

# Experts in the Litigation Process



## Panel Discussion: The Evolving Role of the Expert

**Judge ME Rackemann**  
**Planning and Environment Court of Queensland**

**Friday, 26<sup>th</sup> October 2012**

# Bias: Perception or Reality?

- The perception:
  - *Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today that are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients.*
  - *Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales per Lord Woolf*

# Bias: Perception or Reality?

- The reality:
  - *From my experience, expert witnesses who frequently and regularly give evidence in the P&E Court know perfectly well how thoroughly their evidence will be scrutinised by opposing experts, solicitors, barristers (and presumably the judges). Consequently, the risks associated with attempting to deliberately give one-sided or inaccurate evidence are well known to them, and they are too careful with their reputations and careers to take any such risks. Yet these are the experts usually labelled as “hired guns” in a derogatory sense (ultimately meaning I suppose that their opinions can be bought).*

# Bias: Perception or Reality?

- The reality:
  - *To my mind, the real risk of inaccurate or biased evidence is much more likely to come from professionals who rarely, or perhaps only once give evidence. They have little to lose, and are not likely to know how closely their evidence will be scrutinised, yet they are unlikely to identify this “hired gun” with all that implies.*
  - Personal communication with Colin Beard, Traffic Engineer

# A Single Expert?

- *It follows, it seems to me inevitably that the only way in which we can ever eliminate adversarial bias in expert witnesses is by requiring, at least generally, that all expert evidence which will be received by the court must be that of an expert appointed by the court.*
  - Davies, G *Court Appointed Experts* (2005) 5 QUTLJJ 89, 100.

# A Single Expert?

- UCPR 2004 Single Expert provisions
- Not all bias is adversarial bias
- Limitations on usefulness of Single Experts
- The benefit to the Court of two or more professional provisions tested by rigorous cross-examination

# A Single Expert?

- *I would not trust any of the traffic engineers with whom I regularly work as single experts, including me – we all have our individual biases, no matter how hard we try to overcome them. I believe that technical experts such as traffic engineers operate best as advisers to the legal process, not as de fact judges on technical issues. In my view, two or more professional opinions tested by rigorous cross-examination are much more valuable to the court than one untested opinion.*
  - Personal communication with Colin Beard, Traffic Engineer

# PEC Management of Experts

- Opinions formed in consultation
- Experts in quarantine / conclave before reports are produced
- Save for the joint report, evidence of discussions in meetings are privileged
- Expert support to ADR
- Subsequent individual reports for trial



# Benefits of the PEC Expert Model

- Respect for expert's professionalism and independence
- The ability for experts to professionally critique, discuss and refine views
- Eliminates methodology disputes and focuses on areas of real difference
- Results in better evidence and better outcomes

# Benefits of the PEC Expert Model

- *One of the cornerstones of the Queensland process is preventing any interference by the parties or their representatives until the report is signed. Such quarantining of the experts during their joint report process often makes the difference between settling issues and arguing them in court. This is especially true of contentious evidence or where there are seemingly implacable, adversarial parties. It also forms a critical protection of the expert's independence that serves the process well, providing that experts do not use it to delay or obfuscate. The ability of peers to professionally critique, discuss and refine views, without legal pressure results in considered, not forced outcomes.*
  - Sutherland N, *The Efficacy of Joint Reports in Narrowing Technical Issues During Litigation* (2011) 1 NELR 50, 52.

# Concurrent evidence: Solution or hype?

- Used extensively in NSW
- Too little too late
- Lower levels of scrutiny
- Potential for confusion and frustration
- Best viewed as optional extra, rather than real solution

# Concurrent evidence: Solution or hype?

- *My experience in the Land and Environment Court, and similar courts in NSW, has been less than appealing, due primarily to the preference for concurrent evidence or “hot tubbing”. In my opinion, this is a waste of everyone’s time and effort because it results in a far lower (level) of scrutiny and tends to result in more confusion and frustration than is the case in other jurisdictions.*
  - Personal communication with Ian Shimmin, Economist

# Questions?



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