



## **Express law** *fast track information for clients*

25 May 2005

### **Admissibility of expert evidence**

The New South Wales Court of Appeal on 20 May 2005 overturned a decision of Austin J made on 7 March 2005 in respect of expert evidence. The court held that for expert evidence to be admissible it need only disclose the facts and reasoning process used by the expert, rather than the true factual basis upon which the expert's opinion was formed. Additionally, the court held that the probative value of expert evidence needs to be assessed when the Court is exercising discretionary powers to exclude evidence.

This *Express law* supplements the issue of 10 March 2005 which discussed Austin J's original decision.

### ***Australian Securities & Investments Commission v Rich & Ors***

---

New South Wales Court of Appeal, 20 May 2005, [2005] NSWCA 152

#### ***Background***

---

On 7 March 2005 Austin J in *ASIC v Rich & Ors* [2005] NSWSC 149 handed down a decision that expert evidence tendered on behalf of ASIC ('the Carter Report') was inadmissible because it failed to disclose the real factual basis and true reasoning process of the opinions expressed. This arose because of the expert's involvement with ASIC prior to his engagement to provide expert evidence.

Alternatively, Austin J held that as a matter of discretion the Carter Report should be excluded because of the risk that the expert had taken account of information he had not disclosed. Austin J held that this created a risk that his evidence would be unfairly prejudicial to the defendants and mitigated against its probative value.

ASIC appealed this decision and on 20 May 2005 the Court of Appeal ruled in its favour.

The court held that the trial judge, once he had found that the Carter Report set out the facts asserted by the expert to support his opinions and his reasoning process, should have found the Carter Report admissible under s 79 of the *Evidence Act 1995* (NSW) ('Evidence Act'). It was not necessary that the Carter Report disclose the true factual basis on which it was formed, although the existence of undisclosed facts would be a matter going to the weight to be given to the expert's evidence. The court said:

The mere fact that the expert's opinion is based on facts that are assumed (and not proved) at the time the expert gives evidence is no reason to exclude the evidence at that stage. The assumed facts may be proved later by other evidence. The fact that the opinion was initially formed or later reinforced by reference to other facts, not said by the expert in his evidence to be proved or assumed, is irrelevant to the question of admissibility. [136]

The court also found that the discretionary power to exclude evidence provided by s 135 of the Evidence Act required the trial judge to weigh up the probative value of the Carter Report against the risk it would be unfairly prejudicial, misleading or confusing, or cause or result in undue waste of time. The court found that the trial judge did not conduct a systematic analysis of the Carter Report's probative value and that this was a fundamental error. Determining the impact of an expert's access to material not before the court requires a 'process of assessment' by the trial judge. It is not a matter which can be determined in the abstract. [168] The court said:

The mere fact that there must have been use of some extraneous material ... does not of itself necessarily lead to a conclusion that the evidence is of low probative value. [170]

The court set aside the trial judge's ruling that the Carter Report was inadmissible or should be excluded.

### ***Implications***

---

This Court of Appeal decision assists in clarifying the circumstances under which expert evidence will be admissible (the corresponding provisions of the *Evidence Act 1995 (Cth)* are in relevant terms the same as those considered in this decision).

However, it also highlights the risks of engaging a person to provide expert evidence where that person has a prior relationship with the party engaging the expert. Agencies should exercise caution when engaging expert witnesses in these circumstances.

*Text of the decision is available at:*

[Australian Securities & Investments Commission v John David Rich & Ors](#)

*For further information please contact:*

Steven Small  
Senior Lawyer  
T 03 9242 1311 F 03 9242 1237  
[steven.small@ags.gov.au](mailto:steven.small@ags.gov.au)

---

**Important: The material in *Express law* is provided to clients as an early, interim view for general information only, and further analysis on the matter may be prepared by AGS. The material should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this message.**

This message may contain confidential or legally privileged information. Only the addressee has the right to use or disseminate this information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS. Find out more about AGS at <http://www.ags.gov.au>.

If you do not wish to receive similar messages in the future, please reply to:  
<mailto:unsubscribe@ags.gov.au>