

# Making Sure That Curiosity Does Not Kill the CAT: the Use of Expert Evidence in Merits Review Fora Where the Rules of Evidence Do Not Apply<sup>1</sup>

## The Use of Expert Evidence in CATs

- 1 Expert evidence is an increasingly ubiquitous aspect of modern litigation, including in jurisdictions conducting merits review (that is, the function of evaluating and substituting the correct and preferable decision standing in the place of the decision-maker, as opposed to enforcing a law that constrains and limits executive power, or judicial review) such as civil and administrative tribunals (“CATs”).<sup>2</sup>
- 2 In jurisdictions where the rules of evidence apply, these rules operate to restrict the material admitted into evidence, notwithstanding that it may be relevant.<sup>3</sup> In most CATs, however, the rules of evidence do not apply.
- 3 This paper examines some of the issues which arise where expert evidence is relied upon in proceedings where the rules of evidence do not apply.
- 4 Curiously, as remarked by the current President of the Administrative Appeals Tribunal, “despite a vast underlying canvas of tribunal practice”, little has been written about how a CAT not bound by the rules of

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<sup>2</sup> Lee Aitken, ‘Expert Evidence and Makita – ‘Gold standard’ or Counsel of Perfection?’ (2006) 28 *Australian Bar Review*, 207, 207; Brian Preston, ‘Specialised Court Procedures for Expert Evidence’ (speech presented at the Japan Federation of Bar Associations, Tokyo, 24 October 2014), 1.

<sup>3</sup> See, for example, Ch 3 of the *Evidence Act 1995* (NSW).

evidence, but obliged to afford procedural fairness, can “be best informed about facts and opinions relating to its functions.”<sup>4</sup>

- 5 Throughout this paper the term ‘CAT’ is used as a convenient abbreviation to refer not only to the various State and Commonwealth civil and administrative tribunals, but all merits review jurisdictions in which the rules of evidence do not apply. This includes commissions, tribunals, courts exercising administrative power and other arbitral fora.

## The Excluded Rules of Evidence

- 6 Identifying with precision which rules of evidence are excluded is not easy because the statutes creating CATs do not define what constitutes a ‘rule of evidence’, and moreover, the line between the law of evidence and substantive law is often difficult to determine.<sup>5</sup>
- 7 As Mason P has noted, there are some rules which “masquerade” as exclusionary rules of evidence but are in fact fundamental principles of law that cannot be ignored by a CAT absent unambiguous statutory exclusion.<sup>6</sup> These include legal professional privilege, public interest immunity, the privilege against self-incrimination,<sup>7</sup> and discretionary exclusions with respect to unfair evidence.<sup>8</sup> In addition, in NSW the *Evidence Act 1995* provides for a privilege for a protected confidence made in the course of a professional relationship such as doctor and patient.<sup>9</sup> Properly characterised they are, as the High Court has emphasised, substantive legal rights, not mere evidentiary rules.<sup>10</sup> They cannot be cast aside by a CAT pursuant to a legislative direction that a

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<sup>4</sup> Duncan Kerr, ‘A Freedom to be Fair’, (speech presented at the Excellence in Government Decision-making Symposium, Canberra, 20-21 June 2013), 1.

<sup>5</sup> Roger Giles, ‘Dispensing with the Rules of Evidence’ (1990) 7 *Australian Bar Review* 233, 234; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6<sup>th</sup> ed, 2017), 610; see also the discussion of the definition of the law of evidence in Australian Law Reform Commission, *Evidence*, Report No 26 (1985), 13-23.

<sup>6</sup> Keith Mason, ‘The Bounds of Flexibility in Tribunals’ (2003) 39 *AIAL Forum* 18.

<sup>7</sup> Keith Mason, ‘The Bounds of Flexibility in Tribunals’ (2003) 39 *AIAL Forum* 18.

<sup>8</sup> See, for example, ss 90 and 135-137 of the *Evidence Act 1995*.

<sup>9</sup> *Evidence Act 1995* (NSW) s 126B.

<sup>10</sup> *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at [10] in relation to legal professional privilege.

tribunal is not bound by the rules of evidence. This flows from the principle of legality which is an emanation of the rule of law.

- 8 Subject to the rights referred to above, the rules of evidence are contained in the various evidence acts enacted by the States and the Commonwealth. Whether they also encompass the common law evidential rules remains less clear, but arguably they do.
- 9 Take, for example, the common law rule in *Browne v Dunn*.<sup>11</sup> The rule states that if a party seeks to discredit or contradict evidence given by a witness, the party must first, as a matter of fairness, put the allegations to the witness for comment. The rule, despite being “an aspect of procedural fairness and, if breached, capable of vitiating a decision”,<sup>12</sup> curiously applies in some administrative tribunals,<sup>13</sup> but not all. For example, it does not apply in the Administrative Appeals Tribunal (“AAT”)<sup>14</sup> or the Refugee Review Tribunal (“RRT”).<sup>15</sup>
- 10 Similarly, the rule in *Briginshaw v Briginshaw*<sup>16</sup> has been held not to apply in the AAT,<sup>17</sup> but it is ubiquitous in professional disciplinary tribunals concerning allegations of fraud, unlawful discrimination, conflicts of interest, and misleading or illegal conduct.<sup>18</sup>

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<sup>11</sup> (1893) 6 R 67.

<sup>12</sup> *Haberfield v Department of Veterans' Affairs* (2002) 121 FCR 233 at [58] quoted in Law Book Co, *Land and Environment Court Law & Practice, New South Wales* [LECA.38.20].

<sup>13</sup> *Hoskins v Repatriation Commission* (1991) 32 FCR 443 at 446-7; *Dolan v Australian & Overseas Telecommunications Corp* (1993) 42 FCR 206; *Marelic v Comcare* (1993) 47 FCR 437; *Secretary, Department of Defence v Gorton* (2000) 98 FCR 497 at [79].

<sup>14</sup> Law Book Co, *Land and Environment Court Law & Practice, New South Wales* [LECA.38.20]; *Lawrance v Centrelink* (2005) 88 ALD 664 at [31]; *Re Ruddock (in his capacity as Minister for Immigration and Multicultural Affairs); Ex parte Applicant S154/2002* (2003) 201 ALR 437 at [56]–[57]; *Calvista Australia Pty Ltd v AAT* (2013) 216 FCR 32 at [118]; *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555 at [149]–[151].

<sup>15</sup> *Abebe v Commonwealth* (1999) 197 CLR 510 at [187]; *Re Ruddock (in his capacity as Minister for Immigration and Multicultural Affairs); Ex parte Applicant S154/2002* (2003) 201 ALR 437 at [55]–[58]; *Lawrance v Centrelink* (2005) 88 ALD 664 at [31].

<sup>16</sup> (1938) 60 CLR 336.

<sup>17</sup> *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555 at [121]–[122].

<sup>18</sup> Duncan Kerr, ‘A Freedom to be Fair’ (speech presented at the Excellence in Government Decision-making Symposium, Canberra, 20-21 June 2013), 11. See, for example, *In re A Solicitor; Ex parte the Prothonotary* (1939) 56 WN (NSW) 53; *Hobart v Medical Board of Victoria* [1966] VR 292; *Kerin v Legal Practitioners Complaints Committee* (1996) 67 SASR 149.

- 11 *Briginshaw* stands for the proposition that in matters involving the civil standard of proof (the balance of probabilities) where serious and grave allegations have been made, the decision-maker must have an “actual persuasion” that the allegation has been established and not be “oppressed by reasonable doubt”. The case is commonly cited as authority for the principal that the more severe the consequences of finding a fact, the stronger and more reliable the evidence must be to establish it.<sup>19</sup>
- 12 The Victorian Court of Appeal has held that when a CAT is dealing with serious or contentious issues, the rules of evidence reflect “common sense notions” and “it is entirely proper for the Tribunal to take them into account when considering allegations of serious misconduct.”<sup>20</sup> Presumably this would include the principle in *Briginshaw*.
- 13 But the decision in *Briginshaw* has been the subject of considerable debate in its application to merits review jurisdictions.<sup>21</sup> Its application in CATs has been perceived as problematic. Primarily it has been argued that the principle in *Briginshaw* is not required in merits review proceedings because administrative law has its own mechanisms to ensure that a decision-maker gives proper consideration to the seriousness of the consequences of making findings of fact, in particular, the requirement to afford procedural fairness.<sup>22</sup> Proper regard for the seriousness of the consequences of the proceedings is inherent in the statutory duty a decision-maker in a CAT is under. There is therefore no policy reason for an administrative decision-maker to have recourse to the principle.

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<sup>19</sup> Duncan Kerr, ‘A Freedom to be Fair’ (speech presented at the Excellence in Government Decision-making Symposium, Canberra, 20-21 June 2013), 11.

<sup>20</sup> *Kyriackou v Law Institute of Victoria Ltd* (2014) 45 VR 540 at [26].

<sup>21</sup> Duncan Kerr, ‘A Freedom to be Fair’ (speech presented at the Excellence in Government Decision-making Symposium, Canberra, 20-21 June 2013), 11.

<sup>22</sup> Duncan Kerr, ‘A Freedom to be Fair’ (speech presented at the Excellence in Government Decision-making Symposium, Canberra, 20-21 June 2013), 12.

- 14 Significantly, a CAT's freedom from the rules of evidence does not extend to a freedom from the rules of procedural fairness,<sup>23</sup> and this has the effect of preserving and incorporating many rules of evidence codified today, including the rules in *Browne v Dunn* and *Briginshaw*, which are, in essence, no more than rules of fairness.

## Should CATs be Bound by the Rules of Evidence?

- 15 Almost all statutes establishing CATs contain provisions stating that the CAT is not bound by the rules of evidence.
- 16 Section 38 of the *Land and Environment Court Act 1979* (NSW) ("LEC Act") is one such illustration. In specified proceedings (Class 1, 2 or 3) the Court exercises administrative power when, for example, granting development consents or determining the amount of compensation to be paid upon compulsory acquisition. Section 38(2) of the LEC Act provides the now formulaic recitation that "in proceedings in Class 1, 2, or 3, the Court is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits." This provision mirrors the wording contained in s 33(1)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth) and other acts establishing tribunals, commissions, and courts exercising administrative functions around Australia.<sup>24</sup>
- 17 The principal reason why the rules of evidence do not apply to CATs is to give effect to their overriding objectives of informality, efficiency, economy, and flexibility. For example, s 3(d) of the *Civil and Administrative Tribunal Act 2013* (NSW) states that that Tribunal ("NCAT")

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<sup>23</sup> Enid Campbell, 'Principles of Evidence and Administrative Tribunals' in Enid Campbell and Louis Waller (eds), *Well and Truly Tried: Essays on Evidence in Honour of Sir Richard Eggleston* (The Law Book Company, 1982) 36, 41; *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16 at [128].

<sup>24</sup> See, for example, *Civil and Administrative Tribunal Act 2013* (NSW), s 38(2); *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 98(1)(b); *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 28(3)(b); *State Administrative Tribunal Act 2004* (WA), s 32(2); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), s 53(2)(b).

is “to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible”.<sup>25</sup> This is to be contrasted with the perception of courts as formal, inaccessible, costly, and slow.

18 Some commentators claim that the inflexibility of the common law rules of evidence is one of the major reasons why tribunals have proliferated.<sup>26</sup> As Mason P put it, “the law of evidence started off as judicial common sense practised in context. But by the mid-twentieth century it had hardened and atrophied. Its rules had become traps for the unwary rather than guideposts to facilitate the orderly gathering and testing of relevant information.”<sup>27</sup>

19 Several additional reasons have been suggested as to why the rules of evidence ought not bind CATs:

(a) first, in order to reduce the time and expense involved in proceedings. The rules of evidence are complex and technical. As early as 1947 they were described as “calculated and supposedly helpful obstructionism.”<sup>28</sup> Having to determine the admissibility of each piece of evidence according to these rules would cause undue delay in CAT proceedings and add to their expense,<sup>29</sup>

(b) second, by reason of the more specialist and supervisory function of CATs (whose members often possess a degree of expertise in the subject matter of the proceedings), CATs must

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<sup>25</sup> See also *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 3(b); *State Administrative Tribunal Act 2004* (WA) s 9(b); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), s 10(d)-(g); and *Administrative Appeals Tribunal Act 1975* (Cth), s 2A.

<sup>26</sup> Neil Rees, ‘Procedure and Evidence in ‘Court Substitute’ Tribunals’ (2006) 28 *Australian Bar Review* 41, 69.

<sup>27</sup> Keith Mason, ‘The Bounds of Flexibility in Tribunals’ (2003) 39 *AIAL Forum*, 18, 21.

<sup>28</sup> John Maguire, *Evidence: Common Sense and Common Law*, (Foundation Press, 1<sup>st</sup> ed, 1947), 10-11.

<sup>29</sup> Geoffrey Flick, *Natural Justice: Principles and Practical Applications* (Butterworths, 1979), 34-44, cited in Law Book Co, *Land and Environment Court Law & Practice, New South Wales* [LECA.38.20].

be able to consider all of the evidence before them in order to make the correct decision;<sup>30</sup>

- (c) third, administrative proceedings are not necessarily adversarial in nature. CATs often take a quasi-inquisitorial role guided by the legislative proscription to “inform themselves in any manner they see fit” (including by using their specialist knowledge). The exclusionary rules of evidence are inconsistent with the role and function of a CAT;<sup>31</sup>
- (d) fourth, it is often not practicable to apply the rules of evidence in a CAT which, unlike courts, may be comprised of non-lawyers and often deal with parties who are not legally represented.<sup>32</sup> For example, in the Land and Environment Court, Class 1, 2, and 3 matters are heard by commissioners who possess qualifications and experience in a range of disciplines, such as land valuation, planning, architecture, engineering, or botany, but who often have no legal qualifications. The NSW Law Reform Commission has observed that “it was unreal to expect such an [legally unqualified] arbitrator to apply the laws of evidence as if he were a judge. It was oppressive as well as unreal to put on a conscientious arbitrator a duty which, to the knowledge of the parties, he was not equipped to perform”,<sup>33</sup> and
- (e) fifth, a CAT hears a matter *de novo*, or afresh. This means that the CAT stands in the shoes of the original decision-maker and has available to it all of the discretions and powers of that decision-maker. If the original decision-maker was not bound by

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<sup>30</sup> Geoffrey Flick, *Natural Justice: Principles and Practical Applications* (Butterworths, 1979), 34-44, cited in Law Book Co, *Land and Environment Court Law & Practice, New South Wales* [LECA.38.20].

<sup>31</sup> Geoffrey Flick, *Natural Justice: Principles and Practical Applications* (Butterworths, 1979), 34-44, cited in Law Book Co, *Land and Environment Court Law & Practice, New South Wales* [LECA.38.20].

<sup>32</sup> Roger Giles, ‘Dispensing with the Rules of Evidence’ (1990) 7 *Australian Bar Review* 233, 236.

<sup>33</sup> NSW Law Reform Commission, *Commercial Arbitration*, Report No 27 (1976), 134.

the rules of evidence when making the decision, why should the CAT be so constrained?

- 20 But the extent to which CATs ought to nevertheless have regard to the rules of evidence has been the subject of debate, both curial and non-curial. There is jurisprudence that both encourages the employment of, and cautions against adherence to, the rules of evidence when admitting evidence, especially expert evidence, in CATs.
- 21 In 1933 in the oft quoted case of *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott*<sup>34</sup> (cited with approval in the more recent 2010 case *Kostas v HIA Insurance Services Pty Ltd*),<sup>35</sup> Evatt J (albeit in dissent) stated that the fact that a tribunal is not bound by the rules of evidence “does not mean that all rules of evidence may be ignored as of no account” because those rules “represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth.”<sup>36</sup> His Honour emphasised the importance of ensuring that a CAT, even in the absence of the application of the rules of evidence, did not “resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party.”<sup>37</sup>
- 22 In *Bott*, it was held that the War Pensions Entitlement Appeal Tribunal had failed to afford the appellant natural justice when deciding to dispense with the rule of evidence allowing the appellant to cross-examine two doctors who had provided a medical report which contained opinions adverse to the appellant’s case. The two doctors had based their report on a medical inspection of the appellant and a “full summary” of the appellant’s medical history, however, this “full summary” was not disclosed in the certificate or presented to the Tribunal.<sup>38</sup>

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<sup>34</sup> (1933) 50 CLR 228.

<sup>35</sup> (2010) 241 CLR 390 at [17].

<sup>36</sup> *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 256.

<sup>37</sup> *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 256.

<sup>38</sup> *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 255.

- 23 Despite the attractive logic of the views expressed by Evatt J, in *Pochi v Minister for Immigration and Ethnic Affairs*,<sup>39</sup> Brennan J remarked that this “does not mean, of course, that the rules of evidence which have been excluded expressly by the statute creep back through a domestic procedural rule.”
- 24 In *Rodriguez v Telstra Corp Ltd*,<sup>40</sup> the Federal Court of Australia held that regard should be had to the rules of evidence notwithstanding that a tribunal may not be bound by them.<sup>41</sup> The case concerned an appeal from a decision of the AAT where the AAT had preferred its own opinion to that of the medical practitioners giving evidence before it. The applicant, Mr Rodriguez, had claimed that his major depressive disorder was caused by his employment with the respondent, Telstra Corp Ltd (“Telstra”), and had tendered medical evidence in support of his claim. The AAT accepted that his disorder arose out of, or in the course of, his employment at Telstra, however, it went on to find that after four years the disorder was no longer work related, despite no doctors having expressed this opinion.<sup>42</sup> The AAT made the finding as an inference based on evidence that Mr Rodriguez had stopped referring to his employment in discussions with his general practitioner. Mr Rodriguez appealed this finding to the Federal Court on the ground that the AAT had substituted its own opinion for that of the doctors. Telstra contended that matters of proof and causation did not apply to the AAT, or alternatively, that the AAT was permitted to arrive at its own conclusion because its members were medically qualified.<sup>43</sup>
- 25 The Federal Court upheld the appeal, holding that although the AAT was not bound by the rules of evidence, this did not permit it to make decisions absent a basis in evidence having probative force.<sup>44</sup> The Court also noted

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<sup>39</sup> (1979) 36 FLR 482, 492.

<sup>40</sup> (2002) 66 ALD 579.

<sup>41</sup> *Rodriguez v Telstra Corp Ltd* (2002) 66 ALD 579 at [25].

<sup>42</sup> *Rodriguez v Telstra Corp Ltd* (2002) 66 ALD 579 at [20]-[21].

<sup>43</sup> *Rodriguez v Telstra Corp Ltd* (2002) 66 ALD 579 at [10] and [24].

<sup>44</sup> *Rodriguez v Telstra Corp Ltd* (2002) 66 ALD 579 at [25].

that the AAT ought to have disclosed its intention to act on its own medical opinion to allow the parties the opportunity to comment upon it.<sup>45</sup>

26 Thus in *Sullivan v Civil Aviation Safety Authority*<sup>46</sup> the same court remarked that the rules of evidence were “founded on principles of common sense, reliability and fairness” (however, despite this uncontroversial pronouncement the Court went on to hold that the AAT was not bound to apply the rule in *Browne v Dunn* or the principle in *Briginshaw*).

27 Similarly, the Victorian Supreme Court in *City of Springvale v Heda Nominees Pty Ltd*<sup>47</sup> held that even if a CAT is not bound by rules of evidence, this does not mean that it is permitted to admit expert evidence on matters which would not constitute expert opinion under the rules of evidence.<sup>48</sup> Examples include matters of everyday common knowledge.<sup>49</sup> Expert opinion as to the whether the sky is blue will be inadmissible irrespective of the court or tribunal.

28 Nevertheless, some superior courts and legal scholars have urged against deference to the rules of evidence by CATs. In *McDonald v Director-General of Social Security*,<sup>50</sup> Woodward J remarked that a CAT should determine matters with regard to “the statutes under which it is operating, or ... considerations of natural justice or common sense”, rather than to “the technical rules relating to onus of proof developed by the courts.”

29 In *Re Ruddock (in his capacity as Minister for Immigration and Multicultural Affairs); Ex parte Applicant S154/2002*,<sup>51</sup> Gummow and

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<sup>45</sup> *Rodriguez v Telstra Corp Ltd* (2002) 66 ALD 579 at [28].

<sup>46</sup> (2014) 226 FCR 555 at [93].

<sup>47</sup> (1982) 57 LGRA 298. This case, however, predated the enactment of s 80 of the *Evidence Act 1995* (NSW), which provides that evidence of an opinion is not inadmissible simply because it is about a matter of common knowledge.

<sup>48</sup> *City of Springvale v Heda Nominees Pty Ltd* (1982) 57 LGRA 298, 310.

<sup>49</sup> *R v Healey* [1979] VicSC 482 (5 October 1979) at 13.

<sup>50</sup> (1984) 1 FCR 354 at 356.

<sup>51</sup> (2003) 201 ALR 437 at [56].

Heydon JJ (with Gleeson CJ agreeing) held that provisions excluding the rules of evidence are intended to “free” decision-makers “from certain constraints otherwise applicable in courts of law”. Accordingly, the RRT was not obliged to apply the rule in *Browne v Dunn*. In *S154*, the Tribunal used the absence of a reference to rape in a psychologist’s report as a step in rejecting the appeal, but failed to ask the psychologist for an explanation for the omission. The High Court held that the Tribunal’s failure to follow *Browne v Dunn* did not constitute an error of law because of the RRT’s inquisitorial role and because the rules of evidence did not apply.<sup>52</sup>

30 Learned authors Mark Aronson, Matthew Groves and Greg Weeks caution that CATs not bound by the rules of evidence should not “adopt them in a *de facto* way”, particularly where the rule might “distract attention from the core review function” of the CAT.<sup>53</sup>

31 Further, acclaimed administrative law scholar Professor Enid Campbell has opined that if CATs were bound by the rules of evidence, they would not be able to receive and act upon evidence which was logically probative. In her view, the process of determining what evidence is relevant or logically probative ought to take place after all of the evidence is admitted.<sup>54</sup>

32 It is perhaps for these reasons that NCAT is expressly prohibited from rejecting expert evidence which would otherwise be inadmissible if the rules of evidence applied.<sup>55</sup>

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<sup>52</sup> *Re Ruddock (in his capacity as Minister for Immigration and Multicultural Affairs); Ex parte Applicant S154/2002* (2003) 201 ALR 437 at [55]-[58].

<sup>53</sup> Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6<sup>th</sup> ed, 2017), 611.

<sup>54</sup> Enid Campbell, ‘Principles of Evidence and Administrative Tribunals’ in Enid Campbell and Louis Waller (eds), *Well and Truly Tried: Essays on Evidence in Honour of Sir Richard Eggleston* (The Law Book Company, 1982) 36, 84.

<sup>55</sup> *NCAT Procedural Direction 3 - Expert Evidence*, 28 February 2018, cl 3.

## The Use and Abuse of Expert Evidence When the Rules of Evidence Do Not Apply

- 33 In evidence based jurisdictions expert opinion evidence is permitted as an exception to the opinion rule contained in s 79(1) of the *Evidence Act 1995* (NSW), which states that, “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.”
- 34 The provision provides for a two part test for expert evidence. First, that the person giving it must have “specialised knowledge” by reason of their training, study, or experience; and second, that the opinion must be wholly or substantially based on that knowledge. Over time statutory rules governing the form and content of expert evidence have been developed and are now commonplace in most courts. These are often in the form of expert codes of conduct.<sup>56</sup>
- 35 Section 79(1) of the *Evidence Act* is a rule of evidence, and therefore, not applicable to CATs. Has this had the effect of diminishing the quality of the expert evidence sought to be adduced in CATs?<sup>57</sup>
- 36 Even though the rules of evidence do not apply, CATs are subject to rules, practice notes, directions, or guidelines regarding the content and form of expert evidence.
- 37 In the Land and Environment Court, for example, proceedings in Classes 1, 2, and 3 are subject to the provisions contained within Pt 31, Div 2 of the *Uniform Civil Procedure Act 2005* (“UCPR”), which prescribe the form and content of expert evidence and require expert witnesses to comply with the expert witness code of conduct. Similar rules exist in NCAT

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<sup>56</sup> See, for example, *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; *Uniform Civil Procedure Rules 2005*, Pt 31, Div 2.

<sup>57</sup> LexisNexis Australia, *Planning and Environment Vic* [434,685.50].

(*NCAT Procedural Direction 3 - Expert Evidence*,<sup>58</sup> or “NCAT Procedural Direction”), the Victorian Civil and Administrative Tribunal (“VCAT”) (*Practice Note – PNVCAT2 - Expert Evidence*,<sup>59</sup> or “VCAT Practice Note”), and the AAT (*Persons Giving Expert and Opinion Evidence Guideline*,<sup>60</sup> or “AAT Guideline”).

38 Although not identical, each contains the following general elements:<sup>61</sup>

- (a) the imposition of an overriding duty to the CAT and a declaration by the expert witness acknowledging this duty;<sup>62</sup>
- (b) a requirement that the expert report contain the following information:
  - (i) details of the expert’s qualification and/or expertise;<sup>63</sup>
  - (ii) the letter of instruction from the party engaging the expert witness;<sup>64</sup>
  - (iii) details of any documents, materials, or literature that the expert relied upon in the preparation of the report and the formulation of the expert’s opinions;<sup>65</sup>
  - (iv) details of any examinations, tests, or investigations that the expert has undertaken;<sup>66</sup>

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<sup>58</sup> *NCAT Procedural Direction 3 - Expert Evidence*, 28 February 2018.

<sup>59</sup> VCAT, *Practice Note - PNVCAT2 – Expert Evidence*, 1 October 2014.

<sup>60</sup> AAT, *Guideline – Persons Giving Expert and Opinion Evidence*, 30 June 2015.

<sup>61</sup> The NCAT Procedural Direction and the UCPR contain an expert code of conduct. The AAT Guideline and VCAT Practice Note do not.

<sup>62</sup> AAT Guideline, cls 3.1 and 4.5; NCAT Procedural Direction, cls 14-17; UCPR, Sch 7, cl 2; VCAT Practice Note, cls 8-10.

<sup>63</sup> AAT Guideline, cl 4.1(a); NCAT Procedural Direction, cl 19(b); UCPR, r 31.27(1)(a) and Sch 7, cl 3(c); VCAT Practice Note, cls 11(b) and (c).

<sup>64</sup> AAT Guideline, cl 4.1(b); NCAT Procedural Direction, cl 19(c); UCPR, r 31.27(1)(b) and Sch 7, cl 3(d); VCAT Practice Note, cl 11(e). Note cl 19(c) of the NCAT procedural direction and r 31.27(1)(b) of the UCPR do not require a letter of instruction to be included in the report, but provide that “a letter of instruction may be annexed”.

<sup>65</sup> AAT Guideline, cls 4.1(b) and 4.2(b); NCAT Procedural Direction, cls 19(c) and (f); UCPR, r 31.27(1)(e) and Sch 7, cls 3(e) and (h); VCAT Practice Note, cl 11(g).

(v) details of any facts or assumptions upon which the opinion is based and the sources of those facts and assumptions;<sup>67</sup> and

(vi) the reasoning for the opinion;<sup>68</sup> and

(c) the imposition of a duty to declare relevant information to the CAT that could affect the reliability of the evidence. For example, whether the expert witness has changed his or her opinion; whether the expert witness has a conflict of interest; whether the opinion is outside the expert's field of expertise; or whether the opinion is incomplete, inconclusive, or based on insufficient data.<sup>69</sup>

39 These rules are important. Their effect is to ensure that, whether or not the rules of evidence apply, expert evidence is capable of being assessed by the decision-maker (necessary to fulfil their function) and capable of being tested by the parties (necessary for procedural fairness).

40 The common law principles determining whether or not an expert report is capable of being assessed by a decision-maker were set out in the seminal case of *Makita (Australia) Pty Ltd v Sprowles*.<sup>70</sup> The principles can be summarised as follows:<sup>71</sup>

(a) that the duty of expert witnesses is to furnish the Court with the necessary criteria for testing the accuracy of their conclusions,

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<sup>66</sup> AAT Guideline, cl 4.2(a); NCAT Procedural Direction, cl 19(g); UCPR, r 31.27(1)(f) and Sch 7, cl 3(g); VCAT Practice Note, cl 11(h).

<sup>67</sup> AAT Guideline, cl 4.1(c); NCAT Procedural Direction, cl 19(c); UCPR, r 31.27(1)(b) and Sch 7, cl 3(d); VCAT Practice Note, cl 11(f).

<sup>68</sup> AAT Guideline, cl 4.1(d); NCAT Procedural Direction, cl 19(d); UCPR, r 31.27(1)(c) and Sch 7, cl 3(e). The VCAT Practice Note does not specifically refer to a requirement to provide reasons for the opinion.

<sup>69</sup> AAT Guideline, cls 5 and 4.7; NCAT Procedural Direction, cls 20 - 22; UCPR, r 31.27(2)-(4) and Sch 7, cls 3(j) - (k) and 4; VCAT Practice Note, cl 11(d).

<sup>70</sup> (2001) 52 NSWLR 705.

<sup>71</sup> As summarised in *UTSG Pty Ltd v Sydney Metro (No 3)* [2019] NSWLEC 49 at [33].

so as to enable the Court to form its own judgment by the application of these criteria to the facts proven in evidence;

- (b) that the bare *ipse dixit* of an expert upon the issue in controversy is likely to carry little weight because it cannot be tested by cross-examination or independently appraised;
- (c) that the report must identify the criteria by reference to which a court can test the quality of the expert's opinions. Examining the content of an opinion cannot occur unless a court knows what the essential elements of the opinion are;
- (d) that it is important that a court be placed in a position to test the validity of the process by which an opinion has been formed in order to be in a position to adjudicate upon the value and cogency of the opinion evidence;
- (e) that the hallmarks of unreliable science and the unqualified expert are an inability to articulate the central principles that need to be understood, or to describe in everyday language the methods used and the reasons that led to a particular conclusion; and
- (f) that the expert opinion evidence must be comprehensible and reach conclusions that are rational. The process of inference that leads to the conclusions must be stated or revealed in a way that enables the conclusions to be tested and a judgment made about their reliability.

41 The rules referred to above and the principles in *Makita* provide guidance as to what ought to constitute expert evidence in jurisdictions where the rules of evidence do not apply. When distilled, they are no more than rules of fairness for the court or tribunal and the parties.

- 42 Unlike evidence rules based jurisdictions,<sup>72</sup> in a CAT a failure to comply with these rules will not necessarily result in a report being inadmissible.
- 43 For example, the NCAT Procedural Direction and the AAT Guideline specify that a non-compliant report is still admissible. Non-compliance merely constitutes a factor to be considered in determining the weight afforded to the report.<sup>73</sup> Having said this, in the merits review jurisdictions of the Land and Environment Court and VCAT, a failure to comply can result in expert evidence being inadmissible, albeit at the discretion of the decision-maker.<sup>74</sup>
- 44 Where the non-compliance is resolved as a matter of the weight to be afforded to the expert report, this may be justified on the basis that a decision-maker will not always have all the evidence before them prior to being required to rule on the admissibility of an expert report.<sup>75</sup> Moreover, to require strict adherence to the *Makita* principles in CATs would result in expert reports reaching “an unmanageable length (and cost even larger amounts of money)”.<sup>76</sup>
- 45 Other considerations include the prejudice to the parties if the expert report is admitted or rejected,<sup>77</sup> and whether other measures can be implemented to overcome any unfairness occasioned by reliance on a

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<sup>72</sup> *Makita (Australia) Pty Ltd v Spowles* (2001) 52 NSWLR 705 at [85]; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [60]-[137]; *Ray Fitzpatrick Pty Ltd v Minister for Planning* (2007) 157 LGERA 100 at [29]-[30]; *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District; Sydney Local Health District v Macquarie Health Corp Ltd (No 3)* [2014] NSWSC 828 at [22]-[23]; *Walker Corp Pty Ltd v Liu* [2013] NSWSC 1480 at [42]-[55]. However, see also the discussion in *Wood v The Queen* (2012) 84 NSWLR 581 at [719]-[730].

<sup>73</sup> NCAT Procedural Direction, cl 7; AAT Guideline, cl 1.6.

<sup>74</sup> UCPR, r 31.23 and Sch 1. While the language of the VCAT Practice Note suggests that its application is mandatory in all proceedings, it is silent on the effect of non-compliance. However, in the Victorian Supreme Court Case *Aquiline v Transport Accident Commission* [2015] VSC 117 concerning the appeal of a VCAT decision, the Court upheld the approach taken by VCAT at first instance whereby expert evidence which was non-compliant with the VCAT Practice Note was nevertheless admitted into evidence after alternative arrangements were made to comply with the requirements of procedural fairness.

<sup>75</sup> *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 234 FCR 549.

<sup>76</sup> Lee Aitken, ‘Expert Evidence and Makita – ‘Gold Standard’ or Counsel of Perfection?’ (2006) 28 *Australian Bar Review* 207, 217.

<sup>77</sup> *UTSG Pty Ltd v Sydney Metro (No 3)* [2019] NSWLEC 49 at [45].

deficient expert report. For example, can the default be cured by supplementary oral evidence or additional joint reporting?

### **Case Study: *UTSG (No 3)* and *(No 4)***

- 46 The question of the admissibility of flawed expert accounting reports in the course of a Class 3 compensation for compulsory land acquisition proceeding (where the rules of evidence do not apply) arose in *UTSG Pty Ltd v Sydney Metro (No 3)*<sup>78</sup> and *UTSG Pty Ltd v Sydney Metro (No 4)*.<sup>79</sup> The matter concerned an appeal by UTSG Pty Ltd (“UTSG”) against the amount of compensation offered by the Valuer-General for the compulsory acquisition of a commercial property in the Sydney CBD. The acquisition was required to make way for the construction of a metro system. UTSG held a five year lease over the premises, from which it operated a health centre. UTSG claimed compensation for the acquisition of this interest as well as substantial disturbance costs relating to the relocation of its business.<sup>80</sup>
- 47 UTSG sought to rely upon two expert reports, both of which were objected to by the respondent, Sydney Metro. The reports contained serious breaches of the UCPR expert witness code of conduct as well as the principles in *Makita*. The Court received one report into evidence while rejecting the other.
- 48 *UTSG (No 3)* related to an expert business valuation report by Mr David Mullins (“the Mullins report”), engaged by UTSG. Sydney Metro objected to the report on two bases. First, because Mr Mullins had breached his requirements under the UCPR by withdrawing his report and failing to provide a supplementary one as required under r 31.27(4) of the UCPR:

#### **31.27 Experts’ reports**

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<sup>78</sup> [2019] NSWLEC 49.

<sup>79</sup> [2019] NSWLEC 51.

<sup>80</sup> *UTSG Pty Ltd v Sydney Metro* [2018] NSWLEC 128 at [5]-[9] and [17].

- (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 subrule (1) as is appropriate.

49 Mr Mullins withdrew his report after receiving additional material which rendered unreliable the financial records that he had used as a basis for his expert opinion because they were incomplete. He subsequently participated in joint conferencing and produced two joint reports with Sydney Metro's valuation expert. In the joint reports, Mr Mullins made reference to his withdrawn report.

50 Sydney Metro's second basis of objection was that Mr Mullins had failed to fully disclose the relevant financial materials that he used to calculate UTSG's financial loss.

51 Unlike r 31.23 of the UCPR (which requires an expert to explicitly acknowledge their obligations under the expert witness code of conduct), there was no discretion to waive r 31.27, and therefore, Mr Mullins was required to disclose the information upon which his opinion was based and issue a supplementary report.<sup>81</sup> What followed from Mr Mullins's failure to do so was another matter.

52 Shortly after the Mullins report was withdrawn, UTSG became legally unrepresented. The Court held that it was doubtful whether the applicant or Mr Mullins were aware of the requirement to obtain or provide a supplementary expert report.<sup>82</sup>

53 The Court also accepted that while there were deficiencies in Mr Mullins's report with respect to the disclosure of documents that he relied upon,

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<sup>81</sup> *UTSG (No 3)* at [29].

<sup>82</sup> *UTSG (No 3)* at [39].

some disclosure had nevertheless been made and his conclusions were not “wholly impenetrable”.<sup>83</sup>

54 In determining whether or not to admit the report, the Court had regard to the principles in *Makita* outlined above, as well as cases which considered the application of *Makita* in jurisdictions where the rules of evidence do not apply.<sup>84</sup> These cases made it clear that the principles in *Makita* were nonetheless relevant to a CAT assessing the admissibility of expert evidence, however, they did not necessarily operate to restrict receipt of the evidence.<sup>85</sup> Instead, “the question of the acceptability of expert evidence will...be one...of weight.”<sup>86</sup>

55 The Court found that there were alternative measures which could be used to overcome the deficiencies in the Mullins report. Mr Mullins could be cross-examined on the content of his report.<sup>87</sup> In addition, Sydney Metro’s valuation expert had participated in two joint conferences with Mr Mullins and had been able to express opinions as to the reliability of UTSG’s financial records and comment upon the content of the Mullins report.<sup>88</sup> In other words, Mr Mullins’s report was amenable to challenge.<sup>89</sup>

56 Finally, the Court placed substantial weight on the significant prejudice that would be occasioned to UTSG if the report was not admitted into evidence. UTSG’s claim for compensation for financial loss as a result of the acquisition by Sydney Metro was in the order of \$15 million (albeit reduced from its initial claim of approximately \$50 million). The evidence of Mr Mullins went directly to the loss occasioned by UTSG by the acquisition, and therefore, was central to UTSG’s case. Without it,

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<sup>83</sup> *UTSG (No 3)* at [42]; see also *AMP Capital Investors Ltd v Transport Infrastructure Development Corporation* (2008) 163 LGERA 245 at [42].

<sup>84</sup> *Onesteel Reinforcing Pty Ltd v Sutton* [2012] NSWCA 282.

<sup>85</sup> *Onesteel Reinforcing Pty Ltd v Sutton* [2012] NSWCA 282 at [82]-[83]; *Hancock v East Coast Timber Products Pty Ltd* (2011) 80 NSWLR 43 at [82]; *AMP Capital Investors Ltd v Transport Infrastructure Development Corporation* (2008) 163 LGERA 245 at [42].

<sup>86</sup> *Hancock v East Coast Timber Products Pty Ltd* (2011) 80 NSWLR 43 at [83]; see also *Onesteel Reinforcing Pty Ltd v Sutton* [2012] NSWCA 282 at [83]; *AMP Capital Investors Ltd v Transport Infrastructure Development Corporation* (2008) 163 LGERA 245 at [42].

<sup>87</sup> *UTSG (No 3)* at [42].

<sup>88</sup> *UTSG (No 3)* at [43].

<sup>89</sup> *UTSG (No 3)* at [42].

UTSG's case would have failed and UTSG would have faced the very real prospect of an adverse costs order of over \$2 million.<sup>90</sup>

57 Ultimately, the Court held that it was not appropriate to reject the Mullins report given the fatal consequences to UTSG's case of doing so, the nature of the breaches of the UCPR (which were not overly serious), and because the report's deficiencies could be addressed in cross-examination.<sup>91</sup> These factors would, however, have to be taken into account when assessing the weight to be afforded to the Mullins report.<sup>92</sup>

58 *UTSG (No 4)* concerned the admissibility of a forensic accounting report prepared by Mr Gambhir Watts ("the Watts report") on behalf of UTSG. The Watts report had been prepared in response to an expert report of Sydney Metro's expert forensic accountant, Mr Luke Howman-Giles of KPMG ("the KPMG report"). The opinions expressed in the KPMG report cast doubt on UTSG's financial statements, upon which Mr Mullins had based his expert opinion. The Watts report was relied upon by UTSG to rebuke the KPMG report, and contained a series of "scandalous and intemperate allegations"<sup>93</sup> (to use the words of Sydney Metro) against the KPMG report's assertions. These included phrases such as:<sup>94</sup>

The writer has provided a biased report containing inconsistent and inaccurate comparison of financials.

The KPMG report has been manipulated to suit their client's outcome.

The KPMG report lacks common basic understanding of the industry practices and way the Health Care industry especially in the small business sector functions.

The KPMG report demonstrate [sic] a lack of appreciation of accounting methods and financial year end practices of business in Australia.

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<sup>90</sup> *UTSG (No 3)* at [7].

<sup>91</sup> *UTSG (No 3)* at [45]-[46].

<sup>92</sup> *Hancock v East Coast Timber Products Pty Ltd* (2011) 80 NSWLR 43 at [83]; *Onesteel Reinforcing Pty Ltd v Sutton* [2012] NSWCA 282 at [83]; *AMP Capital Investors Ltd v Transport Infrastructure Development Corporation* (2008) 163 LGERA 245 at [42].

<sup>93</sup> *UTSG (No 4)* at [6(d)].

<sup>94</sup> *UTSG (No 4)* at [34].

- 59 Mr Watts had failed to identify the facts and assumptions on which the scandalous allegations were based, articulate his reasoning, or disclose the materials upon which he relied in expressing his opinions. For example, Mr Watts prefaced several of his allegations with phrases such as “to the best of my investigations and sources of information provided to me by UTSG, I am of firm belief that”, without disclosing what these investigations and sources of information were.<sup>95</sup>
- 60 In addition, it was apparent from his report that Mr Watts was neither an independent nor impartial witness because he had previously provided advisory business, accounting, and taxation services for UTSG.<sup>96</sup> The content of the Watts Report strongly suggested that Mr Watts had impermissibly “crossed over the rubicon from objective and impartial expert witness to partisan advocate for UTSG.”<sup>97</sup> The Court noted, however, that impartiality only goes to the weight to be accorded to an expert’s evidence, and therefore, the Watts report could not be rejected on this basis alone.<sup>98</sup>
- 61 The Court held that the provocative language contained throughout the Watts report, together with the unsupported and unprofessional allegations made against KPMG and the KPMG report, and Mr Watts’s lack of independence and impartiality, were deficiencies which could not be remediated. As the Court said, “even if the Watts report was admitted into evidence, the weight the Court would accord to the report because of its manifest deficiencies would be so low that its receipt would be rendered nugatory.”<sup>99</sup> In other words, its content had become irrelevant. The report was therefore rejected.

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<sup>95</sup> *UTSG (No 4)* at [24]-[25].

<sup>96</sup> *UTSG (No 4)* at [43].

<sup>97</sup> *UTSG (No 4)* at [46].

<sup>98</sup> *UTSG (No 4)* at [44] citing *Lake Macquarie City Council v Australian Native Landscapes Pty Ltd* [2015] NSWLEC 92 at [9]-[15] and the authorities referred to thereat.

<sup>99</sup> *UTSG (No 4)* at [38].

62 While both reports contained breaches of the UCPR expert code of conduct, the principal differences in the result between the *UTSG (No 3)* and (*UTSG No 4*) were that:

- (a) the Mullins report was crucial to substantiate UTSG's compensation claim, whereas the Watts report operated as a rebuttal to the KPMG report. In other words, the prejudice to UTSG if the Mullins report was rejected was far greater than the prejudice to UTSG if the Watts report was rejected; and
- (b) the deficiencies in the Mullins report were not so egregious as to render negligible the weight to be accorded to it, unlike those in the Watts report.

63 *UTSG (No 3)* and *UTSG (No 4)* demonstrate the balancing act a CAT must undertake in deciding whether or not to admit an expert report which would be otherwise inadmissible if the rules of evidence applied. In short, the CAT must weigh up the need for reliability with the desire to maintain procedural flexibility while ensuring that procedural fairness is afforded to all parties.

64 The decisions also highlight a critical limit on a CAT's freedom to depart from the rules concerning the admissibility of evidence, namely, that of relevance.<sup>100</sup> Only evidence that is relevant is admissible, irrespective of the jurisdiction.<sup>101</sup> It is strongly arguable that the prohibition upon receiving irrelevant evidence is a matter that goes to jurisdiction and not a mere rule of evidence. A CAT may commit jurisdictional error by taking into account evidence that is not relevant to the issues before it.

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<sup>100</sup> As was succinctly put by Hill J in *Casey v Repatriation Commission* (1995) 60 FCR 510 at 514, merits review tribunals should be determined exclusively by the "limits of relevance" and not "the interstices of the rules of evidence".

<sup>101</sup> *Papakosmas v The Queen* (1999) 196 CLR 297 at [23].

Furthermore, a CAT may deny a party procedural fairness if it considers evidence which is not relevant to the issues before it.<sup>102</sup>

- 65 Of course it is not always possible to immediately determine the relevance of expert evidence, especially in the absence of pleadings and in circumstances where the parties may not be legally represented. Determining whether or not evidence is relevant to the facts and issues in dispute may be difficult because those facts and issues may not be readily apparent until the CAT has heard all of the evidence and identified the gravamen of the claim.<sup>103</sup> It may therefore be more prudent to admit first and ask questions later.

### **Assessing the Probative Value of Expert Evidence Where the Rules of Evidence Do Not Apply**

- 66 To assess the probative value, including the reliability, of expert evidence, and therefore what weight to attribute to it, a CAT must be aware of some of the common problems associated with expert reports where the rules of evidence do not apply.

- 67 As Cripps CJ in *King v Great Lakes Shire Council* noted:<sup>104</sup>

...For example, the common law requirement that the facts relied upon by an expert must be proved by admissible evidence is frequently ignored. The hearsay rules are rarely enforced and experts, not infrequently, are invited to express opinion evidence on matters not calling for specialised knowledge. The distinction between inferences from observed facts and opinion evidence strictly so called is rarely adverted to. Furthermore, it is common, although not often helpful, for planning experts to be asked to express opinions on matters which the court itself must decide.

- 68 Determining the probative value of an expert report at the commencement of a hearing can prove fraught. It may instead require “careful assessment

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<sup>102</sup> Neil Rees, ‘Procedure and Evidence in ‘Court Substitute’ Tribunals’ (2006) 28 *Australian Bar Review* 41, 74.

<sup>103</sup> Neil Rees, ‘Procedure and Evidence in ‘Court Substitute’ Tribunals’ (2006) 28 *Australian Bar Review* 41, 74-75.

<sup>104</sup> (1986) 58 LGRA 366, 371.

after the testing of the expert's evidence in cross-examination.”<sup>105</sup> Once admitted, if found wanting less weight can be placed on it.<sup>106</sup> Therefore, where uncertainty exists about the probative value of an expert report, CATs should likewise err on the side of caution and admit it into evidence where its contents can be tested.

### Blurred Lines of Expertise

69 The blurred lines of expertise problem arises when an expert gives evidence on an issue that is related to, but not squarely within, the expert's field of expertise. It commonly arises when the lines between specialised fields of expertise are blurred, or when the field of expertise is broad or general (for example, ecology or town planning).

70 In jurisdictions where the rules of evidence apply the evidence is usually impermissible as opinion evidence contrary to s 79 of the *Evidence Act*, which mandates a relationship between the expert's specialised knowledge and the opinion expressed.

71 In circumstances where s 79 of the *Evidence Act* does not apply, rather than reject the expert opinion, a CAT can place little or no weight on any opinion proffered outside the expert's field of specialised knowledge.<sup>107</sup>

72 *Ocean Grove Bowling Club v Victorian Commission of Gambling Regulation*<sup>108</sup> concerned an application by the Ocean Grove Bowling Club (“the Club”) for review of a decision of the Victorian Commission of Gambling Regulation (“the Gambling Commission”) refusing to permit an increase in the number of gambling machines at the Club from 45 to 60.

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<sup>105</sup> *Noetel v Quealey* (2005) 34 Fam LR 190 at [106], quoted in Lee Aitken, ‘Expert Evidence and Makita – ‘Gold Standard’ or Counsel of Perfection?’ (2006) 28 *Australian Bar Review* 207, 212.

<sup>106</sup> LexisNexis Australia, *Planning and Environment Vic* [434,685.50]; *Hancock v East Coast Timber Products Pty Ltd* (2011) 80 NSWLR 43 at [83]; *Onesteel Reinforcing Pty Ltd v Sutton* [2012] NSWCA 282 at [83]; *AMP Capital Investors Ltd v Transport Infrastructure Development Corporation* (2008) 163 LGERA 245 at [42].

<sup>107</sup> See, for example, *Re Healthy Cities Illawarra Inc and Commissioner of Taxation* (2006) ATR 1165 at [7]; *Re No Ship Action Group Inc and Minister for Sustainability, Environment, Water, Population and Communities* (2010) 117 ALD 622 at [46(j)]; *Ocean Grove Bowling Club Inc v Victorian Commission of Gambling Regulation* [2006] VCAT 1422 at [7]-[8].

<sup>108</sup> [2006] VCAT 1422.

At the hearing, the Club sought to adduce evidence from a qualified and experienced town planner, Ms Peterson, on, among other topics, the social and economic impacts of the proposed increase in the number of machines. The Gambling Commission objected on the basis that Ms Peterson, as a planner, was not qualified to give this evidence.

73 In deciding to admit Ms Peterson’s evidence, VCAT held that fields of expertise were not to be thought of in black and white terms, rather “black fading to white”,<sup>109</sup> and that experts in a particular field often have more specialised knowledge than a lay person in the “allied areas that are outside their discipline”.<sup>110</sup> VCAT gave the example of a neurologist being likely to know more about the orthopaedic structure of the body than a layperson, or a town planner being likely to know more about spatial economics.<sup>111</sup>

74 VCAT also noted that town planning was a generalist profession which involved balancing physical, environmental, social, and economic considerations and that town planners, therefore, “tend to know a little about a lot”. VCAT went on to state that although “it is easy to disparage those who know a little about a lot”, this quality allows town planners to make “rounded, balanced” decisions.<sup>112</sup> Accordingly, the evidence was admissible, albeit that it was afforded less weight.

75 As ever the touchstone is that of relevance. As one judge opined extra-judicially, “where the opinion is that of an expert outside his expertise, or outside any recognised field of knowledge, the test of relevance may be thought to provide sufficient control.”<sup>113</sup>

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<sup>109</sup> *Ocean Grove Bowling Club v Victorian Commission of Gambling Regulation* [2006] VCAT 1422 at [8].

<sup>110</sup> *Ocean Grove Bowling Club v Victorian Commission of Gambling Regulation* [2006] VCAT 1422 at [8].

<sup>111</sup> *Ocean Grove Bowling Club v Victorian Commission of Gambling Regulation* [2006] VCAT 1422 at [8].

<sup>112</sup> *Ocean Grove Bowling Club v Victorian Commission of Gambling Regulation* [2006] VCAT 1422 at [9].

<sup>113</sup> Roger Giles, ‘Dispensing with the Rules of Evidence’ (1990) 7 *Australian Bar Review* 233, 241.

## Expert Evidence on the Ultimate Issue

- 76 At common law an expert cannot give an opinion on the ultimate question or issue in dispute.<sup>114</sup> Although this rule has since been abrogated by s 80 of the *Evidence Act*, in jurisdictions where the rules of evidence apply decision-makers retain control over the admissibility of such evidence, especially where the ultimate issue is a matter of law (see the various discretions contained in Pt 3.11 of the *Evidence Act*, for example, s 135). Evidence going to an ultimate issue can be, and is, routinely rejected by courts and tribunals alike.<sup>115</sup>
- 77 Expert evidence on ultimate issues is common in generalist fields of expertise such as town planning.<sup>116</sup> Town planners, as part of their professional duties, determine the overall merit of a given development application, the same function that a planning appeals tribunal fulfils when conducting merits review in determining whether to grant or refuse development consent.
- 78 The issue is particularly problematic in complex technical cases where an expert's knowledge is likely to be superior to that of the decision-maker, potentially resulting in the expert evidence having a disproportionate influence on the outcome of the proceedings.
- 79 Although the ultimate issue rule has been abolished, this does not mean experts will always be permitted to give their opinion on ultimate issues. As Preston J observed in *Pyramid Pacific Pty Ltd v Ku-ring-gai Council*:<sup>117</sup>
79. It is a misunderstanding of the role of the...expert in a planning appeal to look only at the ultimate opinion that the expert expresses. Expert evidence, whether of a court appointed expert or other expert, is designed to assist the Court to draw conclusions in relation to the issues that are within the expertise of the expert. Although the prohibition on an expert giving an opinion about the ultimate issue has

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<sup>114</sup> LexisNexis Australia, *Cross on Evidence* [29105].

<sup>115</sup> Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2006).

<sup>116</sup> *Ocean Grove Bowling Club v Victorian Commission of Gambling Regulation* [2006] VCAT 1422 at [9]; *ULV Pty Ltd v Scott* (1990) 19 NSWLR 190, 202.

<sup>117</sup> [2006] NSWLEC 522 at [79].

been abolished by s 80 of the *Evidence Act* 1985 (NSW) in proceedings where the rules of evidence apply, it is not the role of the expert in a planning appeal to express an opinion on the ultimate issue as to whether development consent should be granted. Such an opinion is of no assistance to the Court. The ultimate issue as to whether development consent should be granted is for the Court to determine, exercising the functions of the consent authority.

80 Nevertheless, in *Venus Enterprises Pty Ltd v Parramatta City Council*,<sup>118</sup> in a Class 1 development appeal the Land and Environment Court allowed evidence from a town planner on the ultimate issue of whether or not the development should be approved. In deciding not to reject the evidence, Cripps J relied on s 38 of the LEC Act and stated that:<sup>119</sup>

In this case I am not prepared to reject the opinion of an expert town planner merely because he is expressing an opinion on a question that the Court itself must decide. The Court is always free to accept or reject an opinion and I do not think its function would be usurped by the reception of this evidence. It would be difficult for a town planner to prepare a report without stating his opinion about some matters of law (or, at least, without making assumptions as to what the law was). It is, of course, for the Court to determine these questions and such statements of law are, at worst, irrelevant.

81 Thus it has been observed that:<sup>120</sup>

To the extent that there is an 'ultimate issue' exclusion, there does not seem to be any good reason why a tribunal not bound by the rules of evidence should not receive the opinion of an expert on the ultimate (factual) issue for its decision. Often the tribunal will be composed of an expert or experts in the relevant field of knowledge, and the supposed danger of a court paying undue regard to the expert's opinion on the ultimate issue will not exist. Where the opinion is that of a non-expert, involving no more than an inference from facts of which he can give direct evidence which the tribunal can just as readily make, there are said to be good reasons to permit the evidence to be received, namely that freeing the witness from artificial constraints lets him express his thoughts rationally and that 'the expression of inferences and opinions by lay witnesses when they are in a position to contribute informed ideas not in the traditional form of facts can assist the court considerably'.

82 A CAT can therefore accept expert opinion on an ultimate issue, but it should exercise caution when considering what weight, if any, to afford it. Even where the expert evidence is uncontradicted, a CAT is not bound to

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<sup>118</sup> (1981) 43 LGRA 67.

<sup>119</sup> *Venus Enterprises Pty Ltd v Parramatta City Council* (1981) 43 LGRA 67 at 69.

<sup>120</sup> Roger Giles, 'Dispensing with the Rules of Evidence' (1990) 7 *Australian Bar Review* 233, 240-241 (footnotes omitted); and *South Australian Housing Trust v Lee* (1993) 81 LGRA 378 at 384-385.

decide the case in conformity with it. This is especially so in tribunals with specialist members who have expertise in the relevant subject-matter.<sup>121</sup>  
A CAT cannot abdicate its duty to decide the case for itself.<sup>122</sup>

### **Adversarial and Preconception Bias**

83 There exists a dilemma faced by courts and tribunals relating to expert evidence:

On the one hand: it permits parties to present their case as they wish; and it can help courts and tribunals to ascertain the truth and to exercise discretionary powers. On the other hand:...true independence of the witness is nearly always in question.<sup>123</sup>

84 Biased expert witnesses is an issue affecting all courts and tribunals irrespective of whether or not the rules of evidence apply. However, without the application of the rules of evidence, which emphasise the importance of neutrality and independence,<sup>124</sup> the capacity of CATs to manage this bias is more limited.

85 In this context, bias means adversarial and preconception bias.

86 Preconception bias arises from the expert's personal preconceptions. This bias exists because every expert witness is likely to base their opinions on a particular set of assumptions or beliefs. For example, a psychiatrist may prefer a behaviourist approach rather than a psychoanalyst approach.<sup>125</sup>

87 Although difficult to detect, preconception bias can be managed through the application of rules and codes of conduct governing the preparation of expert reports. Requirements such as the disclosure of the assumptions

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<sup>121</sup> *South Australian Housing Trust v Lee* (1993) 81 LGERA 378 at 384-385; *Pyramid Pacific Pty Ltd v Ku-ring-gai Council* [2006] NSWLEC 522 at [78].

<sup>122</sup> Law Book Co, *Land and Environment Court Law & Practice, New South Wales*, [LECA.38.20]; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394 at [43].

<sup>123</sup> Stuart Morris, 'Getting Real About Expert Evidence' (speech presented at the National Environmental Law Association Conference, Canberra, 13-15 July 2005), 1.

<sup>124</sup> Stuart Morris, 'Getting Real About Expert Evidence' (speech presented at the National Environmental Law Association Conference, Canberra, 13-15 July 2005), 2.

<sup>125</sup> NSW Law Reform Commission, *Expert Witnesses*, Report No 109 (2005), 70.

and materials upon which an expert opinion is based will assist a CAT in detecting when an expert is expressing a particular preconception, thereby allowing that preconception to be challenged.

88 Adversarial bias results from the operation of the adversarial system. It arises in circumstances where an expert is engaged (and remunerated) by a party, causing them to express an opinion which favours that party. In these circumstances the expert witness becomes an advocate for a particular party in contravention of their overriding duty to the CAT.<sup>126</sup>

89 This is what Sir George Jessell referred to as early as 1873 as the phenomenon of “paid agents”.<sup>127</sup>

Expert evidence of this kind is evidence of persons who sometimes live by their business, but in all cases are remunerated for their evidence. An expert is not like an ordinary witness, who hopes to get his expenses, but he is employed and paid in the sense of gain, being employed by the person who calls him.

Now it is natural that his mind, however honest he may be, should be biased in favour of the person employing him, and accordingly we do find such bias. I have known the same thing apply to other professional men, and have warned young counsel against that bias in advising on an ordinary case. Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them.

90 Similar comments have been made about a “breed of expert witnesses” who act as a “hired gun,” appearing time and time again for the same client.<sup>128</sup> In *Dasreef Pty Ltd v Hawchar* the High Court commented upon on the emergence of a market for experts appearing in legal proceedings.<sup>129</sup>

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<sup>126</sup> *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [56].

<sup>127</sup> *Abinger v Ashton* (1873) LR 17 Eq 358 at 374.

<sup>128</sup> Stuart Morris, ‘Getting Real About Expert Evidence’ (speech presented at the National Environmental Law Association Conference, Canberra, 13-15 July 2005), 3.

<sup>129</sup> *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [56].

91 The NSW Law Reform Commission has divided adversarial bias into three types:<sup>130</sup>

- (a) deliberate adversarial bias, which occurs when an expert deliberately tailors their evidence to advantage the party engaging them;
- (b) unconscious adversarial bias, which occurs when the expert is unconsciously influenced by the fact that they are paid or appointed by a single party and reflexively tends towards opinions that support that party; and
- (c) selection adversarial bias, which occurs when a party to the proceedings reviews multiple experts in a field and deliberately chooses one whose interpretations and opinions support their case.

92 The need to ensure that expert witnesses act objectively when providing evidence to a CAT is paramount. Evidence tainted by bias can result in a flawed CAT decision being made, especially given the function being performed by the decision maker. Irrespective of the species of adversarial bias, its corrosive effect undermines the administration of justice in all decision-making fora.

93 The practice notes, procedural directions, and guidelines imposed on experts serve to mitigate the existence of adversarial bias. But, as was pessimistically remarked by one judicial officer:<sup>131</sup>

It is one thing to impose a theory of neutrality upon experts. But I doubt that an assertion that experts must be independent from those paying for their evidence will ever work.

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<sup>130</sup> NSW Law Reform Commission, *Expert Witnesses*, Report No 109 (2005), 72-73.

<sup>131</sup> Stuart Morris, 'Getting Real About Expert Evidence' (speech presented at the National Environmental Law Association Conference, Canberra, 13-15 July 2005), 3.

- 94 Nevertheless, by reason of their inquisitorial character and their ability to “inform themselves in any manner they see fit”, CATs have a distinct advantage over courts because they need not rely upon exposure of bias through cross-examination.
- 95 For example, in *Lowe v Kerang Shire Council*,<sup>132</sup> an expert acoustic consultant gave evidence that a proposed salt processing plant in rural Victoria would have had unacceptable noise impacts on the adjoining property. The expert deliberately avoided making any reference to potential noise mitigation measures which could have been incorporated into the proposed design. The AAT questioned him on the issue, revealing that there was a range of reasonable, practical, and effective noise mitigation measures available to the proponent. When asked why he had not disclosed these earlier, he candidly stated that he felt that he was not under an obligation to do so because he had been called to give evidence on behalf of the adjoining property owner. The AAT rejected the expert’s opinion on the adverse noise impacts, finding it biased and unfair.

### **There is More Than One Way to Skin a CAT**

- 96 So how should CATs assess the probative value of expert evidence in order to determine whether or not to admit it? According to the Council of Australasian Tribunals’ *Practice Manual for Tribunals*,<sup>133</sup> by adopting a common sense approach<sup>134</sup> and by recourse to the rules of evidence as a guide.<sup>135</sup>

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<sup>132</sup> (unreported, 1993), summarised in LexisNexis Australia, *Planning and Environment Vic* [434,685.50].

<sup>133</sup> Pamela O’Connor, Ian Freckleton and Peter Sallmann, *Council of Australasian Tribunals Practice Manual for Tribunals* (Council of Australasian Tribunals, 4<sup>th</sup> ed, 2017).

<sup>134</sup> Pamela O’Connor, Ian Freckleton and Peter Sallmann, *Council of Australasian Tribunals Practice Manual for Tribunals* (Council of Australasian Tribunals, 4<sup>th</sup> ed, 2017), 138.

<sup>135</sup> Pamela O’Connor, Ian Freckleton and Peter Sallmann, *Council of Australasian Tribunals Practice Manual for Tribunals* (Council of Australasian Tribunals, 4<sup>th</sup> ed, 2017), 117; *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 492.

97 In this context, Aronson, Groves and Weeks have identified some useful principles for CATs to apply:<sup>136</sup>

- (a) the rules of evidence are best regarded as facultative;
- (b) an exemption from the rules of evidence is intended to provide procedural flexibility but not to displace logic or reasons;
- (c) a decision-maker freed from the rules of evidence must still consider whether the material it *can* take into account *should* be taken into account;
- (d) the touchstone for admitting evidence is usually whether the material is rationally probative (which will include whether it is relevant);
- (e) provisions which free tribunals from the rules of evidence do not allow them to draw inferences or jump to conclusions which the available material does not adequately support; and
- (f) while the exclusionary rules of evidence may not apply to exclude the evidence from being admitted, the specific rationale for that exclusionary rule can be taken into account in determining what weight, if any, to give to the evidence. In *Kevin v Minister for the Capital Territory*,<sup>137</sup> the Senior Member opined that s 33 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the provision exempting the AAT from the rules of evidence), when read as a whole, required the Tribunal “to consider that at least the principles underlying a rule of evidence, if not the strict rule itself, may offer clear guidance as to how it should inform itself.”

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<sup>136</sup> Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6<sup>th</sup> ed, 2017), 609-610.

<sup>137</sup> (1979) 37 FLR 1 at 2.

- 98 There are three additional factors that a CAT should consider in assessing the probative value of any expert evidence. First, the expert's qualification to give the evidence,<sup>138</sup> as demonstrated by their training or practical experience in the relevant discipline. Whether academic qualifications or practical experience is more important will depend largely on the subject matter of their evidence. For example, where the evidence concerns the attitudes of a particular or community, personal experience with that community may be sufficient to constitute specialised knowledge.<sup>139</sup> Conversely, more technical or scientific expert evidence will be more likely to demand demonstrated academic endeavour.
- 99 CATs should, however, be aware of the dangers of over-reliance on an expert's qualifications as an indicator of the probative value of their evidence. Direct evidence of the reliability of professed expertise, such as a clear reasoning process based on proven facts, will invariably carry more weight than employment history and academic qualifications.<sup>140</sup> This issue is likely to be less problematic in CATs where members often possess specialist qualifications in the subject-matter of the dispute they are adjudicating.
- 100 Second, CATs should consider whether the field of knowledge is sufficiently advanced for the evidence to be reliable.<sup>141</sup> This is particularly important where a CAT is hearing expert evidence in new and emerging fields of expertise. For example, a decade ago the reliability of facial recognition software to identify a suspect in a criminal trial due would have been questionable. Today this technology is used widely (for

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<sup>138</sup> Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and Uniform Acts* (LexisNexis Butterworths, 6<sup>th</sup> ed, 2017), 762; Brian Preston, 'Science and the Law: Evaluating Evidentiary Reliability' (2003) 23 *Australian Bar Review* 263, 291.

<sup>139</sup> *R v Yildiz* (1983) 11 A Crim R 115.

<sup>140</sup> Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and Uniform Acts* (LexisNexis Butterworths, 6<sup>th</sup> ed, 2017), 760.

<sup>141</sup> Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and Uniform Acts* (LexisNexis Butterworths, 6<sup>th</sup> ed, 2017), 763.

example, to identify inbound travellers arriving into Australia). By contrast, bite mark evidence has now been thoroughly discredited.<sup>142</sup>

101 Third, whether the theory underpinning the expert opinion has general acceptance within the relevant scientific community.<sup>143</sup> It may be necessary for a CAT to defer to a community of experts in a particular discipline. For example, it is generally accepted by the climate science community that human induced climate change is a reality. An expert opinion to the contrary proffered to a CAT would therefore carry little weight.

102 Finally, early and often case management is essential. Case management can manage expert evidence in a manner which proactively seeks to mitigate many of the issues described above.<sup>144</sup> Through case management a CAT can avoid irrelevant expert evidence or limit the extent to which expert evidence of low probative value is sought to be relied upon by the parties, resulting in savings in time and costs to the CAT and the parties. Similarly, orders can also be made mandating joint reports, the use of concurrent evidence, or court appointed experts.<sup>145</sup>

## **A CAT Always Lands on its Feet**

103 Given the increasingly high cost of litigation and the diminishing allocation of judicial resources resulting in stagnation in the final resolution of matters in the court system, CATs will continue to play an indispensable role in the administration of justice in this and other States, and at the

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<sup>142</sup> *R v Carroll* (1985) 19 A Crim R 410; *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521.

<sup>143</sup> Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and Uniform Acts* (LexisNexis Butterworths, 6<sup>th</sup> ed, 2017), 765.

<sup>144</sup> Case management directions relating to expert evidence can be made in NCAT under cl 23 of the NCAT Procedural Direction and in the Land and Environment Court under a combination of s 38(4) of the LEC Act and the Practice Notes for proceedings in Classes 1, 2 and 3. VCAT may appoint its own expert under cl 7 of Sch 3 of the *Victorian Civil and Administrative Tribunal Act 1998* or a special referee under s 95 of that Act.

<sup>145</sup> See, for example, Brian Preston, 'Specialised Court Procedures for Expert Evidence' (speech presented at the Japan Federation of Bar Associations, Tokyo, 24 October 2014); Peter Rose, 'The Evolution of the Expert Witness' (2009) 23 *Australian Journal of Family Law* 1; Gary Downes, 'Problems with Expert Evidence: Are Single or Court-Appointed Experts the Answer?' (2006) 15 *Journal of Judicial Administration* 185.

Commonwealth level. In enacting freedom from the confining strictures of the rules of evidence, legislatures have mandated that form ought not trump substance in reviewing the exercise of administrative power in CATs. Were it otherwise, the overriding objectives of their creation would be subverted.

- 104 Contrary to the initial fears of courts and commentators alike, an evidential free-for-all has not resulted. Rather, through the development of appropriately calibrated practice notes, guidelines, and directions, supported by evolving sympathetic case law, the rules of evidence have continued to inform CAT practice and procedure – especially that relating to the receipt and use of expert evidence – in a manner that seeks to guarantee fairness to all.
- 105 In short, if a CAT finds itself falling, provided that the principles discussed above are adhered to, rather than bounce, the CAT will find that it always land on its feet.

**Justice Rachel Pepper**  
**Land and Environment Court of NSW**