

Urban Development Institute of Australia Legal Luncheon

**Address by The Hon. Justice B J Preston
Chief Judge, Land and Environment Court**

**21 March 2006
Sofitel Wentworth Hotel, Sydney**

Appointment of Court Appointed Expert Witnesses in the Land and Environment Court

Expert evidence is today fundamental to adjudication in the courts and the Land and Environment Court in particular. 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 trier of fact, now need to be illuminated by specialised knowledge. Yesterday's common sense may be today's nonsense. The unformed opinions of the trier of fact may be idiosyncratic or just plain wrong. Expert opinion evidence is needed to assist the trier of fact to draw correct inferences in decision-making.

The duty of an expert has always been to assist the court on matters within the expert's expertise. That is the very justification of the exception to the opinion rule of evidence.

Yet problems have been encountered with expert evidence in the adversarial system of litigation in the Court.

These problems arise because the expert is initially recruited as part of the team which investigates and advances a party's contentions and then has to change roles and seek to provide the independent expert evidence which the Court is entitled to expect.

Courts have said, therefore, that a new approach is required which emphasises the expert's impartiality.

The Land and Environment Court Rules 1996 and Expert Witness Practice Direction contain this needed emphasis on impartiality. The duty of the expert is to help the court on the matters within his or her expertise. This duty overrides any obligation to the person from whom he or she has received instructions or by whom he or she is paid.

Notwithstanding these reforms, concerns still continue to be raised as to the impartiality of the experts called by parties and hence of the reliability and helpfulness of the expert evidence given by such persons.

There is also concern that a multiplicity of experts will increase cost and delay. The multiplicity may be by reason of each party calling an expert in relation to a particular issue or a party calling more than one expert on an issue.

Justice McClellan took the further step in an endeavour to address these problems of encouraging the appointment of a single court-appointed expert in relation to an issue. The Court adopted Part 39 of the Supreme Court Rules which makes provision for the Court to appoint an expert to inquire into and report on any question in the proceedings. A special Practice Direction on Court Appointed Experts was issued on 1 February 2005.

The procedure for appointment of a court appointed expert is set out in the Practice Direction and Part 39 of the Supreme Court Rules.

The selection of the appropriate person is initially done by the parties. Para 12 of the Practice Direction provides:

“12. Although the Court will decide whether an expert or experts should be appointed the Court expects the parties to agree on the particular person or persons to be appointed. Failing agreement the Court will make the appointment. Where there is no agreement the parties shall provide a list of up to three experts acceptable to that party and the fee arrangement which each expert requires”.

In practice, mostly the parties are able to agree on the identity of the expert to be appointed by the Court. In the minority of cases where the parties have not been able to agree, the Court's practice has been to require each party to put forward 3 names with each curriculum vitae and the Court makes a selection from those names.

In England, there is the facility in the Civil Procedure Rules 1998 for the Court to direct that evidence be given by a single expert. Ordinarily, the parties instruct the single expert. Rule 35.7 provides:

- “35.7 –
- (1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by one expert only.
 - (2) The parties wishing to submit the expert evidence are called “the instructing parties”.
 - (3) Where the instructing parties cannot agree who should be the expert, the court may
 - (a) select the expert from a list prepared or identified by the instructing parties; or
 - (b) direct that the expert be selected in such other manner as the court may direct.

The Court may direct a single expert on the application of a party or on its own initiative. If the Court proposes to make an order on its own initiative, the procedure is that the Court gives any person likely to be affected by such an order an opportunity to make representations usually within seven days.

Difficulties can arise where a single expert is appointed to give evidence on a particular issue, but there are a number of disciplines relevant to that issue.

The English Practice Direction (Experts and Assessors), paragraph 5 states that where the court has directed that the evidence on a particular issue is to be given by one expert only but there are a number of disciplines relevant to that issue, a leading expert in the dominant discipline should be identified as the single expert. He/she should prepare the general part of the report and be responsible for annexing or incorporating the contents of any other experts in other disciplines.

Part 39 of the Supreme Court Rules and the Court's Practice Direction on Court Appointed Experts does not give any guidance as to the criteria to be used in selecting the expert who should be a court appointed expert. There are some unstated, but nevertheless implied criteria for selection.

First, the field of knowledge must be one in which expert evidence can be called. Expert opinion evidence will not be permitted if 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 an expert possessing special knowledge or experience in the area. Statements of the obvious or ordinary are not admissible. A person ought not to be called to give such evidence.

Secondly, the field of knowledge in which the expert is to express an opinion must be one which the law recognises. The subject matter of the opinion must form 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 and special acquaintance with such body of knowledge would render the opinion of assistance to the court.

Hence, if a person is knowledgeable in and could express an opinion on, for instance, astrology or creation science, that person would not be qualified to give expert testimony because neither fields are recognised by the law.

Thirdly, the person must be qualified as an expert in the recognised field and have acquired specialised knowledge based on the person's training, study or experience.

Here, some further specification may be required. A person will better assist the decision making if the person's qualifications include particular training, study or experience in relation to the very question on which expert evidence is sought. This requires descending below the "genus" of the recognised field (such as "planning") to the "species" of knowledge particularly relevant to the question in issue (such as "planning concerning licensed premises").

In practice, this may require parties to request expert witness candidates to provide further and better particulars of their qualifications, beyond their standard curriculum vitae, to demonstrate their particular expertise to give expert opinion evidence on the question involved in the case.

A person will also better assist the decision-maker if the person is recognised as a leader in the relevant field of knowledge.

This may require parties casting their net wider than has been the practice to catch the leading experts in the field. These persons may never have given, or may have rarely given, evidence in court. Yet, by reason of their reputation and standing as leaders in the field, their expert evidence may be of greater reliability and weight and hence helpfulness to the Court. There has been a tendency for parties to nominate and for the Court to appoint the familiar faces. I would encourage the parties to search further afield.

Fourthly, the person must be impartial. This requires the person to be free from actual bias, but also free from an appearance of bias (to a reasonable and independent bystander). This requires the parties to ascertain whether the potential candidates have any conflicts of interest such as having performed work for one of the parties in or of relevance to the particular case in which expert evidence is proposed to adduced.

This may mean that the pool of experts able to be appointed as a court-appointed expert is reduced by eliminating consultants who regularly work for, or are called to give evidence in Court as experts for, one or other of the parties. Conversely, the pool of experts is increased by adding experts who do not regularly do such work. These persons may well correspond with those leading experts in the field who have not in the past regularly given evidence in Court.

Fifthly, the person must be ready, willing and able to perform the work necessary to discharge the duty as court-appointed expert. This requires consideration of the person's access to adequate

- (i) human resources,
- (ii) research facilities,
- (iii) technical and technological resources and
- (iv) administrative resources.

It also involves consideration of the time the person has available to carry out the necessary research, field or experimental work, deliberation, oral report and written report involved in being a court-appointed expert in the case.

Sixthly, the expert needs to be able to perform properly the duties as a court-appointed expert in relation to the questions involved at a cost that is

reasonable. There needs to be a reasonable proportionality between the cost and the objectives to be achieved. Obtaining a better quality expert and expert evidence may be worth the additional expense.

There have been some suggestions that the Court should approve a list of persons suitable to be appointed as court-appointed experts in various fields of knowledge. The Court has not embraced this suggestion yet. The Court invites comments in relation to the suggestion.

Some issues that would need to be considered if the Court were to adopt a Court approved list of experts might include the following:

- (a) Whether having an exclusive list – that is, persons may only be appointed as a court appointed expert if they are on that list – is too great a departure from the adversarial system of justice and the rules of natural justice. Parties would no longer be able to nominate and the Court would not appoint a person who, although meeting the requisite criteria for appointment as an expert, was not included on the Court approved list.
- (b) Whether the list would be sufficiently comprehensive and inclusive. There may be a tendency for the Court approved list to become dominated by forensic experts whose primary business is giving evidence in Court. They would nominate themselves for inclusion on the list. Other experts, including leaders in their fields of knowledge, who have not, or have rarely given evidence in Court may not nominate themselves for inclusion in the list.
- (c) The criteria for inclusion on the list, including qualifications in the field of knowledge and training in the role of an expert witness in court.
- (d) The criteria for review of persons on the list in order to stay on the list, including the timing and regularity of any review.
- (e) The process for inclusion on the list, including the processes for making application, consideration of an application, selection of identity of the decision-maker and for appellate review of decisions to include or not include a person on the list.
- (f) The criteria for removal from the list, such as any unethical conduct, partial or biased evidence in court or failure to discharge the duties of a court appointed expert in a timely and competent manner.
- (g) The process for removal from the list, including the processes of notification of intention, inviting and considering submissions, selection of the identity of decision-maker and appellate review of decisions to remove or not remove a person from the list.

- (h) The Court resources available for establishing, maintaining, and reviewing the list, including financial, administrative and judicial resources.

My preliminary view in light of these factors is that a court-approved list inevitably will raise more problems than it might be worth. However, I do not have a closed mind on the issue.

The Court invites stakeholders and users of the justice system administered by the Court to monitor the process of appointment of expert witnesses as Court-appointed witnesses and whether benefits are being achieved by having Court-appointed experts and provide constructive suggestions as to mechanisms for improvements.