

PRACTICAL ISSUES IN ENGAGING AND ADDUCING EXPERT EVIDENCE – AN EXAMINATION OF THE PROCESS AND PROCEDURE IN THE VICTORIAN AND FEDERAL JURISDICTIONS

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I: INTRODUCTION

Often, but not always, a practitioner will identify at an early stage that an expert will be required to opine as to matters requiring specialist knowledge. Armed with specialist opinion, the practitioner will be better informed and therefore better able to advance the case, or assess if further or alternate specialist opinion is required.

The contributions of the expert witness include demystifying, explaining and, in giving an expert opinion, placing the parties and the court in a better position to form judgements as to facts proved in evidence.¹

There are a myriad of potential experts who may be called upon to give evidence including linguists, historians, scientists, anthropologists, medical practitioners (of many hue) and so forth.

In this paper I will examine developments in the rules and procedures relating to adducing expert evidence in court proceedings. In so doing, I will examine legislative requirements, what constitutes a person as an expert, how to determine who to appoint as an expert as well as considering the factors that are relevant to preparation of the brief to the expert. Finally, I will consider the impact of increasing judicial oversight in the giving of expert evidence including hot tubbing and conclaving of experts.

II: DETERMINING THE ROLE EXPERT EVIDENCE WILL PLAY IN YOUR CASE AND APPOINTING AN EXPERT

In determining the role that an expert may play, the practitioner should bear in mind that the role of the expert is to advance a client's case, but this must be done within the context that the expert must assist the court impartially on matters relevant to the area of expertise of the witness.²

Cooper LP in *Davie v Magistrates of Edinburgh*,³ commented that an expert's 'duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their

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¹ *Davie v Magistrates of Edinburgh* [1953] SC 34, 40 (Cooper LP).

² *Supreme Court (General Civil Procedure) Rules 2005* (Vic) Form 44A – Expert Witness Code of Conduct.

³ *Davie v Magistrates of Edinburgh* [1953] SC 34.

conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence'.⁴

Once the practitioner has determined that there is a need for expert opinion, it is necessary to determine what type of expert is needed, and the role the expert will play. It is not always easy to determine the type of expertise required. By way of example, where a client presents with an injury caused by an infection after a surgical procedure, a practitioner would have to decide if they needed expert opinion from a surgeon, or a wound management consultant or an infectious disease physician or some other expert.

In appointing the expert, the practitioner must have a clear understanding of the factual matrix underlying the case, as well as the legal issues which need to be canvassed in order to appropriately run the case.

The role of the expert is discussed more fully below, but at all times, the practitioner should keep in mind that the court will have a keen interest in ensuring that the expert witness is giving opinion evidence about matters within that expert's area of expertise.

Five rules which evolved under the common law remain helpful in guiding practitioners albeit that in respect of two rules, they have been abolished by statute. The following three rules of evidence continue to apply to the reception of expert evidence.⁵ They are:

- a) the **expertise rule**: does the witness have knowledge and experience sufficient to entitle them to be held out as an expert who can assist the court?
- b) the **area of expertise rule**: is the claimed knowledge and expertise sufficiently recognised as credible by others capable of evaluating its theoretical and experiential foundations?
- c) the **basis rule**: to what extent can an expert's opinion be based upon matters not directly within the expert's own observations? Such reliance on material that cannot be directly evaluated by the court falls foul of a fundamental principle of evidence.

The following two rules have been abolished (by section 80 of the *Evidence Act 2008* (Vic)):

- a) the **common knowledge rule**: is the information sought to be elicited from the expert really something upon which the tribunal needs the help of any third party or can the tribunal rely on its general knowledge and common sense?
- b) the **ultimate issue rule**: is the expert's contribution going to have the effect of supplanting the function of the tribunal to decide the issue before the court? If so, it is likely to be rejected.

⁴ Ibid 40 (Cooper LP).

⁵ Ian Freckleton and Hugh Selby, *Expert Evidence Law* (Lawbook Co, 4th ed, 2009) 2.

III: COMMISSIONING EXPERTS

The requirement, in short, is that the expert should be an advocate for his or her opinion but not for the client or for the expert himself or herself.⁶

There are a number of factors to which the practitioner must have regard when commissioning an expert to give evidence in a legal proceeding. These factors include:

- a) Legislative requirements;
- b) Qualifications; and
- c) Area of expertise of the expert.

A: Legislative Requirements

In this paper I shall refer to the following which each affect the commissioning of an expert witness:

- a) *Civil Procedure Act 2010* (Vic) (**‘Civil Procedure Act’**);
- b) *Supreme Court (General Civil Procedure) Rules 2005* (Vic);
- c) *Form 44A – Expert Witness Code of Conduct* established under *Rule 44.01* of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) (Code is attached at Annexure A);
- d) *Magistrates’ Court General Civil Procedure Rules 2010* (Vic);
- e) *Evidence Act 2008* (Vic); and
- f) *Federal Court Rules 2011* and the Federal Court of Australia Practice Note CM 7 (CM 7 is attached as Annexure B) (collectively **‘Federal Court Rules’**).

In general terms, the above are rules which have been set in place by either the legislature or courts and which must be followed when commissioning an expert to prepare a report to be used as evidence. Of central importance in the *Civil Procedure Act* are that the overarching obligations apply to an expert witness.⁷

The *Civil Procedure Act* provides that the overarching purpose ‘in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute’.⁸ The ‘*overarching obligations*’ apply to participants in civil proceedings,⁹ and are designed to improve standards of conduct in litigation.

⁶ Ibid 24.

⁷ *Civil Procedure Act 2010* (Vic) s 10(3).

⁸ Ibid s 7.

⁹ Ibid s 11(a).

To achieve this outcome, the *Civil Procedure Act* imposes on participants in civil litigation, including experts, a paramount duty and overarching obligations including to:

- a) further the administration of justice (the paramount duty);¹⁰
- b) co-operate in civil proceedings with the parties and the court;¹¹
- c) not to mislead or deceive;¹²
- d) narrow the issues in dispute;¹³ and
- e) ensure that costs are reasonable and proportionate.¹⁴

Importantly, the overarching obligations prevail over any legal, contractual or other obligation which a person to whom the overarching obligations apply may have, to the extent that the obligations are inconsistent.¹⁵

Practitioners should note that the effect of the *Civil Procedure Amendment Act 2012* (Vic) was to amend the *Civil Procedure Act* with the aim of ‘improving the efficiency of the civil justice system, and reduce the administrative burden on litigants and legal practitioners’.¹⁶

B: *Qualifications*

None of our men are ‘experts’. We have most unfortunately found it necessary to get rid of a man as soon as he thinks himself an expert because no one ever considers himself expert if he really knows his job.

Henry Ford

Common law rules of evidence generally render evidence of opinion inadmissible. Section 79 of the *Evidence Act 2008* provides that ‘[i]f a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge’.¹⁷

In *Dasreef Pty Ltd v Hawchar*,¹⁸ the High Court held that for expert evidence to be admissible under section 79(1) of the *Evidence Act 2008*, two criteria must be satisfied:

- a) a witness who gives evidence ‘has specialised knowledge based on the person’s training, study or experience’; and

¹⁰ Ibid s 16.

¹¹ Ibid s 20.

¹² Ibid s 21.

¹³ Ibid s 23.

¹⁴ Ibid s 24.

¹⁵ Ibid s 12.

¹⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 21 June 2012, 2946 (Robert Clark, Attorney-General).

¹⁷ *Evidence Act 2008* (Vic) s 79(1).

¹⁸ [2011] HCA 21 (22 June 2011).

- b) the opinion expressed in evidence by the witness ‘is wholly or substantially based on that knowledge’.¹⁹

There is some legislative guidance as to what constitutes an expert. The dictionary to the *Corporations Act 2001* (Cth) provides that an ‘*expert*, in relation to a matter under that statute, means a person whose profession or reputation gives authority to a statement made by him or her in relation to that matter’.²⁰ The *Supreme Court (General Civil Procedure) Rules 2005* (Vic) together with the *Federal Court Rules* provide that ‘*expert*’ means ‘a person who has specialised knowledge based on the person’s training, study or experience’,²¹ Section 3 of the *Civil Procedure Act* also provides that ‘an expert witness, in relation to a civil proceeding, means a person who has specialised knowledge based on the person’s training, study or experience’.

(a) The expert must be an expert.

The requirement goes beyond merely identifying the necessary specialist skill required. The expert opinion has to be in an area that the court accepts is an area of specialised knowledge, with the expert able to demonstrate that by reason of specialised training, study or experience they are an expert and as such can assist the court. Of course, the expert opinion must be on matters within the area of expertise of the expert.²²

(b) The expert must be skilled.

When approaching an expert witness, the practitioner must keep in mind that the court will need to be satisfied that the expert has ‘the requisite education, skill, or training to qualify as an expert’.²³ It is not enough to rely on reputation in making an expert appointment. The practitioner needs to be satisfied that the person has the specialised – and relevant – skills to be admitted as an expert.

That which constitutes ‘*specialised knowledge*’ is not without controversy. This is especially so when there is a lack of formal qualifications.

It seems clear enough that specialised knowledge can be acquired through experience, even in the absence of formal training. However, the practitioner should always be alert to the need to establish that the expert has the knowledge sufficient to be classed as specialised and skilful enough to assist the court, and doubly so where experience is not underpinned by academic training.

¹⁹ Ibid [32], [34] - [37], [41] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

²⁰ *Corporations Act 2001* (Cth) s 9.

²¹ See *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 44.01; *Federal Court Rules*, r 34A2.

²² *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 (14 September 2001) [85] (Heydon JA).

²³ Howard Hilton Spellman, *Direct Examination of Witnesses* (Prentice Hall, 1972).

C: *Areas of Expertise*

In considering the commissioning of an expert, the practitioner must turn their mind to the issue of whether the evidence could be rendered inadmissible by reason of it not being an area ‘sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience’.²⁴

Examples of areas that have thrown up challenges include voice identification, fingerprinting evidence and stylometrics amongst others.

Responsibility ultimately lies with the court to ensure that inexpert evidence is not admitted as expert.

The practitioner needs to be alert to the issue of an expert going outside their area of specialised knowledge. In *Bugg v Day*,²⁵ the court considered that a motor vehicle repairer was qualified to give expert evidence about the condition of a crashed motorcycle, but was not qualified to opine as to the speed of the car that struck it. However, in 1911 in the case of *R v Mason*,²⁶ the court considered a surgeon to have the expertise to give an opinion as to whether wounds were self-inflicted. In a criminal case today, it would be expected that a surgeon who could give expert evidence about wound infliction would have special or additional experience in that field.

And, it is not just the expertise of the particular expert that may be challenged. The asserted field of expertise may be called into question. With new areas of human endeavour opening up, and (sometimes) expansive claims of new specialities arising within new and existing areas of specialist endeavour, judges can be called upon to assess the scientific validity of the reasoning or methodology underlying the expert opinion evidence.²⁷

IV: DETERMINING WHO TO ASK (APPOINTING AN EXPERT(S))

As far as hypnosis is concerned, I had a very serious problem when I was in my twenties. I encountered a man who later became the president of the American Society of Medical Hypnosis. He couldn’t hypnotize me.

Theodore Sturgeon

A: *Specialist Knowledge or Experience*

The expert must have specialised knowledge based on their training, study or experience to be counted as an expert.²⁸

The requirement is not to get the most senior, the most qualified or even the most knowledgeable person, albeit in many cases this may be ideal. The requirement is that the

²⁴ *R v Bonython* (1984) 38 SASR 45, 46-47 (King CJ); see also *HG v The Queen* (1999) 197 CLR 414.

²⁵ (1949) 79 CLR 442.

²⁶ (1911) 7 Cr App R 67.

²⁷ *Daubert v Merrell Dow Pharmaceuticals*, 509 US 579.

²⁸ *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 44.01; *Federal Court Rules 2011* (Cth) r 34A2.

expert has the specialised knowledge required to give an expert opinion. And, it is the expert who must provide the criteria enabling evaluation of the validity of the expert conclusions.

It is often difficult for the practitioner to determine which expert has the specialised knowledge required, or even what is the specialist or technical body of learning most relevant to the issues requiring expert opinion.

The practitioner needs to keep in mind that there are now specialities within specialities. As Ormiston JA commented in *R v Noll*:²⁹

As a matter of principle, as exemplified by the authorities, experts can speak of many matters with authority if their training and experience entitle them to do so, notwithstanding that they cannot describe in detail the basis of knowledge in related areas. Professional people in the guise of experts can no longer be polymaths; they must, in this modern era, rely on others to provide much of their acquired expertise. Their particular talent is that they know where to go to acquire that knowledge in a reliable form.³⁰

(a) Shadow Expert

The practitioner may need assistance to frame the questions the expert is asked to address. The practitioner may also require a crash course in the relevant specialised or technical area which is to be explored in court.

For these reasons practitioners have turned to ‘*shadow experts*’ (sometimes colloquially referred to as ‘*dirty experts*’), to help them understand the specialised and technical issues raised by a case, and assist in the preparation and presentation of the client’s case, including framing the commissioning letter to a ‘*clean expert*’.

In considering the appointment of an expert, including shadow experts, the practitioner should have regard to the rules of evidence, and in particular the rules of privilege. Client legal privilege in respect of expert evidence is preserved until such time as the expert evidence is deployed or disclosed.

This means that when an expert is engaged by a practitioner on behalf of a client to provide confidential expert advice and guidance, given for the purpose of assisting in current or anticipated litigation proceeding, then until deployed the expert opinion is privileged.

²⁹ [1999] VSCA 164 (7 October 1999).

³⁰ Ibid [3] (Ormiston JA).

V: DETERMINING THE ISSUES FOR THE EXPERT – COMMISSIONING A REPORT

We do not need to be shoemakers to know if our shoes fit, and just as little have we any need to be professionals to acquire knowledge of matters of universal interest.

Georg Hegel, philosopher

A: Evidence of Fact Versus Evidence of Opinion

In considering what issues require expert opinion, the practitioner should note the distinction between evidence of fact and evidence of opinion. An opinion has been said to be ‘an inference from observed and communicable data’.³¹ A fact is – at least from the perspective of a witness – something that has been directly observed.

It is for the practitioner to determine the process by which they can best identify the issues on which they require specialised expert opinion. However, in so doing, the practitioner should always ensure that each issue raised for opinion requires the core expertise of the expert, rather than a mere comment as to facts. The distinction is important because it goes to the admissibility of the expert evidence.

By way of example, the evidence of a meteorologist as to the temperature at a particular time and place would be treated as a fact directly observed, as opposed to an opinion given. Cox J makes the amusing and accurate observation that no one would consult a thermometer and say ‘in my opinion, the temperature is now 30 degrees’.³²

Despite the abolition of the common knowledge rule,³³ the fact remains that where the court’s time would be wasted by evidence, the court may refuse to admit it,³⁴ and in any case there remains the ongoing requirement that the opinion rule is displaced only where the person has specialised knowledge.

If evidence of matters of common knowledge were given by a ‘specialist’, it is open to the court to conclude ‘that the subject of investigation does not require a sufficient degree of specialist knowledge to call for the testimony of an expert,’ in which case evidence of opinion can be excluded.³⁵

³¹ See *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd* (No 5) (1996) 64 FCR 73, 75 (Lindgren J).

³² *R v Perry* (No 4) (1981) 29 SASR 119, 124 (Cox J).

³³ *Evidence Act 2008* (Vic) s 80.

³⁴ *Ibid* s 135.

³⁵ J D Heydon, *Cross on Evidence* (LexisNexis, 7th ed, 2004).

VI: BRIEF TO EXPERT

A: Rules and Procedures that the Practitioner Must Follow

There are certain preconditions – or requirements – that must be complied with to facilitate the admission of expert opinion.

In the Federal Court of Australia, the requirement is to first give the expert the Guidelines for Expert Witnesses and ensure the expert report complies with rule 23.13.³⁶ And in Victoria, the requirement is to provide the Code to the expert ‘as soon as practicable after the engagement’³⁷ and comply with rule 44, including serving on each party the expert’s report not later than 30 days before the date fixed for trial.³⁸

To further the overarching purpose, the *Civil Procedure Act* seeks to restrict ‘expert evidence to that evidence which is reasonably required to resolve the proceeding’ as well as emphasise ‘the primary duty of an expert witness to the court’.³⁹

It does so by stating that unless the rules of court otherwise provide, or the court otherwise orders, parties must seek directions from the court as soon as practicable if they intend to, or become aware that they may, adduce expert evidence at trial.⁴⁰ The underlying rationale is to ensure that the parties and the court are discussing the management of expert evidence issues from an early stage of a proceeding.

Further, the court may give any direction it considers appropriate including as to the preparation of an expert report and limiting evidence to specified issues, or excluding evidence on specified issues, amongst other things.⁴¹

These recent changes to the *Civil Procedure Act* have been criticised by, amongst others, the Law Institute of Victoria whose President has stated that: ‘We are disappointed, however, that our concerns, particularly in relation to expert witnesses, have gone unheeded’.⁴² The Law Institute’s concerns centred on the possibility of expert reports that are obtained prior to issue of proceedings not being admitted into evidence, as well as the ability of a court to restrict litigants from appointing their own independent experts.

³⁶ See Federal Court of Australia, *Practice Note CM 7 – Expert Witnesses in Proceedings in the Federal Court of Australia*, 4 June 2013.

³⁷ *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 44.03(1)(a).

³⁸ Supreme Court of Victoria Expert Witness Code of Conduct (which applies in the County Court of Victoria). See also Order 33 of the rules which deals specifically with medical examinations and reports in personal injury matters. For Magistrates’ Court guidelines, see *Magistrates’ Court General Civil Procedure Rules 2010* (Vic) OO 19, 19A.

³⁹ *Civil Procedure Act 2010* (Vic) ss 65F(b)–(c).

⁴⁰ *Ibid* s 65G.

⁴¹ *Ibid* ss 65H(1)–(2).

⁴² Michael Holcroft, *Proposed Amendments to Civil Procedure Act Go Too Far* (21 June 2012) Law Institute of Victoria <<http://www.liv.asn.au/LIVPresBlog2012/June-2012/Proposed-Amendments-to-Civil-Procedure-Act-go-too->>.

B: *What to Include in the Brief to the Expert*

Provide the expert with:

- a) the Code or equivalent;
- b) documents and materials required for the preparation of the report;
- c) any assumptions that the expert may make;
- d) questions for expert opinion; and
- e) a preferred layout (optional).

Consider asking the expert to:

- a) advise if he or she has any conflicts, or generally any lack of availability.
- b) include in their report:
 - a. accurate and up to date details of the expert's qualifications, and
 - b. the criteria, assumptions and methodology on which the report is based so as to enable evaluation of the expert's conclusions,⁴³ and
 - c. answers to the questions asked of them, and
 - d. a note or explanation if an opinion expressed is qualified, and if it is, an explanation as to in what way, and
 - e. identify where possible the facts, assumptions and documents on which an opinion is based, and
 - f. identify any issue or area raised that falls outside the expert's area of expertise.

Disclosure of assumptions and methodology by the expert generally go to the weight of the expert's opinion, rather than its admissibility.

The practitioner should never 'settle' a report by changing its content or by influencing the expert's opinion.⁴⁴ However, practitioners may make suggestions as to the form of the report, and as to admissibility of its contents.⁴⁵

⁴³ *Makita (Australia) Pty Ltd v Sprowles* [2001] 52 NSWLR 705. See also *Peter Norris Dupas v The Queen* [2012] VSCA 328 (21 December 2012) [126].

⁴⁴ Freckleton and Selby above n 5, 246.

⁴⁵ *Harrington-Smith v Western Australia* (No 7) [2003] FCA 893 (20 August 2003) [19].

C: Court Directions – Single and Court Appointed Experts

As discussed above, the court may give directions in relation to expert evidence in order to further the overarching purpose.

Such a direction can be given at any time during the proceeding, however, given the requirement to apply to the court as soon as practicable if the party intends to adduce expert evidence or becomes aware that it may adduce expert evidence at trial,⁴⁶ it may from a timing perspective that the practitioner would be well served approaching the court for directions before engaging an expert.

To encourage efficiency both in terms of time and money, the court has the power to order the appointment of a single joint expert or a court appointed expert.⁴⁷

A single joint expert is defined in the *Civil Procedure Act* to mean ‘a person engaged jointly by two or more parties as an expert witness in a proceeding in accordance with an order under section 65L or under rules of court’.⁴⁸

According to the newly inserted section 65L of the *Civil Procedure Act 2010* (Vic), in making such an order, the court must consider:

- a) whether the engagement of two or more expert witnesses would be disproportionate to the complexity or importance of the issues in dispute and the amount in dispute;
- 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; and
- e) any other relevant consideration.

In practise, it is likely that the court would give significant weight to the views of the parties, but the court may order a single joint expert over the objections of the parties.⁴⁹

A court appointed expert is defined in the *Civil Procedure Act* to mean ‘an expert witness appointed by a court in accordance with an order under section 65M or under rules of court’⁵⁰ and may be appointed by a court to assist it and to enquire into and report on any issue in the proceeding.⁵¹

In the case of an appointment of a single joint expert or a court appointed expert, the parties must endeavour to agree on written instructions to be provided to the expert including the facts and assumptions of fact on which the expert’s report is to be based on,⁵² failing which further directions will need to be sought from the court.

⁴⁶ *Civil Procedure Act 2010* (Vic) s 65G.

⁴⁷ *Ibid* s 65H(2)(f).

⁴⁸ *Ibid* s 3.

⁴⁹ *Ibid* s 65H(4).

⁵⁰ *Ibid* s 3.

⁵¹ *Ibid* s 65M.

⁵² *Ibid* s 65N.

Parties are prohibited from adducing evidence of another expert witness on an issue where a single joint expert has been engaged or a court appointed expert has been appointed in relation to that issue, unless leave of the court is given. The court will consider a number of factors in determining whether or not to give leave to allow a party to adduce further evidence.

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 to the court and all the parties, all or specified aspects of the arrangements under which the expert witness has been retained. The power to apply for an order is subject to any rules of court that may be made to prescribe circumstances in which an application may be made.

Whilst it is not a specific requirement of the *Civil Procedure Act*, it is reasonable to assume that during the course of the directions hearing, the practitioner may disclose if he or she has obtained a report upon which the client may seek to rely. And, the court has power to give any directions it considers appropriate including orders as to time for service. Given the stated aims of the *Civil Procedure Act*, the judge may order early disclosure by way of service.

In respect of appointments of single experts, the President of the LIV opined that ‘any limiting of the parties to a single joint expert without allowing them the opportunity to challenge the evidence of that expert may lead to serious injustices. If a party is deprived of the ability to call their own expert a perception of bias could arise. It can also give rise to concerns about procedural fairness.’⁵³

VII: CONCURRENT EVIDENCE – EXPERT CONCLAVES, JOINT REPORTS AND HOT TUBBING

The *Supreme Court (General Civil Procedure) Rules 2005* provide that the Court may direct expert witnesses to confer and to provide the Court with a joint report.⁵⁴

This will be bolstered with the introduction of section 65I in the *Civil Procedure Act* which provides that ‘[a] court may direct expert witnesses in a proceeding – (a) to hold a conference of experts; or (b) to prepare a joint experts report; or (c) to hold a conference and prepare a joint experts report’.⁵⁵ The court may direct that a conference of experts be held with or without the attendance of the parties, the legal practitioners or an independent facilitator.⁵⁶

Add to this section 65K of the *Civil Procedure Act* which empowers the court to give directions about the giving of expert evidence, including concurrent evidence by expert witnesses, and it is abundantly clear that the legislature’s intention is for the courts to be active and interventionist in management of expert evidence.

The Supreme Court of Victoria Commercial Court Practice Note No 1 of 2010 (which predates the amendments introduced by the *Civil Procedure Amendment Act 2012* (Vic) gives a useful insight into the manner in which the court will deal with expert evidence in light of rule 44.06 of the *Supreme Court (General Civil Procedure) Rules 2005*.

⁵³ Holcroft above n 42.

⁵⁴ *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 44.06

⁵⁵ *Civil Procedure Act 2010* (Vic) s 65I(1).

⁵⁶ *Ibid* s 65I(2).

The Practice Note provides, amongst other things, that the Commercial Court may give directions that two or more experts engaged by the parties present their evidence concurrently,⁵⁷ and '[w]here contentious expert evidence is to be adduced, the Commercial Court will almost invariably direct pursuant to SRC Ch I Rule 44.06 that experts confer before trial'.

The Practice Note makes it clear that the experts are to determine the procedures to be adopted in conference and neither of the parties nor practitioners may interfere with the experts.

Following a conference, the experts are to prepare a joint memorandum for the court stating:

- a) that they have met and discussed each matter upon which they have been directed to confer;
- b) the matters on which they agree;
- c) the matters on which they disagree; and
- d) in brief summary the reasons for their disagreement.⁵⁸

A conference of experts has traditionally been referred to as a '*conclave*', which term refers to a private meeting, albeit that it carries with it an underlying impression of confidentiality, and power. It originates from the Latin expression *cum clave* – '*with a key*', emphasising seclusion and the need for a key to enter a meeting.

Irrespective of terminology, the intention is to get the experts together at a fairly early stage, identify areas of agreement and disagreement, and narrow as far as possible areas of dispute between the experts. In so doing, the benefit sought is a reduction of court time and a focus on genuine areas of disagreement.

The term 'Hot Tubbing' is a reference to the giving of concurrent evidence by expert witnesses. It is now reflected in the new section 65K of the *Civil Procedure Act*. The benefits and detriments of concurrent evidence have been conveniently considered by Rares J in his paper titled '*Using the "Hot Tub" – How Concurrent Expert Evidence Aids Understanding Issues*'.⁵⁹ They can be summarised as follows:

Potential Benefits:

- a) Enables each expert to concentrate on the real issues between them.
- b) May improve performance due to peer presence.
- c) The listener can hear all the experts discussing the same issue at the same time to explain his or her point in a discussion with a professional colleague.

⁵⁷ Supreme Court of Victoria, *Practice Note No 1 of 2010 – Commercial Court*, 1 January 2010, 13.22.2.

⁵⁸ *Ibid* para 13.24.3.

⁵⁹ Steven Rares, *Using the 'Hot Tub' – How Concurrent Expert Evidence Aids Understanding Issues* (12 October 2013) <http://www.fedcourt.gov.au/__data/assets/rtf_file/0004/21469/Rares-J-20100823.rtf>.

- d) Efficiently and effectively identifies the core issues, in particular, disagreements between experts.
- e) Narrows the field of dispute.
- f) Saves time and money.

Possible Detriments:

- a) Evidence may be overly simplified to enable non-experts to understand the concepts.
- b) Confident or assertive experts may dominate the hot tub.
- c) Unmanaged hot tubs may protract proceedings.
- d) The individualism of different judges may cause lack of consistency

Neil Young QC in a paper presented in October 2010 states:

Courts and Tribunals nowadays have extensive case management powers. There is nothing to prevent them getting the parties' legal representatives together at an early stage to identify the critical issues, and to formulate an agreed set of questions for expert opinion. Similarly, there is ample power to bring the experts together early so as to confirm that the questions had been properly identified, or to rephrase or refine those questions in advance of the provision of the individual expert reports.⁶⁰

The point being that in order to foster the twin goals of efficiency and justice, well-managed early judicial intervention may foster early identification of critical issues and thereby speedier resolution.

And, one worthwhile goal is that with experts talking to each other from an early stage, parties will avoid the disconnect that can occur when lawyers pose different questions to experts based on different assumptions, that can ultimately result in further and otherwise unnecessary reports having to be obtained.

⁶⁰ Neil Young QC, *Expert Witnesses: On The Stand Or In The Hot Tub – How, When And Why* (27 October 2010) <<http://www.commercialcourt.com.au/PDF/Speeches/Commercial%20Court%20CPD%20Seminar%20-%20Expert%20Witnesses%20-%20Paper%20by%20Neil%20Young%20QC.pdf>>.

VII: CONCLUSION

In determining the role that an expert may play in litigation, legal practitioners must have regard to the factors which have been discussed above. The expert is not an advocate for a party – rather they have the role and indeed duty to assist the Court impartially on matters which are relevant to their expertise. The expert witnesses' overriding duty is to the court, and a breach of that duty carries with it not only a loss of credibility but potentially a breach of the law. There remains for practitioners the sometimes difficult task of identifying precisely what matters required expert opinion, as well as finding an expert with the requisite qualifications. The various rules, laws and regulations that have come to govern the engagement and deployment of experts have developed to assist the ultimate cause of the justice system – that is to deliver justice. And, that can only be good for the legal profession and the community at large.

ANNEXURE A

FORM 44A

Rule 44.01

EXPERT WITNESS CODE OF CONDUCT

1. A person engaged as an expert witness has an overriding duty to assist the Court impartially on matters relevant to the area of expertise of the witness.
2. An expert witness is not an advocate for a party.
3. Every report prepared by an expert witness for the use of the Court shall state the opinion or opinions of the expert and shall state, specify or provide –
 - a) the name and address of the expert;
 - b) an acknowledgment that the expert has read this code and agrees to be bound by it;
 - c) the qualifications of the expert to prepare the report;
 - d) the facts, matters and assumptions on which each opinion expressed in the report is based (a letter of instructions may be annexed);
 - e) the reasons for, any literature or other materials utilised in support of, and a summary of each such opinion;
 - f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;
 - g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;
 - h) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate, and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the Court;
 - i) any qualification of an opinion expressed in the report without which the report is or may be incomplete or inaccurate; and
 - j) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason.

4. Where an expert witness has provided to a party (or that party's legal representative) a report for the use of the Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i) and (j) of clause 3 of this code and, if applicable, paragraph (f) of that clause.
5. If directed to do so by the Court, an expert witness shall –
 - a) confer with any other expert witness; and
 - b) provide the Court with a joint report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing.
6. Each expert witness shall exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement.

ANNEXURE B

FEDERAL COURT OF AUSTRALIA

Practice Note CM 7

EXPERT WITNESSES IN PROCEEDINGS IN THE FEDERAL COURT OF AUSTRALIA

Practice Note CM 7 issued on 1 August 2011 is revoked with effect from midnight on 3 June 2013 and the following Practice Note is substituted.

Commencement

1. This Practice Note commences on 4 June 2013.

Introduction

2. Rule 23.12 of the Federal Court Rules 2011 requires a party to give a copy of the following guidelines to any witness they propose to retain for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based on the specialised knowledge of the witness (see **Part 3.3 - Opinion** of the Evidence Act 1995 (Cth)).
3. The guidelines are not intended to address all aspects of an expert witness's duties, but are intended to facilitate the admission of opinion evidence¹, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is hoped that the guidelines will assist individual expert witnesses to avoid the criticism that is sometimes made (whether rightly or wrongly) that expert witnesses lack objectivity, or have coloured their evidence in favour of the party calling them.

GUIDELINES

1. General Duty to the Court²

- 1.1 An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.
- 1.2 An expert witness is not an advocate for a party even when giving testimony that is necessarily evaluative rather than inferential.

¹ As to the distinction between expert opinion evidence and expert assistance see *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 per Allsop J at [676].

² The *'Ikarian Reefer'* (1993) 20 FSR 563 at 565-566.

- 1.3 An expert witness's paramount duty is to the Court and not to the person retaining the expert.

2. The Form of the Expert's Report³

- 2.1 An expert's written report must comply with Rule 23.13 and therefore must

- a) be signed by the expert who prepared the report; and
- b) contain an acknowledgement at the beginning of the report that the expert has read, understood and complied with the Practice Note; and
- c) contain particulars of the training, study or experience by which the expert has acquired specialised knowledge; and
- d) identify the questions that the expert was asked to address; and
- e) set out separately each of the factual findings or assumptions on which the expert's opinion is based; and
- f) set out separately from the factual findings or assumptions each of the expert's opinions; and
- g) set out the reasons for each of the expert's opinions; and
- h) contain an acknowledgment that the expert's opinions are based wholly or substantially on the specialised knowledge mentioned in paragraph (c) above⁴; and
- i) comply with the Practice Note.

- 2.2 At the end of the report the expert should declare that "[the expert] has made all the inquiries that [the expert] believes are desirable and appropriate and that no matters of significance that [the expert] regards as relevant have, to [the expert's] knowledge, been withheld from the Court."

- 2.3 There should be included in or attached to the report the documents and other materials that the expert has been instructed to consider.

- 2.4 If after exchange of reports or at any other stage, an expert witness changes the expert's opinion, having read another expert's report or for any other reason, the change should be communicated as soon as practicable (through the party's lawyers) to each party to whom the expert witness's report has been provided and, when appropriate, to the Court⁵.

- 2.5 If an expert's opinion is not fully researched because the expert considers that insufficient data are available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a

³ Rule 23.13.

⁴ See also *Dasreef Pty Limited v Navaf Hanchar* [2011] HCA 21.

⁵ The *'Ikarian Reefer'* [1993] 20 FSR 563 at 565.

report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.

- 2.6 The expert should make it clear if a particular question or issue falls outside the relevant field of expertise.
- 2.7 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports⁶.

3. Experts' Conference

- 3.1 If experts retained by the parties meet at the direction of the Court, it would be improper for an expert to be given, or to accept, instructions not to reach agreement. If, at a meeting directed by the Court, the experts cannot reach agreement about matters of expert opinion, they should specify their reasons for being unable to do so.

J L B ALLSOP
Chief Justice
4 June 2013

⁶ The *'Ikarian Reefer'* [1993] 20 FSR 563 at 565-566. See also Ormrod *'Scientific Evidence in Court'* [1968] Crim LR 240.