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Attachments:

Attachment 1  Suggested Template for Joint Experts Reports
Attachment 2  Suggested Template for Statement of Evidence
Attachment 3  CV – Chris Schomburgk
1.0 WHAT IS AN EXPERT WITNESS?

1. My name is Chris and I’m an expert witness – it’s been nearly 2 weeks since my last trial. That may sound like an introduction at an AA meeting, but it’s not. I am here to speak to you about my experiences as a town planning expert witness. While I have been a town planner in Queensland for over 30 years, my first trial as an expert was in 1985 (and we were successful – perhaps that helped). For the past 4 years, I have done nothing else other than prepare and provide expert evidence. My hair was a dark brown colour back then.

2. It is relevant to begin by describing, or defining, what exactly an expert witness is. One long-winded definition, which seems close to the mark, is that:

   “An expert witness, professional witness or judicial expert is a witness, who by virtue of education, training, skill, or experience, is believed to have expertise and specialised knowledge in a particular subject beyond that of the average person, sufficient that others may officially and legally rely upon the witness’s specialised (scientific, technical or other) opinion about an evidence or fact issue within the scope of his expertise, referred to as the expert opinion, as an assistance to the fact-finder” (Federal Rule of Evidence 702, 2000).

   The “fact finder”, of course, for our purposes is the Court – in Queensland that can be most commonly the Planning and Environment Court (P&E), the Land Court, or in some cases, the Supreme Court (for easements or judicial review) or the Magistrates Court (for prosecutions).

3. A better definition is derived from breaking down the word “ex-pert”: an “ex” is a has-been, and “spurt” is a drip under pressure. I’d like to disagree with the first part, but from bitter experience, I can assure you that the second part is appropriate. As an expert witness, you will be under pressure.

4. In practical terms in Queensland for the purposes of this seminar, an expert witness is one who gives evidence in an appeal – whether it be to the P&E Court or Land Court (or on rare occasions, other Courts) about their area of expertise. Appeals don’t always end up going to trial – often the matter will settle before hand, sometimes as a result of the input of the experts.

2.0 WHO CAN BE AN EXPERT?

5. In short, not everyone. While there are no specific qualifications or minimum years of experience involved, you must be sufficiently skilled to be regarded by your peers (and the Court) as an expert in your field.
6. In practice, the instructing lawyers and barristers will determine whether you are sufficiently skilled to give evidence before they formally engage you. Obviously, formal qualifications (eg: degree and PIA membership) will normally be a pre-requisite, after which your level of experience and the roles you have performed will be relevant.

7. If you’ve only ever worked in forward/strategic planning, that may not be regarded as sufficient experience if the matter is about development assessment (which they usually are). Equally, if you’ve only worked for a state agency, that may not be sufficiently broad experience to comment on general matters, but may be entirely appropriate if you’re asked by that state agency to represent them in an appeal.

8. But don’t let any of that stop you. As I discuss later in this paper, we desperately need more experts, so put your hand up and let people know you’re interested. You may not get to give evidence straight away, but most places will give you some exposure to the appeal system, so you can learn. Often the local government is the “meat in the sandwich” in a fight between competing (say) shopping centres, so you may be able to gain some experience in that type of case if you work for the Council. There was a case a few years ago where a council planner was criticised by the Court as an expert because that planner had been the delegate who signed off on the decision to refuse the application. He was criticised for being biased as an expert witness. However, a council planner who merely provides a recommendation to the council should have no such bias (except in at least one rural council I can think of!). His/her opinions in the recommendation should be objective, so there is no reason why that officer cannot give evidence for the Council as an expert.

9. In practice, as I said, it will be the lawyers and barristers who determine whether you’re a suitable expert to act in the particular case, and who gets to give evidence. Remember that each party to the appeal can only nominate one expert in each field (eg: town planning, traffic, flooding, etc), but that doesn’t prevent each party having a “student” to sit in and assist the nominated expert, at least up until the actual giving of oral evidence.

10. Obviously, what this really means is that you need to get to know your legal representatives and convince them that you’ve got the goods to be an expert.

11. You need to know your stuff, you need to be able to write a sentence that is spelt correctly and makes sense (that will knock out many new graduates), you need to be able speak with a degree of eloquence, volume and clarity, and most important of all, you need to be able to think on your feet. That doesn’t mean you have to be able to go toe-to-toe with your cross-examining barrister (never, ever try to do that – you’ll lose every time!), but you do need to have such a clear understanding of the issues that you can jump from one aspect to another (because that’s what some barristers will try, just to put you off). So, if you’ve got the qualifications, had at least a few years experience, and you think you’re up to it, you too can be an expert.
12. I was involved in a case a few years ago where a member of a local “progress” group (I’ve always smiled at that term) put himself forward as a town planning “expert” and attended the first Joint Experts Meeting we had. I challenged him about his credentials and he told me he had worked as a strategic planner for a HR company once, so he was obviously a qualified “strategic planner”. In the event, he was found not to be an expert, and had to give his evidence as a lay person, but it did create some interesting discussion, as, and I will discuss this later in the paper, we as town planners are not allowed to play lawyer, and so it was not my job to tell him he couldn’t attend the Court-directed meeting of experts. That particular meeting took about 4 hours longer than it should have.

13. So, if you have the qualifications and some experience, you too can be an expert. Remember, however, you can only be an expert in one field of expertise. Some planners have some knowledge of, say, visual impact assessment, and thus hold themselves out to be an expert in that very specialised field. Don’t. Stick to what you know, and rely on others for what you think you might know – but usually don’t.

3.0 WHY WOULD YOU WANT TO BE AN EXPERT WITNESS?

14. In short, because it’s very rewarding – it’s sometimes stressful, but almost always rewarding. It is my long held opinion that being an expert and giving evidence to the Court is the ultimate test of being (in my case) a town planner.

15. Too often I read reports - by both consultants and council officers - that make me cringe, and wonder just what were they thinking. It’s all too easy in the SPA/IDAS world these days to write almost anything that suits your client/employer, without any accountability about what you’ve written. Being an expert and giving evidence tests every word you write and speak. Having done it for so many years now, I am now extremely conscious about any report I write – how could it be interpreted, have I gilded the lily a bit too much, can that word, sentence, phrase or clause be challenged, etc. By way of example, I recently wrote in a joint report that my opinion was based on some engineering advice that I had “seen”. The other side’s lawyers read that and asked for a copy of that advice. In fact, I hadn’t seen any such advice, I had spoken with the engineer and he had told me over the phone that the proposal would comply with the flooding code. My inadvertent choice of words resulted in lawyers letters to and fro for a couple of weeks. Like I said, every word can be scrutinised.

16. From a consultant’s point of view, it’s also rewarding financially. Personally, I make a very good living from doing nothing else other than expert evidence. But I wouldn’t survive at it if at least some barristers, and hopefully some Judges, didn’t think I was reasonably good at it – not just writing and talking about the issues, but also about having an opinion about town planning matters that can withstand challenge. That kind of respect from my peers and from the legal fraternity is very gratifying and rewarding.
17. It’s all too easy for people to say that people like me, who do this for a living, are nothing but “hired guns”, who’ll say whatever needs to be said to defend the position of anyone who’ll hire us. You might get away with that for a couple of matters, but you won’t survive too long doing this work if that’s the case. You need to be able to say “no, I can’t defend that position” just as often as you say “yes, that position (approval or refusal for example) has merit in a town planning sense, and I can defend that position”. At the end of the day, the lawyers and barristers (and the Judges) want someone who is a credible witness – and your credibility won’t last long if you take on any appeal that’s put in front of you. As a hired gun, my credibility is my lifeline – without it, my last appeal is just that – my last appeal.

18. What I often find amusing is that, if I tell an Applicant that I can’t defend their position, I am not infrequently asked soon after by someone from that particular Council if I can act on their behalf, not knowing that I had recently turned down their opposition. That kind of thing is rewarding in itself, and adds to your credibility.

19. In that context, I find it bemusing that staff at (at least) one Council, for whom I have been asked to give evidence, have expressed concern that “hey, Schomburgk sometimes acts against us, why would we give him any work?” That naivety is a real concern, and those people should not volunteer to give evidence, as their objectivity seems to have gone missing. This may come as a surprise to them, but Councils don’t always get it right.

4.0 PRACTICAL ISSUES FOR THE EXPERT

20. Having decided you want be an expert, there is a series of legal provisions that affect what you do, when you do it, and how you do it. The very experienced P&E Court barrister, and a friend of mine, Tim Trotter, is presenting at this Seminar, and will go into some detail about the legal provisions, so I’ll leave much of that to him. However, I’ll touch on some of the practical aspects of these provisions for the purposes of this paper.

21. Once an appeal has been filed (regardless of which party files it), other parties can elect to join or respond (submitters, concurrence agencies etc). Once that has happened, the matter may sit idle for some time, although the Court is doing its best to have matters brought before it these days. But nothing may happen for a couple of months. During that time, the parties start putting their “team” together – experts, lawyers and barrister/s (Counsel). This may include a preliminary opinion of prospects or issues from each of the experts, and perhaps a preliminary meeting of the entire team, while more full-some Briefs are being prepared, and while disclosure of documents between the parties is occurring.

22. The legal team that has appointed you (let’s call them the instructing lawyers, even though they’re not allowed to “instruct” you) as their expert in your field, will provide you with a Brief of material. “Brief” is a curious word in this context, because my experience is that they are usually anything but “brief” (a Land Court matter I’m involved in is up to 12 lever
arch folders at present). Once you’ve been appointed, they will be obliged to advise the other side/s of that appointment at some (fairly early) stage in the process. From that point on, you are bound by certain legal provisions, not the least of which is the “Directions Order/s”.

23. The Directions Order is an Order of the Court, and has legal implications for you to abide by. The better legal teams will discuss a draft Order with you and the whole team prior to taking a draft to Court, but that’s not always the case. As soon as you are given the Order, make sure you can comply with the dates set out therein. If you can’t, let the lawyers know straight away, and they may need to replace you, or seek an Amended Order.

4.1 Preliminary Opinion

24. As I’ve discussed above, an important first step for an expert is the preliminary opinion. If you can’t support the case, say so up front. However, it’s rarely so black-and-white. Very often, your opinion is along the lines of “I can’t support the proposal in its current form, but if the applicant was to do x, y or z, I could support it”. From a council point of view, it might be, for example, you’ve refused it, but if the applicant was to reduce the number of units, or drop off one floor etc, it might be acceptable. Make those comments known early, and it may be that the parties are willing to negotiate along those lines, hence saving the costs of a trial.

25. Getting to this preliminary opinion doesn’t always require a site inspection, but go on site wherever you can. Google Maps, Street View, or NearMap are wonderful things, but nothing makes up for a site inspection, and the earlier the better. You will need to go on site before you start the JER process (well, most planners do – one celebrated case last year saw an expert highly embarrassed and chastised by the Judge for not inspecting the site until only 2-3 days before the trial – and after she had signed the JER, and after she had prepared her Statement of Evidence.

4.2 Disclosure and Particulars

26. Important early steps in the formal process are that of “Disclosure” and the Request for and Response to “Further and Better Particulars”.

27. “Disclosure” is simply notifying the other parties of all documents in your possession that relate to the appeal. This includes file notes and emails. As in any part of daily life, be careful what you put in emails during the DA process, as they are all discoverable in an appeal. I’ve seen some very interesting emails between the parties in some recent appeals.

28. “Particulars” are the opportunity for all of the parties to seek more detail about certain aspects of the issues in dispute. For an applicant in a refusal appeal, it means the opportunity to gain more detail about the grounds of refusal. For the council, it’s an
opportunity to seek more details of the grounds of the appeal – why do you say it should be approved?

29. Very often, but not always, the experts will be asked to provide input into the Response to the Request for Particulars. This certainly helps you focus at an early stage on the matters in dispute and is a useful part of your involvement, but don’t under-estimate the time that might be involved. In some cases, shopping centre appeals are a good example, this can be very time consuming and, if you are a consultant planner, needs to be factored into your time/fee proposal. Personally, because of the unknown quantity of such time, I prefer to leave this step as an hourly rate figure in any fee proposal, as you cannot know just how much time, if any, will be involved when you are preparing a fee proposal.

30. A pet hate of mine, and of many of my peers, is the practice of some lawyers of trawling through the planning scheme to find every word, sentence, phrase or clause that could even remotely relate to their case, and including all of them in the notified Particulars. This means that, as experts, we are obliged to deal with each and every one of those clauses in our JER. Hence the reason why some JERs are up to 50 pages or more in length, without the attachments and figures! This practice is, in my view, unhelpful to the experts and to the Court, and adds substantially to the cost of an appeal, for no real benefit.

31. What is needed is, instead, a discreet summary of what the issues in dispute really are. In many of the recent JERs in which I’ve been involved, we’ve done the laborious task of going through each and every item, repetitive as they are, because we have to, but adding an introductory section of the report setting out, in simplified terms, what we see as the main issues from a town planning perspective in the case.

4.3 Joint Experts Reports

32. An early step in the Directions is the Joint Experts Meeting (the “JEM”), which used to be called the “conclave”. There will be a date for the meeting to commence and a date by which the Joint Experts Report (“the JER”) is to be finished and provided to the lawyers for filing with the Court. For planners, these dates will often, but certainly not always, be a week or two after the other experts have completed their Joint Reports. This is especially the case where the planning opinions are likely to be influenced or need to take into consideration, the views of the other disciplines (eg: economics, if it is about a shopping centre, or flooding if that’s likely to be a show-stopper, etc).

33. Make sure you allow enough time between the first meeting and the date by which the JER is to be provided. Don’t expect that you’ll get it done in one hit. My recent experience is that it can take a couple of weeks from the first meeting to finalising a signed JER, so factor this in to your own timetable.

34. JER’s are becoming longer and more detailed, as we all evolve this aspect of being an expert. However, it’s important to note that once you start that process, the “cone of silence”
prevails, and you are not allowed to talk to your lawyers or any other party about the case until you have a signed JER.

35. Another convention in JER’s (for which I take some of the blame) is that the applicant’s experts (by that I mean the experts nominated as experts by the applicant) take the running of the draft JER. Don’t under-estimate the time required to put together a first draft. It means going through each and every ground, issue and Particular notified by the parties and setting them all out in the draft, together with your own comments. This draft is usually sent to the other experts in advance of the first meeting, and serves, if nothing else, as a starting point for the discussions. The other experts then add their comments, and it becomes something of an iterative process of comment, rebuttal, further comment, etc — either or both by way of further meetings or email exchanges - to get to a signed JER. And if you’re not used to “track changes” in Word documents, get used to it. This way each of the parties can see the other parties’ comments and changes to the draft, but it can get messy, I assure you.

36. While, in the JER, you need to address all of the nominated issues and any Particulars, it is not open to any of the experts to try to introduce new material that hasn’t been formally notified as an issue. Some of the more-seasoned experts may try to do this. If you can’t convince them not to raise the issue, you must make a comment. A safe way is to say that you don’t consider it is relevant and therefore make no further comment, but that you can deal with it in your Statement of Evidence if the Court finds that the issue can be raised. That way, the lawyers and, if necessary, the Court, can decide whether it is a relevant issue. Experts should never try to be lawyers – in the JEM or at any time of the process. The Court has taken a dim view of planners (in particular) trying to interpret planning schemes or other statutes, or attempting to determine matters of legal interpretation.

37. On a very practical note, make sure the JER has every page numbered, including all the attachment pages and all figures/maps/plans. Also, make sure every paragraph is numbered. These may sound like small matters, but when the JER is being discussed in Court, and the lawyers and Judge are looking for a particular comment, it is not good form to have them trying to refer to a particular comment as the third paragraph down on the page two pages before the end. As town planning experts, we’ve generally come to only one or two templates that we all tend to use now, but it still irks me when I see JERs from other experts with no page numbering, no paragraph numbers, no index page, etc. I’ve attached a JER template that has become well accepted by me and my peers over recent months.

38. In the JER, attach all the relevant plans, maps, figures, extracts of planning scheme/s etc, and attach a copy of everyone’s CV. While this adds to the bulk of the JER, it avoids repetition by each expert in their individual Statement of Evidence. Be aware that the lawyers will provide the Judge with a Book of Documents, which will normally include the relevant planning scheme/s (or at least extracts), but it is nevertheless common for planning experts to include specific extracts in the JER to make it easier to refer to specific provisions. One agreed
location map, aerial photo/s, approved plans or proposal plans, zoning map, etc helps cut out multiple copies of the same thing for the Judge.

39. Another tip, on a practical note, is to summarise at the end of the JER the points of agreement and, especially, the points of disagreement in, say, dot point form. This will form the Contents page for your individual Statement of Evidence, if one is needed, and is a useful guide to the lawyers and the Judge when (if) the matter goes to trial.

40. As a consultant planner, don’t under-estimate the amount of time required for this JER process. It used to be, when “conclaves” were first introduced, that they were a relatively minor part of the overall time (and thus fees). That has certainly changed, and JER’s now represent a substantial component of the overall fee in any appeal, especially if you are acting for the applicant and thus required to prepare the first draft of the JER.

41. For all their complexity and costs, however, I like many of my peers (not just town planning experts), truly believe that the JER process is achieving results. We are reducing the number of issues to be ventilated before the Judge in a trial, and in some cases we are actually resolving the appeal altogether. The other side of that coin is, however, that it is front-loading the time and costs in an appeal. That is, a greater percentage of the experts’ time is being spent earlier in the process. Of course, if, as is the most common outcome, it reduces the costs of actually going to trial, that is money well spent.

4.4 Mediation

42. Mediation or Alternative Dispute Resolution (“ADR”) is occurring much more often than it ever used to. Most appeals now require, by Directions Order of the Court, that the parties attend and participate actively in a Mediation before the Registrar, John Taylor.

43. If, as the nominated expert, you are asked to attend the Mediation, be prepared. If the Mediation is to occur prior to the JEM, make sure you are completely on top of the issues that affect your discipline. If, as is more common, the Mediation is to occur after the JEM, make sure that you have completed the JER and that it has been provided to the lawyers well in advance of the Mediation date. This gives the Mediator sufficient time to read all the material – and there will be a substantial amount of reading for him.

44. Mediation is much less intimidating than a trial before a Judge. You may be asked to step outside with your counterpart/s, with or without the Mediator, to see if the remaining issues of disagreement can be resolved between you. That may mean seeking a compromise, so be prepared to participate in negotiations, but in a professional way that doesn’t offend your planning principles. Everything at a Mediation is on a “Without Prejudice” basis, so be open and frank in your discussions.
4.5 Statement of Evidence

45. The individual report is known as the Statement of Evidence, and must address only the points of disagreement arising from the JER. You cannot use this Statement to raise things you forgot raise in the JER. All the more reason to be properly prepared when going into the JER process.

46. As with the JER, it is important to make the Statement easy for the reader – the Judge. Again, number every paragraph and every page, including the attachments and maps/plans/figures, but include only those attachments that are essential for this Statement, and have not already been included in the JER. Include a Table of Contents, and a Summary of your opinions at the end. Don’t use dot points – instead use numbers or letters, so that the reader can refer to any particular point by a reference.

47. Avoid repetition – that should have been taken care of in the JER if a series of (say) planning scheme provisions about the same principle were raised as issues. Use a reasonable sized font – minimum 11pt – so that the Statement is easy on the eye. Remember the Judge will have to read numerous reports in Court, so make yours easy for him to navigate and to digest.

48. Don’t use double sided copies of the Statement. Don’t ask me why, but lawyers and Judges don’t like it, despite the paper-saving. I think it’s something to do with them having trouble with double sided copying – they forget to turn the switch over. Seriously, I think it’s because the Judges like to write notes on the back of the preceding page when they’re going through the reports – things like “he must be kidding!!” or “how could he possibly reach that absurd conclusion” (not on my reports, on others).

49. Given the detail in the JER, this Statement of Evidence should be brief. Avoid simply restating your position as stated in the JER. It should only be used to expand, if necessary, on why you disagree with your counterpart/s about certain issues.

50. Again, be aware of the timing for exchange of these reports. The timing will be set out in the Directions Order, and allow yourself plenty of time to prepare a draft, review it with your legal team if necessary (it will be necessary), finalise it, and prepare the multiple copies that are needed. Allow two copies for the Court, one for each of your barristers (senior and junior counsel), at least one for your lawyers, the same for the number of legal people on the other side/s, and at least one for yourself.

51. Again, I’ve attached a draft template for the Statement of Evidence that I have been using for a while now. Feel free to adopt and adapt it as you see fit.

4.6 Oral Evidence – the Trial

52. Here’s where we get to the fun part.
First, you will not normally know exactly when you are required to attend the Court. If it’s a five-day trial, for example, you could be required any time during that five days, so make sure you keep your diary free.

You can narrow it down to some small degree, knowing the usual order of events. That usual order is that the applicant’s side goes first, followed by the Council, and then the submitters/state agencies if there are any. I say “usual” order, because some Judges are now asking for the experts to give evidence in blocks, that is, the traffic engineers from all sides, then the noise experts from all sides, then the planners, etc. But you usually won’t know this until the first day of the trial, or maybe one or two days prior, so again, you need to remain flexible once the trial starts.

The other point to note is that usually the Judge and barristers will conduct a view of the site after the formal opening of the trial. That means that you probably won’t be required at all on the first day, but again, that varies from case to case.

Even if you’re not required, it is often sensible to sit in the back of the Court while other experts, especially your counterpart/s, are giving evidence. If it’s a shopping centre case, you may also want to listen to the evidence of the economists, for example. It may give you some idea where your own cross-examination may lead.

Once it’s your turn, be aware that the process starts and ends reasonably easily, but gets ugly in the middle. You will, in most cases start with “evidence-in-chief” which is where your barrister will ask you to put into your own words what this case is all about from a town planning point of view. He may also ask you to expand on why you differ from your counterpart/s. This is usually brief and helps you settle in to the evidence.

Then it gets interesting. “Cross-examination” is done by the opposing barrister/s and sometimes also by lay persons if they are self-represented. They will try to discredit your evidence and opinions, by asking questions about all relevant aspects, and sometimes irrelevant aspects as well. The key is to not get flustered, listen carefully to the question, answer directly and in short, sharp statements, and answer only the question as it is put to you, no what you think they might be getting at. Never try to second-guess a cross-examining barrister, and never get into an argument with them – you will lose every time.

When I first started doing this, I was told to listen carefully to the question, then turn and address your answer to the Judge, not the person who asked it. I’m not sure if that is still the protocol, but I don’t do it. I will address my answer to the person who asked the question, conscious that the Judge is listening and, if I think any explanation about my answer is needed, I might address that to the Judge.

During cross-examination, you may be challenged about your qualifications, experience, possible bias, preparation for the case and most importantly, your opinions and how you
arrived at those opinions. Be prepared for that degree of criticism, but accept that this is part of the barrister’s role, it’s not personal (well, most of the time it’s not).

61. I recently heard one learned Judge (they’re all learned, I know) remark how he missed the old days when cross-examination involved blood, sweat and tears. It’s much more civilised these days (mostly), although I have certainly seem some very embarrassed experts crack under cross-examination. It all comes down to knowing your topic and speaking the truth. If you cover these two, you can’t go wrong. Be prepared to concede the obvious. Many barristers will try to tinker with the edges of your opinion first, and if they ask something that is patently obvious, agree with them. You are not there to be an advocate for your client, you are there to assist the Court with your honestly-held opinions. Anything less than that will destroy your credibility – the one thing you need if you are going to be an expert witness.

62. If you’ve survived cross-examination, the Judge will ask your barrister if there is any “re-examination”. This is your barrister’s opportunity to get clarification about any answers you gave during cross that he didn’t like, or to get you to expand on any answers if he thinks you might want to expand but didn’t get the opportunity. He cannot ask new questions, it’s only about matters arising from the cross-examination.

63. Then you get to sit down, go home, have a stiff scotch and a lie-down, and avoid any sharp objects. Seriously, once the dust has settled, you should confer with your legal team and get some feedback about how you went in the box.

64. Then comes the wait. You may have to wait 3-6 months for a decision, sometimes longer (sometimes much longer), and sometimes shorter. I remember a case in Cairns a year or so ago where the Judge told the parties to come back after lunch on the last day, and he delivered his Judgment then and there (in my client’s favour, thankfully). When the Judgement is released, go through it to see what the Judge had to say about the planning evidence and your evidence in particular (if he comments on it, which he won’t necessarily do). This is important feedback but don’t take it too personally. The Judge will invariably have to decide between competing opinions, and he may, on balance, prefer someone else’s over yours. Try to read into the decision why he preferred the other persons (if he did). Remember that, especially in town planning, it’s rarely about black-and-white, it’s usually about shades of grey.

65. If my client has won a case, it’s almost always as a result of the town planning evidence. If my client loses, it’s always the fault of the engineer, the architect, the landscaper, the lawyer, the barrister, the client – anybody else!
5.0 PRACTICAL REQUIREMENTS AND TIPS

5.1 The Brief

66. Make sure you have everything you need. Check which version/s of the planning scheme are relevant – the version in force at the time the application was made, the version in force when the decision was made, and the version in force now. All of these are likely to be relevant to some degree.

67. Check which version of the proposal plans are relevant. It’s usually the plans as determined by the Council, and they are very often different to the plans as originally lodged.

68. Get yourself organised. Personally, I use tabs for everything in my folders, so I can access the relevant material quickly.

69. Visit the site. Ideally, visit the site as soon as you are engaged to get a feel for the locality and to help you form your initial opinions. But visit it again at least once before the trial, ideally before you prepare the JER or your individual Statement. There may be some months between these events and things may change, either on the site or in the surrounding locality.

70. From a consultant planner’s point of view, prepare a fee estimate – I say “estimate” because, despite some lawyers asking for it, you can never give a fixed fee for expert evidence, there are simply too many variables beyond your control. Importantly, set out in the estimate what items are not included, as these can be just as time-consuming. Allow for the fact that the lawyers will often give you direct instructions, but they usually don’t pay the bills, so include a clause to the effect that any such instructions are taken to be from the client.

71. I always set out my fee proposals in seven stages as follows:
   i) Assistance with Interlocutory matters (hourly rate only)
   ii) Site Inspection and surrounding land use survey
   iii) Attendance at necessary conferences with client and Counsel
   iv) Attendance at meeting of experts and preparation of joint report/s
   v) Attendance at Mediation (if required)
   vi) Preparation of expert evidence report for trial
   vii) Attendance at Court to give expert evidence.

72. Obviously not all stages are necessarily required, and the matter may settle along the way, and there may be other time required of you for matters that you can’t foresee, so it has to be an estimate only, but this staged approach to a fee has served me well for many years. Each stage can only be an estimate as, as above, each stage can involve extra (or less) time and effort beyond your control.
73. Once you are engaged, all matters to do with the case should be kept on a confidential basis. Other parties may want to talk to you about engaging you, but if you’ve already been engaged, you should not disclose the nature of your advices to any other party.

74. If you are asked for a preliminary opinion, generally keep it verbal, especially if it’s going to be a negative or heavily qualified opinion. Anything given in writing is potentially disclosable to the other parties, unless specifically noted as “Briefing Notes to Counsel” (although there may be some legal debate about even that).

5.2 Meeting the Team
75. Always seek the opportunity to meet with the legal team and the other experts early, before the JEM process commences. Get the preliminary views (verbally) of the other experts, as this will often influence how you deal with the planning issues.

76. Most barristers will seek to meet with the entire team at an early stage to gauge preliminary opinions and start to work up an approach to the case. Here you can contribute to, for example, the Further and Better Particulars, additional material that may be needed, modifications to the proposal, timeframes for the Directions Order, etc.

5.3 JEM & JER
77. As above, the onus is generally on the applicant’s nominated experts to prepare the first draft of the JER. Don’t under-estimate the amount of time required for this, or in the meeting/s themselves.

78. Be prepared for more than one meeting, and for an ongoing saga of email and track-changes versions of the report. This means starting the process early, to ensure you can comply with the return date for the signed JER. However, town planners are often required to meet after the other experts have completed their JER’s. If they haven’t (and that is usually the case), you may need to ask your lawyers to seek an amended timetable, as your inability to get a signed JER may mean you can’t attend the Mediation.

79. If you’re having trouble with your counterparts, don’t be afraid to ask the ADR Registrar (through your lawyers) to intervene to either get the other parties to meet or to sort out any legal or practical issues.

80. Agree on a set of maps, plans, figures and other attachments, including the CV’s of all participants. That way, while the JER may become bulky, the individual Statements of Evidence will be much shorter, and the Judge will only have to deal with set of plans etc.

5.4 Statement of Evidence
81. Be careful with the language. Every word, phrase, clause sentence and paragraph will be scrutinised by the other parties. If you are relying on someone else’s advice or opinion,
make it clear that you are, and provide the details of that person/report etc. The words “I am advised that ...” are asking for trouble, as the opposing barrister will want to know who advised you. A much better phrase is “it is my opinion that ...” or “I note from the report of Mr Smith that ...”.

82. Always include a list of the reports etc to which you’ve referred or relied upon in your Statement. Even if you simply read it in passing as part of your preparation for this appeal, and are not sure of its relevance, it’s always safer to include it in your bibliography than to leave it out and have someone ask you about it under cross-examination.

83. Have I said it before? – always number every page, paragraph and attachment. Use A4 portrait format, not landscape (all architects take note, please). Use a reasonably large font, with adequate spacing between lines. Simple I know, but it still amazes me how many reports prepared for the Court don’t do this, and the Judge and the barristers – and sometimes even the expert who prepared the report – are left flicking through the report to find the relevant piece and how to refer to it. In short, make it as easy as possible for the Judge (and others) to use your report when they’re looking for something. “Your Honour, that reference you’re looking for can be found in Mr Schomburgk’s report at page 37, paragraph 82”. It keeps your report uppermost in their mind.

5.5 In Court

84. Who’s in the Court? If you’ve attended the Court for some other matters as an observer, you’ll have an idea of who is in the Court, and their respective roles during a trial. If you haven’t, here’s an overview of what to expect.

85. The Judge sits up top in an elevated position. He will probably wear robes and wig, although in the P&E Court they often remove the wigs once they are seated. If the Judge removes his wig, the barristers will do likewise. Below him sits his associate – his assistant if you like. Next to the associate are usually one or two court reporters. The reporting may be by hand or more frequently they simply monitor the tape recording. To one side is the witness box – that’s you. Next to that is the bailiff. He does all the running around in Court, gets you a glass of water, hands you documents from the bar table, swears you in etc. You don’t leave your seat if you need something, he gets it for you.

86. In front of, and facing, the Judge is the “bar table”. No drinks are served, this is where the barristers and lawyers and any self-represented litigants sit. Each party may have a QC or SC (senior barrister) assisted by a junior barrister, assisted by a lawyer. If there are multiple parties in an appeal, it gets pretty crowded at the bar table. On entering the Court, you should take a moment to familiarise yourself with who’s who at the table. Behind the bar table may be a table for assisting (junior) lawyers, behind which is usually the gallery. That’s where observers and witnesses waiting to be called will sit. Sometimes the media may be
present, and they will sit in the gallery as well. Off to one side of the Court may be a separate row of seats for the jury. Don’t sit there - this is not a criminal court.

87. Arrive early. If your lawyers tell you that you may be required at 3:00 pm, arrive at least by 1:00, so that when the Court breaks for lunch – usually from 1:00 to 2:30 - you can meet with your lawyers to discuss how the case is going and what questions you may be asked under cross-examination. If they tell you that you might be required about 11:00, arrive at 10. Nothing is guaranteed to annoy a Judge more than a witness arriving late – never a good start. Wherever you can, arrive in time to hear some of the other witnesses giving evidence. Not only does it give you a feel for the types of questions you may be asked, it also helps to clear your head from your day-to-day workload, and concentrate on this appeal.

88. Be prepared. Have your report at the ready, and have the other planners’ reports ready and tagged for easy access. Same goes for the other experts’ reports, which you may be asked to refer to. I usually prepare two separate folders, with all JER’s in one, and all Statements of Evidence in another, each tagged accordingly for each report. Have a copy of the planning scheme/s with you. Have a copy of any other reports (eg Regional Plan, SPP’s) to which you’ve referred, handy as well. This usually means bringing a decent sized briefcase – I prefer the pilot-style brief case, which opens from the top, for easier access. If the Judge or barristers are fumbling around looking for a particular report, it helps if you can say “Your Honour, I have a copy handy if it assists the Court”. If you look prepared, chances are you are prepared.

89. Swear an oath or take the Bible. I don’t mean swearing at the barrister on the other side (that comes after you’ve given your evidence). If you have a problem swearing on the Bible, ask to take an oath/affirmation. The bailiff will have the appropriate oath at the ready. Either way, once you are sworn in, you are under oath until you are released by the Judge.

90. Neville No-Friends. If you’ve started cross-examination and the Court breaks for lunch or for the day, and you are to resume cross-examination later, you are not allowed to talk to your team or anyone else about the case. That means sitting alone to have lunch.

91. Dress appropriately. For men, that means wearing a suit and tie – even in Cairns. While it may not seem necessary, your appearance does count. The Court is a formal, conservative establishment, and if the Judge and barristers have to wear robes and wigs, you should offer them the same courtesy by wearing a suit and tie. This is not essential (but is desirable) if you’re merely sitting in the back of the Court observing others, but when you’re in the witness box, it counts. As I always say about my golf, “if you can’t be the part, at least look the part”.

92. Be polite. You can disagree with the barrister under cross-examination, but don’t argue. Keep your answers short. If you say too much, you’re only inviting him/her to question you
about the added detail. Be professional. The Court can sometimes relax, and a few jokes may be traded from the bar table, but you need to maintain your professionalism.

93. Talk to the Judge. Most P&E Court Judges will ask questions of you from the bench from time to time. Answer just as you would the barrister.

94. Speak up, speak slowly, and speak clearly. Nothing is more frustrating for the Judge, the barristers and the court reporters (yes, you are being recorded) than a witness who mumbles, or who speaks too fast. If referring to a unique place-name or tree species or something unusual, spell it out for the Court reporters. If you are impressing the Judge (and even worse if you’re not) the Judge will be taking notes while you speak, so allow him/her time to keep up with you. Having said this, don’t take forever to answer a question. It suggests you’re not on top of the issue. Equally, if the question is long-winded or convoluted, ask for it to be repeated, so you can answer properly. Don’t be afraid to take a notepad and pen with you (in fact, always take a note pad and pen) to jot down notes while such a question is being asked.

95. Be prepared. I always take a scale rule, magnifying glass, and calculator into the witness box. Comes from experience, but it’s surprising how often I use all of them when I’m in the box.

96. Be honest about your shortcomings. If you don’t know the answer, say so. If it’s beyond your expertise, say so. They may want you to offer an opinion anyway, but don’t do so without being asked, if it’s clearly a matter that you’re not qualified to speak about.

6.0 WHY WE NEED MORE EXPERTS

97. The fact is that the Court needs more experts, more people prepared to provide expert witness advice to the Court.

98. There is a small group of us who regularly provide that advice to the Court, and an even smaller group who do almost nothing else. There have been criticisms that it’s a bit of “club” in the P&E Court, and to some extent that’s true (and I’m very proud to be a part of the club). However, that’s partly because only a few planners (and the same applies to other disciplines) want to do it.

99. Equally, and understandably, most barristers and clients want someone experienced to present their case, and how do you get that experience if all they want are experienced witnesses?

100. Sadly, perhaps, the experienced ones are not getting any younger. Some of the original planners doing this (Ken Todd, Michael Challoner, etc) have all but faded away over time. The current crop are no spring chickens either, although one or two new faces have started to emerge in recent times. But as a planner, I’m disappointed that more planners don’t
seem interested in doing this type of work. Whether it’s the fear of the Courtroom scene, or the time involved, or a lack of self-confidence in public speaking, or what, I really don’t know or understand. As I have said, it’s rewarding to know that your opinions are valued, and to have clients (be they public sector or private sector) come back to you for advice time after time. More importantly, it is, in my opinion, the one true test of your ability as a professional to have your opinions challenged and tested in Court. Sitting behind a council desk, or a consultant’s desk, writing reports, but never being challenged about them, cannot be satisfying (can it?) and certainly does the profession no good in the long term.

101. If you have an interest in this type of work, please make that interest known to your superiors and to those around you. Importantly, make it known to the legal fraternity who, in the main, are the ones who appoint experts in the first place. Ask to attend a court trial, and to be an observer at a Joint Experts’ Meeting and in subsequent meetings with the legal team etc. Become familiar with the Court system and the Court processes. Look for opportunities to be an expert in relatively low-risk cases (eg: for a Council where it’s an objector appeal, or for a state agency).

102. This type of work is hard, demanding and requires precision, but it’s also personally and professionally very rewarding and, if you are a consultant, it’s financially rewarding.

7.0 SUMMARY

103. In summary, this type of work may not suit everyone in our profession, but it should. It offers challenges and rewards, and tests your skills in front of your peers and others.

104. There are many things to learn, rules to be followed, and time commitments to meet. But being an expert forces you to think about everything you commit to writing, knowing that someone on the other side may challenge every word, phrase, clause or sentence.

105. If you have the qualifications, experience and willingness to become an expert, do it, we need you.

CHRIS SCHOMBURGK
AUGUST 2011
References:
   i) Instructions to Experts - IPA Law (Andrew Davis):
   iii) P&E Court Rules 2010
   iv) P&E Court Practice Direction 1 of 2011
   v) Uniform Civil Procedure Rules 1999 Chapter 11 Part 5
   vi) Land Court Rules 2000

Attachments:
   i) Suggested Template for Joint Experts Reports
   ii) Suggested Template for Statement of Evidence
Attachment 1

Suggested Template for Joint Experts Reports
Attachment 2

Suggested Template for Statement of Evidence
CV

Chris Schomburgk