

Some thoughts on calling expert evidence

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Introduction

1. The primary duty of an expert is to the court. In NSW this is made clear by the Expert Witness Code of Conduct found in Schedule 7 to the *Uniform Civil Procedure Rules 2005 (UCPR)*. In particular, cl 2 states that an expert's "overriding duty [is] to assist the court impartially", that an expert owes his or her "paramount duty to the court" rather than to any party and explicitly states that an expert is not an advocate for either party². If expert witnesses act in accordance with those statements the criticism made almost 50 years ago by Windeyer J, that "it is often quite surprising to see with what facility, and to what extent, [experts'] views can be made to correspond with the wishes or the interests of the parties who call them"³, should die a natural death.
2. 'Witness advocates', who put "from the witness box the inferences and hypotheses on which" the party calling them wishes to rely⁴, do not assist the court in understanding and deciding the real issues in dispute between the parties. The misuse of expert evidence is likely to waste the court's time and unnecessarily increase the costs of the litigation and thus constitute a breach of

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² *UCPR* (NSW) schedule 7 cl 2

³ *Clark v Ryan* (1960) 103 CLR 486 at 509-510

⁴ *HG v The Queen* (1999) 197 CLR 414 per Gleeson CJ at 428-429 [43]-[45]

the obligations under s 56 of the *Civil Procedure Act* 2005 (NSW). It is therefore imperative that practitioners are aware of the issues likely to arise when expert evidence is to be relied upon.

Scope of legal practitioners' involvement

3. Lord Wilberforce stated in *Whitehouse v Jordan*⁵ that any report or other evidence produced by an expert should be "the independent product of the expert, uninfluenced as to form or content by the exigencies of the litigation".
4. However, times have changed. Lindgren J has noted that lawyers do have a role to play in the development of expert evidence. This is to avoid, his Honour said, situations where "little or no attempt [is made] to address in a systematic way the requirements for the admissibility of expert evidence"⁶. Some unsatisfactory results flowing from the preparation of expert evidence without the proper assistance of lawyers occurred in *Jango v Northern Territory of Australia (No 2)*⁷ where 1,100 objections were made to two reports and in *Harrington-Smith* where 1426 objections were made to thirty reports. In the latter matter only 184 of those objections were pressed after Lindgren J delivered a judgment outlining the rulings likely to be made and reinforcing the need for a practical approach to objections to avoid wasting the court's time. In order to avoid such situations it is clear that the role of lawyers extends at least to advising on the form experts' reports should take.

⁵ [1981] 1 WLR 246

⁶ *Harrington-Smith v State of Western Australia* (No 7) (2003) 130 FCA 424 at [19]

⁷ [2004] FCA 1004

5. The involvement of lawyers should be restricted to advising as to form rather than content. Wilcox J, in *Universal Music Australia v Sharman Licence Holdings* observed that where a solicitor had been involved in the wording of a report in a way that affected its contents, the evidence of the expert could not be relied on even though the expert was well qualified to give expert evidence⁸. The example, in the context of a dispute about online file sharing involved a change from the words the “Altnet TopSearch Index works in conjunction with Joltid PeerEnabler to search for Gold Files” to the words “Topsearch searches its own Index file of available Altnet content and PeerEnabler *is not needed or used for this*, other to assist in the periodic downloading of these indexes of available content” (emphasis added)⁹.

6. Even though the expert expressed doubt to the solicitor as to the correctness of the change in an email regarding the draft report, the amendment remained in the final report. Wilcox J concluded that the expert had been “prepared seriously to compromise his independence and intellectual integrity”¹⁰. This example also highlights the fact that experts can be cross-examined on earlier drafts of reports they prepare for the proceedings. Where the reasoning in the earlier draft is consistent with the opinion in the final report this should pose no problem. Where the final report diverges from or is not supported by the earlier reasoning practitioners should consider why this has occurred. The courts will not look favourably on reports changed only to suit the needs of the party relying on it.

⁸ *Universal Music Australia Pty Ltd v Sharman Licence Holdings Ltd* (2005) 220 ALR 1

⁹ *Universal Music* at [228]

¹⁰ *Universal Music* at [231]

7. Lawyers, in observing their own duty to the court, should ensure that experts' reports are the result of the experts' specialised knowledge, in a form which assists the court by providing evidence which can be used to decide the issues in dispute. In doing so, a balance must be struck between the examples above of *Jango (No 2)* and *Universal Music*. Practitioners can assist the court, and their clients, by having proper regard to the law, appropriate rules and relevant practice notes related to the use of expert evidence in the jurisdictions in which they practise.
8. Following are some key considerations to which practitioners should direct their attention.

I. Relevance

9. The first step in considering whether expert evidence should be adduced is the 'relevance' rule in s 56 of that Act. Section 56 states:

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible.

10. By reference to s 55(1) it is clear that evidence will be excluded where there is no chance that it could rationally affect the assessment of a fact in issue. Regardless of the eminence of any qualifications held by a potential witness,

where the party attempting to call that witness cannot identify the fact or facts in issue to which his or her evidence relates, the evidence will be inadmissible.

11. The structure of the Act dictates that even after the test for relevance in s 55 has been met evidence might be excluded pursuant to s 76. Section 76(1) states:

[e]vidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

Subsection (2) allows for certain exceptions to the rule in s 76(1) including, relevantly, expert evidence pursuant to s 79. Subsection (1) of s 79 states:

[i]f a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

Subsection (2) to s 79 specifically recognises that child development and child behaviour will, in appropriate circumstances, be the proper subject of specialised knowledge. It has limited relevance for the purposes of this paper.

12. The High Court has indicated that questions of admissibility and weight with respect to expert evidence are normally matters for a trial judge and that appellate courts will be reluctant to overturn such decisions¹¹. Accordingly, and

¹¹ *Bratt v Western Airlines* (1946) 166 ALR 1061 at 1067; *Clark v Ryan* (1960) 103 CLR 486 at 503 per Menzies J

as noted by the ALRC¹², it is not uncommon for evidence to be admitted 'subject to relevance'. This practice reflects a "pragmatic approach" to the opinion rule and its exceptions¹³.

13. The words of s 79 do not preclude expert evidence being excluded by any reason other than the opinion rule. One should accordingly be aware that judicial discretions regarding the admissibility of evidence exist under ss 135-137 of the *Evidence Act*. Evidence may be excluded where the court considers that it might be unfairly prejudicial; misleading or confusing; or where it might result in an undue waste of time¹⁴. In criminal proceedings the court will refuse evidence where its probative value is outweighed by the danger of unfair prejudice to the defendant¹⁵. Additionally, the court possesses a general discretion to limit the use of evidence if there is a danger that the evidence will be either unfairly prejudicial to a party or be misleading or confusing¹⁶.

14. The fact that ss 135-137 offers flexibility to the court was noted by McHugh J who said, in *Papakosmas v R*, that the use of discretions should be "applied on a case by case basis because of considerations peculiar to the evidence in the particular case"¹⁷.

15. If a practitioner has properly considered whether or not an expert is actually needed, and whether the expert's evidence will actually assist in the resolution of

¹² Australian Law Reform Commission (ALRC) Report 102: *Uniform Evidence Law* at 9.76

¹³ ALRC Report 102 at 9.46

¹⁴ s 135 *Evidence Act* 1995 (NSW)

¹⁵ s 137 *Evidence Act* 1995 (NSW)

¹⁶ s 136 *Evidence Act* 1995 (NSW)

¹⁷ (1999) 196 CLR 297 at 327 [97]

the dispute, that practitioner should easily be able to identify the way in which the evidence is relevant and why it should not be the subject of the exercise of a discretion under any of ss 135-137. It follows therefore, if it is not known already, that practitioners should give very careful consideration to the purpose for which an expert is being called before calling one.

II. The expert code of conduct

16. Experts who intend to give evidence must comply with a code of conduct¹⁸.

Specifically, an expert must also acknowledge such compliance before his or her report may be admitted into evidence¹⁹. In NSW, that code of conduct is found in Schedule 7 to the *UCPR*.

17. Schedule 7 applies to experts engaged or appointed “to provide an expert’s report for use as evidence ... or to give opinion evidence” in proceedings or proposed proceedings²⁰. Clause 2, noted above at [1] of this paper, outlines that the duty of the expert is to the court, whilst cl 3 gives details of some formal requirements among other information. Now that the *UCPR* have been in force for several years, there is little excuse for a practitioner not to be aware of this requirement and its content.

18. In *Investmentsource v Knox Apartments*²¹ I was asked to decide a question about the admissibility of an expert report where the code of conduct was not acknowledged. I concluded that the *UCPR* created pre-requisites to the

¹⁸ *UCPR* r 31.23

¹⁹ *UCPR* r 31.23(3)

²⁰ *UCPR* schedule 7 cl 1

²¹ [2007] NSWSC 1128

admissibility of evidence beyond those set out in the *Evidence Act*²².

Approximately a month after my decision the NSW Court of Appeal²³ accepted the proposition that the *UCPR* could “modify the law of evidence by imposing a precondition upon the admissibility of an expert’s report”²⁴.

19. Barrett J, when faced with an expert’s report which did not attach the requisite acknowledgement of the code of conduct, granted leave for the witness to be examined on his knowledge of the code of conduct²⁵. The witness was able to acknowledge that he was aware of, had read and had complied with the Schedule when preparing his report. Barrett J was therefore satisfied that the expert’s recognition of his duties under the code of conduct could “be taken to relate back to the time when he prepared the report”²⁶.

20. When Einstein J was faced with an analogous problem, in *Commonwealth Development Bank of Australia Pty Ltd v Cassegrain*²⁷, his Honour distinguished the decision in *Barak* because in *Cassegrain* the witness had not been aware of the code of conduct prior to his appearance in court. His Honour stated that considerable importance attaches to requiring compliance with the expert code of conduct. The court, his Honour reasoned, should avoid situations where knowledge of the code of conduct might have led to the provision of different

²² *Investmentsource* at [45]-[46]

²³ Campbell JA, with the concurrence of Tobias JA and Handley AJA

²⁴ *Yacoub v Pilkington (Australia) Pty Ltd* [2007] NSWCA 290 at [59]

²⁵ *Barak Pty Ltd v WTH Pty LTD (t/as AVIS Australia)* [2002] NSWSC 649 at [3]

²⁶ *Barak* at [4]

²⁷ *Commonwealth Development Bank of Australia Pty Ltd v Cassegrain* [2002] NSWSC 980

evidence "without exceptional cause"²⁸. His Honour referred to a passage from *Clough v Tameside and Glossop Health Authority* which stated that:

[I]t is only by proper and full disclosure to all parties, that an expert's opinion can be tested in court: in order to ascertain whether all appropriate information was supplied and how the expert dealt with it. It is not for one party to keep their cards face down on the table so that the other party does not know the full extent of information supplied²⁹.

21. *Barak* is a unique case because the witness was aware of the code of conduct, despite not having specifically acknowledged the same. It will be far more convenient, as well as in accordance with the *UCPR*, for an acknowledgement of the code of conduct to accompany every expert report. Any omission of this requirement will lead to a risk that the report will be rejected.

III. Bias

22. The mere fact that an expert is aligned to one party will not render his or her evidence automatically inadmissible. It may, however, have a bearing on the weight which will attach to that evidence³⁰. Initiatives such as Court Appointed Experts³¹ or Parties' Special Experts³² and Expert Conferences³³ are options available to minimise the extent to which experts are aligned with one party. However, it will not always be possible, nor desirable³⁴, to remove such

²⁸ *Cassegrain* at [14]

²⁹ [1998] 2 All ER 971 at 977

³⁰ *ASIC v Rich* [2005] NSWSC 149 at [346]

³¹ See *UCPR* rr 31.47-31.54

³² See *UCPR* rr 31.37-31.45

³³ See *UCPR* rr 31.24-31.26

³⁴ Kirby, M, *Expert Evidence: Causation, Proof and Presentation*, The International Institute of Forensic Studies, Inaugural Conference, Prato, Italy, 3 July 2002

alignment and there will be differing degrees to which the alignment might affect the objectivity of a witness.

23. In *Liverpool Roman Catholic Archdiocesan Trustees Inc v Goldberg (No 2)*³⁵

Evans-Lombe J, speaking of the relationship between the expert witness and the party calling him or her, suggested that where “a reasonable observer might think [it] was capable of affecting the views of the expert so as to make them unduly favourable to that party, his evidence should not be admitted, however unbiased the conclusions of the expert might probably be”³⁶. This rather stringent approach has not been followed in Australia or the United Kingdom. One of the reasons for this might be, as Mansfield J enunciated in *Risk v Northern Territory of Australia*, because there are great practical differences between different disciplines of expertise³⁷. Some are more subjective than others and therefore more susceptible to problems of bias whereas others are relatively scientific or exact.

24. In *Fagenblat v Feingold Partners Pty Ltd*³⁸ Pagone J was asked to decide whether an accountant’s report was admissible where the accountant was the brother-in-law of the plaintiff who had been a partner in the defendant law firm. The accountant’s evidence was relied on by his brother-in-law. Relevantly there was evidence that money was owed to the accountant by his brother-in-law. A consideration arose, that the accountant might stand to gain from any money

³⁵ [2001] 1 WLR 2337

³⁶ *Goldberg* at [13]

³⁷ [2006] FCA 404

³⁸ [2001] VSC 454

received by the plaintiff through the litigation. Pagone J said that in the circumstances:

it is for the court to do justice to the parties and in doing so should properly take into account all matters which bear upon the ultimate issues to be decided. The bias, actual, potential or perceived, of any witness is undoubtedly a factor which the Court must take into account when deciding the issues between the parties, but the hearing of the evidence from such a witness does not mean that the Court will not be doing justice to the parties impartially³⁹.

25. His Honour reasoned that a “biased witness does not impugn the independence of the decision maker, especially where the proceedings are adversarial and the evidence can be tested”⁴⁰ and that therefore the “possibility of a witness having a bias in favour of one party...is not a ground for rejecting evidence that may be of assistance to the Court in reaching the correct result”⁴¹.

26. This was effectively the same approach taken in *Kirch Communications v Gene Engineering*⁴² where Campbell J said that the structure of the *Evidence Act* allows that if evidence is admissible, notwithstanding that there might be a reasonable apprehension of bias, it should be admitted and proper consideration given to what weight actually attaches to it. Further his Honour indicated that the court should look at all the facts with a general consideration as to whether the evidence will be relevant in light

³⁹ *Fagenblat* at [7]

⁴⁰ *Fagenblat* at [8]

⁴¹ *Fagenblat* at [7]

⁴² [2002] NSWSC 485

of any bias. Such an approach will similarly be useful for practitioners to adopt.

IV. Admissibility or Weight

27. In *Makita v Sprowles*⁴³, the NSW Court of Appeal⁴⁴ was asked to review a decision about the admissibility of expert evidence. At trial the report of a physicist had been admitted to provide evidence about whether stairs leading to the plaintiff's workplace were 'slippery'. While the other members of the court provided relatively short reasons for their decision to exclude the evidence of the physicist, Heydon JA gave a detailed outline of the pre-requisites to the admissibility of an expert's evidence.

28. At 743-744 [85] his Honour set out those pre-requisites, stating that before expert evidence is admissible the following must be demonstrated:
- a. a field of specialised knowledge;
 - b. an identified aspect of that field in which the witness is an expert;
 - c. that the opinion is wholly or substantially based on the witness' expert knowledge;
 - d. in relation to facts relied upon they must be identified and:
 - i. where they are observed they must be proved by the expert; and
 - ii. where they are assumed they must be proved some other way;
 - e. that those facts form a proper foundation for the opinion; and
 - f. that the opinion logically follows from the information on which it is stated to be based.

⁴³ *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705

⁴⁴ Priestley, Powell and Heydon JJA

Heydon JA concluded that where the court was not sure of all of the above matters “the evidence is strictly speaking inadmissible, and so far as it is admissible, of diminished weight”⁴⁵.

29. Logically where any of the criteria in s 79 are not met, the exception to the exclusionary rule in s 76 is not enlivened and the evidence will not be admissible. Heydon JA’s criteria go beyond the elements of s 79 though. It remains to be decided whether admissibility or weight is the proper question to be decided. However, the question may be effectively moot. Allsop J doubted that there was a difference between the approach taken to deciding a question of admissibility or weight, particularly in light of the discretion provided by s 135.⁴⁶
30. Branson J has advocated weight as a better criterion in deciding whether to accept expert evidence, noting that “meticulous consideration, before ruling on the admissibility of the evidence” could not be the intention of s 79 because such an interpretation would prevent the “smooth running of trials involving expert evidence”⁴⁷. Her Honour also pointed out that the appropriate time to rule on admissibility had to be the time the evidence was called and accordingly the decision would “be based on the evidence and other material... before the judge at the time the ruling is required to be made”⁴⁸.

⁴⁵ *Makita* at [85]

⁴⁶ *Evans Deakin Pty Ltd v Sebel Furniture* [2003] FCA 171

⁴⁷ *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157 at [16]

⁴⁸ *Sydneywide* at [9]

31. Branson J said that even though Heydon JA's dictum might "be understood as a counsel of perfection"⁴⁹ practically speaking, for admissibility it is sufficient

that the trial judge is satisfied on the balance of probabilities on the evidence and other material then before the judge that the expert has drawn his her opinion from known or assumed facts by reference wholly or substantially to his or her specialised knowledge⁵⁰.

32. Weinberg and Dowsett JJ on this point agreed stating that it "would be very rare indeed for a court at first instance to reach a decision as to whether tendered expert evidence satisfied all of [Heydon JA's] requirements before receiving it as evidence in the proceedings"⁵¹ because careful judgment of questions of degree would normally be required before a court could be satisfied that all criteria were met. Their Honours further suggested that Heydon JA effectively agreed with such an assessment by prefacing the words "not admissible" in para [85] of *Makita* with the words "strictly speaking". Their Honours said that Heydon JA thus indicated that some latitude might be required when ruling on expert evidence during the course of the trial.

33. For completeness I note that a distinction can probably be drawn between trials before a judge sitting alone and matters involving a jury. For example various authority suggests that whilst voir dire hearings may still be useful in jury trials (for example, s 189 of the *Evidence Act* makes separate provision for voir dire hearings in jury and non-jury trials), in civil trials evidence going to admissibility

⁴⁹ *Sydneywide* at [7]

⁵⁰ *Sydneywide* at [16]

⁵¹ *Sydneywide* at [87]

on a voir dire hearing will be heard as part of the proceedings unless a contrary order is made⁵². This further diminishes the likelihood that a final decision will be reached based merely on admissibility.

V. Basis rule

34. In *Makita* Heydon JA concluded that the prime duty of the expert was “to furnish the trier of fact with criteria enabling evaluation of the validity of the expert’s conclusions”⁵³. The policy underpinning that conclusion was that if the court cannot consider critically whether there is a rational basis for an opinion, it cannot accurately determine (assuming for the moment it will be admissible) how much weight to attach to that evidence. The more easily accessible these reasons are, the easier the task of the court will be.

35. In *Trade Practices Commission v Arnotts Ltd*⁵⁴, Beaumont J was provided with evidence given by a ‘biscuit industry specialist’ which was based on the whole of the exhibits, transcript and court proceedings without the expert identifying more specifically which parts of that evidence he relied on. His Honour ruled that:

except in a straight forward, uncomplicated cases, where the facts are admitted and readily identified, the opinion of an expert is admissible only where the premises, that is to say the facts, upon which his or her opinion is based are expressly stated... [i]n complicated litigation, there are sound reasons of policy which support a rule that the premises

⁵² *ASIC v Rich*, (2004) 213 ALR 338; *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [201]

⁵³ *Makita* at [59]

⁵⁴ (1990) 92 ALR 527

considered by the expert should be expressly stated rather than left to speculation⁵⁵.

36. The ALRC has stated that the better view with regard to the basis rule is that it is not a formal rule of evidence. The Commission decided against recommending its adoption to avoid the exclusion of evidence which does not strictly comply with the requirements of the basis rule. Instead focus is again directed to the use of judicial discretions.⁵⁶ However it was explained that there was a growing acceptance among practitioners that a rational basis for expert opinions needed to be shown for such evidence to be admitted.
37. The basis rule remains a common law rule and might often be an indicator which will influence a decision whether or not to exercise a discretion under ss 135-137 but has not been and does not seem likely to be adopted into the *Evidence Act* in the foreseeable future.
38. Practitioners need to ensure that experts on whose evidence they intend to rely reach a balance between burdening the court with unnecessary information and not providing a sufficient basis for the opinions they have reached. The High Court⁵⁷ has indicated that whilst facts must be proved those facts do not need to "correspond with complete precision to the proposition on which the opinion is based"⁵⁸.

⁵⁵ *Arnotts* at 533

⁵⁶ ALRC Report 102 at 9.78-9.84

⁵⁷ Mason ACJ, Wilson, Brennan, Deane and Dawson JJ

⁵⁸ *Paric v John Holland Constructions Pty Ltd* (1985) 62 ALR 85 at 87-88

39. In contrast, the Federal Court⁵⁹ has stated that the basis for an opinion, including proof of an expert's 'training, study or experience' should be plain for the court to see so that it does not have to rely on drawing inferences, for example under s 183 of the *Evidence Act*, to ascertain the merits of an opinion⁶⁰.
40. The Court indicated in *Ocean Marine* that where a proper basis for an opinion should have been proven but was not there might be resultant costs consequences⁶¹. To avoid such a result it will be best for a practitioner to ensure that the expert provides the necessary basis and support for their opinions in their affidavit or examination chief. Ideally, one should not wait and expect such material to be sufficiently adduced in cross-examination. To do so will risk a finding that the evidence lacks a proper basis and this will have an effect on the weight which will attach to the expert's evidence.
41. In NSW, the requirements of cl 5 of the Expert Witness Code of Conduct obviously reflect aspects of basis rule. In particular, experts are required to state their qualifications relevant to the subject of the report⁶², the facts or assumptions of fact on which the report is based⁶³ and the reasons for the opinions held⁶⁴.

⁵⁹ Black CJ, Cooper and Emmett JJ

⁶⁰ *Ocean Marine Mutual Insurance Association (Europe) OV Jetopay Pty Ltd* [2000] FCA 1463 at [18]-[23]

⁶¹ *Ocean Marine* at [47]-[49]

⁶² UCPR Schedule 7 cl 5(a)

⁶³ UCPR Schedule 7 cl 5(b)

⁶⁴ UCPR Schedule 7 cl 5(c)

42. Primary sources, secondary sources, lay opinions, business records⁶⁵ and material which would otherwise be considered hearsay⁶⁶ among other material might all be accepted by the courts as a basis for an expert opinion in appropriate circumstances. However, given that the purpose of the basis rule is to provide the court with a means to test the validity of the opinion, if that opinion cannot be rationally supported, it is unlikely to be accepted or alternatively, if it is, given any real weight.

VI. 'Specialised knowledge'

43. The common law formulation, prior to the introduction of s 79 of the *Evidence Act* required that a field of expertise be demonstrated as one of the requirements for expert evidence to be admissible. Gaudron J compared the common law test with the statutory requirement and stated that "specialised knowledge" should not be interpreted as giving "rise to a test which is in any respect narrower or more restrictive than the position at common law".⁶⁷ Her Honour's words are consistent with the suggestion by the ALRC that the test imposed should not be restrictive.⁶⁸

44. Giles JA noted in *Adler v ASIC*⁶⁹ that various examples now existed which indicated a broad range of topics had previously been the subject of specialised knowledge including the "attitude of a member of a community"; the behaviour of investors; and the behaviour of prison escapees. His Honour concluded that knowledge of "proper professional conduct in the sense of due care and

⁶⁵ s69 *Evidence Act*

⁶⁶ s60 *Evidence Act*

⁶⁷ *HG v R* at 432 [58]

⁶⁸ ALRC Report 102 at 9.36

⁶⁹ [2003] NSWCA 131

obedience to customary practices and ethics rules” was also capable of being a field of specialised knowledge⁷⁰.

45. Although broad, one should not overlook the restrictions necessarily imposed by the phrase ‘specialised knowledge’. First, the knowledge must be specialised. One might assume that common knowledge is the opposite of ‘specialised’ knowledge. For example, an expert called by Seven in its pay television dispute with News Ltd⁷¹, gave evidence that the AFL and NRL are popular sporting competitions in Australia and rights to them would be important for a sports broadcasting channel. Sackville J accepted that this was probably true but noted that similar evidence had been given by lay witnesses in the case and doubted whether Seven’s ‘expert’ had the “experience or expertise required to evaluate the significance” of such matters⁷². His Honour noted that this was exactly the type of “mischief” warned against by Gleeson CJ in *HG v R* (see below at [51])⁷³. However, s80 now prohibits the exclusion of evidence merely because it relates to common knowledge (see [61] below).

46. The second area of potential restriction is that the opinion must be based on (specialised) *knowledge* rather than merely belief. In relation to this point I will no more than mention it as it is beyond the scope of this paper to explore the difficulties of making distinctions on fact/opinion continuum or the extent to which anyone can truly *know* anything.

⁷⁰ *Adler* at [629]

⁷¹ *Seven Network Ltd v News Ltd (No 15)* [2006] FCA 515

⁷² *Seven Network* at [29]

⁷³ *Seven Network* at [30]

VII. 'Based on training, study or experience'

47. The words 'based on training, study or experience' in s 79 are broad enough to allow a variety of ways for specialised knowledge to have been developed. The allowance for experience to be a base of itself acknowledges the possibility of 'ad hoc' experts⁷⁴. The key question for a practitioner to ask here is whether there is a reasoned process by which it can be said that the specialised knowledge relied on is based on the training, study or experience which the expert has completed.

48. An important factor to consider, according to Einstein J is whether the court can be:

satisfied that the claimed expert, through training, study or experience, is shown to have become capable of appreciating the validity (and sometimes invalidity) and the substance (and sometimes lack of substance) in statements made and points of view expressed in extrinsic reading materials⁷⁵.

49. This, his Honour reasoned, was to avoid situations where a lay person could claim to be an expert in a field merely by reading materials as they would not likely be able to distinguish between acceptable and questionable sources in that field. It follows therefore that experience by itself in a technical field will normally

⁷⁴ See for example *R v Leung* (1999) 47 NSWLR 405 at 412-413 [37]-[40] per Simpson J (with whom Spigelman CJ and Sperling J agreed)

⁷⁵ *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 123 at [25]

be insufficient⁷⁶ but warnings have been made against forming a narrow construction of this aspect of s 79, particularly with respect to developing fields of expertise⁷⁷. It will be essential for practitioners to consider whether, in a common sense manner, the expert to be called has the expertise to address the questions for which he or she is being called and whether that expertise is supported by their training, study or experience.

50. An exception, of sorts, to the requirement of training, study or experience can be found in the relatively new s 78A of the *Evidence Act*. This section allows members of an Aboriginal or Torres Strait Islander group to give evidence of an opinion about the existence, or otherwise, or content of the traditional laws and customs of that group. Such evidence is, of course still subject to the potential restrictions of ss 56 and 135-137. This section has limited applicability and is distinct from, for example, the ability of an anthropologist or historian to give evidence of the traditional laws and customs of that group. Such experts would still need to qualify for the exception to the opinion rule in s 79.

51. Finally, and again drawing on the words of s 79, the opinion needs to be wholly, or at least substantially based on the specialised knowledge that is demonstrated. This is a further reason why the reasoning process of an expert must be clear, so that the court can determine if this criterion has been met. It also limits experts to providing opinions directly linked to their specialised knowledge because to allow otherwise might "invest those opinions with a

⁷⁶ *Clark v Ryan* at 490-491 per Dixon CJ; *Weal v Bottom* (1966) 40 ALJR 436 which distinguished *Clark v Ryan* but indicated that where experience is to be accepted by itself it must be specifically related to the evidence to be given.

⁷⁷ *Idoport* at [2001] NSWSC 123 at [89], [153]

spurious appearance of authority” leading to the subversion of “legitimate processes of fact finding” even though such “mischief” should be avoided⁷⁸.

VIII. Ultimate issues

52. Section 80 of the *Evidence Act* prohibits the exclusion of evidence merely because it relates to an ‘ultimate issue’. It is important to note that s80 is not of itself a ground for admitting evidence. It states, with reference to evidence which is otherwise admissible pursuant to ss 56 and 79, that it should not be excluded merely because it relates to an ultimate issue. Such evidence might still be subject to the exercise of a discretion under one of ss 135-137. Further, the weight given to such evidence, if any, will be determined later, when the court is able to conclude whether or not the remainder of the available evidence supports the expert’s evidence.
53. The origins of the ultimate issue rule arose according to the policy that the function of the court should not be usurped by an expert dictating a final finding.
54. Glass JA said in *R v Palmer*⁷⁹ that the true formulation of the ultimate issue rule “is that no evidence can be received upon any question, the answer to which involves the application of a legal standard”. The concept was refined slightly by Mason P who said in *R v GK* that judges “should exercise particular scrutiny” as experts encroach on an ultimate issue⁸⁰.

⁷⁸ *HG v R* at [44] per Gleeson CJ

⁷⁹ [1981] 1 NSWLR 209 at 214

⁸⁰ (2001) 53 NSWLR 317 at 326 [40]

55. Similar authority on ultimate issue evidence can be found in the Federal Court.

By way of example, in *Allstate Life Insurance Co v Australia & New Zealand Banking Group (No 6)*⁸¹ Lindgren J said that an expert cannot give evidence about the performance of a curial function or how it should properly be performed as this would result in an “abdication of the judicial duty and usurpation of the judicial function...such evidence is necessarily irrelevant”. A further reason for this conclusion is that when a witness advocates a particular interpretation of the law over another, doubt must be cast on the independence of such a witness⁸², and in turn whether they are, at that point, still truly fulfilling their duty of impartiality owed to the court.

56. A minor qualification to continued concerns regarding ‘ultimate issue’ evidence was provided in *Idoport v National Australia Bank*⁸³ by Einstein J. His Honour noted that an expert opinion of the likely legal conclusion in a different jurisdiction might be admissible where it is of assistance, as it might not usurp the function of the court. However, Emmett J has stated that when an expert makes

reference to a legal standard, it will be essential, before it can be admissible and certainly before any weight can be afforded to it, that the expert’s understanding of the relevant legal standard be established and be shown to be in accordance with the law⁸⁴.

⁸¹ (1996) 64 FCR 79 at 83

⁸² *O'Brien v Gillespie* (1997) 41 NSWLR 549 per Levine J

⁸³ *Idoport Pty Ltd v National Australia Bank Ltd* (2000) 50 NSWLR 640

⁸⁴ *Pan Pharmaceuticals Pty Ltd v Selim* [2008] FCA 416 at [36]

57. Giles J suggested, in *RW Miller & Co Pty Ltd v Krupp (Aust) Pty Ltd*⁸⁵ a rule in terms that “the expert may not give an opinion on an ultimate issue where that involves the application of a legal standard”⁸⁶. The ALRC considered the adoption of such an approach but the introduction of such a rule would, it was said, create confusion about the ambit of the rule. Instead the Commission suggested a more desirable approach would be to allow the court to use the available discretions appropriately⁸⁷.
58. There is also a general assumption that the court does not need the assistance of anyone to determine the meaning of an ordinary English word as this is a common function of the court⁸⁸.
59. Similarly, when considering whether an expert’s evidence will encroach on an ultimate issue, a practitioner should be aware that it will be beyond the task of an expert to give evidence about the credibility or truthfulness of another witness. This is a final matter for the trier of fact, especially where credibility is a key issue⁸⁹.
60. Again, some limited exceptions have been applied. For example, Sackville J, in relation to methods of communication used by a particular aboriginal tribe, noted that evidence of this kind might be within the realm of an expert⁹⁰. In *Farrell v R*⁹¹

⁸⁵ (1991) 34 NSWLR 129

⁸⁶ *RW Miller* at 130

⁸⁷ ALRC Report 102 at 9.122

⁸⁸ *Tim Barr v Narui Gold Coast Pty Ltd* [2008] NSWSC 1263 at [24]

⁸⁹ *Jango (No 4)* at [38]

⁹⁰ *Jango (No 4)* at [40]-[42]. However in this instance his Honour rejected the evidence under the discretion in s135(3) as likely to be an undue waste of time.

⁹¹ (1998) 194 CLR 286

three members of the High Court in separate judgments (Gaudron, Kirby and Callinan JJ) accepted evidence of a capacity of a particular witness to recall the truth in regards to memory impairment and therefore a propensity to lie. The addition of subs (2) to s 79 provides an exception to this rule with regard to child behaviour in appropriate cases. Such exceptions will likely have very limited applicability in commercial proceedings.

IX. Common knowledge

61. In attempting to provide a guideline as to when experts should be called to give evidence Dixon CJ suggested that expert witnesses would not be needed when “the inquiry is into a subject-matter the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it”⁹².

Currently s 80 of *Evidence Act* restricts the formulation propounded by his Honour by prohibiting the exclusion of evidence which can be characterised as ‘common knowledge’. Of course, as Barrett J noted in *Tim Barr*⁹³, s 80 does not actually require the court to attach any weight at all to material which falls within its ambit.

62. Whilst it is established that it is not desirable for experts to state opinions beyond the scope of their specialised knowledge, because to do so might “invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding [might] be subverted”⁹⁴, it is no longer acceptable for a court to

⁹² *Clark v Ryan* at 491

⁹³ [2008] NSWSC 1263

⁹⁴ *HG v R* at [44] per Gleeson CJ

exclude evidence merely because it is not “outside the knowledge or experience of ordinary persons”⁹⁵.

63. However, the court can still restrict its use or limit its inclusion where evidence is not relevant, or pursuant to one of the discretions, discussed above at [13]-[14], where material does not assist the court.

X. Summary evidence

64. Given what has been described, at times critically, as the “heavy, often unthinking reliance on expert evidence”⁹⁶ it is not surprising that the court has power to allow summaries of evidence to be provided by experts. Specifically s 50 of the *Evidence Act* is stated in s 76 to be an exception to the opinion rule allowing the court, upon the application of a party, to direct a party to “adduce evidence of the contents of 2 or more documents in question in the form of a summary” to avoid the court wasting time on complex or voluminous material.

65. Additionally, *Potts v Miller*⁹⁷ is authority for the proposition that under the general law summaries, particularly of the books or other business records of a company are admissible because “an accountant’s statement of the result of his examination is receivable as the evidence of a person of skill”⁹⁸. This allows an expert such as an accountant in this instance to give an overall impression of the

⁹⁵ *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* (2007) 159 FCR 397

⁹⁶ *Seven Network Limited v News Limited* [2007] FCA 1062

⁹⁷ (1940) 64 CLR 282

⁹⁸ *Potts* at 303

evidence they have considered. Indeed, Gibbs J said that where books are produced, an accountant may “state their general effect”.⁹⁹

66. Austin J, although expressing no view whether the question was strictly one of admissibility or weight, enunciated that the basis rule does still apply to accountants when they are giving summary evidence¹⁰⁰. However, his Honour reasoned, where the books are produced and the accountant’s evidence is accepted to be a summary “elaborate reasoning” would be less essential.
67. Summary evidence has also been accepted in other circumstances in order to improve the efficiency of the court process. For example, *Potts v Miller* has been relied upon to allow anthropological evidence to be adduced in summary form by Sackville J in *Jango (No 4)*¹⁰¹ and Lindgren J in *Harrington-Smith (No 9)*¹⁰². Clause 5(g) of the NSW Expert Witness Code of Conduct requires that an expert’s report, regardless of the type of specialised knowledge possessed, must include a brief summary at the beginning of the report, where the contents of the report are “lengthy or complex”¹⁰³.
68. It is worth noting, whilst looking at *Potts v Miller*, that it also underpins the rationale for the s 69 business records exception to the hearsay rule that:

records of modern industrial activities in which the facts are complex and the persons concerned so numerous that no one of them has an

⁹⁹ *Re Montecatini’s Patent* (1973) 47 ALJR 161 at 169

¹⁰⁰ *ASIC v Rich* [2005] NSWSC 149

¹⁰¹ (2005) 214 ALR 608 at 613 [27]

¹⁰² (2007) 238 ALR 1 at 116 [433]

¹⁰³ *UCPR* Schedule 7

accurate recollection of the whole chain of events, or, indeed, ever had a complete knowledge of it. The record itself in these cases is in effect the best and only evidence of the transaction. If it is identified, and its correctness and regularity are established, there is no sound reason why it should not be accepted as proof of great value¹⁰⁴.

69. When material, including of the type identified above is relied on in an expert report it may be admitted under s 60(2) of the *Evidence Act* as an exception to the hearsay rule. This subsection overturns the decision of the High Court in *Lee v The Queen*¹⁰⁵. Section 60(2) thus prevents difficulties, which would have been faced by experts and the parties calling them if it were essential to prove every fact used to support an opinion in a report before that opinion could be accepted. Section 136 may and to the view of some should¹⁰⁶ be utilised in such circumstances to limit the use of evidence which is admitted pursuant to s 60.

Conclusion

70. From a judicial perspective, difficulties arise when there is a heavy or unthinking reliance on experts. The court is then faced with, on one hand expert witnesses who are “used mainly for the purposes of advocacy” particularly “where the true technical or specialist expertise involved is limited”¹⁰⁷ and, on the other hand an increasing “number and complexity of scientific and technological advances”

¹⁰⁴ Potts at 304

¹⁰⁵ (1998) 195 CLR 594

¹⁰⁶ See for example *Roach v Page (t/as Freehill Hollingdale Page) (No 11)* [2003] NSWSC 907 at [74] per Sperling J

¹⁰⁷ Gleeson M *Some Legal Scenery* presented at the Judicial Conference of Australia 5 October 2007 p13

which threaten to present “a critical institutional problem” for those attempting to understand expert evidence¹⁰⁸.

71. Given the number of issues of which practitioners need be aware when calling expert evidence they might be forgiven for agreeing with Nicholson J, who said s 79 is “simple in concept but sometimes difficult to apply”¹⁰⁹.
72. Changes to the UCPR allow mean that expert evidence sometimes comes in different forms including Court Appointed Experts¹¹⁰, a Parties’ Special Experts¹¹¹ and Experts’ Conferences¹¹². Practitioners though cannot avoid being aware of the issues, some of which are identified in this paper, relevant to adducing evidence from individual experts
73. Practitioners should be aware not only of the necessary steps to ensure that the evidence they intend to rely on is admitted but also of these and other concerns likely to afflict judicial officers to ensure that the practitioner is best fulfilling his or her duties to both the court and his or her client.
74. Especially in light of the increasing importance and usage of the judicial discretions identified, practitioners can best limit any confusion potentially caused or time potentially wasted through the misuse of experts, and ultimately

¹⁰⁸ Kirby, M, *Expert Evidence: Causation, Proof and Presentation*, The International Institute of Forensic Studies, Inaugural Conference, Prato, Italy, 3 July 2002

¹⁰⁹ *Australian Competition & Consumer Commission v Emerald Ocean Distributors Pty Ltd* [2002] FCA 740 at [2]

¹¹⁰ See UCPR rr31.47-31.54

¹¹¹ See UCPR rr31.37-31.45

¹¹² See UCPR rr 31.24-31.26

ensure the evidence they intend to rely is admitted and accepted by the court by giving serious consideration to the following questions:

- Is an expert actually required in this case?
- What issues is the expert going to address?
- Do the reasons given support the expert's opinion?
- Can this be rationally tested?
- Is the report in a form acceptable to the court?

75. Finally, and in keeping with the pragmatic approach suggested above the witness should be made foremost aware that their duty is to assist the court and provide information based on the specialised knowledge they possess.