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LAW COUNCIL  
— OF —  
AUSTRALIA

DG.CSH.LCA1393

**FAXED**  
12 pages

25 February 2002

Mr Warwick Soden  
Registrar  
Federal Court of Australia  
Law Courts Building  
Queens Square  
SYDNEY NSW 2000  
Fax: 02 9223 1906

Dear Mr Soden

**Review of the Guidelines for Expert Witnesses in the Federal Court**

I refer to your letter dated 4 January 2001 to the then President, Anne Trimmer, in relation to this review.

I regret that the Law Council has not been in a position to formally respond to you earlier. This is largely a result of the consultation process that has occurred and the interest expressed by the various constituent bodies, Sections and Sub-committees of Sections in contributing to the response. For example, while the Law Society of New South Wales responded to you direct in April 2001, the Trade Practices Section of the Business Law Section consulted widely through the second half of 2001 and addressed the matter in various workshops, before providing its submission last week.

I now **enclose**:

1. Letter to the Deputy Secretary-General dated 12 July 2001 from the Chairman of the Victorian Bar;
2. Letter to you dated 22 February 2002 which is a submission from the Trade Practices Committee of the Business Law Section of the Law Council.

I have also seen the 2 April 2001 submission sent direct to you by the Law Society of New South Wales.

You will see that the three submissions reflect several common themes:

1. There is general support for the Guidelines and the principles which underpin them. Lawyers and experts might however be assisted if:
  - 1.1 The Guidelines were converted into Rules of Court;
  - 1.2 the Court continued to reinforce the importance and application of the Guidelines by, for example, directing specific attention to them at the first directions hearing. We note in that regard, that the Guidelines and the issues to which they give rise for practitioners and experts are specifically referred to in the form of letter issued by Justice Branson prior to the first directions hearing in a matter; and
  - 1.3 an explanatory memorandum or practice note elaborating on the expectations of the Court and the application of the principles expressed in the Guidelines was to be issued;

At an immediate and practical level, it would also be of assistance if the individual paragraphs of the Guidelines were to be numbered, so that it becomes possible to refer to them in a manner which is less cumbersome than that adopted in the submission of the Trade Practices Committee of the Business Law Section.

2. While members of the Court's Practice and Procedure Committee have indicated in liaison committee meetings with the Law Council that the Court expects the Guidelines to be viewed with some degree of pragmatism and from a practical perspective, it is inevitably the case that lawyers advise (and experts consider preparation of their opinions) on the basis that the Guidelines are to be strictly construed. Practitioners are aware that sanctions may be applied where the Guidelines are not adhered to and experts are very conscious of the duties which the first three paragraphs of the Guidelines remind them of.

This gives rise to a number of the concerns identified in the Trade Practices Committee submission in connection with, for example, the obligation to summarise "all instructions" given to the expert and which define the scope of the report. It also perpetuates the tension between the obligation to properly define the scope of experts' reports and set out the facts, matters and assumptions relied upon by experts, with the need for practitioners to be able to communicate freely with experts, confident in the knowledge that communications properly the subject of legal professional privilege will continue to be protected.

3. There continues to be a real concern about the use of the second or silent expert. While there may well be significant practical disincentives to such a practice, the mere fact that practitioners and experts have thought it necessary and appropriate to adopt such an approach is of concern. Some of the suggestions made in the enclosed submissions might resolve this issue.

I understand that the Intellectual Property Committee of the Business Law Section may wish to supplement the submission made by the Trade Practices Committee. If a further submission is received, I will of course forward it to you. Otherwise, I look forward to the opportunity to further discuss the matters raised by the enclosed submissions with the Court in future liaison committee meetings.

Yours sincerely

A handwritten signature in black ink, appearing to read "D. Gaszner", written in a cursive style.

David Gaszner  
Chair, Federal Litigation Section



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| DATE RECEIVED                             |
| 16 JUL 2001                               |
| Action Officer/Rec.<br>Init/Date          |
| File No                                   |
| Action Taken / Referred to<br>Init / Date |

12 July 2001

THE  
VICTORIAN  
B A R

Christine Harvey  
Deputy Secretary-General  
Law Council of Australia  
GPO Box 1989  
CANBERRA ACT 2601

Dear *Christine,*

**Review of the Guidelines for Expert Witnesses in the Federal Court**

Thankyou for your letter dated 22 May 2001 inviting the Victorian Bar to comment on the review of the Federal Court Guidelines for expert witnesses.

The Victorian Bar supports the proposal that the Federal Court Guidelines for Expert Witnesses be converted into Rules of Court. Anecdotal evidence suggests that practitioners' experience with the Guidelines has generally been positive. The Guidelines enable experts to be given a standard statement about their role and duties to the Court, and what is expected in their report. The requirement to attach the instructions given to the expert requires practitioners to carefully define the questions they wish the expert to address, and ensure that all relevant material is provided to the expert at the outset. This discipline results in a more thorough, balanced and persuasive opinion. It also assists experts to avoid the trap of partiality.

The Victorian Bar provides the following specific comments on the guidelines:-

- (1) Irrespective of whether the Guidelines are converted into Rules of Court, it would be useful if steps were taken to raise awareness of the Guidelines in the profession. At present some practitioners appear to be unaware of the Guidelines. This can create problems because the Guidelines must be followed from the time an expert is first engaged. It is difficult to comply with the guidelines in retrospect, once instructions have been given and a report obtained. Perhaps the Court could adopt a practice of drawing attention to the existence of the Guidelines at any directions hearing at which the possibility of expert evidence is raised.

The Victorian Bar Inc. - Reg. No. A00343045

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- (2) If the guidelines are adopted as Rules of Court, there should be an evaluation of their impact in order to identify how they have been implemented and whether they have an adverse impact upon parties, particularly in relation to cost.
- (3) Recommendation 63 of the Australian Law Reform Commission's "Managing Justice" report recommended the adoption of procedures to enable experts who have written reports upon which parties seek to rely to be able to be questioned, in written form, on the contents of their reports as part of the interlocutory processes. The Victorian Bar supports this recommendation, providing that the Court retains the usual discretion to permit the questioning only in appropriate cases. If the recommendation is adopted, it should be subject to review after a suitable period of operation, to establish whether it has been effective and any associated cost implications.
- (4) The Victorian Bar does not believe that further formalised procedures are required to encourage pre-hearing conferences and other communication and contact between experts. This is a matter best left to parties and their advisers. The Victorian Bar believes that the Guidelines as presently constituted provide sufficient guidance in this area.

Parties are at liberty to conduct litigation as they deem appropriate. The Victorian Bar believes that this freedom should not be restricted without good reason. There are relatively few circumstances in which parties would not wish to commission their own experts. While encouragement to use 'joint experts' may in some cases be appropriate, the Victorian Bar believes that this issue should be a matter for judicial discretion.

- (5) The practice of using 'silent experts' to advise upon matters informally or to assist in the selection of experts is said to be increasing. There is, however, no empirical evidence in this regard.

It is worth noting that the use of 'silent' expert might be attractive, given the uncertain scope of the obligation to disclose instructions. It would not, however, overcome the uncertainty about communication with an expert who is called to give evidence. Many clients struggle to fund one expert, let alone an extra 'silent' one. If the Guidelines did result in the growth of this strategy, it would provide an unfair advantage to well funded litigants.

- (6) Experts customarily explain to courts, including the Federal Court, at the commencement of examination-in-chief if they have changed their view or if they have located errors in their reports. Thereupon they amend, correct or otherwise alter their reports. This can also be done, and is done, via supplementary reports. The Victorian Bar believes that standard practice and the Guidelines cater adequately for this exigency.
- (7) It is, at present, premature to evaluate the incidence and effectiveness of the "panel presentation of expert evidence" before the Federal Court. It is

apparent, however, that in some instances, the procedure has merit in terms of crystallising issues in dispute and in saving time and expense.

- (8) The Victorian Bar notes the existence of Order 34B of the Federal Court Rules, but, as with many aspects of the use of 'assessors' and 'assistants', it is seldom used. It is conscious, however, of the risks attendant upon the use of the mechanism: see *Porto Seguro Companhia De Seguros Gerais v Belcan SA* (1997) 153 DLR (4th) 577.
- (9) The Victorian Bar shares the concerns expressed by the Law Council about the obligation to disclose instructions given to the expert. The extent of the obligation is unclear. On one view it may extend to all communications between the lawyers and the expert. For example, a conference in which the expert's opinion is tested and alternative factual scenarios are put, or a telephone conversation in which the expert is asked to reconsider a particular opinion in light of new information, or correspondence about a draft report. Experts do not always address the questions put to them in a satisfactory way - sometimes they miss the point, sometimes they misunderstand their instructions. Practitioners who have engaged the expert should be free to discuss this with the expert without fear of compromising the client's legal professional privilege. A practitioner's task is to call expert evidence that supports the client's case and that the expert evidence called is of the highest possible quality. In order to do that it is helpful to be able to test the opinions expressed by the expert. There is some anecdotal evidence to suggest that the guidelines have inhibited this process and have caused communications between lawyers and experts to be somewhat elliptical.
- (10) The Guidelines do not appear to apply clearly to opinion evidence from an expert who has an established relationship with the client, such as a treating doctor, or the client's accountant. Such witnesses will have formed opinions well in advance of the litigation and will have pre-existing duties to the client which do not sit easily with an overriding duty to the Court. In the view of the Victorian Bar the Guidelines should state if, and how, they apply to experts in this category.

I hope these comments are of assistance. If I can provide any further help, please do not hesitate to contact me.

Yours sincerely,



Mark Derham  
Chairman