

**THE ROLE OF THE EXPERT WITNESS AND THE ADMISSIBILITY
OF EXPERT EVIDENCE IN NATIVE TITLE PROCEEDINGS**

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1. INTRODUCTION: THE ROLE OF THE ANTHROPOLOGIST AS EXPERT WITNESS

1. Although the evidence of the Aboriginal witnesses will be central to any native title claim, most native title proceedings will also involve a plethora of expert evidence from various disciplines. Indeed, the mode of proof of continuity in traditional laws and customs and the society to which they relate, will often involve the consideration of historical, archaeological and linguistic evidence as well as anthropological evidence, viewed in the light of the direct testimony of the Aboriginal witnesses.¹
2. The reason why expert evidence and, in particular, expert anthropological evidence is needed is that in all native title proceedings there are inherent forensic difficulties in proving the content of pre-sovereignty laws and customs and the continuous acknowledgment and observance of those laws and customs, down to the present day. While Aboriginal witnesses may be able to recount the content of laws and customs acknowledged and observed in the past, the collective memory of living people will not extend back to sovereignty. As Sackville J noted in *Jango v Northern Territory* (2006) 152 FCR 150 at [462], in the ordinary course, Aboriginal claimants adduce anthropological evidence to establish the link between current laws and customs and the laws and customs acknowledged and observed by the claimants' predecessors at the time of sovereignty. Depending upon the circumstances, anthropological evidence might also help to fill in other evidentiary gaps in the Aboriginal testimony (at [292]-[293]).
3. The importance of anthropological evidence was discussed by Mansfield J in *Alywarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group v Northern Territory* (2004) 207 ALR 539 at [88]. His Honour there observed that anthropological evidence may provide a framework for understanding the primary evidence of Aboriginal witnesses in respect of the acknowledgment and observance of traditional laws, customs and practices. His Honour went on to say that not only may anthropological evidence observe and record matters relevant to informing the Court as to the social organisation

¹*Sampi v Western Australia* [2005] FCA 777 at [964] (French J).

of an applicant claim group, and as to the nature and content of their traditional laws and traditional customs, but by reference to other material including historical literature and anthropological material, the anthropologists may compare that social organisation with the nature and content of the traditional laws and traditional customs of their ancestors and interpret the similarities or differences. Furthermore, there may be circumstances in which an anthropological expert may give evidence about the meaning and significance of what Aboriginal witnesses say and do, so as to explain or render coherent matters which, on their face, may be incomplete or unclear.

4. This potentially important source of expert evidence in native title proceedings will be lost if, as was the case in *Jango*, the evidence is not presented in an admissible form or fails to address critical issues.² The purpose of this paper is twofold. Firstly, I want to discuss the admissibility of expert evidence, with particular reference to expert anthropological evidence. Secondly, I want to discuss the role of the lawyer in ensuring that expert evidence which is presented to the Court is both relevant and admissible.

2. ADMISSIBILITY

(i) General principles

5. In hearing native title proceedings, the Federal Court is bound by the rules of evidence, unless the Court otherwise orders.³ Accordingly, the admissibility of all or of any part of, an expert's report (or oral evidence) must be looked at in the context of the *Evidence Act 1995* (Cth) ("the *Evidence Act*")⁴ as a whole. The key provisions of that Act in respect of the admissibility of evidence are contained in ss.56 and 55. Section 56 is in the following terms:

² In relation to the rejection of much of the applicants' anthropological evidence see *Jango v Northern Territory (No.2)* [2003] FCA 1230 and, in relation to the failure of the anthropological evidence to address critical issues see *Jango v Northern Territory* (2006) 152 FCR 150 at [327]-[328] and [463]-[464].

³ *Native Title Act 1993* (Cth), s.82(1).

⁴ Or its State or Territory equivalent

- "(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 a proceeding is not admissible."*

6. Evidence that is "*relevant in a proceeding*" is defined in s.55(1):

- "(1) *The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.*"

7. Evidence which is not relevant, that is, evidence which could not rationally affect the assessment of the probability of the existence of a fact in issue in the proceedings, is *never* admissible. It is important therefore to bear in mind that expert evidence which satisfies the requirements of s.79 of the *Evidence Act*⁵, will nonetheless be inadmissible if it is not clearly directed towards a fact in issue in the proceeding. What is a fact in issue in the proceeding will be defined by the substantive law and by the pleadings.

8. Where evidence is "*relevant*" and therefore prima facie admissible, there are a number of exclusionary rules which limit its admissibility. The first is the hearsay rule in s.59 and the second is the opinion rule in s.76.

9. Section 59 provides as follows:

- "(1) *Evidence of a previous representation⁶ made by a person is not admissible to prove the existence of a fact that the person intended to assert by their representation.*
- (2) *Such a fact is in this Part referred to as an asserted fact."*

⁵ See later herein under the sub-heading **(ii) Expert opinion evidence** for a discussion of s.79 of the *Evidence Act*.

⁶"*Previous representation*" is defined in the *Evidence Act Dictionary*: "*Previous representation means a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced.*" "*Representation*" is also defined in the Dictionary to include: "*(a) an express or implied representation (whether oral or in writing); or (b) a representation to be inferred from conduct; or (c) a representation not intended by its maker to be communicated to or seen by another person; or (d) a representation that for any reason is not communicated.*"

10. The "*opinion rule*" is expressed in s.76 in the following terms:

"Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed."

11. The opinion rule is subject to two exceptions. One as to "*lay opinion*" evidence and the other as to "*expert opinion*". The exception as to "*lay opinion*" evidence is contained in s.78 whilst the exception as to "*expert opinion*" evidence is contained in s.79. Note that if an expert's opinion is admissible under s.79, it remains admissible even if it addresses an ultimate issue in the proceeding (s.80(a)).

12. The hearsay rule is also subject to a number of exceptions. For present purposes, the relevant exception is contained in s.60. Section 60 provides that the hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

13. This exception extends to hearsay evidence admitted for the purpose of demonstrating the basis of an expert's opinion.⁷ Where a hearsay statement of this type is admissible under s.60, the Court may make an order under s.136 to limit the use to be made of that evidence to explaining the basis of the expert's opinion.⁸ Whether s.136 will be applied in this way will depend on all the circumstances of the particular case.⁹

14. Finally, some reference should be made to s.135 of the *Evidence Act*. This provision confers a discretion on the Court to:

⁷*Lee v The Queen* (1998) 195 CLR 594 at 603-604; *Quick v Stoland Pty Ltd* (1998) 87 FCR 371.

⁸*Quick v Stoland Pty Ltd* (1998) 87 FCR 371 at 377-378, 382; *Daniel v Western Australia* (2001) 186 ALR 369

⁹*Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No.7)* (2003) 130 FCR 424 at [39] Lindgren J; *Lardil, Kaiadilt, Yangkaal, Gangalidda Peoples v Queensland* [2000] FCA 1548 at [16]-[17], [26] Cooper J.

"... refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or*
- (b) be misleading or confusing; or*
- (c) cause or result in undue waste of time."*

(ii) Expert opinion evidence

15. The concept of an "*opinion*" can relevantly be defined as an "*inference drawn from facts ... [or] 'a conclusion, usually judgmental or debatable, reasoned from facts'...*".¹⁰ In most, if not all disciplines, an opinion is formed by reasoning, drawn from a group of facts¹¹. As stated above, the general principle in s.76(1) is that "*evidence of opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed*". Section 79 creates an exception to this principle in the following terms:

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

16. As such, s.79 is concerned with the admissibility of a particular kind of opinion evidence, and poses an objective test which is not discretionary.¹²
17. Those matters which *must* be shown in order to establish that evidence of an expert opinion is admissible were summarised by Lindgren J in *Harrington-Smith on behalf of the Wongatha People v Western Australia (No.7)*¹³ as follows:

¹⁰*Harrington-Smith on behalf of the Wongatha People v Western Australia (No.7)* (2003) 130 FCR 424 at [40] per Lindgren J

¹¹*Risk v Northern Territory* [2006] FCA 404

¹²Eg *Harrington-Smith on behalf of the Wongatha People v Western Australia (No.7)* (2003) 130 FCR 424 at [17] per Lindgren J

¹³(2003) 130 FCR 424 at [20]: quoted with approval by Sackville J in *Jango v Northern Territory (No.2)* [2003] FCA 1230 at [26] and by Mansfield J in *Risk v Northern Territory* [2006] FCA 404 at [455].

- "(a) *that the opinion is relevant (including that the field of knowledge is one in which expert opinion can properly be called (see Cross on Evidence (Australian edn) at [29050]) (Evidence Act ss.55 and 56);*
- (b) *that the person put forward as an expert possesses specialised knowledge in that field (Evidence Act s.79);*
- (c) *that the specialised knowledge is based on the person's training, study or experience (Evidence Act s.79); and*
- (d) *that the particular opinion is based ['wholly or substantially'] on the specialised knowledge (Evidence Act s.79)."*

18. Significantly, it is plain from the last of these requirements that it is not sufficient for a particular opinion to fall within the field in which the witness is an expert if no "*specialised knowledge*" is used in reaching that opinion.¹⁴ In this respect, the opinion will be inadmissible if it is one which the Court could itself reach upon the material considered by the expert. As Finkelstein J stated in *Quick v Stoland*:

*"The function of an expert is to provide the trier of fact, judge or jury, with an inference which the judge or jury due to the technical nature of the facts is **unable** to formulate."*¹⁵ (emphasis added)

(iii) Expert evidence is not necessarily “opinion” evidence

19. It is important to understand that not all expert evidence can be characterised as opinion evidence. There is an important distinction between, on the one hand, evidence of facts which may be given by an expert because their particular study or experience has enabled

¹⁴*Quick v Stoland Pty Ltd* (1998) 87 FCR 371 at 381 per Emmett J and 382-383 per Finkelstein J

¹⁵*Quick v Stoland Pty Ltd* (1998) 87 FCR 371 at 382 (emphasis added) per Finkelstein J. This reflects the position long held at common law: see eg *Bugg v Day* (1949) 79 CLR 422 at 462 per Dixon CJ; *Clark v Ryan* (1960) 103 CLR 486 at 491 per Dixon CJ; *Australian Oil Refining Pty Ltd v Bourne* (1979) 54 ALJR 192. See too *Farrell v The Queen* (1998) 194 CLR 286 at 292-3 per Gaudron J: “*It is well settled that expert evidence is admissible “to furnish ... scientific information which is likely to be outside the experience and knowledge of a judge or jury”*: [*R v Turner* [1975] QB 834 at 841]”.

them to acquire specialised knowledge of those facts which would not be available to a lay witness and on the other hand, evidence of an opinion. An expert may, for example, give evidence about how a complex piece of equipment works or what happens when a car skids.¹⁶ These are not matters of inference or opinion, these are matters of fact.

20. In *R v Perry (No 4)* (1981) 28 SASR 119 at 126, Cox J discussed the difference between a scientific fact and a scientific opinion. His Honour first gave the example of opinion evidence from a psychiatrist, in relation to the diagnosis of a mental condition, and a pathologist, in relation to a person's cause of death. His Honour said that with this type of evidence, much depends on the expert's judgment and it is recognized that the views of informed persons on such matters may reasonably differ. His Honour compared this type of scientific evidence with evidence from an expert analytical chemist. His Honour said that where a reliable method requiring little independent judgment was used to measure the level of arsenic in a person's blood, any statement regarding the presence or absence of arsenic was to be regarded as a statement of fact.
21. In *Quick v Stoland Pty Ltd* (1998) 87 FCR 371, a case involving the expert evidence of an accountant, Branson J said (at 375) that "[T]he distinction between evidence of 'fact' and evidence of 'opinion' assumes a dichotomy which is not always easy to draw". In *Risk v Northern Territory* [2006] FCA 404 at [472], Mansfield J essentially made the same point in relation to expert anthropological reports, the line between an opinion and the facts upon which that opinion is based, is not always clear. Nonetheless, the distinction can be important.
22. In *Gumana v Northern Territory*¹⁷, Selway J made the observation (at [160]) that much of the evidence given by anthropologists in native title proceedings, if it is based upon long-term field work with a claimant group, may not be opinion evidence at all. Rather, it may be evidence of their observations of "*reputation*"¹⁸ or custom or, at least, it may

¹⁶*R v Perry (No.4)* (1981) 28 SASR 119 at 124 cited in *Cross on Evidence* Australian Ed at [29020]

¹⁷(2005) 141 FCR 457

¹⁸ See s.74 of the *Evidence Act*

include such evidence. To that extent, it is direct evidence of facts and is admissible on that basis. On the other hand, Selway J was doubtful whether evidence of “*reputation*” could be given by an anthropologist (or by anyone else) who only carries out an investigation for the purpose of giving evidence in particular litigation.¹⁹ His Honour concluded that such evidence may not be properly characterised as evidence of “*reputation*”, but only as evidence of what that person has been told. If so characterised, it is hearsay and to the extent that any opinion is said to be based on that information, the information needs to be independently proved.²⁰

3. OBJECTIONS TO EXPERT OPINION EVIDENCE

(i) The importance of form

23. In requiring that the particular opinion be based “*wholly or substantially*” on specialised knowledge, s.79 requires that the opinion be presented in a form which enables that statutory question to be answered.²¹ Equally, the report must be presented in a form which enables the relevance of the report, in light of the facts as proved, to be assessed²².
24. Accordingly, even though s.79 may not incorporate the common law “*basis rule*”²³, the evidence of an expert opinion must clearly differentiate between the opinion and the facts upon which it is based, and it must expose the reasoning processes by which the opinions expressed have been reached, so as to enable an assessment to be made as to whether the

¹⁹ *Gumana v Northern Territory* (2005) 141 FCR 457 at [159]

²⁰ *Ibid*

²¹ *HG v The Queen* (1999) 197 CLR 414 at 427 per Gleeson CJ

²² *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 7)* (2003) 130 FCR 424 at [24]-[25].

²³ *Quick v Stoland Pty Ltd* (1998) 87 FCR 371 at 373-374 per Branson J; *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157 at [10] per Branson J; *Neowarra v Western Australia* (2003) 205 ALR 145 at 151-155 [16]-[27]; *Jango v Northern Territory (No.2)* [2004] FCA 1004 at [33]. But see contra *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 731 per Heydon JA which appears to find some support in *Anikin v Sierra* (2004) 79 ALJR 452 at 457 [28] per Gleeson CJ, Gummow, Kirby and Hayne JJ.

opinion is based wholly or substantially on the expert's specialised knowledge.²⁴

25. In *HG v The Queen* (1999) 197 CLR 414, Gleeson CJ pointed out (at [39]) that the provisions of s.79:

“will often have the practical effect of emphasising the need for attention to requirements of form. By directing attention to whether an opinion is wholly or substantially based on specialized knowledge, based on training, study or experience, the section requires that the opinion is presented in a form which makes it possible to answer that question.”

26. His Honour also observed (at [44]) that:

“in trials before judges alone, as well as in trials by jury, it is important that the opinions of expert witnesses be confined, in accordance with s.79, to opinions which are wholly or substantially based on their specialised knowledge. Experts who venture ‘opinions’ (sometimes merely their own inference of fact), outside their field of specified knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted.”

27. Similarly, in *Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd* (2000) 120 FCR 146m, the Full Federal Court observed (at [23]) that the:

*“further requirement [in s.79] that an opinion be **based on** specialized knowledge would normally be satisfied by the person who expresses the opinion demonstrating the reasoning process by which the opinion was reached. Thus, a report in which an opinion is recorded should expose the reasoning of its author in a way that would demonstrate that the opinion is based on particular specialised knowledge.”* (emphasis in original)

28. Thus, for example, the fact that an opinion is expressed in terms of a "*bare ipse dixit*" or "*oracular pronouncement*" raises, in the first instance, an issue as to admissibility under

²⁴*HG v The Queen* (1999) 197 CLR 414 at 427 [39], per Gleeson CJ; *Makita (Australia) Pty Limited v Sprowles* (2001) 52 NSWLR 705 at 731-732 and 744 per Heydon JA; *Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd* [2002] FCA 1463 at [23] per Black CJ, Cooper and Emmett JJ; *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 123 at [19] per Einstein J; *Neowarra v Western Australia* (2003) 205 ALR 145 at 153 [23]; *Jango v Northern Territory (No.2)* [2004] FCA 1004 at [34]; see too the Federal Court Guidelines for Expert Witnesses.

s.79, in addition to the issues of relevance and weight which would arise in any event.²⁵

29. Different views have been expressed by the New South Wales Court of Appeal in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 and the Full Federal Court in *Quick v Stoland Pty Ltd* (1998) 87 FCR 371 and in *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354, on whether, for the opinion of an expert to be admissible, the facts upon which the opinion is based, must not only be disclosed, but then must also be proved by otherwise admissible evidence. The difference is unlikely, however, in most cases, to take on any practical significance²⁶.
30. In native title proceedings, the Federal Court has taken the view that it is not a condition of admissibility of an expert opinion that the assumed facts on which it is based are established by the evidence.²⁷ Nonetheless, if by the end of the proceeding a fact upon which a particular opinion is based is not established by the evidence, the opinion will at the very least be given little or no weight.²⁸
31. It has often been the case in native title proceedings that the expert anthropological reports suffer from a lack of transparency with respect to these critical matters. Opinions have often been expressed as unsourced assertions and generalisations which rarely indicate the reasoning process which underlies them, or the source of statements and information upon which they are based. Further, they often fail to differentiate between matters of fact and opinion.²⁹ The following passage from the judgment of Sackville J in

²⁵*Makita (Australia) Pty Limited v Sprowles* (2001) 52 NSWLR 705 at 729 per Heydon JA. 20 July 2004. See also *id* at 731.

²⁶*Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 at [670], Allsop J; see too *Harrington-Smith v Western Australia (No.7)* (2003) 130 FCR 424 at [24]-[25]. This aspect is further discussed in the next section of the paper.

²⁷*Neowarra v Western Australia (No.1)* (2003) 134 FCR 208 at [25].

²⁸*Neowarra v Western Australia (No.1)* (2003) 134 FCR 208 at [27]; see too *Gumana v Northern Territory* (2005) 141 FCR 457 at [159].

²⁹With respect to the latter proposition, see, for example, *Harrington-Smith on behalf of the Wongatha People v Western Australia (No.7)* (2003) 130 FCR 424 at [31] per Lindgren J; *Jango v Northern Territory (No.2)* [2004] FCA 1004 at [11] per Sackville J.

*Jango v Northern Territory (No.2)*³⁰ illustrates the point:

"Like some of the reports discussed by Lindgren J in Harrington-Smith (No.7), the Yulara Anthropology Report often does not clearly expose the reasoning leading to the opinions arrived at by the authors. Nor does it distinguish between the facts upon which opinions are presumably based and the opinions themselves. Indeed, it is often difficult to discern whether the authors are advancing factual propositions, assuming the existence of particular facts, or expressing their own opinions. Certainly the basis on which the authors have reached particular conclusions is often either unstated or unclear."

(ii) Disclosure and proof of the basis of the opinion

32. For any value or weight to be given to expert opinion evidence, the facts or assumptions upon which the opinion is based must be proved by admissible evidence.³¹ Heydon JA explained in *Makita v Sprowles*³²:

"The basal principle is that what an expert gives is an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based. If other admissible evidence establishes that the matters assumed are 'sufficiently like' the matters established 'to render the opinion of the expert of any value', even though they may not correspond 'with complete precision', the opinion will be admissible and material."³³

33. As his Honour then points out, "[o]ne of the reasons why the facts proved must correlate to some degree with those assumed is that the expert's conclusion must have some

³⁰[2004] FCA 1004 at [11]

³¹See generally eg *Paric v John Holland (Constructions) Pty Ltd* (1985) 59 ALJR 844 at 846; *Gordon v The Queen* (1982) 41 ALR 64 at 64 "... statements made to an expert witness are admissible if they are the foundation, or part of the foundation, of the expert opinion to which he testifies but that if such statements, being hearsay, are not confirmed by evidence, the expert testimony based on them is of little or no value." In the native title context see *Neowarra v Western Australia* (2003) 134 FCR 208 at [27].

³²*Makita (Australia) Pty Limited v Sprowles* (2001) 52 NSWLR 705

³³*Makita (Australia) Pty Limited v Sprowles* (2001) 52 NSWLR 705 at 731 [64] per Heydon JA

rational relationship with the facts proved."³⁴

34. In other words, an opinion without an established basis, is not probative of anything. If, therefore, the basis of the opinion is not disclosed or, if disclosed, is not proved by otherwise admissible evidence, the opinion will not satisfy the requirements of s.79³⁵, or alternatively, should be excluded in the exercise of the Court's discretion under s.135 in any event³⁶. In *Harrington-Smith v Western Australia (No.7)* (2003) 130 FCR 424 at [25] Lindgren J stated that expert opinion will not be relevant if there is an insufficient correspondence between *all* the facts assumed by the expert as the basis of his or her opinion and those proved or admitted.
35. However, as Sackville J recently explained in *Jango v Northern Territory (No.2)* [2004] FCA 1004 at [73], if an expert can express an opinion only if it is based on knowledge or information which is itself independently proved, serious practical difficulties are likely to arise. This is particularly so in the case of valuation evidence.³⁷ Nonetheless, for the reasons set out earlier above, the expert's opinion will not be admissible unless the expert has at least *disclosed* the assumed facts on which the opinion is based and has explained the reasoning process leading to the opinion³⁸.

³⁴Ibid, see too *Harrington-Smith v State of Western Australia (No7)* (2003) 130 FCR 424 at [24]-[25].

³⁵*Makita (Australia) Pty Limited v Spowles* (2001) 52 NSWLR 705 at 745 per Heydon JA; *Quick v Stoland Pty Ltd* (1998) 87 FCR 371 at 377-378 per Branson J; *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157 at [11]-[14] per Branson J; *Jango v Northern Territory (No.2)* [2004] FCA 1004 at [74] per Sackville J. See also *Guidelines for Expert Witnesses in proceedings in the Federal Court of Australia* (Practice Direction, 19 March 2004) at para 2.2.

³⁶*Makita (Australia) Pty Limited v Spowles* (2001) 52 NSWLR 705 at 745 per Heydon JA. Note that the Federal Court take a different view, that is, that proof of the facts assumed by an expert in giving his or her opinion goes to the weight that should be accorded to the opinion rather than its admissibility: *Neowarra v Western Australia* (2003) 205 ALR 145 at 151-155; *Harrington-Smith v State of Western Australia (No7)* (2003) 130 FCR 424 at [24]-[25]; *Jango v Northern Territory (No.2)* [2004] FCA 1004 at [11], [33]-[34]. But the assumed facts on which the opinion is based must still be described (ibid).

³⁷See the passage cited by Sackville J from *English Exporters (London) Ltd v Eldonwall Ltd* [1973] Ch 415, Megarry J (at 420)

³⁸*Seven Network Limited v News Limited (No 14)* [2006] FCA 500 at [25]-[28] and the cases cited therein; *Harrington-Smith v State of Western Australia (No 2)* [2003] FCA 893 at [24]-[25];

36. The proper role of expert evidence was recently described by the High Court in *Anikin v Sierra* (2004) 79 ALJR 452 at 457 [28] in the following terms:

*"Not all judges are mechanically minded or interested. Expert evidence, grounded in the proved testimony, can therefore occasionally be useful. But in the end, such evidence has weight only in respect of matters within the relevant field of expertise and is only as helpful as the evidence and assumptions on which it is based. Such evidence may not usurp the ultimate decisions which remain for the trial judge."*³⁹ (emphasis added)

(iii) The admission of hearsay evidence

37. The opinions expressed by experts engaged by parties to litigation are often based, in large part, on hearsay statements. This is particularly so with the reports of anthropologists in native title proceedings.

38. The seminal decision in respect of the admissibility of expert anthropological evidence is that of Blackburn J in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 161:

"The process of investigation in the field of anthropology manifestly includes communicating with human beings and considering what they say. The anthropologist should be able to give his opinion based on his investigation by processes normal to his field of study, just as any other expert does. To rule out any conclusion based to any extent upon hearsay – the statements of other persons – would be to make a distinction for the purposes of the law of evidence, between a field of knowledge not involving the behaviour of human beings (say chemistry) and a field of knowledge directly concerned with the behaviour of human beings, such as anthropology. A chemist can give an account of the behaviour of inanimate substances in reaction, but an anthropologist must limit his evidence to that based upon what he has seen the Aboriginals doing, and not upon what they have said to him."

39. The general exception to the hearsay rule in s.60 is sufficient to extend to first-hand (but

Evans Deakin Pty Ltd v Sebel Furniture Ltd [2003] FCA 171 at [670]-[671], Allsop J.

³⁹Per Gleeson CJ, Gummow, Kirby and Hayne JJ

not remote), hearsay evidence admitted for the purpose of demonstrating the basis of an expert's opinion⁴⁰. However, in such cases the Court *may* make an order under s.136 to limit the use to be made of that evidence so that it is not used for the hearsay purpose and thus ensure that the factual basis of the opinion is properly proved and tested⁴¹. Such orders will typically be made where there is, for example, a genuine dispute on the facts or the hearsay material is demonstrably unreliable⁴². Alternatively, the view has been taken in some cases that, where the purpose of including statements made to or read by, the expert, is solely to expose the expert's factual assumptions, no order limiting the use of such material is necessary (as Lindgren J held in *Wongatha (No.7)*⁴³). The hearsay nature of the evidence will go to its weight.⁴⁴

40. It should be remembered that merely to restate or summarise the views of another does not involve the provision of opinion evidence based upon specialised knowledge. Such evidence is, as Freckleton and Selby explain, "*not susceptible of meaningful evaluation*"⁴⁵ and "*[e]xpert opinions that function as a conduit for the work and opinions of others cannot adequately be tested by cross-examination and so cannot adequately be evaluated by triers of fact.*"⁴⁶

⁴⁰*Lee v The Queen* (1998) 195 CLR 594 at 603-604; *Quick v Stoland Pty Ltd* (1998) 87 FCR 371 at 377-378 per Branson J and 382 per Finkelstein J

⁴¹*Quick v Stoland Pty Ltd* (1998) 87 FCR 371 at 378 per Branson J and 382 per Finkelstein J; *Daniel v Western Australia* (2001) 186 ALR 369 at 374-375 per Nicholson J. But cf *Lardil Peoples v Queensland* [2000] FCA 1548 at [26] and [28] per Cooper J who considered that the issue could sufficiently be dealt with as a matter of weight in the circumstances of that case.

⁴²*Quick v Stoland Pty Ltd* (1998) 87 FCR 371 at 378 per Branson J and 382 per Finkelstein J

⁴³*Harrington-Smith on behalf of the Wongatha People v Western Australia (No.7)* (2003) 130 FCA 424 at [38] per Lindgren J; *Lardil, Kaiadilt, Yangkaal, Gangalidda Peoples v Queensland* [2000] FCA 1548 at [28].

⁴⁴ *Ibid*

⁴⁵ Freckleton and Selby, *Expert Evidence*, vol. 1 at [6.50]

⁴⁶ *Ibid*. Related to this, where the writings of other learned experts in the field are relied upon by experts to explain or justify their opinions, they should be referred to in such a way "... *that the cogency and probative value of their conclusion can be tested and evaluated by reference to it: R v Abadom* [1983] 1 WLR 126 at 131. This is not to deny that an expert may refer to the work of other experts in the field to demonstrate that his or her opinion is not an isolated view: *R v Deputy Industrial Injuries Commissioner; ex parte Moore* [1965] 1 QB 456 at 483. Nor is it to deny that "*an expert may give an opinion on an issue*

(iv) Partiality

41. Evidence of opinion is not inadmissible merely because the person giving the evidence is not independent.⁴⁷ There is, however, an obvious risk that the involvement of the expert in the preparation of a case will affect the weight which the Court will give to the expert's evidence.⁴⁸ The Federal Court's Guidelines for Expert Witnesses is intended in part to assist experts to understand their role in legal proceedings and to help them to avoid the criticism that is sometimes made, that expert witnesses lack objectivity, or have coloured their evidence in favour of the party calling them.
42. The Explanatory Memorandum cautions that all experts need to be aware that if they participate to a significant degree in the process of formulating and preparing the case of a party, they may find it difficult to maintain objectivity. The decision in *Jango v Northern Territory* (2006) 152 FCR 150 describes a situation in which an expert witness was found to have lost his objectivity through having too close an involvement in the preparation of a party's case (at [322]-[326]). There the expert (an anthropologist) played a very active part in formulating and preparing the applicants' case, including "shaping" witness statements, advising which of his informants would be "good witnesses" and rejecting the original version of the applicants' Points of Claim, as drafted by the lawyers (ibid).
43. In *Gumana v Northern Territory* (2005) 141 FCR 457 at [169], the Court noted that there were potential problems with partiality in respect of the applicants' anthropologist. In particular, it was clear to the Court that the anthropologist had been actively involved in the preparation of the applicants' case, including preparing written statements and taking,

before a court based on the general state of the literature within the area of expertise in question or on the history of a series of well-known events...": Freckleton and Selby, *Expert Evidence*, vol. 1 at [11.250].

⁴⁷ *Gumana v Northern Territory* (2005) 141 FCR 457 at [163]; *Smith Kline Beecham (Aust) Pty Ltd v Chipman* (2003) 131 FCR 796. Although note the comments of Callinan J in *Fox v Percy* (2003) 214 CLR 118 at [151], that the "adversarial stance" taken by the expert witness in that case "might have been basis enough for the rejection of his evidence".

⁴⁸ *Gumana v Northern Territory* (2005) 141 FCR 457 at [163]

and even giving, instructions (at [169]). In that case, however, (unlike *Jango*), those potential problems did not lead the Court to have any strong concerns about the expert's evidence because:

- (i) the expert's conclusions were entirely supported by the Aboriginal evidence;
- (ii) the anthropological literature generally supported the conclusions drawn by the expert; and
- (iii) to the extent that the expert's evidence involved matters of opinion, those opinions were confirmed by the anthropologists called by the respondent parties.⁴⁹

44. In *Neowarra v Western Australia* [2003] FCA 1402 one of the anthropologists called by the applicants acknowledged during his evidence that he was very close to the members of the claimant group and accepted the possibility that this may have affected his opinions about the group. The Court stated, however, that having observed the expert give his evidence and having read the transcript of that evidence several times, it was satisfied that despite the expert's candour in acknowledging the risk inherent in "closeness" his evidence and opinions were at all times entirely professional (at [113]).

4. THE ROLE OF THE LAWYER

45. It is, of course, the responsibility of the lawyer, not the expert, to ensure that any written report is both relevant and in an appropriate form to be tendered into evidence.⁵⁰ The Federal Court's Guidelines for Expert Witnesses provides the lawyer with a useful checklist for use in the preparation and presentation of expert evidence. The Explanatory Memorandum which accompanies the Guidelines, refers to the importance of ensuring that an expert witness' report or other statement of evidence:

⁴⁹ *Gumana v Northern Territory* (2005) 141 FCR 457 at [171]. Note that in *Jango* the respondent parties did not call an anthropologist to give evidence.

⁵⁰ *Gumana v Northern Territory* (2005) 141 FCR 457 at [166].

- (a) is clearly expressed and not argumentative in tone;
- (b) is centrally concerned to express an opinion, upon a clearly defined question or questions, based on the expert's specialised knowledge;
- (c) identifies with precision the factual premises upon which the opinion is based;
- (d) explains the process of reasoning by which the expert reached the opinion expressed in the report;
- (e) is confined to the area or areas of the expert's specialised knowledge; and
- (f) identifies any pre-existing relationship between the author of the report, or his or her firm, company etc, and a party to the litigation.

46. The Explanatory Memorandum also points out that the Court expects legal practitioners and experts to work together to ensure that the Guidelines are implemented in a practically sensible way, which ensures that they achieve their intended purpose of facilitating the admission of opinion evidence and assisting expert witnesses to understand in general terms what the Court expects of them.

47. The role of the lawyer in the formulation of an expert's report, is firstly, to provide the expert with clear and precise instructions and, in particular, to clearly define the question or questions in respect of which the expert's opinion is sought. The opinion sought should, of course, be directed towards the facts in issue in the proceeding. In *Jango v Northern Territory (No.2)*⁵¹ Sackville J made the point in respect of the expert report in those proceedings that:

⁵¹[2004] FCA 1004 at [12]: a point which his Honour returned to in his final decision *Jango v Northern Territory* (2006) 152 FCR 150 at [313]; see too the Explanatory Memorandum to the Federal Court's Guidelines for Expert Witnesses

"It is difficult to avoid the conclusion that this apparently very large investment of time in the preparation of expert reports is attributable, at least in part, to a failure to define their task with precision and due regard to the laws of evidence."

48. In my opinion, it is not sufficient simply to provide the expert with a copy of the relevant Court's Guidelines in respect of the evidence which he or she is asked to give. Experience has shown that the requirements of those Guidelines are not necessarily self-explanatory for someone who is not a lawyer.
49. In providing the expert with instructions on what is required, the lawyer should stress that the expert must, in writing his or her report, focus on providing opinions which are clearly based on the expert's specialised knowledge and which squarely address the questions set out in the expert's instructions. In reaching and expressing an opinion on each of those questions, the expert must:
 - (a) identify with precision the factual premises upon which the opinion is based; and
 - (b) explain the process of reasoning by which the expert has reached that opinion.
50. Secondly, the lawyer should be involved in settling the final form of the expert's report. Again, experience has shown that unless the lawyer is involved in settling the overall form of the expert's report, the report is unlikely to be in a form which will be admitted into evidence:

*"Lawyers **should** be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed."⁵²*

⁵²*Harrington-Smith on behalf of the Wongatha People v Western Australia (No.7)* (2003) 130 FCR 424 at [19] per Lindgren J; a passage quoted with approval by Sackville J in *Jango v Northern Territory (No.2)* [2004] FCA 1004 at [9]

51. The lawyer's role in settling the final form of an expert's report should be limited to ensuring that the report addresses the relevant issues and that its contents are in an admissible form. In my opinion, it is ethically permissible for a lawyer to request substantive changes to an expert's draft report if the purpose of those changes is to remove evidence which is irrelevant or which is outside of the expert's field of expertise. The lawyer may also confer with the expert to test the sufficiency of the factual assumptions underlying the opinions expressed in the draft report and the soundness of the reasoning process.⁵³
52. There are ethical⁵⁴ and practical constraints upon a lawyer taking matters any further than that. The decision in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 at [227]-[231] demonstrates the practical constraints. There the Court concluded that because of the conduct of a solicitor in suggesting changes to a draft opinion expressed by an expert, it would be unsafe to rely on that expert in relation to *any* controversial matter.⁵⁵
53. Finally, it is the lawyer's responsibility to ensure that the facts and assumptions on which the expert's opinions are based are capable of proof by admissible evidence. As discussed earlier in this paper, unless the factual assumptions that underpin an expression of opinion are established by admissible evidence, the opinion itself will either be inadmissible or, if admitted, will be given limited or no weight.
54. The caution with which the higher courts, in particular, approach the evidence of expert witnesses and the corresponding diligence which lawyers must apply to the tender of expert testimony, is addressed in the following passage from the judgment of Callinan J in *Fox v Percy* (2003) 214 CLR 118 at 166-167 [150]-[151]:

"The second matter is the reception, apparently without question, of the whole of the contents of the expert reports in this case. Some of the

⁵³ NSW Bar Association Rules, rule 44.

⁵⁴ See eg NSW Bar Association Rules, rule 43 in relation to the ethical constraints.

⁵⁵ In the context of native title litigation, see too the comments of Sackville J in *Jango v Northern Territory* (2006) 152 FCR 150 at [314] and at [341]

deficiencies to which reference has already been made would require that, either in law, or in the proper exercise of a discretion, much of them should have been rejected. In the long run the indiscriminating tender of inadmissible, unreliable or valueless evidence, the acquiescence in its tender by counsel on the other side, and its reception into evidence, will prolong and increase the costs of trials. It will increase the margin for judicial error as occurred here, and will also lead to uncertainties and difficulties in courts of appeal.”

June 2007

V.B. HUGHSTON SC