JUDICIAL PANEL ON THE FUTURE OF FORENSIC ACCOUNTING

Sydney – 14 March 2008

Justice Margaret Wilson, Supreme Court of Queensland

The Queensland experience with its new regime:

- **the successes and difficulties**
- **what has happened and what hasn't**
- **the practicalities**
- **the responsibility of experts to the Court**

1. It is almost four years since Queensland's new expert evidence rules came into effect. It was unfortunate that so much ill-informed hysteria surrounded their introduction. I acknowledge that they were badly sold.

2. Despite what you may have heard, the rules do not provide for there to be one Court appointed expert in every case, and certainly not where the outcome of a case is likely to turn on the acceptance of expert evidence on a subject on which there is genuine disagreement among

experts. It remains the Court's function to decide what evidence it will act upon and to give reasons for doing so.

3. One of the express purposes of the rules is to –

> "ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court."

Where there is a Court appointed expert, that expert will be the only expert to give evidence on the issue on which he or she reports unless the Court otherwise orders. The Court may appoint another expert to prepare a report on the issue if –

(a) after receiving the first expert's report, it is satisfied –

(i) there is expert opinion different from the first expert's that may be material to deciding the issue; or

(ii) the other expert knows of matters not known to the first which may be material to deciding the issue; or

(b) there are other special circumstances.

4. There will frequently be issues calling for expert evidence which is not likely to be controversial – for example, quantity surveyors' evidence on questions of measurement, valuers' evidence in matrimonial and de facto property disputes, occupational therapists' evidence of aspects of the cost of future care of a badly injured plaintiff, scientists' evidence of the testing of the tensile strength of materials. In most cases where such issues arise, it is unnecessarily costly and time consuming for each side to call its own expert. The rules provide a framework within which these issues can be identified and the costs and delays of a multiplicity of experts can be avoided.

5. The parties may agree on the joint appointment of an expert, or one of them may ask the Court to appoint an expert.

6. The common sense and utility of the appointment of a single expert on such issues is increasingly being recognised. I am talking about a cultural change by the Court, the lawyers, the litigants and the experts.

It has taken a little nudging by the Court: as a general proposition, the experience of using a single expert is more likely to be a productive and mutually satisfactory one if it is done by agreement or consent rather than by order after a contested hearing.

7. There are still cases where one or both parties rush off and retain experts without consultation with the other. We do not have a docket system (where every case is assigned to a particular judge for management and hearing) in the Supreme Court of Queensland – the size and diversity of our caseload and our finite resources are such that it simply would not be practicable. But there is ample opportunity for matters of expert evidence to be canvassed. We have a Commercial List, generally for commercial matters expected to take no longer than 5 days at trial: cases assigned to it are reviewed regularly by one or other of the judges who run the list, when directions are given for further steps necessary to progress them to trial. And there is a Supervised Case List for longer matters considered to require management.

8. Otherwise, we have endeavoured to address the problem of parties' rushing off and retaining experts without giving thought to single experts on some issues in a practice direction (No 2 of 2005), which provides that either before commencement of any such proceeding, or soon afterwards, a party intending to call expert evidence on a substantial issue should raise with all other parties the prospect of their jointly appointing an expert, who would become the only expert to give evidence on that issue (unless the Court otherwise ordered), and that as soon as it is apparent to a party that expert evidence on a substantial issue will be called at the trial or hearing, that party must file an application for directions. On the hearing of that application, that party must inform the Court of steps taken or to be taken to conform with the rules.

9. Further, a judge hearing an interlocutory application often takes the opportunity to review interlocutory steps taken to that point and to give directions for the future conduct of the litigation.

10. But we still have some way to go in devising best practice in this area. Effective early intervention by the Court is often critical. The directions the Court gives should include –

(a) a precise formulation of the issue or issues on which the expert is to express an opinion;

(b) directions about the factual substratum on which the opinion is to be based;

(c) directions about the extent to which the parties may communicate with the expert;

(d) directions about cross-examination of the expert, and in appropriate cases cross-examination before the trial; and

(e) directions about the expert's fees (who is to pay them, whether they are to be capped, etc).

11. There continues to be room for improvement in the instructions given to experts. The issue on which an expert is asked to report must be clearly identified, and the factual substratum needs to be firmly established. The rules require an expert to set out in his or her report a statement of all material facts, whether written or oral, on which the report is based.

12. In the case of a Court appointed expert, the Court may give directions about the information to be furnished to the expert and the extent to which the parties may communicate with him or her. This is an area where there is likely to be more judicial intervention – I can envisage the Court settling a statement of facts to be put before an expert. Often facts emerge after a report is prepared, either during pre-trial preparation or during the trial itself, and ways must be found for putting those extra or different facts before the expert and having him or her revisit an opinion already expressed. The expert must provide a supplementary report if his or her opinion changes.

13. It is open to an expert to apply to the Court for directions to facilitate the preparation of a report.

14. At any stage of a proceeding the Court may direct experts to meet to identify matters of agreement and matters of disagreement, and to attempt to resolve matters of disagreement. The advantages of the experts' meeting are obvious – speedy and cost effective resolution of issues, if not of the proceeding as a whole; the identification and narrowing of remaining issues; binding the experts to their positions, and reducing if not avoiding the need for the experts to attend the trial to be examined orally. As time passes, fewer cases involving expert evidence are likely to be assigned trial dates until the experts have met. To be effective, such a meeting needs careful planning, and this may often involve directions by the Court.

Duty to the Court

15. An expert's foremost duty has always been to the Court, to present his or her honestly held opinion in a non-partisan way. But human nature being what it is, experts have often felt obliged to assist the party who retained them, to the point where some have been accused of being hired guns. The rules declare –

- that an expert witness has a duty to assist the Court; and
- that that duty overrides any obligation he or she may have to any party to the proceeding or to any person liable for his or her fee or expenses.

This is reinforced by the requirements that a report be addressed to the Court and signed by the expert, and that it include a quite detailed certificate of compliance with his or her obligations. These requirements apply to all experts - whether Court appointed, appointed jointly by the parties or appointed by one of the parties.

16. My impression is that this express formulation of an expert's duty has been welcomed by experts themselves. It has freed the expert from the pressure (real or imagined) to favour the position of the party retaining him or her - and in doing so has resulted in a palpable improvement in the quality of report writing and oral testimony.

Appointment before litigation

17. A novel provision in the Queensland rules allows the appointment of an expert witness, intended to be the only witness on an issue in likely

litigation, to be appointed before the litigation is commenced, either by agreement of the disputants or by the Court on the application of one of them.

18. Suppose a building under construction has collapsed causing all manner of economic and personal damage; the cause of the collapse needs to be established; there will no doubt be litigation between the owner, the designer and the builder, but it can be expected to take many months if not years to reach a conclusion; in the meantime the site needs to be cleared and construction recommenced. Those are the types of circumstances where an expert may be appointed before the litigation commences.

19. So far, I am aware of only one such order being made. It related to the failure of tiles on a major children's hospital in Brisbane. Interestingly the disputants asked the Court to appoint two experts to act jointly in inquiring into and reporting on the cause of the failures and how they might be rectified. Detailed directions were given for the furnishing of instructions to the experts. All communications with them were to be in writing, with copies to the other party contemporaneously. Neither

party nor any person associated with either party (including any legal representative) was to be present at any inspection by the experts without the consent in writing of the other. The Court gave the parties liberty to apply for further directions, including a direction that the experts set out and explain the extent to which they disagreed with any of the previous reports with which they were to be briefed.

Conclusion

20. In my view the Queensland rules are producing some real changes, some positive changes, in culture. It is an incremental process: there are still pockets of resistance, sometimes quite stubborn resistance. I encourage you to embrace the changes in the interests of more speedy and cost efficient resolution of litigation.