

Expert Evidence in the Land and Environment Court

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Expert Evidence in the Land and Environment Court¹

INTRODUCTION

1. The Land and Environment Court increasingly delivers judgments dealing with complex, specialised matters. The purpose of an expert is to provide the Court with the expertise and knowledge that is required to understand and to resolve the dispute between the parties. Where each of the parties present their own experts that are qualified in a particular scientific or professional discipline, each with different opinions, it can be difficult for the Court to synthesise and apply the evidence to the legal issues before it.²

2. But the traditional process has been critiqued by a number of sources as transforming the position of the expert to one of advocate.³ As pointed out by McClellan J, “only the most extraordinary person who has been engaged to prepare and give evidence for a client would, when cross-examined, readily confess error, accept their view was wrong and the client’s money wasted.”⁴

3. The Land and Environment Court is particularly vulnerable in this respect as there is a limited pool of experts to give evidence on matters within its jurisdiction. Thus it is likely that experts will endeavour to maintain good relations with those that retain them, as there is likely to be subsequent litigation for which their services will be required.⁵ It is trite to state that a continued connection, together with remuneration, naturally encourages an expert to do their best for the party engaging them. Another term for this phenomenon is ‘adversarial bias’.

4. The Land and Environment Court has employed several methods in order to respond to the difficulties surrounding expert evidence, including: the use of parties’

¹ Paper initially presented to UNSW Land and Environment Law conference on 24 February 2011 and subsequently thereafter. The updating of this paper, first presented in 2009, was undertaken by my tipstaff, Ms Michelle Bradley, for which I am grateful. All errors are my own.

² McClellan J, *Expert Witnesses – the Experience of the Land & Environment Court of New South Wales* (paper presented at XIX Biennial LawAsia Conference 2005, Gold Coast, 24 March 2005), p 8.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*, p 10.

single experts or court-appointed experts, the use of concurrent evidence procedures and the employment of specialised Commissioners.

5. This paper will, first, provide an overview of the rules governing expert evidence; second, discuss practice and procedure in the Land and Environment Court in relation to expert evidence; third, provide a short examination of the merits and criticisms of court-appointed and parties' single experts, and concurrent evidence procedures; and fourth and finally, make some general comments about the critical need to maintain independence as an expert.

RULES IN RELATION TO EXPERT EVIDENCE

6. The rules governing experts, and their evidence, are found in the:

- (a) *Evidence Act 1995* (NSW);
- (b) *Civil Procedure Act 2005* (NSW) ("CPA");
- (c) *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR");
- (d) *Land and Environment Court Act 1979* (NSW);
- (e) *Land and Environment Court Rules 2007* (NSW); and
- (f) *Land and Environment Court Practice Notes*

Evidence Act 1995

7. Expert evidence is generally governed by the *Evidence Act*, in particular, ss 76-79. Although s 76 sets out a general prohibition of opinion evidence, s 79 provides that expert evidence, or someone with "specialised knowledge based on training, study or experience" is an exception to this principle.

8. It is first necessary to identify the fact in issue on which expert evidence is to be adduced, as the initial question that arises in relation to s 79 is whether the subject matter of the opinion is such that a person without experience in the area would be

able to form a sound judgement on the matter without the assistance of a person possessing specialised knowledge, which is in a field that is sufficiently recognised as a reliable body of knowledge.⁶

9. For an expert's opinion to be admitted into evidence on a particular issue: the expert must have specialised knowledge that they are able to demonstrate to the court is based on the person's training, study or experience, and the evidence must be wholly or substantially based on that specialised knowledge.⁷ It is helpful to identify with precision the issue on which the expert opinion is being proffered, as this will aid in identifying the specialised knowledge, based on training, study or experience, that the expert will need to possess.⁸

10. The expert must set out all the assumptions upon which the opinion is proffered. If the opinion is based on facts 'observed' by the expert, they must be identified and proved by the expert, or if the opinion is based on 'assumed' facts, they must be identified and proved in some other way.⁹ Unless the facts upon which the opinion is based can be established, the expert's opinion will be inadmissible, or if admitted, given very little weight.

11. The expert must also set out all of the reasoning he or she has engaged in to arrive at their conclusions. A report that simply states the opinion given or conclusion reached without elucidating how the expert arrived at this conclusion will usually be rejected by the Court.¹⁰

12. The rules of evidence do not apply to all Classes in the Court. For example, the Court may choose not to be bound by the *Evidence Act* in Class 1, 2 or 3

⁶ *R v Bonython* (1984) 38 SASR 45 at 46-47 per King CJ; *Clark v Ryan* (1960) 103 CLR 486 at 491 per Dixon CJ; *Murphy v The Queen* (1989) 167 CLR 94 at 111 per Mason CJ and Toohey J; at 130 per Dawson J; *Farrell v The Queen* (1998) 194 CLR 286 at 292-294 per Gaudron J; *Osland v The Queen* (1998) 197 CLR 316 at 336 per Gaudron and Gummow JJ; *HG v R* (1999) 197 CLR 414 at 432.

⁷ *Evidence Act 1995* (NSW), s 79.

⁸ See Branson J, *Expert Evidence: a Judge's perspective* (paper presented at the inaugural Australian Women Lawyers Conference, Sydney, 29-30 September 2006).

⁹ See *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85].

¹⁰ See *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85], *R v Tang* (2006) 161 A Crim R 377 and *HG v The Queen* (1999) 197 CLR 414.

proceedings.¹¹ This is also the case in Class 5 sentencing matters. However, it is prudent to prepare all expert evidence as if the rules do apply.

UCPR

13. The Court has incorporated the UCPR from 29 January 2008. Part 31, Div 2, Subdiv 5 r 31.17-54 of the UCPR is generally a comprehensive and prescriptive outline of the practice and procedure in relation to expert evidence.

14. Importantly, the UCPR states that the expert witness' paramount duty is to the Court and not to any party to the proceedings.¹²

15. Under UCPR r 31.17 the main purposes for the provision of expert evidence are set out. These include for the Court:

- to have control over the giving of expert evidence¹³;
- to restrict expert evidence in proceedings to only that which is reasonably required¹⁴;
- to avoid unnecessary costs associated with retaining different experts¹⁵;
- to ensure a fair trial of proceedings, and allow for more than one expert if necessary¹⁶;
- to declare the duty of an expert witness in relation to the Court and the parties to proceedings¹⁷; and
- according to r 31.17(d) (emphasis added):

¹¹ *Land and Environment Court Act 1979* (NSW), s 38(2).

¹² UCPR r 31.23 and Sch 7 cl 2(2).

¹³ UCPR r 31.17(a).

¹⁴ UCPR r 31.17(b).

¹⁵ UCPR r 31.17(c).

¹⁶ UCPR r 31.17(e).

¹⁷ UCPR r 31.17(f).

if it is *practicable* to do so *without compromising the interests of justice*, to enable expert evidence to be given on an issue in proceedings by a single expert engaged by the parties or appointed by the court.

16. Any party looking to adduce expert evidence must promptly seek directions in this regard.¹⁸ A court may give directions regarding expert witnesses, including directions: limiting the number of expert witnesses who may be called;¹⁹ providing for the engagement and instruction of a parties' single expert;²⁰ providing for the appointment and instruction of a court-appointed expert;²¹ requiring experts in relation to the same issue to confer, either before or after preparing experts' reports in order to endeavour to reach an agreement on any matters in issue,²² or any other direction that may assist an expert in the exercise of the expert's functions.²³

17. Under the UCPR, as soon as practicable after an expert has been appointed they must be provided with a copy of the expert witness' code of conduct. The expert's evidence cannot be admitted without an acknowledgment of having read the code and having agreed to be bound by it.²⁴ Failure to do so may result in the evidence not being received by the Court, or being accorded less weight.²⁵

18. Under UCPR 31.23(3), the exclusionary rule in relation to the reading of the expert witness' code of conduct applies to 'expert's reports'. Therefore, "quite deliberately, the Rules have been structured to ensure that expert reports that do not acknowledge Sch 7, whether prepared by an expert engaged for the purpose of giving evidence in the proceedings or otherwise, should not be admitted unless the Court otherwise orders."²⁶ The differing definitions of 'experts' and 'expert witnesses' are contained in r 31.18 of the UCPR.

¹⁸ UCPR r 31.19.

¹⁹ UCPR r 31.20(2)(e).

²⁰ UCPR r 31.20(2)(f).

²¹ UCPR r 31.20(2)(g).

²² UCPR r 31.20(2)(h), 31.24(1)

²³ UCPR r 31.20(2)(i).

²⁴ UCPR r 31.23.

²⁵ UCPR r 31.23(3).

²⁶ *Investmentsource Corp Pty Ltd v Knox Street Apartments Pty Ltd* [2007] NSWSC 1128 at [43].

19. In considering whether the Court should admit an experts report that did not contain an agreement to be bound by the expert witness' code of conduct, Barrett J, in *Tim Barr Pty Ltd v Narui Gold Coasts Pty Ltd*²⁷ noted that:

The concern is a quality assurance concern: to be sure that an expert has approached the task responsibly and mindful of the importance the expression of opinion will have as part of a body of evidence placed before the court. As a general rule, a written statement of the opinion of an expert should not be accepted as authoritative on a matter within the relevant field of expertise unless the person expressing the opinion is shown to have proceeded in that way; but the court may, in a particular case, allow the statement to be admitted even where the person is not shown to have proceeded in that way.

Barrett J went on to state that Courts should only make an "otherwise order" under r 31.23 in exceptional circumstances.²⁸

20. The considerations the Court may have regard to when determining whether to make an "otherwise order", and admit a report that does not contain an acknowledgement of the code of conduct into evidence, were discussed by McDougall J in *Investmentsource Corp Pty Ltd v Knox Street Apartments Pty Ltd*²⁹. In finding that a report prepared by an expert should not be admitted into evidence without the acknowledgement³⁰, McDougall J considered that: the expert did not prepare his report with a conscious appreciation of the obligations imposed by the code of conduct; there was a real risk that an expert who had not prepared a report under the discipline of the applicable schedule would form an opinion from which, thereafter, he or she would find it difficult to retreat; an expert who did not start out with an appreciation of his or her obligations under the applicable schedule could find it difficult to confer with other experts and define and refine the issues in dispute; and that there was a risk of prejudice to the other party, which would be exacerbated if the expert was not available for cross-examination.³¹

²⁷ [2009] NSWSC 49 at [46].

²⁸ *Tim Barr Pty Ltd v Narui Gold Coasts Pty Ltd* [2009] NSWSC 49 at [52].

²⁹ [2007] NSWSC 1128 at [50].

³⁰ For those proceedings, the applicable schedule at the time was Schedule K, the acknowledgement is now found under Schedule 7 of the UCPR.

³¹ It is important to note that McDougall J in *CJD Equipment v A & C Construction* [2009] NSWSC 1085 at [14] indicated that the criteria in *Investmentsource Corp Pty Ltd v Knox Street Apartments Pty Ltd* [2007] NSWSC 1128 were not meant to serve as checklist in subsequent cases, but conceded that some of the criteria had general application.

21. The above case is in contrast to the decision in *Barak Pty Ltd v WTH Pty Ltd (T/AS Avis Australia)*³² where Barrett J granted leave to examine an expert witness whose report did not contain an acknowledgement that he had read the code of conduct, but who acknowledged that he was aware of the expert witness' code of conduct when preparing his report and agreed to be bound by it. Further, in granting an "otherwise order" consideration was given to whether the opposing party had used the evidence contained in the report in question for their own purposes.³³

22. In *NM Rural Enterprises v Rimanui Farms Ltd*³⁴, at issue was the timing of the acknowledgement, that is, whether a report prepared for the plaintiff in 2001 without acknowledgement of the expert witness code of conduct, which was substantially reproduced in 2005 as an expert report with acknowledgement of the code of conduct, was admissible into evidence. It was noted that "the Code must instruct and guide the manner in which an expert constructs a report."³⁵ The first defendant submitted that the expert in question would have been unlikely to resile from any views or opinions expressed in the 2001 report or to modify them as the result of reconsidering his position in 2005 by reference to the Code.³⁶ However, ultimately, Harrison J concluded that:

It would ... be an excessive and somewhat slavish insistence on regulation and form in the particular circumstances of this case to permit the Code to operate in a way that excluded a report that has not caused any discernible forensic or procedural prejudice, and in circumstances where I am also satisfied that it contains a useful and reliable expression of opinion...³⁷

23. In reviewing the authorities in relation to r 31.23 of the UCPR White J has noted that the primary reason for the expert witness' code of conduct "was to address concerns about impartiality" (what is referred to above as adversarial bias).³⁸ His Honour went on to distinguish situations where 'expert' statements of opinion are prepared in non-litigious circumstances, which do not give rise to the same concerns in relation to adversarial bias, because:

³² [2002] NSWSC 649 at [5]. This case was in relation to the applicable schedule at the time, Schedule K, the acknowledgement is now found under Schedule 7 of the UCPR.

³³ *CJD Equipment v A & C Construction* [2009] NSWSC 1085 at [16]

³⁴ [2010] NSWSC 945.

³⁵ *NM Rural Enterprises v Rimanui Farms Ltd* [2010] NSWSC 945 at [7].

³⁶ *NM Rural Enterprises v Rimanui Farms Ltd* [2010] NSWSC 945 at [7].

³⁷ *NM Rural Enterprises v Rimanui Farms Ltd* [2010] NSWSC 945 at [20].

³⁸ White J, "Overview of the Evidence Act" (2010) 34 *Australian Bar Review* 71.

...where the expert has no reason to be partial, there may be strong grounds for admitting an expert's report not prepared for litigation, even where the [c]ode of [c]onduct has not been considered. The absence of a motive to be partial is a stronger indication of impartiality than a promise to be impartial.³⁹

24. Once prepared, the expert's report must be served on the other parties within 28 days of the hearing, if no other direction or court practice note applies.⁴⁰ Except by leave of the Court or by consent of the parties, an expert's report is not admissible unless it has been served in accordance with this rule.⁴¹ The Court only grants leave in exceptional circumstances, or where the report concerned only updates an earlier report served in accordance with this rule.⁴² If expert witnesses prepare a joint report it can be tendered at trial as evidence of any matters agreed.⁴³

Rules in Relation to Court-Appointed and Parties' Single Experts

25. Under the UCPR the rules in relation to court-appointed experts and parties' single experts are virtually identical.

26. If parties do not wish to use a single expert but the Court finds that a single expert would be appropriate in that case, the Court may at any stage of the proceedings appoint a "court-appointed expert" to inquire into and report on the issue.⁴⁴ On the other hand, when both parties do agree to have one expert presenting evidence this is called a "parties' single expert" or sometimes also called a "joint expert".⁴⁵ Both "court-appointed experts"⁴⁶ and "parties' single experts"⁴⁷ are remunerated by the parties.

27. In terms of parties' single experts, "the parties affected must endeavour to agree on written instructions to be provided to the parties' single expert concerning the issues arising for the expert's opinion and concerning the facts, and assumptions of fact, on which the report is to be based." If the parties are unable to agree they must

³⁹ White J, *ibid*, p 100.

⁴⁰ UCPR r 31.28(1).

⁴¹ UCPR r 31.28(3).

⁴² UCPR r 31.28(4).

⁴³ UCPR r 31.26.

⁴⁴ UCPR r 31.46.

⁴⁵ UCPR r 31.37.

⁴⁶ UCPR r 31.53.

⁴⁷ UCPR r 31.37.

seek directions from the Court.⁴⁸ In terms of a court-appointed expert, the Court may give directions as to the issues the report is to address; the facts, and assumptions of fact, on which the report is to be based; or instruct the parties to agree on the instructions to be provided to the expert.⁴⁹

28. Once the parties' single expert report has been sent to the parties, unless the Court orders otherwise, the parties may only seek clarification of the report once.⁵⁰ In terms of a court-appointed expert's report, the parties have to apply to the Court for leave in order to be able to seek clarification of any aspect of the report.⁵¹

29. Rule r 31.17(d) of the UCPR sets two criteria for the appointment of a court-appointed expert. First, it must be *practical* to use a court-appointed expert, and second, their engagement must be *without compromising the interests of justice*.

30. In *Abbey National Mortgages v Key Surveyors Nationwide Ltd*,⁵² for example, the parties wished to provide their own experts to value each of the 29 properties in dispute located around England. This would result in a total of 58 experts. The parties later agreed to reduce the number to 12.

31. Facing the inefficient and expensive task of hearing a large number of experts, the judge ordered the appointment of a court-appointed expert to value all the properties in the interests of a just, expeditious and economical resolution of the case. One party argued a court-appointed expert would disadvantage their case because the expert would be without intimate knowledge of property prices and extrinsic criteria relevant to those property prices in areas unfamiliar to the expert. The Court held that not only was the procedure of one expert more practicable, but also "that there could be no unfairness when both parties were in the same position."⁵³

⁴⁸ UCPR r 31.38.

⁴⁹ UCPR r 31.47.

⁵⁰ UCPR r 31.41.

⁵¹ UCPR r 31.50.

⁵² [1996] 3 All ER 184.

⁵³ *Abbey National Mortgages v Key Surveyors Nationwide Ltd* [1996] 3 All ER 184 per Bingham MR at 187.

32. This example illustrates how evidence from the parties' experts would result in disproportionate costs and excessive use of court time and thus a court-appointed expert was more appropriate.

33. Upon completion the court-appointed expert's report must be sent to the Registrar and the parties.⁵⁴ Should the expert change their opinion on a substantial matter in the proceedings, a supplementary report must be provided to the Registrar.⁵⁵ Any party affected by the expert's evidence may request the expert to attend Court for cross-examination with reasonable notice.⁵⁶

34. In *Port Securities Pty Ltd v Wollongong City Council*⁵⁷ one party sought to adduce new evidence on the basis that a different analytical process could have been used to arrive at a different outcome than that established by the court-appointed expert. Pain J of the Land and Environment Court found the demonstration of more than one analytical process of expert analysis to be of assistance to the Court in considering the weight attributable to the court-appointed expert's evidence.⁵⁸ Her Honour stated an appropriate course of action for parties unhappy with a court-appointed expert's report is for parties to write to the court-appointed expert setting out the issues of concern. Through this process the court-appointed expert's report could be amended and an alternative expert report unnecessary.⁵⁹

35. Of course a joint or court-appointed expert may not always be appropriate. The United Kingdom has encountered cases (mostly medical) where there has been more than one school of thought on an issue that contributes substantially to the final determination of liability and/or causation of a matter.⁶⁰ On these occasions, it has been held that it is not suitable to appoint a parties' single expert who may employ only one method of analysis.⁶¹

⁵⁴ UCPR r 31.49.

⁵⁵ UCPR r 31.49.

⁵⁶ UCPR r 31.51.

⁵⁷ (2006) 145 LGERA 285.

⁵⁸ *Port Securities Pty Ltd v Wollongong City Council and Another* (2006) 145 LGERA 285 at 290 [15].

⁵⁹ *Ibid* at 290 [16].

⁶⁰ M Livingstone, "Have we fired the 'hired gun'? A critique of expert evidence reform in Australia and the United Kingdom" (2008) 18 *JJA* 39, p 43.

⁶¹ *Simms v Birmingham Health Authority* [2001] Lloyd's Law Reports 382 as cited in M Livingstone, above n 56, p 43.

36. In most cases where a party objects to a court-appointed expert it is unlikely that the Court will not allow the parties to call their own experts, or use a joint expert, as a matter of fairness.

The Nature of Expert Evidence in the Land and Environment Court

37. Prior to the appointment of an expert the Court Practice Notes require that parties consider whether expert evidence is necessary to resolve the dispute.⁶²

38. During McClellan J's tenure as Chief Judge, his Honour encouraged the use of court-appointed experts. Indeed during the period between March 2004 and April 2005 there were 171 court-appointed experts in this Court.⁶³ In 2010, by contrast, there were only 5 parties' single experts and no court-appointed experts. This change in practice reflects, in part, perceptions of fairness concerning court-appointed experts and the decision by the Court to utilise Commissioners with expertise in specific areas.

39. The position of the current framework, as outlined in the Court Practice Notes for Class 1, 2, 3 and 4 proceedings is, first, to encourage parties to use a parties' single expert, and should the parties disagree, then the Court may appoint an expert if appropriate to do so. The norm, however, is for parties' single experts. Typically, matters relating to more objective issues such as noise, traffic, parking, overshadowing, engineering, hydrology and some contamination issues are seen as suitable for a parties' single expert.

40. In considering whether it is appropriate to use a parties' single expert, the Court Practice Notes set out the following:

⁶² *Practice Note Class 1 Development Appeals* at [42]; *Practice Note Class 1 Residential Appeals* at [53]; *Practice Note Classes 1, 2 and 3 Miscellaneous Appeal* at [30]; *Practice Note Class 3 Valuation Objections* at [34].

⁶³ New South Wales, Attorney General's Law Reform Commission, *Report 109 Expert Witnesses*, (June 2005), p 37.

- (a) the importance and complexity of the subject matter in dispute in the proceedings;
- (b) the likely cost of obtaining expert evidence from a parties' single expert compared to the alternative of obtaining expert evidence from individual experts engaged by each of the parties;
- (c) the proportionality of the cost in (b) to the importance and complexity of the subject matter in (a);
- (d) whether the use of a parties' single expert in relation to an issue is reasonably likely either to narrow the scope of the issue or resolve the issue;
- (e) the nature of the issue, including:
 - (i) whether the issue is capable of being answered in an objectively verifiable manner;
 - (ii) whether the issue involves the application of accepted criteria (such as Australian Standards) to ascertainable facts;
 - (iii) whether the issue is likely to involve a genuine division of expert opinion on methodology, or schools of thought in the discipline; and
 - (iv) whether the issue relates to the adequacy or sufficiency of information provided in the development appeal application;
- (f) whether the evidence of the parties' single expert involves the provision of aids to assist in the assessment of a development appeal application (such as shadow diagrams, view lines or photo montages);
- (g) whether the parties' single expert would be required independently to obtain further information or to undertake monitoring, surveys or other means of obtaining data before being able to provide expert evidence;
- (h) whether the parties are prepared at the time to proceed to hearing on the basis of a parties' single expert report about the issue and no other expert evidence about that issue;

- (i) whether the integrity of expert evidence on the issue is likely to be enhanced by evidence being provided by a parties' single expert instead of by individual experts engaged by the parties; and
- (j) whether the Court is likely to be better assisted by expert evidence on the issue being provided by a parties' single expert instead of by individual experts engaged by the parties.⁶⁴

41. The Court Practice Notes, however, do not discuss the circumstances when a court-appointed expert is appropriate. One such circumstance is where a parties' single expert is appropriate but the parties disagree as to which single expert, it is appropriate to engage a court-appointed expert.

42. Some commentators argue in cases where legal and factual issues are complex or the quantum is large, it is not appropriate to use court-appointed or parties' single experts. Rather in these cases each party should be heard on their own evidence.⁶⁵ However, given the nature of Class 1, 2, 3 and most Class 4 and 5 (especially sentencing matters) proceedings in this Court, the use of a single expert ought to be appropriate.

43. The main arguments for parties' single experts or court-appointed experts are that first, when the issue is one that usually requires only one answer (such as noise) there is no need for more than one expert. Second, it saves costs and time. Third, it has been argued that the Court has the benefit of hearing from at least one expert who is unaffected by adversarial bias.

44. Where the parties have agreed to a parties' single expert in relation to a specific issue they may not adduce evidence of another expert without the leave of the Court, in relation to that issue.⁶⁶ In determining whether to grant leave, the Court will consider the amount involved in the dispute and whether the cost involved in obtaining further evidence is proportionate to the dispute.

⁶⁴ *Practice Note Class 1 Development Appeal* at [42]–[43]; *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals* at [30]–[31]; *Practice Note Class 3 Compensation Claims* at [28]; *Practice Note Class 3 Valuation Objections* at [35].

⁶⁵ M Livingstone, above n 56, p 43.

⁶⁶ *Practice Note Class 1 Development Appeal* at [47]; *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals* at [35]; *Practice Note Class 3 Compensation Claims* at [31]; *Practice Note Class 3 Valuation Objections* at [39].

45. An apprehension of bias may be sufficient to ensure a grant of leave. In granting leave, the Court will also consider whether the party thinks that the joint expert may be wrong because another expert takes a different view.⁶⁷

46. It is important that this facility remains for parties to adduce further evidence so that trial by a parties' single expert or court-appointed expert does not become a substitute for trial by a judge.⁶⁸ The Court must balance the need to restrain the costs of litigation against the need for the parties to be fully heard on the matters in dispute.

47. The three considerations of the Court on an application to adduce further expert evidence are:

- (a) first, the proportionality of the cost of extra evidence relative to the size of the dispute;
- (b) second, whether there is competing respected expert opinion; and
- (c) third, whether the party affected would have a legitimate sense of grievance that it had not been permitted to advance its case at trial.⁶⁹

PRACTICE AND PROCEDURE GENERALLY IN RELATION TO EXPERT EVIDENCE IN THE LAND AND ENVIRONMENT COURT

Timing

48. The Court Practice Notes provide a guideline as to when expert evidence should be utilised in proceedings. The late engagement of experts has been a source of criticism for some time.

49. Davies J, formerly of the Queensland Court of Appeal, has stated:⁷⁰

...the main criticism in the past of court appointed experts has been that, by the time they are appointed, one or both parties will have obtained their own experts. It is therefore said, with some justification as I have pointed out, that to appoint

⁶⁷ *Cosgrove v Pattison* [2000] ALL ER (D) 2007.

⁶⁸ *Tomko v Tomko* [2007] NSWSC 1486 at [9].

⁶⁹ *Wu v Statewide Developments Pty Limited* [2009] NSWSC 587 at [17].

⁷⁰ The Hon Geoff Davies AO, QC "Court Appointed Experts" (2005) 5(1) *Queensland University of Technology Law and Justice Journal* 89, p 97.

yet another expert may result in costs being thrown away and will, at least in some cases, also delay the resolution of the case.

50. The Court Practice Notes state that expert evidence, and the consideration and appointment of a single expert, should be raised at the first or second directions hearing. An early discussion concerning the necessity of expert evidence encourages parties to crystallise and settle the real issues early and understand the specialised areas about which an expert will be engaged to provide evidence, prior to retaining the expert.

Selection of Joint and Court-Appointed Experts in the Land and Environment Court

51. In cases where parties agree to use a joint expert, but disagree as to the identity of that expert, the Court Practice Notes direct each party to put forward three names each with accompanying *curriculum vitae* to the Court.⁷¹ The Court usually makes a selection from that pool.⁷²

52. For court-appointed experts the Court follows the same procedure, although this is not noted in the Court Practice Notes.

53. The UCPR and Court Practice Notes do not, however, outline selection criteria for court-appointed or parties' single experts other than to state that the Court will not usually accept the appointment of an expert if that expert is unable to provide a report within 5 weeks of receiving the brief or is unable to attend a hearing within a further 28 days thereafter.⁷³ Preston J in an address to the Urban Development

⁷¹ *Practice Note Class 1 Development Appeal* Sch D, A 5(c); *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals* Sch A, A 5(c); *Practice Note Class 3 Compensation Claims* Sch A, 3(c); *Practice Note Class 3 Valuation Objections* Sch B, 8(c); *Practice Note Class 4 Proceedings* Sch A, B 1A (ii).

⁷² *Practice Note Class 1 Development Appeal* Sch D, C 1A (iii), (iv); *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals* Sch A, C 1A (iii), (iv); *Practice Note Class 3 Compensation Claims* Sch B, 1A; *Practice Note Class 3 Valuation Objections* Sch C, 1A; *Practice Note Class 4 Proceedings* Sch A, B 1A (iii), (iv).

⁷³ *Practice Note Class 1 Development Appeal* at [44]; *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals* at [32]; *Practice Note Class 3 Valuation Objections* at [36].

Institute of Australia in 2006 outlined some of the unstated, but nevertheless implied criteria for selection.⁷⁴ These are:

First, the field of knowledge must be one in which expert evidence can be called. Expert opinion evidence will not be permitted if the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of an expert possessing special knowledge or experience in the area. Statements of the obvious or ordinary are not admissible. A person ought not to be called to give such evidence.

Secondly, the field of knowledge in which the expert is to express an opinion must be one which the law recognises. The subject matter of the opinion must form part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience and special acquaintance with such body of knowledge would render the opinion of assistance to the court.

Hence, if a person is knowledgeable in and could express an opinion on, for instance, astrology or creation science, that person would not be qualified to give expert testimony because neither fields are recognised by the law.

Thirdly, the person must be qualified as an expert in the recognised field and have acquired specialised knowledge based on the person's training, study or experience. Here, some further specification may be required. A person will better assist the decision making if the person's qualifications include particular training, study or experience in relation to the very question on which expert evidence is sought. This requires descending below the "genus" of the recognised field (such as "planning") to the "species" of knowledge particularly relevant to the question in issue (such as "planning concerning licensed premises").

In practice, this may require parties to request expert witness candidates to provide further and better particulars of their qualifications, beyond their standard curriculum vitae, to demonstrate their particular expertise to give expert opinion evidence on the question involved in the case.

A person will also better assist the decision-maker if the person is recognised as a leader in the relevant field of knowledge. This may require parties casting their net wider than has been the practice to catch the leading experts in the field. These persons may never have given, or may have rarely given, evidence in court. Yet, by reason of their reputation and standing as leaders in the field, their expert evidence may be of greater reliability and weight and hence helpfulness to the Court. There has been a tendency for parties to nominate and for the Court to appoint the familiar faces. I would encourage the parties to search further afield.

Fourthly, the person must be impartial. This requires the person to be free from actual bias, but also free from an appearance of bias (to a reasonable and independent bystander). This requires the parties to ascertain whether the potential candidates have any conflicts of interest such as having performed work for one of the parties in or of relevance to the particular case in which expert evidence is proposed to adduced.

⁷⁴ The Hon Justice B J Preston, *Appointment of Court Appointed Expert Witnesses in the Land and Environment Court* (paper presented at the Urban Development Institute of Australia Legal Luncheon, Sydney, 21 March 2006), pp 3-4.

This may mean that the pool of experts able to be appointed as a court-appointed expert is reduced by eliminating consultants who regularly work for, or are called to give evidence in Court as experts for, one or other of the parties. Conversely, the pool of experts is increased by adding experts who do not regularly do such work. These persons may well correspond with those leading experts in the field who have not in the past regularly given evidence in Court.

Fifthly, the person must be ready, willing and able to perform the work necessary to discharge the duty as court-appointed expert. This requires consideration of the person's access to adequate:

- (i) human resources,
- (ii) research facilities,
- (iii) technical and technological resources, and
- (iv) administrative resources.

It also involves consideration of the time the person has available to carry out the necessary research, field or experimental work, deliberation, oral report and written report involved in being a court-appointed expert in the case.

Sixthly, the expert needs to be able to perform properly the duties as a court-appointed expert in relation to the questions involved at a cost that is reasonable. There needs to be a reasonable proportionality between the cost and the objectives to be achieved. Obtaining a better quality expert and expert evidence may be worth the additional expense.

PARTY EXPERTS -v- COURT-APPOINTED OR PARTIES' SINGLE EXPERTS

54. The increasingly frequent use of expert evidence in the Land and Environment Court has highlighted the limitations of the traditional model of cross-examination of each of the party's experts. Concerns have arisen in relation to: experts feeling like they were unable to explain their evidence properly due to the fact that they were constrained by having to answer the cross-examiner's questions; evidence remaining difficult to understand or ambiguous post cross-examination; experts being biased or acting as advocates; and the process being lengthy and taking too much time to get to the point of difference or disagreement between the experts.⁷⁵

55. As mentioned previously, the Land and Environment Court has employed several strategies in order to overcome the difficulties with expert evidence. The merits and criticisms of two of these strategies will be discussed below.

⁷⁵ For a more expansive list see Rares J, *Using the "Hot Tub" – How Concurrent Expert Evidence Aids Understanding Issues* (paper presented at the New South Wales Bar Association Continuing Professional Development seminar, 23 August 2010), p 2.

56. The problem of adversarial bias in relation to expert witnesses has been identified by a number of sources. It was noted in an empirical study carried out by the Australian Institute of Judicial Administration that more than a quarter of Judges have experienced bias on the part of experts.⁷⁶ One of the identified ways of responding to the difficulty in obtaining objective expert evidence is through the use of court-appointed experts.⁷⁷

57. However, Downes J of the Federal Court believes in the adversarial model and treats with caution the encouraged use of parties' single experts and court-appointed experts. His Honour believes the adversarial method of cross-examination⁷⁸, cross checking evidence and involvement of more expert opinion crystallises more acutely the criteria required to evaluate issues than a single opinion can.⁷⁹ His Honour opines:⁸⁰

I do not find anything untoward in expert witnesses presenting different perspectives. This is what counsel do all the time. The limitation is that they must be sustainable perspectives presented in a way which can be evaluated. I do not even mind experts who are "hired guns" provided that they are not presenting evidence that is unsustainable ...

58. Further, it has been noted that the fact that the different experts do not reach the same conclusion is not inherently a bad thing.⁸¹ The differing criteria exposed by the different experts will enable the judge to reach their own conclusion.

59. Nevertheless, in *Abbey National Mortgages v Key Surveyors Nationwide Ltd* the Court stated:⁸²

It was argued [by the parties] that appointment of a court expert was pointless, since it merely meant the instruction of an additional expert whose opinion would carry no more weight than any other. We feel bound to say that in our opinion

⁷⁶ I Freckleton, P Reddy and H Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (Empirical study, Australian Institute of Judicial Administration, 1999), p 38.

⁷⁷ The Hon Justice Garry Downes AM, *Concurrent Expert Evidence in the Administrative Appeals Tribunal: The New South Wales Experience* (paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, Hobart, 27 February 2004).

⁷⁸ The Hon Justice Garry Downes AM "Problems with expert evidence: are single or court-appointed experts the answer?" (2006) 15 JJA 185, p 188.

⁷⁹ *Ibid*, p 187.

⁸⁰ *Ibid*, p 187.

⁸¹ Rares J, above n 71, 7.

⁸² *Abbey National Mortgages v Key Surveyors Nationwide Ltd* [1996] 3 All ER 184 per Bingham MR at [191].

this argument ignores the experience of the courts over many years. For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend, if called as witnesses at all, to espouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties. There must be at least a reasonable chance that an expert appointed by the court, with no axe to grind but a clear obligation to make a careful and objective valuation, may prove a reliable source of expert opinion.

60. A joint or court-appointed expert, by contrast, has no interaction with the parties other than to clarify evidence or to be cross-examined on it and this will only happen when both parties are present. Separated from the environment of one party, a court-appointed or joint expert is more likely, in my view, to be disinterested in the result of a case and, therefore, give more neutral evidence.

Concurrent Evidence

61. The prevailing approach of the Land and Environment Court of taking expert evidence is to do so concurrently, or 'hot-tubbing'.⁸³ This is the norm rather than the exception. Unless the judge or commissioner orders otherwise, the relevant experts on a particular point are sworn-in together and remain together during the entirety of their evidence, as opposed to the traditional approach where each expert presents their evidence and is separately made available for cross-examination. This approach facilitates a discussion between the experts, the advocates and the judge, and helps to narrow the issues in dispute.

62. The procedure of giving evidence concurrently was explained in *BGP Properties Pty Ltd v Lake Macquarie City Council* as follows.⁸⁴

The issues which were ultimately defined in the proceedings required resolution of the different views of experts in relation to a number of significant matters. As will become commonplace in proceedings in this Court, the oral testimony of the experts was taken by a process of concurrent evidence. This involved the swearing in of the experts with similar expertise, who then gave evidence in relation to particular issues at the same time. Before giving evidence, the experts had completed the joint conferencing process, which enabled the court to identify the differences which remained and which required resolution through the oral evidence. Each witness was

⁸³ UCPR r 31.35(c); *Practice Note Class 1 Development Appeals* at [56]; *Practice Note Class 1 Residential Appeals* at [63]; *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals* at [44]; *Practice Note Class 4 Proceedings* at [48]; *Practice Note Class 3 Compensation Claims* at [39]; *Practice Note Class 3 Valuation Objections* at [48].

⁸⁴ [2004] NSWLEC 399 per McClellan J at [121].

then given an opportunity to explain their position on an issue and provided with an opportunity to question the other witness or witnesses about their position. Questions were also asked by counsel for the parties. In effect, the evidence was given through a discussion in which all of the experts, the advocates and the Court participated.

63. Essentially, the giving of concurrent evidence involves seven distinct stages:

- (a) first, identification of the issues upon which expert evidence is needed;
- (b) second, the preparation of an individual expert report;
- (c) third, a conference between the experts, without lawyers, in order to prepare a joint report that sets out the matters upon which there is agreement and the matters upon which there is disagreement, including where possible short reasons as to why they disagree;
- (d) fourth, the preparation of a joint report covering the matters the experts agree on and the matters they don't together with an explanation of why not;
- (e) fifth, the experts on a particular issue are called to give evidence together, at a convenient time in the proceedings, usually following the tendering of the lay evidence;
- (f) sixth, the experts are given an opportunity to explain the issues in dispute in their own words. After, each expert is allowed to comment on or question the other expert; and
- (g) seventh, cross-examination of the experts is permitted. Although, each party can rely on their expert for clarification of an answer.⁸⁵

⁸⁵ See Rares J, above n 71, p 7; Neil J Young QC, *Expert Witnesses: On the Stand or in the Hot Tub – How, When and Why?* (paper presented at the Commercial Court Seminar, 27 October 2010), p 2; Biscoe J, *Expert Witnesses: Recent Developments in NSW* (paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, 16 September 2006), p 6 and *Strong Wise Ltd v Esso Australia Resources Ltd* [2010] FCA 240 at [93].

59. The procedure for giving expert evidence concurrently is not presently prescribed in the Practice Notes, but is an idiosyncratic process that varies from case to case and judge to judge, which has been succinctly summed up as whichever expert “has the microphone has the floor.”⁸⁶

60. Proponents of concurrent evidence argue that the procedure narrows the issues in dispute, allows all evidence to be presented to the decision-maker at the same time, reduces the likelihood of adversarial bias and saves costs and time.⁸⁷

61. Rares J notes that this procedure is beneficial in that it reduces the chance of the first expert “obfuscating in an answer” and, due to the fact “that each expert knows his or her colleague can expose any inappropriate answer immediately, and also can reinforce an appropriate one, the evidence generally proceeds to the critical... points of difference.”⁸⁸ Further, by effectively identifying the areas of disagreement between the experts, concurrent evidence procedures reduce the hearing time, facilitating the “just, quick and cheap” resolution of the real issues in dispute.⁸⁹ It has been noted that evidence in the Land and Environment Court can now be taken in half the time when using concurrent evidence procedures.⁹⁰

62. Whilst concurrent expert evidence procedures have enjoyed significant support in the Land and Environment Court, they have not been universally accepted. Critics of concurrent evidence procedures, such as Davies J, note that it only serves to increase the adversarial nature of the proceedings. Davies J argues that the ‘hot tub’ turns expert witnesses into expert advocates, with the likely result of producing one of two undesirable consequences:

The first is that the judge will be left with two opposed but apparently convincing opinions by equally well-qualified experts, neither of them has been shaken in the process. The second and, unfortunately more likely, consequence is that the judge will be unwittingly convinced by the more articulate and apparently authoritative personality. The likelihood of this latter consequence increases as the complexity of the question in issue increases.

⁸⁶ Rares J, above n 71, p 11.

⁸⁷ Downes J, above n 73, p 4.

⁸⁸ Rares J, above n 71, pp 10-11.

⁸⁹ *Civil Procedure Act 2005 (NSW)*, s 56.

⁹⁰ McClellan J, above n 2, p 19.

So, in hindsight...the Hot Tub method seem[s], to many, to be too cumbersome, too expensive and too adversarial.

59. Furthermore, critics of concurrent evidence note that, due to the fact the structure of concurrent evidence varies from court to court, the utility of such procedures is greatly dependant on the ability of the judge to direct the discussion, to ensure that all points of view are aired, and that it does not degenerate into an argument between the experts.⁹¹

60. While these concerns point to certain weaknesses in the concurrent evidence model, in practice the procedure has had considerable success in increasing the efficiency of court proceedings, especially in cases where there are more than two experts. It may be that in terms of some issues the traditional method of cross-examination of each expert separately is more appropriate, but this is not constrained under the concurrent evidence model, and the Court would benefit from having the other expert in the room to clarify the point of disagreement.

61. McClellan J, the current Chief Judge of the Common Law Division of the Supreme Court, has praised concurrent evidence procedures, and is in fact responsible for instigating the widespread use in the Land and Environment Court. He notes that, "experience shows that provided everyone understands the process at the outset, in particular that it is to be a structured discussion designed to inform the judge and not an argument between the experts and the advocates, there is no difficulty in managing the hearing."⁹²

62. In addition, concurrent evidence procedures have received support from the experts themselves, as they enable experts to communicate their opinions more effectively, because they are not confined to answering the questions of the advocates. This in turn, increases the capacity of the judge to decide which expert to accept.⁹³

⁹¹ Lisa Wood, "Experts Only: Out of the Hot Tub and into the Joint Conference" (2007) *Anti-Trust* 89.

⁹² McClellan J, above n 2, p 18.

⁹³ McClellan J, above n 2, p 18.

63. In *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* directions were made for concurrent expert evidence. In doing so the Court noted that:⁹⁴

The purpose of the proposed concurrent evidence by the six town planning and architectural experts is to seek to narrow the issues in dispute and to save hearing time. It also allows the Court, as the decision-maker, to consider the competing expert views while they are fresh in the mind...The Court and the experts have already gained considerable benefit out of the process of generating joint reports in accordance with the Expert Witness Practice Direction.

64. Further, Talbot J highlighted in that case the use of concurrent evidence procedures resulted in the oral evidence being confined to four days of a 13-day trial.⁹⁵ In fact, oral evidence by the six town planning and architectural experts took only two days.

DUTIES OF EXPERTS

Independence

65. Any expert, whether court-appointed or otherwise, has certain duties. The duties are largely set out in the code of conduct that the expert must acknowledge, as referred to earlier. As referred to above, and at the risk of repetition, these duties may be summarised as:

- (a) that the expert has an overriding and paramount duty to the Court and not to the party engaging the expert. Thus an expert must not be an advocate for a particular party;
- (b) that the expert has a duty to act honestly and impartially at all times;
- (c) that the expert must assist the Court on matters relevant to the expert's area of expertise;

⁹⁴ *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2004] NSWLEC 170 per Talbot J at [1].

⁹⁵ *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2004] NSWLEC 315 per Talbot J at [14].

- (d) that the expert must comply with directions of the Court, which includes not accepting the work if there is inadequate time in which to provide the opinion sought; and
- (e) that the expert must work co-operatively with other experts involved in the proceedings.

66. In *Vilro Pty Ltd v Roads and Traffic Authority of NSW* the Court said in relation to an expert's paramount duty to the Court, that it includes the following:⁹⁶

As such, it is expected that when an expert gives a commitment that he or she will be available to attend a hearing at which he or she is to give evidence in respect of a report prepared earlier in the proceedings, this commitment will be honoured save in only the most exceptional circumstances that will generally be beyond the control of the expert. Any failure in this regard breaches not only the expert's duty to the client but, and more importantly, the expert's paramount duty to the court.

67. The same may be said with respect to experts who fail to comply with court timetables for the preparation of their reports.

68. Further duties include, avoiding acting only on instructions; or agreeing to a request to withhold; or avoiding agreeing with other experts; and considering all material facts, including those that may detract from their opinion.⁹⁷

69. An expert witness should identify any pre-existing relationship between the expert witness, or their firm or company, and a party to the litigation.⁹⁸ An expert is not precluded from providing expert evidence where they have a material interest in the proceedings or are an employee of one of the parties. That said, their evidence may be given less weight.⁹⁹ Where an expert does have a material interest in the proceedings, the expert must take considerable care to ensure that they fulfil their duties to the Court by providing evidence that is "uninfluenced as to form or content by the exigencies of litigation" and objective and unbiased in relation to the matters within his or her expertise. The expert must also refrain from acting as an advocate:

⁹⁶ [2010] NSWLEC 141 at [37] per Pepper J.

⁹⁷ Rose J, "The Evolution of the Expert Witness" (2009) 23(1) *Australian Journal of Family Law*.

⁹⁸ *Practice Note Class 1 Residential Residential Appeals* at [58]; *Practice Note Class 1 Development Development Appeals* at [51]; *Practice Note Classes 1,2 and 3 Miscellaneous Appeals* at [39]; *Practice Note Class 3 Compensation Claims* at [35]; *Practice Note Class 3 Valuation Objections* at [43].

⁹⁹ *Fagenblat v Feingold Partners Pty Ltd* [2001] VSC 454 at [7].

“[s]uch an expert might well be able to give truthful evidence to ensure the court is fully informed of his or her reasoning process, and to present evidence without misleading the court or concealing any relevant facts from the court. Whether the expert does so is a matter to be tested in cross-examination.”¹⁰⁰ The Court will also consider whether the expert has the requisite degree of impartiality.¹⁰¹

70. In these circumstances, the expert “must be in a position to exclude from consideration everything except the matters identified as the facts upon which his or her opinions are based.”¹⁰²

71. In *Willoughby City Council v Transport Infrastructure Development Corporation (No 2)*, an expert was held not to be independent because not only was she an employee of a party, she was involved in the proposal for the development of the land in question, and therefore, not independent from the matter in dispute. Her report contained facts and partisan opinions, which demonstrated she had adopted the role of an advocate for a party.¹⁰³

72. The objectivity of the expert is essential to the credibility and reliability of expert evidence. This will not be lost by forcefully defending an opinion genuinely held by the expert, but it may be compromised “if the witness is unwilling to consider alternative factual scenarios or is unwilling to appropriately acknowledge recognised differences of opinion or approach between experts.”¹⁰⁴

73. If an expert is retained on the basis of contingency fees or a deferred payment scheme, this must be disclosed to the Court.¹⁰⁵ This should be done either in the expert report or as an annexure to the report. The purpose of this is to ensure that the Court is aware of any financial interest an expert might have in the outcome of

¹⁰⁰ *Sydney South West Area Health Service v Stamoulis* [2009] NSWCA 153 at [211].

¹⁰¹ *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 at [348]; *Pittwater Council v A1 Professional Tree Recycling Pty Ltd (No 2)* [2008] NSWLEC 325; See also The Hon Justice French “Expert testimony, opinion, argument and the rules of evidence” (2008) 36 *ABLR* 263, pp 279-280.

¹⁰² *Australian Securities and Investments Commission v Rich* (2005) 190 *FLR* 242 at [256].

¹⁰³ *Willoughby City Council v Transport Infrastructure Development Corporation (No 2)* [2008] NSWLEC 238 at [11].

¹⁰⁴ *Practice Direction Guidelines for Expert Witnesses*, Federal Court of Australia, issued on 5 May 2008; Biscoe J, *Court Practice and Procedure for Experts* (paper presented at the Environmental Institute of Australia and New Zealand’s Professional Environmental Practice Course Program, 15 May 2008) at [4].

¹⁰⁵ UCPR r 31.22

the proceedings.¹⁰⁶ This does not prevent the evidence from being admissible, but may affect the weight given to it.

The Content of Expert Reports

74. As stated above, the expert report should commence with an acknowledgement by the expert that he or she has read the code of conduct and agrees to be bound to it.¹⁰⁷ If this condition is not satisfied the report will be inadmissible unless granted leave by the Court¹⁰⁸ (leave will only be granted in exceptional circumstances¹⁰⁹). The purpose of the acknowledgement is to ensure that the “expert has approached the task responsibly and mindful of the importance the expression of opinion will have as part of a body of evidence placed before the court.”¹¹⁰

75. The report must include details of the expert’s qualifications.¹¹¹

76. All evidence that would otherwise be adduced orally should be contained in the expert report. If the information is not contained in the report the Court will grant leave for it to be adduced in exceptional circumstances or if the information merely updates the report.¹¹² Having said this, leave may be granted to permit the expert to clarify matters already contained in the report.

77. An expert report must set out any facts or assumptions that the findings of the report are based on.¹¹³ These assumptions should match the facts that it is believed will be found by the Court. Discrepancies between the assumptions made by the expert and the facts found by the Court may result in the expert’s opinion being given so little weight it becomes worthless.¹¹⁴

¹⁰⁶ Biscoe J, *Court Practice and Procedure for Experts* (paper presented at the Environmental Institute of Australia and New Zealand’s Professional Environmental Practice Course Program, 15 May 2008) at [12].

¹⁰⁷ UCPR r 31.23.

¹⁰⁸ UCPR r 31.23; *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2009] NSWSC 49 at [13].

¹⁰⁹ UCPR r 31.23(3); *Jermen v Shell Company of Australia Ltd* [2003] NSWSC 1106.

¹¹⁰ *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2009] NSWSC 49 at [46].

¹¹¹ UCPR Sch 7 cl 5(1)(a), r 31.27(1)(a).

¹¹² UCPR r 31.27(4).

¹¹³ UCPR Sch 7 cl 5(1)(b); r 31.27(1)(b); *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85].

¹¹⁴ *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354 at [14].

78. Similarly, if the assumptions are not specified, the Court is unable to ascertain how the expert has applied their specialised knowledge to the facts and this may result in the report being inadmissible or, again, being given very little weight in the proceedings.¹¹⁵

79. Each opinion expressed by the expert must be supported by the reasons for that opinion.¹¹⁶

80. If it has been requested that the expert comment on something that is beyond their expertise or there is insufficient data supporting the conclusions reached, this should be specified in the report.¹¹⁷

81. The report should also set out all materials and literature that have been used to support the opinions of the report, any examinations, tests or other investigations upon which the expert has relied upon or has carried out.¹¹⁸

82. Section 135 of the *Evidence Act* provides that the Court may refuse to admit evidence if its probative value is substantially outweighed by the evidence being misleading or confusing or will result in an undue waste of time.¹¹⁹ As a result, expert reports should be as clear and transparent as possible.

83. All experts should be mindful of the fact that judges do not have the same level of knowledge, expertise or understanding as them. The report must therefore be written in plain English. Use headings and summaries. Reports that are particularly lengthy or complex should include an executive summary.¹²⁰

84. The parties' legal advisors are permitted to consult with the expert in order to ensure that the report is on point in regards to the issues before the Court. It was noted by Lindgren J that:¹²¹

My impression is that in some cases, beyond the writing of an initial letter of instructions to the expert, lawyers have left the task of writing the reports entirely to the expert, even though he or she cannot reasonably be expected to understand the

¹¹⁵ *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85].

¹¹⁶ UCPR Sch 7 cl 5(1)(c), r 31.27(1)(c), r 31.27(2) and r 31.27(3).

¹¹⁷ UCPR Sch 7 cl 5(1)(d) and 5(3), r 31.27(1)(d).

¹¹⁸ UCPR Sch 7 cl 5(1)(b) and (e), r 31.27(1)(e), r 31.27(1)(f).

¹¹⁹ *Evidence Act 1995* (NSW), s 135.

¹²⁰ UCPR Sch 7 cl 5(1)(g), r 31.27(1)(g)

¹²¹ *Harrington-Smith v Western Australia (No7)* (2003) 130 FCR 424 at [27].

applicable evidentiary requirements. Such a course may have been followed because of a commendable desire to avoid any possibility of suggestion of improper influence on the author. But I suggest that the distinction between permissible guidance as to form and as to the requirements of s56 and s79 of the Evidence Act, on the one hand, and impermissible influence as to the content of a report on the other hand, is not too difficult to observe. It does not serve the interests of anyone, including those of the expert witness, to deny him or her the benefit of guidance of the kind mentioned.

85. However it is important that lawyers do not go beyond making sure the report is on point, beyond ensuring legal tests of admissibility are addressed, and instead alter the substance of the expert's report.¹²² This would lead to the report being given very little weight, or being inadmissible. It must be the expert's, and not the legal representatives', report.

86. A clear example of circumstances where an expert's evidence was given very little weight is *Universal Music Australia Pty Ltd v Sharman License Holdings*.¹²³ In that case the solicitor had suggested a sentence which then appeared in the final report.¹²⁴

87. It is important to consider these authorities in conjunction with the New South Wales Barrister Rules and the Law Society of New South Wales Professional Conduct and Practice Rules, made pursuant to the *Legal Profession Act 1987* (NSW).¹²⁵ For example, according to Barrister Rule 43:

A barrister must not suggest or condone another person suggesting in any way to any prospective witness (including a party or the client) the content of any particular evidence which the witness should give at any stage in the proceedings.

88. However, this does not exclude a Barrister from testing the evidence to be given by an expert for any inconsistencies, as long as it does not amount to coaching or encouraging the expert to deviate from his or her beliefs.¹²⁶

¹²² *Whitehouse v Jordan* [1980] 1 All ER 650 at 654.

¹²³ (2005) 65 IPR 289.

¹²⁴ *Universal Music Australia Pty Ltd v Sharman Licence Holdings Ltd (Universal Music)* (2005) 65 IPR 289 at [226]–[232].

¹²⁵ Bergin J, *A Judicial Perspective on what the Court expects from legal practitioners in equity and commercial litigation* (paper presented at the Law Society of New South Wales Specialist Accreditation Business, Property, Wills, Advocacy and Commercial Litigation Annual Conference, 26 July 2003), p 5.

¹²⁶ New South Wales Barrister Rules, r 44.

Expert Conferences

89. If “a parties’ single expert is not appointed and the parties engage their own experts, the Court will usually direct that the parties’ experts attend a joint conference and produce a joint report to the Court.”¹²⁷

90. The purpose of expert conferences, or conclaves, is to allow the experts to discuss the issues in dispute in a neutral context where questions can be asked and the issues in dispute narrowed and clarified. This facilitates the identification, investigation and resolution of the real issues in contest between the experts.¹²⁸ Discussions between the experts should be full and frank. The content of discussions between the experts cannot be disclosed at the hearing unless the parties agree or bad faith is alleged.¹²⁹

91. The advantages of an expert conference are that:

- (a) any extreme or biased views adopted by experts are quickly moderated when they need to be justified before peers;
- (b) factual concessions are easier to make in private rather than in Court where there is pressure in front of the client for the expert to adhere to the original opinion;
- (c) they often disclose facts and/or relevant information not always known or appreciated by other experts; and

¹²⁷ *Practice Note Class 1 Development Appeals* at [55].

¹²⁸ Biscoe J, *Land and Environment Court of New South Wales: Practice and Procedure* (paper presented at the Australasian Conference of Planning and Environmental Courts and Tribunals, Christchurch, New Zealand, 21 August 2009) at [19].

¹²⁹ UCPR r 31.24(6).

- (d) significant points of disagreement can be identified and more adequately defined, while peripheral issues are often isolated or agreed upon.¹³⁰

92. The conference should result in a joint report stating what remains in dispute.¹³¹ Depending on the circumstances, it may be useful to produce a table setting out the issues that are agreed upon and the issues that are in dispute, together with brief reasons as to the nature of the dispute.

93. It is important that at the conference the experts make a concerted effort to agree. On occasion, experts have met and refused to agree on matters which are subsequently agreed upon on the first day of the hearing. This merely puts the parties to extra cost with no beneficial outcome.¹³²

94. It is also important that experts maintain their independence throughout the process. Legal representatives are not to attend joint conferences of experts or be involved in the preparation of joint reports without the leave of the Court.¹³³ There have been instances where experts have agreed at the conference, but subsequently withdrawn or modified their position after further discussions with lawyers. If this occurs, it defeats the purpose of expert evidence as the experts are no longer giving their opinion, but an opinion "filtered by the lawyers."¹³⁴ It will also subject the expert to rigorous cross-examination that may damage his or her credit.

Expert Assistance -v- Expert Evidence

95. When engaged to provide expert evidence, a distinction must be drawn between the provision of assistance and the provision of evidence. A party may seek to ask questions that go beyond what is required or desirable as evidence. Such information may be for the purpose of cross-examining an opponent's expert.

¹³⁰ Wood J, "Forensic sciences from the judicial perspective: the expert witness in the age of technology" (2003) 23 *Australian Bar Review*, p 137.

¹³¹ UCPR r 31.26.

¹³² McClellan J, above n 2, p 11.

¹³³ *Practice Note Class 1 Development Appeals* at [55], *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals* at [43]; *Practice Note Class 4 Proceedings* at [47]; *Practice Note Class 3 Compensation Claims* at [38]; *Practice Note Class 3 Valuation Objections* at [47].

¹³⁴ McClellan J, above n 2, p 12.

96. In noting that a report, which was prepared by an expert accountant, contained “precious few accounting opinions” and was more akin to an argumentative case put forth by a litigant, Allsop J in *Evans Deakin Pty Ltd v Sebel Furniture Ltd* highlighted that:¹³⁵

There may well have been great value in those preparing Sebel's case obtaining the views of [the accounting expert]. Such views would no doubt have assisted them in analysing and preparing the case and in marshalling and formulating arguments. That is the legitimate, accepted and well known role of expert *assistance* for a party preparing and running a case. Expert *evidence* in which a relevant opinion is given to the Court drawing on a witness' relevant expertise is quite another thing.

97. While it is permissible for a single expert to fill both of these roles, it is important that the “person and the legal advisers understand and recognise the difference between the two tasks, and keep them separate.”¹³⁶ If the same expert is used, the expert evidence will be given little weight if the report makes absolute claims about debateable propositions, rejects the existence of obvious qualifications or areas of uncertainty, treats counsel for cross-examination with contempt, offers combative answers to questions or responds to questions in a way that is calculated to advance the case of the party calling the witness, and goes beyond what is necessary to answer the question.¹³⁷

98. Several strategic reasons mitigate against using the same expert, including: it may diminish the perceived impartiality of the expert and therefore result in the report being given less weight; the role of the expert in the preparation of the case might then be the subject of cross-examination; the Court may exercise its discretion to exclude the evidence if the probative force of the evidence has been weakened, due to the exposure to inadmissible evidence in case preparations; and the expert being privy to privileged communications during case preparation may result in the inadvertent waiver of privilege.¹³⁸

99. Where a party needs both expert evidence and assistance, the party should seriously consider engaging a second expert for the purpose of assistance, rather than evidence.

¹³⁵ [2003] FCA 171 at [676].

¹³⁶ *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 per Allsop J at [676].

¹³⁷ French J, “Expert testimony, opinion, argument and the rules of evidence” (2008) 36 *ABLR* 263, p 279.

¹³⁸ See Hugh Stowe, “Preparing Expert Witnesses: A Search for Ethical Boundaries” (Summer 2006/2007) *Bar News* 44, pp 46-47.

CONCLUSION

100. Given the highly technical nature of many of the issues that the Court must determine across all Classes of its jurisdiction, the Court is increasingly reliant on expert evidence. But it must be remembered that experts are there to assist the Court in determining the real issues in dispute between the parties and that their paramount duty is to the Court. If this is borne in mind, then preparing expert evidence ought neither to be a daunting nor a complex process and the likelihood of the expert's evidence being of limited utility, or worse, inadmissible, should be eliminated. By complying with the relevant rules of practice and procedure with respect to expert evidence in the Land and Environment Court, not only will the Court be genuinely assisted by the evidence of the expert, but in turn, so will the client.

29 March 2011

Justice Rachel Pepper