineers, valuers and land economists.
- Documents and other information held by relevant Commonwealth and NSW Departments and statutory authorities.
- Case law.
- Property information including certificates of title, deposited plans, rating and valuation information.
- Information on planning controls and property titles from online sources such as www.planningportal.nsw.gov.au and <https://maps.six.nsw.gov.au>.

2. Analysing the practical and legal options

2.1 Establishing the options

The solicitor:

- 2.1.1 Analyses the information obtained and identifies:
 - The relevant issues of fact and law;
 - Matters requiring further research; and
 - The extent to which the relevant legal principles are clear or contestable and engages in legal research to ascertain legal principles or to develop arguments where those arguments are contestable.

- 2.1.2 Interprets the information obtained and assesses the impact of that information on the client's position, objectives and expectations.
- 2.1.3 At each stage of the matter, determines whether to seek counsel's opinion.
- 2.1.4 Prepares a list of the options or alternative courses open to the client.
- 2.1.5 Identifies the benefits and disadvantages of each option from the client's perspective.

Note:

The issues may involve:

- The interpretation and application of planning, environmental and Local Government laws
- Refusal or deemed refusal of an application for development consent.
- The imposition of unreasonable or unacceptable conditions of consent.
- The interpretation of an environmental planning instrument or development control plan
- The development of Crown land or land owned by or under the control of a State or Local Government Authority.
- A statutory order to remedy a breach of the law.
- Legal consequences of something done or proposed to be done in relation to property (e.g. rates).
- A development proposal by a public authority.
- Objection to proposed development which may impact on the development of other property.
- Rezoning of land – the planning proposal and other requirements in making a local environmental plan.
- Proposal of an authority to take away or acquire rights over the property of others.
- Civic office and administration.
- Conflicts of interest.
- Declaratory, civil enforcement and judicial review of administrative decisions.
- The powers and functions of a private certifier.
- Options for criminal prosecutions and defence.

2.2 Considering the options

The solicitor, in analysing the benefits and disadvantages of each option, considers:

- 2.2.1 All of the alternatives to litigation including political or commercial negotiations.
- 2.2.2 The need to retain consultants such as those referred to above to provide advice so as to understand better the strengths and weaknesses of the client's case.
- 2.2.3 All of the relevant documentary records, such as documents prepared by experts on behalf of the client, council reports and relevant correspondence.
- 2.2.4 The need for a view of any relevant property.
- 2.2.5 The client's general commercial position, including the range of outcomes which the client would find acceptable, the financial means available to the client and any timing issues arising from matters such as contractual obligations.
- 2.2.6 The possibility of instituting proceedings to preserve rights.
- 2.2.7 The commencement of proceedings for resolution of any short preliminary questions of law which may then be used to the client's advantage to resolve the matter completely.
- 2.2.8 Mediation either within or outside the structure of the Land and Environment Court.
- 2.2.9 Litigation and ADR (including mediation).
- 2.2.10 Negotiating with a statutory authority.
- 2.2.11 Amending applications and requesting reconsideration of the matter.



2.3 Providing advice

In giving advice on strategy or action, the solicitor must bear in mind that the experienced legal adviser works closely with the client in moulding expectations and realising those expectations.

3. The solicitor implements instructions by

3.1 Representation

The solicitor advises the client of the appropriate level and means of representation as an alternative to litigation or alternate dispute resolution, and the likely cost consequences.

Note:

This may involve personal attendance at local planning panel meetings, council meetings, representations to councillors, council staff or other authorities, letters, petitions, or by sending another legal or other relevant expert representative. Representation could be by way of formal submission to government, planning panels, ministers or departmental officers, the ombudsman, the ICAC, the Building Professionals Board or other complaint bodies.

3.2 Alternative Dispute Resolution

The solicitor:

- 3.2.1 Is familiar with the ADR options available in respect of a particular matter and is able to recognise whether the matter is amenable to proceed in this way.
- 3.2.2 Is able to suggest or recognise alternative solutions to facilitate the just, quick and cheap resolution of the real issues in the dispute or proceedings (section 56 of the Civil Procedure Act 2005 (NSW)).

3.3 Litigation

- 3.3.1 Selects the appropriate venue for conduct of the proceedings and recognises the jurisdiction of the relevant forum (in particular the Land and Environment Court (in respect of Class 1, 2, 3, 4, 5, 6, 7 and 8 matters), Pecuniary Interest and Disciplinary Tribunal, Equity and Common Law Divisions of the Supreme Court, Court of Appeal, District Court and Local Court, NSW Civil and Administrative Tribunal).
- 3.3.2 Is completely familiar with the procedure, practice directions and rules applying in the relevant jurisdictions, including codes of conduct for legal advisers to government and statutory authorities.
- 3.3.3 Identifies relevant time limits applicable to the proceedings (in particular commencement of proceedings, filing of expert reports and affidavits, etc.) and acts promptly and efficiently in relation to those time limits.
- 3.3.4 Considers whether it is appropriate to brief counsel, and if so, takes instructions and prepares a detailed brief.
- 3.3.5 Identifies and briefs relevant experts to be utilised in the proceedings (such as town planners, engineers, acoustical consultants, ecologists and others) and obtains expert opinions from them.
- 3.3.6 Reviews expert reports and prepares affidavits (if necessary).
- 3.3.7 Identifies the need to inspect documentary material of other parties as well as the appropriate procedure to adopt for the circumstances.



- 3.3.8 Drafts the majority of initiating process, without assistance of counsel, including relevant applications and affidavit material in Class 4 and 5 proceedings as well as urgent applications.
- 3.3.9 Attends directions hearings and most notices of motion in the Land and Environment Court and is able to appear as advocate in Class 1, 2 and 3 appeals and in straightforward class 4 matters seeking injunctive relief.

4. The solicitor advises on outcomes

4.1 Litigation

The solicitor:

- Advises on the outcome
- Advises on practical implementation of the outcome.

Note:

These steps may involve advice on time limits, appeal options, costs and implementation factors.

4.2 General Matters

The solicitor:

- 4.2.1 Upon giving advice checks whether the advice answered the client's questions and whether any further advice is required.
- 4.2.2 Upon acting in ADR advises on the practical implementation of the outcome.
- 4.2.3 Having made a representation advises on the practical implementation of the outcome.

5. Implementing outcomes

The solicitor has the knowledge and drafting skills to complete final documentation and to advise on the effect of these documents.

B.2 Core knowledge areas

Note:

Candidates taking part in the 2020 accreditation program should be aware of all recent and impending amendments to legislation. **All assessments will be based on the law and procedures applicable as at the date of the assessment.**

B.2.1 Core knowledge

Constitution of Local Government Authorities

- Constitution and alteration of local government areas
- The legal status of a council
- The role of the governing body of a council

Civic Office and Administration

- Elections, polls and constitutional referenda
- The council decision making process
- Meetings
- Affixing the council seal
- Delegations
- Tendering
- Voting
- Council as an applicant for approval
- Conflicts between public duty and private interests
- Code of conduct
- Duties of disclosure
- Pecuniary interests
- Non-pecuniary interests
- Personal liability of council members and staff
- Surcharging
- Organisational structure
- General manager and other senior staff
- Performance based contracts
- Public officer
- Equal employment opportunity
- Remuneration of councillors and mayors

Functions

- Council's charter
- Service functions
- Regulatory functions
- Approvals and orders
- Local policies
- Building certificates
- Planning certificates
- Appeals
- Internal reviews
- Acquisition of land

- Enforcement:
 - Civil proceedings
 - Prosecutions
 - Carrying out work
- Entry onto land and other powers
- Classification and management of council land
- Functions under other Acts
- Tendering
- Ancillary functions
- Joint ventures
- Public Private Partnerships
- Planning agreements
- Integrated planning and reporting
- Community strategic plan, resourcing strategy, delivery program, operational plan, community engagement strategy, annual report and state of the environment report of a council

Management

- Management Plans
- Plans of management for community lands
- Financial management
- Accounting records
- Financial reports and auditing
- Council polls
- Open meetings
- Retention and preservation of records
- Public availability of information
- Privacy
- LEP-making process
- DCP
- Contributions plans and planning agreements

Administrative Review

- Judicial review
- Inquiries, surcharge, investigation of complaints
- Pecuniary Interest and Disciplinary Tribunal
- The Minister for Local Government and the Office of Local Government
- The NSW Ombudsman
- The Independent Commission Against Corruption
- NSW Civil and Administrative Tribunal

Procedural Fairness

- The hearing rule
- The bias rule
- The no evidence rule
- The duty to give reasons
- The duty to initiate inquiries
- Specific application to councils
- Specific applications to State Government in relation to councils
- The duty to act reasonably



Actionable Liability and Rights

- Judicial remedies - damages, specific performance etc.
- Non-judicial remedies - administrative remedies
- Self help
- Defences, immunities and rights - non feasant, statutory authority, statutory exculpation
- Estoppel
- Council insurance and indemnity
- General non-contractual liability and rights
- Vicarious liability
- Specific context:
 - Land owner, occupier or provider of services and facilities
 - Providers of information or advice
 - Planning authority
 - Approval or consent authority
 - Building controller and regulator
 - Roads authority
 - Special statutory liability and rights
 - Contractual liability and rights
 - Defamation by and of Council
 - Immunities

Decision Makers and Recommendatory Bodies

- Local Councils
- The Ministers for Planning and Local Government
- The Secretary of the Department of Planning, Industry and Environment
- The Office of Local Government
- Independent Planning Commission
- Sydney District and Regional Planning Panels
- Local Planning Panels
- Relevant Planning and Consent Authorities
- SEPP 65 Design Review Panels
- Building Professionals Board
- Greater Sydney Commission
- Private Certifiers

Land use planning

- Environmental planning instruments:
 - State
 - Local
- Development control plans
- Metropolitan and Regional Strategies
- Greater Sydney Commission district plans
- Other adopted local policy documents including strategic plans
- Section 9.1 directions
- The Standard Instrument Local Environmental Plan Order
- Moves towards policy and statutory change (e.g. draft planning instruments and legislative bills)
- Planning proposals, knowledge of the second reading speech when the 'gateway' process was introduced.
- Tree preservation orders, trees legislation and other means to protect/conserves/remove trees and vegetation
- Planning Agreements

- Contributions Plans
- Biobanking and offsets
- Climate change considerations

Development applications, consents and certificates

- Requirements for a valid development application
- Statements of Environmental Effects
- Determination of permissibility
- Environmental assessment
- Environmental impact statements
- Biodiversity assessment methods and reports
- Categories of development:
 - Requiring concurrence
 - Designated
 - Advertised
 - Integrated
 - State significant development
- Public consultation and notification
- Determination
- Review
- Commencement and lapsing
- Conditions of consent
- Development contributions
- Planning Agreements
- Modification of consents
- Retrospective approvals
- Certification (complying development certificates and Part 4A certificates)
- Private Accredited Certifiers
- Existing and continuing uses and applications to change or alter these
- Crown development applications
- Exempt and Complying Development

Environmental assessment of activities (Part 5 EPA Act)

- Relevant activities
- Determining authority
- Consideration of environmental factors
- Environmental impact statements
- Biodiversity assessment methods and reports
- Community participation
- Making the decision

State Significant Development and State Significant Infrastructure

- Relevant Developments
- Role of Minister for Planning and the Independent Planning Commission
- Environmental assessment
- Concept plans
- Critical State significant infrastructure
- Community participation
- Making the decision
- Appeal rights and right to seek judicial review of a decision

Heritage Conservation

- *The Heritage Act 1977*
- Aboriginal heritage administration
- Heritage agreements
- Environmental planning instruments
- Implementation and enforcement
- Devolution of heritage protection to local government
- Community participation

Trees (Disputes Between Neighbours) Act 2006

- Damage caused by trees
- View loss and overshadowing caused by hedges
- Land and Environment Court “tree dispute principles”

Appeals, Objections, Judicial Review

- Time limits
- Locus standii
- Costs and compensation
- Proof
- Commencement of proceedings
- Service
- Structure and jurisdiction of the Land and Environment Court; its Rules, including the UCP Rules
- LEC Planning Principles
- Procedures in various classes
- Powers of registrars and commissioners
- Proceedings by third parties
- Judicial review and appeals generally
- Time for compliance with orders and contempt
- Procedures to ensure compliance:
- Stay of proceedings including attempts to regularise illegal activity

Finance

- Sources of finance
- Rates, charges and fees:
 - Making
 - Collecting
 - Levying



- Categories
- Rateable land
- Concessions
- Exemptions
- Records
- Adjustments Of Charges
- Types Of Charges
- Regulation & Control Of Fees, Rates & Charges
- Valuations For Rating Purposes Challenging Liability For Rates or Valuation
- Loans
- Grants
- Investments

Enforcement

- Orders under the Local Government Act
- Orders under the Environmental Planning and Assessment Act
- Civil and criminal enforcement under the Environmental Planning and Assessment Act
- Declarations under the Companion Animals Act
- Interim Orders under the Heritage Act
- Directions under the Roads Act
- Notices and noise abatement directions under the Protection of the Environment Operations Act
- Declarations and management orders under the Contaminated Land Management Act
- Orders and directions under the Biodiversity Conservation Act 2016
- Penalty notices and prosecutions for offences
- Enforcement by Land and Environment Court Order
- Powers of authorised officers (entry and investigation)

Real property considerations

- Public positive covenants
- Restrictive covenants
- Easements
- Removal of obsolete covenants
- Effect of covenants on land use
- Conflict between covenants & development consents
- Acquisition of easements by compulsion

B.3 Legislation

The following legislation has been divided into 'core legislation'; 'important legislation' and 'peripheral legislation'.

Core legislation

Australian Heritage Council Act 2003 (Cth)
Environmental Protection and Biodiversity Conservation Act 1999 (Cth)
Biodiversity Conservation Act 2016
Civil Procedure Act 2005
Companion Animals Act 1998
Contaminated Land Management Act 1997
Environmental Planning and Assessment Act 1979
Food Act 2003
Greater Sydney Commission Act 2015
Government Information (Public Access) Act 2009
Heritage Act 1977
Impounding Act 1993
Independent Commission Against Corruption Act 1988
Land Acquisition (Just Terms Compensation) Act 1991
Land and Environment Court Act 1979
Local Government Act 1993
Mining Act 1992
National Parks and Wildlife Act 1974
Petroleum (Onshore) Act 1982
Protection of the Environment Operations Act 1997
Roads Act 1993
Uniform Civil Procedure Rules 2005
Valuation of Land Act 1916

Important legislation

Aboriginal Land Rights Act 1983
Access to Neighbouring Land Act 2000
Administrative Decisions Review Act 1997
Building Code of Australia and National Construction Code
Building Professionals Act 2005
Civil and Administrative Tribunal Act 2013
Encroachment of Buildings Act 1922
Liquor Act 2007
Public Interest Disclosures Act 1994
Rural Fires Act 1997
Summary Offences Act 1988
Trees (Disputes Between Neighbours) Act 2006

Peripheral legislation

Competition and Consumer Act 2010 (Cth)
Competition Policy Reform Act 1995 (Cth)
Disability Discrimination Act 1992 (Cth)
Telecommunications Act 1997 (Cth)

Animals Act 1977
Anti-Discrimination Act 1977
Boarding Houses Act 2012
City of Sydney Act 1988
Civil Liability Act 2002
Community Land Development Act 1989
Competition Policy Reform (New South Wales) Act 1995 (NSW)
Conveyancing Act 1919
Crimes (Appeal and Review) Act 2001
Crimes (Sentencing Procedures) Act 1999
Criminal Procedure Act 1986
Crown Land Management Act 2016
Dividing Fences Act 1991
Duties Act 1997
Environmentally Hazardous Chemicals Act 1985
Evidence Act 1995
Fair Trading Act 1987
Filming Approval Act 2004
Fire and Rescue NSW Act 1989
Fisheries Management Act 1994
Forestry Act 2012
Gaming Machines Act 2001
Graffiti Control Act 2008 (NSW)
Geographical Names Act 1966
Growth Centres (Development Corporations) Act 1974
Government Information (Public Access) Act 2009
Home Building Act 1989
Interpretation Act 1987
Library Act 1939
Local Land Services Act 2013
Native Title Act 1993 (Cth)
Natural Resources Commission Act 2003
Ombudsman Act 1974
Protection of the Environment Administration Act 1991
Privacy and Personal Information Protection Act 1988
Place Management NSW Act 1998
Public Health Act 2010
Real Property Act 1900
Recovery of Imposts Act 1963
Recreational Vehicles Act 1983
Restricted Premises Act 1943
Soil Conservation Act 1938
State Emergency and Rescue Management Act 1989
State Emergency Service Act 1989
Strata Schemes Development Act 2015 No 51
Strata Schemes Management Act 2015 No 50
Surveying and Spatial Information Act 2002
Swimming Pools Act 1992
Sydney Water Act 1994
Unclaimed Money Act 1995
Waste Avoidance and Resource Recovery Act 2001
Water Act 1912
Water Management Act 2000
Water NSW Act 2014

Relevant regulations (including the Environmental Planning and Assessment Regulation 2000 and Local Government (General) Regulation 2005), the Standard Instruments, Land and Environment



Court practice directions and policies, court practice directions and all State Environmental Planning Policies.

Note:

Candidates must make themselves aware of any associated pending legislative changes, especially in relation to the above core legislation (this includes any associated transitional provisions).

C. Methods of Assessment

Below are listed the methods of assessment which all candidates must undertake. In your responses you will be assessed on the associated assessment criteria. You will be required to perform each criterion to the level expected of a specially competent practitioner.

C.1 Take Home Assignment

An assignment consisting of a series of questions requiring short answers will be distributed to candidates for completion at home. The purpose of the assessment is to test breadth and level of knowledge including identification and application of legal principles and understanding of procedures. The take home assignment will be available for download on the date of release.

The assignment comprises two parts:

- Part (A): focusing on Local Government matters/issues; and
- Part (B): focusing on Environment and Planning matters/issues.

In order to pass the Take Home Assignment overall, candidates must pass both parts.

Assessment criteria

- a) Ability to identify relevant issues from a given set of facts
- b) Depth of knowledge of the law and skill in applying that knowledge to the given facts
- c) Knowledge of relevantly applicable procedures, rules and practices
- d) Ability to provide practical, clear and accurate advice

Release date: 10am, Wednesday, 13th May 2020

Due date: 4pm, Wednesday, 3rd June 2020

C.2 Mock File

The purpose of the Mock File is to assess the candidate's ability to perform tasks undertaken by solicitors in this area of practice. The Mock File will be available for download on the date of release. Candidates will be required to work independently and to return the completed work on the specified date.

Assessment criteria

- a) Gathering information
- b) Analysing facts and legal effects
- c) Analysing the practical and legal options
- d) Reviewing and implementing instructions
- e) Finalising a matter

Release date: 10am, Wednesday, 13th May 2020

Due date: 4pm, Wednesday, 3rd June 2020



C.3 Peer Interview

Applicants will be interviewed by a panel of practitioners. The interview will run for approximately 30 minutes and will be recorded for assessment purposes. The interview will assess the candidates understanding of the area as well as issues arising from the Mock File and the Take Home Assignment. It is recommended candidates retain a copy of their Mock File and assignment answers.

Assessment criteria

- a) Clarity of spoken answers
- b) Legal approach and presentation
- c) Confirmation of understanding of written responses
- d) Application of legal principles to facts

Date: Sunday, 9th August 2020*

Venue: The Law Society of New South Wales

*Candidates will be advised of the Peer interview time in July.

END