



NSW LAW REFORM COMMISSION

# REPORT 109

## Expert witnesses

June 2005

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# NEW SOUTH WALES LAW REFORM COMMISSION

## Letter to the Attorney General

To the Honourable Bob Debus MP  
Attorney General for New South Wales

Dear Attorney

### Expert witnesses

We make this Report pursuant to the reference to this Commission received 16 September 2004.

A handwritten signature in black ink, appearing to read 'Adams', is positioned above the typed name of the Chairperson.

The Hon Justice Michael Adams  
Chairperson

### Head of Division

Professor Richard Chisholm

### Commissioners

The Hon Justice Michael Adams

Professor Michael Tilbury

Dr Duncan Chappell

The Hon Justice David Kirby

The Hon Gordon Samuels AC CVO QC

The Hon Hal Sperling QC

June 2005

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## Terms of Reference

Pursuant to section 10 of the *Law Reform Commission Act 1967 (NSW)*, the Attorney General, the Honourable Bob Debus MP, referred the following matter to the Law Reform Commission by letter dated 16 September 2004:

1. To inquire into and report on the operation and effectiveness of the rules and procedures governing expert witnesses in New South Wales.
2. In undertaking this inquiry, the Commission should have regard to:
  - recent developments in New South Wales and other Australian and international jurisdictions in relation to the use of expert witnesses, including developments in the areas of single or joint expert witnesses, court-appointed expert witnesses, and expert panels or conferences;
  - current mechanisms for the accreditation and accountability of expert witnesses for the purposes of court proceedings, including the practice of expert witnesses offering their services on a “no win, no fee” basis;
  - the desirability of sanctions for inappropriate or unethical conduct by expert witnesses; and any other related matter.
3. The Commission to report no later than 31 March 2005.

## Participants

Pursuant to s 12A of the *Law Reform Commission Act 1967 (NSW)* the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

Head of Division

Professor Richard Chisholm

Commissioners

The Hon Justice Michael Adams

Professor Michael Tilbury

Dr Duncan Chappell

The Hon Justice David Kirby

The Hon Gordon Samuels AC CVO QC

The Hon Hal Sperling QC



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	Ms Lisa Hemingway
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## RECOMMENDATIONS

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### RECOMMENDATION 6.1 – see page 83

The *Uniform Civil Procedure Rules 2005* (NSW) should be amended to provide that in civil proceedings parties may not adduce expert evidence without the court's permission. (Appendix C, Sch 1 Item [2].)

### RECOMMENDATION 6.2 – see page 103

Rule 31.19(6) of the *Uniform Civil Procedure Rules 2005* (NSW) should be repealed. (Appendix C, Sch 1 Item [4].)

### RECOMMENDATION 7.1 – see page 106

The *Uniform Civil Procedure Rules 2005* (NSW) should be revised to include provision for joint expert witnesses in addition to the existing provisions for court-appointed experts.

### RECOMMENDATION 8.1 – see page 126

The *Uniform Civil Procedure Rules 2005* (NSW) should be amended to include rules relating to joint expert witnesses as follows:

- A provision for an order that a joint expert witness be engaged by the parties affected;
- A provision for the joint expert witness to be selected by agreement between the parties affected or, failing agreement, by or in accordance with directions of the court;
- A requirement for consent by the expert being engaged as such;
- A prohibition against a party eliciting the opinion of a proposed joint expert witness before engagement, and provision for disclosure of any such communication;
- A provision allowing the joint expert witness to apply for directions, with advance notice to the parties affected;
- The same requirements in relation to the code of conduct as apply in the case of experts engaged by the parties individually;
- A provision allowing an affected party to put questions in writing to the joint expert witness for the purpose of clarifying the witness's report;
- A provision allowing an affected party to tender the joint expert witness's report and to tender answers by the joint expert witness to written questions put to the witness by a party, unless the court otherwise orders;
- A provision prohibiting the parties from calling other expert evidence on a question submitted to the joint expert witness, except by leave of the court;

- A provision allowing an affected party to examine the joint expert witness orally in court; and
- A provision for payment of the joint expert witness's fees. (Appendix C, Sch 1 Item 5.)

### **RECOMMENDATION 8.2 – see page 133**

The provisions of the *Uniform Civil Procedure Rules 2005* (NSW) relating to experts appointed by the court should be amended as follows:

- Selection of the court-appointed expert to be by the court or as the court may direct, in place of the existing provision for selection by the parties, by the court or as the court may direct;
- Adding a requirement for the expert's consent to being appointed;
- A right to examine in chief, cross-examine or re-examine the court-appointed expert as the court may direct, in place of the existing provision for cross-examination only; and
- Repeal of the existing provision which prohibits the parties from calling other expert evidence in relation to a question submitted to a court-appointed expert. (Appendix C, Sch 1 Items [7] – [10].)

### **RECOMMENDATION 9.1 – see page 139**

The code of conduct for expert witnesses (Schedule 7 to the *Uniform Civil Procedure Rules 2005* (NSW)) should be revised by:

- deleting those provisions that relate to matters of form rather than the experts' duties (those matters to be dealt with in rules or practice directions);
- providing that the duties of disclosure apply to oral evidence as well as to the contents of expert reports. (Appendix C, Sch 1 Items [11] to [13].)

### **RECOMMENDATION 9.2 – see page 143**

The *Uniform Civil Procedure Rules 2005* (NSW) should be amended to require that the fee arrangements with an expert witness be disclosed. (Appendix C, Sch 1 Item [3].)

**RECOMMENDATION 9.3 – see page 160**

There should be a provision, by rule or practice note, requiring that expert witnesses be informed of the sanctions relating to inappropriate or unethical conduct.

**RECOMMENDATION 10.1 - see page 164**

A review of the rules relating to expert witnesses should be planned and undertaken to coincide with the review of the *Civil Procedure Act 2005* (NSW) in five years time.

# 1. Introduction

- Terms of reference
- The conduct of the reference
- Overview of the report

## TERMS OF REFERENCE

1.1 In a letter to the Commission received on 16 September 2004, the Attorney General, the Hon R J Debus MP requested the Commission:

1. To inquire into and report on the operation and effectiveness of the rules and procedures governing expert witnesses in New South Wales.
2. In undertaking this inquiry, the Commission should have regard to:
  - recent developments in New South Wales and other Australian and international jurisdictions in relation to the use of expert witnesses, including developments in the areas of single or joint expert witnesses, court-appointed expert witnesses, and expert panels or conferences;
  - current mechanisms for the accreditation and accountability of expert witnesses for the purposes of court proceedings, including the practice of expert witnesses offering their services on a “no win, no fee” basis;
  - the desirability of sanctions for inappropriate or unethical conduct by expert witnesses; and any other related matter.
3. The Commission to report no later than 31 March 2005.

## THE CONDUCT OF THE REFERENCE

1.2 On receipt of the reference, the Commission called for preliminary submissions, which were received in October 2004.<sup>1</sup> The Commission published Issues Paper 25 in November 2004, which identified some of the major issues and encouraged people to make submissions on any aspect of the reference, including any issues of importance that may not have been addressed in the Issues Paper. It was circulated widely not only in the legal community but also among professional organisations and individuals known to have an interest in the issues, seeking their comments and assistance.

1.3 From December to March 2005, the Commission received a very large number of submissions in response to the Issues Paper – nearly 100 submissions comprising about 1,000 pages in total.<sup>2</sup> At the same time, the Commission conducted a number of consultations with legal practitioners, judges and individuals who regularly appear in court proceedings as expert witnesses not only in New South Wales but also

- 
1. Preliminary submissions are listed in Appendix G to this Report.
  2. Appendix H is a list of submissions the Commission received after the publication of Issuer Paper 25.

interstate.<sup>3</sup> Comments and suggestions from the written submissions and consultations have been taken into account in the formulation of the Commission's conclusions and recommendations.

1.4 At the time of the preparation of this report, the Civil Procedure Working Party established by the New South Wales Attorney General's Department was finalising its work on the *Civil Procedure Bill 2005* and the *Uniform Civil Procedure Rules* ("UCPR").<sup>4</sup> The UCPR, which consolidate the rules of court concerning civil procedure in the Supreme, District and Local Courts and some tribunals, contain provisions on expert witnesses. The bill and rules became law on 2 June 2005 (although the rules have not yet come into effect as at the time of the writing of this Report). The Commission held several meetings with the secretariat of the working party to ensure that the Commission's report would take account of these developments.

1.5 The Attorney General extended the time for this report at the Commission's request.

1.6 To assist in its deliberations and to facilitate the implementation of this report, the Commission sought the assistance of the parliamentary counsel who has produced a draft *Uniform Civil Procedure Rules (Amendment No\*) 2005*, a copy of which is contained in Appendix C of this report. It incorporates the principal recommendations made in this report in the form of proposed amendments to the UCPR.

## OVERVIEW OF THE REPORT

### Structure

1.7 This report consists of 10 chapters:

**Chapter 1** provides the background to the reference and an overview of the scope of the report.

**Chapter 2** provides a historical background to the use of expert witnesses.

**Chapter 3** reviews the current rules of court of the NSW Supreme, District and Local Courts relating to expert witnesses.

**Chapter 4** reviews reform developments in other jurisdictions, including England and Wales, Queensland, the Federal Court, the Family Court, and the Australian Capital Territory.

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3. Appendix I is a non-exhaustive list of the consultations the Commission undertook.

4. See para 3.6 of this Report.

**Chapter 5** examines the problem of “bias” in relation to expert witnesses and sets out the general approach the Commission takes in evaluating the various reform issues to be considered in Chapters 6-10.

**Chapter 6** deals with general procedural aspects of expert evidence including: the so called “permission rule”, disclosure obligations, conference requirements for experts, concurrent evidence (“hot-tubbing”), assumptions in expert evidence, and restrictions on a party’s ability to object to an expert’s qualifications and to the facts in an expert’s report.

**Chapter 7** proposes that the UCPR be amended to provide for joint expert witnesses, explaining the reasons for this measure and the relationship between joint expert witnesses and court-appointed experts.

**Chapter 8** contains proposed rules for incorporation in the UCPR to govern the use of joint expert witnesses. It also includes proposed amendments to the UCPR provisions concerning court-appointed experts.

**Chapter 9** deals with issues relating to standards of conduct for the expert witnesses, in particular: the code of conduct, “no win no fee” arrangements, accreditation of expert witnesses, and sanctions for inappropriate or unethical conduct.

**Chapter 10** deals with the future review of the rules relating to expert witnesses.

## Recommendations

1.8 The Commission’s recommendations are listed at the beginning of this report and have been cross-referenced to the relevant provisions of the draft amendments to the UCPR (Appendix C). In addition, they are included at the beginning of relevant parts of particular chapters so that the reader can identify the reasoning that forms the basis of the specific recommendation.

## Matters not included

### *Criminal law procedures*

1.9 Although the terms of reference are not expressly limited to civil law, it is clear that the reference was not intended to include criminal law. The developments referred to in paragraph 2 of the terms of reference all relate to developments in the area of civil law, and many would be inappropriate in criminal law.

### *Assessors and referees*

1.10 An *assessor* (in the present context) is a person appointed by the court to give it expert advice, but who is neither sworn nor subject to cross-examination, and



whose advice need not be disclosed to the parties.<sup>5</sup> Assessors are experts available to the judge to consult if the judge requires assistance in understanding technical evidence.<sup>6</sup> A *referee* (in the present context) is an expert who makes inquiries, evaluates competing information, makes findings of facts, and reports his or her findings to the court.

The court may (and usually does) adopt the referee's report, which then forms part, or even all, of the court's reasons for decision.<sup>7</sup> In New South Wales, the courts' powers to appoint assessors and referees and the related procedures are contained in the UCPR.<sup>8</sup> The terms of reference require the Commission to inquire into and report on the operation and effectiveness of the rules and procedures governing *expert witnesses*, and thus do not encompass assessors and referees. Accordingly, although the Commission has had regard to the provisions for assessors and referees, they are not the subject of recommendations in this report.

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5. *The Queen Mary* (1949) 82 LIL Rep 609; *The Ship Sun Diamond v The Ship Erawan* (1975) 55 DLR (3d) 138.
  6. *Richardson v Redpath* [1944] AC 62 at 70 (Viscount Simon LC).
  7. I Freckleton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd edition, LawBook Co, Pyrmont NSW, 2002) at 626.
  8. See *Uniform Civil Procedure Rules 2005* (NSW) r 31.35, r 20.13-20.24.

## 2. The Historical Context

- Introduction
- The expert jury
- Assessors
- The expert witness

*Far from being new, the putative problem of scientific expert testimony in common law courts has a long and rich history...discontent with scientific expertise in the courts has existed as long as there have been scientific expert witnesses, and by mid-nineteenth century, the debate over the meaning of these conflicts and the ways to resolve them had all the features that are blithely assumed to be new.<sup>1</sup>*

## INTRODUCTION

2.1 Since medieval times, the common law has grappled with issues as to when and how to use specialist or expert knowledge to assist it in the resolution of disputes. The law has, at different times and for different reasons, employed three distinct procedures for utilising such knowledge in its work: the expert jury, the assessor and the expert witness.

2.2 An understanding of the history behind each of these procedures helps to understand and evaluate many of the current issues and problems associated with expert witnesses. Moreover, the history of these three distinct procedures provides an interesting and important backdrop from which to consider recent reforms in this area of civil procedure.

## THE EXPERT JURY

2.3 The first known manner in which English law received expert knowledge was through the use of “expert juries.”<sup>2</sup> By the late 13th century, trial by jury had become the principal way in which both civil and criminal matters were resolved.<sup>3</sup> Trial by jury at this time resembled “an inquest of neighbours”:<sup>4</sup> the jury comprised members of the local community, who could have been familiar with the persons involved and with the contentious matter itself. These jurors did not evaluate evidence adduced before them, but rather disclosed to the Court their knowledge and preconceived opinions on

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1. T Golan, “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7 at 8.
  2. Note that literature on this topic frequently refers to expert juries as a “special jury”. However, the term “special jury” also refers to the longstanding practice in English law of forming juries, in certain circumstances, from individuals comprising the higher echelons of society. In order to avoid confusion, the terminology of “expert jury” will be used. For a discussion of special juries, see J Oldham, “The Origins of the Special Jury” (1983) 50 *University of Chicago Law Review* 137.
  3. Trial by jury superseded such methods as trial by ordeal, trial by oath and trial by battle.
  4. J Stone and W A N Wells, *Evidence Its History and Policies* (Butterworths, Sydney, 1991) at 16-19.

the matter. They frequently adjourned to make additional inquiries in the community on any point about which they were uncertain.<sup>5</sup>

2.4 In cases where there was perceived a need for jurors with specialist knowledge, a jury could be, and often was, composed either partially or completely of such experts. Thus, records from the 14th century indicate that juries were composed of “experts and men of particular trades, like the London juries of cooks and fishmongers, where one was accused of selling bad food”.<sup>6</sup> Similarly, all-female juries (or the jury of matrons *de ventre inspiciendo*) were used in cases of disputed pregnancy and paternity, and their tasks included a physical examination of the woman in question. This method of empanelling expert juries persisted over the following centuries, and appears to have been particularly frequent in urban areas and in matters involving practices or customs of a particular trade. Indeed, it has been said that, in trade disputes, the use of juries of men of that trade was “not only known, but exceedingly common in the city of London throughout the fourteenth century”.<sup>7</sup>

2.5 Similarly, records indicate that juries composed of merchants were used at times in commercial cases until the 18th century. However, in the 18th century, and primarily under the influence of Lord Mansfield as Chief Justice of the Court of King’s Bench,<sup>8</sup> the practice of using merchant juries became a regular occurrence in commercial cases. Lord Mansfield explained his reasons for using expert juries in the following terms:

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5. *Stephen’s Commentaries on the Laws of England* (17th edition, Butterworths & Co, London, 1922) Volume 4 Ch 25; JER Stephens, “The Growth of Trial by Jury in England” (1896-97) 10 *Harvard Law Review* 150; J Stone and W A N Wells, *Evidence Its History and Policies* (Butterworths, Sydney, 1991) Pt 1, Ch 1 generally; J B Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Reprint of the 1898 edition, Rothman Reprints Inc & Augustus M Kelley Publishers, New Jersey & New York, 1969) Ch 1-4 generally.
  6. J B Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Reprint of the 1898 edition, Rothman Reprints Inc & Augustus M Kelley Publishers, New Jersey & New York, 1969) at 94-95.
  7. L Hand, “Historical and Practical Considerations Regarding Expert Testimony” (1901) 15 *Harvard Law Review* 40 at 41. See also A Dickey, “The Jury and Trial by One’s Peers” (1941) 11 *University of Western Australia Law Review* 205; C Jones, *Expert Witnesses: Science, Medicine and the Practice of Law* (Clarendon Press, Oxford, 1994) at 25-29; Note, “The Case for Special Juries in Complex Civil Litigation” (1980) 89 *Yale Law Journal* 1155; J Oldham, “The Origins of the Special Jury” (1983) 50 *University of Chicago Law Review* 137; J B Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Reprint of the 1898 edition, Rothman Reprints Inc & Augustus M Kelley Publishers, New Jersey & New York, 1969) at 94-95.
  8. Lord Mansfield’s tenure was from 1756 - 1788.

*The special jury, (amongst whom there were many knowing and considerable merchants)... understood the question very well, and knew more of the subject of it than any body else present.*<sup>9</sup>

2.6 Many have argued that Lord Mansfield's practice also had the effect of developing the common law in commercial matters with the assistance of expert knowledge.<sup>10</sup> Special provision to retain the merchant jury was made by statute in the late 19th century and early 20th century.<sup>11</sup> This came to be known as the City of London jury.

2.7 However, the use of expert juries such as the City of London jury fell into decline and virtual disuse in the latter half of the 19th and early twentieth century.<sup>12</sup> This coincided not only with a decline in the use of trial by jury in civil matters,<sup>13</sup> but also with the greater use of expert witnesses. The last recorded case of an expert merchant jury occurred in 1950,<sup>14</sup> and it was formally abolished by statute in 1971.<sup>15</sup>

2.8 Interestingly, and in spite of this movement away from expert juries, in 1919 judges were granted the discretion to compose an all-male or all-female jury as the case may require, or excuse a female from jury service, because of "the nature of the evidence to be given or the issues to be tried".<sup>16</sup> This provision was invoked as late as 1968, when a judge empanelled an all-female jury in a case of manslaughter because the "matters in issue involved the handling of a baby" and "he came to the conclusion that women, on the whole, would better understand matters of that sort".<sup>17</sup> While the

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9. *Lewis v Rucker* (1761) 2 Burr 1167 at 1168; 97 ER 769 at 770.

10. J H Beuscher, "The Use of Experts by the Courts" (1941) 54 *Harvard Law Review* 1105; A Dickey, "The Jury and Trial by One's Peers" (1941) 11 *University of Western Australia Law Review* 205; L Hand, "Historical and Practical Considerations Regarding Expert Testimony" (1901) 15 *Harvard Law Review* 40. E Heward, *Lord Mansfield* (Barry Rose Publishers Ltd, Chichester and London, 1979) Ch 16 generally; F D MacKinnon, "Origins of Commercial Law" (1936) 52 *Law Quarterly Review* 30; Note, "The Case for Special Juries in Complex Civil Litigation" (1980) 89 *Yale Law Journal* 1155; *Potter's Historical Introduction to English Law and Its Institutions* (4th edition, Sweet & Maxwell, London, 1962) at 208-09.

11. 6 George IV c 50 (Eng) (Juries Act of 1825) s 31; *Common Law Procedure Act 1852* (Eng) s 110; *Juries Act 1870* (Eng) s 6; *Juries Act 1949* (UK) s 19.

12. See in particular A Dickey, "The Jury and Trial by One's Peers" (1941) 11 *University of Western Australia Law Review* 205.

13. See R M Jackson, "The Incidence of Jury Trial During the Past Century" (1937) 1 *Modern Law Review* 132.

14. *Young v Rank* [1950] 2 KB 510.

15. *Courts Act 1971* (UK) s 35(7).

16. *Sex Disqualification (Removal) Act 1919* (UK) s 1(b).

17. *Sutton* (1968) 53 Cr App R 128 at 130 (Parker LCJ).

decision by the trial judge was allowed to stand on appeal, the Court of Appeal expressly disapproved of the practice,<sup>18</sup> and the provision was repealed in 1971.<sup>19</sup>

2.9 In New South Wales, the option to empanel an expert jury of 12 was first provided for in 1832.<sup>20</sup> This provision existed in some form<sup>21</sup> and was used in numerous cases<sup>22</sup> until it was formally abolished in 1947.<sup>23</sup>

## ASSESSORS

2.10 The second way in which English law has, over the centuries, received expert knowledge and assistance is through the use of “assessors”. This practice has been primarily confined to admiralty matters, although a number of English courts were granted the power to appoint assessors in a wide variety of matters in the latter part of the 19th century.<sup>24</sup>

2.11 As outlined by Dickey, the term “assessor”:

*derives directly from the Latin assessor, meaning one who sits with another, or an assistant, and in English law denotes a person who, by virtue of some special skill, knowledge or experience he possesses, sits with a judge during judicial proceedings in order to answer any questions which might be put to him by the judge on the subject in which he is an expert...*

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18. *Sutton* (1968) 53 Cr App R 128 at 129 (Parker LCJ).

19. *Courts Act 1971* (UK) s 40(1).

20. 2 William IV No 3 (1832) s 25. Note that the jury was referred to as a “special jury”. A close reading of this provision suggests that this the “special jury” was in fact two different types of juries: expert juries of persons such as merchants and bankers, as well as juries comprised of eminent persons of the colony. Case law seems to bear out this distinction, as the special jury was applied in two sorts of cases: those involving difficult questions of law or fact (requiring an expert jury or, in terms of small population of the colony, those with a higher level of education) or matters of grave public importance (requiring eminent persons as jurors). See *McLaughlin v Bennett* (1889) 6 WN (NSW) 15.

21. 11 Victoria No 20 (1847) s 10; *Jury Act 1901* (NSW) s 21; *Jury Act 1912* (NSW) s 20.

22. See, for example, *Tate v Goodlet* (1864) 3 SCR (NSW) 12; *Graham v Commissioner of Railways* (1864) 3 SCR (NSW) 13; *Nash v Bank of New South Wales* (1864) 3 SCR (NSW) 13; *McLaughlin v Bennett* (1889) 6 WN (NSW) 112.

23. *Jury (Amendment) Act 1947* (NSW) s 4. For an interesting article on the origins of the jury trial in the colony of NSW, including the use of the jury of four, see P Henschman, “The New South Wales Jury of Four Persons” (1959) 33 *Australian Law Journal* 235.

24. See A Dickey, “The Province and Function of Assessors in English Courts” (1970) 33 *Modern Law Review* 494.

*Assessors... are not called by the parties, are not sworn, and cannot be cross-examined. Indeed their advice is both sought by and given to the court in private and is disclosed to the parties at the court's discretion and then usually at the end of the case in the judgment.*<sup>25</sup>

2.12 The practice of using assessors appears to have been adopted by the Admiralty Court, which was founded in the 14th century, from its earliest days, although clear and regular records from this Court do not emerge in this area until the 18th century. Such a distinctive procedure of adducing specialist knowledge grew up within the Admiralty Court because of the direct influence on its work of historical and (then) contemporary maritime procedures in civil law jurisdictions. By the 16th and 17th centuries, Elder Brethren of the Holy and Undivided Trinity, an association of seamen founded in 1514 by Henry VIII, routinely assisted the Admiralty Court. As the common law gradually encroached upon, and finally subsumed the admiralty jurisdiction, this practice was continued. In the 18th century, the situation had developed to the point where judges treated them as “fellow adjudicators”.<sup>26</sup>

2.13 However, by the mid 19th century, the role of assessors in admiralty matters was receiving unflattering attention: there was considerable unease with the perception that judges were seen to depend upon the opinions of assessors and, in doing so, abdicate their judicial decision-making responsibilities.<sup>27</sup> By this time, the role of judge as impartial decision-maker had become firmly entrenched within the common law.<sup>28</sup> In 1850, Dr Lushington stated that “in no case whatever have I pronounced any judgment except it was my own”.<sup>29</sup> But judicial commentary from the period illustrates the judges’ ambivalence, stressing both their reliance on the assessors’ expertise, and the judges’ ultimate decision-making role. An illustration is the judgment of the Master of the Rolls, Sir Baliol Brett in *The Beryl*. It contains the following passages:

*In the Court of Admiralty the application of the rules is to be made by a mixed tribunal. The tribunal which has to try the case is the judge*

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25. A Dickey, “The Province and Function of Assessors in English Courts” (1970) 33 *Modern Law Review* 494 at 501.
26. R G Marsden, quoted in C Jones, *Expert Witnesses: Science, Medicine and the Practice of Law* (Clarendon Press, Oxford, 1994) at 39. See also J H Beuscher, “The Use of Experts by the Courts” (1941) 54 *Harvard Law Review* 1105; A Dickey, “The Province and Function of Assessors in English Courts” (1970) 33 *Modern Law Review* 494; W S Holdsworth, *A History of English Law* (2nd edition, Methuen & Co Ltd, London, 1945) Vol 5 at 120-154; C Jones, *Expert Witnesses: Science, Medicine and the Practice of Law* (Clarendon Press, Oxford, 1994) at 38-48.
27. See in particular C Jones, *Expert Witnesses: Science, Medicine and the Practice of Law* (Clarendon Press, Oxford, 1994) at 40.
28. See T Golan, “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7 at 9.
29. Quoted in C Jones, *Expert Witnesses: Science, Medicine and the Practice of Law* (Clarendon Press, Oxford, 1994) at 41.

*himself, and the judgment is his and his alone. The assessors who assist the judge take no part in the judgment whatever; they are not responsible for it, and have nothing to do with it. They are there for the purpose of assisting the judge by answering any question, as to the facts which arise, of nautical skill...*

*Still, it would be impertinent in a judge not to consider as almost binding upon him the opinion of the nautical gentlemen who, having ten times his own skill, are called in to assist him.<sup>30</sup>*

2.14 Unease with the role of assessors grew in the 20th century. Questions were raised as to their continued usefulness<sup>31</sup> and whether their role was consistent with notions of natural justice. Thus Lord Justice Scrutton pointed out in *The Tovarisch*:

*The judge in the Admiralty talks to them [assessors] and gets information from them. The parties do not know what the witnesses are telling the judge; they have no opportunity of cross-examining the so-called witnesses.<sup>32</sup>*

2.15 The problem was exacerbated by the longstanding rule that in admiralty matters expert evidence could not be tendered on matters within the special skill or experience of the assessors assisting the court.<sup>33</sup> It also caused complication in appeals, since different assessors were used at different levels of appeal, resulting in concern that appeals might be regarded as “not from one judge to another but from one assessor to another.”<sup>34</sup> As late as 1970, the British Law Reform Committee reported:

*Consultation between the judge and the nautical assessor is continual and informal, both in court and in the judge’s room. The advice which the judge receives from the assessor is not normally disclosed to counsel during the course of the hearing, although the judge may do so if he thinks fit. In his judgment he does usually state what advice he has received on particular matters and whether he has accepted it or not.*

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30. *The Beryl* (1884) 9 PD 137 at 141.

31. See *Owners of S S Australia v Owners of Cargo of S S Nautilus* [1927] AC 145 at 149-150 (Viscount Dunedin).

32. *The Tovarisch* [1930] P 1 at 7.

33. See commentary in Australian Law Reform Commission, *Civil Admiralty Jurisdiction* (Report 33, 1986) at para 288; Great Britain, Law Reform Committee, *Evidence of Opinion and Expert Evidence* (Report 17, 1970) at 6-7.

34. *Owners of S S Melanie v Owners of S S San Onofre (No 1)* (1919), noted at [1927] AC 162 (Birkenhead LC); See also *Owners of S S Artemisia v Owners of S S Douglas* (1925), noted at [1927] AC 164.



*But he is under no obligation to do so and the practice is not uniform among all judges.*<sup>35</sup>

2.16 In New South Wales, there are examples of the use of assessors in 19th century admiralty matters.<sup>36</sup> The overwhelming practice in 20th century admiralty matters has been not to use assessors.<sup>37</sup> Interestingly, there has also been, pursuant to the relevant patent legislation,<sup>38</sup> the infrequent appointment of assessors in complex patent matters.<sup>39</sup>

## THE EXPERT WITNESS

2.17 The third way in which English law has taken advantage of specialist knowledge is through the use of “expert witnesses”. The earliest records of such a practice date back to the 14th century, and involve cases in which surgeons were summoned to establish such things as whether a wound was fresh. Cases from the 16th and 17th centuries also show that surgeons were summoned to give expert opinion on the cause of death, to advise on whether a child born 41 weeks after a husband’s death could be legitimate, and even as to whether fits suffered by children could be a result of witchcraft on behalf of a defendant.<sup>40</sup>

2.18 Similarly, records from the 15th and 16th centuries show that the advice of grammarians was sought by the courts where the issues in question turned on the

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35. Great Britain, Law Reform Committee, *Evidence of Opinion and Expert Evidence* (Report 17, 1970) at 6-7.
36. See Australian Law Reform Commission, *Civil Admiralty Jurisdiction* (Report 33, 1986) at para 290, which cites the case of *The Tyburnia* (1887) 8 LR (NSW) Adm 1.
37. See Australian Law Reform Commission, *Civil Admiralty Jurisdiction* (Report 33, 1986) at para 290; *Peters Slip Pty Ltd v Commonwealth of Australia* [1979] Qd R 123. Note, however, that now defunct Courts of Marine Inquiry did sit with assessors. For a general discussion, see A G Oglivie, “Courts of Marine Inquiry in Australia” (1979) 53 *Australian Law Journal* 129.
38. *Patents Act 1903* (Cth) s 86(8); *Patents Act 1952* (Cth) s 167; *Patents Act 1990* (Cth) s 217.
39. *Adhesives Pty Ltd v Aktieselskabet Dansk Gaerings-Industri* (1936) 55 CLR 523; *Cement Linings Ltd v Rocla Ltd* (1940) 40 SR (NSW) 491; *Genetic Institute Inc v Kirin-Amgen Inc (No 2)* (1997) 78 FCR 368; See also *F Hoffman-La Roche AG v New England Biolabs Inc* [1999] FCA 1424 and P Heerey, “Expert Evidence in Intellectual Property Cases” (1998) 9 *Australian Intellectual Property Journal* 92.
40. See L Hand, “Historical and Practical Considerations Regarding Expert Testimony” (1901) 15 *Harvard Law Review* 40; C T Moodie, “Expert Testimony – Its Past and Its Future” (1937) 11 *Australian Law Journal* 210; C Jones, *Expert Witnesses: Science, Medicine and the Practice of Law* (Clarendon Press, Oxford, 1994) at 35-38; J H Wigmore, *A Treatise on the Anglo-American System of Evidence in Trial at Common Law* (3rd edition, Little Brown and Company, Boston, 1940) Vol 7 at para 1917.

meaning of technical Latin phrases in contracts and other commercial documents. In *Buckley v Rice Thomas*, Justice Saunders made what has since become a famous statement:

*[I]n matters arising in our law which concerned other sciences or faculties, we commonly applied to the aid of that science or faculty which it concerns, which is an honourable and commendable thing in our law. For thereby it appears that we do not despise all other sciences but our own, but we do approve of them and encourage them as things worthy of commendation.*<sup>41</sup>

Cases from the early to mid 18th century show that merchants were sought by courts to give expert advice on the correct interpretation of commercial documents.<sup>42</sup>

2.19 The practice gradually gave way to such experts being called by the parties themselves.<sup>43</sup> Although it had occurred gradually over the previous centuries, by the late 18th century, the “adversarial revolution” had transformed the common law system to one that is easily recognisable today.<sup>44</sup> With the movement away from the medieval system of static communal organisation, jurors were no longer necessarily taken from the locality in which relevant events occurred, and the issues before them were not those concerning local knowledge. This modern jury was bound not to base its decisions on its members’ own knowledge, but rather solely on the evidence placed before it by witnesses. As Thayer wrote:

*[T]he old doctrine of their going on private knowledge began more and more to give way. The jury were told that if any of them knew anything relating to the case, they ought to state it publicly in court. This lay long in the shape of a moral duty of the jurors, not enforceable; but after a time it was enforced and the court assumed that, in general, nothing was known to the jury except what was publicly stated in court – adding to this, under the notion of judicial notice, what they were legally supposed to know and what was known to everybody. This brought*

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41. *Buckley v Rice Thomas* (1554) 1 Plowd 118 at 125; 75 ER 182 at 192.

42. C Jones, *Expert Witnesses: Science, Medicine and the Practice of Law* (Clarendon Press, Oxford, 1994) at 35-38; See also L Hand, “Historical and Practical Considerations Regarding Expert Testimony” (1901) 15 *Harvard Law Review* 40; J H Wigmore, *A Treatise on the Anglo-American System of Evidence in Trial at Common Law* (3rd edition, Little Brown and Company, Boston, 1940) Vol 7 at para 1917.

43. Note, however, that English and Australian courts have always maintained that they have the inherent power, though rarely exercised, to appoint a court expert. See for a discussion of, and case law on, this topic J Basten, “The Court Expert in Civil Trials – A Comparative Appraisal” (1977) 40 *Modern Law Review* 174; I Sheppard, “Court Witnesses – A Desirable or Undesirable Encroachment on the Adversary System?” (1982) 56 *Australian Law Journal* 234.

44. See T Golan, “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7.

*matters down to the state of things in which we are now living. The jury became merely judges upon evidence.*<sup>45</sup>

2.20 Moreover, as the idea was that it was the parties and their lawyers who were responsible for the gathering of evidence and calling of witnesses, the judiciary relinquished control over the litigation process and increasingly adopted the role of passive adjudicators. As such, Wigmore, in his *Treatise on the Anglo-American System of Evidence*, writes of the skilled witness that “by the latter part of the 1700s, he took his place with others as a mere witness to the jury”.<sup>46</sup>

2.21 The gradual differentiation between the role of jury and witness, along with the greater role of advocates within the litigation process, gave rise to the need for evidentiary rules as to the manner in which evidence was placed before the jury. One such rule appearing in the latter half of the 18th century was what is today known as the opinion rule: “that a witness must have personal knowledge, must state facts, not opinions”. The development of this rule was intricately linked to the rise of the rule against hearsay.<sup>47</sup>

2.22 In this context, it is interesting to note that, in the late 18th century and early 19th century, the first controversy surrounding the use of expert witnesses was not related to the fact that individual parties called such witnesses. Rather, the problem arose as to how to rationalise the use of skilled persons (a practice long established) with the newly developed rule prohibiting opinion evidence. Experts had thus far been sought out specifically to give such opinions. This problem appears to have been settled by Lord Mansfield in the seminal case of *Folkes v Chadd*,<sup>48</sup> where it was accepted that the evidence of expert witnesses was an exception to the general rule

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45. J B Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Reprint of the 1898 edition, Rothman Reprints Inc & Augustus M Kelley Publishers, New Jersey & New York, 1969) at 174.

46. J H Wigmore, *A Treatise on the Anglo-American System of Evidence in Trial at Common Law* (3rd edition, Little Brown and Company, Boston, 1940) Vol 7 at para 1917. See also T Golan, “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7; L Hand, “Historical and Practical Considerations Regarding Expert Testimony” (1901) *Harvard Law Review* 40; C Jones, *Expert Witnesses: Science, Medicine and the Practice of Law* (Clarendon Press, Oxford, 1994) at 35-38; C T Moodie, “Expert Testimony – Its Past and Its Future” (1937) 11 *Australian Law Journal* 210.

47. J H Wigmore, *A Treatise on the Anglo-American System of Evidence in Trial at Common Law* (3rd edition, Little Brown and Company, Boston, 1940) Vol 7 at para 1917. See also T Golan, “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7; L Hand, “Historical and Practical Considerations Regarding Expert Testimony” (1901) 15 *Harvard Law Review* 40.

48. *Folkes v Chadd* (1782) 3 Doug KB 157; 99 ER 58.

prohibiting mere opinion evidence. The expert witness, as such, became “a special sort of witness”.<sup>49</sup>

2.23 It is interesting to question why, at this time, there was little judicial comment or perturbation about the possible “adversarial bias” that may attach to experts called on behalf of parties. Perhaps there was at that time an inherent confidence in the objectivity of science, as well as the moral integrity of the “gentlemen” who gave such evidence.<sup>50</sup> Similarly, it could be argued that there remained vestiges of the notion, still prevalent in the mid 18th century, that experts were called as an aid to assist the court.

2.24 However, by the mid 19th century, there was evident concern within the judiciary and the general public about the use of partisan expert evidence. There was a perception that “experts could be found who would testify to anything absurd”.<sup>51</sup> Indeed, some argue that, by this time, the issue had become “a persistent thorn in the side of the common law”.<sup>52</sup> This was a period of great industrial expansion and change in British history, with science being applied to many new and developing areas. Not only did this create legal disputes of novel character, it also required the use of experts to assist the court to understand the ever-changing industrial society. Joining the ranks of expert witnesses were “chemists, microscopists, geologists, engineers, mechanists” and the like.<sup>53</sup> At this time, it is said, the law itself came under pressure to be more “scientific” through a rationalisation of its processes and procedures.<sup>54</sup>

2.25 Much criticism of expert evidence at this time was directed at the reliability and objectivity of science itself, as well as the integrity of scientists. In the Victorian era, disagreements of opinion among scientists were viewed by judges, in particular, as a

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49. C Jones, *Expert Witnesses: Science, Medicine and the Practice of Law* (Clarendon Press, Oxford, 1994) at 59. See also T Golan, “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7; L Hand, “Historical and Practical Considerations Regarding Expert Testimony” (1901) 15 *Harvard Law Review* 40; C T Moodie, “Expert Testimony – Its Past and Its Future” (1937) 11 *Australian Law Journal* 210; J H Wigmore, *A Treatise on the Anglo-American System of Evidence in Trial at Common Law* (3rd edition, Little Brown and Company, Boston, 1940) Vol 7 at para 1917.
50. T Golan, “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7 at 14.
51. C Jones, *Expert Witnesses: Science, Medicine and the Practice of Law* (Clarendon Press, Oxford, 1994) at 98.
52. T Golan, “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7 at 14.
53. T Golan, “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7 at 14-15.
54. C Jones, *Expert Witnesses: Science, Medicine and the Practice of Law* (Clarendon Press, Oxford, 1994) at 96-97.

sign of “money minded” partisanship on the part of the expert.<sup>55</sup> This analysis can be understood in the light of the assumption that science was inherently objective – “a ladder by which even a child may, almost without knowing it, ascend to the summit of truth”.<sup>56</sup> As argued by Chief Justice James Fitzjames Stephen, the spectacle of leading scientists contradicting each other on the witness box was attributable to their want of moral fibre rather than professional disagreement; most of them, he said, were “all but avowedly advocates, and speak for the side which calls them”.<sup>57</sup>

2.26 This explanation for the phenomenon of scientists and other experts flatly contradicting one another was echoed by other leading judges of the day. In an 1856 trial, more than one dozen experts were called. Lord Chief Justice Campbell remarked that:

*With regard to medical witnesses, I must observe that, although there were among them gentlemen of high honor, consummate integrity, and profound scientific knowledge, who came here with a sincere wish to speak the truth, there were also gentlemen whose object was to procure an acquittal of the prisoner. It is, in my opinion, indispensable to the administration of justice that a witness should not be turned into an advocate, nor an advocate into a witness.*<sup>58</sup>

Similarly, in his *Treatise on the Law of Evidence* (1885), Taylor states:

*Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses. These gentlemen are usually required to speak, not of facts, but to opinions: and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them.*<sup>59</sup>

2.27 For others, however, the situation was attributable not so much to the expert witness as it was to the lawyers:

*Armed with an hour’s reading... the great man [ie the lawyer] comes down to court to puzzle, bewilder, and very often to confute men of real ability... A pitiable specimen is that poor man of science, pilloried up in the witness box, and pelted by the flippant ignorance of his examiner!*

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- 55. C Jones, *Expert Witnesses: Science, Medicine and the Practice of Law* (Clarendon Press, Oxford, 1994) at 99.
  - 56. Prince Albert, quoted in T Golan, “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7 at 16.
  - 57. Quoted in T Golan, “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7 at 21-22.
  - 58. Quoted in W L Foster, “Expert Testimony – Prevalent Complaints and Proposed Remedies” (1898) 11 *Harvard Law Review* 169 at 170.
  - 59. P Taylor, *A Treatise on the Law of Evidence* (8th edition, W Maxwell & Sons, London, 1885) Vol 1 at 79.

*What a contrast between the different caution of the true knowledge, and the bold assurance, the chuckling confidence, the vain-glorious self-satisfaction, and mock triumphant delight of his questioner!*<sup>60</sup>

2.28 Various proposals to reform the manner in which expert evidence was adduced in court were put forward in the latter half of the 19th century, principally by the scientific community.<sup>61</sup> Thus, for example, in 1862 the British Association for the Advancement of Science published a report recommending that the jury be dispensed with in civil cases having a technical character, that the bench should consist of a judge and up to three skilled assessors, and that the court should be able to call on witnesses independently of the parties.<sup>62</sup> These proposals were opposed on the ground that they were inconsistent with fundamental aspects of the adversarial process, such as a right to trial by jury in civil cases and a right of parties to present to the court the evidence that they choose. As such, the proposals outlined “remedies far worse than the disease”.<sup>63</sup>

2.29 The difficulties and disrepute associated with expert evidence persisted in England. By the late 1920s, one finds commentary not simply about the partisan problems associated with expert evidence, but also its effect on access to justice and responsible use of court resources. Thus, in 1928 Justice Tomlin said:

*Of late years cases involving expert evidence appear to have increased in number and in length. Having regard to the complexity of modern life and the widened field over which science ranges, this is perhaps inevitable, but the overloading of these cases in the preparation of them is becoming not infrequent. Long cases produce evils; they place the parties with the lesser resources at a grave disadvantage, and they delay the course of the general business of the Courts and thereby inflict serious hardships on other litigants.*<sup>64</sup>

2.30 The problems associated with the expert witness in Australia mirror those experienced in England since at least the latter half of the 19th century. Long-time

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60. C O’Dowd, “Cornelius O’Dowd on Men and Women, and Other Things in General” (1864) 96 *Blackwood’s Edinburgh Magazine* 284, quoted in T Golan, *Laws of Men and Laws of Nature* (Harvard University Press, Cambridge Massachusetts, 2004) at 105.

61. Note that the scientific community was itself undergoing transformation in the 19th century, with the influx of new and varied areas of expertise. For a discussion, see T Golan, “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7.

62. T Golan, *Laws of Men and Laws of Nature* (Harvard University Press, Cambridge Massachusetts, 2004) at 122.

63. Former Attorney-General Mr Whiteside MP, quoted in T Golan, “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7 at 23.

64. *Graigola Merthyr Company Limited v Mayor, Aldermen and Burgesses of Swansea* [1928] 1 Ch 31.

practitioners have noted, for example, in reference to workers' compensation matters, that "one only had to hear the name of the [expert] witness and one could have written the report oneself and, indeed, the script for cross-examination".<sup>65</sup> Unflattering judicial commentary on certain expert witnesses routinely called in personal injury cases – the "usual panel of doctors who think you can do a full week's work without any arms or legs" - have also exposed the disrepute with which the area is associated.<sup>66</sup>

2.31 The task facing reformers of today remains the task identified by Learned Hand at the beginning of the 20th century:

*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 how it can do so best.*<sup>67</sup>

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65. H D Sperlberg, "Letter to the Editor" (2003) 6(3) *Judicial Review* 223 at 223.

66. *Vakauta v Kelly* (1989) 167 CLR 568 (Toohey J), quoting the trial judge.

67. L Hand, "Historical and Practical Considerations Regarding Expert Testimony" (1901) 15 *Harvard Law Review* 40 at 40.

### 3.

## The Uniform Civil Procedure Rules 2005

- Introduction
- Background
- Experts engaged by parties
- Court-appointed experts



## INTRODUCTION

3.1 This chapter sets out the existing rules and procedures of courts in New South Wales relating to expert witnesses. The governing legislation is very recent. It comprises the *Uniform Civil Procedure Rules 2005* (“UCPR”), which consolidate the civil procedure rules for the Supreme, District and Local Courts, and which will also apply to a number of tribunals. The UCPR are attached as Schedule 7 to the *Civil Procedure Act 2005* (NSW), which was introduced into Parliament on 6 April 2005 and was assented to on 2 June 2005. At the time of writing this report, most of the provisions of the *Civil Procedure Act 2005* (NSW) and the UCPR are expected to come into force in August 2005.<sup>1</sup>

3.2 The UCPR contain provisions on expert witnesses, which are divided into

- Expert witnesses called by parties (UCPR Part 31 Division 2); and
- Court-appointed experts (UCPR Part 31 Division 3).

3.3 After a brief consideration of the background, this chapter will summarise these provisions.

## BACKGROUND

3.4 This section briefly discusses a number of developments prior to the UCPR. The first development relates to a specific category of cases, namely litigation involving claims for professional negligence. In 1999, the Supreme Court established a Professional Negligence List in the Common Law Division.<sup>2</sup> A new Part 14C was inserted in the *Supreme Court Rules 1970* to govern such matters. Among other things, the new rules required a person instituting a medical or legal professional negligence claim to file and serve an expert’s report with the statement of claim. This was intended to facilitate the reduction of delay in the assessment of a claim and to avoid the precipitate commencement of proceedings.<sup>3</sup> More significantly for present purposes, Part 14C was supplemented by a new Practice Note (No 104), which contained the following provisions concerning expert witnesses:

- A declaration that the paramount duty of expert witnesses is to the court, which overrides their obligation to the party engaging them;

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1. *Civil Procedure Act 2005* (NSW) s 8 and s 7 and Sch 2 commenced on 24 June 2005.

2. It was around this time that reforms on the use of expert witnesses were adopted in other jurisdictions such as England and the Federal Court of Australia: See Chapter 4.

3. See J Abadee, “Commentary: The Professional Negligence List in the Common Law Division of the Supreme Court”  
 «[http://www.agd.nsw.gov.au/sc/sc.nsf/pages/abadee\\_1](http://www.agd.nsw.gov.au/sc/sc.nsf/pages/abadee_1)».

- A prescription concerning the form and contents of an expert's report;
- Provision for the court to direct parties to request expert witnesses to hold conferences among themselves with a view to agreeing on any issue and to make a joint statement on any agreements; and
- A requirement that any party engaging an expert witness should notify such witness of the above requirements.

3.5 In January 2000, the Supreme Court introduced substantial changes to its rules on expert witnesses, in substance expanding the provisions in Practice Note No 104 and applying them generally to civil cases in the Supreme Court. Subsequently, the District and Local Courts emulated the Supreme Court reforms, and thus the rules of court of these courts became substantially similar as regards expert witnesses. The main elements of these rules are reflected in the UCPR and described below. In brief, they contain a definition of expert witness;<sup>4</sup> a code of conduct for expert witnesses;<sup>5</sup> requirements in relation to the code of conduct;<sup>6</sup> requirements as to the form and content of an expert's report;<sup>7</sup> procedures for conferences among expert witnesses;<sup>8</sup> disclosure of the expert's report and supplementary report;<sup>9</sup> admissibility of expert's report or oral evidence;<sup>10</sup> the right of parties to cross-examine or re-examine expert witnesses;<sup>11</sup> and court-appointed experts.<sup>12</sup>

3.6 The UCPR were the product of the Attorney General's Department's Civil Procedure Working Party ("working party"), constituted in 2003 for the purpose of

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4. *Supreme Court Rules 1970* (NSW) Pt 36 r 13C(1); *District Court Rules 1973* (NSW) Pt 28 r 9C(1); *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 23 r 1D(1).
  5. *Supreme Court Rules 1970* (NSW) Sch K; *District Court Rules 1973* (NSW) Sch 1; *Local Courts (Civil Claims) Rules 1988* (NSW) Sch 1.
  6. *Supreme Court Rules 1970* (NSW) Pt 36 r 13C(2); *District Court Rules 1973* (NSW) Pt 28 r 9C(2); *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 23 r 1D(2).
  7. *Supreme Court Rules 1970* (NSW) Sch K cl 5; *District Court Rules 1973* (NSW) Sch 1 cl 5-8; *Local Courts (Civil Claims) Rules 1988* (NSW) Sch 1 cl 5-8.
  8. *Supreme Court Rules 1970* (NSW) Pt 36 r 13CA(1); *District Court Rules 1973* (NSW) Pt 28 r 9E; *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 23 r 1E.
  9. *Supreme Court Rules 1970* (NSW) Pt 36 r 13A(1) and 13C(3); *District Court Rules 1973* (NSW) Pt 28 r 8 and 9C(3); *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 23 r 3 and 1D(3).
  10. *Supreme Court Rules 1970* (NSW) Pt 36 r 13A(5); *District Court Rules 1973* (NSW) Pt 28 r 9(1); *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 23 r 2(2).
  11. *Supreme Court Rules 1970* (NSW) Pt 36 r 13A(5); *District Court Rules 1973* (NSW) Pt 28 r 9(2)-(6); *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 23 r 2(3)-(6).
  12. *Supreme Court Rules 1970* (NSW) Pt 36; *District Court Rules 1973* (NSW) Pt 28A; *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 38B.

producing common civil procedure rules for the Supreme, District and Local Courts. The working party consisted of representatives of the various courts, the Bar Association, the Law Society and the Attorney General's Department.<sup>13</sup> Its aim was to consolidate provisions on civil procedure into a single instrument and to develop a common set of rules, simplified where possible, but without radical changes in substance or in form. Accordingly, the UCPR involve little substantive change, and generally replicate the substance of the previous rules of the Supreme, District and Local Courts.

3.7 In early 2005, there was another development relating to a particular category of matters, this time personal injury cases. Practice Note 128, *Single Expert Witness*, provided for a standard "single expert witness direction" to be given in all personal injury cases unless cause is otherwise shown. The "standard direction" applied only to expert evidence relating to the *quantification* of damages, not that in relation to liability. It incorporated some of the elements of the single joint expert under the English Civil Procedure Rules.<sup>14</sup>

## EXPERTS ENGAGED BY PARTIES

### Definitions

3.8 The UCPR define an expert, in relation to any question, as a person who has such knowledge or experience of that question that his or her opinion on that question would be admissible in evidence. An expert witness is defined as an expert engaged for the purpose of: (a) providing a report as to his or her opinion for use as evidence in proceedings or proposed proceedings, or (b) giving opinion evidence in proceedings or proposed proceedings.<sup>15</sup>

### Expert witness code of conduct

3.9 Schedule 7 of the UCPR consists of an expert witness code of conduct. It provides for the duties of experts to the court, the form of an expert's report and the obligation of expert witnesses to comply with any direction to confer and produce a joint report. The code essentially replicates the provisions of the codes of conduct in the previous rules of the Supreme, District and Local Courts.

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13. Its members are: The Hon Justice Hamilton; Judge Garling; Magistrate Cloran; Mr Michael McHugh, Mr Greg George and Mr Hamish Stitt (the Bar Association's representatives); Mr Peter Johnstone (the Law Society's representative); and Mr Tim McGrath, Ms Jenny Atkinson, Mr Steve Jupp, Mr Stephen Olischlager, Mr Peter Ryan, Mr Peter Shiels and Ms Pam Wilde (Departmental representatives).

14. See Chapter 4, particularly para 4.16 – 4.26.

15. *Uniform Civil Procedure Rules 2005* (NSW) r 31.17.

3.10 The provisions of the expert witness code of conduct in the rules of court have been strongly influenced by the common law, including the principle that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced by the exigencies of litigation.<sup>16</sup> The provisions of the expert witness code of conduct are not to be treated as rules of admissibility of expert opinion evidence, but as a code of conduct designed to improve the quality of expert opinion evidence.<sup>17</sup>

*Requirements relating to the code of conduct*

3.11 A party who engages an expert witness must provide such witness with the expert witness code of conduct at or as soon as practicable after such engagement. Unless the court otherwise orders, an expert's report or oral evidence is not to be admitted in evidence if the expert does not acknowledge in the report (or in writing in the case of oral evidence) that he or she has read the code and agrees to be bound by it.<sup>18</sup>

3.12 In *Commonwealth Development Bank v Cassegrain*,<sup>19</sup> Justice Einstein held that the court should not, "without exceptional cause", exercise its discretion to allow the admission of expert evidence without the required acknowledgement from the expert that he or she has read and agrees to be bound by the code of conduct. He suggested a strict compliance with the rules on expert witnesses.<sup>20</sup> Nevertheless, the court has excused non-compliance with the acknowledgement requirement where it was satisfied that the failure to comply was "technical", in the sense that the report was in fact prepared in compliance with the code,<sup>21</sup> or that the witness had sufficiently

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16. See *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* (The "Ikarian Reefer") [1993] 2 Lloyd's Rep 68.
  17. *Australian Securities and Investments Commission v Rich* [2005] NSWSC 149 at para 333 (Justice Austin's statement on this matter is not affected by the successful appeal from the judgment: see *Australian Securities and Investments Commission v Rich* [2005] NSWCA 152).
  18. *Uniform Civil Procedure Rules 2005* (NSW) r 31.23.
  19. *Commonwealth Development Bank v Cassegrain* [2002] NSWSC 980.
  20. "To my mind, considerable significance attaches to enforcing strict compliance in the expert witness provisions now found in Pt 36 rule 13C. Questions of the significance of the opinions of experts have been mooted over a very extended period of time and the schedule K and Pt 36 rule 13 C (1) Expert Witness Code Of Conduct was promulgated with the clear intent that only reports by experts who have proceeded in accordance with the stated norms of conduct, should be relied upon and may be admitted into evidence. The significance of the Code Of Conduct emerges clearly from the whole of the Code as well as from the 'general duty to the court' section of schedule K as well as from the stipulations as to the form of expert's reports": [2002] NSWSC 980 at para 9.
  21. *Barack Pty Ltd v WTH Pty Ltd* [2002] NSWSC 649.

confirmed the report after being apprised of the contents of the code<sup>22</sup> or where the court was otherwise satisfied of the likely impartiality of the opinions expressed in the report.<sup>23</sup>

*Paramount duty to the court*

3.13 An expert witness has an overriding duty to assist the court impartially on matters relevant to the expert's area of expertise. His or her paramount duty is to the court and not to the person retaining the expert. An expert witness is not an advocate for a party.<sup>24</sup>

*Conferences and joint reports*

3.14 The court may, on application by a party or of its own motion, direct an expert witness to:

- a) confer with any other expert witness,
- b) endeavour to reach agreement on outstanding matters, and
- c) provide the court with a joint report specifying matters agreed and matters not agreed and the reasons for any non-agreement.<sup>25</sup>

3.15 In exercising its discretion to direct a meeting of experts, the court may consider the extent to which the meeting is likely to narrow issues, reduce the scope of evidence, and resolve differences of expert opinion. In addition, the court may take into account the costs of the meeting and its potential impact on the parties, including any risk that any extra costs it involves (including preparation and experts' fees) might prejudice a party's ability to conduct the proceedings effectively and at the least cost.<sup>26</sup>

3.16 An expert who is directed to hold conferences with other experts may apply to the court for further directions. The court may direct that the conference be held with or without the attendance of lawyers. The content of the conference between the expert witnesses cannot be referred to at the hearing or trial unless the parties agree. Where expert witnesses have conferred and have provided a joint report agreeing on

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22. *Langbourne v State Rail Authority* [2003] NSWSC 537; *Jermen v Shell Co of Australia Ltd* [2003] NSWSC 1106.

23. *United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* [2003] NSWSC 870.

24. *Uniform Civil Procedure Rules 2005* (NSW) Sch 7 cl 2. See *Australian Securities and Investments Commission v Rich* [2005] NSWSC 149 at para 334 where Justice Austin stated that the fact that an expert is aligned to the party engaging him or her, and biased or not independent, is not a bar to the admissibility of the expert's opinion evidence, though it may go to the weight of the evidence.

25. *Uniform Civil Procedure Rules 2005* (NSW) r 31.25(1) and Sch 7 cl 4.

26. *Guerin v Watts* [2002] NSWSC 692.

any matter, a party affected may not, without leave of the court, adduce expert evidence inconsistent with the matter agreed.<sup>27</sup>

#### *Expert's report*

3.17 A report by an expert witness must specify:

- the person's qualifications as an expert;
- the facts, matters and assumptions on which the opinions in the report are based (a letter of instructions may be annexed) and the reasons for each opinion expressed;
- if applicable, that a particular issue falls outside his or her field of expertise;
- any literature or other materials utilised in support of the opinions; and
- any examinations, tests or other investigations on which he or she has relied.<sup>28</sup>

3.18 If the expert who prepares a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report. If he or she considers that his or her opinion is not a concluded opinion because of insufficient research or data or some other reason, this must be stated when the opinion is expressed.<sup>29</sup>

3.19 An expert witness who, after communicating an opinion to the party engaging him or her, changes an opinion on a material matter must provide the engaging party with a supplementary report to that effect.<sup>30</sup>

## Disclosure

3.20 The UCPR require each party to serve experts' reports and hospital reports on each other party in accordance with any order of the court or practice note or, if no such order or practice note is in force, not later than 28 days before the date of the hearing at which the report is to be used.<sup>31</sup> This is a change from the former court rules which, in general, do not require a party to disclose the expert's report unless the court directs such disclosure on application of a party or of its own motion.<sup>32</sup>

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27. *Uniform Civil Procedure Rules 2005* (NSW) r 31.25(2)-(7).

28. *Uniform Civil Procedure Rules 2005* (NSW) Sch 7 cl 3(1).

29. *Uniform Civil Procedure Rules 2005* (NSW) Sch 7 cl 3(2)-(3).

30. *Uniform Civil Procedure Rules 2005* (NSW) Sch 7 cl 3(4).

31. *Uniform Civil Procedure Rules 2005* (NSW) r 31.18(1). Hospital report means a statement in writing concerning a patient made by or on behalf of a hospital that the party serving the statement intend to adduce in evidence in chief at the trial.

32. See *Supreme Court Rules 1970* (NSW) Pt 36 r 13A(1); *District Court Rules 1973* (NSW) Pt 28 r 8; *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 23 r 3.

However, since the consequence of non-disclosure is that a report cannot be tendered in evidence, the effect of the new provisions in the UCPR is to require disclosure of those reports which are to be tendered, but not other reports that the party might have obtained.<sup>33</sup>

3.21 Except by leave of the court or by consent of the parties, an expert's report or hospital report is not admissible unless it has been served in accordance with the rules. Leave is not to be granted unless the court is satisfied that there are exceptional circumstances that warrant the granting of leave, or that the report concerned merely updates an earlier version of a report that has been served in accordance with the rules.<sup>34</sup>

3.22 The duty to disclose also applies to supplementary reports. If an expert witness furnishes the engaging party with a supplementary report, including a report indicating that the expert witness has changed his or her opinion on a material matter expressed in an earlier report, the engaging party must serve the supplementary report on all parties on whom the earlier report was served. Failure to serve the supplementary report will bar the use of the earlier report in the proceedings.<sup>35</sup>

## Cross-examination and re-examination

3.23 In a trial without a jury, where an expert's report is served on each of the parties in accordance with the relevant rules, the report is admissible as evidence of the expert's opinion. In such cases, a party may require the attendance of the expert witness for cross-examination and the party using the report may then re-examine the expert.<sup>36</sup>

## Conduct of trial with experts

3.24 The UCPR contain a new rule dealing with the manner of giving expert evidence.<sup>37</sup> It gives a court the power to direct:

- that the expert witnesses give evidence at trial after all factual evidence relevant to the question or questions concerned, or such evidence as may be specified by the court, has been adduced;
- that each party intending to call one or more expert witnesses close its case in relation to the question or questions concerned, subject only to adducing evidence of the expert witnesses later in the trial;

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33. The question whether the law should be changed to require disclosure of all reports obtained by a party, whether or not intended to be put into evidence, is considered in Chapter 6, in particular para 6.29 – 6.33.

34. *Uniform Civil Procedure Rules 2005* (NSW) r 31.18(3).

35. *Uniform Civil Procedure Rules 2005* (NSW) r 31.24.

36. *Uniform Civil Procedure Rules 2005* (NSW) r 31.19.

37. *Uniform Civil Procedure Rules 2005* (NSW) r 31.26.

- that after all factual evidence relevant to the question, or such evidence as may be specified by the court, has been adduced, each expert witness must file an affidavit or statement. This affidavit or statement is to indicate whether the expert witness adheres to any opinion earlier given or whether, in the light of any such evidence, the expert witness wishes to modify any opinion earlier given;
- that the expert witnesses be sworn one immediately after another (so as to be capable of making statements, and being examined and cross-examined), and, when giving evidence, occupy a position in the courtroom (not necessarily the witness box) that is appropriate to the giving of evidence;
- that each expert witness give an oral exposition of his or her opinion, or opinions, on the question or questions concerned;
- that each expert witness give his or her opinion about the opinion or opinions given by another expert witness;
- that each expert witness be cross-examined in a particular manner or sequence; and
- that any expert witness giving evidence be permitted to ask questions of any other expert witness together with whom he or she is giving evidence.

3.25 The rule is based on Order 34A rule 3 of the *Federal Court Rules 1979* (Cth).<sup>38</sup> It enables what is known as “hot-tubbing”, that is, calling all of the expert witnesses on the same question at the same time. It is a procedure that has been successfully adopted by the NSW Land and Environment Court.<sup>39</sup> The provisions in the UCPR are wider than the Federal Court rule on which they are based in that they allow for the experts to ask each other questions.

## COURT-APPOINTED EXPERTS

3.26 Like other Australian jurisdictions,<sup>40</sup> for many years New South Wales has had rules providing for court-appointed expert witnesses. The UCPR provide that if a question 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 question,
- b) authorise the expert to inquire into and report on any facts relevant to the inquiry and report on the question,

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38. See para 4.48 – 5.51.

39. See para 6.49 – 6.52.

40. See, eg, *High Court Rules 1952* (Cth) O 38 r 2; *Federal Court Rules 1979* (Cth) O 34 r 2; *Rules of the Supreme Court 1971* (WA) O 40 r 2; *Supreme Court Rules 1987* (SA) r 82.01.



- 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.<sup>41</sup>

## Selection and appointment

3.27 The court may appoint as a court expert a person selected by the parties, or a person selected by the court or selected in a manner directed by the court.<sup>42</sup> An example of the last method of appointment would be where the court directs that the expert be a person nominated by a professional body.

## Code of conduct

3.28 A copy of the code of conduct must be provided to the expert by the registrar or as the court may direct. The expert's evidence cannot be admitted unless he or she has acknowledged that he or she has read the code and agrees to be bound by it.<sup>43</sup>

## Expert's report

3.29 A court-appointed expert is, like an expert engaged by parties, required to comply with the provisions of the code of conduct relating to the expert's report.<sup>44</sup> While an expert engaged by a party gives the report to the party, a court-appointed expert must send his or her report to the registrar, who must send a copy of the report to each party affected. The report is then deemed to have been admitted into evidence in the proceedings, unless the court orders otherwise.<sup>45</sup>

## Cross-examination

3.30 Any party affected may cross-examine the court-appointed expert, and the expert must attend court for examination or cross-examination if so requested on reasonable notice by the registrar or by a party affected.<sup>46</sup>

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41. *Uniform Civil Procedure Rules 2005* (NSW) r 31.29(1).

42. *Uniform Civil Procedure Rules 2005* (NSW) r 31.29(2).

43. *Uniform Civil Procedure Rules 2005* (NSW) r 31.30.

44. *Uniform Civil Procedure Rules 2005* (NSW) Sch 7 cl 3.

45. *Uniform Civil Procedure Rules 2005* (NSW) r 31.31.

46. *Uniform Civil Procedure Rules 2005* (NSW) r 31.32.

## Prohibition against other expert evidence

3.31 Except by leave of the court, a party to proceedings may not adduce evidence of any other expert on any question arising in proceedings if an expert has been appointed under these rules in relation to that question.<sup>47</sup>

## Remuneration

3.32 The court is required to fix the remuneration of the court-appointed expert. As a general rule, subject to the court's over-riding discretion as to costs, the parties specified by the court are to be jointly and severally liable to pay the amount fixed by the court for the expert's remuneration.<sup>48</sup>

## Use of court-appointed experts

3.33 A judge of the Supreme Court has observed that the appointment of a court expert may save the court and the parties time and expense in having complex technical issues clarified,<sup>49</sup> and there have been instances of court-appointed experts in recent times. Examples include:

- psychiatrists in claims for damages in the Chelmsford Private Hospital (deep sleep therapy) cases;<sup>50</sup>
- an expert on hydrology (water drainage) in a right of way action;<sup>51</sup>
- an expert who had to determine the amount of royalties due under a lease of a quarry;<sup>52</sup> and
- an expert who was directed to examine the reasonableness of steps taken to remove stains from a concrete floor.<sup>53</sup>

3.34 Nevertheless, in Australia, as in England, such appointments have been very much the exception rather than the rule.<sup>54</sup> In 1962, Lord Denning referred to the difficulties in using court-appointed experts:

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47. *Uniform Civil Procedure Rules 2005* (NSW) r 31.33.

48. *Uniform Civil Procedure Rules 2005* (NSW) r 31.34.

49. *Natva Developments Pty Ltd v McDonald Bros Pty Ltd* [2004] NSWSC 777 at para 95 (Palmer J).

50. *Salay v The Estate of the Late Harry Bailey* (NSW, Supreme Court, No 12427/82, Badgery-Parker J, 24 February 1995, unreported).

51. *Natva Developments Pty Ltd v McDonald Bros Pty Ltd* [2004] NSWSC 777.

52. *Heggies Bulkhaul Ltd v Global Minerals Australia Pty Ltd* [2002] NSWSC 410.

53. *Ell v Sisera* [2000] NSWSC 768.

54. I Freckelton and H Selby, *Expert Evidence: Law Practice, Procedure and Advocacy* (2nd edition, LawBook Co, Pyrmont, NSW, 2002) at 608.

*I suppose that litigants realise that the court would attach great weight to the report of a court expert, and are reluctant thus to leave the decision of the case so much in his hands. If his report is against one side, that side will wish to call its own expert to contradict him, and then the other side will wish to call one too. So it would only mean that the parties would call their own experts as well. In the circumstances, the parties usually prefer to have the judge decide on the evidence on either side, without resort to a court expert.<sup>55</sup>*

3.35 The Family Court's recent review on expert witnesses identified the following criticisms of or perceived problems relating to court-appointed experts:

- There is a perception that the appointment by the court of an expert witness is contrary to the adversarial system, whereby parties have the right to call and present witnesses of their choice;
- There is a lack of certainty that a court-appointed expert will be objective;
- The role of the judge may be usurped if the expert effectively decides the case; and
- The parties may incur further costs as they are likely to call their own experts to reduce these concerns.<sup>56</sup>

3.36 A recent survey of Australian judges has confirmed that courts use their power to appoint expert witnesses very rarely. One of the reasons given by the judges in the study for their reluctance to use this power was that they are troubled by its implications for the adversarial system of litigation and that it impinges on the decision-making role of judges. Mostly, though, the judges said that they had not used court-appointed experts either because they had not been asked to do so by the advocates appearing before them or because they had determined such a course to be unnecessary.<sup>57</sup> Nevertheless, the judges in the survey expressed strong support for the power to appoint court experts.

3.37 Exceptionally, the Land and Environment Court of New South Wales has, in recent times, made extensive use of court-appointed experts. This has occurred in a particular class of proceedings which consist of environmental planning and protection appeals. A government agency, such as a local government entity, is ordinarily a

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55. *Re Saxon Deceased (Johnson v Sexon)* (1962) WLR 968 at 972 (Lord Denning).

56. Family Court of Australia, *The Changing Face of the Expert Witness* (2002) at 14.

57. I Freckelton, P Reddy and H Selby, *Australian Judicial Perspectives on Expert Evidence: an Empirical Study* (Australian Institute of Judicial Administration, 1999) at 8. The study is critically reviewed in G Edmond, "Judging Surveys: Experts, Empirical Evidence and Law Reform" (2005) *Federal Law Review* 95 at 139.

party to proceedings of this kind. By rule of court, certain of the rules of the Supreme Court of New South Wales apply to such proceedings, including the rules which relate to court-appointed experts.<sup>58</sup>

3.38 Typically, in this class of cases, matters relating to noise, traffic, parking, overshadowing, engineering, hydrology, contamination issues, among others, are seen as suitable for a court expert. Increasingly, court-appointed experts are also dealing with issues relating to heritage, urban design and general planning, usually at the request of the parties.<sup>59</sup>

3.39 Between March 2004 and April 2005, the court has appointed 474 court experts. In all but 10 instances or thereabouts, the parties have selected the expert by mutual agreement. This accords with the experience in England where, as we are informed, it is extremely rare for the parties to fail to agree on the selection of a single joint expert once an order for a single joint expert is made.

3.40 Under the Supreme Court rules utilised by the Land and Environment Court, the court has a discretion to permit the parties to call their own expert evidence notwithstanding that an order has been made for a court-appointed expert.<sup>60</sup> In the line of cases to which we have referred, the Land and Environment Court has, ordinarily, allowed the parties to call their own expert evidence if they wish, granting leave to do so virtually as a matter of course. However, in the class of case involved, a government agency, as we have said, is usually a party. The government agency frequently elects not to call its own expert evidence, accepting the evidence of the mutually agreed expert even if adverse. Private litigants, on the other hand, usually call their own expert evidence if the opinion of the court-appointed expert is adverse to them. In the result, the court has the benefit of hearing from at least one expert witness who is unaffected by adversarial bias and the number of expert witnesses is mostly not increased. In those cases where the number of expert witnesses is increased by the process, the additional cost may be seen as justified by the public interest factor in litigation of this kind.

3.41 In these cases, the Land and Environment Court has been able to utilise the Supreme Court Rules to obtain expert evidence from at least one expert on the matter in question unaffected by adversarial bias, without preventing litigants from calling their own expert evidence if they wish. Because of the special nature of the proceedings, that has been achieved without incurring the penalty of an unacceptable increase in the number of expert witnesses.

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58. *Land and Environment Court Rules 1996* (NSW) Pt 5 r 1.

59. Justice Peter McClellan (Chief Judge of the New South Wales Land & Environment Court) "Expert Witnesses – the Experience of the Land and Environment Court of New South Wales", Speech at the XIX Biennial Lawasia Conference 2005 (Gold Coast, 20-24 March 2005) at 12-13, 21.

60. *Supreme Court Rules 1970* (NSW) Pt 39 r 6. When the UCPR commence, this rule will become *Uniform Civil Procedure Rules 2005* (NSW) r 31.33.

3.42 Although no statistics are available on the matter, it would appear that the appointment of court experts in the Land and Environment Court has led to a significant reduction in hearing time. Moreover, the feedback from judges, commissioners and legal practitioners is that the evidence from persons appointed as court experts reflects a more thorough and balanced consideration of the issues than was previously the case.<sup>61</sup>

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61. Justice Peter McClellan (Chief Judge of the New South Wales Land & Environment Court) “Expert Witnesses – the Experience of the Land and Environment Court of New South Wales”, Speech at the XIX Biennial Lawasia Conference 2005 (Gold Coast, 20-24 March 2005) at 19-21.

## 4.

# Recent Developments In Other Jurisdictions

- Introduction
- The "Woolf" reforms in England and Wales
- Australian jurisdictions

## INTRODUCTION

4.1 This chapter discusses a number of other jurisdictions which have experienced significant reforms in relation to expert witnesses. These developments are instructive in indicating possible directions for reform in New South Wales.

## THE “WOOLF” REFORMS IN ENGLAND AND WALES

4.2 In 1994, a comprehensive reform of the civil justice system in England and Wales was begun with the appointment of Lord Woolf, one of the most senior judges, to review existing rules and procedures. In his Interim and Final Reports, Lord Woolf found the existing system to be too expensive for litigants; slow in bringing cases to a conclusion; inequitable in favouring wealthy litigants over those who are under-resourced; and too complex and incomprehensible for many litigants. He also said that the system was too adversarial in approach, allowing the parties, rather than the courts, effectively to run cases.<sup>1</sup>

4.3 Lord Woolf found expert evidence to be an area that presented major problems and needed reform. During the consultation process he carried out, a strong view emerged that the use of expert witnesses was a source of excessive expense, delay and increased complexity. Another major concern was the failure by experts to maintain independence from the party instructing them. Furthermore, Lord Woolf observed that a large litigation support industry had grown among professions such as accountants, architects and others, and new professions had developed such as accident reconstruction and care experts. He declared that this went against all principles of proportionality and access to justice, and also created an ethos of what is acceptable, which has a very damaging effect on the civil justice system.<sup>2</sup>

4.4 The linchpin of Lord Woolf’s recommendations on the civil justice system was judicial case management, under which judges are responsible for controlling litigation at all stages. Judges and court staff should ensure that proportionality is maintained between the importance and complexity of a dispute, the procedural means employed, and costs incurred, in its resolution. Within that framework, Lord Woolf made the following recommendations:

- Single experts should be used wherever the case (or the issue) is concerned with a substantially established area of knowledge or where it is not necessary for the court directly to sample a range of opinions;

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1. H K Woolf, *Access to Justice* (Final Report to the Lord Chancellor on the civil justice system in England and Wales, HMSO, London, 1996) at 2. See also H K Woolf, *Access to Justice* (Interim Report to the Lord Chancellor on the civil justice system in England and Wales, HMSO, London, 1995) at 7-17.
  2. H K Woolf, *Access to Justice* (Interim Report to the Lord Chancellor on the civil justice system in England and Wales, HMSO, London, 1995) at 181; H K Woolf, *Access to Justice* (Final Report to the Lord Chancellor on the civil justice system in England and Wales, HMSO, London, 1996) at 137.

- Parties and the court should always consider whether a single expert should be appointed and, if this is not appropriate, indicate why not;
- Where opposing experts are appointed, they should adopt a co-operative approach and produce, where possible, a joint investigation and report, indicating areas of disagreement that cannot be resolved;
- Expert evidence should not be admissible unless all written instructions (including letters subsequent upon the original instructions) and a note of any oral instructions are included as an annexure to the expert's report;
- The court should have a wide power, which could be exercised before the start of proceedings, to order that an examination or tests be carried out in relation to any matter and a report submitted to the court;
- Experts' meetings should normally be held in private. When the court directs a meeting, the parties should be able to apply for special arrangements, such as attendance by the parties' legal advisers;
- Training courses should provide witnesses with an understanding of the legal system and their primary duty to the court.

4.5 Lord Woolf's recommendations were generally adopted in Part 35 of the *Civil Procedure Rules 1998* (Eng) ("CPR"). In addition, the court issued a Practice Direction that supplements Part 35. In December 2001 the Master of the Rolls authorised the publication of the *Code of Guidance on Expert Evidence*, which is intended to facilitate better communication and dealings between experts and the instructing parties.<sup>3</sup> Some courts have published their own guides, which explain the proceedings in those courts.<sup>4</sup>

4.6 The following is a survey of some significant aspects of the CPR, court guidelines and practice directions, and the relevant case law.

## Greater control of the use of expert evidence

4.7 To call expert evidence, parties need permission from the court; and, if a party seeks such permission, it must identify the field of expertise of the expert and, if possible, specify the individual expert to be called.<sup>5</sup> This is much more prescriptive

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3. See Preamble to the *Code of Guidance on Expert Evidence*.

4. See *The Admiralty and Commercial Courts Guide* (6th edition, 2002) para H1.1 (witness statements in admiralty and commercial proceedings). Court guides are published giving guidance for proceedings in the Admiralty and Commercial Courts, the Chancery Division, the Queen's Bench Division, mercantile courts, the Patents Court and the Supreme Court Costs Office.

5. *Civil Procedure Rules 1998* (Eng) (hereafter cited as "CPR") r 35.4(1).



than the former rules, which stated that expert evidence could be adduced either by agreement of the parties or with leave of the court.<sup>6</sup>

4.8 Where a court is called upon to determine whether a person should be permitted to give expert evidence, the judge (in addition to deciding whether or not the expert evidence is admissible) needs to be satisfied that such evidence will genuinely be of assistance in determining the matters that are in issue. The burden rests upon the party who seeks permission to adduce the expert evidence to show that it will assist the judge.<sup>7</sup> If the parties instruct experts without waiting for the court to give permission, they are at risk of not recovering the costs of doing so if the court subsequently decides that expert evidence was not necessary.<sup>8</sup>

## Experts' overriding duty to the court

4.9 The rules provide that it is the duty of experts to help the court on matters within their expertise, and that this duty overrides any obligation to the person from whom they receive instructions or by whom they are paid. The Practice Direction to CPR Part 35 has a catalogue of experts' duties, which is based on the duties specified in case law:<sup>9</sup>

1. Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
2. An expert should assist the court by providing objective, unbiased opinion on matters within his or her expertise, and should not assume the role of an advocate.
3. An expert should consider all material facts, including those that might detract from his or her opinion.
4. An expert should make it clear when a question or issue falls outside his or her expertise and when he or she is not able to reach a definite opinion, for example because he or she has insufficient information.
5. If, after producing a report, an expert changes his or her view on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.

4.10 If an expert witness completely disregards his or her duty to the court by failing to follow the court's directions, the court may rule that the party may not rely on that

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6. *Rules of the Supreme Court 1965* (Eng) (hereafter cited as "RSC") O 38 r 36.
  7. *Clarke v Marlborough Fine Art (London) Ltd (No 3)* [2002] EWHC 11 (Ch).
  8. In *Coker v Barkland Cleaning Co*, TLR, December 6, 1999, where the issue was whether the claimant in a personal injury case had been hit by a machine on the factory floor, the claimant, who won the case, failed to recover the cost of instructing an expert as the court decided expert evidence was unnecessary.
  9. See *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* (The "Ikarian Reefer") [1993] 2 Lloyd's Rep 68.

expert's evidence, the effect of which may mean that the party loses the entire action.<sup>10</sup>

## Experts' request for directions from the court

4.11 To assist expert witnesses in carrying out their functions, they may file a written request with the court for directions.<sup>11</sup> This gives them direct access to the court, either to clarify or amend instructions, or to seek directions: for instance, as to the extent to which they are bound to answer inquiries raised by a party to the proceedings or as to the meaning of a particular direction issued by the court.

## Discussions among experts

4.12 The court may, at any stage, direct experts to discuss among themselves the case or their evidence. The object of the experts' discussion is for them to identify and, if possible, agree on issues; and to identify those on which they disagree. The court may direct what the experts are to discuss; and that they prepare a statement for the court showing the issues on which they agree and those, with reasons, on which they disagree. Discussions between experts are privileged, and any agreement between them cannot bind the parties, save where they agree to be bound by such agreement.<sup>12</sup>

## Written report

4.13 The general rule is that expert evidence, in so far as it is permitted, is to be given in a written report.<sup>13</sup> The report must include:

- the expert's qualifications; details of literature relied on; a summary of any range of opinions on the subject covered by the report and reasons for the expert's opinion;
- a statement of "the substance of all material instructions" received by the expert, which should include a summary of all instructions and facts referred to therein which are relevant to the report or any opinion expressed in it;
- a statement that the expert understands his or her duty to the court and has complied with that duty; and
- a statement of truth, verified and in the prescribed form.<sup>14</sup>

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10. *Stevens v Gullise* [1999] BLR 394 and [1999] 11 CL 47.

11. CPR r 35.14(1) and (2).

12. CPR r 35.12.

13. CPR r 35.5(1).

14. CPR Practice Direction 35 para 2.2-2.5. See also CPR r 35.10(3) and r 35.3.

4.14 It is also the general rule that, where a party wishes to use an expert's report at a trial, it must disclose the report to the other parties. A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the court gives permission.<sup>15</sup>

## Written questions

4.15 Four weeks from the receipt of the expert's report, a party can put to that expert one set of questions solely for clarification of the report.<sup>16</sup> Questions that go beyond mere clarification can be put with permission of the court or the agreement of the other party.<sup>17</sup> Answers to the questions are treated as part of the report.<sup>18</sup> If an expert does not respond to a written request, the court has discretion to disallow the expert's evidence or to deny the party calling him or her the costs of the expert.<sup>19</sup>

## Single joint expert

4.16 Arguably, the most significant and controversial recommendation of Lord Woolf's Report concerning expert evidence is the use of single joint experts. The CPR implements this recommendation by providing that, where two or more parties wish to submit expert evidence on a particular issue, the court may direct that a single joint expert give evidence on that issue only.<sup>20</sup> There is no presumption in favour of the appointment of a single joint expert.<sup>21</sup> It is left for the instructing parties to choose the expert, but, if they cannot do so, the court can select from a list prepared by the parties or can direct selection by some other means.<sup>22</sup>

### *Court guidelines*

4.17 The *Code of Guidance on Expert Evidence* encourages courts to appoint a single joint expert, particularly in cases where the sums involved are not large and the issues are not complex.<sup>23</sup> The *Queen's Bench Guide* and *Chancery Division Guide* both indicate the circumstances in which a single joint expert will be required as a matter of practice:

*In very many cases it is possible for the question of expert evidence to be dealt with by a single expert. Single experts are, for example, often appropriate to deal with questions of quantum in cases where primary issues are as to liability. Likewise, where expert evidence is required in order to acquaint the court with matters of expert fact, as opposed to*

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15. CPR r 35.13.

16. CPR r 35.6(1) and (2).

17. CPR r 35.6(2)(c)(i) and (ii).

18. CPR r 35.6(3).

19. CPR r 35.6(4).

20. CPR r 35.7.

21. *Oxley v Penwarden* [2001] CPLR 1.

22. CPR r 35.7(3).

23. *Code of Guidance on Expert Evidence* para 35.

*opinion, a single expert will usually be appropriate. There remains, however, a body of cases where liability will turn upon expert opinion evidence and where it will be appropriate for the parties to instruct their own experts. For example, in cases where the issue for determination is as to whether a party acted in accordance with proper professional standards, it will often be of value to the court to hear the opinions of more than one expert as to the proper standard in order that the court becomes acquainted with a range of views existing upon the question and in order that the evidence can be tested in cross-examination.*<sup>24</sup>

4.18 The *Commercial Court Guide* encourages parties to consider the use of single joint experts, but also states that “cases in the Commercial Court frequently are of a size and of a complexity or nature that the use of single joint experts is not appropriate.” There is no presumption in the Commercial Court in favour of single joint experts.<sup>25</sup>

#### *Case law*

4.19 The guidelines issued by various courts reflect the case law. For example, in *Simms v Birmingham Health Authority*,<sup>26</sup> the claimant claimed substantial damages from the defendant for negligent management of his delivery at birth, which resulted in severe disabilities, cerebral palsy in particular. The first instance court had ordered a single joint expert to prepare opinion evidence on liability and causation. The appeal court overturned the order because the case was “extremely complex” and the issues covered in the expert’s report were so important to the likely outcome of the case that the parties should be entitled to instruct their own experts.

4.20 In *Oxley v Penwarden*<sup>27</sup> it was held on appeal, in a medical negligence case, that an issue as to correct diagnosis was not appropriate to be dealt with by a single joint expert witness. It was said that there was no presumption in favour of the appointment of a single expert witness and that this was a case in which the parties should be free to call their own evidence. The observation was made that, if there was more than one school of thought on the issue, parties would be unlikely to agree, a judge would then be required to appoint an expert from one particular school of thought, and that would effectively decide an essential question in the case without the opportunity for challenge.

4.21 The same considerations relating to the complexity of the case, the nature of the issues and the amount of the claims are at play when a court appoints a single joint expert, but one of the parties (almost always a party which is unhappy with the view of the single joint expert) wants to introduce evidence from an additional expert witness. In *Daniels v Walker*,<sup>28</sup> involving a claimant struck by a car when he was

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24. See *The Queen’s Bench Guide* (2000) para 7.9.5; *Chancery Division Guide* para 4.11.

25. *Commercial Court Guide* at H2.3-H2.4.

26. *Simms v Birmingham Health Authority* [2001] Lloyd’s Law Reports 382.

27. *Oxley v Penwarden* [2001] CPLR 1.

28. *Daniels v Walker* [2000] 1 WLR 1382.

about six or seven years old, there was no issue of liability and the single main issue concerned the nature of the care that the claimant would require for the rest of his life. The parties agreed that there should be a joint report prepared by an occupational therapist. When this was presented, the defendant's insurers were concerned that the suggested cost far exceeded the care costs they had paid in similar cases. The trial judge refused the defendant's leave to obtain and rely on the evidence of the defendant's own care expert, but invited them to put written questions to the single joint expert. On appeal, the Court of Appeal decided that the trial judge had come to the wrong decision. Lord Woolf, who gave the leading judgment, made the following points:

- The fact that a party has agreed to the appointment of a single joint expert does not prevent that party from obtaining a report of another expert or, if appropriate, to rely on the evidence of another expert;
- In substantial cases (such as the particular case on appeal) the correct approach is to regard the instruction of an expert jointly appointed by the parties as the first step in obtaining expert evidence on a particular case. If, having obtained the report, a party, for reasons that are not fanciful, wishes to consider further information before making a decision as to whether or not to challenge the whole or part of the expert's report, it should, subject to the discretion of the court, be permitted to obtain that evidence. However, the dissatisfied party should initially consider whether its concerns could be satisfied by asking questions on the joint report.
- While it is difficult to make generalisations, where there is a modest sum involved, a court may take a more rigorous approach. Because of the modest amount involved, it may be disproportionate to obtain a second report in any circumstances. At most, what should be allowed is to put questions to the expert who has already prepared a report.<sup>29</sup>

4.22 In *Cosgrove v Pattison*,<sup>30</sup> a case involving a boundary dispute, the court followed *Daniels v Walker* and identified the following factors to be taken into account when considering an application to permit a further expert to be called:

- the nature of the issue or issues;
- the number of issues between the parties;
- the reason the new expert is wanted;
- the amount at stake, and if it is not purely money, the nature of the issues at stake and their importance;
- the effect of permitting one party to call further expert evidence on the conduct of the trial;

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29. See also *Daniels v Walker* [2000] 1 WLR 1382; *Layland v Fairview New Homes Plc* [2002] EWHC 1350 at para 27-32.

30. [2001] CP Rep 68.

- any delay in making the application;
- any delay that the instructing and calling of the new expert will cause;
- any other special features of the case; and
- the overall justice to the parties in the context of the litigation.

4.23 In that case, the court allowed the party dissatisfied with the report of the single joint expert to call evidence from a second expert when that party alleged that the single joint expert might be biased. The court also considered it relevant that another expert had called into question the single joint expert's opinion. Finally, the court characterised the boundary dispute as vital and not completely trivial.

4.24 *Peet v Mid-Kent Healthcare Trust*<sup>31</sup> is another Court of Appeal decision in which Lord Woolf gave the leading judgment. This was a medical negligence claim where the claimant was a twin who had been born suffering from severe cerebral palsy. The defendant offered to pay 95% of the full liability quantum of damages, which was accepted. The trial judge ordered seven single joint experts: an education specialist, an employment consultant, a nursing specialist, an occupational therapist, a physiotherapist, an architect and a speech therapist. The main issue on appeal was whether the claimant's parents could have a conference with the single joint experts without the presence of the defendant's lawyers.<sup>32</sup> More relevant for present purposes, however, are the statements of Lord Woolf regarding the appropriateness of the use of the single joint experts in such a case. He distinguished between medical and non-medical evidence, and said that in the great majority of cases where there is a need for non-medical evidence, such evidence should be given by a single joint expert; it is only by doing so that cost can be controlled.<sup>33</sup>

4.25 In sum, the case law in England currently encourages the appointment of single joint experts in routine cases where the claims involved are modest. In more complex cases, where there is a major issue on liability or causation, courts in England do not ordinarily order a single joint expert. The same may apply to a quantum issue which is substantial and the main issue in the case. However, in personal injury cases, single joint experts are likely to be ordered, as in *Peet v Mid-Kent Healthcare Trust*, in relation to elements of the claim requiring non-medical expert evidence. If a single joint expert is instructed on a substantial issue and one or both parties wish to instruct an additional expert, the court may be constrained to permit them to do so.<sup>34</sup>

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31. *Peet v Mid-Kent Healthcare Trust* [2002] 1 WLR 210.

32. The Court of Appeal affirmed the Master's order that the claimant's parents could not have a conference with the single joint experts in the absence of the other party.

33. *Peet v Mid-Kent Healthcare Trust* [2002] 1 WLR 210.

34. See A May, "The English High Court and Expert Evidence" (2004) 6 *Judicial Review* 353 at 382.

4.26 The apparent aversion of English courts to using single experts in relation to liability and causation issues in substantial cases has been criticised. It is said that the more critical to the case and the more difficult the question for expert opinion, the stronger the argument for confining the evidence to that of a single expert witness. Otherwise, the judge, who is unqualified in the field relating to the expert evidence, has to choose between expert witnesses who have been selected because they support one side or the other. It is arguable that the appointment of a single expert witness in such cases would be likely to produce a better result.<sup>35</sup>

## AUSTRALIAN JURISDICTIONS

### Introduction

4.27 Four Australian jurisdictions have recently reformed the rules relating to expert witnesses: Queensland, the Federal Court, the Family Court, and the Australian Capital Territory. As already indicated, Australian developments have been much influenced by the Woolf reforms in England.

4.28 The main features of these reforms may be summarised as follows.

4.29 The newer approaches feature the formulation of standards, either in rules of court or (as in NSW) as a code of conduct forming a schedule to the rules. To a considerable extent, such codes reflect statements by judges, some of them quite early, relating to expert witnesses. What is new is the attempt to formulate such standards in a coherent and authoritative form, and require expert witnesses to acknowledge and adhere to them.

4.30 Many of the other new measures must be understood against the background of a significant and evident move by courts to increase their control over the flow of cases and the conduct of litigation, a prominent feature of the Woolf reforms. Much effort by judicial officers and other court personnel now goes into “case management”. In general, the courts are actively involved in making a variety of pre-trial orders associated with the preparation of the case for trial. The primary goals of case management are to minimise delay and to reduce public and private costs. The new activism is also intended to assist early settlement of cases, by ensuring that mediation or other dispute settlement mechanisms are utilised, and that the real issues in dispute are identified as clearly and as early as possible. The courts’ close scrutiny of the preparation of the case for trial is designed to ensure, as far as possible, that evidence is available on time and cases are not adjourned because a party is taken by surprise at the last moment, and that the issues have been so clearly defined that time is not wasted with irrelevant or marginally relevant evidence. Although not everyone may be convinced that it has achieved its aims, active case management is now an integral part of the functioning of the civil courts. It forms part of the context in which the role of expert witnesses is to be considered.

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35. H D Sperling, “Commentary on Lord Justice May’s paper: ‘The English High Court and Expert Evidence’” (2004) 6 *Judicial Review* 383 at 387-388.

4.31 One of the objects of case management is to ensure transparency and disclosure. This applies to expert evidence as well as to other types of evidence. Thus we find rules and practices designed to ensure that expert reports to be relied on in evidence are disclosed to the other party well before the hearing.

4.32 These objectives have led to requirements that the experts consult with each other prior to the hearing, and identify (sometimes in a report to the court) the matters on which they agree and those on which they disagree. The arrangements for such consultation – orders requiring that steps be taken within specified times – form part of the case management process.

4.33 In some jurisdictions, notably the NSW Land and Environment Court, there has been a trend to a practice, commonly called “hot-tubbing”, in which experts give evidence concurrently in the course of a general discussion presided over by the judge. The parties’ lawyers also participate in the discussion, rather than proceed to the traditional separate sequential examination and cross-examination of each expert witness.

4.34 Finally, the newer Australian rules move (to varying degrees) towards the use of a single expert witness rather than a number of experts called by each side. This important measure will be considered in detail in Chapter 7. For reasons that will be explained, the Commission will use the term “joint expert witness” for this concept.

## Queensland

4.35 In 1999, Queensland adopted Uniform Civil Procedure Rules, which generally apply to the Supreme, District and Magistrates Courts. They contain provisions on expert witnesses with respect to:

- duty of experts;<sup>36</sup>
- requirements on the contents and form of an expert’s report;<sup>37</sup>
- disclosure of the expert’s report;<sup>38</sup> and
- the process of admitting the expert’s report as evidence, including cross-examination of the expert.<sup>39</sup>

4.36 In July 2004, new rules were adopted with two significant features.<sup>40</sup> First, where proceedings require evidence from expert witnesses, the rules establish a

36. *Uniform Civil Procedure Rules 1999* (Qld) r 426.

37. *Uniform Civil Procedure Rules 1999* (Qld) r 428.

38. *Uniform Civil Procedure Rules 1999* (Qld) r 429.

39. *Uniform Civil Procedure Rules 1999* (Qld) r 427.

40. The new rules also contain important provisions on requirements relating to an expert’s supplementary report, the court’s power to direct experts to hold joint meetings, immunity of experts and costs.



presumption in favour of the appointment of a single expert, either by agreement of the parties or by order of the court. Secondly, the new rules provide for the appointment of an expert before litigation commences; that expert then becomes the only expert on the relevant issue if proceedings are commenced. These particular features apply only to proceedings in the Supreme Court.<sup>41</sup>

### *Single experts*

4.37 An expert may be appointed in the Supreme Court in one of three ways:

1. If two or more parties agree that expert evidence may help in resolving a substantial issue in the proceeding, they may, in writing, jointly appoint an expert to prepare a report on the issue.
2. If parties cannot agree on the appointment of an expert, any party who considers that expert evidence may help in resolving a substantial issue in the proceeding, may apply to the court for the appointment of an expert to prepare a report on the issue.
3. The court may, on its own initiative at any stage of a proceeding, if it considers that expert evidence may help in resolving a substantial issue in the proceeding, appoint an expert to prepare a report on the issue.<sup>42</sup>

4.38 The expert appointed, either jointly by the parties or by the court, is the only expert to give evidence in the proceeding on the issue, unless the court orders otherwise.<sup>43</sup>

4.39 In deciding whether or not to appoint an expert, the court may consider:

1. the complexity of the issue;
2. the impact of the appointment on the costs of the proceedings;
3. the likelihood of the appointment expediting or delaying the trial of the proceeding;
4. the interests of justice; and
5. any other relevant consideration.<sup>44</sup>

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41. *Uniform Civil Procedure Rules 1999* (Qld) r 429F. It has been suggested that, if the rules work well in the Supreme Court, their operation will probably be extended to the District Court and the Magistrates Courts: Justice Margaret Wilson, *The New Expert Witness Rules* (Breakfast Address to the Australian Insurance Law Association, Brisbane, 28 October 2004) at para 14.

42. *Uniform Civil Procedure Rules 1999* (Qld) r 429G.

43. *Uniform Civil Procedure Rules 1999* (Qld) r 429H(6), r 429N(2).

44. *Uniform Civil Procedure Rules 1999* (Qld) r 429K(1).

4.40 The court does not keep a list of experts for the purpose of appointing court experts. It may consider lists of qualified and willing experts put forward by the parties, although it is not confined to choosing an expert from such list. Parties are required to state any connection between an expert named on the list and a party to the proceeding.<sup>45</sup> However, if the court considers an expert is the most appropriate expert to resolve an issue in the proceeding, the court may appoint the expert even if the expert has already given a report to a party in the proceeding on the issue or on another issue in the proceeding.<sup>46</sup>

4.41 Where the court has appointed an expert, it may, on its own initiative or on application by a party, appoint another expert to prepare a report in relation to the issue if the court is satisfied that:

1. there is expert opinion, different from the first expert's opinion, that is or may be material to deciding the case;
2. the other expert knows of matters, not known by the first expert, that are or may be material to deciding the issue; or
3. there are other special circumstances.<sup>47</sup>

4.42 Where the expert witness has been appointed by the parties, the court has a discretion to allow any party to call another expert to give evidence on the relevant issue.<sup>48</sup> Unlike its counterpart rule on court-appointed experts, this rule is silent on the factors the court should consider when exercising such discretion.

*Experts appointed before proceedings have started*

4.43 If there is a dispute that will probably result in a proceeding in the Supreme Court, and obtaining expert evidence immediately may help in resolving a substantial issue in the dispute, an expert witness, intended to be the only witness to give evidence on an issue in the event of litigation, may be appointed by agreement of the disputants or by the Supreme Court on application of the parties.<sup>49</sup>

4.44 Justice Margaret Wilson of the Queensland Supreme Court gave an example of when this might happen:

*Suppose a building under construction has collapsed causing all manner of economic and personal damage; the cause of the collapse needs to be established; there will no doubt be litigation between the owner, the designer and the builder, but that can be expected to take*

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45. *Uniform Civil Procedure Rules 1999* (Qld) r 429J.

46. *Uniform Civil Procedure Rules 1999* (Qld) r 429K(2).

47. *Uniform Civil Procedure Rules 1999* (Qld) r 429N.

48. *Uniform Civil Procedure Rules 1999* (Qld) r 429H(6).

49. *Uniform Civil Procedure Rules 1999* (Qld) r 429S, r 429R.

*months if not years to reach a conclusion; in the meantime the site needs to be cleared and construction recommenced.*<sup>50</sup>

4.45 This is a novel concept that is in place only in Queensland. It was adopted because of the recognition that the system of jointly appointed experts and court-appointed experts may not achieve the goal of saving cost and minimising delay if, by the time such an appointment is made, one or both parties have already retained their experts.<sup>51</sup> The procedure may already exist in practice to a limited extent elsewhere: anecdotal evidence in England suggests that in small claims the solicitors often agree on an expert to produce a report before court proceedings have been commenced.<sup>52</sup>

## The Federal Court

4.46 The Federal Court, in consultation with the Law Council and other professional bodies, has considered reforms on the use of expert witnesses, which resulted in the promulgation in 1998 of new court rules and a Practice Direction.<sup>53</sup> The reforms were patterned after the recommendations of the Woolf Report. The relevant Federal Court Practice Direction contains provisions concerning experts' duty to the court, the form and content of the expert's report, and conferences between experts.<sup>54</sup>

4.47 The Federal Court has, however, differed from the English reforms in two important respects. First, while the English reforms were underpinned by a policy of complete control by the court over the use of expert evidence, the calling of expert evidence in the Federal Court is "subject to the control of the parties, with the Court taking some control in exceptional cases."<sup>55</sup> Unlike the English rules,<sup>56</sup> the Federal Court rules do not require parties to seek the permission of the court before they can call expert witnesses. Secondly, the Federal Court has not adopted the concept of the single joint expert introduced in England, although its court rules contain provisions in relation to court-appointed experts.<sup>57</sup>

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50. M Wilson, *The New Expert Witness Rules* (Breakfast Address to the Australian Insurance Law Association, Brisbane, 28 October 2004) at para 22.
  51. M Wilson, *The New Expert Witness Rules* (Breakfast Address to the Australian Insurance Law Association, Brisbane, 28 October 2004) at para 21-22.
  52. R Jacob, "Court-appointed Expert v Party Expert: Which is Better?" (2004) 23 *Civil Justice Quarterly* 400.
  53. *Federal Court Rules 1979* (Cth) O 34A; Federal Court, *Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* (15 September 1998). The Practice Direction has been superseded by a new one issued on 19 March 2004.
  54. Federal Court, *Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* (19 March 2004).
  55. Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Discussion Paper 62, 1999) at para 13.54.
  56. See CPR r 35.4(1).
  57. *Federal Court Rules 1979* (Cth) O 34.

4.48 Some of the provisions of the Federal Court's rules concern the manner in which evidence of expert witnesses is received at the trial. The rules include provisions for concurrent evidence (hot-tubbing) to which we have referred. They provide that the court may direct:

- that expert witnesses give evidence after all or certain factual evidence has been led;
- that, after factual evidence has been led, expert witnesses file and serve an affidavit or statement indicating whether they adhere to their earlier opinions or whether, in light of factual evidence led at the trial, they wish to modify those opinions;
- that expert witnesses be empanelled together and occupy a point in the courtroom appropriate for giving expert evidence (not necessarily in the witness box);
- that an expert witness give an oral exposition of his or her opinion, including views about the opinions offered by another expert witness;
- that expert witnesses be cross-examined in a certain manner or sequence, or
- that the cross-examination or re-examination of expert witnesses be conducted by completing the cross-examination or re-examination of one witnesses before the other, or by putting to each expert witness in turn each question until cross-examination or re-examination is completed.<sup>58</sup>

4.49 The Federal Court (the first court to adopt this procedure) followed the model pioneered by the Australian Competition Tribunal, which had identified some of its benefits:

- greater clarity and coherence, in that experts are required to prepare written submissions that are set down as a connected argument and, when giving oral evidence, the same connected thread runs through it, rather than being a series of disconnected responses to questions by counsel;
- experts are able to define for their purposes points of agreement and disagreement; and
- experts are taken as far away from the adversarial field as possible.<sup>59</sup>

4.50 The overall effect is that the presentation of evidence is conducted in the manner of a panel discussion among any number of expert witnesses, the legal representatives of the parties, and the judge. The procedure allows the experts to express their own views in their own words, rather than being confined to answering

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58. *Federal Court Rules 1979* (Cth) O 34A r 3(2)(c)-(i).

59. *Re AGL Cooper Basin Natural Gas Supply Arrangements* (1997) ATPR 41-593.

the questions of the advocates. It is arguable that there is less risk that their opinion will be distorted by the advocate's skills. The process gives an expert witness the opportunity to give his or her views about the opinions offered by another expert witness. It is said to reduce the time spent in the examination and cross-examination of expert witnesses.

4.51 The procedure has now been adopted in some Australian jurisdictions including the Family Court<sup>60</sup> and the NSW Land and Environment Court.<sup>61</sup>

## The Family Court

4.52 The use of expert evidence in the Family Court has been the subject of comment and evaluation in recent times by the Australian Law Reform Commission,<sup>62</sup> the Family Court's Future Directions Committee,<sup>63</sup> and in a judgment of the Full Court of the Family Court.<sup>64</sup> In 2002, the Family Court published a discussion paper containing procedural reform recommendations relating to expert witnesses. Those recommendations have been adopted and are now part of the *Family Law Rules 2004* (Cth), which replaced the *Family Law Rules 1984* (Cth), and became effective in December 2004. The concerns that led to the reform of the rules on expert witnesses include:

- partisanship/lack of objectivity of experts;
- experts exceeding their area of expertise; and
- the need for greater clarity of evidence.

4.53 These problems are addressed in the new rules on the basis that an expert's function is to assist the court, that there should be no expert evidence unless it will help the court, and that not more than one expert in any one specialty is required unless this is necessary for some real purpose.<sup>65</sup> Some of the significant features of the rules on expert witnesses are as follows.

### *Greater control of expert evidence*

4.54 Parties who seek to tender a report or adduce evidence from their own experts must, as a general rule, apply to the court for permission to do so.<sup>66</sup> In this respect,

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60. See para 4.67 below.

61. See para 6.49 – 6.52.

62. Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report 89, 1999) Chapter 8.

63. Family Court of Australia, *Future Directions Committee Report* (2000) at 40-42.

64. *W and W* [2001] FamCA 216.

65. Explanatory Statement to *Family Law Rules 2004* (Cth).

66. *Family Law Rules 2004* (Cth) r 15.51. Permission under this rule is not required in the case of a single expert witness or if a child representative intends to

the Family Court has adopted the approach in England of giving the court greater responsibility and control over the use of expert evidence, rather than allowing expert evidence to be adduced at the option of the parties. The court is required to consider whether expert evidence is necessary and, if so, who should give that evidence. A party is not, however, prevented from obtaining advice on technical aspects from the party's own expert.<sup>67</sup>

4.55 When considering whether to permit a party to tender a report or adduce evidence from an expert witness, the court may take into account:

1. the purposes of the court rules dealing with expert evidence;<sup>68</sup>
2. the impact of the appointment of an expert witness on the costs of the case;
3. the likelihood of the appointment expediting or delaying the case;
4. the complexity of the issues in the case;
5. whether the evidence should be given by a single expert witness rather than an expert witness appointed by one party only; and
6. whether the expert witness has specialised knowledge, based on the person's training, study or experience: (i) relevant to the issue on which evidence is to be given; and (ii) appropriate to the value, complexity and importance of the case.<sup>69</sup>

#### *Experts' duties and rights*

4.56 The rules confirm an overriding duty of expert witnesses to the court, prevailing over any obligation to the person instructing or paying the experts' fees.<sup>70</sup> The rules spell out in detail the duties of expert witnesses. For example, expert witnesses are required to give an objective and unbiased opinion on matters that are within their knowledge and capability; to carry out their functions in a timely way; to avoid acting

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tender a report or adduce evidence at a hearing or trial from one expert witness on an issue.

67. Explanatory Statement to *Family Law Rules 2004* (Cth) r 15.51.

68. These are: (a) to ensure that parties obtain expert evidence only in relation to a significant issue in dispute; (b) to restrict expert evidence to that which is necessary to resolve or determine a case; (c) to ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue by a single expert witness; (d) to avoid unnecessary costs arising from the appointment of more than one expert witness; and (e) to enable a party to apply for permission to tender a report or adduce evidence from an expert witness appointed by that party, if necessary in the interests of justice: *Family Law Rules 2004* (Cth) r 15.42.

69. *Family Law Rules 2004* (Cth) r 15.52(3).

70. *Family Law Rules 2004* (Cth) r 15.59(1) and (2).

on an instruction to withhold agreement when attending a conference of experts; to consider all material facts, including those that may detract from their own opinion; to tell the court if a particular question falls outside their expertise; to produce a report that complies with the rules; and to tell the court if their report is based on incomplete research or inaccurate or incomplete information.<sup>71</sup>

4.57 Expert witnesses can ask the court to make orders to assist them to carry out their functions.<sup>72</sup> This might be where the expert's duty to the court conflicts with the instructions of a party or where such instructions are inadequate. It may be to assist a single expert where there are conflicting instructions from opposing parties, or where the expert believes the brief is outside his or her expertise, or where the expert believes it would be inappropriate to release a report to a party for some reason. It may be in relation to a dispute about fees. Such direct access to the court emphasises the expert's independence.<sup>73</sup>

4.58 If an expert witness does not comply with any of the rules, the court may:

1. order the expert witness to attend court;
2. refuse to allow the expert's report or any answers to questions to be relied on;
3. 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
4. take the non-compliance into account when making orders for an extension or abridgment of a time limit; a stay of the case; interest payable on a sum ordered to be paid; or costs.<sup>74</sup>

#### *Single experts*

4.59 The rules allow the use of two types of expert witnesses: (a) experts appointed by each party; and (b) single experts who may be agreed to by the parties or ordered by the court. The rules encourage parties to appoint a single expert.<sup>75</sup> Those who appoint a single expert do not require the permission of the court to tender a report or adduce evidence from that single expert.<sup>76</sup>

4.60 The court may also, of its own motion or upon application by parties seeking permission to adduce expert evidence, order the appointment of a single expert. When considering whether to appoint a single expert, the court may take into account any of the following factors:

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71. *Family Law Rules 2004* (Cth) r 15.59(3).

72. *Family Law Rules 2004* (Cth) r 15.60.

73. Explanatory Statement to *Family Law Rules 2004* (Cth) r 15.60.

74. *Family Law Rules 2004* (Cth) r 15.64.

75. See *Family Law Rules 2004* (Cth) r 15.52(3)(c).

76. *Family Law Rules 2004* (Cth) r 15.44(2).

1. the main purpose of the court rules (which is to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case)<sup>77</sup> as well as the purposes of the rules specifically dealing with expert evidence;<sup>78</sup>
2. whether expert evidence on a particular issue is necessary;
3. the nature of the issue in dispute;
4. whether the issue falls within a substantially established area of knowledge; and
5. whether it is necessary for the court to have a range of opinion.<sup>79</sup>

4.61 If parties appoint a single expert or the court orders the appointment of a single expert, neither party may tender a report or adduce evidence from another expert without court permission. The court may allow a party to adduce evidence from another expert on the same issue if it is satisfied that:

1. there is a substantial body of opinion contrary to any opinion given by the single expert witness and that the contrary opinion is or may be necessary for determining the issue;
2. another expert witness knows of matters, not known to the single expert witness, that may be necessary for determining the issue; or
3. there is another special reason for adducing evidence from another expert witness.<sup>80</sup>

#### *Disclosure*

4.62 The new rules feature an increased emphasis on the disclosure of matters relating to experts' reports and their communications with a party. The intention is to help the parties and their experts to focus on the real issues and improve the quality and integrity of the expert's report, and thereby to narrow the issues and enhance the chances of settlement.<sup>81</sup>

#### *Instructions*

4.63 All instructions to an expert witness must be in writing and must include (a) a request for a written report; (b) advice that the report may be used in an anticipated or actual case; (c) the issues about which the opinion is sought; (d) a description of any matter to be investigated, or any experiment to be undertaken or issue to be reported

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77. *Family Law Rules 2004* (Cth) r 1.04.

78. See *Family Law Rules 2004* (Cth) r 15.42.

79. *Family Law Rules 2004* (Cth) r 15.45(2).

80. *Family Law Rules 2004* (Cth) r 15.49.

81. Explanatory Statement to *Family Law Rules 2004* (Cth) Overview.



on; and (e) full and frank disclosure of information and documents that will help the expert witness to perform the expert witness's function.<sup>82</sup> A summary of the instructions must be attached to the expert's report.<sup>83</sup>

#### *Expert's report*

4.64 Any expert report obtained by a party in a parenting case must be provided to all other parties. The obligation of disclosure extends to a supplementary or further report. Legal professional privilege does not apply in relation to an expert's report that must be disclosed.<sup>84</sup> Overriding the legal professional privilege in this context is considered to be in the best interests of children and is aimed at reducing the over-interviewing of children; ensuring full disclosure of matters affecting children; and reducing the issues between the parties.<sup>85</sup> A party who fails to disclose an expert's report may not use that report at trial.<sup>86</sup>

#### *Experts' fees*

4.65 A party who has instructed an expert witness must, if requested by another party, give each other party details of any fee or benefit received or receivable by the expert witness.<sup>87</sup> This is a requirement adopted from the South Australian Supreme Court Guidelines for Expert Witnesses and is intended to monitor any arrangements that could be said to lead to bias on the part of a witness, such as a contingency fee arrangement or a fee disproportionate to the work involved.<sup>88</sup>

#### *Provision of information*

4.66 A party can apply for an order that another party provide information to an expert to enable a report to be prepared.<sup>89</sup> This addresses the situation where one party has an easily available source of expert information to which the other party does not have access and such information is necessary to allow an expert witness to carry out his or her functions properly. Hence, for example, a party may ask the court for an order that information generated by an in-house expert of the other party be provided to an expert witness in the proceedings.<sup>90</sup>

#### *Conduct of trial with experts*

4.67 The Family Court has adopted the Federal Court's "hot-tub" provisions. The rules provide that the court may order an expert to clarify evidence after cross-examination; require certain factual evidence be led before an expert is called; permit a party to close their case subject only to the evidence of an expert; require all experts

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82. *Family Law Rules 2004* (Cth) r 15.54(2).

83. *Family Law Rules 2004* (Cth) r 15.62(b).

84. *Family Law Rules 2004* (Cth) r 15.55.

85. Explanatory Statement to *Family Law Rules 2004* (Cth) r 15.55.

86. *Family Law Rules 2004* (Cth) r 15.58.

87. *Family Law Rules 2004* (Cth) r 15.56.

88. Explanatory Statement to *Family Law Rules 2004* (Cth) r 15.56.

89. *Family Law Rules 2004* (Cth) r 15.57.

90. Explanatory Statement to *Family Law Rules 2004* (Cth) r 15.57.

on a subject to be sworn and available to give evidence in the presence of each other; and require an expert to give an opinion about the evidence of another expert.<sup>91</sup>

4.68 The provision for an expert to clarify the expert's evidence for the judge (which is not found in the Federal Court rules) was inserted on the recommendation of some experts' groups, who considered that that expert witnesses might not have been able properly to communicate their evidence due to the adversarial way in which trials were conducted.<sup>92</sup>

## Australian Capital Territory

### *Introduction*

4.69 Recent reforms in the ACT relating to expert evidence have focused on two distinct, yet interrelated measures. The first measure involves the inclusion in the ACT Supreme Court Rules of provisions that enable expert evidence to be given concurrently. Secondly, legislation has made it obligatory to use only "agreed experts" (that is, one expert jointly appointed by the parties) or "appointed experts" (court-appointed experts) in all personal injury cases.

### *Concurrent evidence*

4.70 Pursuant to Order 39 Division 9 of the *Supreme Court Rules 1937* (ACT), the court may manage the way in which parties adduce expert evidence in certain situations. This is essentially when two or more parties to a case each wish to call expert witnesses to give a professional opinion on the same or a similar issue.<sup>93</sup> In such circumstances, the court is able, on application of one of the parties or by its own initiative, to direct:<sup>94</sup>

- that the expert witnesses confer;
- that the expert witnesses produce a report indicating where their opinions agree and differ;
- that the expert witnesses give evidence only after all factual evidence on the question has been given and each party has closed its case on the question subject only to the expert evidence;
- that after all factual evidence has been led, a party which called an expert witness file and serve on each other party an affidavit by that witness stating where the witness adheres to his or her earlier opinion or wishes to modify it in any way;
- that expert witnesses be sworn in one after another, with each explaining his or her opinion and/or commenting upon the other experts' opinions; or
- that expert witnesses be cross-examined and re-examined by putting each question to them in turn.

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91. *Family Law Rules 2004* (Cth) r 15.70.

92. Explanatory Statement to *Family Law Rules 2004* (Cth) r 15.70.

93. *Supreme Court Rules 1937* (ACT) O 39.9 r 49F(1).

94. *Supreme Court Rules 1937* (ACT) O 39.9 r 49G.

4.71 Order 39 Division 9 came into effect in November 1999,<sup>95</sup> and was expressly modelled on the similar *Federal Court Rules*.<sup>96</sup>

*Civil Law (Wrongs) Act 2002 (ACT)*

4.72 In September 2003, the *Civil Law (Wrongs) Act 2002 (ACT)* (the “Wrongs Act”) was amended as one of the measures undertaken by the ACT government to reform tort law and, in particular, the law of negligence, as a means of addressing the perceived crisis in medical indemnity and public liability insurance.<sup>97</sup> The amendments introduced new measures to improve “case processing and management” in personal injury cases.<sup>98</sup> One such measure was the establishment of a new regime that regulates the extent to which expert medical evidence could be adduced by parties.<sup>99</sup> This new regime is now contained in Chapter 6 of the Wrongs Act.<sup>100</sup>

4.73 Chapter 6 applies only to claims for damages relating to liability for personal injury,<sup>101</sup> whether brought in tort, contract, breach of statutory duty or another form of action.<sup>102</sup> Personal injury is defined as bodily injury, including mental or nervous shock and death, which may arise from road traffic accidents, but not from workplace injuries.<sup>103</sup>

4.74 Expert medical evidence may only be given in a proceeding by one expert who has been jointly selected by the parties (an agreed expert) or, failing any agreement, an expert appointed by the court.

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95. *Supreme Court Rules Amendment Subordinate Law 1999 (ACT)* No 26 r 1.

96. Explanatory Statement to the *Supreme Court Rules Amendment Subordinate Law 1999 (ACT)* No 26 at 1; See para 4.48 – 4.51 of this report.

97. See *Civil Law (Wrongs) Amendment Act 2003 (No 2) (ACT)* s 2. See also Australian Capital Territory, *Parliamentary Debates (Hansard)* Legislative Assembly, 24 June 2003, the Hon J Stanhope, Attorney General, Second Reading Speech at 2245; Explanatory Statement to the *Civil Law (Wrongs) Amendment Bill 2003 (ACT)* at 2.

98. Explanatory Statement to the *Civil Law (Wrongs) Amendment Bill 2003 (ACT)* at 2.

99. Australian Capital Territory, *Parliamentary Debates (Hansard)* Legislative Assembly, 24 June 2003, the Hon J Stanhope, Attorney General, Second Reading Speech at 2246; Explanatory Statement to the *Civil Law (Wrongs) Amendment Bill 2003 (ACT)* at 2.

100. The new regime was introduced in the *Civil Law (Wrongs) Amendment Bill 2003 (ACT)* as new Chapter 3c. However, pursuant *Civil Law (Wrongs) Amendment Act 2003 (No 2) (ACT)* s 55, the *Civil Law (Wrongs) Act 2002 (ACT)* was renumbered.

101. *Civil Law (Wrongs) Act 2002 (ACT)* s 83(1). Chapter 6 applies only to claims that are based on a cause of action that arises after its commencement on 8 September 2003: *Civil Law (Wrongs) Amendment Act 2003 (No 2) (ACT)* s 2.

102. *Civil Law (Wrongs) Act 2002 (ACT)* s 82.

103. *Civil Law (Wrongs) Act 2002 (ACT)* s 1 and s 83.

4.75 The new regime encourages the parties to a proceeding to agree in writing to joint appointment of one professional to give expert medical evidence in the proceeding.<sup>104</sup> The agreed expert is able to give evidence on any issue on which the expert is so qualified given his or her field of expertise.<sup>105</sup>

4.76 In circumstances where the parties cannot or do not agree on an expert, either party may make an application to the court, or the court may of its own initiative, appoint a professional to give expert medical evidence in the proceeding.<sup>106</sup> The court must not appoint a medical expert unless it is satisfied that he or she is an expert on the issue in question.<sup>107</sup> As with agreed experts, appointed experts may only give evidence on an issue on which they are so qualified given their field of expertise.<sup>108</sup>

4.77 When making an application to the court for the appointment of a particular expert, a party must outline in affidavit evidence such things as:<sup>109</sup>

- Attempts made by the parties to agree on a joint medical expert;
- The issues in the case for which expert medical evidence is sought;
- A list of qualified persons, why they are so qualified and an estimate of their hourly fee for the giving of expert medical evidence; and
- Any other matters that the party believes to be relevant to the application.

4.78 As is evident, one criterion to which the court will have regard when assessing a party's application for the appointment of an expert is what attempts the parties themselves have made at finding a mutually acceptable expert. Thus, it is anticipated that parties will, under this new regime, first seek to agree on one expert before making an application to the court to intervene.

4.79 The new regime provides that, in certain circumstances, more than one expert may be used in a claim for damages for personal injury. The court may appoint additional experts where there are two or more issues arising in the proceeding that require expert evidence and the agreed or appointed expert already involved does not have the necessary qualifications to give evidence on all the issues;<sup>110</sup> or where the court considers that the interests of justice require that an additional expert or experts

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104. *Civil Law (Wrongs) Act 2002* (ACT) s 85(1).

105. *Civil Law (Wrongs) Act 2002* (ACT) s 85(3).

106. *Civil Law (Wrongs) Act 2002* (ACT) s 86(1).

107. *Civil Law (Wrongs) Act 2002* (ACT) s 86(4).

108. *Civil Law (Wrongs) Act 2002* (ACT) s 86(6).

109. *Supreme Court Rules 1937* (ACT) O 39.8A r 45.

110. *Civil Law (Wrongs) Act 2002* (ACT) s 86(2)(a).

be appointed.<sup>111</sup> The legislation specifically provides that the court may not appoint another expert on the same issue unless it is required in the interests of justice.<sup>112</sup>

4.80 In general terms, the costs associated with either an agreed or appointed expert are to be paid by the parties equally, or by agreement between them, or according to order of the court.<sup>113</sup> A party may, when making an application to the court for the appointment of a particular expert, also apply for a particular order about costs relating to that expert. In such circumstances, the supporting affidavit must also address why the particular costs order should be made.<sup>114</sup>

4.81 The Wrongs Act expressly provides that the primary duty of an agreed or appointed expert is to the court and that he or she is not an advocate for a particular party.<sup>115</sup> The role of the expert is to assist the court impartially on the issue on which he or she is giving evidence.<sup>116</sup> As such, parties have an obligation to ensure that all information relevant to the issue on which the expert is giving advice is forwarded to the expert and, if the expert is not briefed jointly, that each party has equal opportunity to do so.<sup>117</sup> The agreed or appointed expert has the power to write to the registrar of the court to seek directions as to the expert medical evidence he or she is to give in a case.<sup>118</sup>

4.82 Expert evidence is given by the filing of a written report with the court, which must comply with any practice direction relating to a code of conduct for agreed or appointed experts.<sup>119</sup> Once the written report is tendered as evidence at the commencement of a proceeding, the expert must, on reasonable notice, be available for cross-examination.<sup>120</sup>

4.83 Although this matter relates more to substantive and procedural law, we note for completeness that Chapter 6 expressly provides that, when an agreed or appointed expert is called upon to give an opinion as to whether a particular treatment amounts to medical negligence, he or she must have regard to whether the treatment was in accordance with an opinion widely held by a significant number of respected practitioners in the relevant field.<sup>121</sup>

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111. *Civil Law (Wrongs) Act 2002* (ACT) s 86(2)(b).

112. *Civil Law (Wrongs) Act 2002* (ACT) s 86(3).

113. *Civil Law (Wrongs) Act 2002* (ACT) s 90.

114. *Supreme Court Rules 1937* (ACT) O 39.8A r 45(g).

115. *Civil Law (Wrongs) Act 2002* (ACT) s 87(2)-(3).

116. *Civil Law (Wrongs) Act 2002* (ACT) s 87(1).

117. *Civil Law (Wrongs) Act 2002* (ACT) s 88.

118. *Supreme Court Rules 1937* (ACT) O 39.8A r 49A. Note that, pursuant to the definition of expert in *Supreme Court Rules 1937* (ACT) O 39.8A r 43, r 49A applies to both agreed and appointed experts.

119. *Supreme Court Rules 1937* (ACT) O 39.8A r 49B-49C.

120. *Supreme Court Rules 1937* (ACT) O 39.8A r 49D-49E.

121. *Civil Law (Wrongs) Act 2002* (ACT) s 87(4). This provision was the subject of an amendment to the original *Civil Law (Wrongs) Amendment Bill 2003* (ACT). See

4.84 Chapter 6 applies only to causes of action arising after its commencement. At the time of writing this report, no case has yet come to trial that is based on a cause of action that attracts the application of Chapter 6 of the Wrongs Act, and thus there is no evidence yet available that demonstrates how this legislation is working in practice.<sup>122</sup>

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Australian Capital Territory, *Parliamentary Debates (Hansard)* Legislative Assembly, 24 June 2003 at 3011-3013.

122. Information supplied by Master Harper of the Supreme Court of the ACT (11 May 2005).

## 5.

# Reform Measures – General Considerations

- Introduction
- The problem of “bias” in expert witnesses
- Assessing proposals and the Civil Procedure Act 2005

## INTRODUCTION

5.1 As a prelude to the consideration of a variety of reform measures, this Chapter addresses two general matters. First, it explains what is meant by “bias” and, in particular by the term “adversarial bias” in relation to expert witnesses. Secondly, it sets out the general approach the Commission takes in evaluating the various reform issues to be considered in Chapters 6-10.

## THE PROBLEM OF “BIAS” IN EXPERT WITNESSES

### Introduction

5.2 A perennial theme in the literature relating to expert evidence is that expert witnesses tend to be biased; and a number of reform proposals seek to address this problem. The main focus will be on what will be termed “adversarial bias”, that is, bias that stems from the fact that the expert is giving evidence for one party to the litigation.

5.3 It should be said at once that, even if adversarial bias could be eliminated or reduced, the result would not necessarily be totally “objective” or totally unbiased expert evidence.<sup>1</sup> Adversarial bias is not the only kind of “bias” that is relevant to expert witnesses. Like other people – including judges, as a number of submissions pointed out – every expert witness will have a distinctive way of looking at the world, and a set of assumptions and beliefs that inevitably affect the expert’s opinions. Most obviously, experts are likely to have views on matters that are controversial within the profession or field of expertise. For example, a psychiatrist may favour a behaviourist or a psychoanalytical approach. Again, differences of opinion about a valuation may reflect different views within the profession about the appropriate methodology to be used. The word “bias” is sometimes used in this connection, but for the purpose of this report, the word “preconceptions” is used to refer to this universal phenomenon in order to distinguish it from what the Report calls “adversarial bias”.

5.4 Secondly, experts may be influenced in ways that have nothing to do with having been engaged by one party or the other. For example, an expert witness involved in a claim for professional negligence against a member of the same profession (whether or not engaged by a party) might feel inhibited by professional solidarity from taking a view adverse to the defendant, a professional colleague.<sup>2</sup>

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1. See on this point G Edmond, “Judicial Representations of Scientific Evidence” (2000) 63 *Modern Law Review* 216; G Edmond, “The Law-Set: The Legal-Scientific Production of Medical Propriety” (2001) 26 *Science, Technology and Human Values* 191.
  2. Some press reports suggest that doctors tend to close ranks rather than testify against other doctors, and that some fear that successful claims will increase their liability insurance premiums: See, for example, J Pearlman, “Doctors wary



## Adversarial bias

5.5 The report uses the phrase “adversarial bias” to refer to bias that derives in some way from the use of an expert by a party in litigation. Among the more colourful castigations of experts for bias is the statement made to Lord Woolf’s inquiry, referring to “hired guns... a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be disadvantageous to their clients”.<sup>3</sup>

5.6 But there are more sophisticated accounts. In the 1870s, Sir George Jessel identified bias in the sense of partisanship:

*[U]ndoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witnesses, rather considering themselves as paid agents of the person who employs them.*<sup>4</sup>

He also drew attention to a different problem, namely the selection of expert witnesses:

*[T]he mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the court. A man may go, and sometimes does, to half-a-dozen experts. I have known it in cases of valuation within my experience at the Bar. He takes their honest opinions, he finds three in his favour and three against him; he says to the three in his favour, “Will you be kind enough to give evidence?” And he pays the three against him their fee and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty...therefore I always have the greatest possible distrust of scientific evidence of this kind, not only because it is universally contradictory and the mode of its selection makes it necessarily contradictory, but because I know the way in which it is obtained. I am sorry to say that the result is that the court does not get that assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect.*<sup>5</sup>

### *Three varieties of adversarial bias*

5.7 Drawing on Sir George Jessel’s classic statement, it is helpful to identify three varieties of adversarial bias: deliberate partisanship, unconscious partisanship, and

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of being caught in a web of litigation” *Sydney Morning Herald* (6 September 2004) at 11.

3. Editorial from the journal *Counsel* (Nov/Dec 1994), quoted in H K Woolf, *Access to Justice* (Interim Report to the Lord Chancellor on the civil justice system in England and Wales, HMSO, London, 1995) at 183.
4. *Abinger v Ashton* (1873) 17 LR Eq 358 at 374 (Jessel MR).
5. *Thorn v Worthing Skating Rink Company* (1877) 6 Ch D 415 at 416 (Jessel MR).

what we will call selection bias. These distinctions are important in identifying appropriate responses to the problem.

5.8 **Deliberate partisanship.** This type of bias occurs when an expert deliberately tailors evidence to support his or her client.

*In response to the question: 'Is that your conclusion that this man is a malingeringer?' Dr Unsworth responded: 'I wouldn't be testifying if I didn't think so, unless I was on the other side, then it would be a post traumatic condition'.<sup>6</sup>*

5.9 It is unusual to encounter experts admitting deliberate bias, and no doubt Dr Unsworth, if accurately reported, had his tongue in his cheek. On the other hand, findings of bias made by judges against expert witnesses in particular instances are commonplace.<sup>7</sup> Some would assert that this is a pervasive problem.<sup>8</sup> It is impossible, however, to determine the extent of such behaviour on the basis of anecdotal evidence.

5.10 **Unconscious partisanship.** Unconscious partisanship is a more subtle form of what we are here calling adversarial bias. In this form, the expert does not intentionally mislead the court, but is influenced by the situation to give evidence in a way that supports the client.

5.11 The literature is replete with descriptions of the process. An American expert witness, for example, said that he had:

*experienced the subtle pressures to join the team – to shade one's views, to conceal doubt, to overstate nuance, to downplay weak aspects of the case that one has been hired to bolster. Nobody (he says) likes to disappoint a patron; and beyond this psychological pressure is the financial inducement. Money changes hands upon the rendering of expertise, but the expert can run his meter only so long as his patron litigator likes the tune. Opposing counsel undertakes a similar exercise, hiring and schooling another expert to parrot the*

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6. *Ladner v Higgins* 71 So 2d 242 (1954) at 244, cited in "Confronting the new challenges of scientific evidence" (1995) 108 *Harvard Law Review* 1481 at 1481.

7. Thus, a District Court Judge is reported as saying that the report of a safety expert was speculative, inferential and "read more like a barrister's final submission than an expert analysis": J Pearlman, "Mouths for Hire" *Sydney Morning Herald* (6 September 2004) at 11.

8. For example, Geoffrey Watson QC, a personal injury and medical negligence barrister, has been reported as saying that the courts were "infested with 'shonky experts' and that codes of conduct had not prevented them giving biased evidence": J Pearlman, "Courts rebel on paid evidence", *Sydney Morning Herald* (6 September 2004) at 1-2. Similarly, a psychiatrist is reported to have altered his report "to suit his lawyers": J Pearlman, "Mouths for Hire", *Sydney Morning Herald* (6 September 2004) at 11.

*contrary position. The result is our familiar battle of opposing experts. The more measured and impartial an expert is, the less likely he is to be used by either side.*<sup>9</sup>

5.12 In Australia, Justice Davies has written:

*Expert witnesses, as much as or perhaps even more than lay witnesses, are subject to adversarial pressure. Many of them make their living primarily from giving reports for and evidence in litigation. Almost all of them derive substantial fees from giving such reports and evidence, in many cases fees which are substantially higher than those which they derive from their other professional work. There is therefore, at the outset, an incentive for them to be chosen by a party to give evidence; and they must know that that party will not choose them unless their evidence supports that party's cause. The likelihood that an expert's evidence will be biased in favour of the client is then increased by the pressure which all witnesses feel to join the team.*<sup>10</sup>

5.13 “**Selection bias**”. By “selection bias” we refer to the phenomenon in which litigants choose as their expert witnesses persons whose views are known to support their case. The expert, although selectively chosen, may be giving careful and honest evidence. The problem is not the fault of the individual expert, but that the process of selection is likely to lead to what Justice Davies calls “polarisation”:<sup>11</sup> the only views advanced tend to be the more extreme views favouring each side, and the court may not hear at all from experts whose views are more moderate or mainstream.

## Addressing the problem of adversarial bias

5.14 As the above discussion indicates, it is not difficult to identify the various forms of adversarial bias, or to find colourful descriptions of the phenomenon. In practice, the three forms of adversarial bias are likely to co-exist, and also to occur in different degrees of severity. One expert may be more influenced by unconscious bias than another. An expert may generally give what he or she sees as honest evidence, but may stretch the truth on a particular aspect. Experts frequently chosen by plaintiffs’ lawyers, or by insurance companies, will know perfectly well that they have been chosen because their views happen to favour the client’s position; it might involve loss of face, as well as perhaps loss of income, for them to depart from their familiar views,

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9. Quoted in J Langbein, “The German Advantage in Civil Procedure” (1985) 52 *University of Chicago Law Review* 823 at 835.

10. G L Davies, “The reality of civil justice reform: why we must abandon the essential elements of our system” paper presented the 20th AIJA Annual Conference (Brisbane, 12-14 July 2002) at 12.

11. G Davies, “Expert Evidence: Court Appointed Experts” (2004) 23 *Civil Justice Quarterly* 367.

and this may make it difficult to approach the issues with an open mind. Some experts will be more able than others to resist such pressures.

5.15 What is difficult, however, is to determine the extent of adversarial bias. Sweeping statements, whether condemning experts or applauding them, do not assist. The vibrant debates of earlier times continue today,<sup>12</sup> both in the literature and in the submissions to the Commission. Although it is not possible to quantify the extent of the problem, in the Commission's view it is safe to conclude that adversarial bias is a significant problem, at least in some types of litigation. Measures that would reduce or eliminate adversarial bias, therefore, are likely to have potential benefits, even if the extent of those benefits cannot accurately be determined.

5.16 Despite the differences between its three forms, adversarial bias arises from the engagement of an expert by a party to litigation. This explains why in England and elsewhere the system has been modified so that expertise can be provided to the court other than by each party engaging its own separate expert witnesses. These measures address the root cause of adversarial bias, namely the engagement of the expert by one of the parties to the proceedings. This point will emerge as particularly important in relation to Chapter 7, which discusses joint experts and court-appointed experts.

*Measures to reduce adversarial bias*

5.17 There are a number of measures that attempt to reduce the problem of adversarial bias in expert witnesses engaged by one party. Their effectiveness is difficult to determine. However it is likely to depend to a considerable extent on the form the adversarial bias takes.

5.18 The problem of *selection* bias is difficult to address other than by a system under which each party no longer selects its own expert witnesses. It is difficult to imagine rules that would otherwise prevent parties from selecting the expert considered most likely to advance the client's cause. It is obvious that neither codes of conduct nor sanctions against the experts would deal with this phenomenon.

5.19 As for reducing *deliberate* partisanship, it is appropriate that the law provide measures specifying the duty of expert witnesses to assist the court honestly and objectively (such as codes of conduct), and sanctions for experts found to have deliberately breached their duties.<sup>13</sup>

5.20 In the case of *unconscious* partisanship, in general a punitive approach featuring sanctions would be likely to be ineffective and possibly unfair, because experts manifesting unconscious adversarial bias would not have knowingly breached the guidelines. However, emphasising their duties to the court by way of codes of conduct might help to reduce the problem, by requiring experts and those who instruct them to give careful consideration to the problem of unconscious bias and deal with it

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12. See Chapter 2.

13. See Chapter 9, particularly para 9.6-9.19, 9.65-9.71.

as best they can.<sup>14</sup> Further, as we see in Chapter 6, there is considerable potential in measures designed to help the court keep control of the manner in which expert evidence is provided, to identify the real issues, and to ensure that expert witnesses are required to present their evidence in proper form, and are subjected to peer review as well as cross-examination by lawyers.

## ASSESSING PROPOSALS AND THE CIVIL PROCEDURE ACT 2005

### Introduction

5.21 The overriding purpose of the *Civil Procedure Act 2005* (NSW) and of the rules of court in their application to civil proceedings is “to facilitate the just, quick and cheap resolution of the real issues in the proceedings”.<sup>15</sup> Guiding principles to further this overriding objective are spelled out in s 56-60 of the Act, which are reproduced in Appendix A of this Report. These provisions form an authoritative and appropriate basis for the assessment of the various proposals to be considered in this report.

5.22 These principles are relevant not only to fully litigated decisions, but also to the vast majority of cases that are settled between the parties. If parties settle a case on the basis of inaccurate information because the system prevents them from using more accurate information, the system would have fallen short of the objective of achieving a just decision. Similarly, the system falls short of the ideal if parties settle for inadequate or excessive amounts because of the need to avoid excessive costs or unreasonable delays.

5.23 The Commission proposes to use these principles as a way of assessing the merits or demerits of particular rules or procedures relating to expert witnesses. It will consider what is involved under three headings based on the words “just, quick and cheap” in s 56.

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14. See generally Chapter 9.

15. *Civil Procedure Act 2005* (NSW) s 56.

## Justice

5.24 Section 58 of the Act uses the words “the just... resolution of the real issues”. In this reference, the Commission’s task is essentially to make recommendations about the various measures that will be available to the courts in relation to expert witnesses. In using them in the particular circumstances of each case, the courts must follow the principles set out in Division 1 of Part 6 of the *Civil Procedure Act 2005* (NSW), and, in particular, must “act in accordance with the dictates of justice”.<sup>16</sup>

5.25 Some of the measures to be considered, notably the rules relating to the joint expert witness, involve approaches that can be seen to depart from the procedural model referred to as the “adversary system”, that is, the common law system of conducting proceedings in which the parties, and not the judge, have the primary responsibility for defining the issues in dispute and for investigating and advancing the case.<sup>17</sup>

5.26 The adversary system is often contrasted with the “inquisitorial” model, thought to characterise European legal systems, in which the court itself plays an active part in the collection of evidence: carrying out an inquiry or investigation, rather than leaving it to the parties to bring the relevant evidence to the court.<sup>18</sup> It is now widely recognised, however, that justice systems in the European and common law traditions have a wide and varying range of features that do not fall neatly within such paradigms. Indeed, it has been said that in recent years there has been a tendency for the models to converge.<sup>19</sup> Within both traditions, there has been much recent re-assessment and change and, according to Zukerman, a “shift towards the imposition of a stronger control by judges over the progress of civil litigation”.<sup>20</sup>

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16. *Civil Procedure Act 2005* (NSW) s 58.

17. Jerome Frank put it thus: “[T]he parties are presumed to be able to look after their own interests, and the court is presumed to have no independent interest in reviewing evidence that the parties do not present”: J Franks, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press, Princeton, 1949) at 85.

18. The Australian Law Reform Commission (ALRC) quotes a submission from the Law Council that describes the inquisitorial procedure as follows: “The term ‘inquisitorial’ refers to a proceeding in which a neutral judicial officer carries out an investigation to discover facts, the discovery of which will serve some identifiable public purpose. There is no dispute per se.”: ALRC, *Managing Justice: A Review of the Federal Civil Justice System* (Report 89, 1999) at para 1.120.

19. B Markesinis “Learning from Europe and learning in Europe” in B Markesinis, *The gradual convergence: Foreign ideas, foreign influences, and English law on the eve of the 21st century* (Oxford University Press, Oxford, 1994) at 30, cited in ALRC, *Managing Justice: A Review of the Federal Civil Justice System* (Report 89, 1999) at para 1.127.

20. A Zukerman “Justice In Crisis: Comparative Dimensions of Civil Procedure” in A Zukerman (ed), *Civil justice in crisis: Comparative perspectives of civil*

5.27 Like the Australian Law Reform Commission in a major inquiry some years ago,<sup>21</sup> the Commission has not found it helpful to resolve the questions posed by whether particular measures conform to “adversary” or the “inquisitorial” systems. Instead, the focus will be on whether making particular measures available to the court is likely to advance the implementation of the principles spelled out in the *Civil Procedure Act 2005* (NSW) to which we have referred.

## Speed

5.28 The importance of this objective requires little explanation. It is desirable that the system disposes of cases with minimum delay. Much of the most severe criticism of legal systems relates to delay, as reflected, for example, in the saying “justice delayed is justice denied”; and, as has been seen, many of the recent reform initiatives have the minimising of delay as one of their main objectives.<sup>22</sup>

5.29 Minimising delay will often entail minimising costs, but it is an objective in its own right. Delay in the satisfaction of a meritorious claim can be seen as perpetuating an injustice. Delay can be highly stressful for litigants. Delay may lead to the loss of evidence, or a decline in its quality as memories fade and documents are mislaid. In some situations, delay can destroy the practical utility of a just decision altogether.

## Minimising public and private costs

5.30 Cost and delay are typically seen as twin barriers to justice, and it is obvious that minimising cost is an important objective of the civil justice system.

5.31 This objective relates to both public and private costs. Thus the Act refers both to “the efficient use of available judicial and administrative resources”<sup>23</sup> and to the proportionality of the costs to the parties in relation to the importance and complexity of the subject-matter in dispute.<sup>24</sup> Some measures may be less expensive for the parties, but more expensive for the community, because they use more of the court’s

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*procedure* (Oxford University Press, New York, 1999) at 47-48. See also J Jolowicz “The Woolf report and the Adversary System” (1996) 15 *Civil Justice Quarterly* 198 at 200. Both sources are cited in ALRC, *Managing Justice: A Review of the Federal Civil Justice System* (Report 89, 1999) at para 1.128.

21. The ALRC found that “an adversarial-non adversarial construct was too elusive a basis on which to analyse problems or to formulate change to the system”: ALRC, *Managing Justice: A Review of the Federal Civil Justice System* (Report 89, 1999) at para 1.112.
22. It has been said that the delays in the Italian civil process are such that the system “is largely useless to citizens who ask for justice”: S Chiarloni, “Civil Justice and its Paradoxes: An Italian Perspective” in A Zuckerman (ed), *Civil justice in crisis: Comparative perspectives of civil procedure* (Oxford University Press, New York, 1999) at 264.
23. *Civil Procedure Act 2005* (NSW) s 57(1)(c).
24. *Civil Procedure Act 2005* (NSW) s 60.

resources. Others may reduce public costs by requiring the parties to take particular steps in the proceedings, thereby, in some situations, increasing private costs. Both public and private costs need to be considered in relation to each proposal.

## Conclusion

5.32 The ideal, no doubt, is a civil justice system that achieves justice, and minimises delay and private and public costs, in both adjudicated and settled cases. In practice, the reality will always fall short, and the object of reform will be to minimise the gap between the reality and the ideal.



## 6. Procedural Aspects of Expert Evidence

- Introduction
- The context of active case management
- The permission rule
- RECOMMENDATION 6.1
- Disclosure and other measures to increase transparency
- Requirements for experts to consult before hearing
- Concurrent evidence
- Restriction on a party's ability to object
- RECOMMENDATION 6.2
- "Attributed histories" and section 60 of the Evidence Act

## INTRODUCTION

6.1 This chapter first proposes that there should be a general rule that parties require the court's permission in order to lead expert evidence (the "permission rule"). The effect of such a rule would be to provide the court with an unqualified power to control the expert evidence which can be adduced and the manner of doing so. Other rules concerning expert evidence would then be read as particular instances of that overarching power.

6.2 Secondly, the chapter considers the merits of certain measures intended to increase transparency, namely the early exchange of experts' reports, disclosure of instructions given to experts, and the disclosure of expert reports obtained but not intended to be used as evidence. The Commission considers that the existing provisions about these matters are satisfactory and recommends no change.

6.3 Thirdly, the chapter considers the requirement that experts consult before the hearing, and fourthly, the desirability of taking concurrent evidence. The Commission's view is that each of these measures is valuable in appropriate circumstances and that the existing law is satisfactory.

6.4 Finally, the chapter proposes the repeal of a rule of the *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR") that restricts the parties' ability to object to an expert's qualifications and facts in an expert report – rule 31.19(6) – and mentions a related development, not within the present terms of reference, relating to attributed histories and s 60 of the *Evidence Act 1995* (NSW).

6.5 Issues relating to joint expert witnesses and court-appointed witnesses require detailed consideration, and are the subject of Chapters 7 and 8.

## THE CONTEXT OF ACTIVE CASE MANAGEMENT

6.6 As is already evident, Australia has participated in the widespread trend referred to by Zuckerman as the "shift towards the imposition of a stronger control by judges over the progress of civil litigation".<sup>1</sup> Much effort by judicial officers and other court personnel now goes into "case management". In general, the courts are actively involved in making a variety of pre-trial orders associated with the preparation of the case for trial. The primary goals of case management are to minimise delay and reduce public and private costs. The new activism is intended to assist early settlement of cases, by ensuring that mediation or other dispute settlement mechanisms are available, and that the real issues in dispute are identified as clearly and as early as possible. Active case management is now an integral part of the

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1. A Zuckerman, "Justice in crisis: Comparative dimensions of civil procedure" in A Zuckerman (ed), *Civil justice in crisis: Comparative perspectives of civil procedure* (Oxford University Press, New York, 1999) at 47-48. See also J Jolowicz, "The Woolf report and the adversary system" (1996) 15 *Civil Justice Quarterly* 198 at 200.

functioning of the civil courts, and forms part of the context for the procedural matters to be considered in the chapter. The close scrutiny of the preparation of the case for trial is designed to ensure, as far as possible, that evidence is available on time and cases are not adjourned because a party is taken by surprise at the last moment, and that the issues have been clearly defined so that time is not wasted with irrelevant or marginally relevant evidence. The processes of case management, well before the date set for the hearing, make it possible for courts to deal at an appropriately early stage with measures such as the engagement of joint expert witnesses (as discussed in Chapter 7) and the application of the “permission rule”, to which we now turn.

## THE PERMISSION RULE

### RECOMMENDATION 6.1

The *Uniform Civil Procedure Rules 2005* (NSW) should be amended to provide that in civil proceedings parties may not adduce expert evidence without the court’s permission. (Appendix C, Sch 1 Item [2].)

### Purpose

6.7 For convenience, in this discussion we will use “permission rule” to refer to a rule that parties may not adduce expert evidence without the court’s permission. Such a rule exists in England and in the Family Court of Australia.<sup>2</sup>

6.8 As described in Chapter 3, under the *Civil Procedure Act 2005* (NSW) and the UCPR, courts have wide powers as to practice and procedure generally and as to the conduct of hearings. In particular, the Act gives courts the power to give directions “limiting the number of witnesses (including expert witnesses) that a party may call”.<sup>3</sup> The Act provides that rules may be made on various topics, including “the admission and exclusion of evidence and the manner in which evidence is tendered”.<sup>4</sup> In view of the width of these powers, the other reforms proposed in this report might be achieved without providing for a “permission rule”. Nevertheless, the Commission considers that such a rule would make explicit the court’s ultimate responsibility for ensuring, so far as possible, that in each case the expert evidence is in the most appropriate form for the purpose of doing justice in that case. In particular, the rule would have the following advantages:

- The rule would negate any argument that new provisions relating to the control of expert evidence should be construed restrictively because, for example, they modify hitherto established procedures and practices.

2. See Chapter 4, particularly para 4.7 and 4.54.

3. *Civil Procedure Act 2005* (NSW) s 61, 62, 62(3)(b).

4. *Civil Procedure Act 2005* (NSW) s 9, Sch 3 cl 7 and 25.

- The rule would negate any argument that such new provisions should be construed restrictively on the ground that such provisions are inconsistent with the longstanding adversarial approach to litigation.
- The rule would ensure an untrammelled exercise of discretion in the application of such provisions, having regard to the saving of time and costs and the interests of justice in the circumstances of the case.
- The rule would cover any gaps in the operation of particular provisions. Particular rules cannot deal definitively with every eventuality that might arise. It may be arguable, for example, whether the provision allowing the court to limit the number of witnesses a party may call<sup>5</sup> permits the court to limit the number of *expert* witnesses a party may call, as distinct from the total number of witnesses a party may call. Again, there may be room for argument about whether the court has power to prevent a party from calling expert evidence of a kind which the court regards as superfluous. There should be no question about the court's capacity to control expert evidence in those respects.
- The rule would encourage the courts to determine how the power over expert evidence should, in broad terms, be exercised, by practice decisions and/or practice notes. That is what has occurred in the United Kingdom (although some would argue that the courts there have been unduly conservative in that regard) and to a limited extent in the New South Wales Supreme Court. In that way, the courts would develop policies in relation to the control of expert evidence pursuant to the rules, drawing on their experience with new or relatively new provisions. That would be a valuable contribution to these developments.

6.9 In the Commission's view, the permission rule will assist in ensuring that the importance of the courts' control over expert evidence is unequivocally expressed and widely understood, and thereby encourage the close judicial management of expert evidence.

6.10 Such a permission rule would not require the courts to consider the matter of expert evidence closely on a case by case basis. As has occurred in England, any such requirement is obviated by practice decisions, practice notes and model directions incorporating broad policy positions in relation to various classes of cases. In the course of case management, the parties then present draft directions, including draft orders in relation to expert evidence, which the court needs only to review in broad terms unless there is some dispute about what should occur in the particular case. There have already been developments in the New South Wales Supreme Court and District Court in relation to practice notes and model directions that would provide a good start in this direction.

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5. *Civil Procedure Act 2005* (NSW) s 62(3)(b).

## Conclusion

6.11 In the Commission's view, the courts should, for these reasons, have comprehensive control over expert evidence. That should be unequivocally stated and widely understood. The permission rule would achieve these objectives.

## DISCLOSURE AND OTHER MEASURES TO INCREASE TRANSPARENCY

6.12 For the reasons set out in this section, the Commission believes that the existing provisions of the UCPR are appropriate in relation to disclosure and other measures to increase transparency, and accordingly makes no recommendation.

### Introduction

6.13 The topic relates to communications between parties and persons they approach with a view to being expert witnesses called by that party. Somewhat similar questions arise in the case of court-appointed experts and joint expert witnesses, and will be considered in Chapter 7.

6.14 The measures to be considered in this section are:

- exchange of advance copies of expert reports to be used as evidence;
- disclosure of instructions and other communications between client and expert witness; and
- disclosure of any expert reports that a party obtains, whether or not to be used in the case.

### Submissions

6.15 The requirement that parties exchange all reports that are to be used as evidence was strongly supported in the submissions, many expressing the view that copies of all reports from opposing experts should be exchanged as soon as possible and in advance of the trial.<sup>6</sup>

6.16 The submissions were divided over whether all reports obtained, including those not being used as evidence, should be disclosed. Some submissions suggested that requiring parties to disclose all reports would assist transparency by allowing the

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6. Australian Institute of Quantity Surveyors, *Submission* at 4; United Medical Protection, *Submission* at 6; Association of Consulting Engineers, *Submission* at 5; National Institute of Forensic Science, *Submission* at 5; Stephen Allnutt, Peter Klug and Bruce Westmore, *Submission* at 5; New South Wales Bar Association, *Submission* at para 27; David Hibbert, *Submission* at 3; Law Society of New South Wales, Litigation Law and Practice Committee, *Submission* at 3.

court access to a range of views rather than only the single view of the expert retained by a party.<sup>7</sup>

6.17 Other submissions identify a variety of reasons why compulsory disclosure of all reports should not be recommended.<sup>8</sup> Thus the Australian Lawyers Alliance submitted:<sup>9</sup>

*Requiring disclosure of a report upon which a party does not intend to rely may prolong or complicate litigation. The decision not to use a report may be based on fundamental errors in the report, a misunderstanding of the facts or instructions. A witness may have become unavailable for the trial or to complete the report so as to render the qualifying of a new expert desirable.*

6.18 The disclosure of instructions given to an expert witness was largely supported by the submissions.<sup>10</sup> However, although some submissions also supported the disclosure of all communications between the client and the expert,<sup>11</sup> several of the submissions indicated that such a requirement would be “unduly burdensome and potentially inappropriate”.<sup>12</sup>

## Exchange of expert reports that are to be used as evidence

6.19 In its review of civil procedure, the Australian Law Reform Commission (“ALRC”) pointed out that an important way in which courts or tribunals control the use of expert evidence is by ordering early disclosure of expert evidence to the opposing party and to the court or tribunal. This is intended to prevent the confusion and time wasting that can occur when, at or on the brink of the hearing, it appears that the experts are proceeding on different assumptions of fact, or are addressing different issues:

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7. Lindsey Browne, *Submission* at 1; Stephen Allnutt, Peter Klug and Bruce Westmore, *Submission* at 5; Australian College of Private Consulting Psychologists, *Submission* at 5.
  8. Expert Experts, *Submission* at para 33.5; Australian Lawyers Alliance, *Submission* at 14, Law Society of New South Wales, Litigation Law and Practice Committee, *Submission* at 3; United Medical Protection, *Submission* at 6; New South Wales Bar Association, *Submission* at para 28; Australian Institute of Quantity Surveyors, *Submission* at 4.
  9. Australian Lawyers Alliance, *Submission* at 14.
  10. Australian Institute of Quantity Surveyors, *Submission* at 4; Australian Lawyers Alliance, *Submission* at 14; United Medical Protection, *Submission* at 7; Stephen Allnutt, Peter Klug and Bruce Westmore, *Submission* at 5;
  11. Australian Lawyers Alliance, *Submission* at 14; Stephen Allnutt, Peter Klug and Bruce Westmore, *Submission* at 5.
  12. United Medical Protection, *Submission* at 7; Australian Institute of Quantity Surveyors, *Submission* at 4; Geoffrey Markham, *Submission* at 4; Freehills, *Submission* at 6.

*Early disclosure of expert reports can enable the parties and decision makers to identify the issues, the relative merits of claims and areas in which agreement may be reached between the parties at a timely stage in proceedings. For those matters which proceed to a hearing, such disclosure helps ensure that the parties are less likely to be taken by surprise at the hearing. Disclosure of reports may facilitate settlement of part or all of the issues, or where settlement is not possible, allow the preparation of focussed, relevant expert evidence for trial. Such outcomes are capable of reducing costs and delay and improving decision making.<sup>13</sup>*

6.20 The requirement that, in advance of the trial, the parties should exchange copies of the expert reports on which they propose to rely is now a well-accepted principle, and was generally approved in the submissions. The rule is appropriately expressed in the UCPR rule 31.18, and accordingly the Commission makes no recommendation for change.

## Disclosure of instructions and other communications with expert witness

### *The present law and practice*

6.21 An expert's opinion is inadmissible without specification of the assumptions of fact made by the witness as a basis for the opinion. That is uncontroversial. The question is whether the law should go further and require disclosure of all communications with the expert.

6.22 If the expert has been engaged for the purpose of legal proceedings, communications with the expert are prima facie protected by client legal privilege, in particular, by s 119 of the *Evidence Act 1995* (NSW). That privilege may, however, be waived by express or implied waiver. There is no problem about express waiver. The privilege will be waived by implication where it would be unfair to allow the privilege to be maintained in the circumstances of the case.<sup>14</sup>

6.23 A practice commonly adopted is for letters of instruction to be freely made available, and for a party who wishes to investigate the matter further to issue a subpoena to the witness and a notice to produce to the retaining party, requiring production of any further written communications, and of any notes of any oral communications. When the documents are produced, discussion between counsel may narrow the ambit of a claim for privilege. Any residual dispute is decided by the judge, who examines the material in order to decide whether privilege has been waived in relation to particular documents. Sometimes, a trial judge will refer the question to another judge to decide in order to avoid any perception that the trial

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13. Australian Law Reform Commission, *Review of the Federal Civil Justice System* (Discussion Paper 62, 1999) at para 13.40.

14. See S Odgers, *Uniform Evidence Law* Pyrmont (Lawbook Co, Pyrmont NSW, 2004) at para 1.3.11060.



judge may have been influenced by documents which are held to be protected from disclosure.

#### *An alternative approach*

6.24 The application of the privilege in relation to expert witnesses has been modified in South Australia, where the Supreme Court rules provide that a party which has engaged an expert must provide to any other party “a list of all conversations in which the expert has taken part with any party, any legal representative of a party or any other expert consulted in relation to the matter relevant to the opinions expressed in the report stating when and with whom each such conversation occurred and the topics discussed”.<sup>15</sup>

#### *Submissions*

6.25 The submissions were divided on whether it is desirable for the law to require disclosure of all communications between the party and the expert. A number of submissions argued that the privilege serves important policy purposes and should be retained: it is important, and useful both to the administration of justice and to the parties, that parties should be able to obtain confidential expert advice as they prepare their cases. The Institute of Chartered Accountants wrote that “to create a regime which requires the production of all iterations of instruction may discourage legal advisors or their clients from seeking appropriate advice in a timely manner”.<sup>16</sup> Freehills wrote that to go beyond the waiver of privilege entailed by tendering the report “is an unnecessary cutting-down of privilege and likely to increase the discovery burden on parties with little real benefit.”<sup>17</sup>

#### *Conclusion*

6.26 No doubt one purpose behind a rule requiring disclosure would be to reveal any improper behaviour, such as a litigant exerting improper pressure on an expert, or misleading the expert as to the facts, or, conversely, an expert indicating a willingness to dishonestly tailor expert evidence to suit the client’s cause. While this may succeed in some cases, as a number of submissions pointed out, such a rule would be easily circumvented, for example, by using oral rather than written communications.

6.27 The ALRC was not persuaded that a change was warranted in relation to the Federal Court or the Family Court.<sup>18</sup>

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15. *Supreme Court Rules 1987 (SA)* r 38.01A(4)(d).

16. Institute of Chartered Accountants, *Submission* at 16; Australian Institute of Quantity Surveyors, *Submission* at 4, expresses a similar view (experts often advise on weaknesses in a client’s case; if such correspondence were discoverable, it would lead to a reluctance to seek such advice, and may thereby increase the amount of avoidable litigation).

17. Freehills, *Submission* at para 26.

18. However the ALRC considered that a different approach was appropriate for administrative review proceedings: Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report 89, 2000) at para 6.84.

*The view is widely held that narrowing the scope of legal professional privilege adds to the documentary burden of litigation without any necessary improvement in the quality of the evidence adduced before the court. The Commission considers that, in most circumstances, it would be unfair to expose experts to cross-examination on the contents of draft reports (which may be no more than the ‘preliminary musings’ of the expert). Experts often modify their views as they carry out more work.*

6.28 On balance, the Commission is not persuaded that the existing law on legal professional privilege should be changed by requiring disclosure of communications between a party and a person who becomes an expert witness on behalf of that party.

## Disclosing any expert reports that a party obtains

6.29 The rule of legal professional privilege, previously discussed, would normally apply to reports and advice obtained by a party in anticipation of litigation, but not actually used in the litigation. In some jurisdictions, however, the goal of transparency has been seen as overriding the goal of protecting the confidentiality of such communications, and thus legal professional privilege has been modified. In particular, the South Australian Supreme Court Rules require mandatory disclosure to an opponent of expert reports prepared for the purposes of litigation and which would, but for the rules, be protected from inspection by client legal privilege.<sup>19</sup> All expert reports, whether favourable or unfavourable, must be exchanged between the parties. A similar scheme has been advocated by the Law Reform Commission of Western Australia (LRCWA), which recommended that, where a party calls on its expert adviser to give evidence, there should be a waiver of legal professional privilege in respect of all communications with the expert, except communications consisting of statements and other communications from other witnesses.<sup>20</sup> In Queensland, the court rules provide that a party to a proceeding has a duty to disclose to each other party each document: (a) in the possession or under the control of the first party; and (b) directly relevant to an allegation in issue in the pleadings; and (c) if there are no pleadings, directly relevant to a matter in issue in the proceeding.<sup>21</sup> While this duty of disclosure does not apply to a document in relation to which there is a valid claim to privilege from disclosure, the rules provide that “[a] document consisting of a statement or report of an expert is not privileged from disclosure”.<sup>22</sup> However,

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19. *Supreme Court Rules 1987* (SA) r 38.01; *Robinson v Adelaide Raceway* (1993) 61 SASR 279.

20. Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia* (Report 92, 1999) at 190-191, Recommendation 245.

21. *Uniform Civil Procedure Rules 1999* (Qld) r 211.

22. *Uniform Civil Procedure Rules 1999* (Qld) r 212.

instructions and documents provided to the expert by a lawyer for the preparation of the expert's report are protected from disclosure by legal professional privilege.<sup>23</sup>

6.30 Justice Davies has supported measures for transparency:

*In some jurisdictions reports obtained from experts, intended for use in litigation, have been made disclosable. This has resulted in greater frankness between parties though, if the existing system of party appointment of experts were to be retained, it would be vastly improved if parties were obliged to disclose not only the reports of experts whom they proposed to call but also those of other experts whom they had engaged but did not intend to call and the names and addresses of those other experts whom they had approached for an opinion but did not intend to call.<sup>24</sup>*

6.31 There are reasons for caution in abandoning the existing law in the search for transparency. First, a rule requiring disclosure of such reports or advices could be readily circumvented by the simple expedient of the parties avoiding written communications with experts until, by telephone or other oral communications, they have ascertained what approach the expert is likely to take.

6.32 Conversely, if the rule were to prove effective, it would be likely to inhibit parties in the way they seek advice about technical matters involved in their potential litigation. Thus one organisation that provides expert witnesses submitted that its experience of the operation of this rule in Queensland is that it tends to encourage the parties to obtain reports only from "experts where they are absolutely sure of the opinion the expert will provide".<sup>25</sup> It encourages litigants to choose experts at the extreme ends of the spectrum rather than those perceived to be more moderate, and to be "careful not to obtain any opinion which may be adverse to their position". According to this view, the rule exacerbates rather than resolves the perceived problems of "shopping for expert witnesses".

6.33 In the Commission's view, there is insufficient evidence to conclude that the positive consequences of such a rule would be likely to outweigh its negative effects. In these circumstances, the Commission is not persuaded that the law should be changed to erode significant aspects of the long-standing law of legal professional privilege.

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23. *Mahoney v Noosa District Community Hospital* [2002] QSC 116; *Greenhill Nominees Pty Ltd v Aircraft Technicians of Australia Pty Ltd* [2001] QSC 7.

24. G Davies, "Expert Evidence: Court Appointed Experts" (2004) 23 *Civil Justice Quarterly* 367.

25. Expert Experts, *Submission* at 35.

## REQUIREMENTS FOR EXPERTS TO CONSULT BEFORE HEARING

### Introduction

6.34 In recent times, it has become routine for courts to require expert witnesses to consult before the date set for the hearing, and, often, to prepare a document setting out the matters on which they agree and those on which they disagree. Such a requirement is intended to save time and money by identifying before the trial the real issues of disagreement, and the common ground relating to the relevant matters. In its 2000 report, the ALRC supported the further development of federal court and tribunal procedures to encourage pre-hearing conferences and other communication and contact between relevant experts.<sup>26</sup>

6.35 UCPR rule 31.25 makes provision for the court to give directions concerning such a conference between experts and for the preparation of a report on the conference.<sup>27</sup>

### Submissions

6.36 The majority of submissions supported the requirement for experts to consult before hearing.<sup>28</sup> Those who supported the process suggested that the main perceived benefits would be that requiring consultation would allow experts to determine the areas of agreement/disagreement, and by eliminating matters agreed from trial, cost and time savings could be achieved. There was also support for the

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26. Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report 89, 2000) Recommendation 62.

27. See Chapter 3 and Appendix B.

28. David Watt, *Submission* at 3; John Hilton, *Submission* at 2; Australian College of Clinical Psychologists, *Submission* at 3; David Hibbert, *Submission* at 3; Royal Institute of Architects, *Submission* at 5; PricewaterhouseCoopers, *Submission* at para 4.1.1; Australian Institute of Quantity Surveyors, *Submission* at 4; Association of Consulting Surveyors, *Submission* at 4; Expert Experts, *Submission* at para 34.2; Australian Lawyers Alliance, *Submission* at 16; Mike Talbot-Wilson, *Submission* at 8; Nigel McDonald, *Submission* at 15; Professions Australia, *Submission* at 6; Royal Australian and New Zealand College of Obstetricians and Gynaecologists, *Submission* at 3; Law Society of New South Wales, Litigation Law and Practice Committee, *Submission* at 3; United Medical Protection, *Submission* at 6; Association of Consulting Engineers Australia, *Submission* at 6; Engineers Australia, *Submission* at 3; National Institute of Forensic Science, *Submission* at 5; Institute of Arbitrators and Mediators, *Submission* at 4; A R Abadee, *Submission* at 12; Royal Australian and New Zealand College of Psychiatrists, *Submission* at 2; New South Wales Bar Association, *Submission* at para 34; Neil Adams, *Submission* at 10; Geoffrey Markham, *Submission* at para 20.

requirement that, at the conclusion of the consultation process, the experts prepare a joint summary or report of the issues that they agree upon, so that these issues do not then need to be further examined through processes such as cross-examination.<sup>29</sup>

6.37 Several submissions, however, cautioned against making consultation between experts mandatory. A R Abadee submitted that although there is anecdotal evidence that when such procedures have been invoked they have proved successful, there is no clear evidence as to the cost and time savings that such an approach may achieve.<sup>30</sup> Similarly, the medical negligence department of Maurice Blackburn and Cashman Lawyers submitted that, in their experience, expert consultation has not “proved effective in narrowing the issues or explaining the basis of the expert’s views”.<sup>31</sup>

6.38 Another concern in several submissions was that the process would not be beneficial in cases where one expert has entrenched or inflexible views or where the expert is easily influenced, as there is the potential for “the loudest voice” to dominate proceedings.<sup>32</sup>

## Discussion

6.39 There appears to be considerable support for experts’ meetings in England. A survey by the Expert Witness Institute in late 2001 indicated that a majority felt that such meetings were useful for advancing settlement.<sup>33</sup> The ALRC also took a favourable view:

*Conferences and other communication between experts which may help to identify and narrow issues in dispute and facilitate settlement, are needed at an earlier stage in proceedings.*<sup>34</sup>

6.40 There have also been judicial comments about the value of the procedure. For example, Justice Peter Heerey has written:<sup>35</sup>

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29. John Hilton, *Submission* at 2; Law Society of New South Wales, Litigation Law and Practice Committee, *Submission* at 3; New South Wales Bar Association, *Submission* at 7; Australian Lawyers Alliance, *Submission* at 16.
  30. A R Abadee, *Submission* at 13.
  31. Maurice Blackburn Cashman Lawyers, *Submission* at para 40.
  32. Stephen Allnut, Peter Klug and Bruce Westmore, *Submission* at 5; Freehills, *Submission* at para 28; Confidential Submission 4 at 5.
  33. See United Kingdom, Department of Constitutional Affairs, *Further Findings: A continuing evaluation of the Civil Justice Reforms* (2002) at para 4.26. Professors Barbara MacDonald and Patrick Parkinson of the University of Sydney Faculty of Law are currently conducting a study on court-directed expert witness conferences in medical negligence cases in NSW.
  34. Australian Law Reform Commission, *Review of the Federal Civil Justice System* (Discussion Paper 62, 1999) at para 6.86.

*I have found the court-directed conference a particularly useful exercise with accounting evidence. A conference can produce from a bewildering barrage of figures a concise statement as to the underlying concepts or assumptions which are really at issue. And in one very complicated case about predatory pricing a conference of accountants produced complete agreement on a wide range of pricing data, complete with coloured graphs and overlays.*

6.41 On the other hand, as indicated in some of the submissions to the Commission, in some circumstances, the effectiveness of such conferences may be compromised. Hostility between experts might undermine real communication; more senior or experienced experts may dominate and intimidate more junior colleagues; and the conference may be unsuccessful where one or more of the experts are uncertain about their role as expert witnesses, or about the nature and purpose of the conference.

6.42 No doubt it was for such reasons that the ALRC wrote that it is not enough for courts and tribunals to direct experts to confer; they may need to set certain ground rules for the aims, conduct and outcomes of these conferences.<sup>36</sup>

6.43 In many cases, it may be appropriate simply to direct that the experts consult and prepare a joint report on their consultation by a particular date, leaving it to the experts to organise the exercise. In others, there might be reasons for the process to be more closely regulated in order to deal with anticipated difficulties. The directions may, for example,

- provide that the lawyers should be present (or absent);<sup>37</sup>
- set a detailed agenda;
- arrange for an independent chair for the conference,<sup>38</sup> or

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35. The Hon Justice Peter Heerey, “Expert Evidence: the Australian Experience” (paper delivered to the WIPO Asia-Pacific Colloquium, New Delhi, 6 February 2002).

36. Australian Law Reform Commission, *Review of the Federal Civil Justice System* (Discussion Paper 62, 1999) at para 6.89.

37. Lord Woolf noted “widespread support” for his suggestion that experts’ meetings should be encouraged, and recommended that meetings should normally be held in private, that is, without the attendance of the parties or their legal advisers: H K Woolf, *Access to Justice* (Final Report to the Lord Chancellor on the civil justice system in England and Wales, HMSO, London, 1996) at 147. However, when the court directs a meeting, the parties should be able to apply for any special arrangements, such as attendance by the parties’ legal advisers.

38. In *Triden Properties Ltd v Capita Financial Group Ltd* (1993) 30 NSWLR 403, the NSW Court of Appeal upheld orders made in a construction dispute that the

- set a specific time for the conference (holding a conference early might save time and money if issues can be resolved at that time; on the other hand, in some situations, an early conference may be unfruitful because the factual basis of the issues may not be clear until shortly before the date for hearing).

6.44 In the Commission's view, it is appropriate that the rules provide the courts with sufficient flexibility to make orders suitable for particular cases. It may be that particular types of matters lend themselves to particular types of arrangements: if so, it might be appropriate that there be rules, or practice directions, relating to those categories of cases.

## Conclusion

6.45 In the Commission's view, the existing provisions of the UCPR provide appropriately for expert conferences<sup>39</sup> and accordingly it does not recommend any change.

## CONCURRENT EVIDENCE

### Introduction

6.46 Expert evidence is normally contained in a written form (for example, a report or affidavit) filed on behalf of each of the parties, and disclosed to the other party before the hearing. The experts are normally made available for cross-examination at the hearing if required by the opposing party. In addition, it is not uncommon for the court to permit experts to give brief oral evidence as necessary before cross-examination commences.

6.47 At the hearing, the usual approach has been that each expert gives any oral evidence in chief, and is then cross-examined in the course of the presentation of each party's case. Sometimes, it is convenient to take expert witnesses out of sequence, so that they give evidence one after another.

6.48 In recent years, however, there has been considerable interest in a different approach, in which the relevant experts in a particular area are sworn in at one time and remain together in court.<sup>40</sup> The giving of evidence becomes a discussion rather than a series of exchanges between a lawyer and a witness. In the discussion, questions may be asked not only by the lawyers and the judge, but also by one expert

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parties' experts meet, under the chairmanship of a referee, in the absence of legal representation.

39. *Uniform Civil Procedure Rules 2005* (NSW) r 31.25, Sch 7 cl 4.

40. In its 2000 Report, the ALRC recommended that procedures to adduce expert evidence in a panel format should be encouraged whenever appropriate: Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report 89, 2000) Recommendation 67.

of another, a departure from the traditional approach in which only the cross-examining lawyer asks questions. The discussion is focussed, highly structured, and controlled by the judge.

## The New South Wales Land and Environment Court

6.49 The taking of evidence of experts concurrently, called ‘hot-tubbing’, but more appropriately referred to as concurrent evidence, has been increasingly used in certain jurisdictions. In New South Wales, it has become the prevailing approach in the Land and Environment Court, and the Commission is grateful to the Chief Judge of that Court for discussing the approach and providing relevant information. The Land and Environment Court was created with two primary functions: (1) to declare and enforce environmental law; (2) to review the merits of the decisions of various bodies relating to land and environment. It relies extensively on the information, analysis and opinions that experts can provide. It has therefore taken a significant role in the development of practices designed to facilitate the optimum use of expert witnesses.

6.50 The Land and Environment Court has changed the process by which expert evidence is given in court. This is now commonly done concurrently, that is, all experts in relation to a particular topic are sworn to give evidence at the same time.<sup>41</sup> The process enables experts to answer questions from the court, the advocates and, most importantly, from their professional colleagues. It allows the experts to express in their own words the view they have on a particular subject. The procedure followed is typically as follows:

*The issues which were ultimately defined in the proceedings required resolution of the different views of experts in relation to a number of significant matters. As will become commonplace in proceedings in this Court, the oral testimony of the experts was taken by a process of concurrent evidence. This involved the swearing in of the experts with similar expertise, who then gave evidence in relation to particular issues at the same time. Before giving evidence, the experts had completed the joint conferencing process, which enabled the court to identify the differences which remained and which required resolution through the oral evidence. Each witness was then given an opportunity to explain their position on an issue and provided with an opportunity to question the other witness or witnesses about their position. Questions*

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41. There is currently no Practice Direction or rule in respect of the matter. At this stage, there is no need for a Practice Direction or rule as the procedure is working very well: Information provided by Justice Peter McClellan, Chief Judge of the Land and Environment Court (10 March 2005). The concurrent giving of evidence by expert witnesses is consistent with the Land and Environment Court’s mandate to conduct proceedings “with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and as the proper consideration of the matters before the Court permit”: *Land and Environment Court Act 1979* (NSW) s 38.



*were also asked by counsel for the parties. In effect, the evidence was given through a discussion in which all of the experts, the advocates and the Court participated.*<sup>42</sup>

6.51 This procedure has met with overwhelming support from experts and their professional organisations. They find that, not being confined to answering questions put by the advocates, they are better able to communicate their opinions to the court. They believe that there is less risk that their opinions will be distorted by the advocates' skills. It is also significantly more efficient in time. Evidence that may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as 20% of the time which would have been necessary.<sup>43</sup>

6.52 *Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority*<sup>44</sup> provides an example of a successful use of the procedure. Among the major issues in contention between the parties and the witnesses was the extent of development potential for the land the subject of the case, for which residential use was being contemplated. The oral evidence of the six expert witnesses in respect of town planning issues and development potential was taken concurrently. This took only two days of hearing time. Other expert evidence given concurrently related to a planning instrument, contamination, design modelling and value. Altogether, the experts' oral evidence occupied only four days of the 13-day hearing.

## Submissions

6.53 Opinions on the issue of possible alternative methods of experts providing testimony were varied. Some submissions indicated that the current procedures for provision of expert testimony are adequate.<sup>45</sup> The majority of submissions, however, indicated that other methods of presenting evidence should be considered. Some of these submissions suggested that the method of presentation of expert evidence should be flexible depending upon the needs of the individual case.<sup>46</sup> In this regard, the New South Wales Bar Association submitted:

*It is undesirable to lay down any general rules about how expert evidence should be heard. Rather, it is a matter about which many*

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42. *BGP Properties Pty Limited v Lake Macquarie City Council* [2004] NSWLEC 399 at para 121.

43. Justice Peter McClellan "Expert Witnesses – the Experience of the Land and Environment Court of New South Wales", Speech at the XIX Biennial Lawasia Conference 2005 (Gold Coast, 20-24 March 2005) at 19-21.

44. *Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority* [2004] NSWLEC 315.

45. PricewaterhouseCoopers, *Submission* at para 4.2.1; Australian Institute of Quantity Surveyors, *Submission* at 4.

46. Maurice Blackburn Cashman Lawyers, *Submission* at para 46; United Medical Protection, *Submission* at 7; Freehills, *Submission* at para 29; New South Wales Bar Association, *Submission* at para 39; Australian Lawyers Alliance, *Submission* at 17.

*judges have strongly held views about what best assists them. It should be left to the court or tribunal concerned to best regulate its own procedure.*<sup>47</sup>

6.54 The issue of testimony being presented concurrently by experts also received support.<sup>48</sup> Some, however, believed that such a procedure would achieve the best results in complex cases.<sup>49</sup> The potential benefits of concurrently presented testimony were identified by Gary Edmond, who submitted that concurrent evidence offers many of the features of the adversarial trial without imposing an expert or eliminating expert disagreement from the courtroom. It may offer time and cost savings to experts, lawyers, parties as well as judges, and, if peer presence exerts any disciplining influence or accountability, then it should be reflected in the hot tub.<sup>50</sup>

6.55 Some members of the Commission had the opportunity to observe the conduct of proceedings in the Land and Environment Court and were favourably impressed by the manner in which the court obtained concurrent expert evidence.

## Conclusion

6.56 In the Commission's view, the giving of concurrent evidence has very significant potential advantages. Especially where there are more than two relevant experts, the process can save time, minimising the time spent on preliminaries and allowing the key points to be quickly identified and discussed. Perhaps more importantly, the process moves somewhat away from lawyers interrogating experts towards a structured professional discussion between peers in the relevant field. The experience in the Land and Environment Court indicates that the nature of the evidence is affected by this feature, and that experts typically make more concessions, and state matters more frankly and reasonably, than they might have done under the traditional type of cross-examination. Similarly, it seems that the questions may tend to be more constructive and helpful than the sort of questions sometimes encountered in traditional cross-examination.

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47. New South Wales Bar Association, *Submission* at para 39.

48. David Hibbert, *Submission* at 3; Association of Consulting Surveyors, *Submission* at 4; Expert Experts, *Submission* at para 34.10; Australian Lawyers Alliance, *Submission* at 17; Law Society of New South Wales, Litigation Law and Practice Committee, *Submission* at 3; National Institute of Forensic Science, *Submission* at 6; Gary Edmond, *Submission* at 22; Freehills, *Submission* at para 29; Institute of Arbitrators and Mediators, *Submission* at 5; PricewaterhouseCoopers, *Submission* at para 4.2.2; Rodney Meeve, *Submission* at 1; New South Wales Bar Association, *Submission* at para 36; *Confidential Submission 4* at 6.

49. Expert Experts, *Submission* at para 34.10; Association of Consulting Surveyors, *Submission* at 4; Law Society of New South Wales, Litigation Law and Practice Committee, *Submission* at 3; Freehills, *Submission* at para 30.

50. Gary Edmond, *Submission* at 22.

6.57 The taking of expert evidence concurrently will no doubt be more successful in some situations than in others. An important factor is the structuring and control of the discussion by the judge. This requires considerable skill, and often a significant amount of preparation, so that the issues are identified and arranged in a way that lends itself to a fruitful discussion. The conduct of the discussion needs to encourage some freedom of exchanges, but nevertheless ensure that all points of view are aired, and that counsel have an adequate opportunity to test opposing experts. The overall success of the technique must also depend on the skills, preparedness and co-operation of the lawyers and experts involved. Various technical issues need to be addressed (for example, ensuring that each speaker is identified for the purpose of the transcript; and arranging for multiple experts to be available at the same time for the court hearing), but the experience of the Land and Environment Court indicates that these can generally be managed.

6.58 It seems clear that, in the case of some judges and some types of cases, concurrent taking of evidence is very successful. It is difficult to predict how successful it would be if used more extensively. On the face of it, the benefits of the system would seem to exist in a wide range of cases. However, its wider successful implementation may well depend on the extent to which it is embraced by judicial officers. Experience suggests that experts and lawyers quickly adapt to it where it is conducted with skill and enthusiasm by judicial officers.

6.59 Addressing the criteria identified for assessing the measures being considered in this report, the following comments can be made. If used effectively, concurrent evidence has considerable potential to increase the likelihood of the court achieving a just decision. It seems more likely to decrease costs and delay than to increase them.

6.60 The Commission is satisfied that the taking of expert evidence concurrently has proved effective and successful. It is not possible to say with confidence whether it should be applied more generally, although it seems likely that its wider application would be beneficial.<sup>51</sup> Indeed, it may well be that, in the future, the taking of expert evidence concurrently will become the norm rather than the exception. For the purpose of this report, it is not fruitful to speculate unduly on these matters, since, in the Commission's view, it is clear that the rules should make provision for the giving of concurrent expert evidence where the presiding judge considers it appropriate.

6.61 The Commission has considered whether the rules should give any preference to this method, for example, by providing that it should be used unless the court otherwise orders, either in general or in particular types of case. On balance, however, at this stage, the experience with concurrent evidence is insufficient to justify such an approach. Nor does it seem appropriate to attempt to regulate the process in more detail, since the arrangements for concurrent evidence should reflect the experience and particular circumstances in each jurisdiction.

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51. The Judicial Commission is preparing an educational video, using a transcript of an actual case in the Land and Environment Court, which provides a dramatised introduction to the process.

6.62 Accordingly, the Commission is of the view that rules of court should facilitate the taking of concurrent expert evidence. The existing provisions of the UCPR<sup>52</sup> deal appropriately with the matter.

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52. *Uniform Civil Procedure Rules 2005* (NSW) r 31.26.

## RESTRICTION ON A PARTY'S ABILITY TO OBJECT

### RECOMMENDATION 6.2

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Rule 31.19(6) of the *Uniform Civil Procedure Rules 2005* (NSW) should be repealed. (Appendix C, Sch 1 Item [4].)

6.63 We anticipate, following consultation with the Civil Procedure Working Party, that the subrule will be repealed. It is unnecessary, in these circumstances, to mention our reasons for the recommendation.

### "ATTRIBUTED HISTORIES" AND SECTION 60 OF THE EVIDENCE ACT

6.64 "Attributed histories" pertain to accounts of the background facts told to experts, accepted by them for the purpose of the report, and stated in the report.

6.65 Attributed histories in experts' reports are relevant and admissible evidence to prove the assumptions made by the expert as a basis for the expert's opinion. By operation of s 60 of the *Evidence Act 1995* (NSW), histories recorded in that way also stand as evidence of the truth of the matters stated. There is a serious question, however, as to whether that ought to be a consequence.

6.66 The question is within the scope of a joint reference on the law of evidence involving this Commission, the Australian Law Reform Commission, and the Victorian Law Reform Commission. We have therefore not dealt with the question in this report. However, elsewhere in this report we have suggested that there is scope for a practice note in relation to the form of expert reports.<sup>53</sup> Consideration could be given, in that context, to including a requirement that expert reports, prepared for the purpose of legal proceedings, should specify the assumptions made by the expert in the form of *assumptions* rather than in the form of an attributed history. It would appear that s 60 of the *Evidence Act 1995* would not operate to make evidence of assumptions specified in that way evidence of the truth of the matters stated.

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53. See para 9.14-9.17.

# 7. Joint Expert Witnesses and Court-Appointed Experts: General

- RECOMMENDATION 7.1
- Introduction
- Joint expert witnesses
- Joint expert witnesses and court-appointed experts
- Conclusion

## RECOMMENDATION 7.1

The *Uniform Civil Procedure Rules 2005* (NSW) should be revised to include provision for joint expert witnesses in addition to the existing provisions for court-appointed experts.

## INTRODUCTION

7.1 This chapter proposes that rules be introduced enabling parties to engage “joint expert witnesses”. The “joint expert witness” envisaged in our proposal is virtually identical with the “single joint expert” in the English *Civil Procedure Rules 1998* (“CPR”). We have used the term “joint expert witness” because we think it better expresses the essential features of the role. The difference in terminology does not indicate any difference in substance.

7.2 The chapter sets out the nature of the joint expert witness and the Commission’s reasons for recommending that the rules make provision for it. Later in the chapter, we explain the difference between the joint expert witness and the court-appointed expert, and why we propose separate new rules for the former, while retaining existing rules on court-appointed experts (with minor amendments).

7.3 Making provision for joint expert witnesses involves many particular issues and matters of detail. These are dealt with in Chapter 8, which also sets out the amendments we propose relating to court-appointed experts.

## JOINT EXPERT WITNESSES

### Introduction

7.4 As we have seen, one of the most significant reforms on expert evidence adopted in recent years by an increasing number of jurisdictions is the concept of the single joint expert witness, which originated in the Woolf reforms introduced in England.<sup>1</sup> Evaluations of the Woolf reforms have found the concept of the single joint expert witness to be working well, and that judges, lawyers and parties to proceedings have displayed a willingness to use single experts, especially in matters that do not involve substantial amounts and where the issues are relatively uncontroversial.<sup>2</sup> The concept has been adopted by a number of Australian jurisdictions, including the Queensland Supreme Court<sup>3</sup> and the Family Court.<sup>4</sup> The Australian Capital Territory

1. See para 4.16 – 4.26 of this report.
2. United Kingdom, Department of Constitutional Affairs, *Emerging Findings: An early evaluation of the Civil Justice Reform (2001)* at para 4.16; *Further Findings: A continuing evaluation of the Civil Justice Reforms (2002)* at para 4.21; United Kingdom, Department of Constitutional Affairs, *Further Findings: A continuing evaluation of the Civil Justice Reforms (2002)* at para 4.27-4.28.
3. See para 4.37 – 4.45.

has also adopted the concept in relation to specific proceedings (personal injury matters).<sup>5</sup>

7.5 Different jurisdictions use varying terminology: England uses “single joint expert”, the Family Court and the Queensland Supreme Court use “single expert”, and the ACT Supreme Court uses “agreed expert”. For purposes of this report, the Commission has chosen to use the phrase “joint expert witness”. The word “joint” emphasises that the parties will almost invariably select the person by agreement, while the word “witness” emphasises that the person is indeed a witness, and not, for example an assessor or person to whom the power to make decisions has been delegated. Moreover, the phrase conforms with the ambit of the relevant rule-making power specified in Schedule 3 of the *Civil Procedure Act 2005* (NSW), namely “the use of expert witnesses including, in particular, the use of expert witnesses engaged jointly by parties to civil proceedings”.<sup>6</sup>

7.6 In general terms, the idea of the joint expert witness is to limit the expert evidence on a question arising in the proceedings to that of one expert witness, selected jointly by the parties affected, or, if they fail to agree, in a manner directed by the court. If a party is dissatisfied with the expert’s evidence, the court has discretion to allow that party to adduce other expert evidence. While the evidence of the joint expert witness is likely to be of great weight, the joint expert witness has no different status from other witnesses and will be available for examination by any party if required.

7.7 The primary objective of the appointment of a joint expert witness is to assist the court in reaching just decisions by promoting unbiased and representative expert opinion. Another important objective is to minimise costs and delay to the parties and to the court by limiting the volume of expert evidence that would otherwise be presented.

## Submissions

7.8 Not surprisingly, a large number of submissions responded to the invitation in the Issues Paper to address the experience to date with the appointment of court-appointed experts and joint expert witnesses (“single experts” was the term used in the Issues Paper), and the advantages and disadvantages of these measures. These submissions contained a great deal of valuable discussion, and this chapter draws considerably on them.

7.9 The submissions fall fairly readily into two groups, those expressing enthusiasm for joint expert witnesses and stressing their advantages,<sup>7</sup> and those

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4. See para 4.59 – 4.61.

5. See para 4.72 – 4.84.

6. *Civil Procedure Act 2005* (NSW) Sch 3 cl 25.

7. Royal Australasian College of Surgeons, *Submission* at 2; Engineers Australia, *Submission* at 3; Rodney Meeve, *Submission* at 1; New South Wales Police -



emphasising reservations and stressing their disadvantages.<sup>8</sup> Those who supported the measure generally argued that the use of a single expert witness had the potential to save time and money, as well as reduce bias inherent in the adversarial system.<sup>9</sup> Those who had reservations about the use of joint expert witnesses argued that the claimed benefits might be illusory in practice, as parties would probably employ their own ‘shadow’ expert to brief them on the relevant issues and assist with cross-examination of the single expert.<sup>10</sup> As a result, it was suggested, the appointment of a single expert witness may actually increase costs rather than reduce them. In

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- Forensic Services Group, *Submission* at 2; Association of Consulting Surveyors, *Submission* at 4.
8. David Watt, *Submission* at para 3; Joy Consulting Group, *Submission* at 1; Carroll and O’Dea Lawyers, *Submission* at 1; IMO, *Submission* at 2; Mark Patterson, *Submission* at 2; Law Society of New South Wales, *Submission* at 2; Australian College of Clinical Psychologists, *Submission* at 3; Dial an Angel, *Submission* at 2, Padraic Grattan-Smith, *Submission* at 3; Royal Australian Institute of Architects, *Submission* at 6-7; Human Factors and Ergonomics Society, *Submission* at 7, Australian Institute of Quantity Surveyors, *Submission* at 5; Association of Consulting Surveyors, *Submission* at 4-6; Maurice Blackburn Cashman Lawyers, *Submission* at 10; Australian Lawyers Alliance, *Submission* at 18-22; Professions Australia, *Submission* at 7; George Cooper, *Submission* at 11; Law Society of New South Wales, Litigation Law and Practice Committee, *Submission* at 3-4; United Medical Protection, *Submission* at 7-8; Gary Edmond, *Submission* at 19; Freehills, *Submission* at 7-9; A R Abadee, *Submission* at 14-17; Australian & New Zealand Association of Psychiatry Psychology and the Law, *Submission* at 8; Geoffrey Markham, *Submission* at para 26; Christopher Clarke, *Submission* at 5; Adrian Howie, *Submission* at 3; Medical Consumers Association, *Submission* at 13; Jack Goldring, *Submission* at 1; Expert Experts, *Submission* at para 15.2; Mike Talbot-Wilson, *Submission* at 9; Royal Australian and New Zealand College of Obstetricians and Gynaecologists, *Submission* at 4; For Legally Abused Citizens, *Submission* at 4; Association of Consulting Engineers, *Submission* at 7; National Institute of Forensic Science, *Submission* at 6; Australian College of Legal Medicine, *Submission* at 6; Institute of Arbitrators and Mediators, *Submission* at 5; Australian College of Private Consulting Psychologists, *Submission* at 2; Michael Enders, *Submission* at 1; Royal Australian and New Zealand College of Psychiatrists, *Submission* at 3; New South Wales Bar Association, *Submission* at para 44; Neil Adams, *Submission* at 4; Forensic Services Group, *Submission* at 2.
  9. Royal Australian College of Surgeons, *Submission* at 4; Rodney Meeve, *Submission* at 1.
  10. David Hibbert, *Submission* at 3; Expert Experts, *Submission* at para 16.8; Institute of Arbitrators and Mediators, *Submission* at 5; Freehills, *Submission* at para 33.1; New South Wales Bar Association, *Submission* at para 44; Neil Adams, *Submission* at 4; Geoffrey Markham, *Submission* at 5; Law Society of New South Wales, *Submission* at 3; Human Factors and Ergonomics Society, *Submission* at 7, Australian Institute of Quantity Surveyors, *Submission* at 5; Professions Australia, *Submission* at 7.

addition, many submissions expressed concern over the use of a single expert witness when divergent opinions may be justified.<sup>11</sup>

7.10 The submissions therefore involved a vigorous debate about the merits and demerits of joint expert witnesses. Although some argued that joint expert witnesses should *never* be used,<sup>12</sup> most of those who expressed reservations about the use of joint expert witnesses conceded, expressly or implicitly, that there might be *some* cases for which they would be suitable, particularly where the parties agreed to the appointment of a particular expert,<sup>13</sup> and where the issue on which the expert is required to testify is straightforward, and two experts would be no more beneficial than one.<sup>14</sup> Conversely, even the most enthusiastic supporters of joint expert witnesses did not seek to argue that they should be used in *all* cases.

7.11 Thus, if one posed the question “Should joint expert witnesses be an option for the court?” most would answer yes, even if one group thought that the option should be used in a minority of cases. As a result, despite the significant differences, there is an important element of common ground among many of the submissions, namely that joint expert witnesses should be an option available to the courts, to be used in suitable cases.

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11. Dial an Angel, *Submission* at 2; Human Factors and Ergonomics Society, *Submission* at 7; Professions Australia, *Submission* at 7; Christopher Clarke, *Submission* at 5; David Watt, *Submission* at 3; Adrian Howie, *Submission* at 3; Maurice Blackburn Cashman Lawyers, *Submission* at para 52; Australian Lawyers Alliance, *Submission* at 20; Mike Talbot-Wilson, *Submission* at 9; United Medical Protection, *Submission* at 8; National Institute of Forensic Science, *Submission* at 6; Royal Australian and New Zealand College of Psychiatrists, *Submission* at 3.
  12. Australian College of Clinical Psychologists, *Submission* at 3; Dial an Angel, *Submission* at 2; Padraic Grattan-Smith, *Submission* at 3; Human Factors and Ergonomics Society, *Submission* at 7; Australian Institute of Quantity Surveyors, *Submission* at 2; Christopher Clarke, *Submission* at 5; Medical Consumers Association, *Submission* at 13; Mike Talbot-Wilson, *Submission* at 9; Institute of Arbitrators and Mediators, *Submission* at 5; Australian College of Private Consulting Psychologists, *Submission* at 4; Royal Australian and New Zealand College of Psychiatrists, *Submission* at 3.
  13. Association of Consulting Surveyors, *Submission* at 4; George Cooper, *Submission* at 11; A R Abadee, *Submission* at 17; Royal Australian Institute of Architects, *Submission* at 7; Maurice Blackburn and Cashman Lawyers, *Submission* at para 59; Law Society of New South Wales, Litigation Law and Practice Committee, *Submission* at 4; Michael Enders, *Submission* at 1; New South Wales Bar Association, *Submission* at para 44; Geoffrey Markham, *Submission* at para 28.
  14. Professions Australia, *Submission* at 7; David Hibbert, *Submission* at 3; Association of Consulting Surveyors, *Submission* at 5; For Legally Abused Citizens, *Submission* at 4; Roy Beran, *Submission* at 6; New South Wales Bar Association, *Submission* at para 46.

7.12 As will be seen, the Commission's approach is to recommend the creation of machinery provisions enabling the courts to make orders for joint expert witnesses in appropriate circumstances, rather than rules specifying that joint expert witnesses should be used in particular classes of cases, or setting out guidelines for their appointment.<sup>15</sup> It will be open to the courts to develop such guidelines, whether by decisions or by practice directions. In the future, experience may suggest that the rules should make more detailed provision relating to the use of joint expert witnesses, perhaps in some jurisdictions or some categories of cases. However, the Commission does not consider that there is, at this stage, a sound basis for such rules.

## Discussion

7.13 This section discusses the reasons why the Commission believes that the rules should be amended to provide for joint expert witnesses. As explained in Chapter 4, the essential issue is whether enabling the court to use joint expert witnesses in appropriate cases would "facilitate the just, quick and cheap resolution of the real issues in the proceedings".<sup>16</sup> It is convenient first to consider the significance of joint expert witnesses in relation to a just resolution, and then to consider their impact on speed and cost. The chapter will then discuss two arguments sometimes advanced against the use of joint expert witnesses: first, that it involves an inappropriate delegation of decision-making power from the court to the joint expert witness, and secondly, that it is unsatisfactory or unfair in cases where there are different schools of thought among experts on the issue involved.

### *Facilitating a just resolution*

7.14 Perhaps the major reason for the appointment of a joint expert witness is that doing so will assist the court in arriving at decisions that are just, by reducing or eliminating adversarial bias, and thereby improving the quality of the expert evidence that comes before the court.<sup>17</sup>

7.15 Under the adversarial model, it is the contesting parties that gather evidence and seek witnesses to support their respective cases. Each party puts their selected witnesses before the judge, who normally needs to decide between them in determining the case. Parties select their expert witnesses in the expectation that the expert's opinion will advance the party's case. The objective is to maximise a party's chance of persuading the court to decide in its favour.

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15. Compare, for example, the rules of the Queensland Supreme Court and those of the Family Court: see Chapter 4 of this Report, in particular para 4.40 and 4.61.

16. *Civil Procedure Act 2005* (NSW) s 56.

17. For a discussion of this issue, see for example G Davies, "Expert Evidence: Court Appointed Experts" (2004) 23 *Civil Justice Quarterly* 367; H D Sperling, "Expert Evidence: The Problem of Bias and Other Things" (2000) 4 *Judicial Review* 347 at 429.

7.16 As explained in Chapter 5, this process encounters the familiar problems of what we have called adversarial bias, namely that the experts engaged by each party will tailor their evidence to support that party, whether deliberately or as a result of more subtle pressures to support those who engaged them; and also that the court will hear only from experts selected by each party in the expectation that their evidence would advance that party's cause. Thus the traditional process creates pressures apt to result in partisan and polarised expert evidence.

7.17 Within the adversarial model, such problems will ideally be mitigated by effective cross-examination. However, in practice, cross-examination may not take place at all.<sup>18</sup> When it does, it is sometimes not directed at rectifying any problems with, or omissions in, the discussion of the expert issue. It is, as the adversarial system dictates, aimed at discrediting the opinion of the opposing expert, in order to support the other party's case. Even effective cross-examination may not address the problem of polarised evidence, and may leave the court unable to ascertain whether any of the expert evidence given is in fact a reasonable representation of the general opinion in the discipline, or even whether it addresses all the factors relevant to the issue in question.

7.18 As we have seen, while the extent of these problems is difficult to determine with precision, and is no doubt affected by various factors, it is the Commission's view that, under the present system, the problems of adversarial bias are pervasive and persisting.<sup>19</sup>

7.19 The use of joint expert witnesses goes to the heart of the problem of adversarial bias and has the potential to redress these failings. The jointly selected expert will not have been selected because he or she supports a party's cause, and, after selection, will be under no pressure to support one party rather than another. Agreement on the selection will be reached only if both sides regard the candidate as being well qualified, and as being a fair and reasonable professional. The court is then likely to have the benefit of sound professional testimony, reasonably representative of thinking in the discipline.

7.20 To summarise, although it is impossible to quantify the extent to which bias and polarisation distorts the evidence given by expert witnesses called on behalf of a party, the Commission believes it is a serious problem. Because the use of joint expert witnesses removes or reduces adversarial bias, and because such information as is available generally supports the value of giving the parties and the courts the option of having joint expert witnesses, the Commission considers that the use of joint expert witnesses in appropriate cases is likely to help the courts achieve a just outcome.

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18. It is common in personal injury cases that there is no cross-examination of expert testimony. Rather, in the interests of economy, reports are simply tendered into the Court.

19. G Davies, "Expert Evidence: Court Appointed Experts" (2004) 23 *Civil Justice Quarterly* 367 at 368.

*Reducing costs and delay*

7.21 The second reason for making joint expert witnesses available is that, in appropriate cases, their use has the potential to reduce the costs and delay of litigation.<sup>20</sup> It must be said at once that the Commission is not aware of systematic evidence on this matter, and inevitably the consequences are likely to depend on the circumstances of each case and other variables. It seems likely that the potential advantages in terms of speed and reduction of costs are likely to increase as the use of joint expert witnesses, and the procedures involved, become increasingly familiar to the courts and legal practitioners.

7.22 There are obvious ways in which the use of joint expert witnesses could reduce delay. Usually, expert reports secured by each side have to be submitted to a party's own expert witnesses for comment and further report. That takes time. If the parties have confidence in the skill and reasonableness of the jointly chosen expert – as is likely – the expert's report should encourage settlement. Similarly, for cases that do proceed to trial, the time taken to examine, and cross-examine, will be significantly less than it would be if there were two or more experts called.

7.23 These benefits may be reduced, or even offset, in particular circumstances. For example, the process of identifying and agreeing on a suitable expert may take time, especially if the subject-matter is unusual, and there may be delays if the parties consider it necessary to seek their own expert advice on whether to challenge a report by a joint expert witness.

7.24 Turning to the question of costs, the appointment of a joint expert witness has the potential to reduce costs significantly. There would only be one expert witness, not several, to give evidence on a topic. This will avoid the onset of a protracted disagreement between experts and increase the likelihood that parties will either settle, or go on to conduct a shorter hearing. The prospect of early settlements and shorter hearings also has the potential to reduce the substantial public costs that are incurred in the running of cases in the civil justice system.

7.25 On the other hand, in particular cases, some additional costs may be incurred as a result of the use of the joint expert witness. There may be controversy about the selection of a joint expert witness, or about the instructions to be given to the expert. Then there is the cost of "shadowing". Particularly in large cases, parties may think it necessary to retain their own expert notwithstanding that only a joint expert witness will be called. This may be done in order to decide whether to apply for leave to call other evidence. It may be done to assist in the preparation of cross-examination. It is

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20. See Australian Law Reform Commission, *Review of the Federal Civil Justice System* (Discussion Paper 62, 1999) at ch 13; G L Davies and J S Lieboff, "Reforming the Civil Litigation System: Streamlining the Adversarial Framework" (1995) 25(2) *Queensland Law Society Journal* 111; R Scott, "Court Appointed Experts" (1995) 25 *Queensland Law Society Journal* 87; H K Woolf, *Access to Justice* (Final Report to the Lord Chancellor on the civil justice system in England and Wales, HMSO, London, 1996) at 137-140.

unlikely, however, that “shadowing” costs would be anything like as much as the costs of calling the retained expert as a witness.

7.26 As previously mentioned, it is not possible to calculate the net effects of engaging joint expert witnesses on delays and on public and private costs. They will no doubt vary greatly from case to case. However, experience suggests that, in the majority of cases, the appointment of a joint expert witness is likely to have positive consequences in terms of time and cost reduction, especially as the steps involved become increasingly routine. With experience, the courts and the legal profession will become increasingly skilled at identifying the cases in which it is appropriate to appoint a joint expert witness.

*Delegation of the court’s decision-making power*

7.27 Arguments are raised in opposition to the greater use of joint expert witnesses on the ground that this would involve an inappropriate delegation of decision-making power from the court to the joint expert witness. It is said that the prospect of a judge rejecting the evidence of a joint expert witness is so unlikely that the process effectively transfers the decision-making authority on the issue requiring expert opinion from the judge to the expert.<sup>21</sup>

7.28 In the Commission’s view, the appointment of a joint expert witness does not involve a delegation of decision-making power. The parties have a right to examine the expert orally, the right to make submissions about the weight of the evidence and about its bearing on the ultimate result, and the right to apply for leave to call other expert evidence. The ultimate decision is made by the court. The opinion of a joint expert witness might be persuasive, but it is not determinative.

*Where there are different schools of thought*

7.29 It is also sometimes objected that the use of joint expert witnesses can lead to injustice where the expert issues are subject to legitimate differences of opinion, or schools of thought, among professionals in the field. This issue pertains to cases that may involve a dispute as to the method chosen, from a number of equally accepted methods, to accomplish a particular task (for example the valuation of a business). Alternatively (but more rarely) there may be cases where the issue in question is itself novel and the subject of intense debate within that particular field of expertise. In such cases, it is argued, the use of a joint expert witness would select out other legitimate views that the court should hear if it is to reach a just determination.<sup>22</sup>

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21. See, for example, R Scott, “Court Appointed Experts” (1995) 25 *Queensland Law Society Journal* 87.

22. See, for example, Australian Law Reform Commission, *Review of the Federal Civil Justice System* (Discussion Paper 62, 1999) at ch 13; P Heerey, “Recent Australian Developments” (2004) 23 *Civil Justice Quarterly* 386; A May “The English High Court and Expert Evidence” (2004) 6 *Judicial Review* 353; H K Woolf, *Access to Justice* (Final Report to the Lord Chancellor on the civil justice system in England and Wales, HMSO, London, 1996) at 141.

7.30 In the Commission's view, this is an important point, but it is an objection to the appointment of a joint expert witness in those cases, not an objection to the court having the option of a joint expert witness in appropriate cases. Lord Woolf recognised this problem and conceded, that for some cases, including those involving issues on which "there are several tenable schools of thought, or where the boundaries of knowledge are being extended", the oral cross-examination of opposing experts selected by the parties may be the best way of producing a just result.<sup>23</sup> The court's decisions in relation to the use of a joint expert witness, like other procedural decisions, must conform to the principles of justice articulated in the *Civil Procedure Act*. Orders that precluded a party from calling evidence would be wrong, and subject to appeal, if, in the particular case justice required that the evidence could be tendered.

7.31 It seems likely, however, that in the majority of cases the issues requiring expert evidence will fall within substantially established areas of knowledge. The most common issues for expert evidence in civil proceedings are questions of causation, and the nature and extent of loss. Such issues rarely involve competing schools of thought, but are rather matters of evaluation and judgment.

7.32 In short, the concept of the joint expert witness is only one of the ways by which courts can effectively manage the use of expert evidence to achieve just decisions. The fact that it may not be appropriate to use joint expert witnesses in some cases (including where it is necessary for the court to have a range of opinions) is not an argument that joint expert witnesses should not be available as an option.

## Conclusion

7.33 The Commission believes that, under the present system, there exist significant problems with the way expert evidence comes before the court. These problems form a powerful argument in favour of amending the rules to provide a further option to the court, namely to order the use of a joint expert witness. The Commission believes that the use of joint expert witnesses can reduce the partisanship that is today so closely associated with expert witnesses called by each party, and encourage the use of experts with balanced, representative, views. Similarly, the use of joint expert witnesses has the potential, in many cases, to reduce the public and private costs and the delays associated with civil litigation. For these reasons, adding the possibility of a joint expert witness to the array of options available to the court is likely to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

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23. H K Woolf, *Access to Justice* (Final Report to the Lord Chancellor on the civil justice system in England and Wales, HMSO, London, 1996) at 139-141.

## JOINT EXPERT WITNESSES AND COURT-APPOINTED EXPERTS

### Introduction

7.34 In this section, we consider the relationship between the Commission's proposal to introduce joint expert witnesses (basically the English "single joint expert") and the existing provisions relating to court-appointed experts. In particular, we explain why, in our view, the work to be done by our proposed joint expert witness cannot be done satisfactorily by persons appointed under the existing rules providing for court-appointed experts.

7.35 A joint expert witness and a court-appointed expert are similar in that neither has been engaged by only one of the conflicting parties, and thus, in each case, the expert is free from adversarial bias. In some instances, the appointment of a court expert may result in a saving in time and costs. It might be, therefore, that new provisions for joint expert witnesses will render the traditional court-appointed expert obsolete. This was presumably the view taken in the UK, where the older provisions were not repeated in the CPR that implemented the Woolf reforms.<sup>24</sup>

7.36 Nevertheless, the Commission does not recommend the abolition of the court-appointed expert. There are fundamental differences between the two roles, and there may continue to be cases in which the courts wish to appoint an expert as they have done in the past. What has happened in recent years, however, is that the rules in this state relating to court-appointed experts have been amended with a view to accommodating elements of the English joint single expert. The process has not, as we will explain, been a comfortable fit. It has not done justice to either concept because of irreconcilable differences between the two roles. We will review these developments.

### The Supreme Court and the District Court

7.37 The starting point is with the rules relating to court-appointed experts in the *Supreme Court Rules 1970* (NSW), being the rules in Part 39, Division 1, *Court expert*. The essential features of this kind of expert witness are apparent from those rules. The main provisions, as at 1970, can be summarised as follows.

- (a) The court could, on application or of its own motion, appoint an expert to inquire and report and could give instructions to the expert in that regard.

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24. This has been the approach of the Family Court of Australia: the *Family Law Rules 2004* (Cth) provide for a single expert witness but do not preserve the older rules for a court-appointed expert (although the general power of the court to call its own witnesses is preserved: r 15.71).



- (b) The court expert's report was to be sent to the registrar (who was to provide the parties with copies).
- (c) The report was admissible in evidence unless the court otherwise ordered but was not binding on the parties unless they agreed to be bound by it.
- (d) A party could cross-examine the court expert on notice given within 14 days after receiving the report.
- (e) The court was to fix the court expert's remuneration.
- (f) Subject to the court's discretion as to costs generally, the parties were jointly and severally liable for the court expert's remuneration and the court could make orders for payment by a party of or towards discharge of that liability.
- (g) A party could adduce the evidence of one other expert on a question which had been submitted to the court expert, provided reasonable notice was given before the hearing, or otherwise by leave.

7.38 It is a discernible objective of these rules that the court should be able to obtain expert evidence when the court believes it requires that assistance. This might occur when the parties do not intend to call expert evidence at all on the matter in question, or where the court believes that the expert evidence the parties have called or intend to call has been or will be unsatisfactory.

7.39 Conformably, the rules were framed to place the control of the process in the court's hands. Although the process could be initiated by a party, it is the court which had control and management of the process from start to finish. There was no provision for selection of the expert otherwise than by the court. The expert's report went to the registrar, with a copy to the parties, and was admissible in evidence unless the court otherwise ordered. The court fixed the expert's remuneration. The parties could cross-examine the expert.

7.40 These provisions show that the court-appointed expert was not, in concept or in fact, the parties' or any party's witness. The expert was, in concept and in fact, the court's witness. The title to the division, *Court expert*, recognised that.

7.41 Other provisions were of a practical nature, unrelated to the underlying concept. There had to be provision for payment of the expert's remuneration. The rule in that regard was practical and equitable. The parties were each limited to one expert witness of their own on the relevant question. That provision, too, was a practical and equitable one in view of a further expert witness having been brought into the proceedings in addition to those whom the parties wished to call on their own account. These provisions did not derogate from the role of the expert as the court's witness rather than the parties' witness, or from the court's control over the appointment and management of the process.

7.42 By contrast, Lord Woolf's single joint expert – our proposed joint expert witness – has a quite different role. The concept of such an expert focuses on the

inherent problems associated with parties calling their own expert witnesses, selected, as they are, for the purposes of the case: adversarial bias, multiple expert witnesses, and the consequences in relation to time and cost of the proceedings.

7.43 The concept of the joint expert witness is designed to avoid or at least to minimise these problems. Once an order is made for a joint expert witness, the objectives of the concept are met. From there on, the court has no interest in the control and management of the process except as may be necessary to keep it going. The parties select the expert. The court becomes involved only if there is a problem about agreeing on a suitable candidate for the role. The parties instruct the expert. The expert's report goes to them. They may put written questions to the expert to clarify the expert's report if that is necessary. What they do with the expert's report is their concern. A party might tender it. It might be decided that there is no need for the evidence after all and no one might tender it. The expert may apply for directions if he or she finds it necessary to involve the court further in the process. In the first instance at least, the joint expert witness's evidence will be the only expert evidence on the relevant question, the parties being allowed to call other expert evidence on the question only by leave.

7.44 Under this regime, the expert is not the court's witness. The expert is the parties' witness, to deal with as is expedient in their respective interests. It is necessary and appropriate that the parties, rather than the court, should have control and management of the process. And it is fundamental that, in the first instance at least, the parties should be precluded from calling other expert evidence on the same question.

7.45 Amendments to the New South Wales rules from 1999 have attempted to modify the provisions relating to court-appointed experts to accommodate elements of the single joint expert idea, but, as will be seen, have not been kind to either concept.

7.46 In 1999, a new Part 39, Division 1, *Court Appointed Expert*, was substituted, by amendment to the *Supreme Court Rules 1970* (NSW), for the original Division, *Court expert*. The substantive changes were as follows.

- (a) Whereas it was implicit in the original provision that the court would select the expert, the rules now provided that the court could appoint an expert selected by the parties affected, or an expert selected by the court, or in a manner directed by the court.
- (b) A provision was introduced making the court-appointed expert subject to the expert witness code of conduct, as in the case of an expert witness called by a party. (A copy of the code was to be provided to the expert, and neither written nor oral evidence by the expert was to be adduced unless the expert had acknowledged the code in writing.)
- (c) Rather than the expert's report being admissible in evidence unless the court otherwise ordered, the expert's report, once sent to the registrar, was now deemed to have been admitted into evidence unless the court otherwise ordered.

- (d) Where a question had been submitted to a court-appointed expert, the restrictions in relation to adducing other expert evidence were relaxed. The only limitation was now that the court could limit the number of other experts whose evidence could be adduced on the question.

7.47 Then, in 2003, the Supreme Court Rules were further amended. The restriction in relation to adducing other expert evidence was increased. The parties were now prohibited from adducing other expert evidence altogether except by leave of the court.

7.48 The rules of the District Court and the Local Court mirrored those of the Supreme Court up to and including the 1999 amendments. Those courts did not adopt the 2003 amendment to the Supreme Court rules. In the result, there is a stricter restriction on adducing other evidence in the Supreme Court than in the District Court and in the Local Court.

7.49 As we have said, it is evident that a number of these amendments were designed to bring into the rules relating to court-appointed experts some of the elements of the single expert witness concept. These were the provision that the court could appoint an expert selected by the parties and the further provision in the Supreme Court that the parties were precluded from calling other expert evidence on the question unless by leave. The former provision retained the option of selection by the court, but the latter provision was an unnecessary and inappropriate restriction in relation to the concept of a court-appointed expert.

7.50 Furthermore, the new rules relating to the court-appointed expert did not contain elements which would have been necessary to provide fully for the role of Lord Woolf's single joint expert, but which would have been inimicable to the concept of a court-appointed expert. These elements related to the role of the parties in the control and management of the process: that the parties rather than the court would instruct the expert, and that the parties would decide in their respective interests what, if anything, was to be done with the expert's report.

7.51 In 2005, Practice Note 128, *Single Expert Witness*, was introduced in the Supreme Court. It provides for a standard "single expert witness direction" to be given in all personal injury cases unless cause is otherwise shown. The standard direction applies only to such expert evidence relating to the quantification of damages as is customarily given by non-medical expert witnesses. When the direction is given, evidence of that kind is restricted to expert witnesses jointly engaged by the parties.

7.52 We have made enquiries concerning the use in recent years of the provisions relating to court-appointed experts. We are informed that the Supreme Court rules and the practice note have been utilised only infrequently. In the District Court, we were told, the rules relating to court-appointed experts have been used very rarely. We expect that the situation would be similar in the Local Court. Neither the Supreme Court nor the District Court keeps a record of the cases in which the provisions have been used or of the number of cases in which the provisions have been used. We do not expect that the Local Court would have done so.

## The UCPR

7.53 The provisions of the UCPR are virtually identical with those of the Supreme Court in relation to court-appointed experts. There is no other provision making separate provision for Lord Woolf's concept of a single joint expert as incorporated in the English CPR.

## The Land and Environment Court

7.54 As noted in Chapter 3, the New South Wales Land and Environment Court is exceptional in that it routinely uses court-appointed experts. The court thus has the benefit of hearing from at least one expert witness who is unaffected by adversarial bias, without preventing the parties from calling their own expert evidence if they wish. However, as mentioned in Chapter 3, because of the special nature of the proceedings, that has been achieved without incurring the penalty of an unacceptable increase in the number of expert witnesses, or an unacceptable increase in costs.

7.55 Having regard to these considerations, we regard the recent use of court-appointed experts by the Land and Environment Court as a special case. It does not, in our view, demonstrate that the current Supreme Court rules concerning court-appointed experts (or the virtually identical UCPR) are satisfactory for the more usual kinds of litigation where an expert witness in the role of the English single joint expert would be useful.

## CONCLUSION

7.56 We conclude that the existing provisions in the UCPR relating to court-appointed experts should be retained, but with amendments designed to restore the core concept of enabling the court to obtain expert assistance which it believes it would otherwise not receive, and providing unequivocally for the court's control over that process. We further conclude that there is a need for a separate and coherent set of rules to provide independently for joint expert witnesses, where the objectives are to reduce adversarial bias and to reduce time and cost having regard to the expert evidence which would otherwise have been adduced by the parties individually.

7.57 As we have mentioned, a provisional prohibition against calling other expert evidence is integral to the concept of a joint expert witness but not to the concept of a court-appointed expert. On the other hand, selection of the expert by the parties is integral to the concept of the joint expert witness, but not to the concept of the court-appointed expert. In the case of the court-appointed expert, the court should have control of the process, including the use to be made of the expert's report. In the case of the joint expert witness, the contrary is the case.

7.58 There is also the matter of presentation and acceptance. The rules providing for joint expert witnesses should convey in clear and positive terms the features of that concept. These should include the following: that it is for the parties affected to select and engage the expert, with the intent (in the first instance at least) that this will

be the only expert evidence to be adduced by any of them on the question; that it is accordingly to the parties that the expert will send his or her report; that it is for the parties to clarify the expert's opinion as may be necessary; and that it is for them to decide in their respective interests what use (if any) they wish to make of the expert's evidence.

7.59 The existing provisions relating to court-appointed experts do not present these elements in clear and positive terms. In some respects, they do not do so at all. This is not possible in view of the fundamental differences between the two concepts. Even the terminology of the existing provisions – that the expert is appointed as a court expert – emphasises the court's control over the process, as is inescapable and appropriate in relation to a court-appointed expert, rather than the parties' control over the process, as is appropriate in relation to a joint expert witness.

7.60 If the idea of the joint expert witness is to gain acceptance and currency in the ordinary run of civil litigation, there needs to be a set of rules which clearly and directly convey the essential features of the concept.

## 8. Joint Expert Witnesses and Court-Appointed Experts: Particular Issues

- RECOMMENDATION 8.1
- Introduction
- Proposed division 3: experts engaged by the parties jointly
- Proposed amendments relating to court-appointed experts
- RECOMMENDATION 8.2

**RECOMMENDATION 8.1**

The *Uniform Civil Procedure Rules 2005* (NSW) should be amended to include rules relating to joint expert witnesses as follows:

- A provision for an order that a joint expert witness be engaged by the parties affected;
- A provision for the joint expert witness to be selected by agreement between the parties affected or, failing agreement, by or in accordance with directions of the court;
- A requirement for consent by the expert being engaged as such;
- A prohibition against a party eliciting the opinion of a proposed joint expert witness before engagement, and provision for disclosure of any such communication;
- A provision allowing the joint expert witness to apply for directions, with advance notice to the parties affected;
- The same requirements in relation to the code of conduct as apply in the case of experts engaged by the parties individually;
- A provision allowing an affected party to put questions in writing to the joint expert witness for the purpose of clarifying the witness's report;
- A provision allowing an affected party to tender the joint expert witness's report and to tender answers by the joint expert witness to written questions put to the witness by a party, unless the court otherwise orders;
- A provision prohibiting the parties from calling other expert evidence on a question submitted to the joint expert witness, except by leave of the court;
- A provision allowing an affected party to examine the joint expert witness orally in court; and
- A provision for payment of the joint expert witness's fees. (Appendix C, Sch 1 Item 5.)

## INTRODUCTION

8.1 This chapter presents and explains the detail of the proposed amendments to the *Uniform Civil Procedure Rules 2005* (NSW) (“UCPR”) designed to implement the recommendations in Chapter 7 relating to joint expert witnesses and court-appointed experts. A draft of the proposed amendments has been settled by the parliamentary counsel.

8.2 The present format of the UCPR relating to expert evidence is as follows. Part 31 includes the following divisions:

*Division 2, Experts called by the parties; and*

*Division 3, Experts appointed by the court.*

8.3 The scheme of the proposed amendments is as follows:

- Rename *Division 2* as *Experts engaged by the parties individually*.
- Two additions and one deletion from that division.<sup>1</sup>
- Introduce a new division, *Division 3, Experts engaged by the parties jointly*.
- Renumber the existing *Division 3, Experts appointed by the court* as *Division 4, Experts appointed by the court*.
- Amend some of the provisions in that division.<sup>2</sup>

8.4 The full details may be seen by reading the following annexures with this chapter:

Appendix B contains the relevant existing provisions of the UCPR (*Part 31, Evidence, Division 2, Experts called by parties, and Division 3, Experts appointed by the court*).

Appendix C contains the Commission’s proposed amendments to the UCPR (including the renamed *Division 2, Experts engaged by the parties individually*) as settled by the parliamentary counsel.

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1. See Recommendations 6.1, 6.2 and 9.2.

2. See Recommendation 8.2.



Appendix D contains the proposed amendments to the existing *Division 3*, renumbered as *Division 4, Experts appointed by the court*, as settled by Parliamentary Counsel. It shows the proposed amendments superimposed on the division in its present form.

Appendix E is a table arranged by topic. It compares and contrasts the existing provisions relating to court-appointed experts, the proposed amendments to those provisions, and the new provisions relating to joint expert witnesses.

## PROPOSED DIVISION 3: EXPERTS ENGAGED BY THE PARTIES JOINTLY

8.5 Under this proposed provision, in contrast with the rules relating to court-appointed experts, the parties have, as is appropriate, the control and management of the process once an order is made for a joint expert witness. They have primary responsibility for selection of the expert. They engage the expert, supply the expert with a copy of the code of conduct, instruct the expert, clarify the expert's report if necessary by written questions, and decide whether the expert's report should be tendered in evidence. The court becomes involved in the process only if there is a need to do so. As is appropriate, other expert evidence on the question or questions submitted to the joint expert witness is proscribed except by leave.

### Proposed rule 31.27B: selection and engagement

8.6 Under this proposed rule, an order for a joint expert witness can be made at any stage in the proceedings. It is envisaged, however, that such an order would be made as early as possible. If one or both parties have instructed their own experts before such an order is made, the value of such an order is reduced. The *Civil Procedure Act 2005* (NSW) and the UCPR contain provisions which recognise the importance of case management as a tool for increasing the efficiency of the court system and reducing the cost of litigation.<sup>3</sup> There is an obvious advantage in tailoring case management procedures to enable orders for joint expert witnesses to be made at the earliest possible time.

8.7 The parties will usually agree on the selection of a joint expert witness once an order for a joint expert witness is made. Experience in England indicates that failure to agree on the selection will be rare. If the parties do fail to agree, the selection is by, or as directed by, the court. The court could then, for example, direct that the witness be a person nominated by the relevant professional body, with final approval by the court.

8.8 An expert cannot be made a joint expert witness without his or her consent.

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3. See generally *Civil Procedure Act 2005* (NSW) Pt 6, particularly s 56-60, which are reproduced in Appendix A of this report.

8.9 So far as is practicable, no party should have an advantage over another, by knowing in advance what a prospective joint expert witness will say. Under the proposed rule, the parties are prohibited from asking an expert under consideration for selection as a joint expert witness for the expert's opinion on the matter in question, and are to notify each other as to whether there has been any infringement of that prohibition before the engagement is finalised. The professional obligations of the parties' legal representatives would be a strong safeguard. In the unlikely event of a breach of the rule being discovered after the expert was engaged, the aggrieved party could apply to the court for replacement of the selected expert.

8.10 An undesirable advantage could arise in ways not covered by the proposed rule. The expert's views about the matter in question might be in the public domain and yet be known to only one side, or the expert's position might be known privately to only one side from previous contact. It is not possible to eradicate the potential for unfair advantage arising in such ways. The proposed rule goes as far as we think is practicable in minimising potential unfairness of this kind.

### **Proposed rule 31.27C: instructions to the expert**

8.11 The proposed rule requires parties to agree on the instructions to be given to the joint expert witness, including the question or questions for consideration and the assumptions of fact to be made by the expert. If they fail to agree, they are to give separate instructions to the expert, and each must serve a copy of their instructions on the other or others.

8.12 The rule envisages that, if the parties are at odds about the questions which arise for opinion or as to the true facts of the case, the expert will provide a report which responds to the respective alternatives. This is no different in principle from the way an expert is examined in court in the ordinary course: the questions for opinion which each party regards as the correct questions are explored in examination or cross-examination and, for that purpose, the facts which each party contends for respectively are put as assumptions. A practical difference under the proposed rules is that the witness has the opportunity of considering such alternatives on notice and of giving a considered response to them.

### **Proposed rule 31.27D: expert may apply to the court for directions**

8.13 Under the proposed rule, a joint expert witness may ask the court to make directions to assist the expert witness in carrying out his or her functions. This might arise where there are conflicting instructions from opposing parties, or where the instructions are inadequate, or where the expert believes the brief is outside his or her area of expertise. The proposed rule could also assist a joint expert witness to resolve any perceived conflict between the expert's duty to the court or professional obligations and what the expert is asked to do.

8.14 It is envisaged that the rule would be construed broadly, allowing the expert to seek the court's assistance in relation to any problem that might arise.

8.15 To minimise unnecessary applications, the proposed rule provides for advance notice to the parties of an intention by the expert to apply for directions. That is to ensure that the parties' legal advisers have a reasonable opportunity to resolve the expert's difficulty, if they can, without the expert having to go to the court for assistance.

### Proposed rule 31.27E: code of conduct

8.16 The NSW Supreme Court has stated that the court should not "without exceptional cause" exercise its discretion to allow the admission of expert evidence absent the required acknowledgement. The code of conduct was promulgated with the intent that only reports by experts who have proceeded in accordance with the norms of conduct found in the code should be relied upon and may be admitted into evidence.<sup>4</sup> These observations apply with equal force in relation to the joint expert witness.

8.17 Accordingly, the proposed rule provides that the parties (or one of them, as may be agreed) are to supply the joint expert witness with a copy of the code of conduct. Written or oral evidence from the witness is then made conditional upon the witness's written undertaking to be bound by the code, as in the case of an expert witness engaged by the parties individually.<sup>5</sup>

### Proposed rule 31.27F: expert's report to be sent to parties

8.18 The joint expert witness is to send his or her report to the parties. This is appropriate. It is then for the parties, in their respective interests, to decide what use is to be made of the report. By contrast, in the case of a court-appointed expert, the report appropriately goes to the registrar (who sends copies to the parties), and the report goes into evidence unless the court orders otherwise.<sup>6</sup>

### Proposed rule 31.27G: parties may seek clarification of report

8.19 Where an order for a joint expert witness is made, the parties do not have the opportunity of conferring with the expert. The proposed rule gives the parties a mechanism for clarifying the expert's report before trial by putting questions to the expert in writing. This may avoid the witness having to be called to testify at the trial. It may avoid a party having to apply for leave to adduce evidence from another expert witness.

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4. *Commonwealth Development Bank v Cassegrain* [2002] NSWSC 980. But compare *Barack Pty Ltd v WTH Pty Ltd* [2002] NSWSC 649; *Langbourne v State Rail Authority* [2003] NSWSC 537; *Jermen v Shell Co of Australia Ltd* [2003] NSWSC 1106.

5. *Uniform Civil Procedure Rules 2005* (NSW) r 31.23.

6. *Uniform Civil Procedure Rules 2005* (NSW) r 31.31.

8.20 The rule relates to clarification. It is not intended that it should be used to cross-examine the witness, or to require the witness to carry out new investigations or tests, or to expand significantly on the witness's report. If the joint expert witness finds that the questions are onerous or require more than clarification of the report, the witness can apply to the court for a ruling in exercise of a joint expert witness's entitlement to apply for directions.<sup>7</sup>

### **Proposed rule 31.27H: tendering reports and answers to questions; examination in court**

8.21 The concept is that the joint expert witness, unlike the court-appointed expert, is the parties' witness. Accordingly, the parties should be free to make whatever use they wish of the witness's evidence. Under the proposed rule, any party affected may tender the joint expert witness's report. Similarly, any party affected may tender any one or more of the witness's answers to questions, irrespective of which party has asked the questions. It is envisaged that one party might tender the report and that another party might tender an answer to written questions.

8.22 It is intended that the rules of evidence and other procedural law should continue to apply, including acceptance by the witness of the code of conduct.<sup>8</sup> Accordingly, tendering the report and answers to questions is made subject to any contrary order of the court.

8.23 We have not made the proposed new division inapplicable to trials with a jury. (The existing rules relating to court-appointed experts are not so limited either.) It is likely that, at a jury trial, neither a joint expert witness's report nor the witness's answers to questions would be admitted into evidence before the jury in written form. The evidence would be led orally. The tendering of the report and of answers to written questions being subject to other order of the court, the proposed rule would accommodate that situation.

8.24 Under the proposed rule, any party affected is entitled to examine the witness in the form of examination in chief, cross-examination or re-examination as the court may direct. In that regard, we have in mind that it may be inappropriate to allow a party with a favourable opinion from the witness to cross-examine, and re-examination should be allowed as may be appropriate.

### **Proposed rule 31.27I: prohibition of other expert evidence**

8.25 The proposed rule provides that no party is allowed to adduce expert evidence individually on any question submitted to a joint expert witness for opinion except by leave.

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7. See para 8.13 – 8.15 which discuss proposed rule 31.27D.

8. See para 8.16 – 8.17 which discuss proposed rule 31.27E.

## Proposed rule 31.27J: remuneration of expert

8.26 The proposed rule provides that the parties are jointly and severally liable for the joint expert witness's fees, but the court may direct when and by whom the fees are to be paid. The rule is also subject to the court's overarching powers in relation to costs. Discretionary orders can be made.

## PROPOSED AMENDMENTS RELATING TO COURT-APPOINTED EXPERTS

### RECOMMENDATION 8.2

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The provisions of the *Uniform Civil Procedure Rules 2005* (NSW) relating to experts appointed by the court should be amended as follows:

- Selection of the court-appointed expert to be by the court or as the court may direct, in place of the existing provision for selection by the parties, by the court or as the court may direct;
- Adding a requirement for the expert's consent to being appointed;
- A right to examine in chief, cross-examine or re-examine the court-appointed expert as the court may direct, in place of the existing provision for cross-examination only; and
- Repeal of the existing provision which prohibits the parties from calling other expert evidence in relation to a question submitted to a court-appointed expert. (Appendix C, Sch 1 Items [7] – [10].)

8.27 These are the proposed amendments to the division, *Experts appointed by the court*. This is Division 3 of Part 31 in the existing UCPR. It would become Division 4 if our recommendation is accepted for the introduction of a new Division 3 providing for joint expert witnesses.

8.28 The proposed amendments do not make any radical change to the division. They are designed to maintain consistency with the purposes for which an expert may be appointed by the court.

## Existing rule 31.29: election and appointment

8.29 The existing rule provides for selection of the court-appointed expert by the parties affected, by the court or in a manner directed by the court.

8.30 It is not appropriate that selection by the parties should be put forward as the first option in this way. The expected method of selection of an expert appointed by the court would be for the court itself to make the selection. It would only be if the court wished to have assistance in the selection process that the expert would be selected by the parties or as the court otherwise directed. The proposed amendment reflects these considerations. If the court wished the parties to assist in making the selection, it could so direct.

8.31 As in the case of our proposed provision for joint expert witnesses, an order of the court should not result in an expert being engaged without the expert's consent. We have, accordingly, proposed the same limitation in relation to court-appointed experts.

## Existing rule 31.32: cross-examination of expert

8.32 The existing rule carries the above heading. The rule provides that the court-appointed expert may be cross-examined by any party and that the expert must attend for cross-examination if so requested by the registrar or by a party.

8.33 As in the case of our proposed joint expert witness, cross-examination may not always be the appropriate form of examination. We have accordingly proposed an amendment which would provide for examination in such form as the court may direct, as we have done in relation to joint expert witnesses.

8.34 A change in the wording of the existing heading presently carried by the rule is similarly proposed, the heading to read "Examination of expert".

## Existing rule 31.33: prohibition of other expert evidence

8.35 The existing rule provides that other expert evidence may not be adduced except by leave. That is not appropriate in this connection. The appointment of an expert by the court would not ordinarily be inconsistent with the parties calling expert evidence of their own.

8.36 By contrast, an automatic prohibition against calling other expert evidence (subject to leave) is appropriate in the case of a joint expert witness, and we have so provided. That is because the objectives there include avoidance of a multiplicity of expert witnesses and the substitution of an independent expert for the experts who would otherwise be called by the parties.

8.37 The amendment we propose in relation to court-appointed experts removes the automatic prohibition against adducing other expert evidence (subject to leave), but allows for an order to be made prohibiting other expert evidence if there is some special reason for doing so.

## 9. Standards and Sanctions

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- The code of conduct
- RECOMMENDATION 9.1
- “No win no fee” arrangements
- RECOMMENDATION 9.2
- Accreditation
- Sanctions
- RECOMMENDATION 9.3



## INTRODUCTION

9.1 This chapter deals specifically with the law's response to what the terms of reference call "inappropriate or unethical conduct" on the part of expert witnesses.

9.2 Although not expressly mentioned in the terms of reference, an important part of the law's response is the formulation of codes of conduct for expert witnesses. In New South Wales, as seen in Chapter 3, a code of conduct forms part of the *Uniform Civil Procedure Rules 2005 (NSW)* ("UCPR"). Since the code defines the obligations of expert witnesses, it forms the first topic considered in this chapter. Although the Commission agrees with the substance of the code, certain amendments are recommended.

9.3 Next, we consider a problem specifically mentioned in the terms of reference, namely the practice of expert witnesses offering their services on a "no win no fee" basis, for which we will use the term "contingency fee arrangements". Although some submissions proposed that such arrangements be prohibited, the Commission's recommendations embody a different approach, namely to ensure that the court is informed of such arrangements, and is able to consider, in light of all the circumstances, whether they should lead to the evidence being excluded, or given less weight.

9.4 Next, we consider mechanisms for the accreditation and accountability of expert witnesses for the purposes of court proceedings. While such schemes make a significant contribution towards the quality of expert evidence, the Commission does not recommend that there should be a rule giving preference to expert witnesses who are accredited, or that courts should maintain their own lists of accredited experts.

9.5 Next, we deal with the desirability of sanctions for inappropriate or unethical conduct by expert witnesses. The Commission considers that the existing sanctions are satisfactory, but recommends rules that would ensure that they are drawn to the attention of expert witnesses.

## THE CODE OF CONDUCT

### RECOMMENDATION 9.1

The code of conduct for expert witnesses (Schedule 7 to the *Uniform Civil Procedure Rules 2005* (NSW)) should be revised by:

- deleting those provisions that relate to matters of form rather than the experts' duties (those matters to be dealt with in rules or practice directions);
- providing that the duties of disclosure apply to oral evidence as well as to the contents of expert reports. (Appendix C, Sch 1 Items [11] to [13].)

### Introduction

9.6 From early times, courts have on occasion expressed concerns about the quality and objectivity of expert witnesses, and the cases abound with judicial exhortations that experts should be unbiased, notwithstanding that they have been called by one party. For example, Lord Wilberforce said in 1981 that expert evidence presented to the court “should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation”.<sup>1</sup> More elaborate statements followed, in one case the court referring to:

*a duty to express only opinions genuinely held and which are not biased; a duty not to mislead by omission; and a duty to consider all the material facts and not to omit to consider material facts which could detract from the concluded opinion.*<sup>2</sup>

9.7 In more recent times, a number of courts have published codes of conduct for expert witnesses. In New South Wales such a code now forms part of the UCPR,<sup>3</sup> and this code will be considered further below.

### Submissions

9.8 A number of submissions made the point, with which the Commission agrees, that standards or codes of conduct alone will not eliminate adversarial bias.<sup>4</sup> On the

1. *Whitehouse v Jordan* [1981] 1 WLR 246 at 256-257.

2. *Re J* [1991] FCR 193 at 226 (Cazalet J).

3. The expert witness code of conduct is reproduced in Appendix F of this report and discussed in Chapter 3.

other hand, many submissions indicated that they had value, noting that codes of conduct were beneficial in providing a clear statement of the duties of an expert witness to the court.<sup>5</sup> In addition, several submissions recognised that the statement of duties contained within the codes of conduct would assist expert witnesses in defending their impartiality against any pressure from clients or lawyers to arrive at a particular conclusion.<sup>6</sup> Thus Dr Gary Edmond submitted:

*Nevertheless, normative codes may possess symbolic value. For some of the reasons already considered, however, they are unlikely to produce 'impartiality', eliminate 'bias', make an expert's obligations clear-cut or provide useful guidelines for sanctioning (more below). They may provide most utility in the face of outrageous expert performances and to assist experts resist importunity from a client or lawyer. Recourse to the 'paramount duty to the court' may help an expert manage the terms of their performance and credibly hold 'their ground' amid the complex network of obligations and responsibilities.<sup>7</sup>*

9.9 A number of submissions focused on the need to ensure that codes of conduct are adhered to in practice and that the codes be enforceable, with sanctions imposed for failure to comply.<sup>8</sup> One suggestion was that judges should sometimes ask witnesses about their understanding of the code, to ensure that compliance did not become token or ritualistic.<sup>9</sup>

## The value of codes of conduct

9.10 The formulation of standards and codes of conduct should help experts understand and focus on their responsibilities to the court. Many experts seem uncertain about what is expected of them. A report by the Australian Council of Professions stated that it was not at all clear to most experts "to whom a duty was owed, and the claim on that duty by the party who pays the expert's fee carries considerable weight".<sup>10</sup> Even if such uncertainties have diminished since that time, a clear and authoritative statement of the duties of expert witnesses is likely to assist the courts in the task of achieving the "just, quick and cheap" resolution of disputes.

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4. Confidential Submission 4 at 2; Australian Lawyers Alliance, *Submission* at 9; Royal Australasian College of Surgeons, *Submission* at 1; Associate Professor Eric Magnusson, *Submission* at 4; Association of Consulting Surveyors, *Submission* at 2; Professions Australia, *Submission* at 4.
  5. Royal Australian Institute of Architects, *Submission* at 3; Institute of Chartered Accounts, *Submission* at 4; Expert Experts, *Submission* at para 29.6; Maurice Blackburn Cashman Lawyers, *Submission* at 5.
  6. Institute of Arbitrators and Mediators Australia, *Submission* at 2.
  7. Dr Gary Edmond, *Submission* at 16.
  8. Expert Experts, *Submission* at para 29.8; United Medical Protection, *Submission* at 3; Professions Australia, *Submission* at 4.
  9. Associate Professor Brian Boettcher, *Submission* at 3.
  10. Australian Council of Professions, *Dealing with risk: Managing Expectations* (Deakin ACT, 1996) at 24.

## The code of conduct in the UCPR

9.11 In this section, the Commission comments on the specific provisions of the code of conduct set out in the UCPR, and suggests certain amendments. In the Commission's view, the code is generally appropriate, although some amendments are suggested. Particular jurisdictions may wish to expand it in certain ways having regard to particular features of the jurisdiction.

9.12 The code of conduct appears as Schedule 7 to the UCPR. It is reproduced as Appendix F to this report. The UCPR provide that an expert witness, whether called by a party or appointed by the court, must be provided with a copy of the code.<sup>11</sup> The expert must then acknowledge in writing that he or she agrees to be bound by the code; otherwise the expert's evidence is inadmissible, except by leave.

9.13 The purpose of the code of conduct is to bring home to expert witnesses what the court expects of them. The essential message, appropriately expressed in clause 2 ("General Duty to the Court"), is that the expert witness is expected to assist the court with impartial expert evidence rather than act as an advocate.

9.14 Clause 3 is entitled "The form of expert reports". Most of its five sub-clauses deal with matters that can properly be regarded as specific applications of the general duty, and, in the Commission's view are appropriately included in the code. Subclause (1) is the exception, as explained in the next paragraph. Subclause (2) requires that where some qualification is necessary to make the report complete or accurate, that qualification should be included. By subclause (3), where the opinion is not a concluded opinion because of such reasons as insufficient data, this must be stated. Subclause (4) requires the expert to provide a supplementary report where the expert has changed an opinion previously given. Clause 4 specifies that experts have certain duties in relation to experts' conferences.

9.15 In the Commission's view, the force of the code of conduct should not be diluted with provisions which are purely procedural in nature. With the exception of paragraph (d), clause 3(1) does not involve any ethical element. It follows that subclause (1), with the exception of paragraph (d), should be removed from the code.

9.16 The substance of subclause (1)(d) can readily be preserved in the code as the sole provision in subclause (1). However, there is no occasion to limit the operation of the provision to reports. The limitation should be removed. The provision would then apply equally to oral evidence by an expert.

9.17 The provisions removed from subclause (1), as recommended above, could be included in a rule or practice note relating to the form of expert reports and other procedural matters concerning expert witnesses. Litigants could be required to provide a copy of such rule or practice note to expert witnesses, together with the code of conduct.

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11. *Uniform Civil Procedure Rules 2005* (NSW) r 31.17 and r 31.28.

9.18 The heading of clause 3, *The form of expert reports*, is apposite in relation to subclause (1) in its present form – most of which we recommend should be removed – but it is inapposite in relation to the balance of the clause. This heading should be, we suggest, *Particular duties to the court*.

9.19 The wording of subclause (5) of clause 3 could be improved. It is engagement simpliciter, rather than engagement by a party, which makes the code applicable by operation of clause 1. And the subclause is probably unnecessary anyway because an expert appointed by the court will have been “engaged”. However, for more abundant caution, the code should refer specifically to joint expert witnesses (as to which, see Chapter 7) and to experts appointed by the court, lest it be thought that the omission is deliberate. We recommend removal of subclause (5) and, in lieu thereof, inclusion of a new subclause in clause 1, worded as follows:

*This code of conduct applies to an expert engaged by a party, to a joint expert witness and to an expert appointed by the court.*

## “NO WIN NO FEE” ARRANGEMENTS

### RECOMMENDATION 9.2

The *Uniform Civil Procedure Rules 2005* (NSW) should be amended to require that the fee arrangements with an expert witness be disclosed. (Appendix C, Sch 1 Item [3].)

### Introduction

9.20 The phrase “no win no fee arrangements”, used in the terms of reference, refers to arrangements under which a party engages a person to act as an expert witness on the basis that the person will be paid a fee only if the party is successful in the proceedings. Such arrangements can be regarded as at one end of a spectrum of arrangements in which the payment to the expert is directly linked to the outcome of the proceedings. Arrangements at other points on the spectrum would involve some financial advantage for a successful outcome, as where the expert is paid a bonus if the party is successful, or is successful to a specified extent. We will use the term “contingency fee” to refer to all such arrangements, in which the amount payable to the expert is directly affected by the outcome of the proceedings.

9.21 Such arrangements, in which there is a *direct* link between payment and the outcome of the litigation, do not constitute the only situation in which experts may be financially advantaged by successful outcomes. Even where there is no direct connection between the payment an expert will receive and the outcome in a particular case, it may be obvious that, if an expert is seen by the client and the legal representatives to have been effective, it is more likely that the lawyers will approach the expert again in similar cases. As it was put in one submission:

*experts who provide opinions in exchange for payment are potentially influenced by the conflict of interest that their payment presents. Where an expert is paid only if a case succeeds, the conflict is stark. Is it any less stark where an expert is paid a very high fee and knows that future work for the same client is more likely if the client is pleased with the opinion?*<sup>12</sup>

9.22 Although we do not include this sort of indirect link between success and financial benefit in the term “contingency fee”, it is useful to keep in mind that the problem of contingency fees is only a particularly stark instance of the wider problem, namely that an expert engaged by a party may have a financial interest in the outcome of the proceedings.

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12. Australian Lawyers Alliance, *Submission* at 10.

## Submissions

9.23 A number of submissions took the view that contingency fee arrangements amplified adversarial bias and should be prohibited or discouraged.<sup>13</sup> Professor Boettcher wrote:

*I believe that 'no win no fee' encourages vexatious actions. It places the expert in the position immediately of being a member of the team. It seems to me that the suggestions as follows are all reasonable:*

*Such arrangements could be treated as contempt of court or an abuse of process.*

*The relevant code of conduct could expressly forbid such arrangements.*

*The Court could decline to receive evidence of an expert witness who had been shown to have made such an arrangement.*

*The making of such arrangements could be expressly stated to be unprofessional conduct by lawyers. (Although such a rule would not apply to unrepresented litigants).*

*If there were to be some form of accreditation, such behaviour could disentitle the expert to be accredited.<sup>14</sup>*

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13. Adrian Howie, *Submission* at 4; Forensic Data, *Submission* at 2; Dial an Angel, *Submission* at 1; Medical Consumers Association, *Submission* at 7; David Hibbert, *Submission* at 2; Royal Australian Institute of Architects, *Submission* at 4; Human Factors & Ergonomics Society, *Submission* at 4; Australian Institute of Quantity Surveyors, *Submission* at 3; Jamieson Foley Traffic and Transport, *Submission* at 3; Michael Talbot-Wilson, *Submission* at 5; Professions Australia, *Submission* at 5; Law Society of New South Wales, Litigation Law and Practice Committee, *Submission* at 2; United Medical Protection, *Submission* at 5; Association of Consulting Engineers Australia, *Submission* at 5; Engineers Australia, *Submission* at 2; Public Interest Law Clearing House, *Submission* at 2; National Institute of Forensic Science, *Submission* at 5; Stephen Allnut, Peter Klug and Bruce Westmore, *Submission* at 4; Freehills, *Submission* at para 13; Roy Beran, *Submission* at 4; Institute of Arbitrators and Mediators, *Submission* at 3; Australian College of Private Consulting Psychologists, *Submission* at 11; A R Abadee, *Submission* at 11; PricewaterhouseCoopers, *Submission* at para 2.1.11; Australian and New Zealand College of Obstetricians and Gynaecologists, *Submission* at 1; Rodney Meeve, *Submission* at 1; Dr Padraic Grattan-Smith, *Submission* at 2; Neil Adams, *Submission* at 2; *Confidential Submission 4* at 4; Geoffrey Markham, *Submission* at 3; New South Wales Police Forensic Services Group, *Submission* at 2.
14. B Boettcher, *Submission* at 4.

9.24 Similarly, the Commission was told that, where experts have apparently been paid on a contingent basis, “they are inclined to strongly advocate their client’s case”.<sup>15</sup> It was also submitted that contingency funding for experts creates the perception that it is more difficult for the expert to provide wholly objective and independent opinions to the court.<sup>16</sup> A number of professional bodies oppose and expressly discourage or prohibit contingency arrangements.<sup>17</sup>

9.25 However, some argued that preventing such arrangements would effectively exclude some people from having their matters heard, and thus potentially cause the failure of meritorious claims.<sup>18</sup> Absence of funds may also be “a practical impediment to obtaining a single expert witness report”.<sup>19</sup> This argument appears to apply primarily to plaintiffs, especially in personal injury cases: they may have insufficient personal resources to prepare their cases, and arguably only a “no win no fee” arrangement would allow them to proceed with their claim.<sup>20</sup> In response to this concern, several submissions indicated that contingency based fee arrangements should not be prohibited, but suggested there should be a requirement that the fee arrangement be disclosed to the court.<sup>21</sup>

9.26 The level of concern among the submissions over the use of contingency fee arrangements was high, despite the fact that the majority believed such arrangements between parties and experts are rare.<sup>22</sup> The few submissions that indicated that contingency fee arrangements were widespread were commenting almost exclusively

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15. Australian Institute of Quantity Surveyors, *Submission* at 3.
  16. Expert Experts, *Submission* at para 27.22; Jamieson Foley Traffic and Transport, *Submission*, at 3.
  17. Australian Institute of Quantity Surveyors, *Submission* at para 2.3; Institute of Chartered Accountants, *Submission* at para 71-75.
  18. David Watt (Evidex), *Submission* at 4; Carroll and O’Dea Lawyers, *Submission*, at para 2; Australian Lawyers Alliance, *Submission* at 12; George Cooper, *Submission* at 5; Medical Consumers Association, *Submission* at 8; David Hibbert, *Submission* at 2; Maurice Blackburn Cashman Lawyers, *Submission* at para 27; For Legally Abused Citizens, *Submission* at 4; Public Interest Law Clearing House, *Submission* at 2; Institute of Arbitrators and Mediators, *Submission* at 3; PricewaterhouseCoopers, *Submission* at para 2.1.11; Royal Australian and New Zealand College of Obstetricians and Gynaecologists, *Submission* at 1; Joan Dwyer, *Submission* at 1
  19. Expert Experts, *Submission* at para 27.24.
  20. George Cooper, *Submission* at 5.
  21. Australian Lawyers Alliance, *Submission* at 12; Mike Talbot-Wilson, *Submission* at 6; Association of Consulting Engineers Australia, *Submission* at 5; Professions Australia, *Submission* at 5; Dr Padraic Grattan-Smith, *Submission* at 2
  22. Stephen Allnutt, Peter Klug and Bruce Westmore, *Submission* at 3; Freehills, *Submission* at para 11; New South Wales Bar Association, *Submission* at 5; Law Society of New South Wales, Litigation Law and Practice Committee, *Submission* at 2; National Institute of Forensic Science, *Submission* at 5; *Confidential Submission 4* at 4; Geoffrey Markham, *Submission* at para 14.



in relation to personal injury cases.<sup>23</sup> In contrast, the submissions that viewed the practice as rare were either commenting more generally across a range of cases, or were referring to more particular types of litigation, such as cases involving psychiatric injury, construction and commercial litigation. The submissions therefore suggest that, although contingency fee arrangements are not common across the board, they may be used more often in personal injury cases.

## The incidence of contingent fee arrangements

9.27 Many submissions included assertions in general terms about the current use of contingent fee arrangements, but there appears to be no systematic or reliable evidence about their prevalence. Obtaining such evidence would involve a major research exercise. However, in addition to studying the submissions received, the Commission interviewed two senior partners in firms of solicitors that have substantial plaintiffs' personal injury practices, the managing director of a company which funds litigation in exchange for a fee which is proportionate to any verdict recovered, and the directors of a company that acts as an agency for expert witnesses.

9.28 Assertions that contingency fee arrangements occur are entirely credible. There is a high incidence of *solicitors* acting on a contingency basis, particularly for plaintiffs in personal injury cases. Market forces would operate in relation to experts who earn the whole or a large part of their income as expert witnesses similar to the market forces which result in solicitors acting on a contingency basis. Similar arrangements might then be expected. On the other hand, there is a lack of hard evidence of the existence and extent of such practices, and there have been assertions that they do not exist. The two solicitors interviewed told us that, for some years now, the practice has been, in personal injury work at least, that the solicitors fund disbursements, including expert witness fees, and stand the loss if the claim fails. We were also told that, in personal injury work at least, medical experts now generally insist on payment before a report is supplied and require payment within 30 days for subsequent services, such as conferences and attending court to give oral evidence.

9.29 There were some qualifications. One solicitor told us that, if there was a poor outcome (which we take to mean a loss or an unexpectedly low verdict), he might negotiate with the expert witnesses in relation to their fees. The other solicitor told us that he had an arrangement with one of the agencies through which expert evidence was obtained for immediate payment of one half of the expert's fee, with the balance payable at the conclusion of the case.

9.30 There may be a subtle difference between what is expressly agreed and what may actually occur. Where a fee or part of a fee is deferred or is subject to negotiation after the event, there is room for development of a practice whereby experts, looking to preserve a line of work, may forgo their fee or part of their fee when the case is unsuccessful. A tacit arrangement may thus develop without any explicit agreement

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23. Expert Experts, *Submission* at para 31.1; Joan Dwyer, *Submission* at 1.

covering the practice. Although we have seen no evidence of such arrangements, it is entirely possible that they would have developed.

9.31 The argument in some of the submissions that proscribing contingency fee arrangements would mean that many meritorious claims would not reach the courts implies that contingency fee arrangements occur with some frequency. This runs counter to what we were told actually occurs, in the personal injury field at least.

9.32 From what we have been told, the incidence of explicit contingency fees for experts may be low to non-existent. On the other hand, there may be an incidence of such a practice, particularly by tacit understanding rather than by overt agreement. That may particularly be so where the payment of fees is deferred in whole or in part pending the outcome of the case.

9.33 We mention in this connection that there is at least one private funding company operating in New South Wales which will, selectively, enter into funding agreements for a share of any verdict recovered. The proportion of the prospective verdict is struck having regard to the prospects in the litigation as assessed. However, that company does not fund personal injury litigation. There are institutional schemes in Victoria and South Australia which do so, particularly in relation to disbursements. If there appeared to be a need for such a scheme in this state, we would recommend that it be investigated, but we have not seen evidence demonstrating such a need.

9.34 The Commission has not received evidence of any arrangements being made with expert witnesses for the payment of *proportionate* fees (eg, a percentage of damages awarded), although this does not exclude the possibility that such arrangements may occur.

## Discussion

9.35 A contingency fee arrangement, whether express or tacit, raises the spectre of adversarial bias. The witness stands to gain financially by giving favourable evidence. That would also be the case where an expert enjoys the financial benefit of a line of work from a particular firm of solicitors or from a particular institution (such as an insurance company), or has a reputation for providing expert evidence with a particular leaning. The contingency fee arrangement is not the only possible source of adversarial bias arising from the financial implications of giving favourable evidence, but it is one such possible source and warrants consideration as such.

9.36 Prohibiting contingency fee arrangements is an obvious response to the problem, but faces two difficulties. First, any attempt to prevent contingency funding of experts faces severe problems of enforcement. There may be no difficulty if evidence can be found of an explicit arrangement between the party, or the party's lawyers, and the expert. However, it would be easy enough to establish informal contingency arrangements: tacit understandings between expert and lawyer that, if the case is unsuccessful, the expert would not send a bill, or, perhaps, would not insist on payment if a bill were not paid. Those seeking to enforce any prohibition might find it

difficult to establish that such an arrangement existed, unless perhaps a pattern could be shown across a number of cases that the expert did not press for payment, or for full payment, in unsuccessful cases.

9.37 An even more substantial problem was that of evaluating the suggestion, in some submissions, that there are situations where, in the absence of a contingency fee arrangement, a litigant would find it difficult or impossible to obtain any satisfactory expert evidence. If prohibiting contingency fee arrangements had the effect of preventing some litigants obtaining expert evidence at all, and thus meritorious claims being abandoned, assessing the merits of such a prohibition would mean balancing the harm caused by the abandonment of some meritorious claims against the harm caused by increased adversarial bias. Given the limited amount of information, it is impossible to assess these competing considerations in a satisfactory way. The Commission notes that some professional organisations prohibit contingency arrangements on the part of their members. This is of course a matter for the organisations, and we make no criticism of it.

9.38 Rather than prohibition, a more constructive approach for the law to take would be to ensure, as far as possible, that the terms on which experts are engaged are made known to the other parties and to the court. This would make it possible for a party to cross-examine the expert (and perhaps other witnesses) in order to bring out the funding arrangements and their potential implications. Submissions could then be made as to the effect of the funding arrangements on the objectivity of the expert. It would be open to a party to submit that, in all the circumstances, the funding arrangements should lead the court to attach little weight to the expert's evidence, or even, perhaps, disregard it entirely.

9.39 The Commission favours rules requiring full disclosure of the financial arrangements between the expert and the engaging party. It considers this preferable to creating a prohibition on "no win no fee" or contingency arrangements, and to introducing a rule or presumption against the court accepting evidence from an expert witness engaged on such a basis.

9.40 It seems that, in general, contingency arrangements are more likely to involve experts engaged on behalf of plaintiffs than those engaged on behalf of defendants. In personal injury matters especially, in practice, defendants are likely to be insurance companies, government agencies or corporations. When considering the desirability of requiring financial disclosure relating to contingency arrangements – which in practice will relate largely to plaintiffs – the Commission considered whether it might be desirable also to require litigants to disclose, in relation to any expert witness, whether they had previously engaged that person as an expert in other, similar cases. The rationale for such a requirement would be that experts used repeatedly by a particular defendant might have as much of a financial interest in a favourable outcome for the party that engaged them as would experts appearing for plaintiffs on a contingency basis. On balance, however, the Commission did not consider that such a requirement was practicable or necessary. First, formulating such a requirement poses serious difficulties. Secondly, it is open under the present law for plaintiffs, if they wish, to ascertain in cross-examination whether the evidence of an

expert engaged by a defendant is influenced by reason of the expert's previous involvement with the defendant.

## Conclusions

9.41 The Commission proposes that the rules should require that the funding arrangements relating to each expert witness be known to all parties and to the court. There should be disclosure of all fee arrangements, including any arrangement for deferral of payment, in whole or in part, and of the payments which have actually been made to the expert under whatever arrangement is on foot. Disclosure in those respects would reveal any arrangement for deferral.

## ACCREDITATION

### Introduction

#### *The terms of reference*

9.42 The terms of reference require the Commission to inquire into and report on the operation and effectiveness of the rules and procedures governing expert witnesses in New South Wales, and, in doing so, to have regard to “current mechanisms for the accreditation and accountability of expert witnesses for the purposes of court proceedings”.

9.43 Current accreditation schemes are discussed in the following paragraphs. In relation to “accountability”, many professions require their members to be accountable by requiring them, as a condition of their membership or their entitlement to a designation such as “accredited”, to adhere to standards of conduct developed by the profession. There are normally procedures within the profession or a disciplinary body to deal with allegations of misconduct. In addition, where the practice of the profession is licensed, legal proceedings may be instituted to remove a member’s licence, and thereby prevent the person from continuing to practise the profession. Finally, expert witnesses are “accountable”, in the sense that certain types of misconduct, such as giving deliberately false evidence, can, if detected, lead to legal sanctions, a matter separately considered in this chapter.

#### *The present law and practice*

9.44 In practice, of course, accreditation will normally be favourably regarded by parties in selecting expert witnesses, and by courts in considering what weight to attach to the evidence of an expert witness who is accredited in the relevant discipline or sub-discipline. However, the law of evidence does not require expert witnesses to be accredited. Expert evidence may be received by anyone qualified to give it, whether accredited or not. Nor do the existing rules relating to expert witnesses refer in any way to schemes of accreditation. At the present time, no New South Wales court itself accredits expert witnesses, and the Commission is not aware of any tribunal that does so.

#### *Issues for consideration*

9.45 Having regard to the present position and the terms of reference, the general issue is whether it would be desirable for the rules and procedures governing expert witnesses to deal expressly with accreditation schemes. The Issues Paper invited comment on whether experts should be accredited by the courts as expert witnesses, and on accreditation of experts more generally. Having regard to the submissions received, and the Commission’s further research and inquiries, the following questions need consideration:

1. Should the rules expressly favour accredited expert witnesses by requiring that expert witnesses be accredited in order to give evidence, or making accreditation a requirement for engagement as a court-appointed expert or

as a joint expert witness, or otherwise giving some special status to expert witnesses who are accredited?

2. If so, should the courts rely on existing schemes, or themselves establish and maintain accreditation schemes for expert witnesses?

## Current accreditation schemes

9.46 Many professional associations conduct accreditation schemes. They vary in numerous ways, including in what is attributed to those who are accredited. A scheme may constitute a simple list of individuals who have satisfied certain identifiable requirements, such as having certain qualifications, having been in practice for a certain period, and having attended prescribed continuing education courses. Alternatively, the relevant profession may have an active disciplinary scheme under which accreditation may be withheld from individuals whose performance is found to have fallen short of the relevant standard: in such cases, accreditation might reasonably be thought to justify a measure of confidence in the skill and integrity of accredited persons. In practice, however, monitoring the performance of those who are accredited can be extremely difficult and time-consuming.

9.47 For the purpose of this discussion, it will be useful to distinguish between accreditation relating to the particular discipline (“discipline accreditation”) and those schemes that specifically focus on the role of expert witness (“forensic accreditation”). It is accepted that, within schemes of discipline accreditation, there may be particular seminars or other activities directed to aspects of the role of expert witness.

### *An example: chartered accountants*

9.48 To take one example, there is a system of accreditation for chartered accountants, administered by the Institute of Chartered Accountants in Australia (ICAA), with requirements relating to education, practical experience and training, and professional standards and ethics.<sup>24</sup> Chartered accountants are bound by the professional standards and disciplinary standards set by the ICAA, and are obliged to undertake at least 120 hours of continuing professional education every three years. Chartered accountants who conduct public practice must hold a current Certificate of Public Practice from the ICAA, and this includes requirements such as professional indemnity insurance.

9.49 Many chartered accountants are also involved in sub-specialty accreditation schemes such as apply to auditors, tax agents, liquidators and financial advisors. These have their own additional systems of regulation: for example, auditors must be registered under a statutory scheme administered by the Australian Securities and Investments Commission. There is also a recently created Business Valuation Special Interest Group, which may develop into an accreditation scheme for chartered accountants who specialise in business valuations.

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24. This section draws on the submission by the Institute of Chartered Accountants in Australia.

9.50 In 1999, the ICAA created a Forensic Accounting Special Interest Group (FASIG), now represented nationally and in most states. FASIG is devoted to the application of accounting knowledge and skills to issues arising in civil and criminal litigation, and investigations, covering a wide range of areas such as valuation, damages, personal injury, fraud investigation and professional negligence. Its broad aims are to “assist chartered accountants to maintain high professional standards when acting as forensic accountants, and to promote a better understanding of the value of forensic accounting services to those groups, such as lawyers and the judiciary, who use or rely upon the work of expert accountants”. In collaboration with CPA Australia, it has formulated a Statement of Forensic Accounting Standards. These are binding on members, and breach may lead to disciplinary proceedings. A document setting out (non-mandatory) practical guidelines has also been produced. FASIG also conducts education in forensic accounting, and has sponsored a Forum on Expert Evidence, attended by judges and lawyers as well as expert groups. The ICAA has also formally endorsed a Monash University course, the Graduate Certificate in Forensic Studies (Accounting), and the FASIG submission indicates that other universities have begun to offer similar courses.

## Submissions

9.51 Many of the submissions were opposed to a recommendation requiring that all experts be accredited before being able to provide expert testimony to the court. It was argued in several submissions that a mandatory requirement for accreditation would limit the pool of available experts, as only those experts who have the most time available or for whom providing evidence was a significant part of their professional activities would be likely to apply for accreditation.<sup>25</sup> This may lead to fewer practising expert witnesses and increase, rather than decrease, the potential for bias to occur. In addition, there was concern that in cases that require the expertise of an expert from interstate or overseas, or in cases where the subject matter is unusual and therefore may require very specific expertise, it would be unlikely that such experts would be accredited. Consequently, important and relevant information may be withheld from the court because the person who can provide it is not accredited.<sup>26</sup>

9.52 Several submissions recognised that accreditation is only effective in ensuring that an expert has appropriate qualifications. It would not guarantee that the expert

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25. Expert Experts, *Submission* at para 12.12; United Medical Protection, *Submission* at 5; *Confidential Submission 4* at 3; Nigel McDonald, *Submission* at 10; Mike Talbot-Wilson, *Submission* at 5; Institute of Chartered Accountants, *Submission* at para 61; New South Wales Bar Association, *Submission* at para 14; A R Abadee, *Submission* at 10.

26. David Watt, *Submission* at para C4; Professions Australia, *Submission* at 5; Freehills, *Submission* at para 9.1; New South Wales Bar Association, *Submission* at para 15.

was acting in an objective or impartial manner, and would therefore have no impact upon the issue of bias and partisanship.<sup>27</sup>

9.53 There was some suggestion that, if an accreditation process were adopted, the courts are not the appropriate body to accredit experts.<sup>28</sup> In this regard, Freehills submitted

*The court is unlikely to have the technical knowledge necessary to enable it to assess the expertise of a particular applicant for accreditation, even in a field from which the court often receives testimony. It would serve little purpose for the court to accredit experts if it did so on some mechanistic, almost formal basis without in some way seeking to assess the applicants' suitability.*

*Accreditation by the courts might be thought to confer on those accredited some indicium of approval. This is at odds with the whole idea of the impartiality of judges and the judicial system.*<sup>29</sup>

9.54 The ICAA also pointed out that, from a practical perspective, it would not be possible to have one body that satisfactorily accredits all the different professions and their technical specialisations.<sup>30</sup>

9.55 Other submissions suggested that accreditation by professional bodies, independent of the court, may be more appropriate.<sup>31</sup> However, some of these submissions recognised that one potential limitation to this form of accreditation is that many professional accreditation schemes are widely focused to cover all professionals within a particular field. They therefore accredit all those who have attained relevant qualifications in a particular field. Although some have particular branches of professionals who work in forensic settings, few actually require knowledge of the requirements and duties of acting as an expert for registration, and

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27. Expert Experts, *Submission* at para 12.3; Maurice Blackburn Cashman Lawyers, *Submission* at para 20; Australian Lawyers Alliance, *Submission* at 9; Nigel McDonald, *Submission* at 10; Law Society of New South Wales, Litigation Law and Practice Committee, *Submission* at 2.

28. A R Abadee, *Submission* at 10; Institute of Chartered Accountants, *Submission* at para 66.

29. Freehills, *Submission* at para 10.1 and para 10.5.

30. Institute of Chartered Accountants, *Submission* at para 54.

31. David Hibbert, *Submission* at 2; Human Factors and Ergonomics Society, *Submission* at 4; Association of Consulting Engineers Australia, *Submission* at 3; Freehills, *Submission* at para 8; National Institute of Forensic Science, *Submission* at 3; New South Wales Police - Forensic Services Group, *Submission* at 2.



therefore provide little assistance in ensuring that expert witnesses are aware of and act in accordance with their duty to the court.<sup>32</sup>

9.56 Consequently, two submissions recommended that an alternative to a requirement for accreditation of expert witnesses may be that, before being able to provide testimony, each expert should be required to participate in expert witness training workshops such as those currently run by the Institute of Arbitrators and Mediators.<sup>33</sup>

9.57 Another submission<sup>34</sup> suggested that bias and partisanship may be reduced if there were a much stricter determination as to who is regarded as an expert in relation to each question to be determined by the court. This submission further suggested that bias and partisanship will be reduced if it were required of the expert to state all limitations that they have in answering each relevant question so that it can be given appropriate weighting. The first suggestion relates to the substantive law of evidence – which determines what expert evidence is admissible – and thus falls outside the terms of reference. The second suggestion certainly identifies what might well be a useful line of cross-examination, but the Commission is not persuaded that it could be translated into useful rules of court or other legislation.

9.58 Although some submissions supported court-administered lists of “impartial and satisfactory experts”,<sup>35</sup> others set out detailed reservations about this approach. For example, the ICAA made the following points:

- Accrediting experts for their forensic skills would not ensure that the accredited expert’s evidence was accepted in any particular case.
- Having a court-accredited expert would at least, to some degree, involve pre-judging the merits of the expert before his or her evidence was tested in cross-examination. Arguably the court would be placed in a position of conflict of interest where it accredited an expert whose evidence proved to be unsatisfactory.
- The credibility of a court-based accreditation scheme would diminish each time a court-accredited expert performed poorly or was subject to adverse judicial comment, or where the evidence of a non-accredited expert was preferred.

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32. Royal Australian Institute of Architects, *Submission* at 3; Association of Consulting Surveyors, *Submission* at 2; Royal Australian and New Zealand College of Obstetricians and Gynaecologists, *Submission* at 2; Engineers Australia, *Submission* at 2.

33. Institute of Arbitrators and Mediators, *Submission* at 3; Professions Australia, *Submission* at 5.

34. McMahons National Lawyers, *Submission* at 2.

35. Adrian Howie, *Submission* at 4.

- Many of the most highly qualified experts (eg, stockbrokers, investment bankers) would be unlikely to seek accreditation because they would not be motivated to earn fees from providing forensic services. Thus the scheme would fail to include the best experts, diminishing its usefulness and credibility.
- Because the scheme would be based on the court's knowledge, it would be likely to exclude younger experts who might be more up to date with recent developments, and the pool of accredited experts could "become progressively removed from current thinking". Further, experts espousing alternative or radical points of view might be excluded, although those views might become the accepted views with the passage of time.
- The courts are ill-equipped for the onerous and resource-intensive task of designing and administering an effective scheme, which would have to deal with initial requirements, requirements for maintaining accreditation, deciding disputed applications, handling complaints, and so on. It would be particular difficult to deal with accredited experts whose performance was poor (though falling short of misconduct).<sup>36</sup>

## Preference for accredited expert witnesses

9.59 The Commission has no doubt that properly run schemes of accreditation, especially those involving forensic accreditation, have considerable potential to assist the system of justice by educating potential expert witnesses in their responsibilities, and helping them understand and work effectively within the justice system. Such schemes are likely to enhance the skills and understanding of those who participate in them, both as to the discipline and as to the role of the expert witness. Schemes of accreditation that advance an understanding of the role of the expert witness might have the effect of excluding or discouraging individuals who are, as stated in one submission, "malleable in their views and who do fall within the rubric of 'guns for hire'".<sup>37</sup>

9.60 The question, however, is whether it is desirable for the law to limit expert witnesses to those who are accredited in some specified way, or to give some legal preference or priority to accredited experts. Such a legal preference might be implemented in various ways. The rules might, for example, provide that expert evidence may not be given by non-accredited experts without the court's permission, and could perhaps provide guidelines on the matter. A guideline might be, for example, that in order to lead evidence by a non-accredited expert, a party would need to demonstrate that no suitable accredited expert was reasonably available.

9.61 Although such a course might have superficial attraction, the Commission agrees with the view of many of the submissions that it would be undesirable. In brief, the lists may be both over-inclusive and under-inclusive: it cannot be assumed that all

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36. Institute of Chartered Accountants, *Submission* at para 58-64.

37. Expert Experts, *Submission* at para 11.7.

or even most accredited experts would be suitable as expert witnesses, or that all or most non-accredited experts would be unsuitable.

9.62 As to the first problem (over-inclusion), in practice, while accreditation may reliably indicate that at the time of becoming accredited, the person met prescribed educational and character reference requirements, and perhaps that, the person has continued to attend required continuing education programs, the list of accredited professionals may include people who are not entirely suitable as expert witnesses. One submission pointed to the difficulty that accreditation schemes have in excluding otherwise qualified people on the basis that their opinions could be bought or sold.<sup>38</sup>

9.63 As to the second problem (under-inclusion), in many areas, there are always likely to be highly qualified persons, including some who might be excellent expert witnesses in particular cases, who, for one reason or another, are not currently accredited in the relevant discipline or sub-discipline. Thus there is a danger that giving legal priority to accredited experts could, paradoxically, exclude some people who would be high quality expert witnesses.

9.64 Finally, the Commission notes that no Australian court has implemented rules of the kind under consideration.

## Lists of accredited experts or schemes of accreditation

9.65 If the previous argument is accepted, there would be no merit in courts keeping lists of accredited experts, because, since the rules would give no priority to such experts, the list would have no purpose. Even if it were thought that there was merit in giving legal preference to accredited experts, however, there are formidable objections to having courts maintain their own accreditation schemes, or their own lists of accredited experts.

9.66 First, the public costs of establishing and maintaining the system would be considerable, and, in the Commission's view, would be a significant burden for the courts involved, disproportionate to any advantage that might be obtained.

9.67 Secondly, such a practice could give rise to a reasonable suspicion of bias on the part of the court, in that a litigant might reasonably feel that the decisions that court-accreditation of certain individuals indicated a bias in favour of those individuals, or the bodies of opinion in the discipline represented by those individuals. Edmond and Mercer illustrate this problem:<sup>39</sup>

*What happens when the different parties want different types of expert?  
For example, in some of the mass toxic tort litigation in the US plaintiffs  
have preferred the causation evidence of toxicologists and chemists*

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38. Expert Experts, *Submission* at para 12.3.

39. G Edmond and D Mercer, "Litigation Life: Law-science knowledge construction in (Bendectin) mass toxic tort litigation" (2000) 30 *Social Studies of Science* 265.

*whereas defendants have favoured the evidence of epidemiologists. In such cases judicial preferences may be outcome dispositive.*

9.68 Avoidance of such a perception is one of the reasons that it is important to distinguish between joint expert witnesses who are almost invariably selected by the parties, and court-appointed experts.<sup>40</sup>

## Conclusion

9.69 For the above reasons, although the Commission believes that schemes of discipline accreditation and forensic accreditation established within various professions and disciplines have an important role in enhancing the quality of expert evidence, it does not recommend that the law be changed to give some priority to expert witnesses who are accredited, or that the courts should maintain their own accreditation schemes, or their own lists of accredited experts.

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40. See Chapter 7.

## SANCTIONS

### RECOMMENDATION 9.3

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There should be a provision, by rule or practice note, requiring that expert witnesses be informed of the sanctions relating to inappropriate or unethical conduct.

### Submissions

9.70 A range of opinions was expressed on sanctions. Some thought that existing provisions were sufficient.<sup>41</sup> Some suggested dangers in some forms of sanctions, notably the risk of discouraging good people from giving expert evidence.<sup>42</sup> Others stressed the harm done by poor expert witnesses, arguing (or implying) that some additional sanctions appear necessary.<sup>43</sup>

### Discussion

9.71 There is considerable anecdotal evidence to the effect that there is a problem of unprofessional behaviour by expert witnesses in New South Wales. It is, however, impossible to quantify the extent of the problem. There is no reliable evidence on its incidence; no doubt because collecting such evidence would be an enormous undertaking, with formidable difficulties in identifying such behaviour. Submissions to the Commission contain wildly different estimates, some suggesting that it is a pervasive problem, others that it is a relatively rare occurrence. The differences are likely to reflect different experiences and perceptions of those making submissions, and, perhaps, variations from one area of expertise to another.

9.72 It is no doubt possible in clear or extreme cases to identify inappropriate or unethical conduct: where, for example, it can be shown that a report has been altered for no reason other than the urgings of a client or a solicitor, or where the evidence is manifestly incompetent or biased, by reason, for example, of clearly inappropriate methodology or concealment of relevant facts. However, a major difficulty in tackling the problem by way of sanctions is that, in practice, it is often difficult to establish that an expert witness is doing other than expressing his or her genuine opinion. It cannot be inferred from the mere fact that an expert witness's evidence strongly favours one side that the witness has been unprofessional or dishonest. A witness might be chosen because a party knows that the witness's genuinely held views support the

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41. Joy Consulting Group, *Submission* at 2; Australian Lawyers Alliance, *Submission* at 13; New South Wales Bar Association, *Submission* at 5.
  42. Carroll and O'Dea Lawyers, *Submission* at 2 (sanctions for experts should be very narrow so as not to be used as a tool to intimidate the witness. The witness must be free to give his or her opinion without fear of sanction).
  43. Ross Vining, *Submission* at 1; College of Clinical Psychologists, *Submission* at 2 (unethical conduct is common and is influenced by the ongoing financial incentives offered by those who pay for expert witnesses).

party's case ("selection bias"); and a witness, while attempting to give unbiased evidence, may not realise that his or her evidence has been influenced by loyalty to the party calling him or her: but such things, however regrettable, do not ordinarily amount to the sort of misconduct that can properly be punished.

9.73 It is obvious that dishonest or unprofessional behaviour by expert witnesses is likely to reduce the likelihood of the court reaching a just decision, and may have other adverse consequences, such as lengthening proceedings and adding to costs. The real issue is to find ways of reducing or eliminating such behaviour.

9.74 A number of other measures, such as codes of conduct and the use of joint expert witnesses, have considerable potential to reduce adversarial bias and unprofessional behaviour. The issues are discussed elsewhere.<sup>44</sup> The present question is the place of sanctions in addressing the problem.

9.75 At present, giving unprofessional evidence may have a series of possible adverse consequences for the expert, which could be seen as "sanctions":

- The expert witness might be criticised by the court, and may lose credibility, and thus a reduced prospect of further work as an expert witness.
- Disciplinary proceedings might be taken against the expert witness within the relevant profession.
- The court might make a costs order against the expert witness.
- The expert witness might be charged with contempt or perjury.

9.76 The Commission considers that the existing "sanctions" are appropriate and sufficient, and that attempting to adopt a more punitive approach would be unlikely to be effective, and may have the unintended consequence of discouraging suitable experts from giving expert evidence. However, there should be a requirement, by rule or practice note, that expert witnesses be notified of the sanctions available in the case of inappropriate or unethical conduct.

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44. See for example para 9.6-9.19 and Chapter 7 generally.

# 10. Future Review of the Rules Relating to Expert Witnesses

- RECOMMENDATION 10.1

## RECOMMENDATION 10.1

A review of the rules relating to expert witnesses should be planned and undertaken to coincide with the review of the *Civil Procedure Act 2005* (NSW) in five years time.

10.1 Section 7 of the *Civil Procedure Act 2005* (NSW) provides that, within five years from the date of assent of the Act, the Minister is to review the Act to determine whether the policy objectives of the Act remain valid, and whether the terms of the Act remain appropriate for securing those objectives.

10.2 The policy objectives of the Act have been referred to in this report.<sup>1</sup> They are specified in s 56 of the Act. In that section, it is stated that the overriding purpose of the Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

10.3 While s 7 of the Act does not appear to contemplate a mandatory review of the *Uniform Civil Procedure Rules 2005* (NSW) (“UCPR”) as it does in the case of the Act, there is the same reason for reviewing the rules relating to expert witnesses as there is for reviewing the Act, namely, to determine whether the UCPR, insofar as they relate to expert witnesses, are effective to serve the statutory objective of facilitating the just, quick and cheap resolution of the real issues in civil proceedings.

10.4 The appropriate agency to institute such a review would, we suggest, be the Rules Committee constituted under the Act. The Committee might, of course, engage some other agency to plan the review and to carry it out on its behalf.<sup>2</sup>

10.5 We expect that the methodology for such a review would need to be designed by appropriate experts, and well in advance. By way of illustration, we expect that statistics and case by case evaluations of various procedures (such as the use of joint expert witnesses) would need to be generated more or less from the start, if not in all cases, then in a proportion of them. That would be likely to involve the use of questionnaires to be completed by the court, by the legal representatives of the parties, and by expert witnesses, which would need to be designed with an eye to the overall methodology of the process of review.

10.6 Obviously enough, as in the case of the review of the Act itself, any review of the rules relating to expert witnesses would have to be appropriately resourced.

10.7 It is to be expected that the need for ad hoc amendment to the rules will become apparent to the Rules Committee from time to time and that amendments will be made. However, we believe that an over-all review of the rules relating to expert witnesses also needs to be programmed and undertaken in order to ensure that, in

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1. See para 5.20-5.28 and Appendix A.
  2. One institution that is currently doing work on expert witnesses is the University of Sydney Faculty of Law. Professors Barbara MacDonald and Patrick Parkinson are conducting a study on court-directed expert witness conferences in medical negligence cases in New South Wales.



the broad view and in particular respects comprehensively, the rules are serving the purpose of facilitating the just, quick and cheap resolution of the real issues in civil proceedings. Otherwise, any evaluation of the effectiveness of the rules would have to depend on anecdotal information and vague impressions.

# Appendices

- Appendix A: Civil Procedure Act 2005 – extracts
- Appendix B: Uniform Civil Procedure Rules 2005 (NSW) – extracts
- Appendix C: Draft Amendment Rules
- Appendix D: UCPR provisions on court-appointed experts with proposed amendments
- Appendix E: Joint expert witnesses and court-appointed expert witnesses
- Appendix F: Expert witness code of conduct
- Appendix G: Preliminary submissions
- Appendix H: Submissions
- Appendix I: Consultations

## Appendix A: Civil Procedure Act 2005 – extracts

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### **Part 6 Case management and interlocutory matters**

#### **Division 1 Guiding principles**

##### **56 Overriding purpose** (cf SCR Part 1, rule 3)

- (1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
- (2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.
- (3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.
- (4) A solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of the duty identified in subsection (3).
- (5) The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs.

##### **57 Objects of case management**

- (1) For the purpose of furthering the overriding purpose referred to in section 56 (1), proceedings in any court are to be managed having regard to the following objects:
  - (a) the just determination of the proceedings,
  - (b) the efficient disposal of the business of the court,
  - (c) the efficient use of available judicial and administrative resources,
  - (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.
- (2) This Act and any rules of court are to be so construed and applied, and the practice and procedure of the courts are to be so regulated, as best to ensure the attainment of the objects referred to in subsection (1).

##### **58 Court to follow dictates of justice**

- (1) In deciding:
  - (a) whether to make any order or direction for the management of proceedings, including:
    - (i) any order for the amendment of a document, and
    - (ii) any order granting an adjournment or stay of proceedings, and
    - (iii) any other order of a procedural nature, and
    - (iv) any direction under Division 2, and

- (b) the terms in which any such order or direction is to be made, the court must seek to act in accordance with the dictates of justice.
- (2) For the purpose of determining what are the dictates of justice in a particular case, the court:
- (a) must have regard to the provisions of sections 56 and 57, and
  - (b) may have regard to the following matters to the extent to which it considers them relevant:
    - (i) the degree of difficulty or complexity to which the issues in the proceedings give rise,
    - (ii) the degree of expedition with which the respective parties have approached the proceedings, including the degree to which they have been timely in their interlocutory activities,
    - (iii) the degree to which any lack of expedition in approaching the proceedings has arisen from circumstances beyond the control of the respective parties,
    - (iv) the degree to which the respective parties have fulfilled their duties under section 56 (3),
    - (v) the use that any party has made, or could have made, of any opportunity that has been available to the party in the course of the proceedings, whether under rules of court, the practice of the court or any direction of a procedural nature given in the proceedings,
    - (vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction,
    - (vii) such other matters as the court considers relevant in the circumstances of the case.

### **59 Elimination of delay** (cf Western Australia Supreme Court Rules, Order 1, rule 4A)

In any proceedings, the practice and procedure of the court should be implemented with the object of eliminating any lapse of time between the commencement of the proceedings and their final determination beyond that reasonably required for the interlocutory activities necessary for the fair and just determination of the issues in dispute between the parties and the preparation of the case for trial.

### **60 Proportionality of costs**

In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.

## APPENDIX B: Uniform Civil Procedure Rules 2005 (NSW)

(Rules concerning experts called by parties and experts appointed by the court)

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### Part 31 Evidence

#### Division 2 Experts called by parties

**31.17 Definitions** (cf SCR Part 36, rules 13A and 13C; DCR Part 28, rule 8; LCR Part 23, rule 1D)

In this Division:

*code of conduct* means the expert witness code of conduct in Schedule 7.

*expert*, in relation to any question, means a person who has such knowledge or experience of, or in connection with, that question, or questions of the character of that question, that his or her opinion on that question would be admissible in evidence.

*expert witness* means an expert engaged for the purpose of:

- (a) providing a report as to his or her opinion for use as evidence in proceedings or proposed proceedings, or
- (b) giving opinion evidence in proceedings or proposed proceedings.

*expert's report* means a written statement by an expert (whether or not an expert witness in the proceedings concerned) that sets out the expert's opinion, and the facts on which the opinion is formed, and contains the substance of the expert's evidence that the party serving the statement intends to adduce in chief at the trial.

*hospital report* means a written statement concerning a patient, made by or on behalf of a hospital, that the party serving the statement intends to adduce in evidence in chief at the trial.

**31.18 Disclosure of experts' reports and hospital reports** (cf SCR Part 36, rule 13A; DCR Part 28, rule 8; LCR Part 23, rule 3)

- (1) Each party must serve experts' reports and hospital reports on each other active party:
  - (a) in accordance with any order of the court, or
  - (b) if no such order is in force, in accordance with any relevant practice note, or
  - (c) if no such order or practice note is in force, not later than 28 days before the date of the hearing at which the report is to be used.

- (2) An application to the court for an order under subrule (1) (other than an order solely for abridgment or extension of time) may be made without serving notice of motion.
- (3) Except by leave of the court, or by consent of the parties:
  - (a) an expert's report or hospital report is not admissible unless it has been served in accordance with this rule, and
  - (b) without limiting paragraph (a), an expert's report or hospital report, when tendered under section 63, 64 or 69 of the *Evidence Act 1995*, is not admissible unless it has been served in accordance with this rule, and
  - (c) the oral expert evidence in chief of any expert is not admissible unless an expert's report or hospital report served in accordance with this rule contains the substance of the matters sought to be adduced in evidence.
- (4) Leave is not to be given as referred to in subrule (3) unless the court is satisfied:
  - (a) that there are exceptional circumstances that warrant the granting of leave, or
  - (b) that the report concerned merely updates an earlier version of a report that has been served in accordance with subrule (1).

**31.19 Expert's report admissible in trial without a jury** (cf SCR Part 36, rule 13B; DCR Part 28, rule 9; LCR Part 23, rule 2)

- (1) If an expert's report is served in accordance with rule 31.18 or an order made under that rule, 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 formed would be admissible, as evidence of that fact, without further evidence, oral or otherwise.
- (2) Unless the court orders otherwise:
  - (a) it is the responsibility of the party requiring the attendance for cross-examination of the expert by whom an expert's report has been prepared to procure that attendance, and
  - (b) the party requiring the expert's attendance must notify the expert at least 28 days before the date on which attendance is required.
- (3) Except for the purpose of determining any liability for conduct money or witness expenses, an expert does not become the witness for the party requiring his or her attendance merely because his or her attendance at court has been procured by that party.
- (4) A party who requires the attendance of a person as referred to in subrule (2):
  - (a) must inform all other parties to the proceedings that the party has done so at least 28 days before the date fixed for hearing, and
  - (b) pay to the person whose attendance is required (whether before or after the attendance) an amount sufficient to meet the person's reasonable

expenses (including any standby fees) in complying with the requirement.

- (5) If the attendance of an expert 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) Unless the court orders otherwise, a party may not in any hearing object to:
  - (a) the qualifications of the expert by whom an expert's report has been prepared, or
  - (b) the facts on which the expert's opinion, as set out in the report, is based, unless a notice, detailing the grounds of the objection, has been served on the party by whom the expert's report was served at least 14 days before the date fixed for the hearing.
- (7) The party using an expert's report may re-examine an expert who attends for cross-examination under a requirement under subrule (2).
- (8) This rule does not apply to proceedings on a trial with a jury.

### **31.20 Fees for medical expert for compliance with subpoena** (cf SCR Part 36, rule 13BA)

- (1) If a subpoena is served on a medical expert who is to give evidence of medical matters but is not called as a witness, the expert is, unless the court orders otherwise, entitled to be paid, in addition to any other amount payable to the expert, the amount specified in item 2 of Schedule 3.
- (2) The amount payable under subrule (1) must be paid to the expert by the issuing party within 28 days after the date for the expert's attendance.
- (3) A party that requires an expert's attendance under rule 31.19 (2), but subsequently revokes it, must pay to the issuing party any amount paid by the issuing party under subrule (2), but otherwise such an amount is not recoverable by the issuing party from any other party unless the court so orders.
- (4) In this rule, *issuing party* means the party at whose request a subpoena is issued.

### **31.21 Service of subpoena on medical expert** (cf SCR Part 36, rule 13BB)

- (1) Service of a subpoena on a medical expert may be effected, at any place at which the expert's practice is carried on, by handing it over to a person who is apparently engaged in the practice (whether as an employee or otherwise) and is apparently of or above the age of 16 years.
- (2) If a person refuses to accept a subpoena when it is handed over, the subpoena may be served by putting it down in the person's presence after he or she has been told of its nature.
- (3) If a subpoena requires a medical expert to attend court on a specified date for the purpose of giving evidence on medical matters, it must be served on the

expert not later than 21 days before the date so specified unless the court orders otherwise.

- (4) The parties may not by consent abridge the time fixed by or under subrule (3).

### **31.22 Subpoena requiring production of medical records (cf SCR Part 36, rule 13BC)**

- (1) A subpoena for production may require a medical expert to produce medical records or copies of them.
- (2) A person is not required to comply with a subpoena for production referred to in subrule (1) unless the amount specified in item 3 of Schedule 3 is paid or tendered to the person at the time of service of the subpoena or a reasonable time before the date on which production is required.
- (3) Rule 33.6 (Compliance with subpoena) does not apply to a subpoena to which subrule (1) applies.
- (4) Rule 33.7 (Production otherwise than on attendance) applies to the photocopies in the same way as it applies to the records.
- (5) If, after service of a subpoena for production referred to in subrule (1), the party who requested the issue of the subpoena requires production of the original medical records without the option of producing copies of them, the party must request the issue of, and serve, another subpoena requiring production of the original medical records.

### **31.23 Expert witnesses to agree to be bound by code (cf SCR Part 36, rule 13C; DCR Part 28, rule 9C; LCR Part 23, rule 1D)**

- (1) As soon as practicable after engaging an expert as a witness, whether to give oral evidence or to provide an expert's report, the party engaging the expert must provide the expert with a copy of the code of conduct.
- (2) Oral evidence may not be received from an expert witness unless:
- (a) he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the code of conduct and agrees to be bound by it, and
  - (b) a copy of the acknowledgment has been served on all parties affected by the evidence.
- (3) If an expert's report does not contain an acknowledgment by the expert witness who prepared it that he or she has read the code of conduct and agrees to be bound by it:
- (a) service of the report by the party who engaged the expert witness is not valid service, and
  - (b) the report is not admissible in evidence.
- (4) This rule applies unless the court orders otherwise.



### **31.24 Supplementary reports by expert witness** (cf SCR Part 36, rule 13C; DCR Part 28, rule 9C; LCR Part 23, rule 1D)

- (1) If an expert witness provides a supplementary report to the party by whom he or she has been engaged, neither the engaging party nor any other party having the same interest as the engaging party may use the earlier report on the question to which the earlier report relates unless the engaging party has served the supplementary report on all parties on whom the engaging party served the earlier report.
- (2) For the purposes of this rule, *supplementary report*, in relation to an earlier report provided by an expert witness, includes any report by the expert witness that indicates that he or she has changed his or her opinion on a material matter expressed in the earlier report.

### **31.25 Conference between expert witnesses** (cf SCR Part 36, rule 13CA; DCR Part 28, rule 9D; LCR Part 23, rule 1E)

- (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 outstanding matters, and
  - (c) to provide the court with a joint report, specifying matters agreed and matters not agreed and reasons for any failure to reach agreement.
- (2) An expert so directed may apply to the court for further directions.
- (3) 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 or their legal representatives, at the option of the parties.
- (4) The content of the conference between the expert witnesses must not be referred to at the hearing unless the parties affected agree.
- (5) If the parties have agreed to be bound on any specified matter dealt with by the joint report, the report may be tendered at the trial as evidence of the matters agreed.
- (6) If the parties have not agreed to be bound on any matter dealt with by the joint report, the report may be used or tendered at the trial only in accordance with the rules of evidence and the practices of the court.
- (7) If expert witnesses have conferred and provided a joint report agreeing on any matter, a party affected may not, except by leave of the court, adduce expert evidence inconsistent with the matter agreed.

### **31.26 Opinion evidence by expert witnesses** (cf Federal Court Rules, Order 34A, rule 3)

In any proceedings in which two or more parties call expert witnesses to give opinion evidence about the same question or similar questions, or indicate to the

court an intention to call expert witnesses for that purpose, the court may give any one or more of the following directions:

- (a) a direction that:
  - (i) the expert witnesses give evidence at trial after all factual evidence relevant to the question or questions concerned, or such evidence as may be specified by the court, has been adduced, or
  - (ii) each party intending to call one or more expert witnesses close that party's case in relation to the question or questions 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 question, 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 question or questions 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 question 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.

### **31.27 Service of experts' reports in professional negligence claims** (cf SCR Part 14C, rules 1 and 6; DCR Part 28, rule 9B)

- (1) Unless the court orders otherwise, a person commencing a professional negligence claim (other than a claim against a legal practitioner) must file and serve, with the statement of claim commencing the professional negligence claim, an expert's report that includes an opinion supporting:
- (a) the breach of duty of care, or contractual obligation, alleged against each person sued for professional negligence, and
  - (b) the general nature and extent of damage alleged (including death, injury or other loss or harm and prognosis, as the case may require), and
  - (c) the causal relationship alleged between such breach of duty or obligation and the damage alleged.
- (2) In the case of a professional negligence claim against a legal practitioner, the court may order the plaintiff to file and serve an expert's report or experts' reports supporting the claim.
- (3) If a party fails to comply with subrule (1) or (2), the court may by order made on the application of a party or of its own motion dismiss the whole or any part of the proceedings, as may be appropriate.
- (4) In this rule:

*professional negligence* means the breach of a duty of care or of a contractual obligation in the performance of professional work or in the provision of professional services by a medical practitioner, an allied health professional (such as dentist, chemist, physiotherapist), a hospital, a solicitor or a barrister.

*professional negligence claim* means a claim in the court for damages, indemnity or contribution based on an assertion of professional negligence.

## **Division 3 Experts appointed by the court**

### **31.28 Definitions**

In this Division:

*code of conduct* means the expert witness code of conduct in Schedule 7.

*expert*, in relation to any question, means a person who has such knowledge or experience of, or in connection with, that question, or questions of the character of that question, that his or her opinion on that question would be admissible in evidence.

*party affected* means a party who may be affected by the court's decision with respect to a question that the court has referred to an expert for inquiry and report.

**31.29 Selection and appointment** (cf SCR Part 39, rule 1; DCR Part 28A, rule 1; LCR Part 38B, rule 1)

- (1) If a question 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 question, and
  - (b) authorise the expert to inquire into and report on any facts relevant to the inquiry and report on the question, 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.
- (2) The court may appoint as an 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.

**31.30 Code of conduct** (cf SCR Part 39, rule 2; DCR Part 28A, rule 2; LCR Part 38B, rule 2)

- (1) A copy of the code of conduct must be provided to the expert by the registrar or as the court may direct.
- (2) A report by an expert may not be admitted into evidence unless the report contains an acknowledgment by the expert that he or she has read the code of conduct and agrees to be bound by it.
- (3) Oral evidence may not be received from an expert unless the court is satisfied that he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the code of conduct and agrees to be bound by it.

**31.31 Expert's report to be sent to registrar** (cf SCR Part 39, rule 3; DCR Part 28A, rule 3; LCR Part 38B, rule 3)

- (1) The expert must send his or her report to the registrar.
- (2) The registrar must send a copy of the report to each party affected.
- (3) Subject to rule 31.30 and unless the court orders otherwise, the report is taken to have been admitted in evidence in the proceedings when it is received by the court.

**31.32 Cross-examination of expert** (cf SCR Part 39, rule 4; DCR Part 28A, rule 4; LCR Part 38B, rule 4)

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

**31.33 Prohibition of other expert evidence** (cf SCR Part 39, rule 6; DCR Part 28A, rule 6; LCR Part 38B, rule 6)

Except by leave of the court, a party to proceedings may not adduce evidence of any expert on any question arising in proceedings if an expert has been appointed under this Division in relation to that question.

**31.34 Remuneration of expert** (cf SCR Part 39, rule 5; DCR Part 28A, rule 5; LCR Part 38B, rule 5)

- (1) The remuneration of an expert is to be fixed by the court.
- (2) Subject to subrule (3), the parties specified by the court are jointly and severally liable to an expert to pay the amount fixed by the court for his or her remuneration.
- (3) The court may direct when and by whom an expert is to be paid.
- (4) Subrules (2) and (3) do not affect the powers of the court as to costs.

**31.35 Assistance to court by other persons** (cf SCR Part 39, rule 7; DCR Part 28A, rule 7; LCR Part 38B, rule 7)

- (1) In any proceedings, the court may obtain the assistance of any person specially qualified to advise on any matter arising in the proceedings and may act on the adviser's opinion.
- (2) Rule 31.34 applies to and in respect of a person referred to in subrule (1) in the same way as it applies to and in respect of an expert appointed under this Division.
- (3) This rule does not apply to proceedings in the Admiralty List of the Supreme Court or to proceedings that are tried before a jury.

## Appendix C: Draft Amendment Rules

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Clause 1      Uniform Civil Procedure Rules Amendment No\*) 2005

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### **Uniform Civil Procedure Rules (Amendment No\*) 2005**

under the

Civil Procedure Act 2005

**1 Name of Rules**

These Rules are the *Uniform Civil Procedure Rules (Amendment No\*) 2005*.

**2 Commencement**

These Rules commence on [*date to be inserted*].

**3 Amendment of Uniform Civil Procedure Rules 2005**

The *Uniform Civil Procedure Rules 2005* are amended as set out in Schedule 1.

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Uniform Civil Procedure Rules (Amendment No\*) 2005

Amendments

Schedule 1

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## Schedule 1 Amendments

(Rule 3)

**[1] Part 31, Division 2, heading**

Omit the heading. Insert instead:

**Division 2 Experts engaged by parties individually****[2] Rule 31.17A**

Insert before rule 31.18:

**31.17A Expert evidence not to be adduced without leave**

Despite any other provision of these rules, a party to proceedings may not tender an expert's report as evidence in the proceedings, or call an expert witness to give opinion evidence in the proceedings, except by leave of the court.

**[3] Rule 31.18 Disclosure of experts' reports and hospital reports**

Insert after rule 31.18 (4):

- (5) Without limiting subrule (3), the expert's report is not admissible unless:
  - (a) an affidavit as to the fees paid and payable to the expert, as at the date on which the report was received by the engaging party, was served on each party affected at the same time as the report was served on that party, and
  - (b) a further affidavit as to the fees paid and payable to the expert, as at the date occurring 7 days before the date of the hearing at which the report was tendered in evidence, was served on each party affected on or before the date of that hearing.
- (6) An affidavit referred to in subrule (5) must include the following particulars:
  - (a) the amounts that are, or have been, payable to the expert in relation to:
    - (i) the expert's preparation of the report, and
    - (ii) any examination, inspection, experiment or other thing done by the expert for the purpose of providing the expert's report, and
    - (iii) the expert's attendance at conferences with the engaging party in relation to the proceedings, and

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- (iv) the expert's attendance at court as a witness in the proceedings,  
or the manner in which, and the rates at which, those amounts are to be calculated,
- (b) the amounts that have been paid to the expert in relation to each of the matters referred to in paragraph (a),
- (c) the amounts referred to in paragraph (a) as to which the expert has agreed to defer payment until after the conclusion of the proceedings.

**[4] Rule 31.19 Expert's report admissible in trial without a jury**

Omit rule 31.19 (6).

**[5] Part 31, Division 3**

Insert after Division 2:

**Division 3 Experts engaged by parties jointly**

**31.27A Definitions**

In this Division:

*code of conduct* means the expert witness code of conduct in Schedule 7.

*expert*, in relation to any question, means a person who has such knowledge or experience of, or in connection with, that question, or questions of the character of that question, that his or her opinion on that question would be admissible in evidence.

*party affected* means a party who may be affected by the court's decision with respect to a question that has been referred to an expert for inquiry and report.

**31.27B Selection and engagement**

- (1) If a question 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) An expert engaged pursuant to such an order 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 an expert under this rule unless he or she consents to the appointment.
- (4) If any party affected has a person under consideration for selection as an expert, or knows that another party has a person



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Uniform Civil Procedure Rules (Amendment No\*) 2005

Amendments

Schedule 1

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under such consideration, the party affected must not, prior to the selection, communicate with the person for the purpose of eliciting the person's opinion as to the question or questions concerned.

- (5) A person may not be engaged as an expert in relation to any proceedings unless each of the parties affected has notified each of the other parties affected:
- (a) as to whether or not the notifying party has, in anticipation of the engagement, communicated with the person for the purpose of eliciting the person's opinion as to the question or questions concerned, and
  - (b) if so, the substance of those communications.

**31.27C Instructions to expert**

- (1) The parties affected must endeavour to agree on written instructions to be provided to the expert concerning the questions arising for the expert's opinion and concerning the assumptions of fact to be made by the expert.
- (2) If the parties affected cannot so agree, they may instead instruct the expert separately in writing and, in that event, must forthwith serve a copy of the instructions on each other party affected.

**31.27D Expert may apply to court for directions**

- (1) The expert may apply to the court for directions to assist the expert in the performance of the expert's functions in any respect.
- (2) Any such application must be made by sending a written request for directions to the court, specifying the matter in relation to which directions are sought.
- (3) Not less than 7 days before sending such a request to the court, the expert must send a copy of the proposed request to the parties by whom he or she was engaged.

**31.27E Code of conduct**

- (1) As soon as practicable after an expert is engaged, the parties affected, or one of them as they may agree, must provide the expert with a copy of the code of conduct.
- (2) A report by an expert may not be admitted in evidence unless the report contains an acknowledgment by the expert that he or she has read the code of conduct and agrees to be bound by it.
- (3) Oral evidence may not be received from an expert unless the court is satisfied that the expert has acknowledged in writing,

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whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the code of conduct and agrees to be bound by it.

**31.27F Expert's report to be sent to parties**

The expert must send a signed copy of his or her report to each of the parties affected.

**31.27G Parties may seek clarification of report**

- (1) Within 28 days after receiving the expert's report, and before the report is tendered in evidence, a party affected may, by notice in writing served on the expert, seek clarification of any aspect of the report.
- (2) Unless the court orders otherwise, a party affected may serve no more than one such notice.
- (3) Unless the court orders otherwise, the notice must be in the form of a series of questions, no more than 10 in number.
- (4) The party serving the notice must serve a copy of the notice on each of the other parties affected.
- (5) Within 28 days after receiving the notice, the expert must send a signed copy of his or her response to the notice to each of the parties affected.

**31.27H Tendering of reports, and of answers to questions, and examination of experts**

- (1) Subject to rule 31.27E (2) and unless the court orders otherwise, the expert's report may be tendered in evidence by any of the parties affected.
- (2) Unless the court orders otherwise, any or all of the expert's answers in response to a request for clarification under rule 31.27G may be tendered in evidence by any of the parties affected.
- (3) Unless the court orders otherwise, any party affected may examine the expert orally.
- (4) Such an examination is to be by way of examination in chief, cross-examination or re-examination, as the court may direct.
- (5) The expert must attend court for examination if so requested on reasonable notice by a party affected.

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Uniform Civil Procedure Rules (Amendment No\*) 2005

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Schedule 1

**31.27I Prohibition of other expert evidence**

Except by leave of the court, a party to proceedings may not adduce evidence of any expert on any question arising in proceedings if an expert has been engaged under this Division in relation to that question.

**31.27J Remuneration of expert**

- (1) The remuneration of an 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.
- (2) Subject to subrule (3), the parties affected are jointly and severally liable to an expert for his or her remuneration.
- (3) The court may direct when and by whom an expert is to be paid.
- (4) Subrules (2) and (3) do not affect the powers of the court as to costs.

**[6] Part 31, Division 3, heading**

Omit the heading. Insert instead:

**Division 4 Experts appointed by the court****[7] Rule 31.29**

Omit rule 31.29 (2). Insert instead:

- (2) The expert may be a person selected by the court or a person selected in a manner directed by the court.
- (3) A person may not be appointed as an expert under this rule unless he or she consents to the appointment.

**[8] Rule 31.32**

Omit the rule. Insert instead:

**31.32 Examination of expert** (cf SCR Part 39, rule 4; DCR Part 28A, rule 4; LCR Part 38B, rule 4)

- (1) Unless the court orders otherwise, any party affected may examine the expert orally.
- (2) Such an examination is to be by way of examination in chief, cross-examination or re-examination, as the court may direct.
- (3) The expert must attend court for examination if so requested on reasonable notice by the registrar or by a party affected.

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draft

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Uniform Civil Procedure Rules (Amendment No\*) 2005

Schedule 1      Amendments

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**[9] Rule 31.33**

Omit “Except by leave of the court,”.

Insert instead “The court may order that”.

**[10] Rule 31.34**

Omit “an expert to pay the amount fixed by the court” from rule 31.34 (2).

Insert instead “the expert”.

**[11] Schedule 7 Expert witness code of conduct**

Omit “(Rules 31.17 and 31.28)”.

Insert instead “(Rules 31.17, 31.27A and 31.28)”.

**[12] Schedule 7, clause 3 Particular duties to the court**

Omit clause 3 (1). Insert instead:

- (1) If a question or issue concerning which an expert has been asked to provide an opinion falls outside the expert’s field of expertise, the expert must so state:
  - (a) in the case of an expert engaged to provide a report, in his or her report, and
  - (b) in the case of an expert engaged to give opinion evidence, in his or her oral evidence.

**[13] Schedule 7, clause 3 (6)**

Insert after clause 3 (5):

- (6) If an expert witness is engaged by a number of parties pursuant to an order of the court, subclause (4) applies as if a reference to the engaging party were a reference to each of the engaging parties.

## Appendix D: UCPR provisions on court-appointed experts with proposed amendments

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### Part 31 Division 3 Experts appointed by the court

#### 31.28 Definitions

In this Division:

*code of conduct* means the expert witness code of conduct in Schedule 7.

*expert*, in relation to any question, means a person who has such knowledge or experience of, or in connection with, that question, or questions of the character of that question, that his or her opinion on that question would be admissible in evidence.

*party affected* means a party who may be affected by the court's decision with respect to a question that the court has referred to an expert for inquiry and report.

#### 31.29 Selection and appointment (cf SCR Part 39, rule 1; DCR Part 28A, rule 1; LCR Part 38B, rule 1)

- (1) If a question 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 question, and
  - (b) authorise the expert to inquire into and report on any facts relevant to the inquiry and report on the question, 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.

~~(2) The court may appoint as an 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.~~

(2) The expert may be a person selected by the court or a person selected in a manner directed by the court.

(3) A person may not be appointed as an expert under this rule unless he or she consents to the appointment.

**31.30 Code of conduct** (cf SCR Part 39, rule 2; DCR Part 28A, rule 2; LCR Part 38B, rule 2)

- (1) A copy of the code of conduct must be provided to the expert by the registrar or as the court may direct.
- (2) A report by an expert may not be admitted into evidence unless the report contains an acknowledgment by the expert that he or she has read the code of conduct and agrees to be bound by it.
- (3) Oral evidence may not be received from an expert unless the court is satisfied that he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the code of conduct and agrees to be bound by it.

**31.31 Expert's report to be sent to registrar** (cf SCR Part 39, rule 3; DCR Part 28A, rule 3; LCR Part 38B, rule 3)

- (1) The expert must send his or her report to the registrar.
- (2) The registrar must send a copy of the report to each party affected.
- (3) Subject to rule 31.30 and unless the court orders otherwise, the report is taken to have been admitted in evidence in the proceedings when it is received by the court.

**~~31.32 Cross-examination of expert~~** (cf SCR Part 39, rule 4; DCR Part 28A, rule 4; LCR Part 38B, rule 4)

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

**31.32 Examination of expert** (cf SCR Part 39, rule 4; DCR Part 28A, rule 4; LCR Part 38B, rule 4)

- (1) Unless the court orders otherwise, any party affected may examine the expert orally.
- (2) Such an examination is to be by way of examination in chief, cross-examination or re-examination, as the court may direct.
- (3) The expert must attend court for examination if so requested on reasonable notice by a party affected.

**31.33 Prohibition of other expert evidence** (cf SCR Part 39, rule 6; DCR Part 28A, rule 6; LCR Part 38B, rule 6)

~~Except by leave of the court, The court may order that~~ a party to proceedings may not adduce evidence of any expert on any question arising in proceedings if an expert has been appointed under this Division in relation to that question.

**31.34 Remuneration of expert** (cf SCR Part 39, rule 5; DCR Part 28A, rule 5; LCR Part 38B, rule 5)

- (1) The remuneration of an expert is to be fixed by the court.
- (2) Subject to subrule (3), the parties specified by the court are jointly and severally liable to ~~an expert to pay the amount fixed by the court~~ the expert for his or her remuneration.
- (3) The court may direct when and by whom an expert is to be paid.
- (4) Subrules (2) and (3) do not affect the powers of the court as to costs.

**31.35 Assistance to court by other persons** (cf SCR Part 39, rule 7; DCR Part 28A, rule 7; LCR Part 38B, rule 7)

- (1) In any proceedings, the court may obtain the assistance of any person specially qualified to advise on any matter arising in the proceedings and may act on the adviser's opinion.
- (2) Rule 31.34 applies to and in respect of a person referred to in subrule (1) in the same way as it applies to and in respect of an expert appointed under this Division.
- (3) This rule does not apply to proceedings in the Admiralty List of the Supreme Court or to proceedings that are tried before a jury.

## Appendix E: Joint Expert Witnesses and Court-Appointed Expert Witnesses - A Comparative Table

	COURT-APPOINTED EXPERTS: EXISTING RULES	COURT-APPOINTED EXPERTS: PROPOSED AMENDMENTS	JOINT EXPERT WITNESSES: PROPOSED ADDITIONAL RULES
<b>Objectives</b>	To provide the court with such expert evidence as the court believes it needs and which would otherwise not be provided.		<p>To improve the quality of the expert evidence which would otherwise be adduced by the parties affected, by removing adversarial bias.</p> <p>To reduce the costs that would otherwise be incurred by the parties adducing evidence from more than one and sometimes multiple expert witnesses.</p> <p>To reduce the time for disposal of the proceedings.</p>
<b>Whose witness?</b>	The expert is appointed by the court and is the court's witness. <i>Existing rule 31.29(1).</i>		The joint expert witness is engaged jointly by the parties affected. <i>Draft rules 31.27B(1).</i>
<b>Time of appointment</b>	The appointment may be made at any stage of the proceedings. <i>Existing rule 31.29(1).</i> [In practice, any appointment is		The order may be made at any stage of the proceedings. <i>Draft rule 31.27B(1).</i> [In practice, any order would be made as early as possible, before the parties had incurred the cost of preparing to adduce their own expert



	COURT-APPOINTED EXPERTS: EXISTING RULES	COURT-APPOINTED EXPERTS: PROPOSED AMENDMENTS	JOINT EXPERT WITNESSES: PROPOSED ADDITIONAL RULES
	likely to be made well into the proceedings, even during the hearing.]		evidence.]
<b>Who selects the expert?</b>	The court may appoint an expert selected by the parties affected or selected by or in a manner directed by the court. <i>Existing rule 31.29(2).</i>	In lieu thereof: The court may appoint an expert selected by the court or in a manner directed by the court. [This conforms with the court having control over the process.]	The witness is selected by the parties affected or, failing agreement, by or in a manner directed by the court. <i>Draft rule 31.27B(2).</i> [This conforms with the parties affected having control over the process, once an order for a joint expert witness is made.]
<b>Consent of the nominee</b>	No provision.	Adding a provision for consent by the nominee. <i>Subrule 31.29(3) added.</i>	Provision for consent by the nominee. <i>Draft rule 31.27B(3).</i>
<b>Party seeking out the expert's opinion before the report</b>	No such provision in the rules. [Such a provision is not required. The primary method of selection is by the court itself. If the court calls on the parties to assist in the selection, it can give whatever directions it deems necessary in that regard.]		The parties are prohibited from eliciting a prospective joint expert witness's opinion, and are to notify each other of any infringement. <i>Draft rules 31.27B(4) and (5).</i>

	COURT-APPOINTED EXPERTS: EXISTING RULES	COURT-APPOINTED EXPERTS: PROPOSED AMENDMENTS	JOINT EXPERT WITNESSES: PROPOSED ADDITIONAL RULES
<b>Who instructs the expert?</b>	The court instructs the expert as to facts to be assumed and as to the questions arising for expert opinion. <i>Existing rule 31.29(1)(d).</i>		The parties affected jointly instruct the witness as to the facts to be assumed and as to the questions for expert opinion; or separately, if they cannot agree on the instructions. <i>Draft rule 31.27C.</i>
<b>Expert may apply for directions</b>	No provision in the rules. [The court will manage the process as it thinks fit.]		Application may be made for directions by the joint expert witness after notice of intention to do so is given to the parties. <i>Draft rule 31.27D.</i>
<b>Code of conduct</b>	The expert is to be provided with the code of conduct by the registrar or as the court may direct. <i>Existing rule 31.30(1).</i> [Conformably with the court's control over the process.]  The admissibility of the expert's report and oral evidence is dependent on the expert's agreement to be bound by the code. <i>Existing rules 31.30(2) and (3).</i> [As in the case of experts called by the parties individually.]		The witness is to be provided with the code of conduct by the parties affected. <i>Draft rule 31.27E(1).</i> [Conformably with the parties' control over the process, once an order for a joint expert witness is made.]  The admissibility of the witness's report and oral evidence is dependent on the expert's agreement to be bound by the code. <i>Draft rule 31.27E(2) and (3).</i> [As in the case of experts called by the parties individually and experts appointed by the court.]

	COURT-APPOINTED EXPERTS: EXISTING RULES	COURT-APPOINTED EXPERTS: PROPOSED AMENDMENTS	JOINT EXPERT WITNESSES: PROPOSED ADDITIONAL RULES
<b>To whom is the report sent?</b>	To the registrar of the court, who sends copies to the parties affected. <i>Existing rules 31.31(1) and (2).</i> [Conformably with the court's control over the process.]		Directly to the parties affected. <i>Draft rule 31.27F.</i> [Conformably with the parties' control over the process, once an order for a joint expert witness is made.]
<b>Written questions addressed to the expert by the parties</b>	No provision. [Such a provision would not be appropriate; the expert is the court's witness.]		A party may, after the witness's report has been provided, put questions in writing to the witness seeking clarification. <i>Draft rule 31.27G.</i>

	COURT-APPOINTED EXPERTS: EXISTING RULES	COURT-APPOINTED EXPERTS: PROPOSED AMENDMENTS	JOINT EXPERT WITNESSES: PROPOSED ADDITIONAL RULES
<b>What happens to the report and the response to questions?</b>	Unless the court orders otherwise, the report is taken to be in evidence. <i>Existing rule 31.31(3)</i> . [Because the court wants the evidence.]		The witness's report may be tendered by any of the parties affected. <i>Draft rule 31.27H(1)</i> . [The report might be tendered by one of them, or by more than one of them, or it might not be tendered at all.]  Similarly as to questions. <i>Draft rule 31.27H(2)</i> .
<b>Oral examination</b>	Any party affected may cross-examine the expert, and the expert must attend court for examination or cross-examination if so requested by the registrar or by a party affected. <i>Existing rule 31.32</i> .	Unless the court orders otherwise, any party affected may examine the expert orally by way of examination in chief, cross-examination or re-examination as the court may direct. [The proposed amendment provides for the mode of examination allowed.]	Any party affected may cross-examine the witness orally by way of examination in chief, cross-examination or re-examination as the court may direct in such manner as the court may direct. <i>Draft rules 31.27H(3) and (4)</i> . [As proposed for experts appointed by the court.]  The expert must attend court for examination or cross-examination if so requested by a party affected. <i>Draft rule 31.27H(5)</i> . [Omitting any requirement for attendance by the court, the expert being the parties' witness.]
<b>Prohibition of other expert evidence</b>	A prohibition against calling other expert evidence on the question submitted to the expert, except by leave of the court.	In lieu thereof: A provision that the court may order that a party may not adduce other expert evidence on the question	A prohibition against calling other expert evidence on a question submitted to a joint expert witness except by leave of the court. <i>Draft rule 31.27I</i> . [An automatic prohibition, subject to leave, is integral to the concept.]

	COURT-APPOINTED EXPERTS: EXISTING RULES	COURT-APPOINTED EXPERTS: PROPOSED AMENDMENTS	JOINT EXPERT WITNESSES: PROPOSED ADDITIONAL RULES
	<i>Existing rule 31.33.</i>	submitted to the expert. [There should be no automatic prohibition.]	
<i>Remuneration</i>	<p>The remuneration of the expert is to be fixed by the court. <i>Existing rule 31.34(1)</i></p> <p>The parties specified by the court are jointly and severally liable to an expert to pay the amount fixed by the court for his or her remuneration. <i>Existing rule 31.34(2).</i></p>	A minor cosmetic amendment to rule 31.34(2)	<p>The remuneration of the expert is to be fixed by agreement between the parties affected and the witness or, failing agreement, by or as directed by the court. <i>Draft rule 31.27(1)</i>. [Fixing the witness's remuneration will figure in the process of selection of the witness by the parties.]</p> <p>Provisions for payment are substantially the same as for experts appointed by the court. <i>Draft rule 31.27(2).</i></p>

## APPENDIX F: Uniform Civil Procedure Rules 2005 Schedule 7 Expert witness code of conduct

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### 1 Application of code

This code of conduct applies to any expert engaged:

- (a) to provide a report as to his or her opinion 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's area of expertise.
- (2) An expert witness's paramount duty is to the court and not to the person retaining the expert.
- (3) An expert witness is not an advocate for a party.

### 3 The form of expert reports

- (1) A report by an expert witness must (in the body of the report or in an annexure) specify the following:
  - (a) the person's qualifications as an expert,
  - (b) the facts, matters and assumptions on which the opinions in the report are based (a letter of instructions may be annexed),
  - (c) reasons for each opinion expressed,
  - (d) if applicable, that a particular question or issue falls outside his or her field of expertise,
  - (e) any literature or other materials utilised in support of the opinions,
  - (f) any examinations, tests or other investigations on which he or she has relied, including details of the qualifications of the person who carried them out.
- (2) If an expert witness who prepares a report believes that it may be incomplete or inaccurate without some qualification, that 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) An expert witness who, after communicating an opinion to the party engaging him or her (or that party's legal representative), changes his or her opinion on a material matter 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) (b), (c), (d), (e) and (f) as is appropriate.
- (5) If an expert witness is appointed by the court, the preceding paragraph applies as if the court were the engaging party.

#### **4 Experts' conference**

- (1) An expert witness must abide by any direction of the court:
  - (a) to confer with any other expert witness, and
  - (b) to endeavour to reach agreement on material matters for expert opinion, and
  - (c) to provide the court with a joint report, specifying matters agreed and matters not agreed and the reasons for any failure to reach agreement.
- (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.

## APPENDIX G : Preliminary Submissions

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Confidential Submission (22 October 2004)

Law Society of New South Wales (25 October 2004)

McMahons National Lawyers (26 October 2004)

Stinson, Rodney, Principal Analyst, Occupational Analysis (15 October 2004)

## APPENDIX H: Submissions

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Abadee QC, A R (11 February 2005)

Adams, Neil, Ergonomics and Safety Management Consultant (1 February 2005)

Allnutt, Stephen, Klug, Peter & Westmore Bruce (11 February 2005)

*Association of Consulting Engineers Australia (14 February 2005)*

Association of Consulting Surveyors (11 February 2005)

Australian and New Zealand Association of Psychiatry Psychology and Law (22 February 2005)

Australian College of Clinical Psychologists (24 January 2005)

Australian College of Private Consulting Psychologists (3 March 2005)

Australian Institute of Quantity Surveyors *Submission 1* (18 January 2005)  
*Submission 2* (10 February 2005)

Australian Lawyers Alliance (11 February 2005)

Beran, Roy, Consultant Neurologist, President, Australian College of Legal Medicine, Vice-President, World Association for Medical Law (8 February 2005)

Boettcher, Brian, Consultant Psychiatrist in General and Forensic Psychology (12 December 2004)

Browne, Lindsey, Civil Engineer (25 February 2005)

Carroll & O'Dea Lawyers (10 November 2004)

Clarke, Christopher W, Consultant Physician, Thoracic Medicine (3 February 2005)

College of Investigative and Remedial Consulting Engineers of Australia

Confidential Submission (22 November 2004) *Confidential Submission 1*



Confidential Submission (7 December 2005) *Confidential Submission 2*  
Confidential Submission (8 and 14 February 2005) *Confidential Submission 3*  
Confidential Submission (9 February 2005) *Confidential Submission 4*  
Confidential Submission (28 February 2005) *Confidential Submission 5*  
Confidential Submission (11 February 2005) *Confidential Submission 6*  
Cooper, George (14 February 2005)  
Culvenor, John, Consulting Engineer (11 February 2005)  
Deloitte Forensic New South Wales (14 February 2005)  
Department of Forensic Medicine, Forensic Pathologists (2 December 2004)  
Dial an Angel (20 January 2005)  
Donohue, Patrick (14 February 2005)  
Dwyer, Joan, Senior Member, Administrative Appeals Tribunal (4 March 2005)  
Edmond, Gary, Senior Lecturer, Faculty of Law, University of New South Wales  
(10 February 2005)  
Enders, Michael (11 February 2005)  
Engineers Australia (17 February 2005)  
Expert Experts (19 February 2005)  
For Legally Abused Citizens (18 February 2005)  
Forensic Data (11 February 2005)  
Freckelton, Ian, Barrister (3 May 2005)  
Freehills (16 February 2005)  
Frost, Richard (19 January 2005)  
Goldberg, John, School of Architecture Design Science and Planning *Submission*  
*1* (17 November 2004) *Submission 2* (7 February 2005)  
Goldring, J (22 February 2005)  
Grattan-Smith, Padraic, Paediatric Neurologist, Sydney Children's Hospital (7  
February 2005)  
Hibbert, D B, School of Chemistry, University of New South Wales (9 February  
2005)  
Hilton, John, Consultant in Forensic Medicine (2 December 2004)  
Howie, Adrian, Minter Ellison Lawyers (15 November 2005)  
Human Factors & Ergonomics Society of Australia (9 February 2005)  
IMO (3 November 2004)  
Institute of Arbitrators & Mediators Australia (11 February 2005)

Institute of Chartered Accountants, Forensic Accounting Special Interest Group (11 February 2005)

Institute of Clinical Pathology & Medical Research *Submission 1* (16 November 2004) *Submission 2* (2 December 2004)

Jamieson Foley Traffic & Transport (18 November 2004)

Joy, Alan, Joy Consulting Group (19 November 2004)

Koutts, Jerry, Department of Medicine, Westmead Hospital and Community Health Services *Submission 1* (8 November 2004) *Submission 2* (10 February 2005)

Law Society of New South Wales, Litigation Law & Practice Committee (9 February 2005)

Legal Aid New South Wales (16 November 2004)

Lucire, Yolande, Forensic and Medico-legal Psychiatrist (11 February 2005)

Madden, W J, Partner, Slater & Gordon (3 November 2004)

*Magnusson, Eric, School of Physical Environmental and Mathematical Science, University of New South Wales (9 February 2005)*

Markham, Geoffrey, Consulting Engineer, Arbitrator and Mediator (11 February 2005)

Maurice Blackburn Cashman Lawyers, Medical Negligence Department (21 February 2005)

Medical Consumers Association (7 February 2005)

Meeve, Rodney, Estate Legal and Allied Affairs (23 February 2005)

National Institute of Forensic Science (22 February 2005)

New South Wales Bar Association (9 February 2005)

New South Wales Forensic Biology Laboratory (2 December 2004)

New South Wales Police, Forensic Services Group (22 February 2005)

Nicholas, Michael K (3 March 2005)

Ooi, Cary T, United Medico-legal Remedies *Submission 1* (18 November 2004) *Submission 2* (11 February 2005)

PricewaterhouseCoopers (11 February 2005)

Professions Australia (15 February 2005)

Public Interest Law Clearing House (11 February 2005)

Royal Australasian College of Surgeons *Submission 1* (8 November 2004) *Submission 2* (16 February 2005) *Submission 3* (22 February 2005)

Royal Australian and New Zealand College of Obstetricians and Gynaecologists *Submission 1* (14 February 2005) *Submission 2* (26 February 2005)

Royal Australian and New Zealand College of Psychiatrists, New South Wales  
Forensic Section (10 February 2005)

Royal Australian Institute of Architects (10 February 2005)

Royal North Shore Hospital, Department of Anaesthesia and Pain Management  
(3 March 2005)

Skinner, Yvonne, Consultant Psychiatrist (11 February 2005)

Stephens, Amanda, Medical Practitioner (23 May 2005)

Stinson, Rodney, Principal Analyst, Occupational Analysis (11 February 2005)

Talbot-Wilson, Michael, Questioned Document Unit, Australian Forensic Science  
Service (11 and 14 February 2005)

Tibbitts, Jo, & Myles, Warwick, Forensic Sound Laboratory (11 February 2005)

TRL Limited (11 February 2005)

United Medical Protection *Submission 1* (23 November 2005) *Submission 2* (11  
February 2005)

Vining, Ross (2 December 2004)

Watt, David, Chief Executive and Director, Evidex (26 January 2005)

Wilcox, David, Consultant Surgeon (17 March 2005)

Winch P M, Public Defender (16 December 2004)

## APPENDIX I: Consultations

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Judge D J McGill SC, Queensland District Court, 13 December 2004

The Hon Justice G N Williams, Queensland Court of Appeal, 14 December 2004

Mr Dan O'Connor, Chief Executive Officer, Queensland Bar Association, 14 December 2004

Associate Professor Bernard Cairns, 14 December 2004

Dr Gary Edmond, University of New South Wales, December 2004

Mr Tom Goudkamp, Managing Director, Stacks Goudkamp; National President, Australian Lawyers Alliance, 7 March 2005

Mr Andrew Ross and Mr Mark Bryant, Ernst and Young, Global Investigations and Dispute Advisory Division, 7 March 2005

Mr Michael Barnes, White Barnes Solicitors, 9 March 2005

Mr Stuart Grant and Mr Bruce Smith, Expert Experts, 14 March 2005

Mr John Walker, Managing Director, IMF (Australia) Ltd, 22 March 2005

Mr Tony Barakat, Partner, Keddies Litigation Lawyers, 29 March 2005

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<i>Australian Securities and Investments Commission v Rich</i> [2005] NSWCA 152 ....	3.10
<i>Barack Pty Ltd v WTH Pty Ltd</i> [2002] NSWSC 649 .....	3.12, 8.16
<i>BGP Properties Pty Limited v Lake Macquarie City Council</i> [2004] NSWLEC 399 .	6.50
<i>Buckley v Rice Thomas</i> (1554) 1 Plowd 118 at 125; 75 ER 182	2.18
<i>Cement Linings Ltd v Rocla Ltd</i> (1940) 40 SR (NSW) 491 .....	2.16
<i>Clarke v Marlborough Fine Art (London) Ltd (No 3)</i> [2002] EWHC 11 (Ch) .....	4.8
<i>Coker v Barkland Cleaning Co</i> , TLR, 6 December 1999.....	4.8
<i>Commonwealth Development Bank v Cassegrain</i> [2002] NSWSC 980.....	3.12, 8.16
<i>Cosgrove v Pattison</i> [2001] CP Rep 68 .....	4.22
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<i>Ell v Sisera</i> [2000] NSWSC 768.....	3.33
<i>F Hoffman-La Roche AG v New England Biolabs Inc</i> [1999] FCA 1424 .....	2.16
<i>Folkes v Chadd</i> (1782) 3 Doug KB 157; 99 ER 58.....	2.22
<i>Genetic Institute Inc v Kirin-Amgen Inc (No 2)</i> (1997) 78 FCR 368.....	2.16
<i>Graham v Commissioner of Railways</i> (1864) 3 SCR (NSW) 13 .....	2.9
<i>Graigola Merthyr Company Limited v Mayor, Aldermen and Burgesses of Swansea</i> [1928] 1 Ch 31 .....	2.29
<i>Greenhill Nominees Pty Ltd v Aircraft Technicians of Australia Pty Ltd</i> [2001] QSC 76.29	
<i>Guerin v Watts</i> [2002] NSWSC 692 .....	3.15
<i>Heggies Bulkhaul Ltd v Global Minerals Australia Pty Ltd</i> [2002] NSWSC 410 .....	3.33

<i>J, Re</i> [1991] FCR 193 .....	9.6
<i>Jermen v Shell Co of Australia Ltd</i> [2003] NSWSC 1106.....	3.12, 8.16
<i>Ladner v Higgins</i> 71 So 2d 242 (1954) .....	5.8
<i>Langbourne v State Rail Authority</i> [2003] NSWSC 537 .....	3.12, 8.16
<i>Layland v Fairview New Homes Plc</i> [2002] EWHC 1350 .....	4.21
<i>Lewis v Rucker</i> (1761) 2 Burr 1167 at 1168; 97 ER 769.....	2.5
<i>Mahoney v Noosa District Community Hospital</i> [2002] QSC 116.....	6.29
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