'Guidelines for Expert Evidence in the Land Court'*

President FY Kingham of the Land Court of Queensland

API National Property Conference

Gold Coast, 3 November 2017

Thank you all. I am very impressed that there are so many people actually in a room on such a beautiful day at the Gold Coast and you do us a great honour to stay here to listen to us.

I am wanting to do a couple of things in my presentation today but before I start on my purpose I will just give you a very quick overview of the Land Court of Queensland. We have got quite a diverse jurisdiction. We deal with land valuation appeals, and that's probably the jurisdiction that most valuers come into contact with. We also deal with compensation determinations when governments acquire land compulsorily. We determine compensation for mining and petroleum and other resources activities and the impact of those activities on landholders, particularly in a rural context. We also hear objections to, and we recommend to governments, on the grant of mining leases and environmental authorities. Given that jurisdiction, you will appreciate that expert evidence is at the core of what we do and it is critical to ensure our expert evidence procedures are as efficient and as effective as possible.

My purpose today is to talk you through some of the changes that we are in the process of introducing to the Land Court. Some of the procedures I will discuss are already in operation. Some of that is fairly new and we are piloting some new procedures. I have provided to the API a draft guideline that covers all of our processes. If you are interested, please ask API for a copy. I would appreciate feedback from experts who have to work within these procedures. We will be introducing a new Practice Direction next year. I would really appreciate feedback from valuers and other experts based on your experience in the Land Court and other Courts.

So, let me start by going to the guiding principles that apply and underpin what we are doing here at the Land Court. I will start with the idea of privilege and responsibility. As

* Edited version of address.

expert witnesses you have, firstly, power, and with that power you also have privilege, and what flows from that is responsibility. So what is your power? I imagine that those of you who have actually given evidence and have been cross-examined may not feel very powerful in that moment, but you are powerful. Your power is that you are being invited into a courtroom to express your professional opinion. You are talking about matters that the judge of fact (whether judge, tribunal member or a jury) does know about; the judge does not have your expertise. That is where your power comes from.

You also have a privilege. Most witnesses in a courtroom or a tribunal hearing room are not allowed to express their opinion. Generally, a witness may only say what they saw, did, heard, felt or experienced. But an expert witness is privileged. You are entitled to express your opinion.

With that privilege comes a responsibility. Your responsibility is to observe your duty to the Court. You must not abuse your power. You must understand your duty to the Court and you must act consistently with it. Cresswell J's summary [1993] 2 Lloyd's Rep 68, 81-82, omitting only case citations:

> "The duties and responsibilities of expert witnesses in civil cases include the following:
>
> 1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation…
> 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise… An expert witness in the High Court should never assume the role of an advocate.
> 3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
> 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness, who has prepared a report, could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report…
> 6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court."

You must do what you can to avoid a miscarriage of justice or an unnecessary waste of time or money. I want to draw your attention to what President Sofronoff said in the second half of the paragraph:

> "... This duty may require a level of candour and voluntary disclosure on the part of an expert that might involve prejudicing the case of the party that called the expert…, nevertheless, that is your duty."

I want to focus for a moment on this paramount duty to the Court. Now, it is often said to experts, and, in fact, it is said to valuers on some material I have seen on the API website, that your duty to your client is consistent with your duty to the Court; that they don't act in conflict. That is a gloss on some really difficult situations you might find yourself in when acting as an expert witness. It is a bit glib to say that they can fit neatly together. When you are acting as an expert witness in proceedings before the Land Court your duty to the Land Court prevails over your duty to your client. Sometimes you will have to give answers, and will volunteer answers, that aren't necessarily in your client's best interests. But it is also your duty to fairly put forward all factors in their favour. But you are not engaged to advocate for your client. You are there to assist the Court to understand the expert issues involved in the case. It is really important that you take that message on board. The reason that integrity is so important is because of your power and responsibility as an expert witness. There are wonderful statements in codes of ethics about the expert's duties and I am not going to repeat any of those today and I think Mark will probably talk more to you about the requirements of integrity and impartiality and the like.

I will now turn to the issue of clarity. As well as ensuring integrity what we are in search of clarity of expert opinion. We are hoping to assist you to better communicate with us, so we can understand your evidence. What we are trying to understand, particularly, is disagreements between competing experts. We are trying to understand not just the fact that you disagree, or even at a high level why you disagree, but to really drill down and to understand what we have to resolve to decide the issue. Is it a question of different information? Is it a question of methodology? Is it a question of different sales? We need to understand where the disagreements really lie because once we understand the disagreements then we really understand the scope of the dispute between the experts.

So let me now take you through the process that we are using to ensure integrity and clarify expert evidence. The first step is nomination of experts. We ask parties to file a

nomination of experts. They give us the names, qualifications and field of expertise of their experts and they identify the issues that the witnesses will be asked to address. This is the first step in defining the scope of the issues. The lawyers will state the issues at a very broad brush level at this stage. It also provides an opportunity for your expertise to be challenged. When you are nominated as an expert you can be sure that the lawyer on the other side will look at your qualifications and consider whether they want to challenge your ability to give evidence as an expert. But the critical first step, from the Court's perspective, is that it identifies the issues at a high level.

The next step is briefing of the experts. You can expect to be provided with the following by a lawyer who engages you in proceedings in the Land Court.

- Reasonable prior notice of the Courts orders;
- Reasonable prior notice of the contents;
- Reasonable prior notice of the issues;
- Enough information and opportunity for adequate investigation; and
- Written notice of the expert's duty to assist the Court.

If you don't get any of these things, ask for them. Some lawyers may not be as good at briefing experts as they should be.

I want to talk about a different aspect of briefing, though. This is a new process we have introduced. I hope it sets experts off on a path together, to collaboratively examine an issue and develop a report explaining where they agree and where they disagree. The court requires parties to produce a single brief to the experts in a field. So, the two valuers will get the same brief prepared by the lawyers, or the parties, together. The brief will identify any issue either party says is relevant or want you to consider and will refer to any information that they say is relevant. We are not asking the parties to agree about those things, but we are asking the parties to provide all experts with a full suite of information from both parties. That reinforces the independence of the expert witnesses. How many times have you found yourself at a meeting and realised that the other expert has information that you have not been privy to? This procedure should prevent that sort of thing happening.

There will be occasions when you are the only expert witness on a topic. Often in a valuation case there will be a valuer called by the Valuer-General and the party who is opposing the valuation will not call their own evidence. You need to understand what the requirements of the rules are for a statement of evidence in those circumstances. They are in the rules. They are what you would expect. Make sure you identifty any facts or assumptions relied upon, reveal your methodology, and explain how you have proceeded from information to opinion. Valuation is not an exact science; it is more of an art. Nevertheless, you must explain your reasoning. If you have discounted value for a reason, what is the reference point for your percentage (%) discount?

If a joint report merely notes you disagree because you have no common sales, it is worthless. For each sale that either expert relies on, explain:

- Why you think or do not think it is a comparable sale;
- Whether, if the Court accepts it is a comparable sale, you agree with the other valuer's analysis;
- If not, how you would analyse the sale.

If it is a highest and best use issue, say why you disagree. If it relates to the likelihood of planning approval this is outside your expertise. Address value on both hypothesis: your highest and best use and the other valuer's. If yours is not accepted, do you accept the other valuer's comparable sales for that use? Would you analyse them differently?

Think carefully about whether you have exposed your reasoning. Lord Prosser said "what carries weight is the reasoning not the conclusion" (Dingley v Chief Constable Strathclyde Police, 1998 SC 548, 604). If you think about that when you are preparing your statements of evidence, when you are engaged in developing a joint report, and when you are preparing to give your evidence in Court, you will be best prepared to assist us, as judges, to understand your reasoning. In valuation cases it is easy to comprehend the dispute. Where the resolution lies is in the reasoning.

We often engage with experts in ADR. Where there is a single expert on a topic, it seems to me to be an ideal opportunity to reality test the prospect of the parties on that issue. If you are a single valuation expert, you should expect you may be involved in a mediation, at which the other party can ask you about your opinion and test it, in a without prejudice forum. This is a much less formal way to proceed and it is a much easier way for a self-

represented person to understand your opinion. This is already used extensively in valuation cases where the amount involved is less than $5 million. We are going to use the same process in mining compensation hearings and other sorts of disputes where expert evidence might be required.

I now turn to a new process called Court Managed Expert Evidence. We will probably call it 'CMEE' because it involves you coming to the Court and seeing, not me necessarily, somebody appointed by the Court or convene this process. We are going to be much more interventionist in certain cases, in managing the expert evidence process. If you who have given evidence in acquisition of land disputes you will understand that you are the last piece of the puzzle. There might be civil engineers, hydrologists, town planners, ecologists, all sorts of experts involved in looking at discreet issues before you are asked to synthesise that information and express your opinion on value. Cases can run off the rails in those complex pipelines of expert evidence. We are beginning to intervene by appointing a convenor to manage the process. It may be a Member, but not the Member who will hear the matter. The convenor will work with the experts to work and report in a timely way, ensuring that the timeframes they are given are realistic. I am much more interested in having a realistic process with some rigour then a quick process that has to be revisited because it is flawed. The CMEE convenor will manage the sequencing of experts, requests for further information and other matters that may arise. As valuers, you might be brought in at the beginning to identify issues that you think might bear upon value. Then you might be left alone for a while so other experts can consider and report on those issues. The CMEE convenor can also manage communications with lawyers and parties. Once you are in the joint meeting process you cannot communicate with your client or the lawyers about the content of your discussions. A CMEE convenor can facilitate communication in a way that is safe and has integrity. Another benefit is that the CMEE convenor can list the matter before me if a ruling is required before you can proceed with your work. We are already using this process and will evaluation CMEE next year. I encourage you to read it and provide feedback to the Court.

I now turn to expert meetings. If there are two or more experts in one field they will be required to meet and produce a joint report. We have developed an agenda for those meetings:

- Understand the expert's duty to the Court;

- Acknowledge that an expert cannot act as an advocate;
- Understand the issues that the expert is asked to give an opinion about;
- Ensure the expert is appropriately qualified;
- Ensure the expert is adequately briefed;
- Ensure the expert provides a report;
- Have the opportunity to test the expert's opinion.

I just want to say a few more things about expert meetings. To do a good joint report you have to have a good expert meeting. Don't trivialise the process; prioritise it. This means you must put in the work. You must prepare to discuss. You must discuss in detail. You must take the time to do it properly. If you need more than one meeting, have more than one. If you need more information, ask for it. If there is a genuine need for more time for the expert evidence process you will get it. Remember, what carries weight is the reasoning, not the conclusions. I would much rather wait for a comprehensive well written joint report than get a report on time in which the experts pass like ships in the night.

My last topic is concurrent evidence. You might have heard this referred to as hot tubbing. It means that experts give evidence together. You will be sworn in together and the member presiding will lead a professional discussion amongst experts. The Member will work through topics agreed with the lawyers and counsel will have an opportunity to ask questions of you, so don't think you will avoid cross-examination. For the Members who have to make a decision, it is a process that works very well. We have a much better understanding of the evidence by the end of a concurrent evidence session. Some lawyers are more reserved about it because it undermines the effectiveness of advocacy techniques to control the way in which experts present in the courtroom. That is of less concern if the process is fair to all parties and if the parties have adequate opportunity to properly test the experts' objections. This can be done as effectively in a concurrent evidence session as in a traditional cross-examination.

We encourage the experts to ask questions of each other and to indicate if they want to make a comment, at any time, on anything that has been said. Once experts settle into the session, it appears to be a more natural process. This is what you do or should be

doing in the joint meeting. The difference is you are doing it on the record in the courtroom and the decision maker gets the benefit of the discussion.

Returning to my opening themes, the Land Court wants to promote the integrity of expert witnesses and their evidence in our proceedings; and we are searching for clarity so the Court can make better use of expert opinions. I encourage you to provide your feedback on the draft guidelines. Thank you.