

COURT PRACTICE AND PROCEDURE FOR EXPERTS

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1. It is a pleasure to present this paper to the Environmental Institute of Australia and New Zealand's Professional Environmental Practice Course Program.
2. Under the old court system expert evidence was often the cause of unnecessary cost and delay due to a culture of confrontation and the doubtful independence or objectivity of some experts. To remedy the shortcomings of the old system, in more recent times the courts have introduced radical measures. The Land and Environment Court of NSW was a leader, particularly in promoting the use of a single court appointed expert wherever possible and, alternatively, directing experts of the same discipline to confer, produce a joint report and give evidence concurrently.
3. Since 28 January 2008 the Land and Environment Court has joined the mainstream of NSW courts by coming under the Civil Procedure Act 2005 (CPA) and the Uniform Civil Procedure Rules 2005 (UCPR). The expert evidence provisions of the CPA and the UCPR apply to Classes 1 to 4 of the Land and Environment Court's jurisdiction, which collectively constitute the whole of the Court's civil jurisdiction. In this respect, no distinction is drawn between the Court's merits review jurisdiction in Classes 1, 2 and 3 where the rules of evidence do not apply, and its judicial review and civil enforcement jurisdiction in Class 4 where the rules of evidence do apply.
4. UCPR Part 31 Division 2 is comprehensive and prescriptive as to court practice and procedure for experts. It contains radical measures to remedy shortcomings in the old system. Three of the main measures may be identified at the outset. First, the use of experts in litigation is placed under the complete control of the Court: UCPR 31.17(a). No party may rely on expert evidence without obtaining and complying with the Court's

directions: UCPR 31.19. The Court has a wide power to give directions: UCPR 31.20. They include a direction that expert evidence may not be adduced on a specified issue except by leave of the Court; a direction limiting the number of expert witnesses who may be called; and a direction providing for the engagement and instruction of a party's single expert in relation to a specified issue. Second, an expert's overriding duty is to assist the Court impartially, not to advance a party's cause: UCPR 31.23 and Schedule 7 Expert Witness Code of Conduct. An expert witness does not compromise objectivity by defending, forcefully if necessary, an opinion which is genuinely held, but may compromise objectivity if the witness is unwilling to consider alternative factual scenarios or is unwilling to appropriately acknowledge recognised differences of opinion or approach between experts (this proposition appears in the Practice Direction on Guidelines for Expert Witnesses in proceedings in the Federal Court of Australia issued on 5 May 2008). Third, the rules seek to encourage the use of a parties' single expert wherever possible: UCPR 31.17(d), 31.37.

Civil Procedure Act 2005

5. The CPA contains two provisions relating to expert witnesses or expert evidence. Section 62 provides:

62 Directions as to conduct of hearing

- (3) Without limiting subsections (1) and (2), the court may, by order, give any of the following directions at any time before or during a hearing:

...

- (b) a direction limiting the number of witnesses (including expert witnesses) that a party may call,

6. CPA s 9 provides that the Uniform Rules Committee may make rules, not inconsistent with the CPA, including with respect to the matters specified in Schedule 3. Matters relating to expert evidence are specified in Schedule 3 paragraph:

25 Matters relating to expert evidence, including:

- (a) the disclosure (by the furnishing of copies of reports or otherwise) of the nature of expert evidence to be given, and including the

exclusion of expert evidence in case of non-compliance with the rules relating to expert evidence or with any order for disclosure of the nature of expert evidence, and

- (b) the use of expert witnesses including, in particular, the use of expert witnesses engaged jointly by parties to civil proceedings and the use of court-appointed expert witnesses.

Uniform Civil Procedure Rules 2005 Part 31, Division 2

7. UCPR Part 31 Division 2 (which incorporates, by reference, Schedule 7) contains all the UCPR provisions applicable to expert evidence. The main purposes of the Division are as follows (r 31.17):

- (a) to ensure that the court has control over the giving of expert evidence,
- (b) to restrict expert evidence in proceedings to that which is reasonably required to resolve the proceedings,
- (c) to avoid unnecessary costs associated with parties to proceedings retaining different experts,
- (d) if it is practicable to do so without compromising the interests of justice, to enable expert evidence to be given on an issue in proceedings by a single expert engaged by the parties or appointed by the court,
- (e) if it is necessary to do so to ensure a fair trial of proceedings, to allow for more than one expert (but no more than are necessary) to give evidence on an issue in the proceedings,
- (f) to declare the duty of an expert witness in relation to the court and the parties to proceedings.

Control Over Expert Witnesses

8. The Court's control over the calling of expert witnesses is through a prohibition on adducing expert evidence unless directions are sought and complied with: UCPR 31.19. A party intending to adduce expert evidence at trial or to whom it becomes apparent that that party, or any other party, may adduce expert evidence at trial, is obliged to promptly seek directions from the Court.

9. The Court may at any time give such directions as it considers appropriate in relation to the use of expert evidence in proceedings: UCPR 31.20. Such directions may include any of the following (UCPR 31.20(2)):

- (a) a direction as to the time for service of experts' reports,

- (b) a direction that expert evidence may not be adduced on a specified issue,
- (c) a direction that expert evidence may not be adduced on a specified issue except by leave of the court,
- (d) a direction that expert evidence may be adduced on specified issues only,
- (e) a direction limiting the number of expert witnesses who may be called to give evidence on a specified issue,
- (f) a direction providing for the engagement and instruction of a parties' single expert in relation to a specified issue,
- (g) a direction providing for the appointment and instruction of a court-appointed expert in relation to a specified issue,
- (h) a direction requiring experts in relation to the same issue to confer, either before or after preparing experts' reports in relation to a specified issue,
- (i) any other direction that may assist an expert in the exercise of the expert's functions,
- (j) a direction that an expert who has prepared more than one expert's report in relation to any proceedings is to prepare a single report that reflects his or her evidence in chief.

Evidence in Chief

10. Unless the Court otherwise orders, an expert witness' evidence in chief must be given by the tender of one or more experts' reports: UCPR 31.21.

Disclosure of Contingency Fees and Deferred Payment Arrangements

11. An expert witness is now required to disclose arrangements for contingency fees or deferred payment schemes. UCPR 31.22 provides:

- (1) A person who is engaged as an expert witness in relation to any proceedings must include information as to any arrangements under which:
 - (a) the charging of fees or costs by the expert witness is contingent on the outcome of the proceedings, or
 - (b) the payment of any fees or costs to the expert witness is to be deferred,

in, or in an annexure to, any report that he or she prepares for the purposes of the proceedings.

- (2) If a report referred to in subrule (1) indicates the existence of any such arrangements, the court may direct disclosure of the terms of the engagement (including as to fees and costs).

12. The rationale for the disclosure appears to be that such arrangements may raise a question as to the objectivity of the expert because the expert has a financial interest in the outcome of the proceedings. However, the mere existence of such an arrangement does not necessarily lead to that conclusion.

Code of Conduct

13. For some years expert witnesses have been required to comply with a prescribed code of conduct. UCPR 31.23 provides:

- (1) An expert witness must comply with the code of conduct set out in Schedule 7.
- (2) As soon as practicable after an expert witness is engaged or appointed:
 - (a) in the case of an expert witness engaged by one or more parties, the engaging parties, or one of them as they may agree, or
 - (b) in the case of an expert witness appointed by the court, such of the affected parties as the court may direct,

must provide the expert witness with a copy of the code of conduct.

- (3) Unless the court otherwise orders, an expert's report may not be admitted in evidence unless the report contains an acknowledgment by the expert witness by whom it was prepared that he or she has read the code of conduct and agrees to be bound by it.
- (4) Unless the court otherwise orders, oral evidence may not be received from an expert witness unless the court is satisfied that the expert witness has acknowledged, whether in an expert's report prepared in relation to the proceedings or otherwise in relation to the proceedings, that he or she has read the code of conduct and agrees to be bound by it.

14. The expert witness code of conduct is set out in schedule 7 to the UCPR. It imposes on experts duties to the Court, a duty to comply with court directions, and a duty to work co-operatively with other expert witnesses. It

also deals with the content of expert reports. The code of conduct is in the following terms:

1 Application of code

This code of conduct applies to any expert witness engaged or appointed:

- (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings, or
- (b) to give opinion evidence in proceedings or proposed proceedings.

2 General duty to the court

- (1) An expert witness has an overriding duty to assist the court impartially on matters relevant to the expert witness's area of expertise.
- (2) An expert witness's paramount duty is to the court and not to any party to the proceedings (including the person retaining the expert witness).
- (3) An expert witness is not an advocate for a party.

3 Duty to comply with court's directions

An expert witness must abide by any direction of the court.

4 Duty to work co-operatively with other expert witnesses

An expert witness, when complying with any direction of the court to confer with another expert witness or to prepare a parties' expert's report with another expert witness in relation to any issue:

- (a) must exercise his or her independent, professional judgment in relation to that issue, and
- (b) must endeavour to reach agreement with the other expert witness on that issue, and
- (c) must not act on any instruction or request to withhold or avoid agreement with the other expert witness.

5 Experts' reports

- (1) An expert's report must (in the body of the report or in an annexure to it) include the following:
 - (a) the expert's qualifications as an expert on the issue the subject of the report,
 - (b) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed),
 - (c) the expert's reasons for each opinion expressed,
 - (d) if applicable, that a particular issue falls outside the expert's field of expertise,
 - (e) any literature or other materials utilised in support of the opinions,

- (f) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out,
 - (g) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).
- (2) If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report.
 - (3) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
 - (4) If an expert witness changes his or her opinion on a material matter after providing an expert's report to the party engaging him or her (or that party's legal representative), the expert witness must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in subclause (1) as is appropriate.

6 Experts' conference

- (1) Without limiting clause 3, an expert witness must abide by any direction of the court:
 - (a) to confer with any other expert witness, or
 - (b) to endeavour to reach agreement on any matters in issue, or
 - (c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, or
 - (d) to base any joint report on specified facts or assumptions of fact.
- (2) 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.

Conferences between Expert Witnesses and Joint Reports

15. Conferences between, and joint reports by, expert witnesses is regulated by UCPR 31.24 which provides:

- (1) The court may direct expert witnesses:
 - (a) to confer, either generally or in relation to specified matters, and
 - (b) to endeavour to reach agreement on any matters in issue, and
 - (c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, and
 - (d) to base any joint report on specified facts or assumptions of fact,

and may do so at any time, whether before or after the expert witnesses have furnished their experts' reports.

- (2) The court may direct that a conference be held:
 - (a) with or without the attendance of the parties affected or their legal representatives, or
 - (b) with or without the attendance of the parties affected or their legal representatives, at the option of the parties, or
 - (c) with or without the attendance of a facilitator (that is, a person who is independent of the parties and who may or may not be an expert in relation to the matters in issue).
16. An expert witness so directed may apply to the court for further directions to assist in the performance of the expert's functions: UCPR 31.24(3)
17. Unless the parties affected agree, the content of the conference between the expert witnesses must not be referred to at any hearing: UCPR 31.24(6).
18. UCPR 31.25 provides for the directions which a court may give if a direction to confer is given under r 31.241(a).

Joint Report

19. A joint report arising from a conference between expert witnesses is regulated by UCPR 31.26 which relevantly provides:
 - (2) The joint report must specify matters agreed and matters not agreed and the reasons for any disagreement.
 - (3) The joint report may be tendered at the trial as evidence of any matters agreed.
 - (4) In relation to any matters not agreed, the joint report may be used or tendered at the trial only in accordance with the rules of evidence and the practices of the court.
20. Importantly, except by leave of the court, a party affected may not adduce evidence from any other expert witness on the issues dealt with in the joint report: UCPR 31.26(5)

Experts' Reports

21. The contents of experts' reports is prescribed by UCPR 31.27 (which unfortunately overlaps with paragraph 5 of the code of conduct):

- (1) An expert's report must (in the body of the report or in an annexure to it) include the following:
 - (a) the expert's qualifications as an expert on the issue the subject of the report,
 - (b) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed),
 - (c) the expert's reasons for each opinion expressed,
 - (d) if applicable, that a particular issue falls outside the expert's field of expertise,
 - (e) any literature or other materials utilised in support of the opinions,
 - (f) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out,
 - (g) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).
- (2) If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report.
- (3) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
- (4) If an expert witness changes his or her opinion on a material matter after providing an expert's report to the party engaging him or her (or that party's legal representative), the expert witness must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in subrule (1) as is appropriate.

Admissibility, Cross-examination and Re-examination

22. The admissibility of an expert's report, cross-examination of an expert and re-examination is regulated by r 31.29 which relevantly provides:

- (1) If an expert's report is served in accordance with rule 31.28 or in accordance with an order of the court, the report is admissible:
 - (a) as evidence of the expert's opinion, and
 - (b) if the expert's direct oral evidence of a fact on which the opinion was based would be admissible, as evidence of that fact,
without further evidence, oral or otherwise.
- (2) Unless the court otherwise orders, a party may require the attendance for cross-examination of the expert by whom the

- report was prepared by notice served on the party by whom the report was served.
- (3) Unless the court otherwise orders, such a requirement may not be made later than:
 - (a) in the case of proceedings for which the court has fixed a date for trial, 35 days before the date so fixed, or
 - (b) in any other case, 7 days before the date on which the court fixes a date for trial.
 - (4) The parties may not by consent abridge the time fixed by or under subrule (3).
 - (5) If the expert's attendance for cross-examination is required under subrule (2), the report may not be tendered under section 63, 64 or 69 of the Evidence Act 1995 or otherwise used unless the expert attends or is dead or the court grants leave to use it.
 - (6) The party using the report may re-examine the expert if the expert attends for cross-examination pursuant to a requirement under subrule (2).

Supplementary Reports by Expert Witness

23. If an expert witness provides a supplementary report to the party by whom the expert has been engaged, neither the engaging party nor any other party having the same interest as the engaging party may use the supplementary report or any earlier report affected by the supplementary report, unless all of those reports have been served on all parties affected: UCPR 31.34. That rule does not apply to a report prepared by a court-appointed expert.

Opinion Evidence by Expert Witnesses

24. In any proceedings in which two or more parties call expert witnesses to give opinion evidence about the same issue or similar issues, or indicate to the court an intention to do so, the court may give any one or more of the directions prescribed by UCPR 31.35, which includes directions relating to concurrent evidence:
- (a) a direction that, at trial:
 - (i) the expert witnesses give evidence **after all factual evidence** relevant to the issue or issues concerned, or such evidence as may be specified by the court, **has been adduced**, or
 - (ii) the expert witnesses give evidence at any stage of the trial, **whether before or after the plaintiff has closed his or her case**, or

- (iii) each party intending to call one or more expert witnesses close that party's case in relation to the issue or issues concerned, subject only to adducing evidence of the expert witnesses later in the trial,
 - (b) a direction that, after all factual evidence relevant to the issue, or such evidence as may be specified by the court, has been adduced, each expert witness file an affidavit or statement indicating:
 - (i) whether the expert witness adheres to any opinion earlier given, or
 - (ii) whether, in the light of any such evidence, the expert witness wishes to modify any opinion earlier given,
 - (c) a direction that the expert witnesses:
 - (i) be sworn one immediately after another (so as to be capable of making statements, and being examined and cross-examined, in accordance with paragraphs (d), (e), (f), (g) and (h)), and
 - (ii) when giving evidence, occupy a position in the courtroom (not necessarily the witness box) that is appropriate to the giving of evidence,
 - (d) a direction that each expert witness give an oral exposition of his or her opinion, or opinions, on the issue or issues concerned,
 - (e) a direction that each expert witness give his or her opinion about the opinion or opinions given by another expert witness,
 - (f) a direction that each expert witness be cross-examined in a particular manner or sequence,
 - (g) a direction that cross-examination or re-examination of the expert witnesses giving evidence in the circumstances referred to in paragraph (c) be conducted:
 - (i) by completing the cross-examination or re-examination of one expert witness before starting the cross-examination or re-examination of another, or
 - (ii) by putting to each expert witness, in turn, each issue relevant to one matter or issue at a time, until the cross-examination or re-examination of all of the expert witnesses is complete,
 - (h) a direction that any expert witness giving evidence in the circumstances referred to in paragraph (c) be permitted to ask questions of any other expert witness together with whom he or she is giving evidence as so referred to,
 - (i) such other directions as to the giving of evidence in the circumstances referred to in paragraph (c) as the court thinks fit.
- (emphasis added)

25. In practice, concurrent evidence is usually given in the Land and Environment Court by a simple global direction to that effect without descending into the host of more specific directions to which this rule refers.

Parties' Single Experts

26. A "parties' single expert" is defined as an expert engaged pursuant to r 31.37 (r 31.18). Under r 31.37, a parties' single expert is engaged jointly by the parties pursuant to an order of the court. A parties' single expert is different from a "court-appointed expert", which is defined to mean an expert appointed pursuant to r 31.46 (r 31.18). Under r 31.46, a court appointed expert is appointed by the court. The Land and Environment Court regularly used to appoint court-appointed experts. As a result of coming within the fold of the UCPR, in the Land and Environment Court, where there is to be only one expert, a parties' single expert is now the norm rather than a court appointed expert.
27. The practice of the Land and Environment Court in merit appeals from planning decisions, is that there is a presumption that a parties' single expert will be appointed in each discipline, rather than each party calling an expert witness. Typically, in this class of case, matters relating to so-called objective issues such as noise, traffic, parking, overshadowing, engineering, hydrology and contamination are seen as suitable for a parties' single expert. Such experts also deal with issues relating to matters such as heritage, urban design and general planning, if requested by the parties. Overwhelmingly, the parties select a parties' single expert by mutual agreement.
28. The main arguments for a parties' single expert are that, first, when the issue is one which usually permits of only one answer (for example, noise) there is no need for more than one expert; secondly, it saves costs. It has also been argued that the court has the benefit of hearing from at least one expert witness who is unaffected by (even subconscious) adversarial bias.
29. The selection and engagement of a parties' single expert is regulated by UCPR 31.37 which provides:
 - (1) If an issue for an expert arises in any proceedings, the court may, at any stage of the proceedings, order that an expert be engaged jointly by the parties affected.

- (2) A parties' single expert is to be selected by agreement between the parties affected or, failing agreement, by, or in accordance with the directions of, the court.
- (3) A person may not be engaged as a parties' single expert unless he or she consents to the engagement.
- (4) If any party affected knows that a person is under consideration for engagement as a parties' single expert:
 - (a) the party affected must not, prior to the engagement, communicate with the person for the purpose of eliciting the person's opinion as to the issue or issues concerned, and
 - (b) if the party affected has previously communicated with the person for that purpose, he or she must notify the other parties affected as to the substance of those communications.

30. Instructions to a parties' single expert is regulated by UCPR 31.38:

- (1) The parties affected must endeavour to agree on written instructions to be provided to the parties' single expert concerning the issues arising for the expert's opinion and concerning the facts, and assumptions of fact, on which the report is to be based.
- (2) If the parties affected cannot so agree, they must seek directions from the court.

31. A parties' single expert may apply to the court for direction in accordance with UCPR 31.39:

- (1) The parties affected must endeavour to agree on written instructions to be provided to the parties' single expert concerning the issues arising for the expert's opinion and concerning the facts, and assumptions of fact, on which the report is to be based.
- (2) If the parties affected cannot so agree, they must seek directions from the court.

32. A parties' single expert must send a signed copy of the expert's report to each of the parties affected on the same day and each copy must be endorsed with the date on which it is sent: UCPR 31.40. Parties may seek clarification of the report within 14 days after it is sent to the parties and before the report is tendered in evidence, by notice in writing sent to the expert. The notice must be in the form of questions, no more than ten in number. The party's single expert must send the signed copy of the expert's response to each of the parties affected within 28 days after the notice is sent to the expert: UCPR 31.41.

33. Generally, any of the parties affected may tender in evidence a report by a parties' single expert and that expert's answers in response to a request for clarification: UCPR 31.42. Any party affected may cross-examine a parties' single expert and the expert must attend court for examination or cross-examination if so requested on reasonable notice by a party affected.
34. Importantly, except by leave of the court, a party may not adduce evidence of any other expert on any issue arising in the proceedings if a parties' single expert has been engaged in relation to that issue: UCPR 31.44.
35. The remuneration of a parties' single expert is to be fixed by agreement between the parties affected and the expert or, failing agreement, by or in accordance with the directions of, the Court. The parties affected are jointly and severally liable to a parties' single expert for the experts' remuneration: UCPR 31.45.

Court Appointed Experts

36. Court appointed experts are regulated by UCPR 31.46 – 31.54. A court appointed expert is appointed by the court and, in that respect, differs from a parties' single expert who is engaged by the parties. The selection and appointment of court appointed experts is governed by UCPR 31.46 which provides:
 - (1) If an issue for an expert arises in any proceedings the court may, at any stage of the proceedings:
 - (a) appoint an expert to inquire into and report on the issue, and
 - (b) authorise the expert to inquire into and report on any facts relevant to the inquiry, and
 - (c) direct the expert to make a further or supplemental report or inquiry and report, and
 - (d) give such instructions (including instructions concerning any examination, inspection, experiment or test) as the court thinks fit relating to any inquiry or report of the expert or give directions concerning the giving of such instructions.
 - (2) The court may appoint as a court-appointed expert a person selected by the parties affected, a person selected by the court or a person selected in a manner directed by the court.

- (3) A person must not be appointed as a court-appointed expert unless he or she consents to the appointment.
- (4) If any party affected knows that a person is under consideration for appointment as a court-appointed expert:
 - (a) the party affected must not, prior to the appointment, communicate with the person for the purpose of eliciting the person's opinion as to the issue or issues concerned, and
 - (b) if the party affected has previously communicated with the person for that purpose, he or she must notify the court as to the substance of those communications.

37. There are provisions for directions by the court to a court appointed expert (31.47); for the court appointed expert to apply to the court for directions (31.48); for the court appointed expert's report to be sent to the Registrar of the Court (31.49); for clarification by the parties of a court appointed expert's report (31.50); and for cross-examination of a court appointed expert (31.51).

38. Except by leave of the court, other expert evidence is prohibited if a court appointed expert has been appointed under the rules. Remuneration of the court appointed expert is governed by identical provisions as those that apply to a parties' single expert: UCPR 31.53.

15 May 2008