

Guidelines for Expert Evidence in the Land Court



*President Fleur Kingham
Issued 30 April 2018*

TABLE OF CONTENTS

Table of Contents

Introduction	1
Overview of Procedures for Expert Evidence	2
The Duty of an Expert Witness	3
Identifying the Issues	4
Nominating the Expert Witnesses	5
Review	6
One Expert Witness on an Issue	7
More than one Expert Witness on one or more Issues	8
Briefing the expert witnesses	8
Meeting of experts	9
Purpose of meetings of experts	9
How meetings of experts are conducted	9
How to approach discussions	10
Communications with the parties and other expert witnesses	11
Joint expert report	12
Further statement of evidence	13
Oral Evidence	14
Words and Meanings	15

Introduction

1. These Guidelines—
 - a) provide an overview of the procedures for *expert evidence* in the Land Court
 - b) explain the duties of *expert witnesses* and their *instructing parties*
 - c) outline the Court’s expectations of expert witnesses giving evidence in the Land Court
 - d) identify the provisions of the *Land Court Rules 2000* and the Practice Directions which deal with expert evidence.
2. Expert witnesses have an important role to play in assisting the Court. Many cases involve issues of a specialist or technical nature, including *mining objection hearings* (MOH), compensation claims for resumption of land or for the impact of mining and other resource activities on land, and appeals against land valuations.
3. The Court looks to expert witnesses for an objective and impartial opinion, drawing on their knowledge and experience. The Court expects expert witnesses to be independent and well informed, and to observe the limits of their expertise.
4. The Court’s overriding objective is to make timely, efficient, fair, and effective use of expert evidence. To retain flexibility, the Court will direct the procedure for expert evidence on a case-by-case basis, usually after the *parties* have defined the issues and nominated their expert witnesses. The Court’s choice of procedure will take into account the resources and preferences of the parties and the nature, scope, and complexity of the issues.

OVERVIEW OF PROCEDURES FOR EXPERT EVIDENCE

Overview of Procedures for Expert Evidence

5. In summary, the procedures for expert evidence involve the following steps—
 - a) The parties will identify the issues for the hearing;
 - b) The parties will nominate their expert witnesses;
 - c) The Court will decide what procedure will apply, in consultation with the parties;
 - d) The parties will brief the experts;
 - e) If only one party nominates an expert on an issue, the expert witness will produce a *statement of evidence*;
 - f) If more than one party engages an expert on one or more issues—
 - a. those expert witnesses;
 - i. will attend a meeting of experts and produce a joint expert report;¹
 - ii. may produce a limited individual statement of evidence;²
 - b. The Court may direct the case to *Court Managed Expert Evidence* (CMEE) so a Member or Judicial Registrar can manage and supervise the meetings and reports process;³
 - g) At any stage, the Court may invite or direct the expert witnesses to participate in a *preliminary conference or mediation*;
 - h) The Member who presides at the hearing will decide how and when expert witnesses will give their oral evidence.⁴

¹ *Land Court Rules 2000* Part 5 Division 2.

² *Land Court Rules 2000* r 24E and r 24F.

³ If the Court directs the case to CMEE, Practice Direction 3 of 2018 governs the procedure for briefing expert witnesses, meetings of experts, and joint expert reports. An order directing a case to CMEE has the effect that Part 5 Division 2, which otherwise governs those steps, does not apply.

⁴ Practice Direction 2 of 2017 which explains how the Court will proceed if it takes evidence from more than one witness in a concurrent evidence session.

THE DUTY OF AN EXPERT WITNESS

The Duty of an Expert Witness

6. The primary duty of an expert witness is to assist the Court. That duty overrides any obligation an expert witness owes to any party or to the person paying their fee or expenses.⁵ An expert witness must not accept (and a person must not give) instructions to adopt or reject a particular opinion about an issue in dispute in the case.⁶
7. The Land Court expects an expert witness to fully understand and comply with their duty to the Court. The President of the Court of Appeal has explained the full extent of that duty—

*“This duty may require a level of candour and voluntary disclosure on the part of an expert witness that might involve prejudicing the case of the party that called the expert witness.”*⁷
8. It follows that an expert witness must not be an advocate or agent for a party, at any stage of the case. The Court will not allow an expert who has attended a *Court-ordered event* as an advocate or agent for a party, to act as an expert witness at any other stage of that case.
9. The Court expects expert witnesses to—
 - a) understand and abide by their duty to assist the Court;
 - b) refrain from acting as an advocate for a party;
 - c) comply with the Court’s directions;
 - d) read the Rules and Practice Directions dealing with expert evidence and these Guidelines;
 - e) know what issues they are being asked to consider;
 - f) identify if they need further information or instruction in order to give their opinion;
 - g) confine their evidence to the issues relevant to their *area of expertise*;
 - h) confine their opinion to their area of expertise;
 - i) expose the facts, assumptions, methodology, and reasoning that supports their opinion;
 - j) fully engage in a meeting of experts; and
 - k) change, qualify, or revise their opinion where necessary.

⁵ Land Court Rules 2000 r 24C.

⁶ Land Court Rules 2000 r 24D.

⁷ *Alliance Australian Insurance Limited v Mashaghati* [2017] QCA 127 at [90].

Identifying the Issues

10. Before a party can decide whether to engage an expert witness, and on what issues, it is necessary to identify the issues for the hearing, at least in broad terms.
11. The Court requires each party to identify their case in enough detail to allow any other party to understand the case made against them or the case they must prepare to meet.
12. The Court requires the parties to identify the issues, depending on the nature of the case, through–
 - a) *statements of facts, matters and contentions*;
 - b) *compensation statements*;
 - c) *particulars*; or
 - d) as agreed between the parties.
13. In a MOH, the issues for the hearing are the grounds of objection to an application for a mining tenure or associated *environmental authority*, as particularised.⁸
14. In an appeal against the valuation of land, the issues for the hearing are the grounds stated in the valuation appeal notice,⁹ as clarified by statements of facts, matters, and contentions.
15. The Court recognises the reports and evidence of expert witnesses can clarify, refine, or confine the issues for the hearing. When the Court lists the case for hearing, it will set the date by which the parties must provide a list of issues and a list of matters not in dispute.

⁸ Procedure for Mining Objection Hearings – Practice Direction 4 of 2018.

⁹ *Land Valuation Act 2010* s 169(1).

Nominating the Expert Witnesses

16. Once the issues are identified, the parties must file and serve on any other party a written notice of the expert witnesses they intend to engage for the hearing. Unless granted leave by the Court, a party cannot engage more than one expert witness for each area of expertise.¹⁰
17. Parties should consider asking a key expert witness they intend to nominate to identify whether evidence from an expert with another area of expertise would affect their opinion.

Example—

In a land valuation appeal or a claim for compensation for resumption of land, a valuer may need advice from other experts, such as town planners and quantity surveyors, to provide an opinion in the case.

18. The notice must include the following details with respect to each expert witness nominated—
 - a) the name of the expert witness;
 - b) their discipline or area of expertise;
 - c) a short statement of each specific issue or assertion the expert witness will address;
and
 - d) confirmation that the expert is able to take part fully, properly, and promptly in the Court process.

¹⁰ Land Court Rules 2000 r 241.

Review

19. Once the parties have nominated their expert witnesses, the case will be listed for review. After hearing from the parties, the Court will decide whether to direct the case to CMEE or set a timetable for the experts to meet and prepare their reports.
20. The Court will consider directing a case to CMEE if–
 - a) the parties nominate multiple experts;
 - b) the case involves complex issues on which expert evidence will be required;
 - 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 in the case of non-compliance with the *Land Court Rules 2000* or directions made about expert evidence.
21. The Court is unlikely to direct CMEE in a case that involves expert evidence on only one or two clearly defined issues.
22. If a case is directed to CMEE it is conducted by a CMEE Convenor who is a Member or Judicial Registrar of the Court. The CMEE Convenor meets with the parties during case management conferences to make arrangements for the experts to be properly briefed and to set a schedule of meetings. The CMEE Convenor will usually chair meetings of experts and facilitate the production of the joint expert reports. Practice Direction 3 of 2018 provides a detailed explanation of the CMEE process and the role and powers of the CMEE Convenor.

ONE EXPERT WITNESS ON AN ISSUE

One Expert Witness on an Issue

23. If only one party nominates an expert witness on an issue, the Court will direct a date by which the party must file the statement of evidence of the expert witness.
24. The filed statement of evidence must–
 - a) comply with the requirements of the rules;¹¹ and
 - b) will be the evidence in chief of the expert witness at the hearing, unless the Court orders otherwise.¹²
25. After the statement of evidence is filed, the Court may direct the expert witness to attend a preliminary conference or mediation with the parties, if the Court considers a *without prejudice* discussion of the expert witness’s opinion might–
 - a) promote resolution of the issue addressed by the expert; or
 - b) assist a party, particularly a self-represented party, to understand the expert’s opinion.

¹¹ Land Court Rules 2000 r 24F.

¹² Land Court Rules 2000 r 24H.

MORE THAN ONE EXPERT WITNESS ON ONE OR MORE ISSUES

More than One Expert Witness on One or More Issues

26. Where more than one party nominates an expert witness on one or more issues, the parties must prepare any expert witness they have engaged to participate in a meeting of experts and produce a joint expert report.
27. If a case is subject to CMEE, the meeting and reporting process is supervised by the CMEE Convenor in case management conferences with the parties and by chairing the meetings of experts. That process is described in detail in Practice Direction 3 of 2018.
28. Otherwise, the parties and expert witnesses manage the meeting and reporting process subject to—
 - a) Part 5 Division 2 of the Land Court Rules 2000; and
 - b) directions by the Court about the timing and sequence for meetings and reports.

BRIEFING THE EXPERT WITNESSES

29. The parties must give their expert witness—¹³
 - a) notice of any orders about a meeting of experts involving that witness;
 - b) notice of the issues in dispute relevant to that expert’s area of expertise;
 - c) enough information and opportunity to adequately investigate the facts in relation to the issues in dispute; and
 - d) written notice of the duty of an expert witness.
30. If the parties separately brief the expert witness they have engaged, they must disclose to the other parties the brief of instructions and any documents included or referred to in the brief that have not already been disclosed.
31. Alternatively the Court may direct that the parties provide a *consolidated brief of instructions* to all expert witnesses attending a meeting of experts that—
 - 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.
32. Including information or a document in a consolidated brief of instructions is without prejudice to the parties’ rights to object at the hearing to the admission into evidence of—
 - a) all or part of any information or document in the brief of instructions; and
 - b) any evidence relating to the disputed information or document.

¹³ Land Court Rules 2000 r 24.

MORE THAN ONE EXPERT WITNESS ON ONE OR MORE ISSUES

33. Whether parties are providing separate briefs to the experts or a consolidated brief, they should give careful consideration to the impact of any factual or legal disputes on the issues the expert witnesses are asked to address. Where an expert witness's opinion might differ depending on the resolution of a factual or legal issue, the parties should brief the expert to—
 - a) provide their opinion based on all potential resolutions of those issues, not just on those contended for by that party; and
 - b) consider whether a legal issue might be resolved by a preliminary determination by the Court.
34. If a case is directed to CMEE, the CMEE Convenor will discuss briefing the experts in a case management conference with the parties. The parties should raise with the CMEE Convenor any factual or legal disputes that may affect an expert witness's opinion on an issue, so that can be clarified and managed in the CMEE.

MEETING OF EXPERTS

Purpose of meetings of experts

35. The purpose of a meeting of experts is for the expert witnesses to discuss, clarify, and perhaps find areas of agreement about their evidence on an issue for the hearing and to prepare a joint expert report that—
 - a) addresses all the issues they are requested to give evidence about;
 - b) explains clearly their assumptions, methodologies, and conclusions and where they differ;
 - c) considers the consequences of those differences for their opinion; and
 - d) explains clearly the differences in their conclusions and the reasons for those differences.
36. Except for statements in their joint expert report, evidence of anything done or said, or an admission made, at a meeting of experts is not admissible unless all parties agree.¹⁴

How meetings of experts are conducted

37. If a case is subject to CMEE, the CMEE Convenor will usually chair the meeting of experts.
38. A meeting of experts starts when the expert witnesses first meet, whether in person or otherwise, and ends when they provide their signed joint expert report to the parties. A meeting of experts may occur over a number of sessions. It may be necessary for the

¹⁴ *Land Court Rules 2000* r 24B(2).

MORE THAN ONE EXPERT WITNESS ON ONE OR MORE ISSUES

expert witnesses to meet to agree on the investigations, testing, or analysis they will undertake before they can make progress in their discussions.

39. The Court encourages expert witnesses to meet in person to promote comprehensive discussions. However, it recognises that some or all of the meetings may have to be conducted using phone, email, or other electronic means of communication.
40. However the meeting is conducted, the Court expects expert witnesses to prepare properly and engage fully in discussions with the other expert witnesses attending the meeting. Otherwise, they cannot fulfil their duty to assist the Court.

How to approach discussions

41. The expert witnesses are required to discuss and attempt to reach agreement about their evidence in relation to an issue in dispute as it relates to their area of expertise.¹⁵ That does not mean they must negotiate their opinions in the way parties may negotiate their positions in a mediation. However, they must explore the factors that underlie their conclusions and squarely address any differences between them in how they have arrived at their conclusions.
42. The expert witnesses attending a meeting will decide their agenda. If a CMEE Convenor chairs the meeting, the CMEE Convenor will assist them to do so.
43. The following checklist may assist the expert witnesses during their discussions and in preparing their joint expert report—
 - a) Do you have the same information?
 - b) If not, does any new information affect your opinion?
 - c) Do you need any more information or instruction from the parties?
 - d) Do you need an opinion or instruction on a matter outside your area of expertise?
 - e) Are using the same methodology and in the same way?
 - f) If not, why not?
 - g) What scenarios are presented in your briefs of instructions or in preceding expert reports (if any)?
 - h) How should you address the possible outcomes from those scenarios?
 - i) What are your points of agreement?
 - j) For your disagreements, are they about:
 - i. the existence, relevance, or validity of an asserted or assumed fact;
 - ii. the methodology that should be applied to deal with the issue;

¹⁵ *Land Court Rules 2000* r 22.

MORE THAN ONE EXPERT WITNESS ON ONE OR MORE ISSUES

- iii. how that methodology should be applied;
 - iv. the conclusions that arise from applying the methodology to the facts or assumptions; or
 - v. something else?
- k) How will you draft and finalise the joint expert report and when?

Communications with the parties and other expert witnesses

44. The expert witnesses attending a meeting must prepare their joint expert report without further reference to, or instruction from, the parties.¹⁶ However, the expert witnesses may ask all parties to respond to an inquiry made jointly of all parties.¹⁷
45. The requirement for a joint request ensures all expert witnesses and all parties are aware of any communications between expert witnesses and the parties. That reinforces the independence of the expert witnesses.
46. Because of the importance of the joint expert report, the Court expects expert witnesses to co-operate about requests for information or instruction. It is not for one expert witness to decide what information or instruction another expert witness needs in order to fulfil their duty to the Court.
47. A joint request should be made even if only one expert needs further instructions. The Court expects expert witnesses attending a meeting to make a joint request to all parties for instruction or advice, if one or more of them—
- a) does not understand the issues as framed;
 - b) considers other issues arise for consideration within their area of expertise;
 - c) considers the material provided to them is insufficient;
 - d) considers advice from other experts is necessary;
 - e) wants to clarify an opinion provided by one or more expert witnesses in another area of expertise; or
 - f) anticipates or experiences any delay in the timetable of steps.
48. The request must be made in writing and the parties' response must be in writing. The parties need not respond jointly, but must provide their response to all other parties as well as to the expert witnesses.
49. If there is a dispute between the expert witnesses about whether the request is relevant or necessary, they can note that in the request. If the request raises a matter that requires

¹⁶ *Land Court Rules 2000* r 24A(1). When the Rules are revised this restriction on communications will be clarified to allow progress reports about the meeting and reporting process.

¹⁷ *Land Court Rules 2000* r 24A(2).

MORE THAN ONE EXPERT WITNESS ON ONE OR MORE ISSUES

direction or a ruling from the Court, a party may request the Court to list the case for review.

50. If a case is subject to CMEE, the CMEE Convenor will manage communications between the expert witnesses and the parties, and between the expert witnesses and any other expert witnesses engaged to give evidence in the case. If necessary, the CMEE Convenor can list the case for review if the parties require direction or a ruling from the Court.

JOINT EXPERT REPORT

51. The joint expert report is the primary report of the expert witnesses who authorises the report. The joint expert report is filed¹⁸ and forms part of the expert witness's statement of evidence for the hearing.¹⁹
52. The Court expects a joint expert report to include, for each expert witness who is an author, the information specified in r 24F(2) and to confirm the matters specified in r 24F(3) of the *Land Court Rules 2000*.
53. The joint expert report must also—
- a) state the joint opinion of the expert witnesses in relation to the issues they have been instructed to give evidence about; and
 - b) identify the matters about which they agree or disagree and the reasons for any disagreement.
54. In giving reasons for any disagreement, expert witnesses must consider whether they have fully explained their reasons. They cannot raise a new matter in a further statement of evidence²⁰ or in their evidence in chief,²¹ without leave of the Court.
55. The Court expects expert witnesses to assist the Court to resolve the disagreement, by identifying the nature of the disagreement and its consequences for their opinion.
56. Expert witnesses should identify whether their disagreement is about one or more of the following, or something else—
- a) the existence, relevance, or validity of an asserted or assumed fact;
 - b) the methodology that should be applied to deal with the issue;
 - c) how that methodology should be applied;
 - d) the conclusions that arise from applying the methodology to the facts or assumptions.

¹⁸ *Land Court Rules 2000* r 24A(5).

¹⁹ *Land Court Rules 2000* r 24E(2)(a).

²⁰ *Land Court Rules 2000* r 24E(3)(b).

²¹ *Land Court Rules 2000* r 24H.

MORE THAN ONE EXPERT WITNESS ON ONE OR MORE ISSUES

57. Each expert witness should explain how their conclusions would differ if the Court resolved the disagreement against their view on any of those matters.
58. If a case is directed to CMEE, the CMEE Convenor will facilitate the production of the joint expert report.

FURTHER STATEMENT OF EVIDENCE

59. A further statement of evidence must not, without leave of the Court—²²
 - a) contradict, depart from, or qualify an opinion in relation to an issue the subject of agreement in the joint expert report; or
 - b) raise a new matter not already mentioned in the joint expert report.
60. A further statement of evidence is not an opportunity to give proper consideration to a disagreement which has been inadequately explained in a joint expert report. A meeting of experts may be adjourned for a further session so further information can be obtained, instructions clarified, or more detailed consideration given to a matter on which the experts disagree. Expert witnesses should request more time if they need it to prepare a joint expert report that will clearly explain the reasons for their disagreement and the consequences of those disagreements for their opinion.
61. The Court expects expert witnesses to observe the restrictions on further statements. The Court will pay close attention to whether a further statement contradicts, departs from, or qualifies an opinion in relation to an issue the subject of agreement, or raises a new matter not already mentioned in the joint expert report.
62. If a further statement of evidence suggests the experts did not properly explore the issues during the meeting of experts or in their joint expert report, the Court may direct the experts to meet again and provide another joint expert report.

²² *Land Court Rules 2000* r 24E(3).

Oral Evidence

63. Evidence from expert witnesses on an issue may be taken sequentially or concurrently. If the evidence is taken sequentially, the experts giving evidence on the issue will give their evidence one after the other. If the evidence is given concurrently, all expert witnesses to give evidence on the issue will give evidence together in a single session. The procedure for concurrent evidence is explained in Practice Direction 2 of 2017.
64. The Member allocated to hear the case will decide when and how oral evidence is taken from the expert witnesses. This will usually be decided at or shortly after the *hearing review*. However, the parties may request a decision from the hearing Member before then.

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.

Area of expertise: The professional discipline or topic or issue in which the expert witness holds specialist knowledge and experience.

Compensation statement: A statement detailing the amount of compensation the party considers the Court should determine having regard to—

- a) in the case of a mining claim – the criteria in s 85(7) and (8) of the *Mineral Resources Act 1989*; or
- b) in the case of a mining lease – the criteria in s 281(3) and (4) of the *Mineral Resources Act 1989* (see Practice Direction 1 of 2017).

Consolidated brief of instructions: 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.

Court Managed Expert Evidence (CMEE): A CMEE is a method where the Court supervises the briefing and meeting of experts and production of their Joint Report.

Court-ordered event: A hearing or a pre-hearing process ordered by the Court, including a directions hearing or review, mediation, preliminary conference and CMEE conference.

Environmental authority: An environmental authority issued under s 195 of the *Environmental Protection Act 1994* that approves an environmentally relevant activity applied for in an application.

Expert Witness: An expert engaged by a party to give evidence of their opinion on an issue arising in a case heard in the Land Court.

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

Hearing review: Directions for hearings arrangements may be made by the President or Member managing the case list. At the hearing review parties or their legal representative inform the Court of the stage they are at in preparation for the hearing. This ensures that all

WORDS AND MEANINGS

parties are ready for the hearing and have provided the President or Member with the information necessary to proceed to the hearing.

Instructing parties: An instructing party is a person or persons who retains or briefs a legal practitioner to provide legal service and advice for them.

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.

Mining objection hearing: A MOH is a hearing of an application for a mining claim, a mining lease, or an environmental authority relating to a mining lease and any objection to that application.

Particulars: The details of the claim in an action before the Court which are necessary in order for the other party to know what case they must meet.

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

Preliminary conference: A preliminary conference is a form of ADR in which the Judicial Registrar or a Member convenes an informal meeting between the parties to identify the issues in dispute, discuss those issues and try to find a mutually acceptable outcome, without a court hearing.

Statements of facts, matters and contentions: An explanation of the particular circumstances of the case together with what you say the issues are and how you say those issues should be resolved.

Statement of evidence: A written statement of the expert witnesses evidence for the hearing of a case.

Without prejudice: Communications (verbal or written) made in the course of genuine attempts to negotiate or mediate. If negotiations fail, the communication cannot be used in Court without the consent of both parties.