

Expert reports and evidence – the dangers of non-compliance



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Expert reports have been under the judicial spotlight recently. In some cases, expert evidence has been excluded due to non-compliance with the relevant legislative requirements. Failure to screen for clauses such as routine disclaimers can be fatal to admissibility and ultimately a client's case. Solicitors are also at greater risk of professional negligence claims arising in these circumstances.

Two recent decisions highlight the problems and deficiencies that can occur in expert reports or evidence and the attendant risks for clients as well as solicitors.

A closer look at expert reports and risk

A recent unreported decision involved a dispute between former co-owners over the apportionment of monies expended on improvements to a property. The judge refused to grant leave to admit the relevant valuer's report because of its numerous deficiencies. For instance, there was a failure to adhere to the relevant Code of Conduct under the *Uniform Civil Procedure Rules 2005*, notwithstanding statements in the report which purported to comply with it. Her Honour found that incorrect expressions of compliance were, in fact, an indication of non-compliance. Furthermore, there was no evidence of the central facts upon which the opinion rested; it appeared to rely on assumptions which were neither explained nor proven.

The case of *Jones v Murrumbidgee Irrigation Limited* [2019] NSWSC 1228 involved an application for leave to admit a non-compliant report by soil and water experts into evidence. Leave was refused because, inter alia:

- the final report was unsigned and had not been expressly adopted by affidavit, or by any of the people who worked on it;
- the expertise of one of the authors had not been established;
- none of the authors gave evidence they had read and complied with the Code regarding their contributions to the final report;
- no explanation was given for why a compliant expert's report relating to the subject matter of the final report had not, and could not, be provided;
- the final report was expressly described as preliminary,

Snapshot

- Expert reports can be critical to proving a client's case.
- Failure to screen for clauses such as routine disclaimers can be fatal to admissibility and may lead to a professional negligence claim.

indicating it was not intended to be definitive, the finding being consistent with internal references to the need for further investigation;

- the report contained a disclaimer which effectively meant it was a preliminary document to be relied upon by the commissioning party only;
- the contents of the report cast doubt on the integrity of the process of

obtaining and handling samples relied upon in forming the expert opinion.

Expert reports have special status as an exception to the rule excluding opinion evidence and can be critical to the proof of a client's case. Oversights or carelessness when preparing and submitting reports and evidence can have a significant impact on admissibility and may lead to a professional negligence claim against the solicitor.

Legislative and compliance matters

Section 79 of the *Evidence Act 1995* (Cth) and its NSW counterpart are the legislative source of the admissibility of expert evidence. Section 79 provides that the rule which excludes opinion evidence does not apply where a witness has specialised knowledge based on training, study or experience and the opinion is wholly or substantially based on that knowledge.

Solicitors must ensure that experts and parties comply with rule 31.23 of the *Uniform Civil Procedure Rules 2005* (NSW). This requires the expert to comply with the Code of Conduct set out in Schedule 7 of the Rules and for a party to provide the expert with a copy of the Code as soon as practicable after engagement. Clause 3 prescribes 12 pieces of information which must be included in the expert's report; these include: the name and address of its author; an acknowledgement the expert has read the Code and agrees to be bound by it; the expert's relevant qualifications; assumptions and material facts upon which the expressed opinion is based; any questions outside the area of expertise; the examinations or investigations undertaken; any qualifications to the opinion; and a brief summary of the report where it is lengthy or complex.

Remember, absent a court order, no report or oral evidence may be admitted unless the expert satisfies the court that he or she has read the Code of Conduct and agrees to be bound by it. **LSJ**