Print Page Close Window

# Expert Evidence

**EXPERT EVIDENCE** [1]

**Robert McDougall**[2]

## Introduction

1. Expert evidence is a species of the genus evidence: an obvious, but frequently overlooked, point. Thus, like all other evidence, expert evidence is only admissible if it is relevant (*Evidence Act* 1995 (NSW), s 55). Even if admissible, it may be rejected (other than on grounds specifically relating to its status as expert evidence), pursuant to the discretion conferred by s 135 (in criminal cases, s 137). If admitted, it may be made the subject of an order under s 136. For example, an order could be made limiting the use to be made of expert evidence so that it is not probative of the truth of any fact stated by the expert as an assumption.

2. The overriding duty of an expert witness is to assist the court impartially on matters relevant to his or her area of expertise. The paramount duty of an expert witness is to the Court, not to the party by whom he or she is retained. An expert witness is not an advocate for a party. These principles are set out in Schedule K to the *Supreme Court Rules* and are given effect by Pt 36 r 13C (in the case of a witness engaged by a party), and Pt 39 r 2 (in the case of a court-appointed expert).

3. Concern about the role of experts has increased substantially in recent years. That concern reflects a number of issues:
(1) The increasing use of experts in every form of civil litigation.
(2) Particularly with recondite or abstruse areas of expertise: the real difficulty that a court has in understanding, let alone examining critically, the reasoning and conclusions of an expert.
(3) The perception that expert witnesses are “hired guns” who give “opinions for sale”.

4. A number of the concerns with expert evidence in civil litigation were identified by the Rt Hon Lord Woolf in his report “Access to Justice” (July 1996: internet version at www.dca.gov.uk/civil/final), in particular in chapter 13. The rules of civil procedure in the courts of England and Wales attempted to accommodate the concerns identified by his Lordship. Many courts in Australia have likewise introduced provisions in an attempt to deal with the perceived problems.

5. An example of the “opinion for sale” problem may be seen in the article by Steven Moss, **Legal Affairs** (March/April 2003). The author, an economist, illustrates graphically how he found himself applying his expertise as an advocate rather than as an impartial witness.

6. A more radical response to the perceived problems with expert evidence has been adopted in Queensland. Davies JA, of the Court of Appeal of the Supreme Court of Queensland, delivered a paper to the Annual Supreme and Federal Court Judges’ Conference in Auckland, New Zealand, on 29 January 2004 (internet version at http://www.courts.qld.gov.au/publications/articles/articlesca.htm). He promoted a solution whereby, except in exceptional circumstances, only one expert witness would give evidence on any particular topic. That is now enshrined in the Queensland Uniform Civil Procedure Rules: see Chapter 11, Part 5. Although it is, as I have said, a radical response, it is equally an acknowledgment of the problems that the courts face in dealing with expert witnesses who cannot, or will not, perform their duty of impartiality and recognise their paramount duty to the court.

## The elements of expert evidence

7. In *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, Heydon JA at 743-744 summarised the applicable law in relation to the admissibility of expert evidence as an exception to the opinion rule. In summary, if evidence tendered as expert opinion evidence is to be admissible:

(1) it must be agreed or demonstrated that there is a field of “specialised knowledge”;

(2) 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;

(3) the opinion proffered must be "wholly or substantially based on the witness's expert knowledge";

(4) so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert;

(5) so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way;

(6) it must be established that the facts on which the opinion is based form a proper foundation for it; and the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert, and on which the opinion is "wholly or substantially based" applies to the facts assumed or observed so as to produce the opinion propounded.

8. It should be noted, however, that the Full Court of the Federal Court has held that many of these matters go to weight, and that a judge sitting without a jury should either admit the evidence or go to the discretions conferred by ss 135 and 136: *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354.

**What is an expert?**

9. Section 79 of the *Evidence Act* provides that 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 opinion rule itself operates to render evidence of an opinion inadmissible to prove the existence of a fact about the existence of which the opinion was expressed: section 76.

10. Accordingly, for a witness to be an "expert" for the purposes of section 79, the following two requirements must be satisfied: firstly, the witness must have specialised knowledge; and secondly, that specialised knowledge must be based on the person's training, study, or experience. In addition, the opinion expressed must be "wholly or substantially" based on that "specialised knowledge": ie, the opinion must represent in substance the application of that specialised knowledge to proved or assumed facts.

*Specialised knowledge*

11. The term "specialised knowledge" is not defined in the Act. However, at common law "two principles govern the question of whether the field is one on which expert evidence can be called": Cross (1996 § 29050). In *R v Bonython* (1984) 38 SASR 45, King CJ at 46-47 stated the two relevant questions as:
*(a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of 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 …*

12. The first limb of King CJ's formulation reflects the test at common law as stated by Dixon CJ in *Clark v Ryan* (1960) 103 CLR 486 at 491 whereby:

> *… the opinion of witnesses possessing peculiar skills is admissible where the subject-matter of the inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance.*

13. In *Velevski v R* (2002) 76 ALJR 402, Gaudron J applied Dixon CJ's test in *Clark* as applicable under section 79. Further, citing King CJ in *Bonython*, Gaudron J at 416 stated that "specialised knowledge" imports knowledge of matters that are "sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience". Gaudron J was in dissent in *Velevski*. However, Gummow and Callinan JJ appeared to accept that "it must be established that there is a reliable body of knowledge and experience": Odgers, **Uniform Evidence Law** (Thomson Law Book Co, 5th ed, 2002) at 211.

*… based on the person's training, study, or experience*

14. In *ASIC v Vines* (2003) 48 ACSR 291, 294-295, Austin J at [11] noted with approval the observation of Giles JA in *Adler v ASIC* (2003) 46 ACSR 504 that the term "specialised knowledge" is not restrictive. Indeed, section 79 expressly encompasses specialised knowledge acquired through experience, in addition to that obtained through training or study. In contrast, at common law there has been uncertainty as to whether expertise can be derived from experience: Odgers at 213.

***Makita v Sprowles***

15. At first instance an employee recovered damages from her employer after slipping and falling down stairs at her workplace. The trial judge accepted expert evidence that the stairs were slippery. The trial judge's acceptance of the expert evidence was essential to the finding of liability given that the evidence of the plaintiff was "brief and uninformative" (see Priestley JA at 707). The Court of Appeal (Priestley, Powell, and Heydon JJA) held that the trial judge erred in accepting the expert evidence. Priestley and Powell JJA rejected the evidence of the expert as "wrong" and "of no real value" respectively. Heydon JA discussed extensively the authorities concerning the duties of expert witnesses in civil cases. In this discussion Heydon JA at 729 focused upon:

> *… the prime duty of experts in giving opinion evidence: to furnish the trier of facts with criteria enabling the evaluation of the validity of the expert's conclusions.*

16. His Honour said at 744 that the basis for the principle is that if:

> *… 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.*

17. Furthermore, as his Honour had said at 733, the requirement of transparency is essential given that the:

> *… trier of fact must arrive at an independent assessment of the opinions and their value, and this cannot be done unless their basis is explained.*
>
> In this context it is necessary to bear in mind, as Kirby P pointed out in *Constantinidis v JGL Trading Pty Ltd* (1995) 17 ACSR 625, 636, that the court does not forfeit its function and duty to experts. The recondite exception (if such it be) in *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554, 573 (Sheller JA), relating to findings about foreign law where there is unchallenged evidence from a qualified expert, may be put to one side for present purposes.

18. On the facts, the prime deficiency that Heydon JA identified in the expert's report was that it did not furnish the trial judge with the necessary scientific criteria for testing the accuracy of his conclusions, thus disabling the trial judge from forming his own independent judgment by applying the criteria to the facts proved.

19. Heydon JA took as the starting point for his analysis, the line of authority flowing from the Scottish decision in *Davie v Lord Provost, Magistrates and Councillors of the City of Edinburgh* (1953) SC 34 at 39-40 where Lord President Cooper stated of expert witnesses that:

> *Their duty is to furnish 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.*

20. Heydon JA noted the existence of an opposing view to that expressed in *Davie* whereby all the expert need do is establish that there is a relevant field of specialised knowledge, that they have expertise in a relevant aspect of it; and that they hold an opinion relevant to establishing a fact in issue in the litigation. In rejecting this view, Heydon JA stated at 731 that:

> *… it is clear that the practice of giving only the conclusion in chief is not only not customary, but is opposed by a line of authority which, while not citing Davie's case, has arrived at conclusions consistent with and supportive of it.*

21. In relation to trial practice, Heydon JA cited the decision of Lawton LJ in *R v Turner* [1975] QB 834 at 840 that:

> *… counsel calling an expert should in examination in chief ask his witness to state the facts upon which his opinion is based. It is wrong to leave it to the other side to elicit the facts by cross-examination.*

22. In addition, the facts or assumptions that underlie the expert's opinion must be proved by admissible evidence: see *Ramsay v Watson* (1961) 108 CLR 642. Such evidence may be led from the expert, or identified or proved in some other way: see *Trade Practices Commission v Arnotts Ltd (No 5)* (1990) 21 FCR 324. This may be a particular problem where the facts assumed are themselves of a hearsay nature (ie, in the hands of the expert, second hand hearsay or worse). Prima facie, statements of assumptions are admissible in an expert report (assuming that the relevant criteria for admissibility of expert evidence have been met) to prove the assumed facts upon which the opinion expressed is based. Thus, by s 66 of the Act, the assumptions would become evidence of the asserted facts. Section 136 provides the obvious remedy to what might otherwise be a problem where the asserted facts are really in dispute.

*The common law and the Act*

23. Heydon JA at 742 cited the decision in *HG v The Queen* (1999) 197 CLR 414 where Gleeson CJ at 427 construed sections 76-80 of the Act as enacting some of the central elements of the common law. In particular, compliance with section 79 will necessitate a distinction between assumed facts upon which the opinion is based and the opinion itself. This arises from the requirement that opinions be wholly or substantially based on the expert's specialised knowledge.

**Other authority**

24. I will look at some other decisions that demonstrate problems that have arisen with expert evidence in recent years. Although some of those decisions deal with the position at common law, they remain relevant and instructive.

*Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313

25. Relevantly, this decision concerned the admissibility of expert evidence rejected by Beaumont J at first instance in an action under Part IV of the *Trade Practices Act* 1974 (Cth): see *Trade Practices Commission v Arnotts Ltd (No 5)* (1990) 21 FCR 324. The expert's evidence consisted of his opinion about the factual correctness of assertions in the pleadings. The expert observed in person, or read the transcript for, the entire 55 days of the proceedings. In addition, the expert read the statement of claim and in excess of one thousand pages of documentary evidence.

26. In his examination-in-chief counsel asked the expert to comment upon particular paragraphs of the statement of claim. The expert's comments consisted of observations about the evidence in the case, and opinions as to whether allegations in the statement of claim had been made out, and the evidence rebutting them.

27. When asked what assumptions the witness was relying on in forming his opinion counsel stated "the assumption is the whole of the transcript and the whole of the documentary evidence".

28. In upholding the decision of Beaumont J to reject the evidence, the Full Federal Court (Lockhart, Wilcox, and Gummow JJ) emphasised that the assumptions upon which an expert's opinion is based must be clearly identified and articulated. It is not permissible for the witness to rely upon the whole of the transcript and documentary evidence *en bloc*. In a complex case where facts are not readily identifiable, such a course does not allow the court to identify the premises that were relied upon in reaching the conclusion. Knowledge of the premises is necessary for the court to determine whether or not to accept the evidence in light of its ultimate factual findings.

29. Importantly, their Honours at 350 cited with approval a passage from Eggleston, **Evidence, Proof & Probability** (Weidenfeld and Nicolson, 2nd ed, 1983) p. 148 to the effect that experts may be able to

base their opinion on facts accumulated in the course of their training without it being necessary to prove every such fact. However, if an expert wishes to refer to a particular fact as the basis for his or her opinion, that fact must be established by admissible evidence. This section of the Full Court's judgment was cited in *Makita* by Heydon JA at 738, and in *ASIC v Vines* by Austin J at 301 [36].

30. Furthermore, the conduct of the litigation underlined the importance of the principle that experts must identify the facts assumed in their opinions; a significant amount of material was admitted after the expert concluded giving evidence. Without knowledge of the basis for the expert's conclusions it was not possible for the Court to determine whether the additional material would have affected the expert's views.

31. In conclusion, the Full Court stated at 597 that:

> *The use of an expert witness to filter the facts, asking the witness to hear or read all the evidence and then express factual conclusions is … illegitimate. It must be stopped.*

*Hillier v Lucas* (2000) 81 SASR 451

32. This decision concerned expert evidence given in the course of professional negligence proceedings against two surgeons. Lander J noted that the diagnosis or prognosis of an expert medical practitioner constitutes an opinion and, consequently, should be made on clearly stated assumptions. For example, the practitioner should state that he or she has assumed the patient's history as recorded by the practitioner (which then itself should be proved), as well as identifying which observations in clinical examinations were relied upon, in addition to identifying any other extraneous facts.

33. Further, Lander J held that the trial judge erred in not making findings of fact that would have either validated or invalidated the expert's opinion. The trial judge simply stated that he preferred the evidence of one expert to that of another. It was incumbent upon the trial judge to consider whether the assumptions upon which the expert based his opinion had been established. In the view of Lander J it was not for the trial judge to reject the expert's evidence without determining whether that opinion could be accepted upon the assumptions that had been found.

34. Finally, one expert witness was questioned in a manner objectionable in light of Beaumont J's reasoning in *Arnotts (No 5)*. In this instance, the witness was asked whether he had looked at "some evidence" that was given before the court.

*Bromley Investments Pty Ltd v Elkington* (2002) 43 ACSR 584

35. The applicant sought an order approving the acquisition of shares and a declaration that the price offered represented fair value for the shares. The applicant had obtained an expert's report as to the fair value of the shares. During the hearing the objection was made that critical assumptions on which the expert's opinion was based had not been independently proven.

36. Muir J reiterated the principle that the assumptions of fact that underlie an expert's opinion must be proved by admissible evidence. In failing to do so Muir J noted that the expert's report was initially deficient, and that subsequent attempts at rectification were not satisfactory.

37. Notwithstanding these deficiencies Muir J exercised his discretion under the *Supreme Court Act* 1995 (Qld) to dispense with the rules of evidence where it is just to do so, and declined to reject the expert evidence. The reason given was that the report was initially admitted into evidence without objection, and that later objections amounted to opportunistic attempts to seize upon real or imagined defects without prior warning to the applicant.

*Rhoden v Wingate* [2002] NSWCA 165

38. The plaintiff sued the defendant in negligence for personal injuries sustained in a motorcycle accident. Due to his injuries the plaintiff could not give evidence, and relied upon reports made by expert witnesses. After the close of the plaintiff's case the defendant objected to the expert reports on the basis that the opinions were based on facts not proved in evidence. The trial judge excluded the reports as unduly prejudicial under section 135 of the Act.

39. A majority of the Court of Appeal allowed the plaintiff's appeal on the basis that exclusion of the

expert reports after the close of the plaintiff's case denied the plaintiff due process and a fair trial. Of the majority, Heydon JA made additional comments on the alleged deficiencies in the expert reports. Heydon JA was of the opinion that the facts relied upon by the expert were "tolerably clear". Heydon JA further commented on the sufficiency of evidence required in support of the assumptions for the expert opinion to be admissible. In this connection it is not necessary for the underlying assumptions to be proven on the balance of probabilities at the conclusion of proceedings for expert evidence to be admitted. The opinion will be admitted if there is evidence, which if accepted, is capable of establishing the truth of the assumptions. On the facts, Heydon JA concluded that there was such evidence. In contrast, Pearlman AJA (in dissent) said that it was open to the judge to conclude that the assumed facts had not been proved.

*Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 806

40. Objection was taken to a report on the basis that the purported expert opinion was based on facts that could not be proved by the expert or on assumptions as to facts that could not be identified or proved in some other way. The report referred to sales forecasts. It was contended that the author of the forecasts was not qualified as an expert on future sales levels. On this point Ryan J was not convinced that the author of the forecasts necessarily lacked the expertise to express an opinion.

41. Further, the expert's report relied upon assumptions as to the commercial life of a software product as well as several other implied assumptions. In addition, the report of a second expert also relied upon a number of assumptions. Ryan J stated that he was unable to conclude whether these reports were inadmissible at that stage of proceedings: a conclusion as to admissibility was dependent upon whether the assumptions and facts relied upon by the experts could be subsequently proven.

*Dagenham Nominees Pty Ltd v Shanks* (2003) 229 LSJS 126; [2003] SASC 219

42. Counsel asked an expert witness who had been sitting in court while evidence was being given whether he was able to express an opinion as to why the mast of a yacht broke. The failure of the mast was the substance of a cross-claim in response to a claim for the cost of rigging the yacht. Lander J (on appeal) held that this line of questioning was inappropriate as it did not permit the Court to identify the assumptions that underlie the expert's opinion.

43. Furthermore, Lander J criticised the trial judge for failing to make findings in relation to the matters upon which the experts based their opinions. The trial judge was "entitled to prefer the evidence of one expert to another but only if there were reasons for so doing".

*ASIC v Vines*

44. This decision concerned expert evidence on what a reasonably competent chief financial officer and reinsurance manager would do in the defendants' position in stated circumstances. Austin J outlined the position in relation to expert evidence of professional standards. In so doing, his Honour noted the particular difficulties that would arise in relation to expert evidence of professional standards where the office is unique such that there is no field of specialised knowledge. Further, Austin J was of the opinion that section 79 permits a professional expert to give expert evidence about the content of general practices in the profession and to express an opinion about the conduct of competent and careful professionals in typical as well as specially defined circumstances.

**Practical considerations**

45. It is essential that the opinions expressed by an expert in a report that is to be tendered should be the opinions of the expert and not of the lawyers by whom, or the client for whom, the expert is retained. But, accepting this, there is still a very large role for the lawyers to play. Further, in a particular case – for example, in litigation relating to major civil engineering or construction projects, where the relevant areas of expertise, and the subjects within those areas, will be numerous and complex – it may be vital that the client also be involved.

46. The work that the lawyers can do includes the following:

(1) Identify the issues in dispute to which expert evidence may be relevant.

(2) Identify an expert or experts who are qualified to express opinions upon those issues.

(3) Frame the issues in respect of which the expert is required to express an opinion.

(4) Specify clearly and in detail the assumptions of fact that the expert is to make.

(5) Where necessary, supplement those assumptions with primary factual material that the expert is to consider.

(6) Work with the expert in the drafting of the report to ensure that, whilst the opinions remain those of the expert, the report as a whole meets the relevant requirements that I have identified above – relating both to the formal admissibility of the report and to its persuasive value.

47. The first and second of those matters may seem trite. But their importance cannot be over-emphasised. All too often, one sees expert reports where the expert has been given the equivalent of the "herewith file please advise" brief dreaded by junior counsel. Further, particularly in complex technical cases, the first and second matters are areas where the assistance of the client is not just desirable but, in a practical sense, mandatory. At the end of the day, it is the client who knows what the real problems are; and, usually, it is the client who knows the experts in the field and can assess their relative strengths and weaknesses.

48. In this context, it really is worthwhile thinking: "do we need an expert at all?". It is not uncommon to see experts called to prove blindingly obvious propositions, or matters that, if they can be regarded at all as relevant subjects of expertise, are only tangentially or peripherally so. It is also worth bearing in mind that an ounce of direct evidence is usually worth a pound of expert conjecture.

49. The third, fourth and fifth matters will often prove to be of an iterative nature. That is to say, it may not be until the expert has received preliminary instructions, and has had a chance to think about the problems, that the real issues can be specified. It is only when the real issues can be specified that it is possible to make a final assessment of the assumptions of fact, and primary factual material, that the expert should consider to enable him or her to reach a reasoned conclusion. At this stage, too, the assistance of the client might be helpful. But I would counsel against excessive involvement of the client, particularly at a face-to-face level with the expert.

50. The sixth matter may involve difficult questions of degree and judgment. It is perfectly in order for the legal advisers to consider a draft report, and to test the arguments advanced in it. After all, if those who are on the same side as the expert can see flaws in the reasoning, it is almost inevitable that those on the other side, with the benefit of their own expert advice, will do likewise. Equally, it is important to ensure that the expert sticks to the relevant issues and does not venture beyond his or her areas of expertise: a failing to which some experts are prone. However, as I have said, it is essential that the opinions expressed be those of the expert and no one else. (When the expert is part of, or the head of, a team, then inevitably some of the work, and perhaps some of the formulation of the opinions, will have been done by others in that team; but in those circumstances, the expert must direct and review, understand and approve the work done by each team member.) Further, in my view, it is not desirable to fiddle too much with the actual phraseology of the expert. For better or for worse, we all have our own individual modes of expression. Evidence – whether lay or expert – speaks most directly when it speaks in the language of the witness and not in the language of the lawyer who has converted it from oral into written form.

51. At the end of the day, the purpose of expert evidence is to persuade the tribunal of fact – usually, a judge – to resolve a particular issue in your client's favour. Most judges will, if time permits, read relevant material (including experts' reports) before the commencement of the hearing, so that they become familiar with the issues and are in a position (among other things) to rule expeditiously on objections to evidence. A judge is likely to find persuasive a report that sets out clearly the issues on which the expert has been asked to express an opinion, the relevant expertise that enables the expert to express that opinion, the facts (including assumptions of fact) on which the opinion is based, the expert's consideration of those facts and analysis of them in the light of his or her expertise, and the conclusions that are reached as a result of that process. If the essential steps in the analysis are set out clearly and consecutively, the cumulative effect of the analysis is likely to be powerful. It is also worth bearing in mind that, whilst the ultimate issue rule has been abolished (see s 80 of the Act), judges rarely find evidence that is, truly, ultimate issue evidence, persuasive.

52. My own practice at the Bar, when time and the client's funds permitted it, was to work through an expert report by myself, in an attempt to see what I could understand and what needed explanation. I would then sit down with the expert and repeat the process, requiring the expert to explain and justify every step in the reasoning that I did not understand. After all, if I could not understand what the expert

said, how could I persuade a judge that the expert's view was more likely than not to be the correct one?

53. As part of the process of preparing the report in final form, it is often helpful (where time and funds allow) to ask the expert to assume that he or she has been retained for the other side, and to consider the draft in a critical and destructive way. In other words, the expert should be asked how he or she would attack it. It is not unnatural for people – and lawyers and experts are no exception to this rule – to become attached to the products of their own thought and labour. However, I have found, exciting the competitive instincts of experts by asking them to assume a critical role can often produce significant improvements in the final product.

54. Of course, it is necessary to bear in mind that in some circumstances an expert whose report has been put into evidence may be required to produce, and may be cross-examined on, not only instructions, but also prior drafts of the report. I personally do not think that it is a problem – at least in the usual case – if draft reports are produced that demonstrate a progressive development of the arguments that are deployed. However, it may be a problem if a comparison of the drafts with the final result shows a sudden U-turn – particularly where the draft was heading towards, and the final version heads away from, a conclusion unfavourable to the party calling the expert and favourable to the party against whom the expert is called.

55. Another matter that needs to be borne in mind is that it is likely (particularly where a matter has been referred out) that experts will be asked to meet, so that they can identify the real issues in dispute between them and the reasons why each contends for his or her respective view. It has been my experience that, whilst some experts may be prepared (notwithstanding their acknowledgment of Schedule K) to take a bold line in their reports, very few will maintain this when confronted with reasoned argument from colleagues whom they respect. It is always desirable to let your experts know that this process is likely to occur. Indeed, where you have tested thoroughly your own expert's report and are satisfied (so far as you are able to judge) that it is well reasoned and that its conclusions are sustainable, it may be desirable to raise, well in advance of any hearing but at a time when the issues and evidence are substantially complete, a conference of the relevant experts to seek to identify the expert issues that are truly in dispute. Not only will that save time at the hearing; it may just lead to an early resolution of the dispute.

END NOTES

1. This is a revised and expanded version of a paper given to the Institute of Arbitrators and Mediators Australia on 13 February 2004. I acknowledge the help of my tipstaff/research assistant, Mr Nigel Firth BEc (Hons), LLB, for his assistance in the preparation and revision of this paper. The defects that remain are attributable to me.

2. A judge of the Supreme Court of New South Wales. The views expressed in this paper are my own, and should not be attributed either to my colleagues or to the Court.