

Comparison of jurisdictions¹

	Supreme Court	District Court
Rules	<p>Pt 31 Division 2 Uniform Civil Procedure Rules (UCPR) Expert evidence is inadmissible unless served in accordance with the rules, except by leave or consent; expert witnesses must agree to be bound by code. There is provision for joint conferences and also provides for evidence to be given 'concurrently'(Rule 31.26) Rule 31.18A: Admissibility of reports, applies to Supreme Court proceedings only</p> <p>Pt 31 Division 3 The court at any stage may appoint an expert to inquire into and report on a question in the proceedings.</p>	<p>Pt 31 Division 2 UCPR- Rule 31.19 is specific to the admissibility of expert reports in Local and District courts – in these courts, it is the responsibility of the opposing party to procure the attendance of an expert for cross examination</p>
Code of Conduct	<p>Schedule 7 to the UCPR is summarised as follows:</p> <ol style="list-style-type: none"> 1. Duty to act impartially 2. Paramount duty to the court 3. The expert witness is not an advocate for a party 4. Requirements as to form of the report including the expert's qualifications must be stated in the report 5. If any change in opinion, the expert must provide a supplementary report. This obligation applies to court appointed experts as well. 6. An expert witness must abide by any direction of the court to confer, endeavour to reach agreement on material matters for expert opinion and provide a joint report, specifying matters agreed, not agreed and reasons for failure to reach agreement. 7. An expert witness must exercise 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. 	<p>Schedule 7 to the UCPR</p>
Practice Notes	<p>SC Practice Note Gen 10 Single Expert Witnesses - applies to all proceedings commenced after 17.8.05 in which a claim is made for damages or personal injury or disability. Unless cause is shown, expert evidence is confined to that of a single witness in relation to any one head of damage. If there is disagreement on the expert or the material to be provided, the court will make directions.</p> <p>Practice Note SC CL 5 General List, Case Management Practice Note It is useful to note the court's concern at number of experts being used in personal injury cases. In general, "Where it is considered that an unnecessary expert has qualified or is sought to be called to give evidence, then the court may, reject the tender of the expert's report; refuse to allow the expert to be called; and disallow any costs incurred in qualifying, in having the expert's report prepared or in calling the expert to give evidence."</p> <p>SC Practice Note Gen 11 Joint Expert Witnesses outlines the processes for joint expert conferences, including: which questions and materials are to be put to the experts; that the conference should take the form of a personal meeting and that the experts should be given a reasonable opportunity to prepare for the conference. Further, the Practice Note provides that the experts provide their own independent opinion and must not act on any instruction or request to withhold or avoid agreement.</p> <p>The joint report should specify matters agreed and matters not agreed and the reasons for non agreement. This requirement is standard across all jurisdictions in NSW in relation to joint expert reports. The Practice Note also specifies the form the joint report is to adopt.</p> <p>Legal representatives who are approached for advice or guidance by a participating expert must be provided jointly unless all representatives of the parties agree. It is not intended that the joint report be provided to the court or that information provided to the court concerning a conference will be evidence in the proceedings unless admitted into evidence the ordinary way.</p>	<p>The practice notes dealing with expert reports in the District Court are not as detailed as those in the Supreme Court. The main thing to note about expert witnesses in the District Court is the timetables in practice note for particular lists. The practice notes make it clear that failure to abide by such timetables can lead to the exclusion of particular expert evidence.</p> <p>It is useful to note <i>District Court Bulletin</i> on the District Court web site under the heading 'Expert witnesses'. The purpose of the bulletin was to 'draw to the attention of experts and practitioners a number of basic propositions', as summarized below.</p> <p>The evidence of an expert is only admissible if the matter sought to be established by the opinion is something which cannot be concluded by the tribunal of fact without the benefit of such an opinion</p> <p>For the conclusions of an expert to be treated as valid, it must appear that those conclusions are sufficiently borne out by the evidence</p> <p>The format or content of the experts' reports is important to their admissibility e.g. expert's qualifications and experience to be provided.</p> <p>Insufficient attention is paid to the order of adducing evidence at a trial. In cases where there is a doubt about what underlying facts will be established in the evidence, it is desirable to call experts later in the trial rather than earlier so that if need be they can be asked to assume different matters of fact.</p>

Land and Environment Court ('LEC')

Under the *Land and Environment Court Rules 1996* Part 13 (rules specific to class 3 compensation matters) rule 21 provides registrar may give directions as to expert reports. Part 14 (rules specific to class 4 proceedings) provides that directions that may be given when two or more parties call expert witnesses to give opinion evidence about the same question or similar questions, including 'concurrent evidence'

The LEC Code in Practice Direction 2003 is the same as Schedule 7 to the UCPR. Practice Direction 2003 in addition states that, unless an expert's report contains acknowledgment of code and agrees to be bound, service of the report will not be valid and the report shall not be admitted into evidence. Further, oral evidence is not to be received from an expert unless acknowledged in writing re proposed evidence, read code and agrees to be bound and a copy of acknowledgment has been served on all parties.

As in other jurisdictions, the court can by application or own motion direct experts to confer. The experts must endeavour to reach agreement and provide the court with a joint report, outlining what is agreed, not agreed and the reasons for any non agreement.

The LEC direction for joint conferences is similar to that of PN SC Gen 11. However, *note* there are some differences including: where experts have conferred and provided a joint report, a party affected may not, without leave of the court, adduce expert evidence inconsistent with the matter agreed; and the content of conference not to be referred to at hearing unless affected parties agree.

In addition, there are standard directions for expert witnesses, summarised below:

Standard Direction 1

Experts must confer not less than seven days before hearing and identify: issues within their expertise, agreement, disagreement and reasons for any disagreement. Not less than five days before the hearing file a joint statement specifying matters agreed and reasons for non-agreement.

Standard Direction 2

Same as No 1, Different time frames – 42 days instead of seven, 49 days instead of five.

Standard Direction 3

On site hearings – expert evidence not required for on site hearings but if party intends to rely on expert witness evidence at on site hearing then that party is directed to file and serve an expert report or short position statement in accordance with Pt13 rule 6 of the LEC Rules.

Federal Court

Similar rules to other jurisdictions. There is provision for court appointed expert (Order 34) and directions that may be given to experts (Order 34A: Evidence of Expert Witnesses, including provision for 'concurrent evidence'). There are particular requirements as to the form of the expert report – see Order 33 rule 20.

Rules on expert witnesses are supplemented by the *Federal Court Guidelines* and explanatory memorandum to the guidelines. The guidelines are 'no more than guidelines. Attempts to apply them literally in every case may prove unworkable.' Guidelines are to be implemented in a 'practically sensible way' which ensure that they achieve their intended purpose.

Same themes as in UCPR Schedule 7: factual substratum, relevant expertise, if deficiencies in opinion need to explain why in a timely manner through legal representatives

The guidelines also state that it would be improper conduct for an expert to be given or to accept instructions not to reach agreement.

Federal Magistrates Court

Division 15.2 is a more concise version of the Federal Court Rules

Rule 15.08 – evidence called by two or more parties on the same question – order of giving evidence and conferencing

Rule 15.09 – appointment of court expert

Rule 15.07 adopts the *Federal Court Guidelines*.

A note to rule 15.07 points out the key aspects of the guidelines, namely that: an expert witness has a duty to assist the court on matters relevant to the expert's area of expertise and that an expert witness is not an advocate for a party. Further, if expert witnesses confer at the direction of the court it would be improper for an expert to be given or to accept instructions not to reach agreement.

¹ Compiled by Alexandra Bartlett. This comparison is intended to be a summary of the procedural requirements for adducing expert evidence in NSW. It is not intended to be a complete guide on each jurisdiction discussed.