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TWENTY  
SEVEN

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C H A M B E R S



## Overview of Expert Evidence: top 5 tips & traps

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## >> The function of expert evidence

- *Quick v Stoland* (1998) 157 ALR 615: “...to provide the trier of fact with an inference which the [trier of fact], due to the technical nature of the facts, is unable to formulate.”
- *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, per Heydon J: “Opinion evidence is a bridge between data in the form of primary evidence and a conclusion which cannot be reached without the application of expertise.”

## >> Rationale for the exclusionary rules

- *Dasreef v Hawchar* (2011) 243 CLR 588 (per Heydon J at 609 – 611).
  - Ensuring the integrity of the trial process (by preventing excessive influence on the outcome by the expert; and advocacy by the expert).
  - Ensuring the evidence is presented in a useful and admissible form.
  - The risk of injustice flowing from unsatisfactory expert evidence.

# >> Criteria for admissibility or weight

- 1) There must be a field of specialised knowledge.
- 2) The witness must demonstrate that by reason of specified training, study or experience, he or she is an expert in an identified aspect of that field.
- 3) The opinion is based “wholly or substantially” on the expert witness’ knowledge.
- 4) The witness must identify the facts upon which the opinion is based. In so far as the facts are assumed by the expert, facts “sufficiently like” those facts must be proved to render the opinion of some value.
- 5) It must be established that the facts observed or assumed form a proper foundation for the opinion.
- 6) There must be demonstration or examination of the intellectual basis for the opinion – i.e. the evidence must show how the application of expertise, on which the opinion is based, applies to the facts observed or assumed, to produce the opinion.

>> ***Makita v Sprowles* (2001) 52 NSWLR 705  
at [85]**

“If all of 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 opinions 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 The Queen* (at 428 [41]), on a “*combination of speculation, inference, and a process of reasoning which went well beyond the field of expertise.*”

>> ***Makita v Sprowles* (2001) 52 NSWLR 705**

*“If Professor Morton’s report were to be useful, it was necessary for it to comply with the 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.”*

## >> Keys to persuasive expert evidence

Are the following matters *explicit* and expressed in a way to enable a court to independently assess the weight to be given to the opinion?

- 1) Are the facts upon which the opinion is based identified?
- 2) How does the application of expertise applies to those facts to produce the opinion?
- 3) Are opinion(s) ultimately reached separately identified?

## >> Top 5 tips

- Number 1 – **Be independent**
  - Consider the position of the judge and the court.
  - Remember the risk to your professional reputation going forward.
  - The weight of your evidence will be affected if you are seen to be an advocate for one side, or if you are making submissions for one side.

## >> Top 5 tips

- Number 2 – **Never assume background knowledge**
  - Although you are an expert, the rest of the participants in a trial are not.
  - It is useful to explain even basic concepts.
  - Try to avoid jargon, or if necessary, provide definitions and use defined terms consistently.

## >> Top 5 tips

- Number 3 - **Identify assumptions clearly**
  - Although you may make assumptions, at some stage these will need to be proved.
  - Opinion evidence cannot be used to overcome 'gaps' in the evidence.
  - If assumptions are not identified clearly, it is likely to be an avenue for cross-examination.

## >> Top 5 tips

- Number 4 – **Stick to your area of expertise**
  - Ideally this should be clarified at the time of briefing an expert.
  - Opinion evidence given outside an area of expertise will be inadmissible (and in any event unconvincing).
  - Although it is tempting to speculate, the best evidence will stick to the facts (or assumptions where necessary).

## >> Top 5 tips

- Number 5 - **Ask for clarification if necessary**
  - If you don't understand a question (including in cross-examination) feel free to say so.
  - It is better to find out weaknesses in a case early, than in the witness box.
  - Take your time to answer questions (especially in cross-examination), although be mindful that court deadlines are often inflexible. Supplementary reports may be necessary in some cases.

## >> Top 5 traps

- Number 1 – **Don't become combative**
  - Either in written reports, or in cross-examination, becoming combative will undermine your independence.
  - Make concessions where necessary, or acknowledge that opinions may differ if that is the case. Hypotheticals should be avoided if possible.
  - Respect the other side's expert, and any orders requiring you to confer or discuss a report with an opposing expert, or to prepare a joint report.

## >> Top 5 traps

- Number 2 - **Don't answer questions you don't understand**
  - As above, if you need more time, or to clarify matters, raise these issues as early as you can.
  - If you need to make a supplementary report, discuss this with your instructing solicitors.

## >> Top 5 traps

- Number 3 - **Incoherent or unintelligible expression**
  - All witnesses have their own styles and expressions.
  - A witness will be less convincing if they don't understand their own language, or if it is clear someone else has had input to their report.
  - If clarity can be enhanced, however, then this should be pursued.

## >> Top 5 traps

- Number 4 – **Don't take shortcuts**
  - If you need to visit a site, visit it. If you need to see a piece of equipment or machinery, go and see it.
  - If you need help preparing a report, make sure you know what your assistants have done, identify who they are, and make sure you are comfortable with everything in the report – you will be the one in the box.
  - Don't overlook small details – information in your CV must be accurate, and it should be clear what information your opinion is based upon.

## >> Top 5 traps

- Number 5 - **Don't forget the judge**
  - The only person in the room whose opinion matters is the judge.
  - It is unlikely that you will convince the other side, or their expert, that they are wrong.
  - Be polite, candid, and remember that your role is to assist the court.