

Administrative Review Tribunal (Expert Evidence) Practice Direction 2024

I, the Hon Justice Emiliou Kyrou AO, President of the Administrative Review Tribunal, make the following Practice Direction.

Dated 9 December 2024

THE HON JUSTICE EMILIOU KYROU AO
President, Administrative Review Tribunal

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Part 1. Preliminary

- 1.1 This Practice Direction is made under section 36(1) of the *Administrative Review Tribunal Act 2024* (Act).
- 1.2 This Practice Direction is arranged in 5 Parts:
 - (a) Part 1 – Preliminary;
 - (b) Part 2 – Duty of parties and experts;
 - (c) Part 3 – Reports;
 - (d) Part 4 – Concurrent evidence assessment; and
 - (e) Part 5 – Concurrent evidence procedure.
- 1.3 This Practice Direction commences on and has effect from the date it is signed. This Practice Direction applies to all proceedings where expert evidence is required or intended to be given whether lodged before, on or after this date, and remains in effect until it is superseded or revoked.
- 1.4 The purpose of this Practice Direction is to make directions about the form and content of evidence to be provided to the Tribunal by experts.
- 1.5 This Practice Direction applies to written reports and oral evidence. It applies to evidence which consists of factual information only as well as evidence which consists of factual information and the expression of an opinion.
- 1.6 This Practice Direction should be read together with the *Administrative Review Tribunal (Common Procedures) Practice Direction 2024*.
- 1.7 To the extent that this Practice Direction is inconsistent with the *Administrative Review Tribunal (Common Procedures) Practice Direction 2024* in relation to applications for review of decisions, the provisions of this Practice Direction prevail. However, where this Practice Direction is silent in respect of any matter, the provisions of the *Administrative Review Tribunal (Common Procedures) Practice Direction 2024* shall apply.
- 1.8 This Practice Direction does not apply to the extent that it is inconsistent with:
 - (a) a provision of the Act or another Act or instrument under which the Tribunal has powers to review decisions;
 - (b) a provision of a regulation made under the Act or another Act; or
 - (c) a provision of a rule made under the Act.

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- 1.9 If the Tribunal makes a direction in relation to a proceeding that is inconsistent with this Practice Direction, the Tribunal’s direction applies to that proceeding and this Practice Direction does not apply, to the extent of the inconsistency.
 - 1.10 A failure by the Tribunal to comply with this Practice Direction does not affect the validity of anything done by the Tribunal.
 - 1.11 A failure to comply with this Practice Direction may have consequences for the weight that is given by the Tribunal to the evidence provided by an expert.

Note: The Tribunal is not bound by the rules of evidence relating to opinion evidence (see section 52 of the Act) and may have regard to material that would not be admissible in a court applying the rules of evidence. The Tribunal will determine the weight that should be given to any evidence that is before it.

Definitions

- 1.12 In this Practice Direction:

Act means the *Administrative Review Tribunal Act 2024*.

concurrent evidence means a procedure where two or more experts give evidence at the same time in a Tribunal hearing and in addition to providing their own evidence, they can listen to, question and comment on the evidence of the other expert(s).

expert means a person who has special knowledge in a subject area due to their skills, qualifications and experience in that subject area.

member means a member of the Tribunal.

Tribunal means the Administrative Review Tribunal.

Part 2. Duty of parties and experts

Duty to the Tribunal

- 2.1 Parties or their representatives must ensure that any expert who is engaged to prepare a report or to give evidence in proceedings in the Tribunal:
 - (a) is given a copy of this Practice Direction at the time the expert is engaged; or
 - (b) already has a copy of this Practice Direction.
- 2.2 An expert giving evidence:
 - (a) has an overriding duty to provide impartial assistance to the Tribunal on matters relevant to their area of knowledge or experience;

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- (b) is not an advocate for a party to a proceeding.

2.3 Parties and experts must comply with this Practice Direction.

Conflict of interest

2.4 If an expert:

- (a) has a pre-existing relationship with the party who has engaged the expert; or
- (b) is party to any unusual remuneration arrangements, including where the expert's remuneration is dependent upon the outcome of the matter,

this must be disclosed in any report or disclosed to the Tribunal before the expert gives evidence.

2.5 If an expert has, or becomes aware of, an actual or perceived conflict of interest that may impact on their role as an expert, the expert must disclose this to the party who engaged them.

2.6 Where a party becomes aware that an expert has an actual or perceived conflict of interest, either due to a disclosure by the expert or through other means, and the expert has prepared a report that has been, or is subsequently, lodged with the Tribunal, the party must notify the Tribunal and the other party or parties of the actual or perceived conflict of interest without delay.

Part 3. Reports

Required information

3.1 An expert's written report prepared for the purpose of a proceeding in the Tribunal must include the following information either in the body of the report or as an annexure:

- (a) details of the expert's subject area of knowledge and their qualifications and/or experience;
- (b) the letter of instruction or details of the questions or issues the expert was asked to address in the report and a reference to any documents or other materials the expert was given to consider;
- (c) details of any facts and assumptions that inform the report and the sources for those facts and assumptions;
- (d) reasons for any opinion that is expressed.

Note: An optional expert report cover sheet which ensures relevant information has been provided is available on the Tribunal’s website at www.art.gov.au.

- 3.2 Where relevant, the expert’s written report must also include the following information either in the body of the report or as an annexure:
- (a) details of any examinations, tests or other investigations upon which the expert has relied in preparing the report as well as the identity, qualifications and experience of the person who conducted the examinations, tests or investigations; and
 - (b) details of any literature or other secondary sources relied upon in preparing the report.
- 3.3 If the expert preparing the report believes that their opinion is not a concluded opinion or the expert is unable to reach a concluded opinion for any reason, this must be stated in the report. Where the expert believes the report may be incomplete or inaccurate without some qualification, that qualification must also be stated in the report.
- 3.4 An expert preparing a report must make it clear when a particular question or issue falls outside their field of knowledge.
- 3.5 Any expert’s written report prepared for the purpose of proceedings in the Tribunal, whether it consists of factual information only or factual information and opinion, must include the following declaration:

I understand that I have an overriding duty to provide impartial assistance to the Tribunal. No matters of significance have been withheld from the Tribunal.

Notification requirement due to errors, omissions or changes

- 3.6 If an expert who has prepared a report:
- (a) becomes aware of a material error or omission relating to a factual matter in the report; or
 - (b) changes their opinion on a material matter for any reason,

the party who engaged the expert must be notified of this in writing. If the report has been, or is subsequently, lodged with the Tribunal then the party or their representative must notify the Tribunal and the other party or parties of the material error or omission or the change in opinion without delay.

Application to documents given to the Tribunal under section 23 of the Act

- 3.7 Documents given to the Tribunal pursuant to section 23 of the Act may include reports that fall within the scope of this Practice Direction. If a party wishes to place particular reliance on such a report but the report does not include

information of the kind referred to in paragraphs 3.1 to 3.5 of this Practice Direction, the party should consider whether any additional information should be sought from the expert and given to the Tribunal.

Part 4. Concurrent evidence assessment

Objective

- 4.1 The objective of using the concurrent evidence procedure in the Tribunal is to support its capacity to make the correct or preferable decision by:
- (a) creating a setting in which the evidence and opinions of expert witnesses can be better explained, analysed and understood;
 - (b) assisting experts in fulfilling their role as impartial individuals whose duty is to assist the Tribunal; and
 - (c) enhancing the efficient operation of Tribunal proceedings by reducing the overall time taken to hear and determine applications for review.

Suitability of cases

- 4.2 The concurrent evidence procedure may be used in any case where more than one party will call oral evidence from experts. Its use is not limited to particular jurisdictional areas or to particular kinds of expert evidence.
- 4.3 The Tribunal may take into account a range of factors in considering whether the concurrent evidence procedure should be used in a particular case, including:
- (a) the nature and complexity of the issues in relation to which expert evidence is to be given;
 - (b) the areas of expertise and level of expertise of the experts who will give evidence;
 - (c) the likely impact of using the concurrent evidence procedure on the length of the hearing and the costs of the parties;
 - (d) whether all parties are represented; and
 - (e) the views of the parties.
- Note:** The Tribunal may take into account other factors that it considers relevant to deciding whether to use the concurrent evidence procedure.
- 4.4 The concurrent evidence procedure is more likely to be considered suitable for use where:

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- (a) expert evidence is central to the issue(s) in dispute in the case;
 - (b) experts will be commenting on the same issue(s);
 - (c) the concurrent evidence procedure will assist in clarifying and understanding areas of difference in the expert evidence;
 - (d) experts are of like disciplines;
 - (e) experts have comparable levels of expertise; or
 - (f) use of the concurrent evidence procedure will reduce the length of the hearing.

4.5 If the Tribunal considers that the concurrent evidence procedure may be suitable, a directions hearing may be convened to discuss its use.

Deciding whether the concurrent evidence procedure will be used

4.6 The potential use of the concurrent evidence procedure should be considered as early as possible in the proceeding. The Tribunal or a party may raise the issue for discussion during the pre-hearing process. The Tribunal will decide whether the concurrent evidence procedure is to be used.

4.7 If the Tribunal decides that the concurrent evidence procedure will be used, the Tribunal will issue directions as necessary. The directions may require the parties to:

- (a) confer and endeavour to provide to the Tribunal dates on which the experts can appear at the same time; and
- (b) provide to the experts copies of relevant reports and other documents.

4.8 The Tribunal will endeavour to list the case for hearing at a time when the experts are available to give evidence at the same time.

4.9 The Tribunal prefers that experts participate in the concurrent evidence procedure in person. However, a party may request that an expert participate by telephone or video link. The Tribunal will determine whether this is appropriate in the circumstances of the case.

4.10 In general, a decision that the concurrent evidence procedure is to be used should be made as early as possible and, in any event, not less than a week before the listed hearing date.

Role of the Tribunal

4.11 The Tribunal is responsible for managing the concurrent evidence procedure to ensure that it proceeds fairly and efficiently.

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- 4.12 The Tribunal will ensure that appropriate hearing room facilities are available when concurrent evidence is to be used so that there is sufficient space for the experts to give evidence in person.
 - 4.13 The Tribunal will also ensure that appropriate conference room facilities are available in the event that the Tribunal directs the experts to confer (see paragraph 5.4(c)).

Role of the parties and their representatives

- 4.14 Parties and their representatives should raise for the Tribunal's consideration the appropriateness of concurrent evidence procedures as soon as possible during the pre-hearing process. If they consider such procedures are appropriate, they should apply to the Tribunal for directions regarding the use of such procedures.
- 4.15 Parties and their representatives must ensure that all relevant steps are undertaken to facilitate the use of the concurrent evidence procedure. This includes complying with any directions relating to the use of the procedure.
- 4.16 The concurrent evidence procedure involves a departure from the traditional method of taking evidence from expert witnesses. Representatives are expected to adjust their approach to take account of the procedure outlined in paragraph 5.4 and any specific directions given by the Tribunal.
- 4.17 Representatives may ask questions of the experts to ensure that all relevant views and material are clarified and put to the Tribunal (see paragraph 5.4(e)).

Role of experts

- 4.18 Experts must participate in the concurrent evidence procedure in good faith. Experts must be willing to consider and comment on alternative factual premises and opinions.

Part 5. Concurrent evidence procedure

Experts' conference

- 5.1 The Tribunal may direct that the experts who are to give evidence concurrently are to confer prior to the day of the hearing or, as set out in paragraph 5.4, on the day of the hearing as part of the concurrent evidence procedure.
- 5.2 The purpose of the conference is for the experts to identify any areas of agreement and clarify areas of disagreement in relation to the issues before the Tribunal. The Tribunal may direct the parties to prepare a joint written memorandum identifying areas of agreement and disagreement.

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- 5.3 Where the Tribunal has directed the experts to confer, it would be improper for an expert to be given, or to accept, instructions not to reach agreement.

Concurrent evidence procedure

- 5.4 This paragraph sets out the way in which the concurrent evidence procedure will generally be conducted in the Tribunal. The Tribunal may determine that a departure from the standard procedure is appropriate in the circumstances of a particular case.

- (a) The experts will each take an oath or make an affirmation.
- (b) When necessary, the Tribunal will outline the way in which the concurrent evidence procedure will proceed.
- (c) The Tribunal will identify any significant factual matters that have arisen in the evidence already given in the proceeding and may clarify the issues the experts should address in their evidence. The parties or their representatives will be invited to comment on, add to, or seek to clarify any matters raised by the Tribunal. The hearing may be adjourned for a short time to allow the experts to confer in light of this discussion and to identify any areas of agreement and clarify areas of disagreement.
- (d) Each expert will be given the opportunity to express their views on the issues and to engage in a dialogue with the other expert(s), which may involve asking questions of the other expert(s). The Tribunal will facilitate the process and may ask questions of the experts. In general, this stage of the procedure will occur without the intervention of the parties or their representatives.
- (e) The parties or their representatives will then be invited to ask questions of the experts.
Note: See paragraph 4.16 for more information in relation to this aspect of the procedure.
- (f) Each expert will be invited to give a brief final summary of their views on any of the issues before the Tribunal.
- (g) At any stage of the process, the Tribunal may intervene and ask questions.

- 5.5 The expert should generally be addressed by name. This will assist in the preparation of any transcript from the hearing.