

EXPERT REPORTS



GREENWAY CHAMBERS

EXPERTS' REPORTS

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INTRODUCTION

1. As experts you are a privileged group of people. You are entitled to give evidence that no one else is able to give. The general rule is that evidence of an opinion is **not admissible**¹. The exception to the rule is that such evidence may be admitted if it is based on the witness' training, study or expertise.²
2. An expert is of no use in litigation if his or her report is not admissible. For the report to be admissible it must comply with certain requirements.
3. On 23 June 2011 the High Court reviewed the requirements of experts reports both under section 79(1) of the Evidence Act and at common law³. Those of you who are routinely required to give expert opinion evidence, ought to be familiar with the principles set out in that decision.
4. Expert witnesses should also expect a tougher line to be taken by Judges in determining the admissibility of expert evidence following *Dasreef*. As Heydon J said:⁴

Finally, and very importantly, there is increasing concern about the risk of injustice that may flow from unsatisfactory expert evidence. The stricter the admissibility requirements for s 79 tenders, the greater the chance that evidence carrying that danger will be excluded.

IS THE PERSON REALLY AN EXPERT?

5. This appears to be an obvious question but it is often forgotten in the all the excitement. It is important to critically analyse what opinion is sought to be obtained and consider whether you have the relevant ability to express all of the opinions that you are being asked to express. As experts you are likely to have a unique insight into whether a question is within or beyond your area of expertise. You may, for example, consider that you can answer part of the question but there are aspects that require different, or specialist, expertise. You may be able to recommend who could help fill the gap.

¹ Evidence Act NSW s.76(1)

² Evidence Act NSW s.79(1)

³ *Dasreef Pty Ltd v Hawchar* [2011] HCA 21

⁴ at [59]

6. In *Dasreef* the majority said that expert evidence tendered under s.79(1) must satisfy two criteria:

- (a) The witness who gives evidence must have specialised knowledge based on the person's training, study or experience; and
- (b) The opinion expressed in evidence by the witness must be wholly or substantially based on that knowledge.⁵

7. At [37] their Honours said:

The admissibility of opinion evidence is to be determined 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. Accepting that to be so, it remains useful to record that it is ordinarily the case, as Heydon JA said in *Makita*, that "the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded".

8. The solicitor should identify a question that requires expert opinion. Your role, however, includes demonstrating that there is a relationship between that question and your particular expertise. In doing that you will be able to show that you are suitably qualified to express the opinion based on your training study or experience.
9. Satisfying the Court that you have the relevant specialised knowledge based on your training, study or experience allowing you to express the opinion, is half the battle. The other half is to ensure the manner in which you express the opinion satisfies the rules dealing with how experts may give their opinion evidence.

THE EXPERTS' CODE OF CONDUCT

10. The Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules⁶ and the similar Codes in other Courts set out a number of general propositions. They are the basic rules with which every expert must comply:

⁵ at [32]

⁶ Rule 31.23 of the Uniform Civil Procedure Rules requires any expert retained to give evidence to be given a copy of the Schedule "as soon as practicable after an expert witness is engaged".

- (a) **an expert's overriding duty is to assist the Court** impartially on matters relevant to the expert's area of expertise, not to the party retaining the expert. It follows that an expert must not be an advocate for either party;
- (b) the form of the expert's report is required to follow the formalities that Schedule 7 dictates. This requires the expert to state in the report (or in an annexure):
 - (i) the expert's qualifications as an expert;
 - (ii) the facts, matters and assumptions on which the opinions in the report are based;
 - (iii) reasons for each opinion expressed;
 - (iv) that any particular question that he has been asked to consider falls outside his expertise, if that applies;
 - (v) any literature or other materials utilised in support of the opinions;
 - (vi) any examinations, tests or other investigations of the on which the expert has relied.

11. Schedule 7 also provides that if the expert considers that any opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when that opinion is expressed.

12. While the matters in Schedule 7 have an ethical dimension, taken together they point to a basic philosophy. The tribunal needs to know and understand the reasoning process you have used in arriving at your opinion and to be given the level of expertise required to make determinations on technical issues. Stripped of any complication, the requirements of Schedule 7 may be translated as follows:

- (a) the expert has the obligation to provide the court with the technical expertise that a court may require in a particular area to arrive at a determination;
- (b) the expert cannot be an advocate, should not make submissions and must limit his or her role to providing opinion evidence on technical matters within the area of expertise;
- (c) the expert must state what qualifications entitle the expert to say what is being said;
- (d) the expert must state what facts are assumed, stating them to be assumed facts;

- (e) the expert must state whatever facts have been determined by the expert from observation, testing or use of expertise, stating the basis on which those facts have been determined. If the opinion is based on testing, calculations or other similar forms of deliberative material, that must be provided to enable the Court to assess the accuracy of the material relied upon; and
 - (f) the expert must clearly identify that the matter is one of opinion. The expert must explain in rational terms how the expert has reasoned from the facts (either assumed or found) to reach the opinion.
13. We should pause to focus on the requirement that you expose your reasoning. That is, explain how, based on the assumed facts and other material, you formed the opinion. You may assume that you generally have a far greater level of understanding about the relevant subject matter than the Judge and the lawyers involved in the case. That requires you to focus on your audience. Your role is not unlike a teacher explaining the topic to students who are new to the topic. The steps you must take to explain the reasoning will be far shorter than those you might take, for example, in a paper intended for your peers.

OTHER REQUIREMENTS OF AN EXPERT'S REPORT

14. The requirements in Schedule 7 are not novel. They are based on propositions that the Courts have expressed in a variety of cases from time to time. For example, on the need for the expert to give reasons for any opinion and to furnish the tribunal with "the necessary scientific criteria for testing the accuracy of their conclusions"⁷, Finkelstein J put it this way in a case:

"The function of the expert is to provide the trier of fact, judge or jury, with an inference which the judge or jury, due to the technical nature of the facts, is unable to formulate".⁸

15. Heydon JA's judgment in *Makita (Australia) Pty Limited v Sprowles*⁹ provides a useful summary of the main principles that you must follow. In that case, his Honour reviewed the authorities relevant to the admissibility of expert evidence, making these observations in the judgment:

⁷ See eg Lord President Cooper in *Davie v Edinburgh Magistrates* (1953) SC 34 at 40

⁸ *Quick v Stoland* (1988) 157 ALR 615 at 625

⁹ (2001) 52 NSWLR 705

- (a) "the basal principle is that what an expert gives is an opinion based on facts. Because of that, the expert must prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based";¹⁰
 - (b) "...Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or he has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless. In our judgment, counsel calling an expert should in examination in chief ask his witness to state the facts upon which his assumption is based. It is wrong to leave the other side to elicit the facts by cross-examination";¹¹
 - (c) "examining the substance of an opinion cannot be carried out without knowing the essential integers underlying it";¹²
 - (d) "... the opinion of an expert is admissible only where the premises, that is to say, the facts, upon which his or her opinion is based, are expressly stated."¹³
16. In order for a report to be admissible, the report must disclose the basis of any opinion and the facts relied on; and these facts must be proven by admissible evidence. It is crucial for the expert to differentiate between the assumed facts and the opinion in question. If, for example, you were not there to see the incident it is unlikely that you will be able to do anything more than make an assumption as to what occurred.
17. It is, of course, for you to make that distinction clear in your own words, using whatever words you consider is appropriate. The importance does not relate to the form of words chosen, but to making sure that the distinction is clearly expressed.
18. Having distinguished between the assumed facts and the opinion, you will then have to properly and clearly identify the relevant facts you have assumed. A simple way to do that is to use phrases such as "I assume that..." or "I have been asked to assume that..." to identify any assumed fact.
19. You may be given a large amount of material or be asked to make a number of assumptions some of which do not consider material to the opinion you have been asked to express.

¹⁰ At 731 of the judgment

¹¹ Referring to R v Turner [1975] QB 834 at 840

¹² At 735

¹³ Referring to R v Fowler (1985) 39 SASR 440

What you regard as irrelevant may be material to your reasoning process. In some cases you may need to explain why you have disregarded certain facts or documents or other matters when you expose your reasoning.

20. In *Sampi v Western Australia*¹⁴ Beaumont J made the following observations in connection with an expert report and the Expert Rules of the Federal Court:

"when the guidelines mandate disclosure of the material upon which the report proceeds, its aim is wider than revelation of information that supports the opinion. It requires disclosure of material which the expert considered but decided, for good reason, not to rely upon it, or considered that it was not necessary to refer to it, because it did no more than reinforce the conclusion reached. In the present case, one is left with the impression that [the expert] has not fully appreciated the scope of guideline (ii), believing that, so far as fieldwork information is concerned, her obligation extended no further than disclosure of what she actually relied upon, without needing to disclose the existence of any other field information of which she took account in the process of reasoning towards her conclusion. This would include field information that she considered, but which (a) she did not specifically mention in the process of forming her opinion because, in her view, it merely corroborated other information which she had quoted, or otherwise directly referred to in the report, or (b) she rejected as unhelpful because, in her view, it was unreliable or irrelevant. In my opinion, guideline (ii) requires disclosure of both (a) and (b). The level of disclosure is governed by what is appropriate to enable a reader to arrive at a proper understanding of the approach taken by the expert to the field information, information which is fundamental to the formation of the expert opinion in this class of case".

21. For these reasons you should:

- (a) include all calculations to support any analysis and to explain how you derived the calculations;
- (b) identify those matters that you did not consider relevant or necessary to rely on; and
- (c) explain in rational terms by reference to either assumed facts or facts that you found, how you arrived at all of the opinions.

¹⁴ [2001] FCA 110 at 20-21

A USEFUL FORMULA

22. I have set out below some examples of how those matters may be expressed in an expert's report.
- (a) You must identify yourself by saying who you are and what is your area of speciality. For example:
 - (i) I am a qualified structural engineer specialising in multi storey glass facades. I have been practising in that field for 25 years. The details of my experience and expertise are more fully set out in my curriculum vitae that is behind tab A in the appendices to this report.
 - (b) You should then identify who has asked for the opinion. For example:
 - (i) I have been asked by Lawyer & Co, Lawyers to express my opinion on a number of matters concerning the failure of the glass façade at 25 Murray Street Sydney NSW. The matters on which I have been asked to express my opinion are set out as follows:
 - (c) Once you have set out the matters on which you have been asked to express an opinion you should then explain how it is that you are able to express an opinion on these matter due to your specialised knowledge based on your training, study or experience.
 - (d) You may then identify the matters on which the opinion has been based. This may consist of a number of things including documents, a view, and photographs and so on. For example:
 - (i) I have been provided with the following documents and photographs ... on which I have based my opinions. I have also inspected the building and in particular the fixing points on levels 3, 15 and 42 on the east and west side of the building. I have marked on the drawing that is behind tab B in the appendices to this report the precise areas that I viewed.
 - (e) You must identify all of the assumptions that you have made on which your opinion is based. You can do that either in the body of the report as and when you express the opinions or in a list of assumptions somewhere in the report such as at the beginning.

One advantage of listing the assumptions at the beginning is that it can act as a check list for the lawyers to ensure that all assumptions have been proven in the factual evidence. If a list is used it may be stated as simply as this:

(i) For the purposes of expressing my opinions I have been asked to make the following assumptions: [Then list them].

(f) You then needs to then expose your reasoning process. That is, how did you arrive at that opinion? The nature of your reasoning will be as varied as the types of cases and may start by saying something as simple as:

(i) The reasons for my opinion are as follows: ...

(g) The explanation may involve carrying out some calculations. If so, you may need to explain the calculation. The explanation may be as simple identifying all of the things that can be seen in a photograph that together led you to the conclusion. Or it could be simply walking the reader through a calculation explaining the steps along the way.

23. You may be the most highly qualified person in your field throughout the known universe, however, if you cannot explain how you formed the opinion in a manner that can be understood by a lay person, the report may not be admitted into evidence. In that case, neither you nor your report serve any purpose for the Court or for the parties.

24. Anyone can make a simple issue sound complex. It takes real skill to explain a complex issue simply.

A COUPLE OF OTHER TIPS

25. Below are a few additional suggestions that will make understanding your report easier for those who are required to read and rely on it. They may seem trivial or stylistic but they do make a difference.

(a) Number every paragraph including subparagraphs. It is a requirement in some jurisdictions and it should be the practice in all. It is often very difficult to make sense of a transcript that refers to parts of an expert's report that are not identified by paragraph numbers.

(b) Use short sentences. The one proposition per sentence rule is a good starting point.

- (c) Use plain English. Try to avoid jargon. You will often have to use terms that are unique to the topic on which the opinion is expressed. However, in that case you may have to explain what the term means.
- (d) Use the active voice. The active voice is generally a far more persuasive way of stating or explaining a proposition. Importantly, it avoids some admissibility problems caused by using the passive voice. For example, consider the statement “*The footings were observed to be 600mm deep.*” The statement is objectionable because it begs the question, observed by whom? The better way to express it is to say “*I saw the footings were 600mm deep.*” That statement is clear and unobjectionable.
- (e) Remember to pitch the report to a lay audience.
- (f) Use at least 1.5 line spaces.

EXPERTS’ CONCLAVES AND JOINT REPORTS

- 26. It is almost the invariable practice of the Courts in which expert evidence is used to require the experts to meet and prepare a joint report. This is one of the most important roles you will undertake as experts.
- 27. The purpose of the conclave and the joint report is to distill from the competing views those aspects that are agreed and those that are not agreed. In the latter case, you will have to explain why you disagree. More often than not what emerges is that the experts do not disagree at all. The differences are often in the assumptions that each has made.
- 28. You should remember that the conclave is a means to an end. That end is the joint report. It will often be the first thing that a Judge will look to when trying to understand the experts’ reports. You should take the same care and apply the same general principles to the preparation of the joint report as you have for your own reports.
- 29. You should strive to make the joint report a stand alone document. It is incredibly frustrating to read in a joint report something to the effect “*I rely on what I said in my report.*” It may be that the detailed calculations and reasoning supporting your opinion will be set out at length in your report, but you can usually set out in a brief way what it is that you say in relation to a particular issue and why.
- 30. The joint report is usually prepared closer to the hearing so more often than not, events have moved on since you prepared your report. Further factual evidence or other experts’ reports

may have been served. Additional investigations may have been undertaken. The parties' knowledge of the underlying issues may be quite different to what they were when you prepared your report. You and your opposite number need to consider the questions put to you for your joint report and prepare a document that you think will most assist the Judge in trying to determine the issues.

31. You will recall from Expert Witness Code of Conduct that your primary obligation is to assist the Court. You need to keep that firmly in mind when meeting with your opposite number and preparing a joint report.

THE HOT TUB

32. There is an increasing tendency to have expert evidence taken concurrently. It is sometimes referred to the "Hot Tub" although that tends to throw up mental images that may be hard to remove.
33. The usual practice involves each of the experts in a particular discipline sitting in the witness box together and answering a series of questions put to them by the Judge or counsel. The practice varies from Judge to Judge but the consistent theme is to have the experts express a view, or be tested, on a particular topic one after the other so the Judge can hear from all of the experts on a topic by topic basis.
34. The Hot Tub can be a efficient and effective method of taking the expert evidence although it does have a few draw backs. First, it is not an effective platform for cross examination. It is more akin to an inquisitorial approach to the expert evidence. In some cases, it is necessary to have a more traditional cross examination to expose flaws in an expert's reasoning.
35. Second, there tends to be a degree of unwarranted deference shown towards experts who may be regarded as the leader in a particular field. In one case my expert had said privately in conference, and in his reports, one thing but inexplicably agreed to the contrary proposition from the opposing expert in the Hot Tub. I was later told that it was because that person was regarded as the authority on the topic and my expert did not think it was appropriate, or lacked the confidence in his opinion, to disagree with him in public. The Hot Tub has its place but there are situations when a more traditional cross examination is required.
36. As an expert, with an obligation to the Court, you will, from time to time, be required to answer questions in that forum. The same principles apply. You will be required to express an opinion in answer to particular questions and expose your reasoning process by

explaining how you formed that opinion. Often the expert who can best explain how he or she reached their view will be one whose evidence is accepted.

CONCLUSION

37. An expert is of no use in litigation if his or her report is not admissible. For the report to be admissible it must comply with the requirements such as those set out above. If the expert follows a simple formula such as this, you will be off to a good start in preparing an admissible report:

- (a) I am an [expert].
- (b) I have been asked by [Solicitor] to express my opinion on [the subject].
- (c) I am aware of the [relevant Code of Conduct] and I agree to be bound by it.
- (d) I have [read/seen/viewed/tested] the following:
 - (i) [documents/photographs/building/accident scene].
- (e) For the purposes of expressing my opinions I have been asked to make the following assumptions:
 - (i) (i) [list assumptions].
- (f) In my opinion, [state opinion].
- (g) The reasons for my opinion are as follows:
 - (i) [explain reasons].

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