Expert evidence reforms — How are they working?

■ **Judge Michael Rackemann, Planning and Environment Court of Queensland**

Introduction

The last few decades have seen an explosion in specialisation across all professional disciplines. Questions which may once have been the province of a single expert discipline may now fall within a range of sub-specialties. The number and range of experts becoming involved in the litigation process has grown and there is a burgeoning litigation support industry more generally.

The understandable proliferation of expert witnesses and birth and growth of the litigation support industry was criticised by Lord Wolfe in his *Access to Justice* report, which led to reforms to the civil procedure rules in England. Subsequently, a range of reforms were implemented in the courts of civil jurisdiction in Australia, including in Queensland, in an attempt to deal with concerns particularly as to costs implications and perceptions of adversarial bias upon the part of experts retained by parties to an adversarial process. The purpose of this paper is to examine the effectiveness of those measures to date.

The single expert

A cornerstone of the reforms in the Supreme Court of Queensland was the express encouragement for expert evidence, on any given issue, to be limited to one expert jointly retained by the parties or appointed by the Court. The main purposes of Part 5 of Chapter 11 of the Uniform Civil Procedure Rules 1999 (Qld) (UCPR), which deals with expert evidence, are stated to include:[1]

b) 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; and
c) avoid unnecessary costs associated with the parties retaining different experts;
…

Those main purposes are supported by more detailed provisions in Divisions 3 and 4, which apply only to civil proceedings in the Supreme Court.

The introduction of this reform was controversial at the time and was opposed by the Bar Association of Queensland. The rationale for the reform was explained by one of its chief proponents in Queensland, the now former Justice of Appeal, the Honourable GL Davies AO, QC. In a paper published in 2005,[2] he wrote:

> Let me return now to where I started. Perhaps the worst way, in any substantially adversarial system such as ours, of resolving a question involving expertise, is by presenting two opposing opinions to an arbiter, judge or jury, who, more often than not, lacks expertise, and expect that arbiter, without independent assistance, to resolve it justly. Permitting cross-examination on these opposing views is as likely to polarize them further as it is to eliminate or reduce areas of difference.
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> If we accept, as I think we realistically must, that presenting evidence in an adversarial way is likely to induce and in most cases will result in adversarial bias in the witnesses, we must also accept that adversarial bias would be immediately eliminated, in the case of expert evidence, if those who gave such evidence gave it as witnesses of the court not as witnesses of one party or another … .
>
> It follows, it seems to me inevitably, that *the only way in which we can ever eliminate adversarial bias in expert witnesses is by requiring, at least generally, that all expert evidence which will be received by a court must be that of an expert appointed by the court* … . [my emphasis]

The contention that judges, who lack the technical expertise of the expert witness, are not well placed, without expert assistance, to resolve conflicting opinion evidence justly, does not accord with my experience either as a barrister or as a judge. Whilst not sharing the technical expertise of expert witnesses, judges are well experienced in assessing that evidence in the deliberative process.

The fact that expert opinion evidence can be "deconstructed", to reveal the relevant factual assumptions and the process of analysis and reasoning leading to the expressed opinion, means that the resolution of competing expert opinion is often one of the easier tasks of a trial judge. Conversely, there is ample research showing that judges are not nearly as good as might be imagined at separating fact and fiction when it comes to resolving conflicting evidence of fact which cannot be deconstructed, such as competing recollections of two eyewitnesses to a particular event or incident.

The concern about the ability of a trial judge, unassisted, to justly resolve conflicting expert evidence tends, in my view, to distract from the more important issue of how to appropriately manage experts and their evidence so that the parties and the court have the benefit of the well informed and properly and objectively considered opinions of the experts.

The argument in favour of mandating, at least generally, the single expert model is based on assumptions which include:

i. the evidence of experts retained by the parties is significantly affected by adversarial bias;
ii. that adversarial bias represents a significant hurdle to the just resolution of the matters in controversy;
iii. adversarial bias cannot effectively be dealt with other than by requiring, at least generally, that all expert evidence be by those who are either jointly instructed by the parties or who are appointed by the court.

Those assumptions should not be accepted uncritically.

While it would be naïve to suggest that expert opinion evidence is never tailored, either consciously or subconsciously, the extent of "adversarial bias" should not be overstated nor the effectiveness of the adversarial system in exposing such bias

understated. While it is often the "professional witness" (ie a person who regularly gives expert evidence and derives at least a significant part of that person's income from doing so) who is suspected of being a "hired gun", the reality is that the integrity of such a person is their currency, which can quickly be lost if significant adversarial bias is demonstrated. As one expert, who frequently gives evidence, attests:[3]

> From my experience, expert witnesses who frequently and regularly give evidence in the P&E Court know perfectly well how thoroughly their evidence will be scrutinised by opposing experts, solicitors, barristers (and presumably the judges). Consequently, the risks associated with attempting to deliberately give one-sided or inaccurate evidence are well known to them, and they are too careful with their reputations and careers to take any such risks. Yet these are the experts usually labelled as "hired guns" in a derogatory sense (ultimately meaning I suppose that their opinions can be bought).
>
> To my mind, the real risk of inaccurate or biased evidence is much more likely to come from professionals who rarely, or perhaps only once give evidence. They have little to lose, and are not likely to know how closely their evidence will be scrutinised, yet they are unlikely to be identified as "hired guns" with all that implies.

It should not be assumed that the fact of the retainer relationship between client and expert is, without more, an insurmountable hurdle to the expression of professionally objective opinions. Experience demonstrates to the contrary. The contention that expert opinions are able to be bought and sold is an inaccurate generalisation. It is also an unseemly one involving, as it does, the suggestion by lawyers that professionals of other disciplines are little more than "paid liars". There are those who regard such an allegation, coming from the mouths of lawyers, as somewhat ironic. For the reasons discussed later, my experience suggests that it is the way in which experts are managed after their engagement which is more critical than the fact of retainer alone.

The elimination of adversarial bias, through the use of a single

expert does not, of course, eliminate all forms of bias, nor does it necessarily result in the court getting the benefit of reliable expert opinion evidence. Unbiased incompetence, or even just fallibility, can be found in all disciplines, including the law.

More fundamentally, experts bring a range of biases, other than adversarial bias, to the task at hand. There is nothing improper about that. Engineers and scientists have their own professional biases in much the same way as lawyers do. Just as some lawyers apply a more "black letter" approach than others, so some engineers or scientists have different professional perspectives. This is perhaps most vividly demonstrated in the personal injuries field, where some doctors are known to be more generous in their assessments of disability than others.

In his article "Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure"[4] Associate Professor Garry Edmond observed that there is little empirical evidence to support the contention that adversarial bias is common. He stated (at 173):

> … but there is little evidence to suggest that adversarial bias is deliberate or consistently detrimental to civil practice. Although experts selected by the different parties may well take on aspects of a case, based *in part* on their contractual relationship, these experts will often be selected because they already adhere to particular assumptions and commitments or employ methodologies considered valuable. Even if not conspicuously or predictably aligned, experts (including court-appointed experts) do not enter disputes without professional, institutional, and ideological "baggage".

This presents an obvious limitation to the usefulness of obtaining only one expert opinion on an issue of relevance to a matter of controversy. As one expert has observed:[5]

> I would not trust any of the traffic engineers with whom I regularly work as single experts, including me — we all have our individual biases, no matter how hard we try to overcome them. I believe that technical experts such as traffic engineers operate best as advisers to the legal process, not as de facto judges on technical issues. In my

view, two or more professional opinions tested by a rigorous cross-examination are much more valuable to the court than one untested opinion.

The most obvious limitation of the single expert model is its relative unhelpfulness in cases where there is room for genuine differences of opinion on matters of importance to the controversy at hand. This limitation is readily acknowledged by Justice McClellan[6] (formally President of the NSW Land and Environment Court and now Chief Judge at Common Law in the Supreme Court of NSW), an early proponent of the model in New South Wales. The model's usefulness is, in practice, generally restricted to circumstances in which the exercise to be carried out is unlikely to be controversial, with the consequence that engaging multiple experts would be wasteful. The avoidance of that duplication can, however, often be accomplished in the course of case management otherwise (a matter discussed later) without the need for specific rules about single experts.

Whatever the merits or otherwise of the single expert model, it is not, in practice, adopted as the most common way in which expert evidence is adduced. The express preference for the model in the UCPR is not reflected in practice. The provisions of Division 3 and Division 4 of Part 5 of the UCPR apply only to the Supreme Court. I am not aware of any enthusiasm or proposal for those provisions to be extended to other jurisdictions. Even in the Supreme Court, the single expert model is, I understand, used in only a minority of cases and there is no evident trend towards it becoming more popular. It is not the most common way in which expert evidence is now given in the Land and Environment Court of New South Wales, and it is, I understand, relatively rarely used in the Supreme Court of New South Wales.

None of this is to say that the use of a single expert might not be a valid choice in a particular case, or that the option should be "off the table", but the focus of the debate about the proper management of expert evidence is shifting in another direction.

The management of experts

Another feature of the last few decades has been the rise and rise of both case management and alternative dispute resolution (ADR). Modern courts actively supervise their lists and individually manage cases towards resolution, usually on a consensual basis. The concern of judges managing lists in the modern context extends (or should extend) to the entire process for resolution, not just to those matters which ultimately proceed to trial.

Notwithstanding this context, reforms in the area of expert evidence have tended to focus either on the beginning of the process, when the expert is first engaged, or on the end of the process, in relation to the form of the expert's trial report and the means by which evidence is to be adduced at trial. Much has been written about the appointment of single experts, informing experts of their duty to the court, setting guidelines for the contents of their report for trial and about whether evidence at the trial should be given concurrently or in some other way. Relatively less attention has been paid to the process between when the expert is first engaged and when that expert produces a report. The process between engagement and the production of a trial report represents a critical opportunity to enhance the prospects of obtaining well-informed, objective and helpful assistance from the experts retained by the parties, yet in many jurisdictions little is done to manage what happens in that period.

Even in jurisdictions which profess to have implemented expert evidence reforms, the experts are often left in the hands of their client and their client's lawyers until a report is published. The expert will generally be reliant upon by the client, or the client's lawyers, not only for a retainer, but for instructions on the issues in dispute and for the briefing of relevant information. Once the expert has begun to form preliminary views (and sometimes earlier) a conference or conferences will typically be held with the client's lawyers. The lawyers, doing their job, will ensure that the expert is fully conscious of all of the matters of relevance which may be thought to favour their client and will tease out any preliminary views helpful to the client's case while

testing the expert on any doubts or misgivings the expert may have about the client's position. The expert will then be asked to prepare a report, without reference to, or consultation with, professional colleagues retained by the other parties. Further conferencing may occur with the client's lawyers in the course of the expert settling the report. The experts retained by the other parties will typically be going through a similar process.

The typical process might not be designed to produce differences in the expert opinions expressed in the reports, but it does little to respect, foster and protect the professional objectivity of the expert.

Typically, it is only after the exchange of reports that the experts are expected to go through a consultative process, in terms of a pretrial meeting and perhaps the giving of concurrent evidence at trial.

A more respectful way of dealing with experts (and one which is more likely to achieve better results) is to insist that, after being retained and briefed by their client and their client's lawyers (but *before* preparation of any trial report) the experts be given the appropriate time and space, free from supervision or interference by the parties or their lawyers, to consider and formulate their opinions in consultation with their professional colleagues, retained by the other parties. This has been a feature of case management in the Planning and Environment Court for some years and is underpinned by the belief that experts should be treated in an appropriately respectful way and that they can be expected to show professional objectivity if that objectivity is respected and protected by the process which they are asked to participate in. Accordingly:

i. Individual parties are permitted to engage experts.
ii. Each party may engage only one expert in relation to each field of expertise.
iii. The parties are required to identify their experts at an early stage.
iv. Whilst the parties must ensure that their expert is properly briefed and ready to participate in an expert meeting process, they may not instruct the expert as to which opinions the expert is to accept or reject.

v. Once the experts have been retained, identified and briefed, they begin an expert meeting process, which generally involves a series of meetings over a number of weeks, in relation to matters of methodology as well as matters of analysis and opinion.

vi. *Critically*, not only does this process take place *before* the publication of any trial reports, but throughout the process, the experts are, in effect, "quarantined". That is, the parties and their lawyers are not permitted to communicate with the experts from the time the process begins until it ends with the publication, by the experts, of their joint report.

vii. The results of that consultative process informs the dispute resolution process, and

viii. It is only if the matter remains unresolved that the experts can then prepare separate reports for court. Those reports are limited to the areas of disagreement expressed in the joint report. Save by leave, an expert may not depart from the joint report.

That process gives the experts time and space to form their opinions in a process of mutual peer review, free from oversight or influence by the parties or their lawyers. This process, has:

a) virtually eliminated disputes about methodology (the experts, in consultation generally agree upon the methodology to be used in investigations, the data from which is then common to them).[7]

b) achieved a high degree of common ground with respect to the opinion evidence.

c) obtained the best from the combined experience of the two experts. There are a number of cases in which experts have subsequently told me that they were better informed as a consequence of the collaborative process and that the results of their joint endeavours were more satisfactory than either of them could have achieved individually.

The process was trialled by me in a case in 2004, with result that, although the matter did not settle, it was reduced from an estimated 11 weeks to 11 days of hearing time. The process was then written into the Court's practice direction in 2006,[8] before

being entrenched in the 2008 and 2010 versions of the Planning and Environment Court Rules. A summary of the key features of the process is attached.

Neil Sutherland, a director and principal agricultural and environmental scientist with Gilbert and Sutherland, has recently examined the results of the joint meeting and report process in 104 cases in which members of his firm have been retained since 2006. In his paper "The efficacy of joint reports in narrowing technical issues during litigation" published in 2011(1) National Environmental Law Review 50, he reports that the joint meeting and report process resulted in complete agreement, among the experts, in all respects, in 48 per cent of cases. This confounds the notion that experts will simply adopt the position of the client who pays them. There was a higher proportion of cases which ultimately settled. The statistics did not descend to the number of cases in which the issues were narrowed, although not completely resolved.

Of particular interest is the trend analysis undertaken by Sutherland which showed that the proportion of cases in which complete agreement was reached among the experts in the joint meeting process increased from 39 per cent in 2006 to 66 per cent in 2009. This generally accords with my own experience. If, in a case which proceeds to trial, each side had originally nominated experts in, say five disciplines then it would be usual for complete agreement to have been reached in two or three of those, with the areas of dispute significantly narrowed in the others.

Sutherland commented on the difference in practice between Queensland and New South Wales as follows:

> Quarantining the Joint Report process within highly adversarial matters, in my view, often makes the difference between settling issues and arguing them in court. One of the cornerstones of the Queensland process is preventing any interference by the parties or their representatives until the report is signed. This forms a critical protection of the expert's independence that serves the process well, providing the experts do not use it to delay or obfuscate. The ability of your peers to professionally critique, discuss and refine one's views, without legal pressure results in considered, not forced,

outcomes.

It is when working within the New South Wales Land and Environment or Supreme Courts that I can contrast the refinements made in Queensland over the last six years. Currently, the New South Wales jurisdictions are less inclined to manage the experts directly, preferring a more traditional, adversarial approach. My experience of joint meetings and the use of court-appointed experts has been mixed, with Counsel and instructing Solicitors having varying views of how the process should be run in each case. In contrast, it appears that the court rules in Queensland regarding the process have now been refined to such an extent that they are well understood by all, irrespective of location or legal practice size.

After examining the experience in more than 100 cases, Mr Sutherland concluded that:

- The numerical results confirmed the use of the joint report process is a highly effective method of reducing or narrowing the issues concerning technical expertise in litigation.
- The trend is of an increasing efficacy over time.
- There was still a proportion of cases (12 per cent of the sample) where areas of disagreement were ventilated at trial.
- In each of those cases the process ensured the relevant issues were well defined, thus assisting the court.
- Technical agreements on the framework of laws, standards and guidelines represented a considerable improvement over arguing in court over which standard or method is the most appropriate.
- Apparent solutions to areas of disagreement often result over time within the joint report process.
- The process also provides for transparent mechanisms whereby the experts can communicate with the parties to assess whether the solutions are practicable for them.
- This collaborative approach can and has resulted in superior outcomes, in my experience without necessarily eroding any party's position.
- Intra-disciplinary meetings between the experts and regular communication with (and direction from) the court tend to foster positive outcomes.

- The joint report process provides a mechanism within the adversarial court process that allows for dispute resolution.
- One of the cornerstones of the Queensland process is preventing any interference by the parties or their representatives until the report is signed.
- Currently New South Wales jurisdictions are less inclined to manage the experts directly, preferring a more traditional approach.

A significant feature of this process is that it obtains the benefit of the professional discourse at an early stage, at a time when it can inform the parties in the dispute resolution process, not just a judge at trial. Indeed the experts will generally attend and assist the parties in the ADR process. Whilst other jurisdictions, which do not use this process, may achieve similar settlement rates, it is appropriate for a court to be concerned with the quality of the process which leads to resolution, not just the settlement rate. Not all resolutions are equally satisfactory. Those achieved as a consequence of "horse-trading" alone, a lack of funds or fear of the court process are not as satisfactory as those which identify an appropriate basis for resolution on a fully informed basis. A consistent theme of feedback which I have received since this process was adopted is that better quality outcomes are being achieved by negotiation.

In advocating the single expert model, Davies dismissed conferences of experts as applying too late in the process of litigation to avoid polarisation. I respectfully agree, in so far as the traditional approach to the timing of joint meetings is concerned. The earlier and more extensive process used in the Planning and Environment Court, however, does not suffer from that vice.

Whilst this process is an initiative of the Planning and Environment Court, the philosophy which underpins it is applicable to other jurisdictions. Its use has spread not only to the Land Court, but is also becoming a feature of directions in some cases in the Supreme Court. For example, Justice Peter Lyons, who had a very significant Planning and Environment Court practice before his elevation to the Supreme Court bench, acknowledges the influence of the Planning and Environment

Court's approach in the directions which he formulates in cases on the Supervised Case list of the Supreme Court of Queensland.

Concurrent evidence

The concurrent evidence process, by which experts expressing differing opinions are called to give evidence at the same time and are invited to participate in a professional discussion amongst themselves, within the witness box, as well as being questioned by the judge and the parties' representatives, is now well known, but has not taken hold in Queensland to the extent that it has in New South Wales. Its history is briefly summarised by Edmond as follows:[9]

> The basic concurrent-evidence technique emerged out of experiments in the 1970s. Since that time, with the support of judges like Lockhart, Lindgren and Heerey, this technique was used intermittently in tribunals and very occasionally in the Federal Court of Australia. The institutionalization of concurrent evidence, however, is a far more recent development. In the last five years, concurrent-evidence procedures have been formally adopted in the Federal Court, the Administrative Appeals Tribunal, the Supreme Courts of New South Wales and the Australian Capital Territory, and the Land and Environment Court of New South Wales; it has also been used selectively in the superior courts of New Zealand.

The proponents of this method of adducing evidence at trial have been quite enthusiastic about its virtues. Their enthusiasm led Edmond to observe that:[10]

> The institutionalization of concurrent evidence has been accompanied by a publicity campaign dominated by senior members of the Australian judiciary … .

Similarly, Ian R Freckelton SC remarked that:[11]

> Proponents of concurrent evidence have on occasions been evangelistic about its benefits.

Some caution needs to be used with respect to this enthusiasm. As Freckelton points out, while the response of judges using the process is generally positive, not all evaluations of concurrent evidence have been so effusive and the practice has not been successful in all instances. Further, the process does not enjoy universal acclaim among experts called to give evidence in this way. For example, Ian Shimmin, an economist and a director of Urbis who is based in Melbourne but regularly gives evidence in Queensland, New South Wales and Victoria, says:

> My experience in the Land and Environment Court, and similar courts in New South Wales, has been less than appealing, due primarily to the preference for concurrent evidence or "hot tubbing". In my opinion, this is a waste of everyone's time and effort because it results in a far lower (level) of scrutiny and tends to result in more confusion and frustration than is the case in other jurisdictions.
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> It is important to recognise that technical experts have varying degrees of specialised knowledge. Scrutiny is therefore important in order for the decision-maker to understand the areas of technical strength and weakness, and the basis of opinions. Sometimes data and modelling is inferior, conflicting or simply wrong; and quite often access to factual data between experts can vary resulting in significant differences as between theory and practice.
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> In addition, expert opinion is necessary to ensure that inference and conclusions are correctly drawn. *In my experience "hot tubbing" does not result in focussed, structured or useful expert discourse, nor does it result in the level of scrutiny required to ensure that the decision-maker is well informed. Judges have openly expressed their confusion during proceedings.*
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> …
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> I cannot offer a view as to which of the Victorian or Queensland systems results in a better outcome, although I would say, without hesitation that the concurrent evidence model in New South Wales

> is the worst process and experience when giving evidence, and is to be avoided, in my opinion. [my emphasis]

The philosophy underlying the concurrent evidence model is similar to that underlying the case management approach of the Planning and Environment Court. Both aim to obtain the benefit of the professional discourse among the experts. The concurrent evidence model is, however, too limited in its application and applies too late in the process to be considered as a viable substitute for appropriate management at an earlier stage.

Being a process for adducing evidence at trial, the benefits of concurrent evidence are limited to the relatively small proportion of cases that proceed to trial. It does not obtain the benefit of the objective professional discourse at a time when it can be used by the parties in a dispute resolution process, which is the means by which the majority of disputes are resolved.

Further, it is difficult to see the attraction of subjecting the experts to an unrestrained adversarial process until they have committed their opinions to a report, formulated in that context, while postponing endeavours to obtain the benefit of the professional discourse until trial.

The opportunity for genuine professional discourse at trial, through the concurrent evidence model, is inherently more limited than a case management approach. Why should experts be expected to conduct their professional discourse on a given day, in a courtroom, in the middle of a trial, while the lawyers and the judge not only spectate, but attempt to manage and participate in the process? A more professionally respectful approach is to give the experts the opportunity, unsupervised, unpressured and uninfluenced by the parties, to formulate their opinions in consultation over a period of time and before committing to opinions expressed in trial reports. Further, by having that professional discourse at an earlier time, matters of methodology are dealt with before they even arise.

None of this is to suggest that the concurrent evidence model is not a valid option for adducing evidence at trial. It is not,

however, a substitute for appropriate management at an earlier time. One of the problems of the enthusiastic promotion of concurrent evidence is that it has tended to give the impression that it is "the" method for adducing expert evidence and is, in itself, a sufficient way to address concerns surrounding expert opinion evidence. In truth, it is neither. It is a tool, the usefulness of which will vary according to the context in which it is used, and the manner in which it is employed.

Use of concurrent evidence has its greatest attraction where pretrial management, to obtain the benefit of the professional discourse at an earlier time, has not occurred. In short, it is better to have some opportunity for expert discourse than none. Too little too late is generally better than nothing at all. While concurrent evidence is also an available tool to be used even where more extensive management has occurred at an earlier stage, many of the perceived benefits of concurrent evidence will already have been realised (and potentially to a greater degree) prior to trial in that event.

Following a trial of concurrent evidence in the Planning and Environment Court, a seminar was held, by the Queensland Environmental Law Association in 2008,[12] to discuss the experience and the merits of using concurrent evidence more extensively in the Planning and Environment Court. The seminar was attended by approximately 130 persons, drawn from the ranks of both lawyers and experts, who participated in a general discussion following three presentations. There was little enthusiasm for the use of concurrent evidence in the context of the Planning and Environment Court.

The views expressed fell into two main categories. There were those who were ambivalent about whether concurrent evidence was used or not, given that an earlier and better opportunity for genuine professional discourse had already occurred prior to trial. The majority were positively opposed to concurrent evidence at trial, so long as the pretrial expert meeting and joint report process, as directed by the Court, was in place. Expert evidence in the Planning and Environment Court is generally adduced by calling experts individually in "blocks", according to their area of expertise, rather than concurrently.

Statements of expert duty and expert guidelines

Part of the reforms, in relation to expert evidence has been the adoption of rules or guidelines which expressly state the content of the expert's duty. Those statements generally communicate, rather than change, the law. In the Queensland context, the duty of an expert is stated in r 426 of the Uniform Civil Procedure Rules as follows:

> **Duty of expert**
> 1) A witness giving evidence in a proceeding as an expert has a duty to assist the court.
> 2) The 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.

That statement of duty is supported by the requirement in r 428, for the expert's report to confirm that the expert understands the expert's duty to the court and has complied with the duty. In the context of the Planning and Environment Court the rules also:

i. require the expert to be given written notice of the expert's duty before the meeting of experts.[13]
ii. require that no person must give and no expert must accept instructions to adopt or reject a particular opinion in relation to an issue in dispute in a proceeding.[14]
iii. require the expert in any individual statement of evidence, to verify that the expert has not received or accepted instructions to adopt or reject a particular opinion.[15]

Rules or guidelines to this effect were dismissed by Davies as "pious hopes" (at 93). It is undeniable that they are not sufficient in themselves, to properly manage expert evidence. They state the duty of the expert, but need to be supported by appropriate case management to ensure that the environment exists within which that duty is likely to be complied with. Notwithstanding these limitations, however, they are appropriate and useful

provisions which underline the proper role of the expert, which is then promoted by case management otherwise.

The reforms also include provisions as to the contents of an expert report. In the Queensland context, that is provided for in r 428. The guidelines assist by ensuring that reports are written in a way which appropriately discloses the basis for the expert opinion, thus allowing the opinion to be "deconstructed", tested and ultimately assessed in the deliberative process.

Conclusion

The expert evidence reforms in the UCPR focused on:

1) declaring the duty of an expert;
2) expressing a preference for expert evidence by a single expert; and
3) prescribing the contents of expert reports.

The first and third of those are appropriate and helpful even if not, of themselves, sufficient.

The single expert model has not proven to be helpful in most cases. The debate has shifted to the best way of obtaining the fully-informed expert discourse among the experts. The concurrent evidence procedure for adducing evidence at trial has been used in other jurisdictions to achieve that. A greater opportunity, however, lies in case management which obtains the benefit of that discourse for the parties, and for the court, at a much earlier stage. While concurrent evidence remains an available tool, it is not a substitute for greater management at an earlier stage. This early management of experts has proven both successful and popular in the context of the Planning and Environment Court and is now influencing the approach in other courts.

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Appendix

Experts in the Planning and Environment Court of Queensland

1. References

P&E Court means the Planning and Environment Court of Queensland.
UCPR means the Uniform Civil Procedure Rules 1999 (Qld).
PECR means the Planning and Environment Court Rules 2010 (Qld).

2. The number of experts

a) The provisions of the UCPR, preferring single court appointed experts, do not apply in the P&E Court (UCPR, r 429E).
b) Without leave, each party may call only one expert for each area of expertise (PECR, r 34).

3. The duty of experts

a) An expert giving evidence has a paramount duty to assist the court, which overrides any obligation to the party or person liable for the expert's fees or expenses (UCPR, r 426).
b) Each expert must be given written notice of the expert's duty (PECR, r 26(e)).
c) Each expert must verify, in writing, that the expert's duty has been understood and complied with (PECR, r 27(3)(a)).
d) No person may give and no expert may accept instructions to adopt or reject a particular opinion (PECR, r 29).
e) Each expert must verify, in writing, that the expert has not received or accepted instructions to adopt or reject a particular opinion (PECR, r 31(3)).

4. Notification of experts

a) Orders or directions almost invariably require an exchange of lists of experts (PECR, r 19(5)(c)(iii)).
b) This is generally ordered to occur, at the latest, upon the completion of disclosure.

5. Expert meetings and joint reports

a) The court almost invariably orders experts to meet and produce a joint report (PECR, r 19(5)(c)(iv)).
b) The meetings occur *before* any individual trial reports are prepared.
c) A party must do all things reasonably necessary or expedient to ensure an expert is ready to take part fully, properly and promptly in the meeting of experts (PECR, r 26).
d) Expert meetings may be chaired by the court's ADR registrar (PECR, r 25).
e) Save for the contents of the joint report, evidence is not given of what is said in the joint meetings (PECR, r 28).
f) The meetings are held in the absence of the parties and their lawyers (PECR, r 22).
g) The purpose of the meetings is to discuss and attempt to reach agreement about the experts' evidence.
h) From the time the experts begin to meet until the joint report is prepared (usually a few weeks or more) they cannot refer to, or obtain instructions from, the parties (save by a joint response to an enquiry made by the expert's jointly). This is known to as the "quarantine period" (PECR, r 27).

6. ADR and experts

a) The joint opinions of the experts inform the ADR process.
b) Experts will ordinarily attend mediation or other court ordered ADR processes.

7. Trial reports

a) Individual trial reports are only prepared:
    i. After expert meetings and joint reports;
    ii. After the completion of court ordered ADR;
    iii. If the matter is one of the relatively few that are nevertheless proceeding to trial
b) Even where a matter is proceeding to trial, individual trial reports are not required. The joint report is used as the primary report at the trial (PECR , r 30(2)(a)). Individual reports *may* also be prepared (PECR, r 30(2)(b)).
c) An individual trial report (other than the joint report):

i. Is directed to any points of disagreement in the joint report (PECR, r 30(2)(b)); and
ii. May not, without the leave of the court, contradict, depart from or qualify an opinion in relation to an issue the subject of agreement in the joint report and may not raise a new matter not already mentioned in the joint report (PECR, r 30(3)).
iii. Otherwise must follow the general requirements as to the contents of reports (UCPR, r 428; PECR, r 31)

8. Evidence at trial

a) The court may direct that expert evidence be given consecutively, concurrently or in another way (PECR, r 19(5)(c)(xi)).
b) Expert evidence is most commonly given consecutively "in blocks" (eg all experts in one field are cross-examined consecutively before the next "block" of experts in another field are called).
c) Except by leave, an expert, in examination in chief, must not repeat or expand on the matters contained in the joint report, or in the individual report or introduce any new material (PECR, r 33).

Notes

1 Uniform Civil Procedure Rules 1999 (Qld), r 423.
2 G Davies "Court Appointed Experts" (2005) 5(1) QUT Law and Justice Journal 89, at 100.
3 *Pers comm* from Colin Beard, traffic engineer, authorised for republication.
4 G Edmond "Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure" (2009) 72(1) Law and Contemporary Problems 159.
5 *Pers comm* from C Beard, traffic engineer, authorised for republication.
6 Most recently in a panel discussion at the Expert Evidence Conference at Australian National University, Canberra, on 11 February 2011.
7 Thus avoiding the duplication of uncontentious exercises.
8 Chief Judge PM Wolfe "Practice Direction 2 of 2006" (Planning and Environment Court, Queensland, 10 February 2006).
9 G Edmond, above n 4, at 166.
10 G Edmond, above n 4, at 167.
11 IR Freckelton and H Selby *Expert Evidence: Law, Practice, Procedure and Advocacy* (4th ed, Thomson Reuters, Sydney, 2009) at 494.
12 Queensland Environmental Law Association seminar "Concurrent Expert Evidence: Three Views of a 'Hot Tub'" (Brisbane, 27 October 2008).
13 Planning and Environment Court Rules 2010 (Qld), r 26.
14 Planning and Environment Court Rules 2010 (Qld), r 29.
15 Planning and Environment Court Rules 2010 (Qld), r 31(3).