

Doug Humpreys - Registrar  
Administrative Appeals Tribunal  
GPO Box 9955  
Sydney NSW 2001

By email – [research@aat.gov.au](mailto:research@aat.gov.au)

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Dear Sir

## Comments on the draft “Guidelines relating to Opinion Evidence” and “Guidelines for the Use of Concurrent Evidence in the Administrative Appeal Tribunal”

### Background

The Institute of Chartered Accountants in Australia (“**Institute**”) welcomes the opportunity to provide comments to the Administrative Appeals Tribunal (“**AAT**”) on the draft “Guidelines relating to Opinion Evidence” (“**Opinion Guideline**”) and “Guidelines for the Use of Concurrent Evidence in the Administrative Appeal Tribunal” (“**Concurrent Evidence Guideline**”).

The Institute represents some 46,000 professional accountants, many of those practicing in Australia.

The Institute formed the Forensic Accounting Special Interest Group (“**FASIG**”) in 1998, the first professional body of Forensic Accountants in Australia. Since its formation, the FASIG has grown to comprise more than 800 Forensic Accountants practicing in all Australian states and territories and in a number of other countries. It is the leading representative body for Forensic Accountants in Australia.

The Institute, through the FASIG, has provided submissions to a number of organisations considering the use of expert evidence, including the New South Wales Law Reform Commission and, more recently, the Victorian Law Reform Commission.

In 2002, the Institute and CPA Australia issued APS 11 *Statement of Forensic Accounting Standards and Guidance Note 2 Forensic Accounting* in an effort to improve the quality of expert evidence provided by accountants who are members of those organisations. Several members of the Institute and the FASIG are now members of a taskforce working with the Accounting and Ethical Standards Board to revised and update APS 11 and GN2.

### General Comments

#### Consistency with other guidelines and rules for expert witnesses

1. There are now a number of guidelines and rules of court amongst the various jurisdictions around Australia. Our experience is that the broad thrust and aims of these guidelines are similar. However the differences in specific wording and elements make it unnecessarily difficult for experts who are familiar with one jurisdiction’s rules/guidelines to quickly pick up the necessary elements from another jurisdiction. We would strongly suggest that the AAT guidelines should be in line with not only the general thrust of the guidelines and rules in other jurisdictions (which they appear to be) but also in line with the specific wording to avoid potential confusion for lawyers and experts alike. To the extent that there are differences between the wording between different guidelines and rules we would suggest that you may wish to consider looking primarily to the Federal Court Guidelines, being the longest standing guidance.

#### Structure of Guidelines

2. We would suggest that consideration should be given to combining the two guidelines into one document. Our understanding is that concurrent evidence is only likely to be used for expert evidence. We would therefore suggest that this guideline should be included as one document with a set of Guidelines for Expert Evidence. This is particularly the case for elements of the guideline that relate to the meeting of experts prior to giving evidence, which is something we think should be encouraged for any issue where the parties are calling expert evidence, regardless of whether it is suitable for concurrent evidence.



## Opinion Guideline

3. **Paragraph 5** refers to “evidence which consists of factual information only” as well as strict opinion evidence. We would suggest that it may be better to refer to the Guideline as relating to Expert Evidence; whilst much of the expert evidence used in various courts and tribunals is opinion evidence, not all expert evidence is opinion evidence. This would also bring this Guideline more in line with other guidelines in Australia (for instance the Federal Court Guidelines on Expert Evidence),
4. **Paragraph 6.** In line with a number of cases that we are aware of, we applaud the move to make issues of compliance with the Guideline a matter of weight given to expert evidence, rather than admissibility. This helps focus users of the guidelines on the substance of the issues, rather than the form of reports etc.
5. **Paragraph 7.** We would suggest that it is simpler to make it a requirement for lawyers to provide a copy of the guidelines, rather than relying on someone having the most recent version of the guidelines. We would also suggest that consideration should be given to the suggestion that these guidelines should be discussed with potential expert witnesses, rather than simply providing them with a copy and assuming they have read and understand the philosophy behind the use of experts, and in particular their responsibilities to the Tribunal. This may be a particular issue where overseas experts or those who have not had experience of the litigation process are used.
6. We would suggest that there should be a requirement for all Experts to identify any relationships or other connections with the parties to the dispute which may be relevant for the Tribunal to consider whether they may be sufficiently objective, rather than relying on the Expert to make a final assessment of their independence.

## Draft “Attachment A” - Guidelines for persons giving opinion evidence to the AAT

7. **Para 2 (b).** You may wish to amend this slightly to reflect the practical reality that there may often be more than one letter of instruction as these instructions are refined and narrowed during the course an engagement.
8. **Paragraph 2 (c).** We would suggest that any report should distinguish between those assumptions that the expert has been instructed to make and those that the expert had chosen to make. Furthermore we would suggest that any expert should comment on whether or not the significant assumptions they have been instructed to make are within their expertise and, if so, if they know of any reason why it would be unreasonable to accept this assumptions. For all significant assumptions made by the expert, the expert should state why it was necessary to make such an assumption and confirm that they think it is a reasonable assumption.
9. **Report.** We would encourage a requirement that the expert should disclose the basis on which he/she, or the organisation for which they work, is being remunerated (this may or may not be adequately be cover in an engagement letter, but Para 2 (b) does not require the engagement letter necessarily, so it may not be disclosed). This is a further element that allows the Tribunal to make an informed decision about any potential commercial interest the expert may have in the outcome of the matter on which he/she is giving evidence.
10. **Paragraph 4.** We would suggest that there should be a specific requirement on the expert to comment on whether there is any information that the expert would have liked to have access to and which has not been available to the expert (this should give rise to a conditional opinion, but not every expert will appreciate the implications of a limitation of scope).



11. **Paragraph 6** – The working of the Federal Court Guideline has a number of features that we feel would make a better, more rounded declaration, along the following lines:

*“I confirm that I have read and understood the Guidelines relating to Opinion [Expert] Evidence. I acknowledge that I have an overriding duty to provide impartial and independent assistance to the Tribunal. I have made all inquiries that, in my opinion, are desirable and appropriate and that no matters of significance that I consider relevant have, to my knowledge, been withheld from the Tribunal.”*

12. **Paragraph 7.** We suggest that it is unnecessary to provide such a pro-forma document, as this can tend to focus the expert and instructing lawyer too much on the form of the report rather than the substance. However, if such a template is to be used we note that the current version doesn't cover all of the points that are requirements of the Guidelines. For instance, the pro-forma “cover sheet” does not make reference to the need to consider whether the opinions are final or not. If a template is to be used it should be comprehensive.
13. **Paragraph 8.** The Federal Court Guidelines requires the expert, where appropriate, to disclose any change of opinion etc to the Court. We would suggest that a requirement to inform the Tribunal where appropriate should be added to these Guidelines.
14. **Paragraph 9.** We would suggest that the guidelines should also state, in respect of the report, the extent (if any) of any relationships with parties who have an interest in respect of the matter in front of the AAT. This means that the Tribunal can consider – fully informed – the extent it considers there may be a conflict of interest, rather than leaving it to the expert to decide if such a conflict exists. This is also particularly relevant where the expert may not be from a professional organisation which requires its members to consider ethical issues such as conflicts of interest and therefore the concept itself may be something they are not familiar with.

## Guidelines for the use of Concurrent Evidence in the AAT

15. We applaud the general thrust of these guidelines in encouraging the use of both concurrent evidence and expert conferences. Our experience is that expert conferences can be a valuable step in helping to clarify the substantive issues that are, or should be, concentrated on by the parties. Such conferences can serve to significantly reduce the amount of time spent in examination and cross-examination of the experts. Concurrent evidence can be a much better way of the Tribunal being educated about the key issues that are relevant to the experts' opinion than more traditional approaches. Please refer to our comments below about encouraging expert conferences in situations where concurrent evidence may not be used.
16. We would suggest that there is mention in the introduction of the fact that concurrent evidence is sometimes referred to as “hot tubbing”. We prefer and encourage the term “concurrent evidence”; however the phrase “hot tubbing” is something that some experts may have come across.
17. **Paragraph 3.** The second bullet point in this paragraph appears to create a requirement that an Expert be independent. We appreciate that the Tribunal is not bound by the strict rules of evidence, however our understanding is that whilst independence, or a lack of it may impact on the weight to be given to expert evidence, there are a number of cases that highlight that there is no strict requirement for an expert to be independent for the evidence to be admissible. Indeed the Federal Court Guidelines state:

*“An expert is not disqualified from giving evidence by reason only of a pre-existing relationship with the party that proffers the expert as a witness, but the nature of the pre-existing relationship should be disclosed.”*

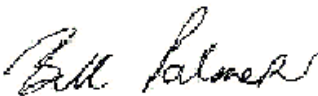
18. We would suggest that consideration should be given to removing the use of the word “independent” in this context, or that it should be clarified to bring it into line with the general proposition that the Tribunal should be aware of relationships to allow it to consider the impact, if any, that such relationships may have on the weight to be afforded to a particular expert in a matter (see comments re Para 9 of the Guidelines re Experts above. It might be preferable to use the word “objective”.



19. **Paragraphs 14- 16.** We would suggest that the use of expert conferences is something that should be strongly encouraged for all situations where more than one expert is considering the same or similar questions/issues, rather than only those where it has been decided that concurrent evidence will be used. Therefore it may be appropriate to have an expert conference to identify the areas on which they agree and which they differ. This process may, in and of itself, remove the need for concurrent evidence and/or reduce the need for evidence from one or both experts. Therefore, if there is a desire to remain with two standards, we would encourage that these sections to be included in the Guidelines relating to Expert Evidence.
20. **Para 14/15.** Even where it has been decided that concurrent evidence may be appropriate we would encourage the use of expert conferences prior to the day on which it is envisaged concurrent evidence will be given. We do not understand the logic of suggesting that the use of concurrent evidence means that expert conferences shouldn't be used prior to the day of concurrent evidence. We would prefer that the specific approach to dealing with more than one expert, including the ordering of pre-trial exchange of reports, expert conferences and joint expert reports, and concurrent evidence, should be decided for each case based on the issues and witnesses being called.

We thank you again for the opportunity to comment on these draft guidelines. If you would like to speak to Owain Stone (National Chair – FASIG – 03 8623 3410) he would be more than happy to discuss these or other points regarding these draft guidelines.

Yours faithfully



Bill Palmer  
General Manager Standards and Public Affairs

