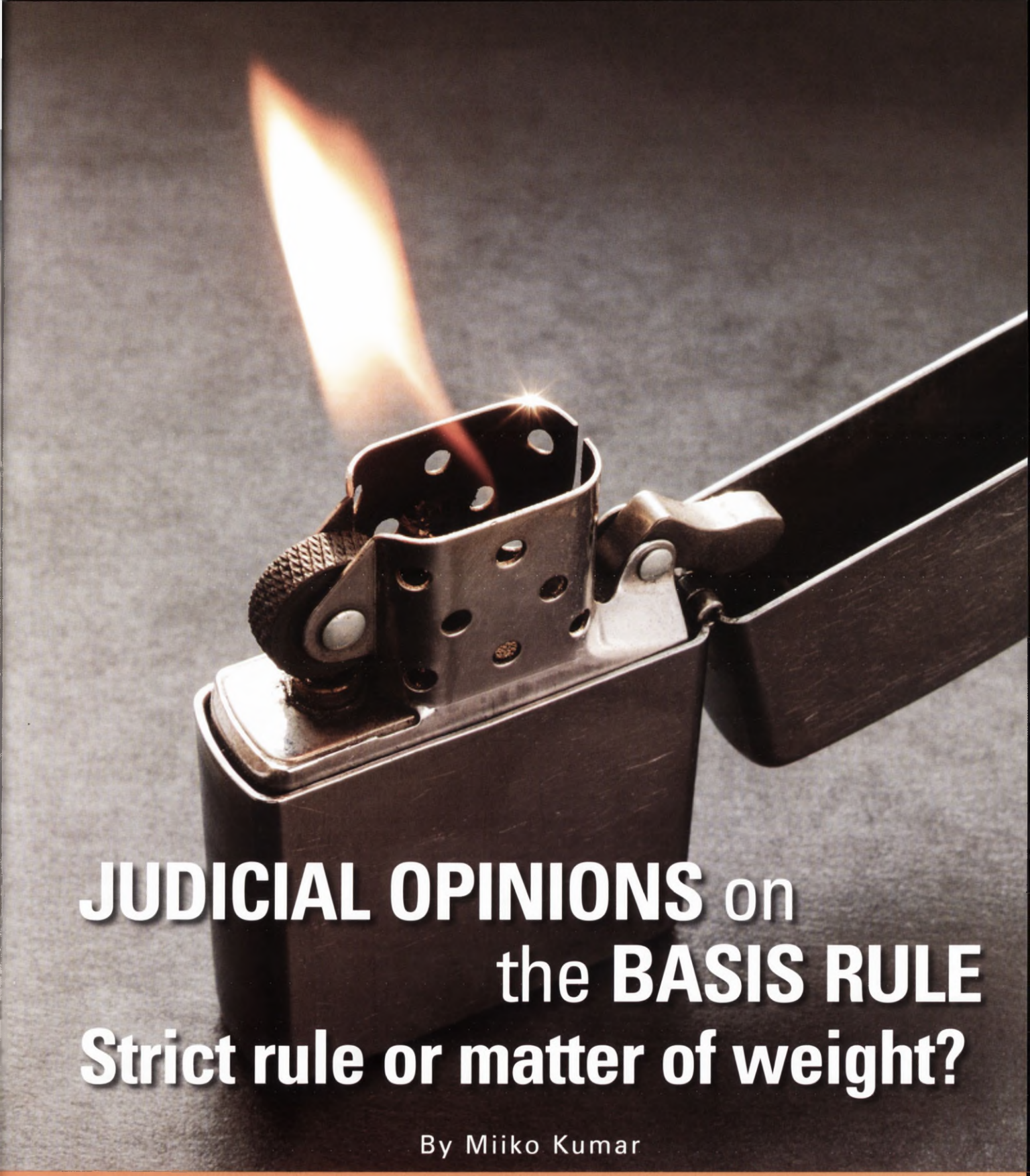

JUDICIAL OPINIONS on the BASIS RULE
Strict rule or matter of weight?

By Miiko Kumar

Objections intended to exclude expert evidence can take up a lot of time in the running of a trial. One such objection is the 'basis rule'. Such a rule is usually, but not always, invoked against expert opinion adduced in a plaintiff's case. Its use can be fatal[1] or it can have no consequence.[2]

The 'basis rule' is a 'rule by which opinion evidence is to be excluded unless the factual bases upon which the opinion is proffered are established by other evidence'.[3] There is reference in cases to the *identification* of the factual assumptions as also being a part of the basis rule.[4] However, this article confines the rule to proof of the factual assumptions upon which the opinion is based. This article considers whether the basis rule is a strict common law rule of admissibility that has not been abolished by the Uniform Evidence Legislation.[5] Or is the failure to prove the basis of an opinion a reason to exclude evidence due to relevance or discretion (this was the approach recommended by the ALRC)? Or can the failure to prove the basis of an opinion be taken into account as a matter of weight? Courts have struggled with these questions both at common law and under Uniform Evidence Legislation. Commentators also disagree.[6] To determine the status of the basis rule, this article considers its background, *Dasreef v Hawchar*, and decisions post-*Dasreef* – in particular, *Kyluk Pty Ltd v Chief Executive, Office of Environment and Heritage*.[7]

DID THE BASIS RULE EXIST?

At common law, there are cases that support a basis rule as a rule of admissibility.[8] Other cases use language to suggest that the basis rule is a matter relevant to the weight to be given to the opinion rather than as a basis for its exclusion.[9] It has been observed that the High Court has not dealt with the issue unequivocally.[10] The plurality in *Dasreef* did not consider the common law position, while Heydon J concluded that there is 'no doubt'[11] that a basis rule exists at common law.[12]

In recommending the Uniform Evidence Legislation, the ALRC reported that there was uncertainty about whether the common law basis rule operated as a 'criterion of admissibility or merely of weight'[13] and if the 'correct view is that there is a basis rule, then the law may be criticised'.[14] The ALRC concluded that the 'better view' is that there was no basis rule which operated as a rule of admissibility at common law and it proposed to refrain from introducing it.[15]

THE UNIFORM EVIDENCE LEGISLATION

Expert opinion must first be relevant; that is, 'if it were accepted, [the opinion] could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'.[16] Under the Uniform Evidence Legislation, the opinion rule excludes evidence of an opinion 'to prove the existence of a fact about the existence of which the opinion was expressed'.[17] The exception to this exclusionary rule is s79(1), which provides:

> '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.'

Failure to prove the factual basis could make an opinion irrelevant.[18]

Expert opinion which satisfies s79 could be excluded if its 'probative value' is outweighed by the danger that the evidence is 'unfairly prejudicial', 'misleading or confusing', or might 'cause or result in undue waste of time'.[19] For example, an opinion based on factual assumptions that are not established by evidence could 'mislead' the trier of fact. An expert opinion which does not disclose its factual basis could potentially place the cross-examiner in a position where their task is to impeach the expert's conclusions without knowing the facts used to reach those conclusions.[20]

MAKITA AND THE BASIS RULE

In *Makita (Australia) Pty Ltd v Sprowles*, Heydon JA (as he then was) set out an influential checklist for admissibility of expert opinion; one of the requirements included the facts observed by the expert must be identified and admissibly proved by the expert and, if the opinion is based on 'assumed' facts, they must be identified and proved in some other way.[21] *Makita* has been followed throughout Australia. In NSW it was modified; an expert's opinion did not become inadmissible because it did not disclose the true factual basis upon which it was first formed.[22]

The Federal Court rejected *Makita*'s basis rule, holding in *Sydneywide Distributors v Red Bull Australia* that s79 did not require the identification of the assumptions for an opinion, proof of the factual assumptions, or the reasoning process to be exposed.[23] *Sydneywide* was applied in subsequent decisions of the Federal Court.[24]

DASREEF PTY LTD v HAWCHAR

Mr Hawchar successfully sued his employer for negligence as a result of silicosis. His employer appealed on the ground that the expert opinion tendered by the plaintiff was inadmissible. The plaintiff relied on expert opinion from Dr Basden about the procedures that an employer could utilise to reduce the risk of a silica-related injury (use of an exhaust hood and wet cutting techniques). An opinion was also given that the plaintiff was exposed to a level of respirable dust a thousand or more times greater than the Australian standard.

The employer argued, relying on *Makita*, that s79 'requires some rational exposition to how the witness employed "specialist knowledge" to derive the particular opinion from facts, proved or assumed'. Mr Hawchar submitted that the application of *Makita* to the interpretation of s79 engrafted a basis rule on to the section. Reliance was placed on the ALRC's intention not to include a basis rule. Further, Mr Hawchar submitted that the failure to identify factual assumptions, or prove the factual basis for the opinion or expose the expert's reasoning process, were all matters that affected the weight of the opinion rather than its admissibility.[25]

The plurality and Heydon J were unanimous that the opinion was inadmissible to establish that Mr Hawchar's exposure to silica dust in the course of working for Dasreef was greater than the maximum level of exposure permitted.[26] The plurality doubted that Dr Basden sought to express an opinion about the 'numerical or quantitative level of respirable silica'; rather, his opinion was 'about what measures could have been taken to prevent Mr Hawchar contracting silicosis *if* he was exposed to respirable silica

at levels as much as 1,000 times greater than permissible levels'.[27] It was 'not intended to be an assessment which could form the foundation for a calculation of the time-weighted average level of exposure of a particular worker'[28] (that is, to base a calculation for proving unsafe levels of exposure).

The plurality in *Dasreef* interpreted s79 as requiring the satisfaction of two criteria:

> 'The first is that the witness who gives the evidence "has specialised knowledge based on the person's training, study or experience"; the second is that the opinion expressed in evidence by the witness "is wholly or substantially based on that knowledge".'[29]

The plurality found that Dr Basden did not satisfy the criteria as he did not give evidence of how his training, study and experience permitted him to give an opinion about the numerical or quantitative exposure,[30] and therefore there was 'no footing on which the primary judge could conclude that a numerical or quantitative opinion expressed by Dr Basden was wholly or substantially based on specialised knowledge based on training, study or experience'.[31]

Heydon J, in dissent, observed that the expression 'basis rule' can be used in 'a variety of senses';[32] first, the disclosure of facts and assumptions upon which the opinion is founded ('assumption identification' rule); second, the proof of the facts and assumptions before the opinion was admissible ('proof of the assumption' rule); and third, the requirement that a statement of reasoning show how the facts and assumptions related to the opinion reveal that the opinion was based on expertise ('statement of reasoning' rule). His Honour found that each of the three rules exists at common law,[33] and that the common law continues to apply in respect of the second rule, whereas the first and third rules are retained by the text of s79.[34] Heydon J criticised the ALRC's reasons for doubting the existence of the proof of assumption rule.[35] His Honour construed the ordinary meaning of s79 as not abolishing the rule[36] and concluded that the ALRC's error in asserting that the basis rule did not exist 'has misled both itself and some of its readers'.[37] The ALRC's 'misapprehension of the common law, and hence of its task, has resulted in a failure to have enacted specific language ensuring that s79 tenders need not comply with a proof of assumption rule'.[38] Therefore, the common law rule survives under s79. His Honour concluded that to use discretions to 'secure the advantages of a proof of assumption rule which s79 putatively did not introduce is inefficient'.[39]

One view is that the plurality did not consider the existence of a basis rule as the opinion was inadmissible because the expert's reasoning showed a 'lack of any sufficient connection between a numerical or quantitative assessment or estimate and relevant specialised knowledge'.[40] It is clear that to satisfy the terms of s79 (that is, to show that an opinion is 'based on [specialised] knowledge'), an expert needs to explain how their field of 'specialised knowledge' applies to the 'facts assumed' to produce the opinion.[41] The plurality did not expressly examine whether the assumptions require proof in order for the opinion to be admissible under s79. But the plurality explicitly referred to the identification of the 'facts assumed or observed' as a requirement of s79 and did not refer to a requirement that the facts be proved. This suggests that they did not view the basis rule as a requirement for admissibility.[42] However, the plurality did not expressly deal with Heydon J's conclusion that the common law proof of assumption rule survives – in addition to the requirements in s79 – to expert evidence tendered under s79. But, then again, they took the view that the common law 'need not be examined' because the statute determines admissibility, which could suggest that the common law rule does not survive.[43]

To satisfy s79, an expert must explain how their 'specialised knowledge' applies to the 'facts assumed' to produce the opinion.

THE BASIS RULE AFTER *DASREEF*

The cases since *Dasreef* demonstrate uncertainty about the status of the basis rule. In one decision it was held that *Dasreef* adopts *Makita*,[44] and others hold that *Makita* was approved by *Dasreef*.[45] While it is clear that Heydon J adopts *Makita*, the plurality analysis in *Dasreef* emphasised that admissibility is to be determined in accordance with the Uniform Evidence Legislation rather than by 'any attempt to parse and analyse particular statements in decided cases divorced from the context in which those statements were made'.[46] *Makita* is cited in a very limited way and is read with 'one basic proposition at the forefront of consideration'; namely, that admissibility of opinion is to be determined by application of the requirements of the Uniform Evidence Legislation rather than statements in decided cases.[47]

There are appellate and single judge decisions that refer to *Dasreef* as authority for the proposition that the basis rule is a requirement for admissibility.[48] One judge used the silence of the plurality on the issue as 'no disagreement with Heydon J' on the issue and found that the basis rule was a requirement for admissibility.[49]

In contrast, there are decisions that have held that *Dasreef* means that the basis rule is not a requirement.[50] The failure to prove the factual basis for an opinion has been held to be a matter that is relevant to the *weight* of the opinion, not its admissibility.[51] The failure to prove the facts upon which the opinion is based is at the court's discretion under s135.[52]

There are decisions where the court lists the requirements for admissibility of expert opinion and does not include the basis rule as a specific requirement.[53] The NSW Court of Appeal in another decision does not list the basis rule as a requirement, but notes the unresolved conflict about the basis rule.[54]

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KYLUK PTY LTD v CHIEF EXECUTIVE – NO BASIS RULE

Kyluk Pty Ltd v Chief Executive, Office of Environment and Heritage[55] concerned the admissibility of an expert report about soil. The expert relied on particle size analysis performed by a laboratory. The analysis was not admitted as evidence in the trial. The issue on appeal was whether the expert report was inadmissible due to the factual basis for the opinion not being proved by evidence. The appellant relied on Heydon J's decision in *Dasreef*.[56] Price J noted the conflict relating to the basis rule in *Dasreef* and concluded that it was not appropriate to resolve the conflict.[57] Price J excluded the report under s135 as the appellant was unable to test the conclusions expressed by the expert without having the laboratory results.[58] Schimdt J (with McCallum J agreeing) found that the evidence was properly excluded by exercise of discretion. However, Schmidt J resolved the question of the status of the basis rule. Schmidt J read the plurality in *Dasreef* as not requiring the factual basis rule to be proved in order for the expert opinion to be admissible.[59] Her Honour referred to the two criteria for admissibility as identified by the plurality in *Dasreef*, and noted that the opinion must state both the facts and the reasoning upon which the opinion is based. Her Honour observed:[60]

> 'An expert opinion which meets those requirements need not be excluded if all of the factual bases upon which the opinion is proffered are not established by the expert's own evidence. Even if facts which the expert "assumes" or "accepts" in reaching the opinion expressed are not proved in some other way, then the opinion may still be admissible. That will depend on the nature of those facts and what bearing they have on the opinion. If they provide but a small part of the basis upon which the opinion rests, then the failure to prove those facts may have but little impact, and not render the opinion inadmissible. The failure to prove facts which provide a significant basis for the opinion might, by way of contrast, be such as to render the opinion no longer relevant to a fact in issue, no foundation for the opinion having been established. Such an opinion, even if it were admitted, would be of no value. Where an opinion is admitted, the failure to establish a fact which is not of such significance, may nevertheless have an impact on the weight given to the opinion.'

This is a significant decision, as it says that the basis rule is not a rule of admissibility. Rather, the non-proof of the factual bases can mean that the opinions cannot be tested or assessed, which gives a prejudicial effect that results in their exclusion under s135 or 137. This approach is consistent with the ALRC's intention. However, after *Kyluk*, the Court of Appeal stated that it would not 'dwell' on the status of the basis rule following *Dasreef*.[61] This could mean that there is no need to dwell on the status of the rule because *Kyluk* has clarified the issue. On the other hand, it may not be necessary to dwell on the rule because it did not arise from the facts of the appeal, and the status of the rule has not been resolved by *Kyluk*.

OBJECTING OR OPPOSING OBJECTIONS DIRECTED TO THE FACTUAL BASIS

An objection to an opinion based on its factual basis ought to be made at the point of tendering the opinion. In some cases, judges take a short cut by admitting the opinion evidence but dealing with the objection as a 'matter of weight'. Such an approach is not strictly correct, if the objection is to admissibility; the evidence is either in or out. The 'general rule' is that trial judges should 'rule upon objections as soon as possible'.[62] Admissibility rulings should be delivered after the objection is made and argued.[63]

One approach that can be taken is to make an objection to the opinion on the ground that the assumptions may not be the subject of proof, and therefore the opinion is irrelevant. A judge can admit the opinion as being provisionally relevant under s57. This was an approach used in a Victorian case, where a judge had to rule on an objection to expert opinion due to 'the factual bases for expressing the opinion were lacking to the point where the opinion was inadmissible'. The judge provisionally admitted the opinion under s57 of the Act and allowed the parties in closing submissions to further debate the question of admissibility of, and the weight to be given to, the opinion.[64]

CONCLUSION

The leading authority after *Dasreef* suggests that the basis rule does not exist as a common law rule, but rather the failure to prove the factual basis may still be fatal, as the opinion could be excluded under ss55, 135 or 137. If the opinion survives an attack under ss55, 135 or 137, the deficiencies in the proof of its factual basis may be a matter that affects the weight of the opinion. ■

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Notes: **1** For example, in *Makita v Sprowles* (2001) 52 NSWLR 705, the exclusion of the expert opinion resulted in the plaintiff failing to prove her case. **2** For example, in *Dasreef Pty Ltd v Hawchar ('Dasreef')* (2011) 243 CLR 588, the expert witness's estimate was inadmissible but other evidence established the employer's negligence, 608 [49]. **3** *Dasreef* (2011) 243 CLR 588, 605 [41] (French CJ, Gummow, Hayne, Crennan, Kieffel and Bell JJ). This is consistent with the Australian Law Reform Commission's definition: Australian Law Reform Commission, *Evidence*, Interim Report No. 26 (1985), 417 [750]. **4** See Branson J in *Quick v Stoland Pty Ltd* (1998) 87 FCR 371, 373-4 and *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354, 357. Also see *Castel Electronics Pty Ltd v Toshiba Singapore Pty Ltd* (2011) 277 ALR 116, 146 [217] (Keane CJ, Lander and Besanko JJ). **5** The jurisdictions that have enacted the Uniform Evidence Legislation are: *Evidence Act* 1995 (Cth); *Evidence Act* 1995 (NSW); *Evidence Act* 2001 (Tas); *Evidence Act* 2004 (Norfolk Island); *Evidence Act* 2008 (Vic); *Evidence Act* 2011 (ACT) ('Uniform Evidence Legislation'). But note such legislation is not uniform: J D Heydon, 'The Non-Uniformity of the "Uniform" Evidence Acts and their effect on the Common Law' paper presented at Continuing Professional Development Annual One Day Seminar: *Evidence Act*, Law Society of New South Wales, 21 September 2013. **6** Some say that the basis rule is not a requirement of admissibility: see Ian Freckelton and Hugh

Selby, *Expert Evidence: Law, Practice and Advocacy* (Thomson Reuters, 4th ed, 2009), 191 and Jeremy Gans and Andrew Palmer, *Uniform Evidence* (Oxford University Press, 2010), 145. Odgers refers to the rule as not 'good law': Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 10th ed, 2012), 374. However, others regard it as a question of admissibility: Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (LexisNexis 5th ed, 2010), 648. **7** *Kyluk Pty Ltd v Chief Executive, Office of Environment and Heritage* (2013) 298 ALR 532. **8** For example, *R v Turner* [1975] 1 QB 834, 840; *Bugg v Day* (1949) 79 CLR 442, 462 (Dixon CJ). **9** For example, *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA 58; 59 ALJR 844, 846 [8]–[10] (Mason ACJ, Wilson, Brennan, Deane and Dawson JJ). **10** Ian Freckelton and Hugh Selby, *Expert Evidence: Law, Practice and Advocacy* (Thomson Reuters, 4th ed, 2009), 114. **11** *Dasreef* (2011) 243 CLR 588, 613 [66] (Heydon J). **12** *Ibid* 631 [108] (Heydon J). **13** ALRC 26, 79 [161]. **14** *Ibid* 198 [362]. **15** *Ibid* 417 [750], 198 [363]. **16** Uniform Evidence Legislation ss55, 56. **17** *Ibid* s76. **18** See *Eric Preston Pty Ltd v Euroz Securities Ltd* (2011) 274 ALR 705, 724 [171]. **19** Uniform Evidence Legislation ss135, 137. **20** See *Kyluk Pty Ltd v Chief Executive, Office of Environment and Heritage* (2013) 298 ALR 532. **21** (2001) 52 NSWLR 705, 743 [85]. **22** *Australian Securities & Investments Commission v Rich* (2005) 218 ALR 764 [136], [105]. Also see *Hancock v East Coast Timber Products Pty Limited* [2011] NSWCA 11 [70] (Beazley JA). **23** *Sydneywide* (2002) 55 IPR 354, 356–7 [6]–[10], 359 [16], 378–9 [86]–[89]. **24** For example, *Neowarra v Western Australia* (2003) 134 FCR 208; *Sampi v Western Australia* [2005] FCA 777; *Gambro Pty Ltd v Fresenius Medical Care Australia Pty Ltd* (2007) 245 ALR 15; *BHP Billiton Iron Ore v National Competition Council* (2007) 162 FCR 234; *Bodney v Bennell* (2008) 167 FCR 84. **25** See Gaudron J's statement in *HG v R* (1999) 197 CLR 414, 433 [63]. Gummow J agreed: 449 [124]. **26** *Dasreef* (2011) 243 CLR 588, 595 [9] and 640 [137]. **27** *Ibid* (emphasis in original). **28** *Ibid* [33]. **29** *Ibid* 602 [32]. **30** *Ibid* 604 [39]–[40]. **31** *Ibid* 605 [40]. **32** *Ibid* 612 [61]. **33** *Ibid* 612 [64], [66], 622 [91]. **34** The plurality judgment also found that these two requirements are from the text of s79. **35** *Dasreef* 615 [71]–[89]. **36** *Ibid* 631 [108]. **37** *Ibid* [109]. **38** *Ibid* 632 [111]. **39** *Ibid* 635 [119]. **40** *Ibid* 605 [42]. **41** *Ibid* 604 [37]. The plurality qualifies this with 'ordinarily'. But note, it has been recorded that *Dasreef* has created a debate about whether the factual assumptions require identification: *Weston & Laurent* [2013] FamCAFC 34 [59] (Finn, Strickland & Ryan JJ). **42** *Ibid* 604 [37], [41]. **43** *Ibid*, 604 [41]. **44** *Clear Wealth Pty Ltd v Kwong* [2012] NSWSC 561 [5] (Rein J). **45** *Chief Executive Office of Environment and Heritage v Kyluk Pty Limited* [2012] NSWLEC 22 [26] (Pain J) (overturned on appeal). See also *Sayer v Radcliffe* (2012) 48 Fam LR 298 [56]. **46** *Dasreef* [37]. **47** *Ibid*. **48** *Millis v Valpak (Australia) Pty Ltd* [2013] [8] (Beazley P, Meagher JA and Gleeson JA); *Origin v Bestcare Foods* [2013] NSWCA 90 [82] (Ward JA with Macfarlan and Hoeben JJA agreeing); *Cooper v The Queen* [2011] NSWCCA 258 [194] (Beazley JA with Hidden J and RA Hulme J agreeing); *Land Enviro Corp Pty Ltd v HTT Huntley Heritage Pty Ltd* [2012] NSWSC 177 [43] (Stevenson J); *Sydney Attractions Group Pty Ltd v Schulman* [2012] NSWSC 951 [61] (Stevenson J); *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2012] VSC [98] (Dixon J); *Hudspeth v Scholastic & Cleaning Consultancy Services Pty Ltd* [2012] [7] (Dixon J); *Gray v Richards (No. 2)* [2011] NSWSC 1502 [24]-[25] (McCallum J). **49** *Land Enviro Corp Pty Ltd v HTT Huntley Heritage Pty Ltd* [2012] NSWSC 177 [43] (Stevenson J). Stevenson J said that 'in *Dasreef* the plurality, which decided the case on a different basis from Heydon J, expressed no disagreement with Heydon J'. **50** *Tivo Inc v Vivo International Corporation Pty Ltd* [2012] FCA 252 [412] – [414] (Dodds-Streeton J); *Walton Construction Pty Ltd v Illawarra Hotel Company Pty Ltd* [2011] NSWSC 952 [12]-[13] (McDougall J); *King v Jetstar Airways Pty Ltd* [2011] FCA 1259 [4] (Robertson J); *Matthews v SPI Electricity & Ors (Ruling No. 24)* [2013] VSC 269 [7] – [9] (Forrest J). **51** *Ample Source International Ltd v Bonython Metals Group Pty Ltd* (No 6) [2011] FCA 1484 [300] (Robertson J); *Gilham v R* [2012] NSWCCA 131 (25 June 2012) [186] (McClellan CJ and CL, with Fullerton and Garling JJ agreeing); *Smith v Brambles* [2011] NSWSC 963 (26 August 2011) [77] (Schmidt J); *Coote v Kelly* [2012] NSWSC 219 [28] (Schmidt J). **52** *Traderight (NSW) Pty Ltd & Ors v Bank of Queensland (No. 13)* [2013] NSWSC 90 [12], [15] (Ball J). **53** *K & M Prodanovski Pty Ltd v Calliden Insurance Limited* [2012] NSWCA 117 [25] (Meagher JA with Macfarlan JA and Tobias AJA agreeing); *Allianz Australia v Sim* [2012] NSWCA 68 [8]-[9] (Allsop P) [113] (Basten JA with Meagher JA agreeing); *Cambridge v Anastasopoulos* [2012] NSWCA 405 [26] (Meagher JA with Barrett JA and Sackville AJA agreeing). **54** *Nicholls & Ors v Michael Wilson & Partners Ltd* [2012] NSWCA 383 [209], [243] (Sackville AJA with Meagher and Barrett JJA agreeing). **55** *Kyluk Pty Ltd v Chief Executive, Office of Environment and Heritage* (2013) 298 ALR 532. **56** [2013] NSWCCA 114, [151] (Schmidt J). **57** [2013] NSWCCA 114, [61] (Price J). **58** *Ibid* [66] (Price J). **59** [2013] NSWCCA 114, [164] (Schmidt J with McCallum J agreeing). **60** *Ibid* [177]. **61** *P & M Quality Smallgoods Limited v Leap Seng* [2013] NSWCA 167 [34] (Barrett JA, Hoeben JA and Tobias AJA agreeing). Although the basis rule did not arise in that case, Barrett JA's comment at [34] indicated that the issue had not necessarily been resolved, for it, by Kyluk. **62** *Dasreef* (2011) 243 CLR 588, 599 [19] (French CJ, Gummow, Hayne, Crennan, Kieffel and Bell JJ). **63** *Ibid* 598 [18]–[20]. See *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No. 4)* [2011] NSWLEC 119 [42] (Pepper J). **64** *Matthews v SPI Electricity & Ors (Ruling No. 24)* [2013] VSC 269 [14] (Forrest J).

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