

Specialised Court Procedures for Expert Evidence



**THE HON JUSTICE BRIAN J PRESTON
CHIEF JUDGE, LAND AND
ENVIRONMENT COURT OF NSW**

Overview of Presentation



- A. Rules of evidence for admissibility of expert evidence
- B. Expert evidence in adversarial systems
- C. Responses to the problems
- D. Court Rules on expert reports and evidence
- E. Means of receiving expert evidence
 - Parties' own experts
 - Parties' single expert
 - Court appointed experts
 - Specialist knowledge possessed by court

A. Rules of Evidence for Admissibility of Expert Evidence



- Rules of evidence to ensure that courts receive reliable evidence include the rule against opinion evidence and the exception for expert evidence.
- The general rule is that witnesses should only give evidence of fact, not opinion.
- Opinion evidence is an inference or conclusion drawn from facts.
- The general rule is that it is the function of the court to draw inferences from facts.
- The reason for the general rule is so that the court can receive the most reliable evidence.

Problem Where Specialised Knowledge Involved



- The opinion rule works well enough where the inferences to be drawn are ones within the ordinary knowledge of the court.
- The problem arises where matters calling for specialised knowledge are involved.
- The court may not have the requisite specialised knowledge and hence cannot draw the proper inferences from the facts stated by the witnesses.

Example: Identification of Threatened Species



- A witness of fact might describe a plant: its morphological appearance, leaves, floral parts and fruits.
- Only a person with specialised knowledge in botany may be able to draw the inference that the plant as described falls within a particular taxonomical classification such as a species listed as threatened.



Eucalyptus robusta (Swamp Mahogany)

Exception to Opinion Rule



- An exception to the opinion rule, therefore, developed for matters calling for specialised knowledge.
- “If a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge”: s 79 of the *Evidence Act 1995* (NSW).

Requirements for Admissibility of Expert Opinion

- Four basic tests for admissibility of expert opinion evidence:
 - The relevance or helpfulness test
 - The specialised knowledge test
 - The qualifications test
 - The basis test
- The court also has a discretion to exclude expert evidence (s 135 of *Evidence Act 1995* (NSW))



Relevance or helpfulness test



- Relevant evidence is “evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding” (s 55(1) of the *Evidence Act 1995* (NSW)).
- Two concepts:
 - (1) Logical connection between evidence and facts
 - (2) The matter on which the evidence ultimately bears is a matter in issue

Specialised knowledge test



- The statutory expression “specialised knowledge” has been held to give rise to a test equivalent to that found at common law.
- Common law test involves asking:
 - whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area; and
 - whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, special acquaintance with which by the witness would render his opinion of assistance to the court.
 - (*R v Bonython* (1984) 38 SASR 45 at 46-47).

Qualifications test



- The witness must be qualified as an expert in the recognised field and have acquired specialised knowledge based on their “training, study or experience” (s 79 of the *Evidence Act 1995* (NSW)).
- The type of specialised knowledge and the means by which specialised knowledge is gained will depend on the field of knowledge in question.
- There must be a correlation between the qualifications and the question.

The basis test



- The basis for the opinion must be established in two ways:
 - the opinion of the witness must be “wholly or substantially based” on the specialised knowledge; and
 - the factual basis of the opinion must be disclosed and proven by admissible evidence.

B. Expert Evidence in Adversarial Systems



- In adversarial systems of adjudication, expert witnesses are engaged by each party and are called to give evidence in the party's case before the court.
- The traditional adversarial approach leads to problems with expert evidence including with the:
 - Integrity of evidence
 - Comprehensibility of evidence
 - Efficiency of adjudicative process



"Your Honour, I call Nigel From The Pub... expert witness on whatever you like."

Integrity of Expert Evidence



- **Experts in the adversarial system:**
 - Identify with and justify engaging party's case (they would not be giving evidence for them otherwise)
 - Give evidence infected by adversarial bias (consciously or unconsciously)
 - See their role as a contest with cross-examining lawyers for the other party
 - Do not engage directly with the other party's expert by conferring or in giving evidence.

Comprehensibility of Evidence



- Generally, courts are lay tribunals of fact without any expertise in the scientific, technical or professional discipline of the expert.
- Yet the court is required to resolve disputes between competing experts who may have expertise at the highest level.
- Courts apply the rules of evidence to assist in assessing the reliability of expert evidence.

Comprehensibility of Evidence Cont.



- The issues as to the integrity of expert evidence undermine the object of these tests; reliability is affected.
- But so too is comprehensibility.
- The court is not able to have independent, dispassionate, objective evidence or a genuine dialogue on a common agenda.

Efficiency



- The traditional, sequential calling of oral expert evidence in each party's case, with examination in chief (direct), cross-examination and re-examination (re-direct), is repetitive and time consuming.
- It requires the putting of one witness's evidence to the other and vice versa, through the medium of a non expert lawyer with the risk of distortion or loss of meaning in translation.

C. Responses to the Problems



- **The Land and Environment Court of NSW has responded by:**
 - Adopting court rules on expert evidence
 - Requiring experts to adhere to a code of conduct
 - Requiring joint conferencing of experts
 - Requiring experts to give their evidence concurrently
 - Directing the use of single experts, both parties' single experts and court-appointed experts
 - Using expertise of technical experts on the court (commissioners).

D. Court Rules on Expert Evidence



- Court rules reflect the tests for ensuring reliability of expert evidence (they supplement the rules of evidence where such rules apply).
- They also address problems of partiality.
- In NSW, the Uniform Civil Procedure Rules 2005 (UCPR) and Land and Environment Court Rules 2007 (LECR) apply.

Court Rules on Expert Evidence



- 1. Compliance with Expert Witness Code of Conduct
- 2. Disclosure of contingency fees
- 3. Court control over giving of expert evidence
- 4. Court directions regarding expert evidence
- 5. Joint conferencing and reporting

1. Compliance With Expert Witness Code of Conduct



- An expert witness must comply with the code of conduct in Schedule 7 to UCPR (UCPR 31.23(1)).
- An expert's report and oral evidence may not be received in evidence unless the expert acknowledges that he or she has read the code of conduct and agrees to be bound by it (UCPR 31.23(3) and (4)).

Expert Witness Code of Conduct



- **The Expert Witness Code of Conduct imposes:**
 - A general duty to the court
 - A duty to comply with court directions
 - A duty to work co-operatively with other expert witnesses.

General Duty to the Court



- An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the court impartially on matters relevant to the area of expertise of the witness (UCPR Sch 7 cl 2).

Duty to Comply With Court Directions



- If directed to do so by the court, an expert witness must:
 - (a) confer with any other expert witness, and
 - (b) provide the court with a joint report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing, and
 - (c) abide in a timely way by any direction of the court (UCPR Sch 7 cl 5).

Duty to Work Co-operatively With Other Expert Witnesses



- **Each expert witness must:**
 - (a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the court and in relation to each report thereafter provided, and must not act on any instruction or request to withhold or avoid agreement, and
 - (b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute (UCPR Sch 7 cl 6).

Experts' Reports



- Every report prepared by an expert witness for use in court must clearly state the opinion or opinions of the expert and must state:
 - (a) the name and address of the expert,
 - (b) an acknowledgement that the expert has read the expert witness code and agrees to be bound by it,
 - (c) the expert's qualifications to prepare the report,
 - (d) the assumptions and material facts on which each opinion expressed in the report is based (a letter of instructions may be annexed),
 - (e) the reasons for and any literature or other materials utilised in support of each such opinion,

Experts' Reports



- (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise,
- (g) any examinations, tests or investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications,
- (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person,
- (i) a declaration that the expert has made all the inquiries which they believe are desirable and appropriate (save for matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have been withheld from the court,

Experts' Reports



- (j) any qualification of an opinion expressed in the report without which the report is or may be incomplete or inaccurate,
- (k) whether any opinion in the report is not a concluded opinion because of insufficient research or data or for any other reason, and
- (l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report (UCPR Sch 7 cl 3).

Experts' Reports: Change of Opinion



- Where an expert witness has provided to a party (or that party's legal representative) a report for use in court, and the expert thereafter changes his or her opinion on a material matter, the expert must forthwith provide to the party (or that party's legal representative) a supplementary report which must state the information referred to in cl 3 (a), (d), (e), (g)-(l), and if applicable, cl 3(f) (UCPR Sch 7 cl 4(1)).
- In any subsequent report, the expert may refer to material contained in the earlier report without repeating it (UCPR Sch 7 cl 4(2)).

2. Disclosure of Contingency Fees



- An expert witness must disclose in his or her expert's report any arrangements under which the charging of fees or costs by the expert witness is contingent on the outcome of the proceedings or the payment of any fees or costs to the expert is to be deferred (UCPR 31.22(1)).
- The court may direct disclosure of the terms of the expert witness's engagement (UCPR 31.22(2)).



3. Court Control Over Giving of Expert Evidence



- Court rules emphasise that the court retains control over the giving of expert evidence (eg UCPR 31.17 (a)).
- This is necessary to ensure integrity of the evidence, proportionality and the just, quick and cheap resolution of the real issues in proceedings.

4. Court Directions Regarding Expert Witnesses



- The court may at any time give such directions as it considers appropriate in relation to the use of expert evidence in proceedings (UCPR 31.20(1)).
- Directions may include:
 - (a) a direction as to the time for service of experts' reports,
 - (b) a direction that expert evidence may not be adduced on a specified issue,
 - (c) a direction that expert evidence may not be adduced on a specified issue except by leave of the court,

Court Directions Regarding Expert Witnesses



- (d) a direction that expert evidence may be adduced on specified issues only,
- (e) a direction limiting the number of expert witnesses who may be called to give evidence on a specified issue,
- (f) a direction providing for the engagement and instruction of a parties' single expert in relation to a specified issue,
- (g) a direction providing for the appointment and instruction of a court-appointed expert in relation to a specified issue,

Court Directions Regarding Expert Witnesses



- (h) a direction requiring experts in relation to the same issue to confer, either before or after preparing experts' reports in relation to a specified issue,
- (i) any other direction that may assist an expert in the exercise of the expert's functions,
- (j) a direction that an expert who has prepared more than one expert's report in relation to any proceedings is to prepare a single report that reflects his or her evidence in chief.

5. Joint Conferencing and Reporting of Experts



- The court may direct expert witnesses:
 - (a) to confer, either generally or in relation to specified matters, and
 - (b) to endeavour to reach agreement on any matters in issue, and
 - (c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, and
 - (d) to base any joint report on specified facts or assumptions of fact,and may do so at any time, whether before or after the expert witnesses have furnished their experts' reports (UCPR 31.24(1)).

Joint Conferencing of Experts



- **The court may direct that a conference be held:**
 - (a) with or without the attendance of the parties affected or their legal representatives, or
 - (b) with or without the attendance of the parties affected or their legal representatives, at the option of the parties, or
 - (c) with or without the attendance of a facilitator (that is, a person who is independent of the parties and who may or may not be an expert in relation to the matters in issue) (UCPR 31.24(2)).

Policy on Joint Conferencing of Experts



- The LEC has adopted the Conference of Expert Witnesses Policy to provide guidance regarding conferences of expert witnesses:
 - Preparing for a joint conference
 - What is the role of an expert at a joint conference?
 - Conduct of the conference
 - Joint report
 - Limitations on communication of content of conference
 - Role of legal representatives

Experts May Apply to the Court for Directions



- An expert witness so directed may apply to the court for further directions to assist the expert witness in the performance of his or her functions in any respect (UCPR 31.24(3)).
- Application must be made by sending a written request for directions to the court, specifying the matter in relation to which directions are sought (UCPR 31.24(4)).
- An expert witness who makes such an application must send a copy of the request to the other expert witnesses and to the parties affected (UCPR 31.24(5)).

Joint Report of Experts



- The joint report is to specify matters agreed and matters not agreed and the reasons for any disagreement (UCPR 31.26(2)).
- The joint report may be tendered at the trial as evidence of any matters agreed (UCPR 31.26(3)).
- In relation to any matters not agreed, the joint report may be used or tendered at the trial only in accordance with the rules of evidence and the practices of the court (UCPR 31.26(4)).
- Except by leave of the court, a party affected may not adduce evidence from any other expert witness on the issues dealt with in the joint report (UCPR 31.26(5)).

Policy on Joint Experts Reports



- The LEC has adopted the Joint Expert Report Policy to provide guidance regarding the form and content of joint expert reports:
 - What are joint expert reports?
 - Grouping of similar contentions in planning appeals
 - Length of a joint expert report
 - Form of joint expert reports
 - Signing and submission of the joint expert report

Benefits of Joint Reports of Experts



- Joint reports crystallise the real questions on which oral evidence is needed.
- Joint reports separate the opinions and the facts and assumed facts on which the opinions are based.
- An expert often accepts another expert's opinion if the facts and assumed facts are as stated.
- This focuses attention on the facts that need to be found.
- Joint reports identify the critical areas of disagreement.

Source: Justice S Rares, "Using the 'Hot Tub' – How Concurrent Expert Evidence Aids Understanding Issues" (2013) 95 *Intellectual Property Forum: Journal of the Intellectual Property Society of Australia and New Zealand* 28.

Benefits of Joint Reports of Experts



Liesfield v SPI Electricity Pty Ltd (Ruling No 2)
[2014] VSC 98 [13], [37] (Dixon J):

- Joint expert reports can facilitate alternative dispute resolution (ADR).
- Dixon J made directions for ADR not to conclude until after joint reports became available.
- A mediation can "substantially advance negotiations" when the parties have access to exchanged expert reports.

E. Means of Receiving Evidence



- The court may receive expert evidence by various means:
 - 1. Parties may engage their own individual experts to give evidence in court
 - 2. Parties may agree to appoint a single expert
 - 3. The court may appoint an expert to assist the court in various ways
 - 4. If a specialist tribunal, the court may use its own specialised knowledge

1. Parties' Individual Experts



- Traditionally, parties engage their own experts to provide expert opinion evidence to the court
- Such expert evidence must comply with the rules of evidence and court rules for expert reports and evidence

Joint conferencing and reporting of individual experts



- The court may direct the parties' individual experts to hold a joint conference and produce a joint report to the court.
- Joint conferencing and reporting lays the foundation for concurrent evidence.

Concurrent Evidence



- The court may direct that the evidence of the expert witnesses be given concurrently (UCPR 31.35).
- Experts, grouped in disciplines, are sworn in together and sit next to each other in the witness box or bar table or other convenient location visible to the parties and the court.
- The experts should have adequate room to place their expert reports and papers.
- There should be sufficient microphones to record the evidence of each witness when he or she speaks.

Concurrent Evidence



- The presiding judge or commissioner takes an active role in the process; acting as a “master of ceremonies”.
- The presiding judge explains the purpose of the process: to engage in an orderly and structured discussion on the real issues to be decided.
- An agenda for oral evidence is settled. Usually the issues disagreed in the joint report form the basis for the agenda.

Concurrent Evidence



- Issues may be addressed sequentially.
- Usually each expert in turn is given an opportunity to explain their opinion on each issue and give their opinion about the opinion of another expert witness on that issue.
- There may be a dialogue between the experts in the form of a structured, orderly debate.
- Experts may ask questions of each other.
- At the conclusion of this dialogue, the court may ask questions.

Concurrent Evidence



- Parties are then given an opportunity to examine the experts. This may involve examination in chief and cross examination.
- Eg. one expert might be examined on a question, then other expert is asked the same question and to comment on the other's answer.
- A party's lawyer may pursue a traditional cross-examination on a particular issue only with one expert. Sometimes, the other party's lawyer or judge will then ask the other expert's opinion on the same issue.

Case Study: Kilmore East Bushfires



- 2009 Black Saturday bushfires: 173 people died, 2000 homes and 125,000 ha land destroyed.
- Plaintiffs sued power distributor, asset manager and Victorian government.
- 40 expert witnesses, 14 conclaves and 6 concurrent evidence sessions.
- Source: A E Butt, “Concurrent Expert Evidence in US Toxic Harms Cases and Civil Cases More Generally: Is There a Proper Role for ‘Hot Tubbing?’” (2017) 40 *Houston Journal of International Law* 1.

Case Study: Kilmore East Bushfires



Pre-trial:

- Associate Justice Zammit moderated the expert conclaves
- Lawyers were not allowed to participate
- Joint reports identified areas of agreement and disagreement – summarised 2000 pages of expert reports into 40-50 pages

Case Study: Kilmore East Bushfires



Concurrent evidence:

- Between 2 and 9 experts per session
- Justice Forrest determined process: for each topic, experts to make an opening statement, followed by examination, cross-examination and an opportunity for experts to question each other

Case Study: Kilmore East Bushfires



Benefits:

- Cost and time efficient despite increased pre-trial preparation
- Improved accuracy of fact-finding – experts could collaborate and identify weaknesses
- Easier for judge and lawyers to synthesise results of the evidence – aided by neatly ordered transcript
- Moderator provided discipline. managed tension between duty to Court and appointing party
- Resulted in post-trial settlement

Benefits of Concurrent Evidence



- Focused, structured and sequential analysis of issues: point and counterpoint
- Experts giving evidence on same assumptions and on same issue
- Experts can clarify immediately any lack of understanding of judge or parties' lawyers on an issue
- Genuine, intellectual dialogue between experts
- Removes ordinary tension in conventional trial process

Benefits of Concurrent Evidence



- Experts can explain, and if necessary defend, their views in an intellectual discussion with their peers
- Experts feel capable of explaining their points of view in a way that utilises their knowledge and experience
- Immediate peer review of each other's evidence
- Each expert knows other expert will hear and can expose any inappropriate evidence
- The experts' presence together encourages them to be precise and accurate

Benefits of Concurrent Evidence



- Court control emphasises overriding duty of experts to assist court
- Experts are less argumentative than in normal confrontational cross-examination process
- Lessens unhelpful confrontation with cross examining lawyers and risk that opinions are distorted by skilled advocates
- Time and cost efficient process – enables evidence to be taken in “half or as little as 20% of the time” (McClellan JA)

Some Criticisms of Concurrent Evidence



- The more assertive expert may overshadow the other expert(s) and appear more persuasive.
- Cross examination is diminished or removed – trial lawyers instead use their expert as a mouthpiece to dispute unfavourable evidence.



2. Parties' Single Expert



- The court may order that a single expert be engaged jointly by the parties affected to address particular issues (UCPR 31.37(1)).
- Some issues and cases lend themselves more to the use of single experts.
- A parties' single expert is to be selected by agreement between the parties affected or, failing agreement, by, or in accordance with the directions of, the court (UCPR 31.37(2)).

Remuneration of a Parties' Single Expert



- The remuneration of a parties' single expert is to be fixed by agreement between the parties affected and the expert or, failing agreement, by, or in accordance with the directions of, the court.
- Subject to direction of the court, the parties affected are jointly and severally liable to a parties' single expert for his or her remuneration.
- The court may direct when and by whom a parties' single expert is to be paid (UCPR 31.45 (1)-(3)).

Instructions to Parties' Single Expert



- The parties affected must endeavour to agree on written instructions to be provided to the parties' single expert concerning the issues arising for the expert's opinion and concerning the facts, and assumptions of fact, on which the report is to be based (UCPR 31.38(1)).
- If the parties affected cannot so agree, they must seek directions from the court (UCPR 31.38(2)).

Parties' Single Expert May Apply to Court for Directions



- The parties' single expert may apply to the court for directions to assist the expert in the performance of the expert's functions in any respect (UCPR 31.39(1)).
- Application is made by sending a written request for directions to the court, specifying the matter in relation to which directions are sought (UCPR 31.39(2)).
- A parties' single expert must send a copy of the request to the parties affected (UCPR 31.39(3)).

Parties' Single Expert's Report to be Sent to Parties



- The parties' single expert must send a signed copy of his or her report to each of the parties affected (UCPR 31.40(1)).
- Each copy must be sent on the same day and must be endorsed with the date on which it is sent (UCPR 31.40(2)).

Clarification of the Report



- Within 14 days after the parties' single expert's report is sent to the parties affected, and before the report is tendered in evidence, a party affected may, by notice in writing sent to the expert, seek clarification of any aspect of the report (UCPR 31.41(1)).
- Unless the court orders otherwise, a party affected may send no more than one such notice and the notice is to be in the form of questions, no more than 10 in number (UCPR 31.41(2) and (3)).

Clarification of the Report



- The party sending the notice must, on the same day as it is sent to the parties' single expert, send a copy of it to each of the other parties affected (UCPR 31.41(4)).
- Each notice sent under this rule must be endorsed with the date on which it is sent (UCPR 31.41(5)).
- Within 28 days after the notice is sent, the parties' single expert must send a signed copy of his or her response to the notice to each of the parties affected (UCPR 31.41(6)).

Tender of Reports and Answers



- Unless the court orders otherwise, the parties' single expert's report and any or all of the parties' single expert's answers in response to a request for clarification may be tendered in evidence by any of the parties affected (UCPR 31.42(1) and (2)).

Cross-examination of Parties' Single Expert



- Any party affected may cross-examine a parties' single expert, and the expert must attend court for examination or cross-examination if so requested on reasonable notice by a party affected (UCPR 31.43).

Prohibition of Other Expert Evidence



- Except by leave of the court, a party to proceedings may not adduce evidence of any other expert on any issue arising in proceedings if a parties' single expert has been engaged in relation to that issue (UCPR 31.44).

3. Court Appointed Experts



- The court may appoint experts to provide evidence and assistance to the court by
 - Appointing a court expert
 - Appointing an assessor
 - Referring a particular matter to a referee for inquiry and report

Court-appointed Experts



- The court may itself appoint an expert to inquire into and report on any issues (UCPR 31.46(1)).
- The court may appoint as a court-appointed expert a person selected by the parties affected, a person selected by the court or a person selected in a manner directed by the court (UCPR 31.46(2)).

Remuneration of Court-appointed Experts



- The remuneration of a court-appointed 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.
- Subject to direction of the court, the parties affected are jointly and severally liable to a court-appointed witness for his or her remuneration.
- The court may direct when and by whom a court-appointed expert is to be paid (UCPR 31.53(1)-(3)).

Instructions to Court-appointed Expert



- **The court may give directions as to:**
 - (a) the issues to be dealt with in a report by a court-appointed expert, and
 - (b) the facts, and assumptions of fact, on which the report is to be based,
- **including a direction that the parties affected must endeavour to agree on the instructions to be provided to the expert (UCPR 31.47)).**

Court-appointed Expert May Apply to Court for Directions



- A court-appointed expert may apply to the court for directions to assist the expert in the performance of the expert's functions in any respect (UCPR 31.48(1)).
- 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 (UCPR 31.48(2)).
- A court-appointed expert who makes such an application must send a copy of the request to the parties affected (UCPR 31.48(3)).

Court-appointed Expert's Report to be Sent to the Court



- The court-appointed expert must send his or her report to the registrar, and a copy of the report to each party affected (UCPR 31.49(1)).
- Unless the court orders otherwise, a report that has been received by the registrar is taken to be in evidence in any hearing concerning a matter to which it relates (UCPR 31.49(2)).

Change of Opinion by Court-appointed Expert



- A court-appointed expert who, after sending a report to the registrar, changes his or her opinion on a material matter must forthwith provide the registrar with a supplementary report to that effect (UCPR 31.49(3)).

Clarification of Report and Cross-examination



- Any party affected may apply to the court for leave to seek clarification of any aspect of the court-appointed expert's report (UCPR 31.50).
- Any party affected may cross-examine a court-appointed expert, and the expert must attend court for examination or cross-examination if so requested on reasonable notice by a party affected (UCPR 31.51).

Prohibition of Other Expert Evidence



- Except by leave of the court, a party to proceedings may not adduce evidence of any expert on any issue arising in proceedings if a court-appointed expert has been appointed in relation to that issue (UCPR 31.52).

Benefits of Parties' Single Expert or Court-appointed Expert



- **Benefits include:**
 - the single expert's independence and impartiality and
 - the savings in cost and time that come from use of a single expert.

Assessors



- The court may have power to appoint one or more assessors with specialist knowledge to sit with the court to assist on those aspects of the case which require specialist knowledge for their comprehension and adjudication.
- In any civil 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 advisor's opinion (UCPR 31.54(1)).

Nature and Function of Assessors



- Assessors act as “expert guides of the court”: *Owners of SS Melanie v Owners of SS San Onofre* [1919] WN 151, HL
- They may be appointed whenever the judge must adjudicate on a case, or limited issues within a case, involving specialist matters.

Assessors Are Not Expert Witnesses



- The assessors provide similar expertise to the court as expert witnesses but they are not expert witnesses. They are not sworn to give evidence and cannot be cross examined: *The Queen Mary* (1947) 80 Lloyd's Reports 609 at 612 and *Earwicker v London Graving Dock Company Limited* [1916] 1 KB 970 at 975

Assessors Do Not Constitute the Court



- Assessors also do not form part of the court, merely an advisor to it: *The Koning Willem II* [1908] P 125 at 137; *The City of Berlin* [1908] P 110 at 118; *The Marinegra* [1959] 2 Lloyd's Reports 65.
- Their role is to assist and advise the court but not to adjudicate on any matter before the court (see eg *Land and Environment Court Act 1979* (NSW) (LEC Act), s 37(3)).

Assessors Do Not Participate in the Hearing



- Assessors do not actively participate in the hearing of the proceedings other than assisting and advising the judge and do not examine or cross examine expert or other witnesses or advocate one party's case:
Earwicker v London Graving Dock Company Limited [1916] 1 KB 970 at 975.

Types of Assistance by Assessors



- Assessors may suggest to the judge questions to be put to expert witnesses by the judge to test the witness's view or make plain its meaning.
- Assessors may also assist the judge as to the proper technical inferences to be drawn from proved facts or as to the extent of the difference between apparently contradictory conclusions in the expert field: *Richardson v Redpath Brown* [1944] AC 62 at 70.

Assessors in LEC



- The Land and Environment Court has access to assessors (called commissioners), both full time and part time, with a broad range of areas of expertise to advise and assist the judges of the court in hearing and determining its civil cases (LEC Act ss12 and 37).

Referees



- The court may refer particular matters, often involving complicated matters of technical fact and inferences, to a referee. The referee may be a person with a special expertise in the particular field.
- The referee will inquire and report to the court on the whole of the proceedings or on any question arising in the proceedings, being the matter referred by the court (UCPR 20.14 and 20.17)

Referee's Report



- The referee provides a written report to the court stating the referee's opinion on the matter and the referee's reasons for that opinion (UCPR 20.23). The court sends a copy to the parties.
- The court may
 - adopt, vary or reject the report in whole or part
 - require an explanation from the referee
 - remit for further consideration by the referee any matter
 - decide any matter on the evidence taken before the referee (UCPR 20.24 (1)).

4. Specialist Tribunals



- Where tribunals are established to adjudicate in particular fields, and where members have specialist knowledge or experience in the field, they are expected to use it in their hearings and deliberations.
- The Land and Environment Court is a specialist court, with commissioners having specialist knowledge and experience (see LEC Act s12).

Specialist Tribunals



- Commissioners are able to inform themselves as they think fit, including using their own specialist knowledge and experience (see LEC Act s12).
- Commissioners can adjudicate, conciliate or mediate appropriate administrative and civil matters (see LEC Act ss 30, 33, 34, 34AA and 36).

Procedural Fairness and Specialist Knowledge



- The rules of procedural fairness should be observed in using such specialist knowledge.
- Where members are aware of or propose to draw on specialist knowledge which is in conflict with evidence in the case, they should alert the parties and give the parties and witnesses the opportunity to deal with it

Appropriate selection of evidence method



- The Court encourages the selection of the appropriate method of providing expert evidence in the circumstances of each case.
- Different cases may justify different methods and even, in a particular case, different issues may justify different methods.
- The Court's Practice Notes summarise the different methods and guidelines for selection of the appropriate methods.