

## Using ADR Techniques to Enhance the Integrity and Utility of Expert Evidence<sup>1</sup>

*“The current approach to expert evidence has not only failed, it has been failing for more than 100 years.”<sup>2</sup>*

### **Introduction**

Not everyone will agree with this statement. It reflects enduring concerns which have led many Australian civil courts to reform their procedures for expert evidence. In this paper, the author will explain an expert evidence procedure introduced by the Land Court of Queensland, the Court’s concerns about expert evidence that the procedure is intended to address, and the way in which the procedure employs the objectives, skills and techniques of alternative dispute resolution in order to address those concerns.

The Court’s reformed procedure, called Court Managed Expert Evidence (or CMEE), was introduced in 2018.<sup>3</sup> The objective of the procedure is to improve the integrity and utility of expert evidence.

The impetus to refine the procedure for expert evidence was driven by two factors.

Firstly, the Land Court *“must act according to equity, good conscience and the substantial merits of the case without regard to legal technicalities and forms or the practice of other courts.”<sup>4</sup>* This requirement provides the scope and the imperative for the Court to design an effective procedure about expert evidence.

Secondly, most cases heard by the Land Court involve some type of expert evidence, and in some cases there is no other evidence in dispute. In many, the parties will call experts from numerous disciplines. The Land Court’s jurisdiction spans a range of land and other natural resources disputes. This includes land valuation appeals, claims for compensation for compulsory acquisition of land, the approvals for and compensation liability arising from mining and energy resource activities and measures to protect cultural heritage.

In resolving such disputes the Court may take evidence from valuers, accountants, economists, town planners, engineers of all types, ecologists, geologists, hydrologists, agronomists, anthropologists and archaeologists to name some of the commonly encountered disciplines.

In that context, the integrity and utility of expert evidence is of critical importance to the member who must hear and decide the case. Of interest to ADR practitioners is how the CMEE procedure employs the objectives, skills and techniques familiar in ADR processes.

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<sup>1</sup> This article is based on a speech delivered by the author to the National Mediation Conference, Canberra, 15-17 April 2019.

<sup>2</sup> Thomas Kearney, “The Unresolved Problem of Expert Evidence” (2018) 92 *Australian Law Journal* 127, 148.

<sup>3</sup> Practice Direction 3 of 2018: Procedure for Court Managed Expert Evidence. The practice direction is set out in Appendix A.

<sup>4</sup> *Land Court Act 2000* s 7.

In designing the CMEE process, the Court identified three key concerns with expert evidence: one relating to its integrity and two relating to its utility.

The Court's concern about the integrity of expert evidence is the extent to which an opinion is truly independent of, and uninfluenced by, the interests of the party who engaged the expert. The Court's concerns about the utility of expert evidence were twofold. Firstly, its comprehensibility, and, secondly, the extent to which it directly engages with the evidence of any other expert witness of similar expertise giving evidence on the same topic.

With those concerns in mind, the Land Court adopted the CMEE procedure. It brings together 2 commonly encountered features of civil litigation - case management conferences and expert meetings and reports – and places them under the supervision of a judicial officer, acting as a CMEE Convenor, who operates within a without prejudice environment.

The role of the CMEE Convenor is expert, neutral, procedural and facilitative. The Convenor is expert, because, as a member or judicial registrar of the Court, the Convenor understands both the Court's procedure and its jurisdiction.

The role of the Convenor is neutral and procedural. The CMEE Convenor cannot make any substantive decisions, cannot preside over the case at trial or on appeal, and, unless the parties consent in writing, cannot preside at a mediation of the case.<sup>5</sup> The Convenor cannot make procedural orders unless all parties consent.<sup>6</sup>

The Convenor facilitates the parties and the experts in navigating the pre-trial preparation of expert evidence. It is not evaluative, except to the extent that suggestions about process might involve applying that expertise to help the parties move through process stalemates.

The Convenor must maintain the confidentiality of both the meeting of experts and the case management conference and must provide draft reports to the parties before providing them to the Court.

Against that background, the author will consider the concerns the CMEE process is designed to address and how it employs ADR techniques to do so.

### ***Concerns about integrity and utility of expert evidence***

#### *Integrity - the impact of the adversarial system on expert evidence*

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<sup>5</sup> Practice Direction 3 of 2018: Procedure for Court Managed Expert Evidence, [16]–[18].

<sup>6</sup> Ibid [19].

Like most courts, the Land Court imposes a duty on expert witnesses to assist the court, which overrides any obligation to a party or the person who is liable for their fees.<sup>7</sup> Further, an expert must not accept instructions to adopt or reject a particular opinion in relation to an issue in dispute in the proceeding.<sup>8</sup>

The scope of the expert's duty to assist a court was recently explored by the President of the Queensland Court of Appeal:<sup>9</sup>

[90] Experts occupy a special position as witnesses. With irrelevant exceptions, no other witness can give opinion evidence. An expert's opinion often, perhaps usually, relates to disciplines that are unfamiliar to a judge hearing a case. Consequently, unlike the position of a witness of fact whose duty is merely to answer questions in a responsive way, an expert has a duty positively to assist the Court. This duty may require a level of candour and voluntary disclosure on the part of an expert that might involve prejudicing the case of the party that called the expert. Nevertheless, the duty to the Court, that is to say the duty to assist the Court in finding the truth of the matter, overrides any obligations owed to the party who pays the expert's fees.

Although such judicial pronouncements are helpful, ultimately the degree of independence of the expert goes to weight, rather than admissibility.<sup>10</sup>

Expert witnesses are usually engaged, briefed, prepared and paid by one party. They may regularly be engaged by a particular law firm or to advise a particular client. In some cases, they are an employee of one party to the litigation. They are engaged in an adversarial context, which creates the tension between their duty to their client and their duty to the court.

In a specialist court such as the Land Court, if expert evidence is overly adversarial it can cause a hearing to miscarry. This was considered by the Queensland Court of Appeal in an appeal from the judgment of another specialist court, the Queensland Planning and Environment Court. In his judgment, the trial judge said the expert evidence had a combative flavour, with both witnesses arguing strongly and at great length for their point of view, each criticizing the evidence of the other. He was unable to reach a confident view about which opinion was correct and decided the case on a different basis, that is whether the party bearing the onus of proof had discharged it.

On appeal, the Court of Appeal made the following observation:<sup>11</sup>

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<sup>7</sup> *Land Court Rules 2000* r 24C.

<sup>8</sup> *Land Court Rules 2000* r 24D.

<sup>9</sup> *Allianz Australia Insurance Limited v Mashaghati* [2017] QCA 127, [90].

<sup>10</sup> *Australian Securities and Investments Commission v Rich* [2005] NSWSC 149, [334]; *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33, [15].

<sup>11</sup> *Reservilt Pty Ltd v Maroochy Shire Council & Anor* [2002] QCA 367, [8] – [9].

“It is inevitable that an applicant, in a system as adversarial as this, will call as an expert only a person whose evidence generally supports the applicant's case; and conversely that a respondent will call as an expert witness only a person whose evidence generally supports the respondent's case. Such a system encourages such a witness to express opinions on the question on which he or she is called which are biased in favour of his or her client and to defend those opinions strongly in court thereby decreasing the possibility of the judge arriving at an objectively correct judgment on the question. That is apparently what has happened here with unfortunate consequences, not only to cost to the parties but also to the unsatisfactory way in which his Honour felt compelled to decide the appeal. Especially in the Planning and Environment Court this practice of adversarial experts should not be permitted to continue.”

Since then, the Planning and Environment Court has significantly reformed its procedures for expert evidence.<sup>12</sup> The first report, and sometimes the only report by an expert, is a joint expert report with their counterpart. Judge Rackemann, who manages that court's list, considers this avoids adversarialism and is a more appropriate way to engage with experts:

“A more respectful way of dealing with experts (and one which is more likely to achieve better results) is to insist that, after being retained and briefed by their client and their client's lawyers (but *before* preparation of any trial report) the experts be given the appropriate time and space, free from supervision or interference by the parties or their lawyers, to consider and formulate their opinions in consultation with their professional colleagues, retained by the other parties.”<sup>13</sup>

The Land Court's CMEE process builds upon that model and extends it in two ways. Firstly, by providing for a without prejudice case management conference. Secondly, by providing judicial supervision of both the case management conference and the experts' meeting and reporting process. The Convenor's role in ensuring a common brief to the experts and their role in overseeing the experts' process, is intended to reinforce the experts' role in advising the Court and the experts' overriding duty to the court. Further, it is intended to guard against an overly adversarial approach by an expert.

#### *Utility – incomprehensibility and passing like ships in the night*

As to comprehensibility, Lord Woolf observed that judges may be “influenced by factors such as the apparently greater authority of one side's expert's relative fluency and persuasiveness in putting across their arguments.”<sup>14</sup>

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<sup>12</sup> The Planning and Environment Court subsequently amended their rules significantly to address that issue: see *Planning and Environment Court Rules 2018* part 3 div 3, div 4.

<sup>13</sup> Judge ME Rackemann, “Expert Evidence Reforms – How Are They Working?” [2011] *Queensland Judicial Scholarship* 10, 7.

<sup>14</sup> Lord Woolf MR, *Access to Justice, Final Report to the Lord Chancellor in the Civil Justice System in England and Wales* (1996) 138.

That may be so, but for a court to be persuaded by the opinion, rather than bedazzled by its manner of delivery, the expert must be able to explain their opinion to laypeople, including judges and lawyers. Further, where conflicting expert opinions are offered, the court must be able to understand the nature and the reasons for the disagreement and the consequences of that disagreement for the issues in dispute.

The Land Court requires experts to meet and produce a report that identifies what they agree and disagree about and the reasons for their disagreement.<sup>15</sup> That is a common practice in civil courts in Australia.

One difficulty with expert reports is the need for them to be both admissible and comprehensible. There is a risk of improper influence if a party's lawyer is involved in settling expert reports. That risk is exacerbated in those jurisdictions where draft reports are privileged.<sup>16</sup>

In a CMEE, the Convenor can provide feedback to the experts about the clarity and comprehensibility of their report before it is finalised. The Convenor will never tell an expert witness what to include in a report, but may give feedback about the way in which it is expressed and the structure of the report. Particularly, the Convenor will focus on how clearly the experts have communicated the important disagreements and the reasons for them.

The supervision of a CMEE Convenor will also serve to guard against the experts' opinions *passing like ships in the night*. That idiom is at least over 150 years old and is attributed to Henry Wadsworth Longfellow who wrote *Tales of a Wayside Inn* in 1863:

*"Ships that pass in the night, and speak each other in passing, Only a signal shown and a distant voice in the darkness; So on the ocean of life, we pass and speak one another, Only a look and a voice, then darkness again and a silence."*

Left to their own devices, experts often pass like ships in the night. Judges who regularly hear evidence from experts will be familiar with the *look* and *voice* in passing and then *darkness* and *silence*. In the author's experience, even in a joint expert report the experts manage to avoid each other, sometimes entirely.

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<sup>15</sup> Land Court Rules 2000 r 22, r 24A.

<sup>16</sup> Kearney, above n 2, 135, 145. In Queensland, draft reports are not privileged, see r 212(2) *Uniform Civil Procedure Rules 1999*; *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141; *Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board* [2004] QSC 329.

Aspects of the experts' personality or their attitude to each other (or the process) may intrude. An expert may be overly confident in their methods or their own point of view. They may not respect their counterpart or consider them to be their inferior. They may be a reluctant participant in the process.

One experienced expert witness has observed that the efficacy of expert meetings depends largely on the good faith participation of the experts. He has experienced difficulties when meeting with an expert who:<sup>17</sup>

- is not participating constructively and professionally in the meeting;
- demonstrates a disinterest in establishing any agreed positions on key issues;
- focuses on criticizing their counterpart's professionalism rather than providing an objective analysis of the merits of the issues in debate;
- introduces new issues, data, opinions or reasons during the meeting; and
- insists on a particular course of action to consider or to resolve an issue that arises during the meeting.

The confidentiality of the meeting process<sup>18</sup> makes it difficult for an expert to deal with such conduct by their counterpart.

Even if they each approach their task conscious of their duty to the court, and intending to participate in good faith, the experts may fail to engage with their counterpart. Intentionally or not, the lawyers may set off the experts on parallel tracks. They may brief them with different information. They may ask them to make different factual assumptions. They may ask them to address different scenarios or to answer different questions.

Sometimes, what appears to be a dispute between expert witnesses is in truth a dispute not of their making and not for them to resolve. The dispute may mask an underlying factual or legal conflict that the court will have to decide. It is unhelpful for an expert to pick the winner and provide an opinion on the assumption that a factual or legal assertion will be accepted by the court. The court will also need to have that expert's opinion if that assertion is rejected.

The Land Court commonly directs the parties to provide a single consolidated brief to the experts, which identifies any issue a party considers the experts should address and any information a party considers

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<sup>17</sup> Andrew Ross "Murky waters: an expert's perspective on the effectiveness of expert conclaves and hot tubs" (2013) 119 *Precedent* 30, 31.

<sup>18</sup> E.g. *Land Court Rules 2000* r 24B.

relevant. Importantly, the parties do not have to agree on the issues or the information. If that is in dispute, the Court will determine that at trial or, if necessary, earlier.<sup>19</sup>

The author of the report on the Kilmore East Bushfire litigation observed:

“There was consensus that there should be more transparency in how parties briefed their experts. It seems that in the right circumstances, a case could benefit from the presiding judge working more closely with the parties to decide how the experts should be briefed by assisting with framing questions and ensuring that the information that forms the basis for the expert reports is available to all experts reporting on the one issue.”<sup>20</sup>

Under the CMEE process, the Convenor may assist the parties in the briefing process and, where appropriate, ask the experts to advise what information they need. The Convenor will ensure the experts have a common understanding of their task and, if that needs to be clarified, will facilitate the parties providing the experts with further instruction.

Other difficulties frequently encountered during the expert meeting and reporting process are worthy of noting briefly. They involve matters of logistics and communication.

Unrealistic timetables may be set by a court after hearing from the lawyers, without informed input from the experts. Dates fixed by the court may be regarded as aspirational targets rather than binding court orders. Experts and lawyers may be uncertain about when the meeting process starts and ends and when and about what topics they may communicate. Experts may require further instruction from the lawyers or the opinions of other experts before completing their work. The experts may wish to undertake further investigations or tests before providing their opinion. Importantly, the experts may disagree about whether further instruction, information, or investigation is required before they finalise their joint report.

The CMEE Convenor has a role in ensuring all of these issues are efficiently and properly addressed, either by agreement between the parties or, if necessary, by listing a matter for decision by the Court.

### **What has ADR got to do with Court Managed Expert Evidence?**

The objectives of the CMEE process and the skills and techniques that the CMEE Convenor must employ are familiar to ADR practitioners.

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<sup>19</sup> See, for example, Ex5 of the Court’s Model Directions: <  
[https://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0018/555012/model-directions.pdf](https://www.courts.qld.gov.au/_data/assets/pdf_file/0018/555012/model-directions.pdf)>

<sup>20</sup> Kilmore at p 24.

### *Resolving and managing the issues*

The *objectives* include to:

- identify, reduce, resolve (if appropriate) and manage disagreements; and
- prepare for mediation or a trial of limited issues.

In a case management conference, the CMEE Convenor will work with the parties to resolve disputes about the expert evidence process, either by agreement or by the Court at the request of the parties and with a report from the Convenor.

In chairing a meeting of experts, the CMEE Convenor will ensure the experts understand and engage with each other's factual assumptions, investigations, methodology and conclusions so as to properly inform the Court of their disagreements and the reasons for them.

In complex matters, determining when the dispute is ripe for mediation can be hard to discern. Well prepared expert evidence can lay the groundwork for a successful mediation. This was acknowledged by lawyers who participated in interviews about the procedures used by the State Administrative Tribunal in Western Australia. Several lawyers suggested SAT should schedule a mediation to follow a joint report, instead of going straight to hearing.<sup>21</sup>

### *Facilitating and managing communications*

The *skills* a CMEE Convenor will use are the core ADR skills of *facilitating and managing communications*. The techniques used by the Convenor are routinely used in ADR: to clarify, to find common ground and to explore solutions.

The CMEE Convenor sits at the centre of communications about expert evidence in the pre-trial phase of a case: lawyer with lawyer; expert with expert; experts with lawyers; and experts and lawyers with the Court.

### *Between the lawyers*

Communications between the *lawyers* are facilitated through a without prejudice case management conference, chaired by the CMEE Convenor. It is like a directions hearing or review, but is without prejudice and proceeds by way of consensus. The focus is on resolving procedural, not substantive, issues although the discussions may clarify what substantive issues are in dispute. The CMEE Convenor may identify process options to deal with procedural issues and help the parties to assess them.

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<sup>21</sup> Ibid at p 20 (n. 57).



Minor and, sometimes, substantial procedural disputes can be resolved directly, without the need to prepare and file substantial documentation, and with the active input of the solicitors who are managing the case. A report about a similar process used by the Supreme Court of Victoria in the Kilmore East Bushfire litigation included the following observation by a barrister about case management conferences:

“[It] lends itself more to a free-flowing discussion [and that] having conversations about these issues rather than a sequence of people making submissions and submissions in response and then submissions in reply, [this] is a much better way of doing it.”<sup>22</sup>

### *Between the experts*

Communications between the *experts* are facilitated through a confidential meeting process. Experience shows that many “meetings” are, in fact, a series of exchanges by phone, email or draft reports. The Convenor will not chair all meetings, but will chair an initial meeting to ensure the experts are well briefed, understand their task and set out on a common endeavour. The Convenor will reinforce the experts’ independence and their duty to the court, and encourage frank discussions. The Convenor is available to chair further meetings, if requested or if the Convenor thinks that is desirable.

Chaired expert meetings are not unique to the Land Court, but reports on the participants’ views about its utility are rare. A report of structured interviews about this aspect of the expert evidence process used by the State Administrative Tribunal included this observation:

“A very strong view was expressed by a large number of interviewees that conferrals (expert meetings) should be chaired because that brings neutrality to the conferral; greater order and fairness; and controls the egos of the experts. Several experts said they were at their first conferral at a loss as to what to do during a conferral and would have appreciated better guidance.”<sup>23</sup>

The author of that report also recorded an interviewee’s view that the issues in complex matters were better defined and delineated by an independent chairperson who understood the subject matter well.<sup>24</sup>

The role of the Convenor in facilitating the experts’ discussions must be contrasted with the role of a mediator. The Convenor is not seeking to mediate a resolution between the experts.

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<sup>22</sup> *The Management of Expert Evidence in the Kilmore East Bushfire Proceeding* (April 2016) <[https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0010/1884799/Management-of-expert-evidence-in-the-Kilmore-East-bushfire-proceeding-Collected-Research-Papers.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0010/1884799/Management-of-expert-evidence-in-the-Kilmore-East-bushfire-proceeding-Collected-Research-Papers.pdf)> 25.

<sup>23</sup> Bertus de Villiers, “From advocacy to collegiality: The view of experts of “concurrent evidence” and “expert conferral” in the State Administrative Tribunal” (2015) 25 *Journal of Judicial Administration* 1, 19.

<sup>24</sup> *Ibid* 20.

The object is to ensure they are addressing the same issue, with reference to the same material and that, if they differ, it is clear why they differ and to what extent.

Many differences between experts, at the end of the day, prove to be immaterial to their ultimate opinion. The CMEE Convenor will encourage the experts to identify what differences between them are material to the outcome of their opinion.

The Convenor will promote constructive controversy. This involves careful discussions between peers, so the experts understand each other's opinion and can synthesise them in writing their report. This type of discussion can be contrasted to debate (a competitive process where one view "wins" over the other) or concurrence seeking (which suppresses disagreement and consideration of alternatives).

Experts are not required to "negotiate" an agreement but they are required to critically consider whether, in their professional view and given the information to hand, there is common ground. The CMEE Convenor will promote rational, rigorous, and respectful discussions, encouraging the experts to critique ideas not people, and to carefully consider each other's perspective.

#### *Between the experts and the lawyers*

The CMEE Convenor plays an important role in facilitating the communications of the *experts with lawyers*. In Queensland, once the experts start their meeting, they must proceed without further instruction from the lawyer or party who engaged them.<sup>25</sup> This can create a dilemma if the experts need further instruction or information or need more time to complete their work. Some courts have tried to deal with this by allowing communication on limited issues.<sup>26</sup> However, there is a real risk the experts' discussions will be compromised by external influence.

The CMEE Convenor will facilitate communications between the experts (as a group) with the lawyers (as a group), providing the same information at the same time. This may be at a case management conference, which the experts may or may not attend. The experts will usually be asked to put in writing their request, their reasons for the request and any disagreement about the request, so this can be provided to the lawyers. The Convenor will discuss with the lawyers how to respond and, if there is any disagreement between the lawyers about that, the Convenor will discuss with them how that disagreement could be resolved. This process ensures that the confidentiality of the expert meeting is not a barrier to meaningful communication and further instruction, where required.

#### *Between the lawyers and experts and the Court*

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<sup>25</sup> E.g. *Land Court Rules 2000* r 24A.

<sup>26</sup> E.g. *Planning and Environment Court Rules 2018* r 28.

Finally, the CMEE Convenor facilitates the communications of the *lawyers and experts with the Court*. Issues may arise during a CMEE which the parties cannot resolve by agreement. In that case, the CMEE process provides an efficient path to a decision through the Convenor's report to the President. Commonly, the CMEE Convenor's report, which is prepared in consultation with the parties, will identify the issue in dispute and attach the parties' written submissions. Unless there is a need to hear evidence or further submissions on the issue, the Court will determine the matter on the papers.<sup>27</sup>

## **Conclusion**

The CMEE process shares some ADR objectives, and CMEE Convenors will use ADR skills and techniques to improve the integrity and utility of expert evidence led in the Land Court of Queensland. Because the process is new, the Court must monitor and evaluate it against the objectives over time. Further, the Court must promote consistency of practice between CMEE Convenors, and ensure parties, their representatives, and experts are well-informed about the process.<sup>28</sup>

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<sup>27</sup> See *Cherwell Creek Coal Pty Ltd v BHP Queensland Coal Investments Pty Ltd & Ors (No 17)* [2018] QLC 45; cf *Cherwell Creek Coal Pty Ltd v BHP Queensland Coal Investments Pty Ltd & Ors (No 19)* [2019] QLC 13.

<sup>28</sup> Appendix B of this paper includes three documents developed in consultation with experts and lawyers: *What to expect if you are involved in a CMEE – lawyers and parties*; and *What to expect if you are involved in a CMEE – experts*; and *CMEE Roles and Responsibilities*.

# **Procedure for Court Managed Expert Evidence**

**Practice Direction 3 of 2018**

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## Part 1: Introduction

1. This Practice Direction is issued pursuant to s 22(2) of the *Land Court Act 2000*.
2. The Practice Direction explains the procedure the Court will use for cases directed for Court Managed Expert Evidence (CMEE) and defines the powers and responsibilities of the person appointed to conduct the CMEE (the CMEE Convenor).
3. If the Court directs a case to CMEE–
  - a) Part 5 Division 2 of the *Land Court Rules 2000* does not apply to a *meeting of experts*
  - b) otherwise, the *Land Court Rules 2000* apply and the Practice Direction must be applied in a way that is consistent with the Rules.
4. 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.
5. The Court will consider directing a case to CMEE if–
  - a) The parties nominate multiple experts; or
  - b) The case involves complex issues on which expert evidence will be required; or
  - c) The evidence of experts 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 about expert evidence.
6. If there are common issues that will involve expert witness evidence, the Court may direct more than one case to a combined CMEE by the same CMEE Convenor.
7. Terms that appear in italics in the Practice Direction are defined in the Words and Meanings section of the document.

## Part 2: Overview of Court Managed Expert Evidence (CMEE)

8. The CMEE process is a method where the Court supervises the briefing and meeting of expert witnesses and production of their *joint expert report*.<sup>29</sup>
9. 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.
10. CMEE involves *case management conferences* and meetings of experts.
11. The role of the CMEE Convenor is—
  - a) to work with the parties to manage the process for expert witnesses to meet and provide a joint expert report for the Court; and
  - 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.
12. The CMEE Convenor must perform their role in consultation with the parties and must ensure any disputes between the parties that arise during CMEE are resolved—
  - a) by agreement between the parties; or
  - b) by *direction* by the President.
13. The CMEE Convenor may convene one or more case management conference or meeting of experts at the request of one or more parties or on their own initiative.
14. Unless otherwise ordered, CMEE will commence with a case management conference and conclude when the parties have filed all joint expert reports for the case.

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<sup>29</sup> Although the term used in the *Land Court Rules 2000* r 22 is joint report it is usually referred to by parties and experts as a joint expert report.

## Part 3: The CMEE Convenor

### APPOINTMENT OF THE CMEE CONVENOR

15. The President appoints the CMEE Convenor. The CMEE Convenor must be a Member or Judicial Registrar of the Court.

### THE ROLE OF THE CMEE CONVENOR

16. The role of the CMEE Convenor is procedural. The CMEE Convenor assists in the Court's management of the evidence of expert witnesses.
17. The CMEE Convenor cannot decide any substantive issue in the case and cannot preside at an *oral hearing, final hearing, or appeal* from a decision made in the case.
18. 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

19. 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 *directions*, with the consent of all parties, about—
    - i. briefing the experts;
    - ii. arrangements for the experts to meet, including which experts are to meet and in what sequence;
    - iii. responding to requests by one or more experts for information or instructions;
    - iv. filing joint expert reports;
  - c) convene and chair a meeting of experts; or
  - d) list the case before the President, for *review*.
20. How closely the CMEE convenor supervises the CMEE will be responsive to—
  - a) the nature of the case;
  - b) how actively the parties and the expert witnesses engage in the CMEE; and
  - c) the resources of the parties.

### REPORTS BY THE CMEE CONVENOR

21. The CMEE Convenor must give a written report to the President, if—
  - a) the CMEE Convenor makes any directions;
  - b) the CMEE may not conclude in time for the hearing to proceed on the dates listed or reserved in the Court calendar;
  - c) the parties cannot agree on how an issue affecting the expert witnesses should be resolved or managed; or
  - d) the parties request the CMEE Convenor to do so.
22. Before reporting to the President, the CMEE Convenor must—
  - a) advise the parties they intend to make a report;



- b) provide the parties with a draft report; and
- c) hear from the parties before finalising the report.

#### RECORDS OF THE CMEE

23. As soon as practicable after they are made, the CMEE Convenor must place any directions and reports made in relation to the CMEE on the Court file.

## Part 4: Case Management Conferences

### THE CMEE CONVENOR WILL CONVENE CASE MANAGEMENT CONFERENCES

24. A case management conference is a meeting of the parties, chaired by the CMEE Convenor, to discuss arrangements for the CMEE.
25. Unless specified in the order directing the case to CMEE, the CMEE Convenor will convene a case management conference on a date fixed in consultation with the parties.
26. The first case management conference will be a meeting of the CMEE Convenor and the parties.
27. In consultation with the parties, the CMEE Convenor may request all or some expert witnesses attend a case management conference or provide a written statement to the CMEE Convenor to assist the parties to—
  - a) identify any information the expert witnesses would require or any tests or investigations they would need to undertake before commencing a meeting of experts;
  - b) identify any matter on which the expert witnesses might need a report or other input from an expert in another area of expertise in order to provide their opinion;

*Example-*

*Before providing their opinion on value, the valuers may need reports by other experts such as town planners, quality surveyors, and/or civil engineers.*

- c) provide timeframes and dates for the work necessary to prepare for and engage in a meeting of experts, taking into account the current commitments of the expert witnesses.
28. The CMEE Convenor must not meet with a party in the absence of any other party, unless all parties agree.

### THE PURPOSE OF CASE MANAGEMENT CONFERENCES

29. During a case management conference, the CMEE Convenor may assist the parties to do all or any of the following—
  - a) identify the issues in dispute, if they have not already been identified;
  - b) decide which of those issues will require expert witness evidence;
  - c) identify which experts should produce joint expert reports and on which issues;
  - d) determine the sequence in which meetings of experts should take place;
  - e) ensure the expert witnesses have the information they need to fulfil their function;
  - f) prepare a consolidated brief to the expert witnesses;
  - g) discuss arrangements for providing secretarial and administrative assistance for the expert witnesses in a meeting of experts;
  - h) communicate with expert witnesses after they have commenced their meeting of experts;
  - i) establish, manage, and adjust the timetable for briefing experts, meetings of experts, and joint expert reports;
  - j) as joint expert reports are filed, consider whether those reports have consequences for the management of evidence by other expert witnesses;

*Example–*

*In a claim for compensation for compulsory acquisition of land, the parties' positions regarding the highest and best use for the land and a hypothetical development scenario may evolve or be clarified as more information is sourced and joint expert reports are obtained.*

- k) agree on directions about steps to be taken during the CMEE;
  - l) consider proposed reports to the President about the CMEE;
  - m) discuss whether there are issues that require further direction from the President.
30. If more than one case is directed to a combined CMEE because there are common issues on which expert witness evidence may be required, the CMEE Convenor may assist the parties to–
- a) identify the common issues to be managed in the CMEE;
  - b) identify how and to what extent those common issues will be managed in the CMEE;
  - c) identify which issues in all or any of the cases will not be considered in the CMEE;
  - d) agree on directions to manage the common issues;
  - e) identify issues on which further directions may be required by the Court to enable the CMEE Convenor to manage the cases directed to a combined CMEE.

#### RESTRICTION ON DISCLOSURES ABOUT CASE MANAGEMENT CONFERENCES

31. 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 all parties agree or unless required by law.
32. 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–
- 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 be connected with, or to have happened during the meeting.

## Part 5: Meetings of Experts

### APPLICATION OF PART 5

33. A meeting of experts–
- a) is a meeting of expert witnesses in one or more areas of expertise relevant to the case, in the absence of the parties–
    - i. to 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
    - ii. to prepare a joint expert report; and
  - b) includes–
    - i. a resumed meeting of experts or further meeting of experts; and
    - ii. a meeting held personally or by other means, such as phone or electronic communications, or a combination of any of those.
34. Part 4 of this Practice Direction applies to a meeting of experts convened during a CMEE.
35. An order directing a case to CMEE pursuant to this Practice Direction is to be read as an order that Part 5 Division 2 of the *Land Court Rules 2000* does not apply to a meeting of experts convened during a CMEE.

### PARTIES MUST PREPARE EXPERTS FOR THE MEETING

36. Before a meeting of experts, a party must do all things reasonably necessary or expedient to ensure an expert chosen by the party is ready to take part fully, properly, and promptly in the meeting, including by–
- a) giving the expert–
    - i. this Practice Direction;
    - ii. the *Guidelines for Expert Evidence in the Land Court*;
    - iii. a copy of any orders or directions about a meeting of experts;
    - iv. a written notice that the expert has a duty to assist the court and the duty overrides any obligation the expert may have to the party or any person who is liable for the expert witness's fee or expenses;
  - b) giving the expert a brief (which may be a *consolidated brief*) that–
    - i. identifies the issues in dispute to the extent they are relevant to the expert witness's area of expertise;
    - ii. states any particular question the party wants the expert witness to answer;
    - iii. includes all *documents* and information the instructing party considers the expert witness should consider in forming their opinion and preparing their report;
    - iv. includes any further documents disclosed that are relevant to the expert witness's consideration, whether or not those documents are favourable to a party's position; and
    - v. otherwise complies with any order or direction by the Court about the brief to the expert witnesses.

## THE CMEE CONVENOR CHAIRS THE MEETING

37. 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.
38. If the CMEE Convenor chairs a meeting of experts, the following applies–
- a) The role of the CMEE convenor in chairing a meeting of experts is to facilitate the expert witnesses to–
    - i. 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
    - ii. prepare a joint expert report.
  - b) In consultation with the expert witnesses, and subject to any directions by the President, 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.
  - c) If the CMEE Convenor considers it necessary or desirable, the CMEE Convenor may explain to the expert witnesses–
    - i. the duty of an expert witness to the Court;
    - ii. the CMEE process;
    - iii. the Court’s expectations of an expert witness in their oral and written evidence; and
    - iv. the Court’s procedures for taking *oral evidence* from expert witnesses, including by way of concurrent evidence.
  - d) 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.
  - e) The CMEE Convenor must not–
    - i. give an expert witness legal advice on any matter; or
    - ii. attempt to influence an expert witness to adopt or reject a particular opinion in relation to an issue in dispute in the case.
    - iii. 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

39. The CMEE Convenor will manage the communications between the expert witnesses participating in the meeting, or 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; and
  - d) keep the parties informed of the conduct of the meetings.
40. The CMEE Convenor must keep the parties informed of the current schedule of meetings of experts and any changes to it.

## THE EXPERT WITNESSES MUST PREPARE A JOINT EXPERT REPORT

41. Except as provided for by this Practice Direction, the expert witnesses attending a meeting of experts must, without further reference to or instruction from the parties, prepare a joint expert report in relation to the meeting.
42. Despite paragraph 41, an expert witness attending a meeting of experts may participate in a mediation involving the parties.
43. The joint expert report must—
  - a) state the joint opinion of the expert witnesses in relation to an issue in dispute in the case;
  - b) identify the matters about which the expert witnesses agree or disagree and the reasons for any disagreement;
  - c) explain what their evidence would be if the Court accepted the evidence of the other expert witnesses on matters on which they disagree;
  - d) confirm that each expert witness understands their duty to the Court and has complied with that duty; and
  - e) the expert witnesses must give a signed copy of the joint expert report to the CMEE Convenor for filing and to each party.
44. The CMEE Convenor must assist in the production of the joint expert report by assisting 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
    - 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 that may need to be clarified so the Member who will conduct the hearing can understand it.

## RESTRICTION ON DISCLOSURES ABOUT MEETINGS OF EXPERTS

45. 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.
46. 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 be connected with, or to have happened, during the meeting.

## Words and Meanings

*ADR:* Alternative Dispute Resolution is the use of alternative methods such as preliminary conferences, mediation, or case appraisal to resolve a dispute without the need for the Court to decide the case.

*Appeal:* An appeal is an application to reconsider or rehear a decision on the ground that there has been an error in the decision.

*Case management conference:* A case management conference is part of the Land Court procedure. Both sides to a dispute, their legal representatives, and a Member or the President of the Court meet to discuss the best way to approach the case. A case management conference would generally be conducted at the beginning of a matter and before the matter goes to a hearing. The purpose of a case management conference is to settle some or all of the issues before the hearing. If the matter is not settled at the case management conference the matter will proceed to a hearing.

*Consolidated brief:* A consolidated brief is a brief of instructions which—

- a) identifies any issue any party considers the experts need to address; and
- b) includes any information or documents any party considers relevant to those issues.

*Directions:* The procedural orders made by the President or a Member regarding the actions the parties and others must take to progress the case.

*Disclose:* Disclosure is the delivery or production of documents by a party to a case to the other parties in the case.

*Document:* Document includes, in addition to a document in writing—

- a) any part of a document in writing or of any other document as defined herein
- b) any book, map, plan, graph or drawing
- c) any photograph
- d) any label, marking or other writing which identifies or describes anything of which it forms part, or to which it is attached by any means whatever
- e) any disc, tape, soundtrack or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom
- f) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom
- g) any other record of information whatever.

*Expert evidence:* Expert evidence is evidence given by expert witnesses.

*Expert witness:* A person that has a specialised knowledge or skill in a particular field that qualifies them to give evidence on an issue in the case, specific to their expertise, during legal proceedings.

*Final hearing:* Final hearing is a hearing that results in a decision that disposes of the case.

*Guidelines for Expert Evidence in the Land Court:* The Guidelines for Expert Evidence explain the Court's expectations of expert witnesses and its procedures for obtaining, documenting and using their evidence.

*Joint Expert Report:* Where two or more persons with specialised knowledge or skill in a particular field, that are qualified to give evidence on an issue in the case specific to their expertise, prepare and file with the Court a written report containing their evidence on that specified issue. For example this may be Town Planners, or Valuers etc.

*Mediation:* Mediation is a form of *ADR*. An impartial person (the Mediator) assists the parties to discuss and attempt to resolve their dispute by agreement. The Mediator must keep the discussions confidential and the parties cannot use what is said or done during a mediation in a court case.

*Mediator:* Mediation is a form of *ADR*. The Mediator is an impartial person who assists the parties to discuss and attempt to resolve their dispute by agreement. The Mediator must keep the discussions confidential and the parties cannot use what is said or done during a mediation in a court case.

*Meeting of Experts:* A meeting at which experts in each area of expertise relevant to a proceeding meet, in the absence of the parties to:

- a) discuss and attempt to reach agreement about the experts' evidence in relation to an issue in dispute in the proceedings as it relates to the experts' area of expertise; and
- b) prepare a joint report.

A meeting of experts also includes:

- a) a resumed or further meeting of experts; and
- b) a meeting attended by experts personally or in a way allowing contemporaneous communication between them, including by telephone, video link or email, or a mixture of both.

*Oral evidence:* Spoken evidence given by expert witnesses, under oath to the Court.

*Oral hearing:* An oral hearing is where the Court will make a determination based on written and oral submissions.

*Parties/Party:* Unless stated otherwise, the term means a party to the case or the party's lawyer or agent.

*Review:* A review is a procedural hearing (after an initial directions hearing) where the President or a Member reviews the progress of the case and makes procedural directions regarding the future management of the case.



## **Appendix B: What to expect if you are involved in a CMEE; CMEE Roles and Responsibilities**

# What to expect if you are involved in a CMEE - lawyers and parties

### HOW DO I PREPARE FOR A CMEE?

47. Usually, the CMEE will start with a case management conference between the lawyers and/or parties, without the experts. Before that meeting, you should think about whether there are any issues about disclosure or particulars that might require discussion. You should be thinking about the issues that the experts need to answer and the material to be included in the brief to experts. You should also be thinking about the timetable for filing any joint expert report (JER) and whether one set of experts will need information from another set to finalise their JER.

### WHAT IS THE ROLE OF THE CMEE CONVENOR?

48. The role of the CMEE Convenor is to work with the expert witnesses to ensure their joint expert report assists the Court to decide an issue as it relates to their area of expertise. In chairing a meeting of experts, the CMEE Convenor will promote careful discussions between peers, so the experts understand each other's opinion and can integrate them into a JER that can be easily understood by the parties, their representatives and the Court.
49. The CMEE Convenor will ensure that the experts will not undertake any additional work required for the preparation of the JER unless the lawyers have been informed about the extra work and consent to it being undertaken.
50. The CMEE Convenor will NEVER tell the experts what to write in a JER but may comment on the way the JER is structured, presented or expressed. Usually, the CMEE Convenor will ask the experts to provide a draft JER to ensure that it is comprehensive, comprehensible, and clearly addresses the issues that the experts were briefed to consider.

### CAN I TALK TO THE EXPERTS DURING THE CMEE PROCESS?

51. Once the experts start the meeting of experts, usually, the ordinary rules apply and you cannot communicate with them.
52. However, the advantage of the CMEE is its flexibility. With the guidance and assistance of the CMEE Convenor, the meeting of experts can be suspended so that the experts can seek clarification or further information and you can talk to them about issues that may have arisen since they entered into the meeting of experts.

### HOW DO I ASK FOR CONTACT WITH THE EXPERTS?

53. Put your request for contact in writing to the CMEE Convenor, with a copy to all other parties/lawyers. If the other parties/lawyers agree, the CMEE Convenor will organise contact. If

the other parties do not agree, it is likely that the CMEE Convenor will organise a case management conference to discuss the issue.

#### WHAT HAPPENS IF THERE IS AN ISSUE THAT CANNOT BE RESOLVED AT CMEE?

54. The CMEE Convenor has no power to decide disputes. If the parties cannot reach agreement on an issue, the CMEE Convenor must prepare a report to the President, so that the President can decide the issue.
55. The report to the President should be comprehensive statement of the issue and each party's position. Ideally, there should be no need to file an application, supporting affidavits or additional submissions. Where appropriate, the President will decide the issue on the papers.
56. The CMEE Convenor must send the parties a draft report before it is filed. Best practice suggests that the draft report should clearly identify the issue and provide for written submissions by way of correspondence to be annexed to the final report.

# What to expect if you are involved in a CMEE - experts

## HOW DO I PREPARE FOR A CMEE?

57. Preparing for a CMEE is no different from preparing for a meeting of experts. Have you read the relevant practice directions and the guidelines for expert evidence? Do you have a clear understanding of the questions you have to answer? Do you have all the relevant information?
58. The CMEE Convenor will already have met with the parties and their representatives in a case management conference. The case management conference is aimed at settling the questions to be answered by each group of experts and the contents of the briefs for experts.

## WHAT IS THE ROLE OF THE CMEE CONVENOR?

59. The role of the CMEE Convenor is to work with the expert witnesses to ensure their joint expert report (JER) assists the Court to decide an issue as it relates to their area of expertise. In chairing a meeting of experts, the CMEE Convenor will promote careful discussions between peers, so the experts understand each other's opinion and can integrate them into a joint expert report that can be easily understood by the parties, their representatives and the Court.
60. If the experts consider that they need to do further work to complete the JER, and that work will involve additional cost to the parties, the CMEE Convenor should inform the lawyers, and, if necessary, convene a case management conference to discuss that work.
61. The CMEE Convenor will NEVER tell you what to write in a JER but may comment on the way the JER is structured, presented or expressed. Usually, the CMEE Convenor will ask you to provide a draft JER to ensure that it is comprehensive, comprehensible, and clearly addresses the issues that the experts were briefed to consider.

## WHO CAN I TALK TO WHEN I'M IN A CMEE?

62. One of the problems of a traditional meeting of experts is the confidentiality. Traditionally, once you entered the meeting of experts you could not talk to lawyers or other experts to get clarification on issues or information.
63. The advantage of a CMEE is its flexibility. The CMEE Convenor can facilitate requests for further information or clarity of instruction. However, you still can't speak directly to a lawyer, a party, or another expert unless the contact is facilitated by the CMEE Convenor.

## HOW DO I ASK FOR FURTHER INFORMATION/CONTACT WITH THE LAWYER OR OTHER GROUP OF EXPERTS?

64. The first step is to confer with all other experts in your meeting of experts. If they agree to the request/contact, one expert should put that request in writing to the CMEE Convenor. Your contact with the CMEE Convenor should be in writing and copied to all other experts involved in

the meeting of experts. If all experts agree to the request, the CMEE Convenor will contact the relevant person to obtain that information or arrange a meeting.

65. If not all experts agree to the request, they should identify the concerns, and the reasons for their concerns, in writing to the CMEE Convenor copied to all other experts. The CMEE Convenor will either convene a meeting of experts to discuss the request, and/or or report to the parties, outlining the request and the concerns. If the parties can't agree on whether your request should be accommodated, the CMEE Convenor will prepare a report to the President, and the President will decide the issue.

# CMEE Roles and Responsibilities

