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RICS Oceania

Expert Witness Registration Scheme

Your guide to becoming a registered expert witness



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RICS Oceania Expert Witness Registration Scheme

This guide provides background information to help you prepare, apply for and successfully complete the application and assessment process for the RICS Oceania - Expert Witness Registration Scheme (EWRS).

Passing the assessment will give your potential clients confidence in your ability to carry out the role and duties of an expert witness, and in your commitment to best practice.



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RICS Oceania Expert Witness Registration Scheme

1 What is the EWRS?

- 1.1 The RICS Oceania Expert Witness Registration Scheme (EWRS) is a voluntary scheme, set up to raise the profile of RICS members in the Oceania marketplace and ensure that clients receive high quality expert witness services. To register, you will need to show that you fully understand the role, duties and liabilities of an expert witness.
- 1.2 The EWRS embraces all RICS professional groups and specialisations.
- 1.3 The EWRS will be administered by the RICS Dispute Resolution Service on behalf of RICS Oceania.
- 1.4 Once you have sent in your application, RICS will send you an acknowledgement usually within five working days, explaining that your application is being forwarded for assessment to an assessment panel.
- 1.5 In a small number of instances, we may invite a candidate to an interview to answer questions about their application and the expert witness report.
- 1.6 When you become EWRS-registered, you will receive an approval notice and an invoice to pay a yearly subscription fee.

2 The application process

- 2.1 To apply to join the scheme you need to:
 - (a) meet all the assessment criteria;
 - (b) complete and return an application form and application fee;
 - (c) provide references from two people you have provided expert evidence to in the last three years (one should be a barrister or solicitor); and
 - (d) submit an expert witness report prepared in contemplation of judicial or quasi-judicial proceedings within the last five years.

3 Assessment criteria

- 3.1 RICS will assess applicants on the following criteria:
 - (a) the applicant must be a chartered surveyor (FRICS or MRICS);
 - (b) the applicant must have a minimum of ten (10) years professional experience as a chartered surveyor;
 - (c) the applicant must have undertaken specific training as an expert witness acceptable to the RICS, preferably by completion of the RICS Expert Witness Training course;



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- (d) the applicant must have appropriate experience as an Expert Witness; and
 - (e) the applicant must be of good fame and character.
- 3.2 In all instances, it is of the discretion of the RICS assessment panel to determine whether an applicant is suitable for inclusion on the EWRS panel.

4 Assessment checks

- 4.1 During the assessment process, RICS will review that you work within the RICS Rules of Conduct and the practice statement and guidance note that has been prepared, titled RICS Oceania - Surveyors Acting as Expert Witnesses.
- 4.2 At any time RICS may undertake a random check of your credentials, asking you to provide evidence to support the declarations you made on the EWRS application form.
- 4.3 If a random check finds any irregularities, or a complaint is made against you as a member of the EWRS, you may need to provide further information and/or attend an interview. This may result in your EWRS membership being suspended or removed and in some circumstances the instigation of further disciplinary investigation.
- 4.4 RICS will decide whether you meet the scheme's requirements by checking your references and expert report. Assessors will be looking for evidence in your report that you exhibit the following competencies:
- (a) an understanding of the role and duties of an expert witness;
 - (b) the ability to present expert evidence in a clear and concise manner;
 - (c) the ability to communicate effectively – whether it be verbally, in written form or graphically, all with a view to adequately assist the court or tribunal where the matter is being heard; and
 - (d) possessing the essential knowledge and understanding of all procedural rules for the governing judicial and quasi-judicial bodies who you work with (including courts, tribunals, committees, inspectors, adjudicators, arbitrators and independent experts, but not mediators).
- 4.5 In addition to satisfying the above competency requirements, EWRS panel members must comply with and understand:
- (i) all relevant RICS Rules of Conduct, practice statements and guidance notes;
 - (ii) RICS best practice guidance relating to fees and disbursements; and
 - (iii) the expected conduct and liability to the instructing party of an expert witness when giving evidence or providing a report to a party both at a hearing or a documents-only form of dispute resolution that is decided on the papers (i.e. adjudication).



- 4.6 It is also imperative that an applicant be aware of and compliant with the Court Rules, Practice Directions and Codes of Conduct of the relevant jurisdiction in which any expert report is being provided. To aid applicants, below is a list of the Court Rules, Practice Directions and Codes of Conduct that govern the provision of expert evidence in the various State and Commonwealth jurisdictions within Australia:

Jurisdiction	Court Rules	Practice Direction & Codes of Conduct
Federal Court of Australia	Federal Court Rules O 33 - 34B;	Federal Court of Australia, Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia dated 5 May 2008
Australian Capital Territory	Court Procedure Rules Part 2.12	ACT Expert Witness Code of Conduct (Schedule to the Court Procedure Rules 2006)
New South Wales	Uniform Civil Procedure Rules 2005 Pt 31, Div 2	Supreme Court of New South Wales Practice Note No. SC Gen 10 Supreme Court of New South Wales Practice Note No. SC Gen 11 NSW Expert Witness Code of Conduct (Schedule 7 Uniform Civil Procedure Rules 2005)
Northern Territory	Supreme Court Rules r 44.03	
Queensland	Uniform Civil Procedure Rules 1999 Ch 11 Pt 5	Supreme Court of Queensland Practice Direction 2 of 2005
South Australia	Supreme Court Civil Rules 2006 Pt 9, Div 2; Pt 4, Div 1	Supreme Court Practice Directions 2006, Direction 5.4 Supreme Court of South Australia Practice Direction No 46A – Guidance for Expert Witnesses in Proceedings in the Supreme Court of South Australia
Tasmania	Supreme Court Rules 2000 Part 19 Div 5	
Western Australia	Rules of the Supreme Court O 36A, 40	District Court of Western Australia Circular to Practitioners CIV 2007/2 District Court of Western Australia Consolidated Civil Practice Direction Annexure C - Code of Conduct Expert Witnesses
Victoria	Supreme Court (General Civil Procedure) Rules 1996, Ch 1, O 44	Supreme Court (General Civil Procedure) Rules 2005 Form 44A - Expert Witness Code of Conduct

- 4.7 The jurisdictions of New Zealand, Fiji and Papua New Guinea are not currently included in the RICS Oceania EWRS.



5 Application form and expert witness report

- 5.1 Your application form, any references and the report submitted will form the major basis of your assessment and assessors will:
- (a) assess your breadth and depth of comprehension and compliance with the role and duties of an expert witness;
 - (b) ensure you can apply relevant knowledge to that specific role;
 - (c) assess your communication skills;
 - (d) use the submissions as a basis for further questioning at an interview, should it be necessary.
- 5.2 RICS does not assess technical knowledge as part of the entry process. The technical competence of an expert witness should ultimately only be determined by the client and the relevant judicial body. Please note that assessors may however take into account any instances where an applicant exhibits an inadequate technical knowledge of the subject.

Points to watch

- 5.3 Because your expert witness report forms a key part of the assessment decision, you should be conscious that you do not:
- (a) insufficiently refer to your instructions, the terms of your engagement, the issues that you are required to address or the dispute for which the report is prepared;
 - (b) lack clarity regarding the identity of parties and their respective roles;
 - (c) prepare your report in a manner that is verbose and include unnecessary jargon;
 - (d) quote references such as extracts from legislation, case law, regulations and other sources which are not necessary;
 - (e) provide an opinion on issues that are not in context or within the scope of your instructions, or with your expertise;
 - (f) provide unsubstantiated or unjustifiable opinions that lack comparable evidence; and
 - (g) omit to provide the requisite declarations or relevant Statutory Declaration.

Confidentiality

- 5.4 Please ensure that you adequately disguise the facts in the report that you submit for assessment. It is imperative that you do not reveal your identity or that of the project or the parties involved in the project. Assessors will treat the information in your report in the strictest confidence.



6 The interview

6.1 If assessors request that you attend a panel interview, you will be provided with a minimum of four weeks advance notice to prepare. Within the notice provided to you, you will be informed when and where the interview will be held, and which particular assessment areas will be addressed. The interview will normally last no more than 45 minutes and is designed to provide you with an opportunity to:

- (a) express yourself clearly;
- (b) exhibit that you can verbally support the submitted report and application form with a thorough understanding of the role and responsibilities of an expert witness; and
- (c) clarify any areas of ambiguity that may have arisen from your original report and/or application form.

6.2 During the interview, you may be asked to expand on:

- (a) your past experience as an expert and your commitment to continuing professional development (CPD); and
- (b) the breadth and depth of your knowledge of the role and duties of an expert witness.

6.3 The assessors will also expect you to have detailed knowledge of the RICS Rules of Conduct, the practice statement and in particular the guidance note titled **Surveyors Acting as Expert Witnesses**, and other codes, laws and regulations relevant to the role of an expert witness. It is essential that you are able to not only comprehend the theoretical components of 'best practice' but that you are also able to exhibit how you can put these into practice.

The final decision

6.4 The assessors take a holistic view of your report and interview performance when making their decision. They will draw on all the evidence available to them to reach a final decision as to whether you meet the standard expected of EWRS panel members.

7 After the decision

Results

7.1 There are three possible assessment outcomes:

- (a) approved (pass); or
- (b) conditionally approved (conditional pass); or
- (c) referral (fail).



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- 7.2 You should get the result within four weeks after RICS receives your application, so you must check that we have your current postal address and contact details.
- 7.3 While RICS will attempt to facilitate the assessment process in an efficient manner, it may not be possible for assessors to reach a final decision within the four weeks specified.
- 7.4 For security reasons RICS cannot provide results over the telephone, by fax or to a third party. RICS will inform you when you have been added to the register if your application has been approved. You will then be asked to pay your subscription fee by cheque within two weeks of your results letter. The subscription fee is at a pro-rata rate of the annual subscription. If you do not pay the fee within two weeks your name and details will not be added to the register, and you will have to reapply and pay the application fee again. You can find details of current application and subscription fees on the application form.

Conditional approvals and referrals

- 7.5 If the outcome of your application is a conditional approval, RICS will provide you with constructive feedback as to where you need to improve before your name will be added to the register. Your referral report will:
- (a) explain why you have not met the required standard;
 - (b) give specific advice on how to improve your knowledge; and
 - (c) explain the process of appealing a decision of RICS when an applicant has had its assessment referred.

8 Appeals

- 8.1 An applicant can elect to appeal his/her referral of application. You must submit a formal appeal within **28 days** of receipt of your referral notice. If you intend to lodge an appeal, the appeal must:
- (a) be in writing;
 - (b) be made by the referred applicant and not be lodged by a third party; and
 - (c) clearly state the grounds of the appeal, and where necessary be supported by appropriate evidence.
- 8.2 The grounds for which an applicant lodges its appeal are not restricted.
- 8.3 The appeal panel has 20 working days to consider whether the assessors initially determined the suitability of the applicant based on the evidence provided. RICS will ensure that the appeal panel does not consist of any members who were involved in the assessment of the original application.
- 8.4 You will get the result of the appeal panel within five working days of their decision.



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- 8.5 If the appeal is upheld you will be notified and added to the register. If the appeal is dismissed, you will be urged to re-apply once you have addressed any of the items contained in the referral report.

9 Any other questions

- 9.1 Please contact RICS if you have any other questions about becoming a EWRS-registered expert witness or require assistance completing the application form.
- 9.2 Our contact details are as follows:

RICS Oceania Expert Witness Registration Scheme (EWRS)
RICS Dispute Resolution Service

Level 3, Waterfront Place
1 Eagle Street, Brisbane, Qld. 4000

PO Box 7815,
Waterfront Place,
Brisbane, Queensland 4001

T: 07 3360 0256

F: 07 3360 0222

E: ewrs@ricsdrs.com.au



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Appendix 1

RICS Oceania Expert Witness Registration Scheme - Application Form



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RICS OCEANIA Expert Witness Registration Scheme

Application

When you are completing this form please note:

For the purpose of any RICS electronic database or system used as a referral service to the public, we will communicate relevant information in this form to potential clients.

1. Personal details

Membership no.....Title.....

Surname.....Given names.....

Your organisation's name and your work address

Company name.....

Address.....

.....

.....

.....

Postcode..... Country

Telephone..... Fax

Email.....

Mobile.....

2. Expert activities and profile

Number of expert reports written

Total Past three years.....

On how many occasions have you given oral evidence?

Total Past three years.....

Please indicate the range of judicial and quasi-judicial bodies at which you presented oral evidence

.....



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Please detail any expert witness training you have received, including the name of provider, date and duration of training received.

- 1.
- 2.
- 3.
- 4.

Please list any other expert witness organisations/directories with which you are registered.

- 1.....
- 2.....
- 3.....
- 4.....

3. Professional details and expertise

Please specify your professional designations e.g. MRICS, MCIQB, AAIQS, etc

.....

RICS Professional Groups joined (please list)

.....

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.....

What are your main areas of expertise for expert witness work?

.....

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4. Geographical areas of work

In which areas of Oceania are you available to accept assignments? (please tick)

- | | | | |
|--------------------------|-------------|------------------------------------|------------|
| <input type="checkbox"/> | ACT | <input type="checkbox"/> | NSW |
| <input type="checkbox"/> | NT | <input type="checkbox"/> | QLD |
| <input type="checkbox"/> | SA | <input type="checkbox"/> | TAS |
| <input type="checkbox"/> | VIC | <input type="checkbox"/> | WA |
| <input type="checkbox"/> | NZ | Not applicable at this time | |
| <input type="checkbox"/> | PNG | Not applicable at this time | |
| <input type="checkbox"/> | Fiji | Not applicable at this time | |

5. Registration and membership criteria

We need the following to process your application (please enclose)

Two references (one must be from a barrister or solicitor) for whom you have provided expert evidence within the past three years. If you have given evidence, include the referee relevant to that case.

One 'anonymous' expert witness report

RICS cannot return your expert witness report and documents because once received, it will become the property of RICS.

Please ensure that your expert witness report remains anonymous throughout, or you risk having the assessors return it. This is particularly important where a report has not yet reached the public domain. Please ensure that your name and contact details and/or firm's name – where your name is evident from the firm's name – are completely anonymous. However, you can leave designations e.g. FRICS, FAAV, FCIOB etc unobscured. Please use a ball point pen or non-transparent, fade-resistant ink, and avoid marker pens.

Cheques are payable to RICS Dispute Resolution Service. The application fee is \$110.00 (\$100 + GST).

Please note that the application fee is non-refundable. If your application is successful, you will also need to pay by cheque an annual registration scheme subscription fee of \$100 + GST. This will be on a pro-rata basis and calculated by the month in which your application is approved. Your name will not be added to the register until your subscription fee has been received.

6. Candidate declarations

On being approved as an expert witness, I promise that neither during nor after my attachment to RICS will I use, permit to be used, in conjunction with my name, or with the name of any firm or undertaking with which I may at any time be associated, any designation or expression whatever, denoting or suggesting membership of or attachment to, or connection with RICS, except in so far as I may become entitled to use



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such designations or expressions under the RICS By-laws after being duly approved as an expert witness.

I declare that I have a full working knowledge of, and access to, the following:

- *Surveyors acting as expert witnesses* (RICS Oceania practice statement and guidance note).
- The expected conduct and liability to the instructing party of an expert witness when giving advice, providing a report and assisting a party both at a hearing and a documents only procedure.
- RICS best practice relating to fees and disbursements (see RICS Oceania - *Surveyors acting as expert witnesses* - practice statement and guidance note).
- The relevant Court Rules, Practice Directions and Codes of Conduct relating to the jurisdictions.

I declare that I have knowledge and understanding of all procedural rules governing judicial and quasi-judicial bodies relevant to my sphere of work. For the avoidance of doubt, such bodies include courts, tribunals, adjudications, arbitrations and the referral of disputes to expert determinations.

I enclose two references from people for whom I have provided expert evidence in the last three years. I confirm that at least one of my references is from a barrister or solicitor.

I enclose an expert witness report prepared by me in contemplation of judicial or quasi-judicial proceedings, in the last five years.

I certify that I have read the RICS Oceania EWRS candidates' guide (RICS Oceania Expert Witness Registration Scheme – *your guide to becoming a registered expert witness*), that the information provided in this application form is true and accurate to the best of my knowledge, and that any false declaration on this form may lead to investigation under the RICS disciplinary process.

Candidate's signature..... Date.....

7. Fees payable

Application fee	\$100.00 +GST
Annual subscription fee	\$100.00 + GST

Notes on fees

Payment can be made by cheque, credit card or direct deposit. Please contact the RICS DRS for the relevant details. Cheques to made payable to 'RICS Dispute Resolution Service'.

*Once approved you must pay (within two weeks of the date of your notification letter) a pro rata subscription rate for the rest of the year. Your next subscription will then be due



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on 31 January the following year. Your name will not be added to the RICS register of expert witnesses until your subscription fee has been received.

Please return your completed application to:

RICS Oceania Expert Witness Registration Scheme (EWRS)

RICS Dispute Resolution Service

Level 3, Waterfront Place
1 Eagle Street, Brisbane, Qld. 4000

PO Box 7815,
Waterfront Place,
Brisbane, Qld. 4001

T: 07 3360 0256

F: 07 3360 0222

E: ewrs@ricsdrs.com.au



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Appendix 2

RICS Oceania Surveyors Acting as Expert Witnesses: Practice Statement



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RICS Oceania Practice Statement

This is a RICS Oceania Practice Statement in respect of the RICS Oceania EWRS. It is the duty of every member admitted to the RICS EWRS to comply with the contents of this document in the interest of maintaining the highest professional standards.

When an allegation of professional negligence is made against a surveyor, the court is likely to take account of any relevant practice statement published by the RICS in deciding whether or not the surveyor acted with reasonable competence. Failure to comply with practice statements may be adjudged negligent.

A member may depart from the requirements of this practice statement, where he or she considers there are special circumstances which render it inappropriate or impractical for the assignment to be undertaken wholly in accordance with them. Where the member so departs, a clear declaration in writing must be given to this effect, with the details of and reasons for the departure, which the member may ultimately be required to justify. If RICS is not satisfied with the reason(s) advanced and/or the manner in which the departure is declared or evidenced, it is entitled to take disciplinary measures.

If a member departs from the practice required by this practice statement, they should do so only for good reason. In the event of litigation, the court may require the member to explain why they decided to act as they did.

In addition, practice statements are relevant to professional competence in that each surveyor should be up to date and should have informed him or herself of practice statements within a reasonable time of their promulgation.



RICS Oceania Surveyors Acting as Expert Witnesses: Practice Statement

PRINCIPAL MESSAGE: Expert evidence provided by chartered surveyors (surveyors) must be, and must be regarded as the independent findings of the surveyor. The surveyor must also believe that the facts upon which he or she relies upon are complete, true, and importantly that his or her opinions are correct and well founded.

1 Application of this practice statement

- 1.1 The practice statement applies where any surveyor who has been admitted to the RICS Oceania EWRS agrees or is required to provide expert evidence (whether oral or in writing) which may be relied upon by any judicial or quasi-judicial body in the Oceania region. For the avoidance of any doubt, such bodies include courts, tribunals, adjudications, arbitrations and the referral of disputes to expert determination (judicial body). Mediators are excluded from consideration.
- 1.2 This practice statement does not apply to the provision of professional advice other than by the surveyor acting as an expert witness during any proceedings nor for the purpose of assisting a client to decide whether to initiate or defend proceedings. However, where the surveyor accepts instructions to provide such advice in contemplation of judicial or quasi-judicial proceedings, the surveyor must advise the client in writing if his or her advice or investigations would fail to comply with this practice statement.
- 1.3 Where the surveyor considers that there are special circumstances which render it inappropriate or impractical for the assignment to be undertaken and comply with this practice statement, the details of and reasons for the departure must be immediately given in writing and contained in the report to those instructing the surveyor. Any surveyor who does depart from the practice statement may be required to justify the reasons for any such departure. RICS is entitled to take disciplinary measures if it is not satisfied with the reasons given and/or the manner in which the departure has been notified or evidenced. In the event of litigation, the court may require the surveyor to explain why he or she decided to act as he or she did.
- 1.4 In Australia, most States and Territories have enacted civil procedures rules ('CPR') alongside practice directions, codes of conduct, pre-action protocols and prescribed forms which apply to their respective court systems. A list of the most relevant enactments is provided in Surveyors Acting as Expert Witnesses: Guidance Note. There are different requirements depending on the rules and procedures of each jurisdiction. All surveyors are, as a matter of professional conduct, expected to comply with the CPR of each jurisdiction in those circumstances in which the CPR apply, and to make themselves aware of the need to comply. This practice statement and the accompanying guidance note does not provide a commentary on the CPR of each jurisdiction. The CPR are amended from time to time and chartered surveyors should acquaint themselves of any changes which may potentially affect them.



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2 Duty in providing evidence

- 2.1 The primary and overriding duty of the surveyor is to the judicial body to whom the evidence is given.
- 2.2 The duty is to be truthful as to fact, honest and correct as to opinion and complete as to coverage of relevant matters. The duty is the same if the surveyor is giving evidence to a judicial body, whether or not on oath.
- 2.3 The surveyor's evidence must be independent, objective and unbiased. In particular, it must not be biased towards the party who is responsible for instructing or paying the surveyor's fees.
- 2.4 The above duty applies in any circumstance in which the surveyor is engaged.
- 2.5 An expert witness should be able to exhibit that he or she has full knowledge of the requirements for an expert when giving evidence, including the need for objectivity.
- 2.6 While it may not be assumed that an employee can never give an independent opinion as evidence, the fact that an expert may be an employee of one of the parties may affect the weight to be given to his or her evidence. The expert should bring this possibility to the employer's attention.

3 Acceptance of and changes to instructions

- 3.1 Surveyors may accept instructions to act as an expert witness only in matters where they have:
 - (a) the knowledge, experience, qualifications and training appropriate for the assignment; and
 - (b) the resources to complete the assignment within the timescales and to the standard required.
- 3.2 Surveyors must:
 - (a) prior to accepting instructions:
 - (i) advise in writing those instructing them that this practice statement and, if appropriate, the relevant jurisdiction's CPR that will apply; and
 - (ii) offer to supply a copy of this practice statement upon request;
 - (b) ensure without delay that they advise in writing those instructing them of their obligations under the relevant jurisdiction's CPR, if they apply. The surveyor must also inform the client of their general obligations, and in particular that the overriding duty of the expert is to the judicial body;
 - (c) ensure that there is a written record, held by the surveyor and sent to (or received from) those instructing the surveyor, as to the matters on which expert evidence is required, whether upon the initiative of the surveyor or those instructing the surveyor;



- (d) obtain agreement and ensure that there is a written record, held by the surveyor and sent to (or received from) those instructing the surveyor, and confirm in writing with those instructing him or her if the surveyor proposes that any part of the assignment is likely to be undertaken by a person other than the individual surveyor retained;
 - (e) agree on the Terms of Engagement which must be in writing (and include the basis upon which all fees will be charged) as a record held by the surveyor and sent to (or received from) those instructing the surveyor; and
 - (f) be satisfied that no conflict of interest arises. If the surveyor has any doubt whatsoever in this respect, any actual or potential conflict must be reported to those offering instructions as soon as it arises or becomes apparent. For the avoidance of doubt, any potential conflict arising after instructions have been accepted must be notified immediately.
- 3.3 If the surveyor's instructions are changed or supplemented, the surveyor must ensure that there is a written record retained.

4 Inspection

- 4.1 If any inspection of any property is required it must always be carried out to the extent necessary to produce an opinion which is professionally competent having regard to its purpose and the circumstances of the case.

5 Reports

- 5.1 The surveyor's written evidence must, unless the rules or directions of the judicial body require otherwise, be addressed to the judicial body and not to the party that instructed the expert. The evidence must be presented in an organised and referenced manner, with brevity and distinguish where possible, between matters of plain fact, expert observations and expert inferences.
- 5.2 The surveyor must, in preparing any written evidence, consider all matters material to the assignment.
- 5.3 The surveyor must, in providing written evidence:
- (a) state the name and address of the witness;
 - (b) state the expert's qualifications to make the report;
 - (c) state all material facts and assumptions, whether written or oral, on which the report is based;
 - (d) state any references to any literature or other material specifically relied on by the expert to prepare the report;
 - (e) state any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out;
 - (f) state the reasons for each opinion expressed in the report;



- (g) if there is a range of opinion on matters dealt with in the report, provide a summary of the range of opinion, and the reasons why the expert adopted a particular opinion;
- (h) state any qualification of an opinion expressed in the statement without which the statement is or may be incomplete or inaccurate;
- (i) state whether an opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason;
- (j) if applicable, state that a particular question or issue falls outside the expert's field of expertise;
- (k) provide a summary of the conclusions reached by the expert;
- (l) comply with any rules or directions of the judicial body to which the evidence is to be presented including, where appropriate the relevant jurisdiction's court rules and procedures, their practice directions and pre-action protocols;
- (m) personally sign and date the report or any other written evidence;
- (n) verify the evidence with a Statutory Declaration in the required form;
- (o) include declarations at the end of the written evidence that the:
 - (i) report includes all facts which the surveyor regards as being relevant to the opinion which he or she has expressed and that the judicial body's attention has been drawn to any matter which would affect the validity of that opinion;
 - (ii) report complies with the requirements of The Royal Institution of Chartered Surveyors, as set down in *Surveyors Acting as Expert Witness: Practice Statement*; and
 - (iii) expert understands his or her duty to the judicial body and has complied with that duty.

5.4 The surveyor must use plain language and explain any technical terms. The surveyor must not use words, terms, and/or a form of presentation with the intention of limiting the ability of those likely to have access to the report from checking the correctness of any statement, calculation or opinion given.

6 Amendment of the contents of written evidence and/or reports

6.1 If after providing evidence the surveyor identifies a material inaccuracy or changes his or her view of a matter material to his or her stated opinion, all other parties to the dispute must be notified immediately.

7 Agreeing facts and resolving differences

7.1 Where, at the direction or order of the judicial body, a surveyor appointed in the matter is instructed to meet or correspond or provide joint expert statements or schedules, the



surveyor must comply with such direction or order and, where such direction or order requires:

- (a) agreement upon relevant facts and calculations wherever possible;
- (b) identification of the issues and reasons for any differences of opinion;
- (c) the preparation of a statement for the judicial body showing:
 - (i) those issues on which they agree; and
 - (ii) those issues on which they disagree and a summary of their reasons for disagreement.

7.2 Where, for any reason, the surveyor is unable to comply with any order or direction of the judicial body he or she must as soon as practicable:

- (a) prepare a written record of the reason for such non-compliance; and
- (b) communicate such record to those instructing him or her and, through legal representatives if any, to the judicial body.

8 Single joint expert

8.1 In certain cases the parties may decide or the court may appoint a single joint expert (SJE).

8.2 The duties and responsibilities of a surveyor acting as an SJE are the same as for any other person acting as an expert witness.

8.3 Where the SJE is appointed by the court, he or she may in some circumstances also receive instructions from either party on the issues already identified with the court. This is subject to any jurisdictional requirements and the SJE should obtain legal advice if unsure as to its compliance with the relevant CPR of the jurisdiction.

8.4 The SJE should be clear as to:

- (a) the subject matter of his or her instructions;
- (b) the need for such expert evidence;
- (c) the issues to be addressed;
- (d) the method of presentation of the evidence (written or oral);
- (e) the release of the evidence to the parties; and
- (f) the relevant judiciary's principles governing the jurisdiction.

8.5 The SJE must recognise that his or her evidence may exercise significant influence on the outcome of the proceedings, and as a result even greater reliance may be placed by the parties on the SJE acting fairly than on an expert who is not acting as an SJE.



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Appendix 3

RICS Oceania Surveyors Acting as Expert Witnesses: Guidance Note



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RICS Oceania Guidance Notes

This is a RICS Oceania guidance note in respect of the RICS Oceania EWRS. It provides advice to members of the RICS on aspects of the profession. Where procedures are recommended for specific professional tasks, these are intended to embody 'best practice', that is, procedures which in the opinion of the RICS meet a high standard of professional competence.

Members are not required to follow the advice and recommendations contained in the guidance note. They should however note the following points.

When an allegation of professional negligence is made against a surveyor, the court is likely to take account of the contents of any relevant guidance notes published by the RICS in deciding whether or not the surveyor has acted with reasonable competence.

It is for each individual surveyor to decide on the appropriate procedure to follow in any professional task. If a member departs from the best practice recommended in this guidance note, they should do so only for good reason. In the event of litigation, the court may require the member to explain why they decided not to adopt the recommended practice.

In addition, guidance notes are relevant to professional competence in that each surveyor should be up to date and should have informed him or herself of guidance notes within a reasonable time of their promulgation.



RICS Oceania Surveyors Acting as Expert Witnesses: Guidance Note.

1 Introduction

- 1.1 This guidance note is for any chartered surveyor (surveyor) who agrees or is required to provide expert evidence (whether oral or in writing) which may be relied upon by any judicial or quasi judicial body in the Oceania region. For the avoidance of doubt, such bodies include courts, tribunals, adjudications, arbitrations and the referral of disputes to expert determination (judicial body). Mediators are excluded from consideration.
- 1.2 The guidance note should be considered in conjunction with the practice statement. It provides further material and information on good practice considered to be generally appropriate where a surveyor is required to give expert evidence; including acting as a single joint expert. Reference in this guidance note to 'PS' are to a paragraph contained in the practice statement.
- 1.3 Neutrality of experts is of the utmost importance. By emphasizing the expert's overriding duty to the judicial body when acting as an expert witness, the practice statement and guidance note help to ensure the impartiality of the expert's evidence and to prevent the expert acting as advocate for his or her instructing party.
- 1.4 This guidance note has been prepared against the background of comment emanating from the courts regarding the duties and responsibilities of expert witnesses. It should also be noted that all surveyors are, as a matter of professional conduct, expected to comply with the civil procedure rules alongside practice directions, codes of conduct, pre-action protocols and forms ('CPR') in those circumstances in which the CPR apply. Surveyors are expected to make themselves aware of the need to comply.

In cases that the CPR apply there may be additional requirements for surveyors acting as expert witnesses over and above those which are contained in this guidance note and the practice statement.

The requirements of the CPR in each jurisdiction relating to expert witnesses are listed below:

Queensland

- (a) Uniform Civil Procedure Rules 1999 Part 5
- (b) Supreme Court Practice Direction 2 of 2005

New South Wales

- (a) Uniform Civil Procedure Rules 2005 Part 31 Div 2
- (b) Uniform Civil Procedure Rules 2005 Sch 7: Expert Witness Code of Conduct
- (c) Supreme Court Practice Note Gen 10: 17 Aug 2005



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- (d) Supreme Court Practice Note Gen 11: 17 Aug 2005

Victoria

- (a) Supreme Court (General Civil Procedure) Rules 2005 Order 44
- (b) Supreme Court (General Civil Procedure) Rules 2005 Form 44A: Expert Witness Code of Conduct

Tasmania

- (a) Supreme Court Rules 2000 Part 19 Div 5
- (b) Resource Management and Planning Appeal Tribunal: Guidelines for expert witnesses in proceedings in the Tribunal

South Australia

- (a) Supreme Court Civil Rules 2006 Part 9 Div 2
- (b) Supreme Court Civil Rules 2006 Part 4 Div 1
- (c) Supreme Court Practice Directions 2006 Direction 5.4

Western Australia

- (a) Rules of the Supreme Court 1971 Orders 36A, 40
- (b) District Court of Western Australia, Circular to Practitioners CIV 2007/2: Expert Evidence (3 August 2007)

Northern Territory

- (a) Supreme Court Rules Order 44

Australian Capital Territory

- (a) Court Procedures Rules 2006 Chap 2 Part 2.12
- (b) Court Procedures Rules 2006 Sch 1: Expert Witness Code of Conduct

Federal Court of Australia

- (a) Federal Court Rules Order 33 Rule 20, Order 34, Order 34A, Order 34B
- (b) Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia: 05 May 2008

- 1.5 The above CPR contains detailed requirements relating to the provision of expert evidence. Any surveyors acting, or proposing to act, as expert witnesses are expected to be familiar with the above CPR for the jurisdiction in which they are providing their opinion.



- 1.6 This guidance note is not intended to provide a commentary on the CPR of each jurisdiction. The CPR of each jurisdiction are subject to amendment and to interpretation by the respective courts. Amendments are usually published on the relevant state or territory government's website. Surveyors acting as expert witnesses in cases to which the CPR apply should make themselves aware of the existence and effect of changes as they occur.
- 1.7 The obligation imposed upon surveyors to make the existence of the practice statement known to clients when accepting instructions to act as expert witnesses (PS3.2) is intended to help reduce misunderstandings and remove pressures upon experts to support their client's cases irrespective of their honest professional opinions. The obligation imposed on surveyors to make a declaration confirming their belief in the accuracy and truth of the matters put forward in their reports and other written evidence (PS5.3) should also assist in this respect.
- 1.8 The leading case which sets out the duties and responsibilities of an expert witness is *National Justice Compania Naviera SA v. Prudential Assurance Co Ltd* ('the Ikarian Reefer') (1993), where Cresswell J said:

'The duties and responsibilities of expert witnesses in civil cases include the following:

- (a) *Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (Whitehouse v Jordan [1981] 1 WLR 246 at 256 per Lord Wilberforce).*
- (b) *An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise (see Polivitte Ltd v Commercial Union Assurance Co Plc [1987] 1 Lloyd's Rep 379 at 386 per Mr Justice Garland and Re J [1990] FCR 193 per Mr Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.*
- (c) *An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion..*
- (d) *An expert witness should make it clear when a particular question or issue falls outside his expertise.*
- (e) *If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that his opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth, without some qualification, the qualification should be stated within the report (Derby & Co Ltd and Others v Weldon and Others, The Times, 9th November 1990 per Lord Justice Staughton).*
- (f) *If, after exchange of reports an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through*



legal representatives) to the other side without delay and, when appropriate, to the court.

- (g) *Where expert evidence refers to photographs, plans, calculations, analysis, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.'*

- 1.9 This guidance note is intended to reflect the above principles, together with the general approach to expert evidence which underlies the CPR of each jurisdiction in the Oceania region.
- 1.10 Surveyors should be mindful of RICS' other practice statements and guidance notes when giving expert evidence.

2 General duty and roles

- 2.1 Upon accepting instructions of any nature, surveyors assume a responsibility to the client and themselves (and to RICS) to provide sound professional advice. To that end surveyors should be satisfied, prior to accepting the instruction, that they have the knowledge and resources to adequately attend to the task specified within any allocated time span. If a surveyor cannot fulfil those basic criterion, the instruction should be declined (PS3) or, alternatively, the client should be advised of the possible need to employ additional expertise.
- 2.2 It is imperative that the surveyor appreciates that, while an instruction may originate from a particular client, the duty to the client becomes secondary once the surveyor is instructed as an expert to produce evidence for a judicial body. PS3.2 makes it obligatory to bring this to the client's attention.
- 2.3 If this is not be acceptable to the client; in such instances instructions to act should be declined.
- 2.4 The various roles which may be adopted as an expert include:
- (a) assisting a party to establish the facts and to assess the merits of a case and to assist with its preparation;
 - (b) giving to the judicial body, as evidence, expert opinion where opinion evidence apart from that of an expert would not be strictly admissible;
 - (c) giving factual evidence on a subject where, because of particular expertise, such evidence will have greater weight than that of an unqualified witness. This category includes the evidence which surveyors sometimes give, in addition to their opinion evidence, as to measurements they have made or examinations which they have carried out; and
 - (d) conducting enquiries on behalf of the judicial body and reporting to that body as to findings.



3 Duty to the client

- 3.1 In many instances, surveyors will be asked to provide an initial advice to a client prior to being instructed to provide expert evidence for presentation to the judicial body. All such initial advice is given in the normal client-professional adviser relationship.
- 3.2 If the initial advice is in relation to a dispute which may have to be finally resolved by the judicial body, then the expert is advised to give careful consideration as to whether the advice should be provided to the client's solicitor (rather than to the client) in case, at a later date, it may otherwise be disclosable in any proceedings and might prejudice the interests of the client. If in doubt, legal advice should be sought.

4 Duty to the judicial body

- 4.1 The duties of an expert witness have been defined in the practice statement. Whom the expert has received instructions or by whom he or she is paid.
- 4.2 Any surveyors who do not feel entirely confident that they can fulfil their duties, for whatever reason, should decline instructions.

5 Acceptance of instructions

- 5.1 The expert, on receiving the proposed instructions from the appointor, must ascertain the identity of the parties to the dispute in order to establish:
- (a) which party the expert is to provide its opinion; and
 - (b) whether any conflicts of interest would arise, or may be perceived to arise.
- (The terms 'Appointor' and 'Client' are defined in the sample Terms of Engagement – see Appendix A.)
- 5.2 A conflict of interest may arise out of a previous involvement with any party, the dispute, or property which would cause the expert to be unwilling or seen to be unable or unwilling to fulfil his or her responsibility to be independent. In such circumstances, the surveyor should either refuse the assignment or seek written confirmation of instructions following disclosure. If the surveyor considers that the judicial body would not attach weight to his or her evidence due to such circumstances, he or she has a duty to advise the party immediately.
- 5.3 For details on the requirements to establish clear instructions and Terms of Engagement see PS3.2. If standard Terms of Engagement are used, they should be attached to the acceptance of instructions. If in a particular case the expert's standard terms are varied, such variations should be explained at the time. Appendix A provides sample Terms of Engagement which may be used.
- 5.4 Circumstances may exist or arise where part of the assignment should be undertaken by another expert. Where this need arises, the surveyor should notify the appointor/client and may give the name(s) of the individual(s) recommended to be engaged, together with information as to their experience and qualifications (PS3.2).



- 5.5 An expert instructed by one party may have written questions about the expert's report put to him or her by another party. The appointor and the client should be informed, before instructions are accepted, of the effect of this. Experts should make it clear that they would be under a professional and, in some cases, statutory duty to reply to such questions unless it is not reasonable for them to do so or if the court directs otherwise. In those cases where the statutory duty applies, the answers may be tendered in evidence subject to orders of the court.
- 5.6 The expert is recommended to indicate a likely reporting program to the appointor/client. This program will vary according to the assignment, but might follow three phases:
- (a) initial report: the expert may provide a report setting out relevant opinions relating to the assignment. If the expert's opinions are not accepted, assuming that the report is competent and researched, the expert may wish to consider withdrawing from the assignment;
 - (b) proof of evidence: this may also involve supplemental proofs or counterproofs together with joint meetings of experts; and
 - (c) giving evidence to a judicial body: this may include conferences with counsel appointed by the appointer/client.
- 5.7 The expert's report must state the substance of all material instructions, whether written or oral, on the basis upon which the report was written (see 13.2). Those instructions are not privileged against disclosure. However, in some jurisdictions, the court can, upon application by a party, direct that such instructions or specific documents be exempt from being disclosed. The expert is advised to inform those instructing him or her of these matters.

6 Purpose of evidence

- 6.1 The purpose of expert evidence is to assist the judicial body in forming its own independent judgment. Therefore, the evidence given must provide all necessary detail from which conclusions have been drawn in order to enable the judicial body to determine the appropriateness of the conclusions based upon the facts submitted (PS5).

7 Evidence of fact

- 7.1 The expert witness is often required to assist the judicial body in establishing, clarifying and ordering logically, the relevant facts and issues to be addressed.
- 7.2 All facts relevant to the case must be stated truthfully and fully, whether or not they favour the appointing party (PS5).
- 7.3 The expert should be aware that evidence to the judicial body takes precedence over any contractual, professional or other duty and this may, on occasions, conflict with confidentiality agreements (PS2.1). Evidence subject to confidentiality agreements cannot be ignored simply by virtue of the existence of such an agreement.
- 7.4 Where an expert is instructed to assume facts, such instructions should be stated fully in the report (PS5).



- 7.5 It is usual for those instructing experts to provide them with facts which they may adopt if relevant to the matters the expert is dealing with. These, and facts which the expert establishes for him or herself and to which the expert has regard in forming any opinion, should be set out in the report either fully or by cross-reference to other documents which will be made available to the judicial body. Accordingly, any written report provided by the expert in evidence should include a full schedule of the documents which he or she has relied upon and, where necessary, copies of such documents or the relevant extracts thereof. (The originals of all documents relied upon need to be available for inspection by other parties to the dispute and, unless agreed by the parties, by the judicial body. The expert should therefore be aware of the locations of all such documents.) Within the report, the expert should provide the source of any factual information which is relied upon (PS5).
- 7.6 Experts must carry out such factual research as they consider necessary to fully discharge their obligation to the judicial body including, where appropriate, an inspection of any property involved.
- 7.7 Experts should give sufficient explanation of what they have done in ascertaining and checking facts to enable the judicial body to be satisfied that they have fully discharged their obligations (PS5).
- 7.8 When directed to do so either by the judicial body or by the appointor, the expert should seek to agree facts and to clarify what is not in dispute. Experts are recommended to request from appointors a copy of any directions relating to such meetings. The expert has a duty to comply with those directions notwithstanding any instruction to the contrary (PS7).
- 7.9 If the expert is in doubt about the admissibility (because it may be privileged) of any fact or statement upon which the expert is relying, he or she should obtain legal advice. Similarly, if the expert believes any material would be regarded as hearsay evidence, he or she should again obtain legal advice.

8 Evidence of opinion

- 8.1 The opinion provided by the expert given must be honest. It must be objective, independent, unbiased and non-partisan. Opinions should not be exaggerated or seek to obscure alternative views.
- 8.2 Where an opinion has been formed based on incomplete knowledge of facts, then such limitations should be stated fully in the evidence (PS5.3 (o) (i)).
- 8.3 Where an expert gives an opinion, he or she should clearly set out the reasoning and facts upon which it is based. Differences of opinion between experts often occur due to the detail of facts and assumptions upon which they are relying being different. Such differences need to be outlined clearly for the benefit of the judicial body (PS5.3 (o) (i)).
- 8.4 When experts are instructed to meet and reach agreement on facts, they may be instructed also to endeavour to agree opinions and, in such instances where opinions are not agreed, the reasons for disagreement should be recorded and reported (PS7).
- 8.5 If there is a range of opinion on the matters dealt with in the report, the expert is required to summarize the range of opinion and give reasons for his or her own opinion (see 13.2(f); PS5.3 (f) (k)).



- 8.6 Where an expert changes his or her opinion, for whatever reason, such change should be communicated as soon as practicable in writing to the appointor, with whom the responsibility will rest to communicate this change of opinion to other parties and the judicial body (PS6). It is suggested that the expert should seek confirmation as to when and to whom the change is notified.
- 8.7 The expert is advised not to give evidence on matters that are outside his or her skill set and ought to be wary of straying inadvertently beyond such limits. In particular, an expert should not express, as his or her own opinion, an interpretation of statute or case law unless qualified to do so. The expert may, however, state an interpretation as a basis on which his or her conclusions on other questions are provided.
- 8.8 The expert is recommended to avoid having to prove or give opinions upon the contents of any document that deals with matters outside the scope of his or her own expertise, even where he or she considers it may assist the judicial body.

9 Questions to experts and answers

- 9.1 Where the expert receives questions about his or her report by an expert instructed by another party, or by a single joint expert, the expert must establish the jurisdictional requirements in respect of responding to those questions.
- 9.2 An expert's answers to the questions are treated as part of the expert's report.
- 9.3 The party or parties instructing the expert must pay any fees charged by him or her for answering the questions. However, this does not affect any decision of the court as to the party who is ultimately to bear the expert's costs.
- 9.4 Where the expert does not answer the questions put to him or her, the court may order either that the party who instructed the expert may not rely on the evidence of that expert, or that the party may not recover the fees and expenses of that expert from any other party, or it may make both orders.
- 9.5 It should be noted that the above section is subject to each particular jurisdiction's requirements.

10 Documents

- 10.1 Any evidence given by an expert will, almost invariably, be based upon documents either provided to, or held by, the expert.
- 10.2 When accepting instructions, experts ought to request details of all relevant documents and, if they consider it necessary, ask to inspect a client's files to satisfy themselves to this effect.
- 10.3 Documents from an expert's own resources often provide useful factual information upon which to rely. Such documents might include text, published material, photographs, plans, the opinion of others, codes of practice and RICS practice statements, guidance notes and information papers.
- 10.4 Documents provided to the expert by third parties may need to be independently proved. If the expert intends to rely upon such documents, he or she should seek legal advice.



- 10.5 During the course of his or her enquiries the expert may be made aware that other documents exist which might be of relevance. In such circumstances it may be necessary to seek legal advice.

11 Oral evidence

- 11.1 In most instances where an expert is required to give oral evidence, such evidence will be given under oath or affirmation but, whether or not such oath or affirmation is required, oral evidence must always be truthful and the expert's honest opinion (PS2.2). If the expert does not know the answer to a particular question, he or she should say so rather than endeavour to give an answer which might prove to be incorrect or misleading.
- 11.2 Preparation is critical and all experts should ensure that:
- (a) all relevant files and documents are taken to the hearing. It is the expert's responsibility to ensure that all documents necessary for proving his or her evidence are available; and
 - (b) they have reminded themselves of the detail of any written evidence which they have previously submitted, and also of the detail of the contents of files, as specific points may need to be addressed before and during the hearing and even while giving evidence.
- 11.3 Where an expert has to refer to bulky material in his or her evidence, or to video, film or other screen-based material, it is the expert's responsibility to ensure that appropriate arrangements have been made in a timely manner to enable such material to be communicated to the judicial body.
- 11.4 When giving evidence witnesses will be questioned by lawyers. However, all answers should be addressed to the judicial body. Concise answers are preferable, but experts should not allow lawyers to prevent a full answer being given.
- 11.5 An expert should never attempt to advocate the merits of his or her client's case when acting as an expert witness.
- 11.6 Adjournments of the hearing, either for lunch, overnight or for longer periods, can sometimes occur. While a witness is under oath or affirmation he or she is not permitted to discuss the case with anyone during those adjournments. This includes his or her client, lawyers, and fellow experts. Adjournments between hearing dates can be lengthy, and in such instances experts are advised to be alert to requesting that they be released from their restriction immediately before the hearing is adjourned.

12 Advising lawyers

- 12.1 The expert witness will almost invariably be required to advise his or her client's lawyer.
- 12.2 Immediately prior to any hearing it is not uncommon for lawyers of opposing parties to discuss between themselves aspects of the case, including possible compromise solutions. Expert advice is often needed during such negotiations and the expert, therefore, needs to ensure that he or she is available well before the hearing is due to begin.



- 12.3 During the hearing the lawyer may wish to consult with his or her client's expert while the lawyer is cross-examining other witnesses and, particularly, the other party's expert. It is important that the expert establishes whether the lawyers intends for him or her to be available for such consultation. The expert is often asked to sit immediately behind the lawyer in order that he or she can be consulted directly during the proceedings.
- 12.4 Experts that are not under oath or affirmation are commonly required to discuss other matters relating to the case with lawyers during adjournments. An expert should not expect to have free time during adjournments (except to another day).

13 Expert's written reports

- 13.1 An expert's report should be addressed to the judicial body and not to the party from whom the expert has received his or her instructions (PS5.1).
- 13.2 The expert must comply with the relevant jurisdictional requirements, and his or her report must, as a minimum, except as otherwise required by the relevant jurisdictional requirements:
- (a) be addressed to the court and not to the party from whom the expert has received his or her instructions;
 - (b) give details of the expert's qualifications;
 - (c) give details of any literature or other material which the expert has relied on in making the report;
 - (d) state who carried out any test or experiment which the expert has used for the reports and whether or not the test or experiment has been carried out under the expert's supervision;
 - (e) give the qualifications of the person who carried out any such test or experiment;
 - (f) where there is a range of opinion on the matters dealt with in the report:
 - (i) summarize the range of opinion; and
 - (ii) give reasons for the expert's own opinion;
 - (g) contain a summary of the conclusions reached;
 - (h) contain a statement that the expert understands his or her duty to the court and has complied with that duty;
 - (i) contain a statement setting out the substance of all material instructions (whether written or oral). The statement should summarise the facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
 - (j) be verified by a Statutory Declaration in the following form: 'I believe that the facts I have stated in this report are true and that the opinions I have expressed are correct'; and



- (k) comply with the requirements of any approved expert's protocol.
- 13.3 The requirement in 13.2(f) is directed primarily to issues of practice or principle on which there exists between experts in the field a known and acknowledged range of opinion, or different schools of thought (for example, on the use of All Risks Yield valuation methodology compared with Discounted Cash Flow methodology). It is not meant that on every occasion on which the expert thinks that another expert might disagree with him or her, the expert is specifically required to say so and go on to say what view another expert might hold and why the expert takes the view he or she does. Nonetheless, the expert's overriding duty to the judicial body will generally require him or her to put forward a fair and balanced assessment. This may include acknowledging any points that can fairly be made against the expert and saying why they do not cause him or her to change views.
- 13.4 It should be noted that the above guidelines may be varied or supplemented by the specific jurisdictional requirements.

14 Form and contents of an expert's written report

- 14.1 This section provides an example of the structure and nature of the content of a typical report by an expert witness. Where appropriate, regard should be had to the report requirements of the particular judicial bodies. Some variations to this structure will be appropriate on occasion, to take account of:
- (a) any prior agreement between the parties as to the order in which the various issues are to be addressed (and possibly determined);
 - (b) any direction of the judicial body as to the procedure or as to the order in which the issues are to be considered; and
 - (c) any statutory material or official guidance as to procedure applicable in particular types of proceedings.
- 14.2 The front sheet should reveal, not obscure, the name of the expert witness, the proceedings and the nature of the evidence, the subject of the report, and the date of the report. It should usually be entitled 'Report, or where appropriate 'Amended Report', or 'Further Amended Report'.
- 14.3 Thereafter, the report often takes the following form:
- (a) **Introductory material**
 - (i) a brief resume of the qualifications and relevant professional experience of the expert witness;
 - (ii) the names of the persons to be referred to in the report, together with a short, uncontroversial description of their respective roles;
 - (iii) chronology as to the expert's involvement in the case;
 - (iv) the factual or assumed background of the case; and
 - (v) the issues which the expert proposes to address in the report.



No opinions are expressed in this section.

(b) **Enquiries made by the expert**

This section is also factual only. The description should be given in itemised subparagraphs, with sub-headings as appropriate.

(c) **The facts upon which the expert's opinion is based**

This should distinguish between facts which the expert has been told to assume, those provided which the expert has chosen to assume, and those the expert has established for him or herself. The various sources of facts and material provided to and derived by the expert should be identified.

(d) **Reasons and conclusions**

This should give the expert's opinion on each issue and the reasons in full on each of them in turn. Facts should only be reported to the extent necessary for the exposition of the opinion. (Sometimes the usual contents of this section can conveniently be disaggregated to follow immediately upon the particular sets of facts.)

(e) **Certificate as to completeness, and signature**

The statements required in the practice statement must be included, along with the signature of the writer and the date the report has been concluded. The specific requirements of each jurisdiction must be complied with.

15 Meetings between the expert witness and the client, solicitor and counsel

- 15.1 Meetings can be beneficial to assist the client and his or her lawyers to understand the points being made and the person making them.
- 15.2 In particular, the bringing together of lawyers and the expert as early as possible is to be encouraged. This enables the strengths and weaknesses of an expert's report, and the client's case, to be evaluated. It may result in the expert wishing to make changes to the report, or the client wishing to make changes to the thrust of his or her case, or indeed settling the matter.
- 15.3 It may also assist the client, it's solicitor, and especially it's counsel if the expert is readily available, and if the expert takes a close interest in the progress of the case.

16 Meetings between experts

- 16.1 Meetings between experts are extremely desirable to attempt to achieve a greater understanding of the issues. In some circumstances they are likely to be required by the judicial body. The meetings should reveal the initial extent of agreements and disagreements and may result in changed opinions, which may ultimately result in the resolution of some of the differences. This process is likely to produce clearer, shorter reports and to save time, thereby reducing overall costs to the parties.



- 16.2 The usual purpose of the meeting (subject to any directions of the judicial body) is to pool relevant technical information, to narrow the technical issues and agree to as many issues as possible and to identify clearly areas of disagreement. Such issues may also be narrowed on hypothetical 'what if' bases. It is helpful if there are frank exchanges of theories and opinions.
- 16.3 It is advisable that experts in the same disciplines meet and it can be useful for combined meetings to take place, including experts for each side but from various disciplines. It is generally best if such meetings occur before reports intended to be disclosed are written, as experts tend to be slow to alter opinions thereafter and time can be wasted.
- 16.4 Each expert ought to approach the meetings with a willingness to listen, be cooperative and constructive; otherwise the worth of such meetings can be severely devalued. It is generally expected that the claimant's expert is the convenor of such meetings, or the first one at least. Neutral territory or 'on-site' may be preferred venues. It is useful to pre-agree a broad agenda and to agree and jointly sign minutes after the meeting, to obviate any misunderstandings at a later date.
- 16.5 Experts are reminded that such meetings may be 'without prejudice' (i.e. 'off the record'). However, the outcomes of such meetings are 'on the record'. For example, if one expert agrees with another that an aspect of the expert's report, or the client's case, is weak, counsel for the other side could legitimately exploit such an admission during cross-examination.
- 16.6 It should be noted that the above guidelines may, and in some jurisdictions have been varied or supplemented by the specific jurisdictional requirements.
- 16.7 Experts who are surveyors should:
- (a) agree relevant facts established by them and calculations prepared by them wherever reasonably possible (PS7.1(a)); and
 - (b) identify the issues and reasons for any differences of opinion (PS7.1(b)),
referring to those instructing them for authority where necessary.
- 16.8 With the consent of the appointor, experts can come outside the expert witness remit to conduct 'without prejudice' meetings to explore and possibly settle differences as to facts and opinions.

17 Basis of charging fees

- 17.1 The basis of charging may vary depending upon the nature of the expert's appointment.
- 17.2 In the case of an expert appointed by a judicial body, the level of fees may be determined by the rules of that body, summary or other cost assessment and/or other statutory provisions. The expert is advised to establish the basis prior to accepting instructions.
- 17.3 When appointed by a party to the dispute, the expert should set out clearly in writing the basis of his or her fees (PS3.2 (e)). For example, by reference to agreed daily or hourly



rates undertaken, or an agreed fixed fee. Provision may also be made for additional payments in respect of:

- (a) travelling time;
 - (b) expenses and disbursements;
 - (c) rates for attending hearings; and
 - (d) late notice, cancellation or settlement after the expert has been booked to attend a hearing.
- 17.4 It is considered important for both the basis of fee charging and for possible detailed or summary assessment purposes that careful and detailed time-sheets and records of tasks undertaken are kept.

18 Contingency fees

- 18.1 It is RICS' view that any form of contingency fee arrangement is incompatible with the duty of impartiality and independence required of an expert and that, accordingly, contingency fees should be avoided. Contingency fees should also be avoided for any other instructions linked with such work undertaken by the expert or his or her colleagues. This is because the fee arrangements relating to the instructions may be incompatible with the duty of impartiality and independence required of an expert.
- 18.2 RICS recognizes that many of its members practising in some surveying specialisms charge on a contingency basis as a matter of normal practice. Those members are advised that, while RICS would not expect any of its members to allow the quality of their evidence to be influenced by the potential fee, should the judicial body become aware that such a fee basis has been agreed, it may consider that the evidence and opinion proffered is not entirely unbiased and may in fact be tainted. It is recommended that experts make their clients aware of this possibility when agreeing the fee basis.

19 Responsibility for fees

- 19.1 The responsibility for payment of fees should be clearly incorporated in the Terms of Engagement entered into. They may identify the client as being solely responsible or, alternatively, consideration may be given to making solicitors, claims consultants or similar parties jointly and severally responsible for payment.
- 19.2 It is recommended that the expert should advise the appointing party that liability will exist for all fees and expenses properly incurred in accordance with the Terms of Engagement, even though those fees and costs may subsequently be reduced to the extent that they are not fully recovered from another party to the dispute.

20 Single joint expert

- 20.1 In applicable jurisdictions, where it becomes apparent that an expert's evidence may help in resolving a substantial issue in the proceeding, the parties may decide, or the court may direct that evidence on that issue is to be given by a single joint expert (SJE). The parties will generally enjoy an ability to agree on the expert, however, failing agreement, the parties may apply for a direction from the court as to the expert to be



- appointed. The court may either select the expert from a list prepared or identified by those parties, or select an expert at its discretion. The parties to the agreement must give the expert a statement of facts, agreed to by the parties to the agreement, on which the expert may base his or her report. Failing agreement, and depending on the jurisdiction, the parties must either supply the expert with separate statements of facts, or the parties must apply to the court for directions.
- 20.2 In applicable jurisdictions it is mandatory that the remuneration of an SJE be fixed by agreement between the parties. However, in other jurisdictions, it is the court which determines the fees and expenses payable to the expert. Unless the parties have agreed otherwise, instructing parties are jointly and severally liable for the expert's fees and expenses. It is expected that the expert will familiarise him or herself with the relevant provisions in each jurisdiction.
- 20.3 There is no specific deadline by which a SJE must be appointed, but it is likely that any appointment, if made, will be early on in the life of the proceedings.
- 20.4 In order to give competent instructions to a SJE, or to put pertinent written questions to him or her (see 9.1), it will be necessary for the parties to have a clear idea of the case they wish to establish or defend. This may involve taking separate advice from their own experts prior to instructing, or putting questions to, the SJE.
- 20.5 SJE's should ensure that they are clear as to what they are instructed to do and the issues that they are required to address.
- 20.6 A SJE is an expert for the purposes of the provisions of the relevant jurisdiction relating to experts. It follows that, for example, his or her report must comply with the requirements of the relevant jurisdiction (see 13.2). The parties may put written questions to the expert (see 9.1) and the expert may in some circumstances ask the court for directions (see 5.5).
- 20.7 The SJE must recognize that his or her evidence may exercise significant influence on the outcome of the proceedings. As a result, even greater reliance may be placed by the parties on the SJE acting fairly than on an expert who is not acting as a SJE.



Appendix A: Sample Terms of Engagement of an Expert Surveyor to Act as an Expert Witness Appointed by a Party Involved in a Dispute before any Court of Law or at Arbitration or before any other form of Judicial Body

Note: Other Terms of Engagements may be specified in a protocol established under specific jurisdictions.

1 Recital of appointment

- 1.1 The Appointor has appointed the Expert Surveyor to provide advice and services, in respect of *(state the nature and extent of the instructions, their purposes and the identify of property concerned)* in accordance with these Terms of Engagement.
- 1.2 The appointment is one which is subject to *Surveyors Acting as Expert Witnesses: Practice Statement*, a copy of which is available on request.
- 1.3 The Appointor is.....
- 1.4 The Client is.....
- 1.5 The Expert Surveyor is.....

[state identity and qualifications of any assistant and extent of their intended involvement]

2 Definitions

Unless otherwise agreed by the parties:

- (a) **‘Appointor’** means the solicitor, person(s), organization or department instructing the Expert.
- (b) **‘Client’** means the person(s), firm, company, or government department(s) for whom the Expert has been instructed to provide such advice.
- (c) **‘Expert Surveyor’** means the person appointed hereunder to provide expert advice, including the giving of evidence.
- (d) **‘Assignment’** means the matter(s), to which these Terms of Engagement apply, referred to the Expert Surveyor by the Appointor, in respect of which advice is or has been required.
- (e) **‘Fees’** means (in the absence of written agreement to the contrary) the reasonable charges of the Expert based on the Expert’s agreed hourly rate. *[Set out hourly rates.]* Time spent travelling and waiting may be charged at the full hourly rate. Goods and Services Tax will be charged in addition (where applicable).



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- (f) **'Disbursements'** means the cost, reasonably incurred, of all photography, reproduction of drawings, diagrams and the like, printing and duplicating, and all out-of-pocket expenses, including travel, subsistence and hotel accommodation. Goods and Services Tax will be charged in addition (where applicable).

3 The Appointor

3.1 The Appointor will:

- (a) provide timely, full and clear instructions in writing supported by good quality copies of documents within his or her possession or arrange or ensure the provision of all these things;
- (b) deal promptly with every reasonable request by the Expert Surveyor for authority, information and documents;
- (c) not settle alterations to the reports of the Expert Surveyor before they are submitted to the judicial body; and
- (d) where possible, at the Expert Surveyor's request, arrange access to the property or properties relevant to the assignment in order that the Expert Surveyor can inspect them and make relevant enquiries.

4 Fees and disbursements

4.1 The Expert Surveyor may present invoices at such intervals as he or she considers reasonable during the course of the assignment, and payment of each invoice is due on presentation.

4.2 For the avoidance of doubt, the Expert Surveyor shall be entitled to charge fees (as herein before defined) where, due to settlement of the dispute, or any other reason not being the fault of the Expert Surveyor:

- (a) the Expert Surveyor's time has been necessarily reserved for a specific hearing, meeting or other relevant engagement;
- (b) specific instructions have been given to the Expert Surveyor for an inspection and report; and
- (c) the reservation of time is not required because the engagement has been cancelled or postponed and/or the instructions have been terminated.

4.3 The Appointor and the Client shall (if different) be jointly and severally responsible for payment of the Expert Surveyor's fees and disbursements.

4.4 The Appointor will pay to the Expert Surveyor, at the Expert Surveyor's sole discretion, simple interest at the rate of [insert]% per month (or part thereof) on all invoices which are unpaid after a period of 10 business days from the date that the Expert Surveyor sends an invoice to the Appointor, calculated from the expiry of such 10 business day period together with the full amount of administrative, legal and other costs incurred in obtaining settlement of unpaid invoices.



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5 Disputes

- 5.1 In the event of a dispute as to the amount of the Expert Surveyor's fees, such sum as is not disputed shall be paid forthwith pending resolution of the dispute, irrespective of any set off or counter claim which may be alleged.
- 5.2 Any dispute relating to the quantum of the Expert Surveyor's fees is required to be dealt with in accordance with the complaints procedure set out in the RICS Code of Conduct and should, in the first instance, be referred to the firm's internal complaints procedure. A copy of the Expert Surveyor's firm's complaints procedure will be provided on request.