

Supplementary report - ACCC Roaming Declaration Inquiry

8 March 2017

Confidential – Subject to Legal Professional Privilege

1 My instructions

- 1.1 I have previously submitted an expert report dated 1 December 2016 (my *First Report*) to Australian Competition and Consumer Commission (**ACCC**) in connection with the ACCC's current Domestic Mobile Roaming Inquiry (the *Inquiry*). The First Report outlined my opinions in my capacity as an economic expert in response to certain questions in relation to the Inquiry that had been put to me by Norton Rose Fulbright Australia (**NRFA**), legal representatives for Vodafone Hutchison Australia (**VHA**). I have now been asked by NRFA to respond to the first report prepared by Prof George Yarrow for Telstra Corporation Limited (**Telstra**) (the *Yarrow Report*) and to his subsequent note of 24 January 2017 (the *Yarrow Note*) commenting on my First Report among other matters (I call this the *Supplementary Report*).
- 1.2 I acknowledge that I have read the Federal Court of Australia's Harmonised Expert Witness Code of Conduct and I agree to be bound by it. My qualifications and experience are outlined in My Report.
- 1.3 In my First Report, I was instructed to address a specific set of well-targeted questions that are important for the ACCC in conducting its Inquiry. In this Supplementary Report, I address a wider set of issues that have been raised by Telstra's submission to the Inquiry and by the Yarrow Report. I will also make certain observations about the report by Ovum dated 2 December 2016 (the *Ovum Report*).

2 Introductory remarks

- 2.1 In earlier sections of the Yarrow Report, a number of fundamental economic concepts that are useful in understanding the issues at play in the Inquiry are helpfully outlined. I am in general agreement with Professor Yarrow's characterizations of these aside from some minor quibbles which are not material and on which I therefore do not elaborate.

- 2.2 There is much common ground between Professor Yarrow and myself. In particular, we agree that competition in mobile telecommunications takes place on multiple dimensions including price, coverage, and service quality. We are also in agreement that static and dynamic investment considerations are highly important in analyzing the long-term interests of end-users (*LTIE*) and the impact that a declaration would likely have on the LTIE. Following on from this observation, there is also much common ground on the observation that the statics/dynamics trade-off has important implications for the tension between service-based and facilities-based competition (I will return to finer points in this regard below). These observations are all quite orthodox and would be common ground for the vast majority of economists.
- 2.3 It is in the application of these widely accepted broad principles to the specific case of the mobile telecommunications in Australia and the Inquiry where my principal differences with the Yarrow Report and the Yarrow Note emerge. These differences can be summarized under the following headings:
- a. The merit and results of considering the existence of natural monopoly in evaluating the impact of declaration on the LTIE,
 - b. The existence and nature of spillover effects from the existence of market power in Telstra-only areas into urban and other contestable areas, and
 - c. The interaction of competition with investment and innovation, and price competition.

3 Natural monopoly

- 3.1 In my First Report I was asked to evaluate whether the supply of mobile telecommunications in regional Australia is likely to be a natural monopoly based on data supplied by VHA. I concluded that the supply of mobile telecommunications constitutes a natural monopoly in those areas of regional Australia that are least-densely populated.
- 3.2 The existence of natural monopoly in certain parts of Australia is not conclusive to the question of whether or not the declaration would be in the LTIE. It is, however, an important part of the analysis. The Australian regulatory approach is based on the core idea that, where certain facilities are uneconomic or unlikely to be duplicated, and where the services of those facilities are materially conducive to enhanced competition in adjacent markets benefiting consumers, it may be appropriate for access to those facilities to be shared subject to an appropriate access price. This is the underlying approach is not explicitly stated in the Part XIC access regime (unlike the Part IIIA access regime), but it implicitly underlies the legislation and policy position, such as in the evaluation of the LTIE. The question of whether there is natural monopoly in mobile telecommunications in certain regions is therefore an important building block in the ACCC's analysis in the Inquiry.
- 3.3 In the Yarrow Note, the three sources of incremental revenue accruing to an MNO investing in infrastructure in a low population density area A (or, for that matter, any area) are itemized

as consisting of: (1) Retail customers primarily located in A; (2) Wholesale customers; and (3) Retail customers primarily located outside A.¹

- 3.4 While I agree that this is (perhaps trivially) true, unfortunately Prof Yarrow's third category of revenues itself conflates and combines two quite different revenue sources in a way that masks differences two quite distinct customer groups and revenue sources, with quite different implications for the analysis. Moreover, the subsequent discussion in the Yarrow Note seems to confirm that Professor Yarrow has these two quite different ideas in mind under this single heading. Moreover, he unfortunately seems to me to skip and elide between these different customer groups in a way that I find unhelpful to the discussion at hand. The two different customer groups that the Yarrow Note appears to conflate into this single category are as follows.
- 3.5 The first is the custom within area A of retail customers primarily located outside A (**within-area custom**). These are customers who travel to and use the services within A. When these customers travel to area A and use the mobile telecommunications facilities in area A, the revenues can quite properly be attributed to the facilities in A. In my view these are the customers that the ACCC has in mind when it refers to "customers who travel frequently" in its Discussion Paper to the Inquiry.²
- 3.6 The second is the custom outside of area A of retail customers primarily located outside area A (**outside-area custom**). These are customers located elsewhere who choose a particular MNO because it has coverage in area A. The boost in revenue that Professor Yarrow appears to include is the entire incremental revenue accruing to the MNO from these incremental customers, even where most or all of that revenue accrues in the customer's primary location far from area A.
- 3.7 By conflating the outside-area custom into the inside-area custom, Professor Yarrow appears to be asserting that one should, as an example, attribute *all* of the revenues from an incremental customer in Sydney who has chosen an MNO because it offers service in Kalgoorlie to the revenues of the facilities in Kalgoorlie when one is determining if Kalgoorlie is a natural monopoly – even if the bulk of those revenues in fact accrued in Sydney. This approach casts a very wide net in the search for revenues for a natural monopoly evaluation in a manner that to my mind is methodologically illegitimate.
- 3.8 Much more importantly from the perspective of the Inquiry, this approach would mask and obfuscate rather than illuminate the fundamental underlying question of whether facilities are likely to be duplicated in the areas in question or whether these areas' status as Telstra-only areas will endure. When one takes the sound approach of including Yarrow's categories 1, 2, and the within-area custom but not including the outside-area custom for reason that this would constitute over-attribution, the results are as I have presented them in my First Report. These results point to the low likelihood of duplication of facilities in some areas of Australia and the high likelihood of enduring local monopoly and consequent enduring market power.

¹ The Yarrow Note, paragraph 22.

² Australian Competition & Consumer Commission (2016), *Domestic mobile roaming declaration inquiry: Discussion Paper*, October 2016, at p.13.

- 3.9 This leads me to make two comments on the Ovum Report regarding the issue of duplication. First, the financial modeling results of the Ovum Report up to its last half-page are broadly comparable to the results in my First Report and they support the proposition that it would be uneconomic to duplicate mobile telephony infrastructure in the less densely populated regions of Australia. Second, in a very brief section on the final half-page of the Ovum Report, alternative results are presented that suggest that duplication of infrastructure in some (but certainly not all) of these areas might become privately profitable for Optus under certain conditions. These alternative results appear to be based on unreasonable assumptions regarding the market share increase in urban areas that might result from a duplication of Telstra's footprint in Telstra-only areas. As the results are presented in a brief and conclusory manner and not accompanied by the actual modelling, it is difficult to understand them in finer detail, but the ACCC may be in a position to cast a finer critical eye on the results. Importantly, these results appear to be entirely driven by a similar approach to Professor Yarrow's, that is, of entirely attributing increased Optus revenues from new customers to the incremental coverage areas; my difference with this is as I have described it in relation to Professor Yarrow's approach in the previous paragraphs.

4 Spillover effects

- 4.1 Section 4 "Spillover Effects" of my First Report outlined that Telstra likely has the ability to leverage its market power in Telstra-only areas into other, contestable areas in a way that likely creates a spillover effect of softening competition and raising prices, with the consequence that Telstra likely has market power in respect of end-users wishing to have coverage in the Telstra-only areas.
- 4.2 The concepts of bundling and tying are well understood in competition law, economics, and enforcement; it is similarly well-known that these mechanisms have the potential to generate anti-competitive effects. The central point is that a supplier who has market power in one product can leverage that market power into having market power in another product by bundling the two products together when selling them to consumers. The ACCC, being a competition authority in addition to being a regulatory body, will of course be very well versed in these ideas, and, while Professor Yarrow's specialization (as I understand it) is regulation rather than competition, I am confident that he will also be familiar with the well-known economic literature and case law cited in my First Report.
- 4.3 When a competition authority engages in a market definition exercise, it commonly defines a market along both the product dimension and the geographic dimension. Both of these dimensions are important to consumers when they make their choices and influence the desire and ability of consumers to substitute among alternatives. The ACCC commonly defines narrower geographic markets when consumer behavior suggests that consumers do not readily switch to far-away locations for a particular service, for instance in its analysis of mergers in certain retail markets.
- 4.4 In this way, a "bundle" can consist of services in different locations as well as consisting of different products, as I describe in detail in my First Report. The most common forms of bundles in competition cases are bundles of different products, such as printers and printer

cartridges, or computer operating systems and internet browsers. However, a “multi-dimensional service package” (as the Yarrow Report calls mobile telephony³) comprised of services delivered in different locations is a bundle in the same way, and can be understood as having competition implications in the same way. It is then simply a bundle along the geographic dimension rather than the product dimension. It is not necessary actually to define the markets with any precision to see that this can be so.

- 4.5 It is worth observing that, in placing significant weight on the existence of demand complementarities across different coverage areas, the Yarrow Report shares the same underlying economic analytical framework. Demand complementarities in essence take place when the demand for one product generates demand for a related but different product. In conceiving of mobile telephony delivered in different geographic areas to be different but related services in this way, the Yarrow Report adopts precisely the same underlying approach that I adopt. I am left puzzled that Professor Yarrow is left puzzled.⁴
- 4.6 The ACCC’s Discussion Paper notes in some detail that mobile telephony markets may work differently in different geographic locations of Australia, and the Yarrow Report attributes great importance to the idea of competition on coverage. This underscores the uncontroversial proposition and my belief that location matters greatly to end-users, and that end-users cannot switch readily between services delivered in different locations, because this would require traveling to the other location in order to make a mobile phone call. This can similarly be seen quite compellingly in some facts provided by Telstra in its submissions⁵ regarding the drivers of end-users’ purchasing decision. Telstra’s data show that just over 40% of all customers surveyed chose their provider in 1H2016 on the basis of which network offered better coverage as one of the factors. Strikingly, the data also show that 70.2% of Telstra customers cited coverage as a reason for their choice of provider, in contrast to 24.2% and 17.6% of Optus and VHA customers (respectively) who cited coverage as a driver of network choice. In my view, this broadly appears to be a picture of different customer groups (some who require regional coverage, some who don’t) roughly self-selecting into the different providers based on whether those MNOs can provide services in the different required locations. In respect of those customers who self-select into Telstra because they value coverage in the Telstra-only areas, Telstra is the only provider capable of meeting their needs, which conveys market power on Telstra in respect of those customers (I will return to this below).
- 4.7 When one sees this, it is simple to see that mobile telephony across different locations operates as a bundle of telephony services offered in those different locations. It then follows directly that this bundle can in certain circumstances be used to leverage market power from one (“tying”) market where the supplier has a monopoly (or market power more generally) into another (“tied”) market in the ordinary way, by reducing the ability of consumers who need to buy both products to choose among different alternatives in the tied market.

³ The Yarrow Report, paragraph 11.7

⁴ The Yarrow Note, paragraph 39

⁵ Telstra Submission, pages 30-32.

- 4.8 As I outlined in detail in my First Report, this effect is likely to be a part of the market dynamic in Australian mobile telephony in a way leading to higher prices. The likely transmission mechanism is a leveraging of Telstra's market power from the Telstra-only areas into the other areas where there is more than one provider, including the urban areas. Telstra has market power in the Telstra-only areas by virtue of being the only supplier (Professor Yarrow's brief and conclusory claims to the contrary notwithstanding). End-users who require service in the Telstra-only areas are thereby sufficiently restricted to Telstra as a supplier to give Telstra greater market power over those end-users, compared to the market power Telstra would have if there was more genuine and vigorous competition in respect of those end-users. This is self-evidently the case for end-users primarily located in the Telstra-only areas. It is also the case for those end-users in all other areas who require or value coverage in the Telstra-only areas, including those located in the urban areas. In this way, through customers in other areas, Telstra's market power is leveraged from the Telstra-only areas into the urban areas.
- 4.9 Professor Yarrow correctly points out that, for the leveraging of market power to work effectively, there must be market power to leverage. However, in both the Yarrow Report and the Yarrow Note, he is quite curtly dismissive of the idea that there could be market power. I confess that I find this dismissal rather striking. I agree with Professor Yarrow that competition for coverage is an important factor in determining the extent of coverage in regional Australia and that there is therefore significant endogeneity in the coverage decision. However, competition for coverage is certainly not the only factor – the ACCC extensively discusses government subsidy programs to extend rural coverage into uneconomic areas, such as the Black Spots Program, in its Discussion Paper. Once an MNO covers an area alone, it clearly has market power in that area, even if it is only transient. It would take extreme assumptions, such as the assumption of effectively immediate entry as in the contestable markets literature⁶, to displace the market power of a single operator that is effectively a local-area monopoly. And it can easily be observed that, in a number of areas, Telstra's sole-provider status has endured for long periods of time, meaning that it has had enduring market power in those areas over those long periods. Moreover, in areas where duplication by another MNO is uneconomic or unfeasible, the consequent market power will last until there is duplication, which is potentially indefinitely. Finally, it is clear to me from the market outcomes that Telstra has significant market power, in respect of certain groups of end-users at least. Telstra and Professor Yarrow naturally emphasize the degree of competition in the market. However, both Telstra's submission and the Yarrow Report provide clear support for the existence of Telstra's market power.
- 4.10 The Yarrow Report helpfully states the following: "If coverage has value to a sub-set of HD [high density] end users, increasing coverage relative to rivals, whether by increasing an advantage or decreasing a disadvantage, has financial payoffs to an MNO in the form of increased revenues from HD customers, either by allowing a higher price to be sustained or by increasing sales volumes or both."⁷ In this description, Professor Yarrow acknowledges the market power that arises from an MNO having wider coverage than its rivals. Other

⁶ Baumol, W., J.C. Panzar, and R.D. Willig (1982), *Contestable Markets and the Theory of Industry Structure*, Harcourt Brace Jovanovich

⁷ Yarrow Report, paragraph 11.4 (emphasis in original omitted)

statements throughout the documents similarly underscore this point. Moreover, Professor Yarrow asserts that the MVNOs operating on Telstra's network will provide a significant competitive constraint on Telstra. However, Telstra itself states that the MVNOs do not have access to the entire Telstra network, but rather only a subset of it constituting 1.6 million square kilometers of Telstra's total network coverage of 2.4 million square kilometers. This underscores the desirability to a MNO of having asymmetric coverage superior to its rivals, and the existence of the market power arising from it.⁸

- 4.11 It is my opinion that this local market power, leveraged into other areas including by way of the mechanism I have outlined, accounts for at least some of Telstra's price premium as I have outlined in my First Report.

5 The interaction of competition with investment and innovation, and price competition

- 5.1 Professor Yarrow takes a number of strong positions on the interaction of competition with investment and innovation. These positions in turn appear to be based on assumptions that appear to me to be difficult to defend, dated, and in my opinion at odds with the majority opinion of the economics profession today.
- 5.2 I find myself differing from the Yarrow Report in this crucially important aspect of the discussion regarding efficient investment in innovation⁹. Professor Yarrow and I largely agree on the very orthodox proposition that efficient investment is substantially a dynamic concept, and Section 5 of my First Report is largely devoted to explaining dynamic investment incentives in the context of a declaration.
- 5.3 There are conflicting schools of thought in economics regarding the interaction between competition and investment in innovation. A traditional school of thought is that market power may spur investment because, in essence, market power rents provide economic profits, which in turn are necessary to fund the research and development that creates innovation – and that “too much competition” *hinders* innovation for the mirror reason. This school of thought (called the “Schumpeterian view”, after the long-deceased economist Josef Schumpeter) once dominated this question but has more recently been displaced. However, it seems to me that it informs much of Professor Yarrow's thinking on this question. It seems to underlie his conclusory assertions that equalization of coverage would deter increased investment by Telstra, and his assertions that declaration would be “presumptively adverse for new investment”¹⁰.
- 5.4 In contrast, the more modern view is that competition in fact *spurs* investment in innovation as firms compete to outpace their rivals with new technologies, and that the harder the competition, the more firms are driven to innovate. There are certain nuances to this view, such as emerging empirical evidence suggesting the existence of an “inverse-U” shape to this relationship, in which both completely atomized markets at one end and full enduring

⁸ Telstra Submission, page 18.

⁹ Yarrow Report, Section 13.

¹⁰ Yarrow Report, paragraph 13.6.

monopoly at the other end are not conducive to investment in innovation, but fierce rivalry (for instance) among several rival suppliers is highly conducive to innovation. However, I think it is safe to say the modern economic literature and the supporting evidence is supportive of the position that competition rather tends to spur innovation in the conditions salient and relevant to the Inquiry.

- 5.5 Moreover, in my view, increased competition in the currently Telstra-only areas would likely spur competition and thereby investment and innovation, rather than to inhibit them. This may interact positively with a targeted and limited form of access holiday, a regulatory mechanism I flagged in my First Report as having merit in some circumstances to preserve the desirable investment incentives to the access provider in the context of mandated access. A targeted access holiday in this instance might provide that access is mandated for a certain base-level technology (for instance, 4G) but not for the frontier technology (for instance, 5G). In this way, access is granted to the base-level technologies, enabling other MNO's to compete in the Telstra-only areas (which is in the LTIE for all the reasons I have described), while the access provider's incentives to invest in the frontier technology (and technologies beyond) are not only maintained but *enhanced* by the fiercer competition and the desire to maintain an edge over the rival. In my opinion, the incentives on an access provider to adopt frontier technology are likely to be significantly greater when there is another MNO providing base-level technology services in the same area, compared to the situation where there is no other MNO providing services or likely to enter in the area, in which case I would expect the incentives for technology investment to be relatively weaker. In this sense, the ability of a form of ladder of investment to take place may be strengthened, in that it would allow the access seeker to enter on a limited scale using today's technology in preparation for future expansion and adoption of tomorrow's technology. In contrast, I find Professor Yarrow's position on these issues to be unconvincing.
- 5.6 As regards the efficient use of investment, Section 5 of my Report discussed the implications of declaration in some detail. It does not seem that Professor Yarrow had much enthusiasm for addressing this issue as not much was said in this regard in the Yarrow Report. Professor Yarrow recounts at length certain aspects of a debate regarding tariff proliferation in the UK electricity market; however, I find this anecdote regarding another industry largely unhelpful in illuminating the issues at hand in mobile telecommunications in Australia (as I similarly find his anecdotes regarding different industries and countries, and his use of analogies from sports, in other sections of the report to be largely unhelpful).
- 5.7 Professor Yarrow does briefly list factors that he proposes would influence whether there is efficient use of infrastructure from the perspective of the LTIE.¹¹ However, in my view this list is incomplete in one crucial respect. Professor Yarrow lists factors to be considered, including the degree to which traffic is expanded, the costs of implementation, and the value that the area's end-users place on greater product differentiation including a wider range of tariffs – but he does not list the effect on *prices* and *price levels*, either to the area's end-users or to end-users more widely. This is a critical omission as the LTIE cannot be properly assessed without consideration of the impact of declaration on the price level. This brings me to the final point of fundamental difference with Professor Yarrow that I will discuss.

¹¹ The Yarrow Report, paragraph 13.8

5.8 Professor Yarrow appears to have little enthusiasm for the value of price competition as being of value to end-users. His lead concept in his depiction of the nature of competition is competition for coverage. Price competition, by contrast, receives rather cursory and curt attention. In the Yarrow Report, he employs a “rule of thumb” to suggest that one should “not expect much price competition in a market”.¹² In a similar way, he appears to attach great importance to the structure of prices and little importance to the levels of prices.¹³ While I would certainly agree that pricing structures may indeed be relevant in considering the impact on the LTIE, I think that Professor Yarrow is wrong to focus on the price structure and to effectively dismiss the importance of the price levels. In contrast, I attach substantially greater importance to the importance of price competition as being a critical determinant of the LTIE, and I would anticipate that most regulatory authorities would share the self-evident view that lower customer price levels (all else being equal) are manifestly in the interests of consumers and therefore in the LTIE. Where Professor Yarrow does briefly address his views on the possible impact in Section 11 of the Yarrow Report, it appears to be rather cursory, conclusory, and uncertain – I am left unconvinced.

Derek Ritzmann

8 March 2016

¹² The Yarrow Report, paragraph 11.26

¹³ The Yarrow Note, paragraphs 14-16.

2 March 2017

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Dear Derek

Expert advice and opinion - ACCC Domestic Roaming Declaration inquiry

We act for Vodafone Hutchison Australia Pty Ltd (**VHA**) and are authorised to engage you and Compass Lexecon (a trading name of FTI Consulting (Hong Kong) Limited) to provide further expert report (**Report**) in connection to the above matter.

To the extent possible, you must observe the Federal Court of Australia's general practice note for expert evidence published in October 2016 in providing the Report (see Attached).

Background

On 5 September 2016, the Australian Competition and Consumer Commission (**ACCC**) commenced an inquiry into whether to declare a wholesale domestic mobile roaming service. As part of this inquiry, the ACCC released a discussion paper (**Discussion Paper**) for public consultation on 26 October 2016.

Telstra Corporation Limited (**Telstra**) made two submission to the Discussion Paper:

- dated 2 December 2016 (the **Primary Submission**); and
- dated 25 January 2017 (the **Supplementary Submission**).

Both the Primary and Supplementary Submissions are published on the ACCC website.

Instructions

Please provide a report addressing the expert reports submitted by Telstra in both its Primary and Supplementary Submissions, specifically the two reports by Professor George Yarrow.

Timing

We will require your report to be finalised by 13 March 2017.

APAC-#40399442-v1

Confidentiality and privilege

You agree that:

- this letter and all communications (whether electronically maintained or not) between us, and between you and our client, are confidential. These communications may be subject to legal professional privilege. Accordingly, please ensure that you mark all documents in the following manner: Confidential – subject to legal professional privilege;
- you must take all steps necessary to preserve the confidentiality of our communications and of any material or documents created or obtained by you in the course of preparing your report;
- you must not disclose the information contained in our communications or obtained or prepared by you in the course of preparing your report without obtaining consent from us;
- you must obtain our consent before disclosing to any person that you have been engaged to provide an opinion in this matter;
- you must not provide any other person with documents which come into your possession during the course of preparing this report, whether created by you or provided to you by us or our client, without obtaining consent from us.

Your duty of confidentiality continues beyond the conclusion of your instructions.

If you are ever obliged by law to produce documents containing any of this confidential information (whether by subpoena or otherwise) please contact us immediately so that we may take steps to claim legal professional privilege on behalf of our client.

Any internal working documents and draft reports prepared by you may not be privileged from disclosure and may be required to be produced in any subsequent litigation.

We look forward to working with you.

Yours faithfully



Martyn Taylor
Partner
Norton Rose Fulbright Australia

Attachment

Extracts from the FCA general practice note for expert evidence

4. ROLE AND DUTIES OF THE EXPERT WITNESS

- 4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.
- 4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.
- 4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

- ***Harmonised Expert Witness Code of Conduct***

- 4.4 Every expert witness giving evidence in this Court must read the *Harmonised Expert Witness Code of Conduct* (attached in Annexure A) and agree to be bound by it.
- 4.5 The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is expected that compliance with the Code will assist individual expert witnesses to avoid criticism (rightly or wrongly) that they lack objectivity or are partisan.

Annexure A - Harmonised Expert Witness Code of Conduct¹

APPLICATION OF CODE

1. This Code of Conduct applies to any expert witness engaged or appointed:
 - (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or
 - (b) to give opinion evidence in proceedings or proposed proceedings.

GENERAL DUTIES TO THE COURT

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

CONTENT OF REPORT

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:
 - (a) the name and address of the expert;

¹ Approved by the Council of Chief Justices' Rules Harmonisation Committee

- (b) an acknowledgment that the expert has read this code and agrees to be bound by it;
- (c) the qualifications of the expert to prepare the report;
- (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];
- (e) the reasons for and any literature or other materials utilised in support of such opinion;
- (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;
- (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;
- (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;
- (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the Court;
- (j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;
- (k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and
- (l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION

4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.
5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

DUTY TO COMPLY WITH THE COURT'S DIRECTIONS

6. If directed to do so by the Court, an expert witness shall:
 - (a) confer with any other expert witness;
 - (b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and
 - (c) abide in a timely way by any direction of the Court.

CONFERENCE OF EXPERTS

7. Each expert witness shall:
 - (a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and
 - (b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.