



# The Use of Court Assessors in Australia

At the most recent United Nations Commission on International Trade Law (UNCITRAL) Working Group II (WGII) session (Vienna, 18-22 September 2023), Australia proposed to present research on the use of court assessors in the Australian federal, State and Territory courts. This research is intended to support ongoing efforts to improve the UNCITRAL Expedited Arbitration Rules, particularly regarding the appointment of experts to assist with factual deliberations in arbitration proceedings. Please note it does not provide information on the use of court assessors in the family law context.

## *Definition of 'court assessor' in Australia*

In the Australian context, court assessors assist the Court to understand and resolve contested factual issues, and where deemed necessary or desirable can be appointed at the discretion of the relevant judge at the pre-trial, trial and post-trial stages of proceedings.<sup>1</sup> The main purpose of appointing a court assessor is to ensure that matters surrounding technical and expert evidence and concepts are adequately explained to the judge.<sup>2</sup> It is important to note that court assessors are not witnesses in proceedings, rather they are individuals with specialised knowledge who may be called upon to consult and advise the relevant judge on the 'effect and meaning of technical evidence to be adduced'.<sup>3</sup>

## *Role of a court assessor*

The historic justification for court assessors evolved as a general response to the need to 'equip courts with research staffs comparable to those employed by administrative agencies' to assist in 'specialised investigations, information and advice'.<sup>4</sup> The extent of a court assessor's role is determined as a matter of judicial discretion. An assessor's role can include:

- Preliminary education and briefings to judges pre-trial on topics relevant to the case;
- Explanation of expert reports prepared by parties for trial;
- Availability to answer questions asked by the judge regarding technical evidence;
- Sitting with the judge to hear technical evidence and assist with comprehension of materials presented both in and out of court;
- Assistance in the determination of whether relevance objections should be made on the basis of evidence presented;
- Directly asking clarifying questions to counsel or witnesses at hearing, or suggesting questions for trial judges to ask;

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<sup>1</sup> Federal Court of Australia, *General Practice Note GPN-REF: Referee and Assessor Practice Note*, 3 November 2022, para 3.1-3.10.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *McNickle v Huntsman Chemical Company Australia Pty Ltd and Others* (2021) 285 FCR 244.

- Ensuring judges correctly understand technical concepts after trial;
- Reviewing draft judgments to ensure they are technically accurate insofar as the judgments review evidence adduced by the parties.<sup>5</sup>

In practice, court assessors are used relatively infrequently in Australian judicial proceedings.<sup>6</sup> Most often, they are used at the federal level to support complex native title, patent or class action matters.

#### *Source of power*

At the federal level, there are discrete powers for appointment of a court assessor in the context of native title<sup>7</sup> and patent<sup>8</sup> litigation. Additionally, section 33ZF of the *Federal Court of Australia Act 1976* (Federal Court Act) provides the Court with the implied power (being to make orders to ensure justice is achieved) to appoint court assessors in relation to representative proceedings (e.g. class actions).<sup>9</sup> Beyond these instances, there is no general power to appoint an assessor in the Federal Court Act or the *Federal Court Rules 2011*.

While a general power doesn't exist, the practice is generally accepted as being within the scope of inherent federal judicial power. For instance, section 23 of the Federal Court Act provides the Court with the power to make orders as it deems appropriate, and the common law provides the Court with the implied power to make orders if 'necessary'.<sup>10</sup> This practice ensures the maintenance of the necessary judicial process where factual expertise may not be present, allowing the court to remain independent and impartial in character.

Australian States and Territories have different legislative models for the use of court assessors. The relevant sources of power are as follows:

- Victoria – *Supreme Court Act 1986* (Vic); ss 77, 24G.
- Queensland – *Supreme Court of Queensland Act 1991* (Qld); s 14.
- South Australia – *Supreme Court Act 1935* (SA); ss 71, 110C.
- Western Australia – *Supreme Court Act 1935* (WA); s 56.
- Australian Capital Territory – *Court Procedure Rules 2006* (ACT), r 1530.
- Tasmania – *Supreme Court Rules 2000* (Tas); r 560.
- NSW and NT – no express provisions dealing with court assessors.

#### *Use in UNCITRAL arbitration context*

Arbitral proceedings often require the consideration of highly technical matters, such as in disputes in particular industry sectors. While the issue of having the requisite expertise is sometimes indirectly addressed through the arbitrator appointment process, there may be similar justifications for the use of experts in arbitral proceedings to those supporting the use of court assessors in Australian judicial proceedings. Despite the concerns expressed in WGII around possible transparency issues and delegation of decision-making power in an arbitral context, the practice of appointing court assessors in Australia illustrates that these concerns can be mitigated when managed effectively.

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<sup>5</sup> Jonathan Beach, 'The Use of Assessors in Class Actions' (2015) 129 *Precedent* 15, 16-17.

<sup>6</sup> *McNickle v Huntsman Chemical Company Australia Pty Ltd and Others* (2021) 285 FCR 244, 247 [15].

<sup>7</sup> *Native Title Act 1993* (Cth) s 83.

<sup>8</sup> *Patents Act 1990* (Cth) s 217.

<sup>9</sup> Federal Court of Australia, *General Practice Note GPN-REF: Referee and Assessor Practice Note*, 3 November 2022, para 3.6

<sup>10</sup> *Ibid.*