Urban Development Institute of Australia

Expert Witness Forum

Land and Environment Court Expert Witness Practice Direction

Friday 8 August 2003

Presentation by The Honourable Justice R N Talbot

Attachments

Practice Direction No. 16 – Expert Witness Practice Direction 12 August 1999

Practice Direction No. 20 – Consolidated Expert Witness Practice Direction 23 September 2002

Expert Witness Standard Directions January 2003

Expert Witness Standard Directions 1 July 2003

Supreme Court Rules Part 39

Contents

Introduction

To say that experts are vital to the conduct of litigation in the Land and Environment Court is to state the obvious position. It is difficult to identify any other jurisdiction, specialist or otherwise, that relies as extensively on the information, analysis and opinions that experts can provide. There is no surprise therefore that the Court has taken a significant interest and leading role in the development of acceptable practices designed to properly utilise and develop the role of the expert witness.

The relationship between expert witnesses and their principals is a matter that has preyed upon judicial minds for a considerable period. Two quotes that I have used before demonstrate this:-

> *"I am sorry to say the result is that the Court does not get assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect."*
>
> (Jessell M R
> *Thorn v Worthing Skating Rink Company*
> 1877 (6 ChD 412 at 415))

> *"…skilled witnesses come with such a bias on their minds to support the case in which they are embarked that hardly any weight should be given to their evidence."*
>
> (Lord Campbell
> *Tracy Peerage*
> (1843) 10 Cl & F 191)

Given the different context of litigation in the United States where the combination of contingency fees and the absence of compensatory cost rules generates a different culture to Australia, the following comments by S G Gross appearing in the Wisconsin Law Review 1113 at 1135 might be read by us with scepticism although not entirely without instruction as to how the problem might develop if left to run on without some measure of control:-

> *One of the most unfortunate consequences of our system of obtaining expert witnesses is that it breeds contempt all around. The contempt of lawyers and judges for experts is famous. They regularly describe expert witnesses as prostitutes, people who live by selling services that should not be for sale. They speak of maintaining 'stables' of experts, beasts to be chosen and harnessed at the will of their masters. No other category of witnesses, not even parties, is subject to such vilification.*

As part of an empirical study conducted by the Australian Institute of Judicial Administration a survey amongst Australian judges in relation to expert evidence showed that over one third ranked expert bias as the most serious problem. The next most serious problems were:-

(1) the failure to prove the basis of expert opinion;

(2) the failure by advocates to pose questions adequately; and

(3) the failure by advocates to cross-examine effectively.

It is against this background that the expert witness practice directions evolved. This important development is an attempt to make expert witnesses aware of their responsibilities and obligations to the Court during the course of preparation for, and during, the trial and at the same time provide a process whereby issues in dispute can be crystallised or even resolved.

Admissibility of Expert Evidence

Although the Expert Witness Practice Direction is not directed specifically to the admissibility of expert opinion it is nevertheless apposite to make some brief observations in regard to the line of authority that has developed from the case law in this respect as follows:-

(1) The starting point for defining established principle can be found in the judgment of Dixon CJ in *Clark v Ryan* (1960) 103 CLR 486 at 491:-

> *The rules of evidence relating to the admissibility of expert testimony as it affects the case cannot be put better than it was by* J. W. Smith *in the notes to* Carter v. Boehm, *1 Smith L.C., 7th ed. (1876) p. 577. "On the one hand" that author wrote, "it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it." Then after the citation of authority the author proceeds: "While on the other hand, it does not seem to be contended that the opinions of witnesses can be received when the inquiry is into a subject-matter the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it." Adopted by* Harding *A.C.J. in Reg. V. Camm.*

(2) Section 79 of the Evidence Act 1995 now provides:-

> *If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.*

(3) Gleeson CJ made the following comments about the form of expert evidence in *HG v The Queen* (1999) 197 CLR 414 at 427:-

> *An expert whose opinion is sought to be tendered should differentiate between the assumed facts upon which the opinion is based, and the opinion in question … the provisions of s 79 will often have the practical effect of emphasising the need for attention to requirements of form. By directing attention to whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience, the section requires that the opinion is presented in a form which makes it possible to answer that question.*

Continuing at p 429 the Chief Justice remarked *Clark v Ryan* illustrates that the opinion of the expert has to be related to his expertise. He expressed doubt that, where there are a number of competing possibilities, it is within the field of expertise to form and express an opinion as to which alternative is to be preferred. That, he said, really amounts to putting from the witness box the inferences and hypotheses on which the party wishes to rely. Although the Chief Justice was in the minority in *HG* it is nevertheless clearly important that opinions of expert witnesses be confined, in accordance with s 79, to opinions which are wholly or substantially based on their specialised knowledge.

(4) If an expert does no more than state what is otherwise obvious from a perusal of documents or a record of facts, the evidence is generally not receivable unless some analysis arises that may prove to be a difficult task for the judge (*Quick v Stoland Pty Ltd* (1998) 87 FCR 371; *Tomark Pty Ltd and Ors v Bellevue Crescent Pty Ltd and Ors* [1999] NSWCA 347, unreported).

(5) Whether expert evidence in the form of argument is admissible was left open by Priestly JA in *Barbosa v Di Meglio* [1999] NSWCA 307, unreported at [33]:-

> *…if the argument (reasoning process) is sound and supports the opinion and the opinion is one in an area within which the person expressing it is acknowledged as an expert, then the argumentative (or reasoning) aspect of the formation of the opinion cannot of itself be a reason for excluding the argument or belittling the opinion. (It will of course be a different matter if the argument is unsound.) Nor, if the way in which the expert opinion is expressed does not conform to the judge's ideas of proper form, should that by itself be a reason for not considering whether or not it has substance.*

In *Handy v Your Tabs Pty Limited* [2000] NSWCA 150, unreported Heydon JA (as he then was) rejected evidence from an expert on the basis that it was not really expert opinion but advocacy.

(6) In *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 Heydon JA (as he then was) offered the following statement of the law at p 743 -4:-

> *In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialised knowledge"; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"; so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the*

> *opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in HG v R (1999) 197 CLR 414, on "a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise" (at [41]).*

Although agreeing with the orders proposed by Heydon JA, the other members of the Court reached the same conclusion by a different reasoning.

In *Sydneywide Distributors Pty Ltd and Another v Red Bull Australia Pty Ltd and Another* (2002) 55 IPR 354 the Full Court of the Federal Court doubted that all of the tests for admissibility posed by Heydon JA in *Makita* should be applied strictly but rather in the course of determining the weight to be given to the evidence. Although *Makita* is routinely referred to as a summary of the applicable principles (see for example Odgers S, *Uniform Evidence Law*, 5th ed, Lawbook Co, 2002, 1.3.4320), the decision of the Federal Court in *Red Bull* raised a doubt about the strict application of those principles by opining that it may be more appropriate to use some of the principles enunciated by Heydon JA for the purpose of determining the weight to be given to the evidence.

(7) Care should be taken not to strictly apply the above principles in class 1 and class 2 proceedings of the Court's jurisdiction, except as a guideline, as the rules of evidence do not apply in those cases. Nevertheless, it must be said that if the rigour required in class 4 and class 5 proceedings was applied in classes 1 and 2 the benefit could well be manifest in greater clarity and cost saving.

Evolution of the Expert Witness Practice Direction

The expert witness practice direction process is designed to facilitate the giving of evidence in a meaningful way not for just the benefit of the Court but also with the prospect that lawyers may be more circumspect in the use of client's money by refraining from obtaining reports which have virtually no evidentiary value.

The original Practice Direction No. 16 made in August 1999 was, what is now appropriately regarded as, the short version. The significant provisions, at least for present purposes, were:-

> *2. An expert witness's paramount duty is to assist the court impartially. That duty overrides the expert witness's obligation to the engaging party. An expert witness is not an advocate for a party.*
>
> *3. A report made on or after 1 September 1999 by an expert witness should (in the body of the report or in an annexure):*
>
> *(a) include the person's qualifications and experience as an expert;*
> *(b) specify the assumptions on which the opinions in the report are based (a letter of instructions may be annexed);*
> *(c) specify any examinations, tests or other investigations on which he or she has relied; and*
> *(d) specify any literature or other materials utilised in support of the opinions.*
>
> …
>
> *5. The court may direct the parties and their expert witnesses to:*
>
> *(a) confer on a "without prejudice" basis;*
> *(b) endeavour to agree; and*
> *(c) make a joint statement in writing to the Court specifying matters agreed and matters not agreed together with the reasons for any such disagreement.*
>
> *6. It is expected that an expert witness will exercise his or her independent, professional judgment in relation to such a conference and joint statement, and that an expert witness will not be instructed or requested to withhold or avoid agreement.*

Notwithstanding its sporadic use, from the Court's perspective the first Practice Direction appeared to work satisfactorily in the initial stages. However, before the system had a reasonable opportunity to adapt to the new regime the decision was made to follow other jurisdictions and expand the direction. Practice Direction No. 20 in the form of the Consolidated Expert Witness Practice Direction commenced on 1 October 2002.

The then Registrar of the Court responded to the consolidated version by publishing and making Expert Witness Standard Directions in January 2003.

From the point of view of practice in the Land and Environment Court, that is when unexpected trouble started. Difficulties were created by cl 6 of the consolidated practice direction and the standard directions that followed. Clause 6 provides as follows:-

> *6. Unless otherwise directed by the Court where a direction is given pursuant to paragraph 5(1), the parties shall agree on the following matters:*
>
> *(a) the experts to attend.*
>
> *(b) the questions to be answered.*
>
> *(c) The materials to be placed before the experts.*

Both cl 6 and the standard directions made provision for settling a list of questions to be answered by the experts in conference. It soon became apparent that a consensual approach to the settlement of agreed questions was often a task beyond the wit and even interest of some legal practitioners. On some occasions the questions were more like a set of interrogatories. In one example, in respect of what was a straightforward development application, the applicant drafted 54 separate questions over 5 issues. It is my opinion that none of the questions, even if capable of a direct answer, could have produced any meaningful result. Maybe that was the idea.

The Court became concerned that the failure to resolve the questions issue, if allowed to continue unchecked, will cause such disruption with consequent delay and additional cost that the viability of the whole process may be lost. Rather than re-address the terms of the Practice Direction itself it was decided that the problem could be overcome by formulating new standard directions. This has been done as from July 2003 in a way that effectively amounts to a direction that is in conflict with cl 6 of the Practice Direction and hence the parties are thereby directed *"otherwise"* in the context of that clause. Accordingly, once the standard directions are made an application must now be made for a special direction if it is considered that the parties are entitled to formulate specific questions in the circumstances of the particular case.

The Results

Significant achievement is evident in class 3 matters. This particularly applies to valuation evidence. Given the alternative circumstances that might prevail following a resolution of critical issues, such as the underlying zoning at the date of resumption or the feasibility of theoretical development that could have occurred but for a resumption, in a large number of cases the valuers have, so far, proved that they are capable of reaching agreement on the alternative bases within an acceptable range, often leading to settlement.

The engineering disciplines, particularly hydraulic engineers, are proving to be particularly suitable for resolving disputes in conference freed of the constraint imposed by lawyers and the client.

In one case recently the engineers achieved the following in joint session:-

(1) Co-option of an additional adviser;
(2) Site Inspection;
(3) Preparation of a specification to carry out work;
(4) Preparation of a schedule of work;
(5) Work areas;
(6) A statement there were no actions not agreed; and

(7) A suggestion of matters which could usefully be submitted to other experts for further opinion.

Landscapers and arborists are another case in point and often prove to be capable of reaching agreement.

A town planning merits appeal in respect of a very large residential flat development was determined solely on the basis of agreed statements by all experts after the Court directed meetings between the representatives of the various disciplines, including, believe it or not, town planners.

Where the opportunity to case manage arises repeated and progressive application of the Expert Witness Practice Direction by directing experts to re-confer is consistently resulting in a narrowing of issues with consequential savings in Court time and litigation costs.

The need for lengthy, arduous, ill-informed and often useless cross-examination is reduced. This is again a benefit in terms of costs but it also reduces stress on the witness and parties.

Very often after listening to complex examination, cross-examination and re-examination ranging over all aspects of an expert's evidence the Court is left confused and bewildered and uninformed. Whereas if the need for oral evidence is confined to the true issues in dispute the Court is in a far better position to comprehend the argument and even become usefully involved while the witness is still present. This is particularly so when the Court has the benefit of an explanation of the matters agreed upon and written reasons for any non-agreement beforehand.

Very often in town planning merit appeals the process results in the Court being left only with subjective qualitative differences of opinion on which it has to rule. Arguably, these issues are generally the most difficult to resolve by any process other than adjudication. To this end the Court, where practicable, tries to deal with the

resolution of major subjective issues by appointing more than one person to hear the matter.

Given the goodwill of the experts and the co-operation of the parties and their representation the regime offers significant benefits, particularly by saving valuable time of the witnesses, the parties and the Court with an obvious consequential benefit sounding in reduced costs.

Failure could lead the Court to take matters a step further and pay greater attention to Pt 39 of the Supreme Court Rules 1970. The Rules speak for themselves and are attached to this paper for your information. Part 39 is incorporated in the Land and Environment Court Rules by Pt 6 r 1. Recourse to it has not occurred in my experience. However, with greater attention being paid to the role of the expert witness it may come into prominence.

RN Talbot
August 2003

ATTACHMENTS

The Land & Environment Court
of New South Wales

Practice Directions Number 16

Expert Witness Practice Directions 1999

Practice Note for Date: 01/09/99

This Practice Direction commences on 1 September 1999

1. The purpose of this Practice Direction is to provide guidance to parties engaging expert witnesses to give evidence to the Court.

2. (1) The Schedule to this Practice Direction applies whenever a person is or has been engaged by a party with a view to giving evidence (in this paragraph called an "expert witness").

(2) The engaging party must, at the time of the engagement, provide the expert witness with a copy of this Practice Direction.

(3) A party who has, before commencement of this Practice Direction, engaged an expert witness must provide the person with a copy of this Practice Direction.

(4) This Practice Direction does not limit the application of provisions relating to experts in the Rules or in other Practice Directions.

SCHEDULE

1. In this Schedule a person engaged by a party with a view to giving expert evidence is referred to as an "expert witness".

2. An expert witness's paramount duty is to assist the court impartially. That duty overrides the expert witness's obligation to the engaging party. An expert witness is not an advocate for a party.

3. A report made on or after 1 September 1999 by an expert witness should (in the body of the report or in an annexure):

(a) include the person's qualifications and experience as an expert;

(b) specify the assumptions on which the opinions in the report are based (a letter of instructions may be annexed);

(c) specify any examinations, tests or other investigations on which he

or she has relied; and

(d) specify any literature or other materials utilised in support of the opinions.

4. An expert witness should notify the engaging party in writing of any change in the opinions in a report, and that party should then notify any other party who has been or is subsequently provided with the report accordingly.

5. The court may direct the parties and their expert witnesses to:

(a) confer on a "without prejudice" basis;

(b) endeavour to agree; and

(c) make a joint statement in writing to the Court specifying matters agreed and matters not agreed together with the reasons for any such disagreement.

6. It is expected that an expert witness will exercise his or her independent, professional judgment in relation to such a conference and joint statement, and that an expert witness will not be instructed or requested to withhold or avoid agreement.

Mahla L Pearlman AM
Chief Judge
12 August 1999

The Land & Environment Court
of New South Wales

Practice Directions Number 20

Consolidated Expert Witness Practice Direction

Practice Note for Date: **23/09/2002**

This is a consolidated version of the Expert Practice Direction No. 16 that came into force on 1 September 1999, and amendments made to it in Amendment to Practice Direction Concerning Expert Witnesses No. 18, which commences on **1 October 2002**

1 The purpose of this Practice Direction is to provide guidance to parties engaging expert witnesses to give evidence to the Court.

2 (1) The Schedule to this Practice Direction applies whenever a person is or has been engaged by a party with a view to giving evidence (in this paragraph called an "expert witness").

(2) The engaging party must, at the time of the engagement, provide the expert witness with a copy of this Practice Direction.

(3) A party who has, before commencement of this Practice Direction, engaged an expert witness must provide the person with a copy of this Practice Direction.

(4) This Practice Direction does not limit the application of provisions relating to experts in the Rules or in other Practice Directions.

SCHEDULE

1 In this Schedule a person engaged by a party with a view to giving expert evidence is referred to as an "expert witness".

2 An expert witness's paramount duty is to assist the court impartially. That duty overrides the expert witness's obligation to the engaging party. An expert witness is not an advocate for a party.

3 A report made on or after 1 September 1999 by an expert witness should (in the body of the report or in an annexure):

(a) include the person's qualifications and experience as an expert;

(b) specify the assumptions on which the opinions in the report are

based (a letter of instructions may be annexed);

(c) specify any examinations, tests or other investigations on which he or she has relied; and

(d) specify any literature or other materials utilised in support of the opinions.

4 An expert witness should notify the engaging party in writing of any change in the opinions in a report, and that party should then notify any other party who has been or is subsequently provided with the report accordingly.

5 (1) The Court may, on application by a party or of its own motion, direct expert witnesses to:

(a) confer and may specify the matters on which they are to confer;

(b) endeavour to reach agreement on outstanding technical matters within their expertise; and

(c) provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for any non agreement.

(2) The objectives of such directions for a joint conference of experts include the following:

(a) the just, quick and cost effective disposal of the proceedings.

(b) the identification and narrowing of issues in the proceedings during preparation for such a conference and by discussion between the experts at the conference. The joint report may be tendered by consent as evidence of matters agreed and/or to identify and limit the issues on which contested expert evidence will be called.

(c) the consequential shortening of the trial and enhanced prospects of settlement.

(d) apprising the Court of the issues for determination.

(e) binding experts to their position on issues, thereby enhancing certainty as to how the expert evidence will come out at the trial. (The joint report may, if necessary, be used in cross-examination of a participating expert called at the trial who seeks to depart from what was agreed.)

(f) avoiding or reducing the need for experts to attend court to give evidence.

(3) Where, pursuant to this paragraph, expert witnesses have conferred and have provided a joint report agreeing on any matter, a party affected may not, without leave of the Court, adduce expert evidence inconsistent with the matter agreed.

6 Unless otherwise directed by the Court where a direction is given pursuant to paragraph 5(1), the parties shall agree on the following matters:

(a) the experts to attend.

(b) the questions to be answered.

(c) the materials to be placed before the experts.

7 The experts to attend should be those specified in the Court's direction. If none are so specified, the parties should arrange for experts to attend who have expertise pertinent to the questions to be asked. Separate conferences may be required between experts in different specialities in relation to different issues arising in the case.

8 The questions to be answered should be those specified by the Court or those agreed by the parties as relevant and any other question which any party wishes to submit for consideration.

9 The questions to be answered should be framed to resolve an issue or issues in the proceedings. If possible, questions should be capable of being answered Yes or No, or (if not) by a very brief response.

10 The materials to be provided to each of the participating experts should include:

(a) this practice note;

(b) an agreed chronology, if appropriate;

(c) relevant witness statements or, preferably, a joint statement of the assumptions to be made by the experts, including any competing assumptions to be made by them in the alternative (which should be specified clearly as such);

(d) copies of all expert opinions already exchanged between the parties and all other expert opinions and reports upon which a party intends to rely; and

(e) such records and other documents as may be agreed between the parties or ordered by the Court.

11 The participating experts should each be provided, 7 days in advance, with the questions and materials referred to in paragraphs 8 to 10 above.

12 Subject to any directions given by the Court concerning the range of dates for the convening of the conference, the parties should communicate amongst themselves to fix a mutually convenient date, time and place for the conference.

13 The conference should take the form of a personal meeting. Alternatively the participants may choose to hold the conference by teleconference, videolink or similar means if a personal meeting is not practicable.

14 The Court may direct that the conference be held with or without the attendance of the legal representatives of the parties affected, or with or without the attendance of legal representatives at the option of the parties respectively.

15 The experts should be given a reasonable opportunity to prepare for the conference by ensuring that before the conference the experts have:

> (a) an opportunity to seek clarification from the instructing lawyers or the Court concerning any question put to them; and
>
> (b) access to any additional materials which the parties are able to provide and which the experts consider to be relevant.

16 The experts should provide their respective opinions in response to the questions asked based on the witness statements or assumptions provided. Where alternative assumptions are provided the experts should provide their respective opinions on the alternative assumptions.

17 The experts may specify in their joint report other questions which they believe it would be useful for them to consider.

18 An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement. An expert should not assume the role of advocate for any party during the course of discussions at the joint conference. If, for whatever reason, an expert is unable to reach agreement with the other experts on any matter, that expert should be free to express his or her disagreement with the other experts on that matter.

19 The experts should accept as fact the matters stated in witness statements or assumptions submitted to them. It is not their role to decide any disputed question of fact or the credibility of any witness. Where there are competing assumptions to be made in the alternative, alternative answers may have to be provided to a question or questions, specifying which of the assumptions are adopted for each answer.

20 The conference should be conducted in a manner which is flexible, free from undue complexity (so far as is practicable) and fair to all parties.

21 The participating experts may appoint one of their number as a chairperson. If one of them so requests and the parties agree or the court orders, some other person may be appointed to act as chairperson.

22 Secretarial or administrative assistance should be provided by the parties if

so requested by the experts.

23 If the participating experts agree, one of them or a secretarial assistant may be appointed to make a note at the conference of matters agreed, matters not agreed and reasons for disagreement.

24 The conference may be adjourned for no more than 7 days and reconvened as may be thought necessary by those participating.

25 The joint report should specify matters agreed and matters not agreed and the reasons for non agreement.

26 The joint report should, if possible, be signed by all participating experts immediately at the conclusion of the conference and, otherwise, as soon as practicable thereafter.

27 Prior to signing of a joint report, the participating experts should not seek advice or guidance from the parties or their legal representatives except as provided for in this Practice Note. Thereafter, the experts may provide a copy of the report to a party or his or her legal representative and may communicate what transpired at the meeting in detail if they wish.

28 The report of the joint conference should be composed by the experts and not the representatives of the parties. The report should be set out in numbered paragraphs and should be divided into the following sections:

(a) statement of agreed opinion in respect of each matter calling for report;

(b) statement of matters not agreed between experts with short reasons why agreement has not been reached;

(c) statement in respect of which no opinions could be given eg issues involving credibility of testimony;

(d) any suggestion by the participating experts as to any other matter which they believe could usefully be submitted to them for their opinion; and

(e) disclosure of any circumstances by reason of which an expert may be unable to give impartial consideration to the matter.

29 The joint report, when signed by all participating experts, should be forwarded to the Court.

30 Legal representatives who attend a conference pursuant to an order of the Court or who are approached for advice or guidance by a participating expert should respond jointly and not individually, unless authorised to do so by the legal representatives for all other parties with an interest in the conference. Such advice or guidance may be provided by:

(a) responding to any questions in relation to the legal process applicable to the case;

(b) identifying relevant documents;

(c) providing further materials on request;

(d) correcting any misapprehensions of fact or an misunderstanding concerning the conference process; and

(e) recommended amendments to plans.

31 The legal representatives of the parties should perform any other role the Court may direct.

32 The legal representatives of the parties should inform the Court of the date of a conference when arranged, the names of the participating experts and the questions submitted.

33 It is not intended that the joint report provided to the Court or that information provided to the Court concerning a conference will be evidence in the proceedings unless admitted into evidence in the ordinary way.

The content of the conference between the expert witnesses shall not be referred to at the hearing or trial unless the parties affected agree.

34 An expert directed to confer may apply to the Court for further directions. That may be done, at the expert's election, by arrangement with the Court. A party may also apply for further directions in relation to a directed conference.

Consolidated Standard Directions - Expert

Witnesses

Expert Witness Standard Directions Number 1

1. The Court directs the *(definition of expertise)* expert witnesses to confer in accordance with Paragraph 5 of the Schedule to the Expert Witness Practice Direction **not less than 3 days before the hearing**.

2. The Applicant is to serve **not less than 12 days before the hearing**:
- a draft list questions to be answered by the experts; and
- a draft list of materials to be placed before the experts.

3. The Respondent is to serve **not less than 10 days before the hearing:**
- a draft list of questions to be answered by the experts; and
- a draft list of materials to be placed before the experts.

4. The parties are to file **not less than 8 days before the hearing**:
- A list of agreed questions to be answered by the experts; and
- A list of materials to be placed before the experts.

5. A joint report made pursuant to Schedule 1 is to be filed **by 4pm on the last day before the hearing**.

Expert Witness Standard Directions Number 2

1. The Court directs the *(definition of expertise)* expert witnesses to confer in accordance with Paragraph 5 of the Schedule to the Expert Witness Practice Direction **within 35 days**.

2. The Applicant is to serve **within 7 days**:
- a draft list questions to be answered by the experts; and
- a draft list of materials to be placed before the experts.

3. The Respondent is to serve **within 14 days:**
- a draft list of questions to be answered by the experts; and
- a draft list of materials to be placed before the experts.

4. The parties are to file **within 21 days**:
- A list of agreed questions to be answered by the experts; and
- A list of materials to be placed before the experts.

5. A joint report made pursuant to Schedule 1 is to be filed **within 42 days**.

Expert Witness Standard Directions Number 3 - On site hearings

1. Expert witness statements/ reports are not required for on site hearings.

2. If a party intends to rely on an expert witness statement/ report at an on site hearing then the statement/ report must be served in accordance with Part 13 rule 16 of the Land and Environment Court Rules.

Expert Witness Standard Directions - Effective from 1 July 2003

Expert Witness Standard Directions Number 1

The Court directs the expert witnesses to:

1. File and serve expert reports/ statements not less than 14 days before the hearing in accordance with Part 13 rule 16 of the Land and Environment Court rules.

2. Confer in accordance with Paragraph 5 of the Schedule to the Expert Witness Practice Direction not less than 7 days before the hearing and identify:

a. the issues within their expertise
b. the matters upon which they agree
c. the issues upon which they disagree
d. the reasons for any disagreement
3. Not less than 5 days before the hearing file a joint statement pursuant to Paragraph 5 (1) (c) of the Schedule to the Expert Witness Practice Direction specifying matters agreed and issues not agreed and the reasons for any non-agreement.

Expert Witness Standard Directions Number 2

The Court directs the expert witnesses to:

1. File and serve expert witness statement/ reports within 28 days.

2. Confer within 42 days in accordance with Paragraph 5 of the Schedule to the Expert Witness Practice Direction and identify:

a. the issues within their expertise
b. the matters upon which they agree
c. the issues upon which they disagree
d. the reasons for any disagreement
3. Within 49 days file a joint statement pursuant to Paragraph 5 (1) (c) of the Schedule to the Expert Witness Practice Direction specifying matters agreed and issues not agreed and the reasons for any non-agreement.

Expert Witness Standard Direction Number 3
On site hearings

1. Expert witness evidence is not required for on site hearings.

2. If a party intends to rely on expert witness evidence at an on site hearing then that party is directed to file and serve an expert report or short position statement not less than 14 days before the hearing in accordance with Part 13 rule 16 of the Land and Environment Court rules.

SUPREME COURT RULES 1970 - SECT 39.1

Selection and appointment

39.1. (1) Where a question for an expert witness arises in any proceedings the Court may, at any stage of the proceedings, on application by a party or of its own motion, after hearing any party affected who wishes to be heard:
(a) appoint an expert (in this Division referred to as "the expert") to inquire into and report upon the question;

(b) authorise the expert to inquire into and report upon any facts relevant to the inquiry and report on the question;

(c) direct the expert to make a further or supplemental report or inquiry

and report; and

(d) give such instructions (including provision concerning any examination, inspection, experiment or test) as the Court thinks fit relating to any inquiry or report of the expert.

(2) The Court may appoint as the expert a person selected by the parties affected or a person selected by the Court or selected in a manner directed by the Court.

SUPREME COURT RULES 1970 - SECT 39.2

Code of conduct

39.2. (1) A copy of the expert witness code of conduct in Schedule K ("the code") shall be provided to the expert by the registrar or as the Court may direct.

(2) A report by the expert shall not be admitted into evidence unless the report contains an acknowledgment by the expert that he or she has read the code and agrees to be bound by it.

(3) Oral evidence shall not be received from the expert unless the Court is satisfied that he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the code and agrees to be bound by it.

SUPREME COURT RULES 1970 - SECT 39.3

Report

39.3. (1) The expert shall send his or her report to the registrar.

(2) The registrar shall send a copy of the report to each party affected.

(3) Subject to compliance with this rule, the report shall be deemed to have been admitted into evidence in the proceedings unless the Court otherwise orders.

SUPREME COURT RULES 1970 - SECT 39.4

Cross-examination

39.4. Any party affected may cross-examine the expert and the expert shall attend court for examination or cross-examination if so requested on reasonable notice by the registrar or by a party affected.

SUPREME COURT RULES 1970 - SECT 39.5

Remuneration

39.5. (1) The remuneration of the expert shall be fixed by the Court.

(2) Subject to subrule (3), the parties specified by the Court shall be jointly and severally liable to the expert to pay the amount fixed by the Court for his remuneration.

(3) The Court may direct when and by whom the expert is to be paid.

(4) Subrules (2) and (3) do not affect the powers of the Court as to costs.

SUPREME COURT RULES 1970 - SECT 39.6

Other expert evidence

39.6. Where an expert has been appointed pursuant to this Part in relation to a question arising in the proceedings, the Court may limit the number of other experts whose evidence may be adduced on that question.

Division 2 Assistance to the Court

SUPREME COURT RULES 1970 - SECT 39.7

Assistance to the Court

39.7. The Court may, in any proceedings other than proceedings entered in the Admiralty List or proceedings tried with a jury, obtain the assistance of any

person specially qualified to advise on any matter arising in the proceedings, may act upon the adviser's opinion, and may make orders for the adviser's remuneration.