

MW Forensic is a newsletter prepared on an ad hoc basis covering topical issues in the areas of business valuations and forensic accounting.

NSW Law Reform Commission Report - Experts

In September 2004, the NSW Law Reform Commission (the Commission) was requested by the NSW Attorney General to inquire into and report on the operation and effectiveness of the rules and procedures governing expert witnesses in NSW.

The Commission issued Issues Paper 25 in November 2004 which identified some of the major issues.

The Commission received a large number of submissions in response to the Issues Paper.

At the time the Commission was preparing its report, the Civil Procedure Working Party established by the NSW Attorney General's Department was finalising its work on the Civil Procedures Bill 2005 and the Uniform Civil Procedures Rules ("UCPR"). The UCPR, which consolidate the rules of court concerning civil procedure in the NSW Supreme, district and local courts and some tribunals, contain provisions on expert witnesses. The bill and rules became law on 2 June 2005.

After conducting numerous consultations, the Commission released its report "Report 109 (2005) – Expert Witnesses" in September 2005.

Recommendations relate to the use of joint expert witnesses and include:

- The *Uniform Civil Procedure Rules 2005* (NSW) should be amended to provide that in civil proceedings parties may not adduce expert evidence without the court's permission.
- The *Uniform Civil Procedure Rules 2005* (NSW) should be revised to include provision for joint expert witnesses in addition to the existing provisions for court-appointed experts.
- The *Uniform Civil Procedure Rules 2005* (NSW) should be amended to include rules relating to joint expert witnesses as follows:
 - A provision for an order that a joint expert witness

be engaged by the parties affected;

- A provision for the joint expert witness to be selected by agreement between the parties affected or, failing agreement, by or in accordance with directions of the court;
- A requirement for consent by the expert being engaged as such;
- A prohibition against a party eliciting the opinion of a proposed joint expert witness before engagement, and provision for disclosure of any such communication;
- A provision allowing the joint expert witness to apply for directions, with advance notice to the parties affected;
- The same requirements in relation to the code of conduct as apply in the case of experts engaged by the parties individually;
- A provision allowing an affected party to put questions in writing to the joint expert witness for the purpose of clarifying the witness's report;
- A provision allowing an affected party to tender the joint expert witness's report and to tender answers by the joint expert witness to written questions put to the witness by a party, unless the court otherwise orders;

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NSW Law Reform Commission Report - Experts

- A provision prohibiting the parties from calling other expert evidence on a question submitted to the joint expert witness, except by leave of the court;
- A provision allowing an affected party to examine the joint expert witness orally in court; and
- A provision for payment of the joint expert witness's fees.
- The provisions of the *Uniform Civil Procedure Rules 2005* (NSW) relating to experts appointed by the court should be amended as follows:
 - Selection of the court-appointed expert to be by the court or as the court may direct, in place of the existing provision for selection by the parties, by the court or as the court may direct;
 - Adding a requirement for the expert's consent to being appointed;
 - A right to examine in chief, cross-examine or re-examine the court-appointed expert as the court may direct, in place of the existing provision for cross-examination only; and
 - Repeal of the existing provision which prohibits the parties from calling other expert evidence in relation to a question submitted to a court-appointed expert.
- The code of conduct for expert witnesses (Schedule 7 to the *Uniform Civil Procedure Rules 2005* (NSW)) should be revised by:
 - deleting those provisions that relate to matters of form rather than the experts' duties (those matters to be dealt with in rules or practice directions);
 - providing that the duties of disclosure apply to oral evidence as well as to the contents of expert report.
- The *Uniform Civil Procedure Rules 2005* (NSW) should be amended to require that the fee arrangements with an expert witness be disclosed.
- There should be a provision, by rule or practice note, requiring that expert witnesses be informed of the sanctions relating to inappropriate or unethical conduct.

- A review of the rules relating to expert witnesses should be planned and undertaken to coincide with the review of the *Civil Procedure Act 2005* (NSW) in five years time.

The report noted that if a party is dissatisfied with the expert's evidence, the court has discretion to allow that party to adduce other expert evidence. While the evidence of the joint expert witness is likely to be of great weight, the joint expert witness has no different status from other witnesses and will be available for examination by any party if required.

The Commission confirmed its acceptance of requiring expert witnesses (if more than one are approved by the court) to consult before the date set for the hearing, and, often, to prepare a document setting out the matters on which they agree and those on which they disagree. Such a requirement is intended to save time and money by identifying before the trial the real issues of disagreement, and the common ground relating to the relevant matters. It therefore confirmed UCPR rule 31.25 which makes provision for the court to give directions concerning such a conference between experts and for the preparation of a report on the conference.

It also confirmed its acceptance of taking of evidence of experts concurrently, called 'hot-tubbing', but more appropriately referred to as concurrent evidence, has been increasingly used in certain jurisdictions (e.g. Land and Environment Court in NSW). The Commission is of the view that rules of court should facilitate the taking of concurrent expert evidence. The existing provisions of the *Uniform Civil Procedure Rules 2005* (NSW) r 31.26 deal appropriately with the matter.

The report addresses the issue of the problem of "no-win, no-fee" arrangement, under which a party engages a person to act as an expert witness on the basis that the expert will be paid a fee only if the party wins the case. It does this by recommending that the fee arrangement with the expert is disclosed.

In relation to the issue of accreditation of experts the Commission believes that whilst schemes of discipline, accreditation and forensic accreditation established within various professions and disciplines have an important role in enhancing the quality of expert evidence, it does not recommend that the law be changed to give some priority to expert witnesses who are accredited, or that the courts should maintain their own accreditation schemes, or their own lists of accredited experts.

The Commissioner to the report, Professor Richard Chisholm, said the primary objective of the appointment of a joint expert witness was to ensure that the witness does not favour one party over the other.

Prof Chisholm said:

“The idea of the joint expert witness is to limit the expert evidence on a question arising in court proceedings to that of one expert witness, selected jointly by the parties, or if they fail to agree, in a manner directed by the court”.

“it reinforces the notion that the duty of expert witnesses is to the courts. It also has the potential to minimise costs and delay to the parties and to the court by limiting the volume of expert evidence that would otherwise be presented”

One of the issues we consider that needs to be addressed is that where a single, joint expert is appointed the expert will require the parties to agree on a statement of facts on which the expert is to report. If they can't then alternative statements of fact are put to the expert.

The recommendation of a joint expert follows similar changes in the United Kingdom, the Family Court of Australia and the Supreme Court of Queensland. Given the recent changes introduced and report of the NSWLRC, it is likely to be soon adopted throughout Australia.

Anti-Money Laundering Legislation Update

In our last edition of MW Forensic we discussed forthcoming significant changes to Australia's money laundering legislation, including the Financial Transaction Reports Act 1988, (“FTRA”).

The international standards for combating money laundering and terrorist financing are contained in the Forty Recommendations of the inter-governmental body, the Financial Action Task Force on Money Laundering.

Following major lobbying from banks about the costs associated with the legislation, a draft copy of the legislation is expected to be released for a three-month consultation period in mid October 2005. The draft is to concentrate on those who are covered under the existing legislation, the FTRA. So it will mainly affect the financial services sector to begin with.

Industries previously not affected by FTRA, such as jewelers and lawyers, are to be consulted more extensively for the second phase of the legislation next year.



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Munday Wilkinson is now Melbourne's largest dedicated forensic accounting firm comprising three directors, a consultant and an administration assistant. We can provide forensic accounting services for a wide variety of dispute related matters from the small to the large.

Warning Signs of Insolvency

In October 2003 edition we discussed the Water Wheel case [ASIC v Plymin, Elliott & Harrison [2003] VSC 123 (5 May 2003)].

The judgement referred to a **checklist of matters** which was put to the second defendant's expert witness as being indicators of insolvency. This was a fairly extensive list, albeit in general terms, and brought to mind very common features in insolvency situations.

Whilst discussing directors liability, we thought it timely to revisit this list.

The list was paraphrased as follows:

1. Continuing losses.
2. Liquidity ratios below 1.3.
3. Overdue Commonwealth and State taxes.
4. Poor relationship with present Bank, including inability to borrow further funds.
5. No access to alternative finance.
6. Inability to raise further equity capital.
7. Suppliers placing [company] on COD, or otherwise demanding special payments before resuming supply.
8. Creditors unpaid outside trading terms.
9. Issuing of post-dated cheques.
10. Dishonoured cheques.
11. Special arrangements with selected creditors.
12. Solicitors' letters, summons[es], judgments or warrants issued against the company.
13. Payments to creditors of rounded sums which are not reconcilable to specific invoices.
14. Inability to produce timely and accurate financial information to display the company's trading performance and financial position, and make reliable forecasts.

The evidence showed that most of these indicators were present in the case of Water Wheel.

Other factors that suggest insolvency include:

- Inadequate insurance
- Unpaid rent
- Opening of second bank account
- External accountant's fees are in arrears.

The above are indicators only for the directors or other parties dealing with the company. The key issue of insolvency is whether it is reasonable to expect that the above problems can be overcome through an improvement in the Company's cash flow.

Personal Liability - Directors of Trust Companies - Update

Our last edition also discussed the recent decision of the Full Supreme Court of South Australia in *Hanel v O'Neill*. This decision raised concerns that directors of corporate trustees could be personally liable in any case where there are insufficient assets to discharge the liabilities of the trust.

The Federal government has addressed these concerns through the introduction of the *Corporations Amendment Bill (No. 1) 2005 Bill* which amends the *Corporations Act 2001* to clarify the scope of potential liability of the directors of corporate trustees. The amendments will only impose personal liability on the director of a corporate trustee where the corporation's right of indemnity as trustee is lost through:

- Disentitling conduct on the part of the corporation; or
- A restriction in the terms of the trust that purports to deny a right of indemnity against trust assets.

Commercial Disputes Booklet

Following recent changes effecting experts, we have updated our booklet – "Forensic Accounting for Commercial Disputes". Copies are to be forwarded to our list of family law solicitors, barristers and judges. If you wish to also obtain a copy, please contact us.

Further Information

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