



## NCAT Procedural Direction 3

### EXPERT WITNESSES

<b>This Procedural Direction applies to:</b>	Proceedings in all Divisions
<b>Effective Date:</b>	7 February 2014
<b>Replaces Procedural Direction:</b>	NCAT Procedural Direction 3 (20 December 2013)
<b>Notes:</b>	You should ensure that you are using the current version of this Procedural Direction. A complete set of Procedural Directions and Guidelines is available on the Tribunal website at <a href="http://www.ncat.nsw.gov.au">www.ncat.nsw.gov.au</a>

#### Introduction

1. The Tribunal may rely on evidence from expert witnesses to reach a conclusion about a technical matter or area of specialised knowledge that is relevant to an issue to be determined in proceedings. It is important that experts' opinions are soundly based, complete and reliable.
2. This Procedural Direction sets out:
  - (a) a code of conduct for expert witnesses (based upon Schedule 7 to the *Uniform Civil Procedure Rules 2005*); and
  - (b) information on how experts may be required to give evidence.

#### Compliance and other matters

3. The Tribunal may excuse an expert witness or any other person from complying with this Procedural Direction before or after the time for compliance.
4. Nothing in this Procedural Direction prevents the Tribunal from giving any directions concerning expert witnesses or expert evidence that the Tribunal considers appropriate in any particular proceedings before the Tribunal.
5. This Procedural Direction is made by the President under s 26 of the *Civil and Administrative Tribunal Act 2013*.

## Definitions

Word	Definition
Act	<i>Civil and Administrative Tribunal Act 2013</i>
Rules	<i>Civil and Administrative Tribunal Rules 2014</i>
Expert witness	A person who has specialised knowledge based on the person's training, study or experience and who give evidence of an opinion based wholly or substantially on that knowledge.

6. Words used in this Procedural Direction have the same meaning as defined in the Act and the Rules.

## Application

7. This Procedural Direction applies to:
- (a) any evidence given by an expert witness in the Tribunal;
  - (b) any arrangement between an expert and a party for the expert to provide evidence or a report for the purposes of proceedings or proposed proceedings in the Tribunal; and
  - (c) any arrangements for Tribunal appointed experts,
- except that this Procedural Direction does not apply to evidence obtained from treating doctors, other health professionals or hospitals (who might otherwise fall within the definition of expert witness), unless the Tribunal otherwise directs.

## Parties' and Experts' Duties

8. Any party who retains an expert to provide evidence or a report for the purposes of proceedings or proposed proceedings in the Tribunal must bring to the expert's attention the contents of this Procedural Direction, including the experts' code of conduct.
9. Where an expert is unable to comply with the experts' code of conduct, whether because of a conflict of interest or otherwise, the expert is not to give evidence or provide an expert's report for use in proceedings in the Tribunal, unless the expert raises the inability with the Tribunal and the Tribunal expressly permits the expert to give evidence or provide a report.

### Application of code

10. Subject to paragraph 7, this experts' code of conduct applies to any expert witness who:
  - (a) provides an expert's report for use as evidence in proceedings or proposed proceedings in the Tribunal, or
  - (b) gives opinion evidence in proceedings in the Tribunal.

### General duty to the Tribunal

11. An expert witness has an overriding duty to assist the Tribunal impartially on matters relevant to the expert witness's area of expertise.
12. An expert witness's paramount duty is to the Tribunal and not to any party to the proceedings (including the person retaining the expert witness).
13. An expert witness is not an advocate for a party.
14. An expert witness must abide by any direction given by the Tribunal.

### Duty to work co-operatively with other expert witnesses

15. An expert witness, when complying with any direction of the Tribunal to confer with another expert witness or to prepare a joint report with another expert witness in relation to any issue must:
  - (a) exercise his or her independent, professional judgment in relation to that issue;
  - (b) endeavour to reach agreement with any other expert witness on that issue; and
  - (c) not act on any instruction or request to withhold or avoid agreement with any other expert witness.

### Experts' reports

16. An expert's report must (in the body of the report or in an annexure to it) include the following:
  - (a) the expert's qualifications as an expert on the issue the subject of the report;
  - (b) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed);
  - (c) the expert's reasons for each opinion expressed;
  - (d) if applicable, that a particular issue falls outside the expert's field of expertise;

- (e) any literature or other materials used in support of the opinions.
  - (f) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out;
  - (g) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report);
  - (h) an acknowledgement that the expert has read the experts' code of conduct and agrees to be bound by it.
17. If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report.
18. If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
19. If an expert witness changes his or her opinion on a material matter after providing a report, the expert witness must immediately provide a supplementary report to that effect containing such of the information referred to in paragraph 16 as is appropriate.

### **Experts' conference**

20. An expert witness must abide by any direction of the Tribunal:
- (a) to confer with any other expert witness;
  - (b) to endeavour to reach agreement on any matters in issue;
  - (c) to prepare a joint report, specifying matters agreed and matters not agreed and any reasons for any disagreement; and
  - (d) to base any joint report on specified facts or assumptions of fact.
21. An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.

### **How may expert evidence be given?**

22. The Tribunal may regulate the conduct of proceedings involving expert witnesses including by:
- (a) requiring expert evidence to be given by written report;
  - (b) requiring expert witnesses to confer and prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement;

- (c) specifying when and in what order expert evidence at a hearing will be given;
  - (d) controlling the form and duration of cross examination of expert witnesses; and
  - (e) requiring expert witnesses to give evidence at a hearing concurrently.
23. If the Tribunal requires or permits expert witnesses to give evidence concurrently this will usually involve the expert witnesses in one particular field of expertise:
- (a) sitting together in the witness box or some other convenient place in the hearing room;
  - (b) being asked questions by the Tribunal;
  - (c) being asked questions by the parties or their representatives (if any);
  - (d) being given the opportunity to respond to the other witness's evidence, as that evidence is given; and
  - (e) being given the opportunity to ask any questions of the other witness, as the evidence is being given, where those questions might assist the Tribunal in determining the matter.

Wright J

President

7 February 2014