

**Practice Note – PNVCAT2  
Expert Evidence**

<b>Application</b>	Proceedings in all Lists
<b>Effective date</b>	1 October 2014
<b>Supersedes Practice Note</b>	PNVCAT2 issued on 15 March 2012
<b>Special note</b>	Please ensure that you are using an up-to-date version of this practice note. Other practice notes may also apply.
<b>Further information</b>	A complete set of current practice notes are available on the Tribunal's website at <a href="http://www.vcat.vic.gov.au">www.vcat.vic.gov.au</a> .

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## Introduction

- 1 Expert witness evidence may be relied upon by the Tribunal to form an opinion about a specialised or technical matter that is relevant to the issues to be determined in a proceeding. Where expert evidence is provided in the form of a written report and/or the expert being called as a witness, it is important that the expert's opinion is soundly based, complete, impartial, dispassionate, and within the scope of his or her expertise.
- 2 Schedule 3 of the *Victorian Civil and Administrative Tribunal Act 1998* sets out certain powers in relation to expert witnesses and expert evidence. This practice note should be read in conjunction with Schedule 3 of the Act and sets out the primary obligations of an expert witness and further requirements about the preparation and giving of expert evidence.
- 3 In any proceeding, the Tribunal may at its discretion vary the operation of a practice note by direction or order.
- 4 This practice note has been approved by the Rules Committee pursuant to s 158 of the *Victorian Civil and Administrative Tribunal Act 1998*.

## Definitions

Word	Definition
Act	<i>Victorian Civil and Administrative Tribunal Act 1998</i>
Expert Witness	A person who has specialised knowledge based on the person's training, study or experience. (This is the definition in s. 3 of the Act).

- 5 A word or term used in this practice note has the same meaning as defined in the Act or in the *Interpretation of Legislation Act 1984*.

## How does this practice note apply?

- 6 This practice note applies to:
  - (a) any evidence given to the Tribunal by an expert witness;
  - (b) the retainer by parties to a proceeding, of any expert witness to provide a report for use in evidence before the Tribunal; and
  - (c) arrangements for a tribunal-appointed expert or special referee.
- 7 Parties to a proceeding must ensure that any expert retained by them to provide a report for use in the proceeding is made aware of the contents of this practice note at the time of such retainer.

### What is the duty of an expert witness to the Tribunal?

- 8 An expert witness has a paramount duty to the Tribunal and not to the party retaining the expert.
- 9 An expert witness has an overriding duty to assist the Tribunal on matters relevant to the expert's expertise.
- 10 An expert witness is not an advocate for a party to a proceeding.

### What must be included in the report of an expert witness?

- 11 The report of an expert witness must include the following matters:
  - (a) the full name and address of the expert witness;
  - (b) the expert's qualifications, experience and area of expertise;
  - (c) a statement setting out the expert's expertise to make the report;
  - (d) reference to any private or business relationship between the expert witness and the party for whom the report is prepared;
  - (e) all instructions that define the scope of the report (original and supplementary and whether in writing or oral);
  - (f) the facts, matters and all assumptions upon which the report proceeds;
  - (g) reference to those documents and other materials the expert has been instructed to consider or take into account in preparing his or her report and the literature or other material used in making the report;
  - (h) the identity and qualifications of the person who carried out any tests or experiments upon which the expert relied in making the report;
  - (i) a statement:
    - summarising the opinion of the expert;
    - identifying any provisional opinions that are not fully researched for any reason (including the reasons why such opinions have not been or cannot be fully researched);
    - setting out any questions falling outside the expert's expertise; and
    - indicating whether the report is incomplete or inaccurate in any respect.
  - (j) A signed declaration by the expert that:

*"I have made all the inquiries that I believe are desirable and appropriate and that no matters of significance which I regard as relevant have to my knowledge been withheld from the Tribunal."*
  - (k) Where relevant, a cover page in accordance with clause 16.
- 12 In the Building and Property List where the expert report relates to completion or rectification works, the report of an expert witness must also include the following:

- (a) if rectification or demolition or other alteration of premises is recommended, the reasons for such recommendation and the likely costs involved (including, where relevant, how those costs have been calculated);
  - (b) whether any alternative remedy or remedies are a reasonable alternative.
- 13 The requirements of clause 11 do not apply strictly to reports obtained from treating doctors and hospitals, unless the Tribunal directs otherwise. Doctors and hospitals are nonetheless encouraged to follow these requirements to the extent practicable.

### **What happens if the expert witness changes his or her opinion?**

- 14 An expert witness who changes an opinion on a material matter (including on the basis of another expert's report) must as soon as practicable communicate that change of opinion in writing to the party retaining the expert.
- 15 A party receiving notice that an expert witness retained by that party has changed his or her opinion on a material matter must forthwith file with the Tribunal and serve on all other parties a notice of such change of opinion, specifying the reasons why his or her opinion has changed and setting out his or her revised opinion. Where appropriate, a supplementary report by the expert witness must also be filed and served.

### **What format is recommended by the Tribunal for an expert witness report?**

- 16 To assist the Tribunal, the report of an expert witness should contain a cover page that clearly identifies, as relevant:
- (a) the file number given by the Tribunal for the relevant proceeding;
  - (b) the date of the report;
  - (c) if the report relates to a person, the name of that person;
  - (d) if the report relates to a property, the address of that property and the date(s) of any inspection;
  - (e) the party for whom the report has been prepared; and
  - (f) the person from whom the expert received his/her instructions.
- 17 A report should, where practicable, adopt the same numbering sequences used in other Tribunal documents and/or include appropriate cross-references. For example, an expert responding to another expert witness report that deals with particular matters (e.g. a numbered list of defects in the Building and Property List) should use the same numbering.
- 18 Unless otherwise directed by the Tribunal, the report of an expert witness should be filed with the Tribunal in hard copy. Where practicable, the report should be filed in A4 size, be stapled but not bound, and be two-hole punched so that it can be included in a file or binder. All pages should be consecutively numbered.

- 19 If the report contains a document that cannot be conveniently reduced to A4 size or would be difficult to read at that size (e.g. a spreadsheet or building plan), the document should be folded within the report so that it can be read without being removed from the file or binder, or included as a separate attachment.
- 20 If the original report contains colour photographs or material, all copies filed with the Tribunal should be good quality colour reproductions.
- 21 Unless the Tribunal directs, or the parties agree otherwise, copies of expert witness reports provided to or served upon other parties must be in the same format as those filed with the Tribunal. Some parties may agree to receive an expert report from another party in electronic format (e.g. email attachment, facsimile, computer disk etc).
- 22 In more complex matters, or proceedings involving multiple parties, the Tribunal may require the report of an expert witness to be filed or served in electronic format, sometimes in addition to the filing and service of printed copies. In such event, the copy filed with the Tribunal should be provided in a Microsoft Office Word “.doc” or Adobe ‘.pdf’ format that enables copying and pasting of text or parts of the report.

#### **When must an expert witness report be filed and served?**

- 23 In more complex matters, the time for filing the report of an expert witness will usually be set out in a procedural timetable contained in a direction or order of the Tribunal. Parties may be directed to file their expert witness reports at the same time, or for the filing of reports to be staged with the opportunity for supplementary reports by way of reply.
- 24 If there is no direction or order setting a time for the filing of the report of an expert witness in a proceeding then, except with the leave of the Tribunal, a party must file with the Tribunal and serve on each other party a copy of the report of any expert witness upon whose evidence that party intends to rely not less than ten (10) business days prior to the date scheduled for commencement of the relevant mediation, compulsory conference or hearing at which the expert witness report will be relied upon.
- 25 In a proceeding involving multiple parties, a party may seek an order of the Tribunal (sometimes called a representative order) that allows for service of an expert witness report only on certain nominated parties, provided other parties are given an opportunity to access the report by alternative means (e.g. if the report is available for inspection and/or downloading on a website).
- 26 The Tribunal may refuse to allow an expert witness report to be relied upon, or refuse to allow an expert witness to be called by a party, if the report of that witness is filed

and served outside of any time limit imposed by a direction or order, or is contrary to this practice note.

### **Can the Tribunal direct expert witnesses to meet?**

- 27 If directed by the Tribunal to do so, an expert witness shall:
- (a) meet with any other expert witnesses retained in the proceeding in a similar or related field of expertise and attempt in good faith to narrow any points of difference between them (sometimes called an expert 'conference' or 'conclave'); and
  - (b) provide the Tribunal with a joint report specifying (as the case requires) matters agreed between the experts, matters not agreed, and the reasons for the disagreement (sometimes called a 'Scott Schedule')
- 28 If the Tribunal directs an expert witness to confer with other expert witnesses, the Tribunal may:
- (a) require the expert witnesses to meet and confer between themselves, or in a meeting facilitated by a Tribunal member or mediator; and/or
  - (b) order that the meeting of expert witnesses take place in the absence of the parties and/or their legal advisers, except with the leave of the Tribunal;
- 29 If a meeting of expert witnesses is ordered as part of a mediation or compulsory conference, unless the parties agree or it is otherwise ordered, all discussions, concessions and agreements reached, including any joint report prepared as part of the mediation or compulsory conference process, shall be on a 'without prejudice' basis and for the purpose only of the mediation or compulsory conference.
- 30 If any expert witness directed by the Tribunal to meet with any other expert is instructed by a party not to reach agreement in respect of certain points of difference, the fact of such instructions must be reported in writing to the Tribunal by the expert witness concerned.

### **How is expert evidence given at a hearing?**

- 31 In all proceedings, the Tribunal may regulate the conduct of a hearing and, in doing so and subject to the principles of procedural fairness, may:
- (a) regulate the order of presentation of expert witness evidence;
  - (b) regulate cross-examination, and/or
  - (c) limit the time to be taken in presenting the evidence of an expert witness, or the time for cross-examination or re-examination of that witness.

- 32 In more complex proceedings, the usual practice of the Tribunal is that the report of an expert witness will be taken 'as read' (i.e. it will be assumed that the Tribunal and parties have read the report before the hearing). The expert should not ordinarily read his or her report, but will be given an opportunity to draw the Tribunal's attention to key elements of it.
- 33 A party will usually call an expert witness during the presentation of that party's case at a hearing. Any other party seeking to cross-examine that expert witness should be present when the expert evidence is presented.
- 34 In more complex hearings, the Tribunal may of its own initiative require that the expert witnesses retained in the proceeding in a similar or related field of expertise all attend at the same time for the purpose of giving concurrent evidence (sometimes called 'hot tubbing'). In such circumstance:
- (a) the conduct of the process of concurrent evidence will be at the discretion of the Tribunal;
  - (b) usually, all of the experts will be 'sworn in' and then give their evidence in a panel format, with issues in the proceeding dealt with sequentially by all experts (e.g. each defect in a building case);
  - (c) experts may be given the opportunity to ask each other questions;
  - (d) the Tribunal and parties (or their professional advocates) will be given an opportunity to ask questions of the experts;
  - (e) cross-examination of individual expert witnesses will usually take place after the concurrent evidence has been given, unless otherwise directed by the Tribunal.

### **Can the Tribunal appoint an expert or special referee?**

- 35 The Tribunal's usual practice is to have regard to expert evidence provided by the parties in a proceeding. However, in appropriate cases (particularly in the Building and Property List), the Tribunal may appoint its own expert under Clause 7 of Schedule 3 of the Act or a special referee under s 95 of the Act. The Tribunal may do this at the request of the parties, or occasionally on its own initiative.
- 36 If the parties jointly seek a Tribunal-appointed expert or a s 95 special referee, this should be done by seeking a consent order. The request for a consent order should contain, as a minimum:
- (a) the name of the proposed expert or special referee, details of his/her expertise, and confirmation that he/she has agreed to accept the appointment. (Note: If this confirmation is not available there should be a specific reservation of liberty to apply);

- (b) the questions to be considered or determined, or the task to be performed, by the expert or special referee;
  - (c) the date by which any documents are to be provided to the expert or special referee and by whom. Where possible these documents should be clearly identified;
  - (d) the date by which the expert or special referee is to complete any report or determination (subject to an extension of time being granted by the Tribunal);
  - (e) details of payment arrangements – the expert or special referee will generally not be required to deliver up the report/determination until his/her account has been paid in full.
- 37 Following receipt of the request for a consent order, the Tribunal may make the consent order appointing the expert or special referee, or refer the request to a directions hearing to consider appropriate orders. The appointment of the expert or special referee is within the discretion of the Tribunal, and the Tribunal may decline to make the order if the terms of appointment appear to be outside the proposed appointee's expertise.
- 38 If the Tribunal proposes to appoint an expert or special referee on its own initiative:
- (a) the Tribunal will first obtain the views of the parties in writing or at a directions hearing, including (in the case of a Tribunal-appointed expert) the views of the parties on the matters the Tribunal must consider under Clause 7 of Schedule 3 of the Act;
  - (b) the costs of the expert or special referee so appointed will initially be shared equally by the parties, unless otherwise ordered by the Tribunal;
  - (c) the expert or special referee will be requested to provide an estimate of their costs, and the parties may be required to make an initial payment on account of the estimated costs before the expert or special referee commences any work under the appointment and/or provide security for costs in a manner specified by the Tribunal;
  - (d) after the expert or special referee completes his or her appointment and renders a final account, the parties will be required to pay any balance within seven (7) days in the same proportion as for the initial payment, unless otherwise ordered by the Tribunal. Payment may be required before the expert or special referee provides a report to the Tribunal;
  - (e) the proportion of costs paid by a party for the expert or special referee will be treated as a cost in the proceeding if there is a subsequent costs application by a party.

**- END OF PRACTICE NOTE -**