An overview of the Evidence Act

Keynote address prepared for the Young Lawyers Annual One Day CLE Seminar 2011: Evidence Act

Robert McDougall[*]

Introduction

1 As you will be aware, the *Evidence Act 1995* (NSW) ('Act') was intended to be part of a national uniform regime, created by reforms in the mid 1990s. Those reforms were aimed at creating consistency in the treatment of evidence by the courts in each of the state and federal jurisdictions.

2 The Act is the product of discussions starting as early as 1979, at which time it was said that a comprehensive law of evidence based on modern conditions was required. Up until that point, the law of evidence had evolved as a matter of common law, complicated by statutory accretion, into a myriad of rules and exceptions that were, in many cases, different from jurisdiction to jurisdiction. The uniform regime has been largely successful in creating the comprehensive law of evidence envisaged in 1979, however, it has still not yet been accepted by each jurisdiction and to the extent that it has been adopted, there remain some differences between the states. Accordingly, I propose to deal today only with the Evidence Act as it is enacted in NSW. To the extent that I refer to a corresponding provision in another jurisdiction, I will so indicate.

3 Another thing to understand about the Act, is that it is not a complete code of the law of evidence. There are a number of topics that are associated with evidence, but are not dealt with in the Act - the attribution of the burden of proof and the doctrines of res judicata and issue estoppel are just a few examples. That being said, Chapter 3 (which contains the rules

[*] Judge, Supreme Court of New South Wales. I acknowledge, with thanks, the contribution of my tipstaff, Ms Karen Petch BA LLB (Hons I) to the preparation of this paper. The views expressed in this paper are my own, and not necessarily those of my colleagues or of the Court.

on admissibility) is to be read as a complete code, and I will refer to its provisions in a moment.

4 The Act is also to be read in light of the laws of procedure in NSW contained in the *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR'). Those instruments are instructive in the procedure of the trial process and, in some cases, provide pre-requisites to the operation of matters provided for in the Act.

5 I note from the conference programme, that during the course of today you will have the benefit of hearing from a number of well-versed experts in this area. They will, no doubt, have much to tell you about particular current issues arising in practice out of the Act. I have been asked today to give only an overview of the Act and I propose to do so first, by providing an outline of the structure of the Act and some of its relevant provisions and then to turn my attention to four topics. They are:

a) the use of hearsay evidence for a non-hearsay purpose;
b) the distinction between lay opinion and expert opinion evidence;
c) problems that often arise with expert evidence in a general sense; and
d) some important points about client legal privilege.

6 I propose to deal only with each of those matters insofar as they relate to civil proceedings.

The structure and key features of the Evidence Act

Chapter 1 – Formal Matters

7 Chapter 1 sets out the methods for interpretation and the application of the Act. By s 4, the Act provides that it will apply in all proceedings in a NSW court, including interlocutory proceedings or matters heard in chambers. A NSW Court means the NSW Supreme Court or any other court (including

courts exercising federal jurisdiction) that is created by the NSW Parliament. The *Evidence Act 1995* (Cth) ('Commonwealth Act') provides, by s 4, that it applies in any proceeding heard in a federal or ACT court. A federal court includes the High Court or any other court created by the Commonwealth government. The Commonwealth Act also applies to proceedings in a Commonwealth tribunal where the rules of evidence apply.

Chapter 2 – Adducing Evidence

8 Chapter 2 deals with the adduction of evidence. It is divided into three parts. The first part, Part 2.1, deals with the adduction of evidence from witnesses. It creates presumptions about competence and compellability and describes the circumstances in which a person who lacks capacity may give unsworn evidence. Part 2.1 also deals with the way in which witnesses give evidence (either by themselves or through an interpreter). It sets out rules for oaths and affirmation and provides for the court to control the questioning of witnesses. The court's discretion as to how it deals with witnesses is wide and intended to ensure that the examination of witnesses in proceedings does not undermine fairness in the trial.

9 The second part, Part 2.2, deals with the means by which the contents of documents may be proved. The methods of tender, stipulated in s 48, remain subject to the tests of admissibility in Chapter 3, to which I will shortly turn. Part 2.2 also deals with the methods of service of documents.

10 The third part, Part 2.3, provides procedural rules for the adduction of evidence, other than evidence by witnesses or evidence of documents. It provides the mechanism by which a judge can order that a 'view', or in the language of the Act, a 'demonstration, experiment or inspection' be held. It also enables the court to draw reasonable inferences from what it 'sees, hears, or otherwise notices' during the view.

Chapter 3 – Admissibility

11 The rules of admissibility are exhaustive and apply at each stage of a witness's evidence (including cross examination) and to any documentary or other evidence. The first step to considering whether evidence should be admitted is whether it is relevant.

Relevance: Part 3.1

12 The starting point to an understanding of admissibility is in s56 of the Act. Section 56 provides that evidence relevant to the proceedings is admissible (subject to the exceptions contained in the Act) and evidence that is not relevant in the proceedings is not admissible. Whether evidence is relevant turns on whether it satisfies the test of relevance in s 55 of the Act.

13 Section 55 states:

> (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
>
> (2) In particular, evidence is not taken to be irrelevant only because it relates only to:
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> a. The credibility of a witness; or
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> b. The admissibility of other evidence; or
>
> c. The failure to adduce evidence

14 The test for relevance is wide. A determination of relevance does not require that the evidence will prove the fact in issue; the test is much more elementary than that. The test is predicated on whether the evidence is capable of affecting the assessment of the probability of a fact in issue. That requires only that the connection between the evidence and the fact in issue be logical. The requirement of logical connection displaces any

role of individual judgment or discretion and focuses the enquiry on whether, objectively speaking, any probative connection exists.

15 Thus, and although it may seem obvious in isolation, practitioners should ensure that any purported tender of evidence be made only once the practitioner is satisfied that that the evidence itself goes directly to one of the elements in issue in the case. A failure to appreciate the relevance of the piece of evidence in the case at large will almost certainly see the evidence rejected.

16 Even once accepted, a finding of relevance is not the end of the inquiry. Once found to be relevant, the evidence must pass through the further tests of admissibility set out in Parts 3.2 – 3.11 of the Act, to which I will now turn.

Hearsay: Part 3.2

17 Section 59 of the Act sets out the 'hearsay rule':

> [e]vidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation

18 Exceptions to the hearsay rule are numerous and are set out in the sections that follow s 59. They include, and this list is not exhaustive, that a statement which would otherwise be considered hearsay may be admissible:

a) where its tender is sought for a non-hearsay purpose (s60);
b) where the statement was a contemporaneous statement about a person's health, feelings, sensation, intention, knowledge or state of mind (s 66A); or
c) where the representation is contained in a business record, tag or label, or a record of electronic communication and the court is

satisfied that the representation conforms with the requirements of ss 69, 70 and 71 respectively.

19 Then there is the exception for first hand hearsay articulated in s 63 and 64[1] which sets out the respective requirements for admissibility of first hand hearsay evidence; in the case of s 63, where the maker of the representation is not available for cross examination and in the case of s 64, where the maker is available. Section 67 provides, and it is important for practitioners to be aware, that a party may not adduce evidence pursuant to ss63 or 64 without that party first giving reasonable written notice of its intention to do so.

20 The hearsay rule does not apply in interlocutory hearings, where the party who adduces the evidence also adduces evidence of its source: s 75. A voir dire is not an interlocutory proceeding for the purposes of s 75[2].

21 A grasp of the distinction between hearsay evidence and evidence used for a non-hearsay purpose is critical, and I will turn to that shortly.

Opinion: Part 3.3

22 The rule against the admissibility of opinion evidence is contained in s 76(1) of the Act. It provides that:

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

There are a number of exceptions to this rule.

23 The first exception is that the opinion rule does not apply to evidence of an opinion tendered for another use. This is contained in s 77.

[1] Note also ss5 and 66, which relate to criminal proceedings.
[2] *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2008] NSWSC 637 at [12] per Barrett J.

24 The second exception is contained in s 78, that is that the opinion rule does not apply to opinion evidence of a lay person where the opinion is based on what a person saw, heard or otherwise perceived about an event or matter, or the opinion is necessary to obtain an adequate account of the person's perception of a matter or event.

25 The third and fourth exceptions relate to specialised knowledge. Section 78A provides that the opinion rule does not apply to a member of an Aboriginal or Torres Strait Islander group who gives evidence about the customs of that group. Section 79 provides that the opinion rule does not apply to the evidence given by a person who holds specialised knowledge based on the person's training, study or experience and the opinion is wholly or substantially based on that knowledge. A failure to demonstrate that an opinion is based on specialised knowledge is a matter that goes to the admissibility of the evidence, not merely the weight.

26 The need to draw a distinction between lay and expert evidence, for example in matters of common human experience, arises frequently in practice and will I will turn to that shortly.

Admissions: Part 3.4

27 Part 3.4 creates an exception to the hearsay and opinion rules for first hand evidence of an admission and evidence of the context in which the admission was made (s81). It applies in both civil and criminal proceedings.

Evidence of Judgments and Convictions: 3.5.

28 Part 3.5 contains the prima facie rule (and exceptions to it) that evidence of the decision, or the finding of a fact in a proceeding, is not admissible to prove the existence of a fact that was in issue in those proceedings. It is not, however, intended that this Part do away with, in particular, estoppel per rem judicatam or issue estoppel.

Tendency and Co-Incidence: Part 3.6

29 Part 3.6 sets out the rules for admissibility of 'tendency' and 'co-incidence' evidence. This Part does not apply to evidence relating only to credibility, nor does it apply to evidence of character, reputation, conduct or tendency of a person where any of those matters is a fact in issue.

Credibility: Part 3.7

30 Evidence that goes to credibility alone is not admissible: s102. Credibility evidence is evidence that is only relevant in the proceedings because it affects the credibility of a witness or person, or because it affects the credibility of a witness or person and it is relevant for some other inadmissible purpose: s101A. However, while the definition of credibility evidence itself is not unclear, the task of determining whether evidence is relevant to a fact in issue, or whether it goes solely to credibility or to credibility and an inadmissible purpose is somewhat more difficult. McHugh J accepted the same in *Palmer v The Queen* (1998) 193 CLR 1 where his Honour said:

> The line between evidence relevant to credit and evidence relevant to a fact-in-issue is often indistinct and unhelpful. The probability of testimonial evidence being true cannot be isolated from the credibility of the witness who gives that evidence except in those cases where other evidence confirms its truth either wholly or partly. Furthermore, the conclusions drawn from that evidence are necessarily dependent on the credibility of the deponent... Indeed, in some cases, the credibility of a witness may be of such crucial importance that it is decisive of the facts-in-issue[3].

31 Indeed there will be many cases where resolution of the 'truth' of the fact in issue comes down to discerning between two competing versions of events. However, as Hayne and Heydon JJ said in *Nicholls v The Queen* (2005) 219 CLR 196 while the intertwining of matters of credibility and fact may be challenging,

[3] [51]. McHugh J was in dissent, but this portion of his reasons is not at odds with the decision of the majority.

> the law as it stands does not permit any relaxation of the traditional rules merely on the ground that the particular witness's credibility is inextricably linked with the principal issue in the case.[4]

32 As with the each of the other rules of admissibility featured in this chapter, the credibility rule is subject to exceptions. Those exceptions are stated in the sections that follow s 102 and include exceptions for:

a) evidence adduced in cross examination where the evidence could substantially affect the assessment of the credibility of a witness (s 103);
b) evidence adduced to rebut other evidence going to the credibility of the witness: (s106);
c) evidence adduced in re-examination to re-establish credibility: (s108);
d) evidence of a previous representation admitted in the proceedings where the maker has not been, and will not be, called and where the credibility evidence could substantially affect an assessment of the person's credibility (s 108A); and
e) evidence given by a person with specialised knowledge which goes to the credibility of a witness where the evidence is based wholly or substantially on that knowledge and could substantially affect the assessment of the witness's credibility (s 108C).

Character: Part 3.8

33 Part 3.8 applies only in criminal proceedings. It permits the defence to adduce evidence of the defendant's good character and to adduce expert opinion evidence relevant to the character of another defendant in the proceedings. It also provides for the means by which this evidence may be rebutted.

Identification Evidence: Part 3.9

34 Part 3.9 also applies only in criminal proceedings. It contains rules for the use of 'visual identification evidence' and 'picture identification' evidence and provides for the judge to inform the jury of the need to use caution before accepting the evidence.

Privileges: Part 3.10

35 Part 3.10 deals with the privileges that may bar admissibility of evidence. The Act divides them broadly into four categories:

a) client legal privilege (Division 1);
b) confidential communications privileges (that is confidential communications made to journalists: Division 1A and for confidential communications made about sexual assault: Division 1B);
c) 'other privileges', which includes privilege in respect of religious confession and self incrimination[5] in other proceedings (Division 2); and
d) evidence to be excluded in the public interest (Division 3).

36 I propose today only to deal with client legal privilege, and I will do so in a moment.

Discretionary and mandatory exclusions: Part 3.11

37 The discretions relating to the admissibility of evidence under ss 135-137 enable the court to deal with evidence flexibly and in a way that reflects 'considerations peculiar to the evidence in the particular case'[6]. Evidence may be excluded [7], or limited [8], if the court considers that there is a danger that the use of that evidence will be unfairly prejudicial, misleading or

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[4] [286]
[5] Under the Act, corporations are not entitled the privilege against self-incrimination: s 187. The privilege in s 128 extends to individuals only.
[6] *Papakosmas v R* (1999) 196 CLR 297 [97] per McHugh J
[7] s135
[8] s136

confusing. Evidence may also be excluded if, to admit it would cause or result in an undue waste of time[9].

38 Section 136 is regularly used in civil proceedings to limit evidence to evidence of, for example, a party's state of mind, or the nature of a conversation, without allowing it in as proof of the truth of matters asserted in it[10]. Whether the discretion can be used in this way will, of course, be subject to the test of relevance just mentioned

39 These discretions are of particular use when it comes to limiting hearsay evidence tendered for a non-hearsay purpose; a matter that I will mention shortly.

Chapter 4 – Proof

40 Chapter 4 deals with proof in both principal and interlocutory proceedings in both the civil and criminal jurisdictions. It is not an exhaustive code of the matters of proof existing at common law. It does not refer, for example, to the allocation of the burden of proof, many of the presumptions available at common law or the doctrines of res judicata and issue estoppel. These matters continue to be governed by the general law.

41 Part 4.1 deals with standards of proof. Sections 140 and 141 codify the well-understood common law burdens of proof and s 143 provides that for questions of admissibility, the standard of proof is balance of probabilities and the court is required to consider the importance of the evidence in the proceedings and the gravity of the matters alleged when coming to a view as to whether the standard is so satisfied.

42 Part 4.2 deals with judicial notice. It separates the matters in respect of which proof is not required, and in respect of which a judge may take

[9] s135
[10] See, for example, *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* (2009) 75 NSWLR 380 at [24].

notice as to matters of law (s143) and matters of common knowledge (s144). The powers of the judge are broad and he or she may inform him or herself about the matters of law, or acquire the knowledge of matters of common knowledge in any way that the judge thinks fit.

43 The remainder of the Chapter contains provisions, which create presumptions and procedures to facilitate the making of proof. While I do not intend to go into the operation of these sections here, practitioners should be well versed in these matters to ensure that the passage of an otherwise well prepared case is not frustrated by an inadequate understanding of basic matters of procedure.

Chapter 5 - Miscellaneous provisions

44 Chapter 5 does, as the title suggests, contain miscellaneous provisions substantially relating to the powers of the court to deal with, and make findings as to, evidence in the course of proceedings. Some notable provisions include:

a) Section 183, which enables the Court to examine a document in respect of which a question is raised during the course of proceedings, and to draw reasonable inferences from it.
b) Section 189, which sets out the procedure for resolution of 'preliminary questions' on the voir dire and the matters to be taken into account by the court when determining the preliminary question. A 'voir dire' in the Act, has the same meaning as at common law – that is, that the voir dire is a hearing by the judge 'in the course of but apart from the main trial'[11]. Section 189(7) provides that the Chapter 3 rules of admissibility apply on the voir dire.
c) Section 190, which permits, with consent of the parties, the court to make an order waiving the rules of evidence with respect to certain

[11] *Brown v Commissioner of Taxation* [2002] FCAFC 75, cited with approval in *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2008] NSWSC 637 per Barrett J at [9].

sections of the Act, including the rules of admissibility in Parts 3.2 – 3.8 mentioned earlier. I will return, in closing, to the way in which this discretion operates with the other discretions in the Act and the general law duty for judges to act only on admissible evidence.

d) Section 191, which provides that where the parties have agreed in writing that certain facts in the proceeding are not in dispute, then evidence is not required to prove those agreed facts, nor may evidence be adduced to contradict the agreed facts without leave of the court.

e) Section 192, which sets out the terms on which leave may be given and Section 192A provides that any question about admissibility, the operation of the Act or the giving of leave can be given in advance of the adduction of the evidence.

f) Section 193, which provides for additional powers available to the court to deal with discovery, inspection of documents and exchange of evidence.

Key Issues

Hearsay evidence for a non-hearsay purpose

45 It is apparent from the hearsay rule itself that evidence of a previous representation tendered to prove the truth of what is represented by it will be rejected. However, if the evidence is tendered for a different purpose and that other purpose comes within the test of relevance in s 55(1) as, for example, being relevant to the state of mind of the person who made the representation, or of the person to whom it was made, then the hearsay rule no longer applies. In those circumstances, the evidence may be admitted. That is the effect of s 60. Section 60 says nothing as to weight – an important factor where, by definition, the truth of the asserted fact cannot be tested through cross-examination of the witness who gives evidence of the previous representation.

46 This is substantially different to the common law understanding of non-hearsay purpose. Under the common law, evidence admitted for a non-hearsay purpose, could only be used for that purpose and may not be used to prove the existence of an asserted fact. The change in approach was deliberate and intended to enable evidence admitted for a non-hearsay purpose to be used as evidence of the truth of the facts asserted in the representation subject to the control of the court. It will then be up to court, with reference to the discretions in ss 135 – 137 to determine whether, for example, the party opposing the tender will suffer undue prejudice by the admission of the evidence, and if so, to limit the effect of the evidence accordingly.

Distinction between lay opinion and expert opinion evidence

47 Section 78 permits the admission of evidence given by a lay person where that evidence is based on what the lay person saw, heard or otherwise perceived. While simple in concept, in practice, the evidence given by the witness is rarely so easy to categorise. For example, take a case where a lay witness gives evidence that a car was 'speeding' and that it then 'jammed on its brakes' at an intersection. On one reading, this evidence may be inadmissible as an expression of a conclusion. After all, unless the witness is an engineer or physicist, it is not within the witness's area of expertise, and is therefore impermissible for them to express such a view. However, on another view, common experience may be sufficient to equip a witness to give evidence on that matter. This may be particularly so when, in the case of my example, the witness is a person who drives regularly, who has, over a number of years as being a driver or pedestrian, seen cars travel at different speeds, or stop suddenly and is familiar with the sound, and appearance of a car which does so. If the latter view is taken, it follows that the evidence may be admissible but subject to restriction pursuant s 136 as evidence of the witness's understanding based on his or her common experience.

48 Similarly, a witness of fact may also be able to express 'ad hoc' expert evidence based on his or her experience. This often occurs in cases where the witness has expertise in some particular field and is not retained as an expert in that case, but rather is called as a witness of fact. There, it may be permissible for the witness to express conclusions founded on his or her area of expertise, provided that a rational connection can be seen between the opinion and the knowledge. For example, a director with a number of years' experience and who regularly deals with and analyses financial records will likely be well equipped to say that, in his or her view, the financial records of the company at a particular time did, or did not, reflect a true and fair view of the company's financial position.

Problems with expert evidence generally

49 The notion that there is 'no property in a witness' does not resound louder than in the context of expert witnesses. The primary duty of the expert is to the court. This is made clear in NSW by the Expert Witness Code of Conduct ('code of conduct'), found in Schedule 7 to the UCPR, with which any expert who intends to give opinion evidence must comply. It is the duty of an expert witness, pursuant to the code of conduct, to assist the court with making clear matters relevant to his or her expertise.

50 It is not a function of the expert witness to give evidence that is favourable to the party who calls the expert witness, and who no doubt pays substantial amounts of money to retain his or her expertise [12]. Any witness who fails to provide his or her expertise impartially does not assist the court in understanding or deciding the real issues in dispute between the parties, wastes the court's time, and is likely to contribute to an unnecessary increase in the costs of the proceedings. Each of these outcomes constitutes a breach of s56 of *the Civil Procedure Act*. Further, where a party retains an expert who is ultimately found to be un-useful, this incurs not only a financial cost to the parties in terms of funds wasted

[12] *Clark v Ryan* (1960) 103 CLR 486 at 509-510 per Windeyer J

in commissioning the report and funds lost on practitioners preparing and liaising with the witness, but can leave a large evidentiary gap in the case.

51 When dealing with the evidence of an expert witness, practitioners should be aware of, and endeavour to avoid, some of the following common pitfalls.

Assistance with form as opposed to substance

52 It is the obligation of the practitioner, in observing his or her own duty to the court, to ensure that the expert's report is the result of the expert's specialised knowledge and that it is presented in a form that can be used to assist the court in its resolution of the issues in dispute. Practitioners should take care as to how much, and the nature of any, assistance the practitioner gives to an expert during the preparation of his or her report. It is permissible for the practitioner to assist the expert as to form, but impermissible to influence the content. Accepting that this may be a fine line to draw, it is helpful to refer to the case law.

53 In *Harrington-Smith v State of Western Australia (No 7)* (2003) 130 FCA 424, Lindgren J was faced with an application for the determination of 30 expert reports by 15 authors relating to matters of native title, and to resolve the 1426 objections made to them. His Honour, in the course of delivering a judgment on the rulings likely to be made, noted that there were significant shortcomings in the reports and that those shortcomings may have been avoided had the lawyers played a greater role in directing the experts as to the form of the reports. His Honour said at [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.

54 *Jango v Northern Territory of Australia (No. 2)* [2004] FCA 1004 was another case which dealt with the inadequacies of form of expert evidence.

In that case 1,100 objections were made to two reports. Sackville J (as he then was) said, that the reports were prepared 'with scant regard for the requirements of the Evidence Act 1995 (Cth)…' and his Honour agreed 'strongly' with the comments made by Lindgren J in *Harrington –Smith* that the admissibility of a report would not be compromised by assistance of the instructing lawyer as to the form of the report.

55 What does this mean? It means (and I shall come back in a moment to these matters as they were articulated by Heydon JA in *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705) that the lawyer should seek to ensure that the report:

a) identifies the field of specialised knowledge and the expert's training, study or experience;
b) identifies the precise questions on which the expert is to opine;
c) identifies the facts (assumed, or known to the expert) on which the opinion will rest;
d) shows the reasoning process which, in turn,
    i. shows how the expert's specialised knowledge has been applied or used;
    ii. shows the rational links, or steps, from premises to conclusion; and
e) sets out the expert's opinion on the question.

56 However, a practitioner who takes his or her role further than advice as to form goes too far. In *Universal Music Australia v Sharman Licence Holdings* [2005] FCA 1242, Wilcox J concluded that it was 'unsafe' to rely on an expert where a solicitor had been involved in the wording of a an earlier draft of a report (the final version of which was tendered in the proceedings) in a way that affected its contents. The involvement of the solicitor was as follows:

> 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.[13]

57 His Honour concluded that the expert was 'prepared seriously to compromise his independence and intellectual integrity'[14] and as such, while he would not disregard the expert's evidence in totality, his Honour said that it would be unsafe to rely on the expert 'in relation to any controversial matter'.

58 The comments of Wilcox J in *Universal Music* should remind practitioners that experts may be cross-examined on earlier drafts of reports that they prepare for proceedings and that such cross-examination may expose inconsistencies in the expert's views over time. Where the reasoning in the earlier draft is consistent with the opinion in the final report, then no problem arises. However, where the final report diverges from the earlier drafts and the reason for that divergence can be attributed to the involvement of the party who commissioned the report, practitioners can expect unfavourable treatment from the court.

Relevance and connection to specialised knowledge

59 It may seem trite to say, but it is important for practitioners to carefully consider the purpose for which an expert is being called before calling one. The admissibility of expert evidence will be, at the first, subject to the test of relevance set out in s55 of the Act, discussed earlier. By reference to s 55(1), it is clear that evidence will be excluded where there is no chance that it could rationally affect the assessment of a fact in issue. Regardless of the eminence of any qualifications held by a potential witness, if the

[13] [228]
[14] [231]

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

60 However, as I mentioned earlier, relevance is not the end of the inquiry, and even after the test for relevance has been met, the evidence may be excluded pursuant to the opinion rule. To take advantage of the exception to the opinion rule stated in s79(1), that is, that the opinion was based on specialised knowledge, parties will need to be able to show that the opinion expressed by the expert is linked clearly to the expert's training and expertise. When practitioners are preparing an expert for hearing, care should be taken to ensure that this connection is clear and understood.

61 The pre-requisites to admissibility of expert opinion evidence were set out in detail in the reasons of Heydon JA in *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705. That was a 'slip and fall' personal injury case, where the expert evidence in question was that of a physicist whose opinion was admitted to provide evidence about whether the stairs leading to the plaintiff's workplace were 'slippery'. His Honour said, at 743-744 [85], that before the evidence of an expert is admissible, the party seeking to have the evidence admitted must demonstrate (unless it is agreed) that:

a) there is a field of 'specialised knowledge';
b) there is 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;
c) the opinion is 'wholly or substantially based on the witness's expert knowledge';
d) to the extent that the opinion is based on facts, that:
    i. if the facts were 'observed' by the expert, that they have been identified and admissibly proved by the expert; and
    ii. if the facts were 'assumed' by the expert that they have been identified and proved in some other way;
e) the facts observed or assumed by the expert form a proper foundation for the opinion; and

f) the opinion logically follows from the information on which it is stated to be based.

62 His Honour went on to say that if the court was not satisfied of each of the elements listed above, then it could not be sure that the opinion was wholly or substantially based on the expert's specialised knowledge, and as a consequence, the evidence is "strictly speaking not admissible, and, so far as it is admissible of diminished weight"[15].

63 The statements of Heydon JA were considered this year by the High Court in *Dasreef Pty Ltd v Hawchar* (2011) 85 ALJR 694. In that case, the High Court was asked to rule on whether the opinion of an expert was one 'wholly or substantially' based on his specialised knowledge or experience.

64 The plaintiff, Mr Hawchar, suffered from silicosis contracted from working as a stonemason. Dr Basden was retained as an expert in Mr Hawchar's claim for damages. Dr Basden's expertise is in chemical engineering and industrial chemistry. In the course of his report, Dr Basden did not offer any calculation of the levels of respirable silica dust to which Mr Hawchar would have been exposed, but proffered the opinion that a "considerable proportion" of the dust cloud would have been in Mr Hawchar's breathing zone. The expert went so far as to say that he was not able, by virtue of his training, to give a precise numerical or quantitative assessment of the level of exposure to silica encountered by Mr Hawchar and that he did not seek to give anything more than a ball-park figure on which his opinion was based.

65 The defendant's argument on appeal to the High Court was that Dr Basden did give an opinion about the numerical or quantitative level of exposure to silica encountered by Mr Hawchar and that this opinion was not based on specialised knowledge acquired from study, training or experience. That argument failed. French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said, in a joint judgment, that the report did not

attempt to opine on the numerical or quantitative levels of respirable silica, but rather that it offered an opinion as to what measures could have been taken to prevent Mr Hawchar from contracting silicosis if he was exposed to those levels of silica. In any event, the majority said, had the expert sought to offer that opinion, it would have been inadmissible due to the "lack of any sufficient connection between a numerical or quantitative assessment or estimate and relevant specialised knowledge" [16].

66 Their Honours said that there is a real need for the expert to explain to the court 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 [17]. In doing so, their Honours endorsed the view of Gleeson CJ expressed in *HG v The Queen* (1999) 197 CLR 414 at [39], that s79 gives the court the task of determining whether the opinion is based 'wholly or substantially based on specialised knowledge based on training, study or experience' and that the expert must present his or her opinion in a way that enables the court to answer that question.

67 Turning back to *Makita* for a moment, the majority in *Dasreef v Hawchar* said, at [37], that the criteria set out by Heydon JA in *Makita* were sound, but that they should be read on the basis that the admissibility of opinion evidence be determined with primacy to the requirements of the Act, rather than by attempting to draw support from particular passages on admissibility of opinion evidence 'in decided cases divorced from the context in which those statements were made" [18]. Accordingly, practitioners, when preparing an expert witness for trial, and when being involved in the preparation of the expert's report should continue to look primarily to the terms of the Act, but may be assisted in interpretation of those terms by the words of Heydon JA in *Makita*.

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[15] [85]
[16] [42]
[17] [37]
[18] [37]

Expert Witness Code of Conduct

68 I have already said that an expert witness must comply with the code of conduct contained in Schedule 7 to the UCPR if the expert gives evidence in the proceedings. However, mere compliance is not sufficient. The expert must also acknowledge affirmatively that he or she has read the code of conduct and agrees to be bound by it. Failure to subscribe to the code of conduct will certainly render the report inadmissible. As it was said by Barrett J in *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd (*2009) 75 NSWLR 380 at [46], the reason for requiring affirmation of the obligations of an expert under the code of conduct is:

> … to be sure that an expert has approached the task responsibly and mindful of the importance the expression of opinion will have as part of a body of evidence placed before the court.

69 In *Investmentsource v Knox Street Apartments* [2007] NSWSC 1214 I considered the admissibility of an expert report where the code of conduct was not acknowledged. I concluded that the UCPR modified the law of evidence by requiring that the evidence of an expert should not be admitted unless, at the time of making the report or giving his evidence, the expert subscribed to the obligations in the code of conduct. That proposition was accepted by the Court of Appeal in *Yacoub v Pilkington (Australia) Ltd* [2007] NSWCA 290[19] and by Barrett J in *Tim Barr v Narui Gold Coast*[20].

70 However, a failure to subscribe to the code of conduct in substance should be distinguished from the mere failure - in form alone - to insert the acknowledgement into the text of the report at the time of writing it. The latter will not necessarily be fatal if the expert is prepared to swear after the fact to compliance with the code of conduct at the time of writing. Whether an ex post facto adoption of the code of conduct can cure a

[19] per Campbell JA at [59], Tobias and Handley agreeing.
[20] At (2009) 75 NSWLR 380 at [6]

failure to acknowledge it at the time of writing will be a matter of fact and circumstance. That was the view taken by Young JA, with whom Beazley and Handley JJA agreed in *Hodder Rook & Associates Pty Ltd v Genworth Financial Mortgage Insurance Pty Ltd* [2011] NSWCA 279 at [63], where Young JA said:

> in the case where an expert makes an initial report without having the Code in mind and then is shown the Code and swears that in fact he or she did abide by it and now affirms the original report, the evidence should be admitted. Again, if the court can see that he or she is not just rubber-stamping the original report, the later report should be admitted into evidence[21].

Some Important points on client legal privilege

71 Client legal privilege is likely to be the privilege to which you will have most exposure. Critical to an understanding of the protections afforded by client professional privilege, is that it is the privilege of the client, not the lawyer, and it may be lost if the client acts in a way which is inconsistent with the maintenance of confidentiality. Client legal privilege in the Act is a substantial codification of legal professional privilege known at common law and many of the common law principles are instructive to interpretation of the current statutory formulation.

72 The substance of the privilege is contained in ss 118 and 119. Section 118 protects a client from the disclosure of confidential communications made between the lawyer and client in circumstances where the dominant purpose of the communication was to provide the client with legal advice. Section 119 provides a similar protection for the disclosure of confidential documents prepared in contemplation of proceedings.

73 The protections afforded by of each of ss 118 and 119 rest on the 'dominant purpose' of the communication or document. The dominant purpose must be the provision of legal services. That dominant purpose must exist at the time in which the document or communication in question

[21] [63]. See also Barrett J in *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* (2009) 75 NSWLR 380 at [46]

is brought into existence. However, as I said in *Singapore Airlines v Sydney Airports Corporation* [2004] NSWSC 380 (which was subsequently affirmed by the Court of Appeal in [2005] NSWCA 47), it does not follow from this that the relevant purpose need only arise at that point. Where there are ongoing discussions between the client and counsel, or where the reasons for which the report is required are constantly changing and the author of the report is notified of those changes, the relevant time period for the dominant purpose analysis could be extended until the date the on which the report was prepared or communication made [22]. However, even where discussions are ongoing, if, as was the case in *Singapore Airlines*, the purpose of the report does not change from the time when the report was first commissioned, the relevant time for assessment of "purpose" will be the time when the report was commissioned.

74 To show that the dominant purpose was that of legal services, the client needs to show that the legal services were 'paramount' to the communication or the document. It will not be sufficient that the communication was provided, or the document commissioned, for a number of different purposes, of which litigation may have been one. This was the result in *Singapore Airlines*, where I found that in addition to its use in litigation, the report in issue would also be provided to the Airline Operation Committee (AOC) to explain the cause of the accident and methods of prevention of such accidents in the future and to enable the AOC to decide whether and when the relevant air bridge would be placed back in service. These facts suggested that Sydney Airport Corporation was unable to show that the purpose of use in litigation was paramount.

75 Another issue that frequently emerges in respect of client professional privilege is the role of in-house counsel in the commission of external legal advice and the extent to which communications between in-house counsel and external advisors are protected by client legal privilege. Going back to the test of dominant purpose; where in-house counsel commissions legal

[22] See [2004] NSWSC 380 at [22]. Young J expressed a similar view in *AWB v Cole* [2006] FCA 571 at [111].

advice, it will be the purpose of the company, rather the in-house solicitor individually, that will be looked at to ascertain the dominant purpose of the commission. This is because it is the company who is ultimately the client of the legal advisor, not the in-house solicitor. Accordingly, even, as was the case in *Singapore Airlines*, where the solicitor who commissioned the report had in his or her mind that the report would be used predominantly for litigation, that intention will not be imputed to the company if a contrary intention is evidenced by the company's behaviour.

76 The final point with which I propose to deal on privilege is waiver. Waiver of privilege is currently dealt with by s 122, which provides that privilege may be waived if the client knowingly and voluntarily discloses the evidence to another person, or allows it to be disclosed with their express or implied consent. There is little guidance given in the Act to meaning of 'consent' and, as I said in *Ingot & Ors v Macquarie & Ors* [2004] NSWSC 1084, the common law test as enunciated most recently in *Mann v Carnell* (1999) 201 CLR 1, should be applied to the interpretation of the equivalent statutory concept. While voluntary disclosure to a third party does not in every case cause privilege to be waived, any disclosure inconsistent with the continued existence of confidentiality will waive the privilege even if the disclosure was undertaken for good reason. The nature of the disclosure will be relevant to whether privilege has been waived and, in my view, and as I said in *Ingot v Macquarie* at [8], in most cases, there will need to be a knowing and voluntary disclosure of the substance (not just the conclusion) of the advice for privilege to be waived.

Concluding remarks

77 To take a high level view of the Act for the moment, the regulation of evidence, and in particular, of the rules of admissibility is intended to protect parties from being put to face assertions contained in documents or statements that may be unfair, or unreliable. And thus, while the rules of evidence can be (and it seems, from my experience at least, are often) pressed by parties in a way that is strict and technical, this is not always

helpful in terms of assisting the court with the resolution of the real issues in dispute in the proceedings in a way that is just, quick and cheap.

78 Parties fight incredibly hard to prevent evidence being admitted for one purpose or another, but these battles often lose sight of the bigger picture; that is, that there are discretions available to the judge both under the Act and under the general law to preserve fairness in the proceedings and to ensure that findings are made only on the basis of admissible evidence.

79 The discretions available under the Act in section 135 and 136 to exclude or limit evidence, in s 190 to waive the requirements of the Act altogether, and in s 193 to make rulings as to discovery, inspection and exchange of evidence, already entrust the court with great power to ensure that fairness is protected.

80 Further to those statutory discretions, the general law provides for an additional duty on judges. That is, as it was put by Gibbs J (with whom Mason and Aickin JJ agreed) in *Hughes v National Trustees, Executors & Agency Co of Australasia Ltd* (1979) 143 CLR 134, for the judge to "reach his [or her] decision on evidence that is legally admissible, and to put evidence only to those uses which the law allows" [23].

81 This duty necessarily requires, as his Honour went on to say, that:

> when a statement is admitted, not as evidence of its truth but simply as original evidence, the mere fact of its admission cannot enable it to be given an additional probative value which the law denies it.[24]

82 Whilst the position at common law, as thus stated, has been overtaken by s60 of the Act, his Honour's words are a reminder that it is not always appropriate to use evidence admitted for a specific and limited purpose for another, unrelated and uncontemplated, purpose simply because s60 may allow this to be done.

[23] at 153.
[24] ibid.

83 This general law duty requires that the judge, not the parties, need be responsible for ensuring that fairness and justice is served by only taking into account admissible evidence and by treating with caution evidence that may be prejudicial or problematic if used for one purpose when admitted for another. Judges are cognisant of this duty, and if that judicial cognisance is also kept in mind by practitioners, then there could be great reduction in the time and expense incurred by numerous objections and evidentiary arguments made by parties based on the perceived need to protect their clients' interests.

84 Perhaps, it is something to consider that if the discretion in s 190 was broadened to reflect this general law duty expressed by Gibbs J in *Hughes v National Trustees*, that is, if its exercise were not restricted to certain provisions of the Act, and if its exercise was not dependent on the consent of the parties, then the purposes of section 56 of the *Civil Procedure Act* might be better served – at least, for judge-alone civil trials.