

16 RULES FOR THE COMPLEAT EXPERT¹

INTRODUCTION

The topic that was originally proposed to me was “Best Practice for Experts”. I have tried to remain true to that task when, later in this paper, I propose the 16 rules referred to in the title. Those rules must be understood in the context of the law relating to expert evidence, which I will summarise. However, I will commence – and conclude – with some observations about unconscious bias in expert evidence.

THE PROBLEM OF UNCONSCIOUS BIAS

The problem of unconscious bias has assumed increased importance in my thinking about expert evidence in litigation. Many of my proposed rules are explicitly or implicitly designed to minimise that problem, but I would like to deal with it first by an express admonition: an expert retained in litigation must be hyper-vigilant to avoid unconscious bias in favour of the party retaining her, who the expert must *not* think of as her client. How can the expert maintain that hyper-vigilance? I suggest it is by the expert consciously adopting something akin to the judge’s mindset where impartiality and objectivity are at the heart of how she approaches her task.

If an expert does her job properly in terms of what the court requires, then the administration of justice is undoubtedly enhanced both by facilitating settlement and identifying the real matters in dispute. The latter, in particular, makes the judge’s job easier and, by doing so, increases the likelihood of a timely judgment.

However, if the expert does not do her job properly in terms of what the court requires, then issues multiply, more time is taken up, costs increase and the overriding purpose of the just, quick and cheap resolution of the dispute is not achieved. The judge is no

¹ A revised version of the keynote address by the Hon Justice François Kunc, a Judge of the Supreme Court of New South Wales, at the Australian Accountants Lawyers and Directors Conference, Aspen, Colorado, 7 January 2017. The title is adapted from Izaak Walton’s 1653 homage to the art of fishing: *The Compleat Angler*. The author gratefully acknowledges the assistance of his tipstaff, Ms Sevanne McGarity BA, LLB (Hons), for her research, and of his daughter, Ms Anna Kunc, for creating the slides that accompanied the original delivery of this paper.

better off (or perhaps even worse off) than if no expert evidence had been called, being left to make a decision from the wreckage of expert evidence that has not illuminated the real points in issue.

For present purposes it is not necessary to embark upon a metaphysical debate as to whether identifying conscious bias in an expert is the same as saying the witness obviously lacks impartiality. In broad terms they seem to me to be synonymous. From time to time courts have found that an expert's evidence is so lacking in impartiality that it is neither reliable nor credible. Two examples will suffice.

In one case², White J in the Supreme Court of New South Wales took the view that an otherwise highly qualified geriatrician had become personally antagonistic to the plaintiff because of an adverse view which the doctor had formed about the motives of the plaintiff in connection with the estate of an elderly woman. More recently³, Edelman J, then sitting as a judge of the Federal Court of Australia, comprehensively dismissed the evidence of an expert investment manager. His Honour concluded⁴ that the expert “had paid scant attention to the key documents. And when confronted by matters which were inconsistent with ASIC's case, many of his answers were preposterous. He displayed the worst characteristics of partisanship and could not, in any respect, be described as an independent expert”.

Unconscious bias is just as real but, of course, harder to detect. As psychological testing has demonstrated across a number of topics, unconscious bias is a very common human failing⁵. Nevertheless, I suggest that being aware of, and avoiding, unconscious bias must be an essential part of any professional expert witness' armoury.

Let me give an example. Assume an expert valuer is retained to give an opinion about the value of a business as at today. That is the fact in issue and the question the witness should answer. However, in my experience, some experts – consciously acting

² *Gray v Hart* [2012] NSWSC 1435 at [305] and ff

³ *Australian Securities and Investment Commission v Drake (No 2)* [2016] FCA 1552 at [370] and ff. The author is grateful to Dr Nuncio D'Angelo for drawing this judgment to his attention.

⁴ At [371]

⁵ See, for example, Harvard University's Project Implicit at <https://implicit.harvard.edu/implicit>

bona fide – in fact do not answer that question. I have been left with the impression that the question the expert is really answering, in the case of the example I have posed, is “what is the highest/lowest value I can reasonably attribute to that business today?” depending on the interests of the party that has retained them. It is a question and answer generated by their unconscious bias in favour of the party that has retained them but they wrongly think of as their “client”.

Outside the context of litigation, that party would be their “client” as it is usually understood: the person whose interests they have a contractual and, in some cases, fiduciary duty to advance. But in the context of litigation that is the very thing the expert is not there to do. The expert’s sole task is to assist the Court. It is in recognition of that fundamental reality that my most important piece of “best practice” advice to court experts is that they must approach their task with the same conscious emphasis on impartiality and objectivity as a judge must apply in making the ultimate decision. If they follow that approach they will, incidentally, maximise the prospect that they will also advance the litigious interests of the party that retained them.

THE LAW

To understand the role of experts in litigation it is necessary to understand something about the rules of evidence. In litigation in Australia those rules of evidence are generally to be found in the uniform Evidence Acts. I will use the Evidence Act 1995 (NSW) (“EA”).

The starting point is that a person can only give evidence of facts - what they perceived through any of their five senses. From there the legislation takes over:

55 Relevant evidence

- (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding. ...

56 Relevant evidence to be admissible

- (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible.

76 *The opinion rule*

(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

78 *Exception: lay opinions*

The opinion rule does not apply to evidence of an opinion expressed by a person if:

(a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event, and

(b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.

79 *Exception: opinions based on specialised knowledge*

(1) 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.

Section 76 — “the opinion rule” — provides that, *prima facie*, an opinion expressed by a witness is not admissible. The term “opinion” is not actually defined in the EA itself. The classic common law statement of opinion is “an *inference* drawn from observed and communicable data”⁶ (emphasis added); in other words, a conclusion based upon something — a fact — that the witness observed or assumed. The drawing of inferences is reserved for the judge (or the jury). Witnesses are charged only with stating facts.⁷

⁶ *Honeysett v The Queen* (2014) 253 CLR 122; [2014] HCA 29, [21]. *Lithgow City Council v Jackson* (2011) 244 CLR 352 at 359 [10] (French CJ, Heydon and Bell JJ); [2011] HCA 36.

⁷ JD Heydon, *Cross on Evidence* (LexisNexis Butterworths) [29010].

This “rule of exclusion”⁸ is subject to various exceptions and qualifications which are mostly set out in Part 3.3 of the EA, in particular s 79(1), known as “the expert opinion rule” (with emphasis added):

“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.”

Expert evidence, as Heydon J commented in *Dasreef Pty Ltd v Hawchar*, “is a bridge between data in the form of primary evidence and a conclusion which cannot be reached without the application of expertise”⁹. Expert opinion evidence is intended to assist the Court, the tribunal of fact, in drawing the relevant factual inferences based on (ideally) objective expertise and knowledge which the Court may not otherwise possess. As with any other witness, a judge can accept any, all or none of an expert witness’s evidence provided the judge can demonstrate a rational basis for the choice that he or she makes.

Three cases will suffice to illustrate the operation of the expert opinion rule. Those are the New South Wales Court of Appeal decision in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305 (“*Makita*”); and two more recent decisions of the High Court of Australia: *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; [2011] HCA 21 (“*Dasreef*”) and *Honeysett v The Queen* (2014) 253 CLR 122; [2014] HCA 29 (“*Honeysett*”).

Makita

The judgment of Heydon JA (as his Honour then was) in *Makita* shaped the common law interpretation of s 79 of the EA and the common law principles/jurisprudence in respect of expert evidence and remains authoritative and influential. In that judgment, it was established that the factual basis of an expert opinion had to be both identified and proved and that in order to show the opinion was based on specialised knowledge,¹⁰ the particular reasoning process of the called expert witness needed to be made known.

⁸ *Honeysett* [20].

⁹ (2011) 243 CLR 588; [2011] HCA 21 [90].

¹⁰ *Makita* 743 [85].

On 30 June 1986, Ms Sprowles slipped and fell on stairs leading from a rooftop car park to the office below where she worked. Ms Sprowles successfully sued Makita for negligence on the basis that her fall was caused by the slipperiness of the stairs. She was awarded damages of \$1,153,886 plus costs. In support of her case, Ms Sprowles had called a physicist who specialised in the investigation of slipping accidents, Associate Professor Morton. Without objection from Makita, the trial judge heard and accepted Morton's expert opinion evidence of the slipperiness of the stairs and found that this caused the fall, not that Sprowles had simply lost her footing.¹¹

Makita appealed the decision on the basis that the expert opinion should not have been admitted as evidence of the slipperiness of the stairs. In three separate but ultimately agreeing judgments, the Court found for Makita and held that the evidence was inadmissible.

Of note are the criteria for the admissibility of expert opinion evidence set out by Heydon JA at [85] (and which I suggest could usefully be provided to experts when they are retained):

1. "...it must be agreed or demonstrated that there is a field of "specialised knowledge";"
2. "...there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge";"
3. "...so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way;"
4. "...it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions

¹¹ *Makita*, [3].

reached: that is, 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."

Heydon JA then went on to say that:

"...If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but ... on "a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise"¹²."¹³

Dasreef

Mr Nawaf Hawchar worked as a labourer and then stonemason for Dasreef Pty Ltd for a little over five and a half years from 1999 to 2005. In 2006, Mr Hawchar was diagnosed with silicosis, a painful form of "occupational" lung disease caused by extensive exposure to and inhalation of crystalline silica dust. He commenced proceedings for personal injury against his former employer in the Dust and Diseases Tribunal of NSW. Mr Hawchar sought to rely upon the expert evidence of Dr Kenneth Basden, a chartered chemist, chartered professional engineer and retired senior lecturer at the University of New South Wales.

Whilst Dasreef objected to Dr Basden's report, the Tribunal admitted evidence in the report including that Mr Hawchar would have been exposed to respirable silica in the order of a thousand or more times the prescribed standard for a forty-hour working week, potentially even approaching one gram. The prescribed standard was half to two ten-thousandths of a gram per cubic metre of air. The opinion, in addition to other

¹² *HG v The Queen* 197 CLR 414 [41].

¹³ *Makita* 743 [85].

evidence, was used to make calculations regarding the level of dust Mr Hawchar had been exposed to during his employment with Dasreef and it was found to exceed standard levels. The Tribunal also used its own experience as a specialist tribunal to conclude that silicosis was generally caused by high level exposure to silica dust.

The tribunal found Dasreef in part responsible for Mr Hawchar's illness and Mr Hawchar was awarded \$131,130.43 against Dasreef.

Dasreef appealed to the Court of Appeal on the basis that Dr Basden's report should not have been admitted. The appeal was dismissed. Dasreef then appealed to the High Court of Australia. There, in two separate but agreeing judgments, the Court held that the expert report was inadmissible and upheld the appeal in favour of Dasreef.

The majority found that because Dr Basden's report did not include a statement of his reasoning, it failed to demonstrate that his opinion was based "wholly or substantially" on his "specialised knowledge based on his training, study or experience" as required by s 79(1) of the EA.

Dr Basden's report was based on the materials provided to him by Hawchar's solicitors including "the statement of claim and statement of particulars that had been filed in the matter, a photograph of a mask of the type worn by Mr Hawchar when at work, a photograph of Mr Hawchar wearing that mask, a photograph of Mr Hawchar demonstrating the use of a hand-held powered masonry cutting disc and a photograph of the Dasreef working premises."¹⁴ However, it did not state his reasoning, which was ultimately fatal to the admissibility of his expert opinion evidence.

Honeysett

Mr Honeysett was convicted of armed robbery and sentenced to eight years imprisonment by the NSW District Court. He subsequently appealed to the New South Wales Court of Criminal Appeal, on grounds that certain expert evidence should not have been admitted. Particularly, Mr Honeysett challenged the admissibility of the

¹⁴ [2011] HCA 2; (2011) 243 CLR 588, 596 [12].

“body mapping” expert evidence of Prof Henneberg, who had identified himself as an expert in “biological anthropology and anatomy”.¹⁵

Prof Henneberg undertook an anatomical comparison of the offender and the known person, Mr Honeysett. Firstly, this involved studying the CCTV footage of the robbery which showed three, armed men entering a suburban hotel, wearing dark clothing and, critically, covering their heads with white material. Secondly, Prof Henneberg noted down the physical characteristics of the robbers — “to avoid the psychological phenomenon known as ‘displacement,’ which is the tendency to read the features of a known person into poor quality images”.¹⁶ The same process (noting down physical characteristics etc.) was then repeated with images and videos of Mr Honeysett in police custody. Eight common features were observed and reported in highly technical language. For instance, “ectomorphic (thin, 'skinny') body build”, “visible lumbar lordosis (the small of his back is bent forward)”, and “dolichocephalic (= long head, elongated oval when viewed from the top) as opposed to brachycephalic (= short head, nearly spherical)”.¹⁷

Comparing the lists, he concluded that there was a “high degree of anatomical similarity”¹⁸ between Mr Honeysett and the offender in the CCTV footage. Both at trial and at the NSWCCA appeal, the evidence was found to be admissible because of Prof Henneberg’s scrutiny of the video evidence, his expertise and knowledge of anatomy, and because “the jury could not have reasonably understood Professor Henneberg's evidence as an assertion that there were no points of difference between the two individuals.”¹⁹ That is to say, that just because no dissimilarities had been noted by the doctor, this was not evidence of similarity.²⁰

However, before the High Court the expert opinion evidence was held inadmissible, the conviction was quashed and the case was ordered for re-trial. On the hearing of the appeal, the prosecution did not maintain that Prof Henneberg had specialised knowledge based on his experience in viewing CCTV images. The prosecution relied

¹⁵ *Honeysett*, [11], [20].

¹⁶ *Honeysett*, [14].

¹⁷ *Honeysett*, [15].

¹⁸ *Honeysett*, [17].

¹⁹ *Honeysett*, [36].

²⁰ *Honeysett v The Queen* [2013] NSWCCA 135 at [68].

solely on Prof Henneberg's knowledge of anatomy. The High Court held the evidence adduced was not wholly or substantially based on Prof Henneberg's "specialised knowledge" of biological anthropology or anatomy. Rather, it was evidence of Henneberg's "subjective impression of what he saw when he looked at the images"²¹ that "gave the unwarranted appearance of science".²² This was something any lay person could have observed in the same comparison exercise.

In *Honeysett*, the Court emphasised the importance of the term "knowledge". It noted that "the word 'knowledge' connotes more than subjective belief or unsupported speculation".²³ No formal qualification is required for someone to possess "specialised knowledge" but any opinion tendered as "expert evidence" needs to be at least substantially based on upon a person's training, study or experience.²⁴

Following on from these cases, the position now stands that for an expert opinion to be admissible, the expert *must* disclose the facts and assumptions upon which the opinion is based. These facts and assumptions must be proved by otherwise admissible evidence. And, "the links between the expert's training, study and experience and the opinion"²⁵ and how those facts and assumptions relate to the opinion stated must be clearly and continuously articulated.

In *Dasreef*, Heydon J identified a number of difficulties with expert opinion,²⁶ which included:

1. "the partiality of expert opinion witnesses" and uncanny ability of experts to "say one thing in one case and a contradictory thing in another, each time to the supposed advantage of the party paying them";²⁷
2. the "skewed" selection process by which the expert most favourable to the cause is found;²⁸

²¹ *Honeysett*, [43].

²² *Honeysett*, [45].

²³ *Honeysett*, [23] citing *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 at 590 (1993), cited in *R v Tang* (2006) 65 NSWLR 681 at 712 [138] per Spigelman CJ.

²⁴ *Honeysett*, [23]–[24].

²⁵ *Dasreef*, 626 [99].

²⁶ *Dasreef*, 610 [56]–[60].

²⁷ *Dasreef*, 610 [56].

3. the tendency of experts to provide opinions on matters that “are questions for the court”²⁹, including giving reasons why the evidence of other witnesses should be accepted or rejected;³⁰
4. that “judicial constraints on tendentious expert testimony are inherently weak because judges (and even more so juries ...) lack training or experience in the relevant fields of expert knowledge”;
5. “the delay and expense caused by the disproportionate volume of expert evidence” and unnecessary experts, noting that “Many potential litigants do not even start litigation because of the advice they are given about cost”³¹;
6. the tendency of experts to dominate proceedings, “exert excessive influence” over outcomes and accordingly compromise the integrity of the process;³²
7. that experts frequently will “appoint themselves as advocates for the party calling them”;³³
8. that evidence tendered by an expert “in a form conventional in their discipline” may end up being inadmissible (“less than useful”) because it fails to conform to the rules of evidence;³⁴ and, finally,
9. that “the risk of injustice that may flow from unsatisfactory expert evidence” given the strict requirements of s 79 of the EA.

It is with those kinds of difficulties in mind that both the law and practice in relation to expert evidence have been developed and continue to be developed. At the centre of that development sits the Expert Witness Code of Conduct (the NSW version is reproduced at the end of this paper), with its fundamental prescription that the expert is an impartial witness who owes her paramount duty to the court and not to whoever

²⁸ *Dasreef*, 610 [56].

²⁹ *Dasreef*, 610 [56] quoting Auld LJ in *Review of the Criminal Courts of England and Wales: Report*, (2001) 574 [133].

³⁰ *Dasreef*, [58].

³¹ *Dasreef*, [57] quoting *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales*, (1996) 137 [2] (Lord Woolf MR)

³² *Dasreef*, [58].

³³ *Dasreef*, [58].

³⁴ *Dasreef*, [58].

happens to have retained her. The Code governs every aspect of the expert's participation in the proceedings, from when she is first briefed to the conclusion of the case. It must be well understood and strictly adhered to.

However, contrary to what is sometimes at least an implicit assumption made by both lawyers and experts, the purpose of the Code is not to compel experts to reach agreement, although that is an important incidental function. It is really intended to identify as quickly, economically and precisely as possible the areas of necessary and genuine disagreement between experts. The law acknowledges that on any particular question in many fields of human activity (including the law), reasonable minds can differ. It is the clarity with which those differences are expressed and explained by properly qualified experts that is of the greatest assistance to the court.

Normally the only person who is permitted to express their opinion is the judge, which she or he does in the judgment. Another name for the judgment is the reasons. In many ways an expert witness will best perform her task if she approaches it with the same sense of obligation to be impartial and to set out the facts relied upon and to give reasons for every step in reaching her opinion.

16 RULES FOR THE COMPLEAT EXPERT

And so I come to the 16 rules which are referred to in the title to this paper. There is no magic in the number 16. Another judge would probably come up with more or less, but these are the rules – or perhaps, more accurately, counsels of perfection – which I have devised in an endeavour to summarise as completely as possible my own experience with experts both as a practitioner and a judge.

The compleat expert:

1. Accepts instructions only when she is genuinely satisfied that she has the requisite expertise, including taking into account the jurisdiction in which the evidence is to be given.

2. Accepts instructions only when she knows she can comply with the Court's timetables and other directions.³⁵
3. Understands and at all times behaves in accordance with the Expert Witness Code of Conduct, in particular recognising that she must be impartial and owes a paramount duty to the Court.
4. Does not think of the party instructing her as her "client" and is never an advocate for that party, especially at conclaves or in the witness box.
5. Having read the pleadings and *all* other materials briefed, is prepared to discuss the questions to be asked with her instructing solicitors and counsel, especially in relation to utility and reality.
6. Does not assume that she has been briefed with everything relevant and applies her own independent judgment to identify and ask for any other material which she considers might be necessary for her to be able to form her opinion about the questions she has been posed.
7. Does not rely on the work of employees but undertakes her own inspections, site visits, personally checks or performs calculations and writes her own report and reaches her own opinions.
8. Never resorts to "ipse dixit" ("self speaking" or mere assertion) but clearly sets out the facts she has assumed and the reasons for each step in reaching her ultimate opinion.
9. Expresses herself in plain English and avoids jargon or, if jargon cannot be avoided, defines it clearly and uses it consistently.

³⁵ *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District* [2013] NSWSC 970

10. Is prepared to receive comments from her instructing solicitors or counsel about the manner in which her opinions are expressed, but resists any attempt to change her opinions unless some proper reason is demonstrated for her to do so.
11. Stands back, “reality checks” her opinion and thinks about what the other expert might say.
12. Prepares for both conclaves and the trial by being thoroughly familiar with her report and the relevant reports of other experts.
13. Approaches both conclaves and concurrent evidence (“hot tubs”) not as an adversary exercise but as occasions to demonstrate genuine dialogue about a common problem, for example by being prepared to undertake sensitivity or other analyses to establish just how significant an apparent difference of opinion really is.
14. Is firm, reasonable and polite in both conclaves and in giving evidence at trial, including by giving other experts a fair opportunity to express their view, but is unafraid to express and maintain her views when she is satisfied there are proper reasons to do so.
15. In drafting a conclave report which notes areas of disagreement, not only records what each expert said, but goes on to identify as precisely as possible the reasons or bases for the disagreement.
16. Is prepared to make concessions in both conclaves and in giving evidence at trial when she is satisfied there are proper reasons to do so.

TWO FINAL SUGGESTIONS

Having set out my 16 “rules” let me return to the topic of unconscious bias with two suggestions about how it could be minimised.

The first suggestion is relatively straightforward. In my view it is highly desirable that, wherever possible, the court should direct that each party’s initial expert’s report should be exchanged simultaneously. In some courts this is the standard practice. It

has the advantage that each expert prepares her initial report free from even the subconscious need to respond to or defend her opinions against those expressed by the expert retained for the other party. The “plaintiff first, defendant second” approach to the exchange of expert evidence should be avoided. In some cases this simultaneous approach may not be possible, but in every case the court should ask itself whether simultaneous exchange can be done.

My second suggestion may be thought to be more novel, but is the logical conclusion of the concerns I have expressed about unconscious bias. My suggestion springs from the fact that, speaking for myself, as a matter of first impression my attention would really be drawn to an expert’s report which was accompanied by an affidavit from the expert stating that she had prepared the report in ignorance of whether the party which had retained her was the plaintiff or the defendant. In many cases there is no reason why that could not be done.³⁶ Instead of commencing the traditional solicitor’s letter of instruction to an expert with “We act for X, the defendant in proceedings brought by Y”, the letter could begin “We act for one of the parties in X v Y”. I would even go so far as to suggest that consideration be given to amending court practice notes concerning expert evidence to suggest that it is desirable, where possible, for an expert’s initial report to be prepared by the expert in ignorance of the litigious role of the party for whom the expert has prepared the report.

I conclude with the results of an entirely unscientific, and inadmissible, straw poll which I conducted among friends and colleagues on the topic of unconscious bias among experts. The experts I consulted on the question agreed that they would find it a challenge to avoid asking, even accidentally, whether they were retained for the plaintiff or the defendant. Similarly, those lawyers who I asked also said that they might find it difficult not to tell the expert they had retained for which side of the record they were acting. While being far short of an adequate factual foundation to make a finding about the reality of unconscious bias among experts, those answers do support the conclusion that it is a phenomenon which at least warrants some consideration.

³⁶ In some cases the need for an expert to undertake a conflict check may require the expert to be told for which of the parties she is being retained.

UNIFORM CIVIL PROCEDURE RULES 2005 (NSW) - SCHEDULE 7

SCHEDULE 7 – Expert witness code of conduct

1 Application of code

This code of conduct applies to any expert witness engaged or appointed:

- (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings, or
- (b) to give opinion evidence in proceedings or proposed proceedings.

2 General duty to the court

- (1) An expert witness has an overriding duty to assist the court impartially on matters relevant to the expert witness's area of expertise.
- (2) An expert witness's paramount duty is to the court and not to any party to the proceedings (including the person retaining the expert witness).
- (3) An expert witness is not an advocate for a party.

3 Duty to comply with court's directions

An expert witness must abide by any direction of the court.

4 Duty to work co-operatively with other expert witnesses

An expert witness, when complying with any direction of the court to confer with another expert witness or to prepare a parties' expert's report with another expert witness in relation to any issue:

- (a) must exercise his or her independent, professional judgment in relation to that issue, and
- (b) must endeavour to reach agreement with the other expert witness on that issue, and
- (c) must not act on any instruction or request to withhold or avoid agreement with the other expert witness.

5 Experts' reports

- (1) An expert's report must (in the body of the report or in an annexure to it) include the following:
 - (a) the expert's qualifications as an expert on the issue the subject of the report,
 - (b) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed),

- (c) the expert's reasons for each opinion expressed,
 - (d) if applicable, that a particular issue falls outside the expert's field of expertise,
 - (e) any literature or other materials utilised in support of the opinions,
 - (f) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out,
 - (g) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).
- (2) If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report.
- (3) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
- (4) If an expert witness changes his or her opinion on a material matter after providing an expert's report to the party engaging him or her (or that party's legal representative), the expert witness must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in subclause (1) as is appropriate.

6 Experts' conference

- (1) Without limiting clause 3, an expert witness must abide by any direction of the court:
- (a) to confer with any other expert witness, or
 - (b) to endeavour to reach agreement on any matters in issue, or
 - (c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, or
 - (d) to base any joint report on specified facts or assumptions of fact.
- (2) An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.