Evidence—basis rule & the hearsay rule

Neowarra v Western Australia [2003] FCA 1399

Sundberg J, 8 December 2003

Issues

The main issues before the Federal Court were:

- whether the 'basis rule' applies in relation to expert anthropological evidence;.
- whether the hearsay rule applies to expert's evidence of a previous representation admitted because relevant for a purpose other than proof of the fact intended to be asserted by the representation;
- whether sundry objections should be upheld concerning 'gap filling' and relevance in the expert reports.

Background

This decision was handed down in conjunction with the decision in *Neowarra v Western Australia* [2003] FCA 1402, summarised in *Native Title Hot Spots* Issue 8. It dealt with objections to a joint anthropological and linguistic report (the joint report) prepared by two anthropologists, as well as other expert reports filed in response to an order made by Justice Lee on 12 March 1999.

The objections dealt with by Justice Sundberg in the revised notices of objections totalled 326 from certain respondents and a blanket objection from the State or, in the alternative, 94 specific objections. Annexed to the judgment were 34 pages of Tables itemising the objections, including objections to other expert reports, and applying his Honour's reasoning.

The basis rule

His Honour looked to discussion by the Law Reform Commission (the Commission) in its 1985 Interim Report No 26 Evidence vol 1 par 161 examining common law on the status of opinion evidence based on material that is not already admitted into evidence. The Commission concluded it was 'a matter of some controversy' and that there was uncertainty in the authorities as to whether the so-called 'basis rule' operated as a criterion for admission or merely went to weight. It considered the better view to be 'no such rule exists'. His Honour also noted that the 'basis rule' does not feature in s. 79 of the *Evidence Act 1995* (Cwlth) (Evidence Act)—at [16] to [22].

His Honour considered the weight of authority supported the proposition expounded by Chief Justice Gleeson in *HG v The Queen* (1999) 197 CLR 414; [1999] HCA 2 that there is no requirement, as a condition of admissibility, that the assumed facts on which the opinion is based are established by the evidence. If, at the end of the evidence, they are not established, the weight to be accorded the opinion will be reduced, perhaps to nil. But it is not an issue of admissibility—at [25].

Hearsay by experts

His Honour reviewed recent case law in relation to the application of s. 60 of the Evidence Act to expert evidence. Subject to the application of ss.135 and 136 of the Evidence Act, hearsay material on which an expert's opinion is based will qualify for admission as relevant to the basis upon which the expert holds the opinion i.e. 'a purpose other than proof of the fact intended to be asserted by the representation'. If it so qualifies, then it can then be used as proof of the fact intended to be asserted. The weight to be accorded to that evidence is a matter for the court—at [38].

Decision

As to the 'basis rule' and expert hearsay, his Honour concluded that:

- the opinion provisions of the Evidence Act do not incorporate a basis rule requiring the facts upon which an opinion or conclusion is based to be established by admissible evidence;
- the weight to be accorded an opinion or conclusion that is founded on a fact that is not established by admissible evidence may thereby be reduced;
- while the Evidence Act does not contain a basis rule as referred to above, the fact that hearsay material may lie behind facts ascribed or assumed does not spell inadmissibility. Rather, it goes to the weight to be accorded the expert's opinion or conclusion;
- an expert's opinion that is based on hearsay is admissible under s. 60 of the Evidence Act in proof of the fact intended to be asserted, although the weight to be accorded the opinion may be reduced by the hearsay quality of the material and, either the hearsay material or the opinion may be excluded under ss. 135 or 136 of the Evidence Act;
- remote hearsay is not admissible under s. 60 of the Evidence Act in proof of the fact intended to be asserted—at [39].

As to objections to the entire document on the basis that the claimants did not give evidence supporting the experts' conclusions or opinions, his Honour decided:

1. it was more appropriate to resolve such a dispute in final submissions rather than on an objection to admissibility;
2. in any event, even if there was no supporting Aboriginal evidence, that did not result in the exclusion of the experts' evidence. It was always contemplated by Lee J's order that the Joint Report would be used in evidence. His Honour decided that this issue went to the weight to be accorded to particular conclusions or opinions where there was no Aboriginal evidence to support it— at [40].

An objection commonly made was that if a matter was the subject of primary evidence, restatement by the authors would be unnecessary. Furthermore, it was argued that evidence of the authors cannot be used to fill gaps in primary evidence. His Honour stated that where the experts cover the same ground as Aboriginal evidence, there is no 'gap'. The evidence may not be necessary and may be entitled to less weight than the Aboriginal evidence, but it is not inadmissible merely because it is in the same terms as that evidence. Given that the applicants were aware of the ambit of the expert evidence, the fact that Aboriginal evidence did not cover the

whole of the relevant field may go to the weight accorded it but it did not render it inadmissible—at [41].

A similar objection to evidence in the Joint Report based on the experience of one of the experts in a local community within the application area was also treated as being appropriately covered in closing submissions and going to weight rather than admissibility—at [42].