

Info Sheet 11

Guide for experts giving evidence

The purpose of this pamphlet

The quality and presentation of expert evidence is important in assisting the Tribunal to make reliable and correct decisions in the many areas of its jurisdiction. Experience shows that, when expert witnesses understand and observe their duty to bring to proceedings an objective assessment of the issues within their expertise, their evidence is of great assistance. When expert witnesses are not objective, and assume the role of advocate for a party, their credibility and consequently the reliability of their evidence suffers.

To maximise the value of expert evidence, the Tribunal has developed standard procedures requiring experts in the same field to confer prior to the hearing, to prepare a joint statement for the hearing, and to give evidence together ("concurrently") at the hearing. This pamphlet is intended to assist parties, their representatives and expert witnesses to understand experts' duties to the Tribunal and the requirements of these procedures. Similar documents have been issued by other tribunals and courts in Australia.

The Tribunal will usually make an order at the first directions hearing or at a subsequent directions hearing requiring a party who engages an expert to attend a mediation or a compulsory conference or to give evidence at a hearing to give the expert:

- (a) this pamphlet, unless the party has already given the expert a copy of the pamphlet; and
- (b) a copy of the orders made by the Tribunal relating to expert evidence.

The Tribunal will also usually make an order at the first directions hearing or at a subsequent directions hearing requiring an expert witness

to acknowledge in his or her statement of evidence and in any joint statement that he or she has read this pamphlet and the orders made by the Tribunal relating to expert evidence and agrees to be bound by the expert's duties stated in the pamphlet.

Directions hearings can also be used to clarify any questions that a party or an expert may have about expert evidence and how the procedures relating to expert witnesses operate in practice. A party or an expert witness may request the Tribunal to convene a directions hearing for this purpose.

Expert's duties to the Tribunal

The Tribunal's rules state that an expert at a hearing before the Tribunal, including a mediation, a compulsory conference and a final hearing, or at a conferral of experts directed by the Tribunal has the following paramount duties to the Tribunal:

- (a) to be impartial and independent;
- (b) to assist the Tribunal; and
- (c) not to be an advocate for the party that has engaged them.

It is fundamental that experts giving evidence in the Tribunal appreciate, acknowledge and comply with their duties to the Tribunal.

The Tribunal recognises that an expert may have been engaged by a party before the proceedings were commenced to provide advice or as their representative or advocate. Nevertheless, when the expert attends a mediation, a compulsory conference or a conferral of experts directed by the Tribunal, or gives evidence at a hearing, he or she must appreciate, acknowledge and comply with the duties set out above.

Expert's statement of evidence

The Tribunal will usually require a party who proposes to call an expert to give evidence at a hearing, by a date specified in the order, to file with the Tribunal, and give to the other party, a signed statement of the expert's evidence.

In that statement, the expert must:

- (a) acknowledge that he or she has read this pamphlet and the Tribunal's orders relating to expert evidence and agrees to be bound by the expert's duties to the Tribunal stated in the pamphlet; and
- (b) specify:
 - (i) his or her qualifications, training and experience in the field of expertise;
 - (ii) the facts, matters and assumptions on which the opinions in the statement of evidence are based (a letter of instructions may be annexed);
 - (iii) reasons for each opinion expressed;
 - (iv) if applicable, that a particular question or issue falls outside his or her field of expertise;
 - (v) any literature or other materials utilised in support of the opinions; and
 - (vi) any examinations, tests or other investigations on which he or she has relied and identify and give details of the qualifications, training and experience of the person who carried them out.

If the expert believes that the statement may be incomplete or inaccurate without some qualification (for example that his or her opinion is not a concluded opinion because of insufficient research or insufficient data), then that qualification must be stated.

If a document referred to in the statement of evidence is contained in a bundle of documents filed by any party, then the

document must be identified by reference to the relevant bundle and page number in the bundle and must not be attached to the statement. Any document referred to in the statement that is not contained in a bundle of documents filed by any party must be attached to the statement and numbered.

Conferral and joint statement of expert witnesses

In accordance with Tribunal's rules, the Tribunal will usually require the expert witnesses in each field of expertise or in a particular field of expertise to confer with one another in the absence of the parties and their representatives, either on their own (an "unchaired conferral") or facilitated by a Tribunal member (a "chaired conferral"), and prepare a joint statement of:

- (a) the issues arising in the proceeding which are within their expertise;
- (b) the matters upon which they agree in relation to those issues;
- (c) the matters upon which they disagree in relation to those issues;
- (d) the reasons for any disagreement; and
- (e) any other matters that the experts consider to be relevant in the proceeding.

A model format for a joint statement of expert witnesses appears at the end of this pamphlet.

The parties, the parties' representatives, the public and the media may not attend a conferral of expert witnesses (including a chaired conferral) unless the Tribunal orders otherwise.

It will usually be desirable for the experts to meet face to face and to work through the issues together. In some cases, where the issues are relatively narrow, it may be adequate for them to confer by telephone. It may be necessary to meet on more than one occasion to finalise the conferral process. The experts who confer determine the arrangements for the conferral, for example, where and when to meet, who keeps notes, who writes up the joint

statement, and who sends the signed joint statement to the Tribunal and the parties.

The experts may jointly request the parties to provide a venue or facilities for the conferral and joint statement.

A conferral between expert witnesses, whether on their own or before a Tribunal member, is not a mediation and its purpose is not to settle the matter or compromise on issues by negotiation. Rather, the purpose of an experts' conferral is to assist the Tribunal to resolve the matter correctly, quickly and with minimum costs to the parties. It is expected that, consistently with their obligations to the Tribunal, the experts will make a genuine attempt to identify the matters of agreement between them and to clearly state their respective reasons for any disagreement. This enables the Tribunal and the parties at the hearing to focus their attention on the key matters of expert evidence that require resolution.

An expert must exercise his or her independent professional judgment in relation to the conferral and joint statement and must not act on any instruction or request by a party, representative or any other person to withhold or avoid agreement. An expert must not discuss the content of a draft joint statement with a party, representative or any other person (other than an expert who participated in the conferral). An expert must not disclose anything said or done in the course of a conferral of expert witnesses, other than the joint statement, to a party, representative or any other person (other than an expert who participated in the conferral) unless the Tribunal grants leave.

The experts must each sign the joint statement at the conclusion of their conferral. If the statement is in handwriting, the experts must appoint one of them to generate a typed version of it, and each must sign the typed document.

The experts must file the joint statement with the Tribunal and give copies of it to the parties by the date specified in the Tribunal's orders.

Late filing of the joint statement may result in an adjournment of the hearing, causing inconvenience, delay and expense for the parties, witnesses and the Tribunal. It is therefore important for experts to adhere to the timetable set by the Tribunal's orders. Usually the conferral will be followed by a hearing, but experts may also recommend that a further directions hearing should be convened for programming orders to be reviewed.

The joint statement will be admitted into evidence at the hearing and a party will not be permitted to present any evidence inconsistent with any agreement in the joint statement unless the Tribunal grants leave. Anything said or done in the course of the conferral, other than the joint statement, may not be referred to in evidence during the hearing unless the Tribunal grants leave.

Concurrent evidence of expert witnesses

In accordance with Tribunal's rules, the evidence of expert witnesses must be given concurrently at the hearing in each field of expertise (unless the Tribunal directs otherwise). Concurrent evidence involves the expert witnesses being:

- (a) called to give evidence together;
- (b) asked questions by the Tribunal;
- (c) given the opportunity by the Tribunal to respond directly to each other's evidence;
- (d) given the opportunity by the Tribunal to ask each other any questions which they consider might assist the Tribunal; and
- (e) asked questions by the parties or their representatives.

Experts will be given an opportunity at the commencement of their evidence to ask the Tribunal any questions about the operation of the concurrent evidence process.

The concurrent evidence process enables the Tribunal to gain a clear understanding of the different opinions of the experts and gives the experts the opportunity to explain in greater detail the reasons for their conclusions.

The process gives the experts the opportunity to highlight any flaws that they see in another expert's opinions directly to the Tribunal.

The concurrent evidence process may, and frequently does, involve more than two experts in a particular field. It is important that parties make arrangements with their expert witnesses in sufficient time to ensure that the experts can manage the conferral process within their work schedules. This is particularly important where a number of experts are involved in the process. Similarly, parties need to make early arrangements to ensure that expert witnesses

are available at the same time to give their evidence concurrently.

Model Format for Joint Statement of Expert Witnesses – attached below)

**STATE ADMINISTRATIVE TRIBUNAL
MODEL FORMAT FOR JOINT STATEMENT OF EXPERT WITNESSES**

Full title (including number) of proceeding

Names of expert witnesses

Field of expertise of expert witnesses

Date of conferral

If “chaired conferral”, Tribunal member who facilitated conferral

Acknowledgments by expert witnesses

Each expert witness acknowledges that he or she:

- (a) has read the Tribunal’s pamphlet entitled *A guide for experts giving evidence in the State Administrative Tribunal* and the Tribunal’s orders made in this proceeding relating to expert evidence; and
- (b) is bound by the following paramount duties to the Tribunal:
 - (i) to be impartial and independent;
 - (ii) to assist the Tribunal; and
 - (iii) not to be an advocate for the party that has engaged them.

Facts, matters and assumptions upon which opinions are based

[Briefly summarise the facts, matters and assumptions upon which each expert witness’s opinions or their joint opinions are based or refer to the witness statement(s) in which the relevant facts, matters and assumptions are set out.]

Methodology used by expert witnesses

[Briefly explain methodology used by each expert witness.]

Issues in the proceeding within the expertise of the expert witnesses

Issue No.	Issue
1	[State issue 1]
2	[State issue 2]
3	[State issue 3]
[etc]	[etc]

[State the issues arising in the proceeding which fall within the expert witness's area of expertise, having regard to the parties' respective statements of issues, facts and contentions and any nominated issues or questions in the Tribunal's orders.]

Matters on which the expert witnesses agree

Issue	Matter on which expert witnesses agree
[State issue 1]	[State mater of agreement 1 on issue 1]
	[State mater of agreement 2 on issue 1]
[State issue 2]	[State mater of agreement 1 on issue 2]
	[State mater of agreement 2 on issue 2]
[State issue 3]	[State mater of agreement 1 on issue 3]
[etc]	[etc]

[Set out matters of agreement in relation to each issue with sufficient detail to ensure that the hearing can focus on matters of disagreement.]

Matters on which the expert witnesses disagree and the reasons for any disagreement

Issue	Matter on which expert witnesses disagree	Expert A's reasons for disagreement	Expert B's reasons for disagreement
[State issue 1]	[State mater of disagreement 1 on issue 1]	[State Expert A's opinion and essential reasons for their opinion and for disagreeing with Expert B's opinion on this matter]	[State Expert B's opinion and essential reasons for their opinion and for disagreeing with Expert A's opinion on this matter]
	[State mater of disagreement 2 on issue 1]	[etc]	[etc]
[State issue 2]	[etc]	[etc]	[etc]
[etc]	[etc]	[etc]	[etc]

[Set out matters of disagreement in relation to each issue and clearly and concisely state each expert witness's opinion and essential reasons for their opinion and for disagreeing with any other expert witness's opinion. Expert witnesses should preferably state the essential reasons for their position, directly responding to any other expert witness's opinion discussed in conferral, in the joint statement, rather than cross-reference to evidence given in their witness statement.]