

Family Court Discussion Paper – “The Changing Face of the Expert Witness”.

In the Family Court, expert evidence has been the subject of consideration and recommendations by the Future Directions Committee.

A discussion paper titled “The Changing Face of the Expert Witness” issued in July 2002, recommends procedural reform to the use of experts in the Family Court of Australia.

The paper follows recent reform already undertaken in the Federal Court of Australia, Supreme Court of NSW and other jurisdictions. The paper firstly examines the nature of expert evidence; secondly provides an overview of recent procedural reforms; thirdly highlights common issues which arise for consideration; and finally, makes recommendations for change in the Family Court.

Recommendations include alterations to existing Order 30A rules and the establishment of Guidelines for expert witnesses as a Practice Direction and are as follows:

1. Definitions be as follows:

“Expert” means a person who has relevant specialised knowledge based on that person’s training study or experience.

“Expert Witness” means an expert who has been instructed to give or prepare independent evidence for the purpose of court proceedings.

2. The Court has a duty to restrict expert evidence - expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.

3. The Court has powers to restrict expert evidence:

(1) A party may not call an expert witness or put in evidence an expert witness’s report without the permission/leave of the court.

(2) A party who applies for permission/leave under sub-rule (1) must identify:

(a) the issue in dispute to which expert evidence may be directed;

(b) the field in which the party wishes to rely on expert evidence, and

(c) where practicable the expert in the field on whose evidence the party wishes to rely.

(3) If permission leave is granted under this rule it shall be in relation only to the expert witness named or field identified under sub-rule (2).

4. A general requirement for expert evidence to be written (unless court grants leave).

5. Unless the court has first granted leave, a party who fails to file and serve a report of an expert witness in accordance with directions made by the court may not adduce evidence from the expert witness at trial.

6. Where a party has disclosed an expert witness’s report, any party may use that report as evidence at trial.

7. That greater use be made of the power to order court appointed experts in appropriate financial circumstances.

8. That the proposed guidelines for expert witnesses apply to court appointed experts.

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Munday Wilkinson



Our Aim

Munday Wilkinson is a boutique forensic accounting firm.

We offer the legal profession, and others, quality service and technical proficiency commensurate with that of the Big 5.

At the same time we are able to provide a more personalised service as we operate in a framework that enables us to be very responsive to our clients while at the same time delivering a high quality service in a cost effective manner.

Our Services

The partners, Russell Munday and Bruce Wilkinson jointly have over 50 years accounting experience including over 20 years specialising in forensic accounting.

In particulars both partners have extensive experience in:

- Business and company valuations
- Valuations of intellectual property
- Quantification of economic losses
- Fraud audits and investigations
- Loss of earnings assessments and reviews
- Family law investigations, valuations and tax advice on settlements
- Due diligence reviews
- Professional negligence matters concerning professional advisors
- Solvency reviews
- Expert determinations
- Expert witness services.

We look forward to being given the opportunity to provide you and your clients with an independent, quality and effective forensic accounting service.

“The Changing Face of the Expert Witness” (cont.)

9. Encourage evidence by a Single Expert Witness:

- (1) The court may, at any stage of proceedings, on application by a party or of its own motion, direct that expert evidence on a particular issue is to be given by one expert witness only.
- (2) The expert witness shall be a person agreed upon between the parties, or if agreement is not possible, a person selected by the court from a list prepared or identified by the parties or selected in such a manner as the court may direct.

Instructions to a Single Expert Witness

- (1) If a party gives instructions to an expert witness appointed under direction (1) the party must, at the same time, send copy of the instructions to the other parties.
- (2) The court may give any direction it thinks fit in relation to:
 - (a) the payment of the expert witness's remuneration and expenses; and
 - (b) any inspection, examination or experiments which the expert wishes to carry out.
- (3) Unless the court otherwise orders, the parties are jointly liable to pay the reasonable remuneration and expenses incurred by an expert witness under direction (1).

10. That the Family Court introduce guidelines for expert witnesses by way of rule amendments and a practice direction.

11. “Practice direction” means the guidelines for expert witnesses.

12. Include the following rule - Provision of guidelines to Expert Witnesses

Unless the Court otherwise orders:

- (a) At or as soon as practicable after engagement of an expert as a witness, whether to give oral evidence or to provide a report for use as evidence, the person engaging the expert shall provide the expert with a copy of the practice direction.
- (b) An expert witness's report shall not be admitted into evidence unless it contains acknowledgement by the expert witness that he or she has read the practice direction and agrees to be bound by it;
- (c) Oral evidence shall not be received by an expert witness unless there has been served on all parties a written acknowledgement by the expert witness that he or she has read the practice direction and agrees to be bound by it.

13. Experts - Overriding Duty to the Court

- (a) an expert has an overriding duty to help the Court impartially on matters within his or her expertise,
- (b) This duty overrides any obligation the expert witness has to the person providing instructions or paying the expert.
- (c) An expert witness is not an advocate for a party.



14. The Form and Content of Expert Reports be as follows:

- (1) A report by an expert witness should be addressed to the court as well as the party from whom the expert has received instructions.
- (2) Unless the court otherwise orders, a report by an expert witness must contain:
 - (a) The expert's qualifications
 - (b) An attachment detailing:
 - i. a summary of relevant instructions, written or oral, given to the expert which define the scope of the report;
 - ii the literature or other material used in making the report;
 - iii the relevant facts, matters and assumptions on which the opinions in the report are based.
 - (c) Any tests, experiments, examinations or other investigations on which the expert relied and identify and give details of the qualifications of the person who carried them out.
 - (d) Reasons for each opinion expressed;
 - (e) Where there is a range of opinion on the matters dealt with in the report, a summary of the range of opinions and reasons for his or her own opinion;
 - (f) A summary of conclusions reached;
 - (g) A disclosure if applicable that a particular question or issue falls outside his or her field of expertise;
 - (h) A disclosure if applicable that the report may be incomplete or inaccurate without some qualification and give details of the qualification;
 - (i) A disclosure if applicable that his or her opinion is not a concluded opinion because further research or data is required or any other reason.
 - (j) A declaration at the end of the report as follows:
 1. I have made all the inquiries which I believe are desirable and appropriate and to my knowledge there have not been any significant relevant matters omitted from this report;
 2. I believe that the facts within my personal knowledge that I have stated in the report are true and the opinions I have expressed are truly held by me
 3. I have read and understand the Family Court practice direction "Guidelines for Expert Witnesses" and agree to be bound by it; and
 4. I have complied with the requirements of any applicable approved expert's protocol.

- (3) An expert witness who changes his or her opinion on a material matter at any time shall forthwith provide the engaging party (or the party's legal representative) with written notice to that effect which shall contain such of the information referred to above as appropriate.
- (4) Where the Court appoints an expert witness, the Court is to be treated as the engaging party for the purposes of paragraph (3).
- (5) If an expert witness's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matters, these must be provided to the opposite party at the same time as the exchange of reports.

15. Guidelines include for Expert Conferences:

- (1) An expert witness must abide by any direction of the Court to:
 - (a) Confer with other expert witnesses;
 - (b) Endeavour to reach agreement on material matters for expert opinion; and
 - (c) Provide the Court with a Joint Statement specifying matters agreed and matters not agreed and the reasons for any non agreement.
- (2) An expert witness must exercise his or her independent, professional judgement in relation to such a conference and joint report, and must not act on any instructions or request to withhold or avoid agreement.

16. That the Family Court guidelines for experts incorporate similar provisions to those included in the practice note issued by the NSW Supreme Court and also include the conferral of experts during the preparation of their reports

17. & These relate to procedures and rules for written questions

18. to expert witnesses

19. & These relates to allowing an expert to seek in writing

20. directions from the Court to assist in carrying out his or her function as an expert witness.

21. This relates to allowing an expert witness to provide a summary of his or her evidence before and after cross-examination.

22. This relates to the Court having the power to direct a party to provide information which is not necessarily available to the other party.

23. This relates to the Court making greater use of assessors in appropriate cases.

24. This relates to the Court making greater use of "hot-tubbing" in appropriate cases.



Forensic Accounting Special Interest Group National Conference

The third Annual National Forensic Accounting Conference was again held in Sydney. Over 160 forensic accountants from across Australia attended to hear an impressive array of speakers including Judges, members of the Bar, solicitors, academics and accountants.

The agenda included panel discussions, a mock trial and presentations on, inter alia, expert evidence in the 21st Century, Assessment of Damages, Discount and Capitalisation Rates, Content of Experts Reports, Conference of Experts, Utilisation of Source Material and Legal Privilege.

A paper on recent cases in Federal Court of Australia concerning the assessment of damages, presented by James Bell, Barrister discussed the various cases that have developed the current principles applied in assessing damages.

The key points being:

- General principle governing the assessment of compensatory damages (be it in tort or contract) is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort not been committed.
- The proper assessment of damages in contract, tort or Trade Practices Act may come to the same result. On the other hand, the result may be quite different (example of *Radferry Pty Ltd & Anor v Starborne Holdings Pty Ltd & Anor [1998] 1689 FCA*).
- It is important to distinguish between the market price and the real value of the thing acquired as they be different (*Haines v Berngal 172 CLR 60*).
- In assessing “real value” subsequent events may be looked at insofar as they illuminate the true value of the thing at that date (*Kizbeau v WG & B Pty Ltd 184 CLR*). However, in a market value exercise, it is an error to take into account post acquisition events (*Spencer v The Commonwealth 5 CLR*). The date of acquisition is the proper date of valuation of a thing (*Potts v Miller 64 CLR*).
- However, in the appropriate case, the court has discretion to adopt a measure of damages other than the date of acquisition (*CSR Readymix (Australia) Pty Ltd v Payne (1998) 2 VR 505*).
- In tort, contributory negligence remains alive and would result in a reduction of the damages awarded to the plaintiff, but is not applicable to a claim for breach of contract (*Astley v Austrust Ltd (1999) 73 ALJR 403*).

- It is important for the expert to identify that an issue may exist. Lawyers can then seek direction. The Hon Stephen O’Ryan, Administrative Judge, Family Court of Australia, summarised the various recommendations of the Family Court Discussion paper “The Changing Face of the Expert Witness”. The key proposals effecting expert witnesses being:

- The court may direct that expert evidence on a particular issue is given by one expert witness only.
- That the Family Court introduce guidelines for expert witnesses by way of rule amendments and a practice direction.
- Experts have an overriding duty to help the Court impartially on matters within their expertise and that this overrides any obligation to the instructing party.
- An expert’s report should contain:
 - The expert’s qualifications
 - Summary of instructions
 - Facts / documents relied upon
 - Reasons for opinion expressed
 - Summary of conclusions
 - State if any issue falls outside the experts expertise
 - Declaration concerning enquiries made and no significant matters omitted from report.
- Expert conference to be held and a joint statement detailing matters agreed and disagreed upon.

(Refer separate section of this newsletter for full details of recommendations made in the discussion paper)

The often vexed question of professional legal privilege, as it applies to the experts files, was discussed by Harold Werksman, partner of Holding Redlich.

This session discussed how expert reports and source materials may lose the protection of legal privilege and the importance of:

- obtaining a retainer from the instructing solicitor.
- setting out assumptions and documents relied upon in the expert’s report.
- not referring to irrelevant documents or legal advice in the report.
- destroying drafts.

Draft Standards Issued by FASIG

Currently there is no specific code of conduct for expert witnesses to follow other than their own profession's code of conduct.

The Institute of Chartered Accountants in Australia's Forensic Accounting Special Interest Group (FASIG) comprises about 800 members nationally and about 130 in Victoria. It recently issued a draft APS 11 – Statement of Forensic Accounting Standards” and a draft “N8 – Guidance Notes – Forensic Accounting”.

The draft APS 11 sets standards relating to:

- Not accepting engagements where such engagements constitute a conflict of interest for the member or the member's firm.
- Accepting engagements only where the member has sufficient knowledge, experience and expertise.
- Taking reasonable professional care in the provision of forensic accounting services.
- Treating confidential information acquired in the provision of forensic accounting services for the proper performance of such services.
- Not being associated with a report or an expression of opinion on behalf of a client if the member is aware it contains incorrect or misleading information, or omits material information.
- Ensuring adequate training and supervision of staff and proper documentation of each assignment.
- Ensuring no part of any fee charged when acting as an expert witness is to be related to the outcome or size of damages awarded.

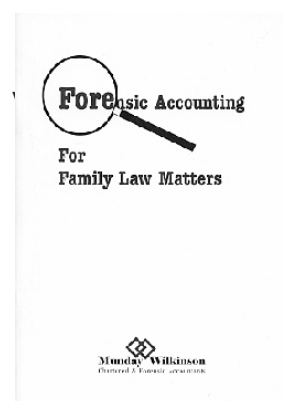
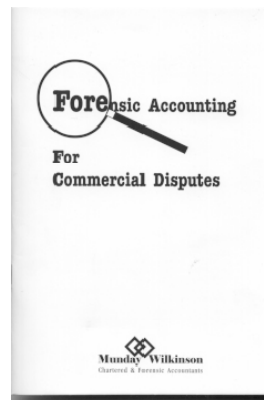
Copies of the APS 11 and draft N8 documents can be found at The Institute of Chartered Accountant's FASIG website <http://www.icaa.org.au/fa>.

Launch of Forensic Accounting for Commercial Disputes Booklet

To provide a better understanding of the role of a forensic accountant in dispute the partners of Munday Wilkinson have written a booklet on Forensic Accounting for Commercial Disputes.

The booklet covers:

- The Roles of the Forensic Accountant
- Engagement Issues
- Damages / Economic Loss
- Forecasting Earnings Capacity of Self-Employed Individuals
- Business Valuations of Businesses, Interests in Companies, Trusts & Partnerships
- Fraud
- Taxation Issues
- Capital Gains Tax
- Income Tax
- Goods & Services Tax
- Report Format
- Expert Conferences



Copies of this booklet were distributed in July to various solicitors and barristers involved in commercial litigation throughout Victoria.

This booklet follows our previous booklet “Forensic Accounting for Family Law Matters” published in October 2001.

Should you wish to receive a free copy of either of these booklets, please contact our office on 9621 1622.

RECENT MATTERS

We have been retained in a wide variety of forensic accounting matters. Recent examples include:

- Business Valuations of:
 - Legal practices
 - Accounting practices
 - Dentists
 - Real Estate Agents
 - Stationery business
 - Restaurants
 - Consulting Engineers
 - IT Consultants
 - Manufacturer
 - Computer Software businesses
 - Computer Supplies Distributor
 - Printer
 - Optus World franchise
 - Service Station
 - Coffee Lounge
 - Tyre Retailer
 - Karate School
- Expert Determinations in relation to:
 - Assessing actual profit of real estate agency group for the purpose of determining one party's entitlements.
- Assessing the loss of earnings in relation to several personal injury matters where the plaintiff operated a business as a
 - Restaurant
 - Property Developer
 - Bingo business.
- Assessing loss of profits in relation to:
 - Various actions against a telecommunications company for business interruptions incurred by several businesses.
 - Breach of contract by landlord.
- Investigations:
 - In relation to dispute between shareholders
 - Fraud of a dentist
 - Fraud of drug supplier
- Professional Indemnity
 - Opinion as to the appropriateness of an accountant's work in relation to Form 19 statement.
 - Opinion on claimed loss involving a travel agency

Investigation Methods Course

Willy Bagg of our office recently attended a 3-day course on "Investigation Methods". The course provided intensive training on investigating alleged or suspected breaches of legislation, policies and procedures. The subjects covered in the course were as follows:

- Role of the Investigator
- Evidence
- Concepts and elements of law
- Principles of investigation
- Statements
- Presenting evidence in court
- Burden and standards of proof
- Interview Techniques

The Course emphasised that a competent investigation is the key to success in any administrative or disciplinary determination, civil litigation or criminal investigation. Participants learned how to apply basic technical skills in gathering the relevant facts and admissible evidence to be presented before a board, court or tribunal for a determination. Case studies and flowcharts were used to define the key steps in a generic investigation process and provided practical reference points for all the techniques, procedures and practices in the field of investigations.

Further Information

If you would like further information regarding this newsletter or our services, please contact either Russell Munday, Bruce Wilkinson or Willy Bagg at:

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