

Legal Alert



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Expert witnesses: The importance of impartiality and independence

In this alert we review a recent and important Victorian Supreme Court case which reinforces and explains:

- the importance of disclosure and transparency of dealings before, during and after the preparation of an expert report.
- the need to minimise interference with the preparation of an expert report.
- the requirement that experts comply with not only Form 44 and Order 44 of the Supreme Court (*General Civil Procedure*) Rules 2005 (Vic) (**Code and Rules**), but also the new overarching obligations under Part 2.3 of the *Civil Procedure Act 2010* (Vic) (**CPA**).

It is important to know and understand these obligations, as a failure to comply may have significant consequences and result in the evidence being afforded little weight or, worse still, being excluded by the Court.

The Secretary to the Department of Business and Innovation v Murdesk Investments Pty Ltd [2011] VSC 581

The case arose after the compulsory acquisition of land owned by Murdesk Investments Pty Ltd (**Murdesk**) by the Victorian Government pursuant to the *Land Acquisition and Compensation Act 1986* (Vic) (**LAC Act**).

In assessing compensation due to Murdesk, the LAC Act required that regard must be had to the market value of the land acquired. Consequently, Murdesk sought to rely upon the expert evidence of three certified valuers.

The Secretary to the Department of Business and Innovation (**Applicant**) challenged the admissibility of all Murdesk's expert valuations on the grounds that they were not admissible under section 79(1) of the *Evidence Act 2008* (Vic) because:

- the opinions expressed by them as to the value of the land were not "wholly or substantially" based upon their specialised knowledge.
- the evidence did not set out the basis or path of reasoning by which the valuer formed his opinion as to the value of the land.

The Applicant also argued that even if the evidence was admissible, it ought to be excluded on the basis that it breached the "overarching obligations" described in the CPA.

Matters giving rise to the Applicant's claims

The Applicant challenged the admissibility of the valuers' evidence on the following grounds:

- the evidence of the first valuer was unduly influenced by others, and accordingly the Court could not be satisfied that the opinions were "wholly or substantially" based on specialised knowledge. This claim was founded upon the fact that the valuer had provided draft parts of his report for comment to Murdesk's legal advisors. The valuer had also attended a number of conferences with the legal advisors and had met separately with the client on one occasion. The notes from the conferences did not clearly detail "who said what".
- the evidence of the second valuer provided no calculations to support the valuation given. The valuer had adopted an "unorthodox" approach to the valuation.
- the evidence of the third valuer was the result of a lengthy "course of dealing" between the valuer and the client. There had been exchanges of views and information between the valuer and the client before the date that the valuer received instructions to prepare the report. The Applicant claimed that the valuer's opinion was the result of an "undisclosed process of collaboration".

All three valuers gave evidence that the opinions contained in the reports were their own. Justice Emerton found that the opinions of the experts were "wholly or substantially" based upon their specialised knowledge and thus, the evidence of all experts was admissible. However, Her Honour also noted that the matters raised by the Applicant were matters that would potentially go to the weight given to the evidence.

Implications for expert witnesses

In her judgment, Justice Emerton acknowledged the following:

- the challenges to the expert evidence did not relate to the qualifications of the experts, but rather to other factors that potentially undermined the cogency of the evidence. Her Honour expressly recognised the specialised knowledge and expertise of the valuers, and the quality of the experts' methodology in preparing their reports.
- there is a balancing task between ensuring the independence and impartiality of the expert, and the need to provide the expert with adequate instructions and information. The duty of disclosure as required by the Code and Rules is therefore important in managing this balance. Her Honour stated that experts are not required "to disclose every detail of their dealings", however "information or instructions relevant to the formation of their expert opinions" should be disclosed in the expert's report. Similarly, reference should be made to "meetings and conferences that took place with the client and with other experts." Insofar as those meetings and conferences "resulted in the provision of instructions or information on which the expert relied in forming his opinions", that too should be stated in the report.
- experts providing opinion evidence must now address the new "overarching obligations" contained in the CPA. Her Honour referred to the following relevant sections of the Act:

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- **section 16:** provides for a paramount duty to the Court to further the administration of justice; and
- **section 21:** provides for an obligation not to engage in conduct, which is misleading, or deceptive or likely to mislead or deceive.
- although the evidence of an expert may be "wholly or substantially" based upon the expert's specialised knowledge and thus admissible under s 79 (1) of the Evidence Act 2008 (Vic), matters relating to the impartiality of the expert may later be considered when weighing the cogency of the evidence.

Conclusion

When accepting a brief to act as an independent expert make sure that you, inter alia:

- comply with the Code and Rules;
- comply with the overarching obligations in the CPA;
- base your opinions "wholly or substantially" upon your specialised knowledge;
- set out clearly and succinctly the methodology, assumptions and instructions relevant to the preparation of your report; and
- set out in the body of your report:
 - the information or instructions relevant to the formation of your expert opinions and,
 - reference to meetings and conferences that took place with the client and with other experts insofar as those meetings and conferences resulted in the provision of instructions or information on which you relied to form your opinions.

Taking these steps will go a long way towards ensuring that your report is robust, admissible and ultimately, able to be relied upon by the Court.