ASPECTS OF EXPERT EVIDENCE: BRIEFING OF EXPERTS AND FINALISING THE REPORT[1]

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CONTENTS

I. INTRODUCTION 1
II. HISTORY OF LAW REFORM 2
III. DIFFERENT EXPERT EVIDENCE MODELS 7
A. SINGLE EXPERT 7
B. CURRENT MODEL 8
C. EMERGING MODEL 9
IV. UNDERSTANDING THE REGULATORY FRAMEWORK 10
V. BRIEFING OF EXPERTS 14
VI. REPORT WRITING 17

> *At the American Trial Bar… expert witnesses are known as "saxophones". …[T]he lawyer plays the tune, manipulating the expert as though the expert were a musical instrument… subtle pressures to join the team… financial inducement… the expert can run his meter only so long as his patron litigator likes the tune.*[3]

I. INTRODUCTION

In this paper I will provide an overview of the laws and rules in respect of adducing expert evidence in civil cases and commercial arbitrations. I will also focus on issues arising during the briefing process and in finalising expert reports.[4] Before I do so, it is useful, I think, to put the topic of expert evidence into its historical perspective.

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1 Paper presented to the IAMA "Expert Evidence Fundamentals: Tips and Traps" Seminar on 8 October 2012.

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3 Langbean, "The German Advantage of Civil Procedure" , (1985) 52(4) University of Chicago Law Review 96.

4 Owain Stone (Forensic Accountant) and David Andrews (Programmer) will address these issues from an expert's perspective.

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".[5]

In 1996, a report was published in the United Kingdom (commonly referred to as the Woolf Report)[6] 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-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients.* [7]

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".[8]

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;

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5 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..

6 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.

7 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.

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

- 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.[9]

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 which emphasise the independence of party-appointed experts and their overriding duty to the Court.[10]

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").[11] Like the Woolf Report, the NSW Report recommended the introduction of a "permission rule" in relation to expert evidence. It also recommended the introduction of special rules dealing with the appointment of a joint single expert by the parties.[12] 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-tubbing" 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").[13] 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 which promote early Court control and flexibility in the management of expert evidence:

(a) first, a rule placing on the parties the obligation of seeking directions from the Court as to expert witnesses, while making it plain that this could be done

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9 As summarised at para [4.4] of the NSW Report. See note 11 below.

10 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.

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

12 As opposed to court-appointed experts.

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

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 witnesses;

(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.[14]

The NSW reforms were implemented by the NSW Uniform Civil Procedure Rules (Amendment No 12) 2006 introduced on 8 December 2006.[15] The relevant rules concerning expert evidence are contained in Part 31, "Expert Evidence" of the UCPRs (NSW), in particular Rules 31.17-31.54.[16] They empower the Court to take early control of the use of expert evidence in civil proceedings.

In 28 May 2008 the Victorian Law Reform Commission ("VLRC") tabled a report in the Victorian Parliament, entitled "Civil Justice Review Report"[17]. It 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;[18]

2. introduction of a requirement that the parties seek directions before calling expert witnesses, and conferral of a broad discretion upon the Court in terms of the directions which may be given;[19]

3. introduction of a broad and express direction to direct expert witnesses to confer;[20]

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14 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].

15 Many of the recommendations contained in the NSW report were already embodied in the UCPRs (2005).

16 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.

17 Available at http://www.lawreform.vic.gov.au/projects/civil-justice/civil-justice-review-report.

18 Cf Rule 31.17 of UCPR (NSW).

19 Cf Rule 31.19 and 31.20 of UCPR (NSW).

20 Cf Rule 31.19 and 31.20 of UCPR (NSW).

4. introduction of a broad and express direction to direct the giving of evidence by the concurrent expert evidence (i.e. hot-tub) method;[21]

5. introduction of a discretion to direct the parties to engage a single joint expert;[22]

6. discretion for the Court to appoint its own expert witness;[23]

7. there should be a more extensive code of conduct for expert witnesses containing, inter alia, a duty to work co-operatively with other expert witnesses;[24]

8. expert witnesses should not be immune from sanctions, including costs orders. However, no specific sanctions are required;[25]

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;[26]

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 expert will be called to give evidence in Court.[27]

In 2010, the Victorian Parliament passed the *Civil Procedure Act* 2010 ("the CPA") which 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."[28] The CPA did not implement any of the particular recommendations made in the VLRC Report insofar as expert evidence is concerned. However, several provisions impact on experts giving evidence in civil matters before Victorian courts.

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21 Cf Rule 31.35 of UCPR (NSW).

22 Cf Rule 31.37 – 31.45 of UCPR (NSW) – contained in Sub-Division 4 entitled "Parties' Single Experts".

23 Cf Rule 31.46 – 31.54 of UCPR (NSW) – contained in new Sub-Division 5 entitled "Court – Appointed Experts". Note the current Victorian Supreme Court Rules (unlike Federal Court Rules) make no provision for Court Appointed Experts.

24 See Schedule 7 of the amended CPR (NSW).

25 This is a departure from the NSW position.

26 Again, this is a departure from the NSW position.

27 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.

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

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 as to costs and, further or alternatively, an order to compensate any person for financial loss materially contributed to by the breach.[29]

In particular, the CPA has 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 experts witnesses (s 10(4)).

Currently, there is a Bill before the Victorian Parliament entitled the *Civil Procedure Amendment Bill* 2012, which introduces some particular reforms in the area of expert evidence.[30] 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(1),(2);
- the directions the Court can give in relation to expert evidence are set out in section 65H. They include permitting the Court to specify 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 engagement of a single joint expert (65L);
- a party may apply to the Court for an order that an expert retained by the other party disclose all or specified aspects of the retainer arrangement (s 65P).

Although many of the matters dealt with in the Amendment Bill are already enshrined in Rules of Court or practice, it usefully emphasises the Court's power to seize control of the expert

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29 Sections 28-29 CPA.

30 Available at http://www.parliament.vic.gov.au/static/www.legislation.vic.gov.au-bills.html. The Bill has passed the Legislative Assembly and is being read a second time in the Legislative Council.

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.

III. DIFFERENT EXPERT EVIDENCE MODELS

A. Single Expert

The introduction of a single joint expert represents the most significant reform in respect of expert evidence in civil proceedings. While the proposal was rejected by the NSW Working Party, it has been adopted in Queensland in the *Uniform Civil Procedure Rules* 1999 (Qld). Part V of the Queensland Rules, entitled "Expert Evidence", provides that unless otherwise ordered by the Court, single experts (whether party appointed or court appointed) will give expert evidence in civil cases.

The single joint expert proposal is somewhat controversial. Indeed, it has generated lively debate between senior judicial figures.[31] One of the major criticisms is that in any area of expertise there is usually a range of opinions, and that to appoint a single expert is to deprive the Court of the benefit of divergent opinions. In that regard, Peter Heerey AM QC (a retired judge of the Federal Court) has commented:

> *…a regime where only one respectable establishment expert is called shuts off legitimate grounds of attack by those holding new or unfashionable opinions. If the proposed Queensland rules operated in Galileo's day no doubt a court-appointed expert would say that the sun moved around the earth and that anybody asserting the contrary did not command peer acceptance or, not to put too fine a point on it, was a crackpot.*[32]

As well, the criticism is made that the appointment of a single expert does not result in any savings in costs as parties invariably appoint their own "shadow" experts.

On the other hand, it is unquestionable that the appointment of a single expert addresses the problem of adversarial bias. That said, critics argue that experts have their own natural biases (just as lawyers do - for example, black-letter lawyers).[33]

It is perhaps instructive that the case law that has developed in England over the past ten or so years since the Woolf reforms have been introduced reveal that joint experts have been

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31 See Geoffrey L. Davies, 'Current issues – expert evidence: court appointed experts' (2004) 23 *Civil Justice Quarterly* 367; Peter Heerey, 'Recent Australian developments' (2004) 23 *Civil Justice Quarterly* 386; and Geoffrey L. Davies, 'Recent Australian developments: a response to Peter Heerey' (2004) 23 *Civil Justice Quarterly* 396. See also Downes, Justice Garry, "Problems with Expert Evidence: are single or court-appointed experts the answers?" (2006) 15 JJA 185; M E Rackemann, 'The Management of Experts' (2012) 21 *Journal of Judicial Administration* 168.

32 Peter Heerey, 'Recent Australian developments' (2004) 23 *Civil Justice Quarterly* 386, 393.

33 Downes, above n 31; Rackermann, above n 31.

appointed in only routine cases where the claims are modest, but not in more complex cases, notwithstanding the presumption in the UK Civil Procedure rules for the appointment of a single expert.[34]

B. Current Model

The current, orthodox model which is employed in civil litigation before Victorian courts (and also, I regret to say, domestic commercial arbitrations) involves:

(e) 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);
(f) 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
(g) 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;[35] 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

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34 See, for example, NSW Report, para 4.25.

35 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.

(2010)[36] provide for party-appointed experts (Article V) as well Tribunal-appointed experts (Article VI), without any preference for either alternative.[37] Somewhat surprisingly, a recent international arbitration survey has revealed that expert witnesses are appointed by the parties (as opposed to arbitral tribunals) in 90% of international arbitrations, in circumstances where, on average, expert witnesses are involved in two-thirds of international arbitrations. Less surprisingly, party-appointed experts were more regularly appointed in arbitrations between parties coming from common law jurisdictions, and civil lawyers were suspicious of party-appointed experts because they were perceived to assume the role of partisan advocates.[38]

C. Emerging Model

A new model for adducing expert evidence by party-appointed experts is now emerging in particular courts and also in international arbitrations. It may be conveniently referred to as the "Expert Teaming" model. I predict that within five years the new model will be the prevalent model. 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.

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

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36 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.

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

38 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process (White and Case, in conjunction with Queen Mary University of London School of International Commercial Arbitration) at p 29 available at http://www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf.

environmental disputes in Queensland.[39] It is also being adopted in international arbitrations.[40] This new model has obvious advantages in terms of, first, addressing adversarial bias and, secondly, achieving efficiencies in the expert evidence process.

IV. UNDERSTANDING THE REGULATORY FRAMEWORK

The first thing that one needs to do, whether one is an expert witness or a lawyer engaged in civil litigation, or in a commercial arbitration, is to understand the relevant regulatory regime. What legislation, rules and practice notes regulate the reception of expert evidence in the dispute at hand.

If the dispute is in the Supreme Court, you have to be familiar with the requirements contained in:

(a) the CPA, especially sections 16 – 17, 20 – 21 and 23 – 25;
(b) the *Evidence Act 2008* (Vic), sections 55, 76, 79(1), 135 and 136;
(c) Order 44 of the *Supreme Court Rules*;
(d) the *Expert Witness Code of Conduct* – Form 44A; and
(e) (if the proceeding is entered in a managed List) any particular Practice Note applying to the List – for example, the Commercial Court guide (2011), paras 13.24-13.26, or the TEC List guide (Practice note 2 of 2009).

Failure to comply with the requirements contained in the relevant regulatory regime may render the expert evidence inadmissible, or even if admissible, of diminished weight.

When giving expert evidence in Court, one starts with section 76 of the *Evidence Act 2008* which in effect prohibits evidence of opinion. An exception to the prohibition is found in section 79. This section was recently considered by the High Court in *Dasreef*.[41]

To be admissible:

(a) expert evidence must be relevant (as required by section 55);[42]
(b) the witness must have specialised knowledge, based on his/her training, study or experience;[43]

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

40 See CIArb Protocol for the use of party-appointed expert witnesses in international arbitration (2007); Doug Jones, "Party-appointed Expert Witnesses in International Arbitration – a protocol at last" (2008) 24 (1) Arbitration International 137; Klaus Sachs and Nils Schmidt – Ahrendts, "Protocol on Expert Teaming: A new Approach to Expert Evidence" in Albert Jan van den Berg (ed), Arbitration Advocacy in Changing Times, ICCA Congress Series, 2010 Rio Volume 15 (Kluwer Law International 2011 pp. 135-148).

41 (2011) 243 CLR 588 at 602 – 605 [30] – [42] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, 612 - 639 [64] – [134] per Heydon J.

42 If, for example, the factual assumptions underlying the expert's opinion evidence are not proved, the expert's opinion is irrelevant and inadmissible: see *Dura* (below) at para [94].

43 This assumes that it can be demonstrated that there is a relevant field of 'specialised knowledge'.

(c) the opinion must be wholly or substantially based on that specialised knowledge;[44]

(d) as far as the opinion is based on facts 'observed' by the expert, they must be identified and proved by the expert. So far as the opinion is based on 'assumed' facts, they must be identified in the expert report and proved by other witnesses or in some other way; and

(e) the expert evidence must explain how the field of 'specialised knowledge' in which the expert is qualified by reason of 'training, study or experience' and on which the opinion is 'wholly or substantially based' applies to the facts assumed or observed so as to produce the opinion propounded.

Even if admissible, the evidence may be excluded entirely, or limited by, the operation of section 135-136, which confers upon the court a discretion to exclude, or limit, that evidence.

A lack of independence is not of itself sufficient to establish the inadmissibility of the expert's opinion.[45] Rather, in an extreme case it may justify the exclusion of the opinion in evidence under s 135. Usually, lack of independence is a factor that goes to the weight to be afforded to the expert evidence. In *ASIC v Rich*[46], ASIC called as an independent expert witness a person who had assisted it in an ASIC investigation which led to the commencement of the proceeding in question, in which the expert was retained to provide expert evidence. During the investigation, the expert had become privy to material which was inadmissible in the proceeding but relevant to the formation of the expert's various opinions. Austin J held that the expert evidence was inadmissible because it failed to comply with section 79, alternatively could be excluded under section 135.[47] On appeal, the NSW Court of Appeal (Spigelman CJ, Giles and Ipp JJA) disagreed, holding that the objections only went to the weight of the opinion evidence.[48]

In *Dasreef*, the High Court stated that, generally, Trial Judges confronted with an objection to admissibility of evidence should rule upon that objection as soon as possible (and not as was previously the case, at a later time including in reasons for judgment).[49] This is a significant development. It means that the expert report must contain sufficient details to establish the admissibility of the opinion evidence. For example, it is critical for the expert report to establish

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44 (b) and (c) are requirements of section 79.

45 See *FGT Custodians Pty Ltd (formerly Feingold Partners Pty Ltd) v Fagenblat* [2003] VSCA 33.

46 [2005] NSWSC 149.

47 At [341] – [348], [406], [415] and [419].

48 [2005] NSWCA 152 at [92] – [94].

49 *Dasreef* (2011) 243 CLR 588 at 605 [42] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, 639 - 640[135] per Haydon J.

the expert's specialised knowledge upon which the opinion is substantially In the past it was possible to remedy deficiencies in the expert's report[50] in evidence-in-chief or re-examination.

More recently, Dixon J in *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3)*[51] ('*Dura*') has helpfully summarised the position, following *Dasreef's* case, in several rules:[52]

In summary, the matters that will usually be considered … [in determining] whether the exception under s 79(1) renders opinion evidence admissible may conveniently be referred to as four 'rules' (one of which is in three parts), which are:

*(a) is the opinion relevant (or of sufficient probative value) **(the relevance rule)**;*
*(b) has the witness properly based 'specialised knowledge' **(the expertise rule)**;*
*(c) is the opinion to be propounded 'wholly or substantially based' on specialised knowledge (**the expertise basis rule)**;*
*(d) is the opinion to be propounded 'wholly or substantially based' on facts assumed or observed that have been, or will be, proved, or more specifically **(the factual basis rules):***

*i. are the 'facts' and 'assumptions' on which the expert's opinion is founded disclosed **(the assumption identification rule)**;*
*ii. is there evidence admitted, or to be admitted before the end of the tendering party's case, capable of proving matters sufficiently similar to the assumptions made by the expert to render the opinion of value **(the proof of assumptions rule)**;*
*iii. is there a statement of reasoning showing how the 'facts' and 'assumptions' relate to the opinion stated to reveal that that opinion is based on the expert's specialised knowledge **(the statement of reasoning rule)**?*

While the rules of evidence do not technically apply in commercial arbitrations,[53] it would be prudent to adhere to the above rules, as failure to do so will affect the probative value of the expert evidence.

Finally, as far as the jurisprudence is concerned, it is worth noting the summary of principles espoused by Heydon J in *Makita (Australia) Pty Ltd* v *Sprowles*[54], which has sometimes been referred to as a counsel of perfection. Heydon JA said:[55]

> *If evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialised knowledge"; there must be an identified*

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50 Such as insufficient particularisation of the relevant specialised knowledge, or the factual assumptions relied on by the expert.

51 [2012] VSC 99.

52 *Dura* [2012] VSC 99 at [98].

53 See, for example, s 19(3) *Commercial Arbitration Act 2011* (Vic).

54 (2001) 52 NSWLR 705, 744 [85] (approved in *Dasreef* (2011) 243 CLR 588).

55 At [41].

> *aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"; so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in HG v R (1999) 197 CLR 414, on "a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise*

Turning to the Rules of Court, rule 44.03 relevantly set out the requirements that an expert report must comply with. Relevantly, it requires, inter alia, that:

(a) as soon as practicable after the engagement of the expert and before the expert makes a report, he/she must be provided with a copy of the Expert Witness Code of Conduct (Form 44A);
(b) the expert report shall contain an acknowledgement that the expert has read the Expert Witness Code of Conduct and agrees to be bound by it;
(c) the expert report shall specify:
    (i) the qualifications of the expert;
    (ii) the facts, matters and assumptions on which the expert opinion is based;
    (iii) a summary of, and reasons for, the expert opinion(s);
    (iv) any literature or other materials utilised by the expert in support of his/her opinion;
    (v) if applicable, an acknowledgement that any particular question falls outside the expert's field of expertise;
    (vi) details of any examination, test or other investigation relied on by the expert in arriving at his/her opinion;
    (vii) a declaration that the expert has made all enquiries which he/she believes are desirable and appropriate and, further, that no matters of significance which the expert regards as relevant have been withheld from the Court;
    (viii) whether any of the opinions expressed in the report are not concluded opinions because of insufficient research or insufficient data or for any other reason.

Failure to provide the expert with the Expert Witness Code of Conduct may result in exclusion of the expert evidence by the Court.[56]

Finally, the Expert Witness Code of Conduct emphasises:

(a) the overriding duty of the expert to assist the Court impartially; and
(b) that the expert is not an advocate for the party retaining him/her.

It has recently been observed that the above two principles of the Code emphasise the independence with which an expert is to approach his or her task.[57]

Like Rule 44.03, the Code requires that the expert report will contain an acknowledgement by the expert that he or she has read the Code and agrees to be bound by it. In *Dura*, Dixon J emphasised that Courts require experts to pay more than 'lip-service' adherence to the Expert Witness Code of Conduct.[58]

V. BRIEFING OF EXPERTS

In briefing experts, lawyers and experts should have at the forefront of their minds the need to maintain the independence of the expert. The expert is not merely an "advocate" for his/her party. His/her overriding duty is to assist the Court.

The manner of briefing experts, and communications between lawyers (or clients) and the expert has the potential of imperilling the independence of the expert. In many cases there is a risk that the expert, consciously or unconsciously, becomes part of "the team". Therefore, it is vital that lawyers explain to the expert their role.[59]

The risk of an expert imperilling his/her independence may arise where lawyers (or indeed clients) hold preliminary discussions with the expert, before his/her engagement, with the objective of identifying the expert's probable approach, if engaged. In *Phosphate-Operative Company of Australia Ltd v Shears* ('*Pivot*')[60], Brooking J criticised this practice:

> *The danger is that, through [the expert] being privy to [preliminary discussions], he may come to be regarded and to regard himself as part of a "team". Moreover, it is undesirable that the prospective independent expert should disclose to his prospective employer [his] probable general approach…*

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56 See *Welker v Rinehart (No 6)* [2012] NSWSC 160.

57 *Roads Corporation v Love* [2010] VSC 253 at [34] per Vickery J.

58 *Dura* at para [174].

59 See *Bossi Security Services Ltd v ANZ Banking Group Ltd* [2011] VSC 255 per Davies J at [141] – [142].

60 [1989] VR 665 at 680.

Similarly, meetings between several experts to be called by a party are to be avoided for similar reasons. In *Roads Corporation v Love*[61] Vickery J said (at [36]):

> *Meetings between experts to be called by a party for the purpose of ensuring a "common line" in the case has a number of vices. The exercise is ultimately self-defeating. In the first place the essential independence of the witness is compromised – the witness is no longer giving exclusively his or her own opinion – the evidence is in danger of becoming a "team presentation". As a consequence, the overriding duty to assist the Court on the expert subject matter is compromised and the witness approaches the role of the advocate for the person retaining him or her. Secondly, adequate testing of the evidence and the information relied upon becomes problematic. The content of discussions at such meetings is rarely likely to be recorded, and the influences which are brought to bear are not likely to be assessed with any degree of confidence. The credibility of the participating witnesses will suffer accordingly.*

While there is no ethical reason why an expert engaged to provide assistance in a consulting role should not later provide expert evidence at trial, the expert and legal advisers need to understand and recognise the difference between the two tasks, and keep them separate.[62] If the expert is to "change hats", it is prudent for the expert to disclose this in his/her expert report, as opposed to the matter coming out in cross-examination.[63]

In *Pivot*, the expert was engaged before any expert questions were identified for his opinion. Indeed, the expert was involved in formulating the particular questions for opinion. Brooking J was damning, concluding that the expert's report did not contain a genuine opinion, but rather was the product of an exercise carried out for the purpose of arriving at a desired result.[64]

In some cases, the area of expertise will be well beyond the lawyers and the client. In such cases, a decision should be made at an early stage as to whether to engage a separate consulting (or "dirty") expert in addition to the "clean" expert who is to give evidence at trial. Not all cases warrant incurring this additional expense but the advantages are obvious - the consulting expert can assist:

(a) the lawyers in understanding the technical issues;
(b) in identifying the precise questions for independent expert evidence, as well as the factual assumptions and the documents to be provided to the independent expert, for the purposes of preparing his/her report.

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61 [2010] VSC 253.

62 *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 at [676].

63 *Pan Pharmaceuticals Ltd (in liq) v Selim* [2008] FCA 416, where the expert assisted in drafting the statement of claim. This gave rise to the question of whether the expert was sufficiently independent, so as to warrant exclusion of his expert evidence pursuant to the Court's discretion under s 135.

64 *Phosphate Co-Operative Co of Australia Pty Ltd v Shears (No 3) (Pivot case)* [1989] VR 665 at 686.

It is critical to use an expert with appropriate expertise. After all, in order to be admissible, the expert's opinion must be based on "specialised knowledge". This can create problems in some cases. For example, an engineer with a general background may not have sufficient specialised knowledge to express an opinion upon the causes of cracking in a vessel made of a special metallic compound operating in particular (say acidic) conditions.[65]

The timing of the brief to expert is also critical. In my experience, often experts are briefed too early in the litigation process. The questions asked of them lack sufficient precision, resulting in the need to modify the questions for opinion and relevant factual assumptions. This can be productive of unnecessary expense, if not severe embarrassment.

Another issue that sometimes arises is the need to control one's client to ensure that an over-eager client does not communicate directly with an expert prior to the preparation of the expert's report. Communications between the client and the expert are often not privileged. Further, such direct communications raise concerns about imperilling the expert's independence.

Lawyers and experts should be circumspect in all their communications from first contact leading up to the preparation of the final expert report. They should assume that the communications may be exposed at trial. Any communication which has the appearance of undermining the independence of the expert should be avoided.

Indeed, the absence of file notes or notes of conference recording communications between the lawyers and expert may of itself give rise to the drawing of adverse inferences, where the documentary record[66] demonstrates that a meeting or tele-conference took place and the substance of the expert's opinion substantially changed before and after those communications.[67] In *Temwell Pty Ltd v DKGR Holdings Pty Ltd*[68], an expert valued certain software at $6.9m - $7.8m. In the final report of 18 June 2003, the expert valued the same software as between $9.6m - $11.17m. In between those two dates, the expert conferred with counsel and communicated drafts with the solicitors. Under cross-examination, the expert conceded that the majority of the changes to her earlier draft were at the suggestion of the legal team (even though there was no contemporaneous note of conference to this effect).

Experts should be circumspect about the language that they employ in their reports. In *Dura*, Dixon J said at [169]:

> It was difficult to accept Mr [F] as impartial. From the outset, his reports displayed a lack of objectivity that ought to have caused concern to Dura's advisers. His concluding opinion in his report was not an opinion drawn from specialist knowledge; it was an

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65 For another recent example, see *NSW Land & Housing Corp v Dia* [2012] NSWCA 321, at [29].

66 In particular, emails and time sheets.

67 See Jim Delaney, 'Interacting effectively with expert witnesses', paper delivered to the Commercial Court Expert Evidence Seminar on 15 August 2012, para [62].

68 [2005] FCA 1403.

> **inappropriate expression of reactions like 'amazement' and of speculative belief in** Hue's **improper motives**. Such observations **call into question the proper basis in the witness' expert knowledge for his opinions** that may amount to nothing more than a combination of speculation, inference, and personal views dressed up with specious authority, subverting the court's task of legitimate fact-finding. It appears that this was the message that Dura wanted to hear. Such observations provide no assistance to the court in the independent assessment of the opinions proffered and carry no weight. [emphasis added]

It is also worth mentioning that the brief to experts should not contain:

- legal opinions, or
- draft witness statements.

This is because privilege in those documents will be taken to have been waived once parties seek to rely on the expert report. Moreover, the provision of legal advice to an expert may give an impression that the expert is retained to give an opinion which accommodates the engaging party's objectives.

A useful guide to the briefing of expert witnesses is contained in the Protocol for the Instruction of Experts to give Evidence in Civil Claims produced by the Civil Justice Council in the UK (2005, amended October 2009).[69] It must be understood in the context of the special features contained in the UK Civil Procedure Rules and Practice Direction. It nevertheless provides useful guidance in relation to:

- duties of experts (paragraph 4);
- instructions to experts (paragraph 18);
- the content of the expert report (paragraph 13)
- amendment of the expert report (paragraph 15)
- discussions between experts (paragraph 18)

VI. REPORT WRITING

Practically speaking, the expert report should:

(a) outline the expert's qualifications and experience sufficient to demonstrate the expert's "specialised knowledge" to answer the questions posed for opinion;
(b) identify the brief to expert (sometimes appended to the report);
(c) identify the questions for opinion;
(d) identify the facts on which the expert opinion is based;
(e) provide a summary of opinion on each of the questions for opinion; and
(f) provide coherent reasons for each opinion. A simple conclusion is not sufficient

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69 Available at http://www.justice.gov.uk/courts/procedure-rules/civil/contents/form_section_images/practice_directions/pd35_pdf_eps/pd35_prot.pdf.

The report must contain a transparent process of reasoning which shows that the opinion expressed is wholly or substantially based on specialised knowledge as applied to the facts (assumed or observed).[70] It should differentiate between:

(a) assumed facts; and
(b) opinion.

The two should not be inextricably intertwined.

The expert should reveal if any part of it was written by the expert's subordinate. While delegation is permissible, ultimately the opinion is of the individual, not the firm of which the expert may be a partner. The reasoning and the conclusions must therefore be that of the individual signing the report.

One thing for experts to avoid (which one often sees in practice) is the temptation to drift into pressing reasons why the Court should accept or reject the evidence of lay witnesses on matters of primary fact.[71] That is the role of the Court, not the expert.

The expert should make all necessary independent enquiries. In *Premier Building v Spotless*[72] Byrne J was highly critical of an expert who was overly-compliant. The expert was originally engaged to express an opinion on the sources of contamination on certain land in circumstances where the party engaging the expert ('Spotless') owned adjacent land on which it had operated a dry cleaning business in the past. The contaminated land was owned by a property developer ('Premier'). It had undertaken a multi-dwelling development of the land. At a late stage of the development, contamination was found on the land. The question for expert opinion was, what was the source of contamination, and in particular, whether the contaminant discharged from Spotless' land. The expert requested further instructions as to the activities previously conducted on Spotless' land. He was told by a director of Spotless that Spotless was unable to assist. When the expert approached Spotless' solicitors, they told him the activities previously undertaken by Spotless on the land were not relevant to the expert's brief. This latter statement is highly surprising, to say the least. Nevertheless, the expert accepted that answer. Later, experts retained by Premier and Spotless attended a joint expert conference and produced a joint report. In that report, they disagreed on the pivotal question as to the source of contamination on the Premier land. The Premier expert contended that the contaminant was discharged from the Spotless land. On the other, Spotless' expert contended in the joint report that there was insufficient information known to warrant that conclusion. During cross-examination of Spotless' expert, it emerged that he had originally been engaged by Spotless to provide an opinion on the sources of information but that his instructions to provide an opinion on that question were subsequently withdrawn before his report was completed but after he had the requested further instructions. Moreover, prior to the withdrawal of his instructions, the expert had produced a 220 page

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70 *Gunnerson v Henwood* [2011] VSC 440 at [63] – [64] where Dixon J discussed the need for the expert to demonstrate how he / she has brought relevant expertise to bear in arriving at the opinion in question.

71 *Dasreef* (2011) 243 CLR 588 at 611 [58] per Heydon J.

72 [2007] VSC 377.

document entitled 'Summary of Data and Observations' in which he had stated that a relevant line of enquiry as to the source of the contaminants present on the Premier land included the activities previously conducted on the Spotless land. Byrne J was highly critical that the Spotless expert would proffer the opinion contained in the joint expert report without appropriate qualification and disclosure. His Honour said:

> *This is, to my mind, a very surprising and somewhat disquieting piece of evidence. Mr [H] disclosed none of this in his evidence in chief. Indeed, he then professed to the Court his opinions as to the likely source of the contaminants without qualification or reservation. For my present purposes, it leads me to conclude that Mr [H] is a very compliant expert witness. A witness with a greater concern for the professional integrity would not have permitted themselves to be dealt with in such a way.*[73]

Two issues arise in finalising the expert report:

(a) should lawyers be involved in finalising the report; and
(b) if so, what is the permissible extent of the lawyer's involvement.[74]

Some lawyers take the view that it is not their role to be involved at all in finalising the expert's report. However, it remains that lawyers have an obligation to ensure that the expert report is in admissible form. In *Yango v Northern Territory of Australia* (No 3)[75], Sackville J said at [13]:

> *"While experts are responsible for the expression of opinions within their field of special knowledge or expertise, the task of preparing relevant and admissible evidence cannot, in the normal course of events, be safely delegated to them without the intervention of appropriate legal knowledge and skills."*

Practically speaking, lawyers should ensure that the expert report does not suffer from:

- jargon;
- technical terms which are not explained;
- ambiguous expressions; and
- lack of coherent reasoning.

That said, the wisest course is for the brief to expert to outline the expectation of the lawyers in terms of the structure and content of the expert report. It is better to get things right at the outset, rather than try to fix things up following preparation of a draft (or even a final expert report).

If it is necessary for lawyers to request an amendment to the expert's report, they should ensure that their communications are transparent and above reproach. Such amendments should be limited to the form of the report and not the content of the opinion. Any attempt to influence

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73 *Premier Building v Spotless* [2007] VSC 377 at [163].

74 For a useful discussion of these issues, see the recent article by Garth Blake SC and Philippe Doyle Gray, 'Can counsel settle expert reports?' Bar News Journal of the NSW Bar Association (Summer 2012-13) pp 55-66.

75 [2004] FCA 1029.

the expert's opinion will subject the expert and the lawyers to heavy criticism. In *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*[76], a solicitor suggested to an expert by email that he amend his expert report by adding an additional sentence (which changed the substance of his opinion). The expert duly complied with the request, saying in a responsive email:

> *"I was not aware of this, even after our testing. But if you say it is so then fine by me."*

The expert's evidence was completely discarded by the Court.

In *Pivot*, Brooking J said it is one thing for the expert to submit a draft of that part of the report which deals with facts, but "to submit a draft of argumentative matter or of reasoning is, I think, asking for trouble".[77]

While it may be 'asking for trouble', I do not think that there is any ethical reason why a lawyer cannot raise comments about the form of a draft expert report - for instance, such as the matters referred to in the four bullet points above, **provided** those comments do not stray into attempting to influence the expert's opinion on the substantive questions. I think it is prudent for this to be done in a separate document to the draft expert report. On the other hand, lawyers are in danger of 'crossing the line' when they engage in 'legal rewriting" of the expert's report. This should be left for the expert to do. After all, it is the expert's report.

While a brief to an expert witness in the context of actual or reasonably contemplated litigation is privileged[78], once the client acts in a way inconsistent with the continued maintenance of that privilege (for example, by relying on the expert report), there is an implied waiver[79] for it would be unfair for the client to rely on the report without disclosure of the brief.[80] There is also an implied waiver or privilege in respect of draft reports passed by the expert on to lawyers, as well as communications between the expert and the lawyer in connection with finalising the expert report.[81] The recent decision of Emerton J in *Prince Removal & Storage Pty Ltd v Roads Corporation*[82] held that the privilege in relation to communications and documentation passing between experts in instructing solicitors was waived upon the expert reports being filed with the Court (as opposed to at the later time of reliance on the expert report at trial).

It is not uncommon in modern litigation for attempts to be made to expose communications between an expert and the lawyer (or client), especially where there is any suggestion of improper

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76 [2005] FCA 1242.

77 [1989] VR 665 at 681.

78 Section 119, *Evidence Act 2008* (Vic).

79 Section 122(2), *Evidence Act 2008* (Vic).

80 *Cobram v Murray Golbourn* [2000] VSC 353.

81 No privilege inures in internal draft reports and working papers of the expert – see *ASIC v Southcorp Ltd* (2003) 46 ACSR 438; [2003] FCA 804 at [21] per Lindgren J.

82 [2012] VSC 245.

dealings in the preparation of the expert report[83]. It is not uncommon for experts to be subpoenaed or for the lawyers to be called on, to produce their respective files. Thus, it pays to be careful!

Dated: 31 January 2013

83 See *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2005] FCA 1403