

# FOLEY'S | LIST

## RULES OF EVIDENCE YOU NEED TO KNOW!

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# RULES OF EVIDENCE YOU NEED TO KNOW!

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## I. INTRODUCTION

1. The law of evidence is a fundamental building block upon which lawyers construct a case. If you do not know whether certain evidence is likely to be admitted then you cannot properly prepare a case or advise your client as to their prospects of success.
2. Further as with substantive legal principles, evidence rules are constantly changing. With the introduction of the Uniform Evidence Acts (**UEA**) the pace of change has increased.
3. The overview of evidence law in this seminar will necessarily be brief. The topics to be covered are:
  - (a) legal professional privilege;
  - (b) without prejudice privilege;
  - (c) hearsay; and
  - (d) expert evidence.
4. This paper concentrates on matters from a commercial or civil law perspective. During the seminar the impact in the criminal law will also be considered.
5. Prior to undertaking that review, it is important to understand the position of the UEA and the manner in which they have been implemented to date and which they are to be implemented in the near future.

## II. THE UEAs AND THE COMMON LAW OF EVIDENCE

6. The UEA has been applied in the courts of the Commonwealth<sup>1</sup>, New South Wales<sup>2</sup>, Tasmania<sup>3</sup> and Norfolk Island<sup>4</sup> for a number of years. The

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<sup>1</sup> *Evidence Act 1995* (Cth)

<sup>2</sup> *Evidence Act 1995* (NSW)

Commonwealth Act is applied by all federal courts (that is, the Federal Court, Federal Magistrates Court, Family Court and, where applicable, the High Court) whether the proceeding be civil or criminal, interlocutory or at trial<sup>5</sup>. Following the joint report of the Australian, New South Wales and Victorian law reform committees on the uniform evidence legislation<sup>6</sup>, Victoria, Western Australia and the Northern Territory decided to enact legislation based on the UEA<sup>7</sup>. In July 2007 the Standing Committees of Attorney's General (SCAG) endorsed a Model Uniform Evidence Bill taking into account the amendments proposed by the law reform commissions. .

7. The Victorian parliament subsequently passed the *Evidence Act 2008* and it came into force at the start of 2009. All Victorian courts (or tribunals that are obliged to apply the laws of evidence) now apply the UEA<sup>8</sup>. Hence, for the first time since 1995 the law of evidence is essentially the same regardless of which side of William Street one is fighting the case.
8. The Commonwealth government enacted amendments to its UEA to take into account a number of recommendations of the ALRC<sup>9</sup>. These amendments are (by and large) part of the Victorian act. Hence, the different UEA's in the various jurisdictions are very similar but not identical in every respect.
9. The UEA is not technically a code but it does exclude the operation of other laws regarding the admissibility of evidence and the competence and compellability of witnesses<sup>10</sup>. This means that common law rules that are not dealt by the UEA remain in place – hence, the following common law rules (amongst others) continue to apply - the rule in *Browne v Dunn*, the various burdens and standards of proof in civil and criminal proceedings, the parol evidence rule and *res judicata* and issue estoppel.

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<sup>3</sup> *Evidence Act 2001* (Tas)

<sup>4</sup> *Evidence Act 2004* (NI)

<sup>5</sup> Somewhat perversely, until the amendments, the common law continued to deal with the question of privilege at an interlocutory level *Esso Resources Australia Ltd v Commissioner for Taxation* (1999) 20 CLR 49. This was one of the changes that was suggested by Australian Law Reform Commission report no 102, New South Wales Law Reform Commission report no 112, Victorian Law Reform Commission final report, *Uniform Evidence Law*, (December 2005) and it has been acted in s 131A.

<sup>6</sup> Australian Law Reform Commission report no 102, New South Wales Law Reform Commission report no 112, Victorian Law Reform Commission final report, *Uniform Evidence Law*, (December 2005)

<sup>7</sup> *Ibid* page 50

<sup>8</sup> *Evidence Act 2008* (Vic) s 4

<sup>9</sup> *Evidence Amendment Act 2008* (Cth)

<sup>10</sup> UEA ss 12(1), 56(1)

10. One of the most important aspects of the UEA is the discretion left to a judge to exclude evidence even if other tests are met where the probative value is outweighed by the potential that the evidence might be unfairly prejudicial<sup>11</sup>, be misleading or confusing<sup>12</sup> or would result in the undue waste of time<sup>13</sup> or if the evidence was obtained illegally<sup>14</sup>.

### III LEGAL PROFESSIONAL PRIVILEGE

11. Legal professional privilege (or client legal privilege as it is known in the UEAs) protects confidential communications passing between a lawyer and his or her client (or between a third party and the client or lawyer<sup>15</sup>) from compulsory disclosure where the dominant purpose of the communication was:
  - (a) seeking or being furnished with legal advice (advice privilege); or
  - (b) preparing for actual or contemplated litigation (litigation privilege)<sup>16</sup>.
12. The privilege is not a mere rule of evidence but a “fundamental human right”<sup>17</sup>.
13. Section 118 of the UEA broadly equates to the advice privilege and s 119 equates to the litigation privilege.
14. Section 120 introduces a new form of privilege for unrepresented parties. Where a party is unrepresented, evidence is not to be adduced of:
  - (a) a confidential communication between the party and another person;
  - (b) the contents of a confidential document that was prepared by or at the direction of the party (whether or not it was delivered);where the communication or document was created for the dominant purpose of preparing for or conducting the proceeding.
15. Legal professional privilege does not prohibit the adducing of evidence of a document or communication that affects the rights of a person<sup>18</sup>. The exception

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<sup>11</sup> UEA s 135(a)

<sup>12</sup> UEA s 135(b)

<sup>13</sup> UEA s 135(c)

<sup>14</sup> UEA s 138

<sup>15</sup> *Pratt Holdings v Commissioner for Taxation* (2004) ALR 117

<sup>16</sup> See, for example, *Esso Resources Australia Ltd v Commissioner for Taxation* (1999) 20 CLR 49

<sup>17</sup> *Baker v Campbell* (1983) 153 CLR 52, 116-117

<sup>18</sup> UEA s 121(3)

only applies if the communication directly affects a person's rights and it is not enough that it is only "relevant" to a person's rights. Hence, defamatory statements, threats and discussions resulting in a binding contract would be admissible.

A. *Application of Legal Professional Privilege*

16. Although the test of legal professional privilege is relatively easy to state its application in certain circumstances can create difficulties.
17. For example, companies are required under the *Corporations Act*<sup>19</sup> to advise their auditors of contingent liabilities and this is ordinarily done by the company's lawyer setting out their estimate of the likelihood of success and the amount likely to be recovered in the event of such success. Such letters are not protected by legal professional privilege because they are not produced for the dominant purpose of the litigation or to obtain advice – they are produced so that the company and its auditors can discharge their obligations under the *Corporations Act*<sup>20</sup>. This problem has not been resolved by the recent amendments.
18. Further, litigation privilege is said not to apply to proceedings before inquisitorial tribunals such as the Administrative Appeal Tribunal<sup>21</sup> or commissions of inquiry<sup>22</sup> although advice privilege does so apply. This leads to the anomalous situation that, where an administrative decision is made, then privilege would not apply if the person affected sought merits review at the AAT but it will apply if they seek judicial review in the Federal Court<sup>23</sup>.
19. The position of in-house counsel can also be problematic. While there is no doubt that legal professional privilege can attach to legal advice from in-house counsel if the advice is more commercial in nature than legal, or if the in-house lawyer was a "player in the transaction", then the privilege will not apply<sup>24</sup>.

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<sup>19</sup> Ss 297, 305

<sup>20</sup> *Westpac Banking Corporation v 789TEN Pty Ltd* (2005) 55 ACSR 519 [2005] NSWCA 321

<sup>21</sup> *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2006) 67 NSWLR 91

<sup>22</sup> *AWB Ltd v Cole* (2006) 152 FCR 382

<sup>23</sup> Australian Law Reform Commission report no 102, New South Wales Law Reform Commission report no 112, Victorian Law Reform Commission final report, *Uniform Evidence Law*, (December 2005) para 3.60

<sup>24</sup> *Sydney Airports Corporation Ltd v Singapore Airlines Ltd and Qantas Ltd* [2005] NSWCA 47; *Seven Network Ltd v News Ltd* [2005] FCA 142 at [5]; *Zemanek v Commonwealth Bank of Australia* (unreported, Federal Court of Australia, Hill J, 2 October 1997)

20. Another issue that arises is determining whether litigation was “contemplated” at the time the relevant document or advice was produced. Two matters need to be noted in this context.
21. First, the mere possibility of litigation is not enough – there must be a real prospect of litigation. Although the authorities do not speak with one voice, it does not, however, appear to be necessary to show that it is more likely than not that litigation will be undertaken. An interesting example appears in the recent case of *ACCC v Prysmian Cavi E Sistema Enrgia SRL (No 2)* [2012] FCA 44. In that case, Lander J had to consider whether certain documents were protected by legal professional privilege. Some of the documents came into existence prior to an interview with a critical witness. The ACCC admitted that without the evidence of this critical witness they could not have commenced the case and they could not know what the witness would say. However, the very purpose of the meeting was to determine if the evidence existed to commence proceedings. After they interviewed the witness, proceedings were commenced. Lander J held that, prior to the meeting, it was not possible to say that, objectively, there was a real prospect (as distinct from a possibility) of litigation.
22. Second, one must ask: whose purposes are relevant? Ordinarily it is the author of the document but that is not inevitably the case. Where the document belongs to a corporation, the author’s purposes must be considered along with the purposes of anyone who gave instructions to the author to produce the document. Further, if a party fails to produce evidence from all of these people then an adverse inference may be drawn that this person’s evidence would not have assisted and the party may fail to discharge the burden on them of convincing the court that the dominant purpose was a protected purpose<sup>25</sup>.

B. *Waiver of Legal Professional Privilege*

23. Traditionally, legal professional privilege was waived where the circumstances were such that, by reason of an earlier disclosure, it would have been “unfair” for a client to say that privilege had not been waived<sup>26</sup>. However, in 1999 the High

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<sup>25</sup> *Powercor Australia v Perry* [2011] VSCA 239 at [20] to [28]

<sup>26</sup> *Attorney-General (NT) v Maurice* (1986) 161 CLR 475

Court, in the case of *Mann v Carnell*<sup>27</sup> (“*Mann*”), changed the focus from one of unfairness to one of inconsistency:

*“What brings about the waiver is the inconsistency, which the courts, where necessary, informed by considerations of fairness, perceive, between the conduct of the client and the maintenance of the confidentiality, not some overriding principle of fairness.”*<sup>28</sup>

24. Whether or not *Mann* worked a significant change to the law is debateable – however, it did at least change the language of the appropriate test<sup>29</sup>. This has led to some confusion. The test of unfairness was a very general test but at least one knew the criteria that were to be applied even if the result of their application was not always readily apparent. The test of inconsistency is no less general than the test of unfairness but it is now not even apparent the extent to which “unfairness” is to play a role. Because the test is so general and the criteria to be applied so broad, it is common that one cannot have confidence in predicting whether a court will determine that legal professional privilege has been waived until a court has delivered its decision and, potentially, an appeal has been determined. Indeed, the cases themselves often refer to the lack of guidance that can be derived from earlier cases<sup>30</sup>.
25. Waiver is now dealt with under the UEA at s 122 which was substantially re-written following the law reform commissions’ reports of 2005 in a way that meant it now follows the common law more closely. (The previous test under the UEA was seen to be insufficiently “flexible” – some may have argued that this meant that it was more predictable). In essence s 122 provides that legal professional privilege is waived if a party acts inconsistently with the maintenance of the privilege<sup>31</sup> which includes (but is not limited to) where a party “knowingly and voluntarily” discloses the substance of the evidence or the disclosure is done with their express or implied consent<sup>32</sup>.
26. Privilege can be impliedly or expressly waived. Implied waiver may take the form of issue or disclosure waiver. Issue waiver arises where a party puts the

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<sup>27</sup> *Mann v Carnell* (1999) 201 CLR 1

<sup>28</sup> *Mann v Carnell* (1999) 201 CLR 1, 13

<sup>29</sup> *Commissioner for Taxation v Rio Tinto Ltd* (2006) 229 ALR 304, 316

<sup>30</sup> *Commissioner for Taxation v Rio Tinto Ltd* (2006) 229 ALR 304, 316

<sup>31</sup> UEA s 122(2)

<sup>32</sup> UEA s 122(3)

confidential communication in issue whereas disclosure waiver arises where the actual communication is disclosed.

27. The fact that a party does not subjectively intend to waive privilege does not matter<sup>33</sup> but under the UEA the disclosure by an employee or lawyer will only amount to a waiver if the lawyer or employee was authorised to make the disclosure<sup>34</sup>. Having said that, if a document is included in an affidavit of documents and inspected then it is likely that privilege, in the absence of it being obvious mistake, has been waived<sup>35</sup>. On the other hand, if a party inadvertently discloses a privileged communication in an affidavit of documents then that fact, on its own, will not amount to a waiver<sup>36</sup>.
28. Issue waiver can arise where a party makes his or her state of mind an issue in the proceeding – such as by claiming in a misrepresentation case that the person relied upon the representation notwithstanding legal advice that they were given. The issue arises even more starkly in cases of undue influence<sup>37</sup>. It is unclear whether this can amount to an immediate waiver or whether any questions of waiver should wait until trial<sup>38</sup>.
29. At other times, a party's state of mind can be even more expressly placed in dispute. In *Commissioner for Taxation v Rio Tinto Ltd*<sup>39</sup> the Commissioner determined that Rio Tinto had engaged in dividend stripping. The legislation provided that the Commissioner had to be convinced of certain matters before he could come to such a view. Rio Tinto argued that, in coming to such a view, the Commissioner either applied the wrong legal test or took irrelevant matters into account. Upon being pressed for particulars as to how he came to his conclusions, the Commissioner provided particulars in which he stated that he took into account the matters “evidenced by” over 500 documents that were set

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<sup>33</sup> *Mann v Carnell* (1999) 201 CLR 1 at [29]; *Commissioner for Taxation v Rio Tinto Ltd* (2006) 229 ALR 304, 316 at[43]

<sup>34</sup> UEA s 122(4)

<sup>35</sup> *Melend Pty Ltd v Restoration Clinics of Australia Pty Ltd* (1997) 75 FCR 511 cf *Sovereign v Bevillesta* [2000] NSWSC 521 at [23]

<sup>36</sup> *Hooker Corporation v Darling Harbourside* (1987) 9 NSWLR 538; *Woolhara MC v Westpac Banking Corp* (1994) 33 NSWLR 529, 539; *BT Australasia v NSW* (1998) 154 ALR 202, 208; *FKP Constructions v Smith* [2005] NSWSC 126

<sup>37</sup> *Thomason v Campbelltown Municipal Council* (1939 ) 39 SR(NSW) 347; *Commissioner for Taxation v Rio Tinto Ltd* (2006) 229 ALR 304, 317

<sup>38</sup> *Telstra v BT Australasia* (1998) 85 FCR 152 cf *John Tanner Holdings v Mortgage Management* (2001) 182 ALR 201

<sup>39</sup> (2006) 229 ALR 304

- out in a schedule. Claims of privilege were expressed to be maintained. Privilege was initially claimed over 17 of the documents and, by the case reached the Full Federal Court, the issue was whether privilege had been waived over 8 documents.
30. The Full Federal Court held that the Commissioner had waived privilege in the documents. The Full Court said that if the Commissioner had merely said that the documents were relevant to his decision, or that he had taken the legal advice into account in coming to his decision, then there would have been no waiver because there would have no inconsistency between that disclosure and maintenance of the privilege. However, because the Commissioner said that he took into account the matters “evidenced by” the documents in the schedule, the contents of those documents were necessarily put in issue and, therefore, there was an inconsistency between making the assertion and the maintenance of the privilege<sup>40</sup>. Special leave to appeal to the High Court was refused<sup>41</sup>.
31. This can be contrasted with the decision in *v Osland v Secretary, Department of Justice*<sup>42</sup> (“Osland”) which was more focussed upon the issue of disclosure waiver than issue waiver. In that case the respondent had been convicted of murdering her husband and petitioned the government for mercy. The petition was refused by the Attorney General. At the time of his refusal the Attorney General issued a press release in which he stated that he had appointed a panel of 3 named silks to consider the petition. He noted that he had received a joint memorandum of advice that recommended on every ground that the petition be refused and that “after carefully considering the joint advice” he had recommended to the Premier that the Governor be advised to deny the petition. The respondent applied for access to the advice under FOI legislation. VCAT held that privilege had not been waived.
32. On appeal, the Court of Appeal and the High Court agreed with VCAT that privilege had not been waived. While the High Court in *Carnell* had disavowed a test based simply on an “overriding principle of fairness”, in *Osland* it emphasised that fairness still has an very important role to play:

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<sup>40</sup> *Commissioner for Taxation v Rio Tinto Ltd* (2006) 229 ALR 304, 324-325

<sup>41</sup> *Commissioner of Taxation v Rio Tinto Ltd* [2006] HCATrans 539 (29 September 2006)

<sup>42</sup> (2008) 234 CLR 275 – the Court of Appeal decision is as (2007) 95 ALD 380

*“Waiver of the kind presently in question is sometimes described as implied waiver, and sometimes as waiver “imputed by operation of law”. It reflects a judgment that the conduct of the party entitled to the privilege is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. Such a judgment is to be made in the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances.”*<sup>43</sup>

33. The important point, then, is that both the Court of Appeal and the High Court, effectively treated “inconsistency” and “unfairness” are being interchangeable concepts.

*“The evident purpose of what was said in the press release was to satisfy the public that due process had been followed in the consideration of the petition, and that the decision was not based on political considerations. .... The Attorney-General was seeking to give the fullest information as to the process that had been followed, no doubt in order to deflect any criticism, while at the same time following the long-standing practice of not giving the reasons for the decision. This did not involve inconsistency; and it involved no unfairness to the appellant. If she had a legal right to reasons for the decision, then she still has it. If she had no such right, the press release did not deprive her of anything to which she was entitled. What the Attorney-General said did not prevent the appellant from making public her petition, or any part of it, as and when she desired.”*<sup>44</sup>

34. The Court of Appeal went on to consider whether the disclosure of the “gist” or conclusion of advice waived privilege over the whole advice. (The High Court did not expressly consider this aspect) The Court of Appeal noted that various decisions under the UEA had decided that the disclosure of the conclusion was sufficient to waive privilege over the whole of the advice but determined that this was based upon the particular wording of s 122 of the UEA – prior to its amendment. It held that, contrary to the decisions of Goldberg J in *Australian Unity Health Ltd v Private Health Administration Council*<sup>45</sup>, Whelan J in

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<sup>43</sup> Osland at (2008) 234 CLR 275, [45]

<sup>44</sup> Osland at (2008) 234 CLR 275, [48]

<sup>45</sup> (1999) FCA 1770

*Switchcorp Pty Ltd v Multimedia Ltd*<sup>46</sup> and Young J in *AWB Ltd v Cole (No 5)*<sup>47</sup>, the common law position was different and that test at common law remained the test of inconsistency and the application of that test to the facts of the particular case<sup>48</sup>. Hence, disclosure of the gist of the advice at common law may or may not amount to a waiver depending on the facts of the case<sup>49</sup>. Although there is no authority directly on point, it seems likely that this will also be the case under the UEA given the amendments to s 122<sup>50</sup>. In fact, s 122(3) assumes that disclosure of the substance of the evidence will only amount to waiver in certain circumstances (eg where the substance is disclosed with consent).

35. Some other matters are worth noting. If a lawyer is sued for providing negligent advice it is inconsistent with the maintenance of the privilege to allow the client to refer to part of the advice but prevent the lawyer from referring to the whole of the advice given<sup>51</sup>.
36. Even more importantly, if a party seeks to settle a case, and endeavours to encourage the other side to settle by setting out the gist of advice that it has received, then there will be a waiver at least under the common law<sup>52</sup>.

#### IV WITHOUT PREJUDICE PRIVILEGE

37. Most lawyers know that simply heading a document “*without prejudice*” will not prevent the other party relying upon it if, in fact, no offer of settlement is made in the document or the document is not otherwise provided in the context of settlement negotiations<sup>53</sup>. Equally, the failure to head a document “without prejudice” does not mean that the privilege is lost<sup>54</sup>. Nonetheless, most lawyers

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<sup>46</sup> (2005) VSC 425

<sup>47</sup> (2006) 155 FCR 30

<sup>48</sup> *Secretary, Department of Justice v Osland* (2007) 95 ALD 380, 390-392

<sup>49</sup> *Secretary, Department of Justice v Osland* (2007) 95 ALD 380, 394

<sup>50</sup> cf. *Hanks v Admiralty Resources NL (No 2)* [2011] FCA 1464 (Gordon J) where her Honour said that :

“The critical question is whether the “substance” or “effect” of the legal advice has been disclosed.” and appeared to assume that if this question was answered in the affirmative then it would be inconsistent.

<sup>51</sup> *Secretary, Department of Justice v Osland* (2007) 95 ALD 380, 385-386 and the cases referred to therein.

<sup>52</sup> *Bennet v Chief Executive Officer of the Australian Customs Service* (2004) 140 FCR 101, 120 (Full Federal Court) cf UEA s 122(5)(a)

<sup>53</sup> *Jadwan Pty Ltd v Porter (No 2)* [2004] TASSC 126; *Bhagat v Global Custodians Ltd* [2002] NSWCA 160 at [28]

<sup>54</sup> *Rodgers v Rodgers* (1964) 114 CLR 608 at 614 per McTiernan, Taylor and Owen JJ

are unaware of the exact limitations on the admissibility of without prejudice communications or the number of exceptions to the without prejudice principle.

38. For example, a lawyer will often say, during mediation or in correspondence marked “without prejudice”, that their client has no money and, therefore, the other party should accept a lesser sum to settle the dispute. The lawyer would usually be surprised to learn that it may be case that this admission can be relied upon by the other side as an act of bankruptcy of their client<sup>55</sup>.
39. Indeed, section 131 of the UEA provides for 11 exceptions to the without prejudice privilege and the common law, arguably, provides for even more<sup>56</sup>. These are considered below

#### A *The Limitations to the Privilege*

40. Section 131 of the UEA provides that evidence is not be adduced of communications between parties in dispute (or between one of the parties and a third party) in connection with an attempt to negotiate a settlement of the dispute or a document that was prepared in connection with an attempt to settle a dispute.
41. In order to obtain the benefit of the without prejudice privilege under the common law or the UEA, there must be a genuine attempt to settle an existing dispute<sup>57</sup>. Circumstances in which the without prejudice privilege will not apply therefore, include:
  - (a) *Where no dispute is yet existing or where discussion turns to matters other than the dispute .*

In *Bath & North Somerset District Council v Nicholson*<sup>58</sup> a defendant claimed adverse possession over a property and wrote a letter to the plaintiff entitled “without prejudice”. The letter proposed terms upon which a lease could be taken. The defendant argued that a dispute did exist because if the negotiations did not prove fruitful then the plaintiff might seek to evict him. The Court held that the fact that a dispute might exist in the future did not attract the privilege. If this

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<sup>55</sup> *Family Housing Association (Manchester) Ltd v Michael Hyde and Partners* [1993] 1 WLR 354.

<sup>56</sup> Such as for excusing delay - *Unilever Plc v Proctor and Gamble Co* [2001] 1 All ER 783 at 791-793

<sup>57</sup> *Lukies v Ripley* (No 2) (1994) 25 NSWLR 283 at 289.

<sup>58</sup> *Bath and North District Council v Nicholson* (Unreported, High Court of England and Wales, Lewison AJ, 22 February 2002).

was so, said the Court, almost all commercial negotiations would attract the privilege.

Similarly, while the privilege will protect all communications made in the course of, or reasonably incidental to, the settlement negotiations<sup>59</sup>, matters that have no relevance to the dispute in question will not be protected<sup>60</sup>.

Other examples of where it was held that communications were admissible include a statement made by a defendant in a without prejudice discussion to the effect that if the plaintiff was successful in the litigation then the defendant would transfer its assets in order to deprive the plaintiff of the fruits of its judgment. This was held to relate to a “collateral matter” and was admissible.

(b) *Where a party is not genuinely attempting to settle the dispute.*

Where, for example, a party is simply “going through the motions” without any genuine attempt to settle may mean that the party is not engaging in mediation at all and evidence of this may be admissible.<sup>61</sup> This is so even if the governing legislation provides that nothing said at the mediation will be admissible<sup>62</sup>.

However, the mere fact that a party refuses to compromise does not mean that they are not negotiating for the purposes of s 131<sup>63</sup>.

## B. *The Exceptions to the Without Prejudice Privilege*

42. Without prejudice privilege has been described as a “sensitive bird which when abused takes flight”<sup>64</sup>. Indeed, it has been suggested that, at common law, statements made during the course of a without prejudice discussion may be admissible whenever they are relevant simply for the fact of having been made

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<sup>59</sup> *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants and Bars Pty Ltd* [2001] 1 Qd R 276, 285, 289; *Field v Commissioner for Railways for NSW* (1957) 99 CLR 285, 291;

<sup>60</sup> *Field v Commissioner for Railways for NSW* (1957) 99 CLR 285; cf *Davies v Nyland* (1974) SASR 76 per Wells J.

<sup>61</sup> *Commonwealth Development Bank of Australia Ltd v Cassegrain* [2002] NSWSC 940 at paragraphs [13] and [14].

<sup>62</sup> *Ibid* paragraph [7].

<sup>63</sup> *Barrett Property Group Pty Ltd v Dennis Family Homes Pty Ltd (No 2)* [2011] FCA 276 at [34]

<sup>64</sup> *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants and Bars Pty Ltd* [2001] 1Qd R 276, 284 per Pincus JA.

irrespective of their truth<sup>65</sup> or that the privilege will give way wherever the interests of justice require it<sup>66</sup>.

43. Section 131(2) of the UEA sets out the circumstances in which the without prejudice privilege will not apply.

(a) *Consent*<sup>67</sup>:

The privilege is a joint one and protects all parties to the discussion. Hence, contrary to the understanding of many practitioners, the without prejudice privilege can only be waived with the consent of all parties to the communication<sup>68</sup>.

If the substance of the evidence has previously been disclosed by all parties to the dispute then the privilege cannot be relied upon at a later time<sup>69</sup>.

However, if the original offer was expressly stated to be “open” (or otherwise not confidential) then the privilege will not apply.<sup>70</sup> Similarly, where an offer is expressed to be “without prejudice save as to costs” it will be admissible on the question of costs<sup>71</sup>.

(b) *A party alleges that the statements made during the course of the without prejudice discussions has resulted in an agreement*<sup>72</sup>.

In such circumstances, it may be necessary for the Court to receive evidence of everything that was said to determine if any agreement was reached<sup>73</sup>;

(c) *Failing to disclose the information would result in the Court being misled*<sup>74</sup>.

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<sup>65</sup> *Tenstat Pty Ltd v Permanent Trustee Australia Ltd* [1992] 28 NSWLR 625 at 633; *NSI Group v Mokas* [2006] NSWSC 1077 at [6]

<sup>66</sup> *Rush & Tompkins* at 1300 per Lord Griffiths; *Cedenco Good Ltd v State Insurance Ltd* [1996] NZLR 205 at 212.

<sup>67</sup> UEA s 131(2)(a), (b)

<sup>68</sup> *Walker v Wilsher* (1889) 23 QBD 335; *Trade Practices Commission v Arnotts Ltd* (1989) 88 ALR 69; *Johnston v Jackson* (1880) 6 VLR 1.

<sup>69</sup> UEA s 131(2)(b)

<sup>70</sup> ;UEA s 131(2)(d)

<sup>71</sup> UEA s 131(2)(h)

<sup>72</sup> *UEA s 131(2)(f)*. *Bentley v Nelson* [1963] WAR 89 (FC); *Biala Pty Ltd v Mallina Holdings Pty Ltd* [1990] WAR 174 at 180; *Western Australia v Southern Equities Corp Ltd (in liq)* (1996) 69 FLR 245 at 249; *Langford v Cleary* (1998) 8 Tas R 52;

<sup>73</sup> *Ibid.*

The without prejudice privilege cannot be used as a cloak to prevent a court being misled, for example by suggesting that no response to a letter has been received when, in fact, a “without prejudice” response was received<sup>75</sup>. If a proper understanding of evidence that has been admitted requires disclosure of the otherwise without prejudice communication, then the without prejudice communication will be admissible.

(d) *where the communication affects the rights of a person*<sup>76</sup>;

This reflects the exception in respect of legal professional privilege under s 121(3) but it has more significant work to do given the communications will be between parties in dispute rather than between a party and their lawyer. Examples of where it would apply are:

- a person publishes defamatory material under the purported cloak of “without prejudice” communications;
- acts of bankruptcy – that is, stating that the client has no money;
- threats – whether they are tortious or criminal;
- misleading or deceptive conduct;
- a contractual offer;
- conduct amounting an election.

Nonetheless, the exception only relates to communications that affects a person’s rights in a fairly direct way and not communications that are simply “relevant to” a right which otherwise exists<sup>77</sup>.

There was a related exception at common law which provided that the privilege would not apply where a party engaged in an “*unambiguous impropriety*”<sup>78</sup>. Under this heading, evidence of the following was found to be admissible:

- Where a party engaged in threats of violence, fraud or blackmail;

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<sup>74</sup> UEA s 131(2)(c), (e), (g)

<sup>75</sup> *McFadden v Snow* (1952) 69 WN (NSW) 8; *Pitts v Adney* (1961) 78 WN (NSW) 886; *Unilever Plc v Proctor and Gamble Co* [2001] 1 All ER 783, 792; Evidence Act 1995 (Cth) .

<sup>76</sup> UEA s 131(2)(i), (j)

<sup>77</sup> *Asciak v Australian Secured and Managed Mortgages Pty Ltd* [2008] FCA 753 at [33]

<sup>78</sup> *Unilever Plc v Proctor and Gamble Co* [2001] 1 All ER 783, 792; *Field v Commissioner for Railways for NSW* (1957) 99 CLR 285 at 291;

- defamation<sup>79</sup>
- where the communication amounted to an estoppel<sup>80</sup>;
- misrepresentation. A party overstated the strength of its case, and thereby convinced the other party to settle the litigation. This amounted to an actionable misrepresentation that rendered the settlement agreement unenforceable<sup>81</sup>;
- a threat by a defendant in without prejudice communications to commence certain types of intellectual property proceedings (such as patent proceedings) may be admissible in proceedings alleging that an unjustified threat has been made<sup>82</sup>;
- a party admitting that they cannot pay their debts<sup>83</sup>;
- a party saying that, in the event of an unfavourable decision, they will leave the jurisdiction, move their assets from the jurisdiction, or to transfer their assets to another person or entity<sup>84</sup>.

An implied admission that proceedings were brought to encourage the defendant to reconsider a commercial arrangement and settle other differences was held to be admissible as “a threat to persist with dishonest proceedings”<sup>85</sup>. Whether or not a similar result would be reached under the UEA is unclear.

(e) *A party needs to explain acquiescence or delay.*

At common law, the fact that without prejudice discussions were taking place may be taken into account to explain delay or where there is an allegation of laches<sup>86</sup>. The contents of those discussions may not be

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<sup>79</sup> Suzanne B McNicol, *Law of Privilege*, (1992), 484.

<sup>80</sup> *Unilever Plc v Proctor and Gamble Co* [2001] 1 All ER 783, 792.

<sup>81</sup> *Williams & Ors v Commonwealth Bank of Australia* [1999] NSWCA 345.

<sup>82</sup> *Kurtz and Co v Spence & Sons* (1884) L.J. Ch 238.

<sup>83</sup> *Family Housing Association (Manchester) Ltd v Michael Hyde and Partners* [1993] 1 WLR 354.

<sup>84</sup> *Dora v Simper* (Unreported, United Kingdom Court of Appeal, 15 March 1999).

<sup>85</sup> *Hawick Jersey International v Caplan* (The Times, 11 March 1988); cf *Foster v Friedland* (1992) CAT

<sup>86</sup> *Unilever Plc v Proctor and Gamble Co* [2001] 1 All ER 783, 792.

admissible<sup>87</sup> but they may become admissible if necessary in order to “give the court a fair picture of the rights and wrongs of the delay.”<sup>88</sup>

Although this common law exception is not expressly referred to in the UEA, it appears to apply nonetheless<sup>89</sup>.

(f) *Certain types of investigations are under way.*

Under the *Corporations Act 2001* (Cth), ASIC, a liquidator or an administrator of a company can apply to the court to issue a summons for the examination of officers or other persons who have been concerned in the administration of the affairs of a corporation that is under external administration<sup>90</sup>. Similarly section 155 of the *Competition and Consumer Act 2010* (Cth) permits the ACCC to issue a notice requiring a person to provide information or documents relating to a suspected contravention of the TPA or to appear before the ACCC to produce documents and give evidence. Evidence of without prejudice discussion may have to be disclosed under these provisions<sup>91</sup> (although such evidence may still not be admissible in any subsequent legal proceedings).

44. In their reviews of the UEA, the Victorian and Australian Law Reform Commissions determined that there was no need for reform in this area<sup>92</sup>. The position is, therefore, not likely to change in the near future. Knowledge of this area of law is not only a powerful shield to prevent a party making unfortunate admissions (and potentially rendering a solicitor liable to allegations of negligence) it can also be a powerful sword to wield when the other side transgresses over the line that few lawyers realise exists

## V. HEARSAY

45. As most lawyers are aware, hearsay is a statement made by a person outside of court where the purpose of the admission of the statement or document is to prove the truth of what was said. If the evidence is relevant for the fact that it

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<sup>87</sup> *Ibid*; *Parry v News Group Newspapers Ltd* [1990] 140 NLJR 1719; *Family Housing Association (Manchester) Ltd v Michael Hyde and Partners* [1993] 1 WLR 354.

<sup>88</sup> *Unilever Plc v Proctor and Gamble Co* [2001] 1 All ER 783, 792.

<sup>89</sup> *Apotex Pty Ltd v Les Laboratoires Servier (No 5)* [[2011] FCA 1282 at [9]

<sup>90</sup> *Corporations Act 2001* (Cth) Part 5.9 Div 1.

<sup>91</sup> *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512.

<sup>92</sup> Victorian Law Reform Commission Final Report, *Uniform Evidence Law*, December 2005 para 15.179.

was said rather than to prove the truth of what was said then it is not hearsay<sup>93</sup>. Generally, it is not admissible. However, beyond those bald propositions, the hearsay rule becomes complicated.

46. In *R v McLean*<sup>94</sup> the victim of a robbery made a mental note of the registration number of the getaway car and told a third person the number some 3 minutes later. The third person wrote down the number but the victim did not see him do it and, by the time of the trial, the victim could not independently recall the number of the car. The evidence was held to be hearsay and not so sufficiently connected with the events as to amount *res gestae*<sup>95</sup>.
47. Further, there are significant distinctions between the operation of hearsay at common law and under the UEA's.

#### A. Implied Assertions

48. The most significant distinction between the common law and the UEAs is that under the uniform evidence legislation, "implied assertions" are admissible to prove the truth of the assertion in any event. Consider the following example:

A boat captain is seen thoroughly inspecting his ship before a voyage and then he gets on it with his family. The boat subsequently sinks. The issue arises as to whether the ship was seaworthy. Can evidence be led by the person who witnessed the captain's inspection as evidence that the ship was seaworthy when it went out to sea?<sup>96</sup>

In the Federal Court the boat owners could rely on the captain's implied assertion that the boat was seaworthy when he inspected it but in the Supreme Court it would generally be considered hearsay (although other rules may apply to allow the evidence to be admitted in any event.)<sup>97</sup>. The reason for this is that s 59 of the UEA, evidence of a previous representation is not admissible to prove the existence of a fact that the person "intended to assert" but it does not prohibit the introduction of the statement for any purposes which, on an objective test, it

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<sup>93</sup> *Subramanian v Public Prosecutor* [1956] 1 WLR 965, 969

<sup>94</sup> (1968) 52 Cr App 80

<sup>95</sup> This would continue to apply under the UEA. Indeed, example (3) that is listed at the end of s 59 of the UEA includes a very similar example of what is inadmissible hearsay.

<sup>96</sup> *Wright v Doe d Tatham* (1838) 4 Bing NC 489; (1838) 132 ER 877

<sup>97</sup> *Pollitt v The Queen* (1992) 174 CLR 558, 620 (per McHugh J)

could reasonably be suspected<sup>98</sup> that the maker of the statement did not intend to assert<sup>99</sup>.

49. Similarly, to adopt the facts of the High Court case in *Walton v R*<sup>100</sup>, under the UEA evidence could be given that a child answered the phone “Hello Daddy” in order to show that the child was talking to his father because there was no intention to assert such a matter. Under the common law, however, it was held to be hearsay (although in *Walton* the evidence was admissible to explain the victim’s state of mind and why she acted as she did in leaving to go into town).
50. The amendments made by the UEA were intended to remove some of the complication and inconsistencies that arise under the common law hearsay rule and its exceptions. However, it developed its own problems.
51. In *R v Hannes*<sup>101</sup> the accused had written in his notebook – “*Am confident that I have full story after my conversations with Mark in London. But must take Mark with me to ASC otherwise will not be believed.*” The issue arose as to whether Mark Booth was a real person or a fiction that the accused used when referring to himself. Ultimately the court decided that the evidence was not relevant. However, Spigelman CJ said (and O’Dowd J agreed) that the word “intended” in s 59 could go beyond that specific fact which the author subjectively intended to assert and may encompass any necessary assumption underlying the fact that the assertor subjectively adverts to<sup>102</sup>. The problem with such an approach is that it has few limitations and effectively ignores the distinction between an implied assertion and express assertion. As a result s 59 of the UEA was amended to seek to make the test an objective test – that is, what would a person have “reasonably supposed” that the maker of a statement intended to assert. Whether this overcomes the problem or not remains to be seen.

## B. *Dual Relevance*

52. Another controversial aspect of the amendments made to the hearsay rule by the UEA is that hearsay evidence that is admitted for a non-hearsay purpose can

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<sup>98</sup> The move to an objective test has only come about as a result of recent amendments – see below.

<sup>99</sup> *Minister for Immigration v Capity* (1999) 55 ALD 365

<sup>100</sup> (1989) 166 CLR 283

<sup>101</sup> (2000) 158 FLR 359

<sup>102</sup> (2000) 158 FLR 359 at [361], [485]

- also be used for its hearsay purpose<sup>103</sup>. This is, of course, subject to the discretionary controls set out in ss 135-137 of the UEA.
53. The reason for the enactment of s 60 was that it was thought that the common law approach was unduly legalistic and complicated. The Australian Law Reform Commission identified two main areas where difficulties arose – prior consistent and inconsistent statements and the factual basis of an expert’s opinion<sup>104</sup>.
54. On the issue of prior statements, a witness may give evidence in court that they saw the event in question. They may concede in cross-examination that they had earlier told police that they had not seen the event. Under the common law the cross examination could be used to suggest that the witness was not credible but could not be used as evidence that the witness had not seen the event. It was considered that this was an artificial and difficult distinction.
55. At common law, the facts set out in an expert’s evidence could only be used to determine the basis upon which the expert’s opinion was based<sup>105</sup>. This is not the case under the UEA but if the factual basis was not proved then the expert evidence may also be excluded as irrelevant or deemed of little weight.
56. However, some confusion was cast on the operation of s 60 by the decision of the High Court in *Lee v The Queen*<sup>106</sup>. In that case the accused (Lee) was alleged to have said to Mr Caitlin, “*Leave me alone, cause I’m running because I fired two shots ...I did a job and the other guy was with me bailed out.*” Mr Caitlin admitted having signed a statement to such effect but denied the statements were his. The prosecution sought to adduce evidence of police officers of the statements by Mr Caitlin.
57. The High Court said that Mr Caitlin had intended to assert that he had heard the words attributed to the accused but not that those words were true. As such the prior inconsistent statement went only to Mr Caitlin’s credibility and not to the truth of the earlier statement. The High Court supported its reasoning by referring to the ALRC report that noted that second hand hearsay was very

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<sup>103</sup> UEA s 60

<sup>104</sup> ALRC, *Evidence*, ALRC 38 (1987) [144]

<sup>105</sup> *Ramsay v Watson* (1961) 108 CLR 642, 649

<sup>106</sup> 195 CLR 594

unreliable. This has led to a conclusion in some circles that Lee is authority for the proposition that s 60 cannot be relied upon if one is seeking to introduce second (or more than second) hand hearsay<sup>107</sup>.

58. Section 60(2) was inserted as a result of this decision. It provides that the dual relevance test applies whether or not the person has knowledge of the asserted fact. Hence, the rather unusual situation is achieved that a person who asserts something that is admissible, is evidence as truth of that fact even where the person has no knowledge of whether it is true or not and even where it is second or third hand hearsay. .

### C. Other Exceptions to the Hearsay Rule

59. Exceptions to the hearsay rule at common law include:
- (a) contemporaneous narrative statements (“*res gestae*”);
  - (b) statements of deceased persons;
  - (c) dying declarations;
  - (d) declarations in the course of duty;
  - (e) declarations as to public or general rights;
  - (f) declarations of pedigree;
  - (g) statements in public documents;
  - (h) admissions; and
  - (i) statutory exceptions such as business records and computer evidence.

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<sup>107</sup> Australian Law Reform Commission report no 102, New South Wales Law Reform Commission report no 112, Victorian Law Reform Commission final report, *Uniform Evidence Law*, (December 2005) para [7.94]

60. The applicability of exceptions under the UEA depends upon whether the hearsay is first hand hearsay or more remote. Exceptions that apply to first hand hearsay<sup>108</sup> include:
- (a) Where it would cause undue delay or would not be reasonably practicable to call the person who made the out of court representation<sup>109</sup>;
  - (b) At the time of the representation, the occurrence of the asserted fact was fresh in the memory of the person who made<sup>110</sup>;
  - (c) Contemporaneous statements about a person's health, intention, knowledge, state of mind and other matters<sup>111</sup>;
  - (d) Where the person who made the representation is not available to give evidence about an asserted fact because:
    - (i) The person is dead;
    - (ii) The person is not competent to give evidence;
    - (iii) Giving the evidence would be unlawful;
    - (iv) All reasonable steps have been taken by the party to find the person or secure their attendance but without success<sup>112</sup>.
61. Notice must be given in certain cases<sup>113</sup> and a party can object to the admission of hearsay evidence where maker of the out of court representation is available but it is not intended that the person will be called as a witness<sup>114</sup>.
62. Exceptions to the hearsay rule under the UEA (other than s 60 and those that relate to first hand hearsay only as referred to above) include:

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<sup>108</sup> S 62 UEA provides that Division 2 of Part 3.2 only applies to first hand hearsay.

<sup>109</sup> S 64(2) UEA

<sup>110</sup> S 64(3) UEA

<sup>111</sup> S 66A UEA

<sup>112</sup> Ss 63, 65 UEA

<sup>113</sup> S 67 UEA

<sup>114</sup> S 68 UEA

- (a) Business records<sup>115</sup>;
- (b) Contents of tags, labels and writing<sup>116</sup>;
- (c) electronic communications – in particular, representations about the sender, recipient or time and date of sending or receipt contained in an email, telegram or telex<sup>117</sup>;
- (d) evidence of an Aboriginal law or custom<sup>118</sup>;
- (e) Reputation as to relationships and age<sup>119</sup>;
- (f) Reputation of public or general rights<sup>120</sup>; and
- (g) Interlocutory proceedings as long as the source is identified<sup>121</sup>.

## VI. ADMISSIBILITY OF EXPERT EVIDENCE

63. The technical distinction between expert and lay evidence is that an expert is permitted to provide opinions but the lay witness is only permitted to give evidence of the facts<sup>122</sup>.

### A. *Legal Standards for Experts*

64. There are a range of rules that apply to expert evidence that can be summarised as follows:

- (a) the witness must be an expert;
- (b) the evidence must relate to an acknowledged area of expertise;
- (c) the evidence must be founded on the expert's expertise and not be a matter of common knowledge;

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<sup>115</sup> S 69 UEA

<sup>116</sup> S 70 UEA

<sup>117</sup> S 71 UEA

<sup>118</sup> S 72 UEA

<sup>119</sup> S 73 UEA

<sup>120</sup> S 74 UEA

<sup>121</sup> Under the UEA a lay witness can give evidence of an opinion if that is necessary to obtain an adequate account or understanding of the person's perception of the event - S 78 UEA

<sup>122</sup> S 72 UEA

- (d) the basis of the opinion must be proved by admissible evidence;
  - (e) the evidence cannot determine the ultimate issue.
65. Whether a person possesses the relevant expertise is a question of fact which depends on training, study and experience and not just qualifications. It is important to ensure that the expert does not express opinions outside his or her area of expertise which, at worse, will render the evidence inadmissible and, at best, will adversely impact on the witness' credit. This is particularly true when a person with a "general" level of expertise (for example, an accountant or a general practitioner) is asked to provide evidence in relation to matters that should be directed to a person with particular expertise.
66. In recent years there has been a shift away from the need to demonstrate that a theory has general acceptance in a field (the so-called "*Frye*" test<sup>123</sup>) and now it is sufficient if the theory has scientific validity or that expert's expertise to be in an area "sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience"<sup>124</sup>. This was said to be case at both common law and under the UEA.
67. If a judge or jury can form their own conclusions from the evidence - and the expert evidence is unlikely to be necessary or useful - then the expert evidence will not be admissible. Again the rules have been liberalised in recent years and whereas previously the question was whether the evidence was necessary, now it appears sufficient to demonstrate that it will be useful - eg *R v Smith* [1987] VR 907 (evidence of psychologist as to unreliability of eye witness identification).
68. Section 80 of the UEA has abrogated this rule and the ultimate issue rule. However, it is doubtful whether this has made any difference - the Court still needs to be convinced that the evidence is likely to assist in the resolution in dispute and if the expert is merely giving opinion as to matter of common knowledge then it is unlikely that the evidence will be of assistance.

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<sup>123</sup> *Frye v United States* 293 F 1012 (1923)

<sup>124</sup> *HG v The Queen* (1999) 197 CLR 414, {58} (Gaudron J, Gummow J agreeing)

69. The various law reform commissions formed the view that there was, in truth, no “basis rule” in the area of expert evidence either at common law or under the UEA<sup>125</sup>. The Commissions said that the so-called rule actually encompassed two concepts:
- (a) if the factual basis of the report is not proved (or the facts proved are substantially different from the facts assumed) then the report itself will carry no weight and, hence, be irrelevant and inadmissible;
  - (b) on the other hand, if the factual basis is insufficiently proved then the weight that can be given to the report will be significantly lessened.<sup>126</sup>
70. The expert’s task is to express an opinion on an assumed substratum of facts and not determine whether those facts are true or not<sup>127</sup>. It is then up to the party to prove the substratum of facts by admissible evidence. If they are unable to do so then the opinion, of course, is rendered worthless and this is a very common method of attacking expert testimony.
71. Finally, as an expert witness is not permitted to adjudicate on a legal standard - that being the court’s role - the witness is not permitted to express an opinion on the ultimate issue. Prior to the introduction of the UEA, the Full Federal Court doubted that the rule was as inflexible as that and said that what the “rule” really means is that “an expert must not express an opinion if to do so would involve unstated assumptions as to either disputed facts or propositions of law.”<sup>128</sup>
72. Again, this rule has been abrogated by the UEA but it survives in practice as to breach the rule is likely to simply alienate the judge if not have it rendered inadmissible on the basis that its prejudicial value outweighs its probative value.

## B. *Instructing the Expert*

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<sup>125</sup> Australian Law Reform Commission report no 102, New South Wales Law Reform Commission report no 112, Victorian Law Reform Commission final report, *Uniform Evidence Law*, (December 2005) at para [9.56]

<sup>126</sup> Australian Law Reform Commission report no 102, New South Wales Law Reform Commission report no 112, Victorian Law Reform Commission final report, *Uniform Evidence Law*, (December 2005) at para [9.57]-[9.58]

<sup>127</sup> *Forrester v Harris Farm Products Pty Ltd* (1996) 129 FLR 431

<sup>128</sup> *Arnotts Ltd v TPC* (1990) 24 FCR 313, 350

73. In all Courts and tribunals, expert reports are required before an expert is permitted to give evidence. In almost all jurisdictions there are guidelines that have to be provided to expert witnesses which set out their role - in particular, the fact that their duty is to the court and not the party that is calling them (see, for example Form 44A in the Supreme and County Courts). This is a matter that must remain at the forefront of the minds of all involved in the proceeding at all times. The fact that they have read and understood the guidelines must be stated in the report.
74. Further, it should be assumed that all instructions given to the expert will have to be shown to the other side and to the court. Certainly any instructions that are relied upon by the witnesses are not covered by legal professional privilege and, in fact, they ought be set out in the report. However, at this stage matters can become somewhat difficult because often an expert serves two roles - for provide expert testimony and to provide advice (for example, on the defects in other reports, on the background detail, on the proposed areas for examination and the like). Confidential communications with an expert that are used for the purposes of the litigation, and which do not form part information upon which the expert has based their opinion, remain privileged. However, distinguishing between such information and assumptions upon which an expert has relied can be a difficult task.
75. At common law, where a draft report is different in substance from a final report, the draft report may be discoverable<sup>129</sup>. Unless there is a good reason for the change this can be devastating to the credit of the witness.
76. The position is different under the UEA where privilege in instructions to an expert will only be waived where disclosure of the instructions and any associated documents are necessary for a proper understanding of the expert's report and their evidence. An understanding of the expert's opinion is possible without an understanding of various versions of the report as they have developed over time<sup>130</sup>. Hence, it is particularly important when dealing in the

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<sup>129</sup> *Cobram Laundry Services Pty Ltd v Murray Goulburn Co-operative Co Ltd* [2000] VSC 353 at para [58]

<sup>130</sup> *Cadbury Schweppes Pty Ltd v Darrell Lee Chocolate Shops Pty Ltd* (No 7) [2008] FCA 323 and the cases referred to therein.

UEA jurisdictions to ensure that the report is able to be understood without reference to any other document.

77. Due to risk of disclosure and the increasing complexity of some of the expert evidence that is being called in the courts, parties sometimes brief two experts - a so called “dirty” and “clean” expert. The “dirty” expert will be given all the information and will be asked for their advice on the areas for further investigation and the matters that need to be placed before the “clean” expert. The “clean” expert will be the one who ultimately gives the evidence.
78. Regardless, extreme care needs to be taken in determining what documents, facts and assumptions are provided to the expert, what questions that expert is asked to answer and what documents are to be provided. The expert themselves ought not be involved in drafting their own brief or determining the questions they are to be asked although there is nothing wrong (indeed, it may be advisable) to have a preliminary discussion to determine if the expert would be able to the answer the types of questions that will be asked. Often the involvement of counsel at this stage can be worth the expense.
79. If the questions asked are too wide then the expert may stray outside their area of expertise and may be giving irrelevant and inadmissible evidence (at great cost). If they are too narrow (which is a much less likely flaw in practice) then they simply will not answer the question. Similarly if the expert is given too many documents then it will increase the cost but if they not provided with sufficient documents then this may impact on the reliability of their evidence.

### C. *Drafting Expert Statements*

80. Where possible, experts ought draft their own statements rather than having them drafted by the lawyers. Although there is some suggestion that lawyers ought play no part in drafting process, the preferred view is that although the lawyer should not impact the substance of the report they may have reference to the form to ensure that it meets the tests for admissibility discussed above<sup>131</sup>.

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<sup>131</sup> *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424 at [19] (Lindgren J)

81. If the expert has understood that their role is to provide unbiased evidence then the report ought not be too argumentative. However, all too frequently, expert reports are argumentative. This is counter-productive as it lessens the credibility of the expert. Indeed, I do not mind where the expert notes the points in favour of the other side (as long as they do not destroy the case) – this highlights the fact that the expert ought be accepted when they comment on the important issues.
82. It is very important that you understand the expert evidence - if the evidence is “over your head” then there is a very real likelihood that it may go “over the head” of the judicial officer as well. You may need to have the expert explain their reasoning in more detail or to spell out their assumptions or background knowledge at greater length.
83. Finally, the clients ought not have contact with expert - it ought all be done through the lawyers to prevent the impression of the expert being part of the “team”. As Brooking J said in *Phosphate Co-operative Co of Australia Pty Ltd v Shears* [1989] VR 665 (the “Pivot “case):

*“The guiding principle must be that care should be taken to avoid any communication which may undermine or appear to undermine the independence of the expert.”*

## **VII. CONCLUSION**

84. The importance of having an understanding of the rules or evidence is critical to “success” in litigation whether that success is measured by a verdict in favour of the client or a settlement that was the best that could be obtained. All too often, practitioners become somewhat blasé about the whether evidence will be admissible because most cases settle and the issue is never litigated – admissibility is considered an issue that “will work itself out”. However, it is important to ensure, from the outset, that all of the important evidence will be admissible and that ensuring its admissibility will not be unduly expensive. If it is not considered early then the cost and expense for the client can be devastating.

22 February 2012

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