

Specialised Court Procedures for Expert Evidence

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INTRODUCTION

Rules of evidence have developed over many years and have been tested and refined.¹ They represent ‘the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth’.² In Australia, these rules are codified in the uniform Evidence Acts in each State and Territory. The purpose of these rules is to ensure that courts receive the most reliable evidence. One rule of evidence that is of interest for the purposes of this paper is the rule against opinion evidence and the exception for expert evidence.

Expert evidence is today fundamental to adjudication in the courts.³ Science and technology have grown exponentially and permeate all aspects of our lives. Matters which previously might have been left to the commonsense of the courts, now need to be illuminated by specialised knowledge. Yesterday’s common sense may be today’s nonsense. The unformed opinions of the court may be idiosyncratic or just plain wrong. Expert opinion evidence is needed to assist the court to draw correct inferences in decision-making.

This is particularly true of specialist courts or tribunals exercising jurisdiction under environmental and planning legislation.⁴ 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. This traditional approach has led to problems regarding the integrity of evidence, the comprehensibility of evidence, and the efficiency of the adjudicative process. In response, courts have introduced reforms to ‘maximise the quality of that evidence and to achieve efficiencies in the way that it

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¹ Brian J Preston, ‘Science and the Law: Evaluating Evidentiary Reliability’ (2003) 23 *Australian Bar Review* 1.

² *Ibid.* See also *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, 256; 39 ALR 533.

³ Preston, ‘Science and the Law’, above n 1, 1.

⁴ Malcolm Craig, ‘Expert evidence in the Land and Environment Court of New South Wales: A Synopsis’ (2012) 27(8) *Australian Environment Review* 269.

is obtained and used in the litigation process'.⁵ The Land and Environment Court of New South Wales has been described as an 'innovator and national leader' in court practices and procedures, including its practices and procedures for dealing with expert evidence.

This paper will discuss: the rules of evidence for admissibility of expert evidence; expert evidence in adversarial systems, including problems with expert evidence; responses to the problems with expert evidence; court rules on expert reports and evidence; and means of receiving expert evidence, including via parties' own experts, parties' single expert, court-appointed experts, and specialist knowledge possessed by the court.

RULES OF EVIDENCE FOR ADMISSIBILITY OF EXPERT EVIDENCE

Courts have adopted rules of evidence to ensure that courts receive reliable evidence. One rule of evidence is the rule against opinion evidence and the exception for expert evidence.

Rule against opinion evidence

Rules of evidence distinguish between evidence of fact and evidence of opinion. The general rule is that witnesses should only give evidence of fact, not opinion. Evidence of fact involves direct observation of fact using the five senses. 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. The rule against opinion was one of a number of rules which the law developed to receive the most reliable evidence (others include the rule against hearsay and the best evidence rule).⁶

⁵ Michael E Rackemann, 'The Management of Experts' (2012) 21 *Journal of Judicial Administration* 168.

⁶ John Dyson Heydon, *Cross on Evidence* (LexisNexis, Service 175) [29001].

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.

One example of a situation where the court may lack the requisite specialised knowledge is in the identification of threatened species of plants or animals listed as protected by threatened species legislation. 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.

Exception to opinion rule

An exception to the opinion rule, therefore, developed for matters calling for specialised knowledge. Section 79 of the *Evidence Act 1995* (NSW) ('Evidence Act') states: '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.'

Tests for admissibility of expert opinion

There are four basic tests for admissibility of expert opinion evidence:

- (a) the relevance or helpfulness test;
- (b) the specialised knowledge test;
- (c) the qualifications test; and
- (d) the basis test.

Relevance or helpfulness test

The first test is fundamental to judicial decision-making. Any evidence, whether of fact or opinion, is only admissible in proceedings if it is relevant to the proceedings.⁷ 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'.⁸ If evidence cannot rationally assist the court, it is non-helpful.

The test of relevance requires a minimum logical connection between the evidence and the fact in issue. In terms of probability, it is sufficient that the relevant evidence makes the fact in issue 'more probable or less probable than it would be without the evidence' (ie it affects the probability).⁹ This test of relevance embraces two concepts: the logical connection between evidence and facts; and the requirement that the matter on which the evidence ultimately bears is a matter in issue in the trial.¹⁰

Specialised knowledge test

The second test requires that the basis of the opinion be 'specialised knowledge'. The expression 'specialised knowledge' in the *Evidence Act 1995* (NSW) has been held to give rise to a test equivalent to the position at common law.¹¹ Under the common law, the opinion of a supposed expert must lie within a field of knowledge that the law recognises as one on which expert evidence can be called. The common law test involves asking:

- (a) 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

⁷ *Evidence Act 1995* (NSW) s 56.

⁸ *Ibid* s 55(1).

⁹ Australian Law Reform Commission, *Evidence (Interim)*, Interim Report No 26 (1985) vol 1, [641].

¹⁰ *Ibid*.

¹¹ *HG v The Queen* (1999) 197 CLR 414, 432; 160 ALR 554.

- (b) 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.¹²

The first of these questions seeks to 'exclude evidence on the ground that the ordinary person is as capable of forming a correct view on the question as anyone else'.¹³ The second seeks to exclude evidence which, not being based on an organised body of sound knowledge or experience, is 'insufficiently reliable'.¹⁴

Different tests have been employed by the courts to determine whether the subject matter of the opinion forms part of a body of knowledge that the law recognises as meeting the standard of reliability. One is the test of general acceptance in the relevant scientific or technical discipline. If the specialised knowledge upon which the opinion is based has been generally accepted in the relevant scientific or technical discipline, this forms the basis for a conclusion of the evidentiary reliability of the opinion.¹⁵ Other tests do not focus on general acceptance as a basis for reliability but require the court directly to make an assessment of the reliability of the opinion. Hence, for a scientific evidentiary opinion, the opinion must be derived by the scientific method and supported by appropriate validation, ie good grounds, based on what is known.¹⁶

Qualifications test

The third test is the 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'.¹⁷ The type of specialised knowledge and the means by which specialised knowledge is gained will depend on the field of knowledge in question. For example, experience with the attitudes of a particular community may

¹² *R v Bonython* (1984) 38 SASR 45, 46-47. See also *Osland v The Queen* (1998) 197 CLR 316, 336; 159 ALR 170; *HG v R* (1999) 197 CLR 414, 432; 160 ALR 554.

¹³ Preston, 'Science and the Law', above n 1, 6.

¹⁴ *Ibid*, 6-7.

¹⁵ *Ibid*, 7.

¹⁶ *Ibid*, 8-10.

¹⁷ *Evidence Act 1995* (NSW) s 79.

well constitute specialised knowledge so as to permit an opinion as to the likely attitude of a member of that community.¹⁸ However, where the field of knowledge in question is a technical field of science, mere experience without proper training or study would be insufficient.¹⁹ The nature and extent of studies will depend on the area of science in question.²⁰ In determining what qualifications are required of an expert and whether the witness possesses them, it will be necessary to identify precisely the question upon which the evidence is proposed.²¹ There needs to be a correlation between the qualifications and the question.

The basis test

The fourth test focuses on the actual opinion expressed by the expert witness and evaluates the basis for the opinion. The basis for the opinion must be established in two ways:

- (a) the opinion of the witness must be 'wholly or substantially based' on the specialised knowledge; and
- (b) the factual basis of the opinion must be disclosed and proven by admissible evidence.²²

The first way requires there to be a relationship between the 'specialised knowledge of an identifiable kind'²³ and the opinion. There cannot be a relationship if the opinion strays outside of the witness's area of expertise.²⁴ Similarly, there cannot be a relationship, even if the opinion falls within the field in which the witness is an expert, if no 'specialised knowledge' is used in reaching that opinion.²⁵ Furthermore, the opinion must be 'wholly or substantially based' on the specialised knowledge.

¹⁸ *Yildiz v R* (1983) 11 A Crim R 115.

¹⁹ *Clark v Ryan* (1960) 103 CLR 486, 491-492; [1960] ALR 524; Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 11th ed, 2014) 372.

²⁰ *R v Duncan* [1969] 2 NSW 675, 678; (1969) 90 WN (Pt 1) (NSW) 150, 154-155.

²¹ *Ajami v Comptroller of Customs* [1954] 1 WLR 1405, 1408.

²² Preston, 'Science and the Law', above n 1, 30.

²³ *NMFM Property Pty Ltd v Citibank Ltd (No 7)* (1999) 161 ALR 576, 577.

²⁴ *Randwick City Council v Minister for the Environment* (1998) 54 ALD 682, 703.

²⁵ *Quick v Stoland Pty Ltd* (1998) 87 FCR 371, 381, 382-383; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, [37], [42].

The second way requires the expert to disclose the facts or assumptions of fact upon which the opinion is based.²⁶ These facts must be capable of proof by admissible evidence, and the evidence must be admitted to prove the assumed facts upon which the opinion is based.²⁷

Discretion to exclude expert evidence

The court also has a discretion to exclude or limit the use of otherwise admissible expert evidence.²⁸ The court may refuse to admit expert evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, be misleading or confusing, or cause or result in undue waste of time.²⁹ The court may also limit the use to be made of evidence if there is a danger that a particular use of the evidence might be unfairly prejudicial to a party, or be misleading or confusing.³⁰ Considerations relating to the four tests for admissibility may be relevant to the discretionary exclusion of expert evidence.³¹

PROBLEMS WITH 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, and efficiency of the adjudicative process.

²⁶ *Bugg v Day* (1949) 79 CLR 442, 462; *R v Fowler* (1985) 39 SASR 440, 442-443, 454; *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313, 348, 349, 350, 351.

²⁷ *Ramsay v Watson* (1961) 108 CLR 642, 649; *Paric v John Holland Constructions Pty Ltd* (1985) 59 ALJR 844, 846; 62 ALR 85; *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, 743; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [66]-[90].

²⁸ *Evidence Act 1995* (NSW) s 135 and 136.

²⁹ *Evidence Act 1995* (NSW) s 135.

³⁰ *Evidence Act 1995* (NSW) s 136.

³¹ Odgers, above n 19, 387-390.

Lack of integrity of evidence

Experts in the adversarial system identify with and justify the engaging party's case³² (they would not be giving evidence for them otherwise), give evidence infected by adversarial bias (consciously or unconsciously),³³ see their role as a contest with cross-examining lawyers for the other party, and do not engage directly with the other party's expert by conferring before the hearing or in giving evidence at the hearing. These issues undermine the integrity of expert evidence.³⁴

Incomprehensibility 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. These include the four tests for the admissibility of expert evidence discussed above. The issues as to the integrity of expert evidence undermine the object of these tests, because reliability is affected. But problems with the integrity of expert evidence also adversely affect its comprehensibility. The court is not able to receive independent, dispassionate, objective evidence of the experts or have the benefit of a genuine dialogue between the experts on the issues that the court needs to resolve. This makes it difficult for the court to understand the issues and the competing arguments on the issues.³⁵

Inefficiency of adjudicative process

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

³² Gary Edmond, 'Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure' (2009) 72 *Law and Contemporary Problems* 159, 160-161.

³³ Peter McClellan, 'Expert Evidence: Aces Up Your Sleeve?' (2007) 8 *The Judicial Review* 215, 220.

³⁴ Ibid 219-221; Megan A Yarnall, 'Dueling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary' (2009) 88 *Oregon Law Review* 311, 317-321.

³⁵ Yarnall, above n 34, 313-317.

the other and vice versa, through the medium of a non-expert lawyer with the risk of distortion or loss of meaning in translation.³⁶

ONE COURT'S RESPONSES TO THE PROBLEMS WITH EXPERT EVIDENCE

The Land and Environment Court of NSW is a specialist, superior court of record in the Australian State of New South Wales.³⁷ The Court has been a world leader in innovations concerning expert evidence.³⁸ The Court has responded to the problems with expert evidence in adversarial systems 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; and
- using expertise of technical experts on the Court (commissioners).

COURT RULES ON EXPERT REPORTS AND 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. These rules contain rules for:

³⁶ Steven Rares, 'Using the "Hot Tub" – How Concurrent Expert Evidence Aids Understanding Issues' (2013) 95 *Intellectual Property Forum* 28.

³⁷ For a description and history of the Court, see Brian J Preston, 'Operating an Environment Court: The Experience of the Land and Environment Court of New South Wales' (2008) 25 *Environmental and Planning Law Journal* 385; and Brian J Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 *Pace Environmental Law Review* 396.

³⁸ McClellan, 'Expert Evidence', above n 33, 221-222; Peter McClellan, 'Expert Witnesses – The Recent Experience of the Land and Environment Court' (2005) 17 *Judicial Officers' Bulletin* 83, 84-86; George (Rock) Pring and Catherine (Kitty) Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative, 2009) 59-61; George (Rock) Pring and Catherine (Kitty) Pring, 'Twenty-First Century Environmental Dispute Resolution – Is There an 'ECT' in Your Future?' (2015) 33 *Journal of Energy & Natural Resources Law* 10, 24-25.

- (a) compliance with expert witness code of conduct;
- (b) disclosure of contingency fees;
- (c) court control over giving of expert evidence;
- (d) court directions regarding expert evidence; and
- (e) joint conferencing and reporting.

Compliance with expert witness code of conduct

Duty to comply with code of conduct

An expert witness must comply with the code of conduct in sch 7 to the UCPR.³⁹ The expert witness must be provided with a copy of the code of conduct as soon as practicable after an expert witness is engaged or appointed.⁴⁰ 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.⁴¹ The code of conduct imposes: a general duty to the court; a duty to comply with court directions; and a duty to work co-operatively with other expert witnesses.

General duty to the court

An expert witness has an overriding duty to assist the court impartially on matters relevant to the expert witness's area of expertise.⁴² An expert witness's paramount duty is to the court and not to any party in the proceedings (including the person retaining the expert witness).⁴³ An expert witness is not an advocate for a party.⁴⁴

Duty to comply with court directions

An expert witness must abide by any direction of the court,⁴⁵ including a direction of the court to confer with any other expert witness and prepare a joint report.⁴⁶

³⁹ *Uniform Civil Procedure Rules 2005* (NSW) r 31.23(1).

⁴⁰ *Ibid* r 31.23(2).

⁴¹ *Ibid* r 31.23(3), (4).

⁴² *Ibid* sch 7 cl 2(1).

⁴³ *Ibid* sch 7 cl 2(2).

⁴⁴ *Ibid* sch 7 cl 2(3).

⁴⁵ *Ibid* sch 7 cl 3.

⁴⁶ *Ibid* sch 7 cl 6.

Duty to work co-operatively with other expert witnesses

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

- (a) must exercise his or her independent, professional judgment in relation to that issue;
- (b) must endeavour to reach agreement with the other expert witness on that issue; and
- (c) must not act on any instruction or request to withhold or avoid agreement with the other expert witness.⁴⁷

Content of an expert's report

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

- (a) the expert's qualifications as an expert on the issue the subject of the report;
- (b) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed);
- (c) the expert's reasons for each opinion expressed;
- (d) if applicable, that a particular issue falls outside the expert's field of expertise;
- (e) any literature or other materials utilised in support of the opinions;
- (f) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out; and
- (g) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).⁴⁸

If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated

⁴⁷ Ibid sch 7 cl 4.

⁴⁸ Ibid sch 7 cl 5(1).

in the report.⁴⁹ 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.⁵⁰

If an expert witness changes his or her opinion on a material matter after providing an expert's report to the party engaging him or her (or that party's legal representative), the expert witness must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in UCPR sch 7 cl 5(1) as is appropriate.⁵¹

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.⁵² If the expert's report indicates the existence of any such arrangements, the court may direct disclosure of the terms of the expert witness's engagement.⁵³

Court control over giving of expert evidence

Court rules emphasise that the court retains control over the giving of expert evidence.⁵⁴ This is necessary to ensure integrity of the evidence, proportionality between the extent and cost of the expert evidence and the nature of the dispute and the matters in issue, and the just, quick and cheap resolution of the real issues in proceedings.

Court directions regarding expert evidence

The court may at any time give such directions as it considers appropriate in relation to the use of expert evidence in proceedings.⁵⁵ Directions may include:

⁴⁹ Ibid sch 7 cl 5(2).

⁵⁰ Ibid sch 7 cl 5(3).

⁵¹ Ibid sch 7 cl 5(4).

⁵² Ibid r 31.22(1).

⁵³ Ibid r 33.22(2).

⁵⁴ Ibid r 31.17(a).

⁵⁵ Ibid r 31.20(1).

- (a) a direction as to the time for service of experts' reports,
- (b) a direction that expert evidence may not be adduced on a specified issue,
- (c) a direction that expert evidence may not be adduced on a specified issue except by leave of the court,
- (d) a direction that expert evidence may be adduced on specified issues only,
- (e) a direction limiting the number of expert witnesses who may be called to give evidence on a specified issue,
- (f) a direction providing for the engagement and instruction of a parties' single expert in relation to a specified issue,
- (g) a direction providing for the appointment and instruction of a court-appointed expert in relation to a specified issue,
- (h) a direction requiring experts in relation to the same issue to confer, either before or after preparing experts' reports in relation to a specified issue,
- (i) any other direction that may assist an expert in the exercise of the expert's functions,
- (j) a direction that an expert who has prepared more than one expert's report in relation to any proceedings is to prepare a single report that reflects his or her evidence in chief.⁵⁶

Joint conferencing and reporting

Conference between expert witnesses

The court may direct expert witnesses:

- (a) to confer, either generally or in relation to specified matters,
- (b) to endeavour to reach agreement on any matters in issue,
- (c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, and
- (d) to base any joint reports on specified facts or assumptions of fact.⁵⁷

The court may do so at any time, whether before or after the expert witnesses have furnished their experts' reports.⁵⁸ If a direction to confer is given before the expert

⁵⁶ Ibid r 31.20(2).

⁵⁷ Ibid r 31.24(1), and sch 7 cl 6.

witnesses have furnished their reports, the court may give directions as to the issues to be dealt with in a joint report by the expert witnesses, and 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 witnesses.⁵⁹

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).⁶⁰

An expert witness who is directed to confer 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 (such as by a party or the legal representative of a party) to withhold or avoid agreement.⁶¹

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.⁶²

Application must be made by sending a written request for directions to the court, specifying the matter in relation to which directions are sought.⁶³ 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.⁶⁴

⁵⁸ Ibid r 31.24(1).

⁵⁹ Ibid r 31.25.

⁶⁰ Ibid r 31.24(2).

⁶¹ Ibid sch 7 cl 6(2).

⁶² Ibid r 31.24(3).

⁶³ Ibid r 31.24(4).

⁶⁴ Ibid r 31.24(5).

Joint report arising from conference

The joint report of the expert witnesses is to specify matters agreed and matters not agreed and the reasons for any disagreement.⁶⁵ The joint report may be tendered at the trial as evidence of any matters agreed.⁶⁶ 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.⁶⁷ 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.⁶⁸ Other than the content of the joint report, unless the parties affected agree, the content of the joint conference between the expert witnesses must not be referred to at any hearing.⁶⁹

MEANS OF RECEIVING EXPERT EVIDENCE

The court may receive expert evidence by various means:

- (a) parties may engage their own individual experts to give evidence in court;
- (b) parties may agree to appoint a single expert;
- (c) the court may appoint an expert to assist the court in various ways; and
- (d) if a specialised court or tribunal, the court may use its own specialised knowledge.

Parties' own 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 expert evidence.

⁶⁵ Ibid r 31.26(2).

⁶⁶ Ibid r 31.26(3).

⁶⁷ Ibid r 31.26(4).

⁶⁸ Ibid r 31.26(5).

⁶⁹ Ibid r 31.24(6)

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.⁷⁰ Experts, grouped in disciplines, are sworn 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 presiding judge takes an active role in the process; acting as a 'master of ceremonies'.

An agenda for the oral evidence of the expert witnesses is settled. The agenda lists the topics that require discussion by the experts in order to resolve the outstanding issues, usually the issues disagreed in the joint report.⁷¹ The court gives directions as to the manner in which the evidence is to be given.⁷² Usually each expert in turn is given an opportunity to explain their response to each issue and give their opinion about the opinion of another expert witness. There may be a dialogue 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. Parties are then given an opportunity to examine the experts. This may involve examination-in-chief and cross-examination. Having completed the discussion on one issue, the process is repeated for the next issue and so on until the discussion of all of the outstanding issues has been completed.⁷³

Benefits of concurrent evidence

The benefits of concurrent evidence include:

- expert evidence on one topic is all given at the same time;

⁷⁰ Ibid r 31.35.

⁷¹ McClellan, 'Expert Evidence', above n 33, 223.

⁷² *Uniform Civil Procedure Rules 2005* (NSW) r 31.35.

⁷³ McClellan, 'Expert Evidence', above n 33, 223; Rares, above n 36, 31-32.

- focused, structured and sequential analysis of issues: point and counterpoint;
- genuine dialogue between the experts;
- immediate peer review of each other's evidence;
- court control emphasises the overriding duty of the experts to assist the court;
- lessens the likelihood of the experts acting adversarially;
- lessens unhelpful confrontation with cross-examining lawyers; and
- time and cost efficient process, significantly reducing the time and cost required for taking expert evidence by traditional, adversarial methods.⁷⁴

Parties' single expert

Selection and engagement

The court may order that a single expert be engaged jointly by the parties affected to address a particular issue or issues.⁷⁵ Some issues and types of 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.⁷⁶

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.⁷⁷ Subject to a direction by the court, the parties affected are jointly and severally liable to a parties' single expert for his or her remuneration.⁷⁸ The court may direct when and by whom a parties' single expert is to be paid.⁷⁹

⁷⁴ McClellan, 'Expert Evidence', above n 33, 223-224; Rares, above n 36, 32-33; Yarnall, above n 34, 325-329; Garry Downes, 'Problems with Expert Evidence: Are Single or Court Appointed Experts the Answer?' (2006) 15 *Journal of Judicial Administration* 185, 188; Brian J Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 *Journal of Environmental Law* 365, 382.

⁷⁵ *Uniform Civil Procedure Rules 2005* (NSW) r 31.37(2).

⁷⁶ *Ibid* r 31.37(2).

⁷⁷ *Ibid* r 31.45(1).

⁷⁸ *Ibid* r 31.45(2).

⁷⁹ *Ibid* r 31.45(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.⁸⁰ If the parties affected cannot so agree, they must seek directions from the court.⁸¹

Parties' single expert may apply to the 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.⁸² Application is made by sending a written request for directions to the court, specifying the matter in relation to which directions are sought.⁸³ A parties' single expert must send a copy of the request to the parties affected.⁸⁴

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.⁸⁵ Each copy must be sent on the same day and must be endorsed with the date on which it is sent.⁸⁶

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.⁸⁷ 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.⁸⁸

⁸⁰ Ibid r 31.38(1).

⁸¹ Ibid r 31.38(2).

⁸² Ibid r 31.39(1).

⁸³ Ibid r 31.39(2).

⁸⁴ Ibid r 31.39(3).

⁸⁵ Ibid r 31.40(1).

⁸⁶ Ibid r 31.40(2).

⁸⁷ Ibid r 31.41(1).

⁸⁸ Ibid r 31.41(2), (3).

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.⁸⁹ Each notice sent must be endorsed with the date on which it is sent.⁹⁰ 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.⁹¹

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.⁹²

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.⁹³

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.⁹⁴

Court-appointed experts

The court may appoint experts to provide evidence and assistance to the court by:

- (a) appointing an expert to inquire into and report to the court on a particular issue;
- (b) appointing an assessor to assist and advise the court on a matter arising in the proceeding; or

⁸⁹ Ibid r 31.41(4).

⁹⁰ Ibid r 31.41(5).

⁹¹ Ibid r 31.41(6).

⁹² Ibid r 31.42(1), (2).

⁹³ Ibid r 31.43.

⁹⁴ Ibid r 31.44.

(c) referring a particular matter to a referee for inquiry and report.

Selection and appointment of court-appointed expert

The court may itself appoint an expert to inquire into and report on any issue for an expert.⁹⁵ 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.⁹⁶

Remuneration of court-appointed expert

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.⁹⁷ Subject to a direction of the court, the parties affected are jointly and severally liable to a court-appointed witness for his or her remuneration.⁹⁸ The court may direct when and by whom a court-appointed expert is to be paid.⁹⁹

Instructions to court-appointed expert

The court may give instructions as to the issues to be dealt with in a report by a court-appointed expert, and the facts, and assumptions of fact, on which the report is to be based. This may include a direction that the parties affected must endeavour to agree on the instructions to be provided to the expert.¹⁰⁰

Court-appointed expert may apply to the 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.¹⁰¹ Any such application must be made by sending a written request for directions to the court, specifying the

⁹⁵ Ibid r 31.46(1).

⁹⁶ Ibid r 31.46(2).

⁹⁷ Ibid r 31.53(1).

⁹⁸ Ibid r 31.53(2).

⁹⁹ Ibid r 31.53(3).

¹⁰⁰ Ibid r 31.47.

¹⁰¹ Ibid r 31.48(1).

matter in relation to which directions are sought.¹⁰² A court-appointed expert who makes such an application must send a copy of the request to the parties affected.¹⁰³

Court-appointed expert's report to be sent to the court

The court-appointed expert must send his or her report to the registrar of the court, and a copy of the report to each party affected.¹⁰⁴ 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.¹⁰⁵

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.¹⁰⁶

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.¹⁰⁷ 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.¹⁰⁸

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.¹⁰⁹

¹⁰² Ibid r 31.48(2).

¹⁰³ Ibid r 31.48(3).

¹⁰⁴ Ibid r 31.49(1).

¹⁰⁵ Ibid r 31.49(2).

¹⁰⁶ Ibid r 31.49(3).

¹⁰⁷ Ibid r 31.50.

¹⁰⁸ Ibid r 31.51.

¹⁰⁹ Ibid r 31.52.

Benefits of parties' single expert or court-appointed expert

Benefits of a parties' single expert or a court-appointed expert include the single expert's independence and impartiality, and the savings in cost and time that come from use of a single expert.¹¹⁰

Appointment of assessors

The court may have power to appoint one or more persons 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.¹¹¹ The advisors are sometimes referred to as assessors.

Assessors act as 'expert guides of the court'.¹¹² They may be appointed whenever the judge must adjudicate on a case, or limited issues within a case, involving specialist matters. 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.¹¹³ Assessors do not form part of the court, but are merely advisors to it.¹¹⁴ Their role is to assist and advise the court but not to adjudicate on any matter before the court. 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.¹¹⁵

Assessors may suggest to the judge questions to be put to expert witnesses by the judge to test the witness's opinion or make plain its meaning. Assessors may also assist the judge as to the proper technical inferences to be drawn from proved facts

¹¹⁰ McClellan, above n 33, 221-222.

¹¹¹ *Uniform Civil Procedure Rules 2005* (NSW) r 31.54(1).

¹¹² *Owners of SS Melanie v Owners of SS San Onofre* [1927] AC 162.

¹¹³ *The Queen Mary* (1947) 80 Lloyd's Reports 609, 612; *Earwicker v London Graving Dock Company Limited* [1916] 1 KB 970, 975.

¹¹⁴ *The Koning Willem II* [1908] P 125, 137; *The City of Berlin* [1908] P 110, 118; *The Marinegra* [1959] 2 Lloyd's Reports 65.

¹¹⁵ *Earwicker v London Graving Dock Company Limited* [1916] 1 KB 970, 975.

or as to the extent of the difference between apparently contradictory conclusions in the expert field.¹¹⁶

The Land and Environment Court of NSW 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.¹¹⁷

Appointment of 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.¹¹⁸ The court may refer a matter to a referee at any stage in the proceedings whenever the court is satisfied that doing so will best achieve the objective of the just, quick and cheap resolution of the real issues in the proceedings.¹¹⁹

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.¹²⁰ On receipt of the report, the court sends a copy to the parties.¹²¹ The court may:

- (a) adopt, vary or reject the report in whole or part;
- (b) require an explanation from the referee;
- (c) remit for further consideration by the referee any matter; or
- (d) decide any matter on the evidence taken before the referee.¹²²

The court has a discretion in relation to the adoption or rejection of a referee's report. Considerations relevant to the exercise of the discretion may involve the nature of the proceedings, their length and complexity, the apparent competence and

¹¹⁶ *Richardson v Redpath Brown* [1944] AC 62, 70.

¹¹⁷ *Land and Environment Court Act 1979* (NSW) ss 12, 37.

¹¹⁸ *Uniform Civil Procedure Rules 2005* (NSW) cl 20.14, 20.17.

¹¹⁹ *Ibid* r 20.14(1); *Stockland (Constructors) Pty Ltd v Darryl I Coombs Pty Ltd* [2004] NSWSC 333 at [45], [46].

¹²⁰ *Uniform Civil Procedure Rules 2005* (NSW) r 20.23.

¹²¹ *Ibid* r 20.23(2).

¹²² *Ibid* r 20.24(1).

expertise of the referee, the procedures adopted by the referee and the nature of the evidence, as well as the nature and apparent substance of the complaints made by a party about the referee's report.¹²³

Specialist courts or tribunals

Where courts or 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 that comprises, in addition to judges, persons having specialist knowledge and experience who are appointed as commissioners.¹²⁴ Commissioners must have qualifications and experience in disciplines of learning relevant to the Court's jurisdiction, including: administration of local government or town planning; town, country or environmental planning; environmental science, protection of the environment or environmental assessment; land valuation; architecture, engineering, surveying or building construction; management of natural resources or Crown lands; urban design or heritage; land rights for Aborigines or disputes involving Aborigines; and law.¹²⁵

Commissioners are able to inform themselves as they think fit, including using their own specialist knowledge and experience.¹²⁶ Commissioners can adjudicate, conciliate or mediate appropriate administrative and civil matters.¹²⁷

The rules of procedural fairness should be observed by members of a specialist court or tribunal 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.

¹²³ *Chloride Batteries Australia Ltd v Glendale Chemical Products Pty Ltd* (1988) 17 NSWLR 60, 67; *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549, 563; *Chocolate Factory Apartments Pty Ltd v Westpoint Finance Pty Ltd* [2005] NSWSC 784 at [6]-[8].

¹²⁴ *Land and Environment Court Act 1979* (NSW) s 12.

¹²⁵ *Ibid* ss 12(2) and (2AA).

¹²⁶ *Ibid* s 38(2).

¹²⁷ *Ibid* ss 30, 33, 34, 34AA, 36.

The Land and Environment Court encourages the selection of the appropriate means of providing expert evidence having regard to the circumstances of each case. Different cases may justify different means and even, in a particular case, different issues may justify different means. The Court's Practice Notes summarise the different means and guidelines for selection of the appropriate means.¹²⁸

CONCLUSION

Expert evidence is fundamental to decision-making by courts. The traditional adversarial system of adjudication has led to problems regarding the integrity and comprehensibility of expert evidence, and the efficiency of the adjudicative process. Courts have addressed these problems by adopting court rules on expert evidence, requiring experts to adhere to a code of conduct, requiring joint conferencing and reporting of experts, requiring experts to give their evidence concurrently, directing the use of single experts, appointing experts to assist the court, and using the expertise of technical experts on the court. The goal of these innovations is to improve the reliability and efficiency of expert evidence in the court.

¹²⁸ The Practice Notes of the Land and Environment Court can be viewed at the Court's website: Land and Environment Court of NSW, *Practice Notes* (18 December 2014) <http://www.lec.justice.nsw.gov.au/lec/practice_notes.html>.