

Expert Evidence

12 – 13 February 2011 | Hedley Bull Theatre
The Australian National University | Canberra | Australia



CONFERENCE

Expert Evidence

12 – 13 February 2011
Canberra, Australia

Hosted by the
National Judicial College of Australia
and
ANU College of Law



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General information

Conference Venue	Hedley Bull Theatre 1 Hedley Bull Centre The Australian National University Canberra ACT AUSTRALIA
Dinner Venue	The Hall, University House Cnr Balmain Cr & Liversidge St The Australian National University Acton ACT T: 6125 5211
Dinner Dress Requirements	Neat casual
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Program

Saturday 12 February 2011	
8.30 – 9am	REGISTRATION
9 – 9.15am	WELCOME Chief Justice WAYNE MARTIN <i>Chair of the Council of the National Judicial College of Australia</i> Professor MICHAEL COPER <i>Dean, ANU College of Law</i>
9.15 – 10am	SESSION 1: KEYNOTE SPEECH Mr JACK RUSH QC (Vic) <i>Chair: Chief Justice Wayne Martin Supreme Court of Western Australia</i>
10 – 10.30am	Morning Tea in Hedley Bull Centre Foyer
10.30am – 12.30pm	SESSION 2: ISSUES IN GATHERING, INTERPRETING, AND DELIVERING DNA EVIDENCE Issues in Gathering, Interpreting and Delivering DNA Evidence Judge ANDREW HAESLER <i>District Court NSW</i> DNA Evidence: Current issues and future challenges Ms WENDY ABRAHAM QC <i>Barrister, Wentworth Chambers</i> Recognition and Presentation of Issues with DNA Evidence Professor ANGELA VAN DAAL <i>Bond University</i> <i>Chair: Dr Gregor Urbas ANU College of Law</i>
12.30 – 1pm	Lunch in Hedley Bull Centre Foyer
1– 3pm	SESSION 3: FORENSIC PATHOLOGY AND THE CSI EFFECT Forensic Pathology and the CSI Effect: A forensic pathologist's experience Associate Professor DAVID RANSON <i>Assistant Director, Victorian Institute of Forensic Medicine & Adjunct Clinical Associate Professor Monash University</i> The CSI Effect Dr JAMES ROBERTSON AM <i>Professor of Forensics, University of Canberra</i> Hollywood Profiling: The impact of the <i>CSI Effect</i> on the use of forensic science in New South Wales Dr JENNY WISE <i>Criminologist, University of New England</i> <i>Chair: Magistrate Michael Barnes Queensland State Coroner</i>
3 – 3.20pm	Afternoon tea in Hedley Bull Centre Foyer

3.20 – 5pm	SESSION 4: SCIENCE AND LAW: A CLASH OF CULTURES? A panel discussion (see p. 13 for outline) <i>Panelists</i> Professor IAN FRECKELTON SC <i>Monash University</i> Associate Professor DAVID RANSON <i>Assistant Director, Victorian Institute of Forensic Medicine</i> Judge MICHAEL RACKEMANN <i>Planning & Environment Court, District Court of Queensland</i> Dr JAMES ROBERTSON AM <i>Professor of Forensics, University of Canberra</i> Justice PETER MCCLELLAN <i>Chief Judge at Common Law, Supreme Court of NSW</i> <i>Session Facilitator: Mr Hugh Selby ANU College of Law</i>
7 for 7.30pm	CONFERENCE DINNER at The Hall, University House, ANU (Dress: neat casual) Guest Speaker: Professor IAN FRECKELTON SC <i>Monash University</i> <i>Dinner Host: Professor Michael Coper Dean, ANU College of Law</i>

Program

Sunday 13 February 2011	
9.15 – 10am	<p>SESSION 5: THE RELIABILITY OF CCTV AS FORENSIC EVIDENCE</p> <p>The Reliability of CCTV as Forensic Evidence Mr GLENN PORTER <i>Senior Lecturer in Forensic Science, University of Western Sydney</i></p> <p><i>Chair: Chief Magistrate Elizabeth Bolton Magistrates Court South Australia</i></p>
10 – 10.40am	<p>SESSION 6: FORENSIC VOICE COMPARISON AND THE PARADIGM SHIFT IN FORENSIC SCIENCE</p> <p>The New Paradigm in Forensic Science Dr GEOFFREY STEWART MORRISON <i>Director, Forensic Voice Comparison Laboratory, School of Electrical Engineering & Telecommunications, University of New South Wales</i></p> <p><i>Chair: Ms Miriam Gani ANU College of Law</i></p>
10.40– 11am	Morning Tea in Hedley Bull Centre Foyer
11 – 11.40am	<p>SESSION 7: DIGITAL FORENSICS</p> <p>Scales of Justice and Cell Phone Evidence Professor REG COUTTS <i>Coutts Communications, Emeritus Professor of Telecommunications, Adelaide University</i></p> <p><i>Chair: Judge John Nicholson District Court New South Wales</i></p>
11.40 – 12.30pm	<p>SESSION 8: TRANSCRIPTS AND LINGUISTIC FORENSICS</p> <p>Transcripts and Linguistic Forensics Dr HELEN FRASER <i>Consultant, Cognitive Phonetics</i></p> <p><i>Chair: Dr Mark Nolan ANU College of Law</i></p>
12.30 – 1.15pm	<p>SESSION 9: STUDY BEING UNDERTAKEN ON EXPERT EVIDENCE IN AUSTRALIA</p> <p>The Cool Crucible: Incriminating expert opinion evidence and the criminal trial Professor GARY EDMOND <i>Director, Program on Expertise, Evidence & Law, Centre for Interdisciplinary Studies of Law, University of New South Wales</i></p> <p><i>Chair: Justice Debra Mullins Supreme Court of Queensland</i></p>
1.15pm	Conference Close & Lunch

SESSION 1: KEYNOTE SPEECH

Keynote Speech

Mr JACK RUSH QC, Victorian Bar

Jack Rush graduated from Monash University in 1974 (BJuris; LLB) and was appointed Queen's Counsel 1992. In trial and appellate advocacy he has predominantly acted in common law cases, product liability, insurance law, personal injury, criminal law and trade practices law. Cases include: representing miners and residents who contracted asbestos disease as a consequence of working and living at the Wittenoom mine in Western Australia; Counsel for Lorna Cubillo and Peter Gunner in *Cubillo & Gunner v Commonwealth (Stolen Generation)*, that attempted to establish Commonwealth Government liability for the policy of removal of part aboriginal children from families in the Northern Territory; Counsel for Rolah McCabe in case *McCabe v British American Tobacco* (Supreme Court Victoria) concerning issues of document destruction and corporate practice; Counsel for families and next of kin in Royal Australian Navy Board of Inquiry into the 2005 crash of RAN Sea King Helicopter in Indonesia that killed 9 Defence Force personnel; Counsel for Unions and Victims Groups in Commission of Inquiry (NSW) into the funding by James Hardie of compensation for Australian victims of asbestos exposure; Counsel Assisting Royal Commission into Victorian Bushfires of 2009. Over the past 15 years Jack has been counsel in, or acted as mediator in major tort and contractual matters. He is Chairman of the AFL Grievance Tribunal involved in mediating/deciding disputes between players and clubs/umpires and the AFL.

SESSION 2: ISSUES IN GATHERING, INTERPRETING AND DELIVERING DNA EVIDENCE

Issues in Gathering, Interpreting and Delivering DNA Evidence

Judge ANDREW HAESLER, District Court NSW

DNA profile matching can provide powerful evidence in support of guilt or innocence in both high volume crimes and the most serious offences. Since initially developed over 20 years ago better technology and better science has enabled experts to get more information from less DNA. DNAs very usefulness has led to increased expectations by the court and the public. These improvements and expectations create their own challenges when DNA evidence is presented in court. This paper examines three areas where problems have arisen:

1. Dealing with the risk of contamination at the crime scene or during processing;
2. How evidence of a DNA profile match and supporting statistics is to be presented in court; and,
3. How such issues are explained to a jury.

Andrew Haesler SC is a Judge of the District Court of NSW. Admitted to practice in 1981, Andrew worked as a Solicitor with the Redfern Legal Centre, in Alice Springs with the Aboriginal Legal Service and in Wollongong with the Legal Aid Commission. Andrew was admitted to the Bar in 1990, became a Public Defender in 1995 and later a Deputy Senior Public Defender. In 1999–2000 he was the Director of the Criminal Law Review Division of the NSW Attorney General's Department. He was appointed Senior Counsel in 2004 and a Judge of the District Court of NSW in September 2010. Andrew has given, and had published, many papers on a variety of topics concerned with criminal law.

DNA Evidence: Current issues and future challenges

Ms WENDY ABRAHAM QC, Barrister Wentworth Chambers

DNA evidence is of vital importance to the administration of justice; it has both the capacity to exclude potential suspects and to provide powerful evidence in a prosecution case. Its significance will only increase with scientific developments. DNA testing, the systems adopted by the Australian Forensic Science Laboratories to conduct the testing and the statistical computations as to the weight to be attached to any relevant match is now generally accepted. That being so, what are the current issues that arise in relying upon such evidence? This paper will address that from three perspectives: preparation and presentation, recent arguments and judicial decisions about the use of such evidence and future challenges.

Ms Wendy Abraham QC was admitted to practice as a barrister in 1982. She worked as a prosecutor in the office of the Director of Public Prosecutions (South Australia) and was Acting Director from May 2004 to April 2005. She was appointed Queens Counsel in 1998. From June 2005 to 2009 Ms Abraham was Barrister on full time retainer with the Commonwealth Director of Public Prosecutions as national appellate counsel. She has appeared for the Crown in cases in the High Court, the NSW Court of Criminal Appeal and the Queensland Court of Criminal Appeal. Ms Abraham is a Barrister in Wentworth Chambers, Sydney.

Recognition and Presentation of Issues with DNA Evidence

Professor ANGELA VAN DAAL, Bond University

DNA analysis often constitutes highly probative evidence and is considered the gold-standard amongst the forensic disciplines. This stature was highlighted in a recent report from the US National Academy of Science. Forensic DNA analysis is based on sound scientific underpinnings and substantial validation studies. Additionally it is underpinned by a solid foundation of molecular biology and population genetics. However, amidst admirable zeal to garner ever more value from biological evidence, controversy has emerged regarding the use of low copy number (LCN) or 'touch' DNA typing. The issues related to analysis of low levels of DNA and samples containing DNA from more than one individual will be discussed.

Professor Angela van Daal has a BSc (Hons) degree from the University of Adelaide and a PhD from Macquarie University. From 1991–98 she worked at the Forensic Science Centre in SA as Assistant Chief Scientist (Biology). She was responsible for the introduction of forensic DNA testing to the courts of SA as well as other states such as Queensland, Victoria and the ACT. She has presented

expert evidence in the courts of QLD, ACT, NSW, VIC and SA. She was part of a small team who formulated the accreditation standards for DNA testing for forensic laboratories. Professor van Daal was an accredited laboratory inspector for both NATA and a US-based forensic accreditation body, ASCLD-LAB, and has audited and inspected many laboratories in Australia, New Zealand and the United States, including the Federal Bureau of Investigation (FBI). In her current position, Professor of Forensic Science, at Bond University she has developed Bachelor and Masters of Forensic Science degree programs and continues research in the area of forensic science. Her research interests include the genetic basis of human physical appearance as well as development of improved methods for forensic DNA analyses.

SESSION 3: FORENSIC PATHOLOGY AND THE CSI EFFECT

Forensic Pathology and the CSI Effect: A forensic pathologist's experience

Associate Professor **DAVID RANSON**, Assistant Director, Victorian Institute of Forensic Medicine & Adjunct Clinical Associate Professor Monash University.

When a forensic pathologist steps into the witness box during a criminal trial today the expectations placed on them by the Judge, Legal Counsel and Jury can be wildly different. This is probably also true for media representatives and visitors to the court. When I started to provide oral testimony in courts some 25 years ago the entertainment media was certainly fascinated by police shows but community interest in the 'forensic sciences' and court activities was not especially pronounced. This is in stark contrast to the position before the Second World War when attendance of the public at 'murder' trials often seemed to be a form of free public entertainment. Reporting of such trials in newspapers had an exciting and sometime salacious quality. The word of the 'Doctor' as the medical expert had an almost divine quality and the great names such as Sir Bernard Spilsbury were challenged with a degree of trepidation by the cross examiner, the resulting verbal exchange often being reported almost verbatim in the daily newspapers. The dangers of such a cult of forensic celebrity are only too well known but ironically today the cult of 'fictional' forensic celebrity is perhaps starting to have a surprisingly similar influence. These issues are further compounded by the increasingly technical nature of forensic scientific evidence, the more rigorous evidence based approach to medical expertise in the medical professions and the rise of post modernistic and alternative therapeutic ideas in the community about the way in which the human body works (or doesn't). The demand by television companies to be successful in competing for advertising revenue by generating and then feeding public mythology regarding forensic sciences has place a new burden on witnesses and courts alike. This paper explores the changing experience of providing oral testimony by a forensic pathologist over the last few decades and the impact that these changes have had on: the provision of expert testimony; witness preparation and judicial and professional legal training.

David Ranson has been with the VIFM since it was formed in 1988. He is currently the Deputy Director of the Institute and an Adjunct Clinical Associate Professor in the Department of Forensic Medicine at Monash University. He is a specialist in Forensic Pathology & Clinical Forensic Medicine with a strong professional interest in Medical Law. David graduated in Medicine from The University of Nottingham and in Law at the University of the West of England. He has worked at various hospitals in England and was a lecturer in the Department of Pathology at Bristol University. He has also practised clinical forensic medicine as a Police Surgeon to Avon and Somerset Constabulary. He is a Fellow of both the Royal College of Pathologists of Great Britain and is currently the Royal College of Pathologists of Australasia's State Councillor for Victoria. He holds the Diploma in Medical Jurisprudence of the Royal Society of Apothecaries (forensic pathology). He is a Foundation Fellow of the Australian College of Legal Medicine and the Faculty of Forensic and Legal Medicine of the Royal College of Physicians in the UK. David has been heavily involved in establishing research units aimed at preventing avoidable death and injury, namely the National Coroners Information System and the Clinical Liaison Service. He is a member of the Australian Suicide Prevention Advisory Council. David investigates approximately 400 deaths per year at the VIFM and has assisted with the death investigation in Thailand after the tsunami and in Kosovo assisting with the exhumation of civilian victims of sectarian fighting. He has numerous publications in forensic medicine, forensic pathology and medical law. He regularly gives expert evidence in a range of courts, including civil, administrative, coronial and criminal matters where he provides expert testimony for both the crown and the defence. He teaches at Melbourne and Monash Universities and also provides medical and pathology advice for writers of books, plays and TV shows.

The CSI Effect

Dr JAMES ROBERTSON AM, Professor of Forensics, University of Canberra

It might be fair to say that the jury is still out with respect to the possible impact of the media portrayal of forensic science as best typified by the plethora of crime scene investigator type programs. CSI effect or not, the way in which the overall media deals with forensic science may have a broader impact on how jurors deal with forensic evidence. However, due to the difficulty in talking to real jurors little is actually known about how these factors may influence their decision making. In this presentation results from an actual juror study conducted in Australia will be discussed in the context of the broader influence of the media. Implications for the presentation of forensic evidence in the future will be discussed.

Dr James Robertson is a Professorial Fellow and Director of the National Centre for Forensic Studies (NCFS) at the University of Canberra. He joined UC after a period of over 20 years as the head of the forensic group at the Australian Federal Police (AFP). Originally from Scotland, where he lectured in forensic science at the University of Strathclyde from 1976 to 1985, he moved to Australia in 1985 and worked as a forensic scientist in South Australia from 1985 until 1989. James has remained an active researcher throughout his career and has edited or co-edited several books and numerous publications across a diverse range of interests but he is best known for his interest in hairs and fibres trace evidence. He perhaps is unique in being able to say that he appeared in court as an expert witness in every year since he started in forensic science in 1976. He has contributed to two major enquiries into wrongful convictions. James has served on numerous academic and government committees. He is currently the Chair of the National Institute of Forensic Sciences (NIFS) Advisory Forum, Chair of Standards Australia Forensic Committee, Vice-president of the Australian and New Zealand Forensic Science Society (ANZFSS) and President of

the Australian Academy of Forensic Sciences (AAFS). He is also Editor of the *Australian Journal of Forensic Sciences*. His contribution to law enforcement and the forensic sciences has been recognised by the award of a Public Service Medal (PSM) and he was recently invested as a Member of the Order of Australia (AM).

Hollywood Profiling: The impact of the *CSI Effect* on the use of forensic science in New South Wales

Dr JENNY WISE, Criminologist, University of New England

Since 2000 the CBS television program, *CSI: Crime Scene Investigation*, has made forensic science look quick and easy. *CSI*, and other similar shows such as *Law and Order SVU: Special Victims Unit*, routinely use forensic science to accurately identify offenders. Science is portrayed as the overarching truth that exposes the lies of the offender and provides certainty in an investigation. As a result of the popularity of these programs, it has been argued that jurors are expecting to see the 'technical wizardry' that appears in *CSI* in the courtroom, and when the prosecution fails to produce such reliable and objective results, the jury fails to convict a defendant. This phenomenon has been dubbed the *CSI Effect* by journalists and academics, and while there are conflicting views as to whether the *CSI Effect* actually exists, there is strong evidence to suggest that the popularity of these television programs is having a widespread impact on criminal justice systems around the world. This paper explores some of the impacts that the *CSI Effect* is having on the New South Wales criminal justice system, and the implications of these changes for the way forensic science is used in both the investigation and prosecution of criminal offences.

Dr Jenny Wise is a lecturer in Criminology within the School of Behavioural, Cognitive and Social Sciences at the University of New England. Jenny's research focuses upon the social impacts of forensic science on the criminal justice system. She published her first book in 2009, titled, *The New Scientific Eyewitness: the role of DNA profiling in shaping criminal justice*, and is continuing her research in this field.

SESSION 4: SCIENCE AND LAW: A CLASH OF CULTURES?

Panel session to explore:

- How the expert guidelines have changed the face of expert evidence
- Quality accreditation—whether and how 'junk science' might be a problem in Australian courts
- Whether the test in the Uniform Evidence Act is good enough or should we move clearly towards or away from the 'reliability' test
- Do counsel adequately expose limitations in expert evidence through cross examination

abstracts & bios

- When is concurrent [hot tubbing] evidence a good approach?
- Single experts—the pros and cons.

Panel Members

Professor **IAN FRECKELTON SC**, Victorian Bar & Monash University

Ian Freckleton is a Senior Counsel in full-time practice at the Victorian Bar. He has been a part-time member of a number of Commonwealth and State tribunals, including Victoria's Medical Practitioners' Board, Disciplinary Appeals Tribunal and Mental Health Review Board. He is also a part-time Professor of Law, Forensic Medicine and Forensic Psychology at Monash University in Melbourne. He is the editor of the *Journal of Law and Medicine* and the Editor-in-Chief of *Psychiatry, Psychology and Law*. With Hugh Selby, Ian is the co-editor of the six volume looseleaf service, *Expert Evidence*, and of the 4th edition (with Hugh Selby) of *Expert Evidence: Law Practice, Procedure and Advocacy* (Thomson, 2009). He was a co-author of the 1999 and 2001 AIJA studies on judges and magistrates' attitudes toward expert evidence and is a participant in the next phase of the AIJA project in relation to expert evidence, surveying jurors, lawyers, experts and trial judges. He is also the author and editor of over 400 peer-reviewed articles and chapters and of a variety of books on causation, medical law, compensation law, coronial law, criminal law, therapeutic jurisprudence, policing, disciplinary law, and scholarly misconduct.

Associate Professor **DAVID RANSON**, Assistant Director, Victorian Institute of Forensic Medicine & Adjunct Clinical Associate Professor, Monash University

David Ranson has been with the VIFM since it was formed in 1988. He is currently the Deputy Director of the Institute and an Adjunct Clinical Associate Professor in the Department of Forensic Medicine at Monash University. He is a specialist in Forensic Pathology & Clinical Forensic Medicine with a strong professional interest in Medical Law. David graduated in Medicine from The University of Nottingham and in Law at the University of the West of England. He has worked at various hospitals in England and was a lecturer in the Department of Pathology at Bristol University. He has also practised clinical forensic medicine as a Police Surgeon to Avon and Somerset Constabulary. He is a Fellow of both the Royal College of Pathologists of Great Britain and is currently the Royal College of Pathologists of Australasia's State Councillor for Victoria. He holds the Diploma in Medical Jurisprudence of the Royal Society of Apothecaries (forensic pathology). He is a Foundation Fellow of the Australian College of Legal Medicine and the Faculty of Forensic and Legal Medicine of the Royal College of Physicians in the UK. David has been heavily involved in establishing research units aimed at preventing avoidable death and injury, namely the National Coroners Information System and the Clinical Liaison Service. He is a member of the Australian Suicide Prevention Advisory Council. David investigates approximately 400 deaths per year at the VIFM and has assisted with the death investigation in Thailand after the tsunami and in Kosovo assisting with the exhumation of civilian victims of sectarian fighting. He has numerous publications in forensic medicine, forensic pathology and medical law. He regularly gives expert evidence in a range of courts, including civil, administrative, coronial and criminal matters where he provides expert testimony for both the crown and the defence. He teaches at Melbourne and Monash Universities and also provides medical and pathology advice for writers of books, plays and TV shows.

Judge MICHAEL RACKEMANN, Planning & Environment Court, District Court of Queensland

Judge Rackemann graduated in Law (Hons) from the University of Queensland in 1986. He served articles with Morris Fletcher and Cross and was admitted as a solicitor in 1988. His Honour was called to the Queensland Bar in 1990, where he specialised in planning and environment law. During his time at the bar, Judge Rackemann was a Member of the Queensland Environmental Law Association's Integrated Planning Act Subcommittee (1995–2003) and the Convenor of the Bar Association of Queensland Planning and Environment Subcommittee (2002, 2003). His Honour was appointed to the District Court of Queensland in 2004 and sits in the Planning and Environment Court where he has been in charge of listings for the last three years. He is the author of papers and articles, mainly in the area of Planning and Environment Law, and with Dr Gore QC wrote 'Water Law' a chapter for *Court Forms, Precedents and Pleadings, Queensland* (Butterworths). He has a particular interest in the management of experts and is responsible for the particular regime for experts which applies in the Planning and Environment Court of Queensland.

Dr JAMES ROBERTSON, Professor of Forensics, University of Canberra

Dr James Robertson is a Professorial Fellow and Director of the National Centre for Forensic Studies (NCFS) at the University of Canberra. He joined UC after a period of over 20 years as the head of the forensic group at the Australian Federal Police (AFP). Originally from Scotland, where he lectured in forensic science at the University of Strathclyde from 1976 to 1985, he moved to Australia in 1985 and worked as a forensic scientist in South Australia from 1985 until 1989. James has remained an active researcher throughout his career and has edited or co-edited several books and numerous publications across a diverse range of interests but he is best known for his interest in hairs and fibres trace evidence. He perhaps is unique in being able to say that he appeared in court as an expert witness in every year since he started in forensic science in 1976. He has contributed to two major enquiries into wrongful convictions. He is currently the Chair of the National Institute of Forensic Sciences (NIFS) Advisory Forum, Chair of Standards Australia Forensic Committee, Vice-president of the Australian and New Zealand Forensic Science Society (ANZFSS) and President of the Australian Academy of Forensic Sciences (AAFS). He is also Editor of the *Australian Journal of Forensic Sciences*. His contribution to law enforcement and the forensic sciences has been recognised by the award of a Public Service Medal (PSM) and he was recently invested as a Member of the Order of Australia (AM).

Justice PETER MCCLELLAN Chief Judge at Common Law, Supreme Court of NSW

Peter McClellan was sworn in as a judge of the Supreme Court of New South Wales on 30 January 2001. He was the Commercial List Judge in 2002–03. On 25 August 2003 His Honour was sworn in as Chief Judge of the Land and Environment Court of New South Wales. Justice McClellan was sworn in as Chief Judge at Common Law in the Supreme Court of New South Wales on 2 September 2005. His Honour was admitted as a solicitor of the Supreme Court of New South Wales on 26 July 1974 and was admitted to the Bar on 2 May 1975. He took silk in 1985. In 1984–85 Justice McClellan was Counsel Assisting the Maralinga Royal Commission into British Nuclear Testing in Australia. In 1988–89 his Honour acted as a Judge of the District Court of New South Wales. Between 1988 and 1991 he was the President of the NSW Division of the National Environmental Law Association and, during much the same period, he was Chairman of the State Government Inquiry into Swimming Pool Safety. In 1992–93 he was Acting and Assistant Commissioner of the Independent Commission Against Corruption. In 1997 and 2000 he was appointed to supervise the statutory review of the Sydney Casino licence. His Honour was Chairman of the Sydney Water Inquiry in 1998.

CONFERENCE DINNER SPEAKER

Guest Dinner Speaker

Professor IAN FRECKELTON SC, Victorian Bar & Monash University

Ian Freckleton is a Senior Counsel in full-time practice at the Victorian Bar. He has been a part-time member of a number of Commonwealth and State tribunals, including Victoria's Medical Practitioners' Board, Disciplinary Appeals Tribunal and Mental Health Review Board. He is also a part-time Professor of Law, Forensic Medicine and Forensic Psychology at Monash University in Melbourne. He is the editor of the *Journal of Law and Medicine* and the Editor-in-Chief of *Psychiatry, Psychology and Law*. With Hugh Selby, Ian is the co-editor of the six volume looseleaf service, *Expert Evidence*, and of the 4th edition (with Hugh Selby) of *Expert Evidence: Law Practice, Procedure and Advocacy* (Thomson, 2009). He was a co-author of the 1999 and 2001 AIJA studies on judges and magistrates' attitudes toward expert evidence and is a participant in the next phase of the AIJA project in relation to expert evidence, surveying jurors, lawyers, experts and trial judges. He is also the author and editor of over 400 peer-reviewed articles and chapters and of a variety of books on causation, medical law, compensation law, coronial law, criminal law, therapeutic jurisprudence, policing, disciplinary law, and scholarly misconduct.

SESSION 5: THE RELIABILITY OF CCTV AS FORENSIC EVIDENCE

The Reliability of CCTV as Forensic Evidence

Mr GLENN PORTER, Senior Lecturer in Forensic Science, University of Western Sydney

Contemporary investigations of crime systematically examine vision captured on CCTV surveillance systems for the purpose of gaining insights surrounding the incident and to possibly identify persons of interest. Identification evidence sourced from CCTV images has recently been used during criminal trials in Australia and overseas and creates highly incriminating evidence due to the nature of this visual form of evidence. Identification methods used during these cases consist of various techniques involving the subjective comparison of anatomical features of the face and body. Identifications are established based on morphological similarities in conjunction with the assumption that these features present individualising characteristics based on natural biological variation. Identifications based exclusively on morphological comparison are highly problematic and the reliability questionable. Bertillon's method of identification using physical measurements made directly from the person (anthropometry) was found to be unreliable in 1903 when two unrelated prisoners presented with the same physical measurements (Will West and William West). Despite the abandonment of this form of objective identification in the last century, contemporary practitioners have reinvented a method that involves the subjective evaluation of morphology from CCTV images. Reliability problems arise when morphology similarities are presented as individualising features without the presence of more distinctive features such as

moles, scars, skin creases, freckles, tattoos etc. Furthermore, comparisons rely heavily on photo interpretation and an understanding of how the photographic process record or represents anatomical features within a two-dimensional media. This presentation will examine various issues associated with recent cases in Australia and overseas when using this form of identification evidence.

Glenn Porter is a Senior Lecturer in Forensic Science and Head of Program for the Bachelor of Science (Forensic Science) degree at the University of Western Sydney (UWS). Glenn teaches specialised forensic science units such as Forensic Photography, Crime Scene Investigation and Complex Forensic Case Studies. He is currently the Secretary-General of the Australian Academy of Forensic Sciences and a member of the Editorial Board of the *Australian Journal of Forensic Sciences*. Glenn has 20 years experience as a forensic practitioner and before becoming an academic at UWS, he was a forensic photographer with the Australian Federal Police. Glenn's PhD thesis is titled 'The Reliability of CCTV Images as Forensic Evidence' and his research focus is the reliability of photographic evidence including; photographic comparison and interpretation, CCTV identification, intelligence and standards, and the application of visual evidence in forensic science. He has published several papers in International journals and written chapters in books.

SESSION 6: FORENSIC VOICE COMPARISON & THE PARADIGM SHIFT IN FORENSIC SCIENCE

The New Paradigm in Forensic Science

Dr GEOFFREY STEWART MORRISON, Director, Forensic Voice Comparison Laboratory,
School of Electrical Engineering & Telecommunications, University of New South Wales

We are in the midst of what Saks & Koehler (2005) have called a paradigm shift in the evaluation of evidence in the forensic comparison sciences. This is a shift to requiring that the evaluation of forensic evidence actually be scientific, including that the procedures used be replicable, and that their validity and reliability be testable. These were requirements laid out in the US Supreme Court's Daubert decision in 1993, and validity and reliability are of primary concern in the US National Research Council's report to Congress released in February 2009. In the report, the evaluation of nuclear DNA evidence is held up as a model to emulate, and current practices in other branches of forensic science are subject to sometimes severe criticism. Over the last decade a small number of forensic-voice-comparison researchers have been working in the post-shift paradigm. They have adopted the likelihood-ratio framework for the evaluation of forensic comparison evidence, the same framework as used in DNA analysis, and they also conduct tests to evaluate the validity and reliability of their systems. However, as is typical during a paradigm shift, a large number of forensic-voice-comparison researchers and practitioners remain wedded to the old paradigm and there is considerable resistance to the implementation of the new paradigm. This paper describes some of the

essential aspects of the new paradigm as applied to forensic voice comparison and its implications for the evaluation and presentation of forensic evidence in general. It includes discussion of R v T [2010] EWCA Crim 2439.

Dr Geoffrey Stewart Morrison received his PhD from the Department of Linguistics, University of Alberta in 2006. He is currently a Senior Research Fellow and Director of the Forensic Voice Comparison Laboratory at the School of Electrical Engineering and Telecommunications, University of New South Wales, Sydney, Australia. He is also an Invited Lecturer in the Judicial Phonetics Specialisation, Master in Phonetics and Phonology, Spanish National Research Council/Menéndez Pelayo International University, Madrid, Spain, and Adjunct Associate Professor, Department of Linguistics, University of Alberta, Edmonton, Canada. He is the author of an introduction to forensic voice comparison recently published in the Thompson-Reuters *Expert Evidence* series. He is lead researcher on an Australian Research Council Linkage Project 'Making demonstrably valid and reliable forensic voice comparison a practical everyday reality in Australia' in partnership with the Australian Federal Police, the National Institute of Forensic Science, the Australasian Speech Science and Technology Association, and others.

SESSION 7: DIGITAL FORENSICS

Scales of Justice and Cell Phone Evidence

Professor **REG COUTTS**, Coutts Communications, Emeritus Professor of Telecommunications, Adelaide University

Cell phone evidence particularly with regard to location of phone calls has sometimes been referred to as 'the silent witness' to a crime scene. Call charge records of mobile phone calls accumulated for every active mobile phone contain information that identifies the physical location of the mobile phone tower that carried each call. This information has been extremely useful in many jurisdictions around the world by the police to provide a pattern of movement of suspected felons as they unconsciously make calls as they travel around the scene of interest. However, the paper will show how while this data is useful for police interrogation, the data if not presented can be unsafe to use in court as primary evidence to assert the location of an individual. The paper will review a number of cases in which such data has been used by the prosecution in an unsafe manner. The further concern with cell phone evidence is that the source of the data the telecommunications operator and expert advice provides often copious support at no cost for the prosecution and often even resists compliance to provide such data for the defence. In addition any expert evidence for the defence to interpret the data must be sought at expert consultancy rates often constrained by the need to access legal aid. The paper argues that unlike some other forms of forensics such as DNA evidence which is available to both sides from public laboratories, cell phone evidence which can be extensive and complex can severely test the balance of the scales of justice.

Emeritus Professor Reg Coutts brings over 30 years experience in the telecommunications covering 18 years in Telstra moving through the research laboratories to become the director of strategy in the early mobile communications business. Reg moved to academia in 1993 as the inaugural Professor of Telecommunications at the University of Adelaide where his multidisciplinary team worked with industry both in Australia and overseas during the first wave of spectrum management reform. Currently Reg consults to business and Government through Coutts Communications and chairs his new venture Red Button Technologies. Reg was originally educated as an Engineer and now is a graduate of the Australian Institute of Company Directors (AICD) and believes in the multidisciplinary mix in the boardroom. Reg is actively involved in developing the ICT profession and is the Director of the Telecommunications Board of the Australian Computer Society (ACS) formerly known as the Telecommunications Society of Australia (TSA). Reg was appointed to the Government's Broadband Expert Panel in 2008 which recommended the broad framework for the current NBN being rolled out and in 2010 was appointed a part time member of the ICT regulator the Australian Communications and Media Authority (ACMA).

SESSION 8: TRANSCRIPTS & LINGUISTIC FORENSICS

Transcripts and Linguistic Forensics

Dr HELEN FRASER, Consultant, Cognitive Phonetics

Transcripts of court proceedings are a cornerstone of the legal system. Appropriately, extensive processes are in place to maximise their accuracy. However, there are few standard processes for verifying transcripts of surreptitious recordings used in evidence, which are typically of far lower quality. Thus it not infrequently happens that inaccurate or unverifiable transcripts of barely audible material are treated as reliable evidence. Indeed it seems some current practices may operate not to control but to facilitate admission of unreliable transcripts as evidence. This paper offers some background on linguistic and phonetic aspects of transcription, with the aim of opening dialogue about possible means of detecting unreliable transcripts in early stages of legal proceedings.

Helen Fraser is a specialist in cognitive aspects of speaking and writing. She studied linguistics and phonetics at Macquarie University and the University of Edinburgh, and taught at several universities in the UK and Ireland before taking a lecturing position at the University of New England, NSW, which she held for 18 years. She is now an independent consultant, focusing on applications such as second language pronunciation, literacy acquisition, and forensic transcription, and currently works part time at UNE on a project titled 'Speaking and Listening in the Multicultural University'.

SESSION 9: STUDY BEING UNDERTAKEN ON EXPERT EVIDENCE IN AUSTRALIA

The Cool Crucible: Incriminating expert opinion evidence and the criminal trial

Professor **GARY EDMOND**, Director, Program on Expertise, Evidence and Law, Centre for Interdisciplinary Studies of Law, University of New South Wales University

Drawing upon recent empirical studies from Australia, England, Canada and the US, this presentation offers a critical re-assessment of the adversarial criminal trial. Focusing primarily on the reception of emerging forms of forensic science, it questions the value of traditional legal safeguards (eg, admissibility standards, judicial discretions, cross-examination, rebuttal experts and jury directions) and the ability of the various participants to manage or reliably evaluate incriminating expert opinions.

Gary Edmond is a law professor and Australian Research Council Future Fellow. He also directs the Program in Expertise, Evidence and Law in the School of Law at the University of New South Wales. Originally trained in the history and philosophy of science, he subsequently studied law at the University of Sydney and took a PhD in law from the University of Cambridge. An active commentator on expert evidence in Australia, England, and the US, he is a member of the Society for the Social Study of Science (US), a reviewer for the National Science Foundation (US), a member of the Council of the Australian Academy of Forensic Sciences, a member of Standards Australia's forensic science reference, and served as an international adviser to the Goudge Inquiry into Paediatric Forensic Pathology in Ontario. Gary is currently involved in a collaborative multidisciplinary project on expert identification evidence with other lawyers, psychologists and forensic scientists, and has published dozens of articles on law and science in leading Australian, English, Canadian, and American law, social science and forensic science journals. With Andrew Ligertwood he is co-author of *Australian Evidence: A principled approach to the common law and the uniform acts* (5th ed LexisNexis, 2010).

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