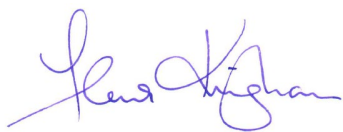


Expert evidence in the Land Court

Practice Direction 6 of 2020



President Fleur Kingham
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Introduction

1. This Practice Direction—
 - a) provides an overview of the procedures for expert evidence in the Land Court
 - b) explains the duties of expert witnesses and the parties who instruct them
 - c) outlines the Court’s expectations of expert witnesses giving evidence in the Land Court
 - d) repeals and replaces Practice Directions 2 of 2017 and 3 of 2018 and the Guidelines for Expert Evidence in the Land Court.
2. An expert witness is a person who would, if called as a witness at the hearing of a case, be qualified to give opinion evidence about an issue arising in the case.¹
3. An expert witness assists the Court on matters of a technical and specialist nature by providing their objective and impartial opinion, drawing on their knowledge and experience. The Court expects expert witnesses to be independent and well informed, and to observe the limits of their expertise.
4. A person who is:
 - a) a party to the case or
 - b) a person whose conduct is in issue in the caseis not an expert witness even if they possess the relevant expertise.
5. Notwithstanding paragraph 4, if a public entity is a party to the case, it may nominate a qualified person in its employ to be an expert witness, provided the nominee confirms they understand and will comply with their duty to the Court.

Example-

The Valuer-General may nominate a valuer in the State Valuation Service as their expert witness in a land valuation appeal.

¹ *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

OVERVIEW OF PROCEDURES FOR EXPERT EVIDENCE

Overview of Procedures for Expert Evidence

6. The Court's objective is to make timely, efficient, fair, and effective use of expert evidence. It will make directions on a case-by-case basis, taking into account the resources and preferences of the parties, and the nature, scope, and complexity of the issues in the case.
7. The procedures for expert evidence involve the following steps—
 - a) The parties identify the issues for the hearing;
 - b) The parties nominate their expert witnesses;
 - c) The Court decides what procedure will apply, in consultation with the parties;
 - d) The parties brief the experts;
 - e) If only one party nominates an expert on an issue, the expert witness will produce a statement of evidence;
 - f) If more than one party engages an expert on one or more issues those expert witnesses will attend a meeting of experts and produce a joint expert report.²
8. If a party contends an expert witness nominated by another party is not qualified to give expert opinion evidence, they must notify all parties and the Court, as soon as practicable, so that question can be dealt with as a preliminary matter.
9. The Court's directions for expert evidence may include directions that³ -
 - a) fix the number of expert witnesses who may be called to give evidence on a specified issue or for a particular area of expertise;
 - b) limit the issues on which expert evidence may be led;
 - c) limit the number of statements or reports an expert witness may file;
 - d) settle the issues or questions the expert witnesses must address;
 - e) schedule meetings of expert witnesses;
 - f) set dates for filing and service of expert witness statements and joint expert reports;
 - g) direct the case to Court Managed Expert Evidence (CMEE);

² *Land Court Rules 2000* Part 5 Division 2.

³ *Land Court Act 2000* s 22; [Land Court Model Directions](#).

OVERVIEW OF PROCEDURES FOR EXPERT EVIDENCE

h) fix how and when expert witnesses will give oral evidence.

THE DUTY OF AN EXPERT WITNESS

The Duty of an Expert Witness

10. The primary duty of an expert witness is to assist the Court. This duty overrides any obligation an expert witness owes to any party or to the person paying their fee or expenses.⁴ An expert witness must not accept (and a person must not give) instructions to adopt or reject a particular opinion about an issue in dispute in the case.⁵
11. Expert witnesses must–
- a) understand and comply with their duty to assist the Court;
 - b) refrain from acting as an advocate for a party;
 - c) comply with the Court’s directions;
 - d) read the Rules and this Practice Direction;
 - e) know what issues they are being asked to consider;
 - f) identify if they need further information or instruction in order to give their opinion;
 - g) confine their opinion and their evidence to the issues relevant to their area of expertise;
 - h) expose the facts, assumptions, methodology, and reasoning that supports their opinion;
 - i) fully engage in a meeting of experts, if required;
 - j) ensure their contribution to a joint expert report, if required, complies with this Practice Direction; and
 - k) be prepared to change, qualify, or revise their opinion where necessary and where the evidence no longer supports their opinion;
 - l) if they change an opinion expressed in a report filed with the Court, explain what factors or information resulted in that change of opinion.

⁴ *Land Court Rules 2000* r 24C. The Land Court expects an expert witness to fully understand and comply with their duty to the Court. The President of the Court of Appeal has explained the full extent of that duty – “This duty may require a level of candour and voluntary disclosure on the part of an expert witness that might involve prejudicing the case of the party that called the expert witness.” (*Alliance Insurance Limited v Mashaghati* [2017] QCA 127 [90]).

⁵ *Land Court Rules 2000* r 24D.

NOMINATING THE EXPERT WITNESSES

Nominating the Expert Witnesses

12. The Court requires each party to identify their case in enough detail to allow any other party to understand the case made against them or the case they must prepare to meet.
13. Once the issues are identified, the parties must file and serve on any other party a written notice of the expert witnesses they intend to engage for the hearing.
14. Unless granted leave by the Court, a party cannot engage more than one expert witness for each area of expertise.⁶
15. The notice must include, for each expert witness nominated—
 - a) the name of the expert witness;
 - b) their discipline or area of expertise;
 - c) a short statement of each specific issue or assertion the expert witness will address;
and
 - d) confirmation the expert can take part fully, properly, and promptly in the Court process.
16. Parties should consider asking an expert witness they intend to nominate to identify whether they require evidence from an expert with another area of expertise in order to express their opinion.

Example—

In a land valuation appeal or a claim for compensation for resumption of land, a valuer may need advice from other experts, such as town planners and quantity surveyors, to provide an opinion in the case.

⁶ Ibid r 24I.

Single Expert Witness

17. If only one party nominates an expert witness in an area of expertise, that party must brief the expert witness. The brief must contain⁷ –
- a) copies of any orders that involve that expert witness;
 - b) notice of the issues in dispute relevant to that expert witness’s area of expertise;
 - c) enough information and opportunity to investigate the facts in relation to the issues in dispute; and
 - d) this Practice Direction.
18. The filed statement of evidence from that expert witness–
- a) must comply with the requirements of the Rules;⁸ and
 - b) will be the evidence in chief of the expert witness at the hearing unless the Court orders otherwise.⁹

⁷ Ibid r 24.

⁸ Ibid r 24F.

⁹ Ibid r 24H.

MORE THAN ONE EXPERT WITNESS IN AN AREA OF EXPERTISE

More than one expert witness in an area of expertise

19. If more than one party nominates an expert witness in an area of expertise, unless otherwise ordered, the parties must provide a consolidated brief of instructions to all those expert witnesses that–
 - a) contains the material in paragraph 17;
 - b) identifies any issue any party considers the expert witnesses need to address; and
 - c) includes any information or documents any party considers relevant to those issues.
20. Including information or a document in a consolidated brief of instructions is without prejudice to the parties' rights to object at the hearing to the admission into evidence of–
 - a) all or part of any information or document in the consolidated brief of instructions; and
 - b) any evidence relating to the disputed information or document.
21. Where an expert witness's opinion might differ depending on the resolution of a factual or legal issue, the parties must brief the expert witnesses to–
 - a) provide their opinion based on all potential resolutions of those issues, not just on those contended for by that party; and
 - b) consider whether a preliminary determination of a factual or legal issue by the Court might result in greater clarity and efficiency in preparing their evidence.

MEETINGS OF EXPERTS

Meetings of Experts

PURPOSE OF MEETINGS OF EXPERTS

22. At a meeting of experts, the expert witnesses must:
- a) discuss and clarify the issues;
 - b) identify any areas of agreement about their evidence;
 - c) discuss and seek to resolve any areas of disagreement; and
 - d) prepare a joint expert report.

HOW MEETINGS OF EXPERTS ARE CONDUCTED

23. The parties and expert witnesses must manage the meeting process in accordance with this Practice Direction and the directions for the case. A meeting of experts starts when the expert witnesses first meet, whether in person or otherwise, and ends when they provide their signed joint expert report to the parties. A meeting of experts may occur over several sessions.
24. The expert witnesses are required to discuss and attempt to reach agreement about their evidence in relation to an issue in dispute as it relates to their area of expertise.¹⁰ They must explore the factors that underlie their conclusions and squarely address any differences between them.
25. The expert witnesses must consider the following during their discussions and in preparing their joint expert report—
- a) Do they have the same information?
 - b) If not, does any new information affect their opinion?
 - c) Do they need any more information or instruction from the parties?
 - d) Do they need an opinion or instruction on a matter outside their area of expertise?
 - e) Are they using the same methodology and in the same way?

¹⁰ Ibid r 22.

MEETINGS OF EXPERTS

- f) If not, why not?
 - g) What scenarios are presented in the brief of instructions or in preceding expert reports (if any)?
 - h) How should they address the possible outcomes from those scenarios?
 - i) What are the points of agreement?
 - j) For any disagreements:
 - i. Do they affect the decision that the Court has to make?
 - ii. Are they about:
 - a. the existence, relevance, or validity of an asserted or assumed fact;
 - b. what methodology that should be used to deal with the issue;
 - c. how that methodology should be applied;
 - d. the conclusions that arise from applying the methodology to the facts or assumptions; or
 - e. something else?
 - k) How will they draft and finalise the joint expert report and by when?
26. The expert witnesses must refrain from conducting independent inquiries unless they have:
- a) advised the parties of their intention to do so together with an estimate of the cost and time required to undertake those inquiries;
 - b) shared the results of their inquiries with all other experts within the same area of expertise before the conclusion of the meeting of experts.

COMMUNICATIONS WITH THE PARTIES AND OTHER EXPERT WITNESSES

27. Once the expert witnesses have commenced their meeting of experts, any communication from them to the parties must be made jointly in writing.
28. The expert witnesses may inform the parties of any matter adversely affecting the proper and timely completion of the joint expert report.

MEETINGS OF EXPERTS

29. Except as provided below, the expert witnesses attending a meeting of experts must prepare their joint expert report without further reference to, or instruction from, the parties.¹¹
30. The expert witnesses may ask all parties to respond to an inquiry made jointly of all parties.¹²
31. A joint request must be made even if only one expert witness needs further information or instructions. If there is a dispute between the expert witnesses about whether the request is relevant or necessary, they can note that fact in the request.
32. The parties' response to the expert witnesses must be in writing although they need not respond jointly. If the parties do not respond jointly, they must provide their response to all other parties as well as to the expert witnesses.
33. If the request raises a matter that requires direction or a ruling from the Court, an expert witness or a party may request the Court to list the case for review.

¹¹ Ibid r 24A(1).

¹² Ibid r 24A(2).

THE JOINT EXPERT REPORT

The Joint Expert Report

34. When parties have nominated more than one expert witness in an area of expertise, the expert witnesses must produce a joint expert report.
35. The applicant/appellant must file and serve the joint expert report within two business days of receipt.¹³
36. The joint expert report is the primary report of the expert witnesses who author it.
37. Unless the Court gives leave to file a further expert report, the joint expert report is the expert witnesses' statement of evidence for the hearing.¹⁴
38. The joint expert report must, for each expert witness who is an author, comply with the Rules.¹⁵
39. The joint expert report must also—
 - a) Include an executive summary that states, for each issue on which they have been asked to give an opinion:
 - a. the matters on which they agree;
 - b. the matters on which they disagree but which are not material to their conclusions;
 - c. the matters of disagreement which are material to their conclusions, and short reasons for their disagreement.
 - b) For each matter of disagreement that is material to their conclusions, state how their conclusions would differ if the Court resolved the disagreement against their view on the matter.
40. In drafting their report, the expert witnesses must consider whether they have fully explained their opinions and the reasons for those opinions. They cannot raise a new matter

¹³ Ibid r 24A(5).

¹⁴ Ibid r 24E(2)(a).

¹⁵ Ibid r 24F.

THE JOINT EXPERT REPORT

in a further statement of evidence¹⁶ or in their evidence in chief,¹⁷ without leave of the Court.

¹⁶ Ibid r 24E(3)(b).

¹⁷ Ibid r 24H.

COURT MANAGED EXPERT EVIDENCE (CMEE)

Court Managed Expert Evidence (CMEE)

THE DECISION TO DIRECT A MATTER TO CMEE

41. CMEE allows the Court to supervise the briefing and meeting of expert witnesses and production of their joint expert report.¹⁸
42. The Court's objective in directing a case to CMEE is to promote an effective, efficient, and fair process for expert evidence, which reinforces—
 - a) the duty of the parties to brief the expert witnesses and prepare them to fulfill their role; and
 - b) the duty of expert witnesses to provide the Court with relevant and impartial evidence within their area of expertise.
43. Unless otherwise ordered, CMEE will commence with a case management conference and conclude when the Court directs.
44. The Court will consider whether to direct a case to CMEE on a case-by-case basis, usually after the parties have nominated their expert witnesses.
45. The Court will consider directing a case to CMEE if—
 - a) The parties nominate multiple expert witnesses; or
 - b) The case involves complex issues on which expert evidence will be required; or
 - c) The evidence of expert witnesses in one or more areas of expertise will impact on the evidence of other experts; or
 - d) There is a history for the case of non-compliance with the *Land Court Rules 2000* or with directions made by the Court.
46. If the Court directs a case to Court Managed Expert Evidence (CMEE), Part 5 Division 2 of the *Land Court Rules 2000* does not apply to a meeting of experts.

¹⁸ For more information about what to expect in a CMEE see Appendices A – C.

COURT MANAGED EXPERT EVIDENCE (CMEE)

THE CMEE CONVENOR

47. The CMEE Convenor must be a Member or Judicial Registrar of the Court.
48. The role of the CMEE Convenor is procedural. Their role is to-
 - a) to work with the parties to manage the process for expert witnesses to meet and provide a joint expert report for the Court;
 - b) to work with the expert witnesses to ensure their joint expert report assists the Court to resolve an issue in dispute as it relates to their area of expertise; and
 - c) to assist the parties in case management.
49. The CMEE Convenor must perform their role in consultation with the parties and must ensure any disputes that arise during CMEE are resolved–
 - a) by agreement between the parties and or experts; or
 - b) by direction of the Court.
50. The CMEE Convenor cannot decide any substantive issue or procedural dispute in the case and cannot preside at an oral hearing, final hearing, or appeal from a decision made in the case.
51. Unless all parties agree in writing, and the CMEE Convenor agrees, the Court cannot appoint a CMEE Convenor to act as a Mediator in the case.

THE POWERS OF THE CMEE CONVENOR

52. At the request of a party or on their own initiative, the CMEE Convenor may do any of the following–
 - a) convene a case management conference;
 - b) make procedural directions, with the consent of all parties including directions as to the management of the case.
 - c) discuss whether there are issues that require further direction from the Court;
 - d) convene and chair a meeting of expert witnesses;
 - e) list the case for review.

COURT MANAGED EXPERT EVIDENCE (CMEE)

53. The CMEE Convenor may convene one or more case management conferences or meetings of expert witnesses, at the request of one or more of the parties and the expert witnesses, or on their own initiative.

REPORTS BY THE CMEE CONVENOR

54. The CMEE Convenor must give a written report to the Court, if–
- a) the CMEE may not conclude in time for the hearing to proceed on the dates listed or reserved in the Court calendar;
 - b) consent directions alter any previous order made by the Court;
 - c) the parties cannot agree on how an issue affecting the expert evidence should be resolved or managed;
 - d) the parties request the CMEE Convenor to do so;
 - e) the Court requests a report;
 - f) the CMEE Convenor considers it appropriate.
55. Before reporting to the Court, the CMEE Convenor must–
- a) provide the parties with a draft report; and
 - b) give the parties an opportunity to comment on the report before it is finalised.

CMEE REPORTS

56. As soon as practicable after they are made, the CMEE Convenor must place a CMEE report on the Court file.

CASE MANAGEMENT CONFERENCES

57. Usually, the CMEE will commence with a case management conference.
58. The CMEE Convenor must not meet with a party in the absence of any other party, unless all parties agree.

COURT MANAGED EXPERT EVIDENCE (CMEE)

59. During a case management conference, the CMEE Convenor may assist the parties to do all or any of the following—
- a) identify and clarify the issues in dispute;
 - b) decide which issues will require expert witness evidence;
 - c) identify which expert witnesses should produce joint expert reports and on which issues;
 - d) determine the sequence in which meetings of expert witnesses should take place;
 - e) establish, manage, and adjust the timetable for briefing expert witnesses, meetings of experts, and joint expert reports;
 - f) ensure the expert witnesses have the information they need to fulfil their function;
 - g) prepare a consolidated brief to the expert witnesses, including fixing the issues or questions they will be asked to address;
 - h) make arrangements for providing secretarial and administrative assistance for the expert witnesses;
 - i) communicate with expert witnesses after they have commenced their meeting of experts;
 - j) as joint expert reports are filed, consider whether those reports have consequences for the management of evidence by other expert witnesses;
 - k) agree upon directions for case management.

RESTRICTION ON DISCLOSURE ABOUT CASE MANAGEMENT CONFERENCES

60. Except by a written report as provided for by this Practice Direction, the Convenor must not disclose anything done or said, or an admission made, at a case management conference unless required by law.
61. Evidence of anything done or said, or an admission made, at a case management conference is not admissible at any stage in the case, another case in the Land Court or in a civil proceeding unless—

COURT MANAGED EXPERT EVIDENCE (CMEE)

- a) all parties agree it may be admitted into evidence; or
- b) it is evidence about consent to a direction made at a case management conference; or
- c) it is relevant to a civil proceeding founded on fraud alleged to relate to, or to have happened during, the meeting.

THE CMEE CONVENOR CHAIRS THE MEETING OF EXPERTS

62. The CMEE Convenor will chair a meeting of experts convened during a CMEE, unless the CMEE Convenor, in consultation with the parties, considers it is unnecessary to do so.
63. The role of the CMEE convenor in chairing a meeting of experts is to facilitate the expert witnesses to–
- a) discuss and attempt to reach agreement on their evidence in relation to an issue in dispute as it relates to their area of expertise; and
 - b) prepare a joint expert report.
64. The CMEE Convenor will ensure that the expert witnesses understand –
- a) the duty of an expert witness to the Court;
 - b) the CMEE process;
 - c) the Court’s expectations of an expert witness in their oral and written evidence; and
 - d) the Court’s procedures for taking oral evidence from expert witnesses.
65. In consultation with the expert witnesses, and subject to any directions by the Court, the CMEE Convenor may fix dates, times, and venues for meetings, including resumed or further meetings, and may provide reasonable access to Court facilities for the meetings.
66. The CMEE Convenor must chair the meeting in a way that allows and encourages all participants to engage in a comprehensive and professional discussion of their evidence.
67. The CMEE Convenor must not–
- a) give an expert witness legal advice on any matter; or
 - b) attempt to influence an expert witness to adopt or reject a particular opinion;

COURT MANAGED EXPERT EVIDENCE (CMEE)

- c) meet with any expert witness attending a meeting of experts unless all the experts attending that meeting participate.

COMMUNICATIONS BETWEEN EXPERT WITNESSES AND THE PARTIES OR OTHER EXPERT WITNESSES

68. The CMEE Convenor will manage the communications between the expert witnesses participating in a meeting of experts and the parties, and other expert witnesses engaged by the parties, to–
- a) seek further information;
 - b) clarify instructions;
 - c) understand the evidence of other expert witnesses engaged by the parties.
69. The CMEE Convenor must keep the parties informed of the current schedule of meetings of experts and any changes to it.

JOINT EXPERT REPORT

70. The CMEE Convenor may assist the expert witnesses to–
- a) check they have addressed all issues identified in their brief or have explained why they cannot do so;
 - b) confirm they have not expressed an opinion outside their area of expertise;
 - c) check they have addressed all scenarios arising from the issues and from the evidence of other expert witnesses, to the extent that evidence is relevant to the issues they must address;
 - d) check they have each considered the underlying facts, assumptions, methodologies, and conclusions of any other expert witness included in the report;
 - e) check that, to the extent they disagree on the matters in (d) above, they each explain–
 - i. why they disagree; and

COURT MANAGED EXPERT EVIDENCE (CMEE)

- ii. what their evidence would be if the Court accepted the evidence of the other expert on any of those matters; and
- f) identify aspects of their evidence they may need to clarify so the Member who will conduct the hearing can understand it.

RESTRICTION ON DISCLOSURES ABOUT MEETINGS OF EXPERTS

71. The CMEE Convenor must not disclose anything done or said, or an admission made, during a meeting of experts unless all expert witnesses agree or unless required by law.
72. Evidence of anything done or said, or an admission made at a meeting of experts is not admissible at any stage in the case, in another case in the Land Court, or in a civil proceeding unless—
- a) all parties agree it may be admitted into evidence; or
 - b) it is relevant to a civil proceeding founded on fraud alleged to relate to, or to have happened, during the meeting.

CONCURRENT EVIDENCE

Concurrent Evidence

73. Unless otherwise ordered, expert witnesses will give their evidence concurrently.
74. Evidence is given concurrently when two or more expert witnesses in the same or closely related areas of expertise give evidence at the same time.
75. The Court may direct expert witnesses give their evidence consecutively.
76. Evidence is given consecutively when each expert witness in the same or closely related areas of expertise gives their evidence individually, in turn.

SETTING THE AGENDA FOR A CONCURRENT EVIDENCE SESSION

77. The parties must jointly propose a draft agenda for concurrent evidence by the date directed by the hearing Member.
78. The agenda must –
- a) identify the areas of disagreement between the expert witnesses upon which a party wishes to ask questions; and
 - b) identify the parts of the joint expert report that relate to each agenda item.
79. The Member will settle the agenda and may direct that specified topics are dealt with before or after the concurrent evidence session.

OVERVIEW OF PROCEDURE FOR A CONCURRENT EVIDENCE SESSION

80. The expert witnesses are sworn or affirmed at the same time.
81. Usually concurrent evidence will occur with all expert witnesses present in person and seated together. However, a Member may approve an expert witness participating by telephone or video link.
82. The Member will use the agenda to facilitate a discussion in which-
- a) the expert witnesses, the parties and their representatives, and the Member will all participate.

CONCURRENT EVIDENCE

- b) all expert witnesses have an adequate opportunity to express their opinion on each topic and to comment on another expert's opinion;
- c) parties can ask relevant questions of any expert witness in relation to each topic;
- d) any consensus between the expert witnesses is clarified and noted

83. The experts may comment on what another expert witness says or ask questions of each other.

84. The parties may ask questions of all expert witnesses to ensure all relevant information and opinions are clarified and tested.

85. A Member may adjourn or terminate a concurrent evidence session if they consider it is in the interests of justice to do so.