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Lip Read Transcription Of Soundless Recorded Speech

Report by: Tim Reedy
Dated: 19 November 2023
Report requested by: Amelia Causley

FEDERAL COURT OF AUSTRALIA
Judge: Lee J Date:
Lehrmann v Network Ten
File No. NSD103/2023
EXHIBIT/MFI: R881
Description:
Return to:
(party/non-party, if produced on subpoena)
Associate:

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Knowledge of Subjects

To the best of my knowledge, I have not met any of the subjects in the material provided. I have no prior knowledge of them and as far as I am aware I have no knowledge of their families or their friends.

Author of the Report

I am a skilled lip reader that depends on lip reading as a major part of my communication. I use this skill daily and in all circumstances. Over the last few years I have done forensic lipreading for various media outlets and can provide testimonies from editors to support my claim.

I have had NO access to papers pertaining to this case.

Copy of the Recorded Material

Access was given to the video via email 06 November 2023

link given to access footage::

<https://tglaw.sharefile.com/f/fo3c6de0-c0ab-4ad4-9c6d-71a6855599fb?a=83ae100597eb62f3>

Instruction

Emails received from acausleytodd@tglaw.com.au

Contact name: Amelia CausleyTodd

Copy of emails: Appendix ii

Statement of Accountability

I understand that my duty is to the Court as an expert witness, and have complied with that duty in compiling this report. I have read, understood and complied with the Practice Note.

NAME: TIM REEDY

DATE 19 NOVEMBER 2023

Comments on the specific material received

The videos on the server were difficult to work with as they lagged when re-played. The WeTransfer link was easier to work with as it could be played with less lagging and could be slowed down.

The quality of the video itself was very good, which is rare to see in forensic lip-reading work. With my new prescription lenses, I viewed the video on my Windows laptop, which has a screen measuring 32cm x 16cm. Upon close up, the pixellation was poor and at times blurry in areas. I also looked at the video on an Apple iPad measuring 19cm x 13cm which has much better pixellation and colours. The iPad has some Accessibility features in its Settings. In its 'Vision' menu, I switched on 'Zoom' which either gives you a bigger screen or gives you a window for magnification purposes. For example, in watching the video, the magnification window enlarged the faces of the Woman and the Man in Glasses. And although the pixellation was sharp, the clips played out in normal time, and this wasn't necessarily successful. The Windows laptop enabled me to watch the clips played out at half the speed, but given the pixellation issues, also was not necessarily successful, either.

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Initials: [TR]

Processes Followed

I used two computers: a Windows Acer Laptop with 1080 Full High-Definition; a 6th generation Apple iPad mini (iPadOS Version 16.7.2). The video was playable directly on both computers from the FTP server. I used VLC to play it from the WeTransfer link. The videos were viewed multiple times, I zoomed in and slowed it down if needed.

I also used an iPhone XR (iOS Version 16.6) for the clip at the timespan 49:53-49:59. This is because the smaller window gave sharper pixellation. To enlarge the female, I used the 'Zoom In' feature via the iPhone's Accessibility settings.

Reliability of producing a lip read transcript of this specific material

This is a very good example of CCTV footage. I haven't seen CCTV footage with such good pixellation. Although it was difficult to lipread whispers or names in the clips, I like to believe that a lot of conversation was captured. For example, the main characters, the woman in the dress and the man in the glasses share a close friendship. The man in glasses spoke quickly and slowly at various timestamps; he was easier to follow partly because he didn't seem too inebriated. The woman in the dress speaks clearly and pleasantly at the beginning, but the speed of her speaking becomes tired and slow towards the end, presumably because she had drunk a lot.

The man in glasses carried a pint of beer but didn't seem to drink too much, given that he seemed physically stable (ie standing straight), thus easier to lipread than the woman in the dress.

The most difficult clip was the Bar, not just because it was black and white; the back of the man's head faced the camera and blocked any sight of the woman's face, so she could not be lipread.

In the Courtyard, they were generally easier to lipread because there was good light. However, as the man in a blue polo shirt facing the camera spoke a lot (and he also spoke very fast) he wasn't very easy to understand.

Transcript

Transcript key

M Man
W Woman

WCV Woman in a cotton vest
MPS Man in polo shirt
MSS Man in spotted shirt

Transcript

24:41-27:45

[Lipreader's notes: footage it black and white; it is not impossible to lipread].

24:41--27:45

[Lipreader's notes: footage it black and white; it is not impossible to lipread].

24:50-M: How about that?

24:54-W: Maybe later.

24:55-W: Oh, go on.

25:06-M: (That woman there; be careful what you say.)

25:11-W: (Come on; she doesn't. No, she does not mean it)

[Lipreader's notes: not lipreadable until 25:26].

25:26-W: (Avoid her!)

25:27-W: Relax!

25:28-W: I'm joking.

25:30-W: (.... I don't like that).

[Lipreader's notes: for the remainder of this clip, lipreading isn't possible].

31:14-31:48

31:18-M: Anyone (b....) in here?

31:30-M: Cheers.

31:32-W: What are you doing?

31:34–M: All hers; all hers.

31:35–W–Oh, stop; oh, stop

31:45--W: (Oh, come on)

31:47–M: You (guys/are)

31:50: M– (And you are?)

31:52–MSS: (Johnny/Malcolm).

31:55–MPS: (That’s what he says and now he says that/That’s what he says/That’s why he’s here for sex/
.... He’s here for sex).

31:58–WCV: Shut up!

32:37–W: (go/come) on

32:55–33:03

[Lipreader’s note: not possible to lipread. Bad pixellation].

35:21–35:47

[Lipreader’s note: not possible to lipread.. Bad pixellation].

36:13–M: (In an hour/)

37:10–38:55. (The Bar)

38:46–W: (I didn’t say that/I didn’t mean that at all).

39:19–39:30

The Courtyard.

39:26–W: Hi.

39:29–M: Now we're back.

39:30–W: What?

42:32–42:43

42:32–W: (I'm going. I'm going to go/Not sure/She doesn't want to/Not really/Bad news).

43:05–43:14

43:05–W: (you say that/no, not sure about that)

43:34–M: Drink that all.

43:36–M: Now.

43:37–M: All.

43:38–W: I don't want to.

43:41–M: Drink it all. You can't leave that, come on. You're not leaving that.

43:44–W: (I will).

43:56–M: (Well done.)

44:01–M: (What a surprise).

49:53–49:59–W: (Give me one second, is that all right?/Wait? Is that all right?/Please, I'll be a second, yeah?/I'll be right with you/Give me two seconds, all right?)

[Lipreader note: end of assignment].

Professional opinion

In my professional opinion, the material is one of the better CCTV videos I have lipread. However, it is not without its issues. For example, on a Windows laptop, the pixellation is sometimes blurry, whereas on an Apple iPad, pixellation is stronger. But that does not mean it is better. The clips on the iPad are played out only in real time, whereas the Windows laptop played out the clips at different speeds. If this were offered to an Apple computer with its superior pixellation, I believe the clips would be easier to lipread and there would be less call for repetitive lipreading.

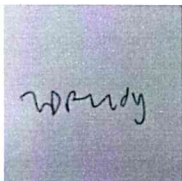
Explanation of Lip Reading

Appendix iii

Final Statement

I confirm that insofar as the facts stated in my report are within my own knowledge, I have made clear which they are and I believe them to be true: and that the opinion expressed represent my true and complete professional opinion.

SIGNED

A small, square, slightly blurry image showing a handwritten signature in black ink on a light-colored background. The signature appears to be 'Wendy'.

Name: TIM REEDY
Date 19 NOVEMBER 2023

Appendix i

C.V.

SKILLS

I was born into a hearing family. I was able to hear from birth, until I contracted meningitis aged four years old. I became profoundly deaf and started to wear a hearing aid. I taught myself to lipread from childhood, starting with the vowels, monosyllables, polysyllables and learned spoken sentences. I also learned/picked up dialects, accents and cliches (eg McDonald's famous phrase: "Would you like fries with that?") These are examples of skills help me communicate with society.

[Tim Reedy] [19 November 2023]

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I am au fait with the following, which may be found in modern conversation--various lip patterns, idiosyncrasies (eg one person might have a habit of saying, "The thing is..." or another person might say, "Ummm" before starting a new sentence or a teenager might say, "I'm like...she be running, you get me?"), facial hair; tics; varying facial muscles; objects in their mouth.

I am a strong communicator and can communicate with both deaf and hearing people. I have primarily grown up in a hearing world I have more hearing friends than deaf friends. I am in a relationship with a hearing woman, so we communicate orally.

Other than that, I have written reports; have experience of managing stakeholders and customer retail management. I have travelled widely and enjoy meeting people. Working in the service industry today strengthens my forensic lipreading skills.

In meetings with groups of people, or on Remote meetings, I assign lipspeakers to help me follow what people are saying. A lipspeaker is a trained communication support worker who listens to the spoken word(s) and 'speaks' the sentences without using voice, for me to lipread.

I have written reports with Microsoft Word and Google Docs.

EXPERIENCE

Since 2010, I have worked professionally as a forensic lipreader. I have worked on assignments for investigative; legal; health visits (real-time lipreading thoracotomy patients to the family and health care professionals); media outlets as well as private clients with CCTV (one instance being investigating an extra-marital affair).

Clients include national newspapers such as The Daily Mail, The Daily Express, The Times, National Health Service, the public sector as well as private clients.

I have worked in the public sector from 2002-2011 at The Department of Culture, Media and Sport.

EDUCATION

- UNIVERSITY OF KENT AT CANTERBURY: MA (RESEARCH): HISTORY AND THEORY OF ART.
- CAMBERWELL COLLEGE OF ARTS: BA (HONS): HISTORY OF DRAWING AND PRINTMAKING

Appendix ii

Instruction emails

19/11/23 email from Amelia Causley Todd with letter containing instructions from Marlia Saunders

Instructions:

'We have set out below our instructions for preparing your expert report:

1. Please confirm in your report that you have read and agree to be bound by the Practice Note, including the Harmonised Expert Witness Code of Conduct. If you are for any reason unable to agree to be bound by the Practice Note, please let us know.
2. Please annex a copy of this letter and the Practice Note to your expert report.
3. Please annex your curriculum vitae to your expert report.
4. In the introduction to your expert report, please describe your qualifications and the reasons why you are qualified to provide an expert opinion on what individuals say in silent CCTV footage.
5. Please review the Footage (which can be found here) and create a transcript based on what is said by the below two people at the timestamps set out below, based on your expert knowledge and experience in the field of lip reading.



(Woman)



(Man)



○

Time in CCTV footage Location

24:41 – 27:45 Bar area (we assume from 25:37

lip reading is not possible)

31:14 – 31:48 Courtyard

31:48 – 31:58 Courtyard

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32:33 – 32:47 Courtyard

32:55 – 33:03 Courtyard

○

35:21 – 35:47 Courtyard

36:10 – 36:56 Courtyard

37:10 – 38:55 Bar area

39:19 – 39:30 Courtyard

39:55 – 40:10 Courtyard

42:32 – 42:43 Courtyard

42:43 – 43:05 Courtyard

43:05 – 43:14 Courtyard

43:30 – 44:05 Courtyard

49:53-49:58 Security scanner

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6. Please provide detailed reasons for the opinions you express.

7. Please identify the question you were asked to address in your report and provide a link to the Footage.

8. Please footnote and annex any publications or other resources that you rely on or refer to in preparing your expert report.

EXPERT EVIDENCE PRACTICE NOTE (GPN-EXPT)

General Practice Note

1. INTRODUCTION

1.1 This practice note, including the Harmonised Expert Witness Code of Conduct (“Code”) (see Annexure A) and the Concurrent Expert Evidence Guidelines (“Concurrent Evidence Guidelines”) (see Annexure B), applies to any proceeding involving the use of expert evidence and must be read together with:

(a) the Central Practice Note (CPN-1), which sets out the fundamental principles concerning the National Court Framework (“NCF”) of the Federal Court and key principles of case management procedure;

(b) the Federal Court of Australia Act 1976 (Cth) (“Federal Court Act”);

(c) the Evidence Act 1995 (Cth) (“Evidence Act”), including Part 3.3 of the Evidence Act;

(d) Part 23 of the Federal Court Rules 2011 (Cth) (“Federal Court Rules”); and

(e) where applicable, the Survey Evidence Practice Note (GPN-SURV).

1.2 This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

2. APPROACH TO EXPERT EVIDENCE

2.1 An expert witness may be retained to give opinion evidence in the proceeding, or, in certain circumstances, to express an opinion that may be relied upon in alternative dispute resolution procedures such as mediation or a conference of experts. In some circumstances an expert may be appointed as an independent adviser to the Court.

2.2 The purpose of the use of expert evidence in proceedings, often in relation to complex subject matter, is for the Court to receive the benefit of the objective and impartial

assessment of an issue from a witness with specialised knowledge (based on training, study or experience - see generally s 79 of the Evidence Act).

2.3 However, the use or admissibility of expert evidence remains subject to the overriding requirements that:

(a) to be admissible in a proceeding, any such evidence must be relevant (s 56 of the Evidence Act); and

(b) even if relevant, any such evidence, may be refused to be admitted by the Court if its probative value is outweighed by other considerations such as the evidence

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being unfairly prejudicial, misleading or will result in an undue waste of time

(s 135 of the Evidence Act).

2.4 An expert witness' opinion evidence may have little or no value unless the assumptions adopted by the expert (ie. the facts or grounds relied upon) and his or her reasoning are expressly stated in any written report or oral evidence given.

2.5 The Court will ensure that, in the interests of justice, parties are given a reasonable opportunity to adduce and test relevant expert opinion evidence. However, the Court expects parties and any legal representatives acting on their behalf, when dealing with expert witnesses and expert evidence, to at all times comply with their duties associated

with the overarching purpose in the Federal Court Act (see ss 37M and 37N).

3. INTERACTION WITH EXPERT WITNESSES

3.1 Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests.

3.2 A party or legal representative should be cautious not to have inappropriate communications when retaining or instructing an independent expert, or assisting an independent expert in the preparation of his or her evidence. However, it is important to note that there is no principle of law or practice and there is nothing in this practice note

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that obliges a party to embark on the costly task of engaging a “consulting expert” in order to avoid “contamination” of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.

3.3 Any witness retained by a party for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based in the specialised knowledge of the witness¹ should, at the earliest opportunity, be provided with:

- (a) a copy of this practice note, including the Code (see Annexure A); and
- (b) all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature.

3.4 Any questions or assumptions provided to an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.

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Such a witness includes a “Court expert” as defined in r 23.01 of the Federal Court Rules. For the definition of "expert", "expert evidence" and "expert report" see the Dictionary, in Schedule 1 of the Federal Court Rules.

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4. ROLE AND DUTIES OF THE EXPERT WITNESS

4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.

4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.

4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

Harmonised Expert Witness Code of Conduct

4.4 Every expert witness giving evidence in this Court must read the Harmonised Expert Witness [Tim Reedy] [19 November 2023] Initials: [TR]

Code of Conduct (attached in Annexure A) and agree to be bound by it.

4.5 The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is expected that compliance with the Code will assist individual expert witnesses to avoid criticism (rightly or wrongly) that they lack objectivity or are partisan.

5. CONTENTS OF AN EXPERT'S REPORT AND RELATED MATERIAL

5.1 The contents of an expert's report must conform with the requirements set out in the Code (including clauses 3 to 5 of the Code).

5.2 In addition, the contents of such a report must also comply with r 23.13 of the Federal Court

Rules. Given that the requirements of that rule significantly overlap with the requirements in the Code, an expert, unless otherwise directed by the Court, will be taken to have complied with the requirements of r 23.13 if that expert has complied with the requirements in the Code and has complied with the additional following requirements.

The expert shall:

(a) acknowledge in the report that:

(i) the expert has read and complied with this practice note and agrees to be bound by it; and

(ii) the expert's opinions are based wholly or substantially on specialised

knowledge arising from the expert's training, study or experience;

(b) identify in the report the questions that the expert was asked to address;

(c) sign the report and attach or exhibit to it copies of:

(i) documents that record any instructions given to the expert; and

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(ii) documents and other materials that the expert has been instructed to consider.

5.3 Where an expert's report refers to photographs, plans, calculations, analyses,

measurements, survey reports or other extrinsic matter, these must be provided to the

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other parties at the same time as the expert's report.

6. CASE MANAGEMENT CONSIDERATIONS

6.1 Parties intending to rely on expert evidence at trial are expected to consider between them and inform the Court at the earliest opportunity of their views on the following:

- (a) whether a party should adduce evidence from more than one expert in any single discipline;
- (b) whether a common expert is appropriate for all or any part of the evidence;
- (c) the nature and extent of expert reports, including any in reply;
- (d) the identity of each expert witness that a party intends to call, their area(s) of expertise and availability during the proposed hearing;
- (e) the issues that it is proposed each expert will address;
- (f) the arrangements for a conference of experts to prepare a joint-report (see Part 7 of this practice note);
- (g) whether the evidence is to be given concurrently and, if so, how (see Part 8 of this practice note); and
- (h) whether any of the evidence in chief can be given orally.

6.2 It will often be desirable, before any expert is retained, for the parties to attempt to agree on the question or questions proposed to be the subject of expert evidence as well as the relevant facts and assumptions. The Court may make orders to that effect where it considers it appropriate to do so.

7. CONFERENCE OF EXPERTS AND JOINT-REPORT

7.1 Parties, their legal representatives and experts should be familiar with aspects of the Code relating to conferences of experts and joint-reports (see clauses 6 and 7 of the Code attached in Annexure A).

7.2 In order to facilitate the proper understanding of issues arising in expert evidence and to manage expert evidence in accordance with the overarching purpose, the Court may require experts who are to give evidence or who have produced reports to meet for the purpose of identifying and addressing the issues not agreed between them with a view to reaching agreement where this is possible ("conference of experts"). In an appropriate
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case, the Court may appoint a registrar of the Court or some other suitably qualified person (“Conference Facilitator”) to act as a facilitator at the conference of experts.

7.3 It is expected that where expert evidence may be relied on in any proceeding, at the earliest opportunity, parties will discuss and then inform the Court whether a conference of experts and/or a joint-report by the experts may be desirable to assist with or simplify the giving of expert evidence in the proceeding. The parties should discuss the necessary arrangements for any conference and/or joint-report. The arrangements discussed between the parties should address:

- (a) who should prepare any joint-report;
- (b) whether a list of issues is needed to assist the experts in the conference and, if so, whether the Court, the parties or the experts should assist in preparing such a list;
- (c) the agenda for the conference of experts; and
- (d) arrangements for the provision, to the parties and the Court, of any joint-report or any other report as to the outcomes of the conference (“conference report”).

Conference of Experts

7.4 The purpose of the conference of experts is for the experts to have a comprehensive discussion of issues relating to their field of expertise, with a view to identifying matters and issues in a proceeding about which the experts agree, partly agree or disagree and why. For this reason the conference is attended only by the experts and any Conference Facilitator. Unless the Court orders otherwise, the parties' lawyers will not attend the conference but will be provided with a copy of any conference report.

7.5 The Court may order that a conference of experts occur in a variety of circumstances, depending on the views of the judge and the parties and the needs of the case, including:

- (a) while a case is in mediation. When this occurs the Court may also order that the outcome of the conference or any document disclosing or summarising the experts' opinions be confidential to the parties while the mediation is occurring;
- (b) before the experts have reached a final opinion on a relevant question or the facts

involved in a case. When this occurs the Court may order that the parties exchange draft expert reports and that a conference report be prepared for the use of the experts in finalising their reports;

(c) after the experts' reports have been provided to the Court but before the hearing of the experts' evidence. When this occurs the Court may also order that a conference report be prepared (jointly or otherwise) to ensure the efficient hearing of the experts' evidence.

7.6 Subject to any other order or direction of the Court, the parties and their lawyers must not involve themselves in the conference of experts process. In particular, they must not seek to encourage an expert not to agree with another expert or otherwise seek to influence the

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outcome of the conference of experts. The experts should raise any queries they may have in relation to the process with the Conference Facilitator (if one has been appointed) or in accordance with a protocol agreed between the lawyers prior to the conference of experts taking place (if no Conference Facilitator has been appointed).

7.7 Any list of issues prepared for the consideration of the experts as part of the conference of experts process should be prepared using non-tendentious language.

7.8 The timing and location of the conference of experts will be decided by the judge or a registrar who will take into account the location and availability of the experts and the Court's case management timetable. The conference may take place at the Court and will usually be conducted in-person. However, if not considered a hindrance to the process, the conference may also be conducted with the assistance of visual or audio technology (such as via the internet, video link and/or by telephone).

7.9 Experts should prepare for a conference of experts by ensuring that they are familiar with all of the material upon which they base their opinions. Where expert reports in draft or final form have been exchanged prior to the conference, experts should attend the conference familiar with the reports of the other experts. Prior to the conference, experts should also consider where they believe the differences of opinion lie between them and

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what processes and discussions may assist to identify and refine those areas of difference.

Joint-report

7.10 At the conclusion of the conference of experts, unless the Court considers it unnecessary to do so, it is expected that the experts will have narrowed the issues in respect of which they agree, partly agree or disagree in a joint-report. The joint-report should be clear, plain and concise and should summarise the views of the experts on the identified issues, including a succinct explanation for any differences of opinion, and otherwise be structured in the manner requested by the judge or registrar.

7.11 In some cases (and most particularly in some native title cases), depending on the nature, volume and complexity of the expert evidence a judge may direct a registrar to draft part, or all, of a conference report. If so, the registrar will usually provide the draft conference report to the relevant experts and seek their confirmation that the conference report accurately reflects the opinions of the experts expressed at the conference. Once that confirmation has been received the registrar will finalise the conference report and provide it to the intended recipient(s).

8. CONCURRENT EXPERT EVIDENCE

8.1 The Court may determine that it is appropriate, depending on the nature of the expert evidence and the proceeding generally, for experts to give some or all of their evidence concurrently at the final (or other) hearing.

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8.2 Parties should familiarise themselves with the Concurrent Expert Evidence Guidelines (attached in Annexure B). The Concurrent Evidence Guidelines are not intended to be exhaustive but indicate the circumstances when the Court might consider it appropriate for concurrent expert evidence to take place, outline how that process may be undertaken, and assist experts to understand in general terms what the Court expects of them.

8.3 If an order is made for concurrent expert evidence to be given at a hearing, any expert to give such evidence should be provided with the Concurrent Evidence Guidelines well in advance of the hearing and should be familiar with those guidelines before giving evidence.

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9. FURTHER PRACTICE INFORMATION AND RESOURCES

9.1 Further information regarding Expert Evidence and Expert Witnesses is available on the Court's website.

9.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP

Chief Justice

25 October 2016

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Annexure A

HARMONISED EXPERT WITNESS CODE OF CONDUCT²

APPLICATION OF CODE

1. This Code of Conduct applies to any expert witness engaged or appointed:

(a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or

(b) to give opinion evidence in proceedings or proposed proceedings.

GENERAL DUTIES TO THE COURT

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

CONTENT OF REPORT

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:

(a) the name and address of the expert;

(b) an acknowledgment that the expert has read this code and agrees to be bound by it;

(c) the qualifications of the expert to prepare the report;

(d) the assumptions and material facts on which each opinion expressed in the report is

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based [a letter of instructions may be annexed];

(e) the reasons for and any literature or other materials utilised in support of such opinion;

(f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;

(g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;

(h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;

(i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the

2 Approved by the Council of Chief Justices' Rules Harmonisation Committee

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knowledge of the expert, been withheld from the Court;

(j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;

(k) whether any opinion expressed in the report is not a concluded opinion because of

insufficient research or insufficient data or for any other reason; and

(l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION

4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.

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5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

DUTY TO COMPLY WITH THE COURT'S DIRECTIONS

6. If directed to do so by the Court, an expert witness shall:

(a) confer with any other expert witness;

(b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and

(c) abide in a timely way by any direction of the Court.

CONFERENCE OF EXPERTS

7. Each expert witness shall:

(a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and

(b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

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ANNEXURE B

CONCURRENT EXPERT EVIDENCE GUIDELINES

APPLICATION OF THE COURT'S GUIDELINES

1. The Court's Concurrent Expert Evidence Guidelines ("Concurrent Evidence Guidelines") are intended to inform parties, practitioners and experts of the Court's general approach to concurrent expert evidence, the circumstances in which the Court might consider expert witnesses giving evidence concurrently and, if so, the procedures by which their evidence may be taken.

OBJECTIVES OF CONCURRENT EXPERT EVIDENCE TECHNIQUE

2. The use of concurrent evidence for the giving of expert evidence at hearings as a case

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management technique³ will be utilised by the Court in appropriate circumstances (see r 23.15 of the Federal Court Rules 2011 (Cth)). Not all cases will suit the process. For instance, in some patent cases, where the entire case revolves around conflicts within fields of expertise, concurrent evidence may not assist a judge. However, patent cases should not be excluded from concurrent expert evidence processes.

3. In many cases the use of concurrent expert evidence is a technique that can reduce the partisan or confrontational nature of conventional hearing processes and minimises the risk that experts become "opposing experts" rather than independent experts assisting the Court. It can elicit more precise and accurate expert evidence with greater input and assistance from the experts themselves.

4. When properly and flexibly applied, with efficiency and discipline during the hearing process, the technique may also allow the experts to more effectively focus on the critical points of disagreement between them, identify or resolve those issues more quickly, and narrow the issues in dispute. This can also allow for the key evidence to be given at the same time (rather than being spread across many days of hearing); permit the judge to assess an expert more readily, whilst allowing each party a genuine opportunity to put and test expert evidence. This can reduce the chance of the experts, lawyers and the judge misunderstanding the opinions being expressed by the experts.

5. It is essential that such a process has the full cooperation and support of all of the individuals involved, including the experts and counsel involved in the questioning process. Without that cooperation and support the process may fail in its objectives and even hinder the case management process.

3

Also known as the "hot tub" or as "expert panels".

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CASE MANAGEMENT

6. Parties should expect that, the Court will give careful consideration to whether concurrent evidence is appropriate in circumstances where there is more than one expert witness

having the same expertise who is to give evidence on the same or related topics. Whether

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experts should give evidence concurrently is a matter for the Court, and will depend on the circumstances of each individual case, including the character of the proceeding, the nature of the expert evidence, and the views of the parties.

7. Although this consideration may take place at any time, including the commencement of the hearing, if not raised earlier, parties should raise the issue of concurrent evidence at the first appropriate case management hearing, and no later than any pre-trial case management hearing, so that orders can be made in advance, if necessary. To that end, prior to the hearing at which expert evidence may be given concurrently, parties and their lawyers should confer and give general consideration as to:

- (a) the agenda;
- (b) the order and manner in which questions will be asked; and
- (c) whether cross-examination will take place within the context of the concurrent evidence or after its conclusion.

8. At the same time, and before any hearing date is fixed, the identity of all experts proposed to be called and their areas of expertise is to be notified to the Court by all parties.

9. The lack of any concurrent evidence orders does not mean that the Court will not consider using concurrent evidence without prior notice to the parties, if appropriate.

CONFERENCE OF EXPERTS & JOINT-REPORT OR LIST OF ISSUES

10. The process of giving concurrent evidence at hearings may be assisted by the preparation of a joint-report or list of issues prepared as part of a conference of experts.

11. Parties should expect that, where concurrent evidence is appropriate, the Court may make orders requiring a conference of experts to take place or for documents such as a jointreport to be prepared to facilitate the concurrent expert evidence process at a hearing (see Part 7 of the Expert Evidence Practice Note).

PROCEDURE AT HEARING

12. Concurrent expert evidence may be taken at any convenient time during the hearing, although it will often occur at the conclusion of both parties' lay evidence.

13. At the hearing itself, the way in which concurrent expert evidence is taken must be applied flexibly and having regard to the characteristics of the case and the nature of the evidence

to be given.

14. Without intending to be prescriptive of the procedure, parties should expect that, when evidence is given by experts in concurrent session:

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(a) the judge will explain to the experts the procedure that will be followed and that the nature of the process may be different to their previous experiences of giving expert evidence;

(b) the experts will be grouped and called to give evidence together in their respective fields of expertise;

(c) the experts will take the oath or affirmation together, as appropriate;

(d) the experts will sit together with convenient access to their materials for their ease of reference, either in the witness box or in some other location in the courtroom, including (if necessary) at the bar table;

(e) each expert may be given the opportunity to provide a summary overview of their current opinions and explain what they consider to be the principal issues of disagreement between the experts, as they see them, in their own words;

(f) the judge will guide the process by which evidence is given, including, where appropriate:

(i) using any joint-report or list of issues as a guide for all the experts to be asked

questions by the judge and counsel, about each issue on an issue-by-issue basis;

(ii) ensuring that each expert is given an adequate opportunity to deal with each issue and the exposition given by other experts including, where considered appropriate, each expert asking questions of other experts or supplementing the evidence given by other experts;

(iii) inviting legal representatives to identify the topics upon which they will crossexamine;

(iv) ensuring that legal representatives have an adequate opportunity to ask all experts questions about each issue. Legal representatives may also seek

responses or contributions from one or more experts in response to the evidence given by a different expert; and

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(v) allowing the experts an opportunity to summarise their views at the end of the process where opinions may have been changed or clarifications are needed.

15. The fact that the experts may have been provided with a list of issues for consideration does not confine the scope of any cross-examination of any expert. The process of cross-examination remains subject to the overall control of the judge.

16. The concurrent session should allow for a sensible and orderly series of exchanges between expert and expert, and between expert and lawyer. Where appropriate, the judge may allow for more traditional cross-examination to be pursued by a legal representative on a particular issue exclusively with one expert. Where that occurs, other experts may be asked to comment on the evidence given.

17. Where any issue involves only one expert, the party wishing to ask questions about that issue should let the judge know in advance so that consideration can be given to whether

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arrangements should be made for that issue to be dealt with after the completion of the concurrent session. Otherwise, as far as practicable, questions (including in the form of cross-examination) will usually be dealt with in the concurrent session.

18. Throughout the concurrent evidence process the judge will ensure that the process is fair and effective (for the parties and the experts), balanced (including not permitting one expert to overwhelm or overshadow any other expert), and does not become a protracted or inefficient process.

Appendix iii

Explanation of lip reading

3.1.

The very nature of lip reading can be open to misconstruction.

Many words can look similar on the lips and it is by gaining sight of the complete sentence rather than the odd word that helps it to make sense.

For example Mop, Bop and Pop look very similar and it would be by lip reading the preceding or following words that a lip reader will be able to 'work out' exactly what has been said.

The above is possible in 'optimum' circumstances, where the speaker is in good light, standing still, facing the lip reader, with no obscuring of the face or lips. (Baseball hats, cigarettes, chewing gum, facial hair, food etc.)

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Lip patterns that are familiar are a great help plus a knowledge of the accent of the people you are communicating with, an idea of the context or the topic also greatly helps as you can 'fit' the words to the topic rather than scrabbling around – conversely this can also be a stumbling block for if the topic changes without the lip reader being aware, then misconstruction can take place, and mistakes, miss seeing what has been said can take place. It must also be said that many lip readers will NOT lip read every word – they will go for the gist of the conversation rather than get bogged down with all the if's, but's, and's, etc. and in a 'real life' situation the lip reader has the chance to interrupt and ask for clarification.

3.2.

Many deaf people consider themselves to be good lip readers, as for many it is a primary source of communication. Whether this can qualify them as an expert is open to interpretation. I have a track record in lipreading for national newspapers. I can provide testimonies from newspaper editors.

Regular assessments by professionals involved within the same field should be actively sourced and available on application.

3.3.

Lip reading recorded material / evidence is inherently difficult. Even a piece that appears to have been recorded for optimum lip readability will have its flaws. The subject can look uncomfortable and their speech may be fast due to the embarrassment of having a camera pointing at them.

Other factors have to be considered, distance and the clarity of the source material, the number of people in the conversation, are there any visual clues available in the background, i.e. recognizable place names / monuments etc., is it dark or does the subject/s have their back to the camera (impossible to lip read!), chewing gum (causes distortion) or bright daylight – which can cause glare.

3.4.

The use of audio dubbed video material should always be used first, unless there is any doubt that the soundtrack is suspect in any way.

3.5.

Lip read evidence should not be seen as a completely reliable source of evidence, as previously explained it can be open to interpretation, with clarity of the source material being the key.

