McKEAN PARK LAWYERS

MATTERS
JULY 2008

MCKEAN PARK - ONWARD AND UPWARD

Monday 31 March heralded a new milestone for the firm.

After a frenzied weekend of activity, we opened for business as usual in our new offices at Level 11, 575 Bourke Street in the city.

This was only the third move for the firm since 1916.

The impetus for the change was that we had outgrown our previous accommodation, and for the firm to continue to provide our extensive range of legal services to our growing list of clients, we needed more room for growth.

Coupled with this was the realisation by the partners of the need to provide our valuable staff with the accommodation and resources required to make their working day as effective and enjoyable as possible. So the new offices embodied a dedicated Staff Café, new phone system, new network copiers/printers/scanners and a host of other features which were not possible in our old location.

Coinciding with the move was the announcement of the new branding of the firm.

As this newsletter highlights we are now known as McKean Park and have a new modern logo. This change is in keeping with the philosophy of the partners in balancing the great heritage of the firm with the modernisation required in the ever changing legal landscape.

A number of cocktail functions were organised to which over 200 clients were able to see for themselves our new offices.

It would be an understatement to say that without exception all our clients approved of the new offices and branding changes.

If you have not yet seen our new offices feel free to drop in the next time you are in the city.

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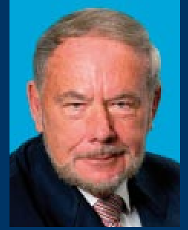
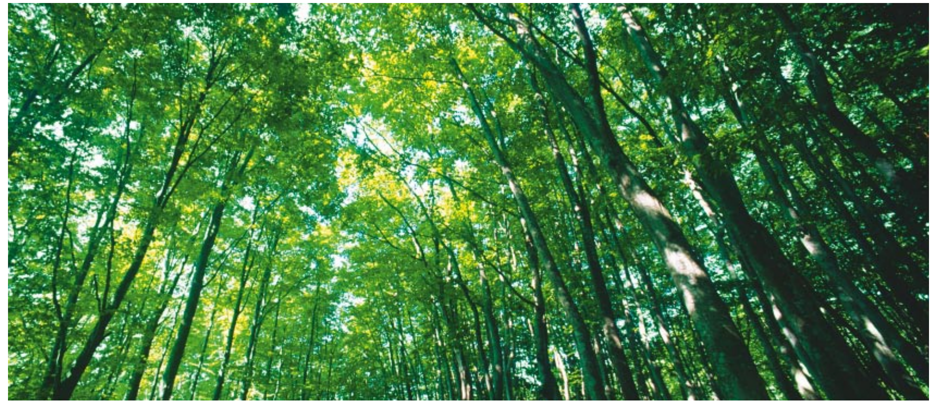
CARBON MARKETS AND LEGAL CERTAINTY

By ROSS BLAIR



Australia is destined to have a carbon market by 2010. Currently discussions concerning such a market are centred around the issuing of Emission Permits which entitle the holder to emit CO2 to the quantity which the permit allows. Discussion will shift shortly to the issue of Carbon Offsets by the capture of CO2 from the atmosphere and its retention, probably for 99 years.



TREE GROWERS CERTIFICATE

The growing of trees is the most obvious, but by no means the only, way of capturing and retaining CO2. Every kilogram of carbon that is retained in a tree and its immediate surrounds represents nearly four kilograms of CO2 removed from the atmosphere. The involvement of many tree growers growing many trees would substantially lessen the stress on the economy which a carbon market is certain to produce and make it easier to show that the net output of emissions has been reduced. To make this happen tree growers, it is suggested, should be rewarded with a certificate recognising the removal and future retention of the CO2 captured by their plantations. That certificate should be capable of being sold in the carbon market. This would add considerable flexibility to the carbon market scheme.

ISSUES OF CERTAINTY

But the use of Carbon Offsets creates its own problems. The certificate, when issued, would most likely represent a tonne of CO2 captured in a particular year by a particular group of trees on a particular piece of land. But who will check if this has actually occurred and over the next 99 years check whether those trees remain in place year after year? Does the buyer of the certificate have to check in each year and make up the deficiency if the trees are removed or destroyed during the 99 year period? Such a requirement would create chaos in the market. Surely, the seller of the certificate must be liable, after all he put the certificates into the market in the first place. The buyer may well have a contract with the seller but sellers in circumstances such as these have been known to simply pass out of existence. Apparently reputable companies seem to suddenly melt down and disappear while the problem remains.

DEVIOUS BEHAVIOUR

Human experience suggests that when articles of value are being traded some, less than wholly ethical, individuals will take advantage of buyers' naivety to cheat them. We have seen this happen with houses, with land, with used cars, with 'bottom of the harbour' and with 'dot.coms'. It is not beyond the bounds of possibility that in the trading of Carbon Offsets the same trees will be sold (while still growing) to two, three or even more different buyers. One of those may raise Carbon Offsets certificates and sell them while another may sell the same trees for milling or wood chipping. There are many such possibilities and many more devious schemes than the simple scenario set out above and says nothing of what schemes of this nature would do to the market itself. The market may be set up as a genuine effort to reduce greenhouse gas emissions but nobody is likely to remember that if it becomes a venue for shonky schemes and crooked dealings.

LAWYERS TO THE RESCUE

All this is likely to occur unless the market is locked into a system which makes trading in Carbon Offsets absolutely certain and reliable – and that is a job for lawyers.

Not only certificate buyers need this certainty and reliability but any future buyers of stands of timber or of rural land. They too could otherwise be dragged unknowingly into a painful financial argument as to who is the owner of what and who becomes liable when something goes wrong.

To explain this further, the owner of a carbon certificate for a particular year depends on the owner of the "right" to get or issue it in respect of specified trees. That "right" owner may depend on the owner of the trees to look after them from year to year and the owner of the trees may rely on the owner of the land permitting him to do this. The owner of the land may also graze cattle or sheep or collect mushrooms or conduct tourists or carry out any number of other rural activities on the same piece of land. The certificates, according to the United Nations, are supposed to represent carbon that is to be locked away for 99 years. During that period it is virtually certain there will be changes of ownership in the land, the trees and the rights and many legal dealings with each of them. This could be by sale or inheritance, it could involve subdivisions so, apart from simple frauds there is considerable opportunity for things to go wrong without any dishonesty being involved.

Without a system that lets the certificate buyer, and the rural land purchasers and anybody else who is going to be involved in the land in question have confidence about the supporting elements that can be quickly and cost effectively checked it is largely dysfunctional. Without legal certainty in this area it can provide a bonanza for professional liability claims.

MCKEAN PARK'S ROLE

Fortunately the fundamental scheme to completely safeguard trading in Carbon Offsets (formerly "carbon credits") already exists. It was suggested by the McKean Park Future Law Team and enacted, in its fundamental form in Victoria, in 2001. The legislation contained in the Forestry Rights Act 1996 provides a solid basis but it needs the refinements that the Future Law Team will shortly present. It is, however, a totally reliable system and capable of being adapted to the laws of most, if not all, other countries.

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CULTURAL HERITAGE MANAGEMENT PLANS
IS IT A CONCERN FOR DEVELOPERS & LENDERS?

The Aboriginal Heritage Act 2006 (Vic) (the Act) came into effect on 28 May 2007 and replaces the Archaeological and Aboriginal Relics Preservation Act 1972 (Vic) and Part IIA of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth).

By DERRICK TOH

One of the major features introduced by the Act is the requirement for a Cultural Heritage Management Plan (CHMP) report to be prepared and approved as part of the development process in certain instances.

CULTURAL HERITAGE MANAGEMENT PLAN (CHMP)

1 What is it?

A CHMP is a written report containing assessments and recommendations for measures to be taken before, during and after a proposed development or activity.

2 When is it required?

The Aboriginal Heritage Regulations 2007 (the Regulations) sets out when a CHMP is required.

In general, a CHMP is required for a proposed development if:

(a) the development requires a high impact activity AND is situated in an area of cultural heritage sensitivity, which has not been subject to significant ground disturbance;

(b) the activity requires an Environmental Effects Statement; or

(c) the Minister for Aboriginal Affairs so directs.

Plans can also be prepared voluntarily.

These requirements are discussed below.

NB: If a CHMP is required, then it must be obtained and approved before a planning permit may be granted. This could lead to major blow-outs in a project if the developer is caught unaware of such requirements.

2. (a) "Cultural heritage sensitivity" areas

The Regulations list the sites which are defined as "areas of cultural heritage sensitivity".

Maps of the affected areas are available on the Aboriginal Affairs Victoria (AAV) website and can be downloaded from the following link:

http://www1.dvc.vic.gov.au/aav/heritage/Maps/index.htm

The Statewide map reveals that the affected areas cover significant parts of the State, albeit to a lesser degree in the Melbourne Metro area. Any development in the affected areas may require a CHMP to be obtained.

NB: Any development of land situated within 50 metres of an affected area is also considered to fall within an Area of Cultural Heritage Sensitivity.

"High impact activity"

This is defined in Part 2 Division 5 of the Regulations.

It generally includes building or construction works associated with certain uses of the land that would result in significant ground disturbance – i.e. the disturbance of:-

(a) the topsoil or surface rock layer of the ground; or

(b) a waterway

by machinery in the course of grading, excavating, digging, dredging or deep ripping, but does not include ploughing other than deep ripping.

These include, for example

- **building and/or construction works for the development of specified uses such as camping and caravan parks, retail premises, warehouses, service centres and industry**
- **construction of specified infrastructure such as roads, railways, airfields and telecommunication towers and lines**
- **developments of three or more dwellings on a lot**
- **subdivision of three or more lots for us as dwellings or subdivision into two or more lots where at least one is for industry**
- **activities which require earth resource authorisations such as mining and exploration; and**
- **production of timber over 40 hectares where a planning permit is required.**

2 (b) Environmental Effects Statement (EES):

An EES is required under the provisions of the Environmental Effects Act 1978 and relates to public works carried out by or on behalf of the Crown or for public statutory bodies but does not include works undertaken by or on behalf of municipal councils.

3 Exemptions

A requirement to obtain a CHMP does not apply if:

- **a cultural heritage sensitive area has been subject to significant ground disturbance in the past – this means any existing or previously developed area would probably be exempt.**
- **building or construction works relate to a use for the land which was already lawfully in use immediately before the Act commenced.**

There are other exemptions from obtaining a CHMP and are listed in Part 2 Division 2 of the Regulations.

These include construction or extension to one or two dwellings, works ancillary to an existing building (such as pools, sheds, water tanks, fences and driveways), minor works, repair and maintenance works, demolition, consolidation of land, development of sea bed and emergencies.

4 Who can prepare it?

The CHMP is prepared by the party proposing the activity, (sponsor).

The sponsor must engage a qualified cultural heritage advisor to assist in the preparation of the CHMP, usually an archaeologist or other heritage specialist, in consultation with Aboriginal community representatives.

5 Who will approve it?

A Registered Aboriginal Party (RAP) or if there is no RAP for the area, the Secretary of the Department of Victorian Communities (DVC).

6 On what grounds can it be rejected?

The grounds on which a CHMP can be rejected is limited to where:

- **the CHMP has not been prepared in accordance with the standards prescribed for the purposes under section 53 of the Act; or**
- **the RAP or the Secretary is not satisfied that the plan adequately addresses the assessment criteria set out in section 61 of the Act, i.e.:**

(a) whether the activity will be conducted in a way that avoids harm to Aboriginal cultural heritage;

(b) if it does not appear to be possible to conduct the activity in a way that avoids harm to Aboriginal cultural heritage, whether the activity will be conducted in a way that minimises harm to Aboriginal cultural heritage;

(c) whether any specific measures required for the management of Aboriginal cultural heritage likely to be affected by the activity, both during and after the activity;

(d) whether any contingency plans required in relation to disputes, delays and other obstacles that may affect the conduct of the activity;

(e) what requirements relating to the custody and management of Aboriginal cultural heritage during the course of the activity will be required.

7 What if the CHMP is rejected?

If a decision is made not to approve a CHMP, grant a permit or if a permit is granted with conditions which are disputed, a sponsor may refer the matter to the Chairperson of the local council for alternative dispute resolution.

If the matter is not resolved, then the sponsor may now appeal to the Victorian Civil and Administrative Tribunal, whereas under the previous regime, there was no such recourse.

CONCLUSION:

The introduction of CHMPs under the Act has the potential to affect:

- **Developers;**
- **Purchasers and Vendors;**
- **Town Planners and engineers**
- **Valuers;**
- **Lenders; and**
- **anyone with an interest or has an advisory capacity in land designated as "Areas of Cultural Heritage Sensitivity"**

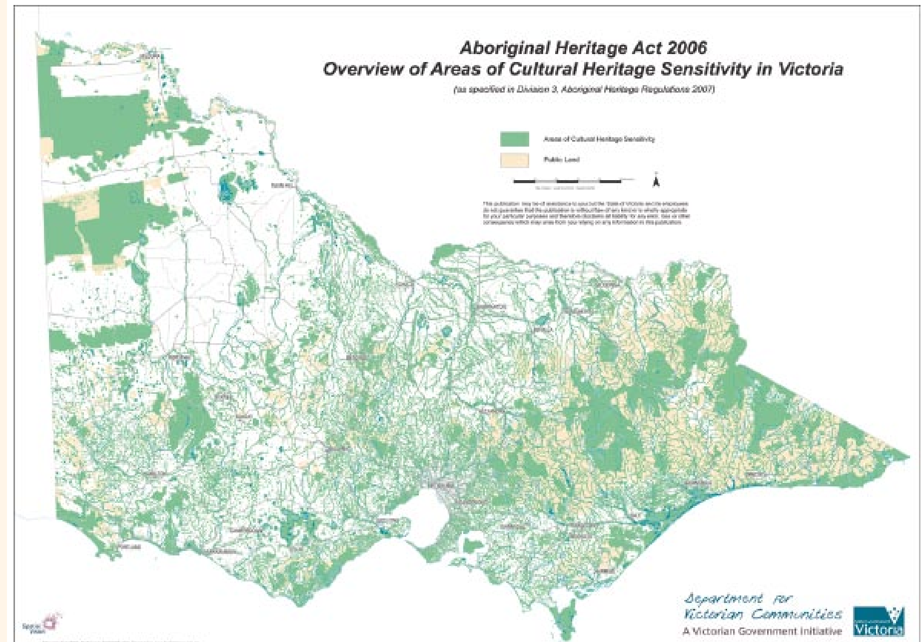
provided that the land has not been subject to previous significant ground disturbance.

Whether or not the CHMP provisions are being adequately enforced is open to question, as discussed below.

As mentioned earlier, maps of the affected areas may be downloaded from the AAV website. Applicants may also obtain advice on the affected areas in the Victorian Heritage Register by submitting a written application to AAV. The application forms may also be downloaded from the AAV website.

AAV relies on the planning departments of each local council to determine whether or not a CHMP is required when considering an application for a planning permit.

Clause 15.11-02 and Clause 43.01-6 (Heritage Overlay) of the State Planning Policy Framework addresses what policies



are in place if a property is identified as an "Aboriginal heritage area". However, most of the areas identified by AAV as cultural heritage sensitive areas are not identified on the Planning Scheme maps as "Aboriginal heritage areas".

Some local councils, like the Mornington Peninsula Shire Council, have an Aboriginal Cultural Heritage clause in their Planning Scheme which affects all land in the district. This is not surprising as almost the entire Mornington Peninsula is identified by AAV as a cultural heritage sensitive area.

However, a look at the Mornington Peninsula Heritage Overlay Schedule only identifies two relatively small areas identified as Aboriginal heritage areas, which are subject to the Act.

It may be that a large proportion of areas identified by AAV as a cultural heritage sensitive area have already been developed and therefore would be exempt from the CHMP requirements, as significant ground disturbance has occurred in the past. Nevertheless, the Heritage Overlay Schedules published by local councils are inconsistent with the affected areas identified by AAV.

Clearly there is some discrepancy between the practice of local councils and the provisions of the Act, which creates uncertainty in the planning process and contradicts one of the main intentions of why the Act was enacted in the first place.

Despite this, there is still a clear legislative requirement for a CHMP to be prepared in certain cases and stakeholders could become unwittingly affected by it. The DVC is committed to reviewing the operations of the regulations on an annual basis and this may be a key issue for stakeholders in the future.

A conservative approach in tackling this issue would be to consider taking the following measures:

- **Obtain a certificate of advice from AAV to determine whether or not any land is affected by the Act, especially where**
  - **developers and purchasers are looking at potential future development of land and**
  - **lenders are looking at taking security over the property.**
- **Consult AAV before undertaking the planning process.**
- **Town Planners and surveyors could also obtain a certificate from AAV to determine whether or not any land is affected by the Act. Most applications submitted to the local council for a planning permit require an accompanying report on the potential impact of the development from environmental and archaeological aspects.**
- **Vendors could insert a clause in a Contract of Sale which states that the purchaser is responsible for carrying out his/her own searches and that no representation is provided as to whether or not the provisions of the Act will apply to the land;**
- **Valuers could insert a general clause in their Reports which state the report is based on an assumption that the Act will not affect the property and contain recommendations for those relying on the report to consult a town planner or a cultural heritage advisor. The insertion of such a clause may still not excuse the obligations of a valuer to make all reasonable enquiries.**

Please do not hesitate to contact the writer if you have any queries relating to this article.

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INJURED WORKERS AND TERMINATION

Francis Tham and Coles Group Supply Chain Pty Ltd [2008] AIRC 110 *By* SAMANTHA GIDLEY

Employers and Employees should take note of this recent decision by the Australian Industrial Relations Commission pertaining to termination of an Employee who had been injured in the workplace.

The Employee Francis Tham was employed by the Employer, Coles as a Store person from 13 June 2000 until 5th September 2007. He was then terminated by the Employer on the basis that he was unable to fulfil the requirements of his position. He argued that he was able to do so. This disagreement formed the basis of the Employee's claim pursuant to Section 643 of the Workplace Relations Act.

Background:

On March 7 2005, the Employee suffered an injury to his back during the course of his employment. As a result of the injury he was absent from work for a two week period from 23 March 2005. He was then placed on restricted duties between April 2005 and 4 July 2005. Thereafter he returned to work on modified duties.

A new Enterprise Bargaining Agreement was negotiated during November 2005 wherein the Employee's duties were varied to those he held under the previous agreement. These changes had been accepted by the Employee.

After the 52 weeks of modified duties (as required under the Accident Compensation Act 1985) had passed, the Employee was sent home pending further medical examinations. He was paid 70% of his pre-injury wage during this time. These examinations were undertaken and the medical opinion was that the Employee had the capacity to work full time, subject to certain restrictions.

On 30th May 2007, the Employer Representatives met with the Employee. They informed him that due to the medical evidence provided, they believed that he was unable to perform the inherent requirements of the position. He was provided with the opportunity to respond and to provide medical evidence to the contrary. He indicated that he wished to be redeployed to another position. The Employer investigated these possibilities and then informed him that there were no other suitable positions available.

The Employee was terminated with effect from 5 September 2007. The Employee made an application to the Industrial Relations Commission pursuant to Section 643 of the Workplace Relations Act. He submitted that his dismissal was harsh, unjust or unreasonable.

The main arguments by the Employer were that all medical evidence concluded that the Employee had a permanent inability to carry out the range of physically challenging duties. In addition to this, the Workplace Relations Act does not require an Employer to provide an injured employee with modified duties on an ongoing basis.

The Employee argued that there was no valid reason for termination because he could undertake a range of tasks albeit not all of them. This did not prevent him from performing the inherent requirements of the position. He also argued that not all of the Employees were required to undertake a variety of tasks within their roles. Finally he argued that the Employer had discriminated against him by having a requirement that he be able to perform manual handling without restriction.

The Decision:

In making the decision as to whether the termination was harsh, unjust or unreasonable, Senior Deputy President Lacy considered the following factors:

- **The Employee was notified of the reason for termination by the Employer.**
- **The Employee was provided with an opportunity to respond to that reason.**
- **The Employee did not have the capacity to perform the inherent requirements of the position and this was supported by the medical evidence.**

Therefore, he was of the view that there was a valid reason for the termination. The termination was not harsh, unjust or unreasonable. The Employee's Application for relief should be dismissed.

Conclusion:

The decision involves a number of complexities and should not be regarded as a precedent for an Employer to automatically terminate an Employee who has a disability or who is unwell. The case does emphasise however, the importance of following proper protocols when making a decision to terminate an employee. Such protocols may be found in the relevant Acts of Parliament. Further advice may be provided in this regard, upon request.

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ADEMPTION OF SPECIFIC GIFTS IN WILLS

A specific gift in a Will fails by ademption if the subject of the gift, either real property or personal property, has ceased to be beneficially owned by the testator ("T") at the date of death. Accordingly the named beneficiary ("B") will take nothing. *By* GEOFF PARK

An example of ademption of a specific gift would be where T had made a specific gift in her Will of the beach house at Rosebud to B, but prior to the date of her death she had personally sold the beach house and received all of the purchase price. As a Will is said to "speak from the date of death" then the subject matter of that gift was no longer in existence and the gift failed. Even if the proceeds of the sale of the property had been put into a bank account named, for example "T – Rosebud Proceeds Account" this would not save the gift for B. Again if a provision in T's Will said "I give my 500 BHP shares to B" but after the date of the Will and during her lifetime she subsequently sold the 500 BHP shares and purchased 1,000 XY Ltd shares then the gift is adeemed and B does not take the XY Ltd shares.

There are several exceptions to ademption.

First where B, using an Enduring Power of Attorney (Financial) granted to her by T, sells a particular asset where T had lost her capacity, then the specific gift in the Will of that particular asset to B would not be adeemed. There have been several cases in various states in Australia including Victoria in recent years which support this exception to the ademption rule and the reasoning of the court is that as T had lost her capacity then, in relation to the specific gift, the Will speaks from the date of the Will and not from the date of death. The sale was without the knowledge of T and if T had the required capacity then T may not have sold that property at all or if she had would probably have made some adjustment to the gifts in her Will.

Furthermore, on the Australian court authorities, it would not seem to matter whether B (acting as attorney under power) was ignorant of the specific gift in her favour in the Will – the exemption to the ademption rule would still apply.

Clients facing this situation should seek

Continued on the back page…

advice as this exemption may change in the future. There are English court decisions which reach the opposite conclusion and there are at least 2 distinguished authors in Australia who cast doubts on whether the Australian decisions are good law.

Second, there is an exception to the ademption rule where an administrator appointed under the Guardianship and Administration Act (Victoria) sells or disposes of property which is the subject of a specific devise in a Will – section 5.3(1). The administrator is required to keep a separate account and record of the money so that, for example, if bonds were sold and shares or real property purchased then such substituted assets are deemed to be the subject matter of the specific gift in the Will.

Third, where property of a person whose estate is being administered under the Guardianship and Administration Act (Victoria) is compulsorily acquired – section 5.3(2). The section deems money to arise from the compulsory sale to be proceeds to which section 5.3(1) applies.

The first exception above will create problems for clients in some instances. If B, as attorney under power, knows of the existence of the specific gift of the asset in the Will of T, does B have a conflict of interest in selling another asset to provide funds for special accommodation fees? If there is no alternative asset to sell to raise the funds for the special accommodation fee what should the administrator do? Guidance can be sought from the Victorian Civil and Administrative Tribunal.

Please contact either Geoff Park or Elisabeth Benfell of this office, both of whom are Specialists Accredited by the Law Institute of Victoria in the area of Wills and Estates, for discussion of the above matters or any other matters relating to Wills, powers of attorney or deceased estates.

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EXPERT WITNESSES IN FAMILY LAW

Expert witnesses are regularly used in all aspect of Family Law. In financial matters property valuers, accountants/business valuers, motor vehicle valuers, chattel valuers and superannuation experts are used to determine the value of different assets of the marriage. In children's matters psychologists, psychiatrists, doctors and counsellors are regularly used to give their opinion in relation to matters such as the best interests of the children or in relation to the parties to the marriage.

By JIM MELLAS

Under the Family Law Rules an expert is defined as an independent person who has relevant specialised knowledge based on the person's training, study or experience.

In 2004 there were significant changes made to the Family Law Rules. One of those changes to the Rules provided that in almost all cases where expert evidence is required, it is to be provided to the Court by a single expert witness.

The single expert rules provides that expert evidence is to be provided to the Court by a single expert witness who is appointed by an agreement between the parties or by the Court to give evidence or prepare a report in relation to a particular issue. Prior to the introduction of the single expert rules, each party to proceedings in the Family Court would obtain a report from their own expert. If the valuations of the two experts differed, then there was a need for a conference of experts and if agreement was not reached, the experts would give evidence and the Court would decide which one to accept.

The purpose of the single expert rule is to restrict expert evidence to that which is necessary to resolve or determine a case and to avoid unnecessary costs. In most cases the single expert rule works extremely well and leads to the effective and efficient determination of an issue in dispute between the parties. In practice the lawyers acting for the respective parties in the Family Court proceedings will first attempt to reach agreement in relation to the appointment of a single expert. If they cannot reach agreement then the Court can order that expert evidence be given by a single expert.

The expert witness in Family Court proceedings is an "independent person". The expert's duty to the Court is to act as a truly independent person and to help the Court with matters that are within the expert witnesses' knowledge and capability. The rules emphasise that an expert witness has a duty to the Court. The expert's duty to the Court prevails over the obligation of the expert witness to the person instructing or paying the fees or the expenses of the expert witness.

The rules set out how instructions should be given to an expert witness. Normally both parties to the proceedings should jointly send written instructions to the expert providing a request for a written report. The letter should set out that the report may be used in a Court case, the issues on which the opinion is sought, a description of any matter to be investigated or any experiment to be undertaken or the issues to be reported and full and frank disclosure, information and documents that will help the expert witness to perform the expert witnesses' function. In most cases the parties will be jointly equally liable to pay the single expert's reasonable fees and expenses incurred in preparing the report. There will normally be some negotiation between the lawyers for the parties to work out what is to go into the joint letter of instruction.

The parties to the matter and their lawyers are also restricted in the way they deal with the single expert. Neither the parties nor their lawyers should approach or contact the single expert directly. If one of the parties wants to ask a single expert questions about their report, then it must be in writing and be put once only within twenty one days after the party receives a copy of the report, be only for the purposes of clarifying the expert's report and not be vexatious or oppressive. Any questions in writing to the single expert must be given to each party in the proceedings.

In most cases the single expert rules work quite well and lead to effective and efficient determination of issues in dispute between the parties. However this will not always be the case. The problems with single experts can arise particularly in situations where the expert is valuing a large business or where there are a range of complex issues involved in a valuation. In such matters it may be prudent to advise the party to appoint a "shadow expert" to examine the methodology employed by the single expert in preparing their report to ensure that the approach taken and the report produced by the single expert is appropriate and reliable. In order to use another expert in such a way however the party will require the Court's permission and the rules provide for circumstances where that can happen.

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