

8 February 2018

President Kingham  
Land Court of Queensland  
GPO Box 5266  
BRISBANE QLD 4001

Dear President Kingham,

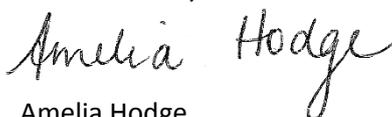
**Re: Guidelines for Expert Evidence in the Land Court**

The Australian Property Institute would like to thank you for the opportunity to provide feedback on the draft Guidelines for Expert Evidence in the Land Court and for the extension of time permitted to complete this feedback.

Please find attached the Australian Property Institute's feedback.

The Australian Property Institute welcomes any opportunity to provide input to the Court on this or any other matter and we look forward to working with you and the Court going forward.

Yours sincerely



Amelia Hodge  
Chief Executive Officer

Australian Property Institute Limited

# SUBMISSION

# GUIDELINES FOR EXPERT EVIDENCE IN THE LAND COURT

**Date** 7 February 2018  
**Contact** Mel Nelson, National Manager – Member Services and Advocacy  
**Email** [mnelson@api.org.au](mailto:mnelson@api.org.au)  
**Phone** 03 9644 7500

## Contents

|    |  |   |
|----|--|---|
| 1. | Introduction .....   | 3 |
| 2. | Terminology .....  | 3 |
| 3. | Direct Feedback Section 1: Background.....                               | 4 |
| 4. | Direct Feedback Section 3: Briefing of Experts .....                     | 4 |
| 5. | Direct Feedback to Section 4: Single Expert Witness.....                 | 4 |
| 6. | Direct Feedback to Section 5: Court Managed Expert Evidence (CMEE) ..... | 5 |
| 7. | Direct Feedback to Section 6: Experts Meetings .....                     | 5 |
| 8. | Direct Feedback to Section 7: Joint Expert Reports (JER) .....           | 5 |
| 9. | Direct Feedback to Section 8: Targeted Expert Evidence Hearings .....    | 5 |

## 1. Introduction

### 1.1 About the API

The Australian Property Institute (API) is the leading membership organisation for property professionals. It is impartial, objective and independent. With more than 8,000 members, API represents a wide range of property professionals who have a significant impact on the wider property industry.

API sets and maintains the highest standards of professional practice, education, ethics and professional conduct for our members. In turn, the work of the Institute raises the bar for the entire property profession.

API membership requires minimum qualifications and experience and ongoing professional development and education, ensuring a highly qualified, highly skilled profession.

API members can be found across all sectors of the property profession, including private practice, public sector and academia. This broad base of qualified and skilled professionals is unique to the Australian Property Institute. The Institute is committed to building and maintaining a strong base for the future of the property profession through broadening the expertise and knowledge of membership.

### 1.2 Guidelines for Expert Evidence in the Land Court

Firstly, the API would like to congratulate the Land Court and President Kingham on the proactive approach to improve procedures in the Land Court.

The API would also like to thank the Court for the opportunity to be consulted on this important topic for our Members.

It is the view of the API that the document presents well and will be effective, however, there are some opportunities for improved clarity and robustness.

## 2. Terminology

2.1 The paper relates to professional (experts) appearing as expert witnesses in the Land Court. The API proposes that the language throughout the document be consistent in the use of the words 'expert witness' where required. For example, the first line on page 3 reads;

*"the role of an expert is incompatible with the role of an advocate or agent."*

Whilst in agreement, the API believes that if the word 'witness' was added after 'expert' it would make it clear that it applies to the situation where the 'expert' is appearing in court as the 'expert witness' rather than acting in their capacity as a professional who is an expert in their field and providing 'expert' advice to one of the parties to the matter.

This change aligns with advice provided by the API to our Members in December 2017 on this same matter. This advice can be accessed at <https://www.api.org.au/news/national-member-reminder-expert-v-advocate>.

### 3. Direct Feedback Section 1: Background

- 3.1 The second dot point is weakened by the phrase “and should not”. The Court has, quite rightly, criticised expert witnesses where it is perceived they were acting as an advocate. The API proposes rewording this to “Acknowledges that an expert **must** not act as an advocate.”
- 3.2 The API supports the inclusion of the final dot in the second paragraph. Litigation involves substantial costs particularly when the matter is heard in court. Testing one’s own opinion against the opinion of another expert should result in many matters being resolved, either by withdrawal or compromise, prior to a formal court hearing. Naturally the expert has no control over the resolution other than as a recommendation to the client.

### 4. Direct Feedback Section 3: Briefing of Experts

The briefing also includes instructions on matters of law. Refer to *Chief Executive, Department of Transport and Main Roads v Cidneo Pty Ltd* [2015] QCA 96. Dalton J said at [64]

*“It was submitted at the hearing of this appeal that experts are independent and, the implication was, beyond the parties’ control. However, it is the duty of lawyers to properly instruct experts so that they provide evidence relevant to the legal questions the Court must decide.”*

In that case the approach taken by the valuers in their Joint Expert Report differed from the pleadings. The criticism related as to whether injurious affection, severance and enhancement, which take into account subsequent events not known at the relevant date, could be incorporated into a “before and after” method of assessment.

The first dot point in the second group should be qualified with the “instructing party” rather than “any party”. The expert needs to have the brief limited to the instructing party and not necessarily the client who, on occasions, may attempt to influence the opinion of the expert witness who is attempting to assist the court to understand a particular issue. The client interference can confuse the delivery of the opinion of the expert.

The second dot point should be amended to “documents and / or information” and similarly qualify to “instructing party”.

### 5. Direct Feedback to Section 4: Single Expert Witness

Most of the content of this section is relevant to all experts, not just a single expert. The API suggests the heading be changed to “Requirements of Expert Reports (Statement of Evidence).” In addition, we suggest the first paragraph be moved to the end of the section.

## **6. Direct Feedback to Section 5: Court Managed Expert Evidence (CMEE)**

The API proposes the court provides a minimum of three months from the date of the direction for a Joint Expert Report (JER) to be prepared as part of the CMEE process. The API welcomes the section of the guidelines which allows for an extension of the timeframes required, as some JERs can take an extended period, particularly when they are reliant from JERs from experts in other fields.

## **7. Direct Feedback to Section 6: Experts Meetings**

In paragraph seven of this section, the API proposes that for clarity the wording is changed from 'may' to 'should' as follows:

"the experts are not required to 'horse trade' opinions to reach settlement but they ~~may~~ should consider;"

## **8. Direct Feedback to Section 7: Joint Expert Reports (JER)**

The acronym JER in the heading conforms to industry practice. The API recommends that references to JR in the text should be adjusted to JER.

## **9. Direct Feedback to Section 8: Targeted Expert Evidence Hearings**

The API is supportive of this approach.

The API looks forward to providing further advice and consultation. For any further information or clarification, or to arrange a meeting please contact Mel Nelson, National Manager – Member Services and Advocacy at [mnelson@api.org.au](mailto:mnelson@api.org.au) or on (03) 9644 7500.