

## Native Title Conference 2005:

### Human Face of Native Title

# Native Title Practice and the Rules of Evidence

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## Introduction

On 12 July 2004, the Attorney-General of Australia asked the Australian Law Reform Commission (ALRC) to conduct an Inquiry into the operation of the *Evidence Act 1995* (Cth). The New South Wales Attorney General had similarly asked the New South Wales Law Reform Commission (NSWLRC) on 2 July 2004 to conduct a review into the operation of the *Evidence Act 1995* (NSW). The ALRC, in consultation with the NSWLRC, published an Issues Paper, *Review of the Evidence Act 1995* (IP 28), in November 2004. IP 28 identifies the main issues relevant to the Inquiry, and provides background information and over 100 questions designed to encourage informed public participation.

The Commonwealth, New South Wales, Tasmania and Norfolk Island have passed legislation based on the uniform Evidence Act. No other state or territory has yet adopted similar legislation—although the Victorian Government announced in 2004 that ‘it is proposing to implement legislation consistent with the model Evidence Acts passed by the Commonwealth and New South Wales parliaments and adapted to the needs of Victorian courts’.<sup>1</sup> In November 2004, the Attorney-General of Victoria asked the Victorian Law Reform Commission (VLRC) to review the laws of evidence applying in Victoria. The VLRC was directed to review the *Evidence Act 1958* (Vic) and other laws of evidence and to advise on the action required to facilitate the introduction of the uniform Evidence Act into Victoria.

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<sup>1</sup> State Government of Victoria, *New Directions for the Victorian Justice System 2004-2014: Attorney-General’s Justice Statement* (2004), 26.

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In March 2005, the Queensland Attorney-General asked the Queensland Law Reform Commission (QLRC) to undertake a review under terms of reference similar to the ALRC's inquiry, with some minor modifications in relation to Queensland specific matters. In May 2005, the Northern Territory Attorney General directed the Northern Territory Law Reform Committee to undertake a similar inquiry. On 27 May 2005, the ALRC was informed that the Attorney-General of Western Australia has placed the uniform Evidence Act formally on the legislative reform agenda.

The ALRC is working in consultation with the New South Wales, Victorian, Queensland, Tasmanian, Northern Territory and Western Australian law reform bodies. It is the current intention of the ALRC, the NSWLRC and the VLRC (the 'Commissions') to produce a joint Discussion Paper (DP 69) in the first week of July 2005. Relevant draft sections of DP 69 are included in this paper.

### **Native Title Practice and the Rules of Evidence**

As part of the current inquiry, the Commissions are reviewing the rules concerning the admissibility of:

- expert opinion evidence, under s 79 of the uniform Evidence Acts;
- hearsay evidence forming the factual basis of expert opinion evidence, under s 60 of the uniform Evidence Acts; and
- evidence of Aboriginal and Torres Strait Islander (ATSI) traditional laws and customs.

The Commissions' key findings on these issues to date, together with proposals for reform of the *Evidence Act* in these areas, are summarised in this paper. More detail can be found in the attached excerpts.

### ***Expert opinion evidence***

Section 79 of the uniform Evidence Acts provides an exception to the opinion rule for expert opinion evidence:

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

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opinion of that person that is wholly or substantially based on that knowledge.

A key issue is the extent of the requirement under the uniform Evidence Acts to show that expert opinion evidence is 'based on' the application of specialised knowledge to relevant facts or factual assumptions.

Heydon JA (as His Honour then was) in *Makita (Australia) Pty Ltd v Sprowles*<sup>2</sup> (*Makita*) interpreted this requirement as meaning that:

- so far as the opinion is based on facts 'observed' by the expert, they must be identified and admissibly proved by the expert;
- 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.

The decision in *Makita*, and its subsequent interpretation in other cases, have caused some confusion about the admissibility criteria for expert opinion evidence. In a recent decision of the New South Wales Court of Appeal in *Australian Securities & Investments Commission v Rich*,<sup>3</sup> the court attempted to clarify the law relating to the admissibility of expert opinion evidence post-*Makita*. Spigelman CJ (with whom Giles A and Ipp JJA agreed) found that Heydon JA's analysis in *Makita* supported what Spigelman CJ characterised as an 'asserted factual basis approach' rather than a 'true factual basis approach'.<sup>4</sup> That is, the New South Wales Court of Appeal held that expert evidence falls within s 79 of the uniform Evidence Acts if it discloses the facts and reasoning process that the expert *asserts* to justify the opinions expressed. His Honour stated:

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2 (2001) 52 NSWLR 705, 743–744.

3 [2005] NSWCA 152.

4 [2005] NSWCA 152, [134].

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The mere fact that the expert's opinion is based on facts that are assumed (and not proved) at the time the expert gives evidence is no reason to exclude the evidence at that stage. The assumed facts may be proved later by other evidence ... The fact that the expert's opinion was at one time—or even still is—reinforced by undisclosed facts and reasoning processes is irrelevant to the admissibility of the opinion (although these matters may go to weight).<sup>5</sup>

For the reasons outlined in the attached excerpt from the draft of chapter 8 of DP 69, s 79 does not require that the facts relied upon be proved or that it be demonstrated that they will be proved. However, failure to identify the factual basis may be extensive enough to require exclusion for lack of relevance (s 55); or under the discretions (ss 135–137). The Commissions' preliminary view is that, if the provisions of the uniform Evidence Acts are interpreted and applied properly, there is no need for an amendment to clarify the operation of s 79.

#### ***Hearsay and the factual basis of expert opinion evidence***

A related issue concerns the extent to which facts stated by an expert as forming the basis for the expert's opinion can be admitted as evidence of the truth of the facts stated. Section 60 of the uniform Evidence Acts states:

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 the fact intended to be asserted by the representation.

Under s 60, evidence of statements made to an expert or other data upon which the expert's opinion is based may, if the expert's opinion is admitted for a non-hearsay purpose, be admitted to prove the facts contained in the statements or data, subject to the discretionary provisions (ss 135–137).

The decision of the High Court in *Lee v The Queen*<sup>6</sup> may limit the extent to which s 60 applies to second-hand or more remote hearsay evidence. Arguably, the reasoning in *Lee* prevents s 60 from applying to second-hand or more remote forms of hearsay

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5 [2005] NSWCA 152, [136].

6 *Lee v The Queen* (1998) 157 ALR 394.

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upon which an expert bases his or her opinion. This may catch such matters as accumulated knowledge, recorded data, and other factual material.

For the reasons outlined in the attached excerpt from the draft of chapter 7 of DP 69, the Commissions are proposing that the uniform Evidence Acts be amended to confirm that s 60 operates to permit evidence admitted for a non-hearsay purpose to be used to prove the truth of the facts asserted in the representation, whether or not the evidence is first-hand or more remote hearsay. The Commissions are also exploring whether there is support for specific exceptions to s 60—in particular, in relation to:

- second-hand or more remote hearsay of an admission by an accused; and
- the factual history provided to an expert.

### ***Evidence of traditional laws and customs***

The hearsay rule and the opinion rule constitute significant evidentiary barriers to a party attempting to adduce evidence of ATSI traditional laws and customs. The Commissions understand that approaches to the admissibility of such evidence in some jurisdictions, and within the Federal Court itself, vary.

For example, in *Gumana v Northern Territory (Gumana)*,<sup>7</sup> Selway J considered it unnecessary to consider evidence of ATSI custom and tradition as a special exception to the usual rules of evidence, even assuming that it were possible to do so under the *Evidence Act 1995* (Cth). Rather, Selway J held that such evidence is ‘direct evidence of a fact in issue—the existence of tradition or custom and of rights pursuant to it’.<sup>8</sup> However, other Federal Court native title cases have tended to interpret such evidence as an exception to the hearsay rule under ss 73 and 74 of the Act, rather than direct evidence of a fact.<sup>9</sup>

Clearly, the hearsay rule and the opinion rule present difficult barriers in relation to the admission and use of evidence of traditional laws and customs. For the reasons discussed in detail in the attached draft of chapter 17 of DP 69, the Commissions are proposing that the uniform Evidence Acts be amended to provide that the hearsay and opinion rules should not apply to evidence of ATSI traditional laws and customs. The

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<sup>7</sup> *Gumana v Northern Territory* [2005] FCA 50.

<sup>8</sup> *Gumana v Northern Territory* [2005] FCA 50, [158].

<sup>9</sup> *De Rose v South Australia* [2002] FCA 1342, [265]–[271]; *Yarmirr v Northern Territory* (1998) 82 FCR 533, [21].

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Commissions are also exploring whether the proposed amendment should apply to a broader category of evidence such as evidence based on 'oral knowledge' or 'oral tradition' and, if so, how the scope of such a term should be defined.

### **Participation in the Inquiry**

As has been noted above, the Commissions intend to release DP 69 in the first week of July. Following release of the Paper, the Commissions would welcome submissions addressing the proposals and questions in the Discussion Paper. The closing date for submissions is **16 September 2005**.