

## Reforms to the Use of Expert Witnesses - A Look Back

A great deal of reform has occurred in the use of expert evidence in both the United Kingdom and Australia.

Opinion evidence is generally inadmissible at common law except for the opinion of witnesses with special skill or knowledge. The Evidence Act (Cth) 1995 permits the use of opinion evidence from a person possessing “specialised knowledge based on the person’s training, study or experience, provided the opinion is wholly or substantially based on that knowledge.”

### Reform in the UK

An influential statement on the responsibilities of expert witnesses in civil cases was laid down by the English Commercial Court in *The “Ikarian Reefer”* [1993] 2 Lloyd’s Rep 61. The statement made by Creswell J., later endorsed by the Court of Appeal, stated:

*“The duties and responsibilities in civil cases include the following:*

- 1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.*
- 2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.*
- 3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.”*

Lord Woolf released his “Access to Justice” Report in July 1996. This report recommended:

- Single experts (appointed by the court or jointly by the parties) should be used where there is a substantial established area of knowledge.
- The parties or the court should provide reasons when appointment of a single expert is not appropriate.
- Experts appointed by the parties should produce a single report for the court indicating areas of disagreement at issue.
- All written and oral instructions should be annexed to the expert’s report.
- The court should have the power to order an expert to conduct an examination and report on a particular issue, to be submitted to the court.
- If the court directs a meeting of experts, this should be held in private.
- Training courses should be provided for experts to ensure they are aware of their primary duty to the court.

In April 1999, the first of the Civil Justice Reforms relevant to expert evidence was introduced as Part 35 of the Civil Procedures Rules (CPR) of the High Court (UK). These reforms included the expert having an overriding duty to assist the court, court can direct the use of single experts, private discussions between experts, etc. (Continued page 2.)

The Civil Justice Reform Evaluation of the CPR under-

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- ★ expert witness

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## Expert Witness Reforms (cont.)

taken in 2001 found that “generally, the change to single joint expert appears to have worked well.”

### Reform in Australia

In April 1995, The Evidence Act 1995 (Cth) commenced, in which s.79 addresses the admissibility of expert evidence.

In November 1995 the Australian Law Reform Commission Report into the civil justice system was commissioned.

In June 1997 the Australian Institute of Judicial Administration surveyed Australian Judges as to expert evidence. The findings, published in June 1999, identified perceived bias of experts as a key issue.

In September 1998, the “Guidelines for Expert Witness in Proceedings in the Federal Court of Australia” were published as a Practice Direction.

In 1999 the Supreme Court of NSW changed its rules and issued a Code of Conduct. In July 2001 it published Practice Note 121, Joint Conference of Expert Witnesses.

During 2000 to 2003 the Supreme Court of SA, Supreme Court of ACT, Supreme Court of Victoria and the Family Court issued new rules and the Supreme Court of Queensland issued draft rules.

Experts appointed from 1 March 2000 in Supreme Court of NSW matters must in their reports, acknowledge that they have read and agree to be bound by the Expert Witness Code of Conduct. The Code requires expert reports to specify:

- The person's qualifications.
- The facts, matters and assumptions on which the opinions in the report are based.
- Reasons for each opinion expressed.
- If relevant, a statement that a particular issue falls outside of the scope of the expert's field of expertise.
- Details of reference material and literature used in the preparation of the report.
- Any examinations, tests or other investigations on which the expert has relied and identify, and give details of the qualifications of, the person who carried them out.
- Any qualifications concerning insufficient data or re-search.

This code differs from the Federal Court Expert Witness Guides in two material respects.

While the Federal Court Guidelines require that all instructions given to the expert, or a written summary of any instructions

given, should be included in or attached to the expert's report, the Supreme Court of NSW Code does not require instructions to be set out in the report.

The declaration at the end of an expert's report in a Federal Court matter should read: *"I have made all the inquiries which I believe are desirable and appropriate and no matters of significance which I regard as relevant have not, to my knowledge, been withheld from the Court."* The declaration by an expert under the Supreme Court of NSW matters is simply that the expert has read the Code and agrees to be bound by it.

Heydon JA's judgment in *Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705* ("Makita's case") considers what is required for an expert's report to be both admissible and persuasive.

The basic principle is that the Court must be able to arrive at an independent assessment of an expert's opinion and its value and this can only be done if the basis of the opinion is clearly explained by the expert.

The following key points were raised by Heydon JA:

1. As expert give an opinion based upon certain facts, the facts relied upon by the expert must be clearly set out.
2. The judge must then determine whether the facts accepted or assumed by the expert have been proved.
3. It must be agreed or demonstrated that there is an area of specialised knowledge in which the witness has become an expert by reason of training, study or experience.
4. The opinion must be wholly or substantially based on the witness's expert knowledge applied to the relevant facts.
5. The expert must explain the intellectual basis of the conclusions reached. That is, how the field of specialised knowledge in which the witness is expert applies to the facts assumed or observed so as to produce the opinion profounded.

In July 2002, The Institute of Chartered Accountants in Australia and CPA Australia issued APS 11 - Statement of Forensic Accounting Standards. Compliance with this statement is mandatory by all members of The Institute and CPA.

The statement details the basis of, and requirements before, accepting engagements as an expert witness, the conduct of the expert, the basis upon which an expert opinion should be based, supervision of staff involved and the prohibiting any fee being based on the outcome or size of damages awarded.

The Supreme Court of Victoria issued Statutory Rule No. 95/2003, effective 1 November 2003, which included the introduction of the Expert Witness Code of Conduct in the Form 44A (this code being similar to that for the Supreme Court of NSW).

On 19 March 2004 the Federal Court of Australia updated its Practice Direction and revised Order 33, Rule 20 concerning the content of expert reports (number paragraphs, pages, annexures, etc).

On 29 March 2004 the new Family Law Rules commenced. Chapter 15.5 deals with expert evidence, using wherever practical a single expert, content of reports, etc.

#### **Possible future reforms:**

- Increased appointment by higher courts such as Federal Court and Supreme Courts of a sole expert.
- Requirement of joint experts' conference as a part of pre-trial directions for Supreme Courts.
- Reluctance to accept evidence by a party from its day-to-day accountant as an expert.
- If a court appoints an expert or parties jointly appoint a sole expert, the parties can not appoint further experts without the leave of the court.

## Family Law - Review of the Work of a Single Expert Witness

Following the new Family Law Rules effective from 29 March 2004, family lawyers are now jointly appointing a single expert to assess the value of the interest in a business owned by the parties. We have recently been engaged as the single expert in numerous family law matters.

How does the family lawyer know whether or not the value derived by the single expert is reasonable?

Under the Rules if a single expert witness has been appointed to prepare a report or give evidence in relation to an issue, a party must not tender a report or adduce evidence from another expert witness on the same issue without the court's permission.

Nevertheless, the engagement of a consultant accountant could be considered.

The role of a consulting accountant could include:

- Reviewing the work of the single expert
- Assist with questions to the Expert Witness (per Sections 15.5.6 of the Rules)
- Evaluate the responses by the single expert to Questions asked of the single expert, and
- Assist in cross-examination of the expert witness, if the matter proceeds to trial.

Also, if the consulting accountant considers the report of the single expert witness to be substantially incorrect, the party could consider applying to the court to adduce evidence from another expert.

This would give instructing solicitors and their clients some comfort that the business valuation of the single expert is reasonably based and, if not, it gives that party the opportunity to contest the valuation of the single expert witness either by Questions to the expert, cross-examination or applying to the court to adduce evidence from another expert.

The above would be particularly relevant to large, complex valuations or in cases where one of the parties is not familiar or comfortable with the work of the single expert.

The role of the consultant accounting is fundamentally different from that of the independent expert witness in that the consultant accountant's primary duty is to his or her client rather than the court.

The work and advice of a consulting accountant would appear not to be required under the rules to be produced to either to other party or the court [as a consultant accountant is not retained as an expert witness].

A consultant accountant should be aware that, due to the proximity of his or her relationship with the client or client's legal representative, there may be a perception that the consultant accountant can not act independently, if subsequently engaged, act as an expert witness, although this may not always be the case.

### Updated Family Law Booklet

Following recent changes to the Family Court Rules (effective 29 March 2004) and the issue of guidelines effecting experts (effected 1 August 2003) we have updated our booklet - Forensic Accounting for Family Law Matters. Please contact our office if you would like a complimentary copy sent to you.

### Further Information

If you would like further information regarding this newsletter or our services, please contact either Russell Munday, Bruce Wilkinson, Paul Spence or Lillian Hung at:

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