

# THE LAND COURT OF QUEENSLAND: A SPECIALIST COURT WITH SPECIALISED PROCESSES OF ALTERNATIVE DISPUTE RESOLUTION AND COURT MANAGED EXPERT EVIDENCE

by

Paul A Smith BA; LLB  
Member, Land Court of Queensland<sup>1</sup>

The Land Court of Queensland plays an important role in legal processes concerning certain land and mining issues.

I intend to present this paper in three parts, namely:

- The Specialist Nature of the Land Court;
- Alternative Dispute Resolution; and
- Court Managed Expert Evidence.

## **The Specialist Nature of the Land Court**

The Land Court is the second oldest court in Queensland, having been first established in 1897 to deal mainly with issues relating to Crown leasehold land. As the years and decades have passed, so too has the role and jurisdiction of the Land Court changed.

The most recent legislation establishing the Land Court is the *Land Court Act 2000* (Qld). Section 4 of the *Land Court Act* provides that the Land Court is a specialised judicial tribunal and court of record.

The Court as currently established consists of a President and four Members, as well as a Judicial Registrar.

---

<sup>1</sup> The views expressed in this paper are my own and not necessarily those of the Land Court of Queensland.

The Land Court has two divisions, a general division to which the vast majority of cases are referred and a cultural heritage division. Additional indigenous assessors can be appointed to sit on cultural heritage matters as required.

Appeals from the Land Court lie to the Land Appeal Court comprising a Supreme Court Judge and two Land Court Members. Further appeal is to the Queensland Court of Appeal on questions of law and by leave. Very occasionally, a case proceeds to the High Court of Australia after grant of special leave.

Currently, jurisdiction is granted to the Land Court in well over 40 statutes.<sup>2</sup> There is no monetary limit on the Court's jurisdiction in any of its matters. Importantly, the Land Court has no inherent jurisdiction; all jurisdiction derives from Statute.

The vast majority of the Court's caseload revolves around four main areas. In brief, these are:

- (a) Compensation for the compulsory acquisition of land under the *Acquisition of Land Act 1967* (Qld) (ALA);
- (b) Statutory valuations under the *Land Valuation Act 2010* (Qld) (LVA);
- (c) Energy and resource matters under various acts including the *Mineral Resources Act 1989* (Qld) (MRA). The *Petroleum Act 1923* (Qld), the *Petroleum and Gas (Production and Safety) Act 2004* (Qld), the *Geothermal Energy Act 2010* (Qld) and the *Greenhouse Gas Storage Act 2009* (Qld), as well as other mining project specific acts; and
- (d) Environmental matters relating to mining under the *Environmental Protection Act 1994* (Qld) (EPA).

## **Alternate Dispute Resolution**

Alternate dispute resolution, known by the acronym ADR, involves a number of ways in which a dispute can be resolved without the need for that dispute to go to a formal hearing before the Land Court. I note that there is a growing trend to refer to ADR as Appropriate Dispute Resolution rather than Alternate or Alternative Dispute Resolution, as ADR processes are increasingly seen as a more appropriate and cost-effective way of resolving disputes in a timely, cost-efficient way in which the parties to the dispute emerge

---

<sup>2</sup> See the Land Court website <https://www.courts.qld.gov.au/courts/land-court/about-the-land-court/jurisdiction>.

from the dispute with a greater sense of ownership of the final outcome, rather than having a decision judicially imposed on them.

There are three key forms of ADR within the Land Court: preliminary conferences (PCs); mediation; and case appraisal. A PC is like a mini mediation. At an early stage of the court proceedings, the parties are brought together under a court-ordered process in an attempt to resolve the dispute. A PC is a confidential, 'without prejudice' process and no formal evidence is taken. Rather, the parties talk about their case and the issues in dispute and they are encouraged to explore options to settle the case. The great majority of PCs in the Land Court are conducted by the Judicial Registrar of the Court and they take approximately one hour. There is a high settlement rate from this process.

For those matters which have not otherwise settled, once the cases are well prepared for hearing, but prior to the actual hearing, the parties are encouraged to attend court-ordered mediation. The Court's Court Supervised Mediation Guidelines are set out in the Land Court Practice Direction 3 of 2017, which is Attachment A. Like a PC, mediation is a confidential, 'without prejudice' process. Although no evidence is heard at a mediation, it is usual for any experts who have been engaged to attend the mediation as complex Land Court matters may require technical analysis which needs to be provided by an expert in the given field. The mediation process is much less formal than a hearing and it allows the parties to reach their own solutions and agreements, without being limited by the statutory requirements which may restrict the orders that the Land Court can make following a hearing.

Mediation is conducted by a mediator. Mediators are either Members of the Land Court; the Judicial Registrar; or an ADR Panel mediator. It is the normal process that, where mediation is conducted by a Member of the Land Court or the Judicial Registrar, such Member or Judicial Registrar cannot go on to conduct the hearing of the matter should mediation fail to result in agreement. This ensures that the parties before the mediator can speak fully and frankly at a mediation, safe in the knowledge that what they say remains confidential and cannot be used against them to influence the outcome of a hearing.

ADR Panel mediators are all accredited mediators. The process for ADR Panel mediation is set out in Land Court Practice Direction 1 of 2018, which is Attachment B.

Case appraisal is a process conducted by a convenor drawn from the Court's ADR Panel list. It involves an expert neutral evaluation of a case without a hearing before the Court. The procedure for a case appraisal is at the discretion of the convenor. At the end of the case appraisal the convenor makes a decision in the matter. This decision is only final and binding if a party does not elect to proceed to a hearing in the Court.

### **Court Managed Expert Evidence**

Court managed expert evidence, known as CMEE, is a new process being undertaken by the Land Court. It is an initiative of President Kingham and Member Stilgoe of the Court. As mentioned earlier, the Land Court does not have any monetary limit to its jurisdiction. While many of the cases before the Court may involve less significant amounts of money or issues in dispute, some of the matters are complex or very complex and can involve very substantial amounts of money in dispute, or issues of state or national significance. In these complex matters, it is usually the case that the Court will be assisted by evidence from expert witnesses. This evidence can be highly detailed and complex and very lengthy. Where there is more than one expert giving evidence in the same discipline or area of expertise, the Land Court makes directions for a meeting of the expert witnesses to occur in order for those experts to prepare a joint expert report (JER).

In cases where a JER is being prepared and the Court considers closer supervision of the briefing and conferencing of the expert witnesses is necessary, the Court may direct the parties to engage in what is known as court managed expert evidence. A CMEE is conducted by a Member or Judicial Registrar of the Court and is a 'without prejudice' process. A Member or Judicial Registrar who conducts a CMEE does not hear the case when it goes to hearing.

CMEEs are designed, not only in an endeavour to help the experts reach agreement with the various component parts of what they have been asked to report on, but to also help make it clear to the Court and to the parties exactly what their areas of disagreement are.

The new innovation of the Land Court in conducting CMEE's has been generally well-received by the experts who have appeared both before a CMEE process and before hearings in the Land Court. Recently, some complex matters which were listed for hearing before myself were settled as a result of a CMEE process, with Senior Counsel advising the Court of the great benefit that the CMEE process had in leading

to the resolution of what would have otherwise been complex matters which would have involved a significant amount of court time at a hearing and, therefore, expense.

The CMEE process is set out in detail in Land Court Practice Direction 3 of 2018 which is Attachment C.

**PRACTICE DIRECTION NUMBER 3 of 2017**

**LAND COURT OF QUEENSLAND**

---

**COURT SUPERVISED MEDIATION GUIDELINES**

---

1. This Practice Direction, issued pursuant to s 22(2) of the *Land Court Act 2000*, defines the process for court supervised mediations. It supplements and should be read in conjunction with s 37 of the *Land Court Act 2000* and Part 6 of the *Civil Proceedings Act 2011*.
2. It does not apply to Preliminary Conferences held in appeals relating to valuations of land, which are governed by Practice Direction 2 of 2015.
3. A mediation conducted under this Practice Direction is referred to as a *court supervised mediation* and the person who conducts it is referred to as the *Mediator*.

**Background**

4. The Court is committed to resolving disputes in a way that is accessible, fair, just, economical and efficient.
5. The use of private mediation is an important means to fulfil that objective. Parties are encouraged to consider private mediation at any stage of any case before the Court.
6. To further the Court's objective, the Court may direct parties to engage in either private or court supervised mediation. The Mediator for a court supervised mediation will be either a Member or Judicial Registrar of the Court.
7. Whether the mediation is a private or a court supervised mediation, the order is made pursuant to ss 43 and 44 of the *Civil Proceedings Act 2011*. However, this Practice Direction applies only to court supervised mediation.
8. Court supervised mediation may be ordered at any stage of any case before the Court; whether the Court is fulfilling a judicial or an administrative function.
9. In deciding whether to direct court supervised mediation, the Court will consider factors including:
  - a. the nature and scope of the issues in dispute;
  - b. the stage the case has reached;
  - c. the resources of the parties; and
  - d. the views of the parties.

## **Participation in the mediation**

10. Participation in a court supervised mediation is under the direction and control of the Mediator. Parties are expected to participate in good faith and must not impede the mediation.<sup>3</sup>
11. Unless the Mediator otherwise allows, a party must attend in person, with or without their legal or other representative.
12. A party will not be relieved of the requirement to attend in person unless:
  - a. they will be represented by a person with full authority to settle the case; or
  - b. if the party is a government agency, it will be represented by a person with authority to recommend the settlement for approval by an authorised delegate; or
  - c. for any other party, the Mediator is informed of the process for endorsing a settlement and, after consulting with the other parties, considers it does not present an unacceptable limitation on the mediation.
13. Where appropriate, the Mediator may allow:
  - a. other persons to also attend, such as expert witnesses; and
  - b. participation by telephone, video or other remote access.

## **Intake process**

14. The Mediator or a court officer will contact each party to discuss arrangements for the mediation, including:
  - date, time, venue, and period allocated for the mediation (if not already fixed);
  - any special requirements (such as cultural and language, physical access, audio-visual or other IT needs);
  - who the parties wish to participate in the mediation, including expert witnesses or other advisors;
  - any requests relating to representation at the mediation (see paragraph 12); and
  - any requests about mediation arrangements made by any other party.

## **Confirmation of mediation process**

15. Following intake, the Mediator will approve arrangements for the mediation, which will be provided in writing to the parties.
16. The arrangements will deal with any preconditions, expectations or particular requirements of the Mediator, and will include:
  - a. who will participate, how many people may attend with a party and what are their roles;
  - b. whether a party is required to provide a confidential statement about the issues raised in the case and how they would like the case to be resolved; and if so, by what date;
  - c. what other material, if any, must be provided by any party and by what date;

---

<sup>3</sup> Section 44 of the *Civil Proceedings Act 2011*.

- d. whether a party has leave to be represented by a person without authority to commit and, if so, confirmation of that party's process for endorsement of an agreement negotiated at the mediation.

### **Without prejudice and confidential process**

17. A court supervised mediation is conducted on a without prejudice basis. Information shared and documents prepared for the mediation are governed by the law relating to without prejudice communications.
18. The Mediator, the parties, and all other participants are expected to respect the confidentiality of the mediation.<sup>4</sup>
19. If the case does not resolve at mediation, evidence may not be given at the hearing of anything done or said or any admission made at the mediation, unless all parties agree.<sup>5</sup>
20. Following completion of the mediation, whether the case is resolved or not, the Mediator must destroy all materials provided to or prepared by or for the Mediator for the sole purpose of the mediation.

### **Meeting separately with the parties – private meetings**

21. Mediation styles and practices may differ between Mediators and between cases. Whether a Mediator holds private meetings with the parties is at the Mediator's discretion and will depend upon the nature and circumstances of the case.
22. If a Mediator does hold private meetings with the parties, the Mediator will not disclose to any other party or participant any information provided during a private meeting, without the express authority of the informing party.

### **Adjournment**

23. A Mediator may adjourn a mediation to continue at a later date.

### **Agreement**

24. If agreement is reached about some or all issues, the Mediator will discuss with the parties whether the agreement will be:
  - a. reduced to consent orders to be proposed to the Court;
  - b. recorded in a private agreement prepared and finalised by the parties; or
  - c. documented in some other way.

---

<sup>4</sup> The Mediator is bound by a requirement of confidentiality with limited exceptions; see s 54 of the *Civil Proceedings Act 2011*.

<sup>5</sup> Section 53 of the *Civil Proceedings Act 2011*.



25. If the parties propose consent orders, the Member managing the case will consider the orders proposed by the parties and, if they consider it necessary to change or refine the orders, will hear from the parties before doing so.

### **Termination**

26. A Mediator may terminate a mediation if:
- a. the Mediator considers there is no utility in continuing; or
  - b. the Mediator believes (on information that provides a reasonable basis for the belief) that a party has engaged or is engaging in illegal, improper or unethical conduct in the mediation, or in the case generally.
27. A Mediator is not required to give reasons for terminating the mediation.

### **Further conduct of the case**

28. Paragraphs [29] to [35] apply if the case does not completely resolve at mediation.
29. The Mediator must file a Mediator's Certificate in the approved form.
30. After consultation with the parties, the Mediator may include in their Mediator's Certificate recommended directions for the further conduct of the case. The Member who is managing the case will consider whether to make the recommended directions and will notify the parties of their decision.
31. The parties may request the Mediator to hear and determine the case or one or more issues raised in the case. The request must:
- a. be in writing and signed by all parties;
  - b. specify what is to be determined; and
  - c. record the parties' agreement to be bound by the Mediator's determination.
32. The Mediator cannot agree to the request unless it is made by all parties.
33. The Mediator can decline the request and is not required to give reasons for doing so.
34. If the Mediator agrees to the request, the Mediator will give directions about the procedure for the case or issue(s) to be determined, including whether there will be an oral hearing or whether it will be determined on documents filed with the Court.
35. Other than as provided for in paragraphs 31 to 34, should the case proceed past mediation to hearing in the Land Court or the Land Appeal Court, the Court as constituted for the case will not include the Mediator.

**Fleur Kingham**  
**President**  
**09/03/2017**

**PRACTICE DIRECTION NUMBER 1 of 2018**

**LAND COURT OF QUEENSLAND**

---

---

**ADR PANEL MEDIATION**

---

---

1. This Practice Direction, issued pursuant to s 22(2) of the *Land Court Act 2000*, defines the process for court-supervised mediations by a Convenor from the Court's ADR Panel. It supplements s 37 of the *Land Court Act 2000* and Part 6 of the *Civil Proceedings Act 2011*.
2. A mediation conducted under this Practice Direction is an *ADR Panel mediation* and the person who conducts it is the *Mediator*.

**Background**

3. The Court is committed to resolving disputes in a way that is accessible, fair, just, economical and efficient. To further that objective, the Court may direct parties to engage in either private or court-supervised mediation.
4. This Practice Direction applies only to an ADR Panel mediation and does not apply to:
  - a. a Preliminary Conference held in an appeal relating to a valuation of land (Practice Direction 2 of 2015); or
  - b. a Mediation by a Member or the Judicial Registrar of the Court (Practice Direction 3 of 2017).

**Mediation Order**

5. The Court may order<sup>6</sup> an ADR Panel mediation at any stage of any case before the Court,<sup>7</sup> whether the Court is fulfilling a judicial or an administrative function.
6. In deciding whether to order an ADR Panel mediation, the Court will consider factors including:
  - a. the nature and scope of the issues in dispute;
  - b. the stage the case has reached;

---

<sup>6</sup> The Court makes its order pursuant to s 43 of the *Civil Proceedings Act 2011*.

<sup>7</sup> Before a party has filed a case in the Court, the parties to a dispute within the jurisdiction of the Court may agree to use a Convenor from the ADR Panel to mediate the dispute (pre-filing mediation). The parties may agree:

- (a) to use the mediation procedure set out in this Practice Direction; and
- (b) to use a Convenor from the ADR Panel as agreed between them or as nominated by the Registrar.

The Court does not make an order for pre-filing ADR. The parties must arrange for pre-filing ADR through the Registrar and the Convenor.

- c. the resources of the parties; and
  - d. the views of the parties.
7. The Mediator for an ADR Panel mediation must be an ADR Panel Convenor selected by the parties, if they agree, or by the Registrar, in consultation with the parties, if they do not agree.

### **Participation in the mediation**

8. Participation in an ADR Panel mediation is under the direction and control of the Mediator. The parties must participate in good faith and must not impede the mediation.<sup>8</sup>
9. Unless the Mediator otherwise allows, a party must attend in person, with or without their legal or other representative.
10. A party will not be relieved of the requirement to attend in person unless:
- a. they will be represented by a person with full authority to settle the case; or
  - b. if the party is a government agency, it will be represented by a person with authority to recommend the settlement for approval by an authorised delegate; or
  - c. for any other party, the party informs the Mediator of the process for endorsing a settlement and, after consulting with the other parties, the Mediator considers it does not present an unacceptable limitation on the mediation.
11. Where appropriate, and after consulting all parties to the Mediation, the Mediator may allow:
- a. other persons to also attend, such as expert witnesses; and
  - b. participation by telephone, video or other remote access.

### **Intake process**

12. The Registrar will provide the Mediator with access to all filed documents.
13. The Mediator will contact each party to discuss arrangements for the mediation, including:
- a. date, time, venue, and period allocated for the mediation (if not already fixed);
  - b. preparatory meetings with all or some of the participants;
  - c. the scope, format and nature of information about the dispute to be provided to the Mediator;
  - d. any special requirements (such as cultural and language, physical access, audio-visual or other IT needs);
  - e. any requests by a party not to attend in person (see [10]);
  - f. any requests about participation in the mediation (see [11]);
  - g. any other requests about mediation arrangements made by a party; and
  - h. arrangements for payment of the Mediator's fee.
14. If the Mediator considers co-mediation will enhance the prospects of reaching agreement, they may recommend the parties agree to engage a co-mediator. The co-mediator must be a Convenor on the ADR Panel with specialist expertise relevant to the dispute. If the parties agree to appoint a co-mediator, the mediation order and this practice direction will bind the co-mediator.

### **Confirmation of mediation process**

15. Following intake, the Mediator will advise the parties in writing of the arrangements for the mediation, including any preconditions, expectations or particular requirements of the Mediator, and, in particular:
- a. who will participate, how many people may attend with a party and what are their roles;
  - b. whether a party is required to provide a confidential summary about the issues raised in the case and how they would like the case to be resolved; and if so, by what date;
  - c. what other material, if any, should be provided by any party and by what date; and
  - d. confirmation of the process by which a party who does not attend the mediation in person will endorse an agreement negotiated at the mediation.

### **Without prejudice and confidential process**

16. An ADR Panel mediation is conducted on a without prejudice basis. The law relating to without prejudice communications governs information shared and documents prepared for the mediation.
17. The Mediator, the parties, and all other participants must respect the confidentiality of the mediation.<sup>9</sup>
18. If the case does not resolve at mediation, no person may give evidence at the hearing of anything done or said or any admission made at the mediation, unless all parties agree.<sup>10</sup>
19. Following completion of the mediation, the Mediator must destroy all materials provided to or prepared by or for the Mediator for the sole purpose of the mediation, whether or not the case is resolved.<sup>11</sup>

### **Meeting separately with the parties – private meetings**

20. Mediation styles and practices may differ between Mediators and between cases. The Mediator may hold private meetings with the parties, at the Mediator's discretion, taking into account the nature and circumstances of the case.
21. If a Mediator does hold private meetings with the parties, the Mediator will not disclose to any other party or participant any information provided during a private meeting, without the express authority of the informing party.

### **Adjournment and request for directions**

22. The Mediator may adjourn a mediation to another date, but must advise the Registrar in writing of the date to which the mediation is adjourned.

---

<sup>9</sup>

The Mediator must maintain confidentiality with limited exceptions; see s 54 of the *Civil Proceedings Act 2011*.

<sup>10</sup> Section 53 of the *Civil Proceedings Act 2011*.

<sup>11</sup> This obligation does not extend to business and taxation records, such as the mediation agreement and invoices.

23. The Mediator or any party may make a written request for further directions from the court about arrangements for the mediation.
24. The Member managing the case will consider the request and provide a written response to the Mediator and the parties.

### **Termination**

25. The Mediator may terminate a mediation if:
  - a. the Mediator considers there is no utility in continuing; or
  - b. the Mediator believes (on information that provides a reasonable basis for the belief) that a party is or was engaging in illegal, improper or unethical conduct in the mediation, or in the case generally.
26. The Mediator must advise the parties before terminating the mediation but is not required to give reasons for doing so.

### **If the case is resolved by agreement**

27. If agreement is reached about some or all issues, the Mediator will discuss with the parties whether the agreement will be:
  - a. reduced to consent orders to be proposed to the court;
  - b. recorded in a private agreement prepared and finalised by the parties; or
  - c. documented in some other way.
28. In any case, the Mediator must file a Mediator's Certificate in the approved form.
29. If the parties propose consent orders, the Mediator must include them in or attach them to the Mediator's Certificate. The Member managing the case will consider the proposed consent orders and either:
  - a. make the orders by consent on the papers; or
  - b. if they consider it necessary to change or refine the orders, hear from the parties before doing so.

### **If the case is not resolved by agreement**

30. Paragraphs [31] to [34] apply if the case does not completely resolve at mediation.
31. If the parties do not reach an agreement which finally disposes of the case, the Mediator will discuss options for the further conduct of the case and seek agreement about procedural matters<sup>12</sup> that will facilitate a fair, efficient and effective hearing, including:
  - a. The contents of a statement of agreed facts;
  - b. The contents of an agreed list of issues of fact or law;

---

<sup>12</sup> The Mediator will use the current Practice Directions and Model Directions, if any, to facilitate agreement about procedural matters.

- c. The expert witness procedure;
  - d. A proposed schedule for the parties to file witness statements and other evidence;
  - e. Arrangements for the hearing, including whether it should be an oral hearing or not and whether there is a preliminary point that the court could decide before it holds a full hearing.
32. Whether the parties agree about procedural matters or not, the Mediator must file a Mediator's Certificate in the approved form.
33. If the parties agree on any procedural matters, the Mediator must specify the agreement in the Mediator's certificate and attach any agreed documents (such as statements of agreed facts or list of issues of fact and law).
34. The Member managing the case may:
- a. make directions, on the papers, in accordance with the parties' agreement; or
  - b. if they consider it necessary to change or refine the procedure proposed by the parties, hear from the parties before doing so.

**Fleur Kingham**  
**President**  
**12/02/2018**

## Procedure for Court Managed Expert Evidence

### Practice Direction 3 of 2018

You can add an abstract or other key statement here. An abstract is typically a short summary of the document content.

A handwritten signature in blue ink, appearing to read "Paul Higham". The signature is written in a cursive style with a large initial 'P' and 'H'.

# Table of Contents

<a href="#">Part 1: Introduction</a>	16
<a href="#">Part 2: Overview of Court Managed Expert Evidence (CMEE)</a>	17
<a href="#">Part 3: The CMEE Convenor</a>	18
<a href="#">Appointment of the CMEE Convenor</a>	18
<a href="#">The role of the CMEE Convenor</a>	18
<a href="#">The powers of the CMEE Convenor</a>	18
<a href="#">Reports by the CMEE Convenor</a>	18
<a href="#">Records of the CMEE</a>	19
<a href="#">Part 4: Case Management Conferences</a>	20
<a href="#">The CMEE Convenor will convene case management conferences</a>	20
<a href="#">The purpose of case management conferences</a>	20
<a href="#">Restriction on disclosures about case management conferences</a>	21
<a href="#">Part 5: Meetings of Experts</a>	22
<a href="#">Application of Part 5</a>	22
<a href="#">Parties must prepare experts for the meeting</a>	22
<a href="#">The CMEE Convenor chairs the meeting</a>	23
<a href="#">Communications between expert witnesses and the parties or other expert witnesses</a>	24
<a href="#">The expert witnesses must prepare a joint expert report</a>	24
<a href="#">Restriction on disclosures about meetings of experts</a>	25
<a href="#">Words and Meanings</a>	26



## 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>13</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.

---

<sup>13</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.