

# EXPERT EVIDENCE AND THE FEDERAL COURTS CURRENT DEVELOPMENTS

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## **Introduction**

This paper is intended to provide an overview of current issues concerning expert evidence in Federal Courts. The Federal Courts include three courts established pursuant to Chapter III of the Australian Constitution, namely the Federal Court, the Family Court and the Federal Magistrates Court (the FMC).

It is self-evident that each of the Federal Courts hear and determine cases which, depending on the specific jurisdiction frequently involve the use of expert opinion evidence.

Rules relating to opinion evidence have evolved in the context of other rules of evidence. The starting point which applies to the so-called "expert evidence" is that usually witnesses are prevented from expressing an opinion. The rule against opinion evidence has developed in the context of the requirement of all courts and tribunals to obtain what is described as the best evidence. Accordingly, the law developed rules against opinion evidence which have a common intention of seeking to ensure that the parties have a fair hearing based upon the rules of evidence.

All the Federal Courts are bound to apply the rules of evidence including the FMC which was established to be less formal than the other courts.

In conventional evidentiary terms, it is clear that opinion evidence has been rejected because a witness giving that opinion is not providing evidence of what he saw and heard (*de visu et auditu*)<sup>1</sup>.

Any discussion concerning expert evidence should never underestimate the privilege extended to witnesses expressing expert opinion if given and that

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<sup>1</sup> 7 *Wigmore*, paras 1917-8 cited in Heydon J. D., *Cross On Evidence*, Australia, LexisNexis Butterworths, 2004, p.922

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the ability to do so is an exception to the rule against opinion evidence. The courts have grappled with the issues concerning expert opinion evidence for centuries. Saunders J stated the following:

“...if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. Which is an honourable and commendable thing in our law. For thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them as things worthy of commendation.”<sup>2</sup>

That extract from the Saunders J decision was reported in 1554.

In that case the issue for determination involved Thomas who was then a sheriff from the County of Anglesea being summonsed to answer a plea by Sir Richard Buckley that Thomas should bring to him £100 owed to Buckley and which Thomas, it was claimed, had unjustly detained. The court was concerned with the grammar and construction of a Latin word<sup>3</sup>.

It is useful to pause for a moment and contemplate the fact that in 1554 when Thomas v Buckley was reported other events included the marriage of Queen Mary to Phillip of Spain, Elizabeth was sent to the Tower on 18 March and released on 19 May and Bishops Ridley and Lattimer were burned at the stake on 16 October. On a more adventurous and less gruesome note, a London syndicate fitted out five ships to explore the Guinea Coast for possible trade.

Hence it is evident that for a considerable period of time the courts have been required to deal with expert opinion evidence and if nothing else the development of the rules of evidence over a long period of time should be at least shown a degree of respect. We should not too readily seek short-term solutions to problems that have been with us for some time. Simply because we no longer burn people at the stake does not mean that we should abandon principles of law developed over centuries.

I should declare my bias when it comes to an analysis of current practice in Federal Courts concerning specialist opinion evidence based upon my own experience in both criminal and civil trials over a period of 20 years. The arrangements which courts make in relation to expert opinion evidence, in my view, should always be undertaken with a degree of care to ensure that the balance is achieved between the important issues of case management and costs and providing an opportunity for parties to adduce and/or test expert opinion evidence.

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<sup>2</sup> (1554) 1 Plowden 118 at 124: 75 ER 182 at 192

<sup>3</sup> Students of Latin would do well to read the decision, not just of Saunders J but also of Staunford J.

I note from a review of cases and articles that often expert opinion evidence may only be required to educate the presiding judge in relation to a specialist area of knowledge by way of what might be described as a "tutorial". This process to some extent is already recognised in rule 34B of the Federal Court Rules which provides for an "expert assistant". The purpose of that rule is to assist the court on "any issue of fact or opinion identified by the court or judge... in the proceeding".

When considering any new proposal to deal with expert opinion evidence, it is useful to consider the manner in which courts have deal with the tension between case management and other issues including adjournment.

In *Smith & Anor v Gannawarra Shire Council & Anor*<sup>4</sup> Winneke P stated:

"In this day and age when the courts are under pressure to deal with cases before them in an expeditious fashion and where, accordingly, case management has become a significant aspect of the curial processes, the administration of justice still requires that the courts ensure, so far as practicable, that justice be administered even-handedly so that each party to a dispute is in a position, within the bounds of reason, to present his or her case to the court in its best light and in an orderly fashion. As Dawson, Gaudron and McHugh, JJ. pointed out in *State of Queensland v. J.L. Holdings Pty Ltd*, in matters like this "Justice is the paramount consideration." In other words, courts should be astute to ensure that expediency is not permitted to usurp justice by refusing to grant an adjournment at the instance of a party in circumstances which will significantly interfere with the ability of that party to present his or her case effectively."

If justice is the paramount consideration when deciding whether to grant an adjournment, then it clearly should be the paramount consideration when dealing with expert evidence.

In my view it is essential when considering expert opinion evidence to ensure that expediency is not permitted to usurp justice by refusing parties the opportunity to adduce and/or test the expert opinion evidence where that evidence forms a crucial or significant part of the Court's decision. Justice should remain the paramount consideration which in simple terms means that the parties are entitled to a fair hearing.

For all Federal Courts the *Evidence Act 1995* (Cth) applies, though it is recognised it does not cover the entire field of evidence.

Opinion evidence is dealt with in ss.76 to 80 which relevantly provide as follows:-

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<sup>4</sup> (2002) 4 VR 344 at 352

**“The opinion rule**

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

**Exception: opinions based on specialised knowledge**

79. 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.

**Ultimate issue and common knowledge rules abolished**

80. Evidence of an opinion is not inadmissible only because it is about:  
(a) a fact in issue or an ultimate issue; or  
(b) a matter of common knowledge.”

I have deliberately set out s.76 which relates to opinion evidence generally and note that the heading in relation to s.79 commences with the word "exception".

It is clear from s.79 that in addition to establishing relevance of evidence the following must be proved to permit the exception to opinion evidence to apply to expert evidence:-

- The witness must have "specialised knowledge"
- The "specialised knowledge" must be based upon persons "training, study or experience" and
- The opinion expressed of that person must be "wholly or substantially" based on that specialised knowledge.

It is not necessary for me to explore in further detail the principles of law which apply when interpreting the provisions of the Commonwealth Evidence Act or indeed other principles. These matters have been extensively dealt with in many publications<sup>5</sup>.

In this paper it is my intention to provide some practical insight into the jurisdictions of the Federal Courts and the way in which each court has sought to deal with expert evidence, rather than embark upon a detailed analysis of the law relating to expert evidence.

It is useful to note the following statement by French J in an excellent contribution on the Federal Courts in, "The Australian Federal Judicial System"<sup>6</sup>, where he states the following which applies to all Federal Courts, including the FMC:

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<sup>5</sup> See for example Heydon J. D., Cross On Evidence, Australia, LexisNexis Butterworths, 2004; Freckelton, I. and Selby, J., 'Expert Evidence Law, Practice, Procedure and Advocacy', Third Edition, Lawbook Co, Sydney, 2005

<sup>6</sup> Opeskin, B., and Wheeler, F., The Australian Judicial System, Victoria, Melbourne University Press, 2000

“In considering the federal courts' jurisdiction, it is wise to bear in mind the words of Sir Hayden Starke about the High Court which are equally applicable to each subordinate federal court: ‘To the Constitution and the laws made under the Constitution it owes its existence and all its powers, and whatever jurisdiction is not found there either expressly or by necessary implication does not exist.’”

Having set out the brief background in relation to expert opinion evidence, it is appropriate to consider each Court and current developments though it would be impossible to set out all the options or variations currently used in each Court.

## **The Federal Court**

The Federal Court, as a national superior court of record, was established to hear and determine what are described as "federal legal controversies".<sup>7</sup> The Federal Court exercises jurisdiction in a wide range of cases, many of which involve expert opinion evidence. Some of the more prominent cases involve actions arising out of Trade Practices, Copyright, Patent, Trade Mark and Native Title legislation. More recently significant expert evidence has been considered by Federal Court Justices sitting as the Australian Competition Tribunal.

Significant adverse comments were made about some experts by Wilcox J in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*<sup>8</sup>. That case concerned the operation of Kazaa internet peer to peer file – sharing system. The system operates worldwide and enables users free of charge to share with other users any material the first user wishes to share whether or not that material is subject to copyright simply by placing that material in a file called “My Shared Folder”. It is not necessary for me to consider in further detail the issues in that case.

Specifically Wilcox J stated the following:

“25 A further notable omission from the evidence was direct and definite identification of the Kazaa source code. Some expert witnesses examined what they thought to be a copy of the source code. Mr Morle gave evidence, under cross-examination by counsel for the Sharman parties, that he had instructed another person to send a library copy of what was thought to be the source code to Professor Keith Ross, one of the Sharman respondents' expert witnesses. However, neither Mr Morle nor anyone else confirmed the identity of the code perused by Professor Ross. Uncertainty about the content of Kazaa's source code complicated the hearing.

26 The principal parties relied heavily on evidence from so-called ‘independent experts’. Much of this evidence was helpful, some of it extremely valuable. Some

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<sup>7</sup> Shaw, G., ‘The Industrial Relations Court of Australia’, *Current Affairs Bulletin*, vol.71 (1994), pp17-19

<sup>8</sup> [2005] FCA 1242

of this evidence was not helpful, either because it related to a peripheral, even irrelevant, matter or because I was compelled to form an adverse view about the objectivity or intellectual integrity of the witness. I mention, in this context, particularly Dr Roger Clarke, whose evidence on behalf of the Altnet parties was little more than a partisan polemic, and, to a lesser extent, Professor Ross.”

The comments received extensive publicity. Part of the publicity arising from this case included an article which appeared in *The Australian*<sup>9</sup> under the headline “Call to Fix-up Biased System”. The article appeared to use as a springboard the criticism of expert evidence arising from Wilcox J in the Universal Music case. Somewhat surprisingly the article proceeded to attack in general terms the adversarial system and cross-examination, though curiously the criticism made by a former senior member of the Administrative Appeals Tribunal seemed to focus more on concerns expressed by that member in relation to use made of one side, namely the respondents, in proceedings before the Tribunal. The article advocated reliance upon treating doctors when dealing with issues of legal liability. That view neglects entirely the lack of practicality of that approach given that most treating doctors are very unwilling to be subject to the inconvenience of the court process and often do not present as good witnesses capable of expressing independent opinion.

Though not acknowledged by the former senior member of the Tribunal, the fact remains that independent expert evidence when subject to appropriate cross-examination and genuine independent adjudication can often assist the court process. Misuse of expert evidence applies equally to applicants and respondents. The senior member referred to it as being “a disgrace that applicants did not have ready access to reports that respondent witnesses compile”. It is difficult to comprehend the basis of this criticism though it may demonstrate a perception of some Tribunal members, who perhaps like members of jury’s, sometimes, feel that not all relevant information is provided.

If one were to examine the use of expert evidence objectively then the same criticism can be made of all parties, where often applicants attend medical examination and no report is produced and respondents never know that the applicant has indeed attended an appointment. There are many difficulties that clearly arise when dealing with expert evidence, though the criticism made by Wilcox J highlights the capacity of competent judges acting independently to assess the value of expert evidence in a forthright, direct and appropriate manner. It does not mean that independent experts or indeed the adversarial system should be abandoned as clearly the cross-

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<sup>9</sup> 16 September 2005

examination process in the matter before Wilcox J assisted in revealing inadequacies of expert evidence adduced in support of one party's case.

In the Federal Court Black CJ issued guidelines dealing with an expert's general duty to the court, the form of expert evidence and the expert's conferences. The guidelines which first appeared in 1998 were subsequently revised in 2003 and 2004.

The third version of the guideline issued on 19 March 2004 specifically states the following under the heading "General Duty to the Court" –

- “1.1 An expert witness has an overriding duty to assist the Court on matters relevant to area of expertise
- 1.2 An expert witness is not an advocate for a party
- 1.3 An expert witness paramount duty is to the Court and not to the person retaining the expert.”

In an Explanatory Memorandum issued together with the revised guidelines on 19 March 2004 the Federal Court states the following:-

“Ways by which an expert giving opinion evidence may avoid criticism of partiality include ensuring that the report, or other statement of evidence:-

- (a) is clearly expressed and not argumentative in tone;
- (b) is centrally concerned to express an opinion, upon a clearly defined question or questions, based on the expert's specialised knowledge;
- (c) identifies with precision the factual premises upon which the opinion is based;
- (d) explains the process of reasoning by which the expert reached the opinion expressed in the report;
- (e) if confined to the area or areas of the expert's specialised knowledge; and
- (f) identifies any pre-existing relationship between the author of the report, or his or her firm, company etc and a party to the litigation (eg. a treating medical practitioner, or a firm's accountant).”

In its discussion paper produced in July 2005 the Australian Law Reform Commission (ALRC) in conjunction with the New South Wales and Victorian Law Reform Commissions referred to the Uniform Evidence Acts and Expert Opinion evidence. Specific reference was made to the requirements of the legislation as interpreted by Heydon JA in *Makita (Australia) Pty Ltd v Sprowles*<sup>10</sup>. The commission noted in its discussion paper that Branson J in *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd*<sup>11</sup> may be understood as a “counsel of perfection”. The Makita criteria according to Branson J in *Sydneywide Distributors* may be regarded as going to weight rather than admissibility. After considering this exchange the ALRC in its

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<sup>10</sup> (2001) 52 NSWLR 705

<sup>11</sup> (2002) FCAFC 157

discussion paper relevantly states the following:

“8.70 It has also been stated that the suggestion in *Makita* that the factual basis of an expert report must be proven in order for expert opinion to be admissible would amount to ‘restoring the basis rule’. By contrast, it has been held that an ‘expert’s exposure of the facts upon which the opinion is based’ should be sufficient to establish whether the opinion is based on the expert’s specialised knowledge in terms of s 79 – a matter that is not dependent on proof of the existence of those facts.

8.71 On the other hand, Justice Heydon has noted that such evidence to be dealt with as a matter of weight at the end of the trial may be difficult to reconcile with the ‘practical exigencies of conducting litigation’ and with the relevance requirement, which contemplates that evidence cannot be admitted unless there is some evidence leaving it reasonably open to conclude that its assumptions are sound.”

It is useful to refer to a decision of Sundberg J who dealt with the “basis rule” arising from expert evidence. In the matter of *Neowarra & Ors v Western Australia & Ors*<sup>12</sup> His Honour had to deal with a challenge to a joint anthropological and linguistic report and indeed various other expert reports in a native title claim over areas of land and waters in the Kimberley. A number of respondents objected to the whole of the joint report on the basis that it was unclear whether various statements in the report were opinions, assumption, hypothesis, fact or hearsay as well as on the basis that it was unclear from the report whose opinions were being expressed. In admitting parts of the reports into evidence the Court held that the opinion provisions of the Evidence Act 1995 do not incorporate a basis rule requiring the facts upon which an opinion or conclusion is based to be established by admissible evidence. The weight to be accorded to an opinion or conclusion that is founded on a fact that is not established by admissible evidence may thereby be reduced.<sup>13</sup>

The ALRC in its discussion paper notes that in its earlier report on evidence in 1985 in recommended that the basis rule should not be a pre condition to admissibility under the Uniform Evidence Acts and that such matters should be resolved under the general discretion to exclude.<sup>14</sup>

A certain amount of flexibility applies in relation to expert evidence in the Federal Court. The concept of expert conferences which appears in the guidelines provides the following:-

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<sup>12</sup> (2003) 205 ALR 145

<sup>13</sup> see paragraphs [15] – [27] and [29]

<sup>14</sup> Uniform Evidence Act, s.135

- “3.1 If experts retained by the parties meet at the direction of the Court it would be improper conduct for an expert to be given or to accept instructions not to reach agreement. If, at a meeting directed by the Court the experts cannot reach agreement about matters of expert opinion they should specify their reasons for being unable to do so.”

In considering options for reconciling expert opinion it is noted that Heerey J in an article in the Civil Justice Quarterly refers to "the hot tub"<sup>15</sup>. His Honour refers to this as being a "irreverent soubriquet" which he refers to as being a procedure "initially developed in the Trade Practices Tribunal" (now the Australian Competition Tribunal) which is an administrative tribunal chaired by a Federal Court judge deciding whether authorisations should be given on public benefit grounds to arrangements otherwise contrary to competition law.

An example of innovative orders made by the Australian Competition Tribunal is found in *Qantas Airways Ltd*<sup>16</sup> where Goldberg J made the following orders during the course of the hearing:-

- “1. The parties deliver to the experts later this afternoon or early this evening a number of questions or issues to which the tribunal wishes to direct the expert's attention and which it will ask them to address tomorrow.
2. Each of the experts, when he receives the list of questions or issues, is not to discuss those matters with anyone before being sworn in to give evidence tomorrow.
3. Those questions and issues will be made available to counsel overnight, but the tribunal does not wish the dissemination of the questions or issues to go any further at this stage.
4. The tribunal proposes to adopt the following procedure in relation to the giving of the expert's evidence tomorrow.
  - (a) the five experts will be sworn in at the same time;
  - (b) each of them be invited to make an opening statement of around 15 minutes as to how they see the issues in terms of their evidence and the core issues in the proceedings at this stage;
  - (c) then the experts will be invited to ask questions of any of the other of the experts;
  - (d) then the tribunal will open the floor between the five experts for any dialogue which they wish to undertake, having regard to what has preceded that dialogue earlier in the morning;
  - (e) the experts will then have the opportunity of about 10 minutes to sum up the position as they see it from their point of view in relation to the issues in respect of which their evidence and their participation is relevant;
  - (f) then counsel would be given the opportunity to cross-examine. So far

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<sup>15</sup> Heerey, J, 'Recent Australian Developments', Civil Justice Quarterly, vol. 23 (October 2004), pp.386-395

<sup>16</sup> (2004) ACompT 9 (12 October 2004)

- as cross-examination is concerned, or questioning, depending on who asks the questions, the extent to which questions might be leading is a matter of flexibility. Each counsel would cross-examine what I might call the five witnesses who are called by the opposing parties, but not their own witnesses. After that range of cross-examination has been completed, then give a final opportunity for re-examination;
- (g) during the procedure the tribunal may ask questions for the purpose of its own clarification. The tribunal will also ask the witnesses to address the specific issues that it has raised in its issues paper.”

Those directions which have been kindly made available by Goldberg J whilst applying to the tribunal proceeding may also be used in a similar form in the Federal Court or indeed FMC proceedings where the need arises.

In the decision of the Australian Competition Tribunal in the *Qantas* case it is instructive to note the way in which the tribunal dealt with expert evidence revealed in the following extract:-

**“THE EXPERT EVIDENCE**

212 Before turning to a consideration of market definition and the relevant markets, we wish to make some observations about expert evidence. A number of economists were called to present expert testimony to us. The applicants called three economists from the United States, Canada and Australia. The Commission called two economists from the United States and Canada. The Gullivers Group called one economist from New Zealand.

213 The economists provided written reports in the form of statements and statements in reply in which they covered a wide range of issues. Thereafter their evidence before the Tribunal was presented in three stages. Prior to the economists being called into the hearing to give evidence, they were requested to meet together to discuss the issues which had been raised in the factual evidence and to see whether they could reach a measure of agreement on relevant issues and, if not, to identify areas of disagreement.”

In the same case the tribunal then continued to helpfully set out the role of the expert in the following passages:

**“THE ROLE OF THE EXPERT**

216 The role of expert witnesses appearing before the Tribunal is to instruct on areas of specialist knowledge in a manner that is ultimately designed to inform rather than to advocate a particular view. Obviously, parties will call upon experts whose opinions support their view of the case. However, it is not appropriate for an expert witness to act as an advocate for the instructing party at all costs, and professional witnesses should be willing to concede points which, whilst not advancing the case of the party engaging them, they believe to be open as a fair and reasonable assessment on the material before them. The Tribunal will be assisted by expert witnesses who can clearly explain the relevant issues and concepts and can pinpoint the differences between opinions in the profession and the reasons for such differences so that an informed decision can be made as to which opinion

should be accepted on the available evidence. The Tribunal will not be assisted by experts who uncritically push a party line, avoid challenging questions, and seek to obscure the real issues in contention.

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- 227 Thus, whilst we were, in general, assisted by the evidence provided by most of the experts, we were concerned that on many occasions the expert opinions lapsed into advocacy, there were occasions when crucial assumptions underlying various factual calculations were not spelled out in as much detail as we would have liked, and the use of supporting empirical literature was at times selective. In addition, it was clear to us that some experts were not particularly well informed about the various airline markets pertinent to the present proceeding, leading them to base much of their testimony on their experience in airline markets distant in both geography and time to the markets under consideration and by reference to outdated material of limited assistance, and we adjusted the weight we gave to their evidence accordingly.”

Undoubtedly the task of the Australian Competition Tribunal will often be difficult dealing with complex issues which of necessity require the tribunal to develop and apply special procedures when dealing with expert evidence.

A further valuable insight into the flexibility and innovative approach to expert evidence is found in directions, again made by Goldberg J in another matter currently reserved for decision by the Australian Competition Tribunal concerning Sydney Airport. It is not necessary to recite in detail that case, save that directions were made on 20 September 2004 by the tribunal in the following form:

**“THE TRIBUNAL DIRECTS THAT:**

1. By 4pm on 6 October 2004, the parties file and exchange lists of witnesses required for cross-examination, together with any objections to documents proposed to be adduced in evidence and objections to any parts of witness statements.
2. If any such objections to documents or witness statements are filed, responses to such objections should be filed by 5pm on 8 October 2004.
3. There be a meeting of each of the parties' experts in Sydney on 15 October 2004 at 8 am, at a place to be notified, which meeting will be chaired by Registrar Efthim. The experts should arrive between 7.30am and 7.45am in preparation for the 8 am start.
4. Secretarial or administrative assistance should be provided by the parties to the meeting of the experts if required.
5. The experts are to consider the expert evidence which they have filed and also the evidence generally which is before the Tribunal.
6. The meeting will follow such procedures as are determined by Registrar Efthim after consultation with the experts and the meeting is otherwise to be informal.
7. Legal counsel will not be present at the meeting.
8. The experts must at all times exercise independent judgment.
9. The experts must not act upon instructions to withhold agreement on any

- matter.
10. The experts are not advocates and are not to act as such.
  11. The meeting is not a negotiation as such, nor is it directed to achieve a compromise outcome. The meeting is for the purpose of the experts acting to identify areas of agreement between them and areas of disagreement between them. They are to clarify the scope and extent of any disagreement between them and to assist the Tribunal in an impartial manner.
  12. The experts are to prepare a joint statement under the supervision of Registrar Efthim and, if they can agree, the first draft is to be prepared by one of their number and circulated to others.
  13. The content of the joint statement will be along the following lines:
    - (i) A brief statement of the issues considered by the experts at their meeting.
    - (ii) A statement of the matters upon which they have reached agreement. Reasons are not required in respect of those matters, but rather a statement of the matters is to be set out so that the subject matter of agreement can be identified.
    - (iii) A statement of matters upon which they have not reached agreement, including a brief outline of the reasons for the disagreement and any suggestions for resolution of such disagreement.
    - (iv) The experts are to sign that joint statement and give it to Registrar Efthim who will file it in the Tribunal and arrange for it to be circulated to the parties, if possible, by 5pm on the day the meeting was held or, if not possible, as soon as possible thereafter as can be arranged.
    - (v) The statement should also identify the extent to which there is unanimous agreement on issues if not otherwise identified and, to the extent to which there is disagreement, the nature of the disagreement should be set out in outline, identifying which experts are on which side of the disagreement.”

It will be noted from the orders made by Goldberg J that strict controls were applied to the manner in which the expert evidence is received. Apart from fixing a tight time frame and providing an opportunity for parties to formulate relevant questions the process is enhanced by the supervision of a registrar where the lawyers may otherwise be excluded from the process or where the parties participate, then the cross-examination process is adjusted to facilitate what might be described as a general discussion with all expert witnesses and with the Tribunal also asking questions in relation to specific issues. The Goldberg orders provide a fascinating example of innovation and flexibility when dealing with expert evidence. Obviously there are many variations and adjustments which can be made to directions of the kind made by Goldberg J.

It is noted that in his Civil Justice Quarterly article Heerey J refers to orders made by Lindgren J in a native title case where directions were made for separate conferences of anthropologists, historians and linguists in the absence of lawyers, though the lawyers would be permitted to assist in setting the agenda, the conferences were presided over by an officer of the court.

The "hot tub experience" is not free of its critics and appears largely confined to the Federal Court. In a response to the article by Heerey J, Justice Geoffrey L. Davies of the Court of Appeal of Queensland seeks to explain why the "hot tub" procedure has not been adopted in other courts in Australia. In his article published in the same volume of *Civil Justice Quarterly*<sup>17</sup> Davies J states:

"Consequently the expert came to the Hot Tub armed not merely as an expert witness but as an expert advocate. In such a context Heerey J's view that an expert's adversarial bias is often exposed in the forensic process shows, in my respectful opinion, a naïve but unfounded faith in the adversarial system. One of two possible consequences is much more likely at the end of that process. The first is that the judge will be left with two opposed but apparently convincing opinions by equally well-qualified experts, neither of them has been shaken in the process. The second and, unfortunately more likely, consequence is that the judge will be unwittingly convinced by the more articulate and apparently authoritative personality. The likelihood of this latter consequence increases as the complexity of the question in issue increases.

So, in hindsight, after the introduction of the reforms I have outlined, the Hot Tub method seemed, to many, to be too cumbersome, too expensive and too adversarial. Hence, the failure to adopt it in other courts."

Commenting on the views expressed by Heerey J and Davies J, Sir Robin Jacob (Lord Justice Court of Appeal of England and Wales - formerly a judge of the Patents Court) states:-

"I do not think one can escape from the fact that testing evidence - expert or fact - is the best way humans have devised for trying to get at the truth. When conducted on a fully funded basis by skilled properly instructed cross-examiners you will get as close as can be done. But the cost (both in time, of individuals and in getting to a hearing, and in money) is immense. So I think it impractical and unconstructive to insist on this procedure for all cases - compromises have to be made.

Thus, when a lot is at stake, I side with Heerey J. The single expert, whether appointed before or after proceedings have started, is likely to produce a less reliable result. Moreover he is less likely to be perceived as 'fair'. On the other hand Davies J has a point too: the new Queensland rules, may prove to provide overall a fairer and cheaper system for lower cost cases. I look forward to seeing how it works in practice. Of one thing I am sure. There is no 'perfect' way of going about expert evidence.<sup>18</sup>"

It is interesting to note that the range of options available to the Federal Court and indeed other Courts means that there can be no prospect of a "one size

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<sup>17</sup> Davies, G. L., "Recent Australian Developments: A Response to Peter Heerey," *Civil Justice Quarterly*, vol.23 (October 2004), pp, 396-399

<sup>18</sup> The Rt. Hon. Sir Robin Jacob, 'Court-appointed Experts v Party Experts: Which is Better?' *Civil Justice Quarterly*, vol. 23 (October 2004), pp.400-407

fits all” approach to expert evidence in the Federal Court.

The docket system, which involves direct case management by individual Justices on and from the first directions date is used in the Federal Court and the FMC. It provides an ideal opportunity for individual Justice’s to adapt and apply the variety of approaches now readily available in relation to expert evidence.

In a recent commercial dispute in the Federal Court which involved expert evidence in relation to the valuation of a business share, a Registrar of that Court commenced hearing the matter in his capacity as an arbitrator pursuant to Order 72 of the Federal Court Rules. Upon hearing an application for an adjournment he suggested to the parties that they may wish to consider an expert’s conference or a ‘Hot Tub’. The parties agreed, given the small amount of the claim and the fact that the parties and experts were already present. Although an adjournment was sought the parties agreed to make use of the time of the experts then in attendance.

The matter proceeded to a conference of the experts in the absence of the lawyers though presided over by the Registrar in a similar manner to the concept invoked by the orders referred to earlier in the Australian Competition Tribunal by Goldberg J. The experts were able to narrow the dispute to the point where a compromise looked likely. Deputy Registrar Bardsley of the Federal Court in Melbourne then suggested the matter proceed to mediation and by consent that occurred, of course this time in the presence of the lawyers, the litigants and experts. The matter resolved.

This innovative approach demonstrates that arranging conferences of experts either in the context of arbitration or as a preliminary exercise to mediation may well succeed and thereby save considerable costs and expense.

Hence, it is clear that the “hot tub” arrangement may well be appropriate at a very early stage either as a preliminary step prior to mediation or indeed at the very least to narrow issues in readiness for trial.

This discussion concerning the guidelines and rules of the Federal Court is not intended to be an exhaustive statement of the practices and procedures of that Court though simply offered as a glimpse of options currently considered and used by that Court.

## The Family Court

The Family Court of Australia was established as a superior court of record dealing with matters previously dealt with by states and often described as "matrimonial causes" together with jurisdiction under the Marriage Act. It is not necessary to recite in detail the matters dealt with by the Family Court, save and except that it would be obvious that it is required to deal with expert evidence in a wide range of cases where issues arise concerning children and property.

Perhaps one of the most significant innovations in the Family Court has been the introduction of a new system for the use of expert witnesses found in Part 15.5 of the *Family Court Rules 2004*. It is noted that problems relating to the use of expert evidence were discussed in the Full Court of the Family Court case of *W v W: Abuse Allegations: Expert Evidence*.<sup>19</sup>

An expert evidence discussion paper was circulated by Nicholson CJ of the Family Court of Australia in July 2002. There can be little doubt that the Family Court is frequently confronted with a requirement to deal expeditiously with expert evidence having regard to the lack of resources of the parties, the high volume of cases dealing with sensitive issues in relation to children and/or a significant proportion of property claims which involve a modest property pool.

The Explanatory Statement for the *Family Law Rules 2004* at p.75 provides the following summary of the essential features of the Rules:-

- “1. There are only 2 types of expert:
  - (a) An expert appointed by a party – adversarial; and
  - (b) A single expert agreed to by the parties or ordered by the court either upon application or of its own motion. There is no separate category of “court expert” – this is covered by the definition of single expert;
2. Parties are encouraged to agree on and appoint a single expert;
3. Parties who appoint a single expert do not require the permission of the court to tender a report or adduce evidence from that single expert;
4. Parties who do not appoint a single expert and seek to tender a report or adduce evidence from their own adversarial experts must apply to the court for permission to do so;
5. The court may allow parties to instruct their own adversarial experts or more than one expert on an issue where this is warranted to ensure a fair trial;
6. The court may of its own motion or upon hearing an application by parties seeking permission to tender evidence or a report from their own adversarial experts order the appointment of a single expert, such person to be agreed by the parties or selected by the court;
7. If parties appoint a single expert or the court orders the appointment of a single expert, neither party may tender a report or adduce evidence from

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<sup>19</sup> *W v W* (2001) FLC 93-085 at [149-67]

- another expert without court permission;
8. The Part sets out the duties, rights and responsibilities of experts and confirms that experts are witnesses and that their overriding duty is to the court. It sets out: best practice standards and is aimed at facilitating communications between experts and those instructing them;
  9. There is an increased emphasis on disclosure. The rules are directed at ensuring that the parties are candid and make full and frank disclosure. This should help the party instructing the expert and the expert to focus on the issues and improve the quality and integrity of the report. This should help narrow the issues and enhance the chances of settlement;
  10. The consequences of non-compliance with the rules by parties and experts are set out;
  11. There are expanded provisions about conferences of experts and evidence from more than 1 expert;
  12. It is intended that the process of obtaining a written report and enabling parties to ask the expert questions before the trial will help narrow the issues and reduce the amount of time the expert will be required to give evidence thus saving time at trial and costs.
  13. Part 15.5 replaces Practice Direction 2/2003 "Guidelines for expert witnesses and those instructing them in proceedings in the Family Court of Australia".

The purpose of Part 15.5 of the Family Court Rules as set out in Rule 15.42 is

- to ensure that parties obtained expert evidence only in relation to a significant issue in dispute;
- to restrict expert evidence to that which is necessary to resolve or determine a case;
- to ensure that if practicable and without compromising the interests of justice expert evidence is given on an issue by a single expert witness;
- to avoid unnecessary costs arising from the appointment of more than one expert witness; and
- to enable a party to apply for permission to tender a report or adduce evidence from an expert witness appointed by that party is necessary **in the interests of justice**.

It should be noted that even under this Rule the Family Court has sought to ensure that 'the interests of justice' are protected by providing that those interests should not be compromised.

The single expert witness under the new rules may be appointed by the parties or the Court and the Court's permission is not required. Where parties cannot agree on who should be a single expert then they are required to provide a list to the Court setting out names of people who are experts on the relevant issue and who have consented to be appointed as expert witnesses and indicating the fee which each expert will accept and preparing

a report and attending Court.

The Court has power to direct the parties to confer for the purpose of agreeing on the person to be appointed as a single expert witness. It is clear from the new Rules that the Court has a wide discretion. It can make orders determining an issue in dispute between the parties to ensure clear instructions are given to the expert. It can direct the parties to confer for the purpose of preparing an agreed letter of instruction to the expert and submit a draft letter of instructions for settling by the Court.

The Rules otherwise provide for liability for the expert's fees and interestingly provide for a process in the event that one party may be dissatisfied with the single expert's opinion. In those circumstances although the Rules provide that an expert's opinion may not be used in Court, the Court may grant permission. The Court in considering whether to grant permission for another expert is required by Rule 15.49(2) to consider the following factors:-

- That there is a substantial body of opinion contrary to any opinion given by the single expert witness and that the contrary opinion is or may be necessary for determining the issue
- Another expert witness knows of matters, not known to the single expert witness that may be necessary for determining the issue or
- There is another special reason for adducing evidence from another expert witness

Again it is clear from the Rules that there is considerable scope and indeed a very wide discretion granted to the Court when considering appropriate orders in relation to expert evidence. The interpretation and application of the Family Court Rules vary from Judge to Judge. The Court is required to take into account pursuant to Rule 15.52(3) certain factors prior to granting permission where the opinion of another expert is sought. Those factors include not only the purpose of the Rules but also the impact of the appointment of an expert witness on the costs, the likelihood of the appointment expediting or delaying the case, the complexity of the issues, whether the evidence should be given by a single expert witness rather than expert witness appointed by one party only and whether the expert witness has specialised knowledge based on the person's training, study or experience relevant to the issue on which evidence is to be given and appropriate to the value, complexity and importance of the case.

The new Family Rules are not free of criticism expressed by practitioners<sup>20</sup>.

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<sup>20</sup> McPharlin, H, 'The Family Law Rules 2004 – Implications for Accounting Experts', Australian Family Lawyer, vol.18, no.2 (2004), pp. 17-21; Planinic, J, 'The rise of the Single Family Law', Law Society Journal, (October 2004), pp.79-81

Only time will tell whether the new rules work to the advantage of the parties and in the interests of justice.

Prior to the introduction of the new Rules relating to single experts the Family Court for many years has adopted what effectively may be regarded as a 'single expert' approach by use of family reports in that Court. Those reports are prepared pursuant to s.62G(2) of the Family Law Act 1975.

It is clear that those reports work effectively in that the report writer is able to interview all relevant parties and prepare a report to assist the Court which ultimately is able to make a decision based upon the interests of the child being paramount. Often the production of the family report leads to settlement usually with the assistance of a Child Representative.

### **The Federal Magistrates Court**

The FMC commenced sittings on 3 July 2000. In the past five years the number of Justices appointed to the FMC has increased from 12 to 33.

The FMC was established by the *Federal Magistrates Act 1999* and its jurisdiction is found in the *Federal Magistrates (Consequential Amendments) Act 1999*. It shares concurrent jurisdiction with the Federal Court in relation to bankruptcy, migration, copyright, applications arising from the Administrative Decisions Judicial Review Act 1977 and has specific jurisdiction arising from consumer provisions of the Trade Practices Act 1975 albeit with a monetary limit to award damages under that Act not exceeding \$200,000. It may hear appeals under the Administrative Appeals Tribunal Act 1975 from non-presidential members which have been transferred to the FMC by the Federal Court. It exercises associated and accrued jurisdiction.

In its family law jurisdiction the Court deals with divorce, parenting orders, property settlements (up to \$700,000), maintenance, child support (assessment and collection) and enforcement.

It is clear therefore that the FMC when dealing with expert opinion evidence needs to address many of the issues which confront both the Federal Court and the Family Court. As a new Court established to deal with less complex applications with less formality, it is perhaps perfectly placed to explore current challenges concerning expert opinion evidence.

No doubt the FMC will continue to be guided and assisted by the approaches adopted by both the Family Court and the Federal Court though at the same time will hopefully develop its own unique practices and procedures consistent with its objects of operating "as informally as possible" and using "streamline procedures together with the use of "a range of appropriate

dispute resolution processes”<sup>21</sup>.

The FMC as indicated earlier in this paper has the opportunity to perhaps be more creative and innovative than the other Courts. It has the advantage of adopting if it believes it is appropriate to do so rules of the other Courts. The FMC Rules provide that where its own rules appear to be insufficient or inappropriate it may apply the Federal Court Rules or the Family Court Rules in whole or in part and modified or dispensed with as necessary.<sup>22</sup>

The FMC has not adopted the Family Court single expert rule. The Rules currently provide in Division 15.2 for expert evidence which by and large reflect the Rules of the Federal Court.

Given the wide diversity of the FMC jurisdiction, it is clear that it will continue to grow both in jurisdiction and in the number of Justices appointed to it and it is likely that the Court will face an increasing challenge like other Courts in dealing with expert evidence.

## **Conclusion**

Whilst it is acknowledged that there are certain reservations expressed concerning expert evidence which have developed over the past 7 or 8 years, it is important to retain a sense of perspective and to always have regard to the interests of justice.

One of the major areas of concern in relation to expert witnesses tends to arise more in the area of personal injuries law where on occasions it is clear that expert medical witnesses give evidence according to the party seeking the expert opinion, hence what has developed over a number of years are medical witnesses who are known to be either plaintiff or defendant witnesses. However, that fact alone should not necessarily encourage Courts to otherwise abandon due process when dealing with expert witnesses. Indeed even in the case of medical expert witnesses who would appear to have a firm view prior to the trial, it should be noted that those views can be properly subjected to cross-examination and indeed the basis for the opinions expressed can be challenged. When challenged then often what may appear to be a straightforward medical view alters given that the expert needs to make an adjustment after appropriate cross examination.

One should never forget that in dealing with expert evidence it is the role and duty of the Court and Counsel to ensure that the evidence is appropriately

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<sup>21</sup>see s.3 Federal Magistrates Act 1999

<sup>22</sup> Federal Magistrates Courts Rules 2001, Rule 1.05(2)

tested. It is essential for Counsel to be properly briefed which includes obtaining the assistance of expert witnesses in order to ensure that counsel has a proper grasp of the technical terms and the issues which are relevant for cross-examination purposes and relate specifically to the issue at trial. The failure of counsel to be properly “educated” about expert areas of evidence diminishes the effectiveness of cross-examination and the quality of the hearing.

There is a responsibility upon the presiding Judge to make findings of fact and to analyse the evidence of experts appropriately. One should not necessarily be eager to avoid that responsibility and introduce a more simplistic approach to expert evidence if it is done at the cost of a fair trial. Whilst those of us who have practiced in the criminal and common law areas for many years might from time to time develop a degree of cynicism in relation to expert evidence, it should be noted that more often than not modern experts do their best to give appropriate independent evidence. To a large extent the “hired gun” approach to expert evidence is declining. Lawyers and Judges are now more prepared to be educated in relation to other disciplines to ensure that both cross-examination and adjudication is more effective and that ultimately the issues before the Court are resolved in an appropriate and cost effective manner.

In dealing with expert opinion evidence, it is clear from the examples of orders to which I have referred that there are indeed many options now available to modern Courts. The options should be carefully considered and we should keep an open mind in relation to dealing with new and innovative approaches to the way in which expert evidence is received in Court.

Each jurisdiction may require a different approach. The challenge for all federal Courts is to continue to develop more innovative and responsive approaches having regard to the issues confronting those courts which arise from specific jurisdiction. It would be unwise to assume that one approach, for example ‘a single expert’ could be simply applied to all jurisdictions or that indeed the “hot tub” is appropriate for jurisdictions other than those where it is currently being used.

The FMC as a relatively new Chapter III court is required to conduct itself with less formality. It is well placed to embrace and develop new options concerning expert evidence.

All Courts should keep an open mind as to any future proposals which would mean a reduction in costs and more efficient disposition of cases provided always that justice remains of paramount concern.