# Guidelines for Expert Evidence in the Land Court and the CMEE process – a court perspective

## GUIDELINES FOR EXPERT EVIDENCE IN THE LAND COURT

### WHY?

The Land Court's many jurisdictions rely heavily on expert evidence to inform its decisions. Valuers, town planners, agronomists, geologists, engineers and accountants all provide the specialist evidence necessary to make complex decisions.

Engaging experts is a complex process and it may be difficult for inexperienced parties to get the maximum benefit from an expert.

The majority of parties who appear in the Land Court do so without legal representation. Although there is a group of lawyers used to, and skilled in, the idiosyncrasies of the Land Court, there are other, equally competent, lawyers who do not have the experience or knowledge of the Land Court's processes.

The *Guidelines for Expert Evidence in the Land Court* is an overview of the Court's procedures for expert evidence. It sets out the duties of experts, the duties of those who engage experts, the Court's expectations of experts and provides strategies for the fair, efficient, timely and economical use of experts. The Guidelines gather into one place all the important concepts involved in the provision of expert evidence so that it accessible for parties, lawyers and experts.

### THE OVERVIEW

The overview of the procedures for expert evidence gives a structure for parties to decide:

- What issues need expert evidence;
- How those experts will be engaged and briefed;
- How the experts' evidence will be prepared to best assist the Court.

The overview emphasises the importance of alternative dispute resolution (ADR). While the Court does not expect the experts to negotiate their views, it does expect the experts to be aware of alternative views and to fairly and objectively prepare parties for opportunities for ADR.

### THE DUTY OF AN EXPERT WITNESS

The duties of an expert witness as set out in the Guidelines are not novel, but they do bear repeating. If there was any doubt about that, a complete reading of *Alliance Australian Insurance Limited v Mashaghati*[1], referred to in the Guidelines, demonstrates that the point must be continually reinforced – to the parties, the lawyers, the experts and the Court itself.

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1 [2017] QCA 127

The Land Court, too, has expressed reservations about the independence of expert evidence.[2] These cases, a sample from only one year of court decisions, show:

- An expert behaving as an advocate;
- An expert expressing an opinion with no factual basis to support that opinion;
- An expert asked to produce a particular result and obliging (lack of independence).

## IDENTIFYING THE ISSUES

It's fair to say that, sometimes, the issues initially identified by the parties are not the issues that the Court has to decide at the final hearing. A vivid example of this is the recent case of *Mirani Solar Farm Pty Ltd v Mackay Regional Council*[3] where 26 elements of conflict were, in fact, reduced to three elements at trial.

Early identification of issues:

- Enables the experts to concentrate on the real issues;
- Saves time and money;
- Increases the prospects of a negotiated outcome.

## NOMINATING THE EXPERT WITNESS

The Guidelines require parties to give notice of their chosen experts. Experts should be chosen with an eye to the Court timetable; the expert should be available to participate in the process within a reasonable timeframe. If an expert has commitments that prevent this, that should be flagged early.

The Guidelines identify that within a particular case, experts in one discipline may benefit from conferring with other experts in different disciplines, and suggest parties turn their mind to that possibility early.

It should go without saying that the parties can nominate only one expert per discipline unless the Court otherwise orders. In practice, however, the principle is sometimes honoured in the breach.

## ONE EXPERT OPINION ON AN ISSUE

In the rare case where there is only one expert on an issue, the Guidelines set out a process.

Parties should consider the possibility of a single expert on areas where the issues are discrete or of short compass. The single expert may be engaged on an advisory or without prejudice basis, so that the parties retain the ability to move into a fully adversarial process if that is desirable.

## BRIEFING THE EXPERT

The Court prefers a consolidated brief of instruction to experts. A single brief reduces the possibility of experts working from different instructions or assumptions and, therefore, producing opinions which appear to be about very different matters.

The parties don't have to agree on the content of the brief; the inclusion of a document is without prejudice to a party's right to object at trial to the admission of that document.

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2 *Heatham Pty Ltd v Valuer General* [2017] QLC 26 at [20]; *The Trust Company Limited v Valuer General* [2017] QLC 25 at [36] – [37]; *Stony Creek Pty Ltd (in liq) & Anor v Department of Transport and Main Roads* [2017] QLC 3 at [155] – [147].

3 [2018] QPEC 38 [29] – [31]

### MEETINGS OF EXPERTS

The purpose of the meeting of experts is to discuss and clarify points of difference and, perhaps, find points of agreement.

It is important that experts actually meet; face-to-face discussions prove more useful than an exchange of emails about how a joint expert report will be written.

The Guidelines provide a checklist for experts attending a meeting and/or preparing their joint report.

### COMMUNICATION WITH EXPERTS IN THE JOINT MEETING PROCESS

Expert witnesses must prepare their joint expert report without reference to, or instruction from, the lawyers or parties.

This is often difficult to achieve in practice when the same expert is engaged in multiple cases for one party, and the cases are at different stages of readiness, or where the parties and experts want to communicate about procedural issues.

Communication about substantive issues must be transparent. For example, a request from the experts for further information must be a joint request and sent to all parties. Any response from one party must also be sent to all other parties and the experts. Ideally, of course, the parties' response should be a joint response.

### THE JOINT EXPERT REPORT

The joint expert report should be the primary document the Court refers to when considering the experts' evidence at hearing. It should:

- Provide an overview of what the experts are required to discuss and explain important concepts, methodology and terminology;
- Consolidate all previous reports;
- Identify any points of agreement;
- Identify any points of disagreement which do not impact their final opinion;
- Identify and explain fully any points of disagreement about matters the Court will have to decide.

If possible, the joint expert report should be written so that any further supplementary reports are unnecessary.

## THE COURT MANAGED EXPERT EVIDENCE (CMEE) PROCESS

### WHY?

Every Practice Direction produced by the Land Court has, in its preamble, a commitment to efficient, fair, and effective processes. Ideally, observance of the Guidelines would ensure that experts provide objective, independent evidence, that they have access to the same information and assumptions, and are asked the same questions. Also, ideally, the provision of reports would occur in a timely way without interference or delay.

In practice, however, the Court has identified problems with the briefing of experts and the provision of the joint expert report:

- Experts are not given the same information. Sometimes, this has not been identified until the experts were in the witness box being cross examined;

- Experts are asked to assume different scenarios. While it is understandable that parties will have different perspectives on the case, and these perspectives will carry forward to the briefing of experts, maintaining that 'silo' approach up to and including the trial is unhelpful. The Court needs the experts to critically examine each other's assumptions and opinions, even if they disagree.
- The experts' view of the issues, and the information they need, is often different from the parties' view (or the lawyers' view).
- Experts may require further data and/or clarification on their instructions when preparing a joint report, and thus communication about substantive issues between lawyers and experts once the experts are in the joint expert report process is sometimes necessary. This can be difficult due to the general restrictions on expert to party communication while experts are in conclave.
- The language used by experts and lawyers is often so different there is miscommunication.
- Experts sometimes have difficulty communicating unwelcome news to lawyers. The earlier unwelcome news (a.k.a. a truly objective opinion) is communicated to the parties, the less unnecessary expense is incurred.
- Experts sometimes do not give the joint expert report meeting process the attention it deserves, instead choosing to 'meet by email'. An example of the danger of this attitude can be seen in *Citigold Corporation Limited v Chief Executive, Department of Environment & Heritage*[4]. In *Citigold*, there were two joint expert reports from the same experts which were so deficient the Court was contemplating a third joint expert meeting.
- Often, especially in valuation cases, the experts find new material or fresh evidence close to, or during, the trial. This may often arise from late disclosure or third party disclosure being completed close to the trial date. There have been situations where the expert and/or party who finds this new material has not shared it with the other side.

## THE CMEE CONVENOR

The role of the convenor is procedural. The convenor cannot make any substantive decisions, cannot preside over the case at trial, and, unless the parties consent in writing, cannot preside at a mediation of the case.

The convenor cannot make orders unless all parties consent.

You might ask what the convenor can effectively do. The convenor can:

- Facilitate communication between the experts and between the experts and the parties;
- Help parties, and experts, narrow the issues in dispute;
- Ensure that all experts have access to the same information;
- Prepare a timetable for the provision of joint expert reports. Where there are a number of areas of expertise (i.e. more than one group of experts), and the experts' reports are interdependent, this is especially important.
- Provide administrative support to the experts (through the convenor's associate) if required;
- Reinforce the experts' independence, duty to the court, and encourage frank discussions.

The convenor might also explain elements of Court procedure, for example:

- What is concurrent evidence and how it might happen in a trial;
- How the Court makes decisions – who bears the onus of proof and what is that onus;
- The importance of the joint expert report.

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4 [2016] QLC 57 at [6] – [8].

## CASE MANAGEMENT CONFERENCES

The first case management conference, attended by lawyers, acts as a template for further work by the experts under the guidance of the convenor. It can be used to discuss procedural issues, such as disclosure, that need to be resolved before the joint expert report is finalised. It should operate to eliminate surprises close to trial.

Case management conferences throughout the course of a complex CMEE can also be an efficient way of debating issues in a without prejudice forum. This can be faster and cheaper than an exchange of emails. It is more flexible than an application to the Court for orders, although that option is always available if the issue cannot be resolved by consent following discussions.

## MEETINGS OF EXPERTS

The convenor does not have to attend every meeting of experts. Often, after an initial meeting, the experts will clearly understand their task and are sufficiently collegiate that they can meet and discuss the issues without a referee.

Sometimes the experts will ask the convenor to be present at subsequent meetings. The experts may want the structure the convenor can provide, or there may be a power imbalance between the experts, or they may want to be able to bounce ideas off a person who stands in a similar position to the person who will decide the case.

## JOINT EXPERT REPORT

The experts may provide the convenor with a first draft of their joint expert report, to see if it covers all the issues the parties want to address, that it is clear in its language and, to the greatest extent possible, eliminates the need for further reports.

A convenor will never tell experts what to write in a joint expert report but might:

- Reinforce the Court's expectations.
- Ask the experts questions to clarify their thinking or to demonstrate that their language might not be making a point clear to a Member.
- Identify gaps in the joint expert report. Have they addressed every issue put to them by the parties and, if not, why not?
- Reality test assumptions.

# CONCLUSION

The Guidelines for Expert Evidence and the CMEE process are designed to assist parties, not to impede the preparation of their case or to interfere in the way that experts deliberate. Both documents are a refinement of the processes that have begun and evolved in the Planning & Environment Court, but specifically taking into account the unique circumstances of the Land Court.

The Guidelines for Expert Evidence were developed in consultation with the profession, stakeholders and experts. It is a living document that will be subject to regular review and the Court welcomes suggestions for improvement.

The CMEE Practice Direction was developed in response to a number of problems that the Court has encountered in expert evidence at trial. At the moment, the effectiveness of the CMEE process is not quantifiable, and will not be known until a number of cases subject to the process go to trial and the benefits in time and cost can be properly analysed. However, while it is early days in its implementation, anecdotal evidence suggests that both lawyers and experts are seeing benefits in having a 'safe' environment in which to discuss contentious issues, informed, but not decided by, input from the Court.