MANAGEMENT OF EXPERTS

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Contents

Annexures

What is an expert?

1. An expert is a person who has experience or expertise in a subject calling for special skill or knowledge. There must be a field of specialised knowledge identified. Such a witness can give opinions within his area of expertise, and is not limited to giving evidence of facts as are other witnesses: *Evidence Act* 1995 (Cth) section 76 (rule against admissibility of opinion evidence) and section 79 (exception for opinion evidence based on specialized knowledge)[1]; see also the equivalent provisions in the *Evidence Act* 2008 (Vic). The Trial Judge must (first) decide whether the field of knowledge in which the witness professes expertise is a recognised and organised body of knowledge[2], outside the ordinary experience of men. The Trial Judge must (second) decide whether the opinion expressed in evidence by the expert witness is wholly or substantially based on that knowledge.[3] Unless at least each of these elements is satisfied, the evidence of the witness concerned is inadmissible.[4]

What are experts used for?

2. Primarily, expert **witnesses** are used in civil proceedings to give **evidence** on technical matters requiring opinion evidence which non-expert witnesses are unable (and not allowed) to give. Examples include medical opinions as to whether the Plaintiff worker is suffering from a claimed injury; evidence as to whether an engineering structure was designed and/or constructed satisfactorily or whether the structure's failure was due to factors for which the architect and/or builder was not responsible; valuation evidence of a business, shares in a company or other assets such as options (call or put) concerning shares in a

[1] *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [32]; *HG v The Queen* (1999) 197 CLR 414 at 432 per Gaudron J
[2] *Fisher v Brown* [1968] SASR 65; *Casley-Smith v FS Evans & Sons Pty Ltd No. 1* (1988) 49 SASR 314
[3] *Dasreef Pty Ltd* per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [42]
[4] *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 per Heydon JA at 743-744, applied by the Victorian Court of Appeal in *Ronchi v Portland Smelter Services* [2005] VSCA 83 per Eames JA at [54] (Buchanan and Nettle JJA concurring). See also *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2012] VSC 99 (30 March 2012) per Dixon J at para [98] where the rules of admissibility are succinctly set out; see also *Matthews v SPI Electricity Pty Ltd (Ruling No 9)* [2012] VSC 340 (13 August 2012) per J Forrest J at [11]; *Matthews v SPI Electricity Pty Ltd (Ruling No 10)* [2012] VSC 379 (4 September 2012) per J Forrest J at [7]

company or other securities; whether the actions taken by a mortgagee to sell real property were reasonable having regard to the mortgagee's duty under section 77 of the *Transfer of Land Act* 1958 (Vic); pharmaceutical or medical evidence about the efficacy of a drug; evidence as to the state of the prior art before the priority date of a challenged patent, the meaning of terms of art used in a patent specification, what was obvious to a person skilled in the art at the priority date, the status of reputation, and so forth.

3. Section 76(1) of the *Evidence Act* expresses the opinion rule in a way which assumes that evidence of an opinion is tendered "to prove the existence of a fact". The opinion rule is expressed in this way in order to direct attention to why the party tendering the evidence says it is relevant. More particularly, it directs attention to the finding which the tendering party will ask the tribunal of fact to make. In considering the operation of section 79(1), it is thus necessary to identify why the evidence is relevant: why it is "evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding".[5] Evidence may also be taken from expert witnesses in Court by using the concurrent evidence or "hot tub" technique.[6] In fact, Hot Tubs are the preferred form of delivery of expert evidence favoured by many judges.[7] The court may also direct expert witnesses to confer outside Court and to provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for their not agreeing.[8]

4. The second main use of experts in litigation in civil proceedings is as a **tutor** to the legal team, in particular the barristers charged with the responsibility for

[5] *Dasreef Pty Ltd* per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [31]
[6] FCR 23.15
[7] Rares, S., "Using the "Hot Tub" – How Concurrent Expert Evidence Aids Understanding Issues" Intellectual Property Forum December 2013 pp 28-36; Middleton JME, "Concurrent evidence – how to plan for and get the most from it" Victorian Bar CPD 4 December 2013; Hargrave, K "Expert Witnesses/Hot-Tubbing" Commercial Court Seminar 27 October 2010; generally see Young, N "Expert Witnesses: On the Stand or in the Hot Tub - How, When and Why" Commercial Court Seminar 27 October 2010.
[8] In the case of the Supreme Court of Victoria, see rule 44.06 and Part 4.6 of the *Civil Procedure Act* 2010 (Vic). For such a direction in a proceeding concerning medical negligence, see *Guerin v Watts* [2002] NSWSC 692; in a geo-technical case, see *Gunnersen v Henwood* [2011] VSC 440 (including discussion about the failure of a joint conference to achieve a joint report). As to quantum, see *Thomas v Powercor Australia Ltd (Ruling No 7)* [2011] VSC 502

settling pleadings and cross-examining opposing experts. This tutoring role can also help members of the legal team understand difficult evidence or instructions, and the expert can give guidance about where to locate appropriate evidence. A common example of tutoring by experts arises where a person who alleges a contravention of one or more of the provisions contained in Part IV of the *Trade Practices Act* 1974 (Cth) and which requires the pleading and proof of a "market", engages an expert (generally an economist) to advise as to the scope of the market concerned for the purpose of assisting counsel in settling the allegations concerning the market in the statement of claim. Another example is where a person who alleges a negligent valuation of real property and which requires the pleading and proof of a "true" or "accurate" valuation engages an expert (generally another valuer) to advise as to the true value of the property concerned for the purpose of assisting counsel in settling the allegations concerning the breach of retainer and/or standard of care in the statement of claim. Tutoring experts can also assist counsel to identify areas for cross-examination of opposing experts.

5. The third use to which experts are commonly put in civil proceedings is that of giving **advice**, usually before proceedings are commenced. For example, a putative patent infringer, knowing of the patent and before embarking upon the alleged infringing conduct, can engage an expert to advise whether the proposed product or conduct falls within the scope of any of the claims of the patent. Such an expert is sometimes referred to as the "**treating**" witness if he is called in litigation because he has or may have had some influence upon the conduct or facts the subject of the proceeding.

How should experts be engaged?

6. Particularly since the introduction in most Australian superior Courts of guidelines for experts, there is a need for great care in retaining experts. The expert, and the lawyers involved in dealing with him, must be familiar with and apply the relevant Court guidelines. That is, each should assume from the outset of the relationship that the expert may be called upon to give evidence and if this

should occur, will be bound by the guidelines. The guidelines most likely to be of relevance to legal practitioners are:

(a) **Federal Court of Australia** – Part 23 of the 2011 Rules and the Practice Direction CM7 of 4 June 2013 "Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia". Where a court-appointed expert reports, a party may only call evidence in answer with the leave of the court: R 23.04. A privately-appointed expert can only be called if a report complying with Div 23.2 has been provided. R 23.13 sets out the requirements for the content of the report. First directions will normally address the question whether an expert will be needed.[9]

(b) **Supreme Court of Victoria** – Order 33 (claims in respect of personal injury) and Order 44 of Chapter I of the Rules and "The Expert Witness Code of Conduct (Form 44A)". In the context of the Commercial Court, Practice Note 10/2011, paragraph 13.25, provides that the Commercial Court will invariably direct that experts confer before trial and then provide to the court and the parties a joint memorandum containing their joint opinion as to stipulated questions. As a matter of practice, those questions will frequently have been settled at a directions hearing prior to the joint experts' conference being ordered, but after the court has received submissions from the parties' legal representatives following the exchange of experts' reports;

(c) **Supreme Court of New South Wales** - Part 31, Division 2 of the Uniform Civil Procedure Rules 2005 and "The Expert Witness Code of Conduct" contained in schedule 7 of the Uniform Civil Procedure Rules; note subdivision 3 of division 2 to the Uniform Civil Procedure Rules that permits the Court to control the use of expert witnesses, and especially rule 31.35 which provides that the Court may make use of the so-called "hot tub" procedure in the giving of expert evidence; note also subdivision

[9] Federal Court Practice Note IP 1 — Proceedings Under the Patents Act 1990 (Cth) was issued on 1 August 2011

5 of division 2, that permits the Court to appoint experts; see also Practice Note 121 "Joint Conferences of Expert Witnesses";

(d) **Family Court** – Practice Direction No. 2 of 2006 (Child-related proceedings); No. 9 of 2004 (Medical Procedure applications); Family Law Rules 2004 Part 15.5; see also Family Court of Australia "Experts' Conference"; see also "The Changing Face of the Expert Witness" – Family Court Discussion Paper;

(e) **Federal Administrative Appeals Tribunal** – section 38(1) of the *AAT Act* enables the AAT to require further particulars of findings on material questions of fact given under section 37(1)(a), and this includes the exchange of reports intended to be relied on for the purposes of the hearing, including expert reports: *Re Australian Mutual Provident Society and Minister for Territories & Local Government* (1984) 6 ALN N50. Guidelines have been issued 9 November 2011 for persons giving expert and opinion evidence.[10]

(f) **Victorian Civil and Administrative Tribunal** – Practice Note – PNVCAT2 "Expert Evidence" dated 15 March 2012.

7. In proceedings conducted in the Victorian State Courts (but not VCAT), the *Civil Procedure Act* 2010 (Vic) ("CP Act") must not be overlooked. The CP Act was recently amended to include Part 4.6. The main objective of the expert evidence provisions included in Part 4.6 is to reduce the costs and delays associated with expert evidence by providing clear legislative guidance and encouragement for the courts to actively manage and control expert evidence.[11] Prior to the recent amendments of the CPA incorporated in Part 4.6, the orthodox model of adducing expert evidence employed in civil litigation before Victorian courts involved:[12]

[10] The text can be found at: *http://www.aat.gov.au/LawAndPractice/PracticeDirectionsAndGuides/Guidelines/ExpertAndOpinionEvidence.htm*

[11] Explanatory Memorandum, *Civil Procedure Amendment Bill* 2012, Part 3

[12] Monichino, A *Aspects of Expert Evidence; Briefing of Experts and Finalising the Report*; Paper presented to the IAMA "Expert Evidence Fundamentals: Tips and Traps" Seminar on 8 October 2012

(a) parties being able to engage experts to answer questions based upon competing sets of factual assumptions;

(b) the respective experts generally being required to meet before trial in a joint expert conference, in the absence of the parties, following the exchange of final expert reports, in an attempt to limit differences and to express brief reasons for their remaining differences; and

(c) debate concerning the remaining differences between the experts at trial, increasingly by the use of the hot tub or concurrent evidence method.

8. It can be anticipated that Part 4.6 of the CP Act may have the effect of fostering the introduction into Victorian courts of the "Expert Teaming" model, now commonly used in international arbitrations,[13] the features of which include:

(a) the Court at an early stage of the proceeding is engaged in identifying particular questions requiring expert evidence, including in identifying the relevant area of expertise and being involved in the selection of the experts by the respective parties (including by limiting the number of experts);

(b) the experts are instructed with the same questions, the same factual assumptions, including competing factual assumptions, and the same documents;

(c) the experts are isolated from the respective parties, and work together to produce a joint expert report answering the nominated questions for opinion;

(d) the experts also produce a joint report identifying points of agreement and disagreement;

(e) having identified points of disagreement, the experts then prepare individual expert reports on the disputed questions, only;

(f) any residual differences are explored at the hearing using the concurrent evidence method.[14]

[13] Monichino, A *Aspects of Expert Evidence; Briefing of Experts and Finalising the Report*; Paper presented to the IAMA "Expert Evidence Fundamentals: Tips and Traps" Seminar on 8 October 2012

9. The introduction of the "Expert Teaming" model would in Victorian Courts constitute a substantial departure from the existing methodology used in the retention of experts. This is because the parties would have less control over each stage of the expert management process, including whether the parties can independently of the court and the other parties retain an expert at all. Regardless of the expert evidence model used, the CP Act imposes obligations on an expert witness expressed to be in the form of "overarching obligations". A failure to adhere to these obligations can result in the court, of its own motion, investigating the expert and the legal practitioners,[15] and include:

   (a) to act honestly (section 17);

   (b) to cooperate in the conduct of the proceeding with the parties and the Court (section 20);

   (c) not to engage in conduct which is misleading or deceptive or which is likely to mislead or deceive (section 21);

   (d) to resolve by agreement any issues in dispute which can be resolved in that way and to narrow the scope of the remaining issues in dispute (section 23);

   (e) to use the expert's reasonable endeavours to ensure that legal costs and other costs incurred in connection with the proceeding are reasonable and proportionate to the complexity or importance of the issues in dispute and the amount in dispute (section 24); and

   (f) to use the expert's reasonable endeavours to act promptly and minimise delay (for the purpose of ensuring the prompt conduct of the proceeding) (section 25).

10. Section 16 of the CP Act provides that each person (such as an expert witness) to whom the overarching obligations apply has a paramount duty to the Court to

[14] Monichino, A *Aspects of Expert Evidence; Briefing of Experts and Finalising the Report*; Paper presented to the IAMA "Expert Evidence Fundamentals: Tips and Traps" Seminar on 8 October 2012

[15] *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (No 4)* [2013] VSC 14; see also *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 6)* [2013] VSC 159

further the administration of justice in relation to the proceeding. Significantly, section 29(1) of the CP Act provides that if a court is satisfied that, on the balance of probabilities, a person has contravened any overarching obligation, the court may make any order it considers appropriate in the interests of justice of its own motion including, but not limited to, those referred to in that provision, such orders extending to the making of orders for the payment of costs and also to the payment of compensation.[16]

11. Broadly, an expert should be retained by means of a letter of retainer which clearly sets out the instructions, the issues to be addressed and any assumptions to be made. It is preferable to ask the expert witness to make assumptions of fact rather than to provide a draft statement or a proof of evidence for another witness, or the client, which turns out later to be a draft statement or proof from which the witness or the client may wish to resile. This is because the draft statement or proof of evidence will not be privileged in the hands of the expert if the report is relied upon in the proceeding. The instructions as set out in the letter of retainer must be clear and unequivocal. Annexed to this paper are two letters of retainer – one is an example of how not to draft such a letter; the second is an example of how one ought be drafted. The expert should not produce a draft of his report until he has been provided with a letter of retainer and instructed concerning the requirements of the Court or Tribunal in which he is to give evidence concerning the expert's conduct. In the absence of such a letter having been provided to the expert prior to the production of his draft report, the admissibility of the report may become subject to challenge by a party. Even if admissible, the weight attributed to the report by the Court in the absence of a letter of retainer may be reduced.

12. A copy of the letter of retainer should be produced to the opposing parties with the report itself. The applicable Expert Witness Code of Conduct, relevant Practice Directions, (where applicable) the CP Act and common sense suggest that the letter of retainer ought to refer to at least the following:

[16] *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (No 4)* [2013] VSC 14; see also *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 6)* [2013] VSC 159

(a) The fact of the retainer of the expert;

(b) The functions to be performed by the expert beyond preparing the report, if there are to be any;

(c) The timing of the report. The Rules of Court and relevant Practice Directions generally provide that save with the leave of the Court or Tribunal or by consent of the parties, a party cannot except in cross-examination adduce expert evidence at trial unless the substance of the evidence is contained within a report which the party has served. A party who fails to serve a statement of the evidence of an expert may be refused leave to call the expert as a witness at the trial;[17]

(d) The form of the report. Generally, it is preferable that the expert's report should be in the form of a narrative. In *HG v The Queen*, Gleeson CJ pointed out that "[b]y directing attention to whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience, [section 79] requires that the opinion is presented in a form which makes it possible to answer that question".[18] The report must demonstrate that the expert applied specialised knowledge in giving the opinion and relating it to the question at hand.[19] Thus, in *NV Sumatra Tobacco Trading Co v British American Tobacco Australia Services Ltd* (2011) 198 FCR 435, the court decided on the basis of the report that the expert's specialised knowledge was limited to a particular area (linguistics, language structure, grammatical and syntactic analysis) and not the propensity of consumers to adopt particular language abbreviations. The report must be a complete statement of the evidence the expert will give. Where the expert gives evidence that substantially adds to what he or she has given in the witness statement or report, the opposite party to the party

[17] see *Alucraft Pty Ltd (in liq) v Grocon Ltd (No 1)* [1996] 2 VR 377; see also *Thomas v Powercor Australia Ltd (Ruling No 5)* [2011] VSC 482 (where a tactical decision was made not to serve the expert's report). In *Investec Bank (Australia) Ltd v Mann* [2012] VSC 58, an application was made to serve an expert report less than 30 days prior to trial. Pagone J declined to grant leave on the basis of prejudice to the other party.

[18] 197 CLR 414 at [39]; see also *Dasreef Pty Ltd* per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [36]; and *R v Farquharson* (2010) 26 VR 410.

[19] *Gunnerson v Henwood* [2011] VSC 440

who called the expert may be entitled to an adjournment to address the additional matters in a supplementary witness statement by the expert engaged by that party;[20]

(e) The manner in which the expert is to conduct himself. That is, whether the expert may approach witnesses, and what he should do if it becomes necessary for him to make use of an assistant in preparing his report. Also, that the expert must retain and produce with his report a copy of all documents seen by him and used in the preparation of his report;

(f) A summary of the issues appearing in the pleadings that are relevant to his report;

(g) Guidance concerning any legal issues that are relevant to the completion of the expert's tasks. This might be necessary, for example, in relation to the concept of obviousness in patent cases, for without such tutoring experience has shown experts tend to regard the length of the inventive step required by law to be rather larger than the cases in fact hold. Another example arises in the context of the valuation of company shares where the value of the shares becomes pertinent in the context of a shareholder oppression action brought under section 232 of the *Corporations Act* 2001 (Cth).[21] In the absence of tutoring, the expert may adopt a methodology in valuing the shares that is at variance with that preferred by the Court. Any instruction to the expert regarding legal principles to be applied must of course be scrupulously fair and free from partisan views;

(h) A summary of the facts that may be relevant to the expert's report. The factual matters must be set out at length, in detail and must be prepared with great care. In cases where the factual issues are not straightforward and may remain unclear, this task is substantial and likely to be time consuming. The absence in the draft of any reference to the factual

[20] *Miljus v CSR Ltd (No 2)* [2010] NSWSC 598
[21] See, for example, *Arhanghelschi v. Ussher* [2013] VSC 253; see also *Wain v Drapac (No. 2)* [2013] VSC 381

matters that are pertinent to the report potentially undermines not only the utility of the draft itself, but also any report produced in reliance upon that document. Of course, when referring to such factual matters, care must be taken to ensure that unwanted admissions are not made. Any such admissions will be *prima facie* admissible against the interests of the party tendering the expert report, and may be potentially damaging to that party's case;

(i) Any assumptions that must be made by the expert in completing his report, and the expert should be instructed to reveal in his report the process of reasoning by which he arrives at the opinions which he professes to hold. The failure to identify the assumptions for the opinion, or prove the factual basis or reasoning used to reach a conclusion, could make an opinion irrelevant and therefore inadmissible.[22] When instructing an expert witness to make assumptions, it is important that the assumptions upon which the witness is being asked to proceed are clearly identified and that the assumptions are assumptions that can be proved either by another witness or by a document which is itself admissible in evidence. If care is not taken in identifying and proving the assumptions, then the whole of the expert's report may be inadmissible or reduced in weight.[23] Where appropriate, it may be necessary for the expert to himself test the assumptions with which he has been instructed.[24] If the expert does not satisfy these requirements, then his report may be excluded from evidence or given diminished weight on the grounds that the evidence is little more than assertion;[25]

(j) The statistical and mathematical models that may be utilised by the expert in the preparation of the report which involves the valuation of an asset,

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[22] *Eric Preston Pty Ltd v Euroz Securities Ltd* (2011) 274 ALR 705 per Jacobson, Foster and Barker JJ at [171]
[23] *ASIC v Rich* (2005) 218 ALR 764; (2005) 54 ACSR 326; (2005) 23 ACLC 1111
[24] *Fletcher Insulation (Vic) Pty Ltd v Renold Australia Pty Ltd* [2006] VSC 269 (28 July 2006) per Byrne J at [38]
[25] *Fletcher Insulation (Vic) Pty Ltd v Renold Australia Pty Ltd* per Byrne J at [52]

and a suggestion to the expert that he discuss in the report which model is appropriate and why;

(k) Guidance concerning the requirements imposed upon the expert by the Court in which the expert is to give evidence. Generally speaking, a photocopy of the applicable Expert Witness Code of Conduct or Practice Direction (as the case may be) issued by the relevant Court or Tribunal should be enclosed with the letter of retainer, together with a copy of the relevant sections of the CP Act (if applicable). Each of the Victorian Supreme Court Rules and the New South Wales Uniform Civil Procedure Rules require that a copy of the Expert Witness Code of Conduct should be provided to the expert as soon as practicable after being engaged as a witness. In the Federal Court, R 23.12 requires (in substance) a party to give a copy of Practice Direction CM7 of 4 June 2013 "Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia" to any witness they propose to retain for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based on the specialised knowledge of the witness; cf in VCAT, Practice Note – PNVCAT2 "Expert Evidence" at [7]. The letter of retainer ought to emphasise that the expert must comply with the requirements of the applicable Expert Witness Code of Conduct or Practice Direction;

(l) The specific questions that the expert is to answer. Care must be taken when formulating the questions to ensure that they are relevant to a fact in issue in the proceeding.[26] If the question put to the expert is not so relevant, then the expert's report will be inadmissible in so far as the expert seeks to answer such a question.[27] The fact in issue in the proceeding on which the expert evidence is to be adduced should be

[26] As to the methods that may be used in the formulation of the questions and the use of a consulting expert, see Young, N *"Expert Witnesses: On the Stand or in the Hot Tub - How, When and Why"* Commercial Court Seminar 27 October 2010

[27] *Ronchi v Portland Smelter Services; Dasreef Pty Ltd* per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [31]

clearly identified, having regard to the substantive law and the pleadings and any other documents which set out the issues between the parties. For these purposes, the expression "fact in issue in the proceeding" in section 55 of the *Evidence Act* is intended to carry a wide rather than a restrictive meaning and will encompass all things that one must prove to succeed.[28] Where the proceeding is conducted by pleadings, the facts in issue will ordinarily be considered to be those material facts that are pleaded by one party and that are not accepted by the opposing party.[29] The opinion of the expert will be admissible to the extent that the opinion, if accepted, could rationally affect (directly or indirectly) the asessment of the probability of the existence of the fact in issue.[30]

How should experts be managed?

13. Experts will be managed differently depending on the role they are to play. If an expert is to be a witness in the proceeding (whether or not as a treating witness) he needs to be managed carefully, scrupulously and transparently. The principles applying to such experts (drawn from The Expert Witness Code of Conduct, the various Practice Directions, the relevant Court Rules, the CP Act and the cases dealing with experts) may be reduced to the following general principles:

    (a) The expert witness has an overriding or paramount duty to assist the Court and is <u>not</u> an advocate for the party calling him.

    (b) An expert must be, and must be seen to be, independent and impartial. In *Roads Corporation v Love* [2010] VSC 253, Vickery J commented upon the undesirability of meetings of experts called by a party to discuss their evidence as a vice that can compromise the independence of such experts and create difficulty in the adequate testing of the evidence leading to loss of credibility of the witness concerned. In *Day v Perisher Blue Pty Ltd* (2005) 62 NSWLR 731 the New South Wales Court of Appeal described

[28] *El Dupont de Nemours & Co v Imperial Chemical Industries plc* (2002) 54 IPR 304
[29] *Dasreef Pty Ltd* per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [31]; *El Dupont de Nemours & Co v Imperial Chemical Industries plc* at [48]
[30] see Branson, C *Expert Evidence: a judge's perspective* (2006) NSW Bar News 32 at 34

similar conduct as being tantamount to the coaching of witnesses and therefore as being "improper".[31] However, in *FGT Custodians v Fagenblat* [2003] VSCA 33, the Victorian Court of Appeal affirmed the decision of the Trial judge not to exclude the evidence of an expert on the grounds of ostensible bias.[32] The Court held that there is no common law principle which would exclude as incompetent the evidence of a person otherwise qualified to give expert testimony but who is said to be affected by interest or bias, at least where that interest or bias is said to arise from some family or personal relationship between the expert and the person calling the expert.[33]

(c) An expert's evidence ought to be transparent in the sense that all facts or assumptions upon which his evidence is based should be stated, his reasoning should be set out, and unfavourable facts or considerations which have been dismissed should be discussed and explained.[34] However, in certain areas of expertise it may not be feasible for an expert to be required to identify every assumption that is the basis of the opinion. Whether this is so turns upon the particular circumstances of the matter under consideration.[35] Thus, it has been held that in certain cases an expert ought not be required to identify every assumption of fact relied upon in the preparation of the relevant report. Such cases include the

[31] See also *Kelly v Commissioner of Taxation* [2012] FCA 423 per Besanko J at [19]; *Kastrounis v Foundouradakis* [2012] NSWSC 264 per Hallen AsJ at [148]; *Roads Corporation v Love* per Vickery J at [37]. In *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49, Bleby J at [900] and [901] described such an approach as being likely to contaminate evidence

[32] Per Ormiston JA at [19] and [20]

[33] Per Ormiston JA at [26]. After considering the decision of Ormiston JA in *Custodians v Faganblat*, Dodds-Streeton J in *Ananda Marga Pracaraka Samgha Ltd v Tomar (No 4)* [2012] FCA 385 held at [45] and [46] that a lack (or perceived lack) of independence or an interest in the outcome of litigation including through a family relationship with, or even the status of, a party does not render any witness including an expert (except, perhaps, as Ormiston JA observed a court appointed expert) incompetent, and thereby exclude that person from giving evidence. Rather, Dodds-Streeton J held that protocols or judicial statements requiring independence in expert witnesses do not constitute a precondition of competence, but rather, a preferred practice; see also *Davies & Nicol as Joint and Several Liquidators Of Harris Scarfe Ltd v Chicago Boot Co Pty Ltd* (2011) 82 ASCR 193 per Sulan J at [30]

[34] *Pettiona v Whitbourne* [2013] VSC 205 per Davies J at [13]; *Sampi v State of Western Australia* [2001] FCA 110 at [46]

[35] *ASIC v Rich* per Spigelman CJ at [170]

evidence of a forensic accountant[36], historians[37], anthropologists[38], economists who are required to give expert economic evidence of the kind traditionally adduced in competition law cases[39], pharmaceutical chemistry[40] and valuers in certain types of cases[41]. However, insofar as these cases were decided prior to the promulgation of the Guidelines that now operate in the jurisdictions concerned, or without proper regard to the operation of the Guidelines, the cases ought to be considered with caution.

(d) The documents with which the expert witness has been instructed will be discoverable.[42]

(e) Legal professional privilege is unlikely to attach to communications with the expert if he is relied upon as a witness.[43] As a rule, legal professional privilege protects a report in writing given to a party by an expert for the purpose of the litigation from disclosure to the other side until it is relied on or is intended to be relied on in evidence.[44] However, legal professional privilege attaching to the contents of an unserved draft witness statement, including an expert's witness statement, or witness outline is not taken to be waived merely by the filing and service of the final form of such witness statement or witness outline.[45] In *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438 Lindgren J summarised the position as follows:

(i) Ordinarily the confidential briefing or instructing by a prospective litigant's lawyers of an expert to provide an opinion for use in anticipated litigation attracts client legal privilege;

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[36] *ASIC v Rich*
[37] *R v Zundel* (1987) 35 DLR (4th) 338 at 387-390
[38] *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)* (2003) 130 FCR 424 per Lindgren J at [26]
[39] *ACCC v Liquorland (Australia) Pty Ltd* [2005] FCA 630 per Allsop J at [21]
[40] *Borowski v Quayle* [1966] VR 382 per Gowans J at 386
[41] *Pownall v Conlan Management Pty Ltd* (1995) 12 WAR 370 per Ipp J at 374-375
[42] *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 806
[43] *ACCC v Cadbury* (2009) 174 FCR 547; (2009) 254 ALR 198; *Temwell Pty Ltd v DKGR Holdings Pty Ltd*
[44] *Causton v Mann Egerton (Johnsons) Ltd* [19741 1 All ER 453; RSC O44; SCV Commercial Court practice note no.11 of 2011 [13.9]
[45] For the position in the Commercial Court, see Commercial Court Practice Note No. 10 of 2011 at [13.19]

(ii) Copies of documents, regardless of whether the originals are privileged, prepared for the purpose of confidential communications between the client's lawyers and the expert witness attract the privilege;

(iii) Documents generated unilaterally by the expert such as working notes, drafts, field notes and the like are not privileged;

(iv) Ordinarily the disclosure of the expert's report for the purpose of reliance upon it in the litigation results in an implied waiver of the privilege in respect of documents referred to in (i) and (ii), at least insofar as they could be said to influence the content of the report because otherwise it would be unfair/inconsistent with maintaining the privilege;[46]

(v) Similarly, privilege cannot be maintained in respect of documents used by an expert to form an opinion or write a report, regardless of how the expert came by the documents; and

(vi) It may be difficult at an early stage of the proceeding to establish whether documents which were before an expert were used so as to influence the content of her or his report.[47]

(f) Waiver of legal professional privilege in relation to witness statements is now generally determined by section 122(2) of the *Evidence Act*. Conduct which can lead to loss of privilege in respect of an expert witness report was considered in *Roads Corporation v Love* [2010] VSC 253.[48] In that case, there was an issue as to whether a note made in respect of a meeting addressed by an expert witness called by a party, a letter, and two emails

[46] Generally see *British American Tobacco Australia Services Limited v Cowell* (2002) 7 VR 524 per Phillips, Batt and Buchanan JJA at [121]; *Perdaman Chemicals & Fertilisers Co Pty Ltd v The Griffin Coal Mining Company Pty Ltd [No 4]* [2012] WASC 157 per Martin CJ at [16]

[47] *Australian Securities and Investments Commission v Southcorp Ltd* per Lindgren J at [31]; see also *Prince Removal & Storage Pty Ltd & Anor v Roads Corporation* [2012] VSC 245 per Emerton J at [9]; *Roads Corporation v Love* per Vickery J at [25]; *Clifford v Vegas Enterprises Pty Ltd (No 3)* [2010] FCA 287 per Barker J at [8]

[48] More recently see *Matthews v SPI Electricity (No. 4)* [2013] VSC 237; *Matthews v SPI Electricity (No. 7)* [2013] VSC 553; *Matthews v SPI Electricity (No. 8)* [2013] VSC 628

in respect of the draft statement were privileged. It was held by Vickery J that calling the relevant expert as a witness was conduct that waived privilege in the communications by being inconsistent with the maintenance of the privilege. Further, the Court held that the conduct of convening a meeting of several experts called by the party including the expert in question was inconsistent with maintaining the privilege;

(g) A draft report may be called for when the expert is in the witness box.[49] The opposing party can engineer circumstances which make it difficult to resist producing draft reports (and correspondence with the expert) for scrutiny by, for example attacking credit, attacking completeness of disclosure of bases of the opinion, alleging changes in opinion not disclosed, and so forth. Because it is impossible to predict what the expert witness will say in the box, it is dangerous to interact with the expert as if the privilege will always protect drafts and other sensitive communications. Thus, where an expert witness concedes in cross-examination that an earlier expert report prepared by him was more favourable towards the opposing party than the report ultimately filed in the proceeding and acknowledged that he altered his opinion following discussions with the legal representatives who have called him, then all the facts and instructions upon which that witness bases the expert opinion may become admissible and subject to production.[50] Nonetheless, this issue is difficult, and the resolution of any question relevant to this issue must inevitably turn upon the facts and circumstances of the case concerned. In short, drafts and correspondence are not automatically discoverable, but can easily become so.

(h) The Court is interested in the expert's opinion, not the lawyer's opinion. Therefore the report or evidence of the expert needs to be primarily (perhaps solely) the product of the expert's endeavours. Involvement by

[49] *Pegela Pty Ltd & Ors v AXA* [2003] VSC 511
[50] *Cobram Laundry Services Pty Ltd v Murray Goulbourn Cooperative Co Ltd* [2000] VSC 353. See also *Prince Removal & Storage Pty Ltd & Anor v Roads Corporation* per Emerton J at [9], [12] and [13]

the lawyers in the drafting process of an expert's evidence or report is to be avoided as much as possible. A failure to adhere to this principle may result in the court investigating, of its own motion, whether the practitioners themselves (and the expert) have failed to comply with the overarching obligations in the CP Act.[51] Counsel and solicitors should not be involved in settling or drafting the substance of an expert's opinion. However, counsel and solicitors may be involved in the settling of the form in which an expert's opinion is to be conveyed in evidence.[52] The English authorities suggest they should not even be involved in matters of form.[53] See also the Supreme Court of Victoria Commercial List "Green Book" (former Practice Note No. 4 of 2004) para 10.3, which disapproved of 'wordsmithing'; in the current Commercial Court Practice Note No 10 of 2011, para 13.17 provides that practitioners who draft witness statements or witness outlines (allowing for their brevity and purpose) should bear in mind that a witness statement or witness outline that is not written in the witness's own words is unlikely to assist either the Commercial Court or the witness. The Federal Court Practice Direction emphasises that the expert is to remain independent of the parties and to give his opinion for the assistance of the Court. This also appears in the applicable Expert Witness Code of Conduct.

(i) If, when the report is received, there is an error in relation to a factual matter or there is another hypothesis which the witness is to be asked to explore, then supplementary written instructions should be provided and the witness asked to comment. If there are problems of form because of the expert's inexperience in report writing, written guidance rather than legal re-writing is the safest course to adopt.

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[51] *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (No 4)* [2013] VSC 14; see also *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 6)* [2013] VSC 159

[52] *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)* per Lindgren J at [19]; see also *SNF (Australia) Pty Ltd v Commissioner of Taxation* [2010] FCA 635 per Middleton J at [110]; *Jango v Northern Territory (No 2)* [2004] FCA 1004 per Sackville J at [9]; *R v Coroner Maria Doogen* [2005] ACTSC 74 per the Full Court at [118].

[53] *Whitehouse v Jordan* [1981] 1 WLR 246 at 256-257 per Lord Wilberforce; *National Justice Compania Naviera SA v Prudential Assurance Co ("The Ikarian Reefer")* [1993] 2 Lloyd's Rep 68 at 81

(j) The relevant Practice Direction (and if applicable, the relevant provisions of the CP Act) should be provided to the expert when being retained or as soon as practicable thereafter, and acknowledged by the expert as having been read and understood. If applicable, the expert must in his report acknowledge that he or she has read the Expert Witness Code of Conduct or relevant Practice Direction and agrees to be bound by it. The Expert Witness Code of Conduct and the relevant Practice Directions generally provide that an expert witness has an overriding duty to assist the court or Tribunal impartially on matters relevant to the area of expertise of the witness, and that the witness is not an advocate for a party. Under the CP Act, the overarching obligations (other than those in sections 18, 19, 22 and 26) apply to expert witnesses in civil proceedings in the Victorian Courts. An expert witness should be provided with a copy of the relevant overarching obligations and confirm that she or he has read and understood them and agrees to be bound by them.[54] It has been held in Victoria,[55] and also New South Wales[56] in respect of a similar rule, that the purpose of the rule is to reinforce the proposition that in general, expert evidence should not be admitted unless the expert has at all relevant times subscribed to the obligations contained in the code of conduct. Exceptional circumstances should exist before any departure from this rule is warranted. The expert must in his report expressly confirm that all matters of relevance have been disclosed and nothing of relevance has been withheld.[57] In *Commonwealth Development Bank of Australia Pty Ltd v Cassegrain* [2002] NSWSC 980, Einstein J did not allow into evidence the report of an expert in relation to a matter of banking in

[54] *Secretary to the Department of Business and Innovation v Murdesk Investments Pty Ltd* (2011) 184 LGERA 288; [2011] VSC 581

[55] *Pettiona v Whitbourne* [2013] VSC 205 per Davies J at [13]

[56] *Investmentsource Corp Pty Ltd v Knox Street Apartments Pty Ltd* [2007] NSWSC 1128; *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* (2009) 75 NSWLR 380; *CJD Equipment Pty Ltd v A C Construction Pty Ltd* [2009] NSWSC 1085; *Hodder Rook & Associates Pty Ltd v Genworth Financial Mortgage Insurance Pty Ltd* [2011] NSWSC 279; for a general discussion of the relevant principles in the context of a criminal prosecution, see *Wood v R* [2012] NSWCCA 21 per McClellan CJ at CL at [727] to [729]

[57] The importance of observing the applicable Expert Witness Code of Conduct or Practice Direction can be seen from cases such as *Pettiona v Whitbourne* [2013] VSC 205 at [13], *ACCC v Lux* [2003] FCA 89 at [46] and *Sampi v State of Western Australia* [2001] FCA 110

circumstances where at the time of preparing his report the expert was not aware of the applicable Guidelines and his report did not contain an acknowledgement in accordance with the Rules. Ideally, the expert should be given further guidance from a select group of cases such as *Qantas Airways Ltd* [2004] ACompT 9 (12 October 2004; reasons 16 May 2005) (*Qantas/Air NZ* case) at paragraphs 211, 221-3.

(k) A "team approach" to the litigation which includes the expert is fraught with danger.[58] Those exposed are the expert, the lawyer and the client, for the following reasons:

(i) The independence of the expert is compromised;

(ii) It is unlikely there will have been compliance with the guidelines, and to demonstrate compliance may require the exposure of all communications;

(iii) No privilege will attach to the communications with or by the expert if he is relied upon as a witness, or any such privilege as may have previously attached to those communications will be lost;

(iv) It is likely both expert and legal practitioner will be required to give evidence to explain their conduct;

(v) The focus of the case is likely to shift from the client's case and interests to the behaviour or otherwise of the lawyers and the expert. This is largely what happened in *Pivot* and *Temwell*.

(l) Generally speaking, legal advice ought not be provided to the expert witness because to do so may compromise the independence of the witness and if provided, is likely to have the consequence that privilege has been waived and the advice will become available to the opposing parties. Some issues between experts are the result of the questions posed to them being based on different legal views being taken of, for example, the

[58] *Phosphate Cooperative Co of Australia Ltd v Shears* [1989] VR 665 (the *Pivot* case); see also *Temwell*; and *Roads Corporation v Love*

statutory construction to be used.[59] However, it may be essential to provide such legal advice in certain cases. Corporate lawyers are likely to be familiar with the initial problem of an expert witness who is asked to value shares in a company as part of the claims made in a shareholder oppression action. An inexperienced expert witness might readily value the shares using concepts known to economists and/or accountants, but give a different view once a proper appreciation of the considerations to which the Court will have regard in valuing the shares is explained. Another example might be where an expert as to inventive step (obviousness) in a patent revocation case may be dismissive of developments over the prior art as routine until the 'scintilla of inventiveness' principles are explained. Any such explanation would of course need to be transparent, neutral and uncontentious. There is a particular need to instruct the expert in the meaning of obviousness in a patent law sense before he is allowed to opine on the issue. In *Aktiebolaget Hässle v Alphapharm Pty Ltd* (2000) AIPC 91-636 at [69] the Full Court said:

> "*Such evidence ought not to be received unless it is first demonstrated that the expert understands the concept of obviousness as explained in the 1990 Act and the authorities*."

(m) Exchanging draft reports with legal advisers and other experts within the team should be avoided. The legal adviser coordinating the case should make sure that reports by one expert upon which the opinion of another depends are finalised in a timely manner before being provided to that second expert. Conferences and other forms of communication between experts for the same party should be avoided (see above para 13(b));

(n) The process of communication between the lawyer and the expert should be transparent. If it is not, then questions as to the independence of the expert may arise. The exchange of emails and draft reports, constant

[59] For example, *Spirit Pharmaceuticals Pty Ltd v Mundipharma Pty Ltd* (2013) 102 IPR 55 at [29] per Rares J.

conferencing between legal practitioner and expert, with or without client, are not only expensive processes, they are likely to be counterproductive. Practitioners should assume that all their communications with the expert (and on behalf of the expert, for example, in obtaining instructions requested by the expert) will be discoverable.

(o) Evidence going to the ultimate issue is, by reason of section 80 of the *Evidence Act*, strictly admissible in a proceeding. However, expert evidence is not a panacea.[60] Whilst experts are allowed to address the ultimate question in a case, they are not to be allowed (or should not be assumed to be able) to subvert the function of the court in deciding the case.[61] In *Durajay v Aristocrat* (2005) 147 FCR 394 Stone J held at [42] that the Court should exercise particular scrutiny when the expert moves close to the ultimate issue, as the expert may move outside his or her field of expertise or express views unsupported by disclosed and contestable assumptions.[62]

(p) Experts must also be used carefully so as not to infect them with impermissible hindsight, especially when engaged to assist in attacking the inventive step of a challenged patent.[63]

(q) Use of experts in an interlocutory application (e.g. injunction) whilst rare, should probably be governed by the same principles as at trial. The evidence of the expert witness should be direct (that is, from his or her own knowledge) lest it be held to be hearsay. Putting it differently, the exception to the hearsay rule created by section 75 in relation to

[60] *Seven Network v News* (2007) ATPR (Digest) 42-274; [2007] FCA 1062 at [23] per Sackville J.
[61] *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354 (Dowsett and Weinberg JJ).
[62] *3M v Tyco* (2002) 56 IPR 248 at 258-259; *R v GK* (2001) 53 NSWLR 317 at 326-7; *Adler v ASIC* (2003) 46 ACSR 504 at [622]
[63] *Aktiebolaget Hässle v Alphapharm Pty Ltd* (2002) 212 CLR 411 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [28]; see also Jagot J in *Sigma Pharmaceuticals (Australia) Pty Ltd v Wyeth* (2010) 88 IPR 459 at [319] where this principle was taken further despite keeping the patent from the eyes of the attacker's experts.

interlocutory proceedings seems not to be an exception to the opinion rule in section 76.[64]

Dangers in managing experts

14. Ignoring or breaching any of the above principles can have serious detrimental effects on the litigation. These consequences fall into six broad categories, which may often overlap:

(a) Discovery – it seems privilege does not attach to the final form of any witness statement, although the drafts may still enjoy privilege.[65] But even then, a claim of legal professional privilege attaching to the expert witness can be rejected and was rejected in *Temwell*[66] where Ryan J refused to give any privilege protection to the extensive input to the expert's report by the solicitors. This resulted in the many drafts of the report being discovered, the discovery of hundreds of emails passing between the solicitor and the expert, the solicitor's file being discovered and the solicitor being cross-examined for several days.

(b) Cross-examination – the *Temwell* case resulted in the solicitor being cross-examined for several days. In the *Pivot* case, the expert was cross-examined extensively concerning his apparent belief that it was legitimate for him to be part of the team trying to win the case. This significantly detracted from the weight of his opinion.

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[64] *Safari Automotive Technology Pty Ltd v Ironman 4x4 Pty Ltd* [2009] FCA 1330 per Middleton J at [17]-[26]; *Terranora Group Management Pty Ltd v Terranora Lakes Country Club Ltd (in liq)* BC9707617 (NSW SC, Santow J, 3 December 1997); Odgers, S., Uniform Evidence Law (10th ed 2012 Thomson Reuters) p.328

[65] *ACCC v Cadbury* and more generally see the discussion above para 13(e), (f), (g)

[66] There were a total of 10 reported rulings by Ryan J during the running of the case concerning experts and privilege:
- *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 806 (5 August 2003).
- *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 930 (2 September 2003).
- *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 948 (9 September 2003).
- *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 985 (24 September 2003).
- *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 1001 (25 September 2003).
- *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 1032 (29 September 2003).
- *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 1078 (8 October 2003).
- *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 1296 (13 November 2003).
- *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 1348 (21 November 2003).
- *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 1349 (21 November 2003).

(c) Weight – reduced weight may be given by the Court to the evidence of the expert. This can happen where the subject is not suited to expert evidence[67] or where the Court concludes that an expert has become a protagonist for a party. There cannot be much doubt that in the *Temwell*, *Pivot* and *Qantas/Air New Zealand* cases the Courts took a dim view of the conduct of the solicitors and experts and the weight of the expert's evidence was accordingly significantly diminished.

(d) Comparison between experts - the failure by an expert witness to adhere to the Guidelines by properly setting out in the report the factual and analytical basis on which he or she expresses the opinion contained in the report can impinge upon whether the evidence of the expert concerned is preferred to the expert evidence given by an expert witness called by an opposing party. For example, in *Abigroup Contractors Pty Ltd v. Sydney Catchment Authority (No. 3)* [2006] NSWCA 282, the New South Wales Court of Appeal considered how to address competing expert evidence, and did so by having regard to whether the experts concerned had given adequate reasons in the form of their examination and analysis of the evidence in the case.

(e) Exclusion – in an extreme case the expert's report can be excluded altogether.[68] A recent example of this was where the rule relating to experimentation was breached. FCR 34.50 requires that if experimental proof is to be used as evidence, the opposing party must be allowed an opportunity to attend such experimentation. In *Bayer Pharma v Generic Health*[69], Jagot J found that the rule applied to the experiment conducted to show that tablets made according to a method in a prior art document dissolved in accordance with the claim 3 and 11 dissolution test, and therefore that the prior art document inherently anticipated the claims. Her Honour also found the rule was breached and concluded the evidence

[67] *3M v Tyco* (supra)
[68] *Cobram Laundry Services Pty Ltd v Murray Goulbourn Cooperative Co Ltd*; *ASIC v Rich*; *Pivot; Commonwealth Development Bank of Australia Pty Ltd v Cassegrain*
[69] *Bayer Pharma Aktiengesellschaft v Generic Health Pty Ltd* [2013] FCA 226; 279.

must be excluded. The result in the merits of the case was that the attack on the patent failed and infringement was found.

Of course, whether the report is to be excluded is always in the discretion of the Court (e.g. FCR 34.50(2)(b), (3)), and in determining this question the Court will have regard to all the circumstances;

(f) Costs - The Court or Tribunal may in appropriate circumstances make a costs order against an expert witness who, by his evidence, causes significant expense to be incurred, and does so in flagrant or reckless disregard of his duties to the court.[70] Where the litigation is conducted subject to the CP Act and the Court determines that an overarching obligation has been breached by the expert, then the Court may, pursuant to section 29 of that Act, make an adverse costs order against the expert personally, and also require the expert to pay compensation. It is also possible that the Court may in such circumstances conclude that the legal practitioners responsible for calling the expert have also breached an overarching obligation arising out of the conduct of the expert. The Court may act of its own motion under the CP Act in investigating such matters. An adverse costs order may thus also be made against the party who called the expert, and the legal practitioners for that party.[71]

15. As a general rule, and subject to any statutory exception such as that found in section 29 of the CP Act, witnesses in Court including expert witnesses enjoy immunity from suit in respect of evidence given in Court.[72] The immunity has been extended to reports and affidavits prepared for litigation and in some cases to preparatory documents.[73] However, the immunity of expert witnesses from suit has recently been reviewed by the United Kingdom Supreme Court in *Jones v*

[70] *Phillips v Symes (No 2*) [2005] 4 All ER 519 at 543
[71] *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (No 4)* [2013] VSC 14; see also *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 6)* [2013] VSC 159
[72] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; *Commonwealth of Australia v Griffiths* (2007) 70 NSWLR 268; *Cabassi v Vila* (1940) 64 CLR 130
[73] *Evans v London Hospital Medical College (University of London)* [1981] 1 All ER 715; [1981] 1 WLR 184; generally see Freckleton, I *Expert Evidence: Law Prac Proc & Advocacy* (4th Ed, Thomson Reuters) Chapter 26

Kaney [2011] 2 AC 398. In that case, the Court decided that there was no justification for continuing to hold expert witnesses immune from suit in relation to the evidence they give in Court or for the views they express in anticipation of Court proceedings. The judgment in *Jones v Kaney* contains a detailed examination of the rationale for the immunity and reasons supporting its abolition. Whether Australian courts will adopt a similar approach remains unclear, although the most recent decisions in the Supreme Court of New South Wales suggest that the decision in *Jones v Kaney* will not be followed in Australia, at least until the High Court determines that it should be.[74]

Expert Evidence in Tribunals

16. All decisions made in tribunals such as IP Australia are subject to appeal or review in some way by superior courts,[75] and those superior courts comply with the principles we have set out above.[76]

17. It is true that the Patent Office, for example, has no guidelines or rules or even regulations regarding expert evidence. Indeed, most tribunals, including the AAT, are not bound by the rules of evidence. But should the expert evidence principles be ignored in a decision reviewed by a superior court, it can be expected that such infractions will be viewed dimly. Even if the infraction does not provide the sole basis for overturning the decision, criticism of the decision below can be part of a matrix of factors which combine to persuade a superior court to disturb the decision below.

18. But even where the Tribunal is expressly authorised to ignore the rules of evidence[77], the tribunals tend (and are encouraged) to nevertheless apply them if

[74] see *Sydney Local Health Network v QY and QZ* [2011] NSWCA 412, where the issues considered in *Jones v Kaney* were acknowledged but the matter was not decided by the New South Wales Court of Appeal; see also *Young v Hones* [2013] NSWSC 1429, where Garling J held at [18] that *Jones v Kaney* was not relevant in the circumstances of that case, because (amongst other things) the Court was bound by the decision of the High Court in *Cabassi v Vila* (supra)

[75] Review by AAT under, for example, Patents Regs 22.26 and *AAT Act* ss.34J-42D, review by the Federal Court under, for example, *AD(JR) Act* s.5; appeal to the Federal Court under, for example, *Patents Act* ss.60(4), 154(2); prerogative relief (mandamus, prohibition etc) under the *Judiciary Act* s.39B

[76] In the case of VCAT, for example, the Tribunal has promulgated its own guidelines on the retention of experts and the admission of expert evidence; Practice Note – PNVCAT2 "Expert Evidence" at [2] is expressly stated to be consistent with the Expert Witness Code of Conduct as it operates in the Supreme Court (and County Court) of Victoria

possible. Usually the AAT will need to be satisfied that it is proper to take into account evidence which would not be admissible in a court.[78] Indeed, the AAT has now issued expert evidence guidelines which are very similar to those in most courts. It can be expected that the reviewing superior courts will not ignore the rules of evidence. Especially is this so where the superior court hears an appeal *de novo,* and due to the evidence being in different form, may be given an excuse for ignoring the decision below. But even as a matter of principle the superior court will always endeavour to apply the rules of evidence. For example, in *R v War Pensions Entitlement Appeals Tribunal; Ex parte Bott* (1933) 50 CLR 228 Evatt J at 256 said:

> *But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer "substantial justice."*

19. Many practitioners regard the hearings in IP Australia as a type of 'dry run' and use it as a testing ground for evidence they know will never be admitted in court. To do so is fraught. The client will not thank the lawyer for knowingly handing to the superior court a ground of criticism. The better course is to comply with the principles set out above concerning the retention and management of expert witnesses, even when litigating in tribunals which do not require it, for at least three reasons. First, it is often highly desirable to do so where the available pool of experts is very small - one does not want to use up some or all of them in an adulterated process in a tribunal and thus have none available for a court trial. Second, to comply with these principles will make the decision of the Tribunal, if favourable, more impervious to attack if appealed to a Court. Third, to do so confers on the practitioner the high ground to attack the evidence of the opposing party for failing to comply with those same requirements. Any such attack on the evidence of the opposing party would be couched in language which directs the

[77] For example, *AAT Act* s.33(1)(c)
[78] See for example *Re McDowall and Secretary, Dept of Social Security* (1994) 37 ALD 117 at 123

attention of the reviewing Court to cases which reject inappropriate expert evidence and suggest the tribunal would be overturned were it to ignore such principles. One can only hope that if sufficient practitioners were to do so, some of the habits of certain inferior tribunals would improve.

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LETTERS OF RETAINER

[Example of how *not* to draft a letter of retainer]

Our Ref: Mr Lazy

*** July 20****

Private & Confidential
Mr Expert

Subject to legal professional privilege

Dear Sir,

Re: A v B

We refer to our letter dated ** July last.

We request that you provide us with an expert report which addresses the following issues:

1. The value of the business as at * January 20**.

   We are instructed that our client referred each of these clients to the first defendant under the terms of the sale agreement which we sent to you with our letter dated ** July. The reports sent to you on ** July set out the details of the business collected by the first defendant from the second defendant listed in the confidential schedule, and the sums paid by the first defendant to the plaintiff under the sale agreement.

   In your report, please set out the methodology which you have adopted for valuing the business and the reasons for adopting that methodology. Please also set out your calculations for your assessment of the goodwill.

2. Whether you consider that there has been any reduction in any value of the business between * January 20** and the present date.

   Please assume that the first defendant has managed the business without reference to our client and the sale agreement since * January 200*.

3. Whether you consider that the information set out in the client schedule and the management authorities relating to each client is confidential.

   Please assume that the client authority that we provided to you under cover of our letter dated ** July is representative of all management authorities.

4. Whether the contents of the letter from B to the clients comprising the list of clients dated ** October 199* ("the letter") contains any terms of trade which within the relevant industry support any of the meanings alleged in paragraph * of the defence.

Please include in your report a copy of your CV which fully sets out your relevant qualifications and experience which qualifies you to act as an expert.

Please also include a copy of the form 44A expert witness code of conduct and confirm that you agree to be bound by it, and ensure that your report is prepared in compliance with the code.

We look forward to receiving your report in due course.

Yours faithfully,

[LAZY & CO SOLICITORS]

[Example of how to draft a letter of retainer: Author – Mr T. Di Lallo, Barrister]

Our Ref: Mr Astute Solicitor
*** July 201***
Private & Confidential

Subject to legal professional privilege

Dear Professor Expert
Best University

ABC Limited –v- Fairly Wealthy Pty Ltd
Supreme Court of Victoria proceeding No. S CI 2012

We act on behalf of ABC Limited ("ABC"). ABC is the Plaintiff in the above legal proceeding.

1. Retainer

1.1 We refer to the letter from your Mr XYZ dated * June 201* in which it was indicated that your firm would be prepared to undertake a valuation of certain property.

1.2 We are instructed to retain your services on behalf of ABC to provide an expert opinion to be used by ABC concerning the market value of the Property (identified hereafter) for first mortgage security purposes as at ** September 201*, on the terms set out in this letter. The Property is constituted by the land and the development to be constructed on the land, being situated at and known as "Wandon" ("the Property"). Pursuant to the development there would be constructed on the land 110 units ("the Development").

1.3 The valuation of the Property as at ** September 201*is to be calculated for first mortgage security purposes as follows:

(a) market value of the land on an "as is" basis with development approval/consent; and

(b) gross realisation market value on completion of the Development on an individual dwelling basis and on a one line basis.

For these purposes, 'Market value' is defined as that price which the Property could be expected to realise if offered by sale under normal commercial circumstances.

1.4 You are retained to:

(a) if necessary confer with representatives of ABC, their solicitors and counsel;

(b) provide a written opinion; and

(c) if required, give expert evidence as to your opinion in Court.

2. Timing

2.1 Your engagement is intended to assist ABC, their solicitors and counsel in the conduct of the Proceeding. Accordingly, we request that your report be finalised as soon as possible, and in any event by no later than 5.00 p.m. on * August 201*. Please let us know as soon as possible if this timeframe is not practicable.

3. Expert Witness Code of Conduct, the Civil Procedure Act and your duties as an expert witness

3.1 The preparation of your written opinion (expert report) and the giving of expert evidence in the Supreme Court of Victoria are governed by Order 44 of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) and the *Expert Witness Code of Conduct* (Form 44A). Copies of each are enclosed. If you have any queries regarding the requirements set out in Order 44 or Form 44A, please contact us prior to the preparation of the expert report.

3.2 The *Civil Procedure Act* 2010 (Vic) also imposes certain obligations on an expert witness. In summary, you are in your capacity as an expert witness subject to the following "overarching obligations":

(a) the overarching obligation to act honestly (section 17);

(b) the overarching obligation to cooperate in the conduct of the proceeding with the parties and the Court (section 20);

(c) the overarching obligation not to engage in conduct which is misleading or deceptive or which is likely to mislead or deceive (section 21);

(d) the overarching obligation to resolve by agreement any issues in dispute which can be resolved in that way and to narrow the scope of the remaining issues in dispute (section 23);

(e) the overarching obligation to use your reasonable endeavours to ensure that legal costs and other costs incurred in connection with the proceeding are reasonable and proportionate to the complexity or importance of the issues in dispute and the amount in dispute (section 24); and

(f) the overarching obligation to use your reasonable endeavours to act promptly and minimise delay (for the purpose of ensuring the prompt conduct of the proceeding) (section 25).

3.3 In addition, section 16 of the *Civil Procedure Act* provides that each person (such as an expert witness) to whom the overarching obligations apply has a paramount duty to the Court to further the administration of justice in relation to the proceeding.

3.4 We would be remiss were we not to draw your attention to section 29(1) of the *Civil Procedure Act*, which provides that if a court is satisfied that, on the balance of probabilities, a person has contravened any overarching obligation, the court may make any order it considers appropriate in the interests of justice including, but not limited to, those referred to in that provision. A photocopy of section 29(1) of the *Civil Procedure Act* is enclosed.

3.5 Should you have any queries regarding the requirements set out in the *Civil Procedure Act* or the consequences of a failure to comply with those requirements, please contact us prior to the preparation of the expert report.

4. Form of the expert report

4.1 The expert report is required to be expressed in a narrative. Whilst you are retained by a party to the proceeding, you are, in preparing the expert report, required to be non-partisan and reflect the objectivity and independence you have brought to the task pursuant to your retainer as expert.

4.2 For your assistance, we suggest that your expert report should include the following:

(a) your name and address;

(b) a copy of your detailed curriculum vitae together with details of any specific experience you possess, which is not referred to in your curriculum vitae, and which is relevant to the formulation of your opinion;

(c) an acknowledgement that you have received, read and agree to be bound by, the Expert Witness Code of Conduct;

(d) the facts, matters or assumptions on which your opinion is based (you may attach a copy of this letter of instruction);

(e) the reasons for your opinion including:

1. any document, literature or other material used by you in support of your report;

2. any assumptions you have made in formulating your opinion and on which your opinion has been based;

(f) a summary of your opinion;

(g) if applicable, an acknowledgement that a particular question or issue falls outside your area of expertise; and

(h) a declaration that you have made all enquiries that you believe are desirable and appropriate and that no matter of significance has been withheld from the Court.

4.3 The expert report must be signed by you and dated. It should be accompanied by clear copies of any documents, literature or other material to which your report refers.

4.4 Please ensure that the expert report is clearly marked "Privileged" and is sent to this office only, marked to the attention of Mr Astute Solicitor.

5. Your role as an expert witness

5.1 You are at all times to remain independent and unbiased in the discharge of your duties as expert witness. Accordingly, please do not discuss this proceeding or any of the enclosed material with any person except the writer or counsel retained on behalf of ABC without the prior consent of this office. This includes any discussions with representatives of ABC.

5.2 Should it become necessary for you to make use of the services of another person, being an officer or employee of Best University in order to assist you in the preparation of any aspect of the expert report, please let us know before doing so. In any event, should you engage the services of another person, you are at liberty to discuss the proceeding and the documents provided with this letter with that person provided that you do so on a strictly confidential basis. However, in doing so it must be understood that the opinion expressed in the expert report is yours, and you as the author of the expert report may be required to give evidence concerning that opinion.

5.3 All communications in the first instance are to be through this office. Should you require further documents or information, you should seek this through this firm rather than from ABC directly. Please note that all written communications with you can be required to be produced to the Court if your expert report is relied on in evidence. Similarly, the substance of any oral discussions you have with any person in the course of performing your retainer may be the subject of cross-examination if your expert report is relied on in evidence.

5.4 If we are instructed not to use your report for the purposes of the proceeding, then these mechanisms will ensure that all communications with you are protected by legal professional privilege and are not subject to disclosure.

6. Documents provided

6.1 You are provided with a copy of:

(a) locality map;

(b) title documentation;

(c) planning documents;

(d) photographs;

(e) plans;

(f) aerial photograph;

(g) construction contract.

7. Supplementary matters

7.1 Your examination of the documents enclosed with this letter and referred to in paragraph 6.1 may be ambiguous in the absence of certain additional information. This is as follows.

7.2 First, the Development would be comprised of 110 units. However, certificate of title volume 1111111 folio 222 refers to several encumbrances, including a restrictive covenant which restricted the Development to 109 units. It is our understanding that planning permit 1 issued * August 1888 by the City of Upper/Lower Kabunga allowed a variation of the restrictive covenant to permit more than 110 dwellings. You should confirm this as part of your Retainer, and consider the significance of this issue when providing your opinion. For your assistance, we have enclosed a copy of planning permit 1.

7.3 Second, we understand that the development of the Property was made under a planning permit issued on * December 201*. While the plans to amend the project had been allowed by the responsible authority in a letter dated * November 201*, the actual date that planning approval would lapse if work had not commenced was not clearly stated. Is it reasonable to conclude that the variation of the covenant implied that construction had commenced as at * May 2018? Again, you should confirm this as part of your Retainer, and elaborate on the significance of this issue, if any, when providing your opinion.

7.4 We understand that unit 108 had been purchased by Mrs Maroon for $100,000,000. Again, please confirm that this is correct if you are able to do so and if it is correct, the significance of this matter, if any, to your opinion.

8. Your opinion

8.1 Based on the documents we have provided, the additional instructions contained in this letter and your qualifications and experience, we seek your expert opinion on the following issues:

(a) *What was the market value of the Property for first mortgage security purposes on an "as is" basis with development approval/consent as at* ** September 201*?

(b) *What was the gross realisation market value on completion of the Development for first mortgage security purposes on an individual dwelling basis and on a "one line" basis as at* ** September 201*?

(c) *What was the insurance valuation of the Property based on replacement / reinstatement cost including demolition and removal of debris, statutory and professional fees, and cost escalation as at* ** September 201*?

(d) *What was the insurance valuation of the Development based on replacement / reinstatement cost including demolition and removal of debris, statutory and professional fees, and cost escalation as at* ** September 201*?

(e) *Is your answer to each of paragraphs (a) to (d) above affected or altered if you are informed that ABC would not prepare an internal property valuation report and as a result, ABC would rely solely on the valuation of the Property and/or the Development in making its decision to lend? If your answer is affected or altered, please elaborate.*

9. Conclusion

9.1 We would appreciate receiving the expert report by the date and in the manner set out above. If you have any queries in respect of the above, please do not hesitate to contact the writer.

Yours faithfully,
etc