EXPERT OPINION EVIDENCE : INQUIRY, PREPARATION, ADMISSIBILITY and WEIGHT

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Opinion Evidence : The Best of All Possible Worlds?

"Doubt is not a pleasant condition; certainty is absurd" Voltaire

1. What is it about "opinion" that the common law generally would not hear of it; that s 76 *Evidence Act* (Cth) and state Uniform Evidence counterparts preclude admission of opinion?

> ***s 76 The Opinion rule***
>
> **(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed**

2. What is, it about *" a person who has specialised knowledge based on the person's training, study or experience"*, that the evidence of such a person upon matters relevant to a fact in issue may be admitted under s 79 *Evidence Act* as an exception to the rule of preclusion expressed s 76?

3. What are the substantive and procedural pre-conditions to successfully adducing evidence of expert opinion?

Opinion/Fact Distinction?

1. Common law and statutory rules of exclusion, (the opinion and hearsay rules are examples) distinguish evidence of fact and evidence of opinion. The exclusionary rules focus on whether the witnesses evidence of "fact" or "opinion" is based on what the witness saw, heard or otherwise perceived. If so, a lay witness may be able to offer opinion in addition to the observation of fact (see s 78). If not, the evidence of opinion will be inadmissible unless it is expert testimony. This includes opinion in documents.
2. An opinion is an inference drawn from observed and communicable data.
3. A witness may not give an opinion on matters calling for the special skill or knowledge of an expert unless the witness is expert in such matters.
4. An expert is a person who has specialised knowledge based on the persons, training, study or experience.

Dasreef Pty Ltd. v Hawchar [2011] HCA 21

"Section 76(1) expresses the opinion rule in a way which assumes that evidence of an opinion is tendered 'to prove the existence of a fact'. That manner of casting the rule does not, as might be supposed, elide whatever distinction can be drawn between 'opinion' and 'fact' or invoke the very difficult distinction which sometimes is drawn between questions of law and questions of fact. It does not confine an expert witness to expressing opinions about matters of 'fact'. ***Rather, the opinion rule is expressed as it is in order to direct attention to why the party tendering the evidence says it is relevant. More particularly, it directs attention to the finding which the tendering party will ask the tribunal of fact to make****. In considering the operation of s.79(1) it is thus necessary to identify why the evidence is relevant: why it is 'evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'. That requires identification of the fact in issue that the party tendering the evidence asserts the opinion proves or assists in proving".* Per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [31]. **Emphasis added**

Honeysett v The Queen [2014] HCA 29

"*Section 76(1) … states a rule of exclusion: 'evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed'. An opinion is an inference drawn from observed and communicable data'. Professor Henneberg's identification of Offender One's physical characteristics consisted of inferences from his observations of the CCTV images. It was evidence of opinion. The evidence was adduced to prove the existence of a fact about the existence of which the opinion was expressed. The evidence was inadmissible unless it came within one of the exceptions to the opinion rule in Part 3.3 of the Evidence Act [21].*

The exception on which the prosecution relied is contained in s.79(1) of the Evidence Act." (Continued over)

Honeysett v The Queen [2014] HCR 29

"Section 79(1) states two conditions of admissibility. ***First, the witness must have "specialised knowledge based on the person's training, study or experience" and, secondly, the opinion must be "wholly or substantially based on that knowledge".*** *The first condition directs attention to the existence of an area of "specialised knowledge".* ***"Specialised knowledge" is to be distinguished from matters of "common knowledge"*** *(sic Evidence Act s.80(b)). Specialised knowledge is knowledge which is outside that of persons who have not by training, study or experience acquired an understanding of the subject matter. It may be of matters that are not of a scientific or technical kind and a person without any formal qualification may acquire specialised knowledge by experience. However,* ***the person's training, study or expertise must result in the acquisition of knowledge.*** *The Macquarie Dictionary defines 'knowledge' as 'acquaintance with facts, truths or principles, as from study or from investigation' (emphasis added) and it is in this sense that it is used in s.79(1). The concept is captured in Blackmun J's formulation in Daubert v Merrell Dow Pharmaceuticals Inc. :* ***"the word 'knowledge' connotes more than subjective belief or unsupported speculation…*** *[It] applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good ground" [23].* **Bold and *italicised* emphasis added.**

Honeysett continues at [24]

"The second condition of admissibility under s.79(1) allows that it will sometimes be difficult to separate from the body of specialised knowledge on which the expert's opinion depends ,'observations and knowledge of everyday affairs and events'. ***It is sufficient that opinion is substantially based on specialised knowledge based on training, study or experience. It must be presented in a way that makes it possible for a Court to determine that it is so based'*** [24] per French CJ , Kiefel, Bell Gageler and Keane JJ [21-24].

"The Ikarian Reefer"
Principles and proof: Guidelines in practice

Justice R E Cooper in 1997 quoted with approval observations of Cresswell J in the "*The Ikarian Reefer*" [1993] FSR 563 as to the proper role of the expert witness. The Ikarian Reefer principles inform Federal Court of Australia Practice Note CM7 and state counterpart Expert Witness Guidelines and Court Rules, See also *Uniform Civil Procedure Rules 2005 (NSW)* and Part 4.6 *Civil Procedure Act* 2010 (Vic) which express inter alia the overriding duty of the expert to the court.

The duties and responsibilities of expert witnesses in civil cases include the following:

(i) Expert evidence presented to the court should be and, should be seen to be, the independent product of the expert uninfluenced as to the formal content by the exigencies of litigation: *Whitehouse v Jordan* (1981) 1 WLR 246 and 256 per Lord Wilberforce.

(ii) An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate.

(iii) An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J* (1990) FCR 193 per Cazalet J).

(iv) An expert witness should make clear when a particular question or issue falls outside his expertise.

(v) If an expert's opinion is not properly researched because he considers that insufficient data is available then this must be stated with an indication that the opinion is no more than a provisional one (*Re J* supra). In cases where an expert witness, who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualifications, that qualification should be stated in the report (*Derby & Co Ltd. v Weldon. The Times 9 November 1990, per Staughton LJ)* .

(vi) If after exchange of reports an expert witness changes his view on a material matter having read the other side's expert reports or for any other reason, such change of view should be communicated (through a legal representative) to the other side without delay and when appropriate to the court).

(vii) Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports".

Proof of assumptions and factual basis of an opinion. A controversy:A basis rule of exclusion or a procedural rule* involving questions of weight: Odgers, Freckleton and Selby and JD Heydon compared

Freckleton and Selby at [2.20.140] and J.D. Heydon *Cross on Evidence* (9th Edition) [29070] discuss a controversy whether the common law expresses a rule by which opinion evidence is to be excluded unless the factual basis upon which the opinion is proffered is established by other evidence: "*the basis rule*".

At [1.3.4320] Odgers *Uniform Evidence Law* 10th ed. observes :

"*Under the common law, the view has generally been taken that the admissibility of expert opinion evidence depends on proper disclosure and evidence of the factual basis of the opinion. Thus, the expert must disclose the facts (usually assumed) upon which the opinion is based, the facts upon which the opinion is based must be capable of proof by admissible evidence and evidence must be admitted to prove the assumed facts upon which the opinion is based. However the ALRC considered that no such preconditions to admissibility should be imposed*". (citations omitted).

* *Allianz Australia Ltd v Sim* [2012] NSWCA 69 at [9]:

"*The two requirements of the section and the explanation that is ordinarily required so as to how the opinion applies to the facts should not be elevated into something more than they are: procedural rules to limit evidence to that which is rational and coherent and properly arising from expertise and directed to areas in respect of which the Court needs assistance.*"

JD Heydon (Cross on Evidence 9th Ed at [29045]) *Heydon JA (Makita v Spowles) Heydon J. Dasreef Pty. Ltd v Hawchar*

In *Makita v Spowles*, Heydon JA as he was then identified a basis of opinion rule in the common law cases upon which admissibility of opinion depended. The rule required proof of fact and of assumptions on which the opinion is based. The development of the *Makita* principles and 'rules' find recent expression in the 9th Ed; Cross on Evidence.

- *First, there must be a field of specialised knowledge.*
- *Secondly, 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.*
- *Thirdly, the opinion proffered must be wholly or substantially based on the witnesses expert knowledge.*
- *Fourthly, the expert must identify the assumptions of primary fact on which the opinion is offered ('the assumption identification rule').*

- *Fifthly, the opinion is not admissible unless the evidence which has been, or will be, admitted, whether from the expert or from some other source, which is capable of supporting findings of primary fact which are 'sufficiently like' those factual assumptions 'to render the opinion of the expert of … value' 'the basis rule'.*
- *Sixthly, it must be established that the facts on which the opinion is based form a proper foundation for it.*
- *Seventhly, the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached. It is not, however, necessary for the experts opinions to be described as such: it is sufficient if in substance they are inferences from assumed facts drawn with the aid of the experts expertise.*

JD Heydon states the ALRC was 'misconceived' as to the existence of a "basis rule".

Freckleton and Selby; *Expert Evidence* (Thomson Reuters Law Book Co, Vol 1) [2.20.140] Page 3052) opine that the joint judgement in *Dasreef* provides no endorsement for the existence of any form of basis rule, *"still less an assumption identification rule"* , a "*proof of assumption rule", or a "statement of reasoning rule".* Heydon J's views are, they say, "unorthodox". I might wish my critics were so kind!

Wait! Does Uniform Evidence Law Express a Basis Rule?

In *Dasreef Pty.Ltd. v Hawchar* [2011] HCA 21 at [41], French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ held that that question whether the basis rule formed part of the common law, "*need not be examined*" in the context of the more refined question arising in that appeal. That question focused in upon a precise forensic issue, namely, "*identification of the fact in issue that the party tendering the evidence asserts the opinion proves or assists in proving*" [31]. "*[T]he complaint which Dasreef made at trial, on appeal to the Court of Appeal and on Appeal to this Court was that Dr. Basden did not express an opinion about the numerical or quantitative level of exposure to respirable silica encountered by Mr. Hawchar in working for Dasreef that was an opinion based on any specialised knowledge Dr. Basden had that was based on his training, study or experience.*" [32].

Their Honours acknowledged [at 41] :

"*It may be accepted that the Law Reform Commission's interim report on evidence denied the existence of (sic) 'the basis rule as a common law rule' and expressed the intention to refrain from including a basis rule in the legislation the Commission proposed and which was later enacted in the Evidence Act 1995 (Cth) and the Evidence Act 1995 (NSW). What has been called the basis rule is a rule directed to the facts of the particular case about which an expert is asked to proffer an opinion and the facts upon which the expert relies to form the opinion expressed. The point which is now made is a point about connecting the opinion expressed by a witness with the witnesses specialised knowledge based on training, study or experience*". (emphasis added).

Conditions of exclusion: Conclusion of inadmissibility

The members of the Court (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) in joint judgement in *Dasreef* expressed a rule of exclusion in the following terms :

> "***A failure to demonstrate that an opinion expressed by a witness is based on the witnesses specialised knowledge based on training, study or experience is a matter that goes to the admissibility of the evidence, not its weight*** *… [if] … as the Court of Appeal observed, (sic) Dr. Basden's opinion on that matter lacked reasoning, the absence of reasoning pointed (in this case inexorably) to the lack of any sufficient connection between a numerical or quantitative assessment or estimate and relevant specialised knowledge".* Bold emphasis added.

Heydon J wrote to similar effect in his separate judgement in *Dasreef.*

See a recent Victorian elucidation of admissibility rules in *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No. 3)* [2012] VSC 99 at [98]. See consideration and application of admissibility rules by Forrest J in *Matthews v SPI Electricity Pty Ltd (No. 24)* [2013] VSC 269; *Matthews v SPI Electricity Pty Ltd (No. 39)* [2014] VSC 109.

Other Admissibility Guidance

- Expert opinion based entirely on inadmissible evidence is inadmissible: *Pownall v Conlan Management Pty.Ltd.* (1995) 12 WAR 370 (FC). See also *R v Lee* (1989) 42 ACrimR 393 (Vic) (FC).
- Expert opinion based on a combination of inadmissible and admissible material is inadmissible if it is impossible to determine what conclusions are based on the expert's own observations and what conclusions are based on hearsay: *Pownall* ibid; *Steffen v Ruban* [1966] 2 NSWR 622 (CA).
- But expert opinion based only partly on inadmissible material which can be readily ascertained and discarded may be admitted subject to weight subject: *Pownall* ibid.
- An opinion without any evidentiary basis is inadmissible: *R v Ryan* [2012] VSCA 126 at [9].

See JD Heydon; *Cross on Evidence* 9th Ed p 973; and

Freckleton and Selby; Expert Evidence [3.0.20 at 30-104 Vol 1].

Proof Of The Factual Basis of Opinion and the Hearsay Rule

- Odgers; *Uniform Evidence* Law 10th edition [1.3.4 330] observes that where some basis of the opinion is hearsay in form, that is, based on evidence of out-of-court representations of fact; careful analysis is required.
- Such evidence is not caught by the hearsay rule (s.59) because it is not adduced to prove the existence of the facts asserted by the representations – it is relevant and admissible to explain the assumptions on which the opinion is based.
- The effect of s.60 (discussed in Odgers at [1.3.940] is that evidence of out-of-court representations of fact admitted to explain the assumptions on which an opinion is based may then, subject to s.136 (see Odgers at [1.3.14640] and [1.3.14680], also be used to prove the existence of the asserted facts. This means not only that such material as the reported data of other experts and information commonly relied on in the area of expertise may be relied on for a "hearsay purpose" so also may statements made to the expert about the facts of the particular case.
- See in particular the discussion of Vickery J *ICM Investments Pty Ltd v San Miguel Corporation [No. 1]* [2013] VSC 463 as to the inter relationship of ss 59-60 and ss76-79 of *Evidence Act* (Vic).

Warning Not Waving!: Section 60 *Evidence Act*

s.60 Exception : evidence relevant for a non-hearsay purpose

(i) the hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact;

(ii) this section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of sub section 62(2));

(iii) however this section does not apply in a criminal proceeding to evidence of an admission;

The New South Wales Court of Appeal (*Welsh v The Queen* (1996) 90 A Crim R 364 at 368) has said of s.60 that it has :

> "*Extraordinarily wide ramifications. Its most obvious effect is in relation to prior inconsistent statements. Before the Evidence Act 1995, a prior inconsistent statement was admissible only to prove that the statement had been made, and so was relevant to the credit of the witness; it did not by itself prove the truth of what had been said. Once that statement is admitted for that purpose, s.60 not only makes it evidence of the truth of what has been said. …*

s 60. Assumption Evidence and Other Basis Material

In *Roach v Page (No. 11)* [2003] NSWSC 907 at [75](j), Sperling J observed:

"*The operation of s.60 on assumption evidence which is given as the basis for an expert opinion is also a special case. Where such evidence is in the form of a bare statement of facts or where the facts are stated as having been provided by some other person or persons, s.60 operates to make the account evidence of the truth of the fact so stated. This is not so if the expert says that certain facts are assumed for the purposes of providing the opinion. A disadvantage should not be incurred in legal proceedings by happenstance. If the facts stated are contentious, it would ordinarily be unfair that the opposite party is fixed with assumption evidence as evidence of the truth of the facts stated by reason of those facts having been stated in one form rather than the other.*"

"Nothing in the Evidence Act displaces the common law principle that experts are entitled to rely on reputable articles, publications and materials produced by others in the area in which they have expertise as a basis for their opinions". Bodney v Dennell [2008] FCAFC 63 at [92-93].

Discretionary Exclusion or Limitation

- s 135 Evidence Act discretion to exclude evidence if probative value is substantially overweighed by the danger that the evidence might:
  a) be unfairly prejudiced to a party; or
  b) be misleading or confusing; or
  c) cause or result in undue waste of time

- s 136 General discretion to limit use of evidence if there is a danger that a particular use of the evidence might:
  a) be unfairly prejudicial to a party; or
  b) be misleading or confusing.

INITIAL KEY PRACTICE ISSUES

At the outset, identify the factual and legal issues in dispute!!! Is specialised knowledge based on training, study and experience required to elucidate a relevant issue, and the means by which such issues might be investigated, understood and resolved? Might a specialist's knowledge be used forensically to disprove or prove a relevant issue? This is first and foremost an analytical exercise.

What specialist knowledge: that of a generalist, or sub-specialist or each of these?

Know the Rules of Court! Know the expert practice notes and guidelines and Civil Procedure laws.

Approach retaining an expert and sustaining an issue reliant upon proof of expert opinion evidence within the prism of analysis which all good trial preparation involves; namely, what will a cross-examiner do with the expert's opinion? There are a number of dos and don'ts which are better to foreshadow from others' bad experience rather than in retrospect. See: *Robert Stitt QC* Cross-Examination of Expert Witnesses: A Practical Approach via A Personal Excursion (2005) 26 Australian Bar Review 219.

INITIAL KEY PRACTICE ISSUES.

Approach retaining the briefing, instructing and communicating with a retained expert cognisant of *Evidence Act* provisions. Assume for risk/case management purposes that;

(i) LPP (advice and litigation) privilege may not protect all your communications and those of an expert from disclosure. (Keep in mind ***dominant purpose***).

(ii) Be aware of facts/circumstances which result in implied if not express, or associated waiver of material on which the expert relied or gave explicit consideration in expressing an opinion in an expert report delivered to your opponent.

(iii) Foreshadow subpoenas, notice to produce and calls in cross-examination.

Considerable discipline and significant analysis and decisions upon issues is required before you instruct and communicate with an expert later called.

Matthews v SPI Electricity Pty Ltd [2013] VSC 37 13 February 2013

→ Application on Summons for Orders that SPI produce specified documents in respect of which SPI claims client legal privilege.

→ Plaintiff contends privilege waived over documents by service of particular experts reports and reliance on those reports by Plaintiff in conclave of experts.

The Relevant Law

→ Interlocutory Application : ss.4(1)(b) and 131A *Evidence Act* (Vic) have effect in applying s.126 to Interlocutory Applications.

→ Privilege : ss.122 (loss of client legal privilege) and s.126 (associated waiver) : inconsistency/imputed waiver; cf *Mann v Carnell* HCA.

→ Lindgren J statement of principles in *ASIC v Southcorp Pty.Ltd.* quoted by Derham AsJ at para [44].

→ *New Cap Reinsurance Corp Ltd (In Liq) v Renaissance Reinsurance Limited* [2007] NSWSC 258 at [44]-[47]. Principle : service of a witness statement waives privilege. Mere reference to a document does not waive privilege.

Derham As J [81] – [86]

→ Applicant must establish as a fact or reasonable inference that the privilege document influenced or underpinned the expert report. There must be knowledge of documents to influence the report. Inspection of documents by Derham AsJ. Ruling: no waiver and no associated waiver.

Matthews v SPI [Ruling No. 19] 18 April 2013 (Forrest J)

→ Expert evidence issues arising in course of trial. Separate conclaves of expert witnesses upon 11 substantive topics; experts had already provided individual reports; met in conclaves: provided joint reports and some supplementary reports.

→ Question : whether to appoint an assessor (s.77 *Supreme Court Act*) "to assist me with their own assessment of the issues I need to tackle" or appoint a special referee under SC Rule 50.01.

→ Decision made applying overarching purpose provisions of *Civil Procedure Act* and powers under Part 4.6 of that Act to facilitate : "***just, efficient, timely and cost effective resolution of the real issues in dispute***" (s.7-9).

Matthews v SPI [Ruling No. 19] 18 April 2013 (Forrest J) Ctd

→ Part 4.6 of the Act (in operation since December 2012) empowers Court to order appointment of an expert (s.65M). See also the following provisions.

s. 65G **Party to seek direction of Court to adduce expert evidence**;

s.65H **Court may give directions in relation to expert evidence**;

s.65I **Court may give directions to expert witnesses – conferences and joint expert reports;**

s.65J **Use of conference of experts and joint expert reports in proceedings;**

s.65K **Court may give direction about giving of evidence, including concurrent evidence by expert witnesses;**

s.65L **Single joint experts**;

s.65N **Instructions to single joint expert or Court appointed expert;**

s.65O **Prohibition on other expert evidence without leave**;

s.65P **Disclosure of retainer arrangements**.

→ s.65Q : Nothing in Part 4.6 of the *Civil Procedure Act* limits any other power a Court may have in relation to case management, evidence or witnesses, the Court's inherent jurisdiction, implied jurisdiction or statutory jurisdiction or powers derived from common law or under any other Act.

Matthews v SPI (Ruling No. 24) 22 May 2013 : Forrest J

→ Objection was taken by the Defendant to the Plaintiff leading evidence of an expert's opinion as to whether the presence of a damper on the Pentadeen Spur line would have made any material difference to the failure of that line on Black Saturday.

→ Overnight Forrest J reflected on ex tempore ruling; revisited *Dasreef v Hawchar* and noted : "*one issue left outstanding by the Court is whether the so-called 'basis rule' remains a pre-requisite to admissibility under s.79 of the Act*".

→ [9] The High Court did not in terms deal with the status if any of the "basis rule" as it applies under s.79. … it is distinctly arguable that this is not now a pre-requisite for the satisfaction of the terms of s.79.

The line of reasoning that an opinion is admissible under s.79 notwithstanding a failure to identify the assumptions of fact which underpin that opinion is supported by a number of decisions of the Federal Court since the well-known and often cited decision of *Makita*. See decisions identified at [10].

At present time I cannot determine whether the divergence if there be any between the assumed facts and the facts which will ultimately be established is such that it goes to a question of weight or the ultimate admissibility of Mr Walley's opinion. Accordingly, I propose to admit the evidence provisionally under s.57 of the Act and allow the parties in closing submissions to further debate the question of admissibility and weight.

Matthews v SPI (Ruling No. 6) 15 August 2013 : Derham AsJ

→ The question referred to AsJ Derham by trial Judge Forrest J in August.

The case having commenced in March. Senior Counsel for the Plaintiff, in cross-examining an employee of SPI, asked questions about and made a call for reports prepared by SPI as a result of the investigation of faults which was a part of the usual practice of SPI. The context involved the following:

7 February 2009, Black Saturday Fires;

8 February 2009, the fracture surfaces of the conductor which failed on 7 February was seized by Victoria Police.

9 February 2009, Freehills was engaged by SPI.

The Premier of Victoria announced there would be a Royal Commission into the fires.

16 February 2009 the Royal Commission's terms of reference were issued.

→ There was a question of fact as to whether documents subject of the call fell within the litigation privilege or legal advice privileges expressed in ss.118 and 119 *Evidence Act* (Vic). The dominant purpose discussed.

Matthews v SPI (Ruling No. 10) 4 September 2012 : Forrest J

A dispute has arisen as to the conduct of the conclaves of expert witnesses which are due to be held in late September. The issue is whether the expert witnesses will participate in discrete sub-issue conclaves or whether the conclave should consist of a larger group of experts.

→ How to stop the bickering.
→ Should there be a moderator?
→ Should there be a scribe?
→ Manner of participation in the conclaves.
→ Should there be an agenda or list of questions?
→ More than one expert.

Matthews v SPI (Ruling No. 29) 10 October 2013 : Forrest J

→ On 24 September 2013 Counsel for SPI sought to tender a large body of material (380 documents) which was provided by SPI's solicitor to three expert witnesses retained for it for the purposes of assisting them in forming their opinion. The issues which have now arisen are :

(a) how much of this material is admissible?

(b) if admissible (whether its tender genuinely assists in determining the issues in this case); and

(c) when the tender of this admissible material should take place.

→ Re "basis rule" or as Heydon J describes it "the proof of assumption rule" in relation to s.79 *Evidence Act* :

"*It is not necessary to delve into the juris prudence further*"

It is clear that, whatever the correct position may be under the *Evidence Act*, at the very least as a question of weight, a party adducing opinion from a witness based on assumed facts will endeavour to ensure that these assumptions, in substance, tally with the evidence that has been adduced and accepted by the trial Judge.

→ For such material to be admissible it must satisfy the tests laid down by the *Evidence Act* : relevance ss.55 and 56; if hearsay, whether it falls within one of the exceptions to the hearsay rule (e.g. admissions s.81, business records s.69) … whether s.136 of the *Evidence Act* permitting limited use tender should be invoked.

→ If such material is admissible there is a further question as to whether s.135(c) *Evidence Act* should be utilised to prevent a voluminous amount of peripheral information deluging the already massive quantity of documents tendered.

→ *Civil Procedure Act* 2010 relevant.

Matthews v SPI (Ruling No. 29) 10 October 2013 : Forrest J Ctd

There is the potential in this trial for a vast number of documents to be tendered which have little or no relevance to the essential reasoning and opinion of the various experts or to the real issues in dispute between the experts.

→ To avoid this scenario, I consider it is inappropriate at the present time to permit the tender of any material which underpins the opinions of witnesses called by any party … it is desirable for the parties to exchange lists of documents and to identify those that are the subject of objection … Counsels views as to relevance are helpful but not determinative … the Court must impose some limits on the evidentiary material abused …

→ At least by reason of this ruling the test of admissibility will now be understood and the parties will at the conclusion of the session have the opportunity to make submissions regarding admissibility.

→ Material which underpins an expert's opinion will need to pass a test of significant relevance to a contested part of the expert's opinion before I consider admitting it into evidence and then on what basis. The only sensible time at which this can take place is at the end of a concurrent evidence session.