RECENT DEVELOPMENTS IN EXPERT EVIDENCE IN VICTORIA[1]

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I. INTRODUCTION

Since 30 October 2012, Victorian courts have been given increased powers to determine how expert evidence may be used in court proceedings. These powers derive from the introduction of a new Part 4.6 of the *Civil Procedure Act 2010* (Vic) ('**CPA**').[3] In this paper, I will:

(a) look at the history of expert evidence reform, so as to put Part 4.6 in its proper context;

(b) examine the case law since 1 November 2012 that has considered Part 4.6, or the CPA in the context of expert evidence;

(c) outline a suggested new model of adducing expert evidence that is likely to emerge as a result of the introduction of Part 4.6.

II. HISTORY OF LAW REFORM

The courts have long been suspicious of expert evidence. This suspicion arises in large part from "the skewed manner in which experts are selected, as each side rummages through a group of experts until the most favourable one is found".[4]

In 1996, a report was published in the United Kingdom (commonly referred to as the Woolf Report)[5] identifying expert evidence, together with uncontrolled discovery, as the major problems facing the civil justice system. It noted two problems with the manner of adducing expert evidence:

(a) first, adversarial bias; and
(b) secondly, excessive costs in the engagement of unnecessary experts.

As far as adversarial bias is concerned, the Woolf Report commented:

> *Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-*

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1 Paper presented to the Leo Cussen "Commercial Litigation Conference" on 28 November 2013 in Melbourne.
2 Senior Counsel, LLM (Cambridge); Barrister, Arbitrator and Mediator.
3 Part 4.6 commenced operation on 31 March 2013. Given that the provisions are procedural in nature, the better view is that they apply to proceedings commenced before that date.
4 Sir George Jessel in *Thorn v Worthing Skating Rink Co* (1876), referred to in *Plimpton v Spiller* (1877) 6 Ch D 412 at 415n, and cited by Heydon J in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at 609 – 610 [56] per Heydon J.
5 Access to Justice – Final Report (HMSO London, 1996). Available at http://www.justice.gov.uk/civil/procrules_fin/contents/form_section_images/practice_directions/pd35_pdf_eps/pd35_prot.pdf.

> *on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients.* [6]

Insofar as expert evidence is concerned, the Woolf Report led to the introduction of Part 35 of the *Civil Procedure Rules* 1998 (UK) and Practice Direction 1995 entitled "Experts and Assessors".[7]

The Woolf Report made the following recommendations concerning expert evidence:

- the parties should need permission from the Court before they call expert evidence;
- single experts should be used wherever the issue is concerned with a substantially established area of knowledge or where it is not necessary for the Court directly to sample a range of opinions;
- parties before the Court should always consider whether a single expert should be appointed and, if this is not appropriate, indicate why not;
- where opposing experts are appointed, they should adopt a co-operative approach and, where possible, conduct a joint investigation, and produce a joint report, indicating areas of disagreement that cannot be resolved;
- expert evidence should not be admissible unless all written instructions (including any letter subsequent upon the original instructions) and a note of any oral instructions are included as an annexure to the expert's report;
- expert's meetings should normally be held in private (that is, in the absence of the parties and their legal representatives); and
- training courses should provide expert witnesses with an understanding of the legal system and their primary duty to the court.[8]

The Woolf Report has spawned reform of expert evidence throughout the common law world (including Australia). There has been no uniform response. One common response has been the introduction by superior courts of practice directions or expert codes of conduct that emphasise the independence of party-appointed experts and their overriding duty to the Court.[9]

Substantial review of the rules and practice concerning expert evidence was undertaken in New South Wales in 2004 – 2005, culminating in the NSW Law Reform Commission Report 109 entitled "Expert Witnesses" (June 2005) ("the NSW Report").[10] Like the Woolf Report, the NSW Report recommended the introduction of a "permission rule" in relation to expert

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6 Lord Woolf MR, Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, HMSO, London, 1995, p. 183.

7 Available at http://www.justice.gov.uk/courts/procedure-rules/civil/pdf/practice_directions/pd_part35.pdf

8 As summarised at para [4.4] of the NSW Report. See note 12 below.

9 The Federal Court was the first off the mark in Australia with the introduction of a practice direction on expert evidence in 1998. This practice note has since been amended several times. The current version is Practice Note CM 7 issued 1 August 2011 and available for download at http://www.fedcourt.gov.au/pdfsrtfs_p/practice_notes_cm7.rtf.

10 Available at http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_r109chp01.

evidence. It also recommended the introduction of special rules dealing with the appointment of a joint single expert by the parties.[11] In addition, the NSW Report:

(a) encouraged joint expert conferences and the presentation of expert evidence at the hearing by the concurrent evidence (colloquially, if not irreverently, referred to as the "hot-tub" method);

(b) recommended disclosure of fee arrangements with experts in all cases.

The proposal for the introduction of a "permission rule" was rejected by the NSW Attorney-General's Working Party on Civil Procedure in its report dated 14 November 2006 ("the Working Party Report").[12] The Working Party considered that the introduction of a "permission rule" was too strong a response to concerns about adversarial bias. Instead the Working Party Report recommended the introduction of four separate rules intended to promote early Court control and flexibility in the management of expert evidence:

(a) first, a rule placing on the parties the obligation to seek directions from the Court as to expert evidence, while making it plain that this could be done in the course of an ordinary direction hearings or case management conference without any separate application to the Court;

(b) secondly, a rule providing for the giving of directions concerning expert evidence;

(c) thirdly, a rule precluding the giving of expert evidence (otherwise than by leave) unless directions have been given or otherwise than in accordance with such directions; and

(d) finally, a rule specifying the directions which may be given by the Court.[13]

The NSW reforms were implemented by the NSW Uniform Civil Procedure Rules (Amendment No 12) 2006 introduced on 8 December 2006.[14] The relevant rules concerning expert evidence are contained in Part 31, "Expert Evidence" of the Uniform Civil Procedure Rules 2005 (NSW) ('**UCPR**'), in particular Rules 31.17-31.54.[15] They empower the Court to take early control of the use of expert evidence in civil proceedings.

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11 As opposed to court-appointed experts.

12 Available at http://www.parliament.nsw.gov.au/prod/la/latabdoc.nsf/0/f0f0a44f52cea86eca2570820039fd5e/$FILE/r109.pdf.

13 John P Hamilton, 'NSW Attorney General's Working Party on Civil Procedure: Reference on Expert Witnesses Report', dated 14 November 2006, available at http://www.lawlink.nsw.gov.au/lawlink/spu/ll_ucpr.nsf/vwFiles/Expert%20Witness%20Report.doc/$file/Expert%20Witness%20Report.doc at [14] and [15].

14 Many of the recommendations contained in the NSW report were already embodied in the UCPR.

15 Available at http://www.legislation.nsw.gov.au/sessionalview/sessional/SRTITLE/Civil%20Procedure%20Act%202005%20-%20Uniform%20Civil%20Procedure%20Rules%20(Amendment%20No%2012)%202006%20(2006-717)%20%5BGG%20No%20175%20of%208.12.2006,%20p%2010468%5D.pdf.

On 28 May 2008 the Victorian Law Reform Commission ('**VLRC**') tabled a report in the Victorian Parliament, entitled "Civil Justice Review Report"[16]. The report addressed the perennial problems of delay and cost inherent in civil litigation. The VLRC made 177 recommendations for reform of the civil justice system in Victoria. Twelve priority areas were identified. One of them was the role of experts in the civil justice system. For present purposes, the VLRC's basic recommendation was that Victoria should adopt the reforms recently introduced in NSW concerning expert evidence (with some modification). There were ten major recommendations concerning expert evidence:

1. introduction of a purpose clause – emphasising Court control and proportionality;[17]

2. introduction of a requirement that the parties seek directions before calling expert evidence, and conferral of a broad discretion upon the Court in terms of the directions which may be given;[18]

3. introduction of a broad and express power to direct expert witnesses to confer;[19]

4. introduction of a broad and express power to direct the giving of evidence by the concurrent expert evidence (i.e. hot-tub) method;[20]

5. introduction of a power/discretion to direct the parties to engage a single joint expert;[21]

6. that there should be a power/discretion for the Court to appoint its own expert witness;[22]

7. there should be a more extensive code of conduct for expert witnesses containing, inter alia, a duty for an expert witness to work co-operatively with other expert witnesses;[23]

8. expert witnesses should not be immune from sanctions, including costs orders. However, no specific sanctions are required;[24]

9. expert witnesses should disclose the basis upon which they are being remunerated, including details of hourly/daily rate, total amount of fees incurred to date and whether payment is contingent on the outcome of the proceedings;[25]

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16 Available at http://www.lawreform.vic.gov.au/projects/civil-justice/civil-justice-review-report.
17 Cf Rule 31.17 of UCPR.
18 Cf Rule 31.19 and 31.20 of UCPR.
19 Cf Rule 31.19 and 31.20 of UCPR.
20 Cf Rule 31.35 of UCPR.
21 Cf Rule 31.37 – 31.45 of UCPR – contained in Sub-Division 4 entitled "Parties' Single Experts".
22 Cf Rule 31.46 – 31.54 of UCPR – contained in new Sub-Division 5 entitled "Court – Appointed Experts". Note the current Victorian Supreme Court Rules (unlike the Federal Court Rules) make no provision for Court-Appointed Experts.
23 See Schedule 7 of the amended CPR (NSW).
24 This is a departure from the NSW position.
25 Again, this is a departure from the NSW position.

10. privilege in respect of any communication with an expert, or any document arising in connection with their engagement (including draft reports, letters of instruction), is waived upon confirmation that the expert will be called to give evidence in Court.[26]

III. THE CIVIL PROCEDURE ACT

In 2010, the Victorian Parliament passed the CPA. It was a legislative response to the Civil Justice Review Report. The introduction of the CPA has been described as "an important step in the evolution in civil procedure that has been underway for some time, in Victoria, Australia, and around the world."[27] The CPA, as originally enacted, did not implement any of the particular recommendations made in the VLRC Report insofar as expert evidence is concerned. However, several of the original provisions impact on the giving of evidence by expert witnesses in civil matters before Victorian courts.

That is, the CPA regulates the relationship between the client, lawyer and expert. It imposes express obligations and duties upon expert witnesses and sanctions for breach, including exposure to an order for costs and, further or alternatively, an order to compensate any person for financial loss materially contributed to by the breach of such obligations.[28]

In particular, the CPA introduced overarching purposes and obligations that apply to parties to civil proceedings, their legal representatives and also, albeit in a more limited way, to experts giving opinion evidence. Expert witnesses now have the following overarching obligations:

(a) a paramount duty to further the administration of justice (s 16);

(b) a duty to act honestly (s 17);

(c) a duty to co-operate (s 20);

(d) a duty not to mislead or deceive (s 21);

(e) a duty to narrow the issues in dispute (s 23);

(f) a duty to ensure that costs are reasonable and proportionate (s 24); and

(g) a duty to minimise delay (s 25).

The above duties are in addition to, and not in derogation of, existing duties applying to expert witnesses (s 10(4)).

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26 See Chapter 7 of the VLRC Report, entitled "Changing the role of experts" (pgs 481-520) for a discussion of the proposed reforms in relation to expert evidence, including the particular recommendations at pgs 513 – 520.

27 Croft, Justice Clyde, "Speech-case management in the commercial court and under the Civil Procedure Act" [2010] Vic JS chol 26.

28 Sections 28-29 CPA.

On 30 October 2012 the Victorian Parliament enacted the *Civil Procedure Amendment Act* 2012. It introduced particular reforms in the area of expert evidence in a new Part 4.6 (ss 65F – Q) -see **Appendix 1**. The objects of Part 4.6 are set out in s 65F as follows:

> The main object of this Part is to further the overarching purpose by—
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> (a) enhancing the case management powers of a court in relation to expert evidence in civil proceedings;
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> (b) restricting expert evidence to that evidence which is reasonably required to resolve a civil proceeding;
>
> (c) emphasising the primary duty of an expert witness to the court.

The amendments apply, subject to the Rules of Court providing otherwise. In essence:

- if a party intends to adduce expert evidence at trial, the party must as soon as practicable seek directions from the Court (s 65G);

- the directions the Court can give in relation to expert evidence are set out in section 65H. They include specifying the issues on which expert evidence may be given, or the number of experts, providing for the appointment of single joint expert or court-appointed experts (s 65H(2));

- a Court may give directions to expert witnesses in relation to joint expert conferences or the preparation of joint expert reports (s 65I);

- the use of the contents of joint expert reports and the communications occurring in joint expert conferences are dealt with in section 65J;

- the Court may also give directions as to the manner of adducing expert evidence at trial, including by the concurrent evidence method (s 65K);

- special provision is made for the engagement of a single joint expert (s 65L);

- special provision is made for the appointment of an assessor(s) to assist the Court (s 65M); and

- a party may apply to the Court for an order that an expert retained by the other party disclose all or specified aspects of his retainer arrangement (s 65P).

Although many of the matters dealt with in the Amendment Act are already enshrined in Rules of Court or practice, it usefully emphasises the Court's power to seize control of the expert evidence process and to approach it in a flexible manner, tailored to the case at hand, so as to

ensure that the costs of the process are proportionate to the complexity of the dispute and the amount involved.

The "main purposes" of Part 31 of the UCPR are broadly similar to the "objects" of Part 4.6 of the CPA. Both these purposes and objects mention: (a) enhancing or ensuring the court has control over the giving of expert evidence;[29] (b) restricting expert evidence to that evidence which is reasonably required to resolve a civil proceeding;[30] and (c) declaring or emphasising the primary duty of an expert witness to the court.[31] Part 31 of the UCPR contain provisions which are similar to the provisions now found in Part 4.6 of the CPA. There are differences, however. Moreover, Part 31 contains provisions that are not found in Part 4.6. Given the fact that the provisions found in Part 4.6 appear to be "borrowed" from Part 31, it would be wise for any practitioner faced with the interpretation of a provision in Part 4.6 to ascertain whether the equivalent provision in Part 31 of the UCPR has been subject to judicial consideration in New South Wales.[32]

IV. RECENT VICTORIAN CASE LAW

So let us look at the recent case law which has judicially considered the provisions of the new Part 4.6 since it was introduced on 1 November 2012. Several themes appear to be emerging. First, the need for parties to seek directions from the court before calling expert evidence. Secondly, the need for early identification of the real issues in dispute, and for the expert evidence (if any) to be referable to those issues. Thirdly, the courts are becoming more proactive when it comes to the management of expert evidence. Finally, that the holding of joint expert conferences and the adducing of expert evidence at trial by the concurrent evidence (or "hot tub") method is becoming de rigeur.

Sections 65G and 65H

In *Haron v Slea Pty Ltd & Ors* [2013] VSC 169 (11 April 2013), Davies J vacated the hearing date for a trial, commencing on 8 April 2013. The application to vacate the trial date was made by the first defendant on the basis that it had inadequate time to obtain expert evidence responding to an expert's report that the plaintiff had filed and served on 8 March 2013. The first defendant was only put on notice of the plaintiff's intention to rely on expert evidence on 1 March 2013, shortly prior to a directions hearing in the proceeding.[33] At the directions hearing, the plaintiff confirmed that he intended to rely on expert evidence, which the plaintiff expected to file and serve the following week. The Court was told that the decision to rely on expert evidence was

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29 *Civil Procedure Act 2010* (Vic) s 65F(a); UCPR 31.17(a).

30 *Civil Procedure Act 2010* (Vic) s 65F(b); UCPR 31.17(b).

31 *Civil Procedure Act 2010* (Vic) s 65F(c); UCPR 31.17(f).

32 See for example - *Walker Corp Pty Ltd v Sydney Harbour Foreshore Authority* [2009] NSWCA 178; *Chaina v Alvaro Homes Pty Ltd* [2008] NSWCA 353; *Ray Fitzpatrick Pty Ltd v Minister for Planning* (2007) 157 LGERA 100; *Yacoub v Pilkington (Aust) Ltd* [2007] NSWCA 290.

33 *Haron v Slea Pty Ltd & Ors* [2013] VSC 169, [3].

made in January 2013 and that the plaintiff had briefed his expert in February 2013. Regarding sections 65G and 65H of the CPA, Davies J remarked:

> Notwithstanding the imminent trial date [of 8 April 2013], the plaintiff did not then take steps to seek directions from the Court as required by s 65G of the [CPA] or to put the first defendant on notice about the nature of the expert evidence that would be relied on so as to afford proper opportunity to the first defendant to respond to that evidence. **Section 65G of the CPA required the plaintiff to seek direction from the Court in relation to adducing expert evidence as soon as practicable upon becoming aware that he may adduce expert evidence at trial.** Seeking such direction enables the Court, at the earliest opportunity, to consider the relevance of the proposed expert evidence to the real issues in dispute, to identify issues about admissibility, and to make appropriate directions for the provision of that evidence. **Those directions may include, but are not limited to, the matters set out in s 65H of the CPA**, namely:
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> - the preparation of an expert's report;
> - the time for service of an expert's report;
> - limiting the expert's evidence to specified issues;
> - providing that expert evidence may not be adduced on specified issues;
> - limiting the number of expert witnesses who may be called to give evidence on a specified issue;
> - providing for the appointment of single joint expert or court appointed experts; and
> - any other direction that may assist the expert witness in the exercise of his or her functions as an expert witness in the proceeding …
>
> As the trial date was approaching, the plaintiff should have taken steps back in January 2013 to notify the first defendant of his intention to call expert evidence and to seek direction from the Court as required by s 65G of the CPA, so as to guard against the possibility that the decision to call expert evidence may jeopardise the trial date.[34] (emphasis added)

Justice Davies was satisfied that the interests of justice favoured vacation of the trial date because, inter alia, the plaintiff's late notification to the first defendant of the his intention to rely upon expert evidence jeopardised the first defendant's ability to present its case adequately at the trial as the first defendant was not given sufficient opportunity to obtain expert evidence to meet the case put against it.[35]

In obiter, Davies J remarked that:

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[34] *Haron v Slea Pty Ltd & Ors* [2013] VSC 169, [3], [6].
[35] *Haron v Slea Pty Ltd & Ors* [2013] VSC 169, [7].

> The parties and their legal practitioners remain under the continuing duty to ensure the prompt conduct of the civil proceeding and to use reasonable endeavours to minimise delay (citing CPA, s 25). That duty carries with it the obligation to bring the matter back before the court at the earliest opportunity when it becomes apparent that the timetable cannot be met, that further trial directions are required, or that the hearing date cannot be maintained. The unresolved issues had consequences here for the expedient conduct of the trial and should not have been left to the last moment for resolution.[36]

Sections 65I and 65K

In *Transport Accident Commission v Zepic* [2013] VSCA 232 (4 September 2013), Maxwell P, in obiter, made the following incidental comments regarding ss 65I and 65K of the CPA:

> I note that the CPA expressly authorises a court to direct that expert witnesses give evidence concurrently (CPA, s 65K). In advance of the hearing, the Court may direct the experts to confer for the purposes of preparing a joint report (CPA, s 65I). When employed in other fields of civil litigation, these procedures have resulted in very substantial savings in the time and cost of proceedings.[37]

Section 65M

Fenridge Pty Ltd v Retirement Care Australia (Preston) Pty Ltd & Ors [2013] VSC 464 (30 August 2013) concerned the breach of a "make good" covenant in a lease of premises requiring the premises to be reinstated at the conclusion of the lease. The Court held that the plaintiff landlord, Fenridge, was entitled to recover the cost of performing certain works which were reasonably necessary to bring the premises up to the state they would have been in had the defendant complied with its obligations in the lease. However, there was a vast disparity in the expert evidence as to the works required and the quantum of those works. Hargrave J, relying on CPA s 65M, made orders referring questions as to what repair works were reasonably necessary to comply with the obligations in the lease, and as to the reasonable cost of those works, to a Court-appointed expert, or a special referee, suitably qualified to consider issues of that kind. His Honour stated he would hear the parties as to the form of the referral order and as to its authority - either under Order 50 of the Rules of Court or s 65M of the CPA.[38]

A recent Ruling in the *Matthews v SPI Electricity & Ors* class action of 18 November 2013 provides an illuminating discussion of the power contained in s 65M. It is discussed in more detail below.

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[36] *Haron v Slea Pty Ltd & Ors* [2013] VSC 169, [9].

[37] *Transport Accident Commission v Zepic* [2013] VSCA 232, [140]-[142]. See also *Gunnersen v Henwood* [2011] VSC 440, [57] per Dixon J: "The experience of the courts, mostly reported through extra-judicial comment in journal articles, conferences and seminars, [of the 'hot-tub' method of adducing expert evidence at trial] is greater efficiency and expedition, achieved by refocussing emphasis to professional dialogue rather than cross-examination. The process allows the critical areas of disagreement between experts to be more efficiently identified and processed, both on the taking of evidence and in judicial decision making."

[38] *Fenridge Pty Ltd v Retirement Care Australia (Preston) Pty Ltd & Ors* [2013] VSC 464, [372].

Matthews Rulings

Matthews v SPI Electricity & Ors is a class action arising out of the disastrous bushfires in Victoria on Black Saturday on 7 February 2009. The claim was brought by the plaintiff on behalf of group members who sustained personal injury and/or property damage, and/or economic loss as a result of one of the bushfires. The plaintiff alleged that the fire was a result of the failure of a wire conductor that formed part of an electricity distribution line. She claimed that she and members of the group suffered injury or loss as a result of negligence on the part of each of the defendants – in particular, the electricity distribution company, its contractor responsible for inspections of the electricity distribution line, and from various State government parties. Damages were claimed from each of them. The trial of the proceeding is ongoing, but has given rise to a number of rulings by the trial judge, Forrest J, in particular in relation to expert evidence.[39] Some of the notable ones are addressed below. In summary, they deal with the following issues:

(a) Whether joint expert conferences should be held before mediation?
(b) The composition of the joint expert conferences – general or by issue?
(c) Whether assessor(s) should be appointed to assist the court to understand the scientific evidence ?
(d) Formulation of the questions for the joint expert conferences and the concurrent evidence sessions respectively
(e) Quarantining of the expert witnesses during the concurrent evidence sessions
(f) The tender of voluminous documents referred to in the expert reports (and the relevance or otherwise of counsel's consent to the tender)
(g) The role of the appointed assessor(s), including in relation to assisting the judge following the conclusion of the concurrent evidence sessions.

Thomas v Powercor Australia Ltd formed part of the class action litigation surrounding the Black Saturday bushfires, and particularly a fire in the area surrounding Horsham in Victoria. The plaintiff, Mr Thomas, owned a farm south-east of Horsham which suffered damage to fencing, sheds and grazing and cropping land. The action was brought on behalf of group members who had suffered property damage in the same fire. The defendant, Powercor, owned and maintained the conductor and power line that caused the fire.

A number of procedural issues arose in respect of a concurrent evidence session, including:

(a) whether there should be an order preventing expert witnesses from conferring with the parties' legal advisers during the course of their evidence;

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[39] Separately, Derham AsJ has delivered a number of judgments dealing with waiver of privilege in respect of draft expert reports and communications with experts, the most recent one being *Matthews v SPI Electricity Pty Ltd & Ors (No 8)* [2013] VSC 628 (19 November 2013).

(b) whether one of the experts, a Mr Phillip Clarke, should give evidence as to factual matters outside the concurrent evidence session.[40]

In *Thomas v Powercor Australia Ltd (Ruling No 7)* [2011] VSC 502 (4 October 2011) Justice Forest noted that:

> Order 44 of the Supreme Court Rules deals with the provision of expert opinions … Underpinning these provisions is the concept that the expert's fundamental obligation is to assist the court in arriving at a just determination of the issues it is required to consider. Effect may be given to this object in a trial setting by the application of the CPA. **The relevant parts of the CPA are those contained in ss 9(1)(a), (c) and (d) and ss 49 (1), (2), (3) (a), (b) and (j).**
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> … [I]t follows from both the Rules [of Court] and the CPA that where a court determines to receive expert evidence in a concurrent session, the court is entitled to fashion the process as it thinks fit. However, it must ensure that the parties are afforded procedural fairness. In this context, each of the parties must be given the opportunity to adduce evidence from a relevant expert and to cross-examine an expert giving evidence contrary to that party's interests … As the CPA and O 44 [of the Rules of Court] demonstrate, the task should be to devise a procedure that will lead to the best way for the expert opinions to be understood by the court and provide fairness to the parties.[41] (emphasis added)

In light of these principles Forrest J held that:

> (a) no order should be made quarantining expert witnesses other than an order that expert witnesses not confer with the legal adviser of the party calling them while that witness is under cross-examination;[42] and
>
> (c) Mr Clarke, given his previous involvement with Powercor, should give evidence as to factual matters outside the concurrent evidence session.[43]

In *Matthews v SPI Electricity and SPI Electricity Pty Ltd v Utility Services Corporation Ltd (Ruling No 4)* [2011] VSC 613 (15 December 2011), an issue arose as to whether a joint expert conference should be held prior or subsequent to a scheduled mediation. Justice Forrest held that it was both practicable and in the interests of justice that the joint expert conference be conducted prior to the mediation because, among other things:

(a) it would best promote the objectives of the CPA - namely, the just, efficient, timely and cost-effective resolution of the real issues in dispute;

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[40] *Thomas v Powercor Australia Ltd (Ruling No 7)* [2011] VSC 502, [2].
[41] *Thomas v Powercor Australia Ltd (Ruling No 7)* [2011] VSC 502, [5]-[6], [9].
[42] *Thomas v Powercor Australia Ltd (Ruling No 7)* [2011] VSC 502, [20].
[43] *Thomas v Powercor Australia Ltd (Ruling No 7)* [2011] VSC 502, [21]-[25].

(b) this course was consistent with the obligations imposed upon the parties by the CPA, including, inter alia, identifying the real issues in dispute in the proceeding as early as possible and taking steps in the proceeding to resolve or determine the dispute;

(c) an early joint expert conference would enhance the prospects of success of the mediation and therefore be consistent with the requirements of the CPA.[44]

In *Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v Utility Services Corp Ltd (Ruling No 9)* [2012] VSC 340 (13 August 2012), the parties were required, by an earlier order of the court, to exchange independent expert reports by 17 August 2012. A dispute arose as to the extent of the parties' obligations to provide information or reports in relation to other witnesses who may, at trial, give opinion evidence. There was no mention of the CPA in this case.

In relation to witnesses not "engaged" by the party calling the witness, and who will not supply an expert report in compliance with Order 44 of the Supreme Court Rules, Forrest J held that, "[i]n addition to providing reports pursuant to r 44.03, these witnesses will participate in the preparation of joint reports (where applicable) and give concurrent evidence at the conclusion of the lay evidence. Prior to the concurrent evidence sessions, a list of topics will be identified which will be covered by these witnesses based upon the contents of the joint report."[45]

Regarding witnesses employed by or contracted to one or other of the defendants and whom that defendant will seek, primarily, to adduce factual evidence, but also an opinion relevant to the trial issues, Forrest J held that, absent good reason, the other parties and the court should be informed of:

(a) the witness' training, study or experience;

(b) the facts, matters and assumptions upon which the opinion is based (often this may be simply the observations made by the witness at a particular event);

(c) the substance of the opinion; and

(d) the reasoning underpinning the opinion which is to be expressed.[46]

In *Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v Utility Services Corp Ltd (Ruling No 10)* [2012] VSC 379 (4 September 2012), a dispute arose as to the composition and conduct of the conclaves (ie. joint expert conferences) of expert witnesses. The issue was whether the expert witnesses should participate in discrete sub-issue conclaves or whether the conclave should consist of a larger group of experts.

Justice Forrest held that there should be specific issue-by-issue conclaves because:

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[44] *Matthews v SPI Electricity and SPI Electricity Pty Ltd v Utility Services Corporation Ltd (Ruling No 4)* [2011] VSC 613, [15].
[45] *Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v Utility Services Corp Ltd (Ruling No 9)* [2012] VSC 340, [22].
[46] *Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v Utility Services Corp Ltd (Ruling No 9)* [2012] VSC 340, [31].

(a) by having a conclave devoted to specific issues there can be no question about the expertise of the particular witnesses who author the joint report;[47]

(b) issue-by-issue conclaves accommodate the notion, consistent with an earlier direction in this case, that this case was not to be a battle of the number of experts a party could rely upon;[48]

(c) the provision of joint reports dealing with specific and discrete issues should help refine the issues, and has a greater prospect of leading to clearer identification of issues in dispute and issues that are not;[49] and

(d) there will be scope to expand the conclaves if the experts think it of assistance.[50]

In *Matthews v SPI Electricity & Ors (Ruling No 19)* [2013] VSC 180 (18 April 2013), the question arose whether it was appropriate for the Court to determine, without the assistance of a suitably qualified person with appropriate engineering and/or physics qualifications, the question of the cause(s) of the failure of the wire conductor, which was of critical importance in determining the question of liability. In deciding this question Forrest J referred to ss 7 and 9 the CPA, which set out the overarching purpose of the CPA and the Court's power to further that overarching purpose, respectively.[51] His Honour then referred to s 65M of the CPA which regulates when a Court may make an order appointing an expert.[52]

Justice Forrest decided that in the complex case before him reaching a just result demanded that he obtain assistance from an assessor, to assist the Court in understanding the expert evidence to be adduced by the parties.[53] In reaching this conclusion, Forrest J noted:

(a) section 65M(1)(a) of the CPA enables a court to appoint an expert to assist it in reaching a just determination and satisfy its overarching obligations under s 9 of the CPA;[54]

(b) the *Supreme Court Act 1986* (Vic), in s 77, provides for the appointment of an assessor to assist the Court;[55]

(c) the Court was "not confident" it would understand the scientific/engineering concepts involved;[56]

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[47] *Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v Utility Services Corp Ltd (Ruling No 10)* [2012] VSC 379, [7].
[48] *Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v Utility Services Corp Ltd (Ruling No 10)* [2012] VSC 379, [8].
[49] *Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v Utility Services Corp Ltd (Ruling No 10)* [2012] VSC 379, [9].
[50] *Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v Utility Services Corp Ltd (Ruling No 10)* [2012] VSC 379, [10].
[51] *Matthews v SPI Electricity & Ors (Ruling No 19)* [2013] VSC 180, [10].
[52] *Matthews v SPI Electricity & Ors (Ruling No 19)* [2013] VSC 180, [11].
[53] *Matthews v SPI Electricity & Ors (Ruling No 19)* [2013] VSC 180, [17].
[54] *Matthews v SPI Electricity & Ors (Ruling No 19)* [2013] VSC 180, [30].
[55] *Matthews v SPI Electricity & Ors (Ruling No 19)* [2013] VSC 180, [30].
[56] *Matthews v SPI Electricity & Ors (Ruling No 19)* [2013] VSC 180, [13]-[14].

(d) where there was disagreement between the experts, the Court may not be able to resolve that disagreement "without some assistance";[57]

(e) without appropriate assistance, the Court was "quite unsure" as to whether it could to reach a 'just determination' of the proceeding";[58]

(f) "it is clear from both the [CPA], the *Supreme Court Act 1986* (Vic) and the ... [Rules of Court] … that where a judicial officer doubts his or her own ability to deal with a complex matter outside his or her experience or knowledge then there is a way in which the exercise can be made easier and, more importantly, fairer."[59]

(g) he would need such assistance both before and during the expert witness concurrent evidence sessions, as well as subsequently when reviewing the expert evidence adduced by the parties.

The Court thereafter appointed two professors of engineering as assessors.

In *Matthews v SPI Electricity Pty Ltd (Ruling No 29)* [2013] VSC 537 (10 October 2013), Counsel for SPI sought to tender a large body of material (some 380 documents) which was provided by SPI's solicitors to three expert witnesses retained by it for the purpose of assisting them in forming their opinions. The material underpinned the opinions of experts involved in the joint expert conferences before trial and the concurrent evidence session in which these experts would later participate in.[60] Three issues arose: (a) how much of this material was admissible; (b) if admissible, whether its tender genuinely assisted in determining the issues in the case; and (c) when the tender of this material should take place.[61] In ruling on these issues, Forrest J noted[62]:

> (a) the overarching purpose of the CPA is to "facilitate just, efficient, timely and cost-effective resolution of the real issues in dispute";[63]
>
> (b) section 8 of the CPA requires a court to give effect to the CPA's overarching purpose;[64] and

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[57] *Matthews v SPI Electricity & Ors (Ruling No 19)* [2013] VSC 180, [14].
[58] *Matthews v SPI Electricity & Ors (Ruling No 19)* [2013] VSC 180, [14].
[59] *Matthews v SPI Electricity & Ors (Ruling No 19)* [2013] VSC 180, [16].
[60] *Matthews v SPI Electricity Pty Ltd (Ruling No 29)* [2013] VSC 537, [4].
[61] *Matthews v SPI Electricity Pty Ltd (Ruling No 29)* [2013] VSC 537, [1].
[62] *Matthews v SPI Electricity Pty Ltd (Ruling No 29)* [2013] VSC 537, [17].
[63] *Matthews v SPI Electricity Pty Ltd (Ruling No 29)* [2013] VSC 53, [17], Forrest J citing *Civil Procedure Act 2010* (Vic) s 1(c).
[64] *Matthews v SPI Electricity Pty Ltd (Ruling No 29)* [2013] VSC 537, [17].

(c) section 9 of the CPA expands the CPA's overarching purpose.[65]

Justice Forrest then stated:

> **There is the potential in this trial for a vast number of documents to be tendered which have little or no relevance to the essential reasoning and opinion of the various experts or to the real issues in dispute between the experts**…I consider that it is inappropriate at the present time to permit the tender of any material which underpins the opinions of witnesses called by any party (unless of course the material is already in evidence). The efficient conduct of the trial and sensible use of finite judicial resources compels this course…
>
> The note of counsel appears to assume that if there is agreement between counsel as to the relevance then the documents may be tendered. I disagree. **Counsel's views as to relevance are helpful but not determinative, particularly given the volume of material to be considered in this case.** If this case is ever to be resolved, the Court must impose some limits on the evidentiary material adduced in the course of the expert evidence sessions. Both the *Evidence Act* and the CPA permit the Court to do so. To allow the tender of a document merely on an uncontested relevance basis where there is no substantive debate between the experts on the opinion which it supports would be foolhardy in the context of this litigation as the example I have set out illustrates.
>
> …
>
> [E]ither by virtue of s 135(c) of the *Evidence Act* or **s 49(3)(g) of the CPA**, material which underpins an expert's opinion (that is not in evidence already) will need to pass a test of significant relevance to a contested part of an expert's opinion before I consider admitting it into evidence and, then, on what basis. The only sensible time at which this can take place is at the end of the concurrent evidence session.
>
> So, in summary, **I will only consider the tender of any underpinning material at the conclusion of the relevant concurrent evidence session**, at which time I should be [able to resolve the evidentiary issues in dispute here].[66] (emphasis added)

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[65] *Matthews v SPI Electricity Pty Ltd (Ruling No 29)* [2013] VSC 537, [17].
[66] *Matthews v SPI Electricity Pty Ltd (Ruling No 29)* [2013] VSC 537, [21]-[31].

In the most recent Ruling in *Matthews v SPI Electricity Pty Ltd (Ruling No 32)* [2013] VSC 630 (18 November 2013) several issues were addressed:

(a) the formulation of questions for the concurrent evidence sessions (referred to as "conclaves");[67]

(b) imposition of limitations on communications between experts (on the one hand) and the parties and their solicitors (on the other hand) during the concurrent evidence session; and

(c) the scope of the role to be played by the two assessors previously appointed to assist the Court in relation to the expert evidence to be adduced during the concurrent evidence session.

As to the first question, Forrest J noted that he had, after consultation with the assessors (previously appointed) and with the assistance of the parties, finalised the set of questions to be put to the expert witnesses during the concurrent evidence session. The experts were required to provide the Court with brief preliminary responses within 48 hours. His Honour noted that the salutary effect of setting questions was to guide the evidence to be adduced during the concurrent evidence session, which the purpose of obtaining a preliminary response from each of the experts prior to the commencement of the concurrent evidence so that his Honour could, to put it colloquially, "get a sense of the lay of the land" in advance of the concurrent evidence session.[68]

As to the second question, his Honour noted that other than providing the experts with a short opportunity to confer with the parties or their solicitors between the date of finalisation of the joint expert report and the commencement of the concurrent evidence session, the experts were "quarantined" until the conclusion of the concurrent evidence session.

The third area of the Court's Ruling is perhaps of greatest interest. Forrest J's conducted a brief survey of the case law concerning the use of assessors to assist judges in understanding scientific, technical or medical evidence. He then usefully articulated the scope of the role of the assessor, as follows:

(a) The assessors' role is to assist the judge. The decision is that of the judge alone.

(b) The assessors will sit with me during the concurrent evidence sessions. If they wish, they may question the experts (or counsel) in this context. Such questioning however will be limited to clarification of the evidence; that is, where they consider the evidence to be ambiguous, unclear or incomplete;

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[67] The expression "conclaves" is sometimes used inconsistently to refer to either a joint expert conference held between experts before a trial / arbitration, alternatively a concurrent evidence session during a trial / arbitration hearing.

[68] *Matthews v SPI Electricity Pty Ltd (Ruling No 32)* [2013] VSC 630 at [17].

(c) I may consult with the assessors while sitting if I find a point of evidence unclear and seek their immediate input as to an appropriate or useful inquiry to make.

(d) I will consult with the assessors whilst in chambers on matters raised by the experts in their oral evidence and in their individual and joint reports. This may include advice as to any questions the assessors think I should ask counsel or the experts in order to determine the questions at hand.

(e) I will seek the guidance of the assessors on technical matters upon which I lack the requisite knowledge to understand without qualified assistance. This may include "lessons" on matters fundamental to, for example in this case, fracture mechanics or vibration.

(f) If the assessors raise a theory or opinion that has not previously been identified by the parties, I will discuss this with counsel.

(g) The assessors may from time to time provide me with advice on matters over which there is dispute between the experts. Such advice is not binding and the determination of a particular issue rests with the judge.

(h) I anticipate that I will consult with the experts immediately after the conclusion of the concurrent evidence session and, from time to time, while drafting the judgment. This is likely to include seeking confirmation from them that I have properly understood the meaning of the expert evidence of conclaves 1, 3 and 4. I repeat, however, that their role is confined to providing advice and ensuring that I have comprehended the evidence given. I also repeat that the decision on these issues is mine and mine alone.[69]

Hudspeth Rulings

A number of rulings following a jury trial in a personal injury action emphasise the importance for expert witnesses, solicitors and counsel to maintain the independence of the expert. Conversely, those rulings highlight the risks now present under the CPA for those persons if the independence of the expert is imperilled.

An employee brought a claim for damages for physical and psychological injury against her employer and the school at which she provided cleaning services. The employee allegedly slipped on liquid soap in a toilet block after a soap dispenser was forcefully removed by students. The employee engaged a consulting engineer to provide an expert report. There were three versions of the report. The third version of the report had a different factual basis to the two earlier versions and was adopted by the consultant as the true and correct version. The existence of the

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[69] *Matthews v SPI Electricity Pty Ltd (Ruling No 32)* [2013] VSC 630 at [27].

third version was not revealed to the court until it was exposed in cross-examination. There was also evidence suggesting that the third version was prepared two days into the trial and after the employee had been cross-examined, but then back-dated to a pre-trial date of 12 November 2012. To refute the allegation that the third report was prepared during the trial and backdated, counsel for the plaintiff produced an email which indicated that the expert had emailed the report directly to counsel on the day before the commencement of trial.

Following the entry of judgment in favour of the employer, the Court, of its own motion, under s 29(1)(2)(b) of the CPA, directed the plaintiff's expert and the plaintiff's solicitors attend Court for directions for the hearing and determination of the Court's motion against either or both of them for orders under s 29(1) of the CPA.[70]

Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (No 4) [2013] VSC 14 (4 February 2013) concerned the directions that ought to be given to enable the court to determine whether it was satisfied that any order should be made under the CPA in the interests of justice. In relation to ss 28 and 29 of the CPA, Dixon J stated:

> This statutory jurisdiction has, I think, its origins in the ability of the courts to enforce duties owed by practitioners to the court in conjunction with the jurisdiction to award costs against persons who are not parties to the proceeding. That jurisdiction is compensatory, not punitive. This is not to deny that where the jurisdiction is enlivened by a finding of a contravention of an obligation to the court there is a punitive, and a deterrent, slant that distinguishes the jurisdiction from the usual costs discretion. An order will ordinarily be limited to costs or expenses that were caused by the contravention of an obligation to the court. Section 29 may be in wider terms than the costs jurisdiction against lawyers personally at common law. Compensation may be

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[70] Section 29(1) of the CPA provides:

"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—

(a) an order that the person pay some or all of the legal costs or other costs or expenses of any person arising from the contravention of the overarching obligation;

(b) an order that the legal costs or other costs or expenses of any person be payable immediately and be enforceable immediately;

(c) an order that the person compensate any person for any financial loss or other loss which was materially contributed to by the contravention of the overarching obligation, including—

(i) an order for penalty interest in accordance with the penalty interest rate in respect of any delay in the payment of an amount claimed in the civil proceeding; or

(ii) an order for no interest or reduced interest;

(d) an order that the person take any steps specified in the order which are reasonably necessary to remedy any contravention of the overarching obligations by the person;

(e) an order that the person not be permitted to take specified steps in the civil proceeding;

(f) any other order that the court considers to be in the interests of any person who has been prejudicially affected by the contravention of the overarching obligations."

> awarded and orders other than for financial payments may be made. That is a matter for another time.[71]
>
> …
>
> The precise characterisation of the orders that might be made under s 29 is a matter for a later time, but in my view the court's motion does not presently warrant comprehensive articulation of alleged contraventions, as contended for by [the expert] and [the plaintiff's solicitors], before they ought to explain the relevant circumstances. That approach is not consistent with the paramount duty owed to the court under s 16 of the CPA or the duties more generally owed to the court. Further, s 20 of the CPA provides that a person to whom the overarching obligations apply must cooperate with the court in connection with the conduct of the proceeding.[72]

Counsel for the expert argued that the court should be hesitant to act on its own motion where it is open to a party to the civil proceeding to move for appropriate relief. Justice Dixon rejected this submission because:

(a) the terms of s 29(2) of the CPA are unambiguous and do not suggest that moving on the court's motion is a backstop or reserve procedure; and
(b) having regard to the broad facilitative language of s 29(2) and the legislature's expressed purposes for its enactment, there is no warrant for the limitation contended for.[73]

The Court directed that any party to the proceeding contending for an order under s 29(1) of the Act in her or its favour, file and serve any application and affidavit in support by 22 February 2013, noting that before the court proceeded of its own motion it was desirable that the other parties identify whether, and to what extent costs expenses or financial loss arose from or were materially contributed to by a possible contravention of an overarching obligation.[74]

Justice Dixon considered that the Court was entitled to a full and proper explanation of the circumstances surrounding the preparation of the third version of the expert's report since:

(a) solicitors are officers of the court subject to the highest duty of fidelity to the Court, a duty not merely preserved, but reinforced, by Part 2.2 of the CPA; and

(b) expert witnesses, many of whom like solicitors make their living in the courts, are in an analogous position to solicitors, arising from, inter alia, the precondition for admissibility of expert opinion that r 44.03 of the Supreme Court Rules be complied with, and the fact

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[71] *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (No 4)* [2013] VSC 14, [5].
[72] *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (No 4)* [2013] VSC 14, [7].
[73] *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (No 4)* [2013] VSC 14, [16].
[74] *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (No 4)* [2013] VSC 14, [17]-[18].

> that expert witnesses must acknowledge an overriding duty to assist the Court impartially, which duty is preserved and restated by the application of the overarching obligations to expert witnesses by s 10(3) of the CPA.[75]

In *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 6)* [2013] VSC 159 (9 April 2013), the plaintiff's solicitors and the expert called by the plaintiff made application for summary dismissal of both the Court's own motion and of the applications by summons by the first and third defendants.[76]

Justice Dixon declined to rule on the summary dismissal applications, effectively refusing them, without denying the opportunity for like applications to be made later. In relation to the CPA, Dixon J stated:

> As I have observed, a divergence is evident between the explanation that the jury heard of the circumstances of this controversy and explanations that are now advanced by affidavit. That has come about, in part, because senior counsel for the plaintiff has provided his explanation of events by an affidavit. As counsel for the solicitors put it, an odd situation arose, as the solicitors were the instructing party. Counsel's role in the controversy now appears more significant, and he is now represented. The issue that arises is whether the circumstances of direct dealing with the third version of the report between counsel and [the expert], that is, other than through the instructing solicitors, may have involved breaches, in the conduct of the trial, of s 21 [the overarching obligation not to mislead or deceive] and s 26 [the overarching obligation to disclose existence of documents] of the CPA …, which initially appeared to have arisen out of conduct of the solicitors. As the circumstances have now evolved, particularly having regard to the explanations so far provided, it appears that senior counsel for the plaintiff may have been more involved than the solicitors in the controversy that is the subject of the court's motion. The role of junior counsel, if any, has not been alluded to in the affidavits filed to date.
>
> I will give directions that I require that [senior counsel] and [junior counsel] attend to be heard about whether the court might find any breach of obligations to the court and ought to consider whether any order under s 29(1) of the Act should now be made in the interests of justice.[77]

Since 9 April 2013, Justice Dixon has held a hearing into whether or not there was a breach of the CPA by the plaintiff's solicitors, counsel and/or expert. His Honour has reserved his decision.

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[75] *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (No 4)* [2013] VSC 14, [21].

[76] Each of the first and third defendants, pursuant to the Court's own motion, filed a summons seeking relief under section 29 of the CPA.

[77] *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 6)* [2013] VSC 159, [12]-[18].

V. EMERGING MODEL

Prior to the recent amendments of the CPA, the orthodox model of adducing expert evidence employed in civil litigation before Victorian courts involved:

(a) parties being free to engage experts with a chosen area of expertise to answer questions (often loaded) based upon competing sets of factual assumptions (often favourable to the party briefing the expert);
(b) the respective experts 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 endeavour to resolve points of difference and to articulate brief reasons for their remaining differences; and
(c) exploration of the remaining differences at trial, increasingly by the concurrent evidence method.

The above model is less than efficient:

(a) first, it may result in "ships passing in the night" as experts with different areas of expertise are asked different questions upon different sets of factual assumptions. Thus, there is the risk of a disconnect between questions addressed and the assumptions used, by one party's expert and those used by the other party's expert, which tends to complicate the expert evidence section of cases;[78] and
(b) secondly, it is counter-intuitive to expect an expert who may have charged thousands, if not tens of thousands, of dollars, in producing a comprehensive final report, to resile from the conclusions reached in his/her report in a joint expert conference scheduled following the exchange of final reports.

While expert conferences and use of the concurrent expert evidence method at trial are useful innovations, they are not a complete panacea to the problems of adversarial bias. There is scope for improvement.

It is perhaps instructive to look at how expert evidence is managed in international commercial arbitrations, which involves the resolution of disputes between parties often from different legal and cultural backgrounds. In the civil law world, expert evidence is usually presented by way of a court-appointed expert. The IBA Rules on the Taking of Evidence in International Arbitrations (2010)[79] contain a hybrid, compromise solution. They provide for party-appointed experts

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78 Neil Young QC, "Expert Witnesses: On the stand or in the hot-tub – how, when and why?: Formulating the questions for opinion and cross-examining the experts", paper presented to the Commercial Court seminar on expert evidence on 27 October 2010, at para 8.

79 Available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence. For commentary on the IBA Rules, see Georg von Segesser, 'The IBA Rules on the Taking of Evidence in International Arbitration' (2010) 28 *ASA Bulletin* 735; Detlev Kühner, 'The Revised IBA Rules on the Taking of Evidence in International Arbitration' (2010) 27 *Journal of International Arbitration* 667.

(Article V) as well Tribunal-appointed experts (Article VI), without any preference for either alternative.[80]

A new model for adducing expert evidence by party-appointed experts is now emerging in international arbitrations.[81] It may be conveniently referred to as the "Expert Teaming" model. I predict that within five years the new model will also be the prevalent model in Australian superior courts. It is fostered by the recent amendments to the CPA. Its essential features are as follows:

(a) the Court (or arbitral tribunal) is actively involved at the outset in identifying particular technical issues 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 respective experts are briefed with the same questions, the same factual assumptions, including competing factual assumptions, and the same documents;

(c) the experts are then quarantined from the respective parties, and work co-operatively to produce a joint-expert report answering the nominated questions for opinion;

(d) the experts then 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.

Coincidentally, the Expert Teaming model has been implemented for some time in the Queensland Planning and Environmental Court, being a specialist court which determines a range of planning and environmental disputes in Queensland.[82] This new model has obvious advantages in terms of, first, addressing adversarial bias and, secondly, achieving efficiencies in the expert evidence process.

VI. CONCLUSION

The CPA was intended to bring about a culture change in the way litigation is conducted before the courts in Victoria. In particular, the CPA implemented many of the VLRC's recommendations in its Civil Just Review Report. The recently introduced Part 4.6 of the CPA

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80 In this context, a Tribunal is a reference to an arbitral panel made up of three arbitrators.

81 See Chartered Institute of Arbitrators, Protocol for the use of Party-Appointed Expert Witnesses in International Arbitration (2007), available at http://www.ciarb.org/information-and-resources/The%20use%20of%20party-appointed%20experts.pdf.

contains a statutory codification of the powers that Victorian courts have in relation to the management of expert evidence. Already one can see a perceptible shift in the way that expert evidence is managed by Victorian courts. Courts now expect greater co-operation between the parties, and that the expert evidence adduced is truly necessary to resolve the real issues in dispute. Moreover, the recent cases emphasise the expert's fundamental obligation to assist the Court.

Dated: 29 November 2013

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[82] In M E Rackemann, "The Management of Experts" (2012) 21 JJA 168.

APPENDIX 1

Part 4.6 of *Civil Procedure Act 2010* (Vic)

65F Objects of this Part

The main object of this Part is to further the overarching purpose by—

(a) enhancing the case management powers of a court in relation to expert evidence in civil proceedings;

(b) restricting expert evidence to that evidence which is reasonably required to resolve a civil proceeding;

(c) emphasising the primary duty of an expert witness to the court.

65G Party to seek direction of court to adduce expert evidence

(1) Unless rules of court otherwise provide or the court otherwise orders, a party must seek direction from the court as soon as practicable if the party—

(a) intends to adduce expert evidence at trial; or

(b) becomes aware that the party may adduce expert evidence at trial.

(2) Subsection (1) does not apply to the Magistrates' Court unless Magistrates' Court rules of court specify that the requirement to seek directions set out in subsection (1) applies to civil proceedings, or specified classes of civil proceeding, in that Court.

65H Court may give directions in relation to expert evidence

(1) A court may give any directions it considers appropriate in relation to expert evidence in a proceeding.

(2) A direction under subsection (1) may include, but is not limited to—

(a) the preparation of an expert's report;

(b) the time for service of an expert's report;

(c) limiting expert evidence to specified issues;

(d) providing that expert evidence may not be adduced on specified issues;

(e) limiting the number of expert witnesses who may be called to give evidence on a specified issue;

(f) providing for the appointment of—

(i) single joint experts;

(ii) court appointed experts;

(g) any other direction that may assist an expert witness in the exercise of his or her functions as an expert witness in the proceeding.

(3) A direction under subsection (1) may be given at any time in a proceeding.

65I Court may give directions to expert witnesses—conferences and joint experts reports

(1) A court may direct expert witnesses in a proceeding—

(d) to hold a conference of experts; or

(e) to prepare a joint experts report; or

(f) to hold a conference and prepare a joint experts report.

(2) The court may direct that a conference of experts be held with or without the attendance of all or any of the following—

(a) the parties to the proceeding; or

(b) the legal practitioners of the parties; or

(c) an independent facilitator.

(3) A direction to prepare a joint experts report may include but is not limited to the following—

(a) that the joint experts report specifies—

(i) the matters agreed and not agreed by the experts; and

(ii) the reasons for any agreement or disagreement;

(b) the issues to be dealt with in the joint experts report by the expert witnesses;

(c) the facts, and assumptions of fact, on which the joint experts report is to be based.

(4) A direction may be—

(a) general or in relation to specified issues;

(b) given at any time in a proceeding, including before or after the expert witnesses have prepared or given reports.

65J Use of conference of experts and joint experts reports in proceeding

(1) Unless the parties to the proceeding agree, or the court otherwise orders, the content of a conference of experts, except as referred to in a joint experts report, must not be referred to at any hearing of the proceeding to which it relates.

(2) A joint experts report may be tendered at the trial as evidence of any matters agreed.

(3) In relation to any matters not agreed, a joint experts report may be used or tendered at the trial only in accordance with—

(a) the rules of evidence; and

(b) the rules of court and practices of the court in which the trial is heard.

(4) Except by leave of the court, a party affected may not adduce evidence from any other expert witness on the issues dealt with in the joint experts report.

65K Court may give direction about giving of evidence, including concurrent evidence, by expert witnesses

(1) A court may give any direction it considers appropriate in relation to the giving of evidence by any expert witness at trial.

(2) Without limiting subsection (1), the court may direct that any expert witness—

(a) give evidence at any stage of the trial, including after all factual evidence has been adduced on behalf of all parties;

(b) give evidence concurrently with one or more expert witnesses;

(c) give an oral exposition of his or her opinion on any issue;

(d) give his or her opinion of any opinion given by other expert witnesses;

(e) be examined, cross-examined or re-examined in a particular manner or sequence, including by putting to each expert witness, in turn, each issue relevant to one matter or issue at a time;

(f) be permitted to ask questions of any other expert witness who is concurrently giving evidence.

(3) A court may question any expert witness to identify the real issues in dispute between 2 or more expert witnesses, including questioning more than one expert witness at the same time.

65L Single joint experts

(1) A court may order that an expert be engaged jointly by 2 or more parties to a civil proceeding.

(2) A court may make an order for the engagement of a single joint expert at any stage of the proceeding.

(3) In making an order to engage a single joint expert, the court must consider—

(a) whether the engagement of 2 or more expert witnesses would be disproportionate to—

(i) the complexity or importance of the issues in dispute; and

(ii) the amount in dispute in the proceeding;

(b) whether the issue falls within a substantially established area of knowledge;

(c) whether it is necessary for the court to have a range of expert opinion;

(d) the likelihood of the engagement expediting or delaying the trial;

(e) any other relevant consideration.

(4) A single joint expert is to be selected—

(a) by agreement between the parties; or

(b) if the parties fail to agree, by direction of the court.

(5) A person must not be engaged as a single joint expert unless he or she consents to the engagement.

(6) Any party who knows that a person is under consideration for engagement as a single joint expert—

(a) must not, prior to the engagement, communicate with the person to obtain an opinion on the issues concerned; and

(b) must notify the other parties to the proceeding of the substance of any previous communications on the issues concerned.

(7) Unless the court orders otherwise, a single joint expert's report may be tendered in evidence by any of the parties to the proceeding.

65M Court appointed experts

(1) A court may make an order appointing an expert—

(a) to assist the court; and

(b) to inquire into and report on any issue in a proceeding.

(2) The court may make an order appointing a court appointed expert at any stage of the proceeding.

(3) In making an order to appoint a court appointed expert, the court must consider—

(a) whether the appointment of a court appointed expert would be disproportionate to—

(i) the complexity or importance of the issues in dispute; and

(ii) the amount in dispute in the proceeding;

(b) whether the issue falls within a substantially established area of knowledge;

(c) whether it is necessary for the court to have a range of expert opinion;

(d) the likelihood of the appointment expediting or delaying the trial;

(e) any other relevant consideration.

(4) A person must not be appointed as a court appointed expert unless he or she consents to the appointment.

65N Instructions to single joint expert or court appointed expert

(1) If a single joint expert is engaged or a court appointed expert is appointed in a proceeding, the parties to the proceeding must endeavour to agree on—

(a) written instructions to be provided to the single joint expert or the court appointed expert concerning the issues arising for the expert's opinion; and

(b) the facts and assumptions of fact on which the expert's report is to be based.

(2) If the parties cannot agree on any of the matters referred to in subsection (1), the parties must seek directions from the court.

65O Prohibition on other expert evidence without leave

(1) Except by leave of the court, a party to a proceeding may not adduce evidence of any other expert witness on any issue arising in proceedings if, in relation to that issue—

(a) a single joint expert has been engaged; or

(b) a court appointed expert has been appointed.

(2) Without limiting any powers of the court, in determining whether to grant leave, the court must consider—

(a) whether one party does not agree with the evidence, or an aspect of the evidence, in the report of a single joint expert or the report of a court appointed expert, as the case requires;

(b) whether allowing additional evidence to be adduced would be disproportionate to—

(i) the complexity or importance of the issues in dispute; and

(ii) the amount in dispute in the proceeding;

(c) whether there is expert opinion which is different to the opinion of the single joint expert or the court appointed expert, as the case requires, which is, or may be, material to deciding the issue;

(d) whether any other expert witness knows of matters which are not known by the single joint expert or the court appointed expert that are, or may be, material to deciding the issue;

(e) any other relevant consideration.

65P Disclosure of retainer arrangements

(1) Unless rules of court otherwise provide, a party to a civil proceeding may apply to the court for an order that an expert witness retained by any party to that proceeding disclose all or specified aspects of the arrangements under which the expert witness has been retained to—

(a) the court; and

(b) all the parties to the proceeding.

(2) On an application under subsection (1), the court may make any order for disclosure it considers appropriate in the circumstances of the proceeding.

(3) Without limiting subsection (2), the court may make an order that an expert witness disclose whether the charging or payment of the fees or costs of the expert witness, or the amount of those fees or costs, is contingent in any respect on the outcome of the proceeding, and if so, the details of that arrangement.

(4) A party must not adduce evidence of a disclosure made pursuant to an order made under this section at the trial without leave of the court.

65Q Interaction with other powers of court

(1) Nothing in this Part limits any other power a court may have—

(a) in relation to case management, evidence or witnesses, including expert witnesses; or

(b) to take any action that the court is empowered to take in relation to a contravention of a direction given or an order made by the court.

(2) Nothing in this Part limits—

(a) in the case of the Supreme Court, the Court's inherent jurisdiction, implied jurisdiction or statutory jurisdiction; or

(b) in the case of a court other than the Supreme Court, the court's implied jurisdiction or statutory jurisdiction; or

(c) any other powers of a court arising or derived from the common law or under any other Act (including any Commonwealth Act), rule of court, practice note or practice direction.