Admissibility of expert evidence under the Uniform Evidence Act

Justice Peter McClellan[†]

Introduction

The *Evidence Act* 2008 (Vic) will bring into operation in Victoria the reforms to the law of evidence in both civil and criminal trials originally proposed by the Australian Law Reform Commission (ALRC) in 1987.[1] Victoria will join the Commonwealth, New South Wales and Tasmania as jurisdictions which have adopted the uniform law. Although in some respects the Act codifies the common law rules of evidence there are some aspects where the provisions of the Act diverge, sometimes significantly, from the common law position.

Expert witnesses play a critical role in the resolution of many civil and criminal trials. Their opinions are sought in relation to an increasing variety of issues. The rapid expansion of knowledge in various areas has meant that new scientific disciplines have emerged on the fringes of recognised science, creating difficulties in the reception of expert evidence and its ultimate utility in resolving a dispute. At the same time there has been an increasing concern as to whether courts are receiving evidence from the "best experts" or rather whether the evidence is coming from the best "expert witnesses." I have written extensively about these issues. Some of the concerns which have been expressed are:

i) The perceived lack of objectivity amongst expert witnesses retained by a party to a dispute – often referred to as "guns for hire";
ii) The danger in expert witnesses exerting too great an influence over the fact finding process rather than that role remaining with the tribunal of fact;
iii) The greater cost burden on litigants as a result of the use of expert witnesses in an increasing variety of fields;[2] and
iv) A tendency to call multiple experts with the same expertise.

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[1] Australian Law Reform Commission, *Evidence*, ALRC 38 Vol.1 (1987).
[2] Lord Woolf MR, *Access to Justice: Final Report*, Chapter 13 p.137.

"Truth" is the 21st century imperative of the justice system.[3] If the role of experts in courts is not properly managed, confidence in the legal system is undermined and (whether actual or perceived) confidence in the courts as the natural body to resolve disputes may be lost.

I have been asked by the organisers of this seminar to address issues relating to admissibility of expert evidence under the uniform *Evidence Act*. That discussion commences with consideration of the structure of the relevant provisions.

The legislative scheme

The threshold enquiry when considering the admissibility of expert opinion evidence, as with evidence of any kind, is to identify its relevance. Sections 55 – 56 provide:

> **55 Relevant evidence**
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> (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.
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> (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
> (b) the admissibility of other evidence; or
> (c) a failure to adduce evidence.
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> **56 Relevant evidence to be admissible**
>
> (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.

Section 76 provides the general rule that operates to exclude evidence of an opinion and reflects the general common law approach:

[3] See further, P. D. McClellan (2008) "*The Australian Justice System in 2020*", presented to the National Judicial College of Australia, 25 October 2008, available online: http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/mcclellan251008.pdf/$file/mcclellan251008.pdf.

76 The opinion rule

Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

Section 79 provides an exception to s 76 and is relevantly in the following terms:

79 Exception – opinions based on specialised knowledge

(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.

The general discretionary exclusions that apply to all otherwise admissible evidence must also be considered when determining the admissibility of an expert opinion. Sections 135 – 137 provide:

135 General discretion to exclude evidence

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

136 General discretion to limit use of evidence

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.

137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

It is convenient "shorthand" to describe s 79 as an exception allowing the reception of "expert opinion evidence." However the uniform legislation has effectively removed the

traditional consideration of "expertise" from that particular discourse. Whether a witness is an "expert" in terms, and determining the source of their "expertise", is no longer part of the judicial enquiry. Instead s 79 raises three discrete questions to be resolved when considering the admissibility of opinion evidence; does the witness have *specialised knowledge*, is that knowledge *based on the person's training, study or experience* and is the opinion of the witness *wholly or substantially based* on that knowledge.

Section 79 requires a nexus first between the knowledge of the expert ("specialised knowledge") and their training, study or experience and then between the expert's opinion and that knowledge. Gleeson CJ considered the relationship between the opinion and the knowledge on which it is based in *HG v Queen*.[4] The Court held that the opinion proffered by a psychologist was not based on specialised knowledge but was rather speculation derived from sources other than the witness' training, study and experience. Gleeson CJ said at [39]:

> "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 … [T]he provisions of s 79 will often have the practical effect of emphasising the need for attention to requirements of form. 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."

It hardly needs to be said that the burden of proving that the opinion is based on specialised knowledge, which is grounded in training, study or experience, rests upon the party seeking to adduce that evidence. Failure to do so will result in rejection of the evidence.[5]

"Field of expertise" v "Specialised knowledge"

The traditional "field of expertise" test applied by the common law has the consequence that a purported expert cannot give evidence in relation to areas of knowledge that do not form part of a "formal sphere of knowledge."[6] The precise formulation of that requirement in

[4] (1999) 197 CLR 414.
[5] *NMFM Property Pty Ltd v Citibank Ltd* (No 7) [1999] FCA 252.
[6] Freckleton, I. & Selby, H. (2009) *Expert Evidence: Law, Practice, Procedure and Advocacy* (4th Edition) Lawbook Co: Sydney, p.52.

Australia has not been resolved although many attempts have been made. There is a line of authority which suggests that the evidence must derive from a body of knowledge or experience that is accepted as being reliable. Dixon CJ, citing with approval the notes of J.W. Smith to *Carter v Boehm*,[7] said in *Clark v Ryan*:[8]

> "On the one hand it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it ... While on the other hand, it does not seem to be contended that the opinions of witnesses can be received when the inquiry is into a subject-matter the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it."

Three key points can be derived from *Clark v Ryan*. First, that the test for admissibility at common law is a functional one: expert evidence is only admissible if it can assist the trier of fact in reaching its decision. Second, that the assistance that is offered by the expert must be by virtue of the knowledge and experience that the expert possesses but the tribunal of fact does not. Third, it is not sufficient that the expert opinion is merely relevant; it must assist the tribunal of fact in such a way as to enable it to draw more accurately the inferences that are necessary to determine the case.[9] [10]

The judgement of King CJ in *Bonython v R*[11] is often cited both in Australia and the UK when considering the "field of expertise" test. His Honour said:[12]

> "Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of

[7] 1 Smith L.C., 7th ed. (1876) p. 577.
[8] (1960) 103 CLR 486 at 491.
[9] See also, *Transport Publishing Co Pty Ltd v Literature Board of Review* (1956) 99 CLR 111; *Weal v Bottom* (1966) 40 ALJR 436 and *Murphy v R* (1989) 167 CLR 94 at 131.
[10] Ligertwood, A. (2004) *Australian Evidence* (4th Ed), LexisNexis Butterworths at 7.44.
[11] (1984) 38 SASR 45.
[12] *Bonython* at 46–7.

> knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a *body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court*. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.
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> (emphasis added)

Both *Clark* and *Bonython* confirm that the "field of expertise" requirement is concerned with the need for the opinion to derive from a "body of knowledge" which is both "organised" and "accepted." The purpose of the test is to ensure the trustworthiness and reliability of the science or technique that is to be relied upon. There is a line of common law authority in New South Wales[13] which imposes a threshold requirement of evidentiary reliability before a field of knowledge upon which an opinion is based can be left to a jury. A similar approach has been taken in other states of Australia.[14]

This threshold question of evidentiary reliability at common law has often been determined by reference to the approach advocated by the United States Supreme Court in *Frye v United States*.[15] The test applied is "general acceptance" of the relevant discipline that is relied upon as falling within a "field of expertise." It was held in *Frye* that:

> "Just when a principle crosses the line between the experimental and the demonstrable stages is difficult to define. Somewhere in this twilight zone, the evidential force of the principle must be recognised, and while the courts will go a long way in admitting expert testimony deduced from a well-recognised scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained *general acceptance* in the particular field in which it belongs."[16]
>
> (emphasis added)

[13] See, for example, *R v Gilmore* [1977] 2 NSWLR 935 where it was held that a comparison between the voice of the accused and a voice on a tape recording was not admissible because spectrographic voice analysis was not a field of knowledge sufficiently reliable to be the basis of expert opinion.
[14] See e.g. *McKay v Page and Sobloski* (1972) 2 SASR 117; *Eagles v Orth* [1976] Qd R 313 and *Lewis v R* (1987) 88 FLR 104.
[15] 293 F 2d 1013 (1993).
[16] *Frye* at 1014.

The *Frye* test, or a variant of that approach, which considers whether there is "general acceptance" of a particular discipline for determining the question of reliability as part of the field of expertise rule has come to form part of the common law in Australia.[17] However, there is no single approach to the question of whether there is a demonstrable "field of expertise". Stephen Odgers notes that there are authorities which adopt a test of general acceptance within the scientific discipline,[18] other authorities that require the court to exclusively consider the reliability of the source of the evidence[19] and authorities that adopt both tests.[20] In their various forms, the application of tests drawing on *Frye* which assess general acceptance as a means of assessing the evidentiary reliability of a purported expert opinion represent a more stringent view toward the reception of expert evidence than the liberal approach taken in early cases such as *Weal v Bottom*[21] and *Transport Publishing Co Pty Ltd v Literature Board of Review*.[22]

Frye is not without its detractors. The major criticism of the decision is that the general acceptance requirement fails to accommodate novel and controversial areas of science, which now come commonly to the attention of courts. The other major concern with *Frye* is that, through the concept of general acceptance, the question of whether a particular field of learning is sufficiently reliable is one that is vested in the various scientific professions, rather than judges. These concerns were addressed in the United States by the introduction of the Federal Rules of Evidence and the subsequent decision in *Daubert*, which is considered further below.

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[17] See, for example, *Clark v Ryan* (supra); *R v Gallagher* [2001] NSWSC 462; *Idoport v National Australia Bank* [1999] NSWSC 828 at [239]; *R v Harris (No 3)* [1990] VR 310 at 318; *Carroll v The Queen* (1985) 19 A Crim R 410 and *R v Runjanjic* (1991) 53 A Crim R 362.

[18] These authorities draw most closely from judgement in *Frye*; see for example, *Carroll v R* (1985) 19 A Crim R 410; *R v Runjanjic* (1991) 56 SASR 114; *R v Lucas* [1992] 2 VR 109; *R v Jamieson* (1992) 60 A Crim R 68 and *R v C* (1993) 60 SASR 47.

[19] *Casley-Smith v Evans & Sons Pty Ltd* (No 1) (1988) 49 SASR 314 at 320, 328; *Shoshana Pty Ltd v 10th Cantanae Pty Ltd* (1987) 18 FCR 285; *Ritz Hotel Ltd v Charles of the Ritz Ltd* (1988) 15 NSWLR 158.

[20] *R v Gilmore* [1977] 2 NSWLR 935 at 939, 941; *R v Lewis* (1987) 29 A Crim R 267; *R v Bonython* (1984) 38 SASR 45, applied by Gaudron and Gummow JJ in *Osland v The Queen* (1998) 197 CLR 316.

[21] (1966) 40 ALJR 436.

[22] (1956) 99 CLR 111.

Freckleton and Selby[23] observe of the common law position that in "formulating the criteria to determine the substance of the area of expertise test, judges will utilise *Frye* language and focus upon the degree of dissension about any new technique within the scientific community. At the same time it may well be that the inquiry is in terms of the scientific community's views as to the technique's reliability."

"Specialised knowledge"

Under the Act the "field of expertise" requirement no longer exists in those terms. The uniform *Evidence Act* does not incorporate an "area [field] of expertise" rule.[24] Einstein J observed in *Idoport Pty Ltd v National Australia Bank Ltd*[25] that s 79 represents a direct rejection of the *Frye* test and its attendant emphasis on "general acceptance."[26] His Honour also identified the issue as to whether reliability formed part of the consideration for admissibility under s 79, although he did not reach a conclusion on this point.[27] In this regard his Honour noted the role of the general discretions to exclude evidence because of its potential prejudice (ss 135 – 137) which, depending on the nature of the proceedings, allows or requires a judge to exclude evidence if its prejudicial effect outweighs its probative value and provides an effective mechanism for excluding expert opinion that is lacking in veracity or is fundamentally unreliable. Einstein J cited the interim report of the ALRC,[28] which indicated that the general discretions to exclude evidence could be applied where a discipline has "not sufficiently emerged from the experimental to the demonstrable."[29]

There is a separate question as to whether it must be separately proved that the person purporting to have specialised knowledge about a particular field does in fact[30] possess that

[23] Freckleton and Selby, above n 6, p.56.
[24] *R v Tang* [2006] NSWCCA 167; (2006) 65 NSWLR 681.
[25] [1999] NSWSC 828 at [242].
[26] See also *Perpetual Trustee Co Ltd v George* (unreported, Supreme Court of NSW, Einstein J, 1 December 1997).
[27] See however his Honour's judgement in *Lakatoi Universal Pty Ltd v Walker* [1999] NSWSC 1336, delivered approximately three months after *Idoport*, where his Honour observed that "it is appropriate then that a trial judge examine evidentiary reliability under s 79…"
[28] Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol.1 (AGPS, Canberra, 1985).
[29] ALRC 26 at para 743.
[30] It is a question of fact: *Hamod v Suncorp Metway Insurance Ltd* [2006] NSWCA 243 at [39].

knowledge.[31] This issue is considered in more detail in the "training, study and experience" section of this paper. There must be an aspect of the field in which the witness is expert, which the witness must identify.[32] What must be proved is the training, study or experience, and how it has made the witness an expert in some aspect of the field of their "specialised knowledge." Mason P in *R v G*[33]stated that the witness must identify their expertise "with precision."

The "specialised knowledge" requirement in s 79 presents a more liberal threshold than that provided by the "field of expertise test" at common law.[34] This was intentional; the ALRC report that produced the uniform evidence legislation expressly recommended against an exclusionary rule based either on the *Frye* criteria of general acceptance, or on the basis of reliability.[35] It was intended that the admissibility of expert evidence should be controlled by the courts through the residual discretion in ss 135 – 137.[36] The Commission noted in its interim report:

> "[It has been suggested] that the expert must be able to point to a relevant accepted 'field of expertise' and the use of accepted theories and techniques. Quite what constitutes such a field remains a matter for speculation. There are major difficulties in implementing such a test. In the United States, the test known as the *Frye* test was adopted in many States. More recently, however, it has been assailed from many quarters as being 'arbitrary' and 'impossible to implement' because of the difficulties of defining the actual 'field' in each instance and then of determining the existence of accepted theories and techniques. It also can exclude evidence which the courts should have before them.
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> It is proposed, therefore, not to introduce the 'field of expertise' test. There will be available the general discretion to exclude evidence when it might be more prejudicial than probative, or tend to mislead or confuse the tribunal of fact. This could be used to exclude evidence that has not sufficiently emerged from the experimental to the demonstrable."

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[31] *Henschke & Co v Rosemount Estates Pty Ltd* [1999] FCA 1561 at [69] per Finn J; *Australian Cement Holdings Pty Ltd v Adelaide Brighton Ltd* [2001] NSWSC 645 at [7] per Barrett J.

[32] The requirement is implicit in the language of s 79, requiring that the witness "*has* specialised knowledge". As to the common law position, see *Murphy v R* (1989) 167 CLR 94 at 111.

[33] (1997) 42 NSWLR 451.

[34] J D Heydon, *Cross on Evidence*, LexisNexis, 7th Edition [29185].

[35] As noted by Freckleton and Selby however, the recommendations of the report preceded the decision in *Daubert*, considered below.

[36] ALRC 26 (Interim) *Evidence* at [743]. See also Eintstein J in *Idoport* at [244] – [246].

In place of the field of expertise test, the test is whether the purported expert has "specialised knowledge." The term is not defined by the Act. Two questions are raised; first, there must be knowledge, as opposed to an understanding or belief; and second, the knowledge must be specialised, rather than being of a level existing generally in the community.

Under the Act an expert witness is not required to identify the particular field from which they draw their knowledge and demonstrate that that field is reliable by reference to considerations of peer review, legitimacy or testability. Instead the witness must prove that they possess some particular knowledge (as defined below), which is "specialised", namely that it derives from an area beyond the experience of laypersons. It was expressly held by Einstein J in *Lakatoi* that s 79 constitutes "a direct rejection of the American *Frye* test." That is to say "general acceptance" of the knowledge under consideration no longer forms a prerequisite for finding that an expert possesses "specialised knowledge" in terms.

The requirement that a person providing an opinion have "specialised knowledge" does retain some aspects of the common law. The opinion will only be admissible to the extent that the information it provides is of assistance to the tribunal of fact, i.e. provides information that is outside the tribunal's own knowledge and experience. The fundamental rationale for such an exception to the general exclusion of opinion evidence remains to assist the trier of fact in making a more informed and reliable decision. As a consequence, views have been expressed that "specialised knowledge" should engage some consideration of evidentiary reliability. This is reflected in some of the early decisions in relation to s 79.

In *HG v The Queen*, Gaudron J observed:

> "So far as this case is concerned, the first question that arises with respect to the exception in s 79 of the Evidence Act is whether psychology or some relevant field of psychological study amounts to "specialised knowledge". The position at common law is that, if relevant, expert or opinion evidence is admissible with respect to matters about which ordinary persons are unable "to form a sound judgment ... without the assistance of [those] possessing special knowledge or experience ... which is sufficiently organized or recognized to be accepted as a *reliable body of knowledge or experience*". There is no reason to think that the expression "specialised knowledge" gives rise to a test which is in any respect narrower or more restrictive than the position at common law."
> (emphasis added)

Her Honour reiterated this view in *Velevski v The Queen*:[37]

> "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."[38]

Gaudron J cited a number of common law decisions that apply the "field of expertise" test, including the formulation applied by King CJ in *R v Bonython.*[39] Gaudron J was of the view that the test in *Clark v Ryan* (extracted above at p.5) remained applicable when considering s 79. It is arguable that her Honour's characterisation of s 79 in *Velevski*[40] and previously in *HG v The Queen*[41] imports a requirement that expert testimony reach a standard of evidentiary reliability before it will be admissible. Her Honour was in dissent as to the outcome in both of those cases.[42] Nevertheless her Honour's view is indicative of the approach (at least in the years shortly following the introduction of the Act) that has been adopted as to whether reliability forms part of the enquiry when deciding whether the proposed witness possesses "specialised knowledge." When the issue returns for consideration by the High Court in the future, it will be with the benefit of over a decade of the Act's operation at both a Federal and (at least in NSW) State level.

Heerey J considered the requirement of "specialised knowledge" in *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd*[43] and offered an arguably more permissive view toward the specialised knowledge requirement at [11]:

> "…the *Turner* [1975] QB 834 rule, adopted in *Murphy* (1989) 167 CLR 94, is a separate requirement. Even if a proffered opinion is that of a person suitably qualified within an organised area of knowledge, if that

[37] (2002) 187 ALR 233.
[38] In both *HG* and *Velevski*, Gaudron J cited a series of cases that derive from the common law common knowledge rule: *R v Bonython* (1984) 38 SASR 45 at 46-47 per King CJ, cited with approval in *HG v The Queen* (1999) 197 CLR 414 at [58] per Gaudron J, and adopted in *R v Makoare* [2001] 1 NZLR 318 at 324 [23] per Blanchard J. See also *Osland v The Queen* [1998] HCA 75; (1998) 197 CLR 316 at [53] per Gaudron and Gummow JJ.
[39] *Bonython*, above n 9.
[40] At [82].
[41] At [58].
[42] In *Velevski* however, Gummow J agreed with her Honour on that particular expert evidence issue.
[43] [2006] FCA 363.

> area is not outside the experience of ordinary persons, the opinion will not be admissible.

The elements which make information "specialised knowledge" have not been finally settled. However, subject to the issue of reliability considered below, the authorities indicate that the concept should not be narrowly applied.[44] Provided that the witness is able to demonstrate that they possess knowledge (as opposed to a belief or understanding) and that that knowledge is specialised, such that it is beyond the scope of ordinary laypersons, then the test will likely be satisfied.

"Knowledge"

Spigelman CJ held in *R v Tang*[45] that the meaning of "knowledge" for the purpose of s 79 is the same as that attributed by the United States Supreme Court in *Daubert v Merrell Dow Pharmaceuticals*[46] at 590:

> "[T]he word knowledge connotes more than subjective belief or unsupported speculation. The term applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on 'good grounds'... Proposed testimony must be supported by appropriate validation- i.e., "good grounds," based on what is known."[47]

In *Tang* the Crown sought to adduce evidence of an expert in the field of "face and body mapping" for the purpose of positively identifying an accused person from recorded footage. Spigelman CJ held[48] in that case that a purported expert in the discipline of face and body

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[44] *Adler v Australian Securities and Investments Commission* [2003] NSWCA 131 at [629] per Giles JA (with whom Mason P and Beazley JA agreed): "But ["specialised knowledge"] is not restrictive; its scope is informed by the available bases of training, study and experience, in the last mentioned perhaps extending the common law. An ample scope has been suggested in, for example, *R v Yilditz* (1983) 11 A Crim R 115 (attitude of a member of a community), *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 6)* (1996) 64 FCR 79 at 85 (investor behaviour) and *Godfrey v New South Wales* (No 1) [2003] NSWSC 160 (behaviour of prison escapees)."

[45] [2006] NSWCCA 167; (2006) 65 NSWLR 681 at [138].

[46] 509 US 579 (1993).

[47] As is discussed in more detail below, this is the extent to which Spigelman CJ viewed *Daubert* as being applicable under the uniform Act. Whilst Spigelman CJ adopted the *Daubert* definition of "knowledge" his Honour did not consider *Daubert* to have any further bearing on the application of s 79 *Evidence Act*.

[48] At [135], [140].

mapping possessed the necessary specialised knowledge in respect of facial mapping but not body mapping. While anatomy (the discipline from which both mapping techniques derive) is capable of recognition as an area of specialised knowledge, the party seeking to adduce the evidence of body mapping in particular could not show that the witness' opinion regarding the posture of the appellant was based on the study of anatomy. The Chief Justice observed that the aspect of the opinion that relied upon body mapping "barely, if at all, rose above a subjective belief and it did not, in my opinion, manifest anything of a 'specialised' character."[49] This approach to the evidence of the expert was due to the fact that she had failed to expose the reasoning process that underpinned her opinion that the person in the recorded footage was the accused. The opinions provided by the purported expert in that case were ultimately characterised as not going beyond "bare ipse dixit."[50]

"Knowledge" relevantly must exist at a higher level than that of a mere understanding or belief, which may not derive from known facts or accepted truths on good grounds. The relevant inquiry for the purpose of meeting the specialised knowledge requirement must be directed towards the "status of the asserted body of fact or corpus of ideas – for the most part, but not exclusively, within the relevant intellectual marketplace or discipline."[51]

Is reliability an element of specialised knowledge?

An enduring debate concerning the "specialised knowledge" requirement under s 79 is concerned with whether reliability is a relevant consideration. The reference to reliability in this context is a reference to the reliability of the science or discipline from which the opinion evidence apparently derives, rather than the intellectual bona fides of the particular witness whose evidence is sought to be adduced.

Evidentiary reliability

Questions of reliability will frequently arise where a party seeks to adduce evidence that is based on emerging or novel disciplines. There is an obvious concern to ensure that a court or

[49] *Tang* at [140].
[50] *Tang* at [154].
[51] Freckleton and Selby, above n 6, p.174.

tribunal only receives expert evidence in circumstances where the opinion is formed on a sound basis. The debate about reliability has centred on whether the requirement that there be "specialised knowledge" accommodates such an inquiry, or whether the issue is more appropriately left to the residual discretionary exclusions contained in ss 135 – 137.

As discussed above, at common law the question of reliability of the expert's evidence was considered under the "field of expertise" rule in determining whether the opinion was admissible. If the purported expert's knowledge did not derive from a recognised field of expertise the evidence would be regarded as unreliable and would consequently be excluded.

Early cases dealing with s 79 indicated that reliability formed part of the specialised knowledge component for admissibility (see for example the judgements of Gaudron J in *HG* and *Velevski*, above). Einstein J in *Lakatoi*[52] was of the view that in the context of s 79 it is appropriate to examine the reliability of the proposed evidence.[53] His Honour said at [6], [9]:

> "At common law, the field of expertise prerequisite required a court in determining the admissibility of expert evidence, to assess the reliability of the knowledge and experience on which the opinion was based. A question may be suggested as arising as to whether a similar exercise is required under the *Evidence Act*.
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> …
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> It is appropriate then that a trial Judge examine evidentiary reliability under section 79, section 56 and/or section 135, and when doing so, exercise the court's appropriate discretion to ensure that the manner in which evidence is adduced by an expert not have a quite often unforeseen consequence, which by dint of s 60 and/or s 77 of the Act would otherwise result, namely that evidence which neither party intended to be evidence of the fact, becomes evidence of the fact. That situation can very easily arise if the court is not astute to limit the precise purpose for which assumptions relied upon by experts in their reports or matters stated in those reports as facts are admitted into evidence."

[52] This aspect of *Lakatoi* was decided in November 1999, approximately three months after his Honour's decision in *Idoport* in August 1999.

[53] See also *R v Gallagher* [2001] NSWSC 462 at [35]; *Perpetual Trustee Co Ltd v George* (unreported, NSWSC, Einstein J, 1 December 1997).

The argument in favour of the consideration of evidentiary reliability as an element of "specialised knowledge' derives largely from the decision of the United States Supreme Court in *Daubert v Merrell Dow Pharmaceuticals*.[54] The Supreme Court was required to decide whether the *Frye* test, which had become the subject of strident criticism, as it was widely considered to be unduly restrictive of the admission of evidence from emerging scientific approaches, had been superseded by the adoption of r 702 of the 1973 *Federal Rules of Evidence*. That rule is similar to s 79 of the *Evidence Act* and makes reference to "specialised knowledge." Like s 79, the wording of the rule makes no direct reference to reliability or general acceptance criteria.

The majority opinion in *Daubert* held that r 702 did supplant *Frye*. However this did not mean that all expert testimony purporting to be scientific was to be admitted without further question. Rule 702 required that the testimony be founded on "scientific knowledge." This implied, according to the Court, that the testimony must be grounded in the methods and procedures of science i.e. "the scientific method." Evidence thus grounded, said the Court, would possess the requisite scientific validity to establish *evidentiary reliability*.[55]

The Supreme Court said:

> "The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" an expert "may testify thereto." The subject of an expert's testimony must be "scientific . . . knowledge." The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." Webster's Third New International Dictionary 1252 (1986). Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science … But, in order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific

[54] 509 US 579 (1993).

[55] *Daubert* was specifically concerned with the admissibility of scientific expert evidence. The united States Supreme Court has subsequently expanded the application of the principles of expert evidence to apply to testimony "based on technical and other specialised knowledge" in *Kumho Tire Co Ltd v Carmichael* 119 S Ct 1167 (1999).

> method. Proposed testimony must be supported by appropriate validation - i.e., "good grounds," based on what is known. *In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability*."
> (emphasis added)

The majority in *Daubert* composed a (non-exhaustive) list of considerations going to reliability in relation to a particular scientific theory; i) the testability of the theory, ii) peer review and publication of the theory, iii) known or potential rate of error and iv) general acceptance within the relevant scientific community. These factors were not to be considered inflexibly; no single factor should be determinative of the reliability (and therefore admissibility) of the expert opinion. Einstein J in the Supreme Court of New South Wales was clearly of the view that, consistent with *Daubert*, reliability should be considered when applying s 79[56]

The application of the reasoning in *Daubert* to s 79, observable in the judgement of Einstein J in *Perpetual Trustee* and the acknowledgement of reliability as a factor in *HG* and *Velevski* are significant. It raises the question as to whether the approach taken in *Frye* and *Daubert*, namely that both the status of bodies of facts and ideas, and the soundness of the basis for them, are relevant when considering whether the witness possesses the requisite "specialised knowledge" in the Australian context.

The NSW Court of Criminal Appeal took a different view to that of Einstein J in *Tang*.[57] In that case the Court said that evidentiary reliability is not a consideration under s 79. Spigelman CJ, with whom Simpson and Adams JJ agreed, said at [134], [137] – [139]:

> "Section 79 has two limbs. Under the first limb, it is necessary to identify "specialised knowledge", derived from one of the three matters identified, i.e. "training, study or experience". Under the second limb, it is necessary that the opinion be "wholly or substantially based on that knowledge". Accordingly, it is a requirement of admissibility that the opinion be demonstrated to be based on the specialised knowledge. The Appellant invokes each limb.
>
> …

[56] See for example his Honour's judgements in *Perpetual Trustee Co Ltd* and *Lakatoi*.
[57] [2006] NSWCCA 167; (2006) 65 NSWLR 681.

> The focus of attention must be on the words "specialised knowledge", not on the introduction of an extraneous idea such as "reliability". (Cf *Velevski v The Queen* (2002) 76 ALJR 402 at [82], [154]-[160]; *Perpetual Trustee Co Ltd v George* NSWSC per Einstein J (unreported); *Idoport Pty Ltd v National Australia Bank Limited* [1999] NSWSC 828 at [242]; Odgers *Uniform Evidence Law* (6th Ed) at par 1.3.4260; Freckleton and Selby *Expert Evidence: Law, Practice, Procedure and Advocacy* (3rd Ed) at 97-98; Anderson, Hunter and Williams *The New Evidence Law* (2002) at 246.)
>
> In the immediate context of "specialised knowledge", picked up by the words "that knowledge" in the second limb of s79, the word "knowledge" has a different connotation to that which it might have in a different context, e.g. "common knowledge". The meaning of "knowledge" in s79 is, in my opinion, the same as that identified in the reasons of the majority judgment in *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993) at 590:
>
> > "[T]he word 'knowledge' connotes more than subjective belief or unsupported speculation. The term applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds'."
>
> The quoted definition is from an American dictionary.
>
> I do not mean to suggest that *Daubert* and its progeny in the United States has anything useful to say about s79 of the *Evidence Act.* Rule 702 of the *Federal Rules of Evidence* (2004), which fell to be interpreted in *Daubert,* is in quite different terms to s79. The definition of the word "knowledge" in this cognate context is, however, instructive."

Spigelman CJ's judgement has been the subject of considerable discussion. It reflects his Honour's approach to the construction of any statute and the obligation on the judicial interpreter emphasised by the High Court.[58] Odgers notes[59] that Spigelman CJ "appears to see a distinction in this context between an inquiry as to whether a supposed field of 'specialised knowledge' involves more than 'subjective belief' and an inquiry into the validity or reliability of the field, although he considered that an inquiry into reliability was

[58] See eg J J Spigelman "Legitimate and Spurious Interpretation" (2008) (online) available at http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman120308.pdf/$file/spigelman120308.pdf; and
J J Spigelman "The Principle of Legality and the Clear Statement Principle" (2005) (online) available at http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman180305.

[59] S Odgers, *Uniform Evidence Law* (8th edition) at [1.3.4260].

appropriate when considering the requirement that the opinion is 'wholly or substantially based on' specialised knowledge." Although *Tang* does not find room for reliability at the "specialised knowledge" stage of considering the admissibility of the evidence, there remains a place for consideration of the nature of the field from which the evidence derives. The threshold requirement that the evidence be relevant (s 55) and the discretions afforded to the judge in ss 135 – 137 *Evidence Act* provide avenues for the exclusion of evidence that may otherwise be unreliable.

It remains to be seen whether the approach preferred by Spigelman CJ in *Tang* will continue to be followed, given the apparent disparity between it and the view at least of Gaudron J that imports a meaning to "specialised knowledge" which draws in part upon the common law consideration of evidentiary reliability.

Discretions to exclude evidence – sections 135 – 137

As I have previously indicated the Act confers a residual discretion upon judges in ss 135 – 137. Unfairly prejudicial evidence may be excluded on certain bases in civil disputes and criminal trials. The exclusionary rules are discretionary in civil trials (s 135) and mandatory in criminal trials (s 137).[60] Unlike other exclusionary rules in the Act, these residual discretions include a requirement that *unfair prejudice* be demonstrated in order for the evidence to be ruled inadmissible. As with all other types of evidence expert evidence may be excluded if it is unfairly prejudicial.

Section 135 – Discretion to exclude evidence if its probative value is substantially outweighed by the danger that it is unfairly prejudicial

Section 135 applies to both civil disputes and criminal trials and retains the position at common law so that where the prejudicial effect of evidence substantially outweighs its probative value, the court has discretion to exclude the evidence.[61] Section 135 also operates

[60] Section 137 involves a balancing exercise – there is no discretion involved in its application: *Em v The Queen* (2007) 232 CLR 67 at [95].
[61] ALRC 26 at para 643.

to exclude evidence which may be "misleading or confusing"[62] as well as evidence which may "cause or result in undue waste of time."[63] This paper however is focussed on s 135(1)(a), where the probative value of evidence is substantially outweighed by the danger of unfair prejudice. "Probative value" is defined by the Dictionary to the Act as meaning "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue", which mirrors the meaning of "relevant evidence" in s 55. The discretion is closely linked to the relevance requirements prescribed by Part 3.1 of the Act.

The meanings which have been attributed to "probative value" and "relevant evidence" in the Act reflect the approach developed at common law.[64] The common law origins of the discretionary rule derive from the requirement that evidence be "sufficiently relevant." Whilst the definition of "relevance" under the Act was intended to be[65] and has been interpreted as being very wide,[66] it is nevertheless necessary to show that there is a rational connection between the evidence in question and the facts in issue. Lindgren J described the "rational connection" requirement of relevance as "an objective test grounded in human experience, on the application of which minds may differ."[67] The Act does not distinguish between different types of relevance (as was the position at common law) as a means of excluding evidence that is of minimal probative value (at least when compared to any prejudicial effect). That function is now largely performed by the application of s 135. McHugh J considered the interaction between the exclusionary rules and the threshold requirement of relevance in *Papakosmas*[68] and said:

> "In the Interim Report of the Australian Law Reform Commission that led to the enactment of the Act, the Commission pointed out that distinguishing between "legal" and "logical" relevance disguised the myriad policy considerations that contributed to the former. The Commission thought that, as a threshold test, relevance should require only a logical connection between evidence and a fact in issue. To the extent that other policies of evidence law, such as procedural fairness and reliability, required the strict logic of the relevance rule to be modified,

[62] s 135(1)(b).
[63] s 135(1)(c).
[64] *Washer v The State of Western Australia* [2007] HCA 48 at [5] per Gleeson CJ and Heydon and Crennan JJ.
[65] ALRC 26, vol 1, paragraph 61.
[66] *Smith v The Queen* (2001) 206 CLR 650 at [45] per Kirby J.
[67] *Harrington-Smith v Western Australia (No 2)* [2003] FCA 893; (2003) 130 FCR 424 at [11].
[68] (1999) 196 CLR 297 at [81].

> that could best be done by the exclusionary rules - such as the hearsay rule and the credibility rule - and by conferring discretions on the court as in ss 135-137. The terms of s 55 indicate that it was intended to give effect to the Commission's view as to the proper approach for determining the relevance of evidence."[69]

The discretion conferred by s 135[70] can be contrasted with the mandatory form of expression used in s 137.[71] It may be that in practice the discretionary language of s 135 ("may refuse to admit") is not significant; it is difficult to conceive a situation where a judge, being satisfied that that the probative value of evidence is substantially outweighed by the danger of unfair prejudice, would still allow the evidence to be admitted. Nevertheless the ALRC, having acknowledged the unlikelihood of the evidence being admitted, decided not to recommend that s 135 be expressed in mandatory terms.[72]

Generally the starting point when considering the application of s 135 is to determine the fact in issue to which the proposed evidence is said to be relevant and then consider the role that the evidence would play if admitted to the resolution of that fact.[73] Evidence given by an expert about matters of common knowledge is unlikely to be relevant because it is not of assistance to the tribunal of fact in performing its duty, may be excluded for that reason.[74] However if the evidence is relevant to a fact in issue it is necessary to undertake a weighing exercise, comparing the probative value of the evidence against the danger of unfair prejudice. Section 135 is weighted in favour of the admission of evidence. The onus on a party seeking to have evidence excluded is invariably a heavy one; it must be demonstrated that the probative value would be "*substantially* outweighed" by the prejudicial effect, and that the prejudicial effect is itself *unfair*.

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[69] This passage was accepted as being correct by the High Court in *Smith v The Queen* (2001) 206 CLR 650.

[70] "*The court may refuse to admit evidence* if its probative value is substantially outweighed by the danger that the evidence might … be unfairly prejudicial to a party."

[71] "In a criminal proceeding, *the court must refuse to admit* evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant."

[72] ALRC 102, paras 16.53 – 16.55.

[73] *R v Mundine* [2008] NSWCCA 55 at [33] – [34].

[74] *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* [2007] FCAFC 70 at [55].

The requirement that the probative value of evidence be "substantially outweighed" before it might be excluded has been described as requiring that the probative value be "well outweighed" by the prejudicial effect.[75]

As to the concept of "unfair prejudice"[76] it is not to the point in a civil context that the evidence sought to be adduced might damage the case of one party or be advantageous to another party to the dispute.[77] In the criminal setting, evidence will not be unfairly prejudicial merely because it increases the likelihood of an accused person being convicted; the prejudice will be *unfair* if there is a real risk that the evidence "will be misused by the jury in some unfair way."[78] The danger of unfair prejudice cannot merely be a risk or possibility; there must be a real danger of such prejudice arising in the event of the admission of the evidence.[79] Spigelman CJ described the necessary danger in *R v Shamouil*,[80] saying that there "must be a real risk that the evidence will be misused by the jury in some way and that that risk will exist notwithstanding the proper directions."[81] Obviously the danger of unfair prejudice, through the misuse of the evidence by the tribunal of fact, is of particular relevance to matters tried by a jury. It may be that it is unlikely that a judge sitting alone would exclude evidence on the basis that he or she would misapply the evidence.

In addition to the unfair prejudice that may arise as a consequence of the use (or misuse) of evidence by the tribunal of fact, it has been held in New South Wales that such prejudice may also stem from procedural considerations. This may be the case in both civil and criminal contexts. An example is the inability of a party to cross-examine an expert who has compiled a report and is for some reason unavailable to give evidence in the hearing, or the inability to cross-examine hearsay evidence that relates to a crucial issue in proceedings. The inability to cross-examine in such circumstances may be an important (although, not

[75] *R v Clarke* [2001] NSWCCA 494 at [163] per Heydon JA (Dowd and Bell JJ agreeing).
[76] "Unfair prejudice" or "unfairly prejudicial" appears in each of ss 135, 136 and 137 – the meaning in each instance is the same: *Ainsworth v Burden* [2005] NSWCA 174 at [99] per Hunt CJ at CL (Handley and McColl JJA agreeing).
[77] *Ainsworth* at [99].
[78] *R v BD* (1997) 94 A Crim R 131 at 139 per Hunt CJ at CL, approved in *Papakosmas* at [91] per McHugh J. See also ALRC 26, paragraph [644] as to the intended meaning of "unfair prejudice".
[79] R v Suteski [2002] NSWCCA 509; (2002) 52 NSWLR 182 at [117] per Wood CJ at CL, Sully and Howie JJ agreeing); *R v Lisoff* [1999] NSWCCA 364 at [60] per curiam.
[80] [2006] NSWCCA 112; (2006) 66 NSWLR 228.
[81] *Shamouil* at [72].

necessarily determinative) consideration in deciding whether to exclude evidence pursuant to s 135.[82] The willingness to exclude evidence as being unfairly prejudicial on procedural grounds, such as the impossibility of cross-examination has been questioned on the basis that if such circumstances were sufficient to exclude evidence under s 135, the result would be to effectively "write the hearsay exceptions out of the Act to a large extent. That outcome would be contrary to the legislative intention."[83] McHugh J also expressed concern in *Papakosmos*:

> "Some recent decisions suggest that the term "unfair prejudice" may have a broader meaning than that suggested by the Australian Law Reform Commission and that it may cover procedural disadvantages which a party may suffer as the result of admitting evidence under the provisions of the Act 1995. In *Gordon (Bankrupt), Official Trustee in Bankruptcy v Pike (No 1)*, Beaumont J used his discretion under s 135(a) to exclude the transcript of a bankrupt, which would otherwise have been admitted as an exception to the hearsay rule pursuant to s 63, on the basis that the prejudicial effect of being unable to cross-examine the maker of the representation on a crucial issue in the litigation substantially outweighed the probative value of the evidence. In *Commonwealth of Australia v McLean*, the New South Wales Court of Appeal also used s 135(a) to exclude hearsay evidence otherwise admitted via the exception contained in s 64 on the basis that the defendants were prevented by other evidentiary rulings from effectively challenging the evidence. It is unnecessary to express a concluded opinion on the correctness of these decisions, although I am inclined to think that the learned judges have been too much influenced by the common law attitude to hearsay evidence, have not given sufficient weight to the change that the Act has brought about in making hearsay evidence admissible to prove facts in issue, and have not given sufficient weight to the traditional meaning of "prejudice" in a context of rejecting evidence for discretionary reasons."[84]

Ultimately of course each case must be determined on its own facts, having regard to he nature of the evidence and the extent to which the opposing party would be unfairly prejudiced by its admission.[85] It should be borne in mind that the prejudicial effect of evidence that might otherwise be excluded by s 135 might be limited by an order pursuant to s 136 limiting the use to which the evidence may be put by the tribunal of fact.[86]

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[82] *R v Suteski* [2002] NSWCCA 509; (2002) 56 NSWLR 182 at [126] – [127] per Wood CJ at CL; *Bakerland Pty Ltd v Coleridge* [2002] NSWCA 30 at [51- [55].
[83] *R v Clark* at [164] per Heydon JA.
[84] *Papakosmos* at [93].
[85] *Suteski* at [126] – [127].
[86] *TKWJ v The Queen* (2002) 212 CLR 124 at [47] per Gaudron J.

Section 137 – Requirement to exclude evidence against an accused person if its probative value is outweighed by the danger of unfair prejudice

Section 137 is concerned only with evidence adduced by the prosecution in criminal proceedings. Unlike s 135, s 137 is expressed in mandatory terms.[87] It requires a balancing exercise to be undertaken by the court between the probative value of the evidence and the "danger of unfair prejudice." There is no discretion.[88] McHugh J considered the inherent difficulty in balancing probative value and prejudicial effect in the context of propensity evidence in *Pfennig v R*[89] and said at 528:

> "Nevertheless, the proposition that the probative value of the evidence must outweigh its prejudicial effect is one that can be easily misunderstood. The use of the term "outweigh" suggests an almost arithmetical computation. But prejudicial effect and probative value are incommensurables. They have no standard of comparison. The probative value of the evidence goes to proof of an issue, the prejudicial effect to the fairness of the trial. In criminal trials, the prejudicial effect of evidence is not concerned with the cogency of its proof but with the risk that the jury will use the evidence or be affected by it in a way that the law does not permit."

Despite the difficulties identified by McHugh J it is the task of the trial judge to balance the inevitably competing considerations of the probative value and unfair prejudice of contested evidence, having regard to the circumstances of the case. The approach that has developed at common law and under the Act has been to assess the probative value of the evidence at the highest when balancing that factor against the danger of unfair prejudice. The trial judge is not required to form any view about the actual probative value of the evidence. The New South Wales Court of Criminal Appeal confirmed the correct approach to be taken by a trial judge in respect of the discretionary exclusions in *R v Shamuoil*:

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[87] Note however, the arguably minimal practical effect of the distinction, discussed above.

[88] *R v Lock* (1997) 91 A Crim R 356 at 364 per Hunt CJ at CL; *R v Blick* [2000] NSWCCA 61; (2000) 111 A Crim R 326 at [20]; *R v* Cook [2004] NSWCCA 52 at [27] per Simpson J (with whom Ipp JA and Adams J agreed); *Rolfe v R* [2007] NSWCCA 155; (2007) 173 A Crim R 168; confirmed in *Em v The Queen* (supra) at [95], [102].

[89] (1995) 182 CLR 529.

> "Before the *Evidence Act* the *Christie* discretion to exclude evidence at common law for which s137 is a replacement, did not involve considerations of reliability of the evidence.
>
> …
>
> After the enactment of s137, the same approach was taken in *R v Singh-Bal* (1997) 92 A Crim R 397 at 403 and *R v Yates* [2002] NSWCCA 520 at [255]-[256], in both of which the formulation from *R v Carusi* was expressly adopted, i.e. the evidence must be "taken at its highest" in order to determine its probative value."[90]

Spigleman CJ considered the definition of "probative value" under the Act and confirmed the narrow approach to be taken when considering the probative value of evidence for the purpose of balancing it against the danger of unfair prejudice:

> "The preponderant body of authority in this Court is in favour of a restrictive approach to the circumstances in which issues of reliability and credibility are to be taken into account in determining the probative value of evidence for purposes of determining questions of admissibility. There is no reason to change that approach.
>
> In my opinion, the critical word in this regard is the word *could* in the definition of probative value as set out above, namely, "the extent to which the evidence could rationally affect the assessment …". The focus on *capability* draws attention to what it is *open* for the tribunal of fact to conclude. It does not direct attention to what a tribunal of fact is *likely* to conclude. Evidence has "probative value", as defined, if it is capable of supporting a verdict of guilty."[91]

Shamouil represents the prevailing approach in New South Wales to the evaluation of probative value in the context of discretionary exclusions.[92] However a view has also been expressed that reliability is a relevant consideration when determining the probative value of evidence. In *Papakosmos* McHugh J said:

> "The distinction which the Act makes between relevance and probative value also supports the view that relevance is not concerned with reliability. Probative value is defined in the Dictionary of the Act as being 'the extent to which the evidence could rationally affect the assessment of

[90] *Shamouil* at [49], [51] per Spigelman CJ (with whom Simpson and Adams JJ agreed).
[91] *Shamouil at* [60] – [61].
[92] See also *Adam v The Queen* (2001) 207 CLR 96 at [59] – [60] per Gaudron J.

> the probability of the existence of a fact in issue.' That assessment, of course, would necessarily involve considerations of reliability. 'Probative value' is an important consideration in the exercise of the powers conferred by ss 135 and 137."[93]

The distinction between the evaluative nature of the task under s 137 as opposed to the exercise of judicial discretion was emphasised by Sheller JA in *R v Blick* (2000) 111 A Crim R 326:

> "When an application is made by a defendant pursuant to s 137 to exclude evidence, the first thing the judge must undertake is the balancing process of its probative value against the danger of unfair prejudice to the defendant. It is probably correct to say that the product of that process is a judgment of the sort which, in terms of appellate review, is analogous to the exercise of a judicial discretion … Translated to the task set by s 137, a trial judge's estimate of how the probative value should be weighed against the danger of unfair prejudice will be one of opinion based on a variety of circumstances, the evidence, the particulars of the case and the judge's own trial experience. In that sense, the result can be described as analogous to a discretionary judgment …
>
> Even so, and with due respect, there seems to me to be a risk of error if a judge proceeds on the basis that he or she is being asked to exercise a discretion about whether or not otherwise admissible evidence should be rejected because of unfair prejudice to the defendant. The correct approach is to perform the weighing exercise mandated. If the probative value of the evidence adduced by the prosecutor is outweighed by the danger of unfair prejudice to the defendant, there is no residual discretion. The evidence must be rejected."

Simpson J confirmed the approach in *R v Cook*[94] and observed at [38]:

> "As the judge pointed out, s137 is not a section that confers a discretion on the trial judge, although the balancing exercise has been said to be "akin" to the exercise of a discretion. S137 calls for the exercise, not of a discretion, but of judgement. It is in that sense that it is "akin" to the exercise of discretion; whilst there will be cases in which the facts are so plain that they admit of only one outcome, there will be many in which minds may properly differ. The exercise of judgement is not, in my view, akin to the exercise of discretion in the sense that, if the exercise is not performed in accordance with the section, it cannot then be undertaken by an appellate court. This Court may, in my view, consider whether the

[93] At [86].
[94] [2004] NSWCCA 52 (Ipp JA and Adams J agreeing).

> result of the balancing exercise, even if performed having regard to irrelevant considerations, was correct."

However as is the position under s 135, the potential for unfair prejudice should be considered in light of the potential for the danger of prejudice to be mitigated by some other action such as by editing the evidence, limiting the way in which evidence is able to be used under s 136 or through a strong jury direction.

As observed by McHugh JA in *TKWJ*:[95]

> "In the vast majority of cases, the risk will be eliminated by a strong direction to the jury that the rebuttal evidence can only be used on the issue of good character. Even if the judge thinks that such a direction may not eliminate the *risk* of prejudice, the probative value of the evidence on the character issue may still require its admission. It will do so if its probative value outweighs any prejudice that it creates."

Professor Gary Edmond has recently criticised what he describes as the "failure of the jurisprudence governing the reception of expert evidence in New South Wales" and "judicial disinterest in the reliability of expert opinion evidence." The "apparent reluctance to exclude unreliable expert opinion evidence and expert opinion evidence of unknown reliability, adduced by the state" is also considered. He asserts that the approach in New South Wales has resulted in a situation where the exclusionary potential of the admissibility rules in the Act and the discretions with respect to expert evidence have been "effectively eviscerated."

He says this has come about because of the reluctance of NSW courts (particularly the NSW Court of Criminal Appeal in *Tang*) to import considerations of evidentiary reliability when determining whether a witness has "specialised knowledge", with the result that evidence derived from techniques of questionable validity is admitted into evidence to the detriment of accused persons. He further argues in the article that after finding that the evidence is admissible, NSW courts have failed to assiduously apply the discretionary exclusions which are designed to protect parties from being exposed to unfairly prejudicial evidence.

[95] At [90].

In response to the asserted deficiencies in the present approach Professor Edmond argues for the introduction of a "demonstrable reliability" component in respect of s 79, similar to that applied in *Daubert* in the United States, and for judges to adopt a revised approach to the way that exclusionary rules are applied to expert evidence.[96]

"Training, study or experience"

At common law, there exists some uncertainty as to whether expertise could be derived from experience, rather than more formal means of study. This has been addressed by the Act. The ALRC addressed the issue in its interim report:

> "An expert should be defined as a person who 'has special knowledge, skill, experience or training about a matter', and that he generally be able to give opinion evidence that utilises his specialised knowledge, skill, experience or training. 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."[97]

The intention of the ALRC in its interim report, which has been translated into the Act, was to remove any doubt about the potential for "experience" to form a sound basis for specialised knowledge. The inclusion of the words "training, study or experience" in s 79 removed any question about the status of specialised knowledge gained exclusively through experience. The Act permits the reception of evidence gained through experience which does not carry with it formal qualifications. On this issue Einstein J observed:

> "The requisite specialised knowledge may have been acquired from different types of training, study and experience. Hence for example, the question of whether or not a person has satisfied section 79 criteria in showing an entitlement to express opinions as to functionality or as to functionality comparisons, may be answered in the affirmative in respect of A who has demonstrated specialised knowledge of a very technical nature (as for example in relation to the writing of technical specifications and functional specifications and calculation of effort estimates and use of source lines of code and the like) with far less experience of a conceptual nature. The question may also be answered in the affirmative in respect of B who has demonstrated specialised knowledge of functionality at far

[96] *"Specialised knowledge, the exclusionary discretions and reliability: Reassessing incriminating expert opinion evidence"* (2008) 31 UNSW Law Journal 1-55.
[97] ALRC 26, vol 1, paragraph 742.

> more of a conceptual level but with less technical experience. There are some cases where too narrow an approach to the route to or categorisation of specialised knowledge or to classification of the opinions capable of being expressed as based whether wholly or substantially, on that specialised knowledge, may lead to injustice because the Court will have pre-empted the entitlement of the parties through appropriately qualified experts to have the issue litigated and only determined in the final judgment following the receipt of the respective opinions of experts."[98]

Where experience is said to be the sole basis of specialised knowledge (i.e. not in conjunction with training or study), greater scrutiny may be given to whether the witness does in fact possess the specialised knowledge that is claimed. It will need to be clearly demonstrated that the experience relied upon is sufficient to satisfy the requirement.[99] This will require evidence as to the background of the expert and an explanation as to how the experience that is relied upon has been acquired.

Ad hoc expertise

The concept of ad hoc expertise is something of an anomaly. Unlike the general requirement at common law that the witness possess expertise within a particular field, which is generally to be acquired over an extended period of learning, it is recognised that there are circumstances where a witness may be an "expert" in relation to a discrete subject matter based on their familiarity and experience with the relevant material. The witness consequently becomes an expert "ad hoc" in respect of that material.

The origin of the common law recognition of ad hoc expertise came from issues relating to the admission of transcripts of conversations that are unclear, inaudible or in a foreign language[100]. Early decisions allowing the evidence of ad hoc experts saw transcripts being admitted for the limited purpose of assisting the jury in its consideration of the content of the sound recordings, rather than as primary evidence of the content of the conversations.

One of the earliest decisions which considered the concept of the acquisition of ad hoc expertise is *R v Menzies.*[101] *Menzies* was concerned with the admissibility of a transcript

[98] *Idoport* at [153].
[99] See, for example, R v Lam (2002) 135 A Crim R 302.
[100] *Butera v DPP (Vic)* (1987) CLR 180.
[101] [1982] 1 NZLR 40.

prepared by a detective who had repeatedly listened to covert recordings of conversations that were of very poor quality. Cooke J stated:

> "Deficiencies in the recording may make it necessary to play tapes more than once to enable a better understanding, yet the sheer length of the tapes may mean that inordinate time would be taken by replaying them to the jury. In such cases, while there should normally be at least one playing to the jury, the evidence of an expert should be admissible as an aid to the jury. He may be a temporary expert in the sense that by repeated listening to the tapes he has qualified himself ad hoc."[102]

The concept of ad hoc expertise was first adopted in Australia in *Butera v The Director of Public Prosecutions (Vic)*,[103] which cited *Menzies* with approval.[104] The joint judgement of Mason CJ, Brennan and Deane JJ applied *Conwell v Tapfield*[105] and held that when an audiotape is admitted into evidence, the evidence is the sound produced by that tape when played. It followed that a transcript of a tape recording was not admissible to prove the content of the sound recording, but the transcript "may be seen as an aid to listening though it is not independent evidence of the recorded conversation."[106] In relation to a situation where words contained in a tape recording were inaudible or unintelligible, Dawson J said:

> "expert evidence of its contents may be required and it has been held that an ad hoc expertise may be acquired by a witness by playing and replaying a tape so as to become more familiar with its contents than could be done by playing it only once or twice."[107]

Sperling J considered the admissibility of a transcript of an audio recording in the context of the uniform evidence legislation in *Regina v Cassar*.[108] His Honour held that s 48(1) *Evidence Act* 1995 relaxed the restriction imposed by *Butera* and permitted a transcript of a recording to be tendered as evidence capable of proving the conversations contained therein.[109] Sperling J considered *Menzies*, *Butera*, and the decision of the Full Court of the

[102] *Menzies* at 49.
[103] [1987] HCA 58; 164 CLR 180.
[104] *Butera* at 195.
[105] (1981) 1 NSWLR 595 at 598 per Street CJ.
[106] *Butera* at 187 per Mason CJ, Brennan and Deane JJ.
[107] *Butera* at 195.
[108] [1999] NSWSC 436.
[109] *Cassar* at [6].

Federal Court in *Eastman*[110] and summarised the effect of s 48 (1) *Evidence Act* in the following propositions:

> "(a) A document that purports to be a transcript of words recorded on a tape is admissible to prove the conversation;
>
> (b) No oral or other evidence is necessary to validate such a transcript, it being sufficient that it purports to be a transcript of the words;
>
> (c) Where a tape is indistinct, a transcript may be used to assist the jury in the perception and understanding of what is recorded on the tape;
>
> (d) Where a tape is indistinct, a transcript made by an "ad hoc expert", being a person qualified only by having listened to the tape many times, may be used for this purpose. That is particularly so where the tape needs to be played over repeatedly before the words uttered could be made out unaided;
>
> (e) If there is doubt or disagreement whether the transcript accurately deciphers the sounds captured on the tape, the transcript should be used only as an aide-memoire. I take that to mean that the jury is to give priority to what they hear (or do not hear) on the tape, if that is not consistent with what appears in the transcript;
>
> (f) The jury may have the transcript before them when this tape is played over in court;
>
> (g) The jury should be informed, when the transcript is tendered, as to the use which they may make of it;
>
> (h) A transcript may be rejected or its use limited pursuant to ss 135-137."

The role of the ad hoc expert was expanded significantly in *R v Leung*[111] where a translator was required to listen to audio recordings of conversations for an extended period in order to create a transcript of the contents. As a result of his extended exposure to the content of the tapes, evidence given by the translator identifying certain speakers on the tapes was admitted. Simpson J (with whom Spigelman CJ and Sperling J agreed) considered *Menzies* and *Butera* (which were decided in contexts other than the uniform evidence law) and reached the view that s 79 of the *Evidence Act* is sufficiently broad to accommodate the evidence of an ad hoc expert.

[110] (1997) 158 ALR 107.
[111] (1999) 47 NSWLR 405.

The High Court had occasion to consider ad hoc expertise in *Smith v The Queen*.[112] The appeal was concerned with whether evidence of police officers identifying a person depicted in security camera footage as the appellant was admissible where those officer's opinions were based on their previous interactions with the appellant. The majority judgement (Gleeson CJ, Gaudron, Gummow and Hayne JJ) held that the police officers were in no better position to determine the fact in issue (namely, whether the accused person was the person depicted in the footage) than the jury, having regard to the evidence that had been adduced. In the particular case, the majority held that the identification evidence of the officers from the photographs was not relevant and should not have been admitted. However the majority reasons left open the possibility that in other circumstances the evidence of identification of an accused from a photo image may be admitted.

The Court of Criminal Appeal further considered the issue in *R v Drollet*. The appeal concerned the admissibility of identification evidence given by a prison officer who witnessed the moments prior to and aftermath of a prison melee, but did not directly observe the event itself. The officer was shown film footage of the melee and purported to identify the appellant as one of the persons participating in and emerging from the incident. The prison officer said that his identification of the appellant was based on his knowledge of him from previous dealings within the prison system.

The trial judge held that the officer was in a better position to identify the appellant than the jury would have been when considering the video footage. Simpson J (with whom McClellan CJ at CL and Rothman J agreed) considered both the joint judgement in *Smith* and the separate judgement of Kirby J.

On the question of relevance, her Honour noted at [46] that the High Court in *Smith* had left open the possibility that evidence identifying a person from photographic material could be admissible. An example was where the accused's appearance had changed since the making of the photographic image or circumstances where the photographic image revealed some unique or identifying trait of the accused. In *Drollet* Simpson J was of the view that the identification evidence of the officer was relevant as he would have been in a better position

[112] [2001] HCA 50; 206 CLR 650.

than the jury to make comparisons between the appellant and the person depicted in the footage. The fact that rendered the officer's evidence inadmissible was that he was not in a position to give an opinion that the jury itself would not have been able to form a view about, having regard to the evidence in the proceedings.

Her Honour was of the view that *Smith* was not authority for the proposition that the evidence of identification from photographs is evidence of fact, rather than opinion. Her Honour said at [44]:

> "The result of this analysis is that, in every case, it will be necessary to examine the nature of the evidence proposed to be adduced, and all relevant circumstances, before a determination can be made whether the evidence tendered falls into the category of opinion evidence and subject to the admissibility provisions of Part 3.3 of the Evidence Act."

Simpson J concluded that the identification evidence of the prison officer was opinion evidence. The officer was not giving evidence of what he had directly observed. The attempt to identify the appellant in the video footage was based solely on the content of that footage. The evidence of the police officer did not fall under the expert opinion exception in s 79 as there was no evidence that the officer had expertise in deciphering the particular type of video footage. Nor was there evidence that the officer had the advantage of particular familiarity with the appellant such as to allow him to be classified as an ad hoc expert.

Professor Edmond has criticised the present approach to ad hoc expert evidence in relation to identification evidence in criminal cases.[113] Professor Edmond argues that ad hoc expertise has expanded "dramatically" under the uniform evidence legislation, to the point where ad hoc expertise "threatens the operation of the rules regulating the admission of expert evidence more generally, and the fairness of an increasing number of criminal trials (and pleas)." It is argued that ad hoc experts, described as "those with no 'specialised knowledge', limited commitment to scientific methods and/or familiarity with problems and dangers associated with specific types of identification" are allowed are being allowed to provide

[113] *Quasi-justice: Ad hoc expertise and identification evidence* (2009) 33 Crim LJ 8 and *Law's Looking Glass: Expert Identification Evidence Derived from Photographic and Video Images* (2009) 20 Current Issues in Criminal Justice 337.

highly incriminating evidence in criminal proceedings and the residual discretions conferred by ss 135 – 137 are insufficient to protect the interests of accused persons.

"Wholly or substantially based" (on specialised knowledge)

This requirement excludes the ability of an individual to provide an opinion on areas that are beyond their specialised knowledge. Something of a divergence in its application has emerged in the case law to date, with markedly different approaches being developed between the NSW Court of Appeal and the Federal Court.

It is important to ensure that any opinion provided by an expert is maintained within the bounds of that person's specialised knowledge. Gleeson CJ observed that:

> "Experts who venture opinions (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted."[114]

Some of the exceptions to the opinion rule do not require the primary facts on which the opinion is based to be adduced.[115] The situation is somewhat different in respect of expert opinion evidence under s 79. The expert must identify the facts which have been assumed and upon which the opinion is based.[116] As the High Court stated in *Ramsay v Watson* (1961) 108 CLR 642 (at 645) the tribunal of fact could be assisted by expert evidence, but was not "simply to transfer their task to the witnesses."[117]

Accordingly it is important to distinguish between the proved and assumed facts upon which the opinion is based, and the opinion itself.

Proof of the basis of the opinion

[114] *HG* at [44].
[115] See eg s 78 *Evidence Act.*
[116] [1999] HCA 2; (1999) 197 CLR 414 at [39] per Gleeson CJ.
[117] *HG* at [39].

In *Makita (Australia) Pty Ltd v Sprowles*[118] Heydon JA, when a judge of the New South Wales Court of Appeal, discussed these issues. The context was the admission of an expert report detailing the slipperiness of a staircase. Heydon JA identified the requirement to first consider whether the report complied "with a prime duty of experts in giving opinion evidence: to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions." [119] After quoting the remarks of Gleeson CJ in *HG*, Heydon JA stated the requirements for admission of expert opinion evidence as an exception to the opinion rule at [85]:

> "In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialised knowledge"; there must be 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; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"; so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, 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. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in *HG v R* (1999) 197 CLR 414, 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" (at [41])."

Heydon JA noted that an expert cannot usurp the function of the tribunal of fact, which bears the responsibility of making factual findings. His Honour observed that while it is open for

[118] [2001] NSWCA 305; (2001) 52 NSWLR 705.
[119] at [59].

the Court to accept the expert evidence, it remains for the tribunal of fact (whether judge or jury) to accept or reject that evidence, or to determine how much weight is placed upon it. Once the Court has received all of the evidence in the proceedings, it is then incumbent on the fact finder to weigh the evidence together and form a view as to the result. It is for this reason, according to Heydon JA, that an expert must prove the basis on which they have reached their opinion to enable the tribunal of fact to understand the foundations upon which it stands. This could be achieved through the expert providing:

> "... the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence."[120]

The expert is required to identify both the facts and assumptions upon which their opinion rests. This allows the Court to assess the opinion in question by considering the means by which it was reached. Heydon JA said at [64]:

> "[W]hat an expert gives is an opinion based on facts. Because of that, the expert must either 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 … One of the reasons why the facts proved must correlate to some degree with those assumed is that the expert's conclusion must have some rational relationship with the facts proved."

Heydon JA at [85] described the consequences of the expert failing to discharge that duty. The likely consequence of the expert failing to identify the facts and assumptions upon which their opinion is based will be that the evidence is rejected or is at least afforded less weight. This requirement places a significant burden upon experts to prove the facts on which they base their opinion at risk of having their evidence ruled inadmissible. A divergence has developed in the authorities on this point, particularly between the Supreme Court of New South Wales and the Federal Court of Australia.

Toward a less restrictive approach to admissibility

[120] *Makita* at [59] per Heydon JA, quoting from *Davie v The Lord Provost, Magistrates and Councillors of the City of Edinburgh* 1953 SC 34 at 39-40 per Lord President Cooper.

The admissibility of expert evidence was considered by the Full Court of the Federal Court in *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd.*[121] The Court made a number of observations in relation to the judgment of Heydon JA in *Makita* and the requirements it imposed upon experts seeking to give evidence. In *Red Bull* the respondents succeeded at first instance in a claim against the appellants, alleging misleading and deceptive conduct and passing off. On appeal the appellants challenged both the admissibility of expert evidence that the respondent had relied upon below, and the weight that was attributed to that evidence. The appellants argued that the expert's evidence was inadmissible or ought not to have been accorded any weight. The appellants relied on the dicta of Heydon JA in *Makita* at [85] in support of their argument. It was held unanimously that the appeal should be dismissed.

Branson J considered the dicta of Heydon JA in *Makita* at [85] and said:

> "The approach of Heydon JA as set out above is, as it seems to me, to be understood as a counsel of perfection. As a reading of his Honour's reasons for judgment as a whole reveals, his Honour recognised that in the context of an actual trial, the issue of the admissibility of evidence tendered as expert opinion evidence may not be able to be addressed in the way outlined in the above paragraph."[122]

Branson J gave three reasons in support of this statement. The first concerned the situation where the parties were legally represented and the expert evidence was admitted at trial without objection. Her Honour observed:

> "…where evidence is adduced from an expert without objection, the trial judge will ordinarily be entitled to assume that all matters crucial to the admissibility of the evidence are conceded by the opposing party, including the existence of a relevant field of specialised knowledge. Rarely, if ever, would a trial judge be expected to interfere with the basis upon which represented parties had chosen to conduct their litigation by challenging the basis of an implicit concession concerning admissibility. Apart from other considerations, to do so could impose a significant and unexpected costs burden on the parties."[123]

[121] [2002] FCAFC 157.
[122] *Sydneywide Distributors* at [7] per Branson J.
[123] *Sydneywide Distributors* at [8] per Branson J.

Her Honour then acknowledged that the trial judge usually makes any ruling as to the admissibility of evidence in the course of the trial before all of the evidence has been adduced. As to the consequence of that situation where the totality of the evidence to be considered is not yet complete, Branson J said:

> "The trial judge's rulings will be based on the evidence and other relevant material, which may include assurance given by counsel, which are before the judge at the time that the ruling is required to be made … [I]t may prove to be the case that evidence ruled admissible as expert opinion will later be found by the trial judge to be without weight for reasons that, strictly speaking, might be thought to go to the issue of admissibility (eg that the witness's opinion is expressed with respect to a matter outside his or her area of expertise or is not wholly or substantially based on that expertise)."[124]

Her Honour then referred to the earlier decision in *Quick v Stoland Pty Ltd*:[125]

> "…the common law rule that the admissibility of expert opinion evidence depends on proper disclosure of the factual basis of the opinion is not reflected as such in the *Evidence Act 1995* (Cth) ("the Evidence Act"). The Australian Law Reform Commission recommended against such a precondition to the admissibility of expert opinion, expressing the view that the general discretion to refuse to admit evidence would be sufficient to deal with problems that might arise in respect of an expert opinion the basis of which was not disclosed (ALRC Report No 26, vol 1, par 750). That general discretion is to be found in s 135 of the Evidence Act."[126]

Branson J made further observations with respect to the admissibility of expert evidence. Her Honour's interpretation of the requirements can be generally characterised as being less strict on a prospective expert than the requirements set out by Heydon JA.

Branson J stated that the requirement that an expert opinion be wholly or substantially based on the witness's specialised knowledge did not require a trial judge to give "meticulous consideration" to whether the facts on which the opinion is based form a proper basis for the opinion, before ruling on the admissibility of the evidence of the opinion. Her Honour said:

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[124] *Sydneywide Distributors* at [9] per Branson J.
[125] [1998] FCA 1200; (1998) 87 FCR 371 at 373 – 374 per Branson J.
[126] *Sydneywide Distributors* at [10] per Branson J.

> "It is sufficient for admissibility, in my view, that the trial judge is satisfied on the balance of probabilities on the evidence and other material then before the judge that the expert has drawn his or her opinion from known or assumed facts by reference wholly or substantially to his or her specialised knowledge."[127]

In their Honour's joint judgement in *Red Bull* Weinberg and Dowsett JJ also considered the application of *Makita* to the requirement that the opinion be "wholly or substantially based" on the specialised knowledge of the witness. The first was in relation to the strictness with which the requirements set out by Heydon JA in *Makita* were to be applied:

> "The use of the phrase "strictly speaking" in the last sentence should not be overlooked. It may well be correct to say that such evidence is not strictly admissible unless it is shown to have all of the qualities discussed by Heydon JA. However, many of those qualities involve questions of degree, requiring the exercise of judgment. For this reason it would be very rare indeed for a court at first instance to reach a decision as to whether tendered expert evidence satisfied all of his Honour's requirements before receiving it as evidence in the proceedings. More commonly, once the witness's claim to expertise is made out and the relevance and admissibility of opinion evidence demonstrated, such evidence is received. The various qualities described by Heydon JA are then assessed in the course of determining the weight to be given to the evidence. There will be cases in which it would be technically correct to rule, at the end of the trial, that the evidence in question was not admissible because it lacked one or other of those qualities, but there would be little utility in so doing. It would probably lead to further difficulties in the appellate process."[128]

Their Honours continued with respect to the expert's "prime duty" to explain their reasoning at [89]:

> "Further, we do not accept the proposition inherent in much of what the appellants have said, that every opinion in an expert's report must be supported by reference to an appropriate authority. Some propositions may be so fundamental in a particular discipline as to be treated as virtually axiomatic. That does not exclude the possibility of cross examination upon such matters. There may be disagreements among experts as to what is axiomatic in their shared discipline … The extent to which an expert should seek to justify views, including opinions expressed in a report may well depend upon the matters which are really in issue between him or her and any expert called by the opposing parties.

[127] *Sydneywide Distributors* at [16] per Branson J.
[128] *Sydneywide Distributors* at [87] per Weinberg and Dowsett JJ.

> In most cases, as one would expect, reputable experts will agree on many, if not most of the preliminary steps and learning upon which an ultimate opinion is based. The areas of difference will emerge when opinions are exchanged. Differences will be further ventilated in the course of cross examination. It cannot be sensibly suggested that an expert should offer chapter and verse in support of every opinion against the mere possibility that it may be challenged."

The approach taken by Full Court in *Sydneywide Distributors v Red Bull* has since been embraced in a number of other Federal Court decisions. A number of issues have been discussed. A more lenient approach to the admissibility of an expert's report is preferred by the Federal Court decision. This is consistent with view that the approach of Heydon JA was a "counsel of perfection" and the admissibility of expert opinion evidence may not practically be able to be accommodated with the approach dictated in *Makita*. There is also a question as to whether the requirements identified by Heydon JA which are not expressly contained in s 79 go to the admissibility of the evidence or to its weight. The third issue is whether a failure to prove the facts on which an expert's evidence is based will result in the rejection of the evidence, or it being afforded less weight by the tribunal of fact.[129]

Heerey J considered the requirement that the expert prove the facts on which their opinion is based in *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd*. His Honour reflected on the dicta of Heydon JA in *Makita* and said:

> "… I accept [that the dicta of Heydon JA] in *Makita* has not been followed in the Federal Court. The lack of proof of a substantial part of the factual basis of Dr Gibbs' opinions does not of itself render his evidence inadmissible under s 79. Such lack of proof merely goes to the weight which may be given to the opinion: *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354; [2002] FCAFC 157 at [16] per Branson J and at [87] per Weinberg and Dowsett JJ, *Neowarra v Western Australia (No 1)* (2003) 134 FCR 208; 205 ALR 145; [2003] FCA 1399 at [16], [21] - [27] per Sundberg J., *Jango v Northern Territory (No 4)* (2004) 214 ALR 608; [2004] FCA 1539 at [19] per Sackville J. This line of authority is consistent with the earlier High Court common law decision in *Ramsey v Watson* (1961) 108 CLR 642 at 649; [1963] ALR 134 at 138-9."[130]

[129] G Nell, (2006) "The admissibility of expert evidence: Makita v Red Bull", *Bar News Summer 2006/2007*, NSW Bar Association, pp. 63-70.

[130] *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* [2006] FCA 363 at [7] per Heerey J.

In *Neowarra v Western Australia*[131] Sundberg J emphasised that as recommended by the ALRC the "basis rule" had not been included in the Act with the result that evidence which had not had its factual basis proved would still be able to be admitted, albeit with potentially less weight attached to it. His Honour observed in relation to the dicta of Heydon JA in *Makita*:

> "…[It] seems to me, with respect, to be restoring the basis rule. The reason his Honour gave for requiring this and the other presently immaterial requirements is that "if all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge". While that may be so with respect to other requirements, the expert's exposure of the facts upon which the opinion is based is sufficient to enable the relevant inquiry to be carried out. That inquiry is not dependent on proof of the existence of those facts."[132]

His Honour did however acknowledge that the expert would be required to identify (without necessarily proving) the facts upon which their opinion is based:

> "While the legislation does not incorporate a "basis rule", an expert should nevertheless differentiate between the facts on which the opinion is based and the opinion in question, so that it is possible for the court to determine whether the opinion is wholly or substantially based on the expert's specialised knowledge which in turn is based on training, study or experience."[133]

Austin J considered the effect of the *Sydneywide Distributors v Red Bull* upon the requirements set down by M*akita* in *Dean-Willcocks v Commonwealth Bank of Australia*.[134] His Honour considered the relevant statements in each case and said:

> "To the extent that the observations in the Full Federal Court may be taken to have qualified Heydon JA's statements (a question that is open to debate: see *Notaras v Hugh* [2003] NSWSC 167 … at [3] - [8]), it seems to me that the qualification was directed to a point that is not before me in the present case. The judges of the Full Federal Court appear to have been concerned that, as a practical matter, it will often be difficult for the judge

[131] [2003] FCA 1399.
[132] *Neowarra* at [24] per Sundberg J.
[133] *Neowarra* at [23] per Sundberg J.
[134] [2003] NSWSC 466.

> to decide early in the trial, when asked to rule on the admissibility of an expert's report tendered in evidence, whether the assumed or proved facts form an adequate foundation for the expert's opinion, and whether the expert's reasoning process is sufficiently laid out and exposed to analysis: see also *Australian Securities and Investments Commission v Adler* (2002) 20 ACLC 222. However, in my opinion there is no practical or other difficulty in the trial judge deciding, when an expert's report is tendered early in the hearing, whether the subject matter of the report is within the scope of the expert's specialised knowledge. … It is the latter aspect of *Makita*, rather than the former, that arises in the present case."

It is plain that there has been considerable resistance to the stringent application of *Makita* to expert opinion evidence in circumstances where it may be impractical, or indeed impossible to prove the factual basis upon which an opinion has been formulated. *Makita* may have the effect of precluding the opinions of suitably qualified persons who would be able to assist the tribunal of fact in making its decision. Evidence from valuers provides an example.

The NSW Court of Appeal considered *Makita* in *Smith v Eurobodalla Shire Council & Anor*,[135] a case in which I sat with Mason P and Santow JA. That case concerned the admissibility of expert opinion evidence provided by a valuer in respect of a house that was allegedly defectively built. The house had numerous serious defects. The valuer whose evidence was tendered was highly experienced, having practiced for 27 years at the time of the trial. The witness gave evidence, which was accepted that if the house had been in good repair it had a value of $310,000. He gave further evidence, which was rejected at trial, that the house in its damaged state was worth only $160,000. The valuer said that he had formed his views having regard to his own observations of the subject property and the likely market impact of the defects. There were no comparable sales.

The District Court applied the dicta of Heydon JA in *Makita*, holding that the facts upon which the opinion as to the value of the house in its damaged state was based had not been proved. Of course these facts had not been proved because there were no comparable sales of damaged properties to which reference could be made by the valuer. This was not an unsurprising situation, given that very few properties would ever be sold in the condition to which the appellant's property had been reduced. The result was that a professional valuer

[135] [2004] NSWCA 479.

with considerable experience was prevented from giving evidence because of his inability to prove the facts upon which the revised valuation was based. The effect of the exclusion of the evidence was that the tribunal of fact, which naturally had no experience in such matters, had no assistance in making its decision.

I said at [121]:

> "There is no doubt that the foundation for an expert's opinion must be adequately proved. This will include the evidence necessary to qualify the person as an expert in the relevant field and proof of the facts in respect of which the expert is requested to give an opinion. As Heydon JA acknowledges, this can give rise to difficulties in areas such as land valuation where, in many cases, the available market evidence is limited and the expert's judgment must be based upon accumulated experience. Sometimes when evidence of comparable sales is not available, alternative but less satisfactory methods of valuation may be utilised. (Various methods are discussed in Alan Hyam, The Law Affecting the Valuation of Land in Australia, 3rd ed, p 113ff). But there will be many cases, particularly in relation to sales of "unique" property, where this may not be possible and a valuer will be required to exercise his or her judgment having regard to the objective material which is available, however inadequate. If there is simply no direct market evidence in relation to a particular property, this does not mean that a valuer cannot express an opinion as to its value. As McClure J points out in the Full Court of the Supreme Court of Western Australia case in Western Australian Planning Commission v Arcus Shopfitters (2003) WASCA 295, Makita does not mean that an opinion will be excluded where the objective material is not complete "but the valuer must reveal as far as possible the reasoning process actually employed so as to enable the court to evaluate the evidence and the expert's conclusions."

What will happen to Makita?

In my opinion *Makita* is unlikely to be followed in other states and will ultimately fall into disuse. Although a counsel of perfection it is ultimately impractical. To maintain public confidence the law must be practical. My own view is that weight is the touchstone by which most issues in relation to the evidence of experts can be resolved.