The utility of expert evidence in dispute resolution

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Introduction

1 Expert witnesses are often called in trial cases. The aim is to assist the court in matters where technical knowledge or expertise is required. Experts are often called in cases involving "hard sciences", such as engineering, medicine and the sciences, and in areas such as accounting and valuation. The utility of expert evidence is well-entrenched within the trial system.

2 The *Evidence Act 1995* (NSW) (the Act) was introduced to form part of an overhaul to the rules relating to evidence across the country. The intention, following from an Australian Law Reform Commission (ALRC) report[2], was to create consistency in the treatment of evidence in each of the state and federal jurisdictions. Although more than 25 years have elapsed, that intention remains unrealised.

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[2] Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985).

3 Prior to the introduction of the Act, the rules (in Australia) relating to evidence were governed primarily by the common law, modified by piecemeal and divergent statutory interventions. In jurisdictions where a version of the "Uniform" Evidence Act is in force, the reception of evidence, including expert evidence, is governed by that legislation.

4 In this paper, I will discuss issues relating to expert evidence by reference to the Act, the Uniform Civil Procedure Rules 2005 (NSW) (UCPR) and relevant case law. The position under the common law may be left, at least in New South Wales, in the dusty archives of legal history.

Admissibility of expert evidence

5 Expert evidence is subject to all rules of admissibility. 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.

Relevance

6 The first step in determining whether an expert's opinion should be admitted into evidence is a consideration of whether it is 'relevant' in accordance with s 56 of the Act. Section 56 states:

> (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
> (2) Evidence that is not relevant in the proceeding is not admissible.

7 Relevant evidence is defined in s 55 of the Act as:

> (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:
> (a) the credibility of a witness, or
> (b) the admissibility of other evidence, or
> (c) a failure to adduce evidence.

8 Evidence will only be excluded under s 56(2) where it lacks any probative force, because it could not rationally affect the assessment of a fact in issue. Relevance is a wide test. There is only a requirement that the connection between the evidence and the fact in issue be logical.

Opinion Rule

9 The opinion rule in s 76 of the Act excludes the reception of opinion evidence. It is subject to a number of exceptions. Section 76 states:

> (1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.
> (2) Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

10 The two primary exceptions to the opinion rule are found in ss 78 (lay opinion) and 79 (expert opinion) of the Act. The focus of today's paper will be on s 79. Although I shall refer to many cases in what follows, I emphasise that, ultimately, the admissibility of expert evidence is to be decided "by application of the requirements of the Evidence Act rather than by any attempt to parse and analyse particular statements in decided cases divorced from the context in which those statements were made"[3].

The expert evidence exception: s 79

11 It is convenient at this stage to set out s 79 in full:

> (1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.
> (2) To avoid doubt, and without limiting subsection (1):
> (a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse), and

[3] *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [37].

(b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:
(i) the development and behaviour of children generally,
(ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

12 There are three key elements that must be satisfied in order for the s 79 exception to apply. These are: that the person whose opinion to be given in evidence has "specialised knowledge"; that the specialised knowledge is based on "training, study or experience"; and that the opinion is wholly or substantially based on that knowledge.

Specialised knowledge

13 "Specialised knowledge" must be "knowledge" rather than "belief" and it must be clearly identifiable as "specialised". One might assume that "specialised knowledge" is the opposite of common knowledge. The High Court in *Honeysett v the Queen*[4] stated that "specialised knowledge is knowledge which is outside that of persons who have not by training, study or experience acquired an understanding of the subject matter"[5]. Importantly, a "person's training, study or experience must result in the acquisition of knowledge"[6]. Similarly, in the older case of *Clarke v Ryan*[7], which whilst applying the common law evidence rules is still applicable, the High Court held that the witness was not qualified to give the evidence that he did, because the evidence "was outside the range of opinion evidence by experts"[8]. As noted by Giles JA in *Adler v Australian Securities & Investments Commission*[9], the term "specialised" is not to be conceived narrowly, "its scope is informed by the available bases of training, study and experience".[10]

[4] (2014) 253 CLR 122.
[5] *Honeysett v the Queen* (2014) 253 CLR 122 at [23].
[6] Ibid.
[7] (1960) 103 CLR 486.
[8] *Clarke v Ryan* (1960) 103 CLR 486 at 492.
[9] (2003) 46 ASCR 504; [2003] NSWCA 131.
[10] *Adler v Australian Securities & Investments Commission* (2003) 46 ASCR 504; [2003] NSWCA 131 at [629].

14 The Act does not require an expert to identify the particular field or area from which their knowledge is derived. As noted by Justice Peter McClellan, the witness must prove that they possess particular knowledge which "derives from an area beyond the expertise of laypersons"[11]. Similarly, in *Velevski v The Queen*[12], Gaudron J (in dissent) reiterated the view her Honour had taken (again in dissent) in *HG v The Queen*[13], stating[14]:

> The concept of "specialised knowledge" imports knowledge of matters which are outside the knowledge or experience of ordinary persons and which "is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience".

15 In *R v Tang*[15], Spigelman CJ noted that the focus of the enquiry in s 79 must be on the words "specialised knowledge". His Honour held that the supposed expert in "face and body mapping" only had specialised knowledge in regard to "facial mapping". His Honour distinguished between "specialised knowledge" and a "subjective belief", stating that the opinion must be "wholly or substantially based" on that person's specialised knowledge.[16]

Relevant training, study or experience

16 A person's expertise may derive from any or a combination of their training, study or experience. These criteria are alternative, not cumulative. However, the basis on which the person acquired specialised knowledge must be clearly articulated and identifiable. Einstein J discussed the requirement for the expert to have specialised knowledge based on training, study or

[11] Justice Peter McClellan, 'Admissibility of expert evidence under the Uniform Evidence Act', (Speech delivered at the Judicial College of Victoria, Emerging Issues in Expert Evidence Workshop, Melbourne, 2 October 2009).
[12] (2002) 187 ALR 233; [2002] HCA 4.
[13] (1999) 197 CLR 414.
[14] *Velevski v The Queen* (2002) 187 ALR 233; [2002] HCA 4 at [82], citing *HG v The Queen* (1999) 197 CLR 414 at [58].
[15] (2006) 161 A Crim R 377; [2006] NSWCCA 167.
[16] *R v Tang* (2006) 161 A Crim R 377; [2006] NSWCCA 167 at [135].

experience in *Idoport Pty Ltd v National Australia Bank Ltd*[17]. His Honour stated that the question to be asked is whether the Court can be[18]:

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

17 The Uniform Evidence Acts were intended to clarify the issues in the common law as to whether a person's expertise can be derived from experience, rather than training or study. The ALRC stated[19]:

> Experience can be a sounder basis for opinion than study. Not to include special experience as a qualification would keep valuable evidence from the courts.

18 Where a person's experience is said to be the basis for the particular expertise, that experience must be clearly identified. Whether that experience is sufficient to enable the person to provide an expert opinion is to be assessed on the balance of probabilities, and is ultimately a question of fact and degree. In *Australian Securities & Investments Commission v Vines*[20], Austin J stated that "[k]nowledge acquired by the experience of doing a job is capable of qualifying as specialised knowledge for the purposes of s 79, if it is sufficiently "specialised""[21]. His Honour referred to *Adler v Australian Securities & Investments Commission*, noting the observations of Giles JA that the phrase "specialised knowledge" is not restrictive.[22]

19 There are many cases where the courts have accepted a person's experience as forming a basis for their expertise. For example, the Federal Court held that a person with experience in identifying products sold under a particular

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[17] [2001] NSWSC 123.
[18] *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 123 at [25].
[19] Australian Law Reform Commission, above n 2, at [742].
[20] (2003) 48 ACSR 291; [2003] NSWCA 1095.
[21] *Australian Securities & Investments Commission v Vines* (2003) 48 ACSR 291; [2003] NSWCA 1095, at [11].
[22] Ibid; citing *Adler v Australian Securities & Investments Commission* (2003) 46 ASCR 504; [2003] NSWCA 131 at [629].

trademark has expertise and a "narrow specialised ability to detect counterfeit products"[23].

20 Where a person's expertise is based on study or professional qualifications, it is necessary to show that the qualification bears directly on the suggested area of knowledge. For example, in *Australian Cement Holdings Pty Ltd v Adelaide Brighton Ltd*[24] Barrett J was required to decide the admissibility of an accountant's expert report. His Honour identified the types of opinion that a chartered accountant might have the requisite specialised knowledge to give. Barrett J held that the expert had specialised knowledge to express opinions about accounting standards and accounting principles, but not to give "opinions about the behaviour of experienced and competent company directors"[25]. His Honour stated that attention should be directed to "specialised" in the term "specialised knowledge".[26]

21 Whether a particular person has the requisite training, study or experience to express an expert opinion is ultimately for the court to decide. The courts have warned against a narrow application of this aspect of s 79,[27] even though there may be a risk of allowing insufficiently qualified "ad hoc" experts to give opinions. An ad hoc expert is someone who does not have relevant study or training, but has gained "expertise" through particular experience in the area. In such a case, 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 that expertise and the opinion. For example, a person repeatedly listening to tape recordings which may be unintelligible to a person hearing them for the first time may be considered to have specialised knowledge on that issue. In *R v Leung*[28], the Supreme Court recognised the utility of ad hoc experts. The Court held that the evidence given by an interpreter was admissible under s 79, as the interpreter had

[23] *Nokia Corporation v Truong* [2005] FCA 1141 at [35].
[24] [2001] NSWSC 645.
[25] *Australian Cement Holdings Pty Ltd v Adelaide Brighton Ltd* [2001] NSWSC 645 at [11].
[26] Ibid at [6].
[27] *Adler v Australian Securities & Investments Commission* (2003) 46 ASCR 504; [2003] NSWCA 131 at [629].
[28] (1999) 47 NSWLR 405.

familiarity with the voices on the tapes and was able to identify the different voices with sufficient certainty.[29]

22 One way that the courts are able to deal with problems arising from "ad hoc" expert evidence is by rejecting or limiting the use of that evidence. That is an aspect of the courts' general discretions when dealing with the admissibility of expert reports. Those discretions are found in ss 135-137 of the Act, and will be discussed in detail below.

Opinion based on specialised knowledge

23 The final step is whether there is a reasoned process by which it can be said that the opinion proffered is "wholly or substantially based" on the expert's "specialised knowledge".

24 This requirement, sometimes called the "basis" rule, requires the expert to identify clearly their reasoning process, and the particular facts or assumptions on which their opinion is based. However, it is important to note that there is no formal "basis" rule at common law or in statute. The ALRC stated that in essence, the basis rule represents two well-founded propositions.[30] First, "the lower the correlation between the facts proved and the facts assumed, the less weight can be given to the expert opinion evidence"[31]. Secondly, "where the facts proved and the facts assumed are substantially different, the point might be reached where the opinion evidence carries so little weight that it is not probative, and hence inadmissible"[32]. This is often linked back to the requirement for the opinion evidence to be relevant. It is difficult to see how that evidence could be relevant if the opinion is not based on facts or assumptions so proved.

[29] *R v Leung* (1999) 47 NSWLR 405 at [34]-[35].
[30] Australian Law Reform Commission, *Uniform Evidence Law,* Report No 102 (2005).
[31] Ibid at 295.
[32] Ibid at 295-6.

25 In *HG v The Queen*, Gleeson CJ reiterated the importance of an expert's opinion being wholly or substantially based on specialised knowledge. His Honour stated[33]:

> An expert whose opinion is sought to be tendered should differentiate between the assumed facts upon which the opinion is based, and the opinion in question … By directing attention to whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience, the section requires that the opinion is presented in a form which makes it possible to answer that question.

26 In that case, the opinion proffered by a particular expert was "not shown to have been based, either wholly or substantially, on [the expert's] specialised knowledge as a psychologist"[34]. Gleeson CJ was particularly critical of this expert's report, stating that "it was based on a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise of a psychologist"[35]. His Honour noted that this was a case where "the evidence the defence sought to lead from [the expert] really amounted to putting from the witness box the inferences and hypotheses on which the defence case wished to rely"[36].

27 The case highlights some of the problems and issues with expert evidence. In particular, it draws attention to the issue of partisan bias, which will be discussed in detail below. Gleeson CJ observed that the opinions which this expert expressed "appear to provide a good example of the mischief which is to be avoided"[37]. Unsurprisingly, the particular expert's opinion was held to be inadmissible.

28 In order to determine whether an expert's opinion is based on specialised knowledge, the reasoning process must be illuminated. In *Dasreef Pty Ltd v*

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[33] *HG v The Queen* (1999) 197 CLR 414 at [39].
[34] Ibid at [41].
[35] Ibid.
[36] Ibid at [43].
[37] Ibid at [44].

Hawchar[38], the High Court stated that where an expert's opinion "lacked reasoning, the absence of reasoning pointed … to the lack of any sufficient connection between [the opinion] and relevant specialised knowledge"[39].

29 In *Bone v Wallalong Investments*[40], a case that I heard, objection was taken to an expert report on two grounds. The first ground was that the report did not comply with the code of conduct. The expert report failed to include the materials that were utilised to give support to the opinions expressed. It was an objection of a formal nature, and I noted that the report would not have been inadmissible on this basis alone.

30 The second, although principal, ground was that the report failed to disclose the expert's reasoning process. The expert sought to give evidence of the valuation of a particular property, and used the direct comparison approach in his report. With reference to *Makita*, I noted that "unless the reasoning of the expert can be deduced from the report, so as to enable satisfaction of the threshold test posed by s 79(1), then the report may not be admissible"[41]. I concluded that the reasoning process of the expert was not adequately disclosed, which made it impossible for the "defendants to make some assessment of the integrity of [the expert's] reasoning process" which is "a necessary element of cross-examination"[42].

31 I concluded the report was wholly inadmissible, as it failed to "demonstrate how the conclusions reached are wholly or substantially based on [the expert's] specialised knowledge"[43]. The defects in the reasoning process of the expert's report resulted in the defendant's being unable to make an assessment of the integrity of the report. I noted that counsel for the defendant would have been "put in the entirely unsatisfactory position that they need to expose the reasoning in cross-examination before they can (if

[38] (2011) 243 CLR 588.
[39] *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [42].
[40] [2012] NSWSC 137.
[41] *Bone v Wallalong Investments* [2012] NSWSC 137 at [26].
[42] Ibid at [31].
[43] Ibid at [36].

they can) attack it"[44]. I also noted the discretions available on the admissibility of expert evidence, finding that even if I were wrong on the s 79 reasoning issue, I would have rejected the report under s 135 of the *Evidence Act*[45]. I stated[46]:

> I would do so because, in my view, it is wholly unfair to the defendants to expect them to elucidate Mr Hadley's reasoning process in the course of cross-examination and then to challenge that process without the opportunity to reflect on it. Although perhaps some time could have been given to allow this, I do not regard the just, quick and cheap resolution of the real issues in dispute as requiring a staged process of cross-examination of an expert witness.

Makita v Sprowles

32 The judgment of Heydon JA in *Makita (Aust) Pty Ltd v Sprowles*[47] is often treated as setting out the pre-requisites or conditions for admissibility of expert opinion evidence. The plaintiff (Ms Sprowles) fell down stairs leading to her place of employment (by Makita). The expert evidence in question was that of a physicist whose opinion was admitted as bearing on the question, whether the stairs leading to the plaintiff's workplace were "slippery". Heydon JA summarised the requirements for admissibility of expert evidence, stating that the party seeking to adduce the evidence must prove that[48]:

(1) there is a field of specialised knowledge;

(2) 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;

(3) the opinion proffered must be "wholly or substantially based on the witness's expert knowledge";

(4) to the extent that the opinion is based on facts:

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[44] *Bone v Wallalong Investments* [2012] NSWSC 137 at [31].
[45] Ibid at [37].
[46] Ibid at [37].
[47] (2001) 52 NSWLR 705
[48] *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 743-44.

(a) if the facts were "observed" by the expert, that they have been identified and admissibly proved by the expert; and

(b) if the facts were "assumed" by the expert, that they have been identified and proved in some other way;

(5) the facts assumed or observed form a proper foundation for the opinion; and

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

33 His Honour stated that if these criteria are not explicitly addressed then "it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge"[49]. His Honour then stated that if the court is not satisfied of this, "the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight"[50]. This statement, and the preceding criteria, by Heydon JA has been the subject of judicial and academic discussion.

34 *Makita* was considered and explained by the High Court in *Dasreef.* In this case, the High Court considered whether an opinion expressed by a particular expert was wholly or substantially based on the person's specialised knowledge.

35 The plaintiff, Mr Hawchar, worked for the defendant for six years as a stonemason. During the course of his employment, he was diagnosed with silicosis. Dr Basden, a chemical and industrial engineer, was retained as an expert in Mr Hawchar's claim for damages. In evidence given on the voir dire, Dr Basden made it clear that he was not trying to express an opinion about the numerical or quantitative level of respirable silica of Mr Hawchar's exposure to respirable silica, but opined that a considerable proportion of the dust cloud would have been in his breathing zone. However, the evidence

[49] Ibid at 744.
[50] Ibid.

given by Dr Basden was interpreted by the primary judge and the Court of Appeal as "expressing an opinion that could found the calculations made by the primary judge of the time weighted average level of respirable silica to which Mr Hawchar had been exposed"[51]. The issue in the High Court was whether Dr Basden had specialised knowledge that allowed him to proffer such an opinion, even though Dr Basden said that was not what he was attempting to do.

36 The defendant argued in the High Court 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. The majority of the High Court (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) disagreed. They said that the report did not attempt to opine on the numerical or quantitative levels of respirable silica but, rather, offered an opinion as to what measures could have been taken to prevent Mr Hawchar from contracting silicosis if he were exposed to those levels of silica. Given Dr Basden's experience, their Honours held that his evidence "was not admissible to found the calculation made by the primary judge of the level of respirable dust to which Mr Hawchar was exposed"[52], as Dr Basden did not possess the relevant specialised knowledge to found such an opinion.

37 Their Honours affirmed what was said by Gleeson CJ in *HG v The Queen,* that the task of the court is to determine whether the opinion is wholly or substantially based on specialised knowledge based on training, study or experience and that the expert must present their opinion in such a way that allows the court to determine that question.[53]

38 Since the decision in *Makita*, courts have grappled with whether the guidelines set out by Heydon JA should go to weight or to admissibility. Some courts have allowed the tender of expert reports that are arguably

[51] *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [34].
[52] Ibid at at [43].
[53] *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [37].

inadmissible, with the view that it will only go to weight[54]. This approach allows reports to go into evidence. It then leaves the tribunal of fact to make some assessment of the weight of the evidence. In my view, that approach is unsound. It is fundamentally unfair to the opposing party. Where the tribunal of fact is a jury, the *Red Bull* approach is downright dangerous.

39 The conflicting views (admissibility, or weight) were resolved by the High Court in *Dasreef*. The majority in the High Court stated that a "failure to demonstrate that an opinion expressed by a witness is based on the witness's specialised knowledge based on training, study or experience is a matter that goes to the admissibility of the evidence, not its weight"[55].

40 The approach in *Red Bull*[56] was essentially rejected by the High Court in *Dasreef*. The Court stated[57]:

> As a general rule, trial judges confronted with an objection to admissibility of evidence should rule upon that objection as soon as possible. Often the ruling can and should be given immediately after the objection has been made and argued. If, for some pressing reason, that cannot be done, the ruling should ordinarily be given before the party who tenders the disputed evidence closes its case. That party will then know whether it must try to mend its hand, and opposite parties will know the evidence they must answer.

Discretionary exclusions

41 If an expert's opinion is arguably admissible under s 79 of the Act, the evidence may still be rejected, or its use limited, under the discretions provided by ss 135-137 of the Act. For our purposes today, I will discuss ss 135 and 136, as s 137 applies only to criminal proceedings.

42 Section 135 states:

> The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
> (a) be unfairly prejudicial to a party, or
> (b) be misleading or confusing, or

[54] *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty* Ltd (2002) 55 IPR 354; [2002] FCAFC 157 at [16].
[55] *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [42].
[56] *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty* Ltd (2002) 55 IPR 354; [2002] FCAFC 157
[57] Dasreef *Pty Ltd v Hawchar* (2011) 243 CLR 588 at [19].

(c) cause or result in undue waste of time.

43 There have been numerous cases discussing and applying s 135. In *Idameneo (No 123) Pty Ltd v Robalino*[58], I rejected the tender of an expert report on the basis that it might have been unfairly prejudicial, or resulted in an undue waste of the court's time. The primary reason for this was that the reasoning process of the expert witness was not clear, and the basis for his opinions was not identified.[59]

44 Section 136 states:

> The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:
> (a) be unfairly prejudicial to a party, or
> (b) be misleading or confusing.

45 Section 136 is often used in a practical way to limit the use of the expert opinion evidence so that it cannot be received as evidence of the truth of the assumed facts to which it relates.[60] That is necessary because of s 60 of the Act, which states that "the hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact"[61]. Unless a limiting order is made, the admission into evidence of an expert's report that (properly) sets out facts that the expert has been asked to assume will have the effect of proving those assumed facts. The ALRC noted that "s 136 is likely to provide the main control of the admissibility and use of expert opinion evidence and the facts to which the opinion relates"[62].

46 Odgers postulates that some of the relevant factors that the courts have taken, or should take, into account in determining whether to limit or exclude the use of expert evidence include[63]:

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[58] [2009] NSWSC 969.
[59] *Idameneo (No 123) Pty Ltd v Robalino* [2009] NSWSC 969 at [143]-[144].
[60] Australian Law Reform Commission, above n 30 at [301].
[61] *Evidence Act 1995* (NSW), s 60.
[62] Australian Law Reform Commission, above n 30, at [301].
[63] Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 11th ed, 2014) at 387-8.

(1) the reliability of the particular field of expertise;

(2) whether the particular facts on which the opinion is based have been identified and/or proved;

(3) whether the expert's reasoning process is clearly identifiable;

(4) the degree of reliability of the expert's opinion, which requires a consideration of the expert's qualifications, training, experience, etc;

(5) the importance of the issue to which the evidence relates; and

(6) the court time utilised if the opinion is admissible.

The Expert Witness Code of Conduct

47 A number of issues have arisen concerning the value or utility of expert evidence. Experts are commonly instructed for a particular party. That leads many to believe that their evidence may be biased. There were numerous instances of experts believed to be biased in favour of plaintiffs in personal injury cases, and equally, others in favour of defendants.

48 In NSW, expert witnesses are bound by the Expert Witness Code of Conduct ('code of conduct'), found in Schedule 7 to the UCPR.[64] The expert must not only comply with the code of conduct, but must acknowledge affirmatively that he or she has read the code of conduct and agrees to be bound by it. This is usually included as part of the expert report. The code of conduct is binding on experts through r 31.23. Failure to subscribe to the code of conduct results in the report being inadmissible, unless the court orders otherwise. Rule 31.23 states:

> (1) An expert witness must comply with the code of conduct set out in Schedule 7.
> (2) As soon as practicable after an expert witness is engaged or appointed:

[64] Schedule 7 of *Uniform Civil Procedure Rules 2005* (NSW) is Appendix 1 to this paper.

(a) in the case of an expert witness engaged by one or more parties, the engaging parties, or one of them as they may agree, or

(b) in the case of an expert witness appointed by the court, such of the affected parties as the court may direct,

must provide the expert witness with a copy of the code of conduct.

(3) Unless the court otherwise orders, an expert's report may not be admitted in evidence unless the report contains an acknowledgment by the expert witness by whom it was prepared that he or she has read the code of conduct and agrees to be bound by it.

(4) Unless the court otherwise orders, oral evidence may not be received from an expert witness unless the court is satisfied that the expert witness has acknowledged, whether in an expert's report prepared in relation to the proceedings or otherwise in relation to the proceedings, that he or she has read the code of conduct and agrees to be bound by it.

49 The discretion to order otherwise has been considered in a number of cases. In *Welker & Ors v Rinehart & Anor (No 6)* [2012] NSWSC 160, Ball J considered the admissibility of three expert reports that failed to acknowledge the code of conduct. His Honour noted that it is "necessary to consider all the circumstances of the case in order to determine whether the objectives sought to be secured by UCPR r 31.23 have been affected by the non-compliance"[65]. In that case, the experts failed to affirmatively acknowledge the code of conduct, and attempted to rectify this defect by swearing an affidavit outlining their acknowledgement of the code. Ball J held that the reports were not admissible, as the experts failed to confirm that they had prepared their reports with the code of conduct in mind. In addition, his Honour noted that the letter of instructions the experts received gave no indication that they were to act independently to the party retaining them.[66]

50 Ball J discussed the decision of Young JA in *Hodder Rook & Associates Pty Ltd v Genworth Financial Mortgage Insurance Pty Ltd*[67]. In that case, his Honour stated at [63]:

> 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

[65] *Welker & Ors v Rinehart & Anor (No 6)* [2012] NSWSC 160 at [35].
[66] Ibid at [36].
[67] [2011] NSWCA 279.

> again. 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.

51 Ball J outlined certain criteria that the court may take into account when considering whether to "otherwise order". These include[68]:

> the nature of the instructions that were actually given to the expert, the expert's prior familiarity with the code, the extent to which the report on its face appears to comply with the code and the evidence subsequently given by the expert concerning the question whether he or she complied with the code at the time and whether his or her opinions have been affected by non-provision of it

Receiving expert evidence

52 There are a number of ways in which the courts may receive expert evidence. The most common method is through parties' experts, where all parties retain their own experts on a particular issue. In certain cases, the court will direct the parties to appoint a single expert for a particular issue, and in other cases the court will appoint a single expert. In cases where there are multiple experts on a particular issue, it is common for the courts to direct the experts to confer prior to giving oral evidence, to prepare a joint report, and to give oral evidence concurrently. In the Commercial and Technology and Construction Lists in which I sit, the "usual order for hearing" set out in Practice Note No SC Eq 3 states that the parties are to agree on the most appropriate method of hearing evidence, which will then be included in the timetable made in accordance with the usual order for hearing.[69]

53 In certain cases, the court may permit a party to adduce evidence of the content of documents in summary form, where the particular documents are particularly voluminous or complex.[70] The court may only make such a direction if satisfied that it would not otherwise be possible to conveniently examine the documents, and the party seeking to adduce the summary has served the summary on the other party, giving that party a reasonable

[68] *Welker & Ors v Rinehart & Anor (No 6)* [2012] NSWSC 160 at [35].
[69] Supreme Court of New South Wales, *Practice Note SC Eq 3*, Supreme Court Equity Division - Commercial List and Technology and Construction List, 10 December 2008, [54].
[70] *Evidence Act 1995* (NSW), s 50.

opportunity to examine the summary or the documents in question. The opinion rule does not apply to evidence adduced in this form.

Parties' experts

54 Usually, parties will engage their own expert witnesses to assist in the technical matters of the case. These experts are bound to comply with the code of conduct, and their evidence should comply with the Act.

55 It is not unusual for experts to assist parties during preparation of the case, and then to appear as an expert witness. There is nothing in the court rules which prevents the expert from doing those things. French CJ has said that "there is no reason in principle why a person who has been advising a party on matters within the person's expertise is disqualified from giving evidence as an expert witness"[71]. His Honour noted that partisan bias, if it exists, is evident through the oral testimony of the particular witness. Factors to look out for include:[72] a refusal to depart from aspects of their report; rejection of the existence of areas of uncertainty of their report; hesitation in conceding points on cross-examination; and "offering combative answers to questions". In addition, his Honour contends that where an expert is truly offering an independent advice service to the parties, offering their specialised knowledge, then issues of the expert being biased should not arise. French CJ stated that "if that basic approach is observed there should be no need to have one expert behind the scenes and one expert in court"[73].

Parties' single expert

56 Under r 31.37, the court may "order that an expert be engaged jointly by the parties affected"[74]. The parties' single expert is to be selected by agreement between the parties, and if agreement cannot be reached, the court may appoint someone. In addition, the parties are to agree on written instructions

[71] Chief Justice Robert French, 'Expert testimony, opinion, argument and the rules of evidence' (2008) 36 *Australian Business Law Review* 263 at 279.
[72] Ibid
[73] Ibid at 280.
[74] *Uniform Civil Procedure Rules 2005* (NSW), r 31.37(1).

to be provided to the expert "concerning the issues arising for the expert's opinion and concerning the facts, and assumptions of fact, on which the report is to be based"[75].

57 In a case where a parties' single expert is appointed, the parties are prohibited from adducing evidence of any other expert on any issue in the proceedings, unless leave of the court is given.[76] There is however nothing to stop parties from retaining experts to advise and assist, short of giving evidence. All affected parties are entitled to cross-examine the expert on their opinion.

Court-appointed expert

58 A court-appointed expert differs from a parties' single expert. A court-appointed expert is an expert appointed by the court to inquire into and produce a report on any particular issue arising in the proceedings.[77] The court may choose the expert either based on recommendations from the parties or at its own discretion. The expert witness is not an assessor or a referee, but a conventional (independent) expert.[78] The court may give the expert directions as to the issues that they are to deal with, and the facts and assumptions to be relied upon in forming their opinion.[79] The report of the court-appointed expert is to be sent to the registrar of the court instead of to the parties, as is the case with the parties' single expert. Similar to the parties' single expert, all parties affected are entitled to cross-examine the expert, and without the leave of the court, the parties are not to adduce any further expert evidence in relation to the issue that the court-appointed expert is engaged to cover.[80] Again, parties may retain their own experts to advise and assist.

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[75] Ibid, r 31.38(1).
[76] Ibid, r 31.44.
[77] Ibid, r 31.46.
[78] The Hon Garry Downes AM QC, 'The use of expert witnesses in court and international arbitration processes' (Paper delivered at the 16th Inter-Pacific Bar Association Conference, Sydney, 3 May 2006) at 6
[79] *Uniform Civil Procedure Rules 2005* (NSW), r 31.47.
[80] Ibid, r 31.52

59 Historically, it has been quite uncommon for the court to appoint an expert under r 31.47. However, as the courts continue to emphasise s 56 and the need for a just, quick and cheap resolution of the dispute, it is possible that the appointment of a court-appointed expert may become more common. The key question is "whether the exercise of a court's broad power to appoint an [expert] would achieve the primary objections of the civil justice system, being the delivery of a just result at minimum cost and maximum efficiency"[81]. The use of a court-appointed expert may reduce the problem of partisan bias, which in turn will facilitate a just result.

60 As I have just said, in the case of a single expert, there is a prohibition on parties adducing other expert evidence, except with leave of the court.[82] When leave is granted, the question might be raised as to whether the use of the single expert is counterproductive, where the parties' separate experts are still required to press their opinion.

61 In *Huntsman v Qenos & Anor*[83], I was required to determine the admissibility of, and weight to be given to, the evidence of a court expert. In this case, the court expert was cross-examined by both parties. I considered whether I was bound to prefer the views of the court expert over the views of the parties' experts. In this case, the parties had retained their own experts prior to the appointment of a court expert, and thus, there was no infringement of r 31.52. I noted[84]:

> I do not think the fact that an expert is a court expert, rather than an expert called by a party, relieves the court of its usual obligation to assess and weigh that evidence as best it can.

62 It was necessary to weigh the evidence of the court expert with the evidence of the other experts. Ultimately, I preferred the evidence of one of the parties' experts to that of the court-appointed expert.

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[81] Rachel Yates, 'An obligation to appoint an assessor?' (2016) 42 *Australian Bar Review* 2, 201 at 217.
[82] *Uniform Civil Procedure Rules 2005* (NSW), rr 31.44, 31.52.
[83] [2005] NSWSC 494.
[84] *Huntsman v Qenos & Anor* [2005] NSWSC 494 at [68].

63 Impartiality is a major benefit of both single parties' experts and court-appointed experts, as it removes the problem of partisan bias which is prevalent in parties' experts. In addition, there are significant cost and time savings with single experts.[85]

Expert to assist the court

64 Under r 31.54, the court may obtain assistance from any person specially qualified to advise on any matter arising in the proceedings, and may act on the adviser's opinion. The role of this person is to assist the court to understand the technical (expert) evidence. The advice given by the adviser is not taken on oath, nor is it subject to cross-examination by the parties. The court is not bound to follow the advice given. The primary role of the adviser is "to provide assistance to the court in interpreting or facilitating the court's understanding of the expert evidence and technical issues before it"[86]. Where a r 31.54 expert tenders advice to the court, its substance must be disclosed to the parties so that they can deal with it at least, where it is a key matter. This is a basic principle of procedural fairness.

65 In *Matthews v SPI Electricity Pty Ltd (No 19)*[87], Forrest J appointed two assessors to assist him with the technical matters in the case. The assessors were to assist Forrest J in understanding the expert evidence, and were to do so both during the giving of such evidence, and during the judgment drafting process.[88] However, his Honour noted that the assessors' views were not determinative and the decision-making process remained with the judge. This was the first published case in over 60 years where an assessor was used in a superior state court.[89]

[85] Justice Brian Preston, 'Specialised Court Procedures for Expert Evidence' (speech delivered to Symposium on 'How to Utilise Expert Evidence in Court', Japan Federation of Bar Associations, Tokyo, Japan, 24 October 2014) at 22.
[86] Yates, above n 81, at 210.
[87] [2013] VSC 33.
[88] *Matthews v SPI Electricity Pty Ltd (No 19)* [2013] VSC 33 at [27].
[89] Yates, above n 81 at 210.

Concurrent evidence

66 Concurrent evidence is defined by Justice McClellan as[90]:

> essentially a discussion chaired by the judge in which the various experts, the parties, the advocates and the judge engage in a cooperative endeavour to identify the issues and arrive where possible at a common resolution of them. Where resolution of issues is not possible, a structured discussion, with the judge as chairperson, allows the experts to give their opinions without the constraints of the adversarial process and in a forum, which enables them to respond directly to each other. The judge is not confined to the opinion of one advisor but has the benefit of multiple advisors who are rigorously examined in public.

67 Concurrent evidence is a relatively new method of adducing expert evidence in the Supreme Court. In my view, it is generally very effective. It successfully addresses the objects of s 56 of the *Civil Procedure Act 2005* (NSW), to achieve justice whilst reducing time and associated costs.

68 Typically, the process leading up to the giving of concurrent oral evidence is as follows. The experts on a particular issue will have prepared individual expert reports, which will have been served on all parties. The parties will then often prepare a list of issues which need to be resolved by the experts, which is prepared by looking at the report of each expert and ascertaining the points of difference. The experts will then meet and discuss their differences in opinion in a joint conclave. Importantly, the discussions which occur at the joint conclave are completely confidential. Justice Garling notes that as a result "the experts are free to discuss matters, change their mind … or modify their views to their colleagues without any fear of that process being used in evidence to form the basis of a challenge to their ultimate position"[91].

69 The experts are required to prepare a joint report as a result of the conclave, clearly identifying the issues they agree or differ on and the reasons why there may be disagreement, and mostly they do. The joint report is regulated by r

[90] Justice Peter McClellan, 'New Method with Experts – Concurrent Evidence' (2010) 3 *Journal of Court Innovation* 259 at 264.
[91] Justice Peter Garling RFD, 'Concurrent expert evidence – the New South Wales experience' (paper delivered at the University of Oxford, Faculty of Law, 1 December 2015) at 13.

31.26. The purpose of the joint report is to assist the court, the parties and the witnesses, facilitating the just, quick and cheap resolution of the dispute.

70 Following service of the joint report, the experts will be called during the course of the hearing to give oral evidence concurrently. My preference is for this to happen once all other (non-expert) evidence is complete. The experts are questioned, point by point, on their points of difference, thereby speeding up the process of cross-examination. In that process, each expert is given the opportunity to comment until each point has been thoroughly covered. My practice is to do this myself, so that cross-examination by counsel is at most minimal. Justice Garling states that the "purpose of counsel's questions is to ensure that an expert's opinion is fully articulated and tested against a contrary opinion"[92].

71 In relation to the issues of partisan bias and outlier expert testimony, Justice Garling noted that in his experience as a judge[93]:

> Extreme expert opinions and "pseudo-experts" have become very rare, because these individuals are loathe to be exposed to the presence of their peers and being required to engage in a viva voce debate with them, in circumstances where they will be likely to have future contact with each other in a professional context. The debate between expert and expert is very much harder for a pseudo-expert than is the debate between that person and a barrister who does not have those qualifications.

72 I agree with his Honour's comments. It is my experience that concurrent evidence aids the entire hearing process. In my experience, this process has the effect of weeding out any partisan bias, and identifying outlier opinions. It is an extremely valuable process as both the court and the parties are able to identify the real issues in dispute. This usually results in a more efficient trial and judgment writing process.

The benefits and problems of expert evidence

73 In *Dasreef*, Heydon J stated that expert evidence is "a bridge between data in the form of primary evidence and a conclusion which cannot be reached

[92] Ibid at 18.
[93] Ibid at 22.

without the application of expertise"[94]. Expertise is often required in certain cases as "the court may not have the requisite specialised knowledge and hence cannot draw the proper inferences from the facts stated by the witnesses"[95].

Partisan bias

74 The paramount duty of the expert is to the court, and not to the party they are retained by. However, courts from time to time experience the "unscrupulous expert". That is, the expert "will give any opinion in favour of the person paying the fees, regardless of any sound analysis of credible theory"[96]. Such experts are commonly referred to as "hired guns".

75 Experts who routinely prepare expert reports for the purpose of court proceedings have an incentive to maintain their reputation in the field, and may hold the view that they will receive more work if they propound more extreme views that are likely to assist the person retaining them. However, the court cannot help but be aware of such experts, and is often likely to disregard or downgrade their opinions almost immediately.

76 There are conflicting views as to whether the legal advisers retaining the expert should assist in the preparation of the report. The ALRC noted that "the dominant view is that lawyers should be involved in order to ensure that expert reports are admissible"[97]. I agree. In *Harrington-Smith v Western Australia (No 2)*[98], Lindgren J said that lawyers' involvement should be limited to the form of the report, "to ensure that the legal tests of admissibility are addressed"[99]. Again, I agree. The involvement of lawyers should be limited to formal matters and ensuring the legal requirements for admissibility are met. It is totally inappropriate for lawyers to suggest that an expert should abandon or modify an opinion that is final. On the other hand, it is totally appropriate for

[94] *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [90].
[95] Justice Brian Preston, above n 85, at 3.
[96] Judge Penelope Wass SC, 'Expert evidence since Makita – a District Court of NSW perspective', (Paper presented to Salvos Legal – March Lecture Series, 12 March 2015) at 4
[97] Australian Law Reform Commission, above n 30, at 305.
[98] (2003) 130 FCR 424.
[99] *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424 at [19].

lawyers to ensure that the expert has all factual material relevant to the questions on which advice is sought.

77 Further, it is in my view appropriate for lawyers to test the expert's views, including by putting inconsistent material before the expert. Again, however, the lawyers should not attempt to dictate the opinion.

78 Unless lawyers are scrupulous in those respects, there is a real risk that their involvement in the preparation of expert reports will exacerbate the problem of partisan bias. Judge Wass SC notes that this is "where the line begins to blur between appropriate assistance and attempts to influence opinion by the changed expression of it"[100]. Where it is clear that the lawyer's (or a party's) intervention has resulted in the change of opinion of the expert, the report is ultimately unhelpful. On this point, Judge Wass states:

> The only useful expert is one who genuinely holds his or her opinions, and not one that was so easily swayed by the lawyer retaining them such that they are necessarily a cross-examiner's dream and a decision-maker's irrelevance. Such an expert is as equally unusable as an expert who unreasonably holds to opinions that defy reasonable belief.

79 The Hon Garry Downes AM QC, a retired Federal Court judge, wrote about his experiences in relation to expert witnesses. He stated[101]:

> I must say that my impression from 32 years of examining expert witnesses and four years of listening to them is that, with very few exceptions, they do not deliberately mould their evidence to suit the case of the party retaining them. When they do, this emerges. They certainly expose the matters which support the hypothesis which most favours the party calling them. But, provided the matters are legitimate and that any doubt as to the strength of the hypothesis is exposed, I see nothing wrong with this. Indeed, I think this process is one of the great values of the traditional approach to expert evidence. It is exposing different expert points of view for evaluation by the judge.

80 He was of the view that it is only in rare cases that you will experience a partial expert. I am not quite so hopeful, but my experience is that the great majority of experts understand, and seek to perform, their primary duty for the

[100] Judge Penelope Wass SC, above n 96, at 10.
[101] The Hon Justice Garry Downes AM QC, above n 78, at 3.

court. In my view, the procedural steps that I have discussed have helped greatly in diminishing the twin scourges of junk science and the partisan expert.

81 One of the major problems with expert evidence, as noted by Judge Wass, is that:

> Expert opinion evidence often concerns complex and abstract theories, together with vast and deep areas of knowledge, given by a person well acquainted with it, to a decision-maker who is not.[102]

82 Tribunals of fact, including judicial officers, often will not have the requisite knowledge and expertise to make a determination of the accuracy and value of the expert testimony given by a particular witness. This has the effect that in certain cases, the expert's opinion may be accepted without challenge. This may be particularly the case with single experts, whether appointed by the parties or by the court. As Justice McClellan noted, there is a "danger in expert witnesses exerting too great an influence over the fact finding process rather than that role remaining with the tribunal of fact"[103].

83 The more technical the issue, the greater the risk that the decision-maker can do no more than to accept expert evidence at face value. As Judge Wass has stated, an issue which arises is "the extent to which, when assessing expert opinion evidence, the decision-maker gives unfounded recognition to scientific data and results"[104]. In addition, the technical nature of the evidence leads to a further risk that the "court's difficulty in understanding the evidence can be compounded by partisan bias". The complex nature of the evidence presented by experts may mean that decision-makers are unable to make an independent and impartial analysis of the evidence. That is where (and why) it is incumbent on experts to set out their reasoning clearly and in detail, and why the process of conclaves, joint reports and concurrent evidence is so valuable.

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[102] Judge Penelope Wass SC, above n 96, at 2.
[103] Justice Peter McClellan, above n 11, at 1.
[104] Judge Penelope Wass SC, above n 96,at 3.

84 Downes does not agree that single expert witnesses represent a viable solution to partisan bias. He states[105]:

> The first question is whether the issue is a matter for expert opinion at all. If it is, the final decision lies with the judge even if there is only one expert witness. However, in cases where there is an issue on a field of expertise and there is only one expert witness the requirement to expose criteria to enable a conclusion to be evaluated seems somewhat pointless when there is no alternative opinion available.

85 That shows why I was fortunate to have alternative expert evidence available in *Huntsman*. I had other, credible, material by reference to which I could assess the validity of the opinions expressed by the court-appointed expert.

Conclusion

86 Expert evidence is common, particularly in the Lists in which I sit. Properly prepared and given, it can be of immense benefit to a judge, helping her or him to come to the correct decision. But the evidence is only beneficial where it is truly independent, and where the expert's primary duty to the court is honoured in full. Any shortfall devalues the evidence and results in a waste of time and money. And unless the courts can be assured that expert witnesses do understand and honour their duties, the approach to permitting such evidence to be called may very well change.

[105] The Hon Justice Garry Downes AM, above n 78, at 4.

APPENDIX 1

Uniform Civil Procedure Rules 2005 (NSW) – Schedule &

SCHEDULE 7 – Expert witness code of conduct

1 Application of code

This code of conduct applies to any expert witness engaged or appointed:
(a) to provide an expert's report for use as evidence in proceedings or proposed proceedings, or
(b) to give opinion evidence in proceedings or proposed proceedings.

2 General duty to the court

(1) An expert witness has an overriding duty to assist the court impartially on matters relevant to the expert witness's area of expertise.
(2) An expert witness's paramount duty is to the court and not to any party to the proceedings (including the person retaining the expert witness).
(3) An expert witness is not an advocate for a party.

3 Duty to comply with court's directions

An expert witness must abide by any direction of the court.

4 Duty to work co-operatively with other expert witnesses

An expert witness, when complying with any direction of the court to confer with another expert witness or to prepare a parties' expert's report with another expert witness in relation to any issue:
(a) must exercise his or her independent, professional judgment in relation to that issue, and
(b) must endeavour to reach agreement with the other expert witness on that issue, and
(c) must not act on any instruction or request to withhold or avoid agreement with the other expert witness.

5 Experts' reports

(1) An expert's report must (in the body of the report or in an annexure to it) include the following:
    (a) the expert's qualifications as an expert on the issue the subject of the report,
    (b) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed),
    (c) the expert's reasons for each opinion expressed,
    (d) if applicable, that a particular issue falls outside the expert's field of expertise,
    (e) any literature or other materials utilised in support of the opinions,

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

(g) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).

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

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

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

6 Experts' conference

(1) Without limiting clause 3, an expert witness must abide by any direction of the court:

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

(b) to endeavour to reach agreement on any matters in issue, or

(c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, or

(d) to base any joint report on specified facts or assumptions of fact.

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