

Expert Alert



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Assumptions in expert reports

As an expert, it is often necessary for you to make assumptions or even rely on other expert reports in order to form your own opinion. When relying on assumptions or other expert reports it is imperative you and the lawyers instructing you, have evidence to support your assumptions and the assumptions of the authors of other expert reports you rely on.

A recent decision in the NSW Supreme Court has highlighted the effect of the "proof of assumption rule" and confirmed the importance of providing evidence in support of any assumptions made in expert reports. Without the appropriate evidence to support your assumptions, your expert report, or part of it, may be found to be inadmissible.

This alert examines the outcome in *Land Enviro Corp Pty Ltd v HTT Huntley Heritage Pty Ltd* NSWSC 177 and the application of the "proof of assumption rule".

Proof of assumption rule

Land Enviro Corp Pty Ltd (*LEC*) filed proceedings against HTT Huntley Heritage (*HTT*) for damages in the amount of \$170 million for the loss of the opportunity to prosecute an earlier proceeding in 2001. LEC engaged an expert to prove the value of the loss claimed (*Dr Ferrier*).

Dr Ferrier prepared reports dated 21 December 2010, 9 August 2011 and 23 February 2012. Dr Ferrier's expert reports made assumptions based on estimates contained in earlier reports by other experts. In making such assumptions, Dr Ferrier assumed the correctness of the estimates in the earlier reports. HTT objected to the admission of these reports on the following grounds:

- (a) the first report expressed an opinion not relevant to the pleaded issues;
- (b) the first report assumed facts not otherwise proven in the proceedings, and was therefore inadmissible due to the "proof of assumption rule"; and
- (c) the third report raised new issues for which leave had not been granted.

This article focuses on category (b), the application of the proof of assumption rule. The proof of assumption rule dictates that *"An expert opinion is not admissible unless evidence has been, or will be, admitted, whether from an expert or some other source, which is capable of supporting findings of fact which are sufficiently similar to the factual assumptions on which the opinion is stated to be based to render to the opinion of value...."*¹

In relying on those earlier reports, it was therefore necessary for LEC to provide evidence in support of their own expert reports as well as the expert reports which had been relied on. LEC only purported to tender the earlier reports as evidence however the earlier reports had not been prepared in accordance with the court rules, the authors of the reports had not been called as witnesses to give evidence in

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support of their reports and no evidence of the authors' expertise was tendered. The court found that LEC had failed to prove the factual assumptions underlying the expert report and as a consequence the expert reports were inadmissible.

After the decision in *Land Enviro Corp Pty Ltd v HTT Huntley Heritage Pty Ltd* it is important to carefully consider any assumptions you make as an expert. The key to including assumptions in your expert report are as follows:

- (a) clearly define instructed assumptions by lawyers in your report and outline your reasons for adopting that assumption;
- (b) work with lawyers throughout the dispute resolution process to continually reassess your assumptions, look for evidence which either supports or disproves those assumptions and disclose them in supplementary reports; and
- (c) if basing your assumptions on other reports, make this clear in your report and work with the lawyers to ensure, where possible, evidence is produced to support those other reports.

Conclusion

To carry out your role as expert to an optimal level, it is crucial to understand all that is expected by the court and from the lawyers you are consulting with. All assumptions, instructed or not, need to be supported by admissible evidence under the 'proof of assumption rule' and be clearly outlined in your report.

¹ Heydon J at , *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588

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