The admissibility of expert evidence

Makita v Red Bull

By Greg Nell

The admission of expert evidence is a significant exception to the general rule, found for the purposes of proceedings in New South Wales in s76 of the Commonwealth and New South Wales Evidence Acts,[1] excluding the admission of opinion evidence. Moreover, reliance upon expert evidence is now a common occurrence in litigation, with expertise being claimed over a broadening range of areas. As a result, when advising as to the use of such evidence and preparing expert's reports, it is important to be aware of the circumstances in which expert evidence can be admitted[2] and the requirements that must be satisfied by a party seeking to rely upon such evidence at a final hearing.

The current rules for the admissibility of expert evidence require that the evidence be relevant[3] and that it have sufficient probative value.[4] Critically it must also satisfy s79 of the Evidence Act, which is in the following terms :

> 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 effect of s79 is that, before evidence can be admitted as expert evidence, three requirements must be met: first, the witness giving that evidence must have a 'specialised knowledge';[5] secondly, this specialised knowledge must be 'based on training, study or experience'; and thirdly the opinion sought to be expressed by the witness must be one that is 'wholly or substantially based on that [specialised] knowledge'. At its most basic level, s79 points up that there is a critical nexus[6] between

- the requirement that the 'specialised knowledge' be shown to be based on the 'training, study or experience' of the witness and
- the requirement that the opinion expressed by the witness be based wholly or substantially on that 'specialised knowledge'.[7]

The requirements of s79 are mandatory. They go to the admissibility of the evidence, as well as its weight if admitted. If those requirements are not satisfied, the evidence is not admissible and will not be admitted.[8] Where there is a challenge to the admission of such evidence on the basis that it is not expert evidence, it will be necessary for these requirements to be established, on the balance of probabilities, by the party seeking to adduce and rely upon that evidence.[9]

There are two further sources of additional obligations relevant to a party's ability to rely upon expert evidence, which must also be considered where such evidence is proposed to be adduced. The first is the rules of court and practice notes or guidelines[10] that have been produced by the courts on the topic of expert evidence. These contain requirements that are, for the most part, procedural, for example prescribing the giving of prior written notice of expert evidence where it is to be relied upon, the time within which such notice must be given, the formalities that must be complied with when such evidence is reduced to writing, particular matters that must be included in an expert's report and the consequences of a failure to comply with any of these requirements. In some respects, the requirements may be expressed as prerequisites to the admissibility of the proposed expert evidence.[11] But even where they are not, they nevertheless still go to whether the party seeking to rely upon that evidence may be permitted to do so and for that reason should be met.

The second source, or potential source, of obligations are those requirements not expressly found in s79 but which the courts have nevertheless stated must be satisfied if expert evidence to be successfully relied upon. These additional requirements derive from the basis on which expert evidence was admitted under the common law prior to the Evidence Act and the enactment of s79. It is these further requirements and the two competing approaches that have been taken by the courts, both to these requirements and the role that they play that are identified and discussed briefly in this article.

Makita (Australia) Pty Ltd v Sprowles

The leading statement as to what a litigant is required to prove in order to successfully adduce expert evidence in proceedings in New South Wales is to be found in the judgment of Heydon JA (as his Honour then was) in *Makita (Australia) Pty Ltd v Sprowles*,[12] in particular in the following summary:

> [85] In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of 'specialised knowledge'; 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; the opinion proffered must be 'wholly or substantially based on the witness's expert knowledge'; so far as the opinion is based on facts 'observed' by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on 'assumed' or 'accepted' facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded. If all 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 opinion 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* [(1999) 197 CLR 414] (at 428[41]), on 'a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise'.[13]

The facts of that case may be shortly stated. The plaintiff fell down stairs at her workplace and was injured. She sued her employer in negligence. The trial judge found for the plaintiff and awarded her substantial damages. In doing so, the trial judge found that the tread of the stairs was slippery, that this was the reason the plaintiff fell and that her employer was in breach of the duty of care that it owed the

plaintiff by reason of the condition of the stairs. The finding that the plaintiff's fall was due to the slipperiness of the stairs was largely, if not entirely, based on the evidence of an expert called by the plaintiff,[14] who had concluded that the plaintiff's accident was caused 'by the inadequate frictional grip afforded by the very smooth concrete stair treads for [the plaintiff's] footwear. ...Whilst the interface between [the plaintiff's] shoes and step tread should not be classed as very slippery, the level of grip afforded is below that needed for a reliable margin of safety'.[15] Prior to and for the purposes of giving this evidence, the expert had carried out two types of tests. The first consisted of tests conducted on the stairs, using various shoe materials, albeit some $9^{1/2}$ years after the accident. The purpose of these tests was to measure the slipperiness of the stairs. The second type of test conducted by the expert was to test the slipperiness of the plaintiff's shoe.

There was also before the trial judge evidence of the plaintiff's use of the stairs in question repeatedly for nearly $2^{1/2}$ years prior to her accident and without incident or injury; evidence from the plaintiff's immediate superior of his regular and frequent use of the same stairs without incident or injury; the expert's own observation that present occupants of the building regularly used the stairs in question for access to and from the car park and between the floors of the building; and the absence of any evidence of any other person engaged in the defendant's business having ever encountered relevant problems on the stairs either before or after the accident. In those circumstances, were it not for the evidence of the plaintiff's expert, a conclusion that the stairs were not slippery would have been inevitable.[16]

The employer appealed. Included amongst its grounds of appeal was a claim that the trial judge had erred in accepting the expert evidence. The appeal was upheld unanimously and verdict entered for the employer. All three members of the Court of Appeal dismissed the evidence of the expert and found that the trial judge ought not to have accepted it, particularly in light of the evidence that was before the trial judge to the contrary effect.

The employer's challenge to the expert's evidence was not as to its admissibility, the expert's report having been admitted at the trial without objection.[17] Rather it was as to whether his evidence ought to have been accepted by the trial judge. In examining whether the expert's report was useful, Heydon JA stated that it was necessary to consider whether it complied 'with a 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'.[18] This then led his Honour to a discussion of the requirements for the admission of expert evidence, commencing at paragraph [59] of his reasons for judgment and culminating in the summary contained in paragraph [85] (quoted earlier).

His Honour's discussion is of interest for at least three reasons. The first is because of the explanation as to how it is that experts came to have this 'prime duty'. In this regard, his Honour noted that an expert cannot usurp the role of the trial judge,[19] who must make the necessary findings of fact.[20] The expert, however skilled and eminent, can give no more than evidence.[21] Whilst it is open to the court to accept that expert evidence when given and to make findings in accordance with that evidence and based upon it, the court is not obliged to accept the evidence of an expert, even where no other expert is called to contradict it.[22] This is particularly where that evidence goes to the ultimate issue.[23] The tribunal of fact is bound to consider and assess all the evidence before it, including that of an expert, in order to determine whether or not to accept that evidence and (assuming that the evidence is accepted) whether or not to prefer it over any contrary evidence. In order for the court to perform that task, it is necessary for the expert to explain the basis on which he or she has reached their opinion, so that the court may undertake its own independent assessment of that evidence and form its own conclusion. The tribunal of fact cannot arrive at an independent assessment of the expert opinion and its value unless the basis of that opinion is explained.[24] The tribunal of fact cannot weigh and determine the probabilities of a fact that is sought to be proved by expert opinion evidence if the expert does not fully expose the reasoning that he or she relied upon in reaching that opinion.[25]

The second reason his Honour's discussion is of interest is for the description of the content of that duty, or more correctly what the expert must do in order to discharge that duty.[26] As has already been observed, first the expert must identify the reasoning underpinning their opinion. This may include for example furnishing :

> 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. [27]

As Heydon JA noted, a statement to similar effect had also been earlier made in Australia by Fullagar J in *R v Jenkins; Ex parte Morrison:*[28]

> Fullagar J said that an expert witness must 'explain the basis of theory or experience' upon which the conclusions stated are supposed to rest, for, as Sir Owen Dixon said in an extra-judicial address quoted by Fullagar J, 'Courts cannot be expected to act upon opinions the basis of which is unexplained.[29]

Secondly, the expert must also identify the particular facts and assumptions upon which their opinion rests, distinguishing between those facts that the expert is able to prove by his or her evidence

and those that have been assumed by the expert and which must be proved independently. For otherwise, it may not be possible for the court to test or assess the expert's opinion,[30] or more importantly, its application to the facts of the case before the court. As Heydon JA observed :

> [64] The basal principle is that what an expert gives is an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based. If other admissible evidence establishes that the matters assumed are 'sufficiently like' the matters established 'to render the opinion of the expert of any value', even though they may not correspond 'with complete precision', the opinion will be admissible and material: see generally *Paric v John Holland Constructions Pty Ltd* [1984] 2 NSWLR 505 at 509-510; *Paric v John Holland Constructions Pty Ltd* (1985) 59 ALJR 844 at 846. One of the reasons why the facts proved must correlate to some degree with those assumed is that the expert's conclusion must have some rational relationship with the facts proved.[31]

The third reason why this discussion is of interest is because of Heydon JA's identification of the consequences of the expert having this duty, or perhaps more importantly, the consequences of the expert failing to discharge that duty, namely that it goes to the admissibility of the expert's evidence. This was identified in the following statement within the summary in paragraph [85] of the judgment in *Makita*:

> If all 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.[32]

It is in this third respect that a divergence has developed in the authorities, in particular in the Federal Court of Australia.[33]

In *Makita* the Court of Appeal did not find that the evidence of the expert called by the plaintiff was inadmissible and both the court's rejection of his evidence and its decision to set aside the judgment below were not made on that basis. Rather, each of the members of the court of Appeal found that the trial judge had erred in accepting the expert's evidence over the contrary evidence that was otherwise available,[34] having regard to the weight of the evidence. For example, after discussing the content of the expert's evidence, Heydon JA concluded :

> The conclusions in Professor Morton's report ought not to be accepted uncritically. On examination it is difficult to be convinced by them. The lay history of incident-free use of the stairs suggests that they were not slippery. That inference from that history is preferable to Professor Moreton's conclusions. If the stairs were not slippery, the defendant was not in breach of its duty of care as occupier and employer. The appeal should be allowed on that ground.[35]

The requirements for the admissibility of expert evidence had also previously been the subject of an extra curial commentary by Heydon JA at a seminar dealing with aspects of the Evidence Act held by the Judicial Commission on 14 November 2000. Extracts from this commentary were quoted with approval by Einstein J. in *Idoport Pty Ltd v National Australia Bank Ltd.*[36] A complete copy of the commentary is available on the Supreme Court web site.[37] In this commentary, Heydon JA summarised the relevant requirements for the admission of expert evidence under the following seven heads:[38]

1. There must be a field of specialised knowledge and the witness must identify it.
2. The witness must have expertise in an aspect of that field, and must identify it.
3. The opinion proffered must be substantially based on the expertise of the witness and the witness must identify it.
4. Any factual assumptions underlying the witness's opinion must be clearly identified and articulated.
5. Any factual observations made by the witness which underly the witness's opinion must be clearly identified and articulated, and the observations must have been sufficiently detailed to form a satisfactory basis for the opinion.
6. If the witness relies on a combination of factual assumptions and factual observations, they must be identified,
7. The witness must explain how the knowledge on which the witness is an expert applies to the facts assumed or observations made so as to produce the opinion propounded.

The short point is that not only must the essential requirements for admissibility be satisfied, but they must be proved to have been satisfied. Whether they exist cannot be left to speculation.

The commentary also contained a discussion of each of these heads and what they entailed. It is not proposed to repeat that discussion here. Suffice it to say for present purposes that the first three heads which his Honour has identified reflect the language and express obligations of s79 of the Evidence Act. The remaining heads reflect those additional requirements which the courts had in the past also required to be satisfied under the common law for the admission of expert evidence, which are not found expressly in s79 but which his Honour found continued to apply to evidence sought to be admitted under that section. Moreover, consistent with the position under the common law, the view expressed in this commentary[39] is that these last four heads go to the admissibility of the evidence and therefore must be proved in order for the evidence is to be admitted.[40] Accordingly, Heydon JA observed in his commentary in relation to the sixth head:[41]

> A failure by a witness to make or identify sufficient factual assumptions to form a rational basis for the opinion may render it inadmissible, or of so little weight that it should not be left for the consideration of the trier of fact. The same is true if a witness fails to make sufficient factual observations to support the opinion. And the same is also true of that class of case where the witness's opinion can only validly rest on a combination of observations and assumptions.

In the same vein, his Honour expanded upon the seventh head in his commentary in inter alia the following terms:[42]

> The opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions

reached: that is, the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded. If all 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 one cannot be sure of that, the evidence is not admissible. And an attempt to make the basis of the opinion 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 R*, on 'a combination of speculation, inference, personal and second hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise of a psychologist' (at para [41]). ...

The process of making the reasoning explicit enables the court to see whether the evidence is admissible expert evidence, or whether it is instead nothing more than 'putting from the witness box the inferences and hypotheses on which' the party calling the witness wishes to rely (*HG v R* at para [43]). The vital importance of compliance with the requirement of s79 that opinions of expert witnesses be confined to opinions based wholly or substantially on their specialised knowledge was stressed by Gleeson CJ for the following reason: 'Experts who venture 'opinions' (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted'. But the rendering explicit of what experts say not only aids the court in the determination of admissibility; it aids the court in fact finding at the end of the trial by making plain what the process of reasoning is. This is important, because it is not the role of the finder of fact merely to accept the opinions given to it, or select one opinion which seems more plausible than another. According to Lord President Cooper in *Davie v Edinburgh Magistrates* 1953 SC 34 at 40, experts must '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'. It follows that an expert witness must explain what Fullagar J. called 'the basis of theory or experience' on which the opinion of the witness has applied to the dispute in questions rests: *R v Jenkins; ex parte Morrison* [1949] VLR 277 at 303.

Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd

Following the decision in *Makita*, the issue of the admissibility of expert evidence arose for the consideration of the full court of the Federal Court of Australia in *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd*,[43] and in the course of dealing with that issue, the members of the full court made a number of observations in relation to the judgment of Heydon JA in *Makita*, especially the summary at para. [85], not all necessarily consistent with it.

In that case, the respondents had brought proceedings against the appellants alleging that the packaging of a product distributed by the appellants was substantially identical with, and deceptively similar to, the respondent's product (which the appellants also distributed) and that the appellants' conduct contravened provisions of the *Trade Practices Act 1974* (Cth) and constituted passing off. The respondents succeeded at first instance. The appellants appealed to the full court.

One of the appellants' grounds of appeal was a challenge both to expert evidence of Dr Beaton which the respondent had relied upon below, and the trial judge's use of that evidence. Although Dr Beaton's evidence had been received at the trial without objection, it was argued by the appellants on appeal that his evidence was inadmissible or ought not to have been accorded weight.[44] In support of that ground, the appellant referred to and placed reliance upon the judgment in Makita.[45] The full court unanimously held that the challenge to the admissibility of Dr Beaton's evidence failed; as did the appellants' challenge to the trial judge's use of that evidence.[46]

In relation to *Makita*, Branson J. observed at the outset:

> [7] The approach of Heydon JA as set out [in paragraph [85] of the judgment] is, as it seems to me, to be understood as a counsel of perfection. As a reading of his Honour's reasons for judgment as a whole reveals, his Honour recognised that in the context of an actual trial, the issue of the admissibility of evidence tendered as expert opinion evidence may not be able to be addressed in the way outlined in the above paragraph.[47]

Three reasons were given for this statement.[48] The first concerned the situation where, as in that case, the expert evidence was admitted without objection. In this regard, her Honour stated:

> Rarely, if ever, would a trial judge be expected to interfere with the basis upon which represented parties had chosen to conduct their litigation by challenging the basis of an implicit concession concerning admissibility.[49]

The second reason had regard to the fact that any ruling on the admissibility of evidence is ordinarily required to be made by the trial judge during the course of the trial rather than at its conclusion, and the consequences of that fact.

> The trial judge's rulings will be based on the evidence and other relevant material, which may include assurance given by counsel, which are before the judge at the time that the ruling is required to be made. ... For this reason, it may prove to be the case that evidence ruled admissible as expert opinion will later be found by the trial judge to be without weight for reasons that, strictly speaking, might be thought to go to the issue of admissibility (eg that the witness's opinion is expressed with respect to a matter outside his or her area of expertise or is not wholly or substantially based on that expertise).[50]

The third reason was that, as her Honour had earlier pointed out in *Quick v Stoland Pty Ltd*:[51]

> the common law rule that the admissibility of expert opinion evidence depends on proper disclosure of the factual basis of the opinion is not reflected as such in the Evidence Act 1995 (Cth) (the Evidence Act). The Australian Law Reform Commission recommended against such a precondition to the admissibility of expert opinion, expressing the view that the general discretion to refuse to admit evidence would be sufficient to deal with problems

> that might arise in respect of an expert opinion the basis of which is not disclosed : ALRC Report No. 26, vol. 1 para. 750.[52]

This last point is one that has since been taken up by a number of subsequent judgments in the Federal Court, distinguishing the judgment of Heydon JA in *Makita* on this basis.[53]

Branson J. also made a number of further observations as to what may be required of a party to satisfy the admissibility of expert evidence. In broad terms, these might be seen as reflecting a relaxation of the stringency of the requirements to admissibility that Heydon JA had identified.[54] First, if Heydon JA's use of the word 'sure' in paragraph [85] of his judgment in *Makita* was intended to be in its usual sense of subjectively certain, then her Honour stated that she did not agree that when determining the admissibility of expert evidence it is necessary for the court to the sure whether the opinion is based wholly or substantially on the expert's specialised knowledge.

> The test is whether the court is satisfied on the balance of probabilities that the opinion is based wholly or substantially on that knowledge: s142 of the Evidence Act. However, as identified in [12] above, satisfaction of that test is not sufficient to render the evidence of the expert opinion admissible. To be admissible the evidence must also be relevant. It is the requirement of relevance, rather than the requirement that the opinion be based wholly or substantially on the expert's specialist knowledge, that, as it seems to me, most immediately makes proof of the facts on which the opinion is based necessary. If those facts are not at the close of trial proved, or substantially proved (see *Paric v John Holland (Constructions) Pty Ltd* (1985) 59 ALJR 844 at 846), it is unlikely that the evidence, if accepted, could rationally affect the assessment of the probability of the existence of the fact in issue in the proceeding to which the evidence is directed.[55]

Secondly, Branson J. also stated that the requirement that an expert opinion be wholly or substantially based on the witness's specialised knowledge was not, in her opinion, intended to require a trial judge to give 'meticulous consideration', before ruling on the admissibility of the evidence of the opinion, to whether the facts on which the opinion is based form a proper (in the sense of logically or scientifically or intellectually proper) base for the opinion. Rather, her Honour said:

> It is sufficient for admissibility, in my view, that the trial judge is satisfied on the balance of probabilities on the evidence and other material then before the judge that the expert has drawn his or her opinion from known or assumed facts by reference wholly or substantially to his or her specialised knowledge. [56]

Branson J. also went on to observe in this regard that the usual practice of requiring expert evidence in writing, together with guidelines such as the Federal Court's *Guidelines for Expert Witnesses* will generally ensure that there is sufficient material before the trial judge to enable him or her to form a view, on the balance of probabilities (albeit in the context of the trial as a whole, a provisional view), as to whether an opinion is wholly or substantially based on the witness's specialised knowledge. [57]

Finally, Branson J. noted that evidence adduced after the reception of the expert evidence, most likely in cross examination, may reveal that an opinion proffered in an affidavit or report is not wholly or substantially based on the witness's specialised knowledge or that the expert made an error (whether of logic, science or otherwise) in the process of reaching his or her opinion.

> While that evidence might be relevant to admissibility in a hypothetical sense, it would not, of itself, demonstrate error in the earlier ruling that the affidavit or report be received in evidence. The correctness of that ruling is to be judged by reference to the relevant evidence and other material before the judge at the time of the ruling. The evidence might, however, be of crucial importance with respect to the weight to be accorded the opinion at the end of the day.[58]

In the course of their joint judgment, Weinberg and Dowsett JJ. also made a number of observations regarding the dicta of Heydon JA in *Makita*. The first was in relation to the strictness with which the elements identified in paragraph [85] of the judgment of Heydon JA were to be applied:

> [87] The use of the phrase 'strictly speaking' in the last sentence should not be overlooked. It may well be correct to say that such evidence is not strictly admissible unless it is shown to have all of the qualities discussed by Heydon JA. However, many of those qualities involve questions of degree, requiring the exercise of judgment. For this reason it would be very rare indeed for a court at first instance to reach a decision as to whether tendered expert evidence satisfied all of his Honour's requirements before receiving it as evidence in the proceedings. More commonly, once the witness's claim to expertise is made out and the relevance and admissibility of opinion evidence demonstrated, such evidence is received. The various qualities described by Heydon JA are then assessed in the course of determining the weight to be given to the evidence. There will be cases in which it would be technically correct to rule, at the end of the trial, that the evidence in question was not admissible because it lacked one or other of those qualities, but there would be little utility in so doing. It would probably lead to further difficulties in the appellate process. [59]

As to the contents of the expert's report, in particular in relation to the expert's duty to explain his or her reasoning, Weinberg and Dowsett JJ observed:

> [89] ... Further, we do not accept the proposition inherent in much of what the appellants have said, that every opinion in an expert's report must be supported by reference to an appropriate authority. Some propositions may be so fundamental in a particular discipline as to be treated as virtually axiomatic. That does not exclude the possibility of cross examination upon such matters. There may be disagreements among experts as to what is axiomatic in their shared discipline ... The extent to which an expert should seek to justify views, including opinions expressed in a report may well depend upon the matters which are really in issue between him or her and any expert called by the opposing parties. In most cases, as one would expect, reputable experts will agree on many, if not most of the preliminary steps and learning upon which an ultimate opinion is based. The areas of difference will emerge when opinions are exchanged. Differences will be further ventilated in the course of cross examination. It cannot be sensibly suggested that an expert should offer chapter and verse in support of every opinion against the mere possibility that it may be challenged. [60]

The differing approach taken by full court in *Red Bull* to the requirements identified by Heydon JA in *Makita* has since been embraced in a number of other Federal Court decisions, in at least three respects. The first is as to the potentially more lenient approach to what must be satisfied at the time of the tender of an expert's report to satisfy the admissibility of the report. This is consistent with the observation of Branson J. that the approach of Heydon JA was a counsel of perfection and the admissibility of evidence tendered as expert opinion evidence may not be able to be addressed in the way outlined by Heydon JA in para [85] of his judgment in *Makita*.[61] The second is as to whether those requirements identified by Heydon JA which are not expressly referred to in s79 in truth go to the admissibility of the expert evidence tendered under that section or only to its weight. The third, following on from the second, is whether a failure to prove the facts on which an expert's evidence is based renders that evidence inadmissible or merely goes to the weight which the tribunal of fact should give to that evidence.

This third respect was, for instance, recently considered by Heerey J. in *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd*.[62] In that case the respondents relied upon (what his Honour described as) the 'well known passage from the judgment of Heydon JA in *Makita*'[63] in support of an objection taken to the admissibility of opinions sought to be tendered as expert evidence 'based on market research reports and the like which had not been proved in evidence and were not likely to be *proved*'.[64] In dismissing the objection on that basis,[65] Heerey J. said:

> However, I accept the submission of senior counsel for Cadbury that this aspect of *Makita* has not been followed in the Federal Court. The lack of proof of a substantial part of the factual basis of Dr Gibbs' opinions does not of itself render his evidence inadmissible under s79. Such lack of proof merely goes to the weight which may be given to the opinion: *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354; [2002] FCAFC 157 at [16] per Branson J and at [87] per Weinberg and Dowsett JJ, *Neowarra v Western Australia (No 1)* (2003) 134 FCR 208; 205 ALR 145; [2003] FCA 1399 at [16], [21] - [27] per Sundberg J, *Jango v Northern Territory (No 4)* (2004) 214 ALR 608; [2004] FCA 1539 at [19] per Sackville J. This line of authority is consistent with the earlier High Court common law decision in *Ramsey v Watson* (1961) 108 CLR 642 at 649; [1963] ALR 134 at 138-9.[66]

In *Neowarra v Western Australia*[67] Sundberg J was required to rule on objections to a joint anthropological report in native title proceedings. In the course of his judgment, his Honour discussed[68] whether 'the basis rule' at common law operated as a criterion of admissibility or merely went to the weight of the evidence and, in any event, whether it survived the enactment of the Evidence Act and was incorporated into s79. His Honour concluded[69] that the Australian Law Reform Commission had decided not to include a basis rule in its draft of the Evidence Act, with the result that opinion evidence whose basis was not proved by admitted evidence would prima facie be brought before the court. In these circumstances, the weight to be accorded to that evidence was to be left to be determined by the tribunal of fact.[70] If the evidence was to be excluded (or not admitted), that would be on discretionary grounds.[71] This conclusion was at odds with what Heydon JA had said in *Makita*,[72] in particular the fourth requirement of his summary at para [85][73] which according to Sundberg J:

> seems to me, with respect, to be restoring the basis rule. The reason his Honour gave for requiring this and the other presently immaterial requirements is that 'if all 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'. While that may be so with respect to other requirements, the expert's exposure of the facts upon which the opinion is based is sufficient to enable the relevant inquiry to be carried out. That inquiry is not dependent on proof of the existence of those facts.[74]

Further, in support of this conclusion, Sundberg J. also stated that the dicta of the High Court in *HG v The Queen*[75] does not support this 'supposed requirement'.[76] Referring to what Gleeson CJ said in that case at para [39] Sundberg J. observed:

> His Honour does not thereby require, as a condition of admissibility, that the assumed facts on which the opinion is based are established by the evidence. If at the end of the evidence they are not established, the weight to be accorded the opinion will be reduced, perhaps to nil. But that is not a matter of admissibility.[77]

But as Sundberg J. also recognised, this is not to say that it may not be not necessary for an expert to identify the facts and assumptions on which his or her opinion (and thereby evidence) is based.

> While the legislation does not incorporate a 'basis rule', an expert should nevertheless differentiate between the facts on which the opinion is based and the opinion in question, so that it is possible for the court to determine whether the opinion is wholly or substantially based on the expert's specialised knowledge which in turn is based on training, study or experience.[78]

It is not proposed to canvass in this article all of the decisions of the Federal Court in this regard; or to seek to reconcile them. The intention is simply to draw the reader's attention to the existence of these competing views.

The potential impact of the full court's decision in *Red Bull* on the dicta of Heydon JA in *Makita*, at least in relation to the first of the three aspects earlier identified, has also been the subject of obiter comment by Austin J in *Dean-Willcocks v Commonwealth Bank of Australia*.[79] After referring to both the effect of some of the observations of Weinberg and Dowsett JJ and Branson J in *Red Bull*,[80] Austin J said:

> [13] To the extent that the observations in the full Federal Court may be taken to have qualified Heydon JA's statements (a question that is open to debate: see Notaras v Hugh [2003] NSWSC 167 ... at [3] - [8]), it seems to me that the qualification was directed to a point that is not before me in the present case. The judges of the full Federal Court appear to have been concerned that, as a practical matter, it will often be difficult for the judge to decide early in the trial, when asked to rule on the admissibility of an expert's report tendered in evidence, whether the assumed or proved facts form an adequate foundation for the expert's opinion, and whether the expert's reasoning process is sufficiently laid out and exposed to analysis: see also *Australian Securities and Investments Commission v Adler* (2002) 20 ACLC 222. However, in my opinion there is no

practical or other difficulty in the trial judge deciding, when an expert's report is tendered early in the hearing, whether the subject matter of the report is within the scope of the expert's specialised knowledge. ...It is the latter aspect of *Makita*, rather than the former, that arises in the present case.[81]

In *Notaras v Hugh*[82] Sperling J after referring to paragraph [85] of *Makita* and to Einstein J's judgment in *Idoport Pty Ltd v National Australia Bank*[83] noted that:

[6] *Makita* presents a strict approach to the admissibility of expert evidence. It arises by implication from the terms of s79 and the antecedent common law. One has then to bear in mind, however, that all statements of principle are to be received in the context of the case before the court: *Quinn v Leathem* [1901] AC 495, 506

[7] The full court of the Federal Court has held that many of the matters referred to by Heydon JA in Makita 'involve questions of degree, requiring the exercise of judgment' and that, in trials by a judge alone they should commonly be regarded as going to weight rather than admissibility : *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157 at [16] and [87].

[8] I would take the statements I have quoted from *Makita* and *Idoport* to be statements of general principle, to be applied insofar as they are apt to ensure compliance with the conditions specified in s79 in the circumstances of the case.[84]

Concluding comments

Where expert evidence is to be relied upon, it is critical that in preparing that evidence the elements of s79 be addressed and proven, or at least capable of being proven if that evidence is or is likely to be challenged. At the same time, care should also be taken to address the other requirements identified by Heydon JA in para [85] of *Makita* which are not otherwise referred to in s79, in particular in identifying those facts and assumptions upon which the proposed evidence is based and explaining adequately the reasoning that underlies the opinion(s) comprised in that evidence. Again, this is especially so if the evidence is, or is likely to be, challenged and notwithstanding the absence of any express reference to these matters in s79. For the purposes of proceedings in the New South Wales courts, the strict application of the dicta of Heydon JA means that these additional matters go to the admissibility of the evidence and require that they be established on the balance of probabilities to avoid rejection of the evidence or a failure to have it admitted.

Whilst the comments of the full court in *Red Bull* and subsequent cases in the Federal Court may reflect an apparently more lenient approach to that apparently countenanced by the comments of Heydon JA, at least insofar as these additional requirements may not be treated as going to the admissibility of the proposed expert evidence and may not serve to prevent the admission of that evidence if the requirements of relevance and s79 are otherwise satisfied, these additional requirements will, nevertheless, still go to the weight that the court is likely to give such evidence once admitted. Accordingly, prudence dictates that these additional requirements should still be addressed when expert evidence is being considered and prepared and steps taken to satisfy them.

Similarly, even if (as the judgments of the Federal Court cited above suggest) the effect of the Evidence Act and s79 is to remove the formal requirement that the basis of the expert evidence must be proved by admissible evidence to make the expert evidence admissible, such that the expert evidence may be admitted even where the assumed facts have not been proved, in the absence of identification of the facts on which it is based and proof of those facts, that evidence is unlikely to have much if any probative value. Indeed, its value may be so low that the evidence is found to have no weight at all or is rejected (not admitted) on discretionary grounds. Accordingly, even if the effect of the Evidence Act is as has been contended, prudence nevertheless still dictates that those facts (and assumptions) which the expert relies upon in reaching his or her opinion should be identified expressly in the expert's report and should be proved, if not by the expert, then by other admissible evidence in order for the expert's opinion to have its desired effect.

1 which are collectively referred to in this article as the Evidence Act.

2 and equally the circumstances in which the attempts of one's opponent to rely upon such evidence can be resisted.

3 see section 55 of the Evidence Act.

4 see section 135 of the Evidence Act.

5 In *Veloski v R* (2002) 187 ALR 233, Gaudron J. described (at [82]) what was meant by 'specialised knowledge' as importing knowledge of matters which are outside the knowledge or experience of ordinary persons and which is sufficiently organised or recognised to be accepted as a reliable body of knowledge.

6 *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 123 at paras [5] - [6] per Einstein J.

7 as to this latter nexus, see also *Ocean Marine Mutual Insurance Association (Europe) OV -v- Jetopay Pty Ltd* [2000] FCA 1463 at [23] which was cited by both Heydon JA in *Makita* at para [86] and Einstein J in *Idoport Pty Ltd v National Australia Bank Ltd* (ibid) at para [19].

8 at least on this basis and in the absence of the lack of any objection from the party or unless some other basis for its admission can be found in the Evidence Act.

9 see also the extract from the commentary of Heydon JA listing the seven heads of proving admissible evidence, quoted later in this article.

10 such as the Federal Court of Australia's *Guidelines for Expert Witnesses* and the rules in UCPR Part 31 Division 2 and the Schedule 7 Code of Conduct.

11 E.g. UCPR r. 31.18(3).

12 (2001) 52 NSWLR 705.

13 (2001) 52 NSWLR 705 at 743 para [85].

14 Professor Morton.

15 (2001) 52 NSWLR 705 at 724 [45].

16 (2001) 52 NSWLR 705 at 728 [56].

17 (2001) 52 NSWLR 705 at 745 [86].

18 (2001) 52 NSWLR 705 at 729 para [59].

19 OR jury, where there is one.

20 (2001) 52 NSWLR 705 at paras [59] and [88].

21 *Davie v Lord Provost, Magistrates and Councillors of the City of Edinburgh* 1953 SC 34, cited by Heydon JA in *Makita* at (2001) 52 NSWLR 705 at 729 para [59].

[22] (2001) 52 NSWLR 705 at para [89] citing *Brodie v Singleton Shire Council* (2001) 75 ALJR 992 at 1060 para [355].

[23] evidence, including expert evidence, is no longer to be inadmissible because it goes to the ultimate issue (s80 of the Evidence Act).

[24] (2001) 52 NSWLR 705 at 733 para [68].

[25] (2001) 52 NSWLR 705 at 733 para [67].

[26] this is particularly having regard to the third reason why the discussion is of interest, namely the consequences of the expert not complying with its duty.

[27] *Davie v Lord Provost, Magistrates and Councillors of the City of Edinburgh* 1953 SC 34 per Lord President Cooper at 39-40, cited by Heydon JA in *Makita* (2001) 52 NSWLR 705 at 729 para [59]. As Heydon JA went on to remark at para [61], since that decision, the approach of Lord President Cooper has been followed and adopted on a number of occasions in Australia, (which his Honour listed in that paragraph).

[28] [1949] VLR 277 at 303.

[29] (2001) 52 NSWLR 705 at 730 para [60].

[30] 'Examining the substance of an opinion cannot be carried out without knowing the essential integers underlying it' (2001) 52 NSWLR 705 at 735 para [71].

[31] (2001) 52 NSWLR 705 at 731 para [64]. The dicta of both Beaumont J in *Trade Practices Commission v Arnotts Ltd (No. 5)* (1990) 21 FCR 324 and of the full court on appeal *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 quoted by Heydon JA at paragraphs [74] to [78] of his reasons for judgment are also particularly apposite and useful in this regard.

[32] (2001) 52 NSWLR 705 at 744 para [85].

[33] examples of this divergence are dealt with later in this article.

[34] see (2001) 52 NSWLR 705 at paras [5] - [6] per Priestley JA; paras [20] - [21] per Powell JA and paras [99] and [102] per Heydon JA.

[35] (2001) 52 NSWLR 705 at 750 para [102].

[36] [2001] NSWSC 123 at paras [8] - [13]. The commentary was in fact upon a paper on different aspects of the Evidence Act delivered by Justice Einstein at that same seminar. A copy of that paper is also available on the Supreme Court web site.

[37] http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_heydon_201100.

[38] which, for the most part, are also consistent with his Honour's summary in para [85] of his judgment in *Makita.*

[39] and repeated in *Makita,* including in the summary at para [85].

[40] or conversely, may result in the evidence not being admitted if they are not proved.

[41] and reminiscent of what his Honour was to later write in *Makita.*

[42] again, reminiscent of what his Honour later wrote in *Makita.*

[43] (2002) 55 IPR 354.

[44] (2002) 55 IPR 354 at [6] per Branson J.

[45] (2002) 55 IPR 354 at [6]. All of the cases that the appellant relied upon are listed at [84].

[46] (2002) 55 IPR 354 at [18] per Branson J and [109] per Weinberg and Dowsett JJ.

[47] (2002) 55 IPR 354 at 356 para. [7]

[48] (2002) 55 IPR 354 at 357 paras [8] - [10].

[49] (2002) 55 IPR 354 at 357 para [8].

[50] (2002) 55 IPR 354 at 357 para [9].

[51] (1998) 87 FCR 371 at 373-74.

[52] (2002) 55 IPR 354 at 357 para [10].

[53] two examples are referred to later in this article.

[54] again consistent with her Honour's observations at para. [7].

[55] (2002) 55 IPR 354 at 358 para [14].

[56] (2002) 55 IPR 354 at 359 para [16].

[57] (2002) 55 IPR 354 at 359 para [16].

[58] (2002) 55 IPR 354 at 359 para [17].

[59] (2002) 55 IPR 354 at 379 para [87].

[60] (2002) 55 IPR 354 at 379 para [89].

[61] (2002) 55 IPR 354 at 365 para [7].

[62] (2006) 228 ALR 719.

[63] (2006) 228 ALR 719 at 722 para [6].

[64] (2006) 228 ALR 719 at 722 para [6].

[65] Heerey J. nevertheless found the opinions to be inadmissible on the basis that they did not furnish the court with scientific information likely to be outside the experience and knowledge of ordinary persons and as such were within the concept of 'specialised knowledge' required by s79 and therefore not expert evidence (see paras [8] - [11]).

[66] (2006) 228 ALR 719 at 722 para [7].

[67] (2003) 205 ALR 145.

[68] at (2003) 205 ALR 145 at 151 paras [16] and following.

[69] as Branson J had also found in *Red Bull* at para [10].

[70] (2003) 205 ALR 145 at 152 para [19] and 153 para [22].

[71] for instance under s135 of the Evidence Act on the basis of a lack of probative value.

[72] see (2003) 205 ALR 145 at 153 para [20].

[73] namely, 'so far as the opinion is based on facts 'observed' by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on 'assumed' or 'accepted' facts, they must be identified and proved in some way' (see (2003) 205 ALR 145 at 154 [24] line 30).

[74] (2003) 205 ALR 145 at 154 para [24].

[75] (1999) 197 CLR 414, which Heydon JA referred to and relied upon in *Makita* at para. [84].

[76] (2003) 205 ALR 145 at 154 para [25].

[77] (2003) 205 ALR 145 at 154-155 para [25].

[78] (2003) 205 ALR 145 at 153 [23] citing *HG v The Queen* (op cit) at [39] and *Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd* (op cit) at [123].

[79] (2003) 45 ACSR 564 at 566- 568 paras [9] - [13].

[80] (2003) 45 ACSR 564 at 567 para [12].

[81] (2003) 45 ACSR 564 at 567 para [13].

[82] [2003] NSWSC 167.

[83] [2001] NSWSC 123 at paras [83] and [197].

[84] [2003] NSWSC 167 at paras [6] - [8].