

Native Title Practice and the Rules of Evidence

by

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Review of the Uniform Evidence Acts

Timeline

- Issues Paper 28 released in December 2004
- Discussion Paper 69 to be released first week of July 2005
- Final Report to AG (Cth) 5 December 2005

Law Reform Bodies Involved

- ALRC, NSWLRC and VLRC involved in writing DP 69
- TasLRI, QLRC, NTLRC and WALRC consulted on issues relating to the Review

Consultations

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- Consultations have been conducted in all states, the ACT and the Northern Territory
- Focusing primarily on regular users of the UEA including:
 - Judicial officers
 - Barristers
 - State and Territory Bar Associations and Law Societies
 - DPP and Public Defenders
 - Legal Aid
 - Other organisations such as HREOC, Aboriginal Interpreter Service (NT)

Section 79 UEA – Expert Opinion Evidence

Key issue – the extent of the requirement under the UEA to show that expert opinion evidence is ‘based on’ the application of specialised knowledge to relevant facts or factual assumptions

Commissions’ view

- *Makita (Australia) P/L v Sprowles* (2001) 52 NSWLR 705, as confirmed in *ASIC v Rich* [2005] NSWCA 152, does not transpose the ‘basis rule’ from the common law into the uniform Evidence Acts.
- However, failure to identify the factual basis may be extensive enough to require exclusion for lack of relevance (s 55); or under the discretionary exclusions (ss 135-137).
- No need for an amendment to clarify the operation of s 79.

Section 60 - Hearsay and the Factual Basis of Expert Opinion Evidence

Key issue – Arguably the decision in *Lee v The Queen* (1998) 157 ALR 394 prevents s 60 from applying second-hand or more remote forms of hearsay upon which an expert bases his or her opinion. This may catch such matters as accumulated knowledge, recorded data and other factual material.

Commissions' view – the uniform Evidence Acts should 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.

- Possible exceptions – second-hand or more remote hearsay of an admission; and the history provided to an expert

Evidence of ATSI Traditional Laws and Customs

Key issue – the hearsay rule and the opinion rule present difficult barriers in relation to the admission and use of evidence of ATSI traditional laws and customs.

Commissions' view – the uniform Evidence Acts should be amended to provide that the hearsay and opinion rules do not apply to such evidence.

- Que – should the proposed amendment apply to evidence based on 'oral knowledge' or 'oral tradition' and, if so, how should the scope of such terms be defined?