DISTRICT COURT OF
WESTERN AUSTRALIA

CIVIL TRIAL PREPARATION PROJECT

DISCUSSION PAPER

OCTOBER 2005

FOREWORD BY THE CHIEF JUDGE

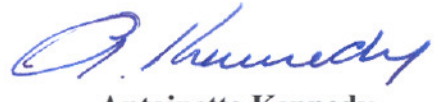
As the intermediate civil Court in Western Australia, the bulk of the work of the District Court is concerned with significant disputes involving individuals and small to medium enterprises. In this arena, access to justice, cost of justice and timeliness of justice have a direct impact on the lives of individuals and the ongoing viability of small to medium enterprises. If a seriously injured victim of a motor vehicle accident cannot afford to commence an action in the Court or is unable to have their matter heard and determined in a reasonable time, then the justice system begins to rapidly fall into disrepute. While the Court is only one part of the justice system, we are conscious to ensure that the Court is meeting the community's expectations of it as the intermediate civil (and criminal) Court.

In order the ensure that the Court is doing as much as it can to meet the community's expectations of it, the Court is committed to continuously evaluating and improving the way it operates. As part of this commitment, the Court is conducting a review of the way in which civil actions are prepared for trial. In order to stimulate debate as to how things could be improved, the Court has issued this discussion paper.

The improvements which the Court is seeking to identify will need to balance two sometimes competing considerations: the need to present actions for trial in a complete and well organised manner, and the need to reduce, or at least contain, the costs of trial preparation.

2005 has already seen two significant changes to the civil jurisdiction of the Court. The first was that the general civil jurisdiction increased from $250,000 to $500,000. The second was that the Court significantly changed the way in which case management oversight is carried out, moving to a model that allows the Court to tailor case management oversight to the circumstances of each action. The case management changes looked at an action from commencement going forwards. The next logical step is to look at the way actions are presented for trial and work backwards. This is the focus of the civil trial preparation project.

I would encourage anyone who is affected by the work of the Court to respond to the discussion paper. The optimal results for both the Court and those affected by the work of the Court are likely to be achieved by gathering and reviewing a wide range of ideas from diverse perspectives.



Antoinette Kennedy
Chief Judge

12 October 2005

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1. PROJECT OUTCOMES

The Court has identified five outcomes of case management in civil matters which at a general level comprise the desired outcomes for this project with its focus on trial preparation. The five outcomes were recently set out in Circular to Practitioners CIV 2005/3, dealing with case management. The outcomes are that the Court will aim to:

- Promote the just determination of litigation.
- Dispose efficiently of the business of the Court.
- Maximise the efficient use of scarce judicial and administrative resources.
- Facilitate the timely disposal of business at a cost affordable to parties.
- Ensure that, where a case proceeds to trial, the issues are clearly defined, evidence is presented in an efficient manner and the materials for the Judge are complete and well organised.

The Circular to Practitioners goes on to note that these outcomes have to be achieved in the context of the ultimate aim of a court, which is the attainment of justice. No principle of case management can be allowed to supplant that aim (see generally *Qld v JL Holdings Pty Ltd* (1997) 189 CLR 146).

As its name suggests, the focus of this project is on the last of these outcomes, trial preparation.

In the present context, the outcomes of case management suggest that two themes will guide the Court's approach to proposed changes:

1. If an existing requirement cannot be justified on the basis that the value it adds to a trial outweighs the costs involved, the requirement should be removed.

2. Before any new requirements will be added, the change must be justified on the basis that the value it adds to the trial outweighs the costs involved.

Value in this context refers to ensuring that the issues are clearly defined, evidence is presented in an efficient manner and the materials for the Judge are complete and well organised. For example, a requirement may add value by reducing the length of a trial, or by reducing the cost of preparation for the trial.

The Court is also conscious of tailoring the case management regime, including trial preparation, to its particular jurisdiction. The Court starts with a desire to mirror Supreme Court practice, but will depart from that for good reason to tailor its practice and procedure to the types of cases that are usual for the Court.

To place these remarks in their context, the following background information is provided for the 12 months ending 30 June 2005:

- 3,526 new cases were commenced, including 3,121 by writ.

- Of the 3,121 cases commenced by writ, 1,824 were for personal injuries and 1,297 were for other types of actions.

- 3,833 cases were finalised, including 3,341 cases commenced by writ.
- 336 cases were listed for trial, of which 140 actually proceeded to trial.
- The average trial length was 3.44 days.

One feature of the profile of cases in the Court is that very few cases actually proceed to trial. This has implications for the way in which case management occurs. Specifically, it suggests that care needs to be taken as to when trial preparation requirements are imposed on parties to ensure that no unnecessary work is done.

2. METHODOLOGY

The Court has taken the view that in order to position itself to possibly make major changes to the way in which cases are prepared for trial, it should consult widely. In order for the consultation to be both efficient and meaningful, it is important that the issues be distilled in a way that can draw out focussed responses. That is the purpose of this discussion paper: to provide a catalyst for focussed responses.

This discussion paper is being provided to major stakeholder groups, including the Law Society of Western Australia and the Bar Association of Western Australia.

Feedback is requested by 31 January 2006. It should be sent or emailed to:

> Project Officer, Trial Preparation Project
> District Court of Western Australia
> Level 2, Central Law Courts
> 30 St George's Tce
> PERTH WA 6000
>
> Fax: (08) 9425 2268
> Email: districtcourt@justice.wa.gov.au

The Court will treat all responses received in confidence in order to ensure full and frank responses. Any future public documents which refer to feedback, will either use the tag "feedback from practitioners is…" or "feedback has been received ….". Notwithstanding that, the Court is also open to receiving anonymous responses, which will be given weight according to their content.

As part of the project, the views of Judges and Registrars of the Court, and Registry staff, will be obtained.

Once all responses have been gathered and analysed, the Court will consider what, if any, changes it should make to its existing practice and procedure. These changes could include:

- Rule changes;
- Practice changes, to be reflected in new Practice Directions or Circulars to Practitioners;
- Administrative changes
- Technology initiatives.

The Court will publish a summary of the major changes proposed.

It may well be that the Court will engage in limited additional consultation in relation to implementation and drafting issues.

Any specific queries in relation to the project may be directed to Michael Gething, Principal Registrar, using the Court contact information set out above.

3. ENTRY FOR TRIAL/ PTCs

Issue 3.1 Timing of the compulsory Court sponsored mediation

Current position

The *District Court Rules 2005* ("2005 DCR") provide that a pre trial conference be held shortly after the action is entered for trial. On the usual case management timetable, the first pre-trial conference should be held within 160 days after the first defence is filed, and within 40 days of the action being entered for trial.

The Court's policy position is that in each and every case there needs to be a pre trial conference with the parties or their corporate representatives present. This is consistent with the practices adopted by equivalent courts Australia wide. The issue for present purposes is when that pre trial conference should occur.

The default position of a holding a pre trial conference after the action is entered for trial is balanced by the ability of the Court to order a mediation or a pre trial conference at any stage in the action using its case management powers. The Court has issued two Circulars to Practitioners (CIV 2005/10 and CIV 2005/11) that set out a framework for early mediation in commercial cases and other civil cases.

The net result is a default setting in which a pre trial conference is held once the case is more or less ready for trial, with flexibility to hold one earlier if that makes sense in the circumstances of the case.

Option 1: Maintain the current position

The reason for the pre trial conference being held after the action is entered for trial is that it does not make sense to hold a pre trial conference until the parties have defined the issues, used the compulsory information gathering powers of the Court (eg discovery and interrogatories) and have obtained expert evidence. Until then, the parties will not know the relative strength of their case at trial, which in turn will define their negotiating position.

The current position explicitly builds in the flexibility to hold an earlier mediation conference if that makes sense in the circumstances of the case.

Option 2: Hold the pre trial conference at a set time after the filing of the first defence

One option is to put a set timing point at which the pre trial conference is held, regardless of the level of preparation of the case. This could be at 160 days after the first defence is filed. The case management timetable sent out when the first defence is filed could give the date of the pre trial conference. The parties could then work towards being ready for a pre trial conference on that date in 5 or so months time.

The down side is that case may reach a pre trial conference when they are not ready, increasing the number of adjournments.

Specific issues for discussion

3.1.1 What should be the default setting for when the Court sponsored pre trial conference should occur?

3.1.2 Could the Court do more to facilitate the parties participating in a pre trial conference or mediation prior to the action being entered for trial, at the time when it makes most sense in the life of an action? If so, what initiatives could the Court put in place.

Issue 3.2 Schedules of damages

Current position

A party wishing to enter a matter for trial must file and serve a schedule of damages with the entry for trial form pursuant to 2005 DCR rule 37. Specifically, rules 37(3)(b) and (c) provide:

> "(3) To enter a case for trial the plaintiff must file and serve:
>
> …
>
> (b) if the case is a personal injuries action, a document setting out in detail the amount of money claimed for any of the following, the justification for claiming it, and how it is calculated:
>
> (i) past loss of earning capacity;
>
> (ii) future loss of earning capacity;
>
> (iii) loss of superannuation due to past or future loss of earning capacity;
>
> (iv) special damages;
>
> (v) future medical expenses;
>
> (vi) future care;
>
> (vii) past gratuitous services;
>
> (viii) future services;
>
> (ix) special services or appliances;
>
> (x) any other discrete item of damages;
>
> (c) if the case is not a personal injuries action, a document setting out in detail any amount of money claimed, the justification for claiming it, and how it is calculated*;* …"

The requirement to file a schedule of damages when the action is entered for trial has the purpose of informing the other side of the damages claimed. It is important for all parties to have this information at the entry for trial stage as this immediately precedes the pre trial conference.

The quality of the schedules is variable. Some include detailed calculations and references to the factual basis on which the damages are calculated. Others are not so useful, and are best described as ambit statements of position.

The status of the schedules of damages is not clear. Are they particulars? Are they submissions? Are they "without prejudice" settlement tools? Technically, all the information in a schedule of damages should be provided in the particulars. The schedule of damages is not part of the book of papers for the Judge (see 2005 DCR rule 37(3)(d)). Moreover, it is usual for an updated schedule of damages to be provided to the trial Judge immediately prior to the trial.

In terms of the utility of a schedule or damages for pre trial conference purposes, it is not uncommon for the first offer made by a plaintiff at the pre trial conference in a

personal injuries case to be a fraction of the amount set out in the schedule - eg an offer to settle at $40,000 inclusive of general damages, when the amount in the schedule is $100,000 plus general damages. This practice means that it is difficult for a defendant to assess the "ballpark" range of damages claimed for settlement purposes from the schedule.

Option 1: Maintain the current position

If the current position is maintained, perhaps the Court could issue some examples of schedules of damages to encourage the adoption of "best practice" in drawing such schedules. Alternatively, the Court could liaise with the Law Society to provide some education on this issue, again with sample schedules.

Option 2: Slightly adjust the current position

One option is that the document should be elevated to the status of a pleading entitled "particulars" of damages instead of "schedule" of damages. This would further clarify the status of the information provided. The particulars would then be included in the papers for the Judge.

Option 3: Tailor the provision of particulars to the stage of the proceeding

Another option would be to require the parties to provide information about damages claimed at two stages. There could be a requirement to provide a "without prejudice" schedule of damages for settlement purposes at the time the action is entered for trial. Perhaps the defendant could be required to file a "without prejudice" response to the plaintiffs at this stage.

There could then be a requirement to provide particulars of damage either at the listing conference or shortly prior to the trial.

The Court would need to develop practices to ensure that the "without prejudice" materials did not inadvertently come to the attention of the trial Judge.

Option 4: A "Scott Schedule" approach

Another option is for there to be a requirement that the schedule of damages be in a form that would enable the defendant to respond to each head of damages. The schedule could be set out in the form of a Scott Schedule, incorporating responses from the defendant.

The combined schedule of damages could be done on a "without prejudice" basis prior to a pretrial conference, and/or on an open basis as part of the trial documents.

Option 5: Dispense with the requirement

Another option is to dispense with a specific requirement to file a schedule of damages, and to leave the issue of identification of damages claimed to the existing particulars process.

Specific issues for discussion

3.2.1 Should the Court as a matter of usual practice order the parties to file and serve a schedule of damages?

3.2.2 Are the schedules of damages filed and served pursuant to 2005 DCR rule 37 actually used at the trial of the action?

3.2.3 If they are used, do they add sufficient value to justify the cost of preparation?

3.2.4 Would any of the alternative options set out above be an improvement on the current position?

3.2.5 Is there a better way of providing a information about the amount of damages claimed?

3.2.6 Should a defendant have to serve a “without prejudice” response to the plaintiff’s schedule of damages prior to a pre trial conference?

Issue 3.3 Chronologies

Current position

2005 DCR rule 42(1)(a) empowers the Registrar presiding at a pre trial conference, when ordering the parties to attend a listing conference, to also order the parties to file and serve a chronology of relevant events. In general terms, the practice of Registrars is to make this order, unless the circumstances of the action are sufficiently straightforward such that chronologies do not add any additional value in defining the issues for the trial Judge.

The outcome designed to be achieved by the rule is to provide a concise summary of the key dates in the action.

The chronologies provided by practitioners are variable in their presentation. Some simply list all medical appointments. Some usefully focus on the key events.

Option 1: Maintain the current position

Maintaining the current position would be justified if the value added to a trial by the exchange of chronologies outweighs the costs involved

The Court could issue guidance, perhaps by way of Circular to Practitioners, as to the form and content of the chronology. This would have the aim of facilitating a consistent optimal practice in the preparation of chronologies.

Option 2: Slightly adjust the current position

The DCR could provide for a process that produced an agreed chronology of key events.

The DCR could provide for the chronologies to be included in the papers for the Judge.

The DCR could provide that the defendant only needed to file a chronology if the defendant was asserting a significantly different series of events.

Option 3: Change the timing

The timing of the production of the chronology could be changed so that it is produced as part of a bundle of documents shortly prior to the trial of the action. This would have the advantage of not putting the party to the expense of preparing the chronology until it was reasonably certain that the action would not settle, and the trial would proceed.

Option 4: Dispense with the requirement

The Court could change its practice so that chronologies are ordered to be exchanged as an exception, rather than routine practice.

There is an invitation, but not a requirement, in the 2005 DCR to include a chronology in the submissions filed prior to the hearing (2005 DCR rule 61(5)(e)).

Specific issues for discussion

3.3.1 Should the Court as a matter of usual practice order the parties to file and serve a chronology of relevant events?

3.3.2 Are the chronologies ordered pursuant to 2005 DCR rule 42(1) actually used at the trial of the action?

3.3.3 If they are used, do they add sufficient value to justify the cost of preparation?

3.3.4 Should only the plaintiff have to file a chronology? Or both parties?

3.3.5 Would any of the alternative options set out above be an improvement on the current position?

3.3.6 Is there a better way of providing a concise summary of the key dates in the action for use in the trial of the action?

Issue 3.4 Summaries of issues

Current position

2005 DCR rule 42(1) empowers the Registrar presiding at a pre trial conference, when ordering the parties to attend a listing conference, to also order the parties to file and serve "a concise summary of the issues of fact and law that the [party] contends will need to be determined at trial". The rules go on to provide that in case involving a building or engineering dispute, the statement must be in the form of a Scott Schedule.

In general terms, the practice of Registrars is to make this order, unless the circumstances of the action are sufficiently straight forward such that summaries of issues do not add any additional value in defining the issues for the trial Judge.

The outcome designed to be achieved by the rule is to identify the key issues in dispute in the action.

The summaries of issues provided by practitioners are variable in their presentation. Some go for several pages and identify every issue in dispute. Others are limited to a couple of points.

There is an argument that a statement of issues only adds value when the pleadings do not sufficiently define the issues. In that case, the pleadings should be amended.

Option 1: Maintain the current position

Maintaining the current position would be justified if the value added to a trial by the exchange of summaries of issues outweighs the costs involved

Option 2: Slightly adjust the current position

The DCR could provide for a process that produces an agreed statement of issues.

The Court could also issue guidance, perhaps by way of Circular to Practitioners, as to the form and content of the summaries of issues. This would have the aim of facilitating a consistent optimal practice in the preparation of summaries of issues.

The DCR could provide that the defendant is not obliged to file a responsive summary unless it saw value in doing so to define the issue for the trial Judge.

Option 3: Change the timing

The timing of the production of the summaries of issues could be changed so that it is produced as part of a bundle of documents shortly prior to the trial of the action. This would have the advantage of not putting the party to the expense of preparing the summary until it was reasonably certain that the action would not settle, and the trial proceed.

Option 4: Focus on facts not in issue

Yet another option would be to require the parties to identify the facts not in dispute. This could be done by some form of notice to admit facts procedure. This would have the outcome of narrowing the facts in dispute prior to detailed trial preparation commencing. It would have to be done early enough so that the number of trial days required could be assessed taking into account any agreed facts.

Option 5: Dispense with the requirement

The argument could be made that any delineation of the issues beyond the pleadings is best done by way of filing of submissions by the parties immediately prior to the trial of the action.

A variation would be for the summaries issues to be incorporated into a requirement to file submissions on issues or law and fact shortly prior to the trial. This would make it clear that the status of the document filed was in the nature of submissions, as opposed to "defacto pleadings".

Specific issues for discussion

3.4.1 Should the Court as a matter of usual practice order the parties to file and serve summaries of issues?

3.4.2 Are the summaries of issues currently ordered pursuant to 2005 DCR rule 42(1) actually used at the trial of the action?

3.4.3 If they are used, do they add sufficient value to justify the cost of preparation?

3.4.4 Would any of the alternative options set out above be an improvement on the current position?

3.4.5 Is there a better way of identifying the key issues in dispute, or perhaps the issues not in dispute, in the action?

Issue 3.5 Scott Schedules

Current position

2005 DCR rule 42(1) empowers the Registrar presiding at a pre trial conference, when ordering the parties to attend a listing conference, to also order the parties to file and serve "a concise summary of the issues of fact and law that the [party] contends will need to be determined at trial". The rules go on to provide that in case involving a building or engineering dispute, the statement must be in the form of a Scott Schedule.

The purpose of a Scott Schedule was recently summarised in the following way by Mazza DCJ in *Dale v Dennis* [2005] WADC 49 at paras 5 and 6:

> "A Scott Schedule is a pleading usually ordered in actions where a party's case is made up of a substantial number of claims. The Scott Schedule allows the court determining the action to have conveniently before it a document which gives a full description of each claim and the contention of each party with respect to it. A Scott Schedule is frequently used in building claims and in claims where it is contended that a series of works have been properly performed and the charges made for those works are reasonable. A Scott Schedule has been aptly described as "a useful procedural device which achieves a considerable saving in time and money": *The Supreme Court Practice 1991*, Sweet and Maxwell, at 18/12/29. Because the aim of a Scott Schedule is for each party to put before the court particulars of their respective cases, it follows that the schedule must provide a sufficient description of the work claimed to have been done to enable the party obliged to respond to do so properly. Where the works are not properly described, the court has a power to order further and better particulars.
>
> Of course, I cannot grant particulars where to do so would be oppressive or unreasonable, or where the information sought is not in the possession of the plaintiffs or could only be obtained with great difficulty: *Odgers on High Court Pleading and Practice*, Casson DB, 23rd ed, Sweet and Maxwell, at p 194."

In that case, the Scott Schedule was used to define the issues in a dispute about work alleged to have been performed by the plaintiff on a number of high performance motor vehicles. In another recent case, *Babura Pty Ltd v Harvey* [2005] WADC 136, a Scott Schedule was used to define the issues in a dispute about whether leasehold premises had been made good. In that case, Eaton DCJ stated that he regarded the Scott Schedule as "being a statement by the parties of the issues of fact to be determined at trial".

The Court's experience is that Scott Schedules are invariably not prepared in a format that provides optimal assistance to the trial Judge.

Option 1: Maintain the current position

Maintaining the current position would mean that the Court would continue to order Scott Schedules in cases typically involving multiple items in a damages claim.

Option 2: Slightly adjust the current position

The Court could provide more guidance on the preparation of Scott Schedules. This would have the aim of facilitating a consistent optimal practice in the preparation of Scott Schedules in various contexts.

Alternatively, the Court could identify areas in which Scott Schedules are commonly defective, and provide this information to, say, the Law Society for use in an education initiative on this issue.

Option 3: Require a Scott Schedule in all cases of certain types

Another option would be to have a requirement in the DCR that in at least building and construction disputes, a Scott schedule be filed as part of the pleadings and particulars processes. There could be a discretion in the Court to dispense with this requirement.

Specific issues for discussion

3.5.1 Are the Scott Schedules prepared from time to time in the Court actually used in the trial of the action?

3.5.2 Is the work done in the preparation of a Scott Schedules usually justified in the benefit received in organising information about the issues in dispute.

3.5.3 Is there a better way of organising information about the issues in dispute in cases in which there are multiple items of damage?

4. EXPERT EVIDENCE

Issue 4.1 Content of experts' reports

Current position

The Court does not prescribe any particular content rules for expert reports either in its rules or by usual orders.

Specifically, it is not the usual practice of the Court to require an expert to comply with the sort of orders set out in Supreme Court Common Form 80, paragraph 4, as follows:

> "(4) A copy of the report or the substance of the evidence of any expert witness shall include the name of the witness, the facts and matters relied upon to qualify him to give expert evidence, and shall identify the facts and other material upon which he bases his opinion. The witness must include in the report or in some other writing submitted to the Court before or when the evidence is formally tendered at trial a statement to the effect that the witness has made all inquiries which the witness believes are desirable and appropriate and that no matters of significance which the witness regards as relevant have, to the knowledge of the witness, been withheld from the Court."

The Court has noted that:

- Many experts, particularly medical experts, do not provide their qualifications in each report.
- Many experts do not set out the information, including documents, which they have been provided with to form their opinion.
- The briefing letters are routinely not provided to the Court at trial.

Option 1: Maintain the current position

The current position has the advantage of not being prescriptive, and thus not imposing additional cost burdens on parties.

Also, the vast majority of cases in the Court settle without going to trial. To require medical experts to include their qualifications and set out the documents provided in each and every report might not be justified in terms of value added. It may also exacerbate the reluctance of medical specialists to provide medico-legal reports.

Option 2: Slight variation to the current position

A slight variation on the current position may be to require the briefing party (as opposed to the expert) to exchange with any expert report a statement of experience (which might be a standard form curriculum vitae) and a list of all briefing letters and materials.

Alternatively, the statement of experience and list of materials relied on could be filed as part of the bundle of materials for the trial. The other party could have a right to call for this material at an earlier stage, for example, prior to briefing their expert.

This approach recognises that many experts are accepted as experts between the parties (in particular medical specialists) and there is no need for there to be a formal statement of experience unless and until the action goes to trial.

There are some privilege issues that would need to be considered if the Court was considering imposing a requirement to disclose all briefing material.

Option 3: Adopt the Supreme Court practice

Another option open to the Court is to routinely make orders akin to the orders in Common Form 80, paragraph 4 when granting leave to adduce expert evidence.

One issue here is that most of the expert evidence coming before the Court is from medical practitioners where no leave is required where the disclosure requirements in RSC Order 36A rule 2 have been complied with. This may mean that the substance of the order in Common Form 80 would have to be contained in, say, a practice direction.

Common Form 80 does not require the disclosure of briefing documents.

Option 4: Issue some form of Guidelines

Another option is for the Court to issue a guidance document dealing with expert evidence.

One possible model for such a guidance document is the Federal Court's "Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia". These guidelines are set out in Annexure A.

Specific issues for discussion:

4.1.1 Should the Court be more prescriptive in the information contained in experts' reports used in trials in the Court? If so, what requirements should be imposed?

4.1.2 If content requirements are to be imposed, how should they be imposed? By rules? By pro forma, but customisable, orders? By guidelines?

4.1.3 Would any of the options set out above be an improvement on the current position?

4.1.4 Are there any other ways in which the Court can facilitate improvements in the quality and independence of expert evidence used in trials before the Court?

Issue 4.2 Indexes of experts' reports

Current position

2005 DCR rule 42(1) empowers the Registrar presiding at a pre trial conference, when ordering the parties to attend a listing conference, to also order the parties to file and serve index of the reports of any expert witnesses that the parties intend to adduce at trial.

The practice of Registrars is to make this order in most cases.

The outcome designed to be achieved by the rule is to allow the parties to make decisions as to which experts they will need to call and/ or respond to at the trial of the action.

On some occasions, the index provided by a practitioner will set out all the experts' reports that the party has received and disclosed, and will not specifically state which experts the party proposes to call. Feedback has been received that this can cause prejudice to opposing parties. One example is where the plaintiff in a personal injuries case lists all medical reports from, say, five doctors, but only calls three of the doctors at trial. The defendant may have wished to cross examine one of the other two doctors, and had it known that they were not going to be called, would have been quite willing to subpoena the doctor to give evidence.

Another shortcoming of the current position is that the information exchanged does not provide the party proposing to call the expert with any information about the attitude of the other party to the evidence being presented. For example, it may be that a bundle of non-contentious reports (say, reports of MRI scans) can be tendered by consent without the need to call the witness.

Option 1: Maintain the current position

Maintaining the current position would be justified if the value added to a trial by the exchange of indexes of experts' reports in their current format outweighs the costs involved, and no better format can be identified.

Option 2: Slight variation to the current position

The current position could be strengthened by a requirement that a party must obtain the leave of the trial Judge, or consent of all other parties, to be excused from calling an expert witness which the party has specified in their index that they intended to call. This would enable the trial Judge to consider any prejudice to the other parties by reason of a party deciding at the last minute not to call a particular expert witness.

Option 3: Require the parties to provide more detailed information

Another option could be for the parties to exchange more information about the expert witnesses to be called at trial. Each party could be required to send a schedule to the other party setting out the witnesses, the reports to be tendered and whether the party

considers that the witness needs to attend in person. The schedule could be sent by email to allow the other parties to annotate it, and return it. The annotations would set out which reports could be tendered by consent and which witnesses had to attend for cross examination. The completed schedule could look something like that in the following table.

Sample plaintiff index of experts' reports

Witness	Reports	Ptf comments	Special requirements	Def comments	Combined length of time
Dr Hamlet	12.4.03 14.7.04 12.4.05	To be called.		Propose to XXN	1 hr
Dr Macbeth	11.6.03 13.7.04 14.6.07	Results of MRI scans. Seek tender by consent. Do not propose to call witness		Reports can be tendered by consent	Nil
Dr Cassius	13.5.03	Substitute for usual GP. Seek tender by consent. Do not propose to call witness.	If to be called, will need to be available by video.	Tender opposed. Wish to XXN.	30 mins
Mr Othello	12.12.03 4.7.04 12.3.05	To be called.		Propose to XXN.	2 hr

Specific issues for discussion

4.2.1 Should the Court as a matter of usual practice order the parties to file and serve a document setting out which experts' reports and substances of expert evidence a party proposes to rely on at trial?

4.2.2 Do the indexes of experts reports currently ordered pursuant to 2005 DCR rule 42(1) provide useful information?

4.2.3 If they are used, do they add sufficient value to justify the cost of preparation?

4.2.4 Would any of the alternative options set out above be an improvement on the current position?

4.2.5 Is there a better way of identifying the expert evidence to be utilised at a trial?

4.2.6 Is there some way of the parties providing an early signal to each other about what expert evidence is contentious and what may be tendered by consent?

4.2.7 At what point in time should the parties exchange information about the expert evidence each is going to call at trial?

Issue 4.3 Conferral between experts

Current position

The usual practice of the Court is not to make orders that experts confer with a view to narrowing the issues in dispute. There is an explicit power to make orders along these lines in the case management directions in 2005 DCR rule 24(2)(f).

Supreme Court Common Form 80 provides for a conference to occur between the experts with a view to narrowing the issues.

> ….
> (5) By [date] if there are differences between the evidence of the respective expert witnesses a conference shall be held between them in the presence of the solicitors for the parties for the purpose of narrowing or removing the differences.
>
> (6) If following the conference points of difference remain between the expert witnesses the solicitors for the parties and the expert witnesses shall attend a mediation conference before a mediation registrar at a time and place to be determined by him and the plaintiff shall contact the associate to the registrar no later than [date] to make arrangements for such a conference.
>
> (7) Three (3) working days before the conference the plaintiff shall lodge with the registrar's associate copies of the expert evidence as exchanged together with a note of the points of difference outstanding between the experts.
>
> (8) By [date] the plaintiff shall file and lodge with the associate to the judge making this order, a report signed on behalf of each party:
> (a) confirming that the conference has occurred as directed; and
> (b) recording of the substance of any resolution or narrowing of the points of difference between the experts resulting from the conference.

In one recent case before the Court, the Court had to consider whether the plaintiff would be able to return to her pre accident duties as a photo laboratory assistant. Expert medical evidence was given from both sides as to the impact of a requirement to lift rolls of photo paper. The trial initially proceeded on the basis that the roll weighed 16 kgs. However, a site inspection at the plaintiff's former workplace mid trial showed the weight to actually be 6.95 kg. This information reached the Court after the expert witnesses had given evidence. The trial Judge commented that: "Those preparing [the plaintiff's] case for trial should have ensured that the experts and the court had accurate information on this issue and that each expert gave an opinion based on the same facts".

Option 1: Maintain the current position

The current position is that the Court has the power to make conferral orders and mediation orders between experts, which can be used in appropriate cases. Conferral orders would not usually be made (for example in an action where the only experts are medical specialists). Common Form 80 provides a convenient form for the orders.

Option 2: Make conferral orders as a matter of usual practice

The Court could adopt a practice of making conferral orders – either in the form of Common Form 80 or customised orders - in all cases when leave is being given to adduce expert evidence. There is a stronger argument for conferral for non-medical experts, so it seems appropriate to attach the order to the grant of leave to adduce the evidence.

Option 3: Narrow the issues earlier

Another option would be for the Court to develop a standard set of orders - or perhaps guidelines – which have the purpose of trying to narrow the areas of dispute between experts from the outset. The primary way this could be done is for the parties to agree on any one or more of:

(a) the documents to be given to the expert;

(b) the factual assumptions the expert should make; and

(c) the questions asked of the expert.

The orders could also extend to issues like having an agreed date for inspection of a relevant work location or machine.

A good example of where this may occur is an action in which the value of a business is in issue. Business valuations typically require a large number of source documents. It may well be that the source documents agreed could go on to be tendered by consent.

One way of introducing this concept would be for the Court to publish a set of pro forma orders which would facilitate this agreement occurring, but not to adopt a practice of making the orders in all cases in which leave to adduce expert evidence is required (at least initially). This would allow the Registrar hearing the application for leave to adduce expert evidence to discuss the issue of agreed facts etc with the parties on hearing the application, and then if an order is to be made, to tailor the order to the needs of the case.

Specific issues for discussion

4.3.1 Should the Court as a matter of usual practice order experts – either generally or non-medical experts – to confer prior to the trial of an action? If so, when should the conferral occur?

4.3.2 If there is to be a conferral process, is the conferral process in Common Form 80 optimal – or is there a better model?

4.3.3 Should the Court develop orders and practices designed to narrow the issues in disputed between experts based on briefing materials, perhaps along the lines set out in option 3?

4.3.4 Are there other, perhaps more optimal, ways of narrowing the issues in dispute between experts prior to trial?

Issue 4.4 Expert evidence generally

Current position

The Court is cognisant that expert evidence:

- Is usually difficult to obtain.
- Often takes time to obtain.
- Often is a major cost of trial preparation.
- Usually impacts on the timing of when a trial can be listed.
- Often is a major cost of the trial.
- Often has a major bearing on the outcome of the trial.

Specific issues for discussion

4.4.1 Should the Court make greater use of video-conference or audio conference facilities for the reception of expert evidence? If so, how might that operate in practice?

4.4.2 Should the Court routinely order experts on a topic to give evidence immediately after each other at the trial?

4.4.3 Are the other initiatives that the Court should consider to reduce the cost to the parties of adducing expert evidence at trial?

4.4.4 Are there other initiatives that the Court should consider to enable expert evidence to be adduced more efficiently at trial?

4.4.5 Are there any other issues more generally in relation to expert evidence that the Court should consider as part of this project?

5. TRIAL MATERIALS

Issue 5.1 Pleadings

Current position

A regular reader of District Court judgments will be aware that comment is made from time to time by Judges about the poor quality of the pleadings, in particular that the pleadings did not accurately define the issues the subject of the trial. In addition, it is not uncommon for the pleadings to be amended, or sought to be amended, on the eve of the trial. This suggests that there is room for improvement in the standard of pleadings in matters going to trial in the Court.

In particular, one outcome that is undesirable is for a trial to be vacated shortly before commencement, as one or party needs to amend its pleadings in a way which causes the other to seek more time in which to prepare its case.

The 2005 DCR require the solicitor entering the matter for trial to certify that "the matter is in all respects ready for trial". The 1996 DCR did not contain an equivalent certification. This certification implicitly includes the fact that the pleadings are in order, though only from the perspective of the entering party.

Specific issues for discussion

5.1.1 Are there any practices or procedures that the Court could put in place to improve the quality of pleadings in cases going to trial?

Issue 5.2 Trial documents

Current position

There is no current routine practice in the Court to require parties to file books of trial documents. There is the power to make orders of this kind as part of the general case management powers (see 2005 DCR rule 24). Orders to file books of trial documents have been made under these powers,

Option 1: Maintain the current position

Maintaining the current position would be justified if the value added to a trial by the routine use of trial document orders outweighs the costs involved, given the fact the most cases proceeding to trial are not document intensive. There is a discretion to make document orders in appropriate cases.

Option 2: Use the Supreme Court model

The usual order in the Supreme Court is set out in Common Form 78 as follows:

Form 78 — Trial Documents Order

(1) No later than fourteen (14) working days prior to the date fixed for commencement of the trial, each party will by notice in writing to each other party, specify the documents he intends to tender at the trial, and if inspection has not been directed, where the documents may be inspected.

(2) Within five (5) working days thereafter, each party will advise each other party in writing which of the specified documents may be tendered by consent, and whether the authenticity of any of the remaining documents (specify which) is disputed and give reasons in writing as to why consent to tender the remaining documents is withheld.

(3) No later than 4.00 pm on the fifth (5th) last working day prior to the date fixed for commencement of the trial, each party other than the plaintiff will deliver to the plaintiff a copy of each of the documents which that party intends to tender and which were not included in the plaintiff's notification pursuant to para (1) hereof.

(4) No later than 4.00 pm on the third (3rd) last working day prior to the date fixed for the commencement of trial, the plaintiff will deliver to the listing co-ordinator, duly indexed and paginated, a bundle of clear, legible copies of documents to be tendered at the trial by the parties. The index will indicate the identity of the party who will tender each document and which documents are to be tendered by consent.

(5) No later than 4.00 pm on the third (3rd) last working day prior to the date fixed for the commencement of trial, the plaintiff will deliver a copy of the bundle referred to in para 4 to all other parties.

(6) The plaintiff will have ready for production at the commencement of the trial a further bundle of documents containing, wherever possible, the originals of the documents, copies of which are included in the bundle delivered in accordance with para (4) hereof, similarly indexed and paginated, and in the absence of originals, clear legible copies. Any party, other than the plaintiff, in possession of original documents to be included in such bundle will deliver such original documents to the plaintiff together with the copies referred to in para (3) hereof.

(7) The plaintiff will have ready a further bundle in the form described in para (4) for the exclusive use of witnesses in the course of their examination.

An advantage of using the Supreme Court model is that practitioners are familiar with it.

A disadvantage is that the bundle of documents is produced only on the third last working day before the trial. This means that Counsel briefed for the trial will have to undertake the bulk of their preparation on another set of documents.

Option 3: A customised model

Another option is for the Court to develop a customised model, perhaps as follows:

Draft minute of directions – trial documents

1. (a) By [trial minus 6 weeks], each party do send by email to each of the other parties, a list (in "word" format) specifying the documents that the party intends to tender at trial, and if inspection has not been granted, the arrangements for inspecting the documents.

   (b) The list is to be in the format set out in schedule 1 to this direction. The documents are to be numbered as set out in schedule 2 to this direction.

   (c) So far as is practicable, the list is to be in chronological order;

   (d) The list may contain sections or groups of documents where that would assist the parties and Trial Judge.

   (e) The list is to include expert's reports and substances of expert evidence exchanges pursuant to directions made by the Court.

2. (a) If a party ("objecting party") wishes to object to the tender of a document by another party ("tendering party"), then the objecting party must insert its name and the basis of objection in columns 4 and 5 adjacent to the document in the schedule prepared by the tendering party, and email the amended schedule back to the tendering party by [trial minus 5 weeks].

   (b) If no objection to the tender of a document is notified to the tendering party by [trial minus 5 weeks], then each other party is deemed to consent to the tender of the document, subject to the party obtaining the leave of the trial judge to withdraw the consent to the tender of the document.

3. By [trial minus 4 weeks] the parties aside from the plaintiff, email to the plaintiff, copied to each other party:

   (a) an amended list specifying the documents the party intends to tender by consent at trial; and
   (b) a second list specifying the documents the party intends to tender at trial, for which another party has advised that it will not consent to the tender, this list to include the details of the objection in columns 4 and 5 in Schedule 1;

4. By [trial minus 4 weeks], each party other than plaintiff deliver to the plaintiff a legible copy of each of the documents which than party intends to tender as set out in the consolidated index to trial documents.

5. (a) By [trial minus 3 weeks], the plaintiff deliver to each other party and file with the Court a bundle of clear legible copies of each of the documents in the consolidated index to trial documents.

(b) The bundle of documents is to be in two parts, being documents tendered by consent and other documents sought to be tendered;

(c) The bundle of documents is to be paginated.

(d) The bundle for the Court must be in a lever arch file (or files).

6.(a) The plaintiff have ready for production at the commencement of the trial a further bundle of documents containing, wherever possible, the originals of the documents in the consolidated index to the trial documents, similarly indexed, and in the absence of originals, clear legible copies.

7. The bundle of documents is to be in a lever arch file (or files) with each document in a plastic sleeve, with the corresponding pagination to the bundle of agreed documents noted on the sleeve.

8. Any party, other than the plaintiff, in possession of original documents to be included in the bundle must deliver those documents to the plaintiff by [trial minus 1 week].

9. The plaintiff have ready at the commencement of the trial a further bundle in the form set out in paragraph 5 for the exclusive use of witnesses at the trial of the action.

Schedule 1 - Pro forma index to documents

INDEX TO AGREED BUNDLE OF TRIAL DOCUMENTS

Document number	**Description**	**Party tendering**	**Name of party objecting**	**Details of objection to tender**

Schedule 2 – Numbering protocol

Name	**Numbering protocol**
Plaintiff	P001 and following
First Defendant	FD001 and following
Second Defendant	SD001 and following
Third Party	TP001 and following

The advantage of a form of orders along these lines is that the trial documents bundle is ready 3 weeks prior to the trial (or even earlier if a different date is ordered) so that counsel can do final preparation based on the bundle of documents that will ultimately be used at trial.

Option 4: A simple model

Options 2 and 3 are quite complex, perhaps too complex for a 3 or so day District Court trial.

Another option would be for the Court to have a requirement or standard direction that the plaintiff file with the Court a bundle of agreed documents, say, 3 weeks prior to the trial (perhaps earlier for longer trials). Importantly, there would be no prescription as to how the parties went about preparing the bundle.

There could be a standard format for the bundle to ensure consistent practice.

It may be that the Court would also develop a set of more detailed orders that could be used in complex cases that mandated a process as to how the agreed bundle was to be prepared.

Specific issues for discussion

5.2.1 Should the Court routinely make orders for the production of books of trial documents in all cases?

5.2.2 If so, what form should the orders take;

5.2.3 Should the Court only make orders for the production of books of trial documents in certain types of cases, for example, cases involving 30 or more documents?

5.2.4 Would any of the alternative options set out above be an improvement on the current position?

5.2.5 Is there a better way to organise the documents for a trial than requiring parties to prepare and file a book of trial documents?

Issue 5.3 Exchange of witness statements

Current position

There is no current routine practice in the Court to require parties to exchange witness statements. There is the power to make orders of this kind as part of the general case management powers (see 2005 DCR rule 24). Orders to exchange witness statements have been made under these powers,

The advantages of requiring the parties to exchange witness statements include:

- It means each party is clearly on notice of the case it has to meet at trial.
- It ensures that witnesses are comprehensively proofed well prior to the trial.
- It can reduce trial time when statements are ordered to stand as evidence in chief.

The disadvantages include:

- There is a risk that the lawyer drafting the statement will "improve" the evidence to be given by the witness, even if only subconsciously or by correct use of grammar.
- The Judge is deprived of the opportunity to see the witness give their account of the facts.

Option 1: Maintain the current position

This would mean that the Court would not routinely order the exchange of witness statements, but had the power to do so in appropriate cases.

This option might reflect a view that the main business of the Court (at present) is personal injuries. In personal injuries cases much turns on the credibility of the plaintiff, so there is considerable benefit to be derived by the trial Judge in hearing the plaintiff give his or her account of the facts.

Option 2: Use the Supreme Court model

The usual order in the Supreme Court is set out in Common Form 79 as follows:

> **Form 79 — Non-Expert Evidence Order**
>
> (1) No later than [insert date] the party who will open shall serve on the other party a signed and dated written statement of the proposed evidence in chief of each witness (save expert witnesses) to be called by him on any issue upon which he carries the burden of proof.
>
> (2) By [insert date] the defendant will take like steps in relation to the evidence of any witness on an issue in respect of which the defendant carries the burden of proof.
>
> (3) By [insert date] a party shall serve any statement (which should be signed and dated) which is purely responsive to material contained in a statement served by the other party on an issue in respect of which the other party bears the onus of proof.
>
> (4) Any party who intends to object to the admissibility of any statement or any part thereof shall within days of service of the statement advise the party serving the

statement of his objections and the grounds therefor. Within days of receipt of the notice of objection the party serving the statement shall inform the other party whether any of the objections are conceded.

(5) If an intended witness, whose statement has been served in accordance with this order, does not give evidence at the trial, no party may put his statement into evidence at the trial save with leave of the court.

(6) Where the party serving a statement does call the intended witness at the trial:
   (a) that party may not, without leave of the court, lead evidence from that witness if the substance of the evidence is not included in the statement served; and
   (b) the court may direct that the statement, or any part of it, stand as the evidence in chief of the witness;
   (c) that party should have the statement ready for tender at the trial together with copies for each other party, the witness and the court.

(7) Save with leave of the court, no party may adduce evidence from any witness whose statement has not been served in accordance with this order.

(8) Save with the leave of the court, no party may object to any evidence in a statement served pursuant to this order other than on grounds set out in a notice of objection served according to para (4) hereof.

An advantage of using the Supreme Court model is that practitioners are familiar with it.

Disadvantages of using the Supreme Court model include the additional cost that parties would incur in producing witness statements to be exchanged.

Option 3: A customised model

Another option is for the Court to adopt as its usual practice orders that try and separate those witnesses who can give their evidence initially through a witness statement and those who should give evidence orally.

Each party could be required to send a schedule to the other party setting out the witnesses, and whether the party considers that the witness needs to attend in person. The schedule could be sent by email to allow the other parties to annotate it, and return it. The annotations would set out which witnesses would produce witness statements and which witnesses had to attend for cross examination. The distinction could be drawn between key witnesses – who would give evidence orally and be available for cross-examination – and subsidiary witnesses – who could give evidence through a witness statement. The completed schedule could look something like the following:

Sample plaintiff index of non-experts witnesses

Witness	Role	Ptf comments	Special requirements	Def comments	Combined length of time
Mary Smith	Plaintiff	Oral evidence in chief		Propose to XXN	1 hr

Reginald Smith	Witness to accident	Oral evidence in chief		XXN	30 mins
Patsy Smith	Plaintiff's mother – evidence of services provided	Witness statement	If to be called, will need to be available by video.	XXN. No objection to video.	30 mins
Mary Jones	Pay officer – Johnsons Books	Witness statement		No XXN	

There would need to be a framework similar to that in Common Form 79 dealing with the evidence going in by tendered statements.

The advantage of this approach include:

- It allows for customisation of the manner in which evidence is to be received depending upon the circumstances of the case.
- It avoids the other party being taken by surprise by the identify of a witness called.
- It would facilitate shorter trials as uncontentious evidence could go in by consent.
- It could be coupled with length of time estimates to facilitate more accurate trial listing.

This disadvantages include:

- It may be unnecessarily complex for District Court cases.
- It may add costs outweighed by the benefits derived by short trials and better definition of the issues.

An alternative would be for the Court to have a standard order along the lines set out above, but to only make the order where the complexity of the case warranted it.

Specific issues for discussion

5.3.1 Should the Court routinely make orders for the exchange of witness statements in all cases?

5.3.2 If so, what form should the orders take?

5.3.3 If so, when should the witness statements be exchanged? 4 weeks prior to trial? Prior to the listing conference? Prior to entry for trial?

5.3.4 Would any of the alternative options set out above be an improvement on the current position?

5.3.5 Should the Court only make orders for the exchange of witness statements in certain types of cases, for example, commercial cases but not personal injury cases?

Issue 5.4 Outlines of Submissions

Current position

The requirement to file outlines of submissions is contained in 2005 DCR rule 61 (which applies to cases otherwise governed under the 1996 DCR by the Consolidated Practice Direction).

The Court has noted that submissions are not consistently filed in relation to actions proceeding to trial. This may be because parties are interpreting Rule 61(2) to require submissions to be filed in relation to a trial where a Judge or Registrar has ordered this occur.

Where submissions are required, they have to be filed and served at least 2 clear days prior to the date of the hearing (2005 DCR rule 61(5)).

Specific issues for discussion

5.4.1 Should 2005 DCR rule 61(2) be amended to make it clear that submissions are required to be filed and served for all trials?

5.4.2 If there is to be a requirement to file and serve submissions, when should the submissions be filed by? Should both parties have to file and serve submissions at the same time? Or sequentially?

6. OTHER ISSUES

Issue 6.1 Reduction of trial cost and length

Issues for discussion

6.1.1 Aside from the issues set out above, are the any other rules, procedures or practices of the Court which cannot be justified on the basis that the value they add to a trial when compared with the costs involved?

6.1.2 Are there any other initiatives the Court should consider introducing which would have the effect of any one or more of:

- Reducing the length of trials
- Reducing the cost of trial
- Improving the quality of materials presented to the trial Judge

6.1.3 Should the Court have a program of callovers of actions listed for trial? If so, how should the callover program operate?

Issue 6.2 Commercial list

In May 2005 the Court's general civil jurisdiction increased from $250,000 to $500,000. In September, partially in response to this, the Court published a Circular to Practitioners (CIV 2005/10) which introduced a commercial list.

Three general principles underpin the management of the Commercial List, as follows:

(a) The Commercial List will operate on an opt-in basis – any party to a commercial action will be able to request the matter to be included in the Commercial List. There will be no specific barrier to entry of the Commercial List (eg no requirement for an affidavit setting out grounds for expedition).

(b) Once a case is within the Commercial List, it will be subject to active case management oversight, meaning that timelines will be set and monitored by the Court.

(c) The timing of any pre-trial mediation will be tailored to the circumstances of the action, and will not necessarily occur after the matter has been entered for trial.

Issues for discussion

6.2.1 Are there other initiatives that the Court should consider introducing especially for commercial cases which would facilitate the more optimal resolution of commercial disputes? Among other issues, the initiatives could target the cost of litigation, the length of litigation as a whole or the cost or length of trial.

6.2.2 Are there any jurisdictional or other legal issues which prevent or inhibit the Court being used as a forum for the resolution of intermediate level commercial disputes?

Issue 6.3: Meeting community expectations

Issues for discussion

6.3.1 What are the main expectations that the community at large has of the Court as the intermediate tier civil Court?

6.3.2 Are there any areas in which the Court is not currently meeting community expectations as the intermediate tier civil Court?

6.3.3 Are there any initiatives that the Court could introduce to significantly improve the extent to which it able to meet community expectations as the intermediate tier civil Court?

Annexure A

FEDERAL COURT EXPERT WITNESS GUIDELINES

Federal Court of Australia

Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia

This Practice Direction replaces the Practice Direction on Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia issued on 4 September 2003.

Practitioners should give a copy of the following guidelines to any witness they propose to retain for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based on the specialised knowledge of the witness (see - Part 3.3 - Opinion of the *Evidence Act 1995 (Cth)*).

M.E.J. BLACK
Chief Justice
19 March 2004

Explanatory Memorandum

The guidelines are not intended to address all aspects of an expert witness's duties, but are intended to facilitate the admission of opinion evidence (footnote #1), and to assist experts to understand in general terms what the Court expects of an expert witness giving opinion evidence. Additionally, it is hoped that the guidelines will assist individual 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.

Ways by which an expert witness giving opinion evidence may avoid criticism of partiality include ensuring that the report, or other statement of evidence:

(a) is clearly expressed and not argumentative in tone;

(b) is centrally concerned to express an opinion, upon a clearly defined question or questions, based on the expert's specialised knowledge;

(c) identifies with precision the factual premises upon which the opinion is based;

(d) explains the process of reasoning by which the expert reached the opinion expressed in the report;

(e) is confined to the area or areas of the expert's specialised knowledge; and

(f) identifies any pre-existing relationship between the author of the report, or his or her firm, company etc, and a party to the litigation (eg a treating medical practitioner, or a firm's accountant).

An expert is not disqualified from giving evidence by reason only of the fact of a pre-existing relationship with the party that proffers the expert as a witness, but the nature of the pre-existing relationship should be disclosed. Where an expert has such a relationship with the party the expert may need to pay particular attention to the identification of the factual premises upon which the expert's opinion is based. The expert should make it clear whether, and to what extent, the opinion is based on the personal knowledge of the expert (the factual basis for which might be required to be established by admissible evidence of the expert or another witness) derived from the ongoing relationship rather than on factual premises or assumptions provided to the expert by way of instructions.

All experts need to be aware that if they participate to a significant degree in the process of formulating and preparing the case of a party, they may find it difficult to maintain objectivity.

An expert witness does not compromise objectivity by defending, forcefully if necessary, an opinion based on the expert's specialised knowledge which is genuinely held but may do so if the expert is, for example, unwilling to give consideration to alternative factual premises or is unwilling, where appropriate, to acknowledge recognised differences of opinion or approach between experts in the relevant discipline.

The guidelines are, as their title indicates, no more than guidelines. Attempts to apply them literally in every case may prove unhelpful. In some areas of specialised knowledge and in some circumstances (eg some aspects of economic "evidence" in competition law cases) their literal interpretation may prove unworkable. The Court expects legal practitioners and experts to work together to ensure that the guidelines are implemented in a practically sensible way which ensures that they achieve their intended purpose.

Guidelines

1. General Duty to the Court (footnote #2)

1.1.1 An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.

1.1.2 An expert witness is not an advocate for a party.

1.3 An expert witness's paramount duty is to the Court and not to the person retaining the expert.

2. The Form of the Expert Evidence (footnote #3)

2.1 An expert's written report must give details of the expert's qualifications, and of the literature or other material used in making the report.

2.2 All assumptions of fact made by the expert should be clearly and fully stated.

2.3 The report should identify who carried out any tests or experiments upon which the expert relied in compiling the report, and state the qualifications of the person who carried out any such test or experiment.

2.4 Where several opinions are provided in the report, the expert should summarise them.

2.5 The expert should give reasons for each opinion.

2.6 At the end of the report the expert should declare that "[the expert] has made all the inquiries which [the expert] believes are desirable and appropriate and that no matters of significance which [the expert] regards as relevant have, to [the expert's] knowledge, been withheld from the Court."

2.7 There should be included in or attached to the report (i) a statement of the questions or issues that the expert was asked to address; (ii) the factual premises upon which the report proceeds; and (iii) the documents and other materials which the expert has been instructed to consider.

2.8 If, after exchange of reports or at any other stage, an expert witness changes a material opinion, having read another expert's report or for any other reason, the change should be communicated in a timely manner (through legal representatives) to each party to whom the expert witness's report has been provided and, when appropriate, to the Court (footnote #4).

2.9 If an expert's opinion is not fully researched because the expert considers that insufficient data are available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report (footnote #4).

2.10 The expert should make it clear when a particular question or issue falls outside the relevant field of expertise.

2.11 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports (footnote #5).

3. Experts' Conference

3.1 If experts retained by the parties meet at the direction of the Court, it would be improper conduct for an expert to be given or to accept instructions not to reach agreement. If, at a meeting directed by the Court, the experts cannot reach agreement about matters of expert opinion, they should specify their reasons for being unable to do so.

footnote#1
As to the distinction between expert opinion evidence and expert assistance see Evans Deakin Pty Ltd v Sebel Furniture Ltd [2003] FCA 171 per Allsop J at [676].

footnote #2
See rule 35.3 Civil Procedure Rules (UK); see also Lord Woolf “Medics, Lawyers and the Courts” [1997] 16 CJQ 302 at 313.

footnote #3
See rule 35.10 Civil Procedure Rules (UK) and Practice Direction 35 – Experts and Assessors (UK); HG v the Queen (1999) 197 CLR 414 per Gleeson CJ at [39]-[43]; Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd [2000] FCA 1463 (FC) at [17]-[23]

footnote #4
The “Ikarian Reefer” [1993] 20 FSR 563 at 565

footnote #5
The “Ikarian Reefer” [1993] 20 FSR 563 at 565-566. See also Ormrod “Scientific Evidence in Court” [1968] Crim LR 240.