

# RESOURCE PACK - ACTING AS AN EXPERT WITNESS

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## Resource Pack

The contents of this resource pack are provided as a guide only and should be read in conjunction with the Guidance Paper (GP) titled *Acting As An Expert Witness*. The current version of the resource pack links to the above-mentioned GP and may assist you in the application of the information contained in the GP.

For example, practitioners will need to ensure currency of the relevant Court Rules at the time of accepting instructions and subsequent provision of expert evidence at court.

Similarly, in Australia practitioners need to be aware of the *Evidence Act 1995*, whilst in New Zealand the *Evidence Act 2006* applies.

## Joint Reports

- a) Identify any pre-existing relationship with any party to the litigation.
- b) experts are to ensure that any joint conference is a genuine dialogue between the experts in a common effort to reach agreement upon,
- c) the matters the experts disagree upon,
- d) reasons for disagreement and agreement,
- e) reasoning process to reach their position,
- f) no outside influence.
- g) include any evidence in reply,
- h) give written notice to the Court and the party instructing them if for any reason they anticipate that they cannot comply with the Court directions,
- i) facilitate a clear understanding of the final position of the experts about the matters in issue and the reasoning process they used to reach those positions,
- j) all experts are to sign and date the JER, and
- k) experts are to file and serve their JER in the Court.

## Points of Consideration for a Joint Expert Report

Set out below is a guide only and experts should be free to construct their Joint Reports in any reasonable manner. For example, some Joint Reports can simply be a single page showing opposing opinions and reasons, with alternate approaches (following the other expert's methodology in case the Court prefers that methodology),

- a) Title page – JER – type, Expert's names, Proceedings Number, Parties, Addressed to the LEC, Date of JER,
- b) Court Directions, the timeframe and whether tasks were completed in accordance with the appointment,
- c) Court Directions, Expert Witness Code of Conduct acknowledgement, any Statement of Facts acknowledgement,
- d) Abbreviations used in the JER - experts names reduced to initials (this tends to remove personalities and potential conflict between the experts); parties, relevant documents

- i.e. town planning instruments, government departments reduced to initials or mnemonics,
- e) Erratum: Correct any error contained within any earlier Statements of Evidence or Evidence in Reply.
  - f) Issues upon which the experts agree (and why they agree),
  - g) A summary of each expert's position, and supporting evidence in brief,
  - h) In valuation matters - elements of what each Valuer expert gains from the previous non-Valuer expert JERs; and for other experts, what they have gained from other experts' JERs. For example, a Town Planning JER may rely on evidence from a Flooding JER.
  - i) Issues Disagreed. Provided in a landscape "point and counter point layout" displaying the respective differences and reasons for those differences between the experts. This simplifies the adjudication process and makes it easier for the Judge (or Commissioner or Member) to discern a preference over competing arguments. This is the Issues Not Agreed Between Experts area. Using a logical sequence in the Issues Disagreed.
  - j) For valuation matters: Sales Evidence: Add an opinion on the hierarchy of sales evidence (primary evidence relied upon, secondary or supporting evidence, and tertiary evidence - background evidence), if appropriate.
  - k) Statement if "no opinion" can be expressed on an issue, or whether further investigation is required, or whether an opinion is not a concluded opinion (awaiting further facts).
  - l) Any matter that may be useful for the Court to consider, or a recommendation for any matter that the experts consider would be of assistance to the Court if submitted to them.
  - m) Conclusion of opinion by each Expert.
  - n) Objections or notations for the Court to consider. For example, the addition of late evidence by the other expert.
  - o) Signature Blocks.

### **Enquiries**

If any Member considers any information or advice in this GP to not be accurate or up to date, or wish to raise any issue for consideration arising from the contents of this GP, please refer this to

API contact: [standards@api.org.au](mailto:standards@api.org.au)

PINZ contact: [standards@property.org.nz](mailto:standards@property.org.nz).

## The Federal Court and the Federal Circuit Court of Australia

### 1.0 Introduction

#### 1.1 The Federal Court is a creation of the Government and s19 of the Act provides or:

- (a) Original jurisdiction "Section 19
- (b) The Court has such original jurisdiction as is vested in it by laws made by Parliament.
- (c) The original jurisdiction of the Court includes any jurisdiction vesting in it to hear and determine appeals from decisions of persons authorised or tribunals other than Courts."

#### **Powers of the Federal Court**

The Court was granted and still retains, subject to the provisions of the Jurisdiction of Courts (Miscellaneous Amendments) Act 1987 jurisdiction over various aspects of Commonwealth legislation under the Competition and Consumer Act 2010 and exclusive jurisdiction under some aspects of that legislation. It has been given certain jurisdiction (largely trade practices related) in respect of any competitive conduct in the trans-Tasman markets and a regime of co-operation and comparable New Zealand legislation in association with the High Court of New Zealand has been established. See Part III A of the Act.

#### **Administration of appeals in Federal Courts**

The Court has and retains jurisdiction (as the Australian Industrial Court had) to hear appeals from the decisions of the Administrative Appeals Tribunal on questions of law. It may review decisions under the Administrative Decisions (Judiciary Review) Act 1977 on the application of persons aggrieved. In the latter case, similar jurisdiction is also vested in State and Territory Supreme Courts.

#### 1.2 The jurisdiction of the Federal Court includes:

- Admiralty
- Industrial property
- Taxation
- Native Title

#### 1.3 The Federal Circuit Court of Australia

It was decided in 1999 that the Commonwealth establish a Federal Magistry (now called The Federal Circuit Court of Australia). It could be said that in doing so it was completing the hierarchy of Federal Courts on the American system and effectively abandoned the original notice of vesting State Courts with Federal jurisdiction.

The Federal Circuit Court of Australia is a creation under Part III of the Constitution.

## 1.4 Trans-Tasman proceedings

Part III A of the Act and O 69 of the Rules deal with the jurisdiction of the Court in relation to what are described as trans-Tasman proceedings. The Federal Court is concerned they deal substantially with the power of the Federal Court to sit and give directions in respect of proceedings in New Zealand and the power to have registered in Australia judgments of the High Court in New Zealand arising out of trade practice issues between the two countries.

For the full outline of the jurisdiction of the Federal Court reference should be made in each State and Territory to the practice volume of the Federal Court, held by the Law Library in each State and Territory.

## 2.0 Experts and Experts' Reports

Experts and experts' reports are addressed in Pt 23 of the Act. There are two divisions to this Pt, the first dealing with Court experts and the second dealing with parties' experts.

Rule 23.01 authorises a party to apply to the Court for an order that an expert be appointed to enquire into a report on any question or of any facts relevant to any question arising in the proceedings.

If a Court expert is appointed, the Court expert report must comply with r.23.02(2). Specifically, an expert report must contain particulars of training, study, or experience on which the Court expert has acquired this knowledge (s.79 of the Evidence Act 1995). It must also identify the question that the Court expert was asked to address (r.23.02(2)(c)). The expert's report must set out separately each of the factual findings or assumptions on which the opinion of the Court expert is based and set out separately those factual findings or assumptions each of the Court expert's opinion (r.23.02(2)(d) and (e)). Lastly, the Court expert's report must set out the reasons for the opinion (r.23.02(2)(f)).

Rule 23.03 provides that the report complies with r.23.02 the report will be admissible at the trial as the evidence of the Court expert (r.23.03(1)).

If a Court expert is appointed by the Court, a party is still entitled to apply to the Court for leave to adduce evidence of another expert on the question, provided that the expert report which is sought to be adduced complies with Div 23.2 r.23.04.

Division 23.2 deals with the parties' reports and 23.11 empowers a party to call an expert to give expert evidence at a trial if the party has delivered an expert's report that complies with r.23.13 and providing the party has otherwise complied with Div 23.2 r.23.11.

Rule 23.12 requires the party who intends to retain an expert to get an expert report or to give expert evidence, to first give the expert any practice notes dealing with the guidelines for expert witnesses and proceedings in a Court (r.23.12).

A party's expert report must be set out in the same way as a Court expert's report. It must also contain an acknowledgment at the beginning of the report that the expert has read and is willing to comply with the practice note (r.23.13(1)(b)). They must also comply with the practice note (r.23.13(1)(h)).

Rule 23.15 addresses the way the expert might give evidence at trial. There are further powers given to the Court in r.5.04. Item 16 of r.5.04 permits the Court to limit the number of expert witnesses to be called.

### **3.0 Court Expert**

#### **3.1 Appointment of Court expert**

(r.23.01)

- (1) A party may apply to the Court for an order:
- (a) That an expert be appointed (at Court) to enquire into a report on any question or any facts relevant to any question arising in the proceedings, and
  - (b) Fixing the Court expert's remuneration including the costs of preparing the expert report, and
  - (c) For the Court expert's attendance before the Court, and
  - (d) Terminating the liability to pay the Court's expert's remuneration.

#### **3.2 Court expert's report**

(r.23.02)

- (1) The Court expert must provide the report to the Court within the time fixed by the Court.

(The Registrar has powers to set out various consequences of that report and who it is to be provided to etc.)

#### **3.3 Report of Court expert**

(r.23.02.10)

The Court expert must provide the report to the Court within the time fixed by the Court. 3.4 Court expert's report

(r.23.03)

- (1) A report that complies with r.23.02 will be admissible at trial as the evidence of the Court expert.
- (2) A party may apply to the Court for an order:
- (a) To cross examine the Court expert before a trial, and
  - (b) The cross examination is to take place before trial, but the cross examination must take place before a Registrar or an examiner.

### 3.4 Other experts' reports on the question

The party who has delivered another party interested in the question a copy of another expert's report that complies with Div 23.2 may apply to the Court for leave to adduce the evidence of the other expert on the question.

### 3.5 Calling expert evidence at trial

(r.23.11)

A party may call an expert to give evidence at a trial only if the party had:

- (a) Delivered an expert report that complied with r.23.13
- (b) Otherwise complied with Div 23

## Family Law Courts (Australia)

### 3.6 Family Law Act

- (a) Covers the field of jurisdiction in respect of families.

Parenting Disputes

- (b) All children, whether a child or a married couple, de facto relationship or no relationship Property Disputes.
- (c) Parties to the marriage Part viii
- (d) De facto couples Part viii AB (including same sex couples who have separated after 1 March 2009)

## 4.0 Administered under Family Law Act (1975)

- (a) Two Courts exercise jurisdiction

**Family Court of Australia**

- (b) Judges
- (c) Court of Appeal (including appeals from the Federal Magistrates Court)

**Federal Circuit Court of Australia**

- (d) Magistrates.
- (e) Deal with other Federal jurisdictions as well. The Family Law jurisdiction managed separately in specific lists.
- (f) The Two Courts are managed separately though there are plans for a Federal Government bill to merge the Courts.
- (g) The Family Law Act empowers judges to make laws of Court.
- (h) Family Law Rules.
- (i) Practice Directions.
- (j) Federal Circuit Court Rules made by Federal Magistrates.



## 5.0 Single Expert Rules Procedure

Single experts:

- (a) Identified after consultation between the parties.
- (b) Jointly instructed in writing.
- (c) Report to the Court (via the Applicant).
- (d) Required for cross examination where appropriate.
- (e) Subject to questions, in writing, in advance of the hearing where appropriate.

## 6.0 Practice of “Shadow Experts”

Either party may retain their own Shadow Expert to advise and assist them to:

- (a) Instruct the Expert.
- (b) Review information provided to the Expert.

Review of Single Expert methodology and report

- (c) Prepare for cross examination of the Expert.
- (d) The Court has a general discretion to admit adversarial expert evidence, where appropriate and order conferences of experts.

Expert evidence:

- (e) Division 15.2 of the Federal Circuit Court Rules 2001.
- (f) Regulation 15.12 of the FCC Rules permits the Court to grant leave to a party to adduce evidence from another (adversarial expert).

## 7.0 Single Expert Rules

- (a) The Family Court relied on parties to lead evidence of an expert on an adversarial basis until recently.
- (b) The Court issued a discussion paper in 2002 called “The Changing Face of Expert Witnesses” which set out “reforms” of Single Expert Rules and proposed “Single Joint Experts”.
- (c) The new Rules commenced on 29 March 2004.

Principal objectives:

- (d) Tighter control over appointment of experts.
- (e) Confining expert evidence to issues identified by the Court.
- (f) Confining experts to Single Joint Experts.

- (g) Jointly instructing in the matter and payment.
- (h) Eliminate an adversarial approach to expert evidence.
- (i) Eliminate duplication of costs.

## **8.0 Advent of Shadow Experts**

- (a) With the introduction of Single Joint Experts, the new concept of “Shadow Experts” emerged.
- (b) Concern that Single Joint Experts meant “trial by expert”
- (c) Arguments as to instructions that are given to Single Joint Experts.

A need for a Shadow Expert to be retained:

- (d) Due to further investigation done by a Single Expert.
- (e) To review and check the work of a Single Expert.
- (f) Assist in preparation and conduct of cross examination of the Single Expert.

## **9.0 Appointing another Expert**

Section 15.49 of the Family Law Rules 2004 provide for the appointment of another expert only on the Court’s permission but that permission may allow a party to tender a report or adduce evidence from another expert on the same issue if it is satisfied that:

- (a) There is an essential body of opinion contrary to any opinion given by the Single Expert.
- (b) Another expert witness knows the matter not known to the Single Expert witness.
- (c) There is another special reason for adducing evidence from another expert witness.

## 10.0 Expert's Obligations (in respect of these matters)

- (a) An Expert witness should provide independent assistance to a Court by way of objective and unbiased opinion.
- (b) An Expert witness should state the facts or assumptions upon which his or her opinions are based.
- (c) An Expert witness should not provide evidence regarding a particular question or issue that falls outside that Expert's expertise.
- (d) Where an Expert's Report refers to photographs, plans, calculations measured in the survey report or other similar documents, these must be provided to the other side at the same time as exchanging of reports.

## 11.0 Report Writing

The Family Law Rules 2004 – 15.62 and 15.63 need to be complied with to provide a proper and admissible statement of evidence, which must be verified by affidavit and include statements and reasons for the conclusions.

## 12.0 Family Law Rules 2004

In respect of the compliance with the requirement for expert evidence in Family Law Courts, the report must comply with specific rules including:

- (a) Rule 15.62 Formal Experts Report
- (b) Rule 15.63 Content of Expert Report

The consequences of failure to comply are significant and set out in Rule 15.64.

## 13.0 Conference between Experts

The Family Court Rules provide for a Single Expert and for conferences out of Court between parties' experts. Though the Court can order that both experts give evidence at the same time, which is sometimes called the "hot tub procedure". This is where the Court thinks there will be assistance gained by experts giving their responses to various questions as a group. The experts can ask each other questions in one sense and elect to have that conference in an open Court.

## 14.0 Family Law Rules

### **Division 15.5.5 Expert witness duties and rights 15.59 Expert witness's duty to the court**

An expert witness has a duty to help the court with matters that are within the expert witness's knowledge and capability.

The expert witness's duty to the court prevails over the obligation of the expert witness to the person instructing, or paying the fees and expenses of, the expert witness.

- a) The expert witness has a duty to give an objective and unbiased opinion that is also independent and impartial on matters that are within the expert witness's knowledge and capability.
- b) conduct the expert witness's functions in a timely way.
- c) avoid acting on an instruction or request to withhold or avoid agreement when attending a conference of experts.
- d) consider all material facts, including those that may detract from the expert witness's opinion.
- e) tell the court:
- f) if a particular question or issue falls outside the expert witness's expertise; and
- g) if the expert witness believes that the report prepared by the expert witness:
- h) is based on incomplete research or inaccurate or incomplete information; or
- i) is incomplete or may be inaccurate, for any reason; and
- j) produce a written report that complies with rules 15.62 and 15.63.
- k) The expert witness's duty to the court arises when the expert witness:
- l) receives instructions under rule 15.54; or
- m) is informed by a party that the expert witness may be called to give evidence in a case.
- n) An expert witness who changes an opinion after the preparation of a report must give written notice to that effect:
- o) if appointed by a party--to the instructing party; or
- p) if appointed by the court--to the Registry Manager and each party.
- q) A notice under sub rule (4) is taken to be part of the expert's report.

### **15.60 Expert witness's right to seek orders.**

- (1) Before final orders are made, a single expert witness may, by written request to the court, seek a procedural order to assist in carrying out the expert witness's function.

Note: The written request may be by letter and may, for example:

- (a) ask for clarification of instructions.
- (b) relate to the questions mentioned in Division 15.5.6; or (c) relate to a dispute about fees.

- (2) The request must:
  - (a) comply with sub rule 24.01 (1); and
  - (b) set out the procedural orders sought and the reason the orders are sought.
- (3) The expert witness must serve a copy of the request on each party and satisfy the court that the copy has been served.
- (4) The court may determine the request in chambers unless:
  - (a) within 7 days of being served with the request, a party makes a written objection to the request being determined in chambers: or
  - (b) the court decides that an oral hearing is necessary.

#### **15.61 Expert witness's evidence in chief**

- (1) An expert witness's evidence in chief comprises the expert's report, any changes to that report in a notice under sub rule 15.59 (5) and any answers to questions under rule 15.66.
- (2) An expert witness has the same protection and immunity in relation to the contents of a report disclosed under these Rules or an order as the expert witness could claim if the contents of the report were given by the expert witness orally at a hearing or trial.

#### **15.62 Form of expert's report**

- (1) An expert's report must:
  - (a) be addressed to the court and the party instructing the expert witness.
  - (b) have attached to it a summary of the instructions given to the expert witness and a list.
  - (c) be verified by an affidavit of the expert witness.
- (2) The affidavit verifying the expert's report must state the following:

*'I have made all the inquiries I believe are necessary and appropriate and to my knowledge there have not been any relevant matters omitted from this report, except as otherwise specifically stated in this report.*

*I believe that the facts within my knowledge that have been stated in this report are true.*

*The opinions I have expressed in this report are independent and impartial.*

*I have read and understand Divisions 15.5.4, 15.5.5 and 15.5.6 of the Family Law Rules 2004 and have used my best endeavours to comply with them.*

*I have complied with the requirements of the following professional codes of conduct or protocol, being [state the name of the code or protocol].*

*I understand my duty to the court, and I have complied with it and will continue to do so'.*

### 15.63 Contents of expert's report

An expert's report must:

- (a) state the reasons for the expert witness's conclusions.
- (b) include a statement about the methodology used in the production of the report; and
- (c) include the following in support of the expert witness's conclusions:
  - (i) the expert witness's qualifications.
  - (ii) the literature or other material used in making the report.
  - (iii) the relevant facts, matters and assumptions on which the opinions in the report are based.
  - (iv) a statement about the facts in the report that are within the expert witness's knowledge.
  - (v) details about any tests, experiments, examinations or investigations relied on by the expert witness and, if they were carried out by another person, details of that person's qualifications and experience.
  - (vi) if there is a range of opinion on the matters dealt with in the report--a summary of the range of opinion and the basis for the expert witness's opinion.
  - (vii) a summary of the conclusions reached; (viii) if necessary, a disclosure that:
    - A. a particular question or issue falls outside the expert witness's expertise.
    - B. the report may be incomplete or inaccurate without some qualification and the details of any qualification; or
    - C. the expert witness's opinion is not a concluded opinion because further research or data is required or because of any other reason.

## 15.0 Consequences of non-compliance

If an expert witness does not comply with these Rules, the court may:

- (a) order the expert witness to attend court.
- (b) refuse to allow the expert's report or any answers to questions to be relied on.
- (c) allow the report to be relied on but take the non-compliance into account when considering the weight to be given to the expert witness's evidence; and
  - (i) take the non-compliance into account when making orders for:
    - (ii) an extension or abridgment of a time limit.
    - (iii) a stay of the case.
    - (iv) interest payable on a sum ordered to be paid; or
    - (v) costs.

Note: For the court's power to order costs, see subsection 117 (2) of the Act.

## 16.0 Effective Date

This Resource Pack is effective from 1 July 2021.