Technical Information Paper

ACTING AS AN EXPERT WITNESS

(EXPOSURE DRAFT – 1 January 2014)

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**Technical Information Papers**

The principal objective of a Technical Information Paper (TIP) is to reduce diversity of practice by identifying commonly accepted processes and procedures and discussing their use. A TIP is designed to be of assistance to property professionals and informed users alike.

A TIP will do one or more of the following:

- provide information on the characteristics of different types of asset that are relevant to the advice,
- provide information on appropriate practices and their application,
- provide information that is helpful to property professionals in exercising the judgements they are required to make in specific situations.

A TIP does not:

- provide training or instruction,
- direct that a particular approach or method should or should not be used in any specific situation.

The contents of a TIP are not intended to be mandatory. Responsibility for choosing the most appropriate approach is the responsibility of the property professional based on the facts of each task.

Whilst TIPs are not mandatory, it is likely they will serve as a comparative measure of the level of performance of a Member. They are an integral part of “Professional Practice”.

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1.0 ACTING AS AN EXPERT WITNESS IN COURTS AND TRIBUNALS

1.1 Objective

The objective of this TIP is to provide a summary of the current principles of dealing with Expert Evidence in Australia and New Zealand.

1.2 Introduction

In 1900 Judge Leonard Hand observed ‘no one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how to do it best.’ (Justice Leonard Hand, “Historical and Practical Considerations Regarding Expert Testimony” (1901) 15 Harvard Law Review 40).

Since then the complexity of litigation and the issues which need to be decided have increased significantly. There has also been criticism of expert witnesses in the areas of perceived bias and a failure to adequately set out reasoning.

The basic rationale for permitting admission of expert opinion evidence, is that the subject matter of the evidence is such that “ordinary persons are unable to form a sound judgment … without the assistance of (those) possessing special knowledge or experience … which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience (see HG v The Queen (1999) 197 CLR 414 at [58].

The primary duty of an expert giving evidence in Courts is to apply specialised knowledge to assume the observed facts, and to form an opinion based on that specialised knowledge. The various codes of conduct adopted by the Courts in the past decade emphasise that in giving this expert opinion, the paramount duty of an expert is to assist the Court to understand the evidence in the case.

In recent years there have been significant changes to the way that the evidence of the expert witness is presented in some jurisdictions and this TIP outlines the present way to adduce expert evidence.

1.3 Scope of this TIP

This TIP applies to Members involved in the provision of expert evidence. It should be used in conjunction with other TIPs and/or practice standards which are either over-arching or directly applicable to the issues involved.

1.4 Background

Although there has been many attempts to address the presentation of expert evidence by Courts and Tribunals in the past, a comprehensive report was prepared by the Law Reform Commission of NSW (Report 109 – Expert Witnesses) in June 2005 which investigated recent developments in Australian and international jurisdictions. In NSW the Uniform Civil Procedure Rules 2005 was introduced to comprehensively codify the use of expert evidence.

The following Courts have formulated practice directions and rules to guide experts:

- Family Court Rules
- Land and Environment Court Practice Directions
- Uniform Civil Procedure Rules, Schedule 7 (formerly Schedule K Supreme Court Rules)
- Federal Court of Australia Practice Notice CM7: Expert Witnesses in Proceedings in the Federal Court of Australia (1 August 2011 – see annexed hereto).

Similar legislation and Codes of Practice have been introduced in all States of Australia and also relating to each of the jurisdictions of the Supreme Court, Federal Court, Family Court as well as Specialised Jurisdictions (eg Land and Environment Court of NSW). Codes of conduct have also been introduced in the District and High Courts of New Zealand.
1.5 **Overriding purpose**

The Courts have an expectation that the parties including expert witnesses will work to achieve the just, quick and least expensive resolution of the real issues in the proceedings.

1.6 **Duties of an Expert Witness**

An expert witness has a number of conflicting duties which need to be managed and resolved correctly. The most important is the duty to the Court and is to be treated as a paramount and overriding duty. At its core is an obligation to assist the Court in arriving at the truth. It should be borne in mind that, it is the Court, which makes the ultimate decision and the role of the expert is to educate the Court to the same level of understanding as the expert on the particular issue in question. The expert is not an advocate for a particular party and should remain true to his profession and refrain from attempting ‘to win’ the case for the client. However an expert witness is to ensure that all of the relevant points of his client’s case are brought to the attention of the Court.

An expert has a duty to comply with the directions or orders made by the Court. These directions should be provided to the expert by the legal practitioner conducting the matter. They are usually straightforward and typically, determine whether there will be a joint conference, the timeframes for serving reports, the dates for hearing, define terms on which experts are to be briefed and the like. In Australia Court directions are usually made by a Registrar sitting in Court but it is not unusual for a Judge to give directions or make orders. In New Zealand such directions will normally be made by the Judge, often by consent of the parties.

The expert has a duty to maintain his reputation by providing competent advice to the Court (reasoned conclusions are preferred to bold conclusions) and refusing to put forward arguments that lack substance or credibility in an attempt to unreasonably advance the client’s case. It is inappropriate to allow the instructing lawyer or any outside party to ‘filter’ the expert’s report. The lawyer may provide advice on legal or procedural matters and may even provide advice as to the scope of the report and its relevance to the proceedings. With Joint Conferencing it is inappropriate to allow the instructing lawyer or any outside party to interfere with the independent expert witness process once a Joint Conference has commenced. The exception to this is where a facilitator is engaged to assist the experts to produce a credible Joint Report.

The duty to the client includes confidentiality, diligence especially in presenting the case fully and fairly, punctuality, not to mislead on the prospects of success in an effort to obtain instructions and to quote fairly and transparently.

The duty is to be truthful as to fact, honest as to opinion and complete as to coverage of relevant matters. The duty is the same whether or not the Expert is giving evidence in Court or to a Tribunal on oath or not on oath. Expert evidence must be independent, objective and unbiased.

1.7 **Code of Conduct**

The various Practice Notes published by the Courts and legislation often refer to a ‘code of conduct’ which usually sets out specifically, the expert’s duties, reporting requirements and includes an undertaking for the expert to have read and agree to be bound by the code.

1.8 **Relevant legislation**

The expert should be familiar with the legislation and Court Practice Notes relevant to the jurisdiction in which he is practising.

For valuation compensation matters consider listing each heading of compensation under the relevant Act, even if a sub-section has “nil” or “not applicable”, or in the case of professional expenses – “to be determined by the Court”. It demonstrates to the Court that the expert has considered each of the relevant heads of compensation under the Act.

1.9 **Taking Instructions**

Before accepting an instruction the expert should advise the client that the expert’s overriding duty is to assist the Court, and that the expert’s opinion is not negotiable, and that at times, it may be necessary to provide advice and explanations to the Court which may be contrary to the client’s interest. The duty to the Court is not altogether inconsistent with the expert’s duty to the client. It is in the client’s interest for the expert to be a credible witness and the expert’s recommendations accepted by the Court.

On receiving instructions to act as an expert witness the expert should follow the below main steps:

1. Identify, read and understand the relevant legislation, Court practice directions and Court rules.
2. Obtain a copy of all relevant directions that have been made by the Court during the pre trial phase of the matter.
3. Read the instructions and confirm that they are correct and appropriate to the area of expertise. If necessary provide assistance in correctly framing instructions bearing in mind that it is a good practice to annex a copy of the instructions to the report.

4. The expert should engage with the client and the legal advisers if already appointed and obtain clear and written instructions as to the expert report and the issues to be addressed in the proceedings. If there is no legal adviser currently appointed such a request is to be made of the client.

5. If the expert requires any particular information that will assist him in preparing evidence which he cannot obtain, he needs to ask his instructing lawyers to take appropriate steps such as issuing subpoenas and notices to produce and/or seeking Court orders for the discovery of documents.

6. Reach agreement on remuneration. In the case of Joint Experts and Court-Appointed Experts the parties are usually jointly and severally liable for the expert’s fees which are usually fixed by the Court.

If the expert is being considered for appointment as a ‘parties’ single expert’ (a jointly instructed expert) then it would be inappropriate for the legal representative to elicit the expert’s opinion on a relevant issue dealing with the matter prior to formal instruction. However, the expert is entitled to know who the parties are (and, if relevant, the other experts) to ensure that there is no conflict of interest.

1.10 Conflict of Interest

If an expert has acted as a negotiator for one party, he cannot then act jointly for both parties. Also if an expert has acted for both parties (such as a determining valuer in an acquisition matter) then he cannot act for one of the parties in any subsequent court action unless agreed to by both parties.

1.11 Presentation of Expert Evidence

The traditional process of adducing evidence is set out below.

1. Statement of Evidence (or expert report) is where the expert sets out his opinion on the issues in question. It should ideally be a complete document without the need for further amendment. (See supplementary reports below)

2. Statement in Reply – this gives the expert the opportunity to respond to issues stated by the opposing party’s expert with which he does not agree. It is not an opportunity to amplify or amend the Statement of Evidence.

3. Supplementary Reports – (a) Generally speaking supplementary reports require the leave of the Court and/or consent of the parties depending on the circumstances. (b) On the other hand if an expert changes his opinion then there is a duty on the expert to advise the parties and immediately provide a supplementary report.

4. Joint conferencing - where two or more experts confer to discuss the questions put to them by the Court or by the parties which leads to the preparation of a Joint Expert Report. This conference is conducted as a conclave, and without the interference or referral to any outside parties, unless the Court directs otherwise.

Some Courts may direct the experts to go straight to Joint Conferencing without first preparing separate reports. If the issues in dispute can be resolved less expensively or quickly by going directly to Joint Conferencing, then the expert should advise the client accordingly.


6. The expert’s evidence is generally tested in Court in two main ways.

   a. Concurrent evidence - where two or more experts’ are sworn in and questioned on their evidence at the same time. (see below under ‘Concurrent Evidence’)

   b. Separate cross-examination of each expert retained by each party.

1.12 Acting as an Advocate

A member is entitled to act as an advocate for a client however the advocacy role is subject to proper professional practice in conducting negotiations on the client’s behalf and that role must be declared to all parties. A member must not act as an advocate then as an expert in the same matter.
2.0 THE EXPERT’S REPORT/STATEMENT OF EVIDENCE

2.1 General Points

An acknowledgement that the expert has read the ‘Code of Conduct’ and agrees to be bound by it should be contained in the first report prepared (i.e., statement of evidence (expert report) or Joint Expert Report). If this is not done then there is a possibility (depending on jurisdiction) that the report cannot be admitted into evidence without the leave of the Court.

In Australia, a written report on the issues to be addressed is nearly always required. Multiple originals are always required which are usually filed by the instructing lawyer in the relevant Court and stamped with the Court’s seal and dated. The Court will retain one original, the instructing lawyer will keep another and an original will be served on the other parties. There is no similar requirement in New Zealand.

The starting point for any expert report is to obtain and
1. read the relevant Court Practice Note (or Direction),
2. read the Points of Claim and Points of Defence (where available),
3. read any relevant Orders from the Court.

The report should be written to a level of detail that actually educates the ‘decision maker’ to the same degree of understanding as the expert. Direct basic ‘Plain English’ language is to be preferred and the report should be capable of being understood by the average person. Technical terms should be fully and clearly explained.

A Summary should be provided at the front of the report.

Every page of the report should be numbered. Ideally, the numbering should run consecutively from 1 onwards including the annexures so that they can be easily found when the report is being dealt with in the Court.

All paragraphs should be numbered or referenced.

A Curriculum Vitae or equivalent should be attached to the report that sets out the expert’s qualifications as an expert on the issue the subject of the report. This could include the expert’s experience, qualifications, professional membership, papers written and presentations.

An expert’s report must (in the body of the report or in an annexure to it) include the following:

a. the expert’s reasons for each opinion expressed,

b. any literature or other materials utilised in support of the opinions,

c. if applicable, that a particular issue falls outside the expert’s field of expertise,

d. any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out,

e. If an expert witness who prepares an expert’s report believes that it may be incomplete or inaccurate without some qualification, then the qualification must be stated in the report.

f. If an expert witness considers that his 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.

In New Zealand, the report must also include:

a. the issues the evidence of the expert addresses and that the evidence is within the expert’s area of expertise,

b. the facts and assumptions on which the opinions of the expert are based.

If an expert wishes to make a minor correction or update a report, it may be possible to do this orally at the hearing with the leave of the Court. The instructing lawyer will have to be informed beforehand and will, after the expert has been sworn in, say to the expert ‘Do you wish to make any correction to your report?’

But note, as previously mentioned, major changes, additions or amendments to the report require a more formal procedure and will incur further costs (without consent of the other side, a Notice of Motion will be required) especially if expert reports have been served.

Again, if the expert changes his opinion, a supplementary report should be provided as soon as possible. Generally, a change of opinion comes about from a material change in the available evidence or a material change in the way the expert has earlier considered the evidence. Supplementary Reports are not automatically admitted into evidence. The problem becomes more acute if the report appears to introduce fresh evidence at a late stage (the issue is procedural fairness to the other party).
3.0 SUPPORTING EVIDENCE

The Court needs to understand the expert’s reasoning process and the legal representatives are entitled to test the basis upon which the expert’s opinion is formed. It is better to have some evidence than no evidence in support of an expert’s opinion. Generally, it is not satisfactory to simply answer ‘due to my 20 years experience’. However in some cases when all avenues of enquiry and analysis have been exhausted, and there is no evidence to support an expert’s opinion then it is appropriate and relevant for the expert to state that he relies upon his experience and judgement alone. Reasoned conclusions are of more assistance than bold conclusions.

Other supporting evidence can be obtained from State GIS systems, austlii.edu.au, government legislative websites, web based viewing/mapping sites and private and public property data providers etc.

4.0 CATEGORIZING EVIDENCE

As part of the reasoning process that should be contained with the expert’s report, consider using a category of:

Primary Evidence – Evidence which provides a high standard of evidence to a particular issue. For example, in valuation matters, a comparable sale that sold at public auction, between willing but not anxious parties, both parties cognizant of the relevant facts, a reasonable marketing period, and excluding any special bid by a special purchaser. It is the main basis for the opinion expressed in the report.

Secondary Evidence – Evidence that does not meet the above standard. In valuation matters, sales to acquiring authorities, or sales that did not meet the ‘market value’ definition, but can be readily adjusted to market value.

Background information – evidence that does not fit the two categories above but provides some guidance to the expert’s rationale exercise. In valuation matters it may relate to sales that underpin a minimum value in a certain area or assists in tying the above sales evidence into the fabric of value in the surrounding areas.

5.0 ATTENDING COURT

The veracity of the expert should be above reproach. Veracity has a somewhat wide connotation and although an expert witness may not consciously be untruthful, it is possible that he may be biased towards his client. He owes a duty to the Court as the Court seeks to gain assistance from the expert. It is important to have confidence in the opinions that he expresses. A primary requirement is to ensure that the expert report is thoroughly prepared and that the expert is familiar with all facts upon which conclusions are formed. Knowledge plus careful preparation helps greatly to engender self-confidence.

At the hearing the expert is sworn in by taking an oath or affirmation. The witness is then asked, for the record, to state his name address and occupation. The witness will be asked whether he has produced a report or reports to be used in the proceedings. After the report/s have been identified and if there are no objections from the other side they will be tendered into evidence and given an exhibit number.

It is a sound practice when attending Court to take a note of all documents tendered and the exhibit number given. The presentation of the expert’s evidence will be enhanced if he is able to refer to the tendered documents accurately and by their exhibit number so everyone in the Court room knows exactly to which document he is referring. Eg. ‘I refer to page 41 of Mr. White’s report which is exhibit Z’?

Remember that if the expert has numbered all the pages and paragraphs of his report, he will be able to refer to parts of his report efficiently and without delay.

When called to the witness box, the expert should take his notes and documents. The expert should not hesitate to request that documents be shown to him if that will assist him in giving evidence.

The expert should remain calm and polite and if necessary be firm but not argumentative.

The expert should listen to the question and if it is not understood ask for it to be repeated or clarified and if he has made an error, he should not try to cover it up.

It is a good practice for the expert to retain a sealed Court copy of the report to make absolutely sure that everyone is working from the same document.

The expert’s report (including a Joint Expert Report) is the ‘evidence in chief’ and will, among other things, form the basis upon which the expert is ‘cross examined’. The essential difference between ‘evidence in chief’ and ‘cross-examination’ is that in the case of ‘cross examination’ leading questions can be asked of the witness.

Expert evidence must be objective, independent and unbiased. Opinion should not be exaggerated or seek to obscure alternative views.
6.0 **TECHNIQUES USED IN CROSS-EXAMINATION**

In the main, ‘yes’ or ‘no’ answers are rarely acceptable to the Court. Usually the answer will accept or reject part of the question or the assumption it contains, or qualifies the whole or a part of the question.

Broadly speaking there are four (4) techniques utilised in cross-examination.

1. **Confrontation:** The cross examiner seizes on a part of the evidence, and then confronts the expert with a fact or an opinion that is directly contradictory in order to elicit a reaction. The expert may be confronted with a fact that is obviously true or that is common ground or that clearly appears to be correct or incorrect, derived from an internal contradiction in the expert's own evidence. The cross examiner may be excessively polite or he may be aggressive.

   In any case, he is doing his best to present his client's case. Confrontation is usually preceded by a passage of cross examination by which it is sought to have the witness commit himself to some fact, proposition or course of reason. When the witness has committed himself, he is confronted and the witness' reaction is noted particularly by the Court.

2. **Probing:** This is a technique capable of wide variation to meet a range of circumstances. In essence, probing means pressing for more details. A cross examiner may probe because he feels a witness is untruthful and if he is pressed for more detail, he may give himself away. The cross examiner may be wanting to prepare the way for a confrontation or seeking some weakness in the expert's evidence that he suspects is present or to expose an absurdity or a contradiction.

3. **Insinuation:** To insinuate here in this context, means to endeavour step by step to see whether and the extent to which the witness will accept or agree to facts or opinions that tell in favour of the side whom the cross examiner represents. It can be done gently or it can be done strongly. It can be employed alone or in conjunction with other techniques.

4. **Undermining:** This technique is rather hard to describe, but speaking generally, it consists of an indirect challenge. An expert witness puts himself forward as an honest and responsible person, aware of the oath which he has undertaken. The witness will be undermined by showing that some of his published works or conclusions have been recently discredited or disproved by others in the same field.

Cross examination is flexible and effective. An expert witness need not view the prospect of being cross examined with alarm, however it should certainly put him on guard that he should check and double check his report, his reasoning and his conclusions. He should strive to express himself as accurately and completely as possible. He must be prepared to be frank and to concede immediately anything that should be conceded. A successful cross examination can severely weaken or destroy an expert's testimony, however a cross examination that reveals the accuracy of an expert's report, the logic of his reasoning and the soundness of his conclusions, enhances the weight and reliability of his opinion and his standing as an expert.

If after cross-examination, it appears necessary to clarify some of the answers given by the expert, leave can be sought and usually obtained for 're-examination' of the matter needing clarification (as opposed to further evidence). This is often a frustrating exercise for the expert witness because leading questions cannot be asked during re-examination with the consequence that the witness may not then have the opportunity to further elaborate on a point or issue.

The expert must ensure that

a. the answers are comprehensive,

b. the opinions are fully expressed if given the opportunity,

c. all points are covered.

7.0 **JOINT CONFERENCING**

The Court may direct experts to confer before the hearing to endeavour to reach agreement on any matters in issue, produce a joint report setting out the matters on which they agree, the matters on which they disagree and the reasons for any disagreement and agreement, and to base any joint report on specified facts or assumptions of fact.

An expert witness must exercise his 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.

If experts are directed by the Court to confer, experts are to ensure that any joint conference is a genuine dialogue between experts in a common effort to reach agreement with the other expert witness about the relevant facts and
issues. Any joint report is to be a product of this genuine dialogue and is not to be a mere summary or compilation of the pre-existing positions of the experts.

A product of the Joint Conferencing process should be a narrowing and a clarification of the issues in dispute. The issues requiring adjudication form the basis of discussion and argument within the Court room and should be dealt with in a logical sequence.

8.0 JOINT EXPERT REPORTS

A Joint Expert Report is a document produced for the Court by two or more experts, usually at the Direction of the Court and at times requested by mutual agreement by the parties.

The key to a good Joint Expert Report is for the experts to jointly:-

1. distil those elements and issues of disagreement between the experts that require adjudication. State the reason/s for the disagreement.
2. place those issues for adjudication into a logical format that makes it easy for the Judge, Commissioner or Member to clearly see the competing arguments and supporting evidence. A point and counter-point layout in a landscape table is recommended and allows for a narrative of the competing arguments and sets out the respective reasoning between the experts,
3. identify those areas of agreement between the experts, those areas where agreement cannot be reached and the reason/s for the disagreement.
4. provide a logical sequence of matters or issues to be adjudicated which could be used as a basis for an Agenda for questioning in the witness box.

A Joint Expert Report should not be

1. a simple regurgitation of the respective Statements of Evidence, or Evidence in Reply,
2. a “this is my half done, now you do your half” approach, and without any correlation between points of disagreement,
3. an overly verbose and extensive document (but must be comprehensive enough to fully state the reasoning and answers the questions put to the experts)

Annexure A refers.

9.0 CONCURRENT EVIDENCE

If the parties are to retain their own experts (as opposed to ‘parties’ single expert’ or ‘court-appointed experts’) the Court may still direct that the expert evidence be presented concurrently by having all the experts in relation to a particular topic sworn in at the same time. The written reports are then tendered together with the document which reflects the experts’ pre-trial discussion (see Joint Expert Report above). The Court may identify the topics that require discussion in order to resolve any outstanding issues.

What often follows is a discussion, which is managed by the Court, so that the topics requiring oral examination are ventilated. The process enables experts to answer questions from the Court, the advocates and, most importantly, from their professional colleagues. It allows experts to express in their own words the view that they have on a particular subject. There have been cases where as many as six experts have been sworn to give evidence at the same time.

The merits of giving evidence concurrently is that it allows a greater discussion within the Court room and allows experts to further elaborate on an issue rather than being tightly controlled in the formality of adducing and testing evidence.

10.0 ADDITIONAL READING

Such reading should include relevance to your jurisdictional environment.

An example of further reading is:

The Expert Witness in the New Millennium - Justice Abadee, 2 September 2000
11.0 Effective Date

This TIP is effective from 1 xxxx 2014.
ANNEXURE A

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.
c. the matters the experts agree upon,
d. the matters the experts disagree upon,
e. reasons for disagreement and agreement,
f. reasoning process to reach their position,
g. no outside influence.
h. include any evidence in reply,
i. 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,
j. 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,
k. all experts are to sign and date the JER, and
l. 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 experts methodology in case the Court prefers that methodology),

1. Title page – JER – type, Expert’s names, Proceedings Number, Parties, Addressed to the LEC, Date of JER,
2. Court Directions, the timeframe and whether tasks were completed in accordance with the Court Directions, Expert Witness Code of Conduct acknowledgement, any Statement of Facts acknowledgement,
3. Abbreviations used in the JER - experts names reduced to initials (this tends to remove personalities and potential conflict between the experts); parties, relevant documents ie town planning instruments, government departments reduced to initials or mnemonics,
4. Erratum: Correct any error contained within any earlier Statements of Evidence or Evidence in Reply.
5. Issues upon which the experts agree (and why they agree),
6. A summary of each expert’s position, and supporting evidence in brief,
7. 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.
8. 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.
9. 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 considered appropriate.
10. 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).
11. 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.
12. Conclusion of opinion by each Expert.
13. Objections or notations for the Court to consider. For example, the addition of late evidence by the other expert.
14. Signature Blocks.
ANNEXURE B

THE FEDERAL COURT AND THE FEDERAL MAGISTRATES COURT (AUSTRALIA)

1.0 INTRODUCTION

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

Original jurisdiction

"Section 19
(1) The Court has such original jurisdiction as is vested in it by laws made by Parliament.
(2) 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.

1.2 The jurisdiction of the Federal Court includes:

 Admiralty
 Industrial property
 Taxation
 Native Title

The Federal Magistrates Court

1.3 It was decided in 1999 that the Commonwealth establish a Federal Magistry. 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 Magistrates Court is a creation under Part III of the Constitution.

Trans-Tasman proceedings

1.4 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.

1.5 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.

12.0 EXPERTS AND EXPERTS' REPORTS

12.1 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.

12.2 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.
12.3 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)).

12.4 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)).

12.5 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.

12.6 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.

12.7 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).

12.8 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). He must also comply with the practice note (r.23.13(1)(h)).

12.9 Rule 23.15 addresses the manner in which the expert might give evidence at trial. There are further powers given to the Court in r.5.04. In particular, item 16 of r.5.04 permits the Court to limit the number of expert witnesses to be called.

13.0 COURT EXPERT

13.1 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.

13.2 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)

13.3 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.

13.4 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.

13.5 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.

13.6 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

(Note – the pleadings of Pt 23 are entirely dealing with the concept of the expert’s report and the duties of the expert in preparing that report and giving evidence before the Court (see r.23.13)).
ANNEXURE C

FAMILY LAW COURTS (AUSTRALIA)

1.0 FAMILY LAW ACT

- Covers the field of jurisdiction in respect of families

  Parenting Disputes
  - All children, whether a child or a married couple, defacto relationship or no relationship

  Property Disputes
  - Parties to the marriage Part viii
  - Defacto couples Part viii AB (including same sex couples who have separated after 1 March 2009)

Administered under Family Law Act (1975)

- Two Courts exercise jurisdiction

  Family Court of Australia
  - Judges
  - Court of Appeal (including appeals from the Federal Magistrates Court)

  Federal Magistrates Court of Australia
  - Magistrates
  - Deal with other Federal jurisdictions as well. The Family Law jurisdiction managed separately in specific lists

- The Two Courts are managed separately though there are plans for a Federal Government bill to merge the Courts.
- The Family Law Act empowers judges to make laws of Court.
  - Family Law Rules
  - Practice Directions
- Federal Magistrates Court Rules made by Federal Magistrates

Single Expert Rules Procedure

- Single experts:
  - Identified after consultation between the parties
  - Jointly instructed in writing
  - Report to the Court (via the Applicant)
  - Required for cross examination where appropriate
  - Subject to questions, in writing, in advance of the hearing where appropriate.

Practice of “Shadow Experts”

- Either party may retain their own Shadow Expert to advise and assist them to:
  - Instruct the Expert
  - Review information provided to the Expert
  - Review of Single Expert methodology and report
  - Prepare for cross examination of the Expert

- The Court has a general discretion to admit adversarial expert evidence, where appropriate and order conferences of experts
- Expert evidence:
  - Division 15.2 of the Federal Magistrates Court Rules 2001
  - Regulation 15.12 of the FMC Rules permits the Court to grant leave to a party to adduce evidence from another (adversarial expert)


**Single Expert Rules**

- The Family Court relied on parties to lead evidence of an expert on an adversarial basis until recently
- The new Rules commenced on 29 March 2004
- Principal objectives:
  - Tighter control over appointment of experts
  - Confining expert evidence to issues identified by the Court
  - Confining experts to Single Joint Experts
  - Jointly instructing in the matter and payment
  - Eliminate an adversarial approach to expert evidence
  - Eliminate duplication of costs

**Advent of Shadow Experts**

- With the introduction of Single Joint Experts the new concept of “Shadow Experts” emerged
- Concern that Single Joint Experts meant “trial by expert”
- Arguments as to instructions that are given to Single Joint Experts
- A need for a Shadow Expert to be retained:
  - Due to further investigation done by a Single Expert
  - To review and check the work of a Single Expert
  - Assist in preparation and conduct of cross examination of the Single Expert

**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

**Expert’s Obligations (in respect of these matters)**

- An Expert witness should provide independent assistance to a Court by way of objective and unbiased opinion
- An Expert witness should state the facts or assumptions upon which his or her opinions are based
- An Expert witness should not provide evidence in regard to a particular question or issue that falls outside that Expert’s expertise
- 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

**Report Writing**

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

**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.
Conference between Experts

- The Family Court Rules provide for a Single Expert and also 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 are able to ask each other questions in one sense and elect to have that conference in an open Court.

Family Law Rules

Division 15.5.5 Expert witness duties and rights

15.59 Expert witness’s duty to the court

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

(2) 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.

(3) The expert witness has a duty to:

(a) 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:
   (i) if a particular question or issue falls outside the expert witness's expertise; and
   (ii) if the expert witness believes that the report prepared by the expert witness:
      (A) is based on incomplete research or inaccurate or incomplete information; or
      (B) is incomplete or may be inaccurate, for any reason; and

(f) produce a written report that complies with rules 15.62 and 15.63.

(4) The expert witness's duty to the court arises when the expert witness:

(a) receives instructions under rule 15.54; or
(b) is informed by a party that the expert witness may be called to give evidence in a case.

(5) An expert witness who changes an opinion after the preparation of a report must give written notice to that effect:

(a) if appointed by a party--to the instructing party; or
(b) if appointed by the court--to the Registry Manager and each party.

(6) A notice under sub rule (5) 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 of any documents relied on in preparing the report; and
   (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.

15.64 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

(d) take the non-compliance into account when making orders for:

(i) an extension or abridgment of a time limit;

(ii) a stay of the case;
(iii) interest payable on a sum ordered to be paid; or

(iv) costs.

Note: For the court’s power to order costs, see subsection 117 (2) of the Act.
Schematic diagram of admissibility of evidence under the *Evidence Act*

1. Is the evidence relevant? *(See Part 3.1)*
   - Yes
   - No

2. Does the hearsay rule apply? *(See Part 3.2, See also Part 3.4 on admissions and Part 3.8 on character evidence)*
   - Yes
   - No

3. Does the opinion rule apply? *(See Part 3.3, See also Part 3.4 on admissions and Part 3.8 on character evidence)*
   - Yes
   - No

4. Does the evidence contravene the rule about evidence of judgments and convictions? *(See Part 3.5)*
   - Yes
   - No

5. Does the tendency rule or the coincidence rule apply? *(See Part 3.6, See also Part 3.8 on character evidence)*
   - Yes
   - No

6. Does the credibility rule apply? *(See Part 3.7, See also Part 3.8 on character evidence)*
   - Yes
   - No

7. Does the evidence contravene the rules about identification evidence? *(See Part 3.9)*
   - Yes
   - No

8. Does a privilege apply? *(See Part 3.10)*
   - Yes
   - No

9. Should a discretion to exclude the evidence be exercised or must it be excluded? *(See Part 3.11)*
   - Yes
   - No

**THE EVIDENCE IS ADMISSIBLE**