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Damming Evidence: Judges Empowered to Restrict the Flow of Expert Evidence

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Introduction

On 20 June 2012 the Victorian Government introduced into Parliament the **Civil Procedure Amendment Bill 2012** (the **Amending Bill**).

The Amending Bill seeks to reform and increase the Court's powers and discretion to deal with the use of expert evidence in civil litigation.

The Amending Bill builds on the foundations of the **Civil Procedure Act 2010** (**CPA**) which commenced operation at the beginning of last year. In previous updates, we have reported on these changes to civil procedure law in Victoria and recent legislative efforts to promote greater efficiency in litigation. Put simply, the CPA imposes on all parties to litigation a paramount duty to the Court and obligations to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute. The CPA also enlarged the Court's discretion in relation to how civil proceedings can be conducted.

The current law on expert evidence in Victoria is found across the **Evidence Act 2008**, the Court Rules, including the **Supreme Court (General Civil Procedure) Rules 2005**, and the CPA. The relevant provisions give parties guidance as to the form expert evidence must take to be admissible, with only limited guidance on what expert evidence is admissible and how it should be presented to the Court. The balance of the law is part of the Common Law. Recently, for instance, the High Court in ***Dasreef Pty Ltd v Hawcher*** **[2011] HCA 21**, considered when expert evidence is admissible and said that an expert must base their opinion on their training, study or experience.

The proposed reforms seek to impose restrictions on when expert evidence should be used, who should be appointed to give expert evidence in a proceeding, and how it should be adduced at trial.

In his recent press release, Attorney-General Robert Clark states, "*the* [Amending] *Bill is a further demonstration of the Government's commitment to work with the courts* [sic] *to enable rights to be upheld and disputes to be resolved as efficiently and effectively as possible*". The Explanatory Memorandum also makes it very clear the Amending Bill's intention is to reduce lengthy delays and substantial costs that flow from what is the government's perception of a "*disproportionate use of expert witnesses*".

Case management and promoting Court efficiency is important. However, this article questions whether the potential consequences that may stem from this expansion of the Court's discretion into the field of expert evidence have been fully considered.

Whilst the amendments, discussed below, may promote the aims in part, it is arguable that the issues are already appropriately dealt with under the existing Court Rules and the Common Law. Indeed there is a real risk the changes may have the opposite effect to what is intended and may just promote more activity and "*front-load*" costs at the interlocutory level.

The Amending Bill

The Amending Bill will, if passed, introduce a new chapter in Part 4 of the CPA.

The most important proposed amendments include:

+ the requirement for parties to make an application to the Court for leave to adduce any expert evidence;

+ the engagement by parties of joint experts and the power of the Court to appoint a single expert;

+ allowing the Court to determine the manner in which evidence can be adduced at trial; and

+ providing a power to order experts to disclose the basis of their retainer, including whether payment of fees is contingent on the outcome.

An Application to Adduce Evidence

The proposed amendments[1] require any party wishing to adduce expert evidence to first seek a direction from the Court.

The Court will be able to make directions in relation to:

+ the preparation of the report;

+ the time for service;

+ limiting the report to address certain issues;

+ precluding expert evidence from addressing certain issues;

+ limiting the number of experts and who may be called to give evidence; and

+ provisions for the appointment of single joint experts or court appointed experts.

The Explanatory Memorandum does not say how the directions should be sought. Presumably however, there will need to be a formal application, probably supported by either oral or affidavit evidence, addressing the need for expert evidence. We assume also that there will be an opportunity for the opposing party to respond to that application.

It is difficult to see, on its face, how this will promote the expediency the Amending Bill aims for. It is not unreasonable to expect such applications to become a preliminary battle ground for contentious issues that will later be the subject of the litigation.

Choice of Expert & Joint Expert Evidence

Probably the most contentious proposal in the Amending Bill is contained in those provisions setting out specific powers for the Court to order, at any time during the proceeding, that a single expert be engaged jointly by parties to a proceeding, or alternatively, that there be a Court appointed expert.

A list of considerations a Court can take into account when making such an order includes:

+ whether the engagement of two or more expert witnesses would be disproportionate to the complexity or importance of the issues in dispute and the amount in dispute in the proceedings;

+ whether the issue falls within a substantially established area of knowledge;

+ whether it is necessary for the Court to have a range of Expert Opinion; and

+ the likelihood of the engagement expediting or delaying the trial.

If a joint expert is engaged or the Court appoints an expert, the Amending Bill will require the parties to endeavour to agree on written instructions to be provided to the expert and to agree and set out the facts and assumptions on which the expert's report is to be based[2].

1 Section 65G
2 Section 65N

If the parties cannot agree, they must seek directions from the Court.

If a single expert is engaged or appointed, a party cannot adduce any other expert evidence unless the Court has granted the party leave to do so. In deciding whether to grant leave, the Court must consider:

+ whether one party does not agree with the evidence or an aspect of the evidence;
+ whether the additional evidence will be disproportionate to the complexity and amount in dispute in the proceedings;
+ whether there is already expert evidence on the issue; or
+ whether the Expert evidence sought to be adduced goes to some other issue not in consideration in previous evidence already obtained and given leave to by the Court.

In other words, the starting point will be that all parties to a proceeding will be bound by the opinion of the joint or Court appointed expert.

Adducing Evidence from Experts

The current Court Rules set out the Court's general powers with respect to directing how expert evidence should be adduced, including giving the Court the power to direct an expert conference or 'hot tubbing' of experts, as it often is referred to[3]. The general discretion given to the Courts by the CPA to take steps to promote the efficient and timely use of Court resources has been used recently by a number of judges to facilitate how expert evidence is adduced, including for instance requiring experts to give their evidence at the same time or after all of the 'lay evidence' has been given.

The Amending Bill expands on the Court's current powers. For example, the Court will have an express power to compel any two or more experts:

+ to give evidence concurrently;
+ to narrow their evidence down to only issues in dispute; and
+ to allow special arrangements be made in respect of cross-examination of expert witnesses including timing and questions that can be asked concurrently to assist the Court in determining and understanding the issues in dispute.

Disclosure of Arrangements

The Amending Bill allows any party to apply to the Court for an order that an expert witness disclose all or specified aspects of the arrangements under which the expert witness was retained.

The Court will be able to make any order for disclosure that the Court considers appropriate.

While there has always been a right of a party to obtain the letter of instruction and any material considered by an expert and relevant to the opinion expressed, this amendment will extend to fee arrangements and may also lead to production of privileged conversations or materials not traditionally obtainable.

The Court will have an express power to require an expert witness to disclose whether the expert's charging or payment of fees is contingent in any respect on the outcome of the proceedings.

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3 The Amending Bill will put into legislation what is already contained in Order 44 Rule 6 of the **Supreme Court (General Civil Procedure) Rules 2005**.

This new disclosure obligation seeks to address a recent trend where 'experts', particularly in personal injury claims, have been retained on a 'no-win no-fee' basis. The proposed amendment is sensible as it is difficult to imagine how an expert can assure the Court of his or her independence or comply with the Code of Conduct for witnesses in circumstances where payment of his or her fees are contingent on the party achieving a successful outcome in the proceedings.

Problems that may arise under the new regime

Where Judges have, in the past, been criticized by Superior Courts for 'entering the arena', the Amending Bill reinforces that there is a growing legislative mandate for Judges to take a greater lead in how proceedings are conducted. Whilst the CPA is not even two year old, we have already seen a dramatic shift in judicial attitude and approach to expert evidence. Many judges have taken the reigns and, armed with the greater discretion provided by the CPA, have embraced change. Compulsory expert conferences, joint reports and conclaves have already become common place – even without the Amending Bill.

This has resulted in greater efficiency, without doubt. However, the risk with the approach proposed by the Amending Bill is that it may promote more activity at the interlocutory level when at the moment the Courts and the parties are basically managing the expert issues well within the context and constraints of the existing regime.

Critically, the leave requirements will place the Court in a position where it will need to consider at the earliest stages, the material issues in a proceeding and to decide on what expert evidence will assist the Court in making a determination. These were matters ordinarily left for the advocates to determine. It is not clear how the Court will manage the additional obligation but expect it will require Parliament to commit further resources and for the Court to consider adopting a "*docket*" system as already happens in the Federal Court and some specialist lists in the Supreme Court of Victoria.

Some provisions are also troubling where the practical effect will be, in certain cases, to remove a party's right to instruct their own expert if the Court considers there are sufficient grounds to do so. This is best evidenced by the provision for the use of a single joint expert (under s65L).

The extent to which the Court may see itself as being assisted by expert evidence, especially at the early stages of the proceedings, may not reasonably balance the disparity of opinion amongst the expert community, nor give appropriate recognition to the different views held by advocates on how a claim should ultimately be proven.

Further, the imposition of Court appointed experts imports a real risk that, in some cases, a Judge may now usurp his or her traditional role as the arbitrator of the facts. In other cases, there is the risk that the process will be flavored by inherent judicial prejudices that may see the character or flow of evidence ultimately favour a particular party's position.

There are also procedural problems foreshadowed with the proposed legislation.

If, as is contemplated by s65N, there is to be a single instruction to an expert, the Amending Bill gives us no guide as to how this process will take place. The parties are expected to agree, but beyond that there is no guidance. Considering for instance what has happened with how Medical Panels are instructed under the **Wrongs Act 1958** or **Accident Compensation Act 1985**, those familiar with the accident compensation and personal injury jurisdictions will know that the referrals themselves can become the subject of lengthy and complex legal argument. This has since become a fertile ground for litigation.

Should the evidence or assumptions each party seeks to rely upon be successfully challenged or defeated at trial, the foundation upon which the joint report has been obtained may be compromised. Rather than promote the aims of the Amending Bill, this is likely to cause delay and expense.

Many of these problems may be capable of being resolved once the amendments are passed and procedures are put in place by the Courts to manage the new regime. However, the question we rise is whether the further change is needed when the current regime appears quite capable of dealing with the "*problems*" the Amending Bill seeks to address.

Conclusions

Case management is an important aspect of litigation and should continue to be encouraged. However, if case management encroaches on a party's right to prepare their case, there is a real risk that justice will be sacrificed by the pursuit of more efficient outcomes.

The Law Institute of Victoria has already raised concerns about the potential effect of the Amending Bill. President Michael Holcroft writes in his blog about the the lack of consideration given to consultations with the legal community, and that the pragmatic aspects of the Amendments have not been fully explored. Mr Holcroft ends his article citing a concern that there is real prospect of injustice to parties. He fears that should the Amending Bill be passed without amendment, some future amendments will be necessary to wind back the Court's reach.

Whilst the Amending Bill remains subject to parliamentary debate, there is also still opportunity for the provisions to be fine tuned and even reigned in. However, the window of opportunity to make comment on the Amending Bill is limited and we encourage anyone who has concerns about these further sweeping changes to raise those concerns loudly and swiftly.

Wotton + Kearney will continue to monitor the progress of the Amending Bill and provide updates.

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