



GREENWAY CHAMBERS

Expert Evidence – just when you thought it was safe to go back to court...

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Expert Evidence – just when you thought...

Agenda

1. Expert Evidence – why does it matter?
2. Xie v R
3. Mattock v State of NSW
4. Stuart v Rabobank
5. Fair Work Ombudsman v Chatime
6. Fonterra v Bega: Choose your expert carefully
7. Dwyer v Volkswagen: “That was not an appropriate thing for me to say”.
8. Coming our way: Griffiths v TU UK Limited



Expert Evidence – just when you thought...

Why does it matter?

Evidence Act 1995 (NSW)

s76 – evidence of an opinion is not admissible

S79 – 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.



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Why does it matter?

UCPR schedule 7

2(1) overriding duty to assist the court impartially

2(3) not an advocate for any party

4 must work co-operatively with other expert witnesses

5(1) report must set out qualifications, facts and assumptions, reasoning



Expert Evidence – just when you thought...

Xie v R [2021] NSWCCA 1

- DNA and software expert evidence
- Objection to specialised knowledge
- Objection to lack of validity



Expert Evidence – just when you thought...

Mattock v State of NSW [2021]

NSWSC 477

- Teaching and sport expertise
- Qualifications relevant but not used
- Experience not on topic



Expert Evidence – just when you thought...

Stuart v Rabobank Australia Ltd [2021]

FCA 1388

- Banking procedure evidence
- Inappropriate questions, assumptions and documents not identified
- Lay evidence not consistent
- Limited reasoning
- Failure to consider the pleaded case



Expert Evidence – just when you thought...

Fair Work Ombudsman v Chatime

Australia Pty Ltd [2021] FCCA 1766

- How many excuses?
- The “medical certificate”
- Inadmissible or admissible but no weight?



Expert Evidence – just when you thought...

When the stakes are high, choose your expert with care.

Fonterra v Bega

[2021] VSC 75

- Where a high stakes case turns on expert evidence in a specialist field (marketing)
- Did the plaintiffs' promotional, marketing and advertising policies and content damage the value of the Trade Marks?
- In the left corner: Professor O'Sullivan: a professor of marketing at the University of Melbourne. He was the only expert witness with academic qualifications in marketing.
- In the right corner: Dr Honeywill: no academic qualifications in marketing and never published in a peer reviewed marketing journal or publication.



Expert Evidence – just when you thought...

“I agree that that was not an appropriate thing for me to say”

Dwyer v Volkswagen

[2021] NSWSC 715

- The plaintiff accepted that (their) Professor Baddeley “presented as a somewhat naïve and inexperienced court expert”.
- The court went somewhat further.
- The lesson? Beware of an expert’s drafts and notes, particularly where they say: “*We will need some guidance from the legal team.....*”



Expert Evidence – just when you thought...

What's coming our way.....

Griffiths v TU UK Limited Ltd

[2021] EWCA Civ 1442

- The correct judicial approach to 'uncontroverted' expert evidence
- Having cake: in which we make a forensic decision to refrain from XXN of expert
- Eating it too: in which we criticise the expert in submissions
- Upshot? Like bear baiting, it's a high risk strategy. Unlike bear baiting, it's permissible.





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Questions?

