

LEVEL

TWENTY
SEVEN

CHAMBERS



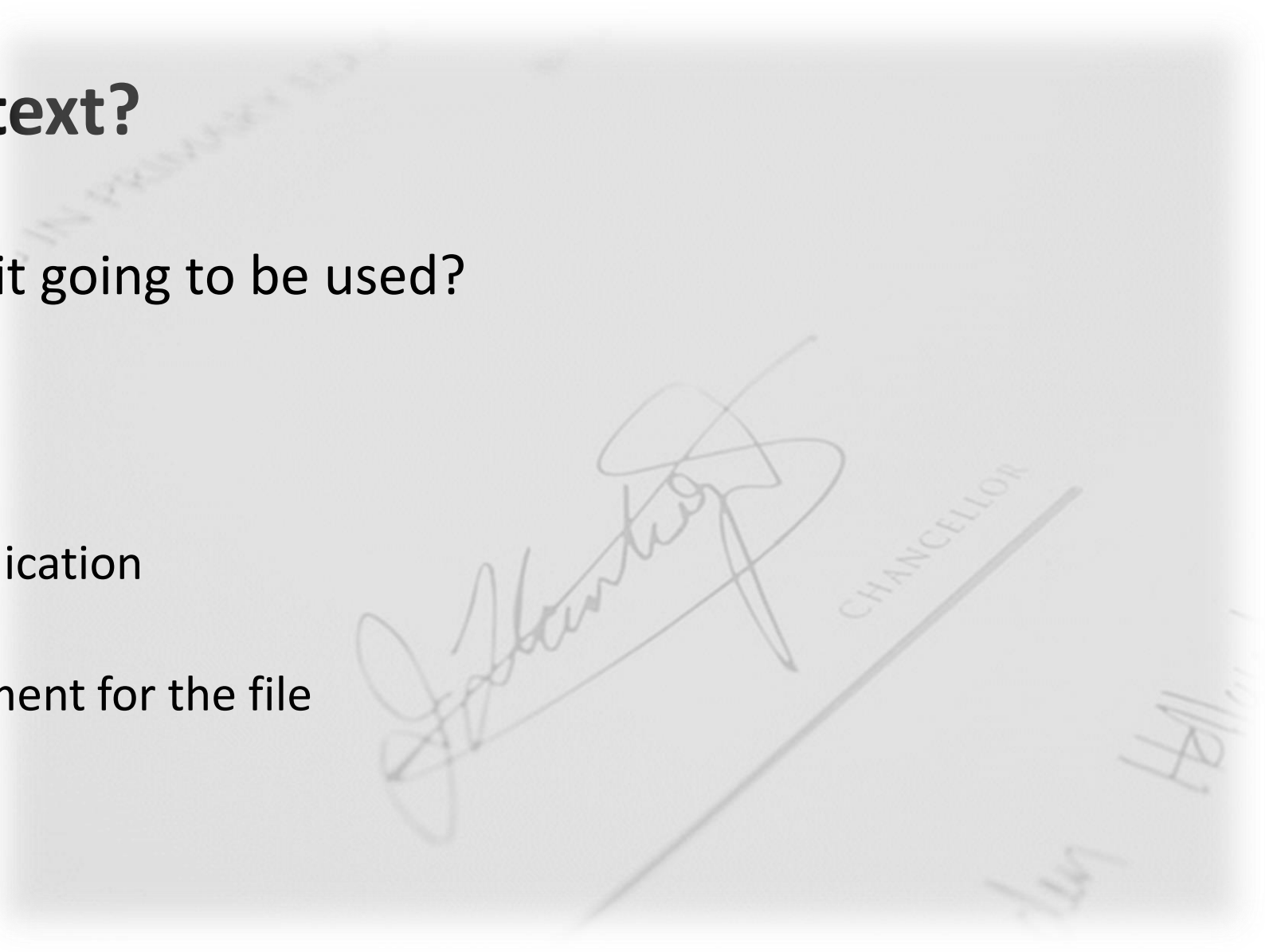
Rules of Evidence and Affidavit Drafting

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>> Affidavits: Context?

> How is the affidavit going to be used?

- Evidence in chief
- Interlocutory application
- Affidavit or statement for the file



>> Affidavits: Evidence in Chief

> UCPR r 390

Way evidence given

Subject to these rules or a direction by the court—

(a) evidence at the trial of a proceeding started by claim may only be given orally; and

(b) evidence in a proceeding started by application may only be given by affidavit

>> Affidavits: Evidence in Chief

- > Sometimes direction or order made to the effect that the evidence in chief will be by way of affidavit (eg UCPR r 367(3)(d))
- > Relevance of content
- > Best evidence
- > Don't volunteer irrelevant material
- > Deponent can be cross-examined on content

>> Affidavits: Interlocutory Application

- > Similar considerations to affidavits used for evidence in chief
- > But note UCPR r 430(2):

Contents of affidavit

- (1) Except if these rules provide otherwise, an affidavit must be confined to the evidence the person making it could give if giving evidence orally.*
- (2) However, an affidavit for use in an application because of default or otherwise for relief, other than final relief, may contain statements based on information and belief if the person making it states the sources of the information and the grounds for the belief.*

Note—For an application because of default, see chapter 9 (Ending proceedings early), part 1 (Default).

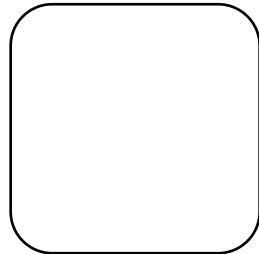
- (3) On assessment, all or part of the costs of an affidavit not complying with these rules or unnecessarily including copies of or extracts from documents may be disallowed.*

>> **Affidavits: for the file only**

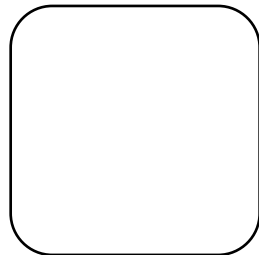
- > Formalities not as important
- > Include more rather than less
- > Prepare sooner rather than later

>> Affidavits: General matters for drafting

Formal requirements



Lay person evidence: UCPR rr 430-441; FCR Div 29.1



Expert evidence: UCPR rr 423-429S; FCR Div 23.1-2

>> Affidavits: General matters for drafting

- > Use deponent's words – they need to be able to understand it and answer questions about it!

Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2006] HCA Trans 682, 12 December 2006

“Mr Douglas: ...Justice Palmer did rely upon the inconsistencies in these affidavits as reflecting adversely upon the credit of the principals of Say-Dee...”

Gleeson CJ: I am sure all witnesses write their own affidavits for themselves.

Mr Douglas: Well, they did not, your Honour, we know that.

Gleeson CJ: We know the way it is done.”

>> Affidavits: General matters for drafting

- > Don't taint evidence by conferencing witnesses together
- > Question relevance of everything
- > Completeness – particularly if used in place of oral EIC
- > Get basics right

>> **Affidavits: General matters for drafting**

How to start?

>> Affidavits: General matters for drafting

IDEALLY: in-person conference, draft affidavit using person's words as much as possible, send to person with instructions to review carefully.

BENEFITS:

- > Credibility testing
- > Identification of inconsistencies
- > Efficiency
- > Completeness

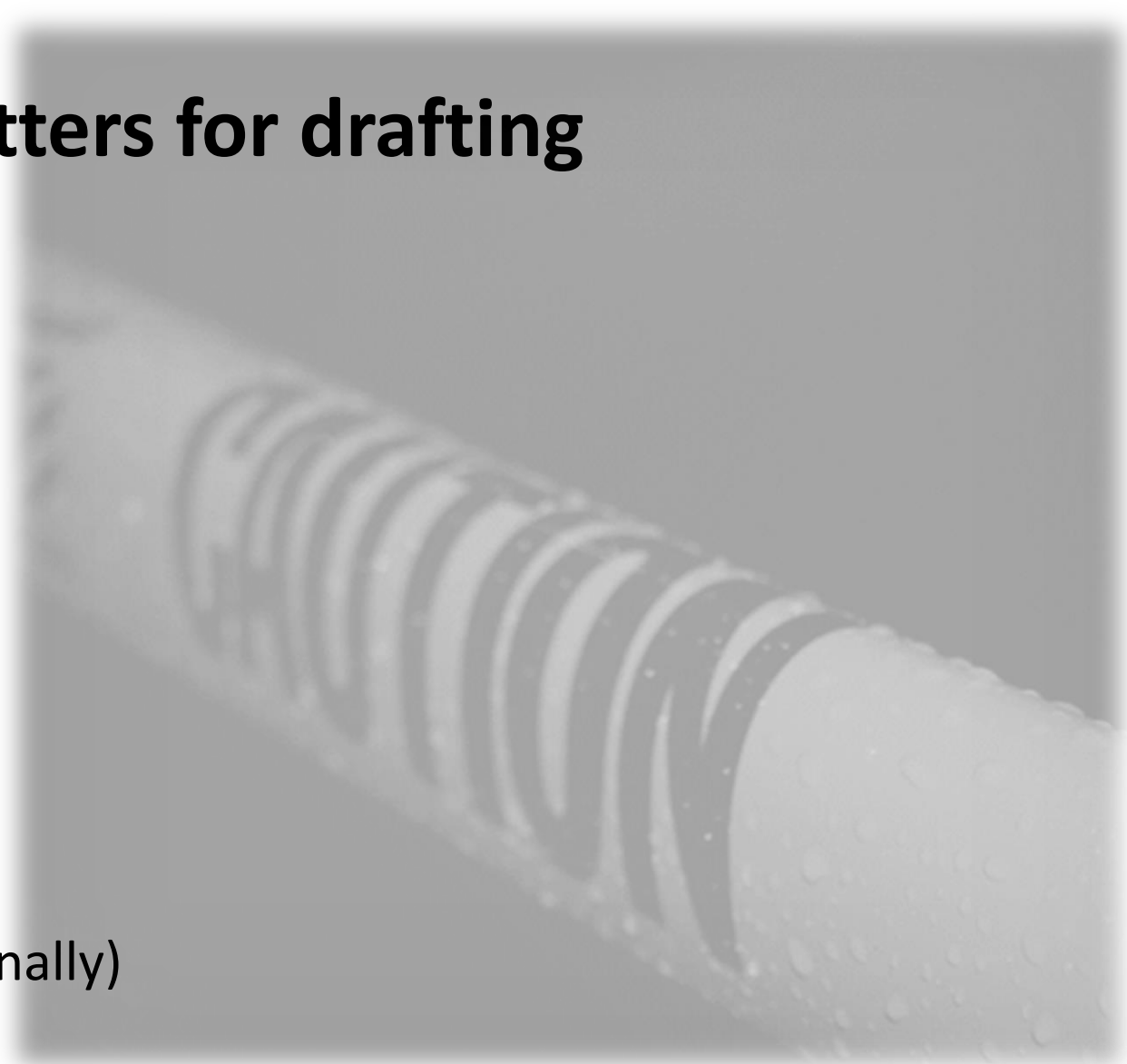
>> Affidavits: General matters for drafting

ALTERNATIVE: send document with topics/questions/prompts, tidy up draft but be sure to have the person review the draft again carefully.

>> Affidavits: General matters for drafting

> Things to avoid?

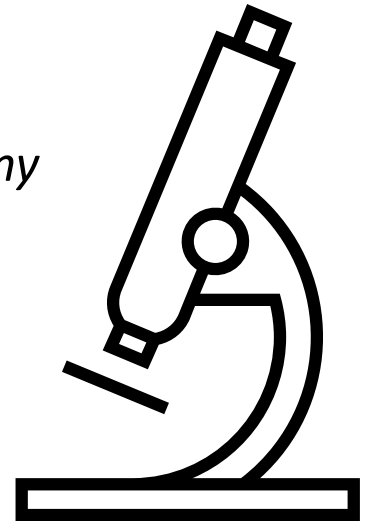
- Unqualified opinion
- Submissions, argumentative
or gratuitous comments
- Irrelevant material
- Waiving privilege (unintentionally)



>> Affidavits: Practical examples

> Objectionable or questionable?

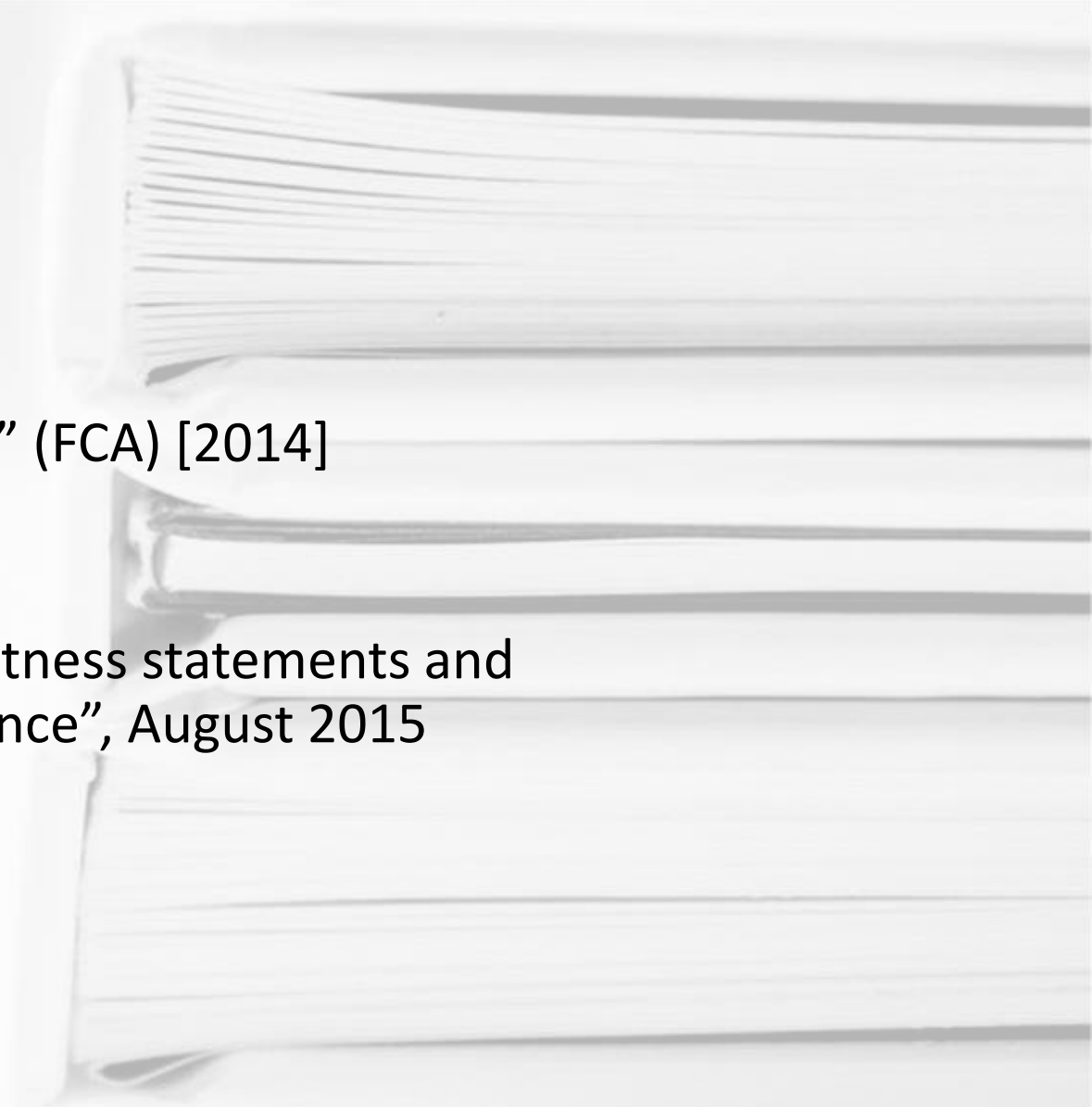
- *“I refer to the affidavit of my wife Beryl Barnes sworn 1 March 2021. I agree with all statements made therein.”*
- *“The defendant’s termination of the contract was manifestly unfair and unlawful because the continuum transfunctioner was not defective in any respect. The Court should award judgment in the plaintiff’s favour.”*



>> Evidential issues

> Useful resources:

- Justice Alan Roberts “Affidavit Evidence” (FCA) [2014] FedJSchol 3
- Allan Sullivan QC “Written evidence: Witness statements and affidavits as an alternative to oral evidence”, August 2015



>> **Evidential issues**

- > Serious repercussions can flow if affidavit does not comply with the rules of evidence





Evidential issues

> *Kinda Kapers Charlestown Pty Ltd v Newcastle Neptunes Underwater Club Inc and Ors*
[2007] NSWSC 329, White J at [78]:

I make the last directions because Mr Athol Davies affidavit was prepared without any regard to the rules of evidence. After the rulings on objections to it, nothing of substance remained. It is not enough to say that a client or a witness wishes to express himself or herself in his own terms. The party's legal representatives have a responsibility to ensure that affidavits are prepared with regard to the rules of evidence. Upon being read, the affidavit will form the witness' evidence in chief.



Evidential issues

> *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52, [35]:

A striking feature of the evidence at trial, and of the reasoning of the learned primary judge, is the attention that was given to largely irrelevant information about the subjective understanding of the individual participants in the dealings between the parties. Written statements of witnesses, no doubt prepared by lawyers, were received as evidence in chief. Those statements contained a deal of inadmissible material that was received without objection. The uncritical reception of inadmissible evidence, often in written form and prepared in advance of the hearing is to be strongly discouraged. It tends to distract attention from the real issues, give rise to pointless cross-examination and cause problems on appeal where it may be difficult to know the extent to which the inadmissible material influenced the judgment at first instance.

>> Evidential issues

Our job as lawyers:

Preparation of written evidence that reflects the honestly held recollection of individuals, assisted by sensibly ordered and presented documentary and other background material, is a difficult task and one requiring experience and skill.

Byrnes v Jokona Pty Ltd [2002] FCA 41, [14].

>> Evidential issues

> *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822 at [9]-[10]

- Against the background of that reasonably orthodox structure involving a relatively clearly pleaded statement of the material facts coupled with causes of action that are conceptually recognisable, the plaintiffs seek to read the affidavit of John Leslie Sullivan sworn 15 December 2009. Although certain concessions have been made this morning, to which I will come, I have to say that, **to use the most neutral language, that affidavit is inappropriate, confusing and unhelpful. It is a prolix examination of minutiae carried out without any lawyerly discrimination. The majority of it is irrelevant to the resolution of the particular factual and legal issues that I must decide.**
- **It can be fairly described as a gallimaufry - difficult to understand and impossible to disentangle.** It is a jumble that masks rather than illuminates the facts that are necessary to determine the issues in dispute. The sheer length of the affidavit is oppressive. It consists of 6,657 paragraphs spread over nearly 500 pages. There are 63 pages of detailed objections by the defendants. Page after page explains in agonising detail the life and times of Mr Sullivan, Mr Thomas and Mr Willett. Dozens and dozens of persons who have no serious involvement in the issues for determination are introduced in cameo roles in the narrative. Minor celebrities and rugby league identities feature frequently. Little attempt has been made to meaningfully correlate the narrative recounted in the affidavit with the particular facts that have been pleaded.

>> Evidential issues - checklist

RELEVANCE

Evidence must be directly/indirectly relevant to a fact in issue in order to be admissible

Evidence Act 1977 (Qld) (QEA) is silent with regard to relevance – the common law applies

Evidence Act 1997 (Cth) (CEA), Part 3.1

>> Evidential issues - checklist

COMPETENCE

Does the witness have the competence, ability and experience to give the relevant evidence?

QEA: Part 2, Division 1A (especially sections 9, 9A)

CEA: Part 2.1, Division 1 (especially 12)

>> Evidential issues - checklist

PRIVILEGE

Does legal professional privilege apply?

- CEA: Part 3.10 (especially section 117, 118, 119)

Does the privilege against self incrimination operate?

- QEA: section 10
- CEA: sections 128, 128A

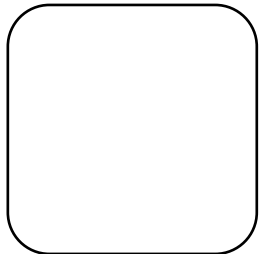
Other privileges?

- Journalist privilege (CEA: sections 126J, 126K)
- Religious confessions (CEA: section 127)

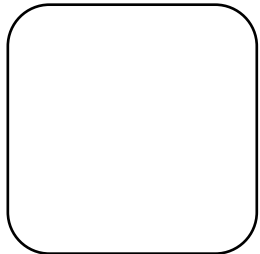
>> Evidential issues - checklist

BEST EVIDENCE RULE

A party relying on words used in a document for any purpose other than for identifying it must adduce primary evidence of contents



QEA: (Part 7 concerning reproductions of documents)



Part 2.2 (especially section 48)

>> Evidential issues - checklist

CONCLUSIONS/ULTIMATE ISSUES

No witness can draw a conclusion on that which is the ultimate issue for the tribunal of fact

(cf CEA: section 80: evidence of an opinion not inadmissible only because it is about a fact in issue / an ultimate issue / a matter of common knowledge)

>> Evidential issues - checklist

OPINION EVIDENCE

Does the deponent have requisite knowledge / experience / qualifications to express the opinion?

CEA: Part 3.3 (section 76(1): evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed, however note the exceptions in sections 77 to 80)

>> Evidential issues - checklist

> Hearsay

- Section 59(1) of CEA: evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation
- Section 60(1) of CEA: hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact
- Permissible in interlocutory applications (Uniform Civil Procedure Rules 1999 (Qld), Rule 430)
- Various exceptions to the rule against hearsay:
 - QEA: Part 6 (note section 92: admissibility of documentary evidence as to facts in issue)
 - CEA: Part 3.2 (see for example sections 63 and 64: maker not available, or maker available by it would cause undue expense/delay/not reasonably practicable to call them)

>> **Evidential issues - checklist**



>> **Evidential issues - checklist**

> **Evidence is confusing, misleading, ambiguous, vague or unintelligible**

- Rule 440 of the UCPR

If there is scandalous or oppressive matter in an affidavit, the court may order —

(a) the affidavit be removed from the file

(b) the affidavit be removed from the file and destroyed

(c) the scandalous or oppressive matter in the affidavit be struck out

>> Evidential issues - checklist

> Argumentative

- The witness should not argue what conclusions should be drawn from the facts or how the case should be decided





Evidential issues

Without endorsing every sentiment but emboldened by the forthright approach the following advice might be offered to one's opponent.

1. Make the story long.
2. Adopt obscure prose.
3. Ignore chronological order.
4. Deal with several subjects in each paragraph.
5. Annex illegible copies of documents that are inadmissible anyway.
6. Leave wide margins on every page after the first.
7. Set dates and sums out in words.
8. File numerous affidavits by the same deponent when one would do.
9. Answer every paragraph by one continuous paragraph with numerous subparagraphs concealing, where possible, the fact being addressed.
10. Show your style:
 - 'I am the hereinbefore mentioned plaintiff in these subject proceedings.'
 - 'On the first day of January in the year of our Lord one thousand nine hundred and ninety.'
 - 'Bill Joan Pty Limited (hereafter called Billjoan).'
 - 'It was always understood between us.'
 - 'I wrote a letter which said (etc).'
 - 'He never wrote to the Deceased.'
 - 'She seemed happy.'
 - 'We agreed.'
 - 'I humbly request this Honourable Court to grant the orders in the summons filed herein.'"

Paul Donohoe QC 'Affidavits' (paper delivered to the NSW Bar Association Bar Practice Course in 1990)

>> Nature of Witness



- > Lay witness
- > Facts

Formal requirements
rr 430-441 UCPR
div 29.1 FCR



- > Expert witness
- > Opinions

Formal requirements
rr 423-429S UCPR
PD2/2005
div 23.1, 23.2 FCR,
GPN-EXPT

>> Expert opinion as an exception to the rule

> General rule: witnesses must state **facts** not **opinions**

> “Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed”: CEA s 76(1)

>> **Fact or opinion? COVID-19 edition**

1. I received a vaccine
2. She was wearing a mask
3. He looked healthy
4. Covid-19 was created as a Zoom viral marketing campaign



When is expert evidence admissible?

1. There is a field of “**specialized knowledge**”.
2. The witness is an expert by reason of “**training, study or experience**”.
3. The opinion must be “**wholly or substantially based on the witness’s expert knowledge**”.
4. The **facts or assumptions** on which the opinion is based must be **identified and proved**.
5. The expert’s evidence must explain how the field of “specialised knowledge” on which the opinion is “wholly or substantially based”, applies to the facts assumed or observed so as to produce the opinion propounded.

These matters must be made explicit in an expert witness’ evidence.

Makita (Aust) Pty Ltd v Sprowles (2001) 52 NSWLR 705 at [85] (Heydon JA)

>> **Threshold question of admissibility**

The court expert should not be asked questions which can only be decided by the court itself.

For example it would be improper to ask a court expert to **construe the specification** or to state what he understood to be the **meaning of particular words**, unless they were in the view of the court used in an **accepted technical meaning in a particular branch of science**.

Minnesota Mining and Manufacturing Co v Beiersdorf (Australia) Ltd (1980) 144 CLR 253 at 270

>> Expert evidence?

1. Cameron is an expert in procrastinating. He has a PhD from the University of Sleep. He will give evidence on effective ways to procrastinate. Is this evidence admissible?
2. Sam is a psychologist. She will give evidence about the risks of crossing the road outside her house. Is this evidence admissible?
3. Kim is a cement truck driver. She will give evidence about the speed at which a cement truck driver can safely turn on a steep mountain road. Is this evidence admissible?

>> UCPR

Part 5 of Chapter 11 of the UCPR sets out requirements for expert evidence in Queensland courts:

- > R 426: expert has an overriding duty to assist the court
- > R 427: evidence in chief must be by way of report, disclosed in accordance with the requirements in r 429 or by leave
- > R 428: requirements for expert reports.

>> **Requirements for expert reports (r 428)**

1. Must be addressed to the Court and signed by the expert.
2. Must include qualifications, all material facts, references to any literature or other material relied on, a description of any inspection, examination or experiment conducted.
3. If there is a range of opinion, a summary of the range of opinion and the reasons why the expert adopted a particular opinion.
4. A summary of conclusions reached by the expert.
5. A statement about whether any additional facts would assist the expert to reach a more reliable conclusion.

>> **Requirements for expert reports continued (r 428(3))**

At the end of the report, the expert must confirm:

1. The factual matters stated in the report are, as far as the expert knows, true.
2. The expert has made all reasonable enquiries considered appropriate.
3. The opinions stated are genuinely held.
4. The report contains reference to all matters the expert considers significant.
5. The expert understand the expert's duty to the court and has complied with the duty.

>> Role of lawyers

- > Ensure report is **admissible** (*Makita v Sprowles* factors)
- > Ensure report is **compliant** (UCPR)
- > Ensure report is **digestible** (able to be understood by a judge)
- > **Test** witness

>> Involvement by lawyers

“Lawyers should be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed..”

Harrington-Smith on behalf of The Wongatha People v State of Western Australia (No 7) (2003) 130 FCR 424, per Lindgren J at [19]

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