THE PERFORMANCE OF EXPERT VALUATION WITNESSES IN AUSTRALIA

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ABSTRACT

Earlier research in the UK found that the performance of expert valuation witnesses was inconsistent. This paper aims to examine the organisation, training and performance of the expert valuation witness in Australia. After reviewing the legal context, the paper examines the criticisms that have been made of expert witnesses and carries out survey work of expert valuation witnesses in Australia, using a comparable survey instrument to that used earlier in the UK. The paper concludes that the current expert witness system is operating reasonably well in Australia, but that more formal training may help to overcome potential bias.

Keywords: Expert witnesses, role, performance and training, Australia.

INTRODUCTION

During 1997, Crosby, Lavers and Murdoch undertook research into professional negligence actions against valuers in both the UK and Australia (Crosby, Lavers and Murdoch, 1998a; 1998b). This research included an examination of 38 valuation negligence cases in the UK and it was found that the performance of expert witnesses in these cases raised a number of concerns. These concerns were addressed by further research concentrating on the role, performance and training of expert valuation witnesses in the UK (Crosby, Lavers and Murdoch, 1999).

In addition to a comprehensive review of the legal context of the UK expert witness system, this research was based upon an analysis of survey data of the opinions of expert witnesses on their role, backed up by further survey work of judges, lawyers, arbitrators and independent experts.

This paper reports on parallel research into the role and performance of the expert valuation witness in Australia. The Australian work replicated the UK research as far as possible. A survey of expert witnesses in Australia was carried out using a virtually identical survey questionnaire. Although no supporting survey work was carried out of judges, arbitrators and other interested parties, Freckelton and others completed a

survey of judges in Australia in 1999 (Freckelton et al., 1999) and this paper draws off these findings. As far as expert valuation witnesses in Australia are concerned, there has been little written in the area recently (see Shank, 1983; Parkinson, 1984; Davison, 1988; Callinan, 1988) and therefore the survey work was necessary to determine present practices and attitudes.

The aim of the paper is to examine the organisation, training and performance of the expert valuation witness in Australia. First, the legal context is discussed before the paper addresses the criticisms that have been made of expert witnesses in general and expert valuation witnesses in particular. The results of the survey work are presented with a discussion of the implications of the research findings for the role of the expert valuation witness. The objective of this paper is solely to address the Australian responses and the implications for expert valuation witnesses in Australia.

THE LEGAL CONTEXT

Expert evidence is necessary where a dispute involves specialist matters of which the judge may lack knowledge. Expert evidence may consist of the witness's *opinion*; it thus forms an exception to the general rule that a witness may give evidence only as to *fact*. Valuers who act as expert witnesses give evidence as to their opinion of property values.

As a general principle, persons giving expert evidence must possess appropriate specialised qualifications or experience, and their expertise must form part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as reliable (ALRC, 1999a). However, it is not necessary for the expert witness to possess any formal professional or academic qualification — "expertise" is a question of fact. For example, section 79 of both the Commonwealth and New South Wales Evidence Acts 1995 refers to "specialised knowledge based on the person's training, study or experience".

In Australia, expert witnesses and expert evidence are subject to a range of controls, deriving from legislation, case law and the rules of the particular professional bodies to which experts belong. Legislative rules, such as the New South Wales Supreme Court Rules, apply only to cases tried in a court of law (though they cover not only an expert's appearance in court, but also the preparation of evidence for potential court proceedings)(Madden, 2000). Significantly, the RICS Practice Statement on "Surveyors Acting as Expert Witnesses" specifically applies to all "judicial or quasi-judicial bodies" and defines these to include "Courts, Tribunals, Committees, Inspectors, Adjudicators, Arbitrators and Independent Experts" (RICS, 1997).

Judges have stated on many occasions that an expert witness owes a duty to "the court" (as the embodiment of justice), and that this transcends any duty owed by the expert to the client. The best known description of this duty is by Cresswell J in *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68, where it was emphasised that the witness should always be independent, objective and unbiased, and that he or she should never assume the role of an advocate. This general requirement of impartiality has since been enshrined in Australia, for example, in the Federal Court Practice Direction, Guidelines for Expert Witnesses (Chesterman, 1998).

The need for expert witnesses to be independent of their clients is also stressed by Codes of Practice and Guidance Notes issued by various professional bodies. In relation to valuers, the RICS Practice Statement (RICS, 1997) is of particular interest. This provides that:

"The primary duty of the Surveyor is to the Judicial Body to whom his evidence is given ... The duty is to be truthful as to fact, honest as to opinion and complete as to coverage of relevant matters ... The Surveyor's evidence must be independent, objective and unbiased. In particular, it must not be biased towards the party who is responsible for paying him. The evidence should be the same whoever is paying for it."

The Australian Council of Professions, which includes professional bodies representing accountants, architects, surveyors and engineers, has published guidance on the "Roles and Duties of an Expert Witness in Litigation" (ACP, 1998; Da Fina, 1998). This statement says that the expert has a threefold duty. The expert's primary duty is to the court. There is a secondary duty "to the body of knowledge and understanding from which his or her expertise is drawn". The expert's tertiary duty is to the party which has sought his or her advice. The Australian Property Institute (API, 2000) is currently developing a Guidance Note on Acting as an Advocate or Expert.

CRITICISMS OF EXPERT WITNESSES' PERFORMANCE

The Woolf Committee, in its Interim Report on the Civil Justice system in the UK, noted that expert evidence was one of the two aspects of civil procedure which had caused most concern among those making submissions (Woolf, 1995).

Criticisms of expert witnesses, on the ground of failing to maintain a proper degree of independence from their clients, can be found in a number of court judgments (for example, *Abbey National Mortgages plc v Key Surveyors Nationwide Ltd* [1995] 2 EGLR 134). Australian judges have also been concerned about the issue of bias (for example, *Vakauta v Kelly* (1989) 87 ALR 633).

The Australian Institute of Judicial Administration's report entitled "Australian Judicial Perspectives on Expert Evidence: an Empirical Study" (Freckelton et al., 1999) surveyed all 478 Australian judges. The judges rated bias as the most serious problem (para 4.9) with the failure to prove the bases of expert opinion as the next most serious. Nevertheless, the judges had quite a positive response to expert reports (para 4.11). The most persuasive factors when an expert was giving evidence were "clarity of expression and impartiality" (para 4.13).

The Australian Law Reform Commission, in both its report: "Managing justice" (ALRC, 1999c) and its earlier Discussion paper 62 (ALRC, 1999b), discussed the role of experts and the problems of the use of expert witnesses within the Australian court system. The Commission echoed the Woolf Report, saying:

"[6.75] Some of the criticism of the present use of expert evidence is based on claims that the use of expert evidence is a source of unwarranted cost, delay and

inconvenience in court and tribunal proceedings. Other mischiefs frequently associated with expert evidence include that:

- the court hears not the most expert opinions, but those most favourable to the respective parties and partisan experts who frequently appear for one side
- experts are paid for their services, and instructed by one party only, some bias is inevitable and corruption a greater possibility
- questioning by lawyers may lead to the presentation of an inaccurate picture, which will mislead the court and frustrate the expert
- where a substantial disagreement concerning a field of expertise arises, it is irrational to ask a judge to resolve it; the judge has no criteria by which to evaluate the opinions
- success may depend on the plausibility or self-confidence of the expert, rather than the expert's professional competence."

The Commission endorsed the development of guidelines similar to that used in the Federal Court (Recommendation 64). The Commission also recommended the development of a generic template code of practice for expert witnesses (Recommendation 65).

The Western Australia Law Reform Commission's Review of the Criminal and Civil Justice System (WALRC, 2000) made similar comments.

SURVEY OF EXPERT VALUATION WITNESSES IN AUSTRALIA

Destination and response

In 2000, a postal survey of expert valuation witnesses was undertaken across Australia to identify how the expert witnesses viewed their task. The survey instrument was very similar to that used in the UK in 1997. The survey destinations were identified from lists of members supplied by the API State Divisions. The State Divisions selected the potential expert witnesses in different ways, hence the comparatively large number from Western Australia. The total number of destinations was 169. The number of responses was 126 of which 112 were usable. The usable response rate was therefore 66% and the total response rate was 75%. Of the 14 responses not used, one response was too late for the analysis and the others were from respondents who did not carry out (or who no longer carried out) this kind of work. The analysis was undertaken after a few very minor amendments had been made to the responses; for example, where respondents stated that they had not read any guidance but then responded on the quality and usefulness of the guidance.

Details of the respondents

The response was from expert valuation witnesses spread all over Australia. Table 1 sets out the breakdown by State.

Table 1: Usable Response by State

State	Number	State	Number
Australian Capital Territory	6 (5%)	Victoria	13 (12%)
New South Wales	28 (25%)	Western Australia	39 (35%)
Queensland	11 (10%)	Tasmania	8 (7%)
South Australia	6 (5%)	Not known	1 (1%)

Due to the different sources of initial destinations from each state, it is difficult to put the response by state into any context, but there does appear to be over-representation from Western Australia. Around 75% of respondents worked in offices which included 5 or fewer qualified staff, with around 25% in sole partnerships/managerships. In addition, the majority of respondents were senior within their organisation, with only eleven respondents (10%) who were neither senior partner/principal nor other partner/director.

The major professional qualification held by respondents was membership of the API. Around 95% held an API qualification and one-quarter of those held some form of dual qualification, mainly API/CPV.

The practice experience of respondents was extensive. More than 40% of respondents had over 30 years' experience in the profession and another 50% had over 15 years' experience. Less than 10% had below 15 years' experience. Expert witness work appears to be undertaken by senior professionals.

The type of experience is set out in Table 2. It records the number and type of cases with which respondents had been involved in the last 5 years.

Table 2: Type of Expert Witness Work Undertaken

Type of CASE	*% of Resp.*	*No of cases*	*Type of CASE*	*% of Resp.*	*No of cases*
Professional liability case in Federal Court	**19%**	**41**	**Professional liability case in State Court**	**38%**	**202**
Land acquisition case in Federal Court	**9%**	**19**	**Land acquisition case in State Court**	**47%**	**800**
Property dispute in Family Court	**52%**	**989**	**Rating dispute in State Court**	**46%**	**1206**
Rental determination/review (commercial)	**58%**	**974**	**Rental determination/review (residential)**	**17%**	**112**

Note: % of Resp. = % of Respondents who had taken part in this kind of case

The most widespread experience was in the commercial rent determination area, although rating work appeared to account for the highest number of cases with which the expert witnesses had been involved. In addition, 65 respondents (58%) suggested other types of expert witness work they had undertaken.

The survey also sought information about certain procedural matters. Around 55% of respondents had appeared as an advocate for a client in a dispute, in circumstances where they were legally entitled to do so. In addition, 88 respondents (80%) had been in attendance at court while other expert witnesses gave evidence in the same court, and 37 respondents (33%) had given evidence as part of a panel of expert witnesses.

Overall, the respondents were experienced and senior members of the valuation profession, who appeared to represent opinion taken from a wide range of backgrounds in terms of location of their practices, size of organisation and type of work.

Guidance and training of experts as valuation witnesses

Only around 40% of expert witnesses had ever undertaken specific training for expert valuation witness work. Around 50% said they had read guidance from the court on acting as an expert witness, and 64% said they had read guidance from one or more professional institutions. However, it became clear from respondents' comments on these questions that a significant number had confused court and professional guidance. In total, 90 respondents (80%) said they had read guidance from one or both sources.

The views of the expert witnesses on the guidance note are illustrated in Figure 1.

Fig. 1a: Guidance from Courts

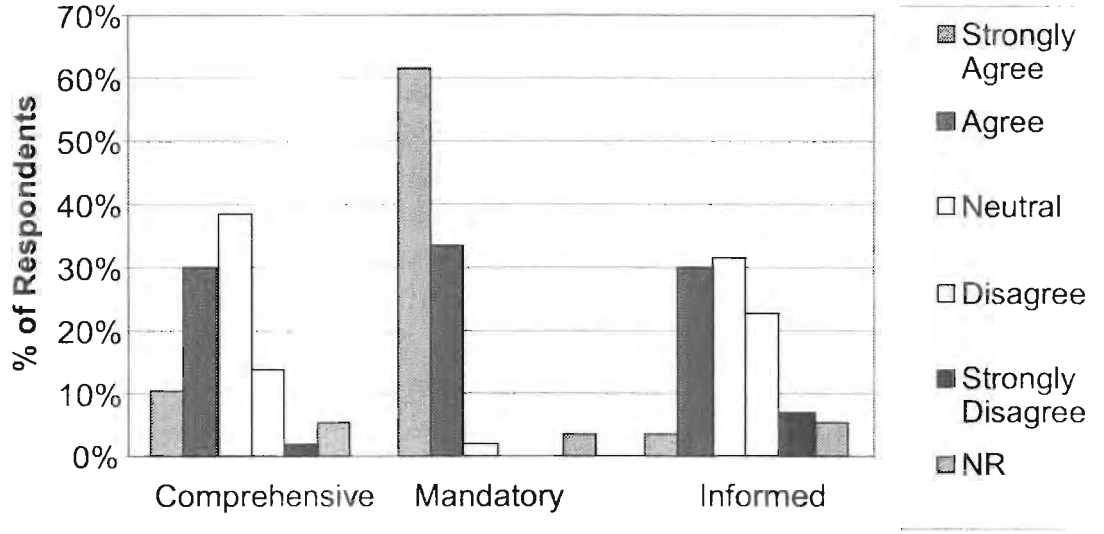
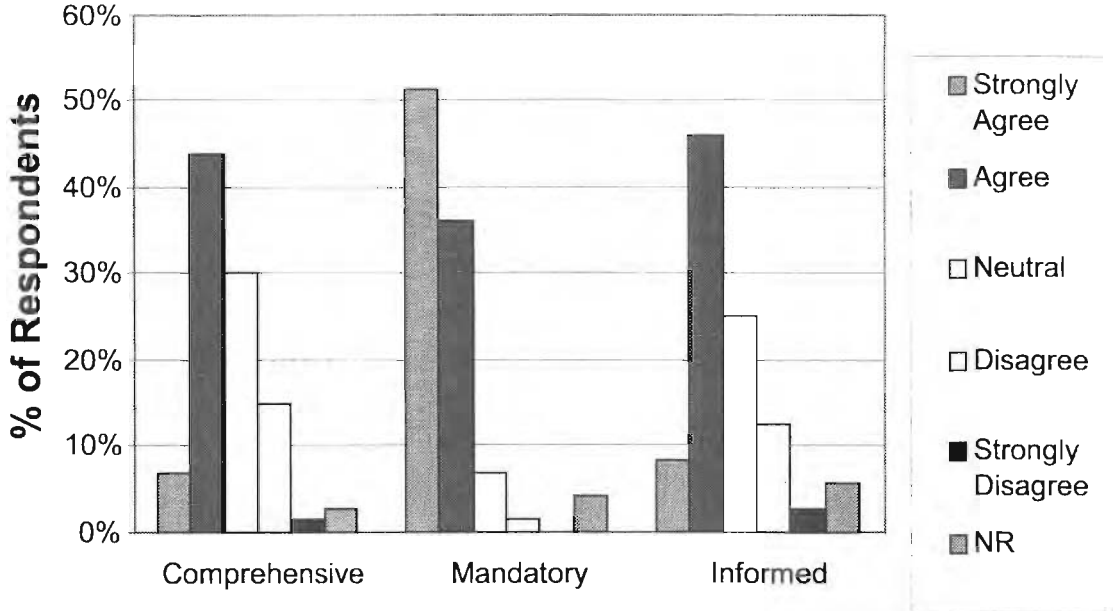


Fig. 1b: Guidance from Professional Body(ies)

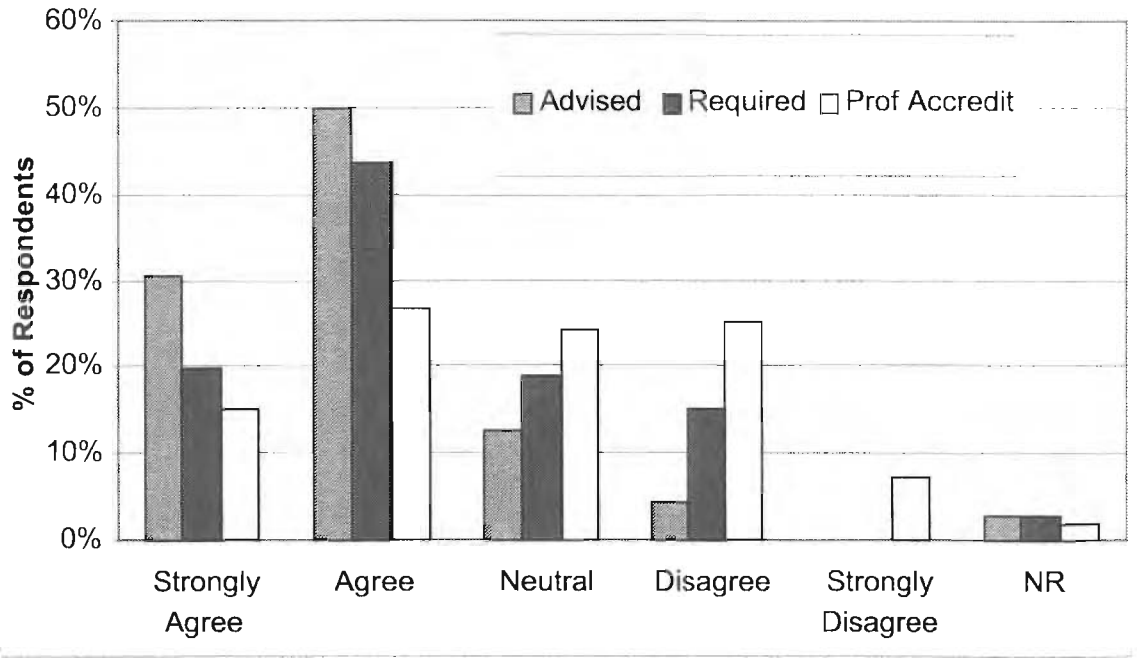


Of the 90 respondents who said that they had read guidance of one sort or another, 57 said they had read guidance from the court. Only 23 respondents (40%) agreed or strongly agreed that such court guidance was comprehensive concerning acting as an expert witness, although this rose to 37 respondents out of 72 who said they had read professional guidance (51%). However, the number who thought that guidance should

be mandatory reading for expert witnesses rose substantially, to 95% and 88% respectively. The number who felt that the guidance added to the respondent's knowledge fell to 33% for the court guidance and 54% for the professional guidance. It would appear that the guidance was not particularly well regarded by respondents, but they nevertheless felt that it should be read by expert witnesses, even though a significant number did not feel it added to their own knowledge.

Figure 2 illustrates the response of expert witnesses to the level of formal training theyshould be required to undertake. There is no doubt that the respondents felt that they should be advised to undertake formal training, with 80% agreeing and strongly agreeing. Support fell to 64% if that training were to be required rather than merely advised. The issue of specific professional accreditation of expert witnesses provoked a further fall in support, with only 42% agreeing or strongly agreeing and 32% disagreeing and strongly disagreeing.

Fig. 2: Expert Witness Opinion on Level of Formal Training



Organisation of appointment of the expert witnesses

The third section of the questionnaire addressed two main issues: how expert witnesses in courts and tribunals were and should be organised, and whether they carried out their task in accordance with their duty. Expert witnesses were asked what were the current arrangements for their appointment, as well as what would be the best arrangement. At present, most disputes are heard with the assistance of two expert witnesses, one called by each of the opposing parties. However, four other alternatives were suggested: a single court appointed expert; a single expert agreed between the parties; multiple experts for each party; and an expert for each party giving evidence in panel format.

The results are illustrated in Figures 3 and 4.

Fig. 3: Actual Arrangement of Expert Witnesses

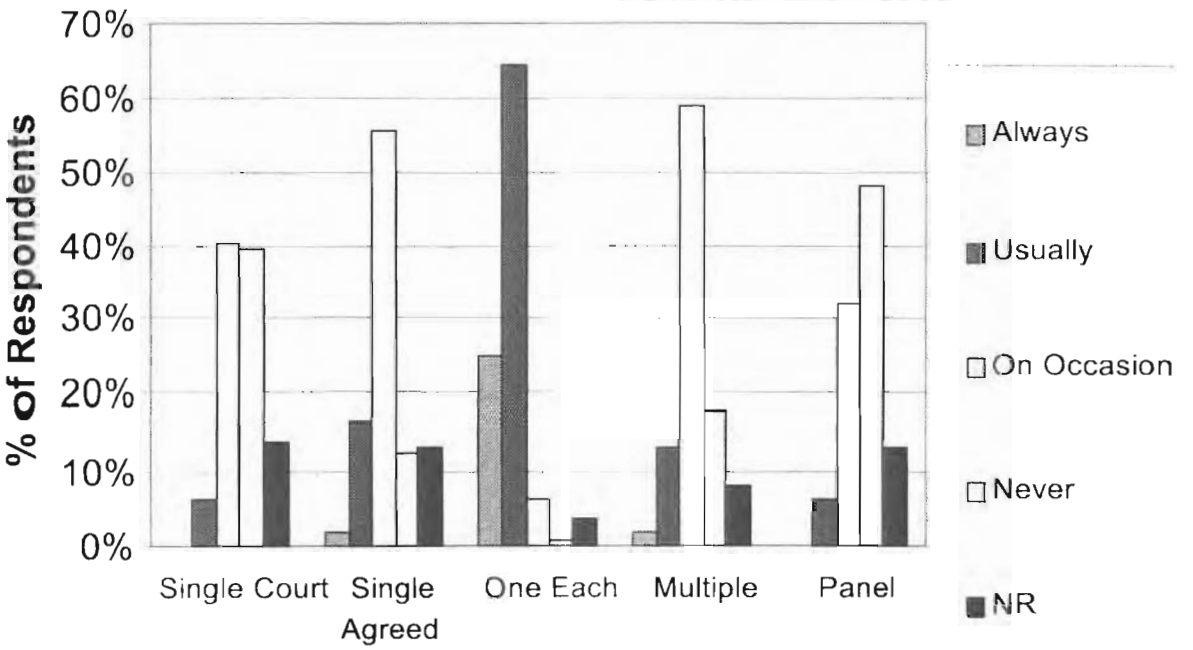
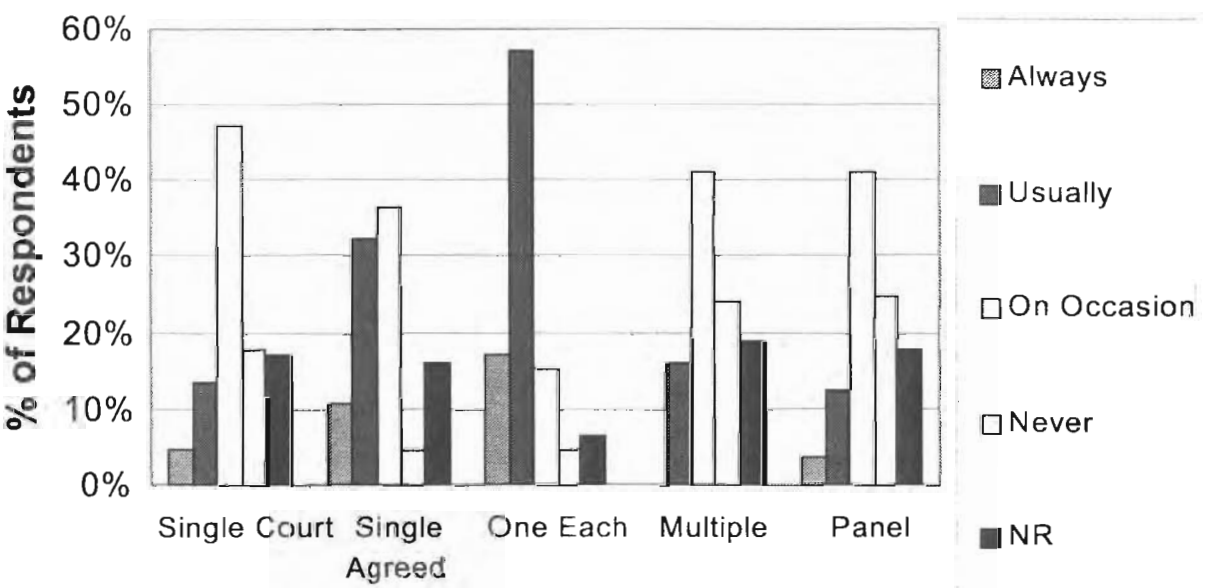


Fig. 4: Preferred Arrangement of Expert Witnesses

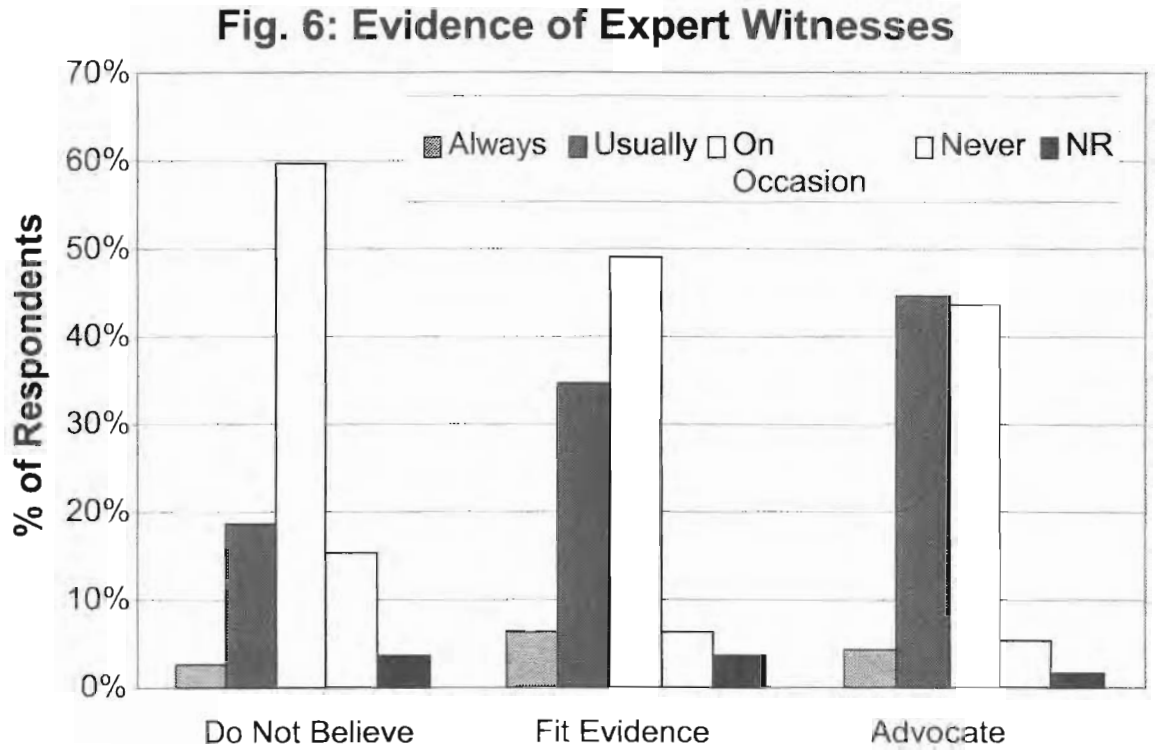


At present, one expert witness for each party is usual in valuation disputes. This was cited as always or usually the case by 100 respondents (89%). However, this fell to 83 respondents (74%) when asked for the preferred arrangement. Court-appointed single experts increased in favour (from 6% of respondents to 18% wishing that they were always or usually adopted) as did single experts agreed by the parties (19% to 43% of respondents) and panel evidence (6% to 16% of respondents). Multiple experts were always, usually or occasionally found currently by 74% of respondents. In terms of preference, this fell to 57%.

Duty and performance of the expert witness

The majority of respondents correctly identified their primary duty as owed to the court, rather than to their client or to any other person or ethic. Figure 5 illustrates that 82 respondents (73%) indicated the court, with a further 10% in the "other" category who identified the court along with a combined duty to another party.

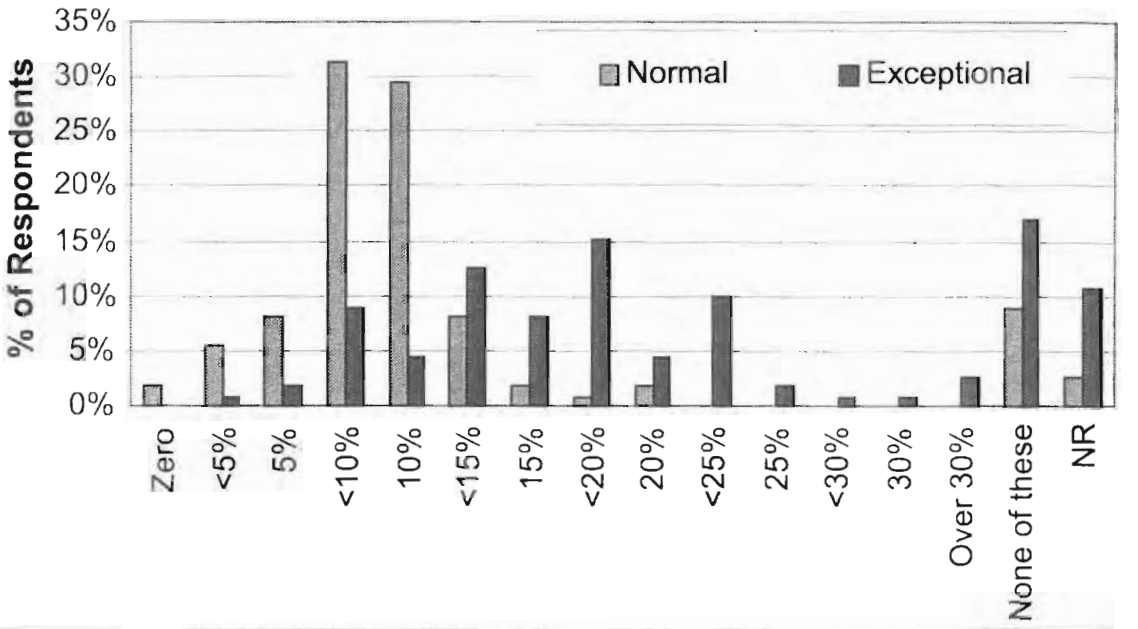
Although the majority were aware of their duty to the court, the expert witnesses were less convinced that their opponents in any case adhered to the duty to provide objective evidence to the court. The respondents were asked to comment on whether those they opposed actually believed the evidence they gave in court, whether they fitted it to the client's case and whether they advocated the client's case while acting as an expert witness. The responses are illustrated in Figure 6.



A substantial minority of expert witnesses felt that the opposing experts advocate for their client and fit their evidence to the client's case. But the majority felt that opposing experts believe their evidence to be objective. The most extensive charge by the minority was that 49% of them felt that opponents advocate for the client 'always' or 'usually'. A total of 46 respondents (41%) felt that opponents fit evidence to the client's case 'always' or 'usually'. But only 24 respondents felt that opponents do not believe their evidence 'usually' or 'always'. However, 67 respondents (60%) felt that opponents do not believe their evidence 'occasionally', 55 respondents (49%) believe that evidence is fitted to the client's case 'occasionally' and 49 respondents (44%) felt that advocating for the client takes place 'occasionally'. Only 17 respondents felt that evidence is believed all the time and this falls to 7 (6%) of respondents for belief that evidence is never fitted and 6 respondents (5%) for belief that advocating for clients never happens. The majority of respondents (62%) felt that instructions from client's legal advisors are adequate 'always' or 'usually'.

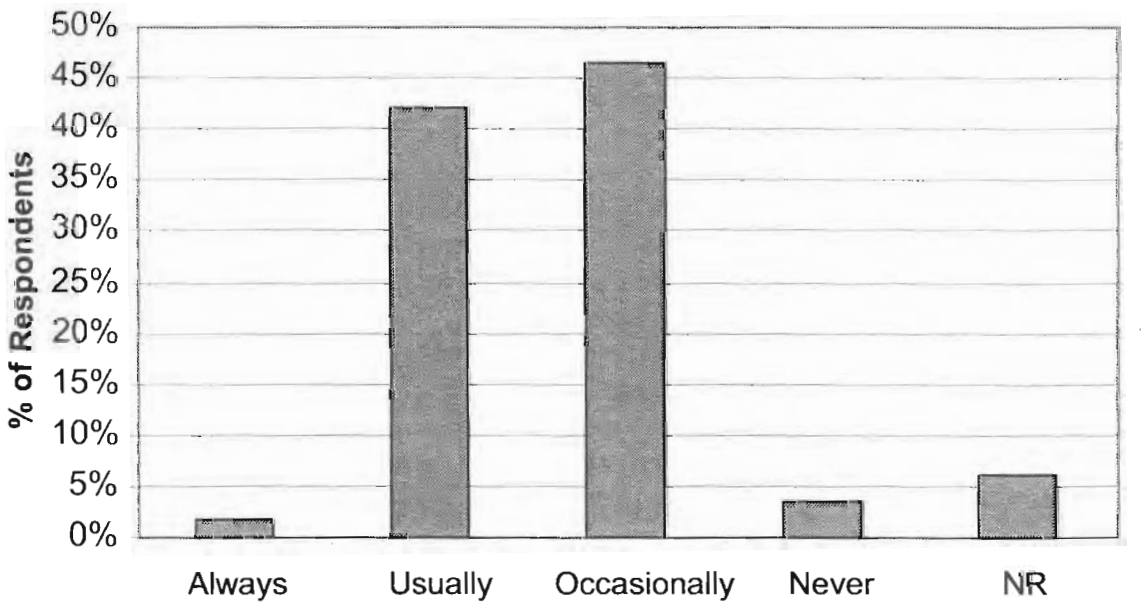
In view of the previous research into the margin of error, and its related issue of the performance of expert witnesses in valuation disputes, the questionnaire asked what answer the respondents would give if asked by a judge to specify a margin of error in a court, in both normal and exceptional circumstances. Of the 99 respondents who quoted a figure, 17 (17%) suggested that it should be +/-5% or less and a further 68 (69%) suggested it should be no more than +/-10% in normal circumstances. No response exceeded +/- 20%. In exceptional circumstances, the number of respondents who expressed an opinion on the margin falls to 81 and the average margin rises. The responses are also more variable. However, 18 respondents still felt that the margin should not exceed +/-10% and a further 45 that it should not exceed +/- 20%. The responses are illustrated in Figure 7.

Fig. 7: Margin of Error



In addition, respondents were asked whether opposing experts, when putting forward a valuation to the court, came within the margin which they had identified. The responses are illustrated in Figure 8.

Fig. 8: Expert Witnesses Within Margin of Error



As can be seen, there was a fairly even split between those who thought that this occurred at least 'usually' (44%) and those who thought it occurred no better than 'occasionally' (50%).

IMPLICATIONS AND CONCLUSIONS

The survey work of Australian expert valuation witnesses for this paper reveals a widespread belief that their evidence is not completely unbiased. Some believe that their colleagues are deliberately fitting the evidence to the clients' case, do not believe the evidence they present and are actively advocating for the client. But the majority of Australian expert witnesses perceive that generally their opponents believe the evidence they present, but that this evidence is fitted to the client's case and that advocating for/representing the client occurs regularly. This suggests that bias is generally perceived to be sub-conscious rather than conscious. There is some inconsistency with these results, for example, only around 20% of Australian expert witnesses think that their colleagues do not believe their evidence "always" or "usually", but this rises to over 50% when advocating for or representing the client is considered. Given the increasing interest in behavioural valuation research, conscious and unconscious bias in expert witnesses appears to be a area for further research.

Despite this acceptance that not all evidence is completely objective, the Australian expert valuation witnesses require a high level of accuracy from their colleagues. Around 80% of all respondents and 90% of those who suggested a figure thought that the bracket or margin of error should be no more than +/- 10% in normal circumstances. Almost half of them believe that their colleagues meet these standards, at least usually.

The Australian expert witness survey revealed that, although a large majority were well aware of their primary duty to the court, a small minority of expert witnesses were not fully aware of their responsibilities. This raises the question of how the performance of expert witnesses might be improved.

One aspect of improving performance could be a more rigorous training regime. There was a strong acceptance of any requirement for formal training and even specific accreditation for expert witness work. Over 60% of Australians were in favour of mandatory formal training and over 40% in favour of specific accreditation for expert witness work.

The second aspect is the organisation of expert witnesses in the court. In previous research, Crosby et al (1998b) suggested that Australia might be organising its expert witnesses differently from the UK and that this might impact on the variation between expert witness valuations. However, this preliminary conclusion was based upon the use of multiple experts in a few relatively large negligence cases. The survey results show that the existing and preferred system in Australia is one expert valuation witness for each side, rather than multiple experts on each side. The use of a single agreed expert witness does receive some support but the use of single court appointed experts, multiple experts or a panel system is not advocated by the experts themselves.

The interpretation of these results is difficult. There is a roughly even split between the perception that expert witnesses are objective and value within fairly tight margins of accuracy and the perception that they do not believe the evidence they are giving and do not come within an acceptable accuracy tolerance. Given the importance of truth to the judicial system, it could be argued that any hint of bias needs addressing.

However, given the variation inherent in the valuation process*, it is doubtful that a single expert would be able to produce more accurate valuations than where a judge or arbitrator has the benefit of a range of opinion given by more than one expert, even where bias is present.

The system is not perfect; but no changes seem to be warranted to the organisation of experts. The more obvious improvement could be in training. The expert witnesses were not averse to more formal training. There is less than 100% knowledge of their responsibilities and there has been criticism of expert witnesses in general by judges and others. These two factors suggest that the provision of more formal training by the professional body representing valuers may improve the performance of those expert witnesses who are not perfectly aware of their duties or persist in ignoring them, while not unduly hampering those who are performing properly. This reinforces the need for the institutional Guidance Note which it appears from the API (2000) is in course of preparation.

* For a discussion of valuation variation and accuracy in the Australian context, see Newell and Kishore (1998) and Parker (1998).

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