

# **Procedure for Court Managed Expert Evidence**

**Practice Direction 3 of 2018**



*President Fleur Kingham  
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# PART 1: INTRODUCTION

## 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)

### 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>1</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>1</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

### 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—

## PART 3: THE CMEE CONVENOR

- 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

### 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;

## PART 4: CASE MANAGEMENT CONFERENCES

- 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.

## PART 4: CASE MANAGEMENT CONFERENCES

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

### 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;

## PART 5: MEETINGS OF EXPERTS

- 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

## PART 5: MEETINGS OF EXPERTS

- 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.

## PART 5: MEETINGS OF EXPERTS

44. The CMEC 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 CMEC 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

## 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.

## WORDS AND MEANINGS

*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.

## WORDS AND MEANINGS

*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.