Can counsel settle expert reports?

By Garth Blake SC and Philippe Doyle Gray

Introduction

A straw poll in chambers for answers to the question Can counsel settle expert reports? produced two clear responses: about half our colleagues replied *Of course!* and the other half replied *Of course not!* This clash of strongly held views has been noted before.[1]

This article identifies, collates and analyses relevant English and Australian case law, academic literature, professional commentary, textbooks, professional practice rules, legislation, and the rules of court, in an attempt to provide a comprehensive, coherent and firm foundation to guide counsel when asked to settle an expert report. In doing so, we pragmatically focus on specific conduct arising in practice, in preference to academic musings revolving around the abstract concept: 'to settle an expert report.' In doing so, we consider the distinctions between: expert witnesses and lay witnesses; preliminary opinions and final opinions; and draft reports and final reports.

Summary

For the reasons set out in detail below, there are two distinct lines of authority which we will refer to as 'the Whitehouse Line' and 'the Federal Line.' At the risk of over-simplification, the Whitehouse Line *discourages* the involvement of lawyers in the settling of expert reports, whereas the Federal Line *encourages* lawyers' participation.

No authorities that we have been able to identify in the Whitehouse Line consider any of the authorities making up the Federal Line. The reverse is not true, but as will be seen, there have been few attempts to consider the Whitehouse Line. As a result of this most unusual state of the law, we have spent time considering various academic journals and textbooks to see if the lines of authority can be reconciled.

It is our opinion, having regard to the totality of the material that we have reviewed, that it is both permissible, proper and appropriate that solicitors and counsel be involved in the settling of expert reports. Further, it is our opinion that the following principles state the current position in New South Wales on the question of counsel's role in settling expert evidence:

(a) Counsel may *and should* identify and direct the expert witness to the real issues.

(b) Counsel may *and should* suggest to the expert witness that an opinion does not address the real issues when counsel holds that view.

(c) Counsel may *and should*, when counsel holds the view, suggest to the expert witness that an opinion does not adequately:

  (1) illuminate the reasoning leading to the opinion arrived at, or

  (2) distinguish between the assumed facts on which an opinion is based and the opinion itself, or

  (3) explain how the opinion proffered is one substantially based on his specialised knowledge.

(d) Counsel may suggest to the witness that his opinion is either wrong or deficient in some way, with a view to the witness changing his opinion, provided that such suggestion stems from counsel's view after an analysis of the facts and law and is in furtherance of counsel's duty to the proper administration of justice, and not merely a desire to change an unfavourable opinion into a favourable opinion.

(e) Counsel may alter the format of an expert report so as to make it comprehensible, legible, and so as to comply with UCPR 4.3 and 4.7.

The Whitehouse Line of authority

Whitehouse v Jordan was a case conducted in the United Kingdom in 1979 about the birth of a child that went wrong. The child's mother, Mrs Whitehouse, alleged professional negligence against her obstetrician, Mr Jordan.

A point highlighted by the Victorian Court of Appeal in a decision that we will consider below, that is often overlooked in the other authorities that we consider, is that there are two different reports of this case. Those reports address the litigation at different stages. The first report is *Whitehouse v Jordan* [1980] 1 All ER 650. This was a decision of the Court of Appeal. We will refer to this decision as *Whitehouse No. 1.* The second report is *Whitehouse v Jordan* [1981] 1 WLR 246. That report is of the appeal from the decision of the Court of Appeal in *Whitehouse No. 1*, to the House of Lords. We will refer to this case as *Whitehouse No. 2*. The most often cited decision is *Whitehouse No. 2*. However, the Victorian Court of Appeal has acknowledged that an understanding of *Whitehouse No. 1* is relevant to

understanding *Whitehouse No. 2*. This is a sentiment with which we agree.

In *Whitehouse No. 1*, the relevant passage appears in the reasons for judgment of Lord Denning MR at 655e:

> In addition, I may say that Professor Sir John Stallworthy (Oxford, now retired) at first made a report saying that Mr Jordan was not negligent. He said that he had dealt with the case 'with courage and skill'. But afterwards Sir John Stallworthy joined with Sir John Peal (also Oxford, retired) in holding that Mr Jordan was negligent. Their joint report was the justification for the continuance of this action to trial. But their joint report has been subjected to severe criticism and has been shown to be mistaken on some very important points.
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> In the first place, the joint report suffers to my mind from the way it was prepared. It was the result of long conferences between the 2 professors and counsel in London and it was actually 'settled' by counsel. In short, it wears the colour of special pleading rather than an impartial report. Whenever counsel 'settle' a document, we know how it goes. 'We had better put this in', 'We had better leave this out', and so forth. A striking instance is the way in which Professor Tizard's report was 'doctored'. The lawyers blacked out a couple of lines in which he agreed with Professor Strang that there was no negligence.

Other than these two paragraphs, there is no exposition of precisely how lawyers were involved, what changes were made, or what was the effect of their involvement.

In *Whitehouse No. 2*, the relevant and famous passage is taken from the reasons for judgment of Lord Wilberforce at 256H:

> One final word. I have to say I feel some concern as to the manner in which part of the expert evidence called for the Plaintiff came to be organised. This matter was discussed in the Court of Appeal and commented on by Lord Denning MR. While some degree of consultation between experts and legal advisers is entirely proper, it [is] necessary that expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation. To the extent that it is not, the evidence is likely to be not only incorrect but self-defeating.

Lord Fraser of Tullybelton concurred on this point with Lord Wilberforce at 268B. The remaining three law lords, Lord Edmund-Davies, Lord Russel of Killowen and Lord Bridge of Harwich did not address this issue one way or another.

Kelly v London Transport Executive [1982] 2 All ER 842 was again a decision of the Court of Appeal, in which Lord Denning MR presided, and which referred to *Whitehouse No.2*. It was a case brought by Mr Kelly against his employer for injuries that Mr Kelly allegedly sustained in the course of his employment. Mr Kelly's employer, London Transport, asserted that Mr Kelly's disabilities were caused by his chronic alcoholism. At trial, Mr Kelly ultimately succeeded, but he received only £75 by way of compensation. The relevant passages again appear from the reasons for judgment of Lord Denning MR at 847c, 847j, and 851c:

> Medical Reports
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> The solicitors for London Transport sent copies of their medical reports to the solicitors for Mr Kelly. One in February 1980, and the others as soon as they were received in July 1980. But Mr Kelly's solicitors did not reciprocate. They only sent at one stage the 'doctored' report of Dr Denham …
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> The Judge's Ruling
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> The hearing lasted 3 days. On 30 October 1980, Caulfield J gave judgment. In picturesque language, he exposed the bogus claim. He found the Plaintiff a wholly unacceptable witness. He rejected completely the evidence of Dr Denham. He said that he was 'over-obliging in his quest for the Plaintiff'. He condemned him for changing his report at the request of the Plaintiff. He said, 'I do not think the solicitor should have asked him anyway to have changed his report and, secondly, if a consultant was asked, knowing that he is delivering a forensic report, one that is going to be used in the courts, he should not have obliged and therefore he falls down in my estimation. '
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> Counsel for the Law Society has told us today that it was not really the solicitor who was responsible for the changing the report. The matter had been put to counsel. Counsel had advised the obliteration of references to previous medical reports. But, whoever it was, it is quite plain to my mind that the specialist's report should not have been changed at the request either of the solicitor or counsel …
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> …
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> These then are the duties of solicitors who act for legally aided clients … They must not ask a medical expert to change his report, at their own instance, so as to favour their own legally aided client or conceal things that may be against him. They must not 'settle' the evidence of the medical reports as they did in Whitehouse v Jordan, which received the condemnation of this Court and the House of Lords. As Lord Wilberforce said:

> 'Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation.'
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> All this is not only in regard to solicitors but also to counsel as well. … If these precepts are observed, I hope we shall in future have no more disgraces such as have attended this case.

The other members of the Court of Appeal, Ackner and O'Connor LJJ, concurred.

It is striking that the quote from Lord Wilberforce has been selective in that it omitted the words: 'While some degree of consultation between experts and legal advisers is entirely proper…'

We attempted to identify any subsequent decisions in the United Kingdom that address these issues. Whilst we have found a number of subsequent decisions that refer to *Whitehouse No. 1* and/or *Whitehouse No. 2*, those cases are concerned with issues of professional negligence and not the involvement of lawyers in the settling of expert reports. We have been unable to identify any English decision after *Kelly v London Transport Executive* that relies on either *Whitehouse No. 1* or *Whitehouse No. 2*. However, we have been able to identify one English decision after *Kelly v London Transport Executive* that, while not relying upon either *Whitehouse No. 1* or *Whitehouse No. 2*, does comment on the same issues as in those decisions. That authority is *Vernon v Bosley (No.2)* [1999] QB 18 discussed below. Whilst there is a real possibility that, as in the Australian cases we canvass below, English courts have made observations about the involvement of lawyers in the drafting of expert reports, those cases do not refer to either *Whitehouse No. 1* or *Whitehouse No. 2*.

We now turn our consideration to the Australian authorities and *Vernon v Bosley (No.2)*.

Phosphate Co-operative Co of Australia Pty Ltd v Shears [1989] VR 665 concerned an application for the approval of a scheme of arrangement between a company and its shareholders, and a related application for the reduction of share capital. In support of the application, the plaintiff relied upon a report initially written by one Mr Williams, accountant of the Arthur Andersen firm of accountants. From an early stage in the obtaining of Mr Williams' expert opinion, and even before a formal letter of instruction was sent to Mr Williams, there were interactions, dealings and discussions between the company, Mr Williams, and the company's other advisers who included solicitors, and junior and senior counsel briefed to advise the company. In the course of hearing, it came to light that the version of Mr Williams' report that had been tendered in evidence had been the last in a series. Furthermore, it became apparent that both the company, and its advisers, including its solicitors and counsel, were actively involved in the drafting of Mr Williams' report. Some of the revisions were said to make the report more understandable, however, other revisions tended to give the impression that the report contained a valuation when it did not. Furthermore, the series of meetings between Mr Williams and the company's solicitors and counsel were often in the presence of officers of the company, and other partisan advisers. In other important respects, the opinion that Mr Williams had expressed earlier had changed. But that was not all; after this extensive consultation, Mr Williams produced a final report, which was delivered signed by him. As the result of further discussions, that signed report was withheld and a further final signed report was issued in its place.

The trial judge Brooking J, found that Mr Williams was influenced to change his opinion by one of the company's solicitors. In considering all this material, the trial judge was satisfied that pressure exerted by or on behalf of the company did affect to a significant extent the contents of Mr Williams' final report. In dismissing the plaintiff's application for approval, Brooking J held at [1989] VR 665 at 683:30:

> It is impossible to lay down specific rules dealing with communications between the expert, on the one hand, and the company and those representing it, on the other: everything depends on the circumstances. The guiding principle must be that care should be taken to avoid any communication which may undermine, or appear to undermine, the independence of the expert. What happened here was quite unsatisfactory. … I think the present case should serve as a model of what ought not to be done. The sooner experts and their clients realise this, the better. The interests of [the company's] shareholders would have been better served if, instead of their money being spent on the procuring of the Arthur Andersen report, that report had never been placed before them.

Vernon v Bosley (No.2) [1999] QB 18 was an application to the Court of Appeal for rehearing of an appeal

following the discovery of fresh evidence. Mr Vernon claimed damages for nervous shock from Ms Bosley following a motor vehicle accident. Contemporaneously with his action for personal injury, Mr Vernon was a party to proceedings concerning his children in which he was opposed by his wife. Expert opinion evidence was relevant to both actions: in the personal injuries action to prove compensable loss, and in the children's action to prove that Mr Vernon was capable of caring for his children. The same psychiatrist and psychologist gave evidence for Mr Vernon in both actions. In both actions, these experts expressed an opinion about Mr Vernon's mental state, however their opinions materially and significantly differed between the actions. Mr Vernon retained the same firm of solicitors to act for him in both actions, and his solicitors were aware of these different opinions, as was counsel retained for Mr Vernon in the personal injury action. However Ms Bosley's legal representatives only became aware of those differences after hearing of the appeal when an anonymous package arrived at chambers of counsel for Ms Bosley containing the judgment in the children's action which revealed the different opinions. That package precipitated the application.

Thorpe LJ considered the role of Mr Vernon's solicitors in procuring those expert opinions, and considered the terms of the letters of instruction, before holding at 58D:

> The recipient [of the letter of instruction] does not have to read between the lines to discern that his instructions are to walk the tightrope leading to the grant of his application, dependent upon a clean bill of health, and the refusal of her [i.e. Mrs Vernon's] application on the ground that his psychiatric state would be too frail to withstand the reaction to an ouster order. This sort of attempt to influence the expression of expert opinion is to be deplored for the simple reason that it colludes in a partisan approach and ignores the expert's duty in Children Act proceedings to write every report as though his instructions came form the guardian ad litem.

Thorpe LJ otherwise agreed with Stuart-Smith LJ to the effect that counsel for Mr Vernon should have advised Mr Vernon to disclose the prior inconsistent opinions to the court in the personal injury action pursuant to an ongoing obligation to give discovery: 31Cff.

The third member of the Court of Appeal, Evans LJ, dissented. He held at 40D:

> This is not a case where the Plaintiff or expert witnesses called on his behalf gave evidence which was incorrect or expressed opinions which were unjustified at the time when their evidence was given. To suggest that he or they have 'changed their evidence' is not accurate.

Evans LJ held at 41B-C that counsel for Mr Vernon should *not* have advised Mr Vernon to disclose the prior inconsistent opinions to the court, and counsel acted in no way improperly. The sending of the anonymous package was a breach of statutory confidence and a contempt of court.

By majority, the application was successful, and the award of damages in Mr Vernon's favour reduced.

Collins Thomson v Clayton [2002] NSWSC 366 addressed whether the independence of an expert is a prerequisite to admissibility. To this question, Austin J commenced his analysis by reciting with approval the well-known judgment in *The Ikarian Reefer*[2] that laid down a number of principles, including the famous passage from Lord Wilberforce in *Whitehouse No. 2*. In considering these principles, Austin J concluded that each of these elements were very weighty considerations which may lead the court to exercise its discretion to exclude evidence that would otherwise be admissible: [22]. Austin J opined that this conclusion was consistent with the famous decision of *Makita (Australia) Pty Limited v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705: [23].

FGT Custodians Pty Ltd v Fagenblat [2003] VSCA 33 was an appeal to the Court of Appeal in Victoria, and concerned the admissibility of expert valuation evidence given on behalf of the plaintiff by a valuer who was the plaintiff's brother-in-law. It was asserted, that the nature of the relationship between the expert and the plaintiff was such that the expert's opinion lacked the independence said to be a necessary characteristic of expert evidence, relying upon the passage quoted above in *Whitehouse (No. 2)*: [3]. In an illuminating analysis of both *Whitehouse No. 1* and *Whitehouse No. 2,* Ormiston JA (with whom Chernov and Eames JJA agreed) observed that Lord Wilberforce's dictum 'was provoked largely by a comment made by Lord Denning' which was directed to criticising the way in which counsel had settled a joint report by 2 professors which showed that it was more the product of 'special pleading rather than an impartial report': [16]. His Honour identified a number of practical realities at

[19], [20] and [21] ending with:

> [21] …If cynicism is properly to be expressed, then it might more fairly be directed to an (unspecified) proportion of expert witnesses who find themselves obliged to earn their living by giving that kind of evidence, and who mistakenly think their own best interests are advanced by 'gilding the lily'.

Universal Music Australia Pty Ltd & Ors v Sharman License Holdings Pty Ltd & Ors (2005) 220 ALR 1 concerned the operation of the *Kazaa* internet peer to peer file sharing system. The applicants included companies associated with the world's major distributors of sound recordings, mostly in the form of compact discs. The applicants claimed that the sharing of so-called 'blue files' between users of the Kazaa service constituted an infringement of their copyright. There were numerous issues in dispute, but relevantly for present purposes, there was a consideration of the evidence given by an American expert called on behalf of the defendant by the name of Professor Ross. Wilcox J held at [227]ff:

> [227] Professor Ross … was obviously well qualified to give expert evidence in this case. However, my confidence in him was shaken during the course of his cross-examination.
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> [228] Mr Bannon showed Professor Ross a draft of his report that contained a passage dealing with the relationship between Joltid's PeerEnabler software (used in FastTrack) and Altnet's TopSearch technology. The draft shows exchanges between Professor Ross and a solicitor at Clayton Utz, acting for the Sharman respondents. Professor Ross initially wrote the words: 'The Altnet TopSearch Index works in conjunction with the Joltid PeerEnabler to search for Gold Files.' The solicitor crossed out this sentence on the draft and suggested a substitute sentence: 'TopSearch searches its own Index file of available Altnet content and PeerEnabler is not needed or used for this, other than to assist in the periodic downloading of these indexes of available content.' Professor Ross replied: 'I was not aware of this, even after our testing. But if you say it is so, then fine by me.' He left the solicitor's words in the draft.
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> [229] When Mr Bannon asked about this, Professor Ross responded:
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> > 'Unfortunately, I don't have the report memorised. But it is my recollection that I was not comfortable with this and I took it out in the end. But I would like to see my report to confirm that.'
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> [230] Mr Bannon then showed Professor Ross the email showing the solicitor's response to his 'fine by me' reaction. The solicitor said: 'Keith, we want to try to avoid you being exposed to criticism so how about…' The solicitor then suggested the sentence that appears in Professor Ross' final report.

Wilcox J concluded that Professor Ross was prepared to seriously compromise his independence and intellectual integrity, and that it might be unsafe to rely upon Professor Ross in relation to any controversial matter, following revelation of email exchanges between Professor Ross and a solicitor at Clayton Utz about the wording of a draft report.

Fortson Pty Ltd v Commonwealth Bank of Australia [2008] SASC 49; (2008) 100 SASR 162 was an appeal to the full court of the Supreme Court of South Australia. The leading judgment was delivered by Debelle J, with whom Doyle CJ and Bleby J agreed. The issue in the case was the admissibility of expert valuation evidence in relation to certain premises that arose in unusual circumstances. At a certain point in time, the valuer in question, Mr Burton, was in private practice. He was retained to provide an opinion about the value of the property in question to the plaintiff as at that certain point in time. Some years later, after the parties came to be in dispute, Mr Burton had changed his employment, and was now an employee of one of the parties, the Commonwealth Bank, who was the defendant. He was asked to provide a written opinion as to the value of the same property as at the same certain point in time (i.e. at the same time as his earlier opinion). Mr Burton did not have access to his previous opinion, or the notes supporting his conclusions. Mr Burton acceded to the request by his employer, and expressed an opinion as to the property's value. That opinion was significantly different to the opinion that he had expressed some years ago. At the time of trial, the plaintiff did not know that Mr Burton was currently an employee of the defendant. On learning that he was, taken in conjunction with the history outlined here, the plaintiff objected and complained about the failure to disclose the fact that Mr Burton was an employee of the bank. Debelle J considered Lord Wilberforce's comments in *Whitehouse No. 2*, as well as the reasons of Ormiston JA in *FGT Custodians*. His Honour agreed with Ormiston JA, and held that the defendant should have disclosed to the plaintiff that Mr Burton was currently its employee, and that this fact went to the weight to be afforded to his opinion, but the failure

to do so, in all the circumstances of this case, did not justify setting aside the judgment at first instance. In New South Wales s 56(4) of the Civil Procedure Act 2005 (discussed below) would normally require that disclosure emanate from counsel or solicitors for the party concerned.

Kulikovsky v Police [2010] SASC 58 was an appeal against conviction to the Supreme Court of South Australia. Mr Kulikovsky had been charged with driving beyond the speed limit and evidence had been led as to Mr Kulikovsky's speed by the use by police of a laser. Coincidentally, Mr Kulikovsky had expertise in the use of that particular laser to measure speed, and he gave expert opinion evidence in his defence. A matter that arose for consideration on appeal, was the bearing that Mr Kulikovsky's obvious lack of independence should have had on the outcome of the trial. In referring to Lord Wilberforce's words in *Whitehouse No. 2*, Gray J observed that the question of independence was a matter going to weight, not admissibility. He also made this observation at [37]:

> The approach to the limits of the role of an expert witness in England is in some ways distinct from the approach in Australia. However, the following are settled: an expert should provide independent assistance to the court by way of unbiased opinion, and an expert witness should never assume the role of an advocate.

Farley-Smith v Repatriation Commission [2010] AATA 637 was an appeal to the Administrative Appeals Tribunal from a decision made by the Veterans Review Board. The matter was heard by Senior Member Fice and Member Shanahan. The appeal was in relation to the death of a veteran who had been exposed to petrol while cleaning weapons and machinery, which exposure may have contributed to his death. In addressing that question, the commission had received evidence from Professor Parkin, which was the subject of criticism and attack on the grounds of perceived bias and lack of independence. At least one reason for that attack was the revelation that Professor Parkin had communicated with the applicant for compensation before being commissioned to author his report, in which he expressed a view contrary to that expressed in his report; Professor Parkin's initial view was unfavourable to the applicant for compensation, but after the applicant commissioned him to provide a report, his contrary opinion was favourable. Furthermore, it appears, though it is by no means immediately clear from the reasons for judgment, that the tribunal found that Professor Parkin's report had been changed at the suggestion of the Applicant or her legal advisers. The Tribunal reviewed, amongst other things, the decisions of *Makita v Sprowles*, *The Ikarian Reefer*, *Whitehouse No. 2*, and *Phosphate Co-operative of Australia*. The tribunal held that Professor Parkin had not brought any independent assistance to the tribunal by way of objective, unbiased opinion, and that 'he had clearly crossed the line into advocacy'.

Secretary to the Department of Business and Innovation v Murdesk Investments [2011] VSC 581 was a dispute about the value of land that had been compulsorily acquired. Emerton J was considering the question of the admissibility of expert evidence in circumstances where there was a suggestion that the relevant valuer was not entirely independent. Her Honour considered at [103] and [104] *Phosphate Co-operative Co of Australia*. Ultimately, Emerton J found that the circumstances were sufficiently different as to reach a different conclusion, ending:

> 110 In this case, there was no evidence of the legal representatives attempting to invite the expert to distort or misstate facts or give other than honest opinions. Nor was there evidence that the legal representatives suggested a particular method of valuation might be more likely to appeal to the Court. Although the legal representatives made suggestions as to form and style, even to the extent of redrafting parts of one of the reports, this does not amount to the kind of conduct...cautioned against.

The principles to be derived from this line of authority include the following:

(a) Some degree of consultation between experts and legal advisers is entirely proper: *Whitehouse No. 2*, *Phosphate Co-operative, Secretary to the Department of Business and Innovation.*

(b) It is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert: *Whitehouse No. 2*, *Phosphate Co-operative, Vernon v Bosley (No.2), Universal Music Australia v Sharman, Kulikovsky, Farley-Smith, Secretary to the Department of Business and Innovation.*

(c) The settling of an expert report by counsel, such that it wears the colour of a special pleading rather

than an impartial report is improper: *Whitehouse No. 1*.

(d) Alterations to expert reports that alter or disguise the expert witness' genuinely held opinion are improper: *Whitehouse No. 1, Kelly v London Transport, Vernon v Bosley (No.2), Universal Music Australia v Sharman, Farley-Smith.*

The Federal Line of authority

All these cases occurred in federal courts – hence 'Federal Line of authority'.

Boland v Yates Property Corporation [1999] HCA 64; (1999) 167 ALR 575 was an action against solicitors for professional negligence in which Callinan J commented at [276] – [277] upon the relationship between the experts called in this case and the lawyers, concluding:

> [278] In Kelly v London Transport Executive, Lord Denning MR said that solicitors and counsel must not 'settle' the evidence of medical experts as they did in Whitehouse v Jordan. In the latter case Lord Wilberforce said:
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> > Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation.
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> [279] What the Master of the Rolls categorically said in Kelly, in my opinion, goes too far. But in any event the passage from Whitehouse v Jordan quoted does not support as far-reaching a proposition as that propounded by Lord Denning. For the legal advisors to make suggestions is a quite different matter from seeking to have an expert witness give an opinion which is influenced by the exigencies of litigation or is not an honest opinion that he or she holds or is prepared to adopt. I do not doubt that counsel and solicitors have a proper role to perform in advising or suggesting, not only which legal principles apply, but also that a different form of expression might appropriately or more accurately state the propositions that the expert would advance, and which particular method of valuation might be more likely to appeal to a tribunal or Court, so long as no attempt is made to invite the expert to distort or misstate facts or give other than honest opinions. However it is the valuer who has to give the evidence and who must make the final decision as to the form that his or her valuation will take. It will be the valuer and not the legal advisors who is under oath in the witness box and bound to state his or her opinions honestly and the facts accurately. The lawyers are not a valuer's or indeed any experts' keepers.

We should like to emphasise that the only reference to that passage in any of the authorities in the Whitehouse Line is that contained in *Secretary to the Department of Business and Innovation v Murdesk Investments*. A similar failure is evident in the balance of the authorities considered below: none of them are considered in any of the authorities in the Whitehouse Line.

Harrington-Smith on behalf of the Wongatha People v Western Australia (No.7) [2003] FCA 893; (2003) 130 FCR 424 was a claim for native title supported and defended by numerous voluminous reports of expert witnesses, which in turn generated numerous evidentiary objections and exposed deficiencies in those reports. This decision came about in the course of case management, after the parties had exchanged their objections to expert reports. In summary, there were 30 expert reports, written by 15 different authors, spread over 35 volumes of documents, to which 1426 objections were taken. One category of objections was whether the opinions expressed in the reports were properly admissible under the *Evidence Act 1995* as opinion based on a person's training, study or experience. None of the reports had had any input from any legal advisers before trial. Lindgren J analysed the material in light of the objections at [18] – [28], which most relevantly includes (emphasis in original):

> [19] 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. In the same vein, it is *not* the law that admissibility is attracted by nothing more than the writing of a report in accordance with the conventions of an expert's particular field of scholarship. …
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> [27] …My impression is that in some cases, beyond the writing of an initial letter of instructions to the expert, lawyers have left the task of writing the reports entirely to the expert, even though he or she cannot reasonably be expected to understand the applicable evidentiary requirements. Such a course may have been followed because of a commendable desire to avoid any possibility of suggestion of improper influence on the author. But I suggest that the distinction between permissible guidance as to form and as to the requirements of ss.56 and 79 of the Evidence Act, on the one hand, and impermissible influence as to the content of a report on the other hand, is not too difficult to observe. It does not serve the interests of anyone, including those of the expert witness, to deny him or her the benefit of guidance of the kind mentioned.

Jango v Northern Territory of Australia (No.2) [2004] FCA 1004 was another native title claim. At an interlocutory stage, Sackville J was called to give rulings on evidence in relation to expert reports. Again, there were voluminous reports advanced on behalf of the applicants, to which the respondents had made at least 1100 separate objections. Sackville J made a list of complaints about the expert reports similar to that in *Harrington-Smith*. After referring to and quoting the judgment in *Harrington-Smith*, Sackville J added his own concurring thoughts at [10] – [18].

R v Doogan [2005] ACTSC 74; (2005) 158 ACTR 1 was an appeal to the full court of the Supreme Court of the ACT comprised of Higgins CJ, Crispin and Bennett JJ, about irregularities in the conduct of a coronial inquiry. One of the matters complained of revolved around the fact that counsel assisting the coroner had himself assisted in the preparation of expert reports relied upon at the hearing. In a unanimous judgment, the court considered what had occurred, and quoted part of the dicta from *Harrington-Smith*, before concluding:

> [119] Accordingly, the mere fact that some editing of the reports of Mr Roche and Mr Cheney occurred does not demonstrate any impropriety on the part of the lawyers in question or provide any valid ground for concern. It is true that the rules of evidence did not strictly bind the first respondent and that some latitude might have been permitted to statements in the reports that strayed to some extent beyond the bounds of admissibility. However, that consideration did not relieve those assisting the first respondent of their duty to ensure that the reports conveyed the author's opinions in a comprehensible manner, that the basis for those opinions was properly disclosed and that irrelevant matters were excluded. It has not been established that any of the lawyers assisting the first respondent sought to change passages in the reports conveying relevant opinions or information, so the prosecutors' complaints seem to have been based upon the editing of passages that were, at best, of marginal relevance.

Risk v Northern Territory of Australia [2006] FCA 404 was a decision of Mansfield J about another claim to native title. Again, expert evidence was sought to be tendered, and it was the subject of similar criticism to that made in *Harrington-Smith*. Mansfield J referred to *Harrington-Smith* and adopted the analysis contained there: 450. Mansfield J observed that *Jango* addressed the same issues: [458]. Mansfield J concluded:

> [469] … The important thing in any expert's report, in my view, is that the intellectual processes of the expert can be readily exposed. That involves identifying in a transparent way what are the primary facts assumed or understood. It also involves making the process of reasoning transparent, and where there are premises upon which the reasoning depends, identifying them. An understanding of the nature of the judicial process in addressing expert evidence would readily recognise the need for the expert's report to communicate those matters to the court.

From this line of authority, the following principles emerge:

(a) For the legal advisors to make suggestions is a quite different matter from seeking to have an expert witness give an opinion which is influenced by the exigencies of litigation or is not an honest opinion that he or she holds or is prepared to adopt: *Boland, Harrington-Smith, Jango, R v Doogan, Risk.*

(b) Counsel and solicitors have a proper role to perform in advising or suggesting, not only which legal principles apply, but also that a different form of expression might appropriately or more accurately state the propositions that the expert would advance, and which particular method might be more likely to appeal to a tribunal or court, so long as no attempt is made to invite the expert to distort or misstate facts or give other than honest opinions: *Boland, Harrington-Smith, Jango, R v Doogan, Risk.*

Cross on Evidence

Heydon J in his capacity as author of *Cross on Evidence* says very little about the issues central to this article:

> [29080] What is the role of the legal practitioner in preparing the expert's report? Since an independent expert is expected to be non-partisan, the consultation with the parties' legal advisers which may be proffered to ensure that the report is directed to the issues before the court, must not be permitted to distort the substance of the witness's opinion so that it loses its essential character as an independent report unaffected as to form or content by the exigencies of litigation.

He cites *Whitehouse No. 1* and *Whitehouse No. 2*. He then quotes from *Harrington-Smith* at [19] quoted above at [36] without expressing approval or disapproval.

Freckelton & Selby

Messrs Freckelton & Selby in their loose leaf service *Expert Evidence* say a little more:

> [5.0.150] Lawyers settling expert reports
>
> It is unacceptable for a lawyer to 'settle' an expert's report if that involves making any significant contribution to the content of the report (and a fortiori to tamper with the expert's opinions). However, there are advantages to lawyers reviewing expert reports as early as possible by contributing to presentational clarity and identifying issues of admissibility that may arise from how they are framed…
>
> There are occasions when the report produced by an expert does not focus upon the issues upon which the commissioning lawyers wish to concentrate. For example, a psychiatrist may be commissioned to provide a report for use in an application that a prosecution not proceed (a nolle prosequi) on the basis of the mental state of a person who has committed a serious assault. If the report were to canvass issues relating to insanity or insane automatism, it might run contrary to what the accused person's solicitors and barristers believe to be in the best interests of their client. There is nothing wrong with their requesting that the report be rewritten to deal exclusively with the capacity of the person to have formed the requisite intent to commit the act, thus removing from potential consideration issues which might lead the prosecution to raise the question of insanity, thereby creating the possibility of the accused person being consigned to detention at the Governor's pleasure or under the supervision of the sentencing Court.

They quote *Whitehouse No. 1* and *Whitehouse No. 2* before concluding that 'another, more modern formulation of the issue is that of Lindgren J in Harrington-Smith.'

Academic literature

We have identified four articles and one book that, to varying degrees, address the central issues:

(a) Stowe, *Preparing Expert Witnesses*, *Bar News*, Summer 2006/2007, page 44, NSW Bar Association.

(b) Hall SC, 'Expert Reports – The Role of Lawyers' (2006) 33(4) *Brief* 19, page 19, WA Bar Association.

(c) Moujalli, *Expert Opinion Evidence in Civil Litigation*, August 2011, unpublished seminar paper.

(d) Ipp J (as he then was), *Lawyers' Duties to the Court* (1998) 114 LQR 63, particularly at pages 91-92 and pages 105-106.

(e) PW Young, *Civil Litigation: A Practice Guide for Advocates*, 1986, Butterworths, Chapters 4 and 18.

While these learned authors do not entirely agree with one another, nor do they entirely agree with either the Whitehouse Line of authority or the Federal Line of authority, the matters raised by them in these articles, to the extent that they have not already been commented upon in this advice, usefully include the following observations:

(a) The drafting of an expert report is but one small component of the entire process of lawyers interacting with expert witnesses, and the courts receiving that evidence. Consequently, in determining the acceptable limits for counsel to settle expert reports, the relevant question is not merely 'What can counsel do?' but also 'How may counsel do it?' Whilst reasonable minds may agree as to what a lawyer may do, there is ample scope for disagreement about how it may be done.[3]

(b) The word 'settled' bears a variety of meanings. Apparent differences in judicial attitudes towards the settling of expert reports by counsel may evaporate after attention is paid to the precise acts, and the manner in which those acts are performed, in the course of counsel settling an expert report.[4]

(c) Contrary to the practice in England and Wales, in New South Wales it has always been considered part of counsel's function to interview witnesses, and in all cases in which there is to be oral evidence in a contested action, it is imperative that counsel does so. After the witness has told his story, counsel needs to test him on it. This extends to what the witness is saying when it is contrary to some document; counsel cannot let this pass, but must put the matter to the witness.[5]

(d) Counsel should give instructions to a witness about giving evidence that include the following matters:[6] If you don't understand the question, say so; If the question can be answered yes or no, answer it yes or no; Answer questions as briefly as possible; Never volunteer information; Don't be smart; Avoid exaggeration; Tell the truth.

(e) It is far more likely, that counsel will win a borderline

case by the way he presents his evidence in chief, rather than by cross-examination. Accordingly, attention should be paid to the evidence in chief.[7]

(f) It is not improper to refer witnesses to the pleadings, affidavits, and other sources, including, during the conduct of the hearing, the oral evidence of other witnesses, in order to ascertain what they will say about that material. Counsel with experience will not put a witness on the stand without knowing in advance what that witness will say in answer to vital questions. Such preparation is regarded as the mark of a good trial lawyer, and is to be commended because it promotes a more efficient administration of justice and saves time. However, there can be a fine line between refreshing memory or explaining what is relevant on the one hand and assisting perjury on the other. Witnesses may not be placed under pressure to provide other than a truthful account of their evidence nor may witnesses be rehearsed, practised or coached in relation to their evidence or in the way in which it should be given. It is particularly important that an expert's report is in its content the product of the expert. An expert witness should not be asked to change a report so as to favour the client or conceal prejudicial material.[8]

Professional practice rules, legislation, and the rules of court

The (new) New South Wales Barristers' Rules dated 8 August 2011 include two rules relevant to the case of counsel settling expert reports: 68 and 69.

The *Civil Procedure Act 2005* introduced novel legislative obligations on counsel: ss 56 & 57.

The *Uniform Civil Procedure Rules 2005* contain rules about the formalities of documents: see UCPR 4.3 that descends into considerable detail, and likewise UCPR 4.7. The UCPR also contain rules about expert evidence and expert reports, most relevantly: UCPR 31.23 and 31.27.

Reconciling the lines of authority with each other and the other material

In New South Wales, the Federal Line of authority should be preferred over the Whitehouse Line of authority for the following reasons:

(a) The *Civil Procedure Act 2005* and the *Uniform Civil Procedure Rules 2005* impose obligations on parties, solicitors and counsel that relate directly to the preparation and use of expert opinion evidence. Authorities pre-dating these obligations need to be reconsidered in light of the current legislative scheme. To the extent that authorities pre-dating the legislative scheme are now inconsistent or incompatible, then they should be disregarded as no longer stating the law.

(b) The *Evidence Act 1995* imposes restrictions on the admissibility and use of expert opinion evidence. The High Court has repeatedly expressed the importance of expert opinion evidence being tendered in a form that allows proper application of the *Evidence Act 1995*. In doing so, the High Court has directly addressed the question of the involvement of solicitors and counsel in the preparation and use of expert opinion evidence. That has not been subsequently distinguished or disapproved by the court. Authorities pre-dating the *Evidence Act 1995* need to be reconsidered in light of the *Evidence Act 1995* and its construction. To the extent that authorities pre-dating the *Evidence Act 1995* are now inconsistent or incompatible, then they should be disregarded as no longer stating the law.

(c) The Federal Line of authority is an internally consistent, cross-referenced and coherent body of legal reasoning, expressed after the introduction of the *Evidence Act 1995*, and at a time soon before or after the introduction of the *Civil Procedure Act 2005* and the *Uniform Civil Procedure Rules 2005*. It takes into account, to some degree, competing views expressed in the Whitehouse Line of authority. The same cannot be said for the Whitehouse Line of authority, which does not even engage with the reasoning process underlying the Federal Line of authority.

(d) There is no relevant and binding decision of either the New South Wales Court of Appeal or the Supreme Court. *R v Doogan* is a decision of an intermediate Court of Appeal. Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong. Since there is

a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89; (2007) 236 ALR 209; (2007) 81 ALJR 1107 at [135]. Authorities pre-dating *R v Doogan* need to be reconsidered in light of that decision. To the extent that authorities pre-dating *R v Doogan* are now inconsistent or incompatible, then they should be disregarded as no longer stating the law.

(e) The New South Wales Barristers' Rules are consistent with the Federal Line of authority but inconsistent with the Whitehouse Line of authority, at least to the extent that the rules draw no distinction between expert and lay witnesses. Authorities pre-dating these obligations need to be reconsidered in light of the current rules. To the extent that authorities pre-dating the rules are now inconsistent or incompatible, then they should be disregarded as no longer stating the law.

(f) The Federal Line of authority is more consistent with views articulated in professional and academic literature than the Whitehouse Line of authority.

(g) Lord Denning's reasoning in *Whitehouse No.1* has been expressly disapproved, albeit in *obita dicta*.

Conclusion

Insofar as expert *witnesses* are concerned, other than the fact that they are entitled to give evidence of an opinion instead of merely evidence of observation, there is no reason why counsel should fall under different obligations when conferring with an expert witness as when conferring with a lay witness.

Insofar as expert witness *opinions* are concerned, it is difficult to identify any meaningful difference between *preliminary* and *final* opinions. The authorities, and the code of conduct, recognise that an expert opinion *may change*. We have had experience of so-called final opinions, changing in the witness box. One might reasonably submit that, irrespective of the label assigned to it, there are simply *initial* opinions first in time, that may be followed by *more recent* opinions later. There is no reason why counsel should fall under different obligations when dealing with opinions formed earlier in time, as when formed later.

Insofar as expert witness *reports* are concerned, it is difficult to identify any meaningful difference between *draft* and *final* versions, for the same reasons. There is no reason why counsel should fall under different obligations when settling a draft expert report as when advising upon a final report.

Accordingly, there is no reason why counsel should fall under different obligations when settling an expert report as when settling a lay affidavit. Having regard to the totality of all this material, in our opinion the following principles state the current position in New South Wales on the question of counsel's role in settling expert evidence:

(a) Counsel may *and should* identify and direct the expert witness to the real issues.

(b) Counsel may *and should* suggest to the expert witness that an opinion does not address the real issues when counsel holds that view.

(c) Counsel may *and should*, when counsel holds the view, suggest to the expert witness that an opinion does not adequately:

  (1) illuminate the reasoning leading to the opinion arrived at, or

  (2) distinguish between the assumed facts on which an opinion is based and the opinion itself, or

  (3) explain how the opinion proffered is one substantially based on his specialised knowledge.

(d) Counsel may suggest to the witness that his opinion is either wrong or deficient in some way, with a view to the witness changing his opinion, provided that such suggestion stems from counsel's view after an analysis of the facts and law and is in furtherance of counsel's duty to the proper administration of justice, and not merely a desire to change an unfavourable opinion into a favourable opinion.

(e) Counsel may alter the format of an expert report so as to make it comprehensible, legible, and so as to comply with UCPR 4.3 and 4.7.

Endnotes

1. Stowe, 'Preparing expert witnesses: A search for ethical boundaries', *Bar News*, Summer 2006/2007 at page 44.
2. *National Justice v Prudential Insurance (The 'Ikarian Reefer')* [1993] 2 Lloyd's Reports 68
3. Stowe, *Preparing Expert Witnesses*
4. Stowe, *Preparing Expert Witnesses*
5. P W Young, *Civil Litigation*
6. P W Young, *Civil Litigation*
7. P W Young, *Civil Litigation*
8. Ipp J, *Lawyers' Duties to the Court*