



GUN NOT FOR HIRE: The Victorian rules on expert evidence in civil proceedings

In 2003, Order 44 of the *Supreme Court (General Civil Procedure) Rules 1996* and the *County Court Rules of Procedure in Civil Proceedings 1999* were substantially amended and the 'Expert Witness Code of Conduct' (the 'code') was introduced at Form 44A.

In the case *Davie v The Lord Provost*, Lord President Cooper explained that expert witnesses in common law jurisdictions have a duty 'to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts proved in evidence'. Expert evidence may assist the court in civil proceedings, for example to establish or disprove the type of injury to a plaintiff, the quantum of loss, or the dangers inherent in a system of work.

The term 'expert' refers to witnesses with 'specialised knowledge based on the person's training, study or experience' (Order 44.01). Expert witnesses have a special role in civil litigation. They are permitted by the rules of evidence and civil procedure to express opinions in written and oral form, rather than being restricted to direct observations. The tribunal of fact is then responsible for determining the weight to be accorded to expert evidence and evaluating the evidence of competing witnesses.

The Background to the Victorian Reforms

The new Victorian rules follow a succession of developments in the regulation of expert evidence in Australia and England.

The reform process was prompted by the 1993 decision of Justice Cresswell in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd* ('*The Ikarian Reefer*'). The decision prescribes a list of duties and responsibilities of expert witnesses. These are the goals that expert evidence shall be the independent product of the expert; an expert witness should provide independent assistance to the court; an expert witness should state the bases of their report and not omit relevant facts; an expert witness shall identify issues outside their expertise; an expert witness shall identify opinions that

are provisional due to insufficient data; any change of opinion ought be communicated; and supporting data shall be provided to the other side.

In 1994 Lord Woolf was commissioned to report on the state of the civil justice system in England and Wales, and the final report ("*Access to Justice*") was published in 1996. The report endorsed the *Ikarian Reefer* principles, and criticised the operation of the rules of expert evidence in relation to accessibility, costs, and delay in the legal system. The report supported the introduction of changes to court rules to provide procedures for expert witness declarations, transparency of instructions to experts, a new procedure for single experts (notwithstanding the opposition of the legal professional to this challenge to adversarial traditions), expert conferences, and training for witnesses.

In Australia, the Australian Law Reform Commission ('ALRC') conducted its review of the federal civil justice system between 1996 and 2000. Its final report in 2000 ("*Managing Justice*") recommended witness conferences, procedures for written questions from parties to experts, guidelines for witnesses, a code of practice to be developed by the Australian Council of Professions, single experts, and a panel format for giving evidence.

The Australian Institute of Judicial Administration surveyed the judiciary to gain empirical data on the operation of expert evidence, and published a report of their findings ("*Australian Judicial Perspectives on Expert Evidence: An Empirical Study*"). The authors of the study supported the continuation of the reform process that had already commenced in the Federal Court, making a particular recommendation in favour of mandatory witness declarations.

Simultaneous with this process of evaluation and review, new court rules took effect in various Australian jurisdictions including the Federal Court from 1998, and the Supreme Court of New South Wales from 2000, both of which emphasised a 'paramount duty' of expert witnesses to the court and published information to be provided to witnesses.

The Victorian Response

The former Victorian Order 44 included the rule that evidence of expert witnesses could not be adduced without leave of the court unless contained in an expert statement that was filed and served within time. The new rules and accompanying code have

removed the old expert statements and introduced comprehensive ethical principles regarding the role and functions of the witness and content of the expert's report, drawing on the developments elsewhere. The amendments apply in relation to experts appointed after 1 November 2003.

By way of contrast, the amended Order 19 of the *Magistrates' Court Civil Procedure Rules 1999* does not include ethical duties or a Code of Conduct. Reports are now required to be exchanged in proceedings under the *Accident Compensation Act 1985* (Vic) or *Workers Compensation Act 1958* (Vic) and other claims for personal injuries, similar to the new rules in the County and Supreme Courts. Expert statements are still required in other types of Magistrates' Court proceedings.

(a) The Overriding Duty, Declaration and Acknowledgement

Rule 44.03(i)(a) requires that a copy of the code be provided to experts as soon as practicable. The code explains to the expert directly at paragraph one that '[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'. Paragraph two of the code states that the expert witness 'is not an advocate for a party.'

Pursuant to rule 44.03(3)(b) the expert must acknowledge in their report that they have read the code and agree to be bound by it. Sub-paragraph (3)(h) then requires a declaration by the expert that they have made all desirable and appropriate inquiries and have not withheld relevant matters.

The introduction of a direct instruction to experts that their role is to assist the court, and not the party hiring their services, leaves no uncertainty for either experienced or new expert witnesses who are approached to participate in a case. The acknowledgement and declaration emphasise for the witness the importance of their role in the administration of justice consistent with the special privilege given to experts to express their opinions. Further, the inclusion of a declaration is consistent with the recommendations of Lord Woolf and the authors of the judicial survey.

(b) Other Required Content of Reports

The code specifies compulsory content for the expert's report at paragraphs 3(a) to (j),

replicating the matters at rule 44.03(2)(a) to (j), including the acknowledgment and declaration referred to above. In particular, the rules require inclusion of the name, address and qualifications of the expert; the facts, matters and assumptions on which the opinions are based; the reasons for and a summary of the opinions held, including supporting literature, tests and investigations and the names and qualifications of persons who have conducted tests on the expert's behalf; identification of matters outside their expertise; and the noting of opinions that are qualified or incomplete.

The report must append all extrinsic material that is referred to and be signed pursuant to rule 44.03(4). Paragraph four of the code imposes a duty on experts to provide a supplementary report if they change their opinion on a material matter. Rule 44.03(3)(a) then requires the party who receives a supplementary report to serve it on their opponent forthwith.

In the New South Wales case of *Makita v Sprowles* the expert evidence was difficult to evaluate because it did not explain the reasoning and bases for the opinion, resulting in an appeal and special leave application on the issue of the weight to give the evidence. In contrast, experts are now required to explain their position in detail, including their instructions about the assumed facts and the supporting material for their opinions. This process will assist the court to decide the appropriate weight of the evidence and make a determination.

(c) Joint Conferences

Rule 44.06 introduces procedures for court-ordered conferences between experts in a proceeding. The court has powers to order a joint conference, to be held with or without practitioners present, and for production of joint reports of experts that identify matters of consensus and disagreement. The rule is summarised for experts at paragraph five of the code.

The code then emphasises the main intent of the changes, stating that each expert witness shall exercise independent judgment in relation to conferences and reports written thereafter, and shall not act on instructions or requests to withhold or avoid agreement. These rules follow ALRC recommendations that there be procedures for expert conferences and guidelines for experts on their role in negotiations.

Conclusion

The amendments to Order 44 of the *Supreme Court (General Civil Procedure) Rules 1996 (Vic)* and the introduction of the accompanying 'Expert Witness Code of Conduct' are the result of a reform process on expert evidence. The changes give clear guidance to experts, and the parties appointing them, that their primary duty is to assist the court. The ethical principles are supplemented with procedural rules concerning the content of reports and the new joint conferences. These changes should assist the courts to achieve just outcomes in civil litigation.

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