



**The Institute of
Chartered Accountants
in Australia**

20 April 2006

Ms Jenny Atkinson
Secretary
Working Party on Civil Procedure
GPO Box 6
Sydney NSW 2001

Dear Ms Atkinson,

Draft Amendment to Uniform Civil Procedure Rules 2005 (UCPR)

I refer to your letter received 12 December 2005 and addressed to the President of the Institute of Chartered Accountants in Australia. In that letter you sought the views of the Institute on the LRC's recommended changes to the law in relation to expert witnesses to be implemented through amendments to the UCPR.

We welcome your request that the Institute submit its views on the draft amendments to the Uniform Civil Procedure Rules 2005 and appreciate the opportunity to provide input.

These views are set out in the attached document. They were prepared by the Institute's Forensic Accounting Special Interest Group (or "FASIG"), a special interest group whose members are most affected by the proposed amendment. FASIG is represented in most states and nationally.

The broad aims of the FASIG are to assist Chartered Accountants to maintain high professional standards when acting as forensic accountants, and to promote a better understanding of the value of forensic accounting services to those groups, such as lawyers and the judiciary, who use or rely upon the work of expert accountants. In doing so, the FASIG brings together Chartered Accountants with an interest in forensic accounting, many of which have prepared expert reports and testified as expert witnesses.

Consequently, Andrew Ross, the National Chair of FASIG would be available to participate in any possible committee that might be formed to progress this matter, especially in the exercise of drafting practice notes, or other developments.

Likewise, should you have any questions in relation to the matters discussed in the attached document, please contact Andrew Ross, on (02) 8295 6027.

Yours sincerely,

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UNIFORM CIVIL PROCEDURE RULES (AMENDMENT NO *) 2005

DRAFT BILL

COMMENTS BY THE INSTITUTE OF CHARTERED ACCOUNTANTS IN AUSTRALIA

Rationale for the proposed amendments

1. The NSW Law Reform Commission's Report in Expert Witnesses (LRC109) produced a number of recommendations which proposed amendments to the *Uniform Civil Procedure Rules 2005* (NSW). These proposed amendments were set out in Appendix C to LRC109.
2. The Attorney General of NSW has asked the Working Party on Civil Procedure to consider and make recommendations on the implementation of the LRC's proposed amendments. The Working Party, in turn, seeks public comment on the LRC's proposed amendments.
3. No further Explanatory Memorandum has been prepared in relation to the proposed amendments. It follows that, to understand the rationale for the proposed amendments, it is necessary to review the context in which the LRC's recommendations were made.

Areas of concern for the FASIG

4. The proposed amendments deal with a number of disparate issues. The FASIG has no comments on many of these issues. Rather, the FASIG's comments are limited to:
 - Proposed amendment [3], which deals with disclosure of fee arrangements with expert witnesses (Division 2: Rule 31.18).
 - Proposed amendment [5], which deals with experts engaged by parties jointly (Division 3: Rules 31.27A – 31.27J).
 - Proposed amendment [12], which deals with particular duties to the court (Division 4: Schedule 7, clause 3).

Disclosure of fee arrangements with expert witnesses

5. Recommendation 9.2 in LRC109 stated:

The *Uniform Civil Procedure Rules 2005* (NSW) should be amended to require that the fee arrangements with an expert witness be disclosed.

6. The background to this recommendation is set out at pages 143-150 of LRC109. The title of this section of LRC109 is "No Win No Fee" Arrangements.

7. This section of LRC109 appears as part of Chapter 9 of that report. That Chapter bears the title “Standards and Sanctions”. Paragraph 1.7 of LRC109 describes the contents of Chapter 9 as follows (emphasis added):

Chapter 9 deals with issues relating to standards of conduct for the expert witnesses, **in particular:** the code of conduct, “**no win no fee**” arrangements, accreditation of expert witnesses, and sanctions for inappropriate or unethical conduct.

8. The introduction in Chapter 9 adds the following context (emphasis added):

This chapter deals specifically with the law’s response to what the terms of reference call “inappropriate or unethical conduct” on the part of expert witnesses.

Next, we consider a problem specifically mentioned in the terms of reference, namely the practice of expert witnesses offering their services on a “no win no fee” basis, for which we use the term “contingency fee arrangements”. Although some submissions proposed that such arrangements be prohibited, **the Commission’s recommendations embody a different approach, namely to ensure that the court is informed of such arrangements, and is able to consider, in the light of all circumstances, whether they should lead to evidence being excluded, or given less weight.**

9. The discussion in Chapter 9 of LRC109 on this issue commences with the LRC’s definition of “no win no fee arrangements” as being¹:

... arrangements under which a party engages a person to act as an expert witness on the basis that the person will be paid a fee only if the party is successful in the proceedings.

10. The LRC then expanded its consideration to “contingency fee” arrangements, which it defined as²:

... all such arrangements, in which the amount payable to the expert is directly affected by the outcome of the proceedings.

11. The LRC then noted that the benefits derived by experts may not be directly dependent on the outcome of the proceedings in which evidence is given. The LRC referred to one submission which suggested that experts may be influenced by the prospect of future work from the same client. The LRC concluded³ (emphasis added):

Although we do not include this sort of indirect link between success and financial benefit in the term “contingency fee”, it is useful to keep in mind that **the problem of contingency fees is only a particularly stark instance of the wider problem, namely that an expert engaged by a party may have a financial interest in the outcome of the proceedings.**

12. The LRC then reviewed the submissions it had received on this issue, noting both that several bodies (including the Institute) prohibited their use and that some submissions argued that they should be allowed (albeit with appropriate disclosure) as a mechanism to facilitate access to justice⁴.

¹ At page 143

² At page 143

³ At page 144

⁴ At pages 144-146

13. The LRC considered the available evidence on the incidence of “contingency fees”, noting⁵ that:

... there appears to be no systematic or reliable evidence about their prevalence. Obtaining such evidence would involve a major research exercise.

14. The LRC also considered the likelihood of informal arrangements being reached which differ to those expressly set out in fee agreements⁶ (emphasis added):

There may be a subtle difference between what is expressly agreed and what may actually occur. Where a fee or part of a fee is deferred or is subject to negotiation after the event, there is room for development of a practice whereby experts, looking to preserve a line of work, may forgo their fee or part of their fee when the case is unsuccessful. A tacit arrangement may thus develop without any explicit agreement covering the practice. **Although we have seen no evidence of such arrangements, it is entirely possible that they would have been developed.**

15. In its discussion on the topic, the LRC first raised the spectre of a connection between contingency fee arrangements and “adversarial bias”⁷:

The witness stands to gain financially by giving favourable evidence. That would be the case where an expert enjoys the financial benefit of a line of work from a particular firm of solicitors or from a particular institution (such as an insurance company), or has the reputation for providing expert evidence with a particular leaning. The contingency fee arrangement is not the only possible source of adversarial bias arising from the financial implications of giving favourable evidence, but it is one such possible source and warrants consideration as such.

16. The LRC then considered submissions that contingent fee arrangements be prohibited, rejecting that approach for a number of reasons, including that prohibition would not prevent tacit contingent fee arrangements arising and the existence of such tacit arrangements may be difficult to establish.

17. LRC109 continued⁸:

Rather than prohibition, a more constructive approach for the law to take would be to ensure, as far as possible, that the terms on which experts are engaged are made known to the other parties and to the court. This would make it possible for a party to cross-examine the expert (and perhaps other witnesses) in order to bring out the funding arrangements and their potential implications. Submissions could then be made as to the effect of the funding arrangements on the objectivity of the expert. It would be open to a party to submit that, in all the circumstances, the funding arrangement should lead the court to attach little weight to the expert’s evidence, or even, perhaps, disregard it entirely.

18. Finally, the LRC considered the desirability of requiring disclosure of whether the expert had been previously retained by the litigant in other matters. The LRC concluded⁹:

⁵ At page 146

⁶ At page 147

⁷ At page 148. At page 71 of LRC109, the term “adversarial bias” is defined as “bias that derives in some way from the use of an expert by a party in litigation”. At pages 72-74, LRC109 identified three varieties of “adversarial bias”: a) deliberate partisanship; b) unconscious partisanship; and c) selection bias.

⁸ At page 149

⁹ At page 150

On balance, the Commission did not consider that such a requirement was practicable or necessary. First, formulating such a requirement poses serious difficulties. Secondly, it is open under the present law for plaintiffs, if they wish, to ascertain in cross-examination whether the evidence of an expert engaged by a defendant is influenced by reason of the expert's previous involvement with the defendant.

19. The LRC recorded the following conclusion¹⁰:

The Commission proposes that the rules should require that the funding arrangements relating to each expert witness be known to all parties and to the court. There should be disclosure of all fee arrangements, including any arrangement for deferral of payment, in whole or in part, and of the payments which have actually been made to the expert under whatever arrangement is on foot. Disclosure in those respects would reveal any arrangement for deferral.

Comments on rationale for proposed amendments requiring disclosure of fee arrangements

Fundamental assumptions

20. Based on the review above, the FASIG concludes that the proposed amendments are designed to address a perception that "adversarial bias" is occurring among experts and that it occurs as a consequence of the nature of particular fee arrangements between the expert and the litigant.

Evidence of "adversarial bias" and its causes

21. The FASIG notes that LRC109 provides no evidence that "adversarial bias" is occurring or, if occurring, is caused by the nature of the fee arrangements made with the expert. Rather, LRC109 proceeds on an assumption that "adversarial bias" exists and that it is likely to be increased in circumstances where particular fee arrangements are in place with the expert.
22. The FASIG notes further that an assumption that "adversarial bias" exists presupposes that the requirements of independence and impartiality placed on an expert in Schedule 7 to the *Uniform Civil Procedure Rules 2005* (NSW) are ineffective, at least where fee arrangements of the nature considered in LRC109 exist.
23. In the experience of the FASIG's members, "adversarial bias" is not commonly encountered.
24. Further, in the FASIG's opinion, it is not axiomatic that an expert whose fee arrangements contain a degree of contingency must therefore exhibit "adversarial bias". Rather, in the FASIG's opinion, since independence and impartiality are states of mind, they can exist notwithstanding the existence of a contingency in a fee arrangement. Similarly, such qualities can be absent where no contingency exists.
25. In any case, as expressly conceded by the LRC, there appears to be "no systematic or reliable evidence" about the prevalence of "contingent fee" arrangements and no evidence at all that experts are entering into tacit fee arrangements of a contingent nature. In the FASIG's view, significant caution should be exercised before initiating an extensive disclosure regime in such circumstances.

¹⁰ At page 150

Types of fee arrangements considered in LRC109

26. The specific types of fee arrangements which appear in LRC109 to be linked to “adversarial bias” include:
- a) “no win, no fee” arrangements, where the expert receives no fee if the retaining party loses;
 - b) other “contingent” fee arrangements, in which either:
 - (a) the amount of the expert’s fee is determine by the outcome; or
 - (b) the proportion of the expert’s fee recovered by the expert is dependent in some way on the outcome; and
 - c) fee arrangements in matters where the expert “enjoys the financial benefit of a line of work from a particular firm of solicitors or from a particular institution”.

The FASIG’s position on “contingent fee” arrangements

27. As described in the FASIG’s submission to the LRC, members of the FASIG are prohibited from entering into contingent fee arrangements when providing expert evidence. Paragraph 26 of the *Statement of Forensic Accounting Standards – APS 11*, issued jointly by the Institute and CPA Australia, states:

No part of any fee charged or received, whether directly or indirectly, when acting as an independent accounting expert is to be related to the outcome of a matter or the amount of the damages awarded.

28. Further, paragraphs 27 and 28 of *Joint Guidance Note GN2 – Forensic Accounting*, also issued jointly by the Institute and CPA Australia, state:

There is an inherent conflict between the need for independence and objectivity of an independent accounting expert, and success or contingency fee arrangements where the independent accounting expert is financially interested in the outcome of the dispute. In particular, where such arrangements exist and become known in Court proceedings, the independent accounting expert may be discredited on the basis of lack of independence and objectivity. In a Court environment such perceptions may erode the value of evidence of the independent accounting expert.

Consequently, in relation to work performed as an independent accounting expert, fees are not to be charged or received on a success or contingency fee basis. That is, no part of any fee charged or received when acting as an independent accounting expert is to be related to the outcome of any matter, nor the amount of any damages awarded. Members are reminded that in some jurisdictions, relevant Court rules require the details of fee arrangements to be provided to the Court.

29. In this context, then, “contingent fee arrangements” are limited to categories 1) and 2) above.

The FASIG’s position on disclosure of fee arrangements

30. Paragraph 29 of *Joint Guidance Note GN2 – Forensic Accounting* states:

Independent accounting experts should charge a fee based upon hourly rates, or a fixed fee. The basis of fees should be clearly stated in the independent accounting experts’ report.

Concerns about the proposed disclosure regime

Evidence as to the significance of the amount of a fee

31. While, as described above, the FASIG considers that disclosure of the basis of an expert's fees is desirable and appropriate, the FASIG considers that the proposed disclosure regime goes too far by requiring disclosure of, not only the *basis* of an expert's fees, but also the *amount* of those fees.
32. Whether or not it is agreed that "adversarial bias" is caused by the existence of contingent fee arrangements, there is no suggestion at all in LRC109 of any connection between the *amount* of the fee paid to an expert and the independence or objectivity of the expert's evidence. That is, in the FASIG's view, unsurprising, for any assertion of such a connection would be unsustainable.
33. A requirement to disclose the *amount* paid to an expert cannot, in the FASIG's opinion, provide the court with any information which could appropriately be used in any assessment of the objectivity or independence of an expert.
34. What (appropriate) use could a court make of a disclosure that, in a given matter, expert 'A' was paid \$5,000 and expert 'B' paid \$10,000? Would that information suggest that expert 'A' was more objective because he or she charged less, or perhaps that expert 'B' should be preferred because he or she must have been more diligent (as reflected in the higher fee)?
35. Rather, in the FASIG's view, a requirement that such information be disclosed would create a substantial risk of prejudice both to a party's position and to the reputation of the expert.

Private commercial arrangements

36. Further, in the FASIG's view the fee arrangements entered into between expert and client are private commercial arrangements. The confidentiality of these arrangements should not lightly be breached. This should only occur where the 'good' derived through such disclosure is plainly greater than the 'ill' caused. This, the FASIG considers, has not been demonstrated.

Disclosure of deferred collection arrangements

37. LRC109 also raises the issue of deferred collection arrangements. However, as described above, the LRC conceded that it had no specific information that such arrangements existed at all or that, if they do occur, that they cause "adversarial bias".
38. Notwithstanding the absence of such evidence, the proposed amendments require disclosure of all amounts unpaid in relation to the expert's fees at particular points in the proceedings.
39. In the FASIG's opinion, even if the arguments about "adversarial bias" raised in LRC109 are accepted, it would not be necessary to require disclosure of the amount of unpaid fees. Rather, in the FASIG's opinion, the apparent 'ills' discussed in LRC109 in relation to unpaid fees could be adequately addressed by disclosure of:
 - 1) the *basis* of any fee arrangement; and
 - 2) *whether or not* fees remain outstanding at the date of issuance of an expert's report and/or provision of expert evidence.

40. If this disclosure was made, it would, to borrow the LRC's argument in relation to "lines of work", be open under the present law for parties, if they wish, to ascertain in cross-examination whether the evidence of an expert engaged by a defendant is influenced by reason of the fact that fees remain unpaid.

Specific drafting issues in relation to Draft Amendment [3]: Rule 31.18

41. Disclosure of experts' reports and hospital reports
42. Notwithstanding the comments set out above, the FASIG has reviewed the proposed draft amendments in relation to fee disclosures. Set out below are the FASIG's comments on the specific provisions of the draft amendments.
43. A new regime is being proposed in relation to the disclosure of fee arrangements for expert witnesses. This regime requires the service of two affidavits by the expert:
- a) An affidavit to be sworn when the report is provided to the instructing party (in this document - "**preliminary fee affidavit**").
 - b) A further affidavit to be sworn 7 days before the hearing (in this document – "**final fee affidavit**").

1. Preliminary fee affidavit

Our understanding of the proposed amendment

44. An expert's report is inadmissible unless accompanied by an affidavit:
- “ ... as to the fees paid and payable to the expert, as at the date on which the report was received by the engaging party”.
45. This affidavit is to be “served on each party affected”, “at the same time as the report was served on that party”.
46. This affidavit must include information on three matters:
- a) Amounts that “are or have been payable” to the expert.
 - b) Amounts “that have been paid” to the expert.
 - c) Amounts in relation to which “the expert has agreed to defer payment until after the conclusion of the proceedings”.

“are or have been payable”

47. The proposed amendment suggests that disclosure must be made in relation to amounts that are or have been payable to the expert in relation to:
- i) preparation of the expert's report, **and**
 - ii) any examination, inspection, experiment or other thing done by the expert for the purpose of providing the expert's report, **and**
 - iii) the expert's attendance at conferences with the engaging party in relation to the proceedings, **and**
 - iv) the expert's attendance at court as a witness in the proceedings,
or the manner in which, and the rates at which, those amounts are to be calculated.

Our comments on the proposed amendment:

Payable “to the expert”:

48. As already described above, the FASIG is generally in favour of disclosure of the basis of fee arrangements entered into by its members. However, the FASIG’s view is that any requirements of this nature should be clear and unambiguous, while not placing a significant burden on members or their clients. Further, the Institute is concerned that the privacy of members’ clients not be unnecessarily negated through the publication of private business matters of those clients.
49. In this instance, we note that the proposed amendment refers to amounts that are or have been payable “to the expert”. In many if not most cases involving accounting experts, payment is not made “to the expert” but, rather, to a firm or company associated with the expert. We recommend that, if these proposed amendments are to be enacted, this ambiguity be resolved.
50. Further, the proposed amendment may not result in full disclosure of an arrangement in which an expert is paid on, say, an hourly rate by an associated entity, while the associated entity is paid on a contingent fee basis by the party to the matter. If such an arrangement is intended to be the subject of these provisions, the proposed amendment may need to be broadened.

Optional disclosure?

51. The draft amendment appears to provide an option of either disclosing the amounts that are or have been payable *or* the manner in which, and the rates at which, those amounts are to be calculated.
52. Because it believes that disclosure of the amounts of fees paid or payable to an expert is both unnecessary and inappropriate, the FASIG supports the existence of a provision which provides for option disclosure in this manner.
53. However, the FASIG observes that a similar optional disclosure regime does not appear to exist in relation to amounts that have been “paid” or deferred. In the FASIG’s view, such an option should be included in the draft amendments.
54. However, if the intent of the amendment is to require disclosure of the actual amounts (rather than the manner of calculation) derived by an expert in relation to the provision of expert evidence, it would be anomalous to require disclosure of amounts paid and deferred but not payable.

Categories of fees

55. While the draft amendment identifies four categories of activity in relation to which disclosure is required, it is not clear whether separate disclosure of the relevant amounts for each category is required, or whether disclosure of the total amount for all categories would suffice.
56. If the former, we anticipate that there may be significant difficulty in isolating the amounts paid or payable in relation to each category.
57. In addition, it is not clear to the FASIG how separate disclosure would assist the Court in combating the fundamental risk of “adversarial bias” to which these measures are addressed.

58. It is not clear whether the provision of this list of categories is intended to be illustrative of the required particulars or an exhaustive list of specific disclosures. For example, it is unclear whether amounts paid or payable in relation to preliminary assessments undertaken by an expert or advice given by an expert in a consulting role are amounts paid or payable “in relation to the expert’s preparation of the report”.
59. Similarly, some difficulties may arise in relation to the breadth of the categories. For example, category (iii) requires particulars to be given in relation to “the expert’s attendance at conferences with the engaging party in relation to the proceedings”. This category is not limited to conferences which relate to the report. It is not clear whether this is intentional.

Conferences with engaging party

60. Category (iii) requires disclosure of amounts that are or have been payable in relation to the expert’s attendance at conferences “with the engaging party”. In many cases, experts attend conferences with legal representatives of the relevant party where the relevant “party” is not present.

Activities undertaken by the expert

61. In many cases, an expert forensic accounting uses colleagues who work under the expert’s supervision in the preparation of the expert report. None of the categories of disclosure include disclosure of amounts that are or have been payable in relation to the time spent by the expert’s colleagues.
62. It is not clear whether the description “any examination, inspection, experiment *or other thing*” done by the expert for the purpose of providing the expert’s report would be interpreted to give “other thing” a meaning which is limited to activities associated with examinations, inspections or experiments or, in the alternative, given a wide interpretation to include other activities (for example, telephone discussions undertaken by the expert with individuals other than the engaging party).

Attendance at court

63. It would seem anomalous to include a mandatory disclosure of amounts that are or have been payable to an expert in relation to attendance at Court in an affidavit which is served before the commencement of the trial. Once again, disclosure of the *basis* of any likely future amounts is considered adequate.

“have been paid”

64. Many of the same issues arise in relation to this required disclosure.
65. In addition, in contrast to the first required disclosure, the draft amendment specifically requires that details of amounts paid be disclosed in relation to “each” of the four categories described above.

“amounts ... as to which expert has agreed to defer payment...”

66. Again, many of the same issues arise in relation to this required disclosure.
67. Further, it may not be clear when the proceedings have reached a “conclusion”.

“served on each party affected”

68. It may not always be clear whether an expert report “affects” all or only some parties. It is unclear why this provision should not simply apply to all parties upon whom the report is served.

2. Final fee affidavit

Our understanding of the proposed amendment

69. An expert's report is also inadmissible unless an affidavit disclosing fees paid and payable is provided:

“ ... as at the date occurring 7 days before the date of the hearing at which the report was tendered in evidence”.

70. This affidavit is to be “served on each party affected”, “on or before the date of that hearing”.

71. This affidavit must include information on the same three matters covered by the preliminary fee affidavit.

Our comments on the proposed amendment:

72. For clarity, we suggest that the draft amendment should read “... at which the report *is to be* tendered ...”.

73. In addition, since proceedings may comprise several “hearings”, it may be appropriate to be more precise as to the definition of “hearings”.

74. We note that the consequences of failing to prepare the affidavit as at the correct date are not stated. If, for example, an affidavit was prepared providing the required disclosure as at, say, 3 days before the hearing, and that affidavit was served on the affected parties “before the date of the hearing”, there may be an argument that no prejudice has occurred.

75. It is noted that, because of the requirements as to the timing of service of the fee disclosure affidavits, those affidavits will not result in disclosure of fees incurred after the week before the commencement of the “hearing”. In our experience, significant fees are often incurred either immediately before a hearing commences or during the hearing. If the purpose of the proposed amendment is to provide disclosure of all fees paid to an expert, it may be appropriate to require that the final fee affidavit be provided at or near the anticipated date of cross-examination.

Comments on draft amendment [5]: insertion of new Division – “Experts engaged by parties jointly”

Our understanding of the proposed amendment

76. We have no objection to an amendment which gives the Courts the power to appoint single joint experts. However, for the reasons set out in our submission to the NSW Law Reform Commission's Inquiry into Expert Witnesses, we do not consider that the use of single joint experts will produce the optimum result in all matters.

Our comments on the proposed amendment:

Selection and engagement

77. The proposed amendment seeks to limit the contact between a person who may be engaged as a single joint expert and a party in the matter in which that person may be engaged by requiring that such contact not occur “for the purpose of eliciting the person's opinion as to the question or questions concerned”.

78. In our members' experience, contact with an expert is most often made not by a party to a matter but by a party's legal representatives. As presently drafted, it is not clear that

the proposed limitations on contact would extend to (current, prospective or former) legal representatives of a party.

79. Further, as drafted, the proposed amendment refers only to contact “for the purpose of eliciting the person’s opinion as to the question or questions concerned”. If the object of the exercise is to promote transparency, it may be appropriate to expand the disclosure regime envisaged in 31.27B(5) to all communications in relation to the particular matter.
80. Finally, in some cases our members believe that they may have been contacted by the legal representatives of a party for the express purpose of ensuring that they **not** be appointed as an expert in a particular matter. On occasion, this has been achieved by formally retaining the expert, but subsequently not seeking that expert’s views or by divulging confidential or sensitive information relating to the matter to the expert. If practices such as these are allowed to continue, selection of appropriate single joint experts may be thwarted.

Expert may apply to court for directions

81. The proposed amendment does not make it clear whether, having sent a copy of the request for directions to each party, the expert can withdraw that request should the matter be resolved by the parties or whether, notwithstanding that resolution, the request must still be sent to the Court.
82. For clarity, we recommend that this issue be resolved.

Expert’s report to be sent to parties

83. Once again, the proposed amendment refers to “parties affected”. It is not clear to us whether it should be for an expert to decide which parties are “affected”.
84. We consider that it may be appropriate to simplify this proposed amendment to require that the expert provide a copy of the report to all parties unless any party requests in writing that it not be provided with a copy of the report.

Parties may seek clarification of report

85. The proposed amendment appears to anticipate that the expert’s report will be produced in excess of two months prior to the hearing (since each party has 28 days to seek clarification and the expert has 28 days to respond).
86. Implementation of such a regime will require that issues requiring expert consideration will need to be determined early in the process of preparation of a case for hearing. In our members’ experience, such a practice is uncommon.
87. We recommend that consideration be given to addressing the situation (commonly encountered by our members) where issues requiring expert consideration are not identified until later than two months prior to a hearing.

Remuneration of expert

88. The proposed amendment states that the remuneration of an expert is to be “fixed by agreement between the parties affected and the expert or, failing agreement, by, or in accordance with the directions of, the court.”
89. It is not clear to us whether this proposed amendment anticipates that an expert’s fees may be capable of determination ahead of the provision of expert assistance. In our members’ experience, this is rarely the position, since the scope of an expert’s retainer is frequently changed throughout the process with consequential changes in the expert’s costs.

90. That uncertainty must exist in relation to the amount of work to be undertaken by a single joint expert is also apparent from the provision that parties *may* seek clarification of the expert's report from the expert.
91. We recommend that the proposed amendment be changed to make it clear that it is the *basis* of remuneration of the expert that is to be agreed by the parties or determined by the court.

Comments on draft amendment [12]: Schedule 7, clause 3 Particular duties to the court

Our understanding of the proposed amendment

92. The proposed amendment appears to require omission of all of clause 3(1) – which presently deals with the form of the expert's report - and its replacement with a new clause 3(1), which deals only with matters which fall beyond the expert's field of expertise.

Our comments on the proposed amendment:

93. It is not clear whether it was intended that the proposed amendment remove all other requirements as to the form of the expert's report or, rather, whether it was intended that it replace only clause 3(1)(d).
94. If the former was intended, then it would seem that a consequential amendment would be required to clause 3(4).