

11 February 2005

Peter Hennessy
Executive Director
New South Wales Law Reform Commission
GPO Box 5199
Sydney NSW 2001

Dear Mr Hennessy

IP 25 Expert witnesses

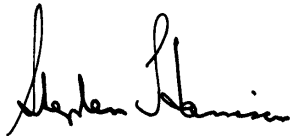
We are writing in response to your letter dated 13 October 2004 addressed to Ms Rachel Grimes of the Institute of Chartered Accountants in Australia ("ICAA"). That letter sought the preliminary comments of the ICAA on the issues raised in the New South Wales Law Reform Commission's ("the Commission's") terms of reference to review the operation and effectiveness of the rules and procedures governing expert witnesses in New South Wales.

Since receiving your letter, the Commission has released its Issues Paper: *IP 25 Expert witnesses*. IP 25 invites submissions relevant to the Commission's review, including but not limited to the issues raised in IP 25. In the attachment to this letter, we set out the ICAA's comments on the issues raised in IP 25. These comments draw on the experience of ICAA members engaged in the preparation of expert reports and the provision of expert evidence. Many of these members are members of the ICAA's Forensic Accounting Special Interest Group ("FASIG").

Because the issues raised in IP 25 and discussed in the attachment to this letter are both numerous and complex, reducing the views of the ICAA to writing has proved to be a significant challenge. In our view there may be merit in establishing a dialogue between the representatives of the Commission and the FASIG to more fully explore these issues and our experiences. Please contact Andrew Ross on (02) 8295 6027 if you wish to do so.

Thankyou for seeking the views of the ICAA on these important issues. Please do not hesitate to contact us if you have any questions on the attached submission.

Yours sincerely



STEPHEN HARRISON AO
Chief Executive Officer
The Institute of Chartered Accountants in Australia

Submission of the Forensic Accounting Special Interest Group of the Institute of Chartered Accountants in Australia

The request for submissions

1. The New South Wales Law Reform Commission (“the Commission”) has invited submissions to be made in relation to the issues raised in its Issues Paper: *IP 25 Expert witnesses*. This document sets out the views of the members of the Forensic Accounting Special Interest Group (“FASIG”) of the Institute of Chartered Accountants in Australia (“ICAA”).

The FASIG

2. Before providing our comments on the issues raised in IP 25, it would be appropriate to explain something of the FASIG.
3. The profession of accountancy is rapidly changing and specialisation is becoming more of a feature. In response to the need to maintain a generalist qualification yet accommodate greater specialisation, the ICAA adopted a model that provided for the creation of Special Interest Groups of members practising in sub-disciplines. The FASIG was the first Special Interest Group to be recognised by the Institute and is represented in most states and nationally.
4. The FASIG is devoted to the application of accounting knowledge and skills to issues arising in the context of civil and criminal litigation and investigations. The litigation or dispute resolution proceedings in which the FASIG members’ skills and experience are applied can be in any number of areas, such as valuation, damages, personal injury, building and construction, insolvency, fraud investigation, insurance, trade practices, family law or professional negligence.
5. The broad aims of the FASIG are to assist Chartered Accountants to maintain high professional standards when acting as forensic accountants, and to promote a better understanding of the value of forensic accounting services to those groups, such as lawyers and the judiciary, who use or rely upon the work of expert accountants. In doing so, the FASIG brings together Chartered Accountants with an interest in forensic accounting, many of whom have prepared expert reports and testified as expert witnesses.
6. Since it was formed in 1999, the FASIG has focussed its attention on the development of professional standards and the provision of education and training to its members. To this end, the ICAA, in collaboration with CPA Australia, issued APS 11 - Statement of Forensic Accounting Standards in July 2002. APS 11 sets out basic principles governing the professional responsibilities which a member must exercise in the course of providing forensic accounting services. The Standards set out in APS 11 are mandatory for all ICAA members and members who breach them may be subject to disciplinary proceedings.
7. In addition, in July 2002 the ICAA and CPA Australia also issued Joint Guidance Note GN 2 – Forensic Accounting. The purpose of GN 2 is to provide a practical guide for members who act as independent accounting experts. Being by its nature a practical guide, its provisions are not mandatory.
8. Included with this submission are copies of APS 11 and GN 2.

9. The FASIG has also focussed its attention on the provision of training and education to its members. This occurs in the context of regular meetings of members at a state-wide level, along with National Conferences. In addition, numerous commercial forensic accounting training providers have arisen since the formation of the FASIG, providing members with an opportunity to undertake formal training.
10. Finally, the FASIG has also taken significant steps to commence a dialogue with the key users of forensic accounting services. In August 2002, a group of NSW FASIG members met with three judges of the Supreme Court of New South Wales to discuss expert evidence. In November 2002 similar discussions occurred with representatives of the NSW District Court. In November 2004, the FASIG co-sponsored the inaugural Forum on Expert Evidence, which was attended by representatives of the judiciary, the legal profession and a number of expert groups. The FASIG's view is that, by engaging in dialogue of this nature, many of the issues which are identified in IP 25 can be discussed and appropriate solutions developed.
11. We now turn to providing our preliminary comments in relation to IP 25. In doing so, we adopt the same numbering used in IP 25.

General comments

12. Much has been written about expert witnesses. Generally, the commentary has tended not to distinguish between types of experts and types of cases. For example, Lord Woolf explained in his final report (at paragraph 4) that he had concentrated on medical negligence, housing (mainly residential tenancy disputes) and multi-party litigation (eg action by a group of unrelated consumer plaintiffs) because he believed that it was in these areas that the UK legal system was failing to meet the needs of litigants.
13. The extent to which conclusions drawn from these areas can be applied elsewhere is questionable. In reality, expert witnesses are drawn from many professions reflecting the wide diversity of issues coming before the courts (see for example, the list of contributors to Freckelton & Selby's "Expert Evidence"). Further, the types of cases in which expert witnesses are called range across most areas of law and vary considerably in size and complexity.
14. Generally, forensic accountants are involved in expressing opinions on accounting, valuation and taxation issues related to the quantum of damages in cases involving commercial issues. Less often they give opinions relating to liability such as, for example, opinions concerning the duties of auditors.
15. The experience of our members is that most of the cases in which they are instructed settle before being heard in court. Often settlement is facilitated through the provision of opinions on relevant issues by forensic accountants. It is our view, therefore, that in any consideration of the existing rules and practice in relation to expert witnesses, care should be applied to ensure that the role presently played by experts in resolving disputes before they reach the court room is not unduly restricted. To do otherwise would be to increase the likelihood that disputes will proceed to trial, thereby resulting in further costs being incurred by both the parties to a dispute and the Courts.

CHAPTER 2

ISSUE 2.1 The extent of partisanship or bias on the part of expert witnesses, and the value of the measures considered in Chapter 2 in reducing such a problem.

16. In addressing concerns about the extent of partisanship or bias on the part of expert witnesses, it is first appropriate to repeat that, in the experience of our members, the great majority of disputes are resolved prior to trial. This is significant not only for what it says about the role of experts in the dispute process – that they can be useful in bringing about a speedy resolution of a dispute – but also for what it says about the matters that are not resolved prior to trial.
17. By definition, matters which remain unresolved and proceed to trial are matters which are controversial. In these matters, different views are often held by the parties on significant legal and factual matters. In a similar way, in such matters the experts retained by each party may hold different views on matters within their expertise.
18. The FASIG is in general agreement with the comments in paragraph 2.4 of IP 25.
19. That experts hold different views on a matter of significance in a dispute does not necessarily reflect partisanship or bias on the part of the expert. By way of analogy, our judicial system frequently throws up differing views, sometimes from among members of the one bench hearing a matter. In those circumstances, we do not conclude that the contrary views must reflect partisanship or bias on the part of one or all of the members of the bench.
20. Rather, in our experience, the existence of different and contrary views among experts frequently reflects the **complexity** of the matters upon which they are asked to opine. Complex questions can often be addressed from a number of different perspectives, each perspective offering a different solution. Where this occurs, it would be wrong to conclude that one or both experts are biased.
21. The existence of complexity in relation to matters in which experts may offer an opinion creates a particular challenge for those non-experts called upon to assess the evidence of the experts. How can a person who, by definition, does not have personal knowledge of the matter upon which expert evidence is called, identify the cause of a difference in views between two or more experts? To conclude that such a difference is caused by bias or partisanship would be to rule out what in our opinion is the more likely answer: genuine differences in opinion held by reasonable unbiased experts and brought about by the complexity of the matter under consideration.
22. Less commonly, but relevant in some cases, differences in experts' views may arise because two or more schools of thought exist within the expert's discipline on the matter in question. Where this occurs, it is rarely bias that causes an expert to prefer one school of thought to the other. As paragraph 2.4 in IP 25 recognises, it is not surprising in these circumstances that parties retain experts whose views happen to coincide with their case. To do otherwise would be surprising. And yet, in these

circumstances, it would be inappropriate to conclude that either or both expert was biased or partisan¹.

23. Finally, perceptions of bias may be rooted in the differing facts experts are asked to assume when forming their opinions. In some cases, two experts given the same facts can reach an agreed position.
24. It is the FASIG's view that the recent discussion of perceived bias and partisanship among expert witnesses may have overlooked these important issues. We urge consideration of these issues to avoid the implementation of measures designed to address a problem which, to a great extent, may not exist.
25. The FASIG agrees with the conclusion in paragraph 2.5 of IP 25 that the measures discussed in that chapter will not reduce the number of occasions upon which two or more experts, each with genuinely held views, will differ. However, we hope that the ventilation of these issues will assist in the wider recognition that a coincidence of the opinions of an expert retained by a party with the position of that party does not necessarily suggest bias or partisanship, even where the opposing party's expert holds a different view consistent with the position of the party by which that expert is retained.
26. Similarly, the FASIG agrees that some of the measures discussed in that chapter may mitigate against any bias that may exist. In particular, we applaud the use by the Courts of formal Codes of Conduct, accompanied by explanatory memoranda that discuss the practical application of the Codes in particular jurisdictions.

ISSUE 2.2 The contents and effectiveness of codes of conduct for expert witnesses, and other ways in which to convey guidelines and principles to expert witnesses, litigants, and lawyers.

27. The Courts in Australia have issued a large number and wide variety of codes of conduct and other formal statements relating to the role and duties of expert witnesses. The FASIG views the issue of these documents positively. They provide a convenient mechanism to communicate the Courts' views on the conduct of experts to both experts and those who retain and instruct them.
28. Beyond the codes of conduct issued by the Courts in Australia, the accounting profession has been proactive in establishing its own code of conduct for those of its members that engage in forensic accounting.

APS 11 – Statement of Forensic Accounting Standards

29. The ICAA, in collaboration with CPA Australia, issued APS 11 - Statement of Forensic Accounting Standards in July 2002. APS 11 sets out basic principles

¹ That bona fide and reasonable experts may disagree on matters within their expertise has received judicial recognition. See, for example, the comments of McHugh ACJ, Gummow, Callinan and Heydon JJ in *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48, at paragraph 68, and Kirby J in "Expert Evidence: Causation, Proof and Presentation", a paper on which was based a lecture to the Inaugural Conference of the International Institute of Forensic Studies, Prato, Italy, 3 July 2002 (located on the High Court website).

governing the professional responsibilities which a member must exercise in the course of providing forensic accounting services.

30. APS 11 deals with the following issues:

- the independence requirements placed on the forensic accountant;
- the degree of skill and competence and professional care to be applied by the forensic accountant;
- the use by the forensic accountant of confidential information obtained during an engagement;
- a requirement that a member not be associated with a report or opinion if the member is aware that the report or opinion is based on or contains incorrect or misleading information, or omits material information;
- the nature of training and supervision of staff used on a forensic accounting engagement;
- the documentation of forensic accounting assignments;
- the appropriate use and description of estimates or assumptions in a forensic accounting engagement;
- a requirement that members adhere to the duties and performance requirements of the relevant court-established codes of conduct; and
- a prohibition of “no win, no fee” and “contingent fee” arrangements for forensic accounting engagements.

31. The Standards set out in APS 11 are mandatory and members who breach them may be subject to disciplinary proceedings. The ICAA treats seriously all complaints it receives in relation to alleged breaches of APS 11 and encourages members of the judiciary, the legal profession and the general public to bring to its attention any concerns about the compliance of its members with this Standard.

GN 2 – Forensic Accounting

32. In addition, in July 2002 the ICAA and CPA Australia also issued Joint Guidance Note GN 2 – Forensic Accounting. The purpose of GN 2 is to provide a practical guide for members who act as independent accounting experts.

33. Being by its nature a practical guide, its provisions are not mandatory. However, GN 2 contains guidelines in relation to:

- the distinction between an “independent accounting expert” and a “consulting accounting expert”²;
- the roles and duties of forensic accountants acting in each capacity;
- the expertise and independence of the forensic accountant, the terms of his or her engagement and the basis upon which fees may be charged for a forensic accounting engagement;

² This distinction is also recognised in Footnote 1 to the Explanatory Memorandum of the Practice Direction: Guidelines for Expert Witnesses in proceedings in the Federal Court of Australia.

- communications and meetings of forensic accountants;
 - documents and assumptions relied upon in the course of a forensic accounting engagement;
 - the form and content of a forensic accountant's report; and
 - the form and content of joint conferences of experts.
34. The FASIG also supports the issuing of Explanatory Memoranda, such as that which accompanies the Federal Court of Australia's Guidelines for Expert Witnesses. Documents of this nature provide good and useful explanations of the context in which the relevant Guidelines are to be interpreted and applied, providing experts and lawyers with important practical guidance.
35. In particular, the FASIG applauds the Federal Court's recognition, in its Explanatory Memorandum, that an expert does not compromise objectivity by defending, forcefully if necessary, an opinion based on the expert's specialised knowledge which is genuinely held. As already discussed, we believe that reasonable experts can and do differ in their views without exhibiting bias or partisanship.
36. Some members of the FASIG have expressed a concern that there is little uniformity in the Courts' formal statements relating to the role and duties of expert witnesses, with different jurisdictions adopting differing standards and practices. In our view, achieving a greater degree of uniformity would be likely to assist in the process of educating experts, and the lawyers that instruct experts, on their various roles and duties.
37. To that end, the FASIG recommends the development of one "Code of Conduct" for all Australian Courts, akin to APS 11. Such a "Code of Conduct" could be supplemented by a variety of "Guidance Notes", akin to GN 2, containing practical advice for experts and lawyers tailored to the specific jurisdiction in which a dispute is to be heard.
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ISSUE 2.3 The existence and operation of any accreditation schemes in NSW or other jurisdictions relating to the role of expert witnesses and their effectiveness and desirability.

38. This term of reference appears to presume that accreditation of expert witnesses for the purposes of litigation would be desirable because there is some problem with the current system – albeit a problem that is not identified in the terms of reference – which a mechanism of accreditation would fix. In our view, a considered approach would require the perceived problem to be clearly identified so that potential alternative solutions could be developed and assessed.

Accreditation as Accountants by ICAA

39. Forensic accountants who are members of ICAA are accredited as accountants by the ICAA.
40. The ICAA's system of accreditation for Chartered Accountants consists of requirements relating to education, practical experience and training, and professional standards and ethics.
41. To become a Chartered Accountant a person must satisfy certain criteria including:
- completion of a relevant Australian tertiary degree covering certain specified technical areas;
 - completion of the post-graduate CA Program, which consists of studies and examinations undertaken part-time while in employment and over a minimum of two years;
 - completion of three years of relevant, practical, professional experience under the mentoring of a Chartered Accountant in public practice or in an approved organisation; and
 - provision of references from Chartered Accountants.
42. As a Chartered Accountant a person:
- is bound by the professional standards, ethics and other pronouncements of the ICAA;
 - is bound by the disciplinary processes of the ICAA; and
 - is obliged to undertake at least 120 hours of continuing professional education every 3 years.
43. Further, a Chartered Accountant who wishes to conduct public practice must hold a current Certificate of Public Practice from the ICAA which is subject to certain requirements including requirements relating to length of relevant professional experience, professional indemnity insurance and quality control systems.
44. As already discussed above, forensic accountants who are Chartered Accountants are bound by the ICAA's professional standards, ethics and pronouncements, including APS 11 and GN 2.
45. Finally, in most courts accountants appearing as expert witnesses are now bound by codes of conduct under the rules of the relevant courts (eg the Federal Court's "Guidelines for Expert Witnesses", the Supreme Court of New South Wales Schedule K etc).

Other Relevant Accreditation Schemes for Accountants

46. Many accountants in public practice are also subject to statutory accreditation schemes in respect of their specialist areas of practice. These schemes typically require applicants to have relevant educational qualifications, minimum periods of relevant, supervised experience, and subject the registrants to disciplinary processes. The main schemes are as follows:
- a) Auditors are required to be registered under a statutory scheme administered by the Australian Securities and Investments Commission, and are subject to the disciplinary powers of the Companies Auditors and Liquidators Board to cancel or suspend registration.
 - b) Tax Agents are required to be registered under a statutory scheme administered by the Tax Agents' Board in each state, and are subject to the disciplinary powers of those Boards to cancel, suspend or terminate registration.
 - c) Liquidators and Official Liquidators are required to be registered under a statutory scheme administered by the Australian Securities and Investments Commission, and are subject to the disciplinary powers of the Companies Auditors and Liquidators Board to cancel or suspend registration.
 - d) Financial Advisers and others providing advice on "financial products" are required to hold an Australian Financial Services Licence which is administered by the Australian Securities and Investments Commission, and is subject to the administrative powers of the Commission which includes the ability to cancel or suspend or amend the licence.
47. Furthermore, the ICAA has recently created the Business Valuation Special Interest Group ("BVSIG") for Chartered Accountants who perform valuations of shares, businesses and intangible assets. Most of these valuations are commissioned for the purposes of taxation, stamp duty, financial reporting, mergers and acquisitions, and some for litigation. The BVSIG is presently considering creating an educational credential or a professional accreditation for Chartered Accountants who specialise in business valuations.

Comments on Specific Paragraphs

Paragraph 2.9:

48. It is the experience of our members that most parties seeking to engage a forensic accountant are very concerned to ensure that the accountant they select will be credible in the eyes of the Court. Consequently when considering a potential accountant, parties and their lawyers pay particular attention to the accountant's professional qualifications, experience, education and independence and to the accountant's experience as an expert witness.

Paragraph 2.10:

49. Using the example of forensic accountants, the issue here seems to be whether the terms of reference refer to accreditation of a forensic accountant for his or her *forensic* skills or accreditation for his or her *accounting* skills.
50. If the former – and that is what we understand to be the Commission's position - then the question is what are the forensic skills to be accredited? Forensic skills for an accountant would include:

- Knowledge of the relevant aspects of the law of evidence and the relevant guidelines of the various courts. (We note that, in many cases, the existing guidelines place a positive obligation on an instructing solicitor to provide a copy of the relevant guidelines to any expert they retain.)
- Knowledge of the relevant legal principles applying to the issue upon which the forensic expert has been asked to opine (e.g. the law relating to remedies for breach of contract, tort or the Trade Practices Act).
- Practical skills in preparing written reports and in giving expert testimony in evidence in chief and under cross examination.

51. In the main these are skills that can be taught. Indeed, the ICAA has formally endorsed a Graduate Certificate in Forensic Studies (Accounting), which is offered by Monash University under the direction of Professor The Hon. George Hampel QC (a former judge of the Supreme Court of Victoria) and which is designed to teach these skills. Recently other universities have begun to offer courses of a similar nature. We understand that some of these institutions are contemplating broadening the scope of their study programmes to include experts from other disciplines.
52. Alternatively the reference could be to accreditation of *accounting* or technical skills. In this regard we have two comments.
53. First, forensic accountants who are Chartered Accountants are already accredited as accountants (and in some cases as specialist auditors, tax agents, liquidators and financial advisers).
54. Second, it is not possible from a practical perspective for an accreditation scheme to satisfactorily accredit experts for litigation purposes across the vast range of professional fields from which experts are drawn. The professional fields within which Chartered Accountants practice are diverse and constantly changing, which reflects the diversity and complexity of modern business. How could an accreditation scheme be designed that could accredit at the same time – and in such a way that it would satisfy the needs of the Courts - the technical skills of, for example, a suburban accountant offering tax and general financial advice to small businesses, or an accountant offering financial planning services to doctors, or an accountant specializing in the international taxation of insurance companies, or an accountant specializing in the valuation of shares and businesses, or an accountant specializing in the audit of banks and financial institutions. This problem is of course even greater when one considers the different professions and their technical specializations (eg medicine). We contend that the only practical way to evaluate the suitability of a professional as an expert on a particular issue in a litigation is to assess the relevance and quality of that professional's training, experience and reputation in light of the particular issues in dispute.
55. To impose a further system of accreditation of either forensic or technical skills on Chartered Accountants would not, in our opinion, address the perceived concerns of the Courts in relation to expert evidence.

Paragraph 2.12

56. Although a scheme for the accreditation of forensic skills might improve the quality of expert evidence, it is far from clear that it would reduce the problems encountered by the Courts. In this regard we believe from our discussions with the judiciary, from the literature, and from our experience that the main issue of concern for the Courts

is how at times two experts asked the same complex technical question can reach conclusions that are opposed. While often it is the case that the difference of opinion arises because the experts based their opinions on different sets of facts or assumptions, there are nevertheless cases where given the same facts and assumptions different conclusions are reached. This should not be surprising. Complex questions are often by their nature problematic and open to differing answers. A good example is complex legal questions which might be given different and even opposing interpretations by the various judges at first instance, on appeal, and finally at the High Court. Indeed, the fact that not all judges might reach the same interpretation is acknowledged by the requirement for a majority decision in cases where more than one judge is sitting.

Paragraphs 2.11, 2.13 and 2.14:

57. We have assumed that the process you refer to is one where the Court would accredit experts for their forensic skills. We have a number of comments to make on this suggestion.
58. First, accrediting experts for their forensic skills would not ensure that an accredited expert's evidence was accepted as expert evidence. Unless the existing provisions of the various *Evidence Acts* were to be amended, in each case where an "accredited expert" gave evidence, the Court would still need to determine whether that evidence was "expert evidence".
59. Second, by having accredited an expert the Court would, at least to some degree, have pre-judged the merits of the expert before his or her evidence was put before the Court. Arguably, the Court could be placed in a position of conflict of interest where it accredited an expert whose evidence proves to be unsatisfactory. We question whether having the Court accredit experts is appropriate given that it is for the parties to prove the qualification of the expert as an expert witness.
60. Third, an accreditation scheme would be a hostage to fortune since its credibility would diminish each time that a Court-accredited expert performed poorly or was subject to adverse judicial comment, whenever the evidence of an expert who was not accredited was preferred by the Court over that of an accredited expert, or whenever a superior Court found in the course of an appeal that an expert accredited by an inferior Court was not qualified as an expert.
61. Fourth, for professionals in some fields (for example, auditors of large corporations, stock brokers, investment bankers, medical researchers, hospital-employed medical practitioners, academics and some valuers) it is likely to be the case that many of the most qualified experts would not seek accreditation because they would not be highly motivated to earn fees from providing forensic services. Thus, while the aim of an accreditation scheme would be to exclude the worst experts it would also inadvertently fail to include the best. Plainly, the absence of the best experts from a scheme would diminish its usefulness and credibility.
62. Fifth, it would seem likely that, were the Courts to accredit experts, they could only accredit those whose expertise is acknowledged by the expert's senior peers. This could create the unfortunate effect that younger experts who may be more up-to-date with developments in their field of expertise would not be accredited, potentially producing a pool of accredited experts which, over time, become progressively removed from current thinking. For similar reasons, if the Court accredited experts

on the advice of the expert's senior peers, those experts espousing views contrary to accepted or traditional schools of thought would not be put forward for accreditation. This would limit the Court's access to alternative or radical points of view which, with the passage of time, may become the accepted view³.

63. Sixth, there would be a risk that lawyers advising their clients would merely recommend experts from the list of accredited experts and would not search for better qualified but non-accredited experts.
64. Seventh, there would be significant difficulties in designing a scheme that would be effective in addressing the concerns of the Courts. Many aspects would need to be taken into account such as the requirements for obtaining accreditation, the requirements for maintaining accreditation, the circumstances upon which accreditation might be suspended or lost, the process of deciding disputed applications, the process of handling complaints against experts and so on.
65. Take, for example, the problem of poor performance by an accredited expert that falls short of professional mis-conduct. While most accreditation schemes have a disciplinary system that addresses mis-conduct such as fraud, dishonesty or gross negligence, it is much more difficult - if not for practical purposes impossible - to address poor performance that does not amount to mis-conduct. What would a Court do if it encountered an accredited expert whom it believed had performed poorly? Would it report the expert to the accreditation body for disciplining or suspension of accreditation? Would the parties be informed and involved? Would the Court's judgment refer to the fact? How would the accreditation body establish the facts of the matter? Would it have to call evidence from the judge? What rights of appeal would the expert have?
66. Eighth, as we know from our own experience with the ICAA's accreditation of its members, designing, implementing and maintaining an accreditation scheme is a very complex task requiring the on-going commitment of significant resources. Courts are ill-equipped for this task. Clearly, the professional organisations would be better placed.
67. Ninth, even if the scheme were successful then market forces would tend to encourage accredited experts to charge more for their services that were now officially recognized as being superior, thereby increasing the cost of litigation to the parties.
68. With these issues in mind, the FASIG recommends that, as an alternative to accreditation:
 - a. other professional groups should be encouraged to take the lead of the FASIG and implement specific written standards governing the conduct of their members who engage in providing expertise in the context of a dispute;
 - b. all experts – but particularly those with little or no prior experience in the Courts – be encouraged to undertake training to improve their forensic skills; and
 - c. solicitors and barristers be better educated on the practicalities of searching for, selecting and recommending experts who would be credible before the Court.

³ Described by Black CJ of the Federal Court at the recent forum on expert evidence as the “Galileo effect”.

ISSUE 2.4 The extent to which ‘no win no fee’ arrangements are currently used, and whether any of the measures indicated, or other measures, would be desirable.

69. Paragraph 2.15 to IP 25 states that, according to press reports, the practice of “no win no fee” arrangements has appeared among a variety of experts, including accountants.
70. It is important here to identify, and distinguish between, two broad categories of fee arrangements:
- a) Arrangements whereby *the receipt* by the expert of the otherwise usual fee for the engagement (be it a fixed fee or a fee determined by reference to time spent) is contingent upon the outcome. This, literally, is a “no win no fee” arrangement.
 - b) Arrangements whereby the amount of the fee received by the expert is contingent upon the amount of the compensation received by the party engaging the expert. While, where the engaging party is unsuccessful, this kind of arrangement produces the same outcome as a “no win no fee” arrangement, where the engaging party is successful, a different outcome arises. This we describe as a “contingent fee” arrangement.
71. APS 11 prohibits the use of both “no win no fee” and “contingent fee” arrangements where a forensic accountant acts as an independent expert. Specifically, APS 11 states:
25. A member providing forensic accounting services shall be remunerated for such services by way only of professional fees computed in accordance with the Code of Professional Conduct (section D and F6).
 26. No part of any fee charged or received, whether directly or indirectly, when acting as an independent accounting expert is to be related to the outcome of a matter or the amount of the damages awarded.
 27. Members’ attention is drawn to the provisions of the Code of Professional Conduct, section D2, Advisory Services – Fees and Commissions.
72. In this context:
- Section D of the Code of Professional Conduct includes the requirement that “Professional Fees must reflect fairly and equitably the value of work performed for the client”.
 - Section F6 of the Code of Professional Conduct includes the requirement that “a contingency fee arrangement for professional services requiring independence and objectivity must not be entered into”.
 - Section F6 also states that “professional fees would normally be determined using appropriate rates per hour or per day for the time of each person engaged on the work”. While Section F6 does envisage that fees may on occasions be charged “on an agreed basis not necessarily related to time”, it requires that professional fees must take into account all of the following factors:
 - the skill and knowledge required for the type of work;
 - the level of training and experience of the persons necessarily engaged in the work;
 - the degree of responsibility applicable to the work; and

- the time of all persons engaged on the work.

73. The ICAA treats seriously alleged breaches of its professional standards. It has disciplined and will continue to discipline members who advertise that they offer “no win no fee” arrangements in relation to independent accounting expert engagements. Members are, however, at liberty to provide such services to indigent parties on a pro bono basis.
74. For completeness, it is appropriate to record that, in Australia, a person may be described as an “accountant” and not be a member of either the ICAA or CPA Australia. It follows that it is possible that some “accountants” who are not members of either body continue to offer “no win no fee” and “contingent fee” arrangements, not being bound by the professional standards of these bodies. Since the ICAA has no power to discipline non-member accountants, an alternative approach (such as one of those listed in paragraph 2.16 of IP 25) would be needed to prevent such arrangements being offered by non-member accountants.
75. The FASIG recommends that other professional bodies take action similar to that taken by the accounting profession to prohibit no win no fee and contingent fee arrangements in relation to independent expert engagements.

ISSUE 2.5 How serious is the problem of inappropriate or unethical conduct by experts? What is the extent of the problem and in what ways might it be sanctioned or controlled?

76. The great difficulty in responding to this issue is that an expert's conduct can only be assessed as being "inappropriate" or "unethical" by reference to some defined standard of behaviour. In the absence of such a standard, sanctioning or control of experts whose conduct may be perceived by some as "inappropriate" or "unethical" is unlikely to be effective.
77. We refer again to the various Court codes of conduct and other statements on the role and duties of experts. At present, none of these documents include a process for disciplining or sanctioning breaches of the standards of behaviour they define.
78. However, the FASIG believes that significant care should be taken in designing any disciplinary process dealing with alleged breaches of the Court codes of conduct. In any trial in which an expert gives evidence, there is likely to be an incentive for one party (typically not the party that retained the expert) to seek to discredit the expert. This may be attempted by asserting or implying, either in cross-examination or in submissions, that the expert was engaged in "inappropriate" or "unethical" conduct.
79. However, in such matters the expert is rarely provided with an opportunity to be heard in response to these assertions. For findings to be made on an expert's behaviour or performance without providing the expert with due process may be both dangerous and counter-productive. Conversely, to provide each expert facing these assertions with a right of reply would risk a significant lengthening of the trial process (with a consequent increase in trial costs), while potentially diverting the trial from its original purpose: determining the issues between the parties.
80. The FASIG recommends that greater use be made of the existing disciplinary processes of professional bodies such as the ICAA, and that other relevant professional bodies be encouraged to replicate this process. Disciplinary processes such as that of the ICAA could be accessed by:
 - a) establishing a confidential referral process between the Courts and the relevant professional bodies where matters of concern to the Courts can be referred for further consideration;
 - b) requiring that experts include in their engagement letters and reports details of the relevant bodies' complaint processes; and
 - c) wider recognition among the legal community of the existence of such processes, and communication of the existence and nature of these processes to all parties who engage experts.

CHAPTER 3

ISSUE 3.1 The effectiveness of current measures relating to expert witnesses that are designed to increase transparency and any issues that they are seen to raise.

81. Paragraph 3.1 of IP 25 suggests that it is through the use of various ‘case management’ techniques that parties may be encouraged at an early stage to identify the real issues, and to achieve a realistic view of the case, in order to maximise the chance of early resolution.
82. In the experience of the FASIG’s members, the great majority of disputes are resolved before trial, and frequently resolved after the ‘real issues’ are identified with the help of relevant expertise. Much of the process that produces these outcomes occurs outside of the judicial ‘case management’ process. Thus, for example, our members are regularly engaged to explain relevant issues to their instructing lawyers and clients, thereby facilitating achievement of a more ‘realistic’ view of the merits of a claim.
83. In the FASIG’s view, this role of an expert requires specific recognition in any consideration of judicial ‘case management’ techniques. An overly prescriptive and restrictive approach to the definition of an expert’s role, and an overly expansive view of the need for further ‘transparency’ may reduce the effectiveness of experts in assisting in the appropriate and early resolution of matters.
84. Referring to the specific matters discussed in paragraph 3.2 of IP 25, the FASIG’s view on each is as follows:

- a) Providing the other party with advance copies of any reports to be used in the case.

In the experience of our members, this process occurs as a matter of course in most matters. Requiring the exchange of reports is a useful mechanism for commencing a dialogue between experts, allowing each expert to record his or her opinions and the bases for them. It should, however, be only the start of a longer process which involves a continuing dialogue between the experts, much of which could occur through face-to-face conversation rather than through the exchange of written reports. The results of this process – the issues on which the experts agree or disagree and why – can then be reduced to a written document for use by the parties and, if necessary, in any subsequent hearing of the matter.

- b) Disclosing any expert report that a party obtains, whether or not to be used in the case.

This provision appears to be based on an assumption that parties are engaged in what is colloquially referred to as “opinion shopping”. In the experience of our members, this practice is not common, at least in relation to accounting experts.

In addition, as described above, one risk associated with such a provision is that, for fear that any report they receive may have to be produced to all parties, a party and its legal advisors may be discouraged from seeking full and frank advice from experts, which advice may otherwise assist in the timely and appropriate resolution of the matter.

- c) Disclosure of instructions to experts (normally contained in an expert's report anyway).

Our members' experience is that final instructions to an expert are routinely disclosed as part of the expert's report. The FASIG supports this disclosure.

However, this provision is sometimes extended to encompass all instructions, including draft and withdrawn instructions. In our view, this approach appears to rest on two assumptions: first, that it is possible to prepare complete and appropriate instructions before retaining an expert; and, second, that the primary reason for changing or withdrawing specific instructions is to reduce transparency.

In the experience of the FASIG's members, it is rarely the case that a legal advisor who, by definition, does not have relevant accounting expertise, is in a position to prepare complete and appropriate instructions before briefing an accounting expert. Rather, complete and appropriate instructions are typically developed during the course of a forensic accounting engagement as the legal advisor becomes more familiar with the subject matter (through the advice of the expert) and its relevance to the matters in issue. To create a regime which requires the production of all iterations of instruction may discourage legal advisors or their clients from seeking appropriate advice in a timely manner.

Second, in the experience of the FASIG's members, it is rarely the case that changes in instructions occur with the intent that transparency is reduced. In our experience, with the growing awareness of the Courts' views on the role of the expert and the requirements in several jurisdictions that experts make positive statements as to the completeness of their reports, a change of instructions designed to 'hide' an adverse opinion from another party would be a particularly risky proposition for a legal advisor or party.

- d) Disclosure of all communications between the party and the party's expert.

In our view, such a provision suffers from similar problems to the provision discussed in b) and c) above. It appears to proceed on the basis of a negative assumption – that parties are abusing the use of experts – and may neglect the negative outcomes it creates.

CHAPTER 4

ISSUE 4.1 The desirability of rules requiring experts to consult.

85. IP 25 records that it is the Commission's impression that rules requiring experts to consult are generally seen as desirable.
86. In the daily life of a professional accountant, views and opinions are commonly reached and refined through a process of dialogue and debate among one's peers. By way of contrast, the traditional approach to expert evidence (exchange of written reports followed by cross-examination) provides little or no opportunity for such a dialogue to occur. For this reason, the FASIG's members view the imposition of a requirement to consult with other experts retained in the same matter as an opportunity, not a threat. As a result, we are generally supportive of such a proposition and, where it already exists, typically observe positive outcomes.
87. In this context, we refer also to the detailed provisions in Appendix 1 to GN 2 relating to conferences of independent accounting experts.
88. We are concerned, however, at the lack of consistency and timeliness of the application of these provisions. It is our experience that experts' conferences are not held in all matters and, when held, are frequently held after the trial has commenced. The FASIG's view is that, whenever opposing parties propose to call experts on the same topic, a conference of experts should be held as soon as each expert has become sufficiently apprised of the relevant subject matter to allow preliminary views to be formed and communicated to the other expert. In any case, such a conference should occur prior to the commencement of each trial, and provision for such conferences could usefully be included in the Court's standard pre-trial directions timetable⁴.

ISSUE 4.2 The experience with the use of different methods of receiving expert evidence, and whether the rules should generally make provision for such methods to be available in suitable cases.

89. The traditional approach to the receipt of expert evidence (as described in paragraph 4.2 of IP 25) appears to conflict in some ways with the more recent description of the duty of an expert to "assist" the Court. Experts frequently find that they can best "assist" their clients and their clients' legal advisors through discussion of relevant issues. In contrast, in our experience, experts are rarely permitted to provide an oral summary of their opinions in the Court room, being typically confined to answering questions put to the expert in cross-examination. Since it is rarely the motivation of the cross-examiner to allow the expert to provide a detailed explanation of the expert's opinion, the FASIG's members frequently express frustration that they have not been allowed to provide the "assistance" that is demanded of them by the Court's codes of conduct and other guidelines.

⁴ We note that in some Courts, such as the Family Court of Australia, these processes are already in place.

90. In our experience, alternative approaches to the receipt of expert evidence are not commonly used. ‘Hot tubbing’ (and variations to this approach) have been used on occasion, and where used have often provided positive outcomes. The FASIG is also aware that some Courts are experimenting with other approaches to expert evidence⁵.
91. In this context, it is our view that alternative approaches to the receipt of expert evidence should be considered. These include:
- a) Encouraging experts to provide a brief oral summary of their opinions to the Court as part of evidence in chief.
 - b) Provision to the Court of a ‘tutorial’ on relevant expert matters, presented jointly by the respective experts (an approach suggested by Chief Justice Black of the Federal Court of Australia at the recent forum on expert evidence).
 - c) Expanded use of ‘hot tubbing’ of experts, including variations on this approach which explore differences in the level of participation in questioning the experts by the Court and counsel.
 - d) Continued use of meetings of experts outside the Court environment, including possibly holding such meetings in the presence of the judge.

CHAPTER 5

92. Before turning to the specific issues addressed in the chapter, it is important to appreciate that the FASIG has no philosophical commitment to the adversarial system or to the existing approach to the use of experts in that system. The FASIG’s members are prepared to provide the benefit of their expertise to parties in dispute, their legal advisors and the Courts in whichever system is determined to be appropriate.
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ISSUE 5.1 The experience of appointing (non-exclusive) Court Experts, and the advantages and disadvantages of this measure.

93. In our experience, the appointment by the Court of its own expert (as contrasted with the mandated appointment of a ‘Single Expert’, to which further reference is made in responding to Issue 5.2 below) is very rare. As a result, the FASIG is not in a position to comment on the advantages or disadvantages of this measure.
94. However, we note the suggestion in paragraph 5.9 of IP 25 that the appointment by the Court of its own expert would be likely to provide the Court with evidence that is “more objective, or more satisfactory, than that provided by the parties”. We do not agree that an expert appointed by the Court will necessarily be more “objective” than an expert appointed by one or more of the parties.

⁵ For example, see the discussion in the judgment of Nicholson CJ of the Family Court (as he then was) in *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* [2004] FamCA 297.

ISSUE 5.2 The experience to date with rules providing for appointment of single experts, and the advantages and disadvantages of this measure. In particular:

(a) To what extent can it be said that existing problems relating to expert witnesses make it necessary or appropriate that the courts (or some courts) should have the power to appoint a Single Expert?

95. IP 25 refers to the “existing problems” relating to expert evidence which might “make it necessary or appropriate that the courts ... should have the power to appoint a Single Expert.” However, these “problems” are not identified, and hence there is no analysis in IP 25 of how the appointment of a Single Expert would avoid or reduce these “problems”. These issues make it difficult to respond to the questions posed in IP 25.
96. In our view, it would be important to first identify, with some precision, what these apparent “problems” are and to assess how any move to appoint Single Experts would resolve those problems. It may then also be necessary to collect some objective data on the significance of any existing “problem” to facilitate assessment of the impact of any change to the existing system.
97. So, for example, if a concern relating to the use of experts is the costs involved in doing so, it would be prudent, in our view, to collect data on what those costs are. This would allow an assessment of how those costs might vary with the introduction of a Single Expert and, if it is considered likely that they will be reduced, provide a basis for assessing whether such an hypothesis is borne out by the data collected after the introduction of any change.
98. Similarly, if the concern is that the present use of expert witnesses extends the time taken to resolve a matter, it would be appropriate, in our view, to collect data on the length of time taken to resolve matters under the existing system (with and without the use of experts).
99. However, in this respect, it would be important to distinguish between the length of time taken to resolve a dispute and the length of time taken to conduct a hearing of a dispute. This is an important distinction for, in our experience, many disputes are resolved more quickly, and often before the commencement of a hearing of the matter, once expert assistance is provided to one or both parties. Whether those matters would have been resolved without the assistance of experts retained by each party is, in the opinion of the FASIG, a matter of some conjecture.
100. However, if data existed in relation to the length of time taken to resolve disputes under the present system, again analysis of the likely impact of changes to that time period could be undertaken, and associated hypotheses tested in trials of the alternative Single Expert system.
101. Paragraph 5.17 of IP 25 suggests that the appointment of Single Experts will produce “more objective evidence”. The FASIG is concerned that there may be no “objective” way in which to assess “objectivity” or the level of any perceived lack of it. In that environment, whether any alternative system produces “more objective evidence” would be particularly difficult to determine.
102. Further, the FASIG is concerned that the proposal for widespread use of Single Experts departs from the process by which professionals typically arrive at appropriate opinions. Where a Single Expert does not have the benefit of a dialogue

with other experts (such as ‘shadow’ experts), the Single Expert may forego the opportunity to have his or her opinions challenged and adjusted. This, it seems to the FASIG, would be unlikely to result in a higher ‘quality’ of expert evidence.

103. The FASIG is also aware that the use of Single Experts has not been without judicial criticism⁶.

(b) Is it objectionable in principle (because it is contrary to the adversary system or to justice), that the Court should ever be able to appoint a Single Expert?

104. The FASIG makes no comment on this question. As recorded above, the FASIG has no philosophical commitment to the adversarial system or to the existing approach to the use of experts in that system.

(c) Are rules providing for single experts authorised by a legislative rule-making power relating to ‘practice and procedure’, or is it necessary that there be a clearer statutory basis?

105. The FASIG makes no comment on this question, other than to say that its members would prefer that there be no ambiguity in relation to the applicability of all rules and guidelines relating to the use of experts and that they be as consistent as possible across all jurisdictions.

(d) If the Court is to have power to appoint a Single Expert, what guidelines should the rules provide as to the circumstances in which a Single Expert should be appointed? Should the rules merely provide that it is one of the options available to the court, or provide lists of factors to be taken into account, or go further and create a presumption favouring (or disfavouring) the appointment of a single expert?

106. The FASIG makes no comment on these questions. We have no philosophical commitment to the adversarial system or to the existing approach to the use of experts in that system.

(e) How should the appointment be made? Is it generally appropriate for the rules to provide for an appointment based on the parties’ consent, or, where there is no consent, on the Court’s own motion? How is the appointment best managed within case management rules?

107. The FASIG makes no comment on whether the appointment should be made by the Courts or by agreement of the parties.

108. However, the FASIG is concerned that, irrespective of how any appointment is made, the terms and conditions of the appointment, including responsibility for the Single Expert’s fees, are made clear.

⁶ For example, see the comments of Kay, Holden and O’Ryan JJ in *Re W (Sex Abuse: Standard of Proof)* [2004] FamCA 768 at paragraphs 20-21, citing Kay J in his dissenting judgment in *K v B* (1994) FLC 92.

(f) How is the single expert to be instructed? What version of the facts should be given? If the facts change between the report and the trial, what is to happen? What communications can there be between the parties and the expert leading up to the hearing? Can a party object to something in a report, or have the expert consider a possible error, before the hearing? Can the expert seek further information, or raise some issue about the nature of his or her brief?

109. The FASIG has no specific response to each of these questions.

110. However, the FASIG agrees that each of these questions exposes important and difficult issues that arise in relation to the appointment of Single Experts. As a result, the FASIG recommends that, if a Single Expert regime is to be implemented, each of these issues will need to be addressed in some detail in the provisions which govern that regime.

111. Further, that these issues exist suggests to the FASIG that there may be significant risks in implementing a Single Expert regime. Those risks centre around the use of a Single Expert, untrained in the conduct of a semi-judicial process, to undertake a role which may include making decisions on issues (such as the number and form of submissions that will be accepted from each party, the extent and nature of communications with each party and the extent to which the Single Expert can determine the course of his or her inquiry) which would, in the traditional system, be determined by the Court or the parties.

CHAPTER 6

ISSUE 6.1 The use of assessors, referees and expert assistants, their effectiveness and acceptability, and whether they are particularly appropriate in particular types of cases.

112. In our experience, the use by the Courts of assessors, referees and expert assistants is not great. However, each of these roles has elements in common with the proposed role of the Single Expert. As a result, similar issues require consideration and resolution. In particular, we repeat the comments raised in relation to Issue 5.2 on the risks associated with using an untrained expert to oversee what is in effect a judicial process. The FASIG recommends that, if the Courts use experts as assessors, referees or expert assistants, consideration should be given to providing the experts, the parties and their legal advisors with relevant educational materials which explains and define each of their roles.

113. Apart from this issue, we see some merit in the use of assessors or referees to determine issues within the expert's experience and expertise. For example, FASIG members engaged to undertake a reference in relation to the determination of appropriate accounting principles or standards often find that the reference occurs with the assistance of experts appointed by each party. Thus, the essential framework within which professional's opinions are derived – a discussion with "colleagues" – can be created within the context of a reference, thereby potentially facilitating more considered outcomes.