ADVANCE DISCRETIONARY RULINGS UNDER SEC 192 A *EVIDENCE ACT*

SEMINAR PAPER FOR LEGALWISE 9TH ANNUAL EVIDENCE AND ADVOCACY SEMINAR

1st March 2019

(with updates 14th March 2019)

By
Sydney Jacobs, Barrister
BA LL.B (UCT), LL.M (Cam)
13 Wentworth Selborne Chambers

TOPICS TO BE COVERED

In this lecture, I will address (though not in the order below), the following topics:

- The main bases for objections to affidavits and experts reports
- Seeking discretionary advanced rulings on admissibility
- Developing strategies to deal with problematic evidence
- Dealing with challenges from opposing counsel

The Chair, Peter Taylor SC, has provided valuable feedback, for which I am grateful. This update incorporates his comments.

INTRODUCTORY COMMENTS *– evidentiary slithering*

1. To leave the evidentiary status of key evidence unresolved during the hearing evokes the situation described by Heydon JA in *Rhoden v Wingate* [2002] NSWCA 165 at [60]:

"... the court and the parties would be confronted by an ever-changing sea in which items of evidence slither about indecisively with questions about ultimate admissibility hanging over their heads. That would lead to even more uncertainty and confusion, in difficult trials, than that which is inevitably generated by conflicting bodies of evidence the weight of which is hard to evaluate."

"Whatever may be the strict requirements of s 79 of the Evidence Act, s 135, in at least other than straightforward cases, demands that the basis of expert opinion be apparent, and that the opinions, in respect of which the witness has expertise, be displayed and apparent. Cross-examination, in particular of a determined and dialectically combative kind, should not be necessary ... to shear away the layers of evidence, in order to assess whether such evidence does involve opinions, and if so, what they are and whether they are relevant....": per Allsop J in *Evans Deakin* [2003] FCA 171 at [679].

OBJECTIONS

2. Objections to evidence are generally dealt with as part of the usual directions in the lead up to the final hearing.

3. The court book contains not only the pleadings & affidavits, but also documents obtained upon discovery, and which are proposed to be tendered.

4. Sometimes documents obtained upon discovery include balance sheets; or profit and loss statements; or building reports *etc.*, a whole range of matters. These reports can often contain the *expert opinion* of the author.

5. Further, sometimes a litigant has a report obtained at a time before litigation was on the cards, and wishes to rely on it.

6. Despite the aspirations of all concerned, the Table of Objections are seldom provided earlier than the week before trial. Sometimes, having regard to the usual

pre -trial pandemonium, counsel doesn't get to look at the objections of the opponent until a day or two before the hearing.

7. By then it's potentially prejudicial to the party seeking to rely on a document to scrounge around for its author.

8. The usual types of objections taken just before a hearing, *include* follows:

    - *Hearsay*
    - *Form (e.g. conversations put in a rolled manner, resembling a submission)*
    - *Argumentative/ conclusory/ ipse dixit (i.e. facts supporting conclusion not set out/ mere declamations of conclusions, maybe even of the ultimate issue)*
    - *Chain of reasoning not disclosed (e.g. bare assertion that an item of building work offends part X of Building Code Y, without saying what part X is etc.)*
    - *Undisclosed material and information relied on*, which have coloured the expert's view (hence, chain of reasoning not disclosed) (this was a significant part of the objection to the Carter Report in *ASIC v Rich*).
    - *Unfairly prejudicial / waste of time*
    - *Intermediate conclusions not made good*

HEARSAY

9. *Sec 59 (1) Evidence Act* ("*EA*") deals with hearsay evidence, and stipulates as follows:

    Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

    Such a fact is referred to as an *asserted fact*. Section 59(1) excludes evidence of

previously asserted facts as proof of those facts.

10. *Sec 59 (2) EA:* Such a fact is in this Part referred to as an asserted fact.

Exceptions: a long list of exceptions are listed in the *EA*, in Sec 59, e.g.

- evidence relevant for a non-hearsay purpose (section 60);

- first hand hearsay, in civil proceedings , if the maker of the representation is unavailable (section 63) or available (section 64);

- business records (section 69)

11. *Sec 60 EA*: 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.

BUSINESS RECORDS

12. *Sec 69 (2) EA Business Records*

s 69(2) of the *Evidence Act* displaces the hearsay rule , where the "*asserted fact*" is contained in a document , and if the representation was made by a person who had or might reasonably be supposed to have had *personal knowledge* of the asserted fact; or, made on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

13. A person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous

representation made by a person about the fact).

14. The displacement of the hearsay rule operates in relation to a document that either is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business or at any time was or formed part of such a record; and the document contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.[1]

15. Section 69 applies to a document (within s 69(1)(a)) that contains an *asserted fact*.

On its face, it is not phrased to extend to an *opinion*. The question arises: what "asserted fact" engages s 69?

16. In *Ringrow Pty Ltd v BP Australia* [2003] FCA 933; (2003) 130 FCR 569, one issue was the value of goodwill of a service station. There was reference to this in a bank valuation. The question in the proceedings was whether there had been any unconscionable forfeiture under a lease.

In this context, Hely J observed at [18] that at least in some contexts, "fact" may include an opinion; and s 69 is engaged even if the *asserted fact* is an *opinion in relation to a matter of fact* .

OPINION EVIDENCE

17. *Sec 76 EA* says that opinion evidence is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

One of a number of exceptions to the opinion rule is Sec 79 -- *Expert Opinion.*

[1] Summarised in *Australian Competition and Consumer Commission v Cement Australia Pty Ltd (No. 3*) [2010] FCA 1131

18. *Sec 79 (1) EA*

> "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."

SECS 135 & 136: DISCRETIONARY EXCLUSION OF EVIDENCE

19. *Sec 135 EA* provides as follows:

> The court *may* refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
>
> (a) be unfairly prejudicial to a party, or
>
> (b) be misleading or confusing, or
>
> (c) cause or result in undue waste of time.

20. *Sec 136 EA*

> The court *may* limit the use to be made 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.

COMMON KNOWLEDGE

21. Sec 144 of the *Evidence Act* deals with matters of common knowledge and provides:

(1) Proof is not required about knowledge that is not reasonably open to question and is:

(a) common knowledge in the locality in which the proceeding is being held or generally, or

(b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.

(2) The judge may acquire knowledge of that kind in any way the judge thinks fit.

(3) The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.

(4)The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced."

SECS 192 & 192A EVIDENCE ACT

22. *Sec 192 Evidence Act*

(1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:

(a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing, and

(b) the extent to which to do so would be unfair to a party or to a witness, and

(c) the importance of the evidence in relation to which the leave, permission or direction is sought, and

(d) the nature of the proceeding, and

(e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

*23. Sec 192 A EA (*Ins 2007 No 46, *Sch 1 [77])*

Where a question arises in any proceedings, being a question about:

(a) the *admissibility* or *use* of evidence *proposed to be adduced*, or

(b) the *operation of a provision of this Act or another law* in relation to evidence proposed to be adduced, or

(c) the giving of leave, permission or direction under section 192,

the court may, if it considers it to be appropriate to do so, *give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings*.

WHAT IS "PROBATIVE VALUE"?

24. "Probative value" is defined by s 3 of the Act to mean "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue".

The determination of the probative value of evidence requires an evaluative assessment, as explained in *IMM v The Queen*:

"[42] Both s 97(1)(b) and s 137 require an assessment of the probative value of the evidence tendered. As mentioned, the Dictionary definition of the 'probative value' of evidence describes evidence which is probative in the same terms as how relevant evidence is described in s 55, namely evidence which "could rationally affect ... the assessment of the probability of the existence of a fact in issue".

[43] The enquiry for the purposes of s 55 is whether the evidence is capable of the effect described at all. The enquiry for the purposes of determining the probative value of evidence is as to the extent of that possible effect. But the point is that in both cases the enquiry is essentially the same; it is as to how the evidence might affect findings of fact. An assessment of the extent of the probative value of the evidence takes that enquiry further, but it remains an enquiry as to the probative nature of the evidence.

....."

WHAT IS UNFAIR PREJUDICE?

25. The concept of unfair prejudice was explained by Crawford CJ in *Neill-Fraser v Tasmania* [2012] TASCCA 2 at [184]**:**

"When considering the danger of unfair prejudice, care must be taken not to confuse prejudice with unfair prejudice. Too often, defence counsel fail to distinguish between them. All evidence that may tend to convict an accused person is prejudicial, but that does not mean that it is unfairly prejudicial. What is meant by unfair prejudice is that the jury may use the evidence to make a decision on an improper, perhaps emotional basis. If there is a real risk that the evidence may be misused by the jury in some way, then it may be unfairly prejudicial. ……..."

See also *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705 at 743-744 [85].

EXPERT OPINION EVIDENCE

26. The following is extracted from *Langford v Tasmania* [2018] TASCCA 1:

"The admissibility of opinion evidence is to be determined by application of the requirements of the Evidence Act rather than by any attempt to parse and analyse particular statements in decided cases divorced from the context in which those statements were made.

Accepting that to be so, it remains useful to record that it is ordinarily the case, as Heydon JA said in Makita, that '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'.

……...

However, proof, or lack thereof, of the underlying facts will be relevant to the weight of the evidence."

27. There is an ongoing debate as to whether all assumptions made by an expert, must be proved as a pre condition to admissibility of the report ; or whether the failure to prove all assumptions simply goes to weight, so long as the chain of reasoning is exposed.

See the judgment of Simpson JA in *Taub v The Queen* [2017] NSWCCA 198.

BUSINESS RECORDS RULE

28. *ASIC v Rich* (2005) NSWSC 417, paras [178] to [220], gives examples given of cases where a document in the nature of a report (i.e. something more than a ledger or invoice or list of debtors or other like small…ish, sort-of-semi-automated business record) is tendered.

Please note that the this case was overturned in *Australian Securities and Investments Commission (ASIC) v Rich* (2005) 218 ALR 764; (2005) 54 ACSR 326|(2005) 23 ACLC 1111; [2005] NSWCA 152.

29. IN *ACCC v Cement Australia (No 3*) [2010] FCA 1131, the ACCC alleged that the respondents took advantage of their substantial degree of power in the SEQ concrete-grade fly ash market in contravention the *Trade Practices Act 1974* (Cth). Sec 46 of the TPA required proof that *purpose* of the respondent's conduct was monopolistic.

30. The officers of the respondents and also its consultants had expressed opinions in emails, Board papers and reports that were relevant to whether Cement Australia acted with the required purpose.

31. The ACCC, made a *pre trial application* for rulings as to the admissibility of 31 volumes of material. So the point of significance for this seminar is the *large amount of material proposed to be tendered* by the ACCC.

32. You will see reference below to an entity named "QLC" -- that was one of the respondents.

33. The applicant sought to tender 31 volumes of documents in support of its case.

34. The respondent raised various objections, in five categories. One issue was the admissibility of *opinions* contained in those documents:

Category 1: opinions expressed by officers of the respondent companies where each author (and there may be more than one) is identified.

Category 2: opinions expressed in documents where the author of the document is *unidentified*. The applicant invited the court to draw inferences from the contents of the document and from other evidence that the opinions expressed in the documents were those of senior management of the respondent corporations.

Category 3: documents which contained "apparent statements of opinion".

These documents addressed attempts by the various respondent corporations to justify a particular contract ("the Millerman Contract").

Category 4: documents in which opinions were expressed but which the applicant contended were not genuinely held.

An example is said to be a draft Board Briefing Paper dated 28 June 2004 about the effect for the applicant should a competitor lower a commodity price.

Category 5: documents produced by third parties who are consultants to one or more of the respondents.

35. *RE: Category 1*

A documents illustrative of category 1 was an email which said:

"Please find attached a Board paper from April 2002 requesting approval for capital expenditure that supported our strategy to win the new contracts at Tarong and Millmerran and maintain our single supplier status position in the QLD Flyash market.

……..

It is very pleasing that this strategy has worked extremely well and performance has been much better than forecast, however like any matter it will need to be managed and tweaked a bit where necessary in the south Brisbane and Gold Coast to ensure that things are kept under control."

36. The applicant sought to rely on the italicised words as opinions which constituted evidence of the facts about which the opinions are expressed.

"[30] It is very common for senior officers of corporations …….to generate emails, reports, Board reports and memoranda which contain views, observations, opinions about matters central to the business of the organisation. The business conduct of corporations would not function in the absence of such activities. …… Facts asserted by the officers of corporations or opinions they hold contained within documents kept by the organisation for the purposes of the business are the subject of specific treatment in Division 3 of Part 3.2 of the Evidence Act. ……. It seems to me that the position in relation to asserted facts (including opinions) contained within business records is intended by the Act to be addressed solely by Division 3 of Part 3.2. ……..."

37. HH compared and contrasted the admissibility requirements of an expert who expresses an opinion about matters in controversy for the purposes of litigation -- that is where Sec 79 is engaged.

38. The ACCC sought to tender documents containing the opinions of the management consultants McKinsey & Co, as probative of the existence of facts about which the opinion was expressed. i.e. McKinsey was an "external third party".

39. Paras [81] – [89] deal with the admissibility of external expert opinions. The approach taken by the Court, was in essence to say that they were admissible; however to then consider whether to exercise the discretion to exclude or limit same, especially in the scenario where the author was not intended to be called

as a witness to be cross examined.

These documents formed part of the business records of McKinsey & Co and at [81] *"having regard to its content in relation to the activities of the QCL group of companies, its strategic content, the confidential nature of the matters reviewed and the central examination of the undertaking, the document comprises a business record of QCL. ……"*

40. Whilst the author of the report was not identified, HH *inferred*, having regard to the above matters, that the document was made by a person who had or might reasonably be supposed to have had *personal knowledge* of the asserted fact or made on the basis of information *directly or indirectly supplied by a person who had* personal knowledge of the asserted fact etc.

41. HH at [82] then considered whether to exercise his discretion pursuant to *Secs 135 or 136* of the *Evidence Act e.g. was it unfairly prejudicial or* misleading or confusing; or might it cause or result in undue waste of time etc..

At [83], HH noted that the reason why admission of the material or its unlimited use might be unfairly prejudicial was that the ACCC did not propose to call the authors of the McKinsey & Co Report; and as such, the respondents would not be able to cross examine them.

42. Against this, HH weighed that the report represented "a reasonably significant analysis of the structure and conduct of QCL's undertaking and the factors influencing its financial performance in the various facets of its business. QCL, Cement Australia and their advisers would, I infer, be likely to be *entirely familiar with the document. It is one of the documents of the respondents*.

HH held that a report that was provided to the respondents and *"…absorbed and debated"* by it, would hardly be prejudicial to it, because their contents would come as no surprise.

CASE LAW ON *SEC 192A EA*

43. "*Whether the Court should make advance rulings under s 192A is a discretionary case management decision to be made in accordance with the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in dispute."*

    Per Biscoe J in *NA & J Investments Pty Ltd v Minister Administering the Water Management Act 2000; Arnold v Minister Administering Water Management Act 2000 (No 4)* [2012] NSWLEC 120 at [40].

44. Appl in *Gooley v NSW Rural Assistance Authority* [2018] NSWSC 593 para [45]. The Plaintiffs wished to make the claim (and they sought leave to amend the pleadings to do so) that by reason of the defendant calling up loans allegedly prematurely, they had lost the commercial opportunity of relocating their farming business and thus suffered losses.

    The defendant Rural Assistance Authority moved for an order under *Sec 192 A EA* to strike out lay and expert evidence.

45. As to the expert report of Mr Wade, an agricultural consultant and animal nutritionist, one ground pressed by the defendant was the "expert" had a close commercial relationship with the plaintiff. This ground was not upheld.

46. However, during debate in court, it emerged that there were "difficulties" with the *form* of Mr Wade's report.

    "[58] On a number of occasions Mr Wade expresses opinions based upon his statement of what Mr Gooley "would have done" and what Mr Gooley "has done". On other occasions Mr Wade speaks of assumptions that he asserts that Mr

Gooley has made and to strategies adopted by “several of my clients”……..

[59] On other occasions Mr Wade expresses opinions without exposing the process of reasoning by which he arrives at those opinions.

[60] For example, at par 33 Mr Wade expresses the opinion that values in a “Pasture Budget” apparently prepared by Mr Gooley “show a conservative estimate of the available dry matter...grown from establishing a pasture budget for the Gooley operation at the Clovass and Dyraaba properties”. Mr Wade does not explain the basis for that conclusion.

[61] Mr Wade concludes his report by saying:

“*[Mr Gooley] has had many years’ experience growing hay, and crops like corn and soya beans so using his experience in contract hay and silage making and growing crops, he should have no problem in planting oats for grazing or hay and growing other crops suited to the Tablelands*”.

[62] Here, Mr Wade is, evidently, using some unstated knowledge he has of Mr Gooley’s farming experience and expressing, without any reasoning, the optimistic conclusion that Mr Gooley would have “no problem” growing crops in the Tablelands.

[63] The passage is plainly inadmissible.”

47. HH concluded that as counsel for the plaintiff foreshadowed supplementing the report, he would let the matter rest there for the time being.

48. The Defendant sought and obtained an order that the report of a Mr Hughes, a chartered accountant, *be rejected in its entirety*, as he did no more than simply adopt what the plaintiff said as to economic loss, without a smidgen of independent analysis of his own.

49. It would be unfair to the Bank to expect it "to elucidate [Mr Hughes'] reasoning process in the course of cross-examination and then to challenge that process without the opportunity to reflect on it" (to adopt the words of McDougall J in *Bone v Wallalong Investments* [2012] NSWSC 137 at [37]).

50. HH deferred ruling on the defendant's application to strike out Mr Gooley's affidavit, which travelled beyond the pleaded case, on the basis of his counsel's concession that the pleadings needed to be re-cast.

Compare and contrast the following two cases

51. *Eastbury v Genea Limited (Formerly Sydney IVF Limited)* (2017) NSWSC 1289, where the application under Sec 192 A was rejected.

    There, the plaintiffs claimed for nervous shock and costs of raising children born with a disability allegedly caused by the negligent blood tests performed by the defendant.

    The defendant said that the plaintiff's expert's reports went beyond his expertise, and prejudice would be suffered if the defendant were required to put on its own report in reply. However, the judge hearing the application said there would be no prejudice were a report to be obtained, and a conclave attended. The judge also noted that he would not be presiding at final hearing, and had not had the benefit of an opening address.

52. In *Morgan v Naughten* [2018] NSWSC 434, the plaintiff called evidence of a highly credentialed equestrian in support of the case that a horse had been purchased consequent upon misrepresentations. The defendant sought an order, pre trial, pursuant to Sec 192 A that the report be rejected. One reason for the refusal to make that order, was that the defendant had sat with the report for 20 months, and only made the application 2 months pre trial. The judge thus left it to the trial judge to deal with objections.

The moral of this case is clear - make any (justifiable) application as early as possible.

53. See further *Lambert Leasing Inc v QBE Insurance Australia Ltd* [2012] NSWSC 953 at [12], and *Chaina v Presbyterian Church (NSW) Property Trust (No.6)* [2012] NSWSC 1476 at [8] (Davies J).

APPLICATION OF THE PRINCIPLES TO DECIDED CASES: how might they be re-run, with the benefit of hindsight?

54. I will suggest some further reading to you, so you might consider cases where 3rd party expert reports have been rejected, or where there have been other major contests as to the admissibility of evidence. This is to consider whether applications in advance of the hearing would have been tactically advantageous to one party -- or another.

55. So please consider when in your practice, you might file an application, and how you would go about it, for example:

i. how central is the relevant evidence to the cause of action or defence?
ii. what is the volume of evidence?
iii. is it in a report or document created in the ordinary course of business? If so, whose business?
iv. what letter would you write your opponents?
v. what submissions / statements might be made at Directions hearings?
vi. what directions and orders would you seek?
vii. at what stage would you seek orders and directions as to Sec 192 *EA*?
viii. what *legitimate forensic advantage* stands to be gained by the applicant ?
ix. How does one weigh as against this, any counter-vailing considerations?

For example:

-- would an objection simply result in advice to the opponent?
-- would an objection cause the opponent to focus more closely on its pleaded case and thus give the opportunity to fine tune pleadings ?
-- would a successful application demoralise the opponent and make it more susceptible to settlement ?

Feedback on my thoughts from the Chair, Peter Taylor SC, which I gratefully acknowledge, includes as follows:[2]

"The overriding view is that *context and particular circumstances are everything*.

In particular, there are likely to be crucial differences in criminal and civil trials. For example, in the vein of historical sex offences, in the current climate - where credibility and reliability are such readily conflated concepts, it is readily understandable that it may be desirable and indeed necessary to go for the early determination."

The learned Chair's feedback included that the early determination of evidence points is in the same category as separate determination of questions, which most judges do not encourage and which can boomerang . There are also the considerations of cost in relation to applications that don't succeed; and that if the point fails, one risks losing / diminishing chances of a favourable settlement.

The feedback from the learned Chair was that, viewed overall, unless one is very sure, or its imperative to take the point, it's probably not the most desirable course to take.

[2] This feedback has been added to the paper 14th March 2019 (i.e. after the presentation 1 March 2019).

Stealth Enterprises Pty Limited trading as The Gentleman's Club v Calliden Insurance Limited **[2015] NSWSC 1270**

56. A fire occurred at a brothel and escort agency, which caused it to cease to trade. A claim was made on the fire & business interruption policy. The underwriters repudiated liability on the basis of material non-disclosure, in that the insured had not disclosed its directors were connected with a bikie gang, the Commancheros, and they would not have insured had they known that.

57. While initially in issue, by the time of the hearing, it was conceded that Stealth Enterprises' sole director Mr Baris Tukel and the brothel's manager, Mr Fidel Tukel's, were members of the Comancheros at relevant times.

    Also, they had allowed the brother's registration to lapse and not advised Calliden of same upon renewal.

58. The backdrop to the case was the general duty of disclosure imposed by s 21 of the *ICA* on an insured.

59. The issues included whether membership of the Comancheros was "a matter relevant to the decision of the insurer whether to accept the risk ..." (s 21(1)(a)); whether a reasonable person in Stealth Enterprises' position could be expected to know that their involvement with the Comancheros was relevant to Calliden's decision to accept the risk of insuring the brothel. That depended not only on what Stealth Enterprises could be expected to know about the involvement of its director and manager with the Comancheros, but also what a reasonable person in its position could be expected to know.

60. Since Mr Baris Tukel was both the guiding mind of Stealth Enterprises and the Sergeant at Arms of the Comancheros, the Court was satisfied that his knowledge of relevant matters fell to be attributed to Stealth Enterprises.

61. Calliden tendered an expert reports from a Mr Macken, an Intelligence Analyst employed by the NSW Police Force, in relation to outlaw motorcycle gangs, including the Comancheros. He said they were engaged in a range of nefarious activities including murder, firearms offences, tax evasion and drug dealing.

62. But the respondent objected to those conclusions on the basis that they lacked factual foundation.

63. An application was made by Calliden to adduce oral evidence from Mr Macken to support these conclusions, and that application was allowed, and the report admitted.

" [38] I concluded that the aspects of Mr Macken's report to which objection was taken, were admissible under s 79 of the Evidence Act 1995 (NSW). That was because the report established that the opinions he had expressed were wholly or substantially based on his specialised knowledge, based on the training, study and experience disclosed in his report. It also disclosed that, in part, the opinions he expressed were based on materials provided by others, but that was not a basis on which his opinions could be rejected. It is commonplace for an expert's opinions to rely on such materials (see R v Jung [2006] NSWSC 658)."

So much for the oral evidence.

Now, to turn to disputes about documents in the case.

64. Calliden sought to tender documents in support of the submission that the existence and conduct of outlaw motorcycle gangs such as the Comancheros was a matter of common knowledge, within s 144 of the *Evidence Act*, i.e. known to the ordinary common person in the street.

65. Calliden sought an order under s 70 of the *Civil Procedure Act* (which permits the Court to dispense with the rules of evidence for proving any matter that is not *bona fide* in dispute).

66. The documents in issue included the following:

- The second reading speech for the Crimes (Criminal Organisations Control) Bill 2009;
- Australian Government, Australian Institute of Criminology, Research in Practice, "The Status of laws on outlaw motorcycle gangs in Australia" (June 2009);
- Australian Government, Australian Institute of Criminology, Research in Practice Report, "The Status of laws on outlaw motorcycle gangs in Australia" (March 2010);
- Nick McKenzie, "Crime data leaked to bikie gangs", WA Today (28 August 2010);
- Nick McKenzie, "Bikie spy infiltrated police HQ", Sydney Morning Herald (28 August 2010) regarding charges laid against a police analyst who was alleged to have stolen police files;
- NSW Government, Office of Director General Trade and Investment, "Sydney Central – Kings Cross Precinct Liquor Accord", announcing the establishment of the Precinct Liquor Accord under *s 136E of the Liquor Act 2007* (NSW) in relation to boundaries established at Kings Cross, in relation to persons wearing the colours of certain motorcycle Clubs;
- Cameron Houston, "Bikies probed over drive-by shooting link", Australian Biker News (3 April 2011);
- Judgment of R A Hulme J in R v Hawi [2012] NSWSC 332.

67. The common knowledge that Calliden contended for was that:

> *"(a) the Comancheros are an outlaw motorcycle gang;*
>
> *(b) outlaw motorcycle gangs are known to engage in activity which may result in property damage or personal injury."*

68. There was much argument about what knowledge about bikie gangs was in the public domain at the relevant time, from newspaper articles, google searches (available even to children), legislative debates and the like. Parallels were drawn with other decided cases about what was common knowledge e.g. the nature of the internet and the world wide web; the historical and persisting disadvantage of women in the legal profession; and that asbestos is dangerous and can be deadly.

69. If you'd like to know the outcome, then I invite you to read the case.

But the question I wish to ask you is whether you might have sought to have this ventilated in advance of the hearing.

70. I also commend a full reading of *ASIC v Rich* [2005] NSWSC 149:

These were civil proceedings brought by ASIC under the *Corporations Act* against four officers of One-Tel relating to its collapse in 2001.

ASIC sought declarations that the officers did not act with reasonable care and diligence; orders prohibiting them from managing corporations, and orders that they pay compensation of approximately $92 million.

ASIC's complaints included that the defendants withheld information from their board of directors of deleterious financial circumstances impacting on the One-Tel Group; and failed to recommend the appointment of an administrator.

ASIC sought to tender an expert report of Mr Carter. The Carter Report was 155 pages plus 15 appendices.

As pointed out by the learned Chair, this case went on appeal: *Australian Securities and Investments Commission (ASIC) v Rich* (2005) 218 ALR 764; (2005) 54 ACSR 326; (2005) 23 ACLC 1111|[2005] NSWCA 152.

However, the learned trial judge struck the Carter report out in its entirety, and

whilst the result was reversed on appeal, the case contains many valuable lessons in what objections can be taken to expert reports.

~ THANK YOU ~

Feedback welcomed to:
sjacobs@wentworthchambers.com.au