



THE QUANTITY SURVEYOR'S ROLE AS AN EXPERT WITNESS

AIQS GUIDANCE NOTE

2nd EDITION



2nd edition published November 2024

ISBN 978-1-876389-51-2

Copyright © The Australian Institute of Quantity Surveyors 2024

Any reproduction of copyright material must acknowledge The Australian Institute of Quantity Surveyors (AIQS) as the source of any such material reproduced.

The Australian Institute of Quantity Surveyors
Level 4, 24 Clarence Street, Sydney NSW 2000 Australia
www.aiqs.com.au



TABLE OF CONTENTS

1.0 BACKGROUND	2
1.1 Purpose.....	2
1.2 Status of Guidance Notes.....	2
1.3 Application.....	3
2.0 MINIMUM REQUIREMENTS OF THE QUANTITY SURVEYOR.....	3
2.1 Experience	3
2.2 Professional Indemnity Insurance Levels.....	3
2.3 Conflicts of Interest	3
2.4 Limitation of Service.....	3
3.0 ADVOCACY AND ROLE OF AN EXPERT	4
3.1 The Quantity Surveyor's Role is to Assist the Court or Tribunal.....	4
3.2 Qualifications Necessary to Give Expert Evidence	4
4.0 DUTIES AND RESPONSIBILITIES OF AN EXPERT	5
5.0 TYPES OF EXPERT WITNESS	5
5.1 Quantum Expert.....	5
5.2 Delay Expert	6
5.3 Technical Expert	6
6.0 ACCEPTING INSTRUCTIONS	6
7.0 CONFIDENTIALITY, LEGAL PROFESSIONAL PRIVILEGE AND IMMUNITY	7
7.1 Confidentiality and Legal Professional Privilege	7
7.2 Immunity From Suit.....	8
8.0 PREPARATION AND SUBMISSION OF A WRITTEN REPORT	8
9.0 CHANGE OF OPINION	11
10.0 CONCLAVES AND JOINT STATEMENTS.....	11
11.0 PREPARING TO TESTIFY AND GIVING ORAL EVIDENCE.....	12
11.1 Introduction.....	12
11.2 Preparation.....	12
11.3 Making a Start	13
11.4 The Giving of Evidence.....	13
11.5 Examination in Chief.....	13
11.6 Cross-Examination.....	14
11.7 Re-Examination	14
11.8 Concurrent Evidence.....	14
12.0 THE GOLDEN RULES	15
13.0 DEFINITIONS	16
APPENDIX A: AIQS DECLARATION FOR EXPERT WITNESS (TEMPLATE)	17
APPENDIX B: EXAMPLE SCOTT SCHEDULE (FOR JOINT EXPERT REPORT).....	18



1.0 BACKGROUND

1.1 PURPOSE

The purpose of this guidance note is to create a uniform scope of service and clarify the quantity surveyor's role when acting as an Expert Witness before a court or tribunal.

This guidance note is not intended to provide comprehensive training, instruction or prescriptive practices and procedures, or direct that a process, professional approach or method should or should not be used in any specific instruction or situation.

1.2 STATUS OF GUIDANCE NOTES

Guidance notes are intended to embody recognised 'better practice' and therefore may provide some professional support if properly applied. While they are not mandatory, they will likely serve as a comparative measure of the level of performance of a quantity surveyor.

MEMBER OBLIGATION

Quantity surveyors are responsible for choosing the most appropriate approach in a matter based upon the task and instruction. It is a matter for each person to decide the appropriate practice in any situation, and if they are unclear, seek professional advice from others, or contact AIQS. Each professional has the responsibility of deciding when it is appropriate to follow a guidance note.

AIQS does not warrant that anything contained in this or any guidance note is the definitive or final statement on any issue. Quantity surveyors must perform their own work pursuant to their own professional expertise and experience and if required, seek additional advice from appropriate professionals.

COURT OR TRIBUNAL RELIANCE

A court or tribunal may take into account the contents of any relevant guidance note or

other document relating to a recommended professional practice published by AIQS in deciding whether a quantity surveyor acted to a standard required by law.

CURRENCY OF PUBLICATION

Case law and relevant legislation may change over time, and whilst AIQS considers that the content of this guidance note is current at the date of publication, quantity surveyors and those who use quantity surveying services should have regard to legislative changes, new rulings, and if necessary, seek further advice prior to having regard to the guidance note.

DEPARTURE OR NON-COMPLIANCE

Where a quantity surveyor considers that a circumstance exists that warrants the departure from or non-compliance with the content of this guidance note, the quantity surveyor's report (or other advice) must include a statement that outlines:

1. the reasons for the departure or non-compliance with the guidance note; and
2. any impact the quantity surveyor's departure or non-compliance may have on the content of the report.

Quantity surveyors are advised to seek legal and/or other advice before departing from practice recommended in this guidance note.

This guidance is applicable to an AIQS member acting as an expert witness. It does not constitute legal or other professional advice and should not be relied on as such. Users should seek their own legal/professional advice.

DISCLAIMER

AIQS disclaims any and all liability to any person in respect of anything done, or the consequences of anything done, or omitted to be done, in reliance upon the whole or any part of this guidance note.



1.3 APPLICATION

This guidance note has been developed as a guide for quantity surveyors seeking to extend their capability to include acting as quantum experts primarily engaged in resolving and assisting courts in settling matters between disputing parties.

Becoming an expert witness should not be considered a daunting challenge, but the pinnacle of a practising quantity surveyor's career, where the knowledge and expertise, developed over their professional career, are ultimately tested under conditions that will confront their competency.

A quantity surveyor actively involved in a dispute that may come before a court or tribunal may find themselves carrying out one or more roles, including that of an expert witness, either as a single expert or engaged by one of the disputing parties. In such a circumstance, the quantity surveyor's primary duty as an expert witness is not to their client but to the court or tribunal where their Expert Witness Report and/or oral Evidence given must:

- a. be seen to be independent and unbiased and fall within their area of expertise;
- b. state the facts and assumptions upon which their report is based;
- c. be impartial and uninfluenced by those providing instructions and those responsible for the payment of the quantity surveyor's services; and
- d. be bound by the AIQS Code of Conduct and the relevant Expert Witness Code of Conduct relating to the proceedings in which the quantity surveyor is engaged.

Upon accepting an instruction to act as an expert witness, the quantity surveyor assumes a responsibility to the court or tribunal and AIQS to provide honest, impartial, and independent opinions, addressing all the relevant issues.

It is of paramount importance that the quantity surveyor satisfies themselves, prior to accepting the instruction, that they have the requisite experience, knowledge, expertise, and resources to fulfil the task specified within the court or tribunal's timetable.

2.0 MINIMUM REQUIREMENTS OF THE QUANTITY SURVEYOR

2.1 EXPERIENCE

The quantity surveyor's role as an expert witness should only be undertaken by an AIQS member, holding the Certified Quantity Surveyor (CQS) designation, with specific training in the field of expert witness services. There is, however, no substitute for experience.

2.2 PROFESSIONAL INDEMNITY INSURANCE LEVELS

The quantity surveyor should ensure that appropriate, and not excessive, levels of professional indemnity insurance are held in accordance with the client's requirements.

2.3 CONFLICTS OF INTEREST

Any conflicts of interest (real, potential, or perceived) such as previous involvement in the project or other services being provided for a party involved in the project should be disclosed immediately by the quantity surveyor to their instructing solicitor. These should not necessarily preclude the quantity surveyor from undertaking their role unless they are of a nature which may in practice or perception prevent the quantity surveyor from acting as an expert witness in an independent manner.

2.4 LIMITATION OF SERVICE

While the quantity surveyor is an expert in construction costs, they may not be experts in quality of workmanship or programming, and therefore, should limit their comments to areas in which they are competent to do so.



Notwithstanding this, it may be appropriate for the quantity surveyor to make observations (not recommendations) with regard to workmanship and programming based on their level of experience.

3.0 ADVOCACY AND ROLE OF AN EXPERT

3.1 THE QUANTITY SURVEYOR'S ROLE IS TO ASSIST THE COURT OR TRIBUNAL

The purpose of expert evidence is to assist the court or tribunal. Decision-makers are highly qualified and experienced in the law, but they are not specialists in every field or discipline that may arise in the cases they are called upon to decide.

Where a case involves technical questions or analysis of a large amount of data, an appropriately qualified expert can be called upon to give evidence about a specific topic or topics to help the court or tribunal resolve the wider dispute.

An expert witness does not take over the role of the decision-maker. The court or tribunal will reach its conclusion, based on expert and other evidence presented in the case. If opposing parties' witnesses express different opinions about the same topic, the court or tribunal will weigh those opinions and the reasoning on which they are based and decide which of the opinions is to be preferred (or, in some cases, adopt its own solution).

To be useful to the court or tribunal, expert evidence must be impartial. An expert must be prepared to express an opinion contrary to the interests of the party that engaged that expert. Experts should also willingly change their opinion or make concessions when it is appropriate to do so, even if the change goes against the client's interests.

This might occur when the facts affecting their opinion turn out to be different from the facts that were assumed when that opinion was originally formed or when a witness for another party raises a point that had not been previously considered. In some instances, a quantity surveyor's opinion may change in the event that they are provided conflicting information from that issued to the opposing party, which may result in the expert offering an alternative opinion. The topic of impartiality and demonstrating independence is addressed in Section 4.0.

In summary, an expert is not an advocate. The expert is not there to take sides or to tailor their evidence to suit the outcome the expert thinks the client wishes to achieve. The expert's role is to assist the decision-maker in deciding the issues of the case by providing expertise in a specialised field.

3.2 QUALIFICATIONS NECESSARY TO GIVE EXPERT EVIDENCE

To give expert evidence, a witness must be appropriately qualified. For example, some courts or tribunals require an expert to have "specialised knowledge based on the person's training, study or experience"¹.

At present, there are no specialised courses or accreditations for expert witnesses offered by the AIQS. While the necessary qualifications can be obtained through 'on-the-job' experience, in the case of quantity surveying, tertiary or similar qualifications will make the quantity surveyor more attractive as a potential expert witness. Greater weight will also be given to an expert witness's opinion if the witness can demonstrate practical experience, ongoing membership in professional bodies, and participation in continuing professional education.

¹Section 79 of the Uniform Evidence Acts



4.0 DUTIES AND RESPONSIBILITIES OF AN EXPERT

While the specific duties and responsibilities of an expert will be set out in the procedural rules for the jurisdiction where the dispute is being determined, the underlying principles of expert evidence remain relatively consistent across jurisdictions.

Unlike a traditional consultancy appointment, where standard services may be reduced or expanded depending on the project, the duties of an expert are determined by a court or tribunal. Once appointed, the expert is obligated to perform these duties.

The duties of an expert were first defined by Mr Justice Cresswell in his 1993 judgement for the “Ikerian Reefer” case (National Justice Compania Naviera SA v Prudential Assurance Company Ltd). Mr Justice Cresswell stated:

“Expert evidence that is 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 (demands) of litigation.”

In other words, the expert must not be a ‘hired gun’ advocating a case on behalf of their client.

To demonstrate this independence, the expert’s evidence should be:

- objective;
- unbiased; and
- within their area of expertise.

The failure of an expert to demonstrate these three characteristics is likely to result in the decision-maker giving less weight or, in some circumstances, striking out evidence provided by an expert. It is vital, therefore, for an expert to remain open-minded and balanced when providing an opinion. All three principles are likely to be tested under cross-examination.

The guiding principle to expert evidence is that the expert’s first duty is to the court or tribunal. Whilst each judge in the respective courts in each State and Territory have their own specific requirements and expectations of expert witnesses, the core principles are set out at Annexure A of the Federal Court of Australia’s ‘Expert Evidence Practice Note (GPN-EXPT)’.

If the expert’s circumstances change such that they are unable to fulfil these obligations to the court or tribunal, it is essential that they inform the instructing solicitor or client before further costs are incurred.

5.0 TYPES OF EXPERT WITNESS

The expert witness landscape continually evolves as legal teams seek opinions on the ever-narrowing nuances of disputes.

For construction disputes, experts generally fall under three distinct headings:

- Quantum Expert
- Delay Expert
- Technical Expert.

5.1 QUANTUM EXPERT

A quantum expert will be a person experienced with the management of costs, generally a quantity surveyor in construction disputes, who provides an opinion on the value of the disputed matters within a contract. Opinions could be provided on matters such as increased costs in a contract due to variations or the costs of works necessary to rectify defective work carried out under a contract.

A quantum expert may, for example, provide an opinion with respect to the additional costs associated with delays determined by a delay expert or the rectification works determined by a technical expert.



5.2 DELAY EXPERT

A delay expert may be an experienced engineer, architect, quantity surveyor or other professional with appropriate experience in scheduling, programming, and managing construction activities. A delay expert would provide an opinion on the impact that an event, such as a variation or inadequate information, had, or would have had, upon a contracted schedule of activities.

A delay expert might provide an opinion on the extent of delay caused by unforeseen latent conditions upon which a technical expert had provided an opinion.

5.3 TECHNICAL EXPERT

Technical experts form a more general group of specialists from which experts are appointed to provide opinions on specific technical matters. Technical experts range from general practitioners such as architects or structural engineers, who would provide opinions on matters such as the standard of service provided by a fellow professional, or the nature of a technical issue or interpretation to experts in narrower technical fields such as glass or acoustics.

When selecting technical experts, it is vital to ensure that the issue falls within the expert's area of expertise. For instance, an architect may have an understanding of acoustics but that is not the same as being an expert in acoustic matters.

Experts need to be very clear about the limits of their expertise. In some instances, expert opinion is required in relation to disruption.

Disruption experts could be either quantum, delay or productivity experts and they would be required to provide an opinion on the financial impact of an event on the contractor's ability to progress with the works. While the event may not have impacted upon the completion of the works, it may have impacted the manner in which the contractor had envisaged executing the works.

Where delays in the progress of construction works impact one or more parties' commercial activities outside of the construction contract, such that they incur losses beyond those envisaged by liquidated damages or other mechanisms, the services of a commercial damages expert may be required. Typically, an accountant, such experts might provide an opinion on the loss of profit due to the late opening of a hotel or perhaps the closure of a hotel during rectification works.

6.0 ACCEPTING INSTRUCTIONS

The matters set out below need to be considered before accepting instructions to act as an expert witness.

- a. Does the quantity surveyor have the specialised knowledge and experience necessary to give an opinion on the issues in question?
- b. Does the quantity surveyor have the capacity to assist, having regard to the timetable in the matter?
- c. Is the quantity surveyor able to provide - and be seen to be providing - an impartial opinion?

It is helpful to those who engage expert witnesses (generally solicitors) if they can access the quantity surveyor's CV online. The quantity surveyor should keep their CV up to date and make it as comprehensive as their duty of confidentiality to previous clients allows.

Having the time needed to dedicate to a new matter is very important. Often, an expert will be instructed when the court or tribunal has already put in place a timetable that sets the date on which the quantity surveyor's expert report is due. It is important for the quantity surveyor to have detailed discussions with their instructing party about the parameters of the task, before accepting the brief, to ensure there is sufficient time available to meet the deadline.



Extensions of time are not necessarily available (unless there is a good reason, such as late access to relevant documents).

A perceived conflict of interest can be as damaging as a real conflict, so it is important to implement and follow a robust system to flag potential conflicts of interest before the quantity surveyor takes instructions in a matter. Otherwise, should a conflict come to light later, the work previously undertaken by the quantity surveyor preparing their evidence may be wasted.

7.0 CONFIDENTIALITY, LEGAL PROFESSIONAL PRIVILEGE AND IMMUNITY

7.1 CONFIDENTIALITY AND LEGAL PROFESSIONAL PRIVILEGE

In general terms, legal professional privilege protects certain confidential communications between legal advisors and their clients from compulsory disclosure. It does so to promote better administration of justice by:

- a. encouraging freedom of consultation between clients and their legal advisors and full disclosure to the advisors of the relevant circumstances; and
- b. encouraging the production of information for the purposes of litigation.

The courts are regularly called upon to decide disputes about privilege, often involving draft expert reports.

Here it is useful to cite some decisions of the superior courts in which the principles have been considered. In *Grant v Downs* (1976) 135 CLR 674, Barwick CJ described legal professional privilege in these terms:

"Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the court should state the relevant principle as follows: a document which

was produced or brought into existence either with the dominant purpose of its author or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection."

In the decision of *Baker v Campbell* (1983) 153 CLR 52, Gibbs CJ observed that legal professional privilege exists...

"...to ensure that the client can consult his lawyer with freedom and candour, it being thought that if the privilege did not exist a man would not venture to consult any skilful person, or would only dare to tell ... half his case."

Today, the privilege is recognised as a matter of substantive law – rather than a mere rule of evidence – and in many countries is regarded as a matter of human rights. In *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, Deane J stated:

"It is a substantive general principle of the common law and not a mere rule of evidence that subject to defined qualifications and exceptions, a person is entitled to preserve the confidentiality of confidential statements and other materials which have been made or brought into existence for the sole purpose of his or her seeking or being furnished with legal advice by a practising lawyer or for the sole purpose of preparing for existing or contemplated judicial or quasi-judicial proceedings."

From the perspective of an independent expert witness, questions of privilege often arise concerning drafting expert reports. Is the draft report privileged, such that it may not be disclosed (or 'discovered') to the other parties? Or is the document not privileged, in which case it may be required to be disclosed? Both the uniform evidence law and the common law in Australia now adopt a 'dominant purpose' test.

What was the dominant purpose (if any) for which a document came into existence?



If the dominant purpose was to allow the solicitors to provide legal advice to their client, or to provide professional legal services relating to current or anticipated proceedings, then the document will be privileged.

There is no hard and fast rule to identify the 'dominant purpose'. However, the High Court of Australia has observed that the following approach is "close to a dominant purpose test":

"If a document is created for the purpose of seeking legal advice, but the maker has in mind to use it also for a subsidiary purpose which would not, by itself, have been sufficient to give rise to the creation of the document, the existence of that subsidiary purpose will not result in the loss of the privilege."

Of course, there may not be a dominant purpose. If two purposes are of equal weight, so that one purpose is not dominant over another purpose, then the document may not be privileged.

As an independent expert, the quantity surveyor must be aware of the concept of legal professional privilege, and the circumstances in which it may arise. There are important differences in practice and procedure across Australian jurisdictions that have a bearing on whether or not draft expert reports, or even solicitor's file note of a conversation with an expert (e.g., although obiter, the 2021 comment by Justice Dalton in *Landel Pty Ltd & Anor v Insurance Australia Ltd*), may be required to be disclosed. These matters are for discussion with the solicitors for the party retaining the quantity surveyor.

7.2 IMMUNITY FROM SUIT

A fundamental principle of Australian law, confirmed in *Hastwell v Parmegiani* [2023] NSWSC 1016, is that action against an expert witness for their conduct whilst giving evidence is precluded. The effect of this rule means that a civil action against an expert witness cannot be brought, even if it is alleged the expert's opinion was negligent, defamatory or misleading.

This was the case in the UK until 2011 when in *Jones v Kaney* [2011] UKSC 13, the court held there was no justification for granting expert witnesses immunity when participating in legal proceedings.

As immunity or otherwise of an expert witness varies across the globe, all experts should carefully consider potential expert witness engagements outside of Australia.

8.0 PREPARATION AND SUBMISSION OF A WRITTEN REPORT

Expert witnesses are usually required to present their evidence in the form of a written expert report unless otherwise directed. This is usually referred to as an 'expert witness report' or 'expert quantum report'.

The report may include a Scott Schedule or other similarly-formatted document, which summarises the issues being claimed in a format that can act as a useful tool for evidence comparison, and for summarising findings in a joint statement.

The contents of the report should preserve professional objectivity and impartiality at all times and should consider all the material facts and material provided with their instructions. The report should be the independent product of the expert witness, uninfluenced by the pressures of litigation.

The role of an expert witness is to assist the court or tribunal by providing objective, unbiased opinions on matters within their expertise and making it clear when a question or issue falls outside of their expertise or if they are unable to reach an opinion in the event information is not made available.

In providing a written expert witness report to be lodged before the court or tribunal, the quantity surveyor must comply with any rules, orders, directions, and protocols of the court or tribunal to which the expert witness report is to be presented.



The quantity surveyor's instructing solicitors should keep the client fully informed of any specific protocol or directions that must be met.

The content and extent of expert witnesses' reports should be governed by the scope of their instructions, general obligations and appropriate codes of conduct which set out the following prerequisites for which all experts (quantity surveyors) should be familiar:

- a. Introduce the expert witness report with an executive summary that concisely sets out the conclusions that have been reached with a summary table that references the source and location of the findings. Complex expert reports may require a more comprehensive approach if options/alternative opinions have been sought.
- b. It is recommended that the cover sheet reveals the name of the expert witness and includes the following information:
 - i. the case number and court;
 - ii. the instructing party and client;
 - iii. the opposing party;
 - iv. the subject/title of the report;
 - v. the date of the report; and
 - vi. the title of the 'report', or where appropriate 'supplemental report', 'amended report', or 'further amended report'.
- c. Provide details of qualifications and relevant experience, knowledge, and expertise. It is recommended practice that specific experience that is relevant to the case is set out in the expert witness report with general experience, background and curriculum vitae attached as an annexure. For example, an expert report associated with contaminated material would require the expert to have a general knowledge of groundworks/civil construction. The quantity surveyor's specialist experience must be clearly referenced in their curriculum vitae.
- d. List all the documents that have been provided or acquired during the investigative work and preparation of the report including any documents not included in the letter of instruction.
- e. Consider all matters that relate to or influence the issue(s) in dispute, upon which the quantity surveyor is required to give an opinion, including matters adverse to their client's case.
- f. Questions that fall outside of the quantity surveyor's expertise should be clearly noted. For example, a claim based upon disruption to the works may require the expertise of a delay analyst.
- g. State the methodology and the sources/ references used with clear and succinct language when developing calculations supporting a cost estimate/quantity and the like by providing transparent links to the supporting information.
- h. Provide appropriate references about publications/internet links/quotations or other material upon which the quantity surveyor has relied in preparing their expert report, including any calculations in the annexures. Be mindful that there may be an evidential problem with 'internet links' in that solicitors do not always accept that internet pages have not been changed.
- i. Refer to any staff member/associate that has contributed in any way to the preparation of the expert witness report including stating their relevant experience, knowledge, expertise and qualifications. It is necessary to state that the work they undertook was carried out under the quantity surveyor's direct supervision and the opinions stated are the quantity surveyor's and the quantity surveyor's alone.
- j. State all material facts upon which the quantity surveyor's opinion is based, including those that might detract from the opinion as given.



State all assumptions and clarifications upon which the quantity surveyor's opinion and reasoning are based. If their opinion is provisional or if they consider that further information is required, they should state that a final and unqualified opinion cannot be expressed until such time as further material is made available.

- k. Distinguish between those facts that the quantity surveyor believes to be indisputable and those that have been assumed, be it instructed or otherwise.
- l. When responding to questions of fact and opinion, the quantity surveyor must ensure to keep the two separate and discreet.
- m. Where there is a range of opinions on the matters dealt with in the expert witness report or the quantity surveyor has sought to offer options where further clarification is to be provided, the quantity surveyor must summarise the ranges of opinions and their sources supported by their respective opinion.
- n. When there are material facts in dispute, express separate opinions on each theory presented and show no partiality towards one opinion/fact unless it is possible to demonstrate that one set of facts is probable/improbable.
- o. If the quantity surveyor is unable to give an opinion without qualification, such qualification must be identified and clearly stated in their expert report.
- p. End the expert report with a summary of conclusions detailing a summary of the quantity surveyor's opinions.

Attest the expert witness report by including a signed declaration at the end of the report and any other requirements of the court. The quantity surveyor must print their name clearly beneath their signature and include all professional designatory letters together with the date of the report.

The requirements for a declaration may differ between jurisdictions and courts throughout Australia. However, a typical declaration includes wording similar to that stated below:

- a. I declare I have made all the inquiries that I believe are desirable and appropriate (save for any matters identified explicitly in the report) and that no matters of significance that I regard as relevant have, to my knowledge, been withheld from the court.
- b. I confirm that my report has referred to all relevant material facts made available to me and upon which my professional opinion has been based.
- c. I confirm that I understand and have complied with my duty to the [specify the court] as an expert witness which overrides any duty to those instructing or paying me, that I have given my evidence impartially and objectively, and that I will continue to comply with that duty as required.
- d. I confirm that I am not instructed under any conditional or other success-based fee arrangement.
- e. I confirm that I have no conflicts of interest.
- f. I confirm that I am aware of and have complied with the requirements of the codes, protocols and directions of the [specify the court].
- g. I confirm that my report complies with the requirements of AIQS [Australian Institute of Quantity Surveyors], as chronicled in the AIQS guidance note for quantity surveyors acting as expert witnesses.

A copy of the AIQS Declaration for Expert Witness can be found in Appendix A.

In the event of any departure from the requirements of this guidance note, this should be outlined to the court or tribunal at the earliest opportunity and in accordance with any procedures or arrangements agreed in advance when acting as an expert witness.



9.0 CHANGE OF OPINION

Expert opinions take time to mature, and developed opinions require reflection and balanced consideration. Very often, when presented with a set of circumstances for the first time, the initial impression turns out to be different from the final opinion.

The process of completing analysis and writing a report is fundamental to developing an opinion. The task of articulating an opinion, in itself, strengthens that opinion. Experts must recognise this process.

While clients and solicitors will press an expert for an opinion as early as possible, it is important to qualify an early impression to reflect the limited investigation or perhaps limited information available at that stage. If, however, the expert's opinion does not align with the expectation of the client the expert should be clear, while perhaps indicating at the same time what further information might change that opinion.

Should the expert have provided an opinion to its client at an early stage and, as the report nears completion, then arrives at a different opinion, the client must be made aware as early as possible of this shift in position. While the expert's opinion is theirs alone, the opinion expressed in a final report should not be a surprise to the client.

All experts' reports should be qualified to the extent that the expert is entitled to change their opinion should new information come to light. Such new information could be revealed on receipt of the other expert's report or during an expert conferral such that a modified opinion is provided in either a supplemental report or in a joint statement with the other expert.

New information may also come to light during a hearing when witnesses of fact are being cross-examined. Here, the client should be made aware of how this new evidence impacts the quantity surveyor's expert opinion and any intention to change their opinion in advance of any signed report or statement.

The final opportunity to declare an expert's opinion comes at the commencement of cross-examination when the expert is asked, on oath, whether the opinions expressed in the reports signed by the expert remain the expert's opinion. It is vital that by that point the client is clear about the expert's opinion and that this opinion is recorded in the documents provided to the court or tribunal. While it may be a difficult conversation, clients would far rather know an expert's changed position than hear it for the first time under cross-examination.

10.0 CONCLAVES AND JOINT STATEMENTS

The court may direct the quantum experts to conclave before the hearing in an attempt to agree on facts and to clarify, narrow and settle the differences between the parties. This is likely to involve joint conferencing or even a joint site inspection in an endeavour to agree on scopes of work that may require further consideration and dialogue between the experts.

The preparation of a joint statement/report should set out the questions placed upon them jointly by their instructing solicitors and set out the matters upon which the experts agree, the matters on which they disagree and the reasons for any disagreement.

Should an expert change their opinion on any material matter, such a change of opinion should be communicated (through their instructing solicitor) to the other side without delay and, when appropriate, to the court prior to the joint conference taking place.

The quantum expert must exercise their impartial and professional judgment about such a conference and joint report and must not act on any instruction or request to delay or avoid agreement. The expert must follow any lawful order or direction of the court, notwithstanding any directive by a client to the contrary. It should be known to the expert that their duty is to the court and not their instructing party.



The experts are to ensure that any joint conference is governed by honest dialogue between experts in a common effort to reach an agreement with the other expert witnesses about the relevant facts and issues that have arisen. The joint report is to be an outcome of this dialogue, and not merely a summary of the pre-existing positions, as otherwise, it will serve no purpose.

The primary aim of the joint conferencing process is to produce a narrowing of the conflicting opinions so that a court or tribunal can be directed towards those issues where differences of opinion can be discussed in detail during the cross-examination of the expert witnesses.

Failure to participate in a conclave will place the instructing party at a disadvantage in the conduct of the proceedings as it does not meet the obligation placed upon a litigant to act honestly and fairly in handling litigation. Narrowing the contentious issues at a conclave is likely to avoid some of the costs incurred in the proceedings.

11.0 PREPARING TO TESTIFY AND GIVING ORAL EVIDENCE

11.1 INTRODUCTION

For most experts, the prospect of giving evidence in court is the most uncertain and potentially worrying aspect of the expert's role.

For many this apprehension is because they have to explain their conclusions and opinions in an adversarial atmosphere and, in some cases, in public.

Remember that a quantity surveyor is a professional and must always expect to have to explain their opinions. In the legal arena, this is all part of the process of testing evidence.

The quantity surveyor should meet with their barrister before being called to give evidence to ensure the barrister is familiar with building terminology and has sufficient general knowledge of construction or procedures, they intend to question the quantity surveyor on. If this is not done, the quantity surveyor's barrister may have

good intentions but ask the wrong questions. They may ask the quantity surveyor a question, which the quantity surveyor is obligated to answer truthfully, that may not help the quantity surveyor's client's cause.

In other words, have a rehearsal in case the quantity surveyor needs to modify the barrister's terminology. For example, the barrister may ask the quantity surveyor a question about 'cement' when they mean 'concrete'.

In the majority of cases, it is unlikely that the quantity surveyor will ever have to testify in court. In those cases, the quantity surveyor will fulfil the function of an advisor without the need to appear in court. Ultimately, the quantity surveyor must see it as part of their role as an expert that an accomplished ability in the witness box is perhaps the most valuable skill to be cultivated.

11.2 PREPARATION

The time for preparation for court comes when the quantity surveyor receives their original instructions, not the days before the hearing. Each stage of the commission should be taken with an eventual appearance in the witness box in mind.

It is important to note that the quantity surveyor's reports/supplementary reports and joint statements have been lodged in court and are Evidence-in-Chief.

Ensure that the counsel with which the quantity surveyor is working fully understands the strengths and weaknesses of the case so that he/she may question accordingly. It equally applies to the quantity surveyor in preparing responses to potential questions on the weaknesses in their report.

There are subtleties that the quantity surveyor should be aware of that relate to a dichotomy when acting as an expert. On the one hand, the quantity surveyor is to act as a team member when working with their solicitors, counsel and any other experts on the same team.

Conversely, the quantity surveyor must remain independent and impartial and therefore never be part of the 'team' during the whole process prior to and during their court appearance.

The quantity surveyor should aim to convey an aura of calm confidence, as they have an important role as a member of the team. They should remember that they are the only ones who will have to explain their opinions, so should not let words be put in their mouth.

11.3 MAKING A START

First impressions are all important. The quantity surveyor will need to get off to a good start by familiarising themselves with the oath or affirmation and memorising the fundamentals such as their professional job title, qualifications and place of work.

The most commonly used oaths and affirmations are:

- Oath – "I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth and nothing but the truth." (Christianity, Judaism, Hindu & Islam)
- Affirmation – "I (insert name) solemnly, sincerely and truly declare and affirm that the evidence which I shall give shall be the truth, the whole truth and nothing but the truth." (Affirmation & Buddhism)

One tip – if giving evidence by video conferencing and the quantity surveyor chooses to swear under oath, ensure a copy of the Holy Bible/ Quran or similar is at hand.

Use this period as a 'warm-up period' to settle down and check the acoustics in the room (if applicable). It will ensure a good first impression.

Always be mindful of the fact that the quantity surveyor is there to assist the court or tribunal to understand technical matters outside the knowledge of the layman and above all, do not defend the indefensible.

Where the quantity surveyor is thoroughly familiar with the facts of the case and knows both their and the other side's expert's reports cover-to-cover, it is unlikely that they will falter during cross-examination.

Remember, most experts run into difficulties when they are either taking the role of an advocate or commenting upon matters that are outside of their jurisdiction (such as legal interpretation) or expertise.

Experts also run into difficulties when they attempt to defend their opinion, rather than explain it. The quantity surveyor does not ultimately care who 'wins'. Their role is to give an impartial opinion. It is psychologically important for the quantity surveyor to adopt a mindset that will explain their opinion but not defend it. It is for others to decide whether or not they agree.

11.4 THE GIVING OF EVIDENCE

Not all expert work culminates in the giving of evidence to a court or other tribunal. Much expert work is aimed at helping the parties to reach a settlement without recourse to law.

Court procedure for giving evidence normally consists of three stages but may vary depending upon the complexity of the matter:

- a. Examination in chief by counsel for the quantity surveyor's side;
- b. Cross-examination by counsel for the other side; and finally,
- c. Re-examination by counsel for the quantity surveyor's side.

Each of these examinations is aimed at different purposes and each requires a different technique from the expert.

11.5 EXAMINATION IN CHIEF

The purpose of 'Examination in Chief' is to enable the expert to relay their opinion under the supervision and guidance of their instructing party's counsel.



There are generally two methods employed:

- a. To place the expert's report in evidence (this is the usual practice), or
- b. To have the expert give direct evidence by their counsel asking questions.

It is during this stage that the expert establishes their credibility and clearly communicates the basis of their opinions by giving answers in simple terms so that the decision-maker understands them. In so doing, the decision-maker understands that the responses and the answers are directly pertinent to the questions asked.

11.6 CROSS-EXAMINATION

After the expert has given their evidence-in-chief, the counsel for the other side puts questions to the expert with the intention of testing the validity of the evidence. The process is designed to test the expert's evidence, put across alternative opinions or opinions that have not been considered and ultimately weaken or neutralise the quantity surveyor's evidence.

Discrediting the expert's evidence has the effect of neutralising their evidence.

During cross-examination, responses to questions should be kept to a minimum of words and no unnecessary information should be disclosed or volunteered.

Where the quantity surveyor finds their opinion is being misrepresented or misstated in the question put forward to them, they should correct it before answering the question.

Address the court or tribunal. The quantity surveyor is there to assist them. It does not assist if the quantity surveyor is drawn into an argument with cross-examining counsel.

11.7 RE-EXAMINATION

Finally, after cross-examination is finished, the quantity surveyor's counsel may pose questions to the quantity surveyor to clear up any matters raised for the first time by counsel in cross-examination.

This enables the quantity surveyor's counsel to clear up any misunderstandings or doubts that have arisen as a result of the cross-examination. It should be noted that questions can only be raised that relate to matters that have been previously discussed. It is not permitted for new matters to be raised during this stage.

11.8 CONCURRENT EVIDENCE

The practice of hearing concurrent oral evidence from expert witnesses of like discipline has become widespread. This is often colloquially referred to as 'hot-tubbing' and has been in use for several years in arbitral/court proceedings. The overriding duty to the court still applies, however, the structure and methodology differ considerably.

The court or tribunal may include directions for the quantity surveyor to give their evidence and be cross-examined on an issue-by-issue basis so that each party calls its quantity surveyor(s) to give evidence in relation to a particular issue, followed by the other party calling their respective quantity surveyor(s) to opine upon the same issue.

Alternatively, the court or tribunal may set an agenda for the taking of expert evidence concurrently or on an issue-by-issue basis, whereby the agenda should be based on the areas of disagreement identified in the experts' joint statement.

In this instance, the decision-maker will initiate discussions by asking the quantity surveyor in turn their views in relation to the issues on the agenda.



Once the quantity surveyor has expressed a view, the decision-maker may ask questions about it. During the questioning of an expert, the decision-maker may invite the other expert to comment or ask the expert's questions of the first expert.

After this process has been completed, the decision-maker will invite the parties' representatives to ask questions of the experts, followed by the decision-maker, who will summarise the experts' different positions on the issue and ask them to confirm or correct that summary.

12.0 THE GOLDEN RULES

The golden rules, with which every quantity surveyor should be conversant, are set out below.

- Do not be an advocate.
- Do not be or appear to be partisan.
- Do not respond to questions outside of your expertise.
- Do not be drawn into matters beyond your expertise.
- Do not adopt a defensive mindset.
- Be properly prepared.
- Know your report and your opposing expert's report thoroughly.



13.0 DEFINITIONS

TERM	DEFINITION
Court	A person or body of persons having judicial authority to hear and resolve disputes in civil, criminal, ecclesiastical, or military cases. The judiciary also includes the Court system itself.
Decision-maker	A person acting as a judge, referee or arbitrator.
Evidence	Any information presented to a Court or Tribunal which complies with rules under the relevant act. This may be Evidence of fact, expert opinion, or Hearsay Evidence. The weight to be attached to Evidence by a Tribunal will depend on various factors, the importance of which may vary from case to case.
Evidence-in-Chief	The questioning of an Expert Witness at a hearing to elicit their account of what took place prior to cross-examination.
Expert Witness	A witness called to give expert opinion by virtue of experience, knowledge, and expertise of a particular area beyond that expected of a lay person. The overriding duty of the Expert Witness is to provide independent, impartial, and unbiased Evidence to the Court or Tribunal to assist in reaching its determination.
Expert Witness Report	A report completed by the Expert Witness which must adhere to the rules of the specific Court or Tribunal.
Hearsay Evidence	A person can only give oral or written evidence as to what they themselves saw, heard or otherwise perceived.
Legal Professional Privilege	Protects confidential communications and confidential documents between a lawyer and a client made for the dominant purpose of the lawyer providing legal advice to the client, or for use in current or potential litigation.
Scott Schedule	A Scott Schedule is a document submitted to a court detailing the complaints regarding a third party which the court is being asked to consider. Such schedules are often used in cases where there are building defects, incomplete works or variations to the building contract.
Single Expert	Engaged to prepare a report on or behalf of both parties in dispute.
Tribunal	Tribunals are similar to Courts because they use similar processes to resolve disputes between parties. However, Tribunals are not part of the constitutionally established system of government, while the Courts are. Most Tribunals are set up to deal with a limited type of dispute and often cases that involve a dispute between an individual and government.
Without Prejudice Privilege	A rule of Evidence that, when certain elements are met, prevents communications and documents provided during the course of negotiations to settle a dispute or a potential dispute, from later being used against a party in Court.



APPENDIX A - AIQS DECLARATION FOR EXPERT WITNESS (TEMPLATE)

1. I understand that I am not an advocate for a party to the proceedings and that my paramount duty (which overrides any duty to a party to the proceedings or other person retaining myself as the expert witness or any person who is liable for paying my fees and/or expenses), is to assist the [court/tribunal*¹] independently and impartially on matters relevant to the area of my expertise.
2. I acknowledge that I have read the relevant code of conduct, rules, protocols, and directions, and agree to be bound thereby.
3. I have no conflicts of interest other than any matters I have disclosed in my report.
4. My report is my own, independent, impartial, and objective opinion.
5. I have made all the inquiries which I believe are desirable and appropriate (save for any matters explicitly identified in my report), and that all matters of significance which I regard as relevant have, to the best of my knowledge, been disclosed to the [court/tribunal¹].
6. My report has drawn attention to all material facts which I understand to be relevant to my instructions.
7. All matters upon which I have expressed an opinion are within my area(s) of expertise.
8. I have provided references and sources for all information I have used and/or relied upon.
9. If, after the date of this report, I change my opinion on a material matter or consider that this report requires any correction or modification, I will issue a supplementary report forthwith.
10. I am not instructed under any form of success-based fee arrangement¹.

[OR] ¹

I am instructed under a success-based fee arrangement. The details of my success fee arrangements are as follows: **[provide details here²]**¹

_____ (insert full name, qualifications & postnominals) _____

(signature)

(date)

.....

.....

(position)

(company)

(address)

¹Delete as applicable.

²If instructed under a success fee arrangement, provide details.



APPENDIX B - EXAMPLE SCOTT SCHEDULE (FOR JOINT EXPERT REPORT)

ITEM	DESCRIPTION	EXPERT 1		EXPERT 2		JOINT REPORT POSITION			EXPERT 1	EXPERT 2
		CLAIM \$	ALTERNATIVE \$	CLAIM \$	ALTERNATIVE \$	AGREED \$	DISAGREED \$	TOTAL \$		
1	CLAIM ITEMS									
1.1	DIRECT COSTS									
1.2	CHANGE IN METHODOLOGY									
1.3	ACCELERATION									
1.4	PROLONGATION									
1.5	LIQUIDATED DAMAGES									
1.6	TOTALS	-	-	-	-	-	-	-		



ADVANCING BUILT ENVIRONMENT
COST PROFESSIONALS

Level 3, 70 Pitt Street,
Sydney, New South Wales,
Australia 2000
+61 2 8234 4000

www.aiqs.com.au