

GETTING THE MOST OUT OF EXPERT WITNESSES— LESSONS FROM THE VICTORIAN BUSHFIRES

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WHEN TO BRIEF AN EXPERT

The appropriate time to brief an expert in pending or actual litigation or arbitration will depend on a number of issues arising from the dispute. It also depends on what role the expert is required to fulfil—expert witness, or technical expert member of the legal team.

The distinction between these roles is fundamental; it must be clearly understood by the legal team, and it must be made clear in the brief to the expert.

An expert witness's primary duty is to the court, not to the party who briefed them. There are strict ethical duties imposed by the court on an expert witness, breach of which may render the expert's evidence nugatory. The most important of these is that the expert witness is not an advocate for the party briefing them. The brief to an expert witness, and any discussions with him/her must be carefully prepared to ensure that the expert is not party to the 'case theory' and the expert evidence is not tainted. An expert witness is sometimes colloquially referred to as a 'clean expert'.

By contrast, a technical expert member of the legal team is briefed to provide technical advice so that the legal team is in possession of the technical details necessary to prepare the best case for the client in the circumstances. A technical member of the legal team (referred to colloquially as a 'dirty expert') is engaged to advocate for the client's interests, and will be a party to all of the relevant aspects of the case theory.¹

It can be seen from the distinction between these two roles that it could be problematic to engage one person to fill both roles. Once an expert has been engaged as a 'dirty expert', s/he is in possession of material that could be seen to

influence the nature of the expert's opinion. Nevertheless, it may be possible to engage one person to act in both roles, but the legal team needs to be very clear in all of its communications as to which role the communication refers to.

The nature of the dispute resolution proceedings is also relevant to the issue of whether an expert is engaged as a 'clean expert' or a 'dirty expert'. Whilst a 'clean expert' is needed for court or arbitration proceedings, in a mediation, the client's interests may be better served by a 'dirty expert' who can advocate the client's case from a knowledge of the technical issues.

The starting point for determining when to brief an expert is the extent to which the legal team needs technical assistance to adequately plan the litigation/arbitration steps. Most (potential) disputes that require expert opinion involve at least a perception of a 'failure' of some sort. It may be a technical failure such as collapse of a structure, or it may be a failure of a professional to exercise due skill and care. If the legal team is unable to determine from the facts whether there has been a failure or not, it may be appropriate to brief an expert at an early stage to provide an expert opinion on whether there has been a failure, and if so, who appears from the evidence to be responsible for the failure.

Another factor that may indicate engaging an expert early in the process is if the legal team needs assistance to determine what factual evidence needs to be collected on which an expert opinion can be expressed. Failure of physical facilities will usually require an expert to make inspections and provide guidance on collection of evidence, further testing etc. at the earliest possible stage.

Early briefing of an expert (even a 'clean expert') enables the expert to assist the legal team to determine the appropriate staging of the assembly of expert evidence. In a significant dispute, the expert's brief is likely to be undertaken in a number of stages, the exact extent and timing of which will evolve as the case progresses.

There may be budgetary considerations in determining the timing of the expert's engagement. The earlier and the more involved the expert is, the greater the expert's costs will be, particularly if the expert prepares a number of drafts of a report before it is finalized. If the legal team is able to assemble the necessary factual evidence (or provide factual assumptions that can be proved) and prepare a brief that is focused on the essential issues, it may be appropriate to brief an expert at a later stage.

Of course, the exigencies of the litigation/arbitration may ultimately control the timing at which an expert must be briefed. The legal team will be alert to complying with the timetable for submission of expert evidence set by the court/tribunal, and will need to have at least preliminary discussions with potential experts to understand their availability and the time required for the necessary investigations and report writing.

In summary, the legal team will have to weigh a number of factors in determining when to brief an expert. Other things being equal, in this writer's view, the earlier the right expert is engaged, the better prepared the legal team will be. The first challenge in engaging the right expert may well be in determining what expertise is needed, so that the right individual can be identified. It may be that the legal team will need a 'dirty expert' to assist in this process before a 'clean expert' can be identified.

Establishing what expertise is needed also requires a careful consideration of what are the real issues that need expert evidence. In many situations expert evidence is obtained (at great expense) for issues that are not important for resolution of the key issues that will be determinative in the dispute. The legal team needs to carefully assess what are the real issues on which the dispute hinges, and then establish (perhaps with the assistance of an expert) what evidence (expert or lay) is required, before briefing an expert.

ETHICAL CONSIDERATIONS

The engagement of an expert involves ethical questions for the legal team, as well as the expert.

The legal team should be well aware that their duty to the court takes precedence over the duty to their client. In respect of litigation in Victoria, there is a specific duty in relation to litigation articulated in section 7 of the *Civil Procedure Act 2010* (Vic): 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'.

Members of the legal team, solicitors and barristers, are usually also members of their relevant professional body such as the Law Society and the Bar. Each of these professional bodies have ethical rules that articulate detailed provisions governing the conduct of their members, including the taking of evidence. Such rules supplement the duties to the court, and apply equally to their members' conduct in relation to arbitration.

The provisions of the *Civil Procedure Act 2010* (Vic) (and similar legislation in other states and territories) provide statutory force to specific ethical obligations of all the participants in the court process—parties, the legal team and expert witnesses.²

These obligations are in addition to the common law and statutory obligations to the court, and take precedence over other obligations such as contractual duties,³ or the instructions or wishes of the client.⁴

The overarching obligations of the *Civil Procedure Act 2010* (Vic) include the obligation to act honestly,⁵ not to make frivolous or vexatious claims, or claims that are an abuse of process or do not have a proper basis,⁶ not to take unnecessary steps in the litigation,⁷ cooperate with the other parties and the court,⁸ and not to engage in misleading or deceptive conduct.⁹ The overarching obligations also include the requirement to use reasonable endeavours to: resolve the dispute by agreement,¹⁰ narrow the issues in dispute,¹¹ ensure the costs are reasonable and proportionate,¹² act promptly and minimize delay,¹³ and to disclose the existence of documents.¹⁴ There are also obligations not to disclose information or documents obtained in the litigation.¹⁵

These overarching obligations of the *Civil Procedure Act 2010* (Vic) are in addition to the specific obligations on expert witnesses imposed by Order 44 of the Supreme Court (General Civil Procedure) Rules 2005 (Vic). The specific obligations in Order 44 are considered below.

An expert witness being a member of a profession, may also be subject to the ethical rules of that profession. For example engineers who are members of the Institution of Engineers Australia are bound by its Code of Ethics.¹⁶

It is suggested that the requirements of that Code are entirely consistent with the overarching obligations of the *Civil Procedure Act 2010* (Vic), including to:

- act on the basis of a well-informed conscience;

- be honest and trustworthy;
- maintain and develop knowledge and skills;
- represent areas of competence objectively;
- act on the basis of adequate knowledge;
- uphold the reputation and trustworthiness of the practice of engineering; and
- communicate honestly and effectively, taking into account the reliance of others on engineering expertise.

DEALING WITH ADVERSE OPINIONS

The legal team may be faced with expert opinions that are contrary to or raise doubts about the case theory. Whilst in adversarial litigation or arbitration it is to be expected that expert evidence from the other side will not support one's own case, the legal team may also receive adverse opinions from an expert it has briefed.

It is suggested that the adverse expert opinion should be reviewed in the light of the following factors, whether the adverse opinion emanates from an expert briefed on behalf of the client, or an expert briefed by an opposing party. The answers from this assessment should provide guidance as to how to deal with the adverse opinion.

Does the brief provide all of the relevant reference documents? An expert's brief should include all of the documents relevant to the issues in dispute, and an expert's assistance might be required to identify all of the potentially relevant documents.

Does the brief ask the right questions? The expert's answers to the questions asked may suggest that different or further questions should be asked. In preparing a brief to an expert on behalf of the client it may be appropriate to provide the expert the opportunity

to consider the questions before the brief is finalized. In relation to opposing experts, there may be an opportunity to pose the 'right' questions for an experts' conference, if one is held before evidence is adduced. Of course, cross examination will always provide an opportunity of asking the 'right' questions of an opposing expert, which may need to be provided by an expert briefed on behalf of the client.

Assess the expert's qualifications and experience to qualify him/her to express their opinion on the specific issues. It is a fundamental requirement of the *Evidence Act 2008* (Vic) that a witness can only give opinion evidence if the opinion is based on their study, training or experience, and where the opinion is wholly or substantially based on that knowledge.¹⁷ In order for an expert's opinion to be persuasive to a court or arbitral tribunal, it is important to be able to demonstrate that nexus.

Determine the facts on which the expert's opinion was expressed:

- Was it based on the expert's own observations?
- Was it based on an assumption provided in the brief?
- Are there alternative 'facts'?

Ultimately, an expert's opinion will have little if any evidentiary weight if the 'facts' on which it is based are not proved. Many of the 'facts' on which an expert's opinion is based will have to be proved by other (lay) witnesses.

Is the expert's technical opinion soundly based on generally accepted technology in the specialist field? There may be more than one theoretical basis for a particular failure hypothesis, but an opinion based on a theory that does not have respectable support in the relevant professional community is not likely to be persuasive.

Is opinion based on the expert's own experience? This will need to be adequately explained in the expert's report and consistent with the expert's CV. Evidence sought to be adduced from an 'expert' that goes beyond that expert's experience as revealed in the CV may be objectionable and subject to exclusion.¹⁸

Has the expert considered the opinions in the opposing expert reports? Opposing opinions need to be addressed and the differences explained as precisely as possible, e.g. different factual basis or different theoretical basis.

Has the expert complied with the requirements of Order 44 (or equivalent)? Compliance with these requirements is mandatory, and any failure to do so renders the opinions expressed liable to rejection.

Is the expert a 'gun for hire'? That is, does the expert have a reputation for giving evidence (always supportive of its client's case) on a wide range of issues that suggest the person purports to be an 'expert' in many fields. Internet searches and discussions with colleagues can be of great assistance in identifying such individuals. Prior to engaging an expert, the legal team will normally need to carry out its own due diligence to avoid the engagement of such a person.

The issues identified above should provide guidance in preparing cross examination of an opposing expert. The aim of such cross examination will be to cast doubt on the opinions expressed because they are not soundly based or adequately justified, or, in some cases, to discredit the witness so that their evidence will be excluded or given little weight.

In respect of a witness briefed on behalf of the client, if the above issues do not reveal any flaws in the opinion, the legal team may

need to seek a second opinion, or review its case theory. In considering the consequences of an adverse opinion, the legal team needs to keep in mind its obligation not to put forward a claim without a proper basis.¹⁹

COURT RULES

Order 44 of the Supreme Court (General Civil Procedure) Rules 2005 (Vic) contains detailed requirements in respect of expert evidence to be adduced in court. Although not mandatory in arbitral proceedings, these rules (or their equivalent) are often also applied in arbitrations because they are perceived to define the norms that experts should comply with for their evidence to be relevant and persuasive.

Experts would be well advised to comply with the requirements of Order 44 (or its equivalent) in arbitral proceedings in any event, as such compliance removes any grounds for rejection of the evidence on the grounds of admissibility.

A party briefing an expert is required to provide the expert with a copy of the expert's code of conduct in Form 44A. A copy of the expert's report must be served on the other parties not later than 30 days before the trial.

Reg 44.03 specifies information that must be included in an expert report. This includes the details required to demonstrate that the evidence satisfies the requirements of section 79 of the *Evidence Act 2008* (Vic):

- identification of the expert and details of their qualifications;
- the facts, matters and assumptions on which the opinion is based;
- the reasons for the opinion; and
- details of any examinations, tests or other investigations on which the opinion is based.

In addition, Reg 44.03 requires the following 'ethical' obligations to be acknowledged in an expert's report:

- that the expert has read the code of conduct and agrees to abide by it;
- that a particular question, issue or matter falls outside the expert's field of expertise (if applicable);
- a declaration:
 - that the expert has made all the enquiries which the expert believes are desirable and appropriate;
 - that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the court;
 - any qualification of an opinion expressed in the report without which the report is or may be incomplete or inaccurate; and
- whether an opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason.

Reg 44.03 also contains requirements in respect of service of supplementary reports, including supplementary reports produced when an expert has altered his/her opinion.

The Supreme Court code of conduct in Form 44A provides succinct (1½ pages) instructions to experts as to their overarching obligations to the court, as well as providing specific instructions as to the formal requirements of their expert report(s) (as detailed in Reg 44.03(2)).

The Code imposes a specific obligation on an expert to prepare a supplementary report in the event that s/he changes her/his mind.²⁰ The Code states that an expert may be required by the court to confer with other experts and produce a joint report stating matters agreed and, in respect

of matters not agreed, reasons for the experts' disagreement.²¹ Importantly, the legal team are precluded from influencing the outcome of such an experts' conference:

*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.*²²

Practice Note CM7 of the Federal Court provides guidelines for expert witnesses giving evidence in the Federal Court. Pursuant to Rule 23.12 of the Federal Court Rules 2011 (Cth), a party must give a copy of these guidelines to any witness it proposes 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 specialised knowledge of the witness. The Federal Court guidelines cover the same issues and overarching requirements as in Supreme Court Form 44A. Subject to minor formal issues, an expert who complies with the requirements of one of these documents will also comply with the requirements of the other.

The consequences of not complying with the requirements of O 44 or its equivalent are well illustrated in the English case of *SPE International Ltd v Professional Preparation Contractors (UK) Ltd* [2002] EWHC 881 (Ch). In that case pretty well everything that could possibly go wrong with expert evidence did go wrong. The judge rejected the evidence as inadmissible because the 'expert' had breached all of his obligations to the court and had not complied with the fundamental requirements of giving independent expert evidence based on relevant qualifications, training and experience.

HOW TO WORK EFFECTIVELY WITH EXPERTS

An important aspect of the expert's role is to educate the legal team in the 'technical' issues in the case, so that they understand how those technical issues impact on the 'legal' issues of causation, obligations and breach of obligations.

An important aspect of the legal team's role is to educate the expert on the 'legal' issues in the case, so that the expert's report and evidence is appropriately structured and articulated to address those issues. Also to assist the expert to prepare her/his report to be most persuasive to the court or tribunal in respect of the key issues.

The legal team working with an expert for the first time will need to assess the expert's familiarity with the court/arbitration process. An expert who has never given evidence in court before will need more instruction and explanation than an experienced expert witness.

The starting point for working effectively with an expert is to provide him/her with a clear brief that defines the scope of the investigation to be carried out, the required 'deliverables', and the time by which the 'deliverables' are to be provided. The brief will need to include the background of the matter, the facts and assumptions on which the expert is being asked to rely, a list of all the documents provided to the expert and the questions the expert is asked to address.

In many situations, the expert's ultimate brief will evolve over time, subject to the requirements of the case and the results of the expert's investigations. A balance will be required in providing sufficient definition of the scope of the 'legal' requirements of the case, and allowing sufficient input

from the expert on the 'technical' requirements of the case that are within his/her expertise. However, the brief needs to ensure that, subject to compliance with the expert's obligations to the court/tribunal, the expert is confined to consideration of issues relevant to the case as identified by the legal team. It is usually helpful for the legal team to confer with the expert to discuss the content of his/her draft report before it is finalized, to ensure that it is in the appropriate format, addresses all of the issues in the brief, and does so in a way that is understandable to lay people.

Clearly, it would be improper for the legal team to provide comments on the substance of the expert's opinion. However, there are areas in which the legal team has a role in assisting the expert to prepare her/his report in the appropriate form that will have the best evidential impact. For example, the legal team can:

- advise on the legal admissibility of the contents of the report;
- assist with clarity, completeness and structure of the expert's reasoning; and
- identify any weakness in the logic and analysis in the report.

In the large class action case arising out of the 2009 Victorian bushfires referred to below, Derham AsJ made several rulings on whether documents provided to an expert attracted legal privilege. His Honour canvassed various circumstances related to the production of an expert's final report and his/her communications with the instructing solicitor. He noted that it is perfectly proper for the legal team to have such conferences, and 'ordinarily the confidential briefing or instructing by a prospective litigant's lawyers of an expert to provide a report of his or her opinion to be used in the anticipated litigation attracts client legal privilege'.²³

However, the legal team must be careful that they are not perceived as putting pressure on the expert to change their mind to suit the requirements of the case theory, or breach their obligations to the court/tribunal. Draft expert reports prepared as part of the process of briefing the expert are *prime facie* covered by legal professional privilege in Victoria (but not necessarily in other jurisdictions), however, 'privilege is impliedly waived in the working papers and draft reports if there is a proper basis for concluding that they contain communications or information that was taken into account by, or influenced, the expert'.²⁴

Section 119(b) of the *Evidence Act 2008* (Vic) extends privilege to confidential documents, whether communicated or not, provided they were brought into existence with the requisite dominant purpose of the client being provided with professional legal services relating to legal proceedings.²⁵ Thus, whilst the dominant purpose of a final expert's report would, *prime facie* not be privileged (as its dominant purpose would be for the purpose of being laid before the court as the expert's evidence), draft reports, and notes used in preparing a report, may be privileged,

... particularly where the expert has been retained by the party's solicitors and it is expected that the party's lawyers will advise on the contents of, and settle the form of, the report. There is nothing improper in such a course. It is not inconsistent with the expert's paramount duty being the duty to the court and not to the client retaining him or her. ... However, if they were brought into existence for the dominant purpose of the expert forming his or her opinions to be expressed in the final report, then it could be arguable that they were not made for the

*dominant purpose of the plaintiffs being provided with professional legal services relating to the proceedings.*²⁶

Derham AsJ noted that whilst it would be entirely improper for an expert to change his/her opinion because of influence from the plaintiff's advisors, an expert 'is permitted, indeed to be encouraged, to change his or her mind, if a change of mind is warranted. Experts should not be inhibited by fear of exposure of a draft from changing their minds when such change is warranted by the material then before the expert'.²⁷

The most important role for the legal team in assisting an expert is to ensure that the report answers the questions in the brief (and only the questions in the brief), and the expert articulates their reasoning to be intelligible to the judge/arbitrator. This normally involves the use of short sentences and (preferably) no jargon. If jargon is required, it must be explained in lay terms. The legal team can also ensure that the expert complies with the formal requirements for expert evidence in the relevant jurisdiction, e.g. Order 44 of the Supreme Court of Victoria.

An expert's report has far more impact on the court or tribunal if it concentrates on what is important. The legal team can assist the expert to concentrate on the determinative issues so that the expert's analysis of these issues has the greatest impact. Whilst the expert's report must demonstrate that the conclusions and opinions are based on a thorough analysis of the issues based on the facts, the detail of this may be distracting from the conclusions, and may be better in an appendix to the report.

Nevertheless, in determining what should be in the report, it is important that it reveals the reasoning behind the conclusions,

in a way that can be understood by the (non technical) court or arbitral tribunal. Avoid the 'black box' syndrome, in which you can't see inside the black box to work out how it produced the output.

An expert who has not previously given evidence in court will need the process explained; it may be appropriate for counsel in the legal team to subject the expert to cross examination on the contents of their report so that they are prepared for the sort of questions that may be posed by the other side.

It will often assist an expert to provide them with a copy of a paper that explains the process of preparing and delivering expert evidence, and gives guidance on behaviour in court.²⁸

The independent expert's role is not necessarily compromised by his/her assistance to the legal team in preparing questions for cross examination. Such cross examination issues will be consistent with the expert's independent views as already expressed, and specifically where these are in conflict with the opposing experts' views.

The expert's evidence is usually provided to the court or tribunal in a report (or reports) that are tendered as the expert's evidence in chief. Notwithstanding that it can be assumed that the court or tribunal has read the report(s), it may be assist the court or tribunal's understanding for the expert to give an oral summary of the key issues and conclusions. Such a summary may be assisted by appropriate visual aids, such as explanatory diagrams, graphics, photographs, animations etc. A Powerpoint presentation may be the most effective form of presentation. Whatever the format, the expert must prepare adequately so that the evidence has the most persuasive impact.

EXPERT CONFERENCES AND CONCLAVES

MATTHEWS V SPI ELECTRICITY

The following case notes refer to rulings made by Forrest J in a case arising out of the disastrous bushfires in Victoria in 2009. The claim was brought pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) by the plaintiff on behalf of group members who sustained personal injury and/or property damage, and/or economic loss as a result of the Kinglake/Kilmore East bushfire on 7 February 2009.

The representative plaintiff, on behalf of 10,000 plaintiffs with common claims, asserted that the bushfire was ignited as a result of the electricity conductor strung on what was referred to as the Valley Span falling to the ground close to pole 39. The plaintiff alleged that the conductor's failure and the consequential fire were caused by a breach of duty by the electricity distribution company (SPI) in the management, inspection and engineering of the Valley Span. Damages were claimed from the electricity distribution company, its contractor responsible for inspections of the distribution line, and from various state government parties.²⁹

In this large and complex case (which ran for 209 sitting days) there were a number of technical issues that required expert evidence. In total there were 40 expert witnesses who produced, over the course of the proceedings, 73 individual reports and 13 joint reports. The judge hearing the proceedings, Forrest J, implemented a number of modern techniques for managing the expert evidence, including:

- Expert conferences, facilitated by an Associate Justice, in which the experts produced joint reports that addressed specific questions posed by Forrest J;

- Expert evidence on specific issues was adduced in concurrent evidence sessions, a technique commonly referred to as 'hot tubbing'; and
- The judge appointed two engineering professors to sit with him as assessors of some of the expert evidence.

The importance, extent and complexity of expert evidence in this case can be gauged from the fact that there were nine separate concurrent evidence sessions over a period of approximately two and a half months. One of these sessions involved ten expert engineers and took over a month. The assessors assisted the judge to understand the technical evidence adduced in this session.

The techniques adopted in this case to manage the expert evidence are well established in Victoria and have appropriate statutory support in the Supreme Court (General Civil Procedure) Rules 2005 (Vic), the *Supreme Court Act 1986* (Vic), the *Civil Procedure Act 2010* (Vic) and the *Evidence Act 2008* (Vic). The following rulings made by Forrest J on various aspects of the process are invaluable for their articulation of the relevant principles, and their application to the complexities in this case 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'.³⁰

STEPS IN PRODUCTION AND EXCHANGE OF EXPERT EVIDENCE

MATTHEWS V SPI ELECTRICITY & ORS (RULING 4) [2011] VSC 613

The ruling made by Forrest J in this report included the common questions formulated by his Honour (the answers to which will form part of the judgment pursuant to section 33Z of the *Supreme Court Act 1986* (Vic)) that had

been settled by agreement in the course of a case management conference.

The ruling also detailed the steps involved in the production and exchange of independent expert evidence, and the subsequent experts' conferences. Forrest J considered that it was appropriate for the complete expert evidence process to be completed prior to mediation, including expert conclaves. This would promote the just, efficient, timely and cost-effective resolution of the real issues in dispute, in accordance with the objectives of the *Civil Procedure Act 2010* (Vic). By identifying the real issues in dispute in the proceeding as early as possible the prospects of success of the mediation would be enhanced.

Omitting the dates, Forrest J directed that the following steps were required in this case:

- (1) The parties finalise the discovery process.
 - (2) The parties exchange draft questions for expert witnesses.
 - (3) The parties file and serve lists of questions for experts.
 - (4) The parties file and serve their expert reports.
 - (5) The parties' experts on particular issues shall meet in conference and prepare for the court a joint report:
 - (a) addressing each of the questions on particular issues;
 - (b) identifying each of the matters on which they agree;
 - (c) identifying each of the matters on which they do not agree; and
 - (d) providing detailed reasons outlining the basis on which they are unable to agree on any matter relating to any of those questions on particular issues.
- In respect of the conference(s) of the experts on particular issues:

(a) the experts' conference(s) be private to the experts and confidential and there be no involvement of the parties or legal practitioners; and

(b) the experts' joint report(s) be delivered to the parties' solicitors as soon as is practicable.

(6) The parties file the experts' joint report(s).

(7) The parties file an agreed chronology of events relevant to the plaintiff's claim.

(8) The parties file and serve a list of witnesses (excluding expert witnesses) they intend to call at the trial.

(9) Mediation of the proceeding be conducted by a mediator approved and/or appointed by the court.

The mediation be attended by those persons who have the ultimate responsibility for deciding whether to settle the dispute and the terms of any settlement, and the lawyers who have ultimate responsibility to advise the parties in relation to the dispute and its settlement.

(10) The mediator report to the court and to the class actions coordinator on the outcome of the mediation.

Whilst the steps ordered were based on the specific features of the case, they are a useful summary of the procedures currently used in the Supreme Court of Victoria in relation to expert evidence in complex cases. The importance of adherence to the procedure, and participation by the experts in the conclaves was emphasised by Forrest J:

It will be necessary to hold separate conclaves of experts, given the disparate allegations of negligence, the different areas of expertise and the scope of the opinions likely to be expressed. The mechanics of this arrangement can be sorted out over the next

*couple of months—as long as the experts are aware that they must confer and be available to give evidence in May 2013. Whatever the timing of the conclaves, an important part of their function will be the provision of joint expert reports which will provide the basis for the concurrent evidence sessions at the trial. So that there is no misunderstanding about the importance of the conclaves, I emphasise that participation in the conclave and the production of a joint report is a pre-condition to the expert giving evidence in the trial.*³¹

LIMITS TO APPLICATION OF ORDER 44 TO OPINION EVIDENCE

MATTHEWS V SPI ELECTRICITY & ORS (RULING 9) [2012] VSC 340

In this report Forrest J distinguished between three types of opinion evidence:

- (1) Opinion evidence given by 'independent experts' 'engaged' by a party to the proceeding who calls the witness;
- (2) Opinion evidence given by a witness not 'engaged' by the party calling the witness; and
- (3) Opinion evidence given by an 'internal witness' of the party calling the witness.

'Independent experts' are required to file their reports in accordance with Order 44 of the Supreme Court Rules and, in particular, to ensure that their reports conform with rule 44.03. Forrest J noted:

The rationale for rule 44.03, and O 44 as a whole, is twofold. One is to ensure that each party has an adequate forewarning of the expert evidence to be led at trial. This, it is assumed, assists in pre-trial dispute resolution, as well as ensuring that trial ambushes are kept to a minimum. In recent times, expert reports provide the foundation for meetings of experts and the subsequent preparation

*of a joint expert report. The other basis is to ensure that expert witnesses engaged by the party for the purposes of the trial are aware of their responsibilities to the court in preparing an independent opinion, notwithstanding the interests of the commissioning party. The aim is to eliminate, or at least reduce, the 'gun for hire' approach endemic to adversarial litigation prior to the introduction of the Code.*³²

His Honour noted the general rule in Victoria that a witness expressing an opinion should comply with Order 44, but the rule did not apply to a situation in which a party seeks to lead opinion evidence from a witness in circumstances where it is either impractical or unlikely that the witness will consent to an engagement to provide a report under the terms of rule 44.03. Order 44 was directed to independent experts 'engaged' by a party to prepare an opinion for the purpose of the trial, where engagement means an expert commissioned by a party to provide an opinion for the purpose of the relevant piece of litigation.

There may be various valid reasons why a person with relevant expertise may not be able or prepared to be 'engaged' to prepare an expert report in compliance with Order 44, but whose opinion may nevertheless be of assistance to the court in determining the issues before it. In this case, there were witnesses who had been involved in investigations into the bushfires and their causes who were able to give evidence as to factual matters surrounding the fire and the allegations made by the parties. The party calling these witnesses also wished to lead opinion evidence from them.

An 'internal witness' is one employed by or contracted to one of the parties and whom that party

would seek, primarily, to adduce factual evidence, but also an opinion relevant to the trial issues. As with the second category, these witnesses have not been 'engaged' to provide a report.

Forrest J stated that, as the latter two categories of witness were not 'engaged' by any of the parties to the litigation, their evidence did not have to satisfy the requirements of Order 44. Nevertheless, in respect of any opinion evidence not satisfying rule 44.03, the other parties and the court should be informed of the following essential matters:

- (a) the witness' training, study or experience;
- (b) the facts, matters and assumptions upon which the opinion is based (often this may be simply the observations made by the witness at a particular event);
- (c) the substance of the opinion; and
- (d) the reasoning underpinning the opinion which is to be expressed.

In this case the witnesses in category 2 had previously given evidence at the Victorian Bushfires Royal Commission, and these essential matters were generally known. However, where the evidence had not yet been adduced or placed into written form, it would be necessary for the party calling that witness to provide the essential details.

Forrest J also made two other observations in relation to opinion evidence:

- (1) Merely because a witness has expertise does not mean that his or her evidence is necessarily opinion evidence.
- (2) A witness with appropriate expertise may give factual evidence—for instance, a doctor as to his observations during a clinical examination. Notwithstanding that the witness's

expertise may be relevant to the making of the observation, it remains admissible as evidence of an observed fact. Thus, where a witness gives evidence based upon his or her own observations and/or scientific or specialised analysis, such evidence may not amount to opinion evidence, but rather be properly characterised as a factual conclusion.

It is therefore important to distinguish whether evidence sought to be adduced from an 'expert' is truly an opinion within the meaning of section 79 of the *Evidence Act 2008* (Vic) and rule 44.03 of the Supreme Court Rules, or whether it is evidence of a fact based on the expert's own observations or analyses.

The following is a useful definition of opinion evidence quoted by Forrest J that makes the distinction from factual evidence clear:

*Opinion evidence can be described as evidence of a conclusion, usually judgmental or debateable, reasoned from facts.*³³

COMPOSITION AND CONDUCT OF EXPERT CONCLAVES

MATTHEWS V SPI ELECTRICITY & ORS (RULING 10) [2012] VSC 379

This report contains the rulings made by Forrest J in relation to the composition and conduct of the conclaves of expert witnesses. His Honour had to decide between two different proposals:

(1) Conclaves within four broad topics, in which there may be a larger number of experts for one party than the other, each with expertise in some aspects of the topics; or

(2) Specific issue-by-issue conclaves, requiring roughly fourteen separate meetings, each with a smaller number of experts all with expertise in the conclave issue.

Forrest J noted that, although the second model would require more conclaves and be challenging administratively, it was preferable for the following reasons:

(a) By having a conclave devoted to specific issues there can be no question about the expertise of the particular witnesses who author the joint report. That report will ultimately form part of the evidence at trial and any issue about the expertise of the witnesses (which may arise in a mass conclave where witnesses possess differing areas of expertise) will be avoided. The alternative model has real potential to lead to the production of a joint report where there are issues about the capacity of the authors to express the opinion contained in the report, as happened recently in the case of *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd*.³⁴

(b) The expert evidence is not a 'battle of numbers'. The preferred model generally avoids an imbalance in the number of experts that would occur in the alternative model.

(c) The provision of joint reports dealing with specific and discrete issues will help refine the issues and has a greater prospect of leading to clearer identification of the issues that are in dispute and those that are not.

(d) There is scope to expand the conclaves if the experts think it would be of assistance—and it is legally permissible.

(e) The provision of joint reports using the preferred model will not determine the composition of the concurrent evidence sessions at trial. After the reports have been received and considered, it may be apparent that a concurrent evidence session involving experts from more than one conclave would be appropriate.

(f) 'This is not a trial by expert. It is for the court to determine the issues having regard to all the evidence whatever the source.'

In addition to ruling on the form of the expert conclaves, Forrest J also made the following directions in respect of the procedural aspects of the conclaves:

(a) An Associate Justice will undertake the supervision and management of the conclaves. She will conduct a case conference and be available subsequently to assist with the conduct of the conclaves.

(b) The decision as to whether a moderator is required for a conclave is a question for the experts, and not the lawyers or the judge. If the experts require a moderator, the Associate Justice will be available to act.

(c) Administrative assistance should be provided to assist the experts with recording their discussions and preparing the report, unless they think it unnecessary.

(d) It is preferable for the experts to meet face to face. However, where experts reside interstate or overseas, they should determine the best way to conduct their conclave.

(e) Provision of an agenda is worthwhile to assist in keeping the experts on track. The parties should meet and endeavour to agree an agenda, failing which it can be discussed at a case conference with the Associate Justice supervising the expert conclaves.

(f) Although expert evidence will be determined on quality and not quantity, if one party feels disadvantaged by the numbers of experts on the other side, this can be canvassed with the Associate Justice.

USE OF ASSESSOR V SPECIAL REFEREE

MATTHEWS V SPI ELECTRICITY & ORS (RULING 19) [2013] VSC 180

In this ruling, Forrest J determined that, in view of the technical complexity of issues at the heart of the case, he would be assisted by an 'assessor', rather than referring specific technical questions to a 'special referee'.

This issue arose because 'the cause or causes of the failure of the conductor on the Valley Span is of critical importance in determining the legal liability of SPI to Mrs Matthews and the group members'.³⁵ His Honour was conscious of the technical complexity of the issues that required to be determined, and recognized the value of the expert evidence. However, he candidly expressed the view that he was unsure as to whether he would understand the expert evidence without assistance.³⁶

His Honour noted that, without expert assistance:

*I am quite unsure as to whether I can give effect to the overarching purpose of endeavouring to resolve a civil dispute (whether by reference to section 7 of the CPA [Civil Procedure Act 2010 (Vic)] or to the common law)—to provide the parties with a just result or, to use the language of section 9(1) (a) of the CPA, to reach a 'just determination' of the proceeding.*³⁷

Forrest J canvassed the issues in using a special referee to determine discrete issues, but determined that, in addition to the parties' opposition to such an appointment, this was not appropriate in the circumstances because:

- the technical cause of the failure was a critical issue in the case;
- it was likely that there would be issues of reliability and credibility

of one or more of the expert witnesses;

- the questions would not be solely scientific, but would involve a hybrid of legal and factual issues;
- referral to a special referee would have a negative impact in terms of timing and subsequent fragmentation of the entire trial; and
- questions in relation to adoption of the report.³⁸

In determining that he required the assistance of an assessor, his Honour was convinced that 'the judicial task can be better performed with such assistance and the likelihood of a fair determination enhanced'.³⁹

Forrest J noted that, notwithstanding the assistance of an assessor, 'it must be borne firmly in mind that the decision and the exercise of the judicial power is that of the judge and the judge alone'.⁴⁰

EVIDENCE OF STATE OF KNOWLEDGE OF RELEVANT INDUSTRY

MATTHEWS V SPI ELECTRICITY & ORS (RULING 18) [2013] VSC 185

The issue in this ruling related to the admissibility of evidence as to the state of knowledge in the relevant industry.

His Honour held that 'the state of knowledge, be it documentary or oral, is admissible and goes to both questions of duty and breach of duty in determining the foreseeability of the relevant risk'.⁴¹

Such evidence is relevant in determining whether a defendant has or has not acted reasonably in the circumstances. However:

*... the primary rule is that the evidence of industry practice is not determinative—the test remains: what is a reasonable response to the identified risk in all the circumstances?*⁴²

An expert witness's primary duty is to the court, not to the party who briefed them. There are strict ethical duties imposed by the court on an expert witness, breach of which may render the expert's evidence nugatory.

SUPPLEMENTARY EXPERT REPORT AFTER EXPERT CONCLAVES

MATTHEWS V SPI ELECTRICITY & ORS (RULING 20) [2013] VSC 197

The issue in this ruling was whether a supplementary expert report could be admitted into evidence at a late stage, after the relevant conclaves had produced their joint reports.

The basis of the objection was that it would potentially re-enliven the conclave process, be extraordinarily disruptive and contrary to the spirit of various orders that the judge had made in the course of the proceeding to date.

As with the other decisions on expert evidence, ultimately admissibility hinged on whether it was in the interests of justice to admit the evidence. His Honour noted that 'At times, there is a price to be paid to ensure a fair trial—in this case I think it is relatively modest'.⁴³

His Honour noted the following were some of the relevant principles to be applied in determining the application, derived from *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27; [2009] 239 CLR 175, 217:

- (a) *whether there will be a substantial delay caused by the amendment;*
- (b) *the extent of any wasted costs;*
- (c) *whether there is an irreparable element of unfair prejudice caused by the amendment;*
- (d) *concerns of case management arising from the stage in the proceeding when the amendment is sought;*
- (e) *whether the grant of the amendment will lessen public confidence in the judicial system; and*

(f) *whether a satisfactory explanation has been given for seeking the amendment at the stage when it is sought.*⁴⁴

Notwithstanding a number of cogent arguments against admission of the supplementary report, his Honour determined that it was in the interests of justice in the case for it to be admitted.

ENGAGEMENT OF EXPERT TO CARRY OUT FURTHER TESTING

MATTHEWS V SPI ELECTRICITY & ORS (RULING 23) [2013] VSC 239

This ruling related to an application by the plaintiff to engage an expert to carry out further testing, at a time when the experts' evidence was six months away.

In determining that it was in the interests of justice to permit further testing, his Honour noted:

*I have endeavoured throughout the pre-trial and trial stages of this case to immunise the experts from the solicitors (for all sides) so that they do not become an integral cog in a party's team and thus, even if subconsciously, fail to appreciate their obligations to the court. That consideration, however, should not prevent a party from endeavouring to seek further evidence to fortify his or her case—if that be what the case demands. It is a legitimate forensic exercise for a solicitor to endeavour to adduce evidence which supports the case of his or her client.*⁴⁵

ADMISSIBILITY OF EXPERT EVIDENCE

MATTHEWS V SPI ELECTRICITY & ORS (RULING 24) [2013] VSC 269

This ruling was in relation to the admissibility of expert evidence. It followed the judge's ex-tempore ruling that an opinion expressed on assumed (hypothetical) facts

put to the expert by counsel was admissible.

His Honour noted the High Court's view that the court's primary task in applying the *Evidence Act 2008* (Vic) section 79 (exception to the opinion rule in section 76 for opinions based on specialized knowledge) is to determine that the opinion in question is one which relies upon the expert's specialised knowledge.

In light of the High Court's judgment, he noted that it is now arguable that the so-called 'basis rule' (or 'proof of assumption rule') is not now a prerequisite for the proper application of section 79. That is, an opinion may be admissible under section 79 notwithstanding a failure to identify the assumptions of fact which underpin that opinion.⁴⁶

However, his Honour considered that there are limits beyond which the basis rule may effectively still apply:

(11) If this line of reasoning is correct then the basis rule goes solely to the weight to be given to the opinion such that the greater the divergence from the established facts, the lesser the weight to be given to it. If that approach alone be applied in this case then the ruling I made yesterday would still stand.

(12) However there is, I think, a qualification. There must be a point at which the divergence between the assumed facts and the established facts is so great that the opinion becomes irrelevant: that is, it does not satisfy the relevance test laid down by section 56 of the Act and is therefore inadmissible.

TENDER OF DOCUMENTS PROVIDED TO EXPERTS

MATTHEWS V SPI ELECTRICITY & ORS (RULING 29) [2013] VSC 537

This ruling related to the proposed tender of documents provided to experts for use in preparing their reports. His Honour was concerned that:

*... there is the potential in this trial for a vast number of documents to be tendered which have little or no relevance to the essential reasoning and opinion of the various experts or to the real issues in dispute between the experts.*⁴⁷

His Honour reviewed the relevant provisions of the *Evidence Act 2008* (Vic) and the *Civil Procedure Act 2010* (Vic), particularly the court's powers to further the overarching purpose and obligations in civil proceedings, and noted that 'the mere provision of material to an expert does not make it relevant or admissible. Nor does the use of the material in the body of a report or as an annexure necessarily justify its admission'.⁴⁸

He concluded that it was inappropriate to permit the tender of any material which underpinned the opinions of witnesses called by any party (unless of course the material is already in evidence) prior to conclusion of the expert conclaves.⁴⁹

His Honour accepted counsel's suggestion that it was desirable for the parties to exchange lists of documents and identify those that were the subject of objection, but did not permit automatic tender of documents objected to. It was the court's role to impose limits on the amounts of evidentiary material adduced.⁵⁰

He determined that, in order to minimize the extent of possible objections, the material should only be tendered at the end of the concurrent evidence session, at which point he would determine:

(a) whether the material is admissible;

(b) whether it is sufficiently probative in the sense that it is significantly relevant to a contested part of an expert's opinion to justify its admission; and

*(c) whether, if the sole basis for its tender is that it is of significant relevance to the disputed opinion, it should be permitted only on a limited basis pursuant to section 136 of the Evidence Act.*⁵¹

SCOPE OF ASSESSORS' ROLE

MATTHEWS V SPI ELECTRICITY & ORS (RULING 32) [2013] VSC 630

This ruling addressed the scope of the role of the assessors appointed to assist the court, as well as procedural aspects of the experts' concurrent evidence sessions. It was made after the factual evidence in the hearing had been concluded.

After consultation with the assessors and with the assistance of the parties, Forrest J finalised a set of questions to be put to the expert witnesses in the concurrent evidence session. The experts were requested to provide brief preliminary responses to each question (no more than one paragraph).

The questions were intended to identify the disputed matters of central importance in determining the cause(s) of the failure of the Valley Span conductor, and to be a guide to the evidence adduced in the concurrent evidence sessions. His Honour also hoped that the experts' responses would assist

him in understanding the expert evidence adduced in court. However, the questions were only a guide to the anticipated evidence, and did not preclude discussion of other evidence relevant to the cause of the failure of the conductor.

His Honour made an order precluding the expert witnesses of conclaves 1, 3 and 4 from communicating with the parties or the parties' solicitors in the period commencing from the time when the concurrent evidence session was scheduled to commence. After that, and subject to any further order, the experts were to be 'quarantined' until the conclusion of their concurrent evidence session.

Forrest J reviewed the requirements of the relevant legislation [*Civil Procedure Act 2010*, *Supreme Court Act 1986*] and English, NZ and Federal Court authorities in determining the appropriate role for the assessors in this case:

The primary role of the assessors is to assist the court in understanding the evidence of the experts. Applying the CPA [Civil Procedure Act 2010], combined with the principles of natural justice and the guidance from the cases I have referred to, I set out below the scope of the role of the assessors in this case:

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

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

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

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

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

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

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

(h) I anticipate that I will consult with the experts immediately after the conclusion of the concurrent evidence session and, from time to time, while drafting the judgment. This is likely to include seeking confirmation from them that I have properly understood the meaning of the expert evidence of conclaves 1, 3 and 4. I repeat, however, that their role is confined to providing advice and ensuring that I have comprehended the evidence given. I also repeat that the decision on these issues is mine and mine alone.⁵²

USE OF A MODEL TO ASSIST THE COURT

MATTHEWS V SPI ELECTRICITY & ORS (RULING 34) [2014] VSC 40

This ruling was made at a late stage of the trial when the plaintiff sought leave to use a scale model of the pole that failed as an aid in one of the upcoming concurrent evidence sessions. The defendant objected to the use of the model on the grounds that it had not reviewed the details, that it was unnecessary, and that there was a risk it would be used to introduce new evidence or supplementary experts' reports.

Forrest J referred to section 53 of the *Evidence Act 2008* that regulates the use of demonstrations and experiments, and referred to High Court authority on the distinction between a view, a demonstration and a reconstruction. *Evans v F⁵³* is authority for section 53 not applying to conduct in the courtroom, the consequence of which is that the common law applied in this case.⁵⁴

Thus, the common law (as modified by other relevant legislation) and strict rules of proof apply in circumstances where a model is used to assist a court in the evaluation or understanding expert evidence.⁵⁵

His Honour determined that section 7 of the *Civil Procedure Act 2008* gave him the power to allow the use of a model, and that in the circumstances, this would give effect to the overarching purpose in section 7: the just, efficient, timely and cost-effective resolution of the real issues in dispute. He noted that the use of aids to assist a court in understanding the evidence given in a trial is a long-standing practice permitted by the common law.⁵⁶

Based on these considerations, his Honour gave leave for the use of the model, but

... its use must be strictly confined to that of an aid: the model will be permitted for the limited use of providing me with a reference point as to what the experts are speaking about when giving concurrent evidence. In particular, the parties will not be permitted to use the model to conduct any form of test or experiment and will not be permitted to rely on the model as an evidentiary base upon which to establish the sequence of events after the conductor broke.⁵⁷

EXCLUSION OF CROSS-EXAMINATION UNDER SECTION 42 EVIDENCE ACT

MATTHEWS V SPI ELECTRICITY & ORS (RULING 36) [2014] VSC 82

This ruling resulted from an application by the first defendant, during the course of the trial, to prevent cross examination of an expert witness for the second defendant.

Forrest J referred to section 42 of the *Evidence Act 2008* that details the basis on which the judge can rule against the normal use of leading questions in cross examination of a witness not called by the cross examining party.

In ruling that the witness could be cross examined without restriction, his Honour rejected the defendant's submissions on the following bases:

- (1) R 44.05 of the Supreme Court Rules creates no obstacle to cross-examination by counsel for the plaintiff;
- (2) The judge did not accept that the witness was in the plaintiff's 'camp';
- (3) The matters in section 42(2) of the *Evidence Act 2008* that permit disallowance of leading questions

were merely matters to be taken into account, and did not require disallowance of leading questions per se;

(4) There was no real purpose in requiring notice of the questions to be asked, as the cross-examiner did not know what the witness would say in response to questions;

(5) There was no requirement for the witness to give evidence on a *voir dire* as to his expertise, as the judge was satisfied as to the witnesses expertise to give evidence on the matters in issue.

FURTHER SUPPLEMENTARY REPORTS TO ADDRESS LAY EVIDENCE AT TRIAL

MATTHEWS V SPI ELECTRICITY & ORS (RULING 37) [2014] VSC 97

This ruling arose from an application late in the trial to permit further supplementary experts' reports to take into account lay evidence adduced at the trial that conflicted with the basis of facts assumed by the experts.

The application was opposed by the state parties on the basis that it was made too late in the trial, and that the first defendant was attempting to introduce a wholly new and unpleaded case. Further, that the first defendant should have been aware that its case would be attacked on the basis of its impracticability on the known facts, it would cause severe disruption and inconvenience, and it was a tactical decision in conflict with the spirit of previous rulings.

His Honour determined that it was in the interests of justice that the further supplementary reports be permitted, and referred to the relevant principles in his previous ruling in *Matthews v SPI* (Ruling No 20).⁵⁸

He gave the following reasons:

(1) The evidence of the lay witness sought to be used as the basis of assumed facts was unique (the extent and clarity of which was acknowledged by the first defendant), and provided a firm evidentiary basis on which the experts could base their opinion. Further, it was likely that this evidence would be relied on in determining the appropriate assumptions of fact.

(2) The evidence would not result in the experts expressing opinions on a different basis to that on which they had previously based their reports, but merely on a different assumption of the facts underpinning those opinions.

(3) At some point in time, the factual basis underpinning the experts' reports would have to be addressed, either in evidence in chief or in cross examination.

(4) Permitting a party to put an alternative set of assumptions of fact to an expert witness was quite common. The first defendant was not attempting to obtain a fresh opinion on new matters, merely providing a different set of assumptions to its expert.

(5) The assumptions of fact arising from the lay evidence did not fall outside the first defendant's pleaded case. 'To decide this application on the basis of a divergence from SPI's pleadings would be a triumph of form over substance'.⁵⁹

(6) Any inconsistencies between the new assumptions provided to the first defendant's expert and the lay evidence was not a reason to preclude a supplementary report, as any discrepancy could be addressed by the weight afforded to the evidence.

(7) Any potential prejudice to the state parties could be adequately addressed by providing sufficient time for their expert to produce a supplementary report, and rescheduling the date of the

relevant concurrent expert evidence session.

(8) His Honour quoted Dixon J in an earlier ruling: 'It is sensible and reasonable to conclude that a claim that is dependent for its success on expert evidence becomes fanciful once the basis for the expert opinion that has thus far sustained it evaporates'.⁶⁰

His Honour's fundamental rationale for permitting further supplementary reports in the circumstances was that: 'It is clearly contrary to the interests of justice for the case to proceed to judgment with [the expert witness] operating on a set of assumptions that may prove to be inaccurate or unreliable'.⁶¹

STRIKING OUT OF EXPERT EVIDENCE

MATTHEWS V SPI ELECTRICITY & ORS (RULING 38) [2014] VSC 102

This ruling was in relation to the defendant's submissions that substantial parts of an expert's report should be struck out on the basis of admissibility on the following grounds:

(a) the expert made findings of fact and therefore ventured outside of his expert role;

(b) the expert failed to distinguish between assumptions of fact and opinion;

(c) to the extent that the report contained opinion evidence, the expert failed to distinguish between assumptions of fact and opinion; and

(d) the expert should be characterized as an advocate for the plaintiff.

The judge noted that these submissions resulted from 'an exhaustive, and exhausting, over-analysis of the contents of the two [expert's] reports',⁶² which analysis the judge found to be 'distracting and unhelpful'.⁶³

In assessing the defendant's submissions, the judge suggested that the proper procedure in this and most cases was to 'examine the report as a whole and determine whether the reader can sensibly distinguish between assumed facts and the expression of opinion based on the witness' expertise'.⁶⁴

Forrest J emphasized that the adducing of expert evidence is regulated by the *Evidence Act 2008* (Vic), and procedural aspects are governed by the *Civil Procedure Act 2010* (Vic), and the Supreme Court (General Civil Procedure) Rules 2006 (Vic). He referred to the High Court case of *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 for its articulation of the two criteria for evidence to be admissible under section 79(1) of the *Evidence Act 2008* (Vic):

*The first is that the witness who gives the evidence 'has specialised knowledge based on the person's training, study or experience'; the second is that the opinion expressed in evidence by the witness 'is wholly or substantially based on that knowledge'.*⁶⁵

His Honour accepted that it was necessary for an expert report to make clear the distinction between assumption of fact and expression of opinion, so that counsel know the case they have to meet in preparing for cross examination of the witness.⁶⁶

The defendant's submissions, in part, were based on a distinction between 'primary', and 'secondary' findings of fact, based on reference to the case of *ASIC v Rich* (2005) 190 FLR 242. Forrest J questioned the utility of that distinction and stated that 'the distinction between primary (or intermediate) propositions only confuses and mystifies what is a basic requirement: identification of

the assumed facts as opposed to opinion evidence'.⁶⁷

His Honour noted that 'what is important is whether it is clear that the expert is referring to an assumed fact as opposed to an opinion'.⁶⁸

Ultimately his Honour concluded that, based on a close reading of the expert's reports and the source material referred to, the expert had distinguished between his findings of fact (based on the defendant's documents), and his opinions.⁶⁹

Some of the defendant's submissions were based on a criticism of the expert's brief, in that it did not include 'assumed facts', but was based on 'open' questions from the instructing solicitor. In his comments on the defendant's submissions on this issue, his Honour made the following pertinent comment:

*Surely it is in the interests of justice to permit an expert to examine the materials provided free from the potentially biased or preconceived view of the facts that a party's lawyer may have when providing 'assumptions of fact'. Even if not so skewed, the assumed facts may be incomplete or inadequately set out due to a lack of expert knowledge on the part of the lawyer.*⁷⁰

In this writer's view, this is an important caveat to the lawyers instructing expert witnesses: the lawyers rarely fully understand the technical issues that the expert is briefed to opine on, and the expert should not be constrained by the lawyer's understanding of the 'facts' on which the expert is briefed to opine. In this writer's experience, the facts underlying many technical issues are apparent from the documents: documents that were prepared in the normal course of execution of the project without any thought as to their ultimate evidential value in a dispute. Such documents

often 'speak for themselves', and are persuasive evidence of facts, uninfluenced by the exigencies of the dispute resolution process.

The report of this case supports such an approach: notwithstanding some minor issues with the expert reports that could be characterised as procedural defects, the judge was able to establish that the expert had satisfied the substantive requirements in relation to expert's reports. On a close reading of the expert reports, the judge was satisfied that the reports complied with the requirements of the relevant statutes, and distinguished between the facts derived from the documents, and the opinions derived from those documents.

FURTHER EXPERT EVIDENCE LATE IN THE TRIAL

MATTHEWS V SPI ELECTRICITY & ORS (RULING 39) [2014] VSC 109

This ruling was made in response to an application, made near the end of the trial, for one of the plaintiff's experts to be permitted to adduce further evidence.

There were two issues in contention: (1) whether the expert had the relevant expertise to opine in his report as to what should have been seen from ground based inspections, and (2) whether the expert should be permitted to adduce evidence as to other aspects of the asset inspection process.

Forrest J had no difficulty in concluding the experts' report was admissible in relation to ground based inspections, as the opinions in it were appropriately based on his expertise as revealed in his CV.

In respect of the further evidence sought to be adduced, his Honour refused leave on the basis that it opened up new issues, and had been served far too late.

In providing detailed reasons for this ruling, his Honour referred to his ruling no 38 for the rationale for the relevant provisions of the *Evidence Act 2008*.⁷¹ Also to the relevant provisions of the *Civil Procedure Act 2008*, and Supreme Court (General Civil Procedure Rules) 2005 for the relevant procedural aspects governing expert evidence in court.

Forrest J detailed the expert's expertise in his CV that underpinned the evidence he had given to date, and highlighted the significant extensions to that expertise included in an amended CV submitted in support of his proposed further evidence. His honour commented:

*The fresh details in [the witness'] updated CV are surprising. They appear to have been inserted with the intention of demonstrating that [he] is qualified to give the additional evidence [the plaintiff] now seeks to adduce.*⁷²

His Honour also detailed the extent to which the subject of the proposed further evidence sought to extend the evidence in the expert's expert reports and evidence to date 'extraordinarily'.⁷³ His Honour noted that:

Apart from an oblique inference that may be drawn in respect of (a), not one of these matters was, as I will demonstrate, mentioned in the context of asset inspection in the report'.⁷⁴ This was all new material that was not included in the report already served: 'It extends into extraordinary detail that is not mentioned in the report and has never been canvassed with witnesses called by [the defendants].⁷⁵

His Honour concluded that the plaintiff would not be permitted to adduce the further expert evidence for the following reasons:

(1) An expert would not be permitted to go outside the scope of the opinion(s) expressed in

his report(s). From a reading of the expert's original CV and his instructions, it was clear that the plaintiff did not intend him to opine on the asset management practices the subject of the proposed additional evidence. The evidence was not necessary to deal with evidence adduced a year earlier, as leave could have been sought at that time.⁷⁶

(2) The opinions sought from the expert went well beyond his engineering expertise. His Honour determined that there was no basis to conclude that the expert had the requisite 'specialized knowledge'.⁷⁷

(3) The submission raised the 'spectre' that the expert 'is not truly an expert on these asset inspection issues but an advocate for [the plaintiff's] case'.⁷⁸

(4) There would be significant prejudice to the defendants, as they had not had the opportunity of putting the issues to their witnesses, as required by the rule in *Browne v Dunne*.⁷⁹ Considering that the trial had been running for more than 180 days, 'recalling a number of witnesses to satisfy [the plaintiff's] application would be inimical to the efficient, timely and cost-effective resolution of the dispute, as required by the [Civil Procedure Act 2008]'.⁸⁰

(5) There were evidentiary matters sought to be adduced that went beyond the case as put in the plaintiff's statement of claim.⁸¹

In summary, his Honour determined that it would be inimical to the interests of justice to permit the plaintiff to adduce the further evidence.⁸²

There are important lessons in this ruling, both for experts, and the lawyers instructing them. Both need to reflect on the fundamental principles enshrined in Order 44, based on the principle that an expert's duty is to the court, and not to their instructing party. An expert not only needs to express

independent views, irrespective of the exigencies of the litigation, they need to be perceived to be independent by the court.

The instructing solicitor needs to be aware of the expert's expertise relevant to the issues in the case, and to ensure that the expert's brief encompasses all of the issues on which the expert's opinion is sought.

The expert needs to ensure that his/her CV comprehensively covers all of his/her experience and expertise that might be relevant to issues in the case, but also that s/he does not stray into expressing opinions outside that demonstrated expertise and experience.

The following observation by Forrest J in this case should give experts and their instructors pause for thought:

The evidence that [the plaintiff] now seeks to adduce from [the expert] is new and breathtaking in its scope. Indeed, one could easily conclude that [the plaintiff's] lawyers have assembled the contents of the [expert's] notice after reflecting upon the evidence given in the trial to date, with the intention of plugging perceived gaps in [the plaintiff's] case.⁸³

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6. Section 18
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10. Section 22	(Ruling No 4) [2011] VSC 613, [11]	67. [36]
11. Section 23	32. <i>Matthews v SPI Electricity Pty Ltd & Ors; SPI Electricity Pty Ltd v Utility Services Corporation Limited</i>	68. [37]
12. Section 24	(Ruling No 9) [2012] VSC 340, [14]	69. [42]
13. Section 25		70. [43]
14. Section 26	33. <i>RW Miller & Co Pty Ltd v Krupp (Australia) Pty Ltd</i> (1991) 34 NSWLR 129, 130 per Giles J	71. <i>Matthews v SPI Electricity & Ors</i> (Ruling No 38) [2014] VSC 108
15. Section 27		72. [33]
16. http://www.engineersaustralia.org.au/sites/default/files/shado/About%20Us/Overview/Governance/codeofethics2010.pdf	34. [2012] VSC 99	73. [43]
17. Section 79	35. [1]	74. [44]
18. E.g. see <i>Matthews v SPI Electricity & Ors</i> (Ruling No 39) [2014] VSC 109, in which Forrest J declined to permit an expert to provide a supplementary report on issues that went significantly beyond his experience as revealed in his CV already in evidence.	36. [14]	75. [57]
19. <i>Civil Procedure Act 2010</i> (Vic) section 18	37. [15]	76. [61]–[64]
20. No 4	38. [23]–[27]	77. [66]
21. No 5	39. [34]	78. [67]
22. No 6	40. [35]	79. [68]
23. <i>Matthews v SPI Electricity & Ors</i> [2013] VSC 33, [44] (per Derham AsJ)	41. [5]	80. [69]
24. <i>Matthews v SPI Electricity & Ors</i> (Ruling No 10) [2014] VSC 44, [22] (per Derham AsJ)	42. [8]	81. [71]
25. <i>Ibid</i> , [21]	43. [7]	82. [73]
26. <i>Ibid</i>	44. [38]	83. [61]
27. <i>Ibid</i> , [23]	45. [23]	
28. E.g. PG Murphy, L Duthie, B Bielert & D Charrett, 'Australian Legal Guidelines for Forensic Engineering Experts' (2010) Vol 11, No 1 <i>Australian Journal of Structural Engineering</i> 11	46. [10]	
29. <i>Matthews v SPI Electricity & Ors</i> (Ruling No 20) [2013] VSC 197, [11]	47. [21]	
30. <i>Civil Procedure Act 2010</i> (Vic) section 7	48. [20]	
31. <i>Matthews v SPI Electricity Pty Ltd; SPI Electricity Pty Ltd v Utility</i>	49. [23]	
	50. [24], [25]	
	51. [30]	
	52. [27]	
	53. [2007] HCA 59; (2007) 235 CLR 521	
	54. [10]–[11]	
	55. [11]	
	56. [14]–[16]	
	57. [20]	
	58. [2013] VSC 197	
	59. [39]	
	60. [43]	
	61. [44]	
	62. [3]	
	63. [33]	
	64. <i>Ibid</i>	
	65. (2011) 243 CLR 588, 602–3	

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