Dealing with Expert Witnesses

by The Hon. Justice Chesterman, RFD

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seem to me that if a party has not agreed to be bound by the court-appointed expert report and has cross examined that expert with any effect at all, the court would be obliged to give leave to call further expert evidence.

I do not see that, in practice, much will change about calling expert evidence. The reason I say that no radical change is affected is that, since 1876, the Judiciary Act has allowed a court to refer questions involving specialist knowledge to a referee for determination.[16]

The facility has hardly ever been used. It should be recalled that courts themselves have pointed out that a judge (or jury) is not bound to accept the views of an expert, however eminent, even if uncontradicted, because the litigants have invoked the decision of the court and not the "oracular pronouncement by an expert".[17]

To similar effect Turner J said in Blackie v Police:[18]

"I approach the problem with an acute sensibility that there is always danger in allowing an expert witness, or indeed any witness, to answer the very question which the court is called upon to decide. Once this is done and an answer given which is accepted by the court, the chances of success on an appeal on fact are slight indeed."

These considerations are, it seems to me, fundamental to the role of courts in society and the vindication of rights according to law. Litigants go to court for the protection of their rights or just redress for an infringement of them.

When the parties invoke the aid of the courts they should not be relegated to the status of supplicants before an expert who does not have the status, experience, learning or assistance which the judge has at arriving at the right answer.

A serious and wholly unnecessary change to the nature of the judicial process can, if one is not careful, be wrought by excessive or unwise use of procedures allowing experts to determine vital issues in litigation.

Endnotes

1. Eagles v Orth at 319D.
2. Wigmore on Evidence, 3rd ed, vol. 2, para. 665.
3. (1973) 1 Ch 415 at 420 per Megarry J.
4. At 422.
5. Australian and Overseas Telecommunications Corporation Limited v McAuslan 47 FCR 492 at 495.
6. 34 NSWLR 129 at 130-131; see also Grey v Australian Motorists and General Insurance Co Pty Ltd (1976) 1 NSWLR 669 at 675-6 and Glass Expert Evidence (1987) Australian Bar Review 43.
7. Thannhauser v Westpac Banking Corporation (1991) 31 FCR 572.
8. At p.574
9. Davie v Edinburgh Magistrates (1953) SC 34 at 40.
10. Holtman v Sampson (1985) 2 Qd R 472 at 474.
11. Munroe Australia Pty Ltd v Campbell (1965) 65 SASR 16.
12. 103 CLR at 509-10.
13. Hollingsworth v Hopkins (1967) Qld R 168.
14. Munroe Australia Pty Ltd v Campbell (1995) 65 SASR 16 at 27.
15. Minister v Ryan (1963) 9 LGRA 112.
16. Sections 11 and 12.
17. Davie v Edinburgh Magistrates op.cit.
18. (1966) NZLR 910 at 919.

GREEN CLAIMS MEET NEW STANDARDS

A new Standard on environmental-claims labelling is set to provide an international basis for determining the 'fairness' of environmental claims, and free up markets for 'green' goods worldwide.

The new Australian Standard gives comprehensive guidelines about what environmental claims are reasonable and what evidence is required to substantiate these claims.

It provides general guidance on how to formulate claims, specific direction for using twelve common claims, including 'Recycled Content', 'Recyclable', 'Reusable' and 'Refillable', and deals with the correct use of symbols to convey claims.

AS ISO 1402 (Int) - 1998, *Environmental labels and declarations - Self declared environmental claims*, also addresses methodologies that can be used to verify the correctness of a claim.

Standards Australia has just published the document, based on a draft International Standard prepared by an International Organisation for Standardisation (ISO) subcommittee on environmental labelling. Standards Australia holds the secretariat of the ISO subcommittee.

John Henry, Associate Director of Standards Australia's Environment and Consumer Group, said the new Standard addressed a worldwide need for recognized means to assess the validity of environmental claims. Misleading or deceptive claims about the environmental attributes of a product are prohibited under Australian Commonwealth law.

"Because it will be recognized internationally, Australian-made products labelled with claims which comply with the Standard, will be acceptable overseas," Mr Henry said.

Bill Dee, of the Australian Competition and Consumer Commission and Chairman of the International subcommittee responsible for the ISO Standard, said AS ISO 1402I (Int)-1998 drew on guidelines prepared by various governments "in response to spurious green claims".

"The document will be useful for agencies administering fair trading laws to assess whether environmental claims are misleading and are capable of being substantiated." Mr Dee said.

"And because of the detailed nature of the guidance provided in the Standard, and its emphasis on correct and substantiative claims, consumers should be more confident that claims made by companies complying with AS ISO 1402I (Int) -1998 will be truthful."

AS ISO 1402I-1998 has been released as an Interim Standard to give Australian industry and other interested parties a head start, pending the finalization of ISO 1402I at the International level.

The International Standard is expected to be finalized later next year.

In the meantime, copies of AS ISO 1402I -1998 are available from Standards Australia sales offices in all State capitals or over the Internet at www.standards.com.au