Adhering to expert codes of conduct

By Elizabeth Cheeseman

For practitioners in New South Wales the relevant guidelines are contained in:

- Order 34A of the Federal Court Rules and the Practice Direction of 19 March 2004 entitled *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*; and
- Part 31, Division 2 of the *Uniform Civil Procedure Rules 2005* (NSW) and The Expert Witness Code of Conduct contained in Schedule 7 of the *Uniform Civil Procedure Rules*.

Part 36 rule 13C(2) of the *Supreme Court Rules 1970* (NSW) was the precursor of the code contained in the UCPR. Part 36 rule 13C(2) provided that unless the court otherwise ordered an expert report that does not contain an acknowledgement by the expert that he or she has read the code and agrees to be bound by it, the report shall not be admitted into evidence. The rule is set out below as it is relevant to the discussion of cases that follows:[1]

2. Unless the court otherwise orders:

(a) at or as soon as practicable after the engagement of an expert as a witness, whether to give oral evidence or to provide a report for use as evidence, the person engaging the expert shall provide the expert with a copy of the code;

(b) unless an expert witness's report contains an acknowledgment by the expert witness that he or she has read the code and agrees to be bound by it:

(i) service of the report by the party who engaged the expert witness shall not be valid service for the purposes of the rules or of any order or practice note; and

(ii) the report shall not be admitted into evidence

The following cases illustrate the consequences of failing to comply with an applicable expert code of conduct in a variety of circumstances.

Barak Pty Ltd v WTH Pty Ltd [2002] NSWSC 649

In this case, the report of an expert architect failed to include an acknowledgement in the terms contemplated by Part 36 rule 13C(2), however the evidence demonstrated that notwithstanding the failure to include the express acknowledgement the architect was in fact aware of the code and had complied with the code to the best of his ability. In those circumstances, Barrett J admitted the report into evidence (at [4] - [5]):

> There have thus been unequivocal statements by Mr Byrnes under oath acknowledging that he had read the code in Schedule K and agreed to be bound by it. I am satisfied that that position may be taken to relate back to the time when he prepared the report.
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> In those circumstances, the intent of the rule of ensuring that only reports by experts who have proceeded in accordance with stated norms of conduct should be relied upon can be seen to be satisfied and it is appropriate that the court make an order under the opening words of Pt 36 r13C(2) displacing the operation of para (b), that is, an order that service of the report annexed to Mr Byrnes' affidavit was valid service and that the report is admitted into evidence.

Commonwealth Development Bank of Australia Pty Ltd v Cassegrain [2002] NSWSC 980 (Cassegrain)

Justice Einstein rejected the report of an expert witness in matters of banking in circumstances where the at the time of preparing his report the expert was not aware of the code and as a result his report did not contain the acknowledgement in accordance with the rules. At paragraph [9], Einstein J commented as follows as to the requirements for strict compliance with Pt 36 r13C of the NSW Supreme Court Rules:

> To my mind, considerable significance attaches to enforcing strict compliance in the expert witness provisions now found in Pt36 r13C. Questions of the significance of the opinions of experts have been mooted over a very extended period of time and the Schedule K and Pt 36 r13C(1) Expert Witness Code Of Conduct was promulgated with the clear intent that only reports by experts who have proceeded in accordance with the stated norms of conduct, should be relied upon and may be admitted into evidence. The significance of the code of conduct emerges clearly from the whole of the code as well as from the 'general duty to the court' section of Schedule K as well as from the stipulations as to the form of expert's reports.

The determination of whether an 'otherwise' order should be made is discretionary and Einstein J declined to make such an order, stating at [11] that:

> In my view the problems which confront the opposing party when such an otherwise order is sought, clearly include, importantly, the fact that an expert not having committed to the code of conduct at or as soon as practicable after his or her engagement in circumstances such as the present, will have committed to a particular form of opinion. Whilst the party applying for an otherwise order may submit that there is no difficulty in the putative experts adopting Schedule K in an ex post facto fashion, it seems to me that this is a course which the court should strain against in so far as the proper administration of justice is concerned and in terms of fundamental fairness. For those reasons it seems to me that the application for an 'otherwise order' should be refused.

In *Portal Software International Pty Ltd v Bodsworth* [2005] NSWSC 1228, Brereton J made the following observation in respect of this decision:

> It has not infrequently been accepted that the decision of Einstein J can be distinguished inter alia on the basis that it was a commercial cause in which a higher degree of alertness to strict compliance with procedural requirements may be insisted upon than might be the case, for example, in some of the personal injury cases heard in the Common Law Division.

Langbourne v Sate Rail Authority NSW [2003] NSWSC 537 (Langbourne)

In this case Levine J assumed that Pt 36 r13C of the NSW Supreme Court Rules applied as there was a question as to whether the expert had been retained prior to the commencement of the rule (1 March 2000). Justice Levine relied on the judgment of Einstein J in *Cassegrain*

as providing useful guidance but in the exercise of his discretion allowed the admission into evidence of a non-complying expert report. The factors that predisposed Levine J to admit the report were identified at [13] - [14] as follows:

(a) consent to the tender of the original report in the course of the hearing;

(b) the defendant's concession that no prejudice had been incurred by reason of the apparent failure to comply with the rule;

(c) the expert's evidence on voir dire, that having read the Schedule he would not have changed his approach or opinion;

(d) the expert's evidence in the cause that he was familiar with what Levine J inferred to be a cognate rule of the Supreme Court of South Australia;

The final factor was the question as to whether the expert had been retained prior to the commencement of the relevant rule.

United Rural Enterprises Pty Ltd v Lopmand Pty Ltd & Ors [2003] NSWSC 870

In this case the expert report was that of an accountant prepared to evidence the value of a share in a company in circumstances where one of the remedies under contemplation was the compulsory acquisition of the share in the company. The expert was not supplied with a copy of the code before he embarked on writing his report and was provided with it only shortly before he actually swore his affidavit. Importantly, his affidavit did contain an acknowledgment that he had read and agreed to be bound by the code in the terms required by Part 36 rule 13C(2)(b). The difficulty was that the expert had not been provided with a copy of the code as soon as practicable after being engaged to give expert evidence as required by Part 36 rule 13C(2)(a).

Justice Campbell commented at [9] that:

> The provisions of Part 36 rule 13C were introduced into the court's Rules at the beginning of 2000. They should by now be very well known to the profession. It is only as the result of extraordinary incompetence that the situation has arisen where I am asked to make the decision which I now need to make. Any solicitor practicing in this court ought know that if an expert is to be engaged, that expert must be given a copy of the code of conduct.

Unlike in *Langbourne*, where the expert had some acquaintance with what was described as a cognate rule of the Supreme Court of South Australia, the expert in this case had not, from his previous professional activities, come across the code.

The expert gave evidence, which was not challenged, that he believed that had complied with Schedule K in preparing his opinion and that at all times he understood that his obligations were to the court.

Justice Campbell accepted that because the affidavit did contain an acknowledgement in the terms of Part 36 rule 13C(2)(b) that the mandatory rejection of the expert's evidence under that rule did not arise and it was not necessary to consider whether the court should make an 'otherwise order' under that rule.

The alternative submission upon which Campbell J ruled was whether the expert's evidence should be rejected under section 135 of the Evidence Act (NSW). Ultimately, Campbell J did not reject the evidence because he did not consider there was 'a risk that the fact that Mr Brigden formed his opinions without having Schedule K at the forefront of his mind will result in a real possibility that the court might be misled, or the opposite party unfairly prejudiced, because he might be expressing an opinion to the court which is infected by failure to understand his responsibilities as an expert.'[2] Justice Campbell's conclusion was based on the fact that upon analysis of the expert report in question and the opposing party's expert report, he regarded that the differences between the experts were quite clear, and were of a type which would not be resolved by the court simply saying that it accepted one expert over the other but by an application of legal principle rather than of accounting expertise. That said, Campbell J regarded the policy underlying the existence of Part 36 rule 13C was a matter to be taken into account in considering whether the affidavit should be rejected under section 135:

> That policy recognises that an expert witness can form a view in circumstances where he or she does not realise that his role is one of the kind set out in the code, and once that view has been formed will find it difficult to retreat from it. This can happen as a matter of ordinary human psychology, without any dishonesty on the part of the expert concerned. Therefore, one needs to be very much on guard as to whether there is any real possibility that this sort of process of opinion formation may have influenced the ultimate report which is presented to the court, with the result that the court cannot safely act on it.[3]

Portal Software International Pty Ltd v Bodsworth [2005] NSWSC 1228

In this case, Brereton J considered the application of *Uniform Civil Procedure Rules 2005* (NSW), rule31.23(2).[4] The plaintiff had sought to rely on two expert affidavits that did not contain an acknowledgement with respect to the code and subsequently sought to rely on two later affidavits in substantially the same form save that the later affidavits did contain an acknowledgement with respect to the code. The acknowledgement in the later affidavits extended to include confirmation that in swearing one of the earlier affidavits the expert had acted in accordance with the obligations imposed by the code.

Justice Brereton indicated that he would, if necessary, make an 'otherwise order' to permit the evidence to be led because the expert after being made aware of the code of conduct confirmed that he prepared the earlier affidavit in accordance with the obligations which the code contains. However, because the evidence in issue was in the form of an affidavit, Brereton J considered that it was not necessary to make such an order:

> The rule distinguishes between oral evidence being received from an expert, and the tender of an expert's report. The rule does not deal explicitly with evidence by affidavit. Generally speaking, an

affidavit is regarded as a substitute for oral evidence, rather than as a report. What is sought in this case is to read an affidavit. I would regard this as the adducing of oral evidence within r31.23(2), rather than the tendering of a report under sub-rule (3). That being so, the affidavits which are read (being those of 17 October) do include a statement by which the witness acknowledges in writing that he has read the code of conduct and agrees to be bound by it, and a copy of that has been served, albeit only today, as I understand it, on the defendant. Accordingly, I do not think there has been a failure to comply with r31.23(2).[5]

Expert reports should conform to the principles in the oft cited decision of Crestwell J in *National Justice Companions Naviera SA v Prudential Insurance Co Ltd ('The Ikarian Reefer')* [1993] 2 Lloyd's Rep 68 at 81-82. The following extract is from the decision of Heydon J in *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [79]:

> In *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* ('The Ikarian Reefer') [1993] 2 Lloyd's Rep 68 at 81-82 Cresswell J set out a list of duties and responsibilities of expert witnesses in civil cases as follows:
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> 1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation ...
> 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise... An expert witness in the High Court should never assume the role of an advocate.
> 3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
> 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one ... In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report ...
> 6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.
> 7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports ...
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> While some of these matters have an ethical dimension, taken together they point to the need for the trier of fact to be fully informed of the reasoning process deployed in arriving at the expert's opinions. Cresswell J's list has been influential both in causing rules of court to be devised in this and other jurisdictions to control expert evidence and in later judicial pronouncements. Thus in *Clough v Tameside and Glossop Health Authority* [1998] 2 All ER 971 at 977 Bracewell J said:
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> > It is only by proper and full disclosure to all parties, that an expert's opinion can be tested in court: in order to ascertain whether all appropriate information was supplied and how the expert dealt with it. It is not for one party to keep their cards face down on the table so that the other party does not know the full extent of information supplied.
> >
> > This implies that not only must the appropriate information be supplied, but that the expert must reveal the whole of the manner in which it was dealt with in arriving at the formation of the expert's conclusions.

In the explanatory memorandum accompanying the third version of the Federal Court expert guidelines (issued on 19 March 2004), the Federal Court stated that ways in which an expert giving opinion evidence may avoid criticism of partiality included ensuring that the report, or other statement of evidence:

- is clearly expressed and not argumentative in tone;
- is centrally concerned to express an opinion, upon a clearly defined question or questions, based on the expert's specialised knowledge;
- identifies with precision the factual premises upon which the opinion is based;
- explains the process of reasoning by which the expert reached the opinion expressed in the report;
- if confined to the area or areas of the expert's specialised knowledge; and
- identifies any pre-existing relationship between the author of the report, or his or her firm, company etc and a party to the litigation (e.g. a treating medical practitioner, or a firm's accountant).

1 See also *Uniform Civil Procedure Rules 2005* (NSW), r31.23(2). *Uniform Civil Procedure Rules*, Pt 31 r23 provides relevantly as follows:

(2) Oral evidence may not be received from an expert witness unless:

(a) he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the Code of Conduct and agrees to be bound by it, and

(b) a copy of the acknowledgment has been served on all parties affected by the evidence.

(3) If an expert's report does not contain an acknowledgment by the expert witness who prepared it that he or she has read the code of conduct and agrees to be bound by it:

(a) service of the report by the party who engaged the witness is not valid service, and

(b) the report is not admissible in evidence.

(4) This rule applies unless the court orders otherwise.

2 At [19]

3 At [15]

4 Extracted at n 1 above.

5 At [7]