

EXPERT WITNESS CONFERENCING IN NEW ZEALAND

In New Zealand an amendment to the Environment Court's Consolidated Practice Note 2006 provided guidance on the Court's expectations of expert witness conferencing, effective from 1 March 2011, as follows:

5.4 Expert Witness Conferencing

5.4.1 Expert conferencing is a process by which expert witnesses confer and attempt to reach agreement on issues, or at least to clearly identify the issues on which they cannot agree, and the reasons for that disagreement. Conferencing is a structured discussion between peers within a relevant field of expertise which can narrow points of difference and save hearing time (and costs). All experts have a duty to ensure that any conference is a genuine dialogue between them in a common effort to reach agreement about the relevant facts and issues. It should be understood that the term 'expert' means a person who would be recognised by the Court as an expert in his or her field by reason of relevant qualifications and experience. Persons not having such qualifications and experience will not participate in conferences.

5.4.2 Like mediation, conferencing is a private procedure and, apart from any agreed primary data, and the joint statement produced at the conclusion of the conference, what is said or done at the conference cannot be referred to or relied on in any proceeding before the Court. In that sense it is a 'without prejudice' discussion, although those participating may report back to the parties engaging them.

5.4.3 Every person at an experts' conference is participating in his or her role as an expert witness, having agreed to comply with the Code of Conduct for such witnesses, and not as an advocate for the party who engages the witness. The expert witness must exercise independent and professional judgement and must not act on the instructions or directions of any person.

5.4.4 The Court expects that, as a matter of course, expert conferencing will occur prior to a hearing. In many circumstances it will be most advantageous to do so before full briefs of evidence are prepared, with the conference proceeding on the basis of summarized 'will say' briefs being exchanged beforehand (see para 5.7.1). In most cases the parties should be able to make the arrangements without Court intervention, although the Court will be willing to assist if required. Sound preparation is essential and the parties must allow adequate time for this process to be completed. Counsel are responsible for ensuring that the experts have all necessary documentation to enable proper preparation, and for briefing the experts on the process to be followed and their responsibilities as participants.

5.4.5 Either by agreement of the parties, or at the Court's direction, the conference may be facilitated by another expert (who has not been engaged to act by a party to the proceeding), an Environment Commissioner, or any other person agreed to by the parties. If the conference is facilitated by an Environment Commissioner, that person may sit as a member of the Court to hear a proceeding on the same matter only if the parties and the Court are satisfied that is appropriate. In cases where there are only two witnesses within a given field of expertise, or where the experts have agreed to manage the process themselves, facilitation may not be necessary.

5.4.6 The Court may limit the cross-examination of experts on the matters agreed to at the conference, and may restrict the calling of any further evidence, particularly where a witness attempts to introduce an issue or issues which the participants in the conference agreed did not need to be considered.

5.4.7 While the experts participating in the conference may agree on matters within their fields of expertise, it should be understood that their agreement will not necessarily bind any party to a particular overall outcome, or to the wording of conditions.

5.5 Case management

5.5.1 Expert conferencing is an essential element of case management and evidence exchange timetables. To that end, subject to any directions from the Court, at an early stage in case management the parties should direct their minds to it and provide to the Court and all parties:

- (a) details of any expert conferencing that has already occurred;
- (b) identification of the expert witnesses who are to confer, and their disciplines;
- (c) whether it is appropriate to have a single or multi-disciplinary conference (the latter may be necessary where issues overlap);
- (d) a proposed sequence by which the topics and their related issues are to proceed to conferencing; and
- (e) whether an Environment Commissioner is requested to convene and facilitate the conference.

5.6 General Directions on Conferencing

5.6.1 Subject to any specific directions from the Court, any expert conference is to be conducted subject to the following general conditions:

- (a) before the conference the experts are to be provided with the following:
 - (i) a copy of the Environment Court's Expert Witnesses Code of Conduct;
 - (ii) a copy of the application and any proposed amendment, the Notice of Appeal, the Assessment of Environmental Effects and the proposed conditions and all other documents necessary to enable them to thoroughly understand the issues in the proceeding;
 - (iii) copies of the relevant evidence (if prepared) and any relevant reports;
- (b) the experts are to familiarise themselves with the Code of Conduct before commencing the conference;
- (c) the experts are to confer in the absence of the parties and their legal counsel;
- (d) the experts are not to be instructed as to what may be agreed or not agreed at the conference;
- (e) the experts must confer in their roles as experts and are not to act as advocates for the parties who engage them;
- (f) the experts must only confer on matters within their fields of expertise;
- (g) while conferencing is inherently an iterative process and may require a number of meetings to be concluded, the experts may request that the Court approve a formal adjournment of the process if, for instance, it is agreed that further information or analysis is required.
- (h) at the conclusion of the conference the experts, without the assistance of counsel for the parties, will prepare and sign a joint witness statement.
- (i) the joint witness statement is to be lodged with the Court and circulated to all parties who have given an address for service.

5.6.2 The joint witness statement will include the following matters:

- (a) the key facts and assumptions that are agreed upon by the experts;
- (b) identification of any methodology or standards used by the experts in arriving at their opinions and reasons

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for differences in methodology and standards (if any);

- (c) the issues that are agreed between the experts;
- (d) the issues upon which the experts cannot agree and the reasons for their disagreement;
- (e) an identification of all material regarded by the experts as primary data; and
- (e) confirmation that in producing the statement the experts have complied with the Code of Conduct for Expert Witnesses.

5.6.3 The joint witness statement may include reservations by one or more participants about issues on which they are uncertain about the substantive law (for instance, whether the concept of a 'permitted baseline' applies) or about procedural matters.

5.6.4 Other than matters agreed by the experts to be primary data, the matters discussed at the conference of expert witnesses (but not included in the joint witness statement) must not be referred to at the hearing unless all the parties by whom the expert witnesses have been engaged so agree.

5.6.5 No party may, without the express consent of all other parties, introduce as evidence documents expressly prepared for the conference except for documents containing agreed primary data.

5.6.6 The witnesses shall review their evidence in light of the joint witness statement. If formal briefs were exchanged before the conference, they may be withdrawn and replaced by briefs which accord with the agreements reached and, where applicable, deal only with the issues remaining in dispute.

5.7 Conferencing in Advance of Evidence Exchange

5.7.1 If conferencing occurs in advance of the exchange of formal briefs of evidence it is essential that the witnesses are prepared. The Court will expect that:

- (a) the expert witness will confirm any evidence given at an earlier hearing in relation to the same matter; or
- (b) except as otherwise directed by the Court, will provide to all other participating experts a summary 'will say' brief of relevant evidence, that will, as a minimum:
 - (i) set out the key facts and assumptions relied upon;
 - (ii) identify the methodology and standards used in arriving at his or her opinion;
 - (iii) clearly explain the opinion arrived at.

C J Thompson
Principal Environment Judge
New Zealand
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