NATIONAL ENVIRONMENT LAW

ASSOCIATION LIMITED

2005 NATIONAL CONFERENCE

RYDGES LAKESIDE, CANBERRA

13-15 JULY 2005

"GETTING REAL ABOUT EXPERT EVIDENCE"

by

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Getting Real about Expert Evidence

By Justice Stuart Morris[1]

There is a dilemma about expert evidence. On the one hand: it permits parties to present their case as they wish; and it can help courts and tribunals to ascertain the truth and to exercise discretionary powers. On the other hand: the expertise of the witness is sometimes doubtful; and the true independence of the witness is nearly always in question. How is this dilemma to be resolved?

Courts of general jurisdiction have been struggling with the problem for decades. If the number of papers and seminars on the subject is any guide, this struggle has intensified in recent years and is no closer to resolution. Courts and tribunals exercising powers in relation to planning and environmental matters have also had to confront the dilemma; and different responses are emerging.

No doubt different responses are warranted. Legal and cultural circumstances are not universal. But, in the context of courts and tribunals that review decisions on the merits and exercise planning and environmental discretions, I believe there is an opportunity to resolve the dilemma by engaging in a paradigm shift. The essence of this paradigm shift is for the court or tribunal to focus, not on which of the witnesses is to be preferred, but upon what is the preferable decision having regard to *all* the matters that may be considered. Relevant matters will include the evidence of witnesses, but will also extend to a wide range of other matters: the submissions of the parties, inferences which can or should be drawn from evidence, inquiries that may be initiated by the court or tribunal and, not least, the experience and expertise of the members of the court or tribunal.

By engaging in this paradigm shift, we move away from the strict adversarial model, we acknowledge that the distinction between submission and evidence in planning reviews is blurred, and we give proper recognition to the expertise of the decision makers. In turn this provides an opportunity to take the emphasis off the *admissibility* of expert evidence, and place it instead on an active and inquisitorial assessment of the *weight* of such evidence. Certainly questions of the expertise and independence of a witness will still be relevant, but these questions will usually be addressed in the context of weight and on the basis that there is rarely such a thing as truly independent evidence. By adopting this approach, tribunals and courts will "get real" about expert evidence.

The approach of courts to expert evidence

An early judicial discussion of expert witnesses was in the 16th Century case of *Buckley v Rice Thomas.*[2] The judge in this case stated, somewhat pompously, that the use of expert

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1 Delivered as a speech at the National Environmental Law Association Conference, 13 - 15 July 2005, Rydges, Lakeside, Canberra.

2 (1554) 75 ER 182 at 191.

evidence made it appear as though "we do not despise all other sciences but our own, but we approve of them and encourage them as things worthy of consideration." As knowledge has developed over the centuries courts have become more and more reliant upon the evidence of experts. It is difficult to contemplate how most modern day disputes could be resolved without the help of professional expertise.

It was not until the mid-19th century, and the growth of judicial authority that came with the times, that evidentiary rules were pushed from their embryonic stage (with judges exercising very little rationalised control over court procedure) to a more rigorous exercise of control over admissible evidence. This reflected a judicial mistrust of an over-reliance on expert evidence, as the courts had been exposed to conjecture, mere opinion and a reduction in the emphasis on "factual" evidence.

This judicial mistrust deserves some further attention. Judges harbour a strong anxiety about the use of expert evidence in court, which can be explained in several ways. Questions have been raised about levels of competence, lack of training and accreditation of so-called experts. Expert evidence may also unduly prolong litigation without significantly assisting the trier of fact, leading to a higher cost of litigation. And an over-reliance on expert evidence may shift the burden of responsibility from the bench to the witness box.

Additionally, the role of expert evidence in jury trials is particularly troubling: jurors may not understand complex, conflicting expert evidence; or they may be misled by the myth that the expert is wholly independent from the party engaging them; or the very role of the jurors may be usurped by evidence which trespasses into their domain.

It is often easy to blur the line between opinion and fact when it comes to the evidence of an expert. Expertise will always be a matter of degree; and does not admit the black and white answers which the rules of evidence demand. Indeed, in a recent commentary English High Court judge Mrs Justice Hallett has said:

> "However good the training, however good the system of accreditation, however vigilant the professional associations, miscarriages of justice have undoubtedly occurred and will continue to occur unless expert evidence is put into its proper context; namely, it is an opinion, based hopefully on fact and science, but nevertheless an opinion".[3]

As judicial mistrust developed over the years, so did a series of exclusionary rules designed to limit the admissibility of expert evidence. The two key rules relate to expertise and independence. For example, section 79 of the *Evidence Act* 1995 (Cth) and (NSW) provides the basic rule that a person's opinion on a matter will be admissible only if the person has specialised knowledge based on the person's training, study or experience, and the opinion of that person is wholly or substantially based on that knowledge. This encapsulates the "expertise rule", in that the expert's training, study or experience will be open to challenge;

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[3] Hon Mrs Justice Heather Hallet DBE "Expert Witnesses in the Courts of England and Wales" (May 2005) 79 *ALJR* 289 at 295.

and also the "area of expertise rule", as, on the face of the section, an expert's specialised knowledge will also be open to challenge if the knowledge is about a novel or relatively untested area. It is also a well established rule that an expert witness must be independent of the party calling the witness.

This raises another concern with the use of expert evidence. A common complaint calls into question the independence and neutrality of the expert from the party engaging them. Expert witnesses, unlike other witnesses in a hearing, are paid for their evidence. This has the consequence of raising potential contaminants such as "subjectivity, personal interests, partisanship, fraud, speculation, bias, gratuitous assumptions and so forth".[4]

Relevant rules of evidence emphasise the importance of neutrality and independence. In a perfect world, both of these are clearly desirable. Indeed most jurisdictions have adopted practice notes that provides that an expert witness has a paramount duty to the court and not to the party retaining them and a duty to assist the court on matters within the expert's expertise.[5]

However, we know from experience that theory and reality diverge. It is one thing to impose a theory of neutrality upon experts. But a host of conscious and sub-conscious factors can impact on the true neutrality of any evidence given by an expert. This is hardly new. As long ago as 1821 Malthus observed that the bias which is most difficult to guard against is the insensible bias of situation and interest.[6] I doubt that an assertion that experts should be independent from those paying for their evidence will ever work. Rather courts and tribunals accepting such evidence need to be inquisitive and flexible enough to assess the credibility of evidence and assign weight to it accordingly.

The very fact that experts can have strongly held and contradicting opinions on the same point of fact sometimes raises a question mark over the reliability of such evidence. Further, there is a long-standing problem of "expert shopping" – where a party engages a series of experts to provide advice until they find the particular expert who will support their client's case. This witness is brought to the witness box to espouse their form of expertise without any reference to the fact that the client may have engaged a long line of potential witnesses and discarded their opinions before finally settling on the most advantageous opinion available.

This problem is again exacerbated with the breed of expert witnesses who have a long standing professional relationship with the client who hires them. Some expert witnesses appear time and time again in litigation for a particular client; a situation in which an allegation of being a "hired gun" could be levelled.

> "The dilemma is, then, that our witness is employed and paid by one party to a dispute, he commences as a consultant and probably becomes negotiator. If he is doing his client justice, he will be partisan, the hired gun. He must, however,

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4 Gary Edmond, "After Objectivity: Expert Evidence and Procedural Reform" [2003] *Sydney Law Review* 8.
5 The Victorian Civil and Administrative Tribunal is no exception: see "PNVCAT 2 – Expert Evidence".
6 Thomas Robert Malthus, *Principles of Political Economy*, (Wells and Lilly, Boston, 1821), p. 186n.

> change his spots when he commences his report and while he is 'in court' remember that he is the [decision maker's] assistant even though it is his client who is paying for his appearance at the hearing".[7]

Expert evidence can be a weapon in the hands of a client who wants to manipulate the tactical play of litigation and overwhelm the court with complex information whilst withholding any expert material that might be damaging to their case. It is not enough to presume that expert witnesses will abide by the ethics of neutrality in every single circumstance. Instead, as I will expand on later, courts and tribunal must "get real" about this evidence and begin to actively assess the weight that should be attached to any and all expert evidence.

Court and tribunals not bound by the rules of evidence

Parliaments around Australia have established numerous tribunals (and some courts) which are *not* bound by the rules of evidence. This has been especially so in relation to tribunals and courts established to review decisions about planning and environmental matters.[8] Why have parliaments taken this course? I think there are several reasons. The rules of evidence (especially those developed at common law) have developed in the context of criminal trials before juries. The rules are less suited to civil or administrative disputes before judges or tribunal members. Disputes about the admissibility of evidence take time, increase costs and promote legalism. Further, the type of evidence in planning and environmental matters is often about the effects of a *proposed* development; which is inevitably a matter of conjecture and inference, rather than conventional fact finding. And, in the context of the review of a planning or environmental decision, most tribunals or courts are constituted as expert bodies.

I suspect the time will come when there is one basic rule of evidence in non-jury civil proceedings: namely, that evidence is relevant. If all relevant evidence is admissible, there will be increased focus on the *weight* of evidence and the probabilities. In my view this would be a positive development, as it would better accord with the way every-day decisions are made in society: that is, by reference to probabilities. This is so even though we often choose binary concepts (for example, "safe" or "unsafe") to express decisions made on the basis of the probabilities.

In providing that tribunals and certain courts are not bound by the rules of evidence, parliaments have clearly contemplated that these rules may be a barrier to the type of justice and decision making it seeks to promote. The history of tribunals in Australia clearly shows that parliaments have deliberately avoided vesting many new jurisdictions in courts of general jurisdiction.[9] The common threads for preferring a tribunal have

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7 J Franks, "The Expert Witness: what an Arbitrator Should Expect" (1994) May *The Arbitrator* 25 at 28-29.

8 For example, section 98 of the *Victorian Civil and Administrative Tribunal Act* 1998 provides that the tribunal is not bound by the rules of evidence or any practices or procedures applicable to courts of record.

9 See, for example, Stuart Morris, "The Emergence of Administrative Tribunals in Victoria", a paper delivered at the Annual General Meeting of the Victorian Chapter of the Australian Institute of Administrative Law Incorporated on 13 November 2003 at Parliament House, Melbourne.

been to promote accessibility by avoiding legalism, to reduce cost, to promote timely decision making and to enable expert decision making. These common threads ought be reference points in determining the practices and procedures of tribunals, including in relation to all evidentiary matters. The question of expert evidence should be no exception. In other words the practices in relation to expert evidence should not just be determined by reference to the method most likely to promote truthful or reliable evidence, but also by reference to cost, timeliness, and accessibility.

It is easy to see how the cost of litigation would be affected by an insistence that expert witnesses be completely impartial. In Victoria it is common for a town planner to be engaged to assist a permit applicant to prepare an application for submission to the responsible authority. If the town planner is then prevented from giving expert evidence in the event of an appeal this will necessitate the engagement of a second town planner with the additional costs that this would incur. But, looking at the matter realistically, is the second town planner likely to be any less partial than the first town planner? Further, the need to engage a second town planner may be at the expense of timeliness as a second person will need to review the papers, inspect the land and prepare a report.

Hence, in the context of an expert tribunal not bound by the rules of evidence, it is sensible to adopt a relaxed view of the two key rules of expert evidence – expertise and independence – provided that these factors are taken into account in assessing the weight of such evidence. A relaxation of the rule in relation to expertise may mean that an opinion can be expressed by a professional engineer about a planning matter or by a town planner about a traffic engineering matter. This is likely to reduce the cost of engaging expert witnesses; and any shortcomings in the expertise of a witness can be accommodated when it comes to the weight placed upon the evidence. In relation to the question of independence, the suggested approach recognises that no witness who is being paid by a party can truly be said to be completely independent. It allows the parties to present the evidence they wish to present, subject to the rider that reduced weight (or no weight) will be placed upon opinion evidence which is partial.

It also needs to be borne in mind that evidence given by professionals in planning and environmental matters is not just evidence of opinion, but also generally includes evidence of a factual nature. There is no bar to a person who is partial giving evidence of a factual nature. And when it comes to the expression of opinion, usually this will be about the effects of a use or development and will inevitably be a matter of informed speculation.

In truth, the traditional distinction between evidence and submission is blurred in the conduct of an administrative review of a decision in relation to a planning or environmental approval. This is because the key issues are not usually issues of primary fact; rather the key issues are what inferences should be drawn from the evidence as to the effects of the proposed development. This question may be influenced by opinions held by reputable experts. However it is equally influenced by *submissions* made by the parties (or, for that matter, by experts). Because the key issues usually depend upon the assessment of argument, not findings about primary facts, courts and tribunals exercising

administrative review powers need not be fastidiously concerned with the conceptual distinction between submission and evidence.

It needs to be kept in mind that, in reviewing a planning discretion on the merits, a decision of a tribunal or court is not a decision as to what are the legal rights of the parties as existing immediately before the giving of the decision.[10] Rather it is an administrative decision as to whether a permit should be granted to allow a use or development that would otherwise be unlawful. Thus it has been held that no question of *res judicata* or *issue estoppel* can arise because a permit has previously been granted or refused in like circumstances.[11] Because the tribunal or court making such an administrative decision is not deciding on the legal rights of parties, it is not engaging in fact finding in the usual sense. This has implications not just in relation to expert witnesses, but affects the whole manner in which such proceedings are conducted.

Importantly the expertise of a court or tribunal can be used, subject to natural justice requirements, in determining a proceeding. Such expertise is not confined to better assessing the evidence given by witnesses.[12] In *Spurling v Development Underwriting (Vic) Pty Ltd*[13] Stephen J explained that a planning tribunal was "an expert tribunal … the members of which are no doubt expected to bring to their task of adjudication those qualities which have qualified them for membership". In this context, he identified that a question arose as to the circumstances where it would be necessary for the tribunal to inform the parties of its intention to use its own expertise. He concluded that an expert tribunal can use knowledge which everyone working in the field has but that, if it bases its decision on any other sort of information, it must first give the parties to the dispute an opportunity of presenting opposing evidence.

The general expertise of a typical planning tribunal is particularly relevant in relation to the inferences that should be drawn from the primary facts about the effects of a development. It is also an expertise which is valuable in assessing the weight that should be given to the opinions of an expert witness.

Planning and Environment List of VCAT

Let me take the Planning and Environment List of VCAT as an example. This list operates in a different manner than the courts of general jurisdiction. As a starting point, the tribunal is not bound by the rules of evidence. But it is important to look deeper than this and examine what makes the tribunal different and why it does not require the same limiting and exclusionary rules with respect to admitting expert evidence as the courts. Although the tribunal has an obligation to act fairly and according to the rules of natural

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10 *Cook v Faithland Inc* (1993) 79 LGERA 308.
11 *Cook v Faithland Inc* (1993) 79 LGERA 308.
12 *Keller v Drainage Tribunal* [1980] VR 449.
13 [1973] VR 1 at 8-12.

justice,[14] it also has a mandate to provide timely and affordable access to justice. A key ingredient in achieving this objective is that the tribunal operates as an expert tribunal.

VCAT is based upon the principle that decisions will be made by members with specialist knowledge. Hence a member of VCAT is assigned to a specific list or lists; and can only sit in an assigned list. Further in assigning a member to a case the nature of the case is examined and categorised so that a member who has expert knowledge in the required areas can be called upon. The twelve full time members in the planning list are from varied backgrounds and bring varied specialities to the table, ranging from law, mediation, design, town planning, heritage, engineering, science and the environment. Then the list has 32 sessional planning members – with a wider range of expertise – who can be called upon from time to time to sit on matters that require their particular skill-set. Usually these sessional members sit with a full time member. This means that if you bring a planning or environmental matter to VCAT, the tribunal can be constituted by members with specialised knowledge of the key issues likely to arise in relation to that matter, whether it be planning law, traffic engineering, environmental science, architecture, economics, or perhaps, if the case requires it, coastal geomorphology. This high degree of specialisation means that it is less and less likely that the tribunal will have to rely on evidence outside the expertise or experience of a tribunal member.

It will still be necessary to properly manage the giving of expert evidence. For example, when expert evidence is given, the tribunal must have the opportunity to shape the circumstances and manner in which expert evidence is received, to improve accessibility and to reduce the cost of litigation. Thus the tribunal has the power to direct experts retained by the parties to meet and narrow points of difference between them. If this is ordered, the remaining points of difference must be identified in writing and filed with the tribunal. This may shorten the proceeding and reduce costs. Or the tribunal can order that expert evidence be given concurrently.

However the need for these approaches is substantially reduced by the paradigm shift I have identified. Having specialist members sitting on tribunals and using their own expert knowledge assists in resolving the dilemma about expert evidence. It enables the focus to shift from the management of the case to the determination of the case. An expert tribunal can better evaluate the credibility and reliability of evidence. And an expert tribunal is unlikely to feel compelled to accept unchallenged evidence simply because it is given by an expert.

Conclusions

It is clear enough that there are a myriad of problems inherent in the admissibility of, and reliance upon, expert evidence. But what are our options for dealing with these problems? I suppose one logical option might be to abolish expert evidence completely. But this would deprive the parties of a persuasive tool. More importantly it would

[14] Section 98(1)(a) VCAT Act. See also *Francis-Wright v VCAT* (2001) 17 VAR 306 at 317.

deprive courts and tribunals of the great benefit of professionally prepared evidence and the testing of that evidence by counsel.

The exclusionary rules as they exist now are bent towards admitting the evidence of a person who appears to be an expert "on the papers" yet may not have the nuts and bolts knowledge of the particular facts of the case. In the inverse situation, the exclusionary rules may operate to exclude the evidence of a person who may not have impressive formal qualifications, but through experience and exposure may have a far more reliable opinion on certain areas.

I believe a better approach is to take a generous approach as to who may give expert evidence, both in relation to expertise and independence, and to then consider such matters in assessing the weight to be given to such evidence. Thus a well informed amateur might be permitted to give evidence on a scientific matter, with the degree of expertise being a factor in assessing the weight to be given to that evidence. Similarly, an expert engaged by a party to advance the party's case should be permitted to give expert evidence, but this fact will be relevant to weight. The approach I advocate will improve accessibility to the justice system; it will reduce costs to litigants; it will acknowledge the broad extent of knowledge in the community, as well as the extent of cross-discipline knowledge.

The approach will also face up to the fact that it will rarely be the case that an expert witness is truly independent of the party who engages him or her. It is dangerous for decision makers to take the aspirational statements of neutrality at face value and assume that the evidence being put before them will, by some stroke of good intentions, be truly non-partisan. Once decision makers have identified that ever-present danger, they must take back the responsibility of assessing the credibility and reliability of the evidence by focusing on the weight to be given to that evidence. By adopting this approach, tribunals and courts will "get real" about expert evidence.