

TIPS FOR BRIEFING EXPERTS

Tips for briefing experts

1. You cannot properly brief an expert if you do not understand the Court's approach to and procedures for taking expert evidence. You must read and provide copies of the following documents to any expert engaged:
 - a) *Land Court Rules 2000* part 5 div 1-3;
 - b) Guidelines for Expert Evidence in the Land Court;
 - c) Procedure for Court Managed Expert Evidence (PD 3 of 2018);
 - d) Guidelines for the Use of Concurrent Evidence (PD 2 of 2017); and
 - e) Model Directions (those that relate to expert evidence).¹
2. Where parties nominate experts in the same field, the Court usually requires the parties to provide the experts with a consolidated brief.² The following tips are relevant whether a party is preparing a brief to their expert or a consolidated brief to all experts in that field. If the case is subject to CMEE, the Convenor may facilitate preparation of the brief.

THE INITIAL APPROACH

3. Ask the expert about their availability (for both pre-hearing and the hearing).
4. Identify and articulate:
 - a) the issues the Court must decide, and consider how the expert's opinion might assist the Court to decide them; and
 - b) the factual and legal assertions made by **all** parties relating to the expert's expertise.
5. Explain to the expert their overriding duty to the Court and reinforce their independence in all your dealings with them. Explain their duty requires:

*"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."*³

¹ Appendix A extracts the Model Directions which relate to expert evidence.

² See Appendix A, Ex 5 & 6.

³ *Allianz Australia Insurance Limited v Mashaghati* [2017] QCA 127 at [90] (Sofronoff P).

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6. Provide the experts with a chronology and basic data that relates to the dispute. Discuss:
 - a) the questions you think will require their expertise;⁴
 - b) what information they may want to be included in the brief; and
 - c) whether they want the brief or parts of it to be provided in an electronic format.

REFINING THE BRIEF

7. Once the experts have had time to look at the initial material and consider the issues that might be relevant for them, it may be appropriate to provide further information to the experts, or the experts may have some questions. At this stage, discuss:
 - a) the time they expect to take in providing a report (bearing in mind their other commitments);⁵
 - b) arrangements for a site inspection;
 - c) whether they require any additional information or testing to complete their JER; and
 - d) if so, what time frame and expense is involved in the additional enquiry.

THE EXPERT MEETING/CMEE PROCESS

8. When briefing an expert for a meeting of experts or a CMEE process, provide the information required by *Land Court Rules 2000* r 24 (and see [2]).
9. Once the experts commence their meeting process, do not communicate with them about their brief. If you need to communicate with an expert during their meeting process, or if an expert communicates with you:
 - a) If the case is subject to CMEE, ask the CMEE Convenor to facilitate communication with the experts.
 - b) If the case is not subject to CMEE, communicate with the expert in writing and copy that to all experts involved in the meeting and all parties or their representatives.
10. Advise the experts that they cannot communicate directly with “their” expert in another discipline. Instead, they should jointly approach both experts in that other discipline.

⁴ Tell them, to the extent you know, the factual and legal assertions made by both sides which will be relevant to their task.

⁵ This will assist the Court to set a realistic timetable for expert meetings and reports and list the case for hearing.

APPENDIX A – MODEL DIRECTIONS

Appendix A – Model Directions

Ex1: By [TIME & DATE] each party must file in the Land Court Registry and serve on any other party a written notice of the expert witnesses they intend to engage for the hearing. The notice must specify:

1. the name of each expert witness;
2. their area of expertise;
3. a short statement of each specific issue or assertion the expert witness will address; and
4. confirmation that the expert is able to participate fully, properly, and promptly in the court process.

Ex2: By [TIME & DATE] [party's name] must file in the Land Court Registry and serve on any other party a statement of evidence sworn or affirmed by [expert's name], [expert's area of expertise].

Ex3: By [same date as Ex2] [party's name] must provide to any other party a copy of the brief of instructions provided to the expert witness and any document included or referred to in the brief that has not already been disclosed.

Ex4: The filed statement of evidence sworn or affirmed by [expert's name] will be their evidence in chief at the hearing, unless the Court orders otherwise.

Ex5: By [TIME & DATE] the parties must prepare and deliver to the [area of expertise] expert witnesses a consolidated brief of instructions which:

1. identifies any issue that any party considers the experts need to address; and
2. includes any information or documents that any party considers relevant to those issues.

Ex6: Including information or a document in a consolidated brief of instructions is without prejudice to the parties' rights to object at the hearing to:

1. the admission into evidence of all or part of any information or document included in the brief of instructions; and

APPENDIX A – MODEL DIRECTIONS

2. any evidence relating to the disputed information or document. Meeting of experts and joint reports

Ex7: By [TIME & DATE] the [area of expertise] expert witnesses must participate in a meeting of experts. 11

Ex8: By [TIME & DATE] the [area of expertise] expert witnesses must produce a joint report¹² and deliver a copy to each party.

Ex9: [appellant/applicant name] must file a copy of the joint report in the Land Court Registry within two business days of its receipt.

Ex10: Unless otherwise ordered, the expert witnesses may not file any statement of evidence other than their joint report.

Ex11: This case is directed to Court Managed Expert Evidence (CMEE) pursuant to Land Court Practice Direction 3 of 2018.

Ex12: The CMEE Convenor is [insert name of Member or Judicial Registrar].

Ex13: By [TIME & DATE] the CMEE Convenor must convene a case management conference.

Ex14: By [TIME & DATE] the CMEE Convenor must provide a report to the President on the progress of the CMEE [or specify the specific issue to be reported on].

Ex15: The evidence of [names of expert witnesses], [experts' area of expertise] will be taken concurrently.

Ex16: By [TIME & DATE] the parties must file in the Land Court Registry an agreed proposed agenda for the concurrent evidence session(s) for the Court's consideration.

Ex17: By [TIME & DATE] the parties must deliver to each of their nominated expert witnesses:

1. a copy of Land Court Practice Direction 2 of 2017; and
2. a copy of the agreed/proposed agenda for their concurrent evidence session.