

## The Business

# Expert evidence in planning: 'Reasons' or 'conclusions'?



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In evidence law, witnesses are only allowed to give evidence about things they perceived directly – “*I saw the accused walking down Smith Street at 4pm holding a ‘keep cup’*”. They can’t give evidence of opinion – “*She must have been going to get a coffee*”.

Expert witnesses are afforded an exception to the ‘opinion rule’ and can give evidence about their opinions, but only to the extent that their opinions are based “*wholly or substantially on specialised knowledge*”.

Opinions are conclusions drawn from facts.

- Step 1 – You start with a bundle of facts. “*I surveyed 3 existing supermarkets and they generated parking demands of 3.3, 2.5, and 4.1 spaces per 100m<sup>2</sup> respectively.*”
- Step 2 – Apply reasons to those facts. “*This proposed supermarket has similar transport characteristics to my 3 other supermarkets.*”
- Step 3 – To produce an opinion. “*Therefore, this supermarket proposal is likely to generate a parking need for, at most, 4.1 spaces per 100m<sup>2</sup>.*”

In this article, I will argue that the relevant component of expert evidence is step 2, reasoning. I will argue that an expert’s conclusions are, of themselves, of limited relevance.

I will make my argument by referencing the rules of admissibility of expert evidence that apply in the courts under the *Evidence Act 2008* (Vic). Whilst those rules don’t apply in VCAT or planning panels, I believe they represent a sound body of theory to draw from for comparative purposes.

### Conclusions vs reasons ‘focus’

A ‘conclusions focus’ in expert evidence provides minimal explanation of the basis for the opinion, and/or minimal explanation of how the opinion is based on the expert’s specialised knowledge. “*The building is too tall. I’m an urban design expert. That’s my opinion.*” This is an extreme ‘conclusions’ focus.

“*The building is too tall. I’m an urban design expert. It’s much taller than the building next door. It’s out of character. That’s my opinion.*” This incorporates reasons, but still has a conclusions focus. The conclusion is treated as the ‘product’, or ‘main goal’, even though it’s backed up by some reasons. It’s presented in a way where you either accept the conclusion, or you don’t. You’re not able to use the reasoning component separately from the conclusions. “*It’s out of character*”. Why? “*It’s much taller than the building next door.*” So what?

Now, a ‘reasons’ focus:

“*Buildings which are taller than adjoining buildings can disrupt the rhythm of the street, reducing legibility of an existing precinct’s character and identity. It has long been recognised in urban design discourse that consistency of built form features – such as materiality, massing, colours and form – contribute to sense of place, which in turn, promote economic and social well-being of local areas. This is recognised in the Urban Design Guidelines for Victoria and an extensive body of urban design literature (see, e.g., Gehl, J 2010, *Cities for People*). The proposed building is 2x taller than all other buildings on this street, which may disrupt the existing built form character of the precinct and thereby undermine sense of place.*”

This example is a bit wordy, but it’s transparent and explains the basis for the opinion that the building is too tall. The basis for the opinion is not hidden behind a veil of ‘expertise’; it is brought clearly into light to be given the weight it deserves. If the opinion sounds a bit subjective and ‘airy fairy’, so be it. We shouldn’t hide from that.

### Which approach is required in evidence law?

To be admissible under the *Evidence Act 2008* (Vic), expert evidence must pass two hurdles:

- the relevance test at s55; and
- the ‘specialised knowledge’ exception to the opinion rule at s79.

### Relevance

‘Relevant evidence’ is defined as evidence that could rationally affect the assessment of the probability of a fact in issue.

The key is the ability to ‘rationally affect’ the decision maker’s reasoning.

To rationally affect a decision, you need to add information. You need to provide a piece of information that the decision maker doesn’t already have.

This is illustrated by the High Court’s decision in *Smith v The Queen* [2001] HCA 50; 206 CLR 650. This was a bank robbery case where the robbers were captured on blurry CCTV footage. The issue was whether the accused was one of the men seen in the CCTV. Two police officers gave opinion evidence saying it was the accused. The Court held these opinions weren’t relevant, saying:

“*The process of reasoning from one fact (the depiction of a man in the security photographs) taken with another fact (the observed appearance of the accused) to the conclusion (that one is the depiction of the other) is neither assisted,*

*nor hindered, by knowing that some other person has, or has not, arrived at that conclusion. Indeed, if the assessment of probability is affected by that knowledge, it is not by any process of reasoning, but by the decision-maker permitting substitution of the view of another, for the decision-maker's own conclusion.*" (My underlining).

This 'substitution of judgement' question is particularly relevant in the context of planning evidence regarding overall 'acceptability' / 'net community benefit'. Once the factual and legal building blocks of a decision are on the table for a decision maker to assemble, isn't the decision maker, after hearing all the evidence and submissions, then in an equal or better position to gauge overall acceptability than the witnesses? What additional information (relevant evidence) can the witness then add?

This shows why reasons matter. To use the introductory example, the decision maker knows the building in question is 2x taller than other buildings on the street. That's not new information. If all the witness does is assert that this alone means the building is out of character and therefore unacceptable, then they haven't added any relevant evidence. But if the witness brings forward their specialised knowledge – and I mean actually articulates it, such as explaining the link based on urban design theory between height and relevant planning considerations (character, sense of place etc.) – then they add relevant evidence to the equation.

### Wholly or substantially based on 'specialised knowledge'

The second hurdle to admissibility is that opinion evidence must be "wholly or substantially based on specialised knowledge". 'Specialised knowledge' is defined as knowledge acquired through "training, study or experience".

So, in evidence law, it's not enough for an expert witness to have reasons. Advocates have reasons why facts and law should combine in a particular way. The reasoning provided by expert witnesses – to be treated as evidence, rather than submission – must both 'add something' (relevance) and be based on specialised knowledge.


The rationale for this rule is as follows. In an adversarial system, we entrust the task of making findings (conclusions) to an impartial decision maker. Because an opinion is a conclusion, it overlaps with the role of the decision maker. That's an uneasy tension. But evidence law allows an exception to the 'opinion rule' for practical reasons. We can't expect every decision maker to go and get a physics degree to decide factual disputes about physics. So, we allow expert witnesses to express opinions about what the laws of physics are (noting that they aren't actually fixed, but involve synthesis of a body of, sometimes, competing theories) and how they apply to the issues in dispute.

The key here is that 'ordinary' and 'common sense' reasoning processes are not wholly or substantially based on 'specialised' knowledge. The expert may have clever reasons why facts should combine in a particular way. But if the reasons are based on ordinary knowledge, not specialised knowledge, then they are in the nature of a submission, not admissible expert evidence.

### Conclusions

Think of the 'evidence' (a noun) that an expert witness provides as 'specialised knowledge' – it's the information about physics, town planning, urban design etc. that the witness puts on the table so the decision maker doesn't have to go off and get a degree to decide the issues in the case.

Because (I say) the 'product' of expert evidence is 'specialised knowledge', it is necessary for the witness to explain how their specialised knowledge applies to the facts to produce their opinion. In the courts this is called the 'statement of reasoning rule'.

So, when you are giving, testing or using expert evidence, focus on the reasoning processes, not the conclusions. 

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