

## Guidelines for Experts in Family Law

New guidelines for expert witnesses and those instructing them have been issued by the Family Court of Australia, "Guidelines for Expert Witnesses" - Practice Direction 2003/2. These guidelines became effective on 1 August 2003.

A copy of the guidelines can be found at [www.familycourt.gov.au/html/22003.html](http://www.familycourt.gov.au/html/22003.html)

As with other recently issued guidelines the Practice Direction refers to the expert's overriding duty to impartially assist the Court on matters within his or her knowledge.

The guidelines indicate that the report should be addressed to the Court as well as the party engaging the expert and details what should be contained in an expert's report, including:

- ★ The experts qualifications.
- ★ An attachment detailing:
  - a summary of the relevant instructions;
  - literature or other material relied upon; and
  - relevant facts, matters and assumptions on which the opinion in the report is based.
- ★ Tests, examinations and investigations upon which the expert has relied.
- ★ Reasons for each opinion expressed.
- ★ Summary of conclusion reached.
- ★ Disclosure if a particular question falls outside the experts expertise.
- ★ Disclosure if the report may be inaccurate without some qualifications (and details thereof).
- ★ Disclosure, if applicable, that the experts opinion is not a concluded opinion because further research or data is required or any other reason.
- ★ A declaration at the end of the report as follows:

- I. I have made all the inquiries that I believe are necessary and appropriate and to my knowledge there have not been any significant matters omitted from this report;*
- II. I believe that the facts within my personal knowledge that are stated in this report are true and the opinions I have expressed are truly held by me;*
- III. I have read and understand the Family Court practice direction "Guidelines for Expert Witnesses" and agree to be bound by it;*
- IV. I am independent of the engaging party and their legal representative; and*
- V. I have complied with the requirements of the following professional codes of practice that apply to me (to be inserted)."*

The guidelines also refer to Expert's Conferences, preparing for such, information to be made available, conduct of conferences, joint reports, etc and states that an expert must abide by any direction of the Court to:

- a) Confer with any other expert witness;
- b) Endeavour to reach agreement on material matters for expert opinion;
- c) Provide the Court with a joint statement specifying matters agreed and matters not agreed and the reason for any non-agreement.

Also an expert is required to exercise his or her independent professional judgement in relation to such a conference and must not act on any instruction or request to withhold or avoid agreement.

Finally, the guidelines states that the Family Court will appoint an expert witness in financial cases where appropriate, for example, where the issues are not complex and the assets of the parties are modest. This is in line with the direction of the Family Court and the use of Single Experts (unlike that of the Supreme Court of Victoria).

### Electronic MW Forensic

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MW Forensic is a newsletter prepared on an ad hoc basis covering topical issues in the area of forensic accounting. We would welcome your thoughts on contents for future editions.



## 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 4.

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

We have extensive experience in:

- business and company valuations
- quantification of economic loss
- loss of earnings assessments /reviews
- family law investigations, valuations, tax issues for proposed settlements
- fraud reviews and investigations
- due diligence reviews
- professional negligence matters concerning accountants, tax advisors, auditors and directors
- compulsory acquisitions
- solvency issues
- expert determinations
- expert witness

Munday Wilkinson is now Melbourne's largest dedicated forensic accounting firm comprising two directors, two associate 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.

## Water Wheel Case - Insolvency Indicators

The judgement in ASIC v Plymin, Elliott & Harrison [2003] VSC 123 (5 May 2003), known as **the "Water Wheel case"** highlights the responsibilities of directors to prevent insolvent trading.

This was a civil penalty proceeding brought by the Australian Securities and Investments Commission ("ASIC"), against three company directors in relation to alleged insolvent trading by two companies, Water Wheel Mills Pty Ltd and Water Wheel Holdings Limited.

At all relevant times Plymin was the Managing Director, Harrison was the Chairman of the Board of Directors and Elliott was a non-executive director of the companies.

In this case ASIC issued proceedings under s588J(1) of the Corporations Act 2001 for a breach of s.588G of the Corporations Act 2001 (Cth) regarding a director's duty to prevent insolvent trading by the company.

Section 588J(1) provides:

"Where, on an application for a civil penalty order against a person in relation to a contravention of section 588G, the Court is satisfied that:

- (a) the person committed the contravention in relation to the incurring of a debt by a company; and
- (b) the debt is wholly or partly unsecured; and
- (c) the person to whom the debt is owed has suffered loss or damage in relation to the debt because of the company's insolvency;

the Court may (whether or not it makes a pecuniary penalty order under subsection 1317(G) or an order under 206c disqualifying a person from managing corporations) order the first-mentioned person to pay to the company compensation equal to the amount of that loss or damage."

There was no debate between the parties about the relevant legal tests of insolvency. Section 9 of the repealed Corporations Law provided that "insolvent" has the meaning given by s.95A(2) of the Law which stated that a person who is not solvent is insolvent. In turn, s.95A(1) of the Law provided that a person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable. This is the so-called "cash flow test" of insolvency.

"The cash flow test provides that a company is insolvent when it is unable to pay its debts as they fall due. It is of no consequence, under this test, that assets exceed liabilities. The important point is: can the company pay its way in carrying on its business? The court, in examining whether a company is suffering cash flow insolvency, will consider whether the company is actually paying its debtors [sic]" - A R Keay "The insolvency factor in avoidance of antecedent transactions in corporate liquidations" (1995) *Monash University Law Review* 305 at 307.

A checklist of matters was put to the second defendant's expert witness as being indicators of insolvency.

The list is 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. **The Court determined that the date of insolvency was the date on which the Water Wheel's banker reclassified its loan as "payable on demand"**.

In considering the issue of when a debt is due and payable the Court referred to:

★ *Manpac Industries Pty Ltd v Ceccattini* (2002) NSWSC 330, where Young CJ found that, in business, payments are not always made within trading terms written on the invoice and therefore "it is relevant to take into consideration the relationships between creditor and debtor, any agreement and the course of conduct"

★ *Lee Kong v Pilkington (Aust) Ltd* (1997) 25 ACSR 103, a decision of the Full Court of the Supreme Court of Western Australia, Owen J commented that "the mere fact that a creditor refrains from taking enforcement action (whether by suing for the debt, seeking to bankrupt or wind up the debtor, or seeking to enforce any security) does not negative [sic] the debt being "due" for the purposes of the provision."

The Court did not comment on the conflict of these cases.

In regard to the issue of when a debt is incurred, the Court adopted what was said by Hodgson J in *Leigh-Mardon Pty Ltd v Wawn* (1995) 17 ACSR 741: "... In relation to sale of goods, it seems to me that, in some cases, it will be the order which in substance and commercial reality renders the company liable for the price of the goods, even if that price is not actually payable until delivery; while in other cases, it will be the acceptance of delivery which, as a matter of substance and commercial reality, so renders the company liable. And intermediate positions are possible."

## Expert Witnesses in the Supreme Court

On 31 July 2003 the Supreme Court of Victoria issued Statutory Rule 95/2003, effective from 1 August 2003, introducing changes to the Order 44 requirements for expert evidence and the new "Expert Witness Code of Conduct".

The rules can be accessed at [www.dms.dpc.vic.gov.au](http://www.dms.dpc.vic.gov.au).

The code states that an expert witness has an overriding duty to assist the Court impartially on matters relevant to the expertise of the witness.

Expert Reports must state, specify or provide:

- ★ the name & address of the expert;
- ★ an acknowledgement that the expert has read the code and agrees to be bound by it;
- ★ the qualifications of the expert to prepare the report;
- ★ the facts, matters and assumptions on which opinion is based;
- ★ the reasons for, materials utilised in support of, and a summary of each opinion;
- ★ (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;
- ★ any tests, investigations on which the expert has relied, etc;
- ★ a declaration that the expert has made all the inquiries desirable and appropriate and no material matters have been withheld from the court;
- ★ any qualification of an opinion expressed in the report without which the report is or may be incomplete or inaccurate; and
- ★ whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason.

Where the expert has issued a report and the expert thereafter changes his or her opinion on a material matter a supplementary report should be issued.

If directed to do so by the Court, an expert shall confer with any other expert, provide the Court with a joint report specifying matters agreed and matters not agreed and reasons for not agreeing.

Each expert is to exercise his or her independent judgment in relation to each conference pursuant to a direction of the Court and shall not act on any instruction or request to withhold or avoid agreement.

The Victorian Code of Conduct is similar to that for the Supreme Court of NSW in that both codes require the above declaration by the expert but do not require the disclosure or a copy of instructions provided to the expert.



## Forensic Accounting Conference

The 4<sup>th</sup> annual Forensic Accounting National Conference held in Sydney on 4<sup>th</sup> and 5<sup>th</sup> of September 2003.

The conference was opened by the Chief Justice of the NSW Supreme Court, the Hon. Justice James Spiegelman AC. Who presented a paper on recent trends impacting forensic accounting including the release of guidelines and codes of conduct by most jurisdictions, the overriding duty an expert has to the Courts, use of joint expert meetings and jointly or court appointed experts.

John Van Geldermalsen, a director of the St James Ethics Centre, discussed the issue of independence. He referred to two types of governance models. One trust based which includes self-regulation by the professional bodies and the other, control based which increases the regulation of the industry's participants. He said that the control model was taking over in the current environment (Enron, HIH, etc). However, he believed it is not so much a matter of independence, but rather not taking responsibility for the duty one has to the public interest, which is often the problem.

John Watts, a Sydney Barrister, gave a presentation on the main differences between Evidence in Chief and Cross Examination. His tips about giving expert evidence included:

- not going beyond your area of expertise
- make sure your report complies with Makita v Sproules (refer June 2003 edition of MW Forensic)
- listen carefully to the question
- if you don't understand the question say so
- just answer the question you are asked as precisely and simply as you can
- use simple language, not jargon
- do not argue with counsel or the judge.

The Honourable Justice Stephen O'Ryan of the Family Court of Australia gave an overview of the Family Law Rules 2004 and what they mean for experts. He referred to Section 15 of the Rules (again refer June 2003 edition of MW Forensic).

Tony Jones of the ABC's Lateline was the moderator of a stimulating discussion on: "Issues in the Fight for Integrity in Business". Panelists included: Ruth Picker of Ernst Young, Dean Newlan of KPMG, Rick Allert - chairman of Coles Myer and Ross Wraight – CEO of Standards Australia.

Discussion covered the impact of the Ramsay report, independence of auditors, including rotation of auditors, and the engagement of consulting services, treatment of executive options, the prevalence of fraud and the role of whistleblowers.

Rick Allert commented that business is about risk, not regulation and events happen which materially impact on a business such as September 11, SARS, etc.

Further, he claimed accountants and auditors should have a whistleblower role and governments must be seen to respond to financial calamities with greater regulation.

Other presentations included:

- Investigative techniques
- Damages in Personal Injury – a practical approach
- Is Marketing Evidence crucial in identifying and quantifying losses?
- An Interactive Investigation workshop
- Valuations in the Context of Litigation

### Munday Wilkinson Flies to India

You never know where you'll end up on a forensic accounting assignment.

We were recently engaged by a New York firm of Lawyers to assist their client in the quantification of a loss claim for several million US dollars. The claim involves commissions payable on the sale of goods in the USA by an agent (our client) appointed by an Australian company that had most of the goods manufactured in India (by a business owned, in part, by our client's brother) and exported directly to the USA.

In order to complete our report in this matter Bruce Wilkinson flew to New Delhi in late August to inspect many of the documents involved in this matter together with the extensive working papers of our client's accountant.

Following the issue of the report Bruce will be again heading overseas, this time to New York, where he is required to give initial evidence by way of a deposition before the New York Supreme Court.

### Further Information

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

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