EXPERT EVIDENCE
THE IMPACT OF THE CIVIL PROCEDURE ACT, 2005 (NSW)

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Previously the admissibility of expert evidence was allowed as an exception to the rule against opinion evidence and the rule against hearsay.

> "Opinion Evidence may be described as evidence of a conclusion, usually judgmental in nature, debatable as to accuracy and reasoned from facts. The common law was preoccupied with proof of facts and evidentiary rules developed to provide the best means of proving the material facts on which a party relied to establish its case or defence. Opinions were not admitted into evidence. An early exception was the reception of opinions of witnesses who possessed special skills or knowledge."[1]

Historical Background

In Phipson on Evidence,[2] it is stated that the history of the rules against hearsay and opinion evidence arose from the demarcation between the province of the witness and that of the jury.[3] Witnesses swore to give testimony as to what they had seen and heard, the jury however took the oath to determine "what they knew of reasoning and influence."[4]

> "A witness swears but to what he hath heard or seen, generally or more largely to what hath fallen under his senses. But a juryman swears to what he can infer and conclude from the testimony of such witnesses by the act and force of his understanding."[5]

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[1] Justice R. Chesterman RFD, Dealing with expert witnesses, Law Society Journal (NSW), November 1998, p. 50.
[2] 10th ed., London, Sweet & Maxwell, 1963.
[3] M.V. Argyle, E. Havers and P. Benady, Phipson on Evidence, 10th ed., p. 475.
[4] M.V. Argyle, E. Havers and P. Benady, Phipson on Evidence, 10th ed., p. 475; see also *Adams v Canon*, 1 Dyer 53, n. *(b)* (1621).
[5] *Bushell's Case* (1670) Vaughan 135 at p. 142 cited in Phipson on Evidence, 10th ed., London Sweet & Maxwell, 1963, p. 475.

It is noted in Phipson on Evidence that the rule against opinion evidence does not emerge until the early 1800's. It is not mentioned in Gilbert's Evidence (written before 1726) nor in Buller's N.P. (written before 1767) however it appears in Peake's Evidence in 1801 (at p. 142),[6] as follows:

> "Though witnesses can in general speak only to facts, yet in questions of science, persons versed on the subject may deliver their opinion on oath on the case proved by others."[7]

The appointment by the court of experts to assist the tribunal of fact is not a new concept:

> "… it must be remembered that from very ancient times it was the practice for the court to be assisted by skilled workers, eg. 1354 by surgeons, as to whether a wound was mayhem or not (Lib. Ass. 145,5); and it is probable that, for a long time after ordinary witnesses were allowed to testify to the jury, experts were still thought of in the old way, as helpers of the court, the latter instructing the jury on the point on which such evidence was furnished, until finally the modern conception came in of regarding experts as testifying like other witnesses, directly to the jury."[8]

Later, the admission of expert testimony was treated at common law as an exception to the rule against hearsay and opinion. Opinion evidence is admissible where the following conditions are met:

> "(a) the witness must possess some special skill or knowledge;
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> (b) the subject matter of the witness's knowledge must be such that the court would not be able to arrive at a correct decision without the assistance of the expert, that is, the subject matter of expert evidence must be beyond the ordinary limits of experience and knowledge possessed by the court. A corollary to the second condition is that the courts will not regard as 'expert' an opinion on a matter which the court could determine for itself having regard to its own knowledge and experience."[9]

The common law provides that an expert cannot given evidence of the ultimate issue, i.e., "the common law provides that an expert witness may not be asked the question which the court itself has to decide."[10]

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[6] Phipson, op. cit., p. 476.
[7] Ibid., p. 476.
[8] Ibid., p. 476; see also W.S. Holdsworth, History of English Law, Vol. 9, p. 212.
[9] Justice R. Chesterman RFD, Dealing with expert witnesses, Law Society Journal (NSW), November 1998, p 50.
[10] D.M. Bryne and J.D. Heydon, Cross on Evidence, Australia Edition, Butterworths, p. 29054 at [29105].

Recent Developments

The ultimate issue and common knowledge rules have been abolished by Statute (section 80 *Evidence Act,* 1995 (NSW); see also, section 80 *Evidence Act,* 1995 (Cth)):

> "80 Ultimate issue and common knowledge rules abolished
> Evidence of an opinion is not inadmissible only because it is about:
> (a) a fact in issue or an ultimate issue, or
> (b) a matter of common knowledge."

However, admission of expert evidence as an exception to the opinion rule remains, section 79 *Evidence Act,* 1995 (NSW), (see also, section 79 *Evidence Act,* 1995 (Cth)):

> "79 If 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."

In *Pepsi Seven-Up Bottles Perth Pty Ltd v Federal Commissioner of Taxation* (1995) 132 ALR 632 at 643 Hill J., stated:

> "No doubt the 1995 Act operates to widen the circumstances in which expert testimony may be proffered. With both the common knowledge rule and the ultimate issue rule abolished, there could seem to be but two obstacles to the admission of evidence going to the meaning of words as used in a statue. These would be (assuming the evidence is properly to be characterised as within the opinion rule enunciated by s 76), whether the testimony is relevant to the issue to be determined, that is to say the meaning of the particular word in the statute, and whether the witness does have specialised knowledge based on training, study or experience to support the opinion evidence he or she is to give."[11]

Cases involving the application of section 80 of the *Evidence Act,* 1995 (NSW) (and Cth) and academic commentary have highlighted that section 80 may be interpreted restrictively (*Pepsi Seven-Up Bottles Perth Pty Ltd v Federal Commission of Taxation* (1995) 132 ALR 632 at 643 per Hill J.; see also *Westpac Banking Corp v Jury,* unreported, New South Wales, Supreme Court 17 October 1995 per Rolfe J). In *Allstate Life Insurance Co. v Australia and New Zealand Banking Group* (1996) 137 ALR 138 at 142-144, Lindgren J. found that section 80 of the Evidence Act 1995 (Cth) did not refer to expert legal opinion "which impinges on the essential curial function of applying law …". Lindgren J., further held that " … the use in s 80 of the words 'only' and 'about' signifies that the provision leaves untouched the fundamental common law principles which excludes *legal opinion* evidence as intruding upon judicial function and duty. Secondly, he found that the expression 'an ultimate issue' does not catch 'the ultimate *legal issue* for decision by a court." Lindgren J., further held that "reference to the

[11] See also I. Freckleton and H. Selby, The Law of Expert Evidence, LBC Information Services, 1999, p. 258.

legislative background of s 80 shows that the reference in s 80(a) to the 'ultimate issue' was intended to refer to opinion by non-legal expert witnesses or non-expert witnesses on an ultimate issue of fact expressed in language which applies a legal standard."[12]

In *Dean-Willcocks v Commonwealth* (2003) 21 ACLC 1206, Austin J. held that if an expert chooses to address the ultimate issue and does not have expertise in the law there is a probability that the opinion will be outside the scope of the expert's specialist knowledge as elucidated in section 80 of the *Evidence Act,* 1995 (NSW) (and Cth).[13]

I. Freckleton and H. Selby in The Law of Expert Evidence[14] state:

> "It remains sound advocacy for the most part for counsel to have expert witnesses refrain from trespassing upon what has traditionally been regarded as the domain of the court – drawing the ultimate inference. It is good advocacy practice for the decision-maker to be provided with the data so that it is they who move logically to the final conclusion, rather than feeling that they are having it dictated to them by a witness."[15]

Reforms

As a precursor to the reforms implemented in the enactment of the *Civil Procedure Act,* 2005 (NSW), the *Supreme Court Rules,* 1970 (NSW) were amended incrementally to allow for reforms in the manner in which expert testimony could be received.[16]

In 1999 the Supreme Court of New South Wales established a Professional Negligence List within the Common Law Division and a new Part 14C of the *Supreme Court Rules*, 1970 (NSW) was promulgated with Practice Note No. 104. The new rules required a person commencing a professional negligence claim to file and serve an expert's report with the statement of claim. Further, Practice Note 104 required:

- "a declaration that the paramount duty of expert witnesses is to the court, which overrides their obligation to the party engaging them;
- a prescription concerning the form and content of an expert's report;
- provision for the court to direct parties to request expert witnesses to hold conferences among themselves with a view to agreeing on any issue and to make a joint statement on any agreements; and

[12] *Allstate Life Insurance Co. v Australia and New Zealand Banking Group* (1996) 137 ALR 138 at pp. 142-144 per Lindgren J. at 143-144 and I. Freckleton and H. Selby, op cit., p. 260.
[13] Dr I. Freckleton, "Expert Evidence Law Reform", (2005) 12 JLM 398.
[14] I. Freckleton and H. Selby, op. cit., 1999.
[15] I. Freckleton and H. Selby, op. cit., 1999, p. 260.
[16] NSW Law Reform Commission, Report 109, Expert Witnesses, June 2005 pp. 24-27.

- a requirement that any party engaging an expert witness should notify such witness of the above requirements."[17]

Also in January 2000, the Supreme Court of New South Wales expanded the application of Practice Note 104, *Supreme Court Rules*, 1970 (NSW) to govern the practice of the provision of expert evidence in all civil cases in the Supreme Court. Thereafter the District Court and Local Courts of New South Wales adopted similar provisions.

In 2005, Practice Note 128 of the *Supreme Court Rules*, 1970 (NSW) allowed for the appointment of a "Single Expert Witness" in respect to the quantification of damage in personal injuries claims.

The provisions noted above are now emulated in the *Uniform Civil Procedure Rules,* 1995 (NSW).

Law Reform Commission Report 109 – Expert Witnesses

In September 2004, the New South Wales Attorney General required the New South Wales Law Reform Commission to "inquire into and report on the operation and effectiveness of the rules and procedures governing expert witnesses in New South Wales." He asked the Commission to have regard to:

- recent developments in New South Wales and other Australian and international jurisdictions in relation to the use of expert witnesses, including development in the areas of single joint expert witnesses, court-appointed expert witnesses, and expert panels or conferences;

- current mechanisms for the accreditation and accountability of expert witnesses for the purposes of court proceedings, including the practice of expert witnesses offering their services on a 'no win, no fee' basis,

- the desirability of sanctions for inappropriate or unethical conduct of expert witnesses; and

- any other related matter.[18]

The New South Wales Law Reform Commission produced an Issues Paper No. 25 on expert witnesses which investigated the following issues:[19]

- the extent of partisanship or bias on the part of expert witnesses, and investigation of measures to reduce existing problems;

[17] Ibid., p. 25.
[18] Dr I. Freckleton, op. cit., (2005) JLM 393 at 395.
[19] Ibid., p 396.

- the contents and effectiveness of codes of conduct for expert witnesses, and the utility of guidelines to convey principles to expert witnesses, litigants and lawyers;

- the existence and operation of any accreditation schemes relating to the role of expert witnesses, their effectiveness and desirability;

- the extent to which 'no win, no fee' arrangements are currently utilised, and whether any of the measures indicated, or other measures, would be desirable;

- the seriousness of inappropriate or unethical conduct by experts and ways in which it might be controlled;

- the effectiveness of current measures relating to expert witnesses that are designed to increase transparency;

- the utility of rules requiring experts to consult;

- experience with the use of different methods of receiving expert evidence, and whether rules should generally make provision for such methods to be available in suitable cases;

- the experience of appointing (non-exclusive) court experts, and the advantages and disadvantages of this measure;

- the experience to date with rules providing for the appointment of single experts, and the advantages and disadvantages of this measure; and

- the use of assessors, referees and expert assistants, their effectiveness and acceptability.[20]

The New South Wales Law Reform Commission made the following recommendations in its Report 109 on Expert Witnesses in June 2005:[21]

- Recommendation 6.1 – The Permission Rule (refers to a rule that parties may not adduce expert evidence without the court's permission)[22] – The *Uniform Civil Procedure Rules* 2005 ("UCPR") should be amended to provide that in civil proceedings parties may not adduce expert evidence without the court's permission;

[20] Ibid., p. 396.
[21] New South Wales Law Reform Commission, Report 109, Expert Witnesses, June 2005.
[22] Ibid., p. 83.

- Recommendation 6.2 – Rule 31.19(6) of the UCPR should be repealed. This was repealed on 15 August 2005;[23]

- Recommendation 7.1 – The UCPR should be revised to include provision for joint expert witnesses in addition to the existing provisions for court-appointed experts;[24]

- Recommendation 8.1 – The UCPR should be amended to include rules relating to joint exert witnesses as follows:

    - A provision for an order that a joint expert witness be engaged by the parties affected;

    - A provision for the joint expert witness to be selected by agreement between the parties affected or, failing agreement, by or in accordance with directions of the court;

    - A requirement for consent by the expert being engaged as such;

    - A prohibition against a party eliciting the opinion of a proposed joint expert witness before engagement, and provision for disclosure of any such communication;

    - A provision allowing the joint expert witness to apply for directions, with advance notice to the parties affected;

    - The same requirements in relation to the code of conduct as apply in the case of experts engaged by the parties individually;

    - A provision allowing an affected party to put questions in writing to the joint expert witness for the purpose of clarifying the witness's report;

    - A provision allowing an affected party to tender the joint expert witness's report and to tender answers by the joint expert witness to written questions put to the witness by a party, unless the court otherwise orders;

    - A provision prohibiting the parties from calling other expert evidence on a question submitted to the joint expert witness, except by leave of the court;

    - A provision allowing an affected party to examine the joint expert witness orally in court; and

    - A provision for payment of the joint expert witness's fees.[25]

[23] Ibid., p. 103.
[24] Ibid., p. 106.

- Recommendation 8.2 – The provisions of the UCPR relating to experts appointed by the court should be amended as follows:

    - Selection of the court-appointed expert to be by the court or as the court may direct, in place of the existing provision for selection by the parties, by the court or as the court may direct;

    - Adding a requirement for the expert's consent to being appointed;

    - A right to examine in chief, cross-examine or re-examine the court-appointed expert as the court may direct, in place of the existing provision for cross-examination only; and

    - Repeal of the existing provision which prohibits the parties from calling other expert evidence in relation to a question submitted to a court-appointed expert.[26]

- Recommendation 9.1 – The code of conduct for expert witnesses should be revised by:

    - Deleting those provisions that relate to matter of form rather than the experts' duties (those matters to be dealt with in rules or practice directions);

    - Providing that the duties of disclosure apply to oral evidence as well as to the contents of expert reports.[27]

- Recommendation 9.2 – The UCPR should be amended to require that the fee arrangement with an expert witness be disclosed.[28]

- Recommendation 9.3- There should be a provision, by rule or practice note, requiring that expert witnesses be informed of the sanctions relating to inappropriate or unethical conduct;[29] and

- Recommendation 10.1 – A review of the rules relating to expert witnesses should be planned and undertaken to coincide with the review of the *Civil Procedure Act 2005* (NSW) in five years time.[30]

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[25] Ibid., p. 126.
[26] Ibid., p. 133.
[27] Ibid., p. 139.
[28] Ibid., p. 143.
[29] Ibid., p. 160.
[30] Ibid., p. 164.

Civil Procedure Act, 2005 (NSW)

The *Uniform Civil Procedure Rules,* 2005 (NSW) ("UCPR") consolidates the civil procedure rules for the New South Wales Supreme, District and Local Courts (and also apply to a number of tribunals in New South Wales). In summary, Part 31 of the UCPR governs the procedure in calling expert witnesses by parties to the proceedings (Part 31 Division 2) and court-appointed experts (Part 31, Division 3).

The provisions of Part 31 of the UCPR (previously encapsulated in the Supreme Court of NSW Practice Notes No. 104 and 128 and Part 14C of the Supreme Court Rules 1970) are:

1. a definition of an expert witness;
2. a code of conduct for expert witnesses;
3. requirements in relation to the code of conduct;
4. requirements as to the form and content of an expert's report;
5. procedures for conferences among expert witnesses;
6. disclosure of the expert's report or oral evidence;
7. the right of parties to cross-examine or re-examine expert witnesses; and
8. procedures relating to the court-appointed experts.[31]

Experts Engaged by Parties

The following Uniform Civil Procedure Rules govern the engagement of experts by parties.

Definitions

In Rule 31.17 of the UCPR (cf SCR Part 35, Rules 13A and 13C DCR Part 28, Rule 8; LCR Part 23 Rule 1D) an expert is defined as:

> "… a person who has such knowledge or experience of, or in connection with, that question, or questions of the character of that question, that his or her opinion on that question would be admissible in evidence."

An expert witness is defined as:

> "an expert engaged for the purpose of: (a) providing a report as to his or her opinion for use as evidence in proceedings or proposed proceedings , or (b) giving opinion evidence in proceedings or proposed proceedings."

An expert's report is defined as:

[31] Ibid., p. 26-26.

> "a written statement by an expert (whether or not an expert witness in the proceedings concerned) that sets out the expert's opinion, and the facts on which the opinion is formed, and contains the substance of the expert's evidence that the party serving the statement intends to adduce in chief at the trial."

Code of Conduct

Schedule 7 of the UCPR consists of an expert witness code of conduct (see annexure "A"). The code of conduct replicates the provisions of the codes of conduct applicable to expert witnesses previously noted in the Supreme Court (NSW), District Court (NSW) and Local Court (NSW) rules.[32]

Rule 31.23(1) of the UCPR's requires legal representatives as soon as practicable after engaging an expert as a witness to provide the expert with a copy of the code of conduct (Schedule 7). An expert's report or oral evidence is not admissible unless the expert acknowledges in writing that he or she has read the code of conduct and agrees to be bound by it. A copy of this acknowledgment must be served on all parties affected by the evidence (UCPR 31.23(2)). In *Commonwealth Development Bank v Cassegrain* [2002] NSWSC 980, Einstein J suggested that strict compliance with the then NSW Supreme Court Rules (Part 36 Rule 13C and Schedule K) is necessary for the admission into evidence of an expert's report or expert's oral testimony.[33]

Schedule 7 cl 3(1) mandates that an expert witness must specify in the report or an annexure to the report:

(a) "the person's qualifications as an expert,
(b) the facts, matters and assumptions on which the opinions in the report are based (a letter of instructions may be annexed),
(c) reasons for each opinion expressed,
(d) if applicable, that a particular question or issue falls outside his or her field of expertise,
(e) any literature or other materials utilised in support of the opinions, and
(f) any examinations, tests or other investigations on which he or she has relied, including details of the qualifications of the person who carried them out."

Additionally if the expert who prepares a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report (Schedule 7, cl 3(2)). If the expert's opinion is not a concluded opinion because of insufficient data this must be stated when the opinion is expressed (Schedule 7, cl 3(3)) and when an expert changes his or her opinion on a material matter he/she must provide a supplementary report (Schedule 7 cl(3)(4)).

[32] Ibid., p. 27.
[33] See also, Ibid., p. 28.

Directions as to Evidence

UCPR 31.26 deals with the manner in which an expert witness's testimony is given:

"31.26 In any proceedings in which two or more parties call expert witnesses to give opinion evidence about the same question or similar questions, or indicate to the court an intention to call expert witnesses for that purpose, the court may give any one or more of the following directions:

(a) a direction that:
(i) the expert witnesses give evidence at trial after all factual evidence relevant to the question or questions concerned, or such evidence as may be specified by the court, has been adduced, or

(ii) each party intending to call one or more expert witnesses close that party's case in relation to the question or questions concerned, subject only to adducing evidence of the expert witnesses later in the trial,

(b) a direction that, after all factual evidence relevant to the question, or such evidence as may be specified by the court, has been adduced, each expert witness file an affidavit or statement indicating:
(i) whether the expert witness adheres to any opinion earlier given, or

(ii) whether, in the light of any such evidence, the expert witness wishes to modify any opinion earlier given,

(c) a direction that the expert witnesses:
(i) be sworn one immediately after another (so as to be capable of making statements, and being examined and cross-examined, in accordance with paragraphs (d), (e), (f), (g) and (h)), and

(ii) when giving evidence, occupy a position in the courtroom (not necessarily the witness box) that is appropriate to the giving of evidence,

(d) a direction that each expert witness give an oral exposition of his or her opinion, or opinions, on the question or questions concerned,

(e) a direction that each expert witness give his or her opinion about the opinion or opinions given by another expert witness,

(f) a direction that each expert witness be cross-examined in a particular manner or sequence,

(g) a direction that cross-examination or re-examination of the expert witnesses giving evidence in the circumstances referred to in paragraph (c) be conducted:

(i) by completing the cross-examination or re-examination of one expert witness before starting the cross-examination or re-examination of another, or

(ii) by putting to each expert witness, in turn, each question relevant to one matter or issue at a time, until the cross-examination or re-examination of all of the expert witnesses is complete,

(h) a direction that any expert witness giving evidence in the circumstances referred to in paragraph (c) be permitted to ask questions of any other expert witness together with whom he or she is giving evidence as so referred to,

(i) such other directions as to the giving of evidence in the circumstances referred to in paragraph (c) as the court thinks fit.

Disclosure

The UCPR's require each party to serve the experts' reports they seek to rely upon on all parties to the proceedings in accordance with any court order or practice note and if no order or practice note is in force, not later than 28 days before the date of the hearing of the matter (UCPR 31.18(1)). The consequence of non-disclosure is that the report cannot be tendered in evidence. The Law Reform Commission in its Report 109 on Expert Witnesses notes that "the effect of the new provisions in the UCPR is to require disclosure of those reports which are to be tendered, but not other reports that the party might have obtained."[34]

In South Australia and in Queensland the experience is different. The procedure rules which govern the provision of expert evidence have altered the application of the rule of legal professional privilege in that legal professional privilege which normally applies to reports and advice obtained by a party in anticipation of litigation is not enforced. In these jurisdictions "transparency" is considered to override the protection of legal professional privilege and the confidentiality of these communications (Supreme Court Rule 1987 (SA) r 38.01; *Robinson v Adelaide Raceway* (1993) 61 SASR 279; r 211 and r 212 *Uniform Civil Procedure Rules*, 1999 (Qld); a similar scheme has been recommended by the Law Reform Commission of Western Australia, Report 92, 1999, Recommendation 245 at pp 190-191. For example, in South Australia, the *Supreme Court Rules*, 1987 (SA) require mandatory disclosure to an opponent in proceedings of expert reports prepared for the purposes of litigation (rule 38.01).[35]

[34] Ibid., p. 31.
[35] *Supreme Court* Rules, 1987 (SA), Rule 38.01. See also NSW Law Reform Commission, op. cit., pp 90-92.

Joint Expert Witnesses

The concept of a joint expert witness was enunciated in the Woolfe Reforms.[36] The terms "joint expert witness", "single joint expert" or an "agreed expert" are often used as synonyms. Schedule 3 of the *Civil Procedure Act 2005* (NSW) allows for "the use of expert witnesses engaged jointly by the parties to civil proceedings" (*Civil Procedure* Act 2005 (NSW) Schedule 3, clause 25).

The New South Wales Law Reform Commission in its Report 109 noted that:

> "The primary objective of the appointment of a joint expert witness is to assist the court in reaching a just decision by promoting unbiased and representative expert opinion. Another important objective is to minimise costs and delay to the parties and to the court by unifying the volume of expert evidence that would otherwise be presented."[37]

Many reservations are raised by advocates in respect to the appointment of joint expert witnesses. Parties are likely to employ their own "shadow-experts" which may increase costs. In some circumstances there may be justifiably, a number of legitimate schools of thought in a speciality relating to a particular issue in dispute, which may not be effectively elucidated by one expert. The court in this instance may by at a disadvantage in not having all of the relevant expert opinion before it. A further argument raised against the use of "joint experts" in that there may be a delegation of decision-making power by the court to the "joint expert".[38]

It is likely that joint experts may be used in some cases particularly when the issue in dispute is relatively clear to reduce court time, expense and adversarial bias. The usual method contemplated for selecting a "joint expert" is by agreement between or among the parties which is likely to avoid or reduce the incidence of adversarial bias. The joint expert is not linked by an pecuniary benefit to a particular party.

A joint expert witness and a court appointed expert are similar as neither is regarded as partisan however there are some stark differences.[39]

A joint expert engaged by the parties is controlled by the parties and the parties have management of the process of adducing the expert evidence once an order is made for a joint expert witness.[40] Usually the parties:

- have primary responsibility for the selection of the expert,

[36] H.K. Woolf, op. cit.
[37] NSW Law Reform Commission, op. cit., p. 107.
[38] Ibid., pp 106-116.
[39] Ibid., pp 116-119.
[40] Ibid., p.128. See also Practice Note SC Gen 10, "Supreme Court – Single Expert Witness", Ritchie's Uniform Civil Procedure NSW, pp. 130,045 – 130,049.

- engage the expert,
- supply the expert with a copy of the code of conduct (UCPR, Schedule 7),
- instruct the expert,
- clarify the expert's report if necessary by written questions, and
- decide whether the expert's report should be tendered in evidence.[41]

The method of engaging court-appointed experts is a process dictated by the court which provides the court with a method of obtaining expert assistance. The court has unequivocal control over the process.[42]

Experts Engaged by the Court

Consultation Among Experts

The UCPR (NSW) (Rule 31.25 and Schedule 7) provides for expert conferences. Consultation among experts is often directed by the court prior to the hearing of a matter (e.g. Land and Environment Court of New South Wales). Often areas of agreement and disagreement are identified and documented. The purpose is to reduce court hearing time and expense and to concentrate efforts on identifying the real issues in dispute.

Although, *prima facie* the idea of an expert conclave appears to be productive, some advocates are wary of the outcomes. One concern is that experts with entrenched views and strong personalities may dictate outcomes which may not evolve the best expert evidence. Strong guidance may be required by the relevant judicial officer in respect to the process to be adopted for a conclave e.g. to outline the role of the experts so that the conclave results in the narrowing of issues or the provision of a detailed and relevant basis for the experts' views.

Lord Woolf in his report Access to Justice[43] suggested that experts' be encouraged to meet in private without the assistance of parties or their legal advisers, (see also, *Triden Properties Ltd v Capital Financial Group Ltd* (1993) 30 NSWLR 403).

The New South Wales Law Reform Commission stated that:

> "In many cases, it may be appropriate simply to direct that the experts consult and prepare a joint report on their consultation by a particular date, leaving it to experts to organise the exercise. In others, there might be reasons for the process to be more closely regulated in order to deal with anticipated difficulties. The directions may, for example,
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> - provide that the lawyers should be present (or absent);
> - set out a detailed agenda;

[41] Ibid., p. 128.
[42] Ibid., p. 122.
[43] H.K. Woolf, Access to Justice, Final Report to the Lord Chancellor on the civil justice system in England and Wales, HMSO, London, 1996 at p. 147.

- arrange for an independent chair for the conference; or
- set a specific time for the conference (holding a conference early might save time and money if issues can be resolved at that time; on the other hand, in some situations, an early conference may be unfruitful because the factual basis of the issues may not be clear until shortly before the date for hearing)."[44]

It is clear that "conclaves" or conferences of experts should not be mandated and that flexibility to make specific orders suitable for the particular circumstances of each case is required.

Concurrent Evidence

The previous approach to dealing with expert evidence (subject to the rules or practice directions of a court) has been to file written expert evidence in the form of a report or affidavit and to serve the written expert evidence on the other parties to the proceeding. The experts are called, if required by the opposing party, for cross examination and may on occasions supplement their written evidence with oral testimony.

The recent introduction of the concept of concurrent evidence or "hot-tubbing" allows all relevant experts to be sworn in to give evidence at the same time, as a panel. The judicial officer will direct the discussion and questions may be asked by lawyers, the judge or the experts. The testimony is not restricted to cross-examination by legal representatives. This process is being implemented regularly in the Land and Environment Court of NSW (see for example *BGP Properties Pty Limited v Lake Macquarie City Council* [2004] NSWLEC 399 at para 121 and *Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority* [2004] NSWLEC 315).

Alternative methods of adducing expert evidence are likely to develop. At present, the NSW Law Reform Commission does not regard that the process of concurrent evidence should be precisely regulated and that the UCPR currently deals appropriately with this method of elucidating expert evidence.[45]

Recent Decisions

The decision in *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 enunciated criteria for establishing the admissibility of expert evidence.

In *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305, Priestley JA, Powell JA and Heydon JA considered on appeal the decision of James J. in respect to the basis upon which expert evidence is admissible pursuant to the *Evidence Act* 1995, NSW. Heydon JA at p. 729 said that: "If … (the expert witness's) report were to be useful, it was necessary for it to comply with a prime duty of experts in giving opinion evidence to

[44] NSW Law Reform Commission, op. cit., p 95. See also Practice Note SC Gen 11, "Supreme Court – Joint Conference of Expert Witnesses", Ritchie's Uniform Civil Procedure NSW, pp. 130,045 - 130,049
[45] Ibid., p. 102.

furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions." Thereafter at 743-744 Heydon J.A. identified the criteria which must be met for expert opinion evidence to be admissible:

- it must be agreed or demonstrated that there is a field of "specialised knowledge";
- there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert;
- the opinion proffered must be "wholly or substantially based on the witness's expert knowledge";
- so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way;
- it must be established that the facts upon which the opinion is based form a proper foundation for it; and
- the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded.

Heydon JA, at p. 744 stated in summary that:

> "… the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight."

Subsequent cases have commented on the difficulties in practically applying the requirements formulated in *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305. For example, *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) FCAFC 157; *Velevski v R* (2002) 187 ALR 233; *Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd* (2000) 120 FCR 146; *Adler v Australian Securities and Investments Commission* (2003) 46 ACSR 504; and, *Principal Strategic Options Pty Limited v Coshott* (2003) FCA 181 (13 March 2003).

Australian Securities and Investments Commission [ASIC] v David Rich & Ors [2005] NSWSC 149 (7 March 2005) and [2005] NSWSC 256 (21 March 2005).

The admissibility of the expert opinion evidence of an accountant of Pricewaterhouse Coopers in the form of a forensic accountant's report ("the Carter Report") pursuant to s79 of the *Evidence Act,* 1995 (NSW) was in question before Austin J. in *ASIC v Rich* (2005) NSWSC 62. In essence, ASIC sought to tender in evidence the principal report together with affidavits and other reports by the expert and twelve volumes of documents exhibited in his affidavit evidence. The defendants objected to the tender on the basis that the evidence was inadmissible that is, whether the expert's prior relationship with the litigant involving access to additional information and the formulation of opinions for another purpose rendered the expert's evidence inadmissible. Alternatively, if the expert's report was admissible that it should be excluded by the court in exercise of its direction pursuant to section 135 of the *Evidence Act* 1995 (NSW).

The provisions of s 135 of the *Evidence Act,* 1995 (NSW) are:

> "135 General discretion to exclude evidence
> The court may 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."

Austin J. in *ASIC v Rich & Ors* [2005] NSWSC 149 found as follows:

> "I have therefore reached the conclusion that the Carter Report is inadmissible as a whole. If the facts did not, contrary to my view, support the findings upon which my decision as to admissibility is based, then I would exercise my discretion to exclude the Carter Report from the evidence in this case, as a whole, under s 135."

The question of weight and not the admissibility of expert evidence is likely to be the area of argument in the majority of cases.

The Role of the Legal Practitioner in Engaging an Expert

The following are some issues which a Legal Practitioner should have regard to in the provision of expert evidence:[46]

- the non-partisan role of an independent expert;
- any conflicts of interest of any expert engaged;

[46] D.M. Bryne and J.D. Heydon, op. cit., p 29,042 at 29080.

- the extent of consultation with the parties' legal advisers which is to ensure that the experts' report is directed to the issues before the court;

- the extent of the consultation between the parties' legal advisers and the selected expert in that the legal adviser must not distort the substance of the witness's opinion so that it loses its independent character (*Whitehouse v Jordan* [1980] 1 All ER 650 at 654 per Lord Denning MR at 276 per Lord Wilberforce and Lord Fraser);

- the requirement that an expert's report is to be unaffected as to form or content by the exigencies of litigation (*Whitehouse v Jordan* [1980] 1 All ER 650);

- the requirement that an expert witness should provide independent assistance to the court by the provision of an unbiased opinion in relation to matters within the expert's area of expertise;

- the requirement that an expert witness should never assume the role of an advocate (*Fox v Percy* (2003) 214 CLR 118 at 151);

- the need for an expert witness to make it clear when a particular question or issue falls outside the witness's expertise;

- the need for an expert witness who considers that insufficient data is available to conclude his/her report and his/her opinion is not properly researched to state that his/her opinion is a provisional one;

- the requirement that an expert witness must be able to assert that the report he/she has prepared contains the truth, the whole truth and nothing but the truth. If a qualification exists in the mind of the expert witness this qualification should be noted in the report;

- the requirement that if after the exchange of reports by experts in a case an expert witness changes or qualifies his/her opinion the change should be communicated through legal representative to the other parties without delay and pursuant to court rules; and

- the rules relating to the provision of letters of instructions, advices and additional or subsequent reports prepared by the expert.

The above is merely a sketch of the issues and requirements a legal practitioner may confront in this evolving area.

Many issues will arise where joint expert witnesses, conclaves, court appointed experts and concurrent expert evidence become a regular part of litigation practice. The use of

experts in alternative dispute resolution processes and issues of confidentiality and immunity will also need to be clarified.

At present, the considerations which arose in *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 and *Australian Securities and Investments Commission [ASIC] v David Rich & Ors* [2005] NSWSC 149 (7 March 2005) and [2005] NSWSC 256 (21 March 2005) (above) and the new provisions of the *Civil Procedure Act,* 2005 (NSW) will engage most litigators in the careful scrutiny of the preparation of their cases for trial.

Annexure “A”

Schedule 7 Expert witness code of conduct

(cf SCR Schedule K)

(Rules 31.17 and 31.28)

1 Application of code

This code of conduct applies to any expert engaged:

(a) to provide a report as to his or her opinion for use as evidence in proceedings or proposed proceedings, or

(b) to give opinion evidence in proceedings or proposed proceedings.

2 General duty to the court

(1) An expert witness has an overriding duty to assist the court impartially on matters relevant to the expert's area of expertise.

(2) An expert witness's paramount duty is to the court and not to the person retaining the expert.

(3) An expert witness is not an advocate for a party.

3 The form of expert reports

(1) A report by an expert witness must (in the body of the report or in an annexure) specify the following:

(a) the person's qualifications as an expert,

(b) the facts, matters and assumptions on which the opinions in the report are based (a letter of instructions may be annexed),

(c) reasons for each opinion expressed,

(d) if applicable, that a particular question or issue falls outside his or her field of expertise,

(e) any literature or other materials utilised in support of the opinions,

(f) any examinations, tests or other investigations on which he or she has relied, including details of the qualifications of the person who carried them out.

(2) If an expert witness who prepares a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.

(3) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.

(4) An expert witness who, after communicating an opinion to the party engaging him or her (or that party's legal representative), changes his or her opinion on a material matter must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in subclause (1) (b), (c), (d), (e) and (f) as is appropriate.

(5) If an expert witness is appointed by the court, subclause (4) applies as if the court were the engaging party.

4 Experts' conference

(1) An expert witness must abide by any direction of the court:

(a) to confer with any other expert witness, and

(b) to endeavour to reach agreement on material matters for expert opinion, and

(c) to provide the court with a joint report, specifying matters agreed and matters not agreed and the reasons for any failure to reach agreement.

(2) An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.