

Episode 10: Summary



Episode name: How to be an Expert at Briefing Experts

Guest(s): John-Henry Eversgerd

What area(s) of law does this episode consider?

Evidence, in particular engaging an expert. John-Henry, an expert valuer and economic loss and damage specialist, shares his insights and tips on how to identify and brief the right expert.

Why is this topic relevant?

Expert witnesses can be engaged in contentious and non-contentious matters. From advising on the value of shares during a buy-out, to advising on the amount of economic loss for breach of contract in litigation, experts are integral to aiding our understanding of difficult and/or specialised concepts. John-Henry shares insights from his perspective in being briefed as an expert.

What legislation and/or cases are considered in this episode?

Expert witnesses are bound by the Expert Witness Code of Conduct found in Schedule 7 of the Uniform Civil Procedure Rules 2005. This Code outlines:

- that an expert's paramount and overriding duty owed to the Court;
- requirements of an expert's report;
- requirements of any supplementary report following the change of an opinion;
- the duty to comply with the Court's directions; and
- conduct of experts in conferences.

Evidence Act 1995 (including Part 3.3)

Federal Court Rules 2011 (in particular Part 23)

Honeysett v The Queen [2014] HCA 29

What are the main points?

- The role of an expert witness is to provide impartial evidence in their area of expertise to enable the Court to have the benefit of an objective and impartial assessment from a witness with specialised knowledge and experience.
- Admissibility of expert evidence will depend on relevance to the issues in dispute and probative value. Evidence may be refused if its probative value is outweighed by other considerations such as the evidence being unfairly prejudicial, misleading, or will result in a waste of time.
- It is important to recognise and understand the purpose for which an expert is being engaged. Is the engagement to act as an independent expert? If so, the expert is required to abide by the Expert Witness Code of Conduct and observe their paramount and overriding duty to the Court.
- If, instead, you require an expert to assist with strategy, you could engage a consulting expert. Remember, an independent expert can later act as a consulting expert. However, this does not go both ways. A consulting expert (or a 'dirty' expert) cannot later act as an independent expert.
- It is important for your expert, as well as the instructing solicitor, to understand both the assumptions and questions that you are asking the expert to opine on,

remembering that you need to prove each of the assumptions that you are asking the expert to make.

- It is natural and expected that experts will disagree and fail to reach the same conclusions; notwithstanding this they should be prepared and willing to change their opinions and make concessions when it is appropriate to do so.
- ‘Hot-tubbing’ refers to the process of calling expert witnesses to give evidence and be examined concurrently and often included the parties’ experts engaging in discussion together while in the witness box. This method of providing evidence can reduce the confrontational nature of conventional hearing processes and minimise the risk that experts become “opposing experts” rather than independent experts assisting the Court.
- The Federal Court has issued guidelines titled *Concurrent Expert Evidence Guidelines* intended to inform parties, practitioners and experts of the Court’s approach to concurrent evidence.

What are the practical takeaways?

- Aside from understanding the type of expert you need, be it independent or consulting, it is important to understand and engage an expert with the right discipline.
- Ordinarily an opposing party will seek to disprove the assumptions upon which an expert’s opinion is based (rather than the methodology adopted by the expert). An expert cannot prove the assumptions included in his or her brief; that task is left to the lawyers and advocate.
- Legal professional privilege protects the disclosure of certain communications between a lawyer and a client when these communications are for the dominant purpose of seeking or providing legal advice or for use in existing or anticipated legal proceedings (*Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 at 64–65 [35]). In the context of litigation and engaging an expert, ordinarily privilege will apply to confidential oral or written communications between solicitors and the expert but not necessarily to draft reports and notes produced by the expert. A good rule of thumb is to assume all communications between lawyer and expert will be disclosed to the opposing party.

Show notes

[The Practitioner’s Guide to Briefing Experts](#)

[Francesca Gino, Are you Too Stressed to Be Productive? Or Not Stressed Enough?, HRB](#)