Chapter 7
Changing the Role of Experts
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Often plaintiffs and defendants are subject to extra trauma and expense as a result of days and days of argument over the competing views of so-called experts.¹

1. INTRODUCTION

Expert evidence has recently been the subject of extensive enquiry and reports in a number of jurisdictions. These reviews have led to the introduction of a new framework for the judicial control of expert evidence to improve the usefulness of and address the high costs of such evidence.

New strategies for controlling expert evidence include:

- limiting the number of expert witnesses to be called
- appointing single joint experts (that is, one expert appointed jointly by the parties, sometimes referred to as the ‘parties’ single joint expert’) or court-appointed experts
- permitting experts to give evidence concurrently in a panel format (often referred to as ‘concurrent evidence’ or ‘hot-tubbing’), or in a particular order
- introducing a code of conduct to be observed by experts
- formalising processes for instructing experts and presenting experts’ reports
- requiring disclosure of fee arrangements
- imposing sanctions on experts for misconduct
- developing training programs for expert witnesses.

Victoria has implemented some, but not many, of these measures.

Reviews by the NSW Law Reform Commission² (NSWLRC) and the NSW Attorney General’s Civil Procedure Working Party³ chaired by Justice Hamilton have culminated in new procedural rules, and a revised Code of Conduct for Expert Witnesses, which came into force recently in NSW. Those rules promote flexibility and court control, and provide greater scope for the court to make directions in relation to the use of expert evidence.

In view of the extensive review and consultation carried out in NSW and given the desirability of increased harmonisation in procedural rules both within and between jurisdictions, we recommend that the recently introduced NSW provisions should be adopted in Victoria, with some minor modifications, as discussed at the end of this chapter. Before setting out our recommendations, we examine the comments made in submissions, consultations and relevant literature, and review developments in other jurisdictions.

2. THE PROBLEMS WITH EXPERT EVIDENCE

The reforms mentioned above aim to address the many concerns expressed by the judiciary and profession about the quality and cost of expert evidence. Justice Peter McClellan of the NSW Supreme Court believes ‘the effective and fair use of expert evidence is one of the most significant issues which the courts now face’,⁴ and unless courts are able to address perceived problems, the community’s confidence in the legal system will be fundamentally undermined.⁵

Justice Stuart Morris, former President of VCAT, describes the problem from a judicial perspective:

Judges harbour a strong anxiety about the use of expert evidence in court, which can be explained in several ways. Questions have been raised about levels of competence, lack of training and accreditation of so-called experts. Expert evidence may also unduly prolong litigation without significantly assisting the trier of fact, leading to a higher cost of litigation. And an over-reliance on expert evidence may shift the burden of responsibility from the bench to the witness box.⁶

Expert evidence has been identified as one of the principal sources of expense, complexity and delay in civil proceedings.⁷ This is in part the result of parties calling multiple experts in jurisdictions ‘where limits have not been placed upon the number of experts who can be qualified and called. Quantity rather than quality of opinion has often been the norm’.⁸

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⁴ Justice Peter McClellan, ‘The New Rules’ (Speech delivered at the Expert Witness Institute of Australia and The University of Sydney Faculty of Law Conference, Sydney, 16 April 2007).
⁵ Justice Peter McClellan, ‘Concurrent Expert Evidence’ (Speech delivered at Medicine and Law Conference, Law Institute of Victoria, Melbourne, 29 November 2007).
Perhaps the most common criticism of expert witnesses is that they are overly partisan and fail to provide the court with a neutral or independent opinion:

When expert witnesses give paid evidence, they are part of a system that is an affront to common sense. Experts paid by parties to court cases may be unbiased but they are not disinterested. So, it should be no surprise that the evidence presented by expert witnesses is in most cases entirely predictable: it favours those who pay their bills.9

The NSWLRC describes this phenomenon as ‘adversarial bias’, and identifies three varieties:10

- deliberate partisanship—‘an expert deliberately tailors evidence to support his or her client’11
- unconscious partisanship—‘the expert does not intentionally mislead the court, but is influenced by the situation to give evidence in a way that supports the client’12
- selection bias—‘litigants choose as their expert witnesses persons whose views are known to support their case’.13

It is alleged in some cases that the bias displayed by an expert is serious enough to amount to professional misconduct. Such misconduct may involve experts giving evidence about matters beyond their expertise or deliberately falsifying their evidence. Whether the court can or should be able to impose sanctions on expert witnesses in such cases remains controversial.14

The actual extent of adversarial bias is, of course, almost impossible to calculate. However, in 1999 the Australasian Institute of Judicial Administration released a report entitled Australian Judicial Perspectives on Expert Evidence: An Empirical Study. The report contained the findings of research conducted by Ian Freckelton, Prasuna Reddy and Hugh Selby, who sent a questionnaire (incorporating multiple choice questions and space for ‘free-form comments’) to all 478 Australian judges, and received 244 responses.15 Some of the key findings of that study were:

- 68.1 per cent of respondents said they ‘occasionally encountered’ expert bias, while 27.59 per cent said they encountered it ‘often’;16 34.84 per cent of respondents (the largest proportion) felt expert bias to be the ‘single most serious’ of the seven categories of expert evidence problems that were put to them.17
- 76.72 per cent of respondents said they were ‘occasionally’ faced with evidence that they found difficult to understand, while 14.22 per cent had this experience ‘often’.
- An overwhelming percentage of respondents thought expert reports, evaluated in terms of ‘usefulness’, were in general ‘reasonable’, ‘good’ or ‘very good’.18 However, 53.39 per cent of respondents thought lawyers played a role in settling the content of experts’ reports ‘occasionally’, while 17.8 per cent of respondents thought this occurred ‘often’.19
- 54.34 per cent of respondents thought that more use of court-appointed experts would be ‘helpful’, while 33.79 per cent thought it would not be helpful.20 Some judges indicated that they regarded the judicial appointment of an expert as ‘trespassing into the arena of litigation’.21

Adversarial bias, as the term suggests, can also be seen as an inevitable feature of a system in which courts must arrive at decisions about complex questions of fact based on the competing views of opposing experts. Justice Davies, former Justice of Appeal of the Supreme Court of Queensland, believes such a system only serves to further polarise the opinions of expert witnesses and to induce adversarial bias. This in turn obscures the real questions in dispute, makes the judge’s role more difficult and potentially favours more articulate and positive witnesses.22 The solution to this problem, Justice Davies argues, is to have the court appoint its own expert witnesses.

Apart from being a problem for judges, the culture of adversarialism is also said to have the effect of deterring experts from participating in litigation:

It is commonplace to hear people who have much to offer to the resolution of disputes—doctors, engineers, valuers, accountants and others—comment that they will not subject themselves to a process which is not efficient in using their time. It is equally common to be told that the person will not give evidence in a forum where the fundamental purpose of the participants is to win the argument rather than seek the truth. A process
in which they perceive other experts to be telling ‘half truths’ and which confines them to answering only ‘the questions asked’ depriving them of the opportunity, as they see it, to accurately inform the court, is rejected as ‘game playing’ and a waste of their time.23

Justice Garry Downes, President of the Australian Administrative Appeals Tribunal, on the other hand, denies that adversarial bias in expert evidence is a significant problem:

*My impression from 32 years of examining expert witnesses and four years of listening to them is that, with very few exceptions, they do not deliberately mould their evidence to suit the case of the party retaining them. When they do, this emerges. They certainly expose the matters which support the hypothesis which most favours the party calling them. But, provided the matters are legitimate and that any doubt as to the strength of the hypothesis is exposed, I see nothing wrong with this. Indeed, I think this process is one of the great values of the traditional approach to expert evidence. It is exposing different expert points of view for evaluation by the judge.*24

On this basis, Justice Downes advises adopting caution in relation to the use of single and court-appointed experts, because ‘there is no way of testing whether the conclusions are correct’.25

Submissions to our review also raised problems encountered with expert evidence.

The Victorian Bar identified the following key problems with expert evidence:

- There is a problem with ‘adversarial bias’ in expert witnesses. This seems to be a perennial issue and steps have already been taken through the implementation of the Expert Witness Codes of Conduct in Form 44A of the Supreme Court Rules. However, the question still arises whether any further measures need to be undertaken to reduce partisan and unethical expert witnesses.

- The use of experts in the courts is excessive. At present, there is no restriction on the number of expert witnesses that a party can call to support its cause. Also, in multi-party proceedings, a number of parties who adopt the same expert position can call a number of expert witnesses, who are all essentially supporting the same opinion. This creates potential for considerable cost and delay.

- There is a problem with how expert witnesses can give evidence and be cross-examined in the most effective and flexible way at trial.26

The question of bias was also raised by the TAC, the Victorian WorkCover Authority and the Legal Practitioners’ Liability Committee. The TAC submitted that the rules governing expert witnesses ‘require urgent reform’ and noted the measures introduced in NSW to address adversarial bias.27 WorkCover supported the need for review to ‘address the requirement of expert objectivity’ and for any changes to the rules to reinforce the expectation that ‘the expert is required to assist the court and not a party to the litigation’. WorkCover also submitted that:

*Addressing the court’s approach to the use of expert evidence might also go some way towards addressing the increasing costs of the provision of expert evidence and/or curtail the obtaining of ‘expert’ opinion as a matter of process and with little or no focus on evidentiary need or quality of content.*

The Legal Practitioners’ Liability Committee submitted that the ‘most prevalent problem is the expert who acts more as an advocate for their client’s case, than providing independent expert evidence’. A number of judges told us that in their opinion adversarial bias on the part of expert witnesses remains a problem, despite the code of conduct.28

Judge Wodak submitted that:

*in certain types of civil litigation, the role of expert testimony, and thus the cost of it, is very significant in both relative and absolute terms. Litigation involving allegations of, for example, professional negligence, product liability, patents, and intellectual property all invariably involve expert evidence. Sometimes the expert evidence consumes much of the time of the trials. The cost of obtaining expert reports has become a very substantial burden for parties. At times, there is difficulty encountered in obtaining expert opinion. That is a difficulty sometimes experienced more by one side than the other, for example, by plaintiffs in medical negligence litigation.*

11 Ibid 102.
12 Ibid 40.
13 Ibid 103.
14 For further discussion, see Chapter 3, in particular the examination of *Meadow v General Medical Council* [2006] EWCA Civ 390, [2007] 1 All ER 1.
16 Ibid 25–6.
17 Ibid 37.
18 Ibid 41.
19 Ibid 40.
20 Ibid 102.
21 Ibid 103.
23 Justice Peter McClellan, ‘Contemporary Challenges for the Justice System—Expert Evidence’ (Speech delivered at Australian Lawyers’ Alliance Medical Law Conference, Sydney, 20 July 2007).
26 Submission CP 33 (Victorian Bar).
27 Submission CP 37 (Transport Accident Commission).
28 Supreme Court consultations, 2 August 2007, 9 August 2007. This view was also expressed in two confidential submissions.
Submissions from the Victorian Aboriginal Legal Service, Turks Legal and AXA Australia, and Deacons also raised the problem of the cost and delay associated with expert evidence. The Supreme Court noted that ‘courts are ultimately reliant upon the integrity of experts’, and that enhancing case management may help to ensure their integrity and reduce delays. The Law Institute of Victoria acknowledged that ‘changes to the way in which expert evidence is presented to the court in civil proceedings could offer significant cost and time savings and increase the integrity of the evidence’.

Concerns were also raised about delays experienced in obtaining reports from medical experts in some personal injury matters. Such delays can cause additional procedural delays and expense, for example if a mediation has to be postponed because a relevant medical report has not been obtained.

The Mental Health Legal Centre expressed concern about the problem of access to experts such as psychiatrists:

For too many people this is a ‘threshold’ requirement that cannot be met because of cost and difficulty finding practitioners with sufficient accessibility, recognised expertise and independence.

The Forensic Accounting Special Interest Group of the Institute of Chartered Accountants in Australia called for greater consistency between the rules of the Supreme, County and Magistrates’ Courts, as well as between Victoria and other Australian jurisdictions, although it did not see a strong case for change in terms of the obligations of expert witnesses. The Magistrates’ Court advised that it did not encounter problems with expert witnesses because the lower value of the claims within its jurisdiction renders it uneconomic for parties to call an excessive number of experts.

On the other hand, some people believe the drive to reform the rules relating to expert evidence is misplaced. Law firm Maurice Blackburn submitted that there was no reason to change the rules governing expert evidence, especially in the area of medical negligence litigation, given the high rate of pre-trial settlement of such matters. The firm also noted the potential for additional demands on experts to deter them from continuing to offer their services for litigation. The Law Institute of Victoria also warned against the introduction of further pre-trial requirements for expert evidence:

Given that the vast majority of litigation is resolved prior to trial, it is important to avoid imposing rules which will increase costs and delays without ultimately improving the outcome for the parties.

Dr Gary Edmond provided the commission with his extensive submission to the NSWLRC’s expert evidence reference in February 2005. In it Dr Edmond noted there is little empirical information on expert evidence, such that ‘the extent and seriousness of problems associated with [it] is largely unknown’ and much debate is predicated upon anecdote and speculation and focussed exclusively on trials. Dr Edmond also argued:

Bias, objectivity, impartiality, neutrality and independence are not particularly precise or analytically reliable concepts when it comes to assessing expert evidence. They tend to be used descriptively, and retrospectively, to privilege certain subjects and opinions. All experts (and expertise) are more [or] less aligned, subjective, interested, biased and dependent …

Controversy, disputes and disagreement are largely intractable features of modern scientific activity. For many commentators and proponents of law reform there seems to be a suggestion that legal contexts produce partisan pressures. While legal contexts may contribute to … polarisation and alignment … few commentators recognise that there are no neutral procedures or mechanisms for resolving expert disagreement.

Similarly, in its submission to the NSWLRC the Forensic Accounting Group challenged the assumption that adversarial bias is pervasive. The submission noted that it is not surprising that litigants tend to adduce expert evidence that supports their cases, and that divergences of opinion can sometimes be traced to differences in the ‘facts’ provided to experts in the first place. It emphasised that complex fields of knowledge do not lend themselves to attempts to formulate definitive answers:

in our experience, the existence of different and contrary views among experts frequently reflects the complexity of the matters on which they are asked to opine. Complex questions can often be addressed from a number of different perspectives,
each perspective offering a different solution. Where this occurs, it would be wrong to conclude that one or both experts are biased.

The existence of complexity in relation to matters in which experts may offer an opinion creates a particular challenge for those non-experts called upon to assess the evidence of the experts. How can a person who, by definition, does not have personal knowledge of the matter on which expert evidence is called, identify the cause of a difference in views between two or more experts? To conclude that such a difference is caused by bias or partisanship would be to rule out what in our opinion is the more likely answer: genuine differences of opinion held by reasonable unbiased experts and brought about by the complexity of the matter under consideration.

3. CURRENT LAW IN VICTORIA

Order 44 of the Supreme and County Court civil procedure rules and Order 19 of the Magistrates’ Court rules govern the use of expert evidence in Victorian courts. Order 33 of the Supreme and County Court rules and Order 19A of the Magistrates’ Court rules deal specifically with medical examinations and exchange of medical reports in personal injury matters.

Leave of the court is not required to adduce expert evidence. Parties seeking to adduce expert evidence do, however, have to serve on each other party a copy of any expert’s report before trial.37 The court generally makes orders at an early directions hearing fixing dates for the exchange of expert reports.38

In the Supreme and County Courts parties must provide their experts with a copy of the expert witness code of conduct, and in turn experts must acknowledge they have read the code and agree to be bound by it.39 The code of conduct (form 44A) stipulates that an expert ‘has an overriding duty to assist the Court impartially on matters relevant to the area of expertise of the witness’ and ‘is not an advocate for a party’. It also specifies the form and content required of experts’ reports. The court may direct expert witnesses to confer and to provide a joint report specifying the extent to which they agree and reasons for any disagreement.40 The Supreme Court’s Commercial List Practice Note indicates that the court may give directions that expert evidence be presented in a panel format, and may limit the number of experts each party may call.41

In personal injury matters, plaintiffs must serve on defendants those medical reports which the plaintiff intends to tender at trial.42 Defendants must likewise serve on the plaintiff those reports they intend to tender at trial, but they must also serve on the plaintiff any medical report prepared as a result of an examination of the plaintiff, regardless of whether they intend to use it at trial.43 The Law Institute of Victoria, the Victorian Bar Council and AMA Victoria have developed Guidelines for Cooperation between Doctors and Lawyers.44 The guidelines aim to promote cooperation between lawyers and doctors in the preparation of expert medical reports, medical examination of plaintiffs and attendance at court by doctors to give expert evidence.45 The County Court may refer medical questions arising in proceedings under the Accident Compensation Act 1985 to a medical panel for opinion.46 The court must treat such opinion as final and conclusive.47 Parties are only compelled to disclose an expert’s report if they intend to adduce evidence from the expert at trial. Legal professional privilege attaches to an expert’s report obtained by a party for the purpose of the litigation if the party does not intend to call that expert to give opinion evidence.48

In the Commercial List of the Supreme Court:

A party will be taken to have waived for the purpose of the proceeding legal professional privilege to the content of a witness statement which has been served in that proceeding. Legal professional privilege attaching to the content of an unserved draft witness statement, including an expert’s witness statement, is not taken to be waived merely by the filing and service of the final form of such witness statement.49

There is no code of conduct for expert witnesses in the Magistrates’ Court, nor do the Magistrates’ Court rules set out that experts have a duty to assist the court. However, the Magistrates’ Court is in the process of drafting a new set of rules which would, if implemented, align its rules with those of the County and Supreme Courts, and therefore incorporate a code of conduct.
Chapter 7

Changing the Role of Experts

There are no express sanctions for breach of the code of conduct by an expert witness. However, as discussed in Chapter 3, there are a number of potential sanctions experts may face if they breach their duties to the court.50

4. DEVELOPMENTS IN OTHER JURISDICTIONS

The commission has reviewed proposals and measures developed and implemented in other jurisdictions, both in Australia and overseas, to address widespread concerns about expert evidence.

4.1 NEW SOUTH WALES

4.1.1 NSW Uniform Civil Procedure Rules

Following a report by the NSWLRC and its subsequent review by the NSW Working Party on Civil Procedure (both summarised below), new rules governing expert evidence were introduced in NSW in 2006.51 They are currently in force under Part 31 of the Uniform Civil Procedure Rules 2005 and their key features are as follows:

- A purposes clause: the main purposes of the expert evidence rules are to ensure the court has control over the giving of expert evidence, to restrict expert evidence to that which is reasonably required, to avoid unnecessary costs associated with retaining experts, to enable a single expert to be engaged by the parties or appointed by the court and to declare the duty of an expert witness in relation to the court (r 31.17).

- A requirement to seek directions: parties are required to seek directions from the court if they intend to adduce expert evidence at trial (r 31.19).

- A detailed list of the court’s power to give directions: the court may give such directions as it considers appropriate regarding the use of expert evidence, including a list of 10 specified directions such as limiting the number of expert witnesses who may be called to give evidence on a particular question or refusing to allow expert evidence to be permitted on a specified issue (r 31.20).

- Disclosure of contingency fee arrangements: experts providing their services on a contingent or deferred fee basis must disclose that information in any report they prepare for the proceedings (r 31.22).

- Additional duties on expert witnesses: experts must read, agree to be bound by and comply with the code of conduct (r 31.23). Schedule 7 sets out two new duties: a duty of the expert witness to comply with a direction of the court, and a duty to work cooperatively with other expert witnesses.

- Detailed rules providing for conferences and joint reports: the court may direct witnesses to confer and endeavour to reach agreement on any matters in issue, to prepare a joint report specifying matters agreed and not agreed, and to base any joint report on specified facts or assumptions of fact (rr 31.24–31.26).

- More extensive requirements for experts’ reports: rule 31.27 and schedule 7 also list what must be included in an expert’s report. These requirements are more extensive than those currently in force in Victoria.52

- An extensive list of options for the manner in which expert evidence is to be given: the court may give detailed directions to facilitate, among other things, concurrent expert evidence (hot-tubbing) or the giving of evidence in a particular sequence (r 31.35).

- A power to appoint single joint experts: the court has a discretion to order that an expert be engaged jointly by the parties, and may make directions in respect of the selection and engagement of the parties’ single expert, the instructions to be given to the expert, and the remuneration of the expert. The parties may seek clarification of the single expert’s report, may cross-examine the expert, but are not entitled to adduce other expert evidence unless the court orders otherwise (rr 31.37–31.45).
• A power to appoint court-appointed experts: the court has a discretion to appoint an expert to inquire into and report on an issue on behalf of the court, and may make directions to facilitate such an appointment. The parties may seek clarification of the expert’s report, may cross-examine the expert, but are not entitled to adduce any other expert evidence without leave of the court (r 31.46–31.54).

The Practice Notes for the Supreme Court’s General Case Management List and the Commercial List and Technology and Construction List encourage practitioners to make arrangements for the use of single experts.53 The General Case Management List Practice Note describes the types of directions the court is likely to make in personal injuries matters. The court will limit the number of experts to be called by a party to one medical expert in any specialty (unless there is a substantial issue as to ongoing disability), and two experts of any other kind. All expert evidence will be given concurrently unless there is a single expert appointed or the court grants leave for the evidence to be presented in a different way. A single expert will generally be appointed to give opinion evidence in relation to each head of damages.

The experience of the NSW expert evidence rules has been the subject of recent commentary and analysis. In relation to court-appointed experts, Justice Hamilton has observed that ‘in my experience, albeit limited, of the use of a court appointed expert, the production of a well reasoned expert report will often quell disputation, even in cases which [are] otherwise embattled’.54 Single experts are often used in the Supreme Court for issues such as cost of care in personal injury matters.55 Single and court-appointed experts and concurrent evidence are routinely and successfully used in the NSW Land and Environment Court.56

Justice Hamilton also reports that in the NSW Supreme Court the conference provisions are widely used and the hot-tubbing provisions increasingly so. Justice Peter McClellan reports that concurrent evidence ‘has met with overwhelming support from the experts and their professional organisations’ because they are ‘better able to communicate their opinions … and more effectively respond to the views of the other expert or experts’.57 Another benefit is the increased opportunity for experts to express their views in their own words, given the more reduced scope for questioning by counsel.58 Justice McClellan also estimates that taking expert evidence concurrently can reduce the time required for such evidence by 50–80 per cent.59 He describes the process as follows:

The experts are sworn together and using the summary of matters upon which they disagree the judge settles an agenda with counsel for a directed discussion, chaired by the judge, of the issues the subject of disagreement. The process provides an opportunity for each expert to place their view before the court on a particular issue or sub-issue. The experts are encouraged to ask and answer questions of each other. Counsel may also ask questions during the course of the discussion to ensure that an expert’s opinion is fully articulated and tested against a contrary opinion. At the end of the process the judge will ask a general question to ensure that all of the experts have had the opportunity of fully explaining their position.60

Dr Gary Edmond also acknowledges that the introduction of the new expert evidence rules appears to have produced beneficial results, such as the quick resolution of some complex cases and the potential to improve communication and comprehension.61 However, he argues that, in light of the equivocal data available on its impact on cost and delay, ‘when it comes to improving access to justice the existence of the rule would encourage the courts to develop (through practice decisions and/or practice notes) cohesive policies in this connection’.62

4.1.2 NSWLRRC Report (2005)

In 2005, the NSWLRRC released a report entitled Expert Witnesses.63 The report traced the historical development of current practices for expert evidence, and set out recent developments in NSW and elsewhere before examining specific issues in detail.

Permission rule

The NSWLRRC recommended that leave of the court be required for the introduction of all expert evidence in civil proceedings (the permission rule).64 The purpose of the permission rule, it felt, would be to make it clear that the courts have ‘comprehensive control over expert evidence’,65 and the existence of the rule would encourage the courts to develop (through practice decisions and/or practice notes) cohesive policies in this connection.66

50  See also NSWLRRC (2005) above n 2, [9.75].
51  Uniform Civil Procedure Rules (Amendment No 12) 2006 (NSW).
52  See Supreme Court (General Civil Procedure) Rules 2005 r 44.01(3); County Court Rules of Procedure in Civil Proceedings 1999 r 44.01(3). There is no code of conduct in the Magistrates’ Court Civil Procedure Rules 1999.
53  Practice Note No SC CL5 Supreme Court Common Law Division—General Case Management List (5 December 2006); Practice Note SC Eq 3 Supreme Court Equity Division—Commercial List and Technology and Construction List (30 July 2007).
55  Justice McClellan (20 July 2007) above n 23.
58  Justice McClellan (29 November 2007) above n 5.
59  Ibid.
60  Ibid.
62  Ibid 76.
64  Ibid [R6.1]. A similar recommendation was made by Lord Woolf.
65  Ibid [6.11].
66  Ibid [6.8], [6.10].
Disclosure

No recommendations were made about disclosure of experts’ reports. The NSWLRC felt that the existing rules about the disclosure of reports to be relied on at trial were adequate.67 It declined to recommend an extension of the rules to render all experts’ reports obtained for litigation purposes (whether intended to be relied on at trial or not) subject to disclosure obligations, noting that such a move could encourage litigants to ‘shop’ for extreme opinions to avoid the prospect of obtaining a (counterproductive) adverse report.68 Moreover, the NSWLRC did not support the introduction of a requirement that all written communications between litigants or their representatives and experts be disclosed, citing practical difficulties and the potential for such a requirement to be ineffectual in practice.69

Consultation between experts

The NSWLRC noted that the Uniform Civil Procedure Rules already made provision for courts to direct expert witnesses to confer and produce a joint report setting out ‘matters agreed and matters not agreed and reasons for any disagreement’,70 and most submissions ‘supported the requirement for experts to consult before hearing’.71 Some concern was raised as to the real benefits of expert conferences and their potential to be unproductive or dominated by one or other of the participants.72 The NSWLRC did not propose any change to the rules,73 but emphasised that courts would often need to give detailed directions about the conduct of a conference in a particular case.74

Concurrent evidence

The NSWLRC noted that the use of concurrent evidence in the Land and Environment Court75 had been well received:

This procedure has met with overwhelming support from experts and professional organisations. They find that, not being confined to answering questions put by the advocates, they are better able to communicate their opinions to the court. They believe that there is less risk that their opinions will be distorted by the advocates’ skills. It is also significantly more efficient in time. Evidence that may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as 20% of the time which would have been necessary.76

The NSWLRC considered that the use of concurrent evidence could have potential benefits in a broader range of cases:

The process moves somewhat away from lawyers interrogating experts towards a structured professional discussion between peers in the relevant field. The experience in the Land and Environment Court indicates that the nature of the evidence is affected by this feature, and that experts typically make more concessions, and state matters more frankly and reasonably, than they might have done under the traditional type of cross-examination. Similarly, it seems that the questions may tend to be more constructive and helpful than the sort of questions sometimes encountered in traditional cross-examination.77

However, it emphasised that:

• it was difficult to predict whether the widespread implementation of concurrent evidence procedures would produce tangible benefits
• their usefulness would depend on ‘the skills, preparedness and cooperation of the lawyers and experts involved’ as well as the skill of individual judges in ‘structuring and [maintaining] control of the discussion’.78

For these reasons, the NSWLRC declined to recommend that the Rules give concurrent evidence preference over more traditional methods,79 and concluded that the courts’ powers under the Rules80 were sufficient to enable the use of the former in appropriate cases.81

Joint expert witnesses and court-appointed witnesses

The report devoted considerable attention to the issue of single joint expert witnesses. The NSWLRC outlined the basic concept in this way:

In general terms, the idea of the joint expert witness is to limit the expert evidence on a question arising in the proceedings to that of one expert witness, selected jointly by
the parties affected, or, if they fail to agree, in a manner directed by the court. If a party is dissatisfied with the expert’s evidence, the court has discretion to allow that party to adduce other expert evidence … The primary objective of a joint expert witness is to assist the court in reaching just decisions by promoting unbiased and representative expert opinion. Another important objective is to minimise costs and delay to the parties and to the court by limiting the volume of expert evidence that would otherwise be presented.\footnote{Ibid [7.36].}

It noted that:

\begin{quote}
Evaluations of the Woolf reforms have found the concept of the single joint expert witness to be working well, and that judges, lawyers and parties to proceedings have displayed a willingness to use single experts, especially in matters that do not involve substantial amounts and where the issues are relatively uncontroversial.\footnote{Ibid [7.9].}
\end{quote}

The NSWLRC considered possible advantages to the use of single joint experts. It considered that the use of single joint experts could mitigate ‘significant problems [that existed] with the way expert evidence comes before the court’.\footnote{Ibid [7.33].} In particular, it noted:

- the potential exists for expert evidence to become less expensive and time-consuming.\footnote{Ibid [7.9].}
- However, there was a dearth of ‘systematic evidence’ on this point,\footnote{Ibid [7.21].} and in some circumstances (in particular contentious ones) there was the potential for the use of a joint expert witness to generate expense and other difficulties.\footnote{Ibid [7.33].}
- the potential exists to ‘reduce bias inherent in the adversarial system’ and eliminate the problem of polarisation, therefore improving the calibre of evidence placed before the court.\footnote{Ibid [7.33].} Adversarial bias and polarisation was a ‘serious problem’, although there existed no valid measure of its extent.\footnote{Ibid [7.20].} It was noted that:

\begin{quote}
The jointly selected expert will not have been selected because he or she supports a party’s cause, and, after selection, will be under no pressure to support one party rather than another. Agreement on the selection will be reached only if both sides regard the candidate as being well qualified, and as being a fair and reasonable professional. The court is then likely to have the benefit of sound professional testimony, reasonably representative of thinking in the discipline.\footnote{Ibid [7.20].}
\end{quote}

Against these putative benefits were weighed a number of potential problems:

- Some submissions warned that parties would likely be engaged ‘shadow’ experts ‘to brief them on the relevant issues and assist with cross-examination of the single expert’, which would frustrate the intention of reducing the cost of expert evidence.\footnote{Ibid [7.56].}
- Some submissions expressed concern that the use of single joint experts would suppress legitimate differences of opinion (both methodological and substantive) that might exist in particular fields of expertise.\footnote{Ibid [7.6]–[7.7].} However, the NSWLRC felt that this was ‘an objection to the appointment of a joint expert witness in [contentious] cases, not an objection to the court having the option of a joint expert witness in appropriate cases’.\footnote{Ibid [6.51].} The character of the field of knowledge in question was a matter that courts could take into account in determining whether or not to approve the use of a joint expert.\footnote{Ibid [6.57]–[6.58].}
- Some consider that the use of joint expert witnesses involves an abdication of the court’s decision-making function, as ‘the prospect of a judge rejecting the evidence of a joint expert witness is so unlikely that the process effectively transfers the decision-making authority on the issue requiring expert opinion from the judge to the expert’.\footnote{Ibid [6.45].} The NSWLRC rejected this idea, noting that the parties retained the power to interrogate and make submissions on the evidence of the expert, and call their own experts if the circumstances warrant it, and that ‘the ultimate decision’ as to the significance of the evidence remains with the court.\footnote{Ibid [6.61].}

Having taken these considerations into account, the NSWLRC recommended that the use of joint expert witnesses be added to the ‘array of options’ available to a court in endeavouring to ‘facilitate the just, quick and cheap resolution of the real issues in the proceedings’.\footnote{Ibid [6.36].} The NSWLRC did not feel that the joint expert witness ought to supersede the court-appointed witness, citing “fundamental differences between the two roles”.\footnote{Ibid [7.72].} Rather, it felt that the court-appointed witness

\begin{thebibliography}{99}
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\item\textsuperscript{67} Ibid [6.20]. See Uniform Civil Procedure Rules 31.28 (NSW).
\item\textsuperscript{68} NSWLRC (2005) above n 2, [6.32]–[6.33].
\item\textsuperscript{69} Ibid [6.25]–[6.28].
\item\textsuperscript{70} See Uniform Civil Procedure Rules 31.24 (NSW).
\item\textsuperscript{71} NSWLRC (2005) above n 2, [6.36].
\item\textsuperscript{72} Ibid [6.37]–[6.38], [6.41].
\item\textsuperscript{73} Ibid [6.45].
\item\textsuperscript{74} Ibid [6.43]–[6.44].
\item\textsuperscript{75} See ibid [6.50] as to the procedure adopted.
\item\textsuperscript{76} Ibid [6.51].
\item\textsuperscript{77} Ibid [6.56].
\item\textsuperscript{78} Ibid [6.57]–[6.58].
\item\textsuperscript{79} Ibid [6.61].
\item\textsuperscript{80} See Uniform Civil Procedure Rules 31.35.
\item\textsuperscript{81} NSWLRC (2005) above n 2, [6.62].
\item\textsuperscript{82} Ibid [7.6]–[7.7].
\item\textsuperscript{84} NSWLRC (2005) above n 2, [7.33].
\item\textsuperscript{85} Ibid [7.9].
\item\textsuperscript{86} Ibid [7.21].
\item\textsuperscript{87} Ibid [7.23].
\item\textsuperscript{88} Ibid [7.9], [7.14].
\item\textsuperscript{89} Ibid [7.20].
\item\textsuperscript{90} Ibid [7.19].
\item\textsuperscript{91} Ibid [7.9].
\item\textsuperscript{92} Ibid [7.9], [7.29].
\item\textsuperscript{93} Ibid [7.30].
\item\textsuperscript{94} Ibid [7.30], [7.32].
\item\textsuperscript{95} Ibid [7.27], citing R Scott, ‘Court Appointed Experts’ (1995) 25 Queensland Law Society Journal 87.
\item\textsuperscript{96} NSWLRC (2005) above n 2, [7.28].
\item\textsuperscript{97} Ibid [7.33].
\item\textsuperscript{98} Ibid [7.36].
\end{thebibliography}
Changing the Role of Experts

should be retained, ‘with amendments designed to restore the core concept of enabling the court to obtain expert assistance which it believes that it would not otherwise receive, providing unequivocally for the court’s control over that process’.  

The NSWLRC considered it essential that the role and purpose of the joint expert witness be clearly delineated. 101 In particular, its recommendations included that:

- the court is empowered to order that a joint expert witness be engaged, with the witness to be selected by agreement between the parties or, failing this, by direction of the court
- the joint expert witness must consent to being selected
- the parties are prohibited from seeking the opinion of any persons proposed as a joint expert witness before the selection is made
- the parties must agree on instructions to be given to the joint expert and, failing agreement, each must serve on their opponent the instructions separately given to the expert, who will then provide a report responding to the alternative instructions
- the expert is permitted to seek the court’s assistance or directions on performance of the role, but must put the issue to the parties’ legal representative before doing so
- the parties are responsible for providing the expert with the relevant code of conduct
- the expert is required to send the report on the issue or issues to the parties, who can seek clarifications in writing
- the parties affected by the expert evidence are permitted to examine, cross-examine or re-examine the expert as the court directs
- the parties are not permitted to adduce separate expert evidence on a matter submitted to the joint expert without leave
- the parties are jointly and severally liable for the expert’s fees, but the court may direct when and by whom the fees are to be paid and retains its powers in relation to costs. 102

The NSWLRC also recommended some minor clarifications in relation to court-appointed experts, the main purpose of which was to differentiate them from joint experts. 103

Ethical witness conduct

The NSWLRC proposed some small changes to the existing code of conduct for expert witnesses, and proposed that it be made explicit that the code applied to joint experts and court-appointed experts as well as experts engaged by the parties. 104

The NSWLRC also gave extensive consideration to the engagement of experts pursuant to ‘contingency fees’, such that ‘the amount payable to the expert is directly affected by the outcome of the proceedings’. 105 Some submissions were hostile to such arrangements, noting their potential to compromise the independence of the expert and encourage speculative litigation, whereas others considered them necessary to ensure access to justice. 106 It was noted that there was no ‘reliable evidence about their prevalence’. 107 The NSWLRC felt that outright prohibition of contingency fee arrangements would be difficult to enforce and could preclude some meritorious cases from being run (although it had no data as to how often this might occur). 108 It stated:

Rather than prohibition, a more constructive approach for the law to take would be to ensure, as far as possible, that the terms on which experts are engaged are made known to the other parties and to the court. This would make it possible for a party to cross-examine the expert (and perhaps other witnesses) in order to bring out the funding arrangements and their potential implications. Submissions could then be made as to the effect of the funding arrangements on the objectivity of the expert. It would be open to a party to submit that, in all the circumstances, the funding arrangements should lead the court to attach little weight to the expert’s evidence, or even, perhaps, disregard it entirely. 109

Accordingly, the NSWLRC recommended that all fee arrangements for the engagement of experts be disclosed to all parties and the court. 110
With regard to unprofessional behaviour on the part of expert witnesses, the NSWLRC considered that existing ‘sanctions’ were sufficient but felt that ‘there should be a requirement, by rule of practice note, that expert witnesses be notified of the sanctions available in the case of inappropriate or unprofessional conduct’.

### 4.1.3 NSW Working Party on Civil Procedure (2006)

The NSW Attorney General’s Working Party on Civil Procedure, chaired by Justice John Hamilton, was charged with considering and responding to the recommendations of the NSWLRC. Its report emphasised the value of flexible procedures for experts and stressed (endorsing Lord Woolf and the NSWLRC) the importance of courts maintaining control over the use of expert evidence.

#### Permission rule

The Working Party expressed doubts about the direct transplantation of Lord Woolf’s permission rule into the NSW Rules:

> As I understand it, the [permission] rule was cast in this form by Lord Woolf as a shock tactic to confront the situation he saw in England in the 1990s of partiality and proliferation of expert witnesses in court proceedings … [However, it must be remembered that there is a] difference in context between England in 1995 and NSW in 2006. We have in that time strengthened case management powers enormously. We have introduced rules that compel the exchange of expert reports and the use of reports as evidence in chief, that prescribe a code of conduct for expert witnesses; that provide for compulsory conferences between experts; and (although this is beyond what is dealt with in the Report) that provide for ‘hot tubbing’ at the trial, that is, the giving of evidence concurrently by more than one expert … The shock of the new is not as necessary in NSW in 2006 as it was in England in 1995.

The Working Party reported ‘no support at all’ among its members for the introduction of a permission rule, noting ‘two principal objections’:

- a permission rule would undercut the adversarial basis of litigation, as ‘[w]e still have a system where it is the responsibility and prerogative of the parties to assemble the evidence and shape their own cases’
- the need for flexible procedures ‘is at odds with the notion that, at some unspecified stage of the proceedings, there should be an application which should produce an answer, yea or nay, as to whether any, and if so, what expert evidence should be given’.

However, the Working Party did consider ‘that there should be a rule that ensures control by the court of the giving of expert evidence in all proceedings’. It was of the opinion that expert evidence could be dealt with in the course of ordinary directions hearings and case management conferences, and therefore felt that it would suffice to place an obligation on the parties to seek directions about expert witnesses.

That rule should provide (1) that any party to whom it is or becomes apparent that expert evidence will be given at a trial must promptly seek the directions of the court in this regard; (2) that such directions may be sought at a directions hearing or case management conference, but, if there is no appropriate directions hearing or case management conference available, then directions must be sought by notice of motion.

Directions (which the Working Party felt should be non-exhaustively specified in the Rules) could:

- require that no expert evidence be given on a particular subject
- limit the subjects on which expert evidence could be given
- limit the number of experts permissible on a particular subject
- provide for the appointment of a single expert witness or a court appointed expert
- mandate the holding of conferences of experts.

#### Joint expert witnesses and court-appointed witnesses

The Working Party agreed with the NSWLRC’s conclusion that joint expert witnesses and court-appointed witnesses should be differentiated under the Uniform Rules: ‘it is desirable that there should
be the ability to appoint an expert essentially under the control of the court as well as one essentially under the control of the parties’. It endorsed the NSWLRC’s recommendations about the procedures that ought to govern parties’ single experts and court-appointed experts.

**Ethical witness conduct**

The Working Party was in partial agreement with the NSWLRC in relation to its proposed changes to the Uniform Civil Procedure Rules expert witness code of conduct, but favoured the retention of a provision about the form of expert reports, to which it felt it was important to draw the experts’ attention.

There was some disagreement about the disclosure of fee arrangements. The Working Party concluded that disclosure should only be required as a matter of course in the case of speculative or deferred fees, acknowledging the view that ‘the routine revelation of fees in all cases is an unwarranted intrusion which may lead to a diminution in the pool of persons available as expert witnesses’.

With regard to sanctions, the Working Party questioned whether it was ‘appropriate to wave under the nose of prospective witnesses in every case the existing sanctions, which in general terms one would have thought that they are aware of in any event’. The Working Party also disputed the NSWLRC’s view that costs orders could be made against experts, which raised the further question of whether such an order ought to be available. It concluded:

> The total experience in litigation of the members of the Working Party ran to centuries rather than years or even decades. None of the members, to his or her recollection, had in fact been involved in any case where an order for costs against an expert witness appeared to be called for. Balancing the rarity of occasions for the imposition of the sanction against the risk of its availability causing experts to withdraw themselves from giving reports, the Working Party has come to the conclusion that a costs sanction should not be provided for at this stage.

**4.2 QUEENSLAND**

The Uniform Civil Procedure Rules 1999 (Qld) state that a ‘witness giving evidence in a proceeding as an expert has a duty to assist the court’ and that that duty ‘overrides any obligation the witness may have to any party to the proceeding or to any person who is liable for the expert’s fee or expenses’. The rules set out the requirements for the form and content of an expert’s report and permit the court to direct experts to meet and confer.

One of the main purposes of the rules is to ‘ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court’. An expert may give evidence in a proceeding if:

- the parties have agreed in writing that expert evidence may help in resolving a substantial issue in the proceeding and jointly appoint an expert to prepare a report
- a party applies to the court for an order that an expert be appointed
- the court of its own motion appoints an expert.

The rules provide for the appointment of an expert before proceedings have been commenced. If the parties agree that there is a dispute between them that will probably result in a proceeding, and obtaining expert evidence immediately may help in resolving a substantial issue in the dispute, they may jointly appoint an expert to give an opinion on an issue. Alternatively, they may apply to the court for the appointment of an expert. If the dispute proceeds to litigation, that expert is the only person who may give evidence on that issue, unless the court otherwise orders.

Similarly, if an expert is appointed jointly by the parties after proceedings have been commenced, that expert is the only expert who may give evidence on the issue, unless the court orders otherwise.

If a party applies to the court for the appointment of an expert, the party must file supporting material, including the names of at least three experts qualified to give evidence on the issue in question.

When considering whether to appoint an expert on the application of a party or of its own initiative, the court may consider:

- the complexity of the issue; and
- the impact of the appointment on the costs of the proceeding; and
The Rules also make provision for shadow experts. A shadow expert is an expert engaged to assist the court and may exercise any powers the court delegates. When making a report, an expert appointed to assist with the preparation of a party's case but not on the basis that the expert will, or may, give evidence at the trial. If a party engages a shadow expert, the party must notify the other parties of the engagement and the details of the expert.

Parties seeking to rely on expert evidence at trial must, on request from another party, disclose ‘details of any fee or benefit the expert has received, or is or will become entitled to receive, for preparation of the report or giving evidence on behalf of the party’ as well as ‘details of any communications relevant to the preparation of the report…between the party, or any representative of the party, and the expert; and…between the expert and another expert’. The court may relieve a party from disclosing such information.

The Rules also make provision for shadow experts. A shadow expert is an expert ‘engaged to assist with the preparation of a party’s case but not on the basis that the expert will, or may, give evidence at the trial’. If a party engages a shadow expert, the party must notify the other parties of the engagement and the details of the expert.

The rules permit the court to make directions in respect of expert evidence, including that the expert witnesses confer and report on the matters on which they agree and disagree, and that they give evidence in a particular sequence or concurrently.

The South Australian Magistrates’ Court has power ‘to refer any question arising in an action for the determination of any issue of fact or law, or for the purpose of ascertaining by the expert’s report opinions on any technical matter, to an expert appointed by the court’. Such an expert becomes an officer of the court and may exercise any powers the court delegates. When making a report, an expert appointed by the court must give the following undertaking:

I undertake to limit my expressions of opinion to matters within my expertise, to disclose the factual material upon which my opinions are based, and to be fair, unbiased and accurate in my expression of opinion.

Andrew Cannon, Deputy Chief Magistrate and Senior Mining Warden, South Australia, has researched and reported on the success of the court’s practice of referring technical matters (such as building disputes) to experts:

The experience of the South Australian Magistrates Court is that it can be of great benefit to a court to have its own expertise available. This can be used to assist parties to settle their disputes at the outset, to prepare for an efficient trial, to assist the court to understand technical issues during a trial, and to provide expert opinions to the court to decide technical issues… Costs are saved and the court now deals effectively with technical complexities that result in the parties being denied a prompt, affordable remedy.

Justice Davies has expressed the view that the model implemented in these rules will eliminate adversarial bias, and because the parties are able to select the expert (either before or after proceedings are commenced) they will be disinclined to appoint their own ‘shadow’ experts, which will therefore reduce costs. The model also provides for the appointment of an additional expert where there are genuine differences of opinion, which could counter some of the criticisms otherwise able to be levelled at the concept of single joint experts.

4.3 SOUTH AUSTRALIA

In South Australia expert reports to be relied on in the Supreme and District Courts must comply with Practice Direction 5.4, which requires experts to acknowledge they have read and understood the relevant rules and practice direction. The Practice Direction states that experts’ overriding duty is to assist the court and that they are not advocates for a party. It also specifies the form and content of experts’ reports and sets out the consequences of failure to comply with the rules or practice direction:

- The court may adjourn the hearing or trial at the cost of the party in default or that party’s lawyer.
- The court may direct that evidence from that expert not be adduced by that party at the trial in the action.
- The trial judge may award costs to the other parties or reduce costs otherwise to be awarded to the party in default.

Parties seeking to rely on expert evidence at trial must, on request from another party, disclose ‘details of any fee or benefit the expert has received, or is or will become entitled to receive, for preparation of the report or giving evidence on behalf of the party’ as well as ‘details of any communications relevant to the preparation of the report…between the party, or any representative of the party, and the expert; and…between the expert and another expert’. The court may relieve a party from disclosing such information.

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122 Ibid [22].
124 Ibid [25].
125 Ibid [28].
126 Ibid [27].
127 Ibid [32].
128 Ibid [23].
129 Uniform Civil Procedure Rules 1999 (Qld) r 426.
130 Uniform Civil Procedure Rules 1999 (Qld) r 428.
131 Uniform Civil Procedure Rules 1999 (Qld) r 429B.
132 Uniform Civil Procedure Rules 1999 (Qld) r 423.
133 Uniform Civil Procedure Rules 1999 (Qld) r 429G.
134 Uniform Civil Procedure Rules 1999 (Qld) r 429R.
135 Uniform Civil Procedure Rules 1999 (Qld) r 429R.
136 Uniform Civil Procedure Rules 1999 (Qld) r 429H(5).
137 Uniform Civil Procedure Rules 1999 (Qld) r 429K(1).
139 Supreme Court Civil Rules 2006 (SA) r 160(3)(e), Supreme Court of South Australia, Practice Directions to Operate in Conjunction with the Supreme Court Civil Rules 2006. The relevant District Court rules and practice direction are identical: District Court Civil Rules 2006 (SA) r 160(3) (e), District Court of South Australia, Practice Directions to Operate in Conjunction with the District Court Civil Rules 2006.
140 Supreme Court of South Australia, Practice Directions to Operate in Conjunction with the Supreme Court Civil Rules 2006 [5.4.6].
141 Supreme Court Civil Rules 2006 (SA) r 160(5).
142 Supreme Court Civil Rules 2006 (SA) r 160(6).
143 Supreme Court Civil Rules 2006 (SA) r 161.
144 Supreme Court Civil Rules 2006 (SA) r 213.
145 Magistrates Court Act 1991 (SA) s 29.
146 Magistrates Court Act 1991 (SA) s 29(2).
147 Magistrates Court (Civil) Rules 1992 (SA) r 69A(2).
4.4 WESTERN AUSTRALIA

4.4.1 Law Reform Commission of Western Australia Report (1999)

In 1999, the Law Reform Commission of Western Australia (LRCWA) released the final report on its review of the criminal and civil justice system. The LRCWA noted that ‘uncontrolled expert evidence has been described as one of the major costs in civil litigation’ and stated that ‘the lack of impartiality of witnesses is a major problem’. It recommended, among other things:

- that courts encourage a shift towards use of an agreed single expert (using costs sanctions against uncooperative parties)
- that parties be able to submit questions to opponents’ experts prior to trial, on payment of ‘reasonable costs’
- formalisation of a rule that no expert evidence be adduced without leave
- enhanced case management, with the potential for a case manager to require the parties to endeavour to agree to certain facts prior to the engagement of an expert or experts, for the purpose of avoiding later controversies
- maintenance of a distinction between ‘expert advisers’ (who have assisted one of the parties in a partisan manner pre trial) and ‘expert witnesses’ (who provide ‘independent’ evidence at trial), with expert witnesses being required to disclose (and able to be cross-examined on) the nature of their relationship with a litigant.
- that legal professional privilege be waived in relation to expert witnesses called at trial.
- that where the parties fail to appoint a single expert, their partisan experts be required to respond to each others’ statements, noting points of agreement and disagreement, and detailing reasons for the latter
- that costs be disallowed for experts’ reports of excessive length
- that, for the purpose of reinforcing experts’ obligation to assist the court, experts’ reports contain a declaration to the effect that all relevant and appropriate matters have been enquired into and documented
- establishment of an Expert Evidence Forum for the purpose of encouraging communication between judges, practitioners, litigants and experts themselves.

The LRCWA noted that it was dissuaded from suggesting more adventurous reforms for expert evidence because of a lack of data about ‘the use and cost of expert witnesses in litigation’ and ‘strong stakeholder opposition’.

4.4.2 Western Australia Rules

The rules provide that no expert evidence may be adduced at trial without leave of the court. The court may give directions in respect of the expert evidence sought to be adduced, and the general form of order made by the court requires the experts to confer for the purpose of narrowing or removing any differences between them. The court may limit the number of experts able to be called to give evidence at trial.

The Practice Direction for cases in the Commercial and Managed Cases List of the Supreme Court of Western Australia encourages more flexibility in relation to expert evidence:

Innovative approaches to expert evidence will be encouraged, including the parties conferring with a view to agreeing some or all of the facts upon which the expert opinions are to be based and the questions to be addressed to the experts. Conferment of experts prior to trial will normally be ordered. The taking of expert evidence concurrently at trial will be considered.
A code of conduct applies to any experts engaged to give evidence in a proceeding in the District Court of Western Australia.\(^{168}\) The code states that expert witnesses have an overriding duty to assist the court, and are not advocates for the parties retaining their services. It also sets out requirements for the form and content of experts’ reports and for conferences between experts. Expert witnesses must certify that they have read and complied with the code of conduct.\(^{169}\)

### 4.5 COMMONWEALTH

#### 4.5.1 Australian Law Reform Commission: Managing Justice (2000)

In 2000, the ALRC released *Managing Justice: A Review of the Federal Civil Justice System*, which made several recommendations ‘aimed at ensuring decision-makers are provided with independent expert evidence, presented or interpreted in the manner that best assists them to make high quality decisions’.\(^{170}\)

The ALRC noted that federal courts and tribunals have ‘well developed rules and procedures enabling them to control the use of expert evidence’,\(^{171}\) and that most practitioners and experts consulted felt that their powers were adequate to the task.\(^{172}\) The major criticism respondents made in connection with expert evidence related to

*particular case types where parties routinely use the same expert witnesses who become associated as ‘applicant’ or ‘respondent’ experts. These criticisms were most applicable to proceedings in the AAT.*\(^{173}\)

The ALRC felt that the Family Court and the Administrative Appeals Tribunal ought to adopt guidelines similar to those in operation in the Federal Court, which were under review at the time of writing, but in general explained the overriding obligation of an expert witness.\(^{174}\) It also favoured the development of codes of practice for expert witnesses by the Australian Council of Professions and its constituent bodies, reasoning that these organisations ‘have a stake in protecting the integrity of the body of knowledge and understanding from which their expertise is drawn’.\(^{175}\)

The ALRC considered, but rejected, the idea of a general moderation of legal professional privilege between experts and the parties responsible for engaging them, noting that ‘it would be unfair to expose experts to cross-examination on the contents of draft reports (which may be no more than the ‘preliminary musings’ of the expert). Experts often modify their views as they carry out more work.’\(^{176}\)

The ALRC expressed support for ‘the further development of Federal Court and tribunal prehearing conferences and other communication and contact between relevant experts’,\(^{177}\) and endorsed the LRCWA’s proposal to permit pre-trial interrogation of an opponent’s expert.\(^{178}\)

The ALRC noted that the use of agreed/appointed experts had the potential to produce costs savings, but that this object would be frustrated if litigants felt compelled to call their own witnesses to ‘supplement or refute’ their opinions.\(^{179}\) It felt that the use of agreed experts should be encouraged, in particular where an ‘established area of knowledge’ was concerned.\(^{180}\) It favoured the integration into the case management process of opportunities for the parties to consider settling on a single expert.\(^{181}\) On the subject of court-appointed experts, the ALRC noted that some submissions expressed ‘strong reservations’, although in general judges saw the practice in a more favourable light than practitioners.\(^{182}\)

The ALRC also discussed the practice of taking the evidence of experts in panels, or hot-tubbing. It noted that hot-tubbing had produced some efficiencies in the Federal Court and the Administrative Appeals Tribunal, although reservations were expressed in submissions about its appropriateness in all cases. It considered that ‘it is desirable for courts and tribunals to have rules or practice directions expressly empowering, and therefore encouraging, judges and tribunal members to direct that expert evidence be adduced in a panel format’ and made a recommendation to that effect.\(^{183}\)

#### 4.5.2 Federal Court of Australia Rules

Where parties intend to call expert witnesses to give opinion evidence, the Federal Court may direct that the experts confer, that they give evidence concurrently or file statements or affidavits indicating whether, after hearing the factual evidence, they adhere to or wish to modify their original opinion.\(^{184}\)

Further, the court has issued guidelines for experts preparing reports and/or giving evidence in a proceeding before it.\(^{185}\) The guidelines are not binding, but the court expects cooperation from legal practitioners and experts in their implementation. They are intended, in part, to ‘assist individual

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150 Ibid [22.1].
151 Ibid [22.2].
152 Ibid [22.3], [R238], [R239].
153 Ibid [22.4], [R240].
154 Ibid [22.5], [R241].
155 Ibid [22.6], [R242].
156 Ibid [R243].
157 Ibid [R245].
158 Ibid [22.13].
159 Ibid [R246].
160 Ibid [22.16]–[22.17], [R247].
161 Ibid [22.17], [R248].
162 Ibid [22.23], [R250].
163 Ibid [22.24].
164 *Rules of Supreme Court 1971 (WA) r 36A.03(2).*
165 Supreme Court of Western Australia, *Notice to Practitioners 1 May 1996, Form 80.*
166 *Rules of Supreme Court 1971 (WA) r 36A.05.*
167 Supreme Court of Western Australia, *Practice Direction No 4 of 2006.*
168 District Court of Western Australia, *Consolidated Practice Direction—Civil Jurisdiction, Annexure C.*
169 District Court Rules 2005 (WA) r 48.
171 Ibid [6.78].
172 Ibid [6.79]; see also [6.93].
173 Ibid [6.78].
174 Ibid [R64].
175 Ibid [6.101], [R65].
176 Ibid [6.84].
177 Ibid [R62].
178 Ibid [R63].
179 Ibid [6.102].
180 Ibid [6.104], [R66].
181 Ibid [6.112].
183 Ibid [6.112], [R67].
184 Federal Court Rules (Cth) r 34A.03.
expert witnesses to avoid the criticism that is sometimes made (whether rightly or wrongly) that expert witnesses lack objectivity, or have coloured their evidence in favour of the party calling them. The guidelines, which must be provided to any expert witness retained by a party, set out the matters to be addressed in the expert’s report, and stipulate that:

1. An expert witness has an overriding duty to assist the court on matters relevant to the expert’s area of expertise.
2. An expert witness is not an advocate for a party even when giving testimony that is necessarily evaluative rather than inferential.
3. An expert witness’s paramount duty is to the court and not to the person retaining the expert.

The guidelines also ask that any pre-existing relationship between the expert and the party seeking to proffer the expert as a witness be disclosed.

The Federal Court has the power to appoint an expert as a court expert to enquire into and report on a question that arises in the proceeding. Where such an expert is appointed, the parties are entitled to adduce evidence of one other expert if they give prior notice of their intention to do so. The court also has the power to appoint, with the consent of the parties, an expert to assist the court on any issue of fact or opinion identified by the court. An expert assistant submits a report to the court and the parties but does not give evidence in the proceeding. The parties have an opportunity to comment on the expert assistant’s report, and may apply to adduce evidence in relation to an issue identified in the report.

4.6 UNITED KINGDOM


Lord Woolf had significant concerns about the incumbent regime for the use of expert evidence in litigation, arguing that it was susceptible to misuse. However, his interim proposals on the topic, which focused on mitigating ‘the full-scale adversarial use of expert evidence’, met with substantial resistance during the consultation stage. Members of the legal profession, he opined, were ‘reluctant to give up their adversarial weapons’.

Lord Woolf nevertheless felt reform to be needed if ‘more focused use of expert evidence’ was to be achieved, and premised his recommendations on the notion that ‘the expert’s function is to assist the court’. He considered that there was no uniform solution appropriate to all cases, and that the preferable approach would be a ‘flexible’ one built around enhanced court control and broad management discretion. In particular, he proposed:

- making leave of the court a condition precedent to the adducing of expert evidence, such that the court can, for example
  - prevent the use of expert evidence, in general or on particular subjects
  - limit the number of experts whose evidence the parties can adduce
  - direct the use of a single expert on a particular matter
  - require an expert’s evidence to be given in writing
  - direct the parties’ experts to meet and produce a joint report noting matters of agreement and divergence
- limiting the scope of expert evidence in fast-track cases (eg, one expert per side per field of expertise, global limit of two experts per side, preference for single joint experts, no oral evidence)
- the entrenchment of the use of single experts as a legitimate case management tool, of particular value in matters involving ‘established areas of knowledge’. Lord Woolf noted that there was significant opposition within the legal profession to the use of single experts, but felt that judges should consider whether it was appropriate in a particular matter. He noted that:
A single expert is much more likely to be impartial than a party’s expert can be. Appointing a single expert is likely to save time and money, and to increase the prospects of settlement. It may also be an effective way of levelling the playing field between parties of unequal resources. These are significant advantages, and there would need to be compelling reasons for not taking them up.

- encouraging, in matters where each of the parties appoints its own expert, cooperation between the experts (if possible resulting in a joint report), and empowering the court to direct that a (private) meeting of experts be conducted (on such terms as the court sees fit) for the purpose of narrowing the outstanding issues;

- reinforcing the idea that the paramount obligation of experts is to assist the court in an impartial manner, through:
  - the formal recognition of experts’ overriding duty to the court;
  - a requirement that experts’ written reports be addressed to the court, where prepared for the purposes of contemplated litigation;
  - a requirement that written instructions (and/or a précis of written instructions) given to experts be annexed to their reports for the reports to be admissible;
  - a requirement that experts’ reports be accompanied by a declaration that the experts understand their obligations and have fulfilled certain requirements in preparing their reports;

- granting a power to the court ‘to order that an examination or tests should be carried out in relation to any matter in issue, and a report submitted to the court’;

- granting wide powers to the court to appoint experts and/or assessors of its own motion;

- encouraging training and proper instruction of experts, in particular with regard to the nature of their role in the legal process.

4.6.2 Civil Procedure Rules

In England and Wales Part 35 of the Civil Procedure Rules 1998 seeks to restrict expert evidence to that which is reasonably required to resolve the proceedings. The Rules stipulate that an expert’s duty is to help the court and that the duty overrides any obligation the expert may have to the party instructing or paying the expert. Expert evidence may only be adduced with leave of the court, and the court may limit the amount of the expert’s fees and expenses able to be recovered from the other party. If two or more parties wish to adduce expert evidence the court may direct that evidence be limited to one expert only, a single joint expert. The court may limit the amount that may be paid by way of fees and expenses to a single joint expert. Where more than one expert is to give evidence, the court may direct them to meet and discuss the extent of agreement between them. Instructions given to an expert by a party are not privileged, and are required to be stated in the expert’s report.

A Practice Direction supplements the Rules, annexing a Protocol for the Instruction of Experts to give evidence in civil claims, which was developed under the auspices of the Civil Justice Council. Many expert witnesses in the UK are listed on the Register of Expert Witnesses. A recent survey of 414 experts on the register revealed there had been a reduction in the number of cases for which experts have been required to give evidence in court, and that 73 per cent of experts surveyed (commonly medical experts) had been instructed as single joint experts. The study also produced data on rates charged by experts for writing reports and appearing in court. Another recent study has produced findings on the training available for expert witnesses.


A recent report by the Commercial Court Long Trials Working Party in England concluded that expert reports ‘in large scale litigation are often too long and over elaborate.’ The Working Party identified that the main reason for this was the ‘failure of the parties and the court to define with sufficient precision the relevant expert disciplines and issues before the experts write their reports.’ It commented that the existing practice of deciding expert witness disciplines at an early case management conference was problematic because at that point disclosure and the exchange of witness statements had not yet occurred.
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The Working Party suggested that parties should more closely consider the disciplines and precise issues to be covered by experts before the court made any orders. In addition, it concluded that judges ‘must take a more active part in the question of whether expert evidence is really needed on a particular topic, and if it is, the particular issues that evidence will cover’. The key recommendations of the Working Party included:

- the List of Issues should identify expert issues, either when it is first produced or subsequently when they have been properly identified
- expert reports should be framed by reference to those issues
- expert reports should normally be exchanged sequentially
- the court should delay settling the List of Issues, to the extent that it relates to expert issues, if more time is needed before doing so
- the court should always consider limiting the length of expert reports.

4.7 CANADA

4.7.1 Canadian Bar Association Report (1996)

In 1996, the Canadian Bar Association published its Systems of Civil Justice Task Force Report. It expressed concern about ‘what appears to be a growing tendency to use increasing numbers of experts at trial’ and the failure of judges to adopt ‘a consistent approach to curtail the scope of opinion evidence offered in complex cases’. It thought these problems could be mitigated through procedural reform and enhanced case management. In particular, it recommended:

- the establishment of strict requirements with regard to both initial and continuing disclosure of expert reports
- the exchange of ‘expert “critique” reports’—‘reports prepared by each party’s expert critiquing the opinions and work undertaken by the opposing party’s expert as reflected in the initial expert report’ and which ‘reflect the rebuttal evidence that experts might be expected to give at trial’
- that judges adopt a more interventionist stance with regard to ‘assisting parties to limit the costs and delay associated with the use of experts’.

The association also offered suggestions for possible efficiencies in relation to the introduction of expert evidence at a trial, in particular, the increased use of written evidence-in-chief, ‘limits on the number of experts to be called per issue’ and the calling of experts in ‘panels’, where appropriate.

4.7.2 Alberta Rules of Court Project (2003)

The Alberta Law Reform Institute recently considered the law in that province in connection with expert witnesses as part of its Rules of Court Project. The Institute’s Discovery and Evidence Committee established as part of the project examined a number of issues pertinent to the control of expert evidence.

Issues addressed in its Consultation Paper included whether there ought to be ‘prescribed criteria for the form of expert reports’. The committee noted:

It was generally agreed that standardizing the format or prescribing minimum standards for the content of expert reports has many benefits. Doing so may assist in ensuring that expert reports provide useful and complete information to the court. It is more difficult for an expert to rebut or replicate the results of an opposing expert if expert statements and reports are not sufficiently detailed and do not set out the methodology or data that the expert used in reaching his or her conclusions, thus establishing minimum standards for the content of the report may permit more efficient and effective rebuttal. Reports may be deliberately ambiguous to disguise weaknesses in the conclusion therein. Prescribing minimum standards may allow all parties to better evaluate both their own and their opponents’ positions. Setting minimum standards for the content and form of an expert report was also thought to benefit less experienced lawyers and ‘non professional’ expert witnesses in creating useful and complete expert reports.
The committee formulated a set of guidelines for experts’ reports that it considered should be incorporated in the Rules.228

- Whether the scope for oral expert evidence given at trial ought to be limited. The committee did not favour a presumption against the attendance of experts at trials, noting the usefulness of examination and cross-examination in developing and explaining the substance of written reports and isolating problems therein. Thus, it favoured retention of the incumbent regime under which the parties could ‘replace oral expert testimony with a written expert report upon notice’. It also felt that there should be scope for the pre-trial examination of experts.229

- Whether there should be limits on the number of experts available to the parties. The committee noted that each of the parties was restricted to one expert per issue in a ‘very long trial’ action,230 but that in other cases there were no limitations because a previous provision restricting each of the parties to three experts in total had been repealed.231 The committee expressed doubt about the usefulness of a ‘per issue’ criterion and stated that its ‘initial opinion is that the current Rules provide adequate safeguards to limit the number of experts who can be called’.232

- Whether the use of joint experts should be required or encouraged. The committee was sceptical about the benefits of compelling the use of joint experts:

  While the Committee recognizes the perceived benefits of requiring parties to use single joint witnesses, it had doubts about the practical application of doing so. There was a concern that arguments concerning choosing and instructing the joint expert would cause extensive delay and result in numerous court applications. In the Committee’s view requiring joint experts would likely cause more problems than it would solve. However, the rules should permit the parties to use a joint expert by consent or with leave of the court.233

- Whether the Rules should continue to permit the use of court-appointed experts, and if so on what terms. The committee concluded there are times when court-appointed experts can be useful and proposed that the Rules regarding court-appointed experts stay as they are.234

- Whether expert witnesses should be examined for discovery. As the committee noted, the examination of experts could be useful to ensure full disclosure and eliminate ambiguities in written reports, thus narrowing the issues in dispute at trial. However, the committee expressed serious concerns about permitting a prima facie right to discover experts prior to trial in part because requiring experts to be present for discovery in addition to trial may be impractical and expensive.235 However, in light of its potential benefits, the committee considered that it should be possible to seek leave to examine an expert in ‘exceptional circumstances’.236

- Whether provision should be made for pre-trial conferences of experts in all actions.237 The committee thought the pre-trial conference was an ‘interesting idea’, but one that would be compromised by practical difficulties (cost/delay, difficulty of scheduling etc) and should be restricted to long or complex trials where consent or leave is given.238

- Whether provision should be made for convening panels of experts (hot-tubbing). The committee was receptive to this idea, noting that it could be efficient and mitigate against partisanship. However, it also felt it would not be appropriate in all circumstances and could be ‘a significant infringement upon a party’s ability to call [its] evidence in the manner it [chooses]’.239 It recommended that a concurrent evidence procedure be made available as an option but that it only be used by consent of the parties or with leave of the court.240

- Whether guidelines ought to govern the conduct of experts. There appears to have been a degree of in principle support for the notion of guidelines, but some members of the committee considered that they would be better promulgated by professional bodies than written into the Rules.241 Doubt was expressed about ‘whether guidelines in the rules

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221 Ibid [78].
222 Ibid recommendation A6, B.
224 Ibid.
225 Ibid.
227 Ibid [32].
228 Ibid Appendix.
229 Ibid [54].
230 Under the Rules, a ‘very long trial’ action is one which ‘will or is likely to require more than 25 trial days’: r 5(1)(u).
232 Ibid [62].
233 Ibid [67].
234 Ibid [76]–[77].
235 Ibid [89].
236 Ibid [90].
237 Note that pre-trial conferences were, at the time of writing, available in ‘very long trial’ matters.
239 Ibid [101].
240 Ibid.
241 Supreme Court Civil Rules 2006 (SA) r 160(5).
• would have any real or practical effect on expert testimony, particularly in curing bias’.242

Ultimately, the committee did not recommend the incorporation into the Rules of conduct
guidelines for experts.243

Other issues considered by the committee included the use of timelines for the exchange of experts’
reports and associated sanctions, whether experts’ reports ought to be exchanged simultaneously or
sequentially, and whether and when the courts should engage referees or assessors.

4.7.3 Nova Scotia Rules Revision Project (2005)

In Nova Scotia, a recent working group examination of the rules of court relating to evidence touched
on several matters connected with expert witnesses.244 The working group considered, in part, that:

• an initial expert report should be served at least 120 days prior to the date set down for
  hearing, and a response at least 45 days before

• there should be a ‘standardization’ of expert reports (along the lines suggested in a
  schedule annexed to the report)

• examination of experts should not be available as of right, although whether oral
  examination or written examination should be available with leave was contentious.

4.7.4 British Columbia Justice Review (2006)

The British Columbia Justice Review Task Force, established in 2002 on the initiative of the Law Society
of British Columbia, released a report in November 2006 which proposed, among other things,
reform of some of the rules relating to expert evidence in that province.245 The task force’s overarching
recommendation was to “reduce expert adversarialism and limit the use of experts in accordance with
proportionality principles”.246 This recommendation had several components, in particular:

• the incorporation of a statement of the duties of an expert witness into the Rules of Court,
similar to that in the UK and Queensland; although ‘difficult to enforce’, such a statement
would set ‘an important standard for experts to follow’ and had ‘no down-side’247

• the better use of existing provisions for the appointment of an independent expert, acting
on the court’s instructions; the task force felt that the appointment of such an expert
ought to be considered at the (proposed) case planning conference248

• the close judicial management of issues relating to experts at the (proposed) case planning
conference, with particular reference to issues requiring expert evidence, the appropriate
number of experts, the appropriateness of a joint expert/court-appointed expert, deadlines
for disclosure of information on which an expert’s opinion is based, deadlines for the
exchange of experts’ reports, meetings between opposing experts.249 The task force stated:

  We believe that providing the CPC [case planning conference] judge with the discretion
to place limits on the use of experts will provide the most flexible and most fair approach
to matching the available process to the size and complexity of the claim. Although
consideration of the issue of experts will take some time at the CPC, we believe that this
will be well worth the investment, as we expect it to reduce costs by reducing the number
of experts, reducing the issues to those clearly in dispute, and reducing the adversarial
nature of the relationship between opposing experts.250

• a presumptive limit of one expert per side in litigation involving a claim valued at less than
$100 000.251

The task force declined to recommend widespread use of single joint experts, noting that there had
been no formal evaluation of their effectiveness in other jurisdictions and that the Expedited Procedure
Project Rule in place in British Columbia allowed for their use.252

4.7.5 Ontario Civil Justice Reform Project (2007)

The Ontario Civil Justice Reform Project, headed by the Hon. Coulter A Osborne QC, released
its recommendations in 2007.253 The project’s recommendations about expert evidence may be
summarised as follows:

• Early in the litigation process, parties should discuss jointly retaining a single expert to
reduce costs and avoid unnecessary competing expert reports, but use of joint experts
should not be mandatory.
The presiding judicial officer at pre-trials, settlement conferences and trial management conferences should consider and make orders about the appropriate number of experts that may be called by each side and on particular issues and whether expert evidence is admissible.

A judge presiding over pre-trial processes may grant leave to call more than three experts (or fewer in simplified procedure cases).

The court should consider, in exercising its discretion on the appropriate number of experts, whether the proposed number of experts is reasonably required for the fair and just resolution of the proceeding, whether the proposed number of experts is consistent with the principle of keeping costs and the length of the proceeding proportionate to the amount or issues at stake, and any other factors relevant to the fair, just, expeditious and cost-effective resolution of the proceeding.

A new provision should establish that it is the duty of experts to assist the court on matters within their expertise and that this duty overrides any obligation to the persons from whom they have received instructions or payment. Experts should be required to certify that they are aware of and understand this duty.

The presiding judicial official at pre-trials, settlement conferences and trial management conferences should be able to order opposing experts in appropriate cases to meet, on a without-prejudice basis, to discuss one or more issues in the respective expert reports to identify, clarify and resolve issues on which the experts disagree and prepare a joint statement on the areas of agreement, or reasons for continued disagreement.

Parties should discuss the number of experts and the timing for delivery of expert reports within 60 days of the action being set down for trial. As a default, rule 53.03 should be amended to require all expert reports to be exchanged within the 90/60/30 days before pre-trial or settlement conference, subject to the parties’ agreement otherwise or court order.

The information to be included in expert reports should be specified.

4.8 USA

Court control of expert evidence in the US: Gatekeeper approach

In the US federal jurisdiction, the court may screen expert witnesses before they give oral evidence at a trial. This ‘gatekeeper’ role in part arises out of the fact that most civil trials are before juries.

In Daubert v Merrell Dow Pharmaceuticals Inc, the US Supreme Court had occasion to consider the implications of rule 702 of the Federal Rules of Evidence, which at the time provided:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In particular, the court was required to evaluate the status of the so-called Frye criterion in light of the introduction of the Federal Rules in 1975. The Frye criterion had been set out in a 1923 decision of the Court of Appeals for the District of Columbia, the court stating:

While courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

The Supreme Court noted that the narrow ‘general acceptance’ test had been the ‘dominant standard for determining the admissibility of novel scientific evidence at trial’ since the decision in Frye (albeit a much-criticised one). However, it did not consider the Frye standard to have been preserved by rule 702:

Nothing in the text of this Rule establishes ‘general acceptance’ as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a ‘general acceptance’
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standard. The drafting history makes no mention of Frye, and a rigid ‘general acceptance’ requirement would be at odds with the ‘liberal thrust’ of the Federal Rules and their ‘general approach of relaxing the traditional barriers to “opinion” testimony’.

The court held that rule 702 makes it incumbent on a trial judge to ‘ensure that any or all scientific evidence admitted is not only relevant [“will assist the trier of fact … to determine a fact in issue”] but reliable [“scientific … knowledge”]. In other words, the judge assumes a gatekeeper role and must be satisfied, at an initial stage, that tendered expert evidence is grounded in the scientific method and ‘fits’ with regard to, or is applicable to, a fact in issue in the case. The court emphasised that the inquiry is a ‘flexible’ one, and set out a non-exhaustive list of factors that might bear upon it, including:

- whether the theory or technique said to be validated by ‘scientific knowledge’ has been, or is capable of being, tested (ie, whether it is falsifiable)
- whether the theory or technique ‘has been subjected to peer review and publication’
- ‘the known or potential rate of error’ of a particular scientific technique, and ‘the existence and maintenance of standards controlling the technique’s operation’
- the degree of ‘general acceptance’ of the theory or technique (the Frye criterion).

The court further emphasised that ‘[t]he focus … must be on principles and methodology, not on the conclusions that they generate’.

Other factors identified as potentially relevant to the Daubert exercise in subsequent cases include whether:

- the subject matter of expert evidence is linked to research conducted by the expert independent of the litigation, or whether his or her work has been carried out just for the purpose of the litigation
- the link between the expert’s premises and his or her conclusion is sound, or at least reasonable
- other possible theories or opinions as to the subject matter of the evidence can be ruled out
- studies conducted by the expert have been thorough, and whether other relevant studies have been considered
- the opinion is over-reliant on anecdotal evidence.

The Daubert opinion has been criticised as ‘open-ended and vague’. Nonetheless, it is clear, as Saks points out, that its effect is to significantly increase the burden on judges to come to terms with technical and scientific evidence:

The major paradox of judicial gatekeeping of ‘scientific, technical or other specialized’ expert knowledge is that those to whom the law assigns the responsibility for screening such evidentiary offerings have no particular expertise for conducting those evaluations. Our legal system provides judges with few tools to help them evaluate the assertions of experts … Frye-like tests allowed judges to piggy-back their decisions onto someone else’s judgment of whether the proffered evidence was sufficiently valid to be admitted … The move from Frye to Daubert increases judges’ gatekeeping duty by requiring them to evaluate claims of scientific expertise much as scientists would.

In two subsequent opinions, the Supreme Court has endeavoured to clarify particular aspects of the Daubert principles. In General Electric Co v Joiner, the court affirmed that appellate review of a trial judge’s decision under the Daubert principle must take place according to an ‘abuse of discretion’ standard rather than on a de novo basis. In Kumho Tire Co v Carmichael, the court made it clear that the Daubert principle was applicable to all forms of expert knowledge, not just those that could be characterised as ‘scientific’: ‘We do not believe that rule 702 creates a schematic that segregates expertise by type while mapping certain types of questions to certain types of experts’. It also sought to re-emphasise the flexible nature of the Daubert test:

[Daubert] made it clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not necessarily apply even in every case in which the reliability of scientific testimony [as such] is challenged. It might not be surprising in a particular case, for example that a claim made by a scientific witness has never been the subject of
peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of Daubert’s general acceptance factor help show that an expert’s testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so called generally accepted principles of astrology or necromancy.

Interestingly, it has been suggested that it is increasingly common for litigants and/or law firms to fund scientific research for publication to render particular novel litigation theories more ‘legitimate’ for the purposes of the Daubert criteria.261

In 2000, rule 702 was amended in an attempt to render it more reflective of the decisions in Daubert, Joiner and Kumho Tire Co. The rule now reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

5. SUBMISSIONS

Submissions received by the commission, in response to both the questions asked in the Consultation Paper and the proposals contained in the exposure draft released on 28 July 2007, expressed a range of views about the options available for controlling expert evidence. A similar divergence of views was expressed by those with whom we consulted directly. In addition to submissions made to our review, we were also provided with the submissions made to the NSWLRC by the Forensic Accounting Special Interest Group of the Institute of Chartered Accountants in Australia and Dr Gary Edmond.

5.1 NSW PROVISIONS

The Victorian Bar, the Royal Australasian College of Surgeons, Clayton Utz, IMF, the Australian Bankers Association, the Law Institute of Victoria and a number of judges supported the introduction of provisions along the lines of those in NSW. The Victorian Bar noted the ‘excellent and detailed’ report of the NSWLRC on expert witnesses, suggesting that ‘[v]ery much the same problems [as those addressed by the NSWLRC] apply in Victoria’.

The Bar endorsed a number of the NSWLRC’s recommendations, and in particular suggested that provision be made for:

- the use of court-appointed and joint experts in appropriate cases, and under appropriate rules262
- the application of identical duties of disclosure in relation to written and oral expert evidence
- the disclosure of fee arrangements with experts
- notifying experts of the sanctions applicable to inappropriate behaviour
- a requirement that litigants give notice to the court of experts they intend to call, and an explicit power of the court to restrict the number of experts who can be called
- the use, in appropriate cases, of concurrent evidence.

The Law Institute appreciated the potential for greater harmonisation in the rules if the NSW provisions were to be implemented in Victoria, and acknowledged that changes to the rules could offer time and cost benefits and increase the integrity of the evidence.

However, the Forensic Accounting Group believed the current provisions for controlling expert witnesses are sufficient, and should be explored further before introducing more changes.

5.2 COURT CONTROL

The Supreme Court recommended the introduction of new provisions in relation to experts, although it noted that the need for ‘careful and sometimes intensive case management’ rendered their application more appropriate ‘in complex cases in specialist lists where expert evidence forms a

256 See US Federal Rules of Evidence Manual § 702.02[6]–[7].
257 Ibid § 702.02[6].
262 The Victorian Bar also raised questions about court-appointed experts: ‘should there be an entitlement for the parties to cross-examine the court-appointed expert? Should the parties be entitled to call their own expert evidence to respond [to] or rebut, or even support, opinions expressed by the Court-appointed expert?’
significant aspect of the case’. One judge also expressed the view that there is room for the courts to improve the process, and to be more rigorous before trial by examining experts’ reports for admissibility issues.263

The court recommended that courts and tribunals be given a discretion to make orders:

- limiting the number of experts in a proceeding
- compelling an expert evidence directions hearing, to take place after discovery and the exchange of lay witness statements264
- directing the formal nomination of experts, and directing them ‘to confer (without reference to the parties or their lawyers), and produce a joint report’ stating matters agreed and not agreed265
- rendering the joint report the sole expert evidence permitted to be adduced at trial on an issue, ‘subject to cross-examination and the use of concurrent evidence procedures where appropriate’
- directing that mediation follow the production of a joint report.

Questioning the Law Institute’s submission that there was no need for reform of the rules relating to expert evidence prior to mediation, the court stated:

In the view of the Court, early production of a joint expert report offers significant time and cost savings to litigants. Such a report enables issues to be crystallised, and may increase the likelihood of a successful mediation.

The court also noted that any suggestion of ‘inequality of experts’, which is to some degree endemic to litigation, could be ‘counterbalanced’ through court control, codes of conduct, concurrent evidence procedures, etc.

The Legal Practitioners’ Liability Committee supported

’a tightening of the rules in relation to expert evidence. Whilst each party should be able to lead its own expert evidence, the court should be involved at directions hearings assisting the parties in identifying and formulating the questions on which an expert’s opinion will be required’.

It argued that judges adopt inconsistent approaches to the question of whether or not particular expert evidence is useful and admissible, which renders it difficult for the parties to be certain about what evidence should be obtained before trial.

The Group submission did not support limiting the number of experts able to be called at trial, suggesting that this would be an ‘overreaction’. Deacons noted that the court can address instances of abuse through its power over costs. The Group submission also opposed the use of ‘stop clock’ restrictions on the examination of experts, which it believed could be prejudicial to the parties.

WorkCover submitted:

Addressing the court’s approach to the use of expert evidence might also go some way towards addressing the increasing costs of the provision of expert evidence and/or curtail the obtaining of ‘expert’ opinion as a matter of process and with little or no focus on evidentiary need or quality of content.

5.3 SINGLE JOINT EXPERTS

Submissions did not express enthusiastic support for the concept of single joint experts and many—such as Allens Arthur Robinson and Philip Morris, the Mental Health Legal Centre, and Clayton Utz—argued that it would pose a risk to the administration of justice.

The Supreme Court rejected the use of single experts:

Experts may have bona fide differences of opinion, and parties should not be foreclosed from producing that evidence. Further difficulties with the single expert model included the possibility that a single expert may limit the different points of view of which the judge may be informed, and a concern that a single expert witness is a challenge to the fundamental concept of the role of the judge—to hear both sides, and make a finding of fact.
The joint submission of Turks Legal and AXA Australia expressed doubts about the appropriateness of reports prepared by both parties’ experts in conjunction with one another, noting that disagreements between the experts can increase costs and delay, and that ‘joint’ views are ‘often moderated so as to be more generally acceptable to both parties [such that both experts’ actual opinions are] tainted by external factors’.

Mallesons agreed with the NSWLRRC that the use of single experts might be appropriate in more straightforward cases, but that partisan experts must be permitted in more complex ones (although consultation between experts could remain useful). It did not recommend that parties be able to be compelled to share a single witness.

Allens Arthur Robinson and Philip Morris and Corrs argued that if the court is able to appoint a single expert, the rules should state such appointments are discretionary and only to be made in appropriate cases or only with the parties’ consent. Allens Arthur Robinson and Philip Morris also submitted that parties should still be able to adduce their own expert evidence if a single expert is appointed.

The TAC supported the concept of single agreed joint witnesses, although it cautioned that ‘[p]rocesses for the joint or agreed instruction of the appointed expert appear imperative and will require careful consideration’. The Victorian Aboriginal Legal Service (VALS) also supported the use of single experts as a means of promoting independence and controlling cost and complexity.

Judge Wodak submitted:

> Whilst I am prepared to support careful consideration of both concurrent evidence and a single expert rule, I do so on a qualified basis. I would support the use of such initiatives in substantial litigation, where the cost, and judicial time inevitably involved would be justified. I would commend caution in seeking to apply this approach universally.

In its submission to the NSW Working Party the Forensic Accounting Group also urged caution in the use of single joint experts, although it did not object to them in principle. It made a number of suggestions as to the form of the amendments proposed by the NSWLRRC.

On a different but related question, Hollows Lawyers expressed support for the idea of joint medical examinations conducted by doctors for both the plaintiff and the defendant.

Dr Edmond considered that the imposition on litigants of single experts could diminish the appearance of fairness of a proceeding, and thus impact on litigant satisfaction.

5.4 Court-appointed experts

The Supreme Court submitted that ‘all courts and tribunals’ should be able, on application or of their own motion, to appoint a ‘special referee to report to the court or tribunal on any issue in the proceeding’. It proposed that:

- the referee should be appointed and provided with ‘all relevant documents and witness statements well in advance of trial’
- the referee’s task should be ‘to produce a report to the court soon after the completion of evidence, and prior to the completion of final submissions’
- the referee ‘may be permitted to take part in the trial of [the relevant] issue, or facts relevant to it, in such manner as the court or tribunal directs including by asking questions of both expert and lay witnesses’
- the court/tribunal can ‘adopt the report of the special referee in whole or in part after having heard submissions from all interested parties’.

The court considered that there should be a presumption that the parties should meet the costs of the referee in equal shares, subject to the court’s discretion.

VALS expressed support for the appointment of independent experts by the court. It proposed that experts should be subject to a deposition-like procedure for the purpose of answering questions about their written reports. VALS also recommended:

> People on the Urgent Civil Law List should be [able] to benefit from access to Court employed experts which would preclude the need for each side to seek their own expert reports. This is similar to the current Medical Panel which makes decisions in relation to percentage of injury.

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263 Supreme Court consultation 2 August 2007.
264 The court noted that the court or tribunal involved could have input in the questions to be put to experts, and the facts that should be assumed.
265 The court noted that ‘[t]he report must be in plain English and employ layperson’s terms where possible’.
266 Submissions ED1 13 (Allens Arthur Robinson and Philip Morris), ED1 32 (Corrs Chambers Westgarth, Confidential submission, permission to quote granted 14 January, 2008)
267 Submission CP 37 (Transport Accident Commission).
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The Group submission proposed that if court-appointed experts were to be engaged the parties ought to be able to cross-examine them as of right, and suggests that sound protocols dealing with communication between the expert and the parties would be required. It was also suggested that court-appointed experts would be more appropriate in certain classes of cases than others.

Dr Brendan Dooley, on behalf of the Royal Australasian College of Surgeons, advocated the appointment of medical panels in the early stages of medical negligence cases to act, in effect, as court-appointed experts. The panel would be chaired by a lawyer, but the members would be medical experts. The panel would examine the plaintiff, meet with the doctors and review all of the medical reports before making a decision on liability to be submitted to the court for final determination.

Dr Dooley felt that the use of medical panels could:

- diminish bias
- establish at an early stage whether claimants meet the threshold impairment requirement for a medical negligence proceeding and/or give claimants an indication of the strength of their position, leading to the abandonment of unmeritorious claims
- avoid the cost and delay involved in the ‘to-ing and fro-ing of medical reports between the two parties’ and in general increase speed of resolution. He considered that the costs of using a panel system would be ‘relatively low’, and estimated that ‘probably at least 70–75 per cent of cases judged by the panel would be withdrawn or settled at the time of the meeting of the panel, or soon after’.

The Forensic Accounting Group urged caution in the use of single court-appointed witnesses, stressing that while the option ought to be available it should be recognised that it is not appropriate in all cases.

Dr Gary Edmond raised the problem of potential for impugning judicial independence if judges are able to select whose evidence will be presented to the court.269 Dr Edmond also cautioned:

Court appointed experts may limit discretion by forcing judicial hands. Judges may lose the ability to weigh competing claims and produce policy sensitive compromises … Judges should not underestimate the discretions and institutional benefits conferred by having a range of expert perspectives. If they exclude dissenting views or reduce the range of perspectives judges may become increasingly beholden to expert elites.270

5.5 PRE-TRIAL CONFERENCES AND CONCURRENT EVIDENCE

The Supreme Court considered that concurrent evidence procedures should be used where ‘possible and appropriate’. It envisaged a procedure in which ‘[t]he judge takes the lead with asking questions, and then invites counsel to question the witnesses. The experts can also question their colleagues … The judge controls the discussion’. It noted a number of benefits of concurrent evidence:

- better evidence, ‘as experts can act as checks and balances on each other’
- ‘experts are more inclined to give evidence’ as there is less emphasis on ‘adversarial pointscoring’
- a less hostile environment in the courtroom
- time and cost savings.

As to expert conferencing and joint reports, the court considered that ‘[t]he aim of parties involved in producing expert evidence to the Court should be to place all relevant information before the judge in a single document’.

Judge Wodak advocated further consideration of initiatives such as concurrent evidence.

The Law Institute acknowledged that changes to the mode of presentation of expert evidence at trial could be constructive, and in particular supported consideration of pre-trial expert conferences, statements of agreed facts and hot-tubbing, which it noted has ‘appeared to reduce the amount of time experts are required to give evidence in court’.271

The TAC endorsed consideration of hot-tubbing.

WorkCover considered that ‘careful pilot studies’ were required to determine the appropriateness of introducing hot-tubbing and pre-trial conferencing in Victoria, and recommended consideration of the different parameters that might be applicable in different classes of proceedings.
The Group submission suggested that the following measures (‘aimed at distilling and narrowing the areas of dispute between experts and ... reducing the time and cost’ of adducing expert evidence) could improve the management of expert evidence:

- after exchange of expert reports and any reply reports, the appointment of a facilitator (by agreement between the parties or, failing which, by the Court)
- compulsory, facilitated meetings between the relevant experts
- production of a joint expert report or statement of differences
- engagement of the experts in the process of ‘hot tubbing’.

The Group noted that meetings between experts offer a chance for the ‘resolution through communication [of outstanding issues] between the experts’, but cautioned that such meetings would be of little value unless their purpose and form were clearly defined. In the Group’s opinion:

Standard protocols for meetings of experts would have to be adopted. The protocols could be modified by the Court where required, and could address who would attend the compulsory meetings, who would be responsible for preparing a first draft of any joint report, the format of a joint report etc ... Consideration should be given to the value of the appointment by agreement between the parties or by the court of an appropriately qualified facilitator. The role of the facilitator would be to facilitate the meetings between the experts and ensure that the process of preparing a joint expert report to the Court identifying the issues which remain contested occurs.

The Forensic Accounting Group expressed support for ‘the selective use of other procedures, such as joint expert conferences, to better manage the use of expert witnesses’. In its submission to the NSWLRC the group noted that dialogue with one’s peers was more productive than ‘the traditional approach to expert evidence (exchange of written reports followed by cross-examination)’ and was more consistent with an expert’s duty to assist the court. However, it registered concern at the lack of consistency and timeliness of the application of [conferencing] provisions.

At a recent Medical List Users’ Group meeting with Judge Wodak, it was unanimously agreed by practitioners acting on behalf of both plaintiffs and defendants that there was no need to move to single or joint experts. However, it was noted that where a claim had not been resolved at mediation, the parties might agree to a conference between experts on damages being held ... Rule 44.06 of the County Court Rules of Procedure in Civil Proceedings already provides discretion for the court to direct expert witnesses to confer and provide the Court with a joint report. In circumstances where the rules already provide for joint conferences in appropriate cases, we do not consider that there is a need for the rules to be further amended.

Dr Gary Edmond thought the use of concurrent evidence might be preferable to single experts, as it ‘allow[s] for disagreement, but the parties and judge are able to explore the extent and reasons for disagreement with all the relevant experts simultaneously’.

The Victorian Aboriginal Legal Service suggested that parties should be able to require another party’s expert witness to attend at a convenient place (not the court) to answer questions on oath.

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269 Ibid 19.
270 Ibid 20.
271 Submission CP 18 (Law Institute of Victoria).
272 Edmond (2005) above n 34, 22.
5.6 CODE OF CONDUCT

WorkCover identified ‘an overriding need to ensure that the rules address the requirement of expert objectivity and … confirm that the expert is required to assist the court and not a party to the litigation’.

In its submission to the NSWLRCC the Forensic Accounting Group ‘applauded’ the use of codes of conduct and other like instruments to communicate the courts’ expectations to experts and those retaining them, and detailed the enforceable Statement of Forensic Accounting Standards of the Institute of Chartered Accountants in Australia and CPA Australia. However, it expressed concern about the proliferation of differing instruments in the various Australian jurisdictions, and proposed that a uniform code of conduct be developed, and supported by an individual, context-specific ‘guidance note’ in each court and tribunal.

The joint submission of Turks Legal and AXA Australia stated that ‘sceptics’ would say that the current expert witness code of conduct ‘has little effect’.

Dr Gary Edmond argued that if codes of conduct are too detailed but divorced from practical reality (as Edmond argues they often are), they may create ‘artificial problems’, as all ‘derogations, no matter how significant, become vulnerable to detailed retrospective examination and critique’.

5.7 DISCLOSURE OF FEE ARRANGEMENTS

Some submissions expressed opposition to experts being able to offer their services on a ‘no win, no fee’ basis. Telstra, the Australian Corporate Lawyers Association and the TAC said such arrangements should not be permitted. The TAC also noted that the Medical Practice Board of Victoria Medico-Legal Guidelines discourage the practice on the basis that they are ‘generally considered unethical’.

The Group submission suggested that contingent fee arrangements create an ‘inherent conflict’ and are at odds with the expert’s obligation to assist the court. WorkCover felt that fee arrangements ‘which may be perceived as compromising objectivity should be confirmed as inappropriate’.

On the issue of disclosure of experts’ fee arrangements, a number of judges supported such disclosure, but the Forensic Accounting Group submitted that there should only be disclosure of the basis of charging fees, not of the details of hourly rates or amounts outstanding. Telstra, the Australian Corporate Lawyers Association and Maurice Blackburn all submitted that there is no reason for financial arrangements to be disclosed. The Victorian Bar and Australian Bankers’ Association felt the issue required further consideration.

In its submission to the NSW Working Party, the Forensic Accounting Group was critical of the NSWLRCC’s proposal to require disclosure of the fee arrangements under which an expert is engaged. It noted that its members were already under a professional obligation to disclose in expert reports the basis on which their fees were calculated, and prohibited from charging contingent or success-related fees. However, it objected to the imposition of a more specific obligation to disclose the actual amount involved, arguing that there was insufficient justification for such an incursion on a private commercial arrangement.

5.8 SANCTIONS

The Supreme Court considered that experts who breach the code of conduct should be able to be made personally liable for the costs of their evidence.

Mallesons highlighted ‘the difficulty of sanctioning expert witnesses for unethical conduct’, and endorsed the NSWLRCC proposal that all experts be notified of the sanctions available. However, the firm did not support an ‘overly punitive’ suite of sanctions, noting that such a measure could discourage experts from acting in litigation.

The Forensic Accounting Group did not believe ‘there should be any significant change to the alteration of legal obligations of expert witnesses. There are already many anecdotal examples of parties having difficulty in obtaining appropriately qualified expert witnesses, and any significant increase in such obligations would serve to potentially further reduce the pool of such qualified witnesses’. It also argued that imposing sanctions was contrary to the concept of immunity of witnesses, and that there are already adequate sanctions in the form of complaints mechanisms and judicial findings on the quality of evidence. Victoria Legal Aid also argued that sanctions would dissuade experts from becoming involved in litigation. Maurice Blackburn argued experts should not be singled out for attention.
The Victorian Bar and the Australian Bankers’ Association felt the issue of sanctions required further detailed consideration.

Dr Gary Edmond believed criteria for the imposition of sanctions were problematic, as it would be difficult to isolate partisanship from legitimate (and honest) disagreement and the endeavour to do so could lead to the imposition of ‘artificial standards’ on experts.275

5.9 PRIVILEGE

According to the Supreme Court, there is still significant argument about the status of draft reports and instructions to experts.276 However, a number of submissions argued that the current rules and common law governing privilege in communications with experts operate fairly.277 The Forensic Accounting Group argued that it would be counterproductive if privilege were to be lost on all communications between experts and their instructing solicitors as this would make it more difficult and/or expensive for the key issues to be explored and then narrowed if the need arose. In its submission to the NSWLRC, the group opposed the introduction of a formal requirement obliging experts to disclose all instructions/communications, noting that instructions can develop over time and there is little basis for assuming that litigants commonly conceal attempts to influence experts’ reports.

There appeared to be a degree of consensus that privilege should be retained for communications between solicitors and those experts retained to assist a party but not ultimately called to give evidence.278 Allens Arthur Robinson and Philip Morris submitted:

Privilege should apply to communications with an expert, or any document connected with the engagement of the expert, where the expert is to give, but has not yet given, evidence in a court proceeding. There is a real risk that removing privilege in such cases would discourage parties from providing full disclosure of all relevant information to experts or from engaging experts at all, with detrimental effects for the administration of justice. Similarly, if a party briefs an expert but does not intend to call them to give evidence, that party should be entitled to the protection of privilege if the other party attempts to subpoena the expert.

5.10 SERVICE OF EXPERTS’ REPORTS

The joint submission of Turks Legal and AXA Australia noted that a requirement that all expert reports be filed with the court prior to being sent to the parties ‘would have the effect of focussing the experts’ minds on the fact that the initial audience for their reports is the court’, but could disincline the expert to take a ‘moderate stance’.

In terms of regulation of the receipt of expert evidence at trials, Mallesons Stephen Jaques considered that the current Federal Court Rules offer a ‘sufficient formula’.

5.11 OTHER MATTERS

The TAC expressed particular concern about current over-reliance on written reports in Transport Accident Act serious injury applications in the County Court: ‘[e]valuation of written medical reports without even sighting the expert is fraught with difficulty’.279

No submissions addressed the permission rule. We assume this means that there is no support for the introduction of a requirement for leave to adduce expert evidence. Several submissions stressed the importance of parties retaining the right to call expert evidence in support of their cases.280

Victorian barrister Albert Monichino has stated that the ‘Rules of Court in Victoria concerning expert evidence are, with respect, out of date … they mirror rules previously in force in New South Wales which have been substantially re-worked’.281

6. CONCLUSIONS

The commission has concluded there is considerable merit in adopting the bulk of the recently introduced NSW provisions governing expert evidence. This approach, we believe, would assist in achieving the important policy objectives of:

• promoting judicial flexibility and control

273 Ibid 16.
274 Submission CP 37 (Transport Accident Commission).
276 Consultation with Supreme Court 6 June 2007.
277 Submission ED1 32 (Corrs Chambers Westgarth, confidential submission, permission to quote granted January, 2008).
278 Submissions ED1 19 (Maurice Blackburn); ED1 11 (Mental Health Legal Centre); ED1 18 (Clayton Utz); ED1 12 (Allens Arthur Robinson and Philip Morris).
280 Submissions ED1 25 (Victoria Legal Aid); ED1 11 (Mental Health Legal Centre); ED1 32 (Corrs Chambers Westgarth, Confidential submission, permission to quote granted January, 2008).
Chapter 7

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- strengthening the integrity and reliability of expert evidence by emphasising the expert’s duty to assist the court
- achieving a greater degree of uniformity between jurisdictions.

We acknowledge that some stakeholders and commentators argue that reforms to rules about expert evidence should be implemented only after conducting empirical research to determine whether a significant problem exists. In this respect we believe that a new set of Rules can have a normative effect, and concur with the conclusions reached by the NSWLRRC:

Although it is not possible to quantify the exact extent of the problem, in the Commission’s view it is safe to conclude that adversarial bias is a significant problem, at least in some types of litigation. Measures that would reduce or eliminate adversarial bias, therefore, are likely to have potential benefits, even if the extent of those benefits cannot accurately be determined.

New approaches to the presentation of expert evidence can also address the problems of delay and excessive costs associated with expert evidence. Hot-tubbing, as evidenced by experience in NSW, has the potential not only to reduce the hearing time devoted to expert evidence (and therefore costs), but also to improve the integrity of opinion evidence and the usefulness of that evidence to decision makers.

In particular, the NSW provisions we recommend should be implemented in Victoria are:

- a purposes clause: r 31.17
- a requirement to seek directions: r 31.19
- a detailed list of the court’s power to give directions: r 31.20
- detailed rules providing for conferences and joint reports: rr 31.24–31.26
- a list of options for the manner in which expert evidence is to be given, including concurrently: r 31.35
- a power to appoint single joint experts: rr 31.37–31.45
- a power to appoint court-appointed experts: rr 31.46–31.54
- additional obligations of expert witnesses: a duty to comply with a direction of the court and a duty to work cooperatively with other expert witnesses: schedule 7
- more extensive requirements for experts’ reports: schedule 7.

The commission is mindful that initiatives implemented in NSW and Queensland—in particular single joint experts and court-appointed experts—remain controversial, including in NSW. However, we think that in appropriate circumstances appointment of such experts may be useful. We emphasise that such appointments would be discretionary. In exercising its discretion the court would be likely to take into account the particular circumstances of the case, as well as the circumstances in which appointments of single experts have been usefully made in other jurisdictions. We have not recommended the introduction of a model similar to Queensland’s, where the Rules establish a presumption in favour of single experts in all cases. As noted in some of the submissions to our review, the appointment of single joint experts may be appropriate in more straightforward cases, for example the assessment of future care needs of a plaintiff in a personal injury matter, but not for complex issues of liability. Similarly, the court would retain discretion to decide when to direct that experts give their evidence concurrently. Ongoing research, monitoring and review of these procedures will assist the courts to make more informed decisions about when to make use of them.

There are three areas where it is proposed that Victoria depart from the NSW model and one area where further clarity is required.

On the issue of sanctions, as noted earlier in this chapter, the NSWLRRC thought that power to order costs against experts already exists, and recommended that in the code of conduct experts be made aware of this possible sanction. The Working Party concluded there is no power in the court to order costs against experts and was not in favour of sanctions or any form of ‘warning’ that might have a chilling effect on the willingness of experts to give evidence. The NSW Rules follow the Working Party and do not implement the NSWLRRC’s position. On one view, the Working Party’s concern is overstated. Courts in England and Wales have power to order costs against experts and there does not appear to be any evidence or suggestion that this has had a ‘chilling effect’. We recommend
that experts should not be singled out for attention in relation to sanctions, but equally should not be immune from sanctions applicable to other participants in the civil justice system, including costs orders in appropriate cases.

On the issue of disclosure of financial arrangements with experts, the NSWLRRC recommended that there should be transparency and all financial arrangements should be disclosed. The Working Party took a different view and only favoured disclosure of arrangements where the expert had agreed to a deferral of payment or payment in the event of a ‘successful’ outcome. One difficulty with this is that it may not cover arrangements whereby an expert agrees to a fee that is apparently payable in any event, but in practice is written off if the party loses and is unable to afford to pay. There is considerable force in the view that ‘problems’ arising out of pecuniary interest are not limited to situations where the fees are deferred or contingent on outcome. Experts who are paid substantial sums of money and who have pre-existing or ongoing financial or other ‘commercial’ arrangements with parties to litigation may be no less problematic. We recommend that disclosure of financial arrangements should be required, but should not be selective. In this regard we note that such arrangements are often, if not always, the subject of cross-examination of experts in any event.

A point of difference between the NSW provisions and those in Victoria is the rule relating to service of medical reports prepared on the basis of an examination of a plaintiff by an expert retained by a defendant in personal injury matters. There are strong policy reasons to retain the requirement for defendants to serve any such reports on the plaintiff, regardless of whether or not they intend to use them in court, given the reports relate directly to the plaintiff’s own medical condition. Such a provision does not currently exist in NSW.

Further clarity is required in relation to the application of client legal privilege and litigation privilege to experts. There are some important questions of principle (both in favour of retaining the existing privilege and in favour of abrogating it) and some obvious practical problems which require detailed consideration. One current practical problem arises out of the inherent uncertainty of the scope of implied waiver when the expert is to be called as a witness and where a report is prepared and served. This creates problems for the parties and for the court, and is the subject of much interlocutory and inter partes disputation in some jurisdictions. We believe the position requires clarification: privilege should not apply to any communication with an expert who is to give evidence in a court proceeding or any document arising in connection with the engagement of the expert, including drafts of reports, letters of instruction etc. The existing law regarding privilege would continue to apply where a person has been engaged as an expert, but where it is not proposed that the person be called as an expert witness in the proceeding.

RECOMMENDATIONS

93. Victoria should adopt reforms based on the recently introduced NSW expert evidence provisions. This would enhance the court’s control over the provision of expert evidence. The court’s powers would be discretionary. Reforms based on the NSW provisions should: (a) be subject to certain specific modifications; (b) exclude those provisions where there is already a substantially equivalent provision in Victoria; and (c) be subject to retaining certain specific Victorian provisions.

The provisions should apply in the Supreme, County and Magistrates’ Courts. In particular the following provisions should be implemented:

93.1 A purposes clause, to ensure the court has control over the giving of expert evidence, to restrict expert evidence to that which is reasonably required, to avoid unnecessary costs associated with retaining experts, to enable a single expert to be engaged by the parties or appointed by the court and to declare the duty of an expert witness. A draft provision is as follows:

The main purposes of this order are as follows:

(a) to ensure that the court has control over the giving of expert evidence
(b) to restrict expert evidence in proceedings to that which is reasonably required to resolve the proceedings
(c) to avoid unnecessary costs associated with parties to proceedings retaining different experts

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282 Associate Professor Gary Edmond from the University of New South Wales is currently undertaking an empirical study of expert evidence, including an evaluation of recent procedural reforms, supported by the Australian Research Council: email from Gary Edmond 14 March 2007. See: Gary Edmond, ‘Secrets of the “Hot Tub”: Expert Witnesses, Concurrent Evidence and Judge-led Law Reform in Australia’ (2008) 27(1) Civil Justice Quarterly 51.

283 NSWLRRC (2005) above n 2, [5.15].

284 These requirements are more extensive than those currently in force in Victoria. See the Supreme Court (General Civil Procedure) Rules 2005 r 44.01(3); County Court Rules of Procedure in Civil Proceedings 1999 r 44.01(3).


286 See Casey v Cartwright [2007] 2 All ER 78, 87 (Dyson LJ).
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(d) if it is practicable to do so without compromising the interests of justice, to enable expert evidence to be given on an issue in proceedings by a single expert engaged by the parties or appointed by the court

(e) if it is necessary to do so to ensure a fair trial of proceedings, to allow for more than one expert (but no more than are necessary) to give evidence on an issue in the proceedings

(f) to declare the duty of an expert witness in relation to the court and the parties to proceedings.

93.2 A requirement that the parties seek directions before calling expert witnesses, as follows:

(1) Any party:
   (a) intending to adduce expert evidence at trial
   or
   (b) to whom it becomes apparent that he or she, or any other party, may adduce expert evidence at trial, must promptly seek directions from the court in that regard.

(2) Directions under this rule may be sought at any directions hearing or case management conference or, if no such hearing or conference has been fixed or is imminent, by notice of motion or pursuant to liberty to restore.

(3) Unless the court otherwise orders, expert evidence may not be adduced at trial:
   (a) unless directions have been sought in accordance with this rule
   (b) if any such directions have been given by the court, otherwise than in accordance with those directions.

In NSW this rule (r 31.19) does not apply to proceedings involving a professional negligence claim. This exclusion may not be appropriate in Victoria.

93.3 A broad and express discretion to give directions in relation to the use of expert evidence, in the following terms:

(1) Without limiting its other powers to give directions, the court may at any time give such directions as it considers appropriate in relation to the use of expert evidence in proceedings.

(2) Directions under this rule may include any direction:
   (a) as to the time for service of experts’ reports
   (b) that expert evidence may not be adduced on a specified issue
   (c) that expert evidence may not be adduced on a specified issue except by leave of the court
   (d) that expert evidence may be adduced on specified issues only
   (e) limiting the number of expert witnesses who may be called to give evidence on a specified issue
   (f) providing for the engagement and instruction of a parties’ single expert in relation to a specified issue
   (g) providing for the appointment and instruction of a court-appointed expert in relation to a specified issue
   (h) requiring experts in relation to the same issue to confer, either before or after preparing experts’ reports in relation to a specified issue
   (i) that may assist experts in the exercise of their functions
   (j) that experts who have prepared more than one expert report in relation to any proceedings are to prepare a single report that reflects their evidence in chief.
A broad and express discretion to direct expert witnesses to confer, to endeavour to reach agreement on any matters in issue, to prepare a joint report specifying matters agreed and matters not agreed and reasons for any disagreement. A draft provision is as follows:

(1) 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
   (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.

(2) 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).

(3) An expert witness so directed may apply to the court for further directions to assist in the performance of such expert functions.

(4) Any such application must be made in writing to the court, specifying the matter on which directions are sought.

(5) 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.

(6) Unless the parties affected agree, the content of the conference between the expert witnesses must not be referred to at any hearing.

(7) If a direction to confer is given under rule (1)(a) before the expert witnesses have furnished their reports, the court may give directions as to:
   (a) the issues to be dealt with in a joint report by the expert witnesses
   (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 witnesses.

(8) This rule applies if expert witnesses prepare a joint report as referred to in rule (1)(c).

(9) The joint report must specify matters agreed and matters not agreed and the reasons for any disagreement.

(10) The joint report may be tendered at the trial as evidence of any matters agreed.

(11) 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.

(12) 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.
In any proceedings in which two or more parties call expert witnesses to give opinion evidence about the same issue or similar issues, or indicate to the court an intention to call expert witnesses for that purpose, the court may give any one or more of the following directions:

(a) a direction that, at trial:
   (i) the expert witnesses give evidence after all factual evidence relevant to the issue or issues concerned, or such evidence as may be specified by the court, has been adduced
   or
   (ii) the expert witnesses give evidence at any stage of the trial, whether before or after the plaintiff’s case has closed
   or
   (iii) each party intending to call one or more expert witnesses close that party’s case in relation to the issue or issues concerned, subject only to adducing evidence of the expert witnesses later in the trial

(b) a direction that after all factual evidence relevant to the issue, or such evidence as may be specified by the court, has been adduced, each expert witness file an affidavit or statement indicating:
   (i) whether the expert witness adheres to any opinion earlier given
   or
   (ii) whether, in the light of any such evidence, the expert witness wishes to modify any opinion earlier given

(c) a direction that the expert witnesses:
   (i) be sworn one immediately after another (so as to be capable of making statements, and being examined and cross-examined, in accordance with paragraphs (d), (e), (f), (g) and (h))
   (ii) when giving evidence, occupy a position in the courtroom (not necessarily the witness box) that is appropriate to the giving of evidence

(d) a direction that expert witnesses give an oral exposition of their opinion, or opinions, on the issue or issues concerned

(e) a direction that expert witnesses give their opinion about the opinion or opinions given by other expert witnesses

(f) a direction that expert witnesses be cross-examined in a particular manner or sequence

(g) a direction that cross-examination or re-examination of the expert witnesses giving evidence in the circumstances referred to in paragraph (c) be conducted:
   (i) by completing the cross-examination or re-examination of one expert witness before starting the cross-examination or re-examination of another
   or
   (ii) by putting to each expert witness, in turn, each issue relevant to one matter or issue at a time, until the cross-examination or re-examination of all of the expert witnesses is complete

(h) a direction that any expert witness giving evidence in the circumstances referred to in paragraph (c) be permitted to ask questions of any other expert witnesses who are concurrently giving evidence

(i) such other directions as to the giving of evidence in the circumstances referred to
in paragraph (c) as the court thinks fit.

93.6 A discretion to direct the parties to engage a single joint expert, and to make directions for the preparation of the expert’s report and the cross-examination of the expert. A draft provision is as follows:

(1) Selection and engagement

(a) If an issue for an expert arises in any proceedings, the court may, at any stage of the proceedings, order that an expert be engaged jointly by the parties affected.

(b) A parties’ single expert is to be selected by agreement between the parties affected or, failing agreement, by direction of the court.

(c) A person may not be engaged as a parties’ single expert unless he or she consents to the engagement.

(d) Any party affected who knows that a person is under consideration for engagement as a parties’ single expert:

(i) must not, prior to the engagement, communicate with the person to obtain an opinion as to the issue or issues concerned, and

(ii) must notify the other parties affected of the substance of any previous communications for that purpose.

(2) Instructions to parties’ single expert

(a) 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 the facts, and assumptions of fact, on which the report is to be based.

(b) If the parties affected cannot so agree, they must seek directions from the court.

(3) Parties’ single expert may apply to court for directions

(a) The parties’ single expert may apply to the court for directions to assist in the performance of the expert’s functions in any respect.

(b) Any such application must be made in writing to the court, specifying the matter on which directions are sought.

(c) A parties’ single expert who makes such an application must send a copy of the request to the parties affected.

(4) Parties’ single expert’s report to be sent to parties

(a) The parties’ single expert must send a signed copy of his or her report to each of the parties affected.

(b) Each copy must be sent on the same day and must be endorsed with the date on which it is sent.

(5) Parties may seek clarification of report

(a) 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.

(b) Unless the court orders otherwise, a party affected may send no more than one such notice.

(c) Unless the court orders otherwise, the notice must be in the form of questions, no more than ten in number.

(d) 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.
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(e) Each notice sent under this rule must be endorsed with the date on which it is sent.

(f) 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.

(6) Tendering of reports and answers to questions

(a) Unless the court orders otherwise, the parties’ single expert’s report may be tendered in evidence by any of the parties affected.

(b) Unless the court orders otherwise, 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.

(7) 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.

(8) 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 under this Division in relation to that issue.

(9) Remuneration of parties’ single expert

(a) The remuneration of a parties’ single expert is to be fixed by agreement between the parties affected and the expert or, failing agreement, by direction of the court.

(b) Subject to sub-rule (c), the parties affected are jointly and severally liable for the remuneration of a parties’ single expert.

(c) The court may direct when and by whom a parties’ single expert is to be paid.

(d) Sub-rules (b) and (c) do not affect the powers of the court as to costs.

93.7 The court should have a broad and express discretion to appoint experts. A draft provision is as follows:

(1) Selection and appointment

(a) If an issue for an expert arises in any proceedings the court may, at any stage of the proceedings:

(i) appoint an expert to inquire into and report on the issue

(ii) authorise the expert to inquire into and report on any facts relevant to the inquiry

(iii) direct the expert to make a further or supplemental report or inquiry and report

(iv) give such instructions (including instructions concerning any examination, inspection, experiment or test) as the court thinks fit relating to any inquiry or report of the expert or give directions on the giving of such instructions.

(b) 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.

(c) A person must not be appointed as a court-appointed expert unless he or she consents to the appointment.

(d) Any party affected who knows that a person is under consideration for appointment as a court-appointed expert:
(i) must not, prior to the appointment, communicate with the person to obtain an opinion as to the issue or issues concerned
(ii) must notify the court as to the substance of any previous communications for that purpose.

(2) 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
(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.

(3) Court-appointed expert may apply to court for directions
(a) A court-appointed expert may apply to the court for directions to assist in the performance of the expert’s functions in any respect.
(b) Any such application must be made in writing to the court, specifying the matter on which directions are sought.
(b) A court-appointed expert who makes such an application must send a copy of the request to the parties affected.

(4) Court-appointed expert’s report to be sent to registrar
(a) The court-appointed expert must send his or her report to the registrar, and a copy of the report to each party affected.
(b) Subject to the expert having complied with the code of conduct and 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.
(c) A court-appointed expert who, after sending a report to the registrar, changes his or her opinion on a material matter must immediately provide the registrar with a supplementary report to that effect.

(5) Parties may seek clarification of court-appointed expert’s report
Any party affected may apply to the court for leave to seek clarification of any aspect of the court-appointed expert’s report.

(6) Cross-examination of court-appointed expert
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.

(7) 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 under this Division in relation to that issue.

(8) Remuneration of court-appointed expert
(a) The remuneration of a court-appointed expert is to be fixed by agreement between the parties affected and the expert or, failing agreement, by direction of the court.
(b) Subject to sub-rule (c), the parties affected are jointly and severally liable for the remuneration of a court-appointed witness.
(c) The court may direct when and by whom a court-appointed expert is to be paid.
(d) Sub-rules (b) and (c) do not affect the powers of the court as to costs.
94. There should be a more extensive code of conduct for expert witnesses, including a duty to:

(1) comply with the applicable overriding obligations
(2) comply with a direction of the court
(3) work cooperatively with other expert witnesses.

95. Expert witnesses should not be immune from sanctions applicable to other participants in the civil justice system, including costs orders in appropriate cases. However, there should not be specific sanctions directed solely at expert witnesses.

96. Expert witnesses shall, at the time of service of their reports or at any other time ordered by the court, disclose: (a) the basis on which they are being remunerated for services as an expert witness, including whether any payment is contingent on the outcome of the proceedings; (b) the details of any hourly, daily or other rate; and (c) the total amount of fees incurred to date.

97. It should be made clear that privilege in respect of any communication with an expert or any document arising in connection with the engagement of the expert (including drafts of reports, letters of instruction etc) is waived as soon as it is confirmed that the expert will be called to give evidence in court. Privilege in respect of communications with experts retained but not proposed to be called to give evidence would not be affected.

98. The requirement that the defendant serve on the plaintiff any medical report prepared as a result of an examination of the plaintiff, regardless of whether the defendant intends to use it in court, should be retained.