



# Expertise in Regulation and Law

*Edited by  
Gary Edmond*

APPLIED  
LEGAL  
PHILOSOPHY

# Expertise in Regulation and Law

*Edited by*

GARY EDMOND

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ASHGATE

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# Preface

The essays in this volume emerged from a conference on expertise sponsored by the ANU and held in Canberra in August 2002. The speakers were invited and each maintains a longstanding research interest in the area. After the conference the papers were reviewed and revised for publication in this collection.

I would like to thank all of those who participated in the *Law's Experts* Conference whether as speakers, respondents, attendees, organizers or sponsors. The following participants presented challenging papers, comments and ideas which helped to refine and clarify some of the issues at the heart of this collection: John Abraham, Rachel Ankeny, John Braithwaite, Chris Bryant, David Caudill, Simon Cole, Tony Connolly, Angus Corbett, Susan Dodds, Marc Eisner, Ian Freckelton, Jeremy Gans, Jane Goodman-Delehunty, Stephen Healy, Keith Houghton, Alan Irwin, Andrew Ligertwood, Mike Lynch, Leighton McDonald, David Mercer, Rosemary Robins, Tim Rowse, Colin Scott, Hugh Selby, Margaret Somerville, Jane Stapleton, David Turnbull and Judy Wajcman.

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Gary Edmond

# Abbreviations

AAAS	American Association for the Advancement of Science
ADR	adverse drug reaction
AEBC	Agriculture and Environment Biotechnology Commission (UK)
ALF	Atlantic Legal Foundation
AMA	American Medical Association
BSE	bovine spongiform encephalopathy ('mad cow' disease)
CMR	Centre for Medicines Research
CNS	central nervous system
COMAR	Committee on Man and Radiation
DNA	deoxyribonucleic acid
EBM	evidence-based medicine
EMF	electric and magnetic fields
EMS	environmental management systems
EPA	Environmental Protection Agency (US)
EWG	expert working group
FDA	Food and Drug Administration (US)
FOIA	Freedom of Information Act (US)
FRE	Federal Rules of Evidence (US)
FSE	farm scale evaluations
GM	genetically modified or genetic modification
HPS	history and philosophy of science
ICH	International Conference of Technical Requirements for Registration of Pharmaceuticals for Human Use
ICNIRP	International Committee for Non-Ionising Radiation Protection
IEEE	Institute of Electrical and Electronics Engineers Inc.
IFAR	International Foundation for Art Research
IFPMA	International Federation of Pharmaceutical Manufacturers Associations
IoM	Institute of Medicine
JPMA	Japanese Pharmaceutical Manufacturers' Association
LCGIS	London Centre for Governance Innovation and Science
LEO	Legal Ethics Opinions
MLP	multi-locus probe
NAAQS	National Ambient Air Quality Standards (US)
NAS	National Academy of Sciences (US)
NDA	new drug application
NEPT	National Environmental Performance Track (US)
NGO	non-governmental organization
NRC	National Research Council (US)
OMB	Office of Management and Budget (US)



OMB-OIRA	Office of Management and Budget's Office of Information and Regulatory Affairs (US)
PCDB	Public Consultation on Developments in the Biosciences (UK)
PCR	polymerase chain reaction
PDAC	Psychopharmacological Advisory Committee (US)
PUS	public understanding of science
QC/QA	quality control/quality assurance
RCEP	Royal Commission on Environmental Pollution (UK)
RIA	regulatory impact assessments
RF	radiofrequency radiation
SLP	single-locus probe
SPS	Shirley Primary School Trustees
SRS	spontaneous reporting system
SSK	sociology of scientific knowledge
STR	short-tandem repeat
STS	science and technology studies or science, technology and society
VNTR	variable number tandem repeat
WHO	World Health Organization

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## Chapter 1

# Experts and Expertise in Legal and Regulatory Settings

Gary Edmond and David Mercer

### Introduction

Who is an expert? How is expertise authorized? How are the opinions of one expert to be weighed against those of another? Can experts be trusted? What are the responsibilities of an expert? Are the legal and regulatory demands placed on experts distorting expert practice? How should courts and regulators deal with new technological processes and knowledge claims? What processes or institutional designs will produce the most appropriate forms of expertise? How do we prevent experts from becoming advocates or ‘hired guns’? How do our visions of society shape our responses to expertise (and vice versa)? While many of these questions are not new, what binds the contributions to this book is an empirical orientation explicitly sensitive to changing discourses about science and expertise and the emergence of new institutional forms and procedures.

Most of the chapters have been shaped by recent and intense debate over the nature of expertise (see, for example, Turner 2001; Collins and Evans 2002). Renewed interest in expertise seems to have been prompted by a series of crises, public controversies and litigation clusters, many of which are ongoing. ‘Mad cow’ disease, genetically modified organisms, environmental pollution, the regulation of domestic economies, the efficacy and distribution of pharmaceuticals, recognition of indigenous knowledges, changes in forensic science, institutional reform and the ethical dimensions of expertise have brought expertise to the forefront of contemporary politics, law and regulation. As the subject matter for this collection, these examples provide a clear indication of the continuing significance of experts and expertise in public life. Protracted controversies, unimaginative proposals for reform, the prevalence of polemical concepts such as ‘junk science’ and impediments to public participation all point toward limitations in much contemporary theory and practice.

Most commentators treat the concepts of *expert* and *expertise* as non-problematic. The concepts are presented as predetermined, temporally and spatially stable, quite often obvious, and even natural. Typically, ‘experts’ from specific fields, occupations or with special skills—perceived or represented as relevant—are identified and their ‘expertise’—whether skills, opinions, authority and so on—invoked, evaluated or criticized. *Problems* tend to arise when experts stray beyond



their *proper* sphere, *misrepresent* their knowledge or experience, *exaggerate* degrees of certitude and *disregard* the standards (or norms) of their field or profession. In contrast, the essays in this text encourage the reader to dispense with some of these commitments in order to direct attention to the roles played by experts and expertise in real world situations.

Questions around what counts as expertise and who is an expert need to be examined in *context*. What ought to be considered as ‘context’, along with its perceived significance, will vary. It will depend on the stakes involved, the issues being considered, the resources available, the strength of institutional traditions, rules and procedures, the position of institutions in the particular legal or regulatory hierarchy, the audiences, and the interests of experts and those engaging them. What we can suggest is that *expertise has no natural condition*. Definitions of expertise, like the development, mobilization, appropriation and representation of expertise, are always situated, always purposive. That some experts and some forms of expertise appear mundane, institutionally appropriate or uncontroversial should not disguise the historical emergence of different kinds of expertise, the roles of legal and regulatory institutions in the social legitimation of specific kinds of expertise, competition between individual experts or entire fields, and continuing professional and institutional dynamics.<sup>1</sup> Attention to context extends the analytical focus *beyond* the technical content of expertise.

The following essays provide a challenging response to much of the existing literature on expertise in legal and regulatory settings. Each of the studies problematizes the ostensibly orderly operation of legal and regulatory institutions, especially in relation to the roles played by experts and expert knowledge. Each, in its own way, could be read to suggest that attempts to design (or reform) institutions and procedures to produce (non-problematized forms of) *objective, neutral, impartial* or *reliable* knowledge might be incorrigible. None of the contributors makes recourse to such simplistic images of expertise, accepts expert rhetorics at ‘face value’ or adverts to the need for, or possibility of, acquiring more *objective* knowledge. To suggest that expertise, whether in courts or regulatory agencies, can be reduced to impersonal formulaic expressions trivializes or excludes the social, institutional and political dimensions which underlay the production, management and representation of all expert knowledge. Instead, these essays illustrate the complexity intrinsic to the production and use of expert knowledge during the transition from specialist to other domains—particularly policy formation, regulatory standard-setting and litigation. Consequently, our understanding of the production and use of specialized knowledges and skills is infused at every stage with potential socio-political significance.

The essays might also be read in a way that suggests the need for caution. There may be a need to temper the expectations we place on institutions, procedures, experts and decision-makers. The contributions, therefore, raise important and enduring questions about the shapes of our legal, regulatory and political institutions and the nature and roles of expertise in contemporary democratic societies (see Albury 1983; Ezrahi 1990).