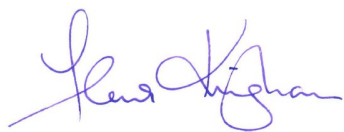


# Expert evidence in the Land Court

## Practice Direction 6 of 2020



*President Fleur Kingham*  
*Amended 6 April 2022*

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## Introduction

1. This Practice Direction—
  - a) provides an overview of the procedures for expert evidence in the Land Court
  - b) explains the duties of experts and the parties who instruct them
  - c) outlines the Court’s expectations of experts giving evidence in the Land Court
  - d) repeals and replaces Practice Directions 2 of 2017 and 3 of 2018 and the Guidelines for Expert Evidence in the Land Court.
2. An expert is a person who would, if called as a witness in a proceeding, be qualified to give opinion evidence as an expert witness in relation to the issue.<sup>1</sup>
3. An expert assists the Court on matters of a technical and specialist nature by providing their objective and impartial opinion, drawing on their knowledge and experience. The Court expects experts to be independent, impartial, well informed, to observe the limits of their expertise, and to comply with the requirements of the Land Court Rules.<sup>2</sup>
4. A person who is:
  - a) a party to the case; or
  - b) a person whose conduct is in issue in the case;is not an expert even if they possess the relevant expertise.
5. Notwithstanding paragraph 4, if a public entity is a party to the case, it may nominate a qualified person in its employ to be an expert, provided the nominee confirms they understand and will comply with their duty to the Court.

### *Example-*

*The Valuer-General may nominate a valuer in the State Valuation Service as their expert in a land valuation appeal.*

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<sup>1</sup> Land Court Rules 2022 r 16.

<sup>2</sup> Ibid r 20(3).

# OVERVIEW OF PROCEDURES FOR EXPERT EVIDENCE

## Overview of Procedures for Expert Evidence

6. The Court's objective is to make timely, efficient, fair, and effective use of expert evidence. It will make directions on a case-by-case basis, taking into account the resources and preferences of the parties, and the nature, scope, and complexity of the issues in the case.
7. The procedures for expert evidence involve the following steps—
  - a) The parties identify the issues for the hearing;
  - b) The parties nominate their experts;
  - c) The Court decides what procedure will apply, in consultation with the parties;
  - d) The parties brief the experts;
  - e) If only one party nominates an expert on an issue, the expert will produce a report;
  - f) If more than one party engages an expert on one or more issues, those experts will attend a meeting of experts and produce a joint report.<sup>3</sup>
8. If a party contends an expert nominated by another party is not qualified to give expert opinion evidence, they must notify all parties and the Court, as soon as practicable, so that the question can be dealt with as a preliminary matter.
9. The Court's directions for expert evidence may include directions that<sup>4</sup> -
  - a) fix the number of experts who may be called to give evidence on a particular issue or for a particular area of expertise;
  - b) limit the issues on which expert evidence may be led;
  - c) limit the number of reports an expert may file;
  - d) settle the issues or questions the experts must address;
  - e) schedule meetings of experts;
  - f) set dates for filing and service of experts' reports;
  - g) direct the case to Court Managed Expert Evidence (CMEE);

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<sup>3</sup> Ibid Part 3 Division 5 Subdivision 3.

<sup>4</sup> *Land Court Rules 2000* r 19; *Land Court Act 2000* s 22; [Land Court Model Directions](#).

## OVERVIEW OF PROCEDURES FOR EXPERT EVIDENCE

h) fix how and when experts will give oral evidence.

## The Duty of an Expert

10. The primary duty of an expert is to assist the Court. This duty overrides any obligation an expert may have to any party, any person who engaged the expert to give evidence, or any person paying their fee or expenses.<sup>5</sup> An expert must not accept (and a person must not give) instructions to give any particular evidence or opinion about the evidence.<sup>6</sup>
11. Experts must also–
- a) understand and comply with 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 *Land Court Rules 2022* (‘Rules’) and this Practice Direction;
  - 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 opinion and their evidence to the issues relevant to their area of expertise;
  - h) expose the facts, assumptions, methodology, and reasoning that supports their opinion;
  - i) fully engage in a meeting of experts, if required;
  - j) ensure their contribution to a joint report, if required, complies with this Practice Direction; and
  - k) be prepared to change, qualify, or revise their opinion where necessary and where the evidence no longer supports their opinion;
  - l) if they change an opinion expressed in a report filed with the Court, explain what factors or information resulted in that change of opinion.

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<sup>5</sup> *Land Court Rules 2022* r 20. The Land Court expects an expert 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.” (*Alliance Insurance Limited v Mashaghati* [2017] QCA 127 [90]).

<sup>6</sup> *Land Court Rules 2022* r 21(2).

## Nominating the Expert

12. 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.
13. Once the issues are identified, the parties must file and serve on any other party a written notice of the experts they intend to engage for the hearing.
14. Unless granted leave by the Court, a party cannot engage more than one expert for each area of expertise.
15. The notice must include, for each expert nominated—
  - a) the name of the expert;
  - b) the contact details of the expert;
  - c) their discipline or area of expertise;
  - d) a short statement of each specific issue or assertion the expert will address; and
  - e) confirmation the expert can take part fully, properly, and promptly in the Court process.
16. Parties should consider asking an expert they intend to nominate to identify whether they require evidence from an expert with another area of expertise in order to express 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.*

## Single Expert

17. If only one party nominates an expert in an area of expertise, that party must brief the expert. The brief must contain<sup>7</sup> –
- a) copies of any orders that involve that expert;
  - b) notice of the issues in dispute relevant to that expert’s area of expertise;
  - c) enough information and opportunity to investigate the facts in relation to the issues in dispute; and
  - d) this Practice Direction.
18. The filed report from that expert–
- a) must comply with the requirements of the Rules; and
  - b) will be the evidence in chief of the expert at the hearing unless the Court orders otherwise.<sup>8</sup>

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<sup>7</sup> Ibid r 21(1)(b).

<sup>8</sup> Ibid r 29.



## MORE THAN ONE EXPERT IN AN AREA OF EXPERTISE

### More than one expert in an area of expertise

19. If more than one party nominates an expert in an area of expertise, unless otherwise ordered, the parties must provide a consolidated brief of instructions to all those experts that—<sup>9</sup>
  - a) contains the material in paragraph 17;
  - b) identifies any issues that any party considers the experts need to address; and
  - c) includes any information or documents that any party considers relevant to those issues.
20. 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 consolidated brief of instructions; and
  - b) any evidence relating to the disputed information or document.
21. Where an expert's opinion might differ depending on the resolution of a factual or legal issue, the parties must brief the experts 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 preliminary determination of a factual or legal issue by the Court might result in greater clarity and efficiency in preparing their evidence.

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<sup>9</sup> Ibid r 23.

## Meetings of Experts

### PURPOSE OF MEETINGS OF EXPERTS

22. At a meeting of experts, they must:
- a) discuss and clarify the issues;
  - b) identify any areas of agreement about their evidence;
  - c) discuss and seek to resolve any areas of disagreement; and
  - d) prepare a joint report.

### HOW MEETINGS OF EXPERTS ARE CONDUCTED

23. The parties and experts must manage the meeting process in accordance with this Practice Direction and the directions for the case. A meeting of experts starts when the experts first meet, whether in person or otherwise, and ends when they provide their signed joint report to the parties. A meeting of experts may occur over several sessions.
24. The experts 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.<sup>10</sup> They must explore the factors that underlie their conclusions and squarely address any differences between them.
25. The experts must consider the following during their discussions and in preparing their joint report–
- a) Do they have the same information?
  - b) If not, does any new information affect their opinion?
  - c) Do they need any more information or instruction from the parties?
  - d) Do they need an opinion or instruction on a matter outside their area of expertise?
  - e) Are they using the same methodology and in the same way?
  - f) If not, why not?

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<sup>10</sup> Ibid r 22.

## MEETINGS OF EXPERTS

- g) What scenarios are presented in the brief of instructions or in preceding expert reports (if any)?
  - h) How should they address the possible outcomes from those scenarios?
  - i) What are the points of agreement?
  - j) For any disagreements:
    - i. Do they affect the decision that the Court has to make?
    - ii. Are they about:
      - a. the existence, relevance, or validity of an asserted or assumed fact;
      - b. what methodology that should be used 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; or
      - e. something else?
  - k) How will they draft and finalise the joint report and by when?
26. The experts must refrain from conducting independent inquiries unless they have:
- a) advised the parties of their intention to do so together with an estimate of the cost and time required to undertake those inquiries;
  - b) shared the results of their inquiries with all other experts within the same area of expertise before the conclusion of the meeting of experts.

### COMMUNICATIONS WITH THE PARTIES AND OTHER EXPERTS

27. Once the experts have commenced their meeting of experts, any communication from them to the parties must be in accordance with rule 26 of the Rules.
28. If the request raises a matter that requires direction or a ruling from the Court, an expert or a party may ask the Court to list the case for review.

# THE JOINT REPORT

## The Joint Report

29. When parties have nominated more than one expert in an area of expertise, the experts must produce a joint report.
30. The applicant/appellant must file and serve the joint report as soon as practicable or as directed by the court.<sup>11</sup>
31. The joint report is the primary report of the experts who author it.
32. Unless the Court gives leave to file a further expert report, the joint report is the experts' statement of evidence for the hearing.<sup>12</sup>
33. The joint report must, for each expert who is an author, comply with the Rules.
34. The joint report must also—
  - a) Include an executive summary that states, for each issue on which they have been asked to give an opinion:
    - a. the matters on which they agree;
    - b. the matters on which they disagree but which are not material to their conclusions;
    - c. the matters of disagreement which are material to their conclusions, and short reasons for their disagreement.
  - b) For each matter of disagreement that is material to their conclusions, state how their conclusions would differ if the Court resolved the disagreement against their view on the matter.
35. In drafting their report, the experts must consider whether they have fully explained their opinions and the reasons for those opinions. They cannot raise a new matter in a further report or in their evidence in chief, without leave of the Court. Experts also cannot give

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<sup>11</sup> Ibid r 24.

<sup>12</sup> Ibid r 29.

## THE JOINT REPORT

expert evidence that is contrary to the opinion expressed in their reports unless the court gives leave.<sup>13</sup>

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<sup>13</sup> Ibid r 29(5).

# COURT MANAGED EXPERT EVIDENCE (CMEE)

## Court Managed Expert Evidence (CMEE)

### THE DECISION TO DIRECT A MATTER TO CMEE

36. CMEE allows the Court to supervise the briefing and meeting of experts and production of their joint report.<sup>14</sup>
37. 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 experts and prepare them to fulfill their role; and
  - b) the duty of experts to provide the Court with relevant and impartial evidence within their area of expertise.
38. Unless otherwise ordered, CMEE will commence with a case management conference and conclude when the Court directs.
39. The Court will consider whether to direct a case to CMEE on a case-by-case basis.
40. 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) The case has a history of non-compliance with the *Rules* or with directions made by the Court.

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<sup>14</sup> Ibid r 27.

# COURT MANAGED EXPERT EVIDENCE (CMEE)

## THE CMEE CONVENOR

41. The CMEE Convenor must be a Member or Judicial Registrar of the Court.
42. The role of the CMEE Convenor is procedural. Their role is to<sup>15</sup>
  - a) to work with the parties to manage the process for experts to meet and provide a joint report for the Court;
  - b) to work with the experts to ensure their joint report assists the Court to resolve an issue in dispute as it relates to their area of expertise; and
  - c) to assist the parties in case management.
43. The CMEE Convenor must perform their role in consultation with the parties and must ensure any disputes that arise during CMEE are resolved–
  - a) by agreement between the parties and or experts; or
  - b) by direction of the Court.
44. The CMEE Convenor cannot decide any substantive issue or procedural dispute in the case and cannot preside at an oral hearing, final hearing, or appeal from a decision made in the case.<sup>16</sup>
45. 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

46. 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 procedural directions, with the consent of all parties including directions as to the management of the case.
  - c) discuss whether there are issues that require further direction from the Court;

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid r 27(2).

## COURT MANAGED EXPERT EVIDENCE (CMEE)

- d) convene and chair a meeting of experts;
- e) list the case for review.

47. The CMEE Convenor may convene one or more case management conferences or meetings of experts, at the request of one or more of the parties and the experts, or on their own initiative.

### REPORTS BY THE CMEE CONVENOR

48. The CMEE Convenor must give a written report to the Court, if–

- a) the CMEE may not conclude in time for the hearing to proceed on the dates listed or reserved in the Court calendar;
- b) consent directions alter any previous order made by the Court;
- c) the parties cannot agree on how an issue affecting the expert evidence should be resolved or managed;
- d) the parties request the CMEE Convenor to do so;
- e) the Court requests a report;
- f) the CMEE Convenor considers it appropriate.

49. Before reporting to the Court, the CMEE Convenor must–

- a) provide the parties with a draft report; and
- b) give the parties an opportunity to comment on the report before it is finalised.

### CMEE REPORTS

50. As soon as practicable after they are made, the CMEE Convenor must place a CMEE report on the Court file.



# COURT MANAGED EXPERT EVIDENCE (CMEE)

## CASE MANAGEMENT CONFERENCES

51. Usually, the CMEE will commence with a case management conference.
52. The CMEE Convenor must not meet with a party in the absence of any other party, unless all parties agree.
53. During a case management conference, the CMEE Convenor may assist the parties to do all or any of the following—
  - a) identify and clarify the issues in dispute;
  - b) decide which issues will require expert evidence;
  - c) identify which experts should produce joint reports and on which issues;
  - d) determine the sequence in which meetings of experts should take place;
  - e) establish, manage, and adjust the timetable for briefing experts, meetings of experts, and joint reports;
  - f) ensure the experts have the information they need to fulfil their function;
  - g) prepare a consolidated brief to the experts, including fixing the issues or questions they will be asked to address;
  - h) make arrangements for providing secretarial and administrative assistance for the experts;
  - i) communicate with experts after they have commenced their meeting of experts;
  - j) as joint reports are filed, consider whether those reports have consequences for the management of evidence by other experts;
  - k) agree upon directions for case management.

## RESTRICTION ON DISCLOSURE ABOUT CASE MANAGEMENT CONFERENCES

54. 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 required by law.

## COURT MANAGED EXPERT EVIDENCE (CMEE)

55. 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<sup>17</sup>
- 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 relate to, or to have happened during, the conference.

### THE CMEE CONVENOR CHAIRS THE MEETING OF EXPERTS

56. 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.
57. The role of the CMEE convenor in chairing a meeting of experts is to facilitate the experts to—
- a) 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
  - b) prepare a joint report.
58. The CMEE Convenor will ensure that the experts understand –
- a) the expert’s duty to the Court;
  - b) the CMEE process;
  - c) the Court’s expectations of an expert in their oral and written evidence; and
  - d) the Court’s procedures for taking oral evidence from experts.
59. In consultation with the experts, and subject to any directions by the Court, 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.

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<sup>17</sup> Ibid r 25.

## COURT MANAGED EXPERT EVIDENCE (CMEE)

60. 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.

61. The CMEE Convenor must not–

- a) give an expert witness legal advice on any matter; or
- b) attempt to influence an expert witness to adopt or reject a particular opinion;
- c) meet with any expert attending a meeting of experts unless all the experts attending that meeting participate.

### COMMUNICATIONS BETWEEN EXPERT WITNESSES AND THE PARTIES OR OTHER EXPERT WITNESSES

62. The CMEE Convenor will manage the communications between the experts participating in a meeting of experts and the parties, and other experts engaged by the parties, to<sup>18</sup>

- a) seek further information;
- b) clarify instructions;
- c) understand the evidence of other experts engaged by the parties.

63. The CMEE Convenor must keep the parties informed of the current schedule of meetings of experts and any changes to it.

### JOINT REPORT

64. The CMEE Convenor may assist the experts 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;

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<sup>18</sup> Ibid rr 26 and 27.

## COURT MANAGED EXPERT EVIDENCE (CMEE)

- c) check they have addressed all scenarios arising from the issues and from the evidence of other experts, 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 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 they may need to clarify so the Member who will conduct the hearing can understand it.

### RESTRICTION ON DISCLOSURES ABOUT MEETINGS OF EXPERTS

65. 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.
66. 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—<sup>19</sup>
- 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 to, or to have happened during, the meeting.

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<sup>19</sup> Ibid r 25.

# CONCURRENT EVIDENCE

## Concurrent Evidence

67. Unless otherwise ordered, experts will give their evidence concurrently.
68. Evidence is given concurrently when two or more experts in the same or closely related areas of expertise give evidence at the same time.
69. The Court may direct experts to give their evidence consecutively.
70. Evidence is given consecutively when each expert in the same or closely related areas of expertise gives their evidence individually, in turn.

### SETTING THE AGENDA FOR A CONCURRENT EVIDENCE SESSION

71. The parties must jointly propose a draft agenda for concurrent evidence by the date directed by the hearing Member.
72. The agenda must –
- a) identify the areas of disagreement between the experts upon which a party wishes to ask questions; and
  - b) identify the parts of the joint report that relate to each agenda item.
73. The Member will settle the agenda and may direct that specified topics are dealt with before or after the concurrent evidence session.

### OVERVIEW OF PROCEDURE FOR A CONCURRENT EVIDENCE SESSION

74. The experts are sworn or affirmed at the same time.
75. Usually, concurrent evidence will occur with all experts present in person and seated together. However, a Member may approve an expert participating by telephone or video link.
76. The Member will use the agenda to facilitate a discussion in which-
- a) the experts, the parties and their representatives, and the Member will all participate;

## CONCURRENT EVIDENCE

- b) all experts have an adequate opportunity to express their opinion on each topic and to comment on another expert's opinion;
- c) parties can ask relevant questions of any expert in relation to each topic;
- d) any consensus between the experts is clarified and noted.

77. The experts may comment on what another expert says or ask questions of each other.

78. The parties may ask questions of all experts to ensure all relevant information and opinions are clarified and tested.

79. A Member may adjourn or terminate a concurrent evidence session if they consider it is in the interests of justice to do so.