Expert report under scrutiny: A discursive construction of the role of a forensic accountant expert

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by

Ilimotama Cawi

Master of Forensic Accounting with Distinction

BA (Accounting/Banking & Finance), BA (Economics/Management)

July, 2016
CERTIFICATION

I, Ilimotama Cawi, declare that this thesis, submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the School of Accounting, Economics and Finance, University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. The document has not been submitted for qualifications at any other academic institution.

______________________

Ilimotama Cawi

July, 2016
ABSTRACT

This thesis explores the role of forensic accountant experts in assisting a court in its understanding of financial transactions and other accounting-related matters including: matrimonial disputes; valuation; fraud-related matters; unexplained wealth; and confiscation of proceeds of criminal activities. Forensic accountant experts use accounting technology when reconstructing facts and requirements pertaining to the admissibility in court of the expert opinion of a forensic accountant. How a court determines what makes someone an expert through their training, education, experience, expertise; and how a court determines whether expert opinion is based on a recognised body of knowledge, is also explored. Additionally, the thesis examines the appropriateness of the methodology forensic accountant experts’ use (including assumptions) and relevance of an expert report to the specific facts of a case.

The thesis draws on case law in Australia, United Kingdom, and United States, to demonstrate the criteria the judiciary have set for acceptance of expert opinion - with a specific focus on accounting. This issue has more to do with the specifics of each individual case rather than different treatments in court. Three leading cases dealing with admissibility of expert evidence are Daubert v Merrell Dow Pharmaceuticals, Inc, 509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469, 1993 U.S. (No. 92–102) (Daubert (USA)); National Justice Compania Naviera SA v Prudential Assurance Co. Ltd [1993] 2 Lloyd’s Rep 68 (the Ikarian Reefer (UK)) and Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305; (2001) 52 NSWLR 7 (Makita Australia). These three leading cases are referred to in each of these jurisdictions.

The thesis adopts as its research framework the three-tiered framework of Critical Discourse Analysis (CDA) proposed by Fairclough (1992): analysis of discourse as text, analysis of
discourse as discursive practice, and analysis of discourse as social practice. These three tiers deal with the discursive construction of communicative processes, the pragmatics of discourse, and the interpretation of social authority in court. The sovereignty of a court is manifest in ways that are revealed through analysis of the discourse of judicial reasoning and decisions regarding the evidence of an independent forensic accountant expert witness. The thesis concludes by demonstrating the importance of the role of forensic accountant experts in assisting a court in matters pertaining to financial affairs.

The thesis contribution is threefold. First, it contributes to accounting literature on the role of forensic accountant expert in assisting a court. There is limited accounting literature on this matter. Second, the thesis demonstrates how Fairclough’s Critical Discourse Analysis can be used beneficially as a research framework in the discursive construction of the role of forensic accountant experts and the influence of a court during its decision making on different interpretations of accounting-related matters. Finally, the results of the analysis pertaining to the requirements of the admissibility of forensic accountant experts’ opinion in court will assist forensic accountant experts in performing their role of assisting a court.
DEDICATION

This thesis is dedicated to my late father, Ilimotama Cawi (Snr), and mother Veniana Cawi for teaching me to embody their vision of a better future so that they can be proud. My father once said:

“Luvequ mo maroroya na lotu mo na kune kalougata kina.”

Son, entrust your faith in the Lord’s safekeeping and it will bring prosperity.
ACKNOWLEDGEMENTS

Having a sleepless night at home in Fiji during the monster category five cyclone that battered my country was the last hurdle of my PhD journey. Without the guidance of the ‘Almighty God’, advice and assistance of the following personnel, this journey would never have been completed.

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Dr. Parulian Silaen, your words of encouragement and assistance I will never repay. It is always in my prayers that the Lord will bless you and your family. To members of the Department of Accounting and Finance and those I do not name - thank you very much for your assistance.

I wish to acknowledge my parents (Motama and Veniana) and elder brother Marika who sacrificed his education for employment to meet my educational expenses. To my late father, I wish that you were alive to witness this special moment.

Last but not the least, I acknowledge my family who kept me sane throughout this journey. My wife, Alefina Lee Cawi lived through the struggles and difficulties of family life while I was away overseas studying. I am indebted to my children Patrick, Martina, Unaisi and baby daughter Wilma for coping with the struggles when their father is away.
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<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>AASB</td>
<td>Australian Accounting Standards Board</td>
</tr>
<tr>
<td>AICPA</td>
<td>American Institute of Certified Public Accountants</td>
</tr>
<tr>
<td>APESB</td>
<td>Accounting Professional &amp; Ethical Standards Board</td>
</tr>
<tr>
<td>ASIC</td>
<td>Australian Securities and Investments Commission</td>
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<tr>
<td>BCE</td>
<td>Before Common Era</td>
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<tr>
<td>CA</td>
<td>Chartered Accountants</td>
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<tr>
<td>CDA</td>
<td>Critical Discourse Analysis</td>
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<tr>
<td>CPA</td>
<td>Certified Practising Accountant</td>
</tr>
<tr>
<td>Cth</td>
<td>Commonwealth</td>
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<tr>
<td>GAAP</td>
<td>Generally Accepted Accounting Principles</td>
</tr>
<tr>
<td>HCA</td>
<td>High Court of Australia</td>
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<tr>
<td>IASB</td>
<td>International Accounting Standards Board</td>
</tr>
<tr>
<td>NSW</td>
<td>New South Wales</td>
</tr>
<tr>
<td>POCA</td>
<td>Proceeds of Crime Act</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>USA</td>
<td>United States of America</td>
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GLOSSARY OF KEY TERMS

**Dialectic** – the art or practice of arriving at the truth by the exchange of logical arguments: for example, arguments presented by opposing parties during court proceedings.

**Dialectical relationship** – the relationship between discourse (including language but also other forms of semiosis, e.g. body language or visual images) and other elements of social practices (Fairclough 2001a, p.1).

**Discourse:** the “language use conceived as social practice”, including “visual images” and “a way of signifying experience from a particular perspective” (Fairclough 1993a, p.138). For example, the language used by the trier(s) of fact during judgement, the opposing parties during dialectical relationships in court, and forensic accountant experts using flow charts and diagrams as visual images in expert reports.

**Discursive event:** an instance of language use analysed as text, discursive practice and social practice (Fairclough 1993a, p.138).

**Discursive practice:** the production and interpretation of the text (Fairclough 1993a, p.138), for example, the forensic accountant expert opinion evidence adduced by opposing parties, and the court’s interpretation thereof.

**Expert:** persons selected by the court or parties in a cause, because of their knowledge or skill, to examine, estimate, and ascertain things and make a report of their opinions (Merlin, Report cited in Black’s Law Dictionary).

**Genre:** the “use of language associated with a particular social activity” (Fairclough 1993a, p.138), for example, the discourse used in forensic accountant expert’s opinion evidence adduced in court.
**Orders of discourse**: is the “totality of discursive practices of an institution and relationship between them” (Fairclough 1993a, p.138). For example, forensic accountant expert evidence adduced during court proceedings and arguments by opposing parties.

**Power**: refers to judicial power of a judge, expressed in the constitution such as *Australia’s Constitution*, and disciplinary power of the forensic accountant expert as a member of the accounting profession: for example, Certified Practicing Accountant (CPA) or Chartered Accountant (CA).

**Social practice**: a stabilised form of social activity including situational, institutional and societal practice: for example, court proceedings and the dialectical relationship between opposing parties.

**Trier of fact(s)**: the judge only.

**Trier(s) of fact**: these words can be used interchangeably to refer to the judge or jury, or both.
CHAPTER 1

INTRODUCTION

If the electronic money trail could talk, it would tell you to leave the electronic device alone in any situation where you suspect a fraud has been committed. This does not mean ‘do not investigate’, it means ‘do not contaminate’ (Watt 2010).

The preceding text highlights the significance of this thesis in addressing the role of forensic accountant experts in following financial trails and assisting a court in understanding financial transactions. Financial trails can extend across the globe. Successfully following these trails can unearth complex, intertwined and contaminated (tainted) transactions in accounting-related matters. While it is the role of forensic accountant experts to follow the financial trail, write a report, and assist clients or a court in explaining financial transactions, this thesis will focus on those who attend court: for example, forensic accountant experts who are engaged to appear and explain to a court complex financial transaction involving fraudulent activities.

Disputes and criminal matters that occur in everyday life are often adjudicated in court. Parties involved in civil matters sometimes settle cases outside of courts. Often, the court’s resolution relies on technical evidence. Examples of disputes and criminal matters include matrimonial, fraudulent activities, confiscation of assets and valuation of properties. Experts are engaged to investigate disputes and criminal matters and to “tell a judge or a jury what to believe, based on the expert’s opinion while all other witnesses are restricted to testimony about facts” (Smith & Bace 2003). Part of the role of a forensic accountant expert is to assist a court by explaining differing interpretations of accounting-related matters, such as accounting methods and audit processes.
This chapter proceeds as follows. Section 1.1 explores the background of the thesis. Then, section 1.2 presents the research questions. The importance of the thesis is outlined in section 1.3. Section 1.4 examines the research framework and section 1.5 outlines the structure of the thesis.

1.1 Background

This thesis explores the discursive construction of the role of a forensic accountant expert. The role of an expert is based on the use of accounting technology and practice when reconstructing facts and requirements pertaining to the admissibility of an expert opinion in court. The thesis draws on case law or court decisions in the United Kingdom, United States and Australia to demonstrate the criteria the judiciary have set for acceptance of expert opinion, with a specific focus on accounting (Appendix 1). The legislation, court rules, and guidelines in these countries are used to explain admissibility of expert evidence and the difficulties in determining whether an opinion is actually based on a body of expert knowledge. While the focus of this thesis has more to do with the specifics of each case rather than the different treatments in court, the issue is that courts deal with different cases and different interpretations. The selection of the three countries was based on three leading cases that deal with the admissibility of expert opinion: Daubert v Merrell Dow Pharmaceuticals, Inc, 509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469, 1993 U.S. (No. 92–102) (Daubert (USA)); National Justice Compania Naviera SA v Prudential Assurance Co. Ltd [1993] 2 Lloyd’s Rep 68 (the Ikarian Reefer (UK)); and Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305; (2001) 52 NSWLR 705 (Makita (Australia)).
Common Law

Common law is the “body of law derived from judicial decisions, rather than from statutes or constitutions” (Black’s Law Dictionary 2004). Decisions in common-law courts are based on legal precedent or prior decisions by judges (Craig et al. 2014). According to Ceci and Hembrooke (1998), court decisions are binding authority. Facts in the cases heard in a court should be similar in order for a court to use the legal precedent. The common-law system allows a judge to apply legal precedent from other jurisdictions to assist them in decision-making.

Australia, United Kingdom and United States are “common-law countries that have the accusatorial (alias adversarial) system” (Ceci & Hembrooke 1998, p.29). Under the accusatorial system, disputes are settled in a court through the presentation of evidence and arguments by the parties to a dispute. The trier of fact evaluates the evidence, applies the appropriate law and provides a judgement in favour of one of the parties. The role of a court is “limited to deciding who wins” (Ceci & Hembrooke 1998, p.29). Both parties have the freedom to appeal the decision by a court in a higher court.

Statutory law is also practised in Australia, United Kingdom and United States. Statutory law is the “body of law derived from statutes rather than from constitutions or judicial decisions” (Black’s Law Dictionary 2004). For example, the three countries use the proceeds of crime legislation. Common law imposes criminal responsibility to any act performed by a person (Gur-Arye 2001). According to Ceci and Hembrooke (1998), in common law countries, the role of an expert is to assist a court. For example, a forensic accountant expert is engaged to explain the facts at issue before a court. However, experts are “hired guns” in the United States, acting as advocates of the party engaging them. Forensic accountant experts can be engaged in both civil and criminal proceedings. In the twenty-first century “juries are no longer used in civil matters” and “vast majority of criminal matters are heard by a judge
sitting alone” (McClellan 2012). The continuous engagement of juries in criminal trials ensures that they play an important role in the justice system.

**Justification for analysing case law in Australia, UK and USA**

There is limited case law on the role of a forensic accountant expert in assisting a court. The selection of Australia, United Kingdom and United States was due to the availability of existing case law. The countries also practice common law allowing the courts to adopt legal precedent when scrutinizing the role of forensic accountant experts. The adoption of common law provides a consistent analysis and comparison of the role of a forensic accountant expert. Although other countries such as New Zealand also adopt common law, they have limited case law on the role of a forensic accountant expert in assisting a court. The applications of statutory laws in individual countries affect the role of forensic accountant experts because these countries apply and interpret laws differently. The findings of this thesis can be used in countries that adopt common law but not in other countries that have statutory laws only.

This case study research is qualitative, focussing on a rich description of complex situations in court. Examination of a judges’ decisions, expressed in case law, addresses how the trier of fact uses accounting discourse in forensic accountant expert reports to assist in making decisions on a specified accounting-related matter. Discourse used in court judgements has different meanings, depending on the interpretation of the user.

This thesis proposes to answer one primary and three secondary research questions through the application of Fairclough’s Critical Discourse Analysis (Fairclough 1992) in its endeavour to determine the role of forensic accountant experts. The research questions are designed to address aspects of accounting-related matters and legal requirements for the admissibility in court of a forensic accountant’s expert opinion.
Understanding financial trails is becoming a contentious issue in court for several reasons. For example, criminals continue to create new ways to hide and transact illicit gains domestically and transnationally. In civil litigation cases, married couples dispose matrimonial assets across international communities. Criminals use technology to transfer tainted assets transnationally. Following and explaining financial trails requires “scientific techniques and evidence” produced by experts who are recognised by the courts. Forensic accountant experts are recognised by courts to explain financial transactions using scientific evidence. Even though courts recognise scientific evidence, they have the authority to decide the criteria for recognising experts before expert opinion is admissible as evidence. This thesis will show the importance of having forensic accountant experts in court, the criteria for admissibility of expert evidence, and importance of expert opinion evidence.

1.2 Research framework

This thesis uses Fairclough’s (1993b) three-tier framework on Critical Discourse Analysis (CDA) as the research framework. It includes the analysis of discourse as text, discursive and social practice. Figure 1 demonstrates the framework diagrammatically and establishes a systematic method for exploring the relationship between text and social practice.

![Diagram of the three-tier framework](image)

Figure 1: The three-tier framework (Fairclough 1993b, p.73).
The analysis of case law concerns a discursive event. According to Fairclough (1993a, p.138), a discursive event is an instance of language use analysed as text, discursive practice (production and interpretation of text) and social practice (including situational, institutional and societal practice). Analysis of discourse as text is descriptive while the other tiers are interpretive (Fairclough 1993a, p.73). Discourse processes refer to the changes text encounter during production and consumption. These will be discussed in section 3.5.2 under intertextuality. Fairclough (1995, p.100) argues the nature of the discourse production process can itself be referred to the wider sociocultural practice within which it occurs.

Discourse is a complex of three elements: text, discourse practice (text production, distribution and consumption), and social practice. The analysis of a specific discourse calls for analysis in each of these three dimensions and their interrelations (Fairclough 1995, p.74). The thesis also uses Goodrich’s approach to legal analysis since the thesis draws on case law. CDA is used to demonstrate the influence of power in the admissibility of forensic accountant expert opinion evidence. To achieve this, the thesis analyses case law on accounting-related matters such as legal actions arising from proceeds of crime and forfeiture legislation, disputes dealing with the valuation/measurement of assets and matrimonial disputes. Case law was collected and analysed through a qualitative approach. The approach is used to uncover court opinions on the role of forensic accountant experts. Further, the approach examines the criteria for admissibility of expert evidence.

1.2.1 Justification for using Fairclough’s CDA

The application of Fairclough’s CDA demonstrates discourse is socially constitutive and socially conditioned. Fairclough (1993b) and Wodak and Meyer (2009) argue that CDA considers language as a form of social practice; social relations; systems of knowledge and belief; and that demonstrates a mode of action and representation. According to Fairclough
(1993b, 1995), discourse is often used for spoken or written language usage, as a form of social practice, and analysis of how texts work within socio-cultural practice. Social theory and analysis uses discourse to refer to different ways of structuring areas of knowledge and social practice (Fairclough 1993b, p.3).

Fairclough’s approach to CDA draws upon several social theorists such as Michael Halliday (concept of systematic linguistics) and Michel Foucault (concept of orders of discourse). In Fairclough’s (1993a, p.135) view, the concepts of ideology and power relations become central to the study of discourse analysis. As claimed by Fairclough (2003), ideologies are representations of aspects of the world (social identities, social relationships, and systems of knowledge and belief) which contribute to establishing and maintaining relations of power, domination and exploitation. The ideologies embedded in discourse practices are most effective when they become naturalised and achieve the status of common sense (Fairclough 1992).

Fairclough’s (1993b, p.38) framework for discourse analysis “operationalizes Foucault’s insights demonstrated in his theory of discourse in actual methods of analysis.”¹. As Fairclough notes, Foucault’s theory of discourse (order of discourse) has informed the development of Fairclough’s framework for discourse analysis. Foucault’s “abstract approach” to discourse analysis is widely referred to as a model by social scientists (Fairclough 1993b, p.37). He contributed to a “social theory of discourse in such areas as the relationship of discourse and power, the discursive construction of social subjects and knowledge, and the functioning of discourse in social change” (Fairclough 1993b, p.37-38). Foucault’s network of power is exercised through the production, accumulation and functioning of various discourses (Corson 2000). Fairclough adopted Foucault’s social theory

¹ This research uses Fairclough’s application of Foucault’s concept of power in the dissection of case law.
to explore the power of discourse as discursive and social practice. This is applied in this thesis to explore the different dimensions of discourse forensic accountant experts adopt in preparing expert opinions, and in applying discourse in accounting and the court as institutions. There is an absence of textual analysis in Foucault’s historical studies of discourse; it is currently included in Fairclough’s framework (Fairclough 1992, p.211).

The thesis also analyses the corresponding dimensions of CDA demonstrated in Fairclough (1993b). The first dimension is “description”; this is the linguistic analysis of a text. The second dimension is the “interpretation” of the discursive practice and their relationship, a process of production and interpretation to the text. The third dimension is the “explanation” of the discursive practices and social practices. The analysis is anticipated to affect how one views the world. In court, participants agree to disagree, prosecution and defense disagree, and sometimes the court disagrees or agrees with either one.

1.3 Research Questions

The primary research question addresses the role of forensic accountant experts in addressing financial matters:

How does the role of forensic accountant experts assist the trier(s) of fact in understanding financial transactions?

This thesis addresses the role of forensic accountant experts in court. For example, in cases referred to the NSW Independent Commission Against Corruption (ICAC 2013, p.12), criminals conduct illegal activities by maintaining secrecy, leaving few or no paper trails, and sometimes creating a false paper trail. They often destroy evidence to hide the money trail and forensic accountant experts are called upon to use their expertise to reconstruct the money trail (Levi & Osofsky 1995). In such cases, a forensic accountant expert can be
engaged to “unravel the financial camouflage and obstacles criminals create to disguise their illegal earnings” (ICAC 2013, p.12) and “assist the trier of fact”\(^2\) in resolving the case (Evidence Act 1995 (Cth), Practice Note CM 7\(^3\)).

A forensic accountant expert uses the facts of a specific case, and available data, to identify suspect financial transactions and activities, and form an opinion about the source of financial resources or other assets. The expert report is given to the opposing legal counsel. Forensic accountant experts are also engaged in civil suits dealing with financial disputes, for example, valuation of shares for individuals and companies, and divorce settlements. The role of a forensic accountant expert is to provide opinions discursive practices such as valuation of assets (see Figure 1), including asset measurement or valuation, and whether assets were sourced from legitimate or illicit sources. In this way, a forensic accountant expert assists the trier(s) of fact to reach a decision that is consistent with the objectives of the relevant legislation. For example, the Australian Evidence Act 1995 (Cth), in cases dealing with criminal matters.

The judge, as a gatekeeper, determines the capability of experts to provide assistance in the form of a relevant and reliable opinion regarding the issue in question (Daubert (USA)). Compliance with relevant court rules is also prominent in determining the admissibility of expert opinions. The relevance and reliability of the basis of expert opinion (including assumptions) are considered in the admissibility of the opinion, and the weight accorded to it by a court. In this regard, the subject matter of the expert opinion and underlying assumptions must be drawn from a recognisable body of knowledge that is based on the expert’s training, study or experience, accounting standards, accepted practice, other professional pronouncements and literature (Evidence Act 1995 (Cth), section 79 & 177,

\(^2\) Refers to the judge only.
\(^3\) The Australian Act & Regulation is used to demonstrate the role of forensic accountant experts.
In addition, membership of a recognised professional body, such as CPA, will assist in convincing the trier(s) of fact that expert opinion evidence should be taken seriously (Smith & Bace 2003). The weight of forensic accountant expert evidence can be enhanced through membership of a recognised professional body.

Forensic accounting engagements often deal with very complex issues. These arise because of the inherent ambiguity and flexibility of accounting methods and processes. Therefore, this adds complexity to the issue of the role of forensic accountant experts and the admissibility of their expert opinion evidence. For example, there is a long-standing and on-going measurement debate that had resulted in a lack of definitive valuation guidelines in accounting standards. Fair value is an accepted method of valuation, but it is not a precise or ‘scientific method’. In the absence of this “scientific method” within the accounting profession, valuation is determined on a case by case basis, relying on professional judgement of what constitutes fair value, and what are relevant accounting principles according to a given set of circumstances. For example, forensic accountant expert engagements requiring calculation of the present value of assets, estimates of goodwill for corporations and personal goodwill associated with valuation of a professional practice.

The complexity of asset measurement/valuation was demonstrated by Bonbright (1937). He argued that a court could value the same property in five different ways for five different valuation purposes, using 89 different valuation methods. This points to the complexity legal disputes that affect the admissibility or acceptance by a court of a forensic accountant’s expert opinion - simply because different experts will have different opinions. In the absence of accepted measurement method within the accounting framework, valuation is determined

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4 The Australian Act, Regulation and Case Law are used to demonstrate the requirement for the admissibility of an expert opinion.
on a case by case basis, relying on professional judgement according to a given set of circumstances.

Questions of the admissibility of, and weight accorded to, an expert opinion will be explored in three secondary research questions pertaining to legal aspects of accounting-related matters. The three questions are addressed using the three tiers of Fairclough’s discourse analysis. Findings from these research questions will complement and address the primary research question. The analysis does not follow the sequence in Fairclough’s framework. It will commence with analysis of the second tier: that is, analysis of discourse as discursive practice. According to Fairclough (1992), there is no procedure for discourse analysis and the sequence of analysis depends on the objective of the researcher. In this thesis, opinion evidence has to be admitted first as evidence before conducting an analysis of text that supplements the admissibility.

The first secondary research question which addresses tier two of Fairclough’s framework is:

(i) What is required to facilitate the admissibility of an expert opinion?

Expert opinion is inadmissible to prove the facts at issue during court proceedings (Australian Evidence Act 1995 (Cth, section 76)). There are certain exceptions to this opinion rule. This position “reflects the assumption that the trier(s) of fact have the competence to draw all necessary inferences where the subject matter of the inquiry is common-place” (Branson 2006, p.33). Trials of accounting-related cases are not common-place. As noted by Branson (2006, p.33), in such cases the trier of fact will “need the assistance of a person who has the relevant acquired wisdom.” This assistance complements the court’s decision to accept opinion evidence, as stated in the Australian Evidence Act 1995 (Cth). Courts encounter several difficult and recurring issues when ruling on the admissibility of expert opinion. According to Smith and Bace (2003), “the power of testimony is a two-edged sword, one that
can devastate those associated with the witness as easily as help to defend them in a criminal case or advance their just cause in civil litigation.”

Compliance with professional requirements can be viewed by a court as indicative of the ethical character of an expert and quality of the expert opinion. Professional ethics helps to facilitate the admissibility of expert opinion. For example, compliance with *APES 215 Forensic Accounting Services* and *APES 305 Terms of Engagement* is not mandatory. Nonetheless, it is persuasive and assists admissibility of expert opinion. Furthermore, the weight of expert evidence can be improved when adduced in court. Conflict of interest arising from breaching these rules of engagement will affect the credibility of the expert witness, and admissibility of an expert report in court. Providing quality forensic accounting services is important while engaged as an expert witness. The quality of forensic accounting expert services can be maintained through compliance with *APES 215*. The aim of *APES 215* is to ensure quality in the provision of ethical forensic accounting services. Further, it is important that forensic accountant experts comply with the requirements of *APES 305* when engaged by a court. Professional membership such as CPA helps to demonstrate an area of expertise, and acceptance by a court of methods and assumptions underlying valuation of accounting-related matters.

The second secondary research question addresses tier one of Fairclough’s framework. Analysis of case law focusses on accounting discourses or keywords/texts that supplement the admissibility of a forensic accountant’s expert opinion addressed in tier two.

(ii) *What is required to supplement the criteria for admissibility of an expert opinion?*

Admissibility of forensic accountant expert opinion is a matter of law. Trier(s) of fact have the role to consider the scope of admissibility of evidence. Judges use keywords during
deliberation on the scope of admissibility. These keywords are analysed during the analyses of case law. Analysis also focusses on how judges use keywords from legal precedent to support their judgement. As there often are a lot of texts adduced during the hearing of any case, trier(s) of fact consider the scope of the engagement and whether the facts of a forensic accountant expert’s opinion were outside the scope. Even if expert opinion evidence is deemed admissible by a court, it is not followed. In such instances, an analysis of discourse can reveal why the opinion of one expert is preferred over another. Therefore, it is imperative for forensic accountant experts to convince the trier(s) of fact through their testimony. The ability to communicate opinion evidence verbally and non-verbally is an important characteristic for forensic accountant experts since they need to convey key information to the trier(s) of fact. Experts need communication skills since evidence cannot speak and experts need to communicate evidence clearly in court to enable the trier(s) of fact to understand any opaque or complex financial information. Communication of evidence can be made through visual aids (such as graphs) which would allow the trier(s) of fact to understand the financial transactions. As noted by Fairclough (2001a, p.1), “CDA is analysis of the dialectical relationships between discourse (including language but also other forms of semiosis, e.g. body language or visual images) and other elements of social practices.” Courts operate in a social practice environment by complying with legislation, court procedures and codes of conduct.

The third research question explores the sovereignty of the court in addressing issues before them. Analysis of case law focusses on tier three of Fairclough’s framework.

(iii) How do the social practices of a court affect forensic accountant experts and the trier(s) of fact?
The judge has ultimate authority in court when determining the admissibility of forensic accountant expert opinion. A court can rule on the admissibility of a forensic accountant expert’s opinion by accepting everything, part of it or completely ignoring everything. The role of a forensic accountant expert is to assist the court on different interpretations of accounting related matters. However, in the United States, the role of a forensic accountant expert is to be an advocate for the party who calls him/her as a witness (Adrogue & Ratliff, 2010). The roles of the trier(s) of fact and forensic accountant experts are examples of social practices in court. These roles are based on institutional authorities, for example, the court as an institution and “accounting as an institution” (Mouritsen 1994, p.205). Trier(s) of fact as members of the court have sovereign authority while forensic accountant experts, by virtue of their knowledge, training, skill, experience and recognised expertise have disciplinary authority. Valuation of assets, matrimonial disputes, criminal activities and confiscation of assets are examples of social activities tried before the courts that require the assistance of forensic accountant experts. The decision by the trier(s) of fact will affect individuals and society, demonstrating the importance of having a fair trial in court.

1.4 Significance

The aim of this thesis is to examine the tension or challenge courts encounter when evidence concerning financial affairs is presented. Trier(s) of fact require the assistance of forensic accountant experts to understand financial transactions before judgements. Forensic accountant experts have clearly specified roles when assisting a court. The thesis also addresses the complexity of measurement/valuation of assets and other complex accounting issues. According to Branson (2006), increasingly courts are required to deliver judgements concerning complex or highly technical subject matter. In such cases, courts often require the assistance of experts to understand issues in dispute. Little has actually been written in this
area. Further, there is less evaluation of the text of judicial reports to determine the role of a forensic accountant expert in facilitating understanding of financial information.

1.5 Contribution

The thesis makes a substantial contribution to the disciplines of accounting and law. It includes the methodology, theory, literature, and practice in both disciplines. Fairclough’s three-tier critical discourse analysis can be used as a research framework in forensic accounting. This is the theoretical and methodological contribution of this thesis. Further, the thesis makes a significant contribution to literature on the role of forensic accountant experts. Literature dealing specifically with forensic accountant experts engaging in legal disputes is scarce. However, there is substantial accounting literature dealing with financial affairs in financial reporting. Practically, forensic accountant experts will understand the admissibility criteria for expert opinion. They will also know how a judge accords the weight of expert opinion. Finally, the findings of this thesis can be applied in other jurisdictions that adopt common law principles.

1.6 Structure

Chapter 2 discusses information pertaining to the historical background of forensic accounting as a legal concept. The chapter also examines the criteria for admissibility of expert opinion evidence in the United Kingdom, United States and Australia. Expert opinion is not admissible in court, for example, Australian Evidence Act 1995 (Cth). However, there are certain exceptions to this rule. For example, an expert should have the appropriate qualification based on study, training and experience.

Chapter 3 explores Fairclough’s (1992) three-tier concept of discourse analysis as the research framework. The three-tiers are the analysis of discourse as text, analysis of discourse
as discursive practice, and analysis of discourse as social practice. The thesis also adopts Goodrich’s (1984) critical discourse analysis. Further, the chapter discusses the qualitative research method and case study research strategy that are used to demonstrate the methods applied to analyse case law.

Chapter 4 examines the discursive practices or criteria courts have set for admissibility of forensic accountant expert opinion evidence. The analysis in this chapter is framed by the first secondary research question. Discussion focusses on the relevance and reliability of forensic accountant expert evidence. Courts have identified specialised knowledge based on training, study and experience as one criterion for admissibility of expert evidence. The criteria were based on legal precedent from the following cases: Daubert (USA), the Ikarian Reefer (UK) and Makita (Australia). The chapter also discusses the importance of qualification, such as diploma or university degree, and its connection to experience and training. A forensic accountant expert must also demonstrate specialised knowledge in the specific area in which expertise is required. Admissibility of expert evidence also relies on the assumptions and methodology forensic accountant experts use during investigation and formulation of their expert opinion. Forensic accountant experts have to comply with the criteria stated in the legislation, for example, in Australia, the Evidence Act 1995 (Cth) and codes of conduct such as Federal Court Rules Practice Note CM 7. Compliance with practice statements and other pronouncements issued by the accounting professional bodies provides credibility to the opinion of a forensic accountant expert, and supports claims that the opinion is based on a recognised body of knowledge and expertise. Furthermore, the discussion focusses on the independence of forensic accountant experts. The admissibility of expert evidence is considered by the court on a case-by-case basis.

Chapter 5 presents the accounting discourse or text/keywords trier(s) of fact use to supplement the criteria for admissibility of forensic accountant expert evidence (discussed in
Chapter 4). The analysis in Chapter 5 is framed by the second secondary research question. Accounting technology, for example, flow charts, diagrams and cash flow analysis are used to address the relevance, reliability and reasonableness of accounting evidence to the facts in issue. Chapter 5 also discusses the importance of forensic accountant experts in serving courts, their need to be independent and not act as an advocate of the party engaging them. However, in the United States, they are advocates of the party engaging them as witnesses.

Chapter 6 addresses the third secondary research question. It demonstrates the effect social practices in court have on the work of the trier(s) of fact and forensic accountant experts. The discussion focusses on how a court interprets the findings addressed in Chapters 4 and 5. The chapter also explores legal precedent, and the ideology the trier of facts relies upon in deliberating each case. The practices used by the trier(s) of fact in distinguishing facts of one case from another are addressed also. Discussion in this chapter also focusses on a court’s institutional authority, and a forensic accountant expert’s disciplinary authority based on accounting as a discipline. The chapter ends with a discussion of the power of the trier of fact to use their own perception. These powers are based on court rules and legislation.

Chapter 7 addresses the conclusion of the thesis. It highlights the contribution of the thesis to accounting literature, methodology and forensic accounting practice. A summary of all the chapters in this thesis are also presented. The chapter ends with discussion of the key findings, limitations of the thesis and areas for further research.

1.7 Summary

This thesis focuses specifically on the role of forensic accountant experts in assisting a court by way of expert opinion evidence. Forensic accountant experts are engaged to assist a court to help it understand financial transactions and other accounting-related matters, including
matrimonial disputes, valuation, fraud related activities, unexplained wealth and confiscation of proceeds of criminal activities.

Australia, United Kingdom and United States are common-law countries. Disputes are settled in court through the presentation of evidence and arguments by parties to the disputes. Trier(s) of fact evaluate evidence presented and apply appropriate laws to determine the winner. Both parties have the freedom to appeal court judgements. The role of an expert in common-law countries is to assist a court. For example, a forensic accountant expert is engaged to explain the facts at issue before a court. However, experts are “hired guns” in the United States, acting as advocates of the party engaging them. Australia, United Kingdom and United States also practise statutory law. For example, they use the proceeds of crime legislation. This legislation imposes criminal responsibility to any act performed by individuals.

Fairclough’s framework in discourse analysis is used as the research framework and the chapter presents an overview of the framework. A brief discussion of Goodrich’s approach to legal discourse analysis is also examined. Both approaches are further examined in chapter three.

The chapter also discussed the primary, and three secondary, research questions. The basis of the major empirical work of this thesis is formed by the primary research question. This addresses accounting-related aspects of the role of forensic accountant experts. The three secondary research questions supplement the primary research question. They focus on the admissibility and weight accorded to the forensic accountant expert’s opinion. These three questions address the three tiers in Fairclough’s discourse analysis framework. Case law analysis does not follow the sequence in Fairclough’s framework. It will commence by focussing on the second tier (discursive practise) and first secondary research question: that
is, what is required to facilitate the admissibility of an expert opinion? Then, the second secondary research question will be used to analyse the first tier (text): what is required to supplement the criteria for expert opinion? The analysis concludes by examining the third tier (social practice) using the final secondary research question; how do the social practices of the court affect forensic accountant experts and the trier(s) of fact? This question explores the sovereignty of the court in addressing financial issues.

There is limited information available to determine the role of forensic accountant experts in facilitating a court’s understanding of financial information. The aim of this thesis is to examine the tension or challenge courts encounter when evidence concerning financial affairs is presented. Trier(s) of fact require the assistance of forensic accountant experts to understand financial transactions before judgements. The complexity of measurement/valuation of assets and other complex accounting issues are also addressed. The thesis makes a substantial contribution to the disciplines of accounting and law. It includes the methodology, theory, literature, and practice in both disciplines. The chapter concludes with a discussion on the structure of the thesis.

The next chapter explores the rules for admissibility in court of expert opinion evidence. Then, the historical background of forensic accounting is examined.
CHAPTER 2
FORENSIC ACCOUNTING AND EXPERT EVIDENCE

2.1 Introduction

The “... categories of expert evidence are unlimited ...” and so are not limited to areas in which a person’s special knowledge or skill is derived from scholastic studies. As Thomas JA, with whom McPherson JA and Chesterman J agreed, said in R v Lam: “There are many fields in which an expert’s skill does not derive from scholastic studies. Examples include the practical experience of an Aboriginal tracker ..., a mechanic with much practical experience of engines ... and even the capacity of a heroin addict to identify a substance as heroin ...” (Confidential and Commissioner of Taxation [2013] AATA 112 (1 March 2013)[at 492] ) (Commissioner of Taxation).

The analysis of legal decisions undertaken in this thesis demonstrates there are many fields that do not require scholastic studies and for courts to consider various discursive practices when considering the admissibility and weight of expert evidence. For example, courts categorise expert evidence in many ways, including based on a person’s specialised knowledge, training, study or experience. Other factors such as practical experience and capacity of an individual are considered by the court, since expertise is not derived from scholastic studies alone.

This chapter explores how admissibility of expert opinion evidence evolved, focussing on the United States, United Kingdom and Australia. These countries deal with three leading cases on admissibility of expert opinion evidence. The historical background of forensic accounting and its legal recognition are also examined. Historically, accounting as a social (discursive) practice emerged and has been refined since ancient Mesopotamian and Egyptian times. It reached general (social) recognition in the 19th century when it was indirectly included in legislation calling for the keeping of accounting records and the preparation and audit of published financial accounts (May 1972, Ezzamel & Hoskin 2002, Baker 2006). Accounting emerged as a social practice in a changing and increasingly complex financial environment.
The concomitant need to facilitate the court’s understanding of financial events occurring within that environment has given rise to a new social practice - forensic accounting as the basis of an independent expert’s opinion and report. Forensic accounting is an extension of the keeping of accounting records and preparation and audit of published financial accounts. In the context of Critical Discourse Analysis (discussed in chapter 3), forensic accounting evolved from financial accounting, audit and criminology.

The chapter outline is as follows. Section 2.2 explores the emergence of laws pertaining to admissibility of expert opinion evidence in court. Section 2.3 focusses on the criteria for admissibility of expert opinion evidence. Section 2.4 examines the developments in forensic accounting as a legal practice. Section 2.5 explores autonomy and professionalism. Section 2.6 discusses the historical developments in forensic accounting. The chapter ends in Section 2.7 focussing on forensic accounting and the application of accounting technology as social practice.

### 2.2 How admissibility of expert opinion evidence evolved: USA, UK and Australia

Historically, the participation of experts in court cases dates back to the late medieval period (Jones 1994). These individuals were knowledgeable juries. As time passed, they were replaced with “silent, uninformed juries whose responsibility was to consider evidence and testimony from other participants in a trial” (Stavrianos 2011). This change established the need to have participants who have “special knowledge and specialist evidence” or expert witnesses (Stavrianos 2011). An expert witness is “one who by reason of education or specialised experience possesses superior knowledge respecting a subject about which persons having no particular training are incapable of forming an accurate opinion or deducing correct conclusions” (Garner & Black 2004).
Expert opinion evidence, based on scientific principle, was not admissible in the United States, United Kingdom and Australian courts until the early 1990’s. Courts have argued that “soft” scientific evidence or scientific expert opinion evidence will only be deemed admissible if it is accepted by the relevant scientific community. This view has changed over the years, following a series of cases dealing with admissibility of expert opinion evidence developed in the United States in the 1990s. The court’s views (legal precedent) or “discursive practices” in three leading cases (Daubert (USA), the Ikarian Reefer (UK) and Makita (Australia)) are discussed in the countries below.

2.2.1 United States of America

Expert opinion based on scientific evidence was deemed not admissible in United States courts based on the judgement in Frye v United States 293 F. 1013; 54 App. D.C. 46; 1923 U.S. (Frye). Frye (the Appellant) was convicted of second-degree murder. On appeal, it was argued evidence relating to the results of a systolic blood pressure deception test taken following the crime should have been taken into account because it provided scientific support for his innocence. The court ruled that expert opinion was inadmissible since it was based on a scientific technique generally accepted as reliable in the scientific community. Admission of expert opinion will only be based on the expert’s credentials, experience, skill and reputation. This decision, commonly known as the “Frye test” or the “general-acceptance test”, continued to be exercised in United States courts until the Supreme Court set the standard for admissibility of expert opinion in Daubert (USA). The court argued that expert opinion is admissible if: the expert has appropriate qualifications to testify on the relevant issue; if the testimony will assist the trier of fact; and if the expert’s methodology is sufficiently reliable.
In *Daubert (USA)*, two minor children and their parents (the plaintiffs) alleged in their lawsuit that their children’s serious birth defects (limb deformities) had been caused by their mothers’ prenatal ingestion of *Bendectin*, a prescription drug marketed by Merrell Dow Pharmaceuticals (the Defendant). The appellants engaged an expert. The court determined that the expert evidence did not meet the applicable “general acceptance” standard for the admission of expert testimony. The majority of the scientific field did not agree that the drug causes limb deformities. The Federal Drug Authority continues to approve of its use by pregnant women. The Court of Appeals referred to *Frye*. It argued expert opinion based on scientific technique should only be admissible in court if the technique is generally accepted as reliable in the relevant scientific community. The court must analyse “proffered expertise” and the objective of the analysis is to “ensure that what is admitted is not only relevant but reliable” - a two-prong test for admissibility of expert opinion (*Daubert (USA), Reference Manual on Scientific Evidence 2011*).

In the first evidence accepted (relevance), expert testimony will not assist the trier of fact in resolving a factual dispute unless the expert’s theory is connected sufficiently to the facts of the case (*Daubert (USA), Reference Manual on Scientific Evidence 2011*, Rule 702). Further, Rule 702 stipulates that for evidence to be relevant, it must “assist the trier of fact to understand the evidence or to determine a fact at issue.” This qualifies the expert scientific evidence to be admissible for some purposes but not for others (Welch 2006).

The second evidence accepted is reliability. The court has provided several tests to determine whether evidence is reliable and admissible in court. The court also ruled that for proffered scientific testimony or evidence to satisfy the standard of evidentiary reliability, a judge must ascertain that it was “grounded in the methods and procedures of science” (*Daubert (USA), Reference Manual on Scientific Evidence 2011*).
The trier of fact will determine and evaluate whether an expert’s opinion is grounded on a reliable foundation and based wholly or substantially on the expert’s specialised knowledge foundation (Daubert (USA), General Electric Co v Joiner (1997) (General Electric) and Kumho Tire Co. v Carmichael (1999))\(^5\) (Kumho). Experts must show that methods used to reach their conclusion “were consistent with how their colleagues in the relevant field or discipline would proceed to establish a proposition if they were presented with the same facts and issues” (Reference Manual on Scientific Evidence 2011). The expert’s methodology in subsequent cases was further tested using Daubert’s four factor reliability test: the theory’s testability; whether it was the subject of peer review or publication; its known or potential rate of error; and its general acceptance within the scientific community.

Two other cases dealing with admissibility of expert scientific evidence were tried in court after Daubert (USA). In General Electric, Joiner (the plaintiff), a heavy smoker with a family history of lung cancer, claimed he developed small-cell lung cancer from exposure to polychlorinated biphenyls (PCBs) and their derivatives “furans” and “dioxins”, manufactured by the respondent. Joiner engaged experts who testified and supported his claims. The court accepted expert scientific evidence after referring to the decision in Daubert (USA). According to General Electric, a judge is not a scientist and should be strongly encouraged to use their authority to appoint experts.

The third case also deals with admissibility of scientific evidence. This case extended the admissibility criteria to include “soft” scientific expert opinion evidence. Expert opinion evidence is deemed admissible in court regardless of the subject matter. In Kumho, the plaintiffs sued the respondent after a tyre blew out on a minivan, causing the death of one passenger and serious injury to others. The plaintiffs claimed the tyre was defective. They engaged an expert in tyre-failure to testify on their behalf. The judgement in the case

\(^5\) American case law is used to demonstrate the role of the trier of fact.
supported judgements in *Daubert (USA) and General Electric* to include “soft” scientific expert opinion. According to the Reference Manual on Scientific Evidence:

*Kumho* provides new insights into the meaning of *Daubert* and *Joiner*, and offers guidance on how federal trial and appellate courts can appropriately respond when a party seeks to exclude an opponent’s expert testimony (Berger 2011, p.10).

The “*Daubert test*” affirmed that expert opinion is admissible if the expert has appropriate qualifications to testify on the relevant issue; the testimony will assist the trier of fact; and the expert’s methodology is sufficiently reliable. The expert’s methodology could be further tested using *Daubert’s* four factor reliability test: the theory’s testability; whether it was the subject of peer review or publication; its known or potential rate of error; and whether it is generally accepted within the scientific community. The court also referred to a “two-prong test” for admissibility of expert opinion: the court must analyse “proffered expertise” and the objective of the analysis is to “ensure that what is admitted is not only relevant but reliable”.

**2.2.2 United Kingdom**

Historically, England and Wales adopt the adversary system in their civil procedures. Criminal procedures started to develop the adversary system only in the 18th century (Stavrianos 2011). According to the NSW Law Reform Commission (2005a), the earliest records of experts appearing in court for any matter date back to the 14th century. These experts appeared as juries. The engagement of expert juries was abolished formally by statute in 1971 (*Courts Act 1971 (UK) s 35(7)*). Expert opinion evidence was not admissible in United Kingdom courts until the judgement in the *Ikarian Reefer (UK)*. The plaintiffs were owners of the insured vessel the Ikarian Reefer which ran aground in Sierra Leone. Fire broke out in the vessel’s engine room and spread to the accommodation area. Under the insurance policy, the vessel was valued at US$3 million of which 87.5% was subscribed by the
insurance company (the defendant). Cresswell J in his deliberation (at p.81, col 2) addressed the duties and responsibilities of expert witnesses in civil cases.

1. Expert evidence presented to the Court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation . . .

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise . . . An expert witness in the High Court should never assume the role of advocate.

3. An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion . . .

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an expert's opinion is not properly researched because he considers that insufficient data is available then this must be stated with an indication that the opinion is no more than a provisional one . . .

6. If after exchange of reports, an expert witness changes his view on a material matter . . . such change of view should be communicated . . . to the other side without delay and when appropriate to the Court.

7. Where expert evidence refers to photographs, plans, calculations . . . survey reports or other similar documents these must be provided to the opposite party at the same time as the exchange of reports . . .

The case demonstrated the primary duty of the expert is to assist the court on matters within their expertise. Experts should be seen to be independent regardless of the pressure of litigation and produce unbiased opinions (Freckelton et al. 1999). For example, the expert must not be biased towards the party engaging them. Experts must also be thorough in their technical reasoning and tell the whole truth about matters for which they were engaged.

2.2.3 Australia

Admissibility of expert opinion in Australia was evident in Makita (Australia). Ms Sprowles (the plaintiff) successfully sued her employer for negligence and was awarded $1,153,886 in damages plus costs. The plaintiff fell at her workplace on stairs leading from a roof top car park to the office below where she worked. She engaged Associate Professor Morton, a
physicist who specialised in the investigation of slipping accidents to testify on what caused her accident. In his deliberation, Heydon JA addressed six requirements for admissibility of expert opinion evidence:

[i]f evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of “specialised knowledge”; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be “wholly or substantially based on the witness’s expert knowledge”; so far as the opinion is based on facts “observed” by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on “assumed” or “accepted” facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert’s evidence must explain how the field of “specialised knowledge” in which the witness is expert by reason of “training, study or experience”, and on which the opinion is “wholly or substantially based”, applies to the facts assumed or observed so as to produce the opinion propounded [para 85].

The spirit of case law dealing with the admissibility of opinion evidence has been incorporated in legislation including Australia’s Evidence Act 1995 (Cth). The Act expresses relevant sections dealing with admissibility of expert evidence, for example, sections 55, 56, 76, 135 and 79.

Expert opinion evidence is not admissible in court, for example, section 76 of the Australian Evidence Act 1995 (Cth). However, there are certain exceptions to this rule. The Evidence Act 1995 (Cth) also provides certain requirements for parties who would like to tender expert evidence in court. First, section 55 and 56 of the Act demonstrate expert evidence will be admissible in court if it is relevant to the determination of the facts in issue. Second, section 135 of the Act expresses that expert opinion evidence should have sufficient probative value. Finally, section 79 of the Act presents three mandatory requirements that must be satisfied before expert opinion evidence is admissible in court. These requirements determine the

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6 The Australian Evidence Act 1995 (Cth) is used to demonstrate the criteria for admissibility of expert evidence in court, later authorities.
admissibility and weight of the evidence. The provisions of the legislation are taken from case law.

2.3 Power of discourse and admissibility

Textual analysis can be used to demonstrate the power of discourse as text. This is evident when addressing power relationships in case law on the admissibility and application of an independent expert opinion to the resolution of a case. Power in discourse and power behind discourse are the two major aspects of the power/language analysis (Fairclough 1989). Power behind discourse addresses:

[h]ow orders of discourse, as dimensions of the social orders of social institutions or societies, are themselves shaped and constituted by relations of power. Power in discourse is concerned with discourse as a place where relations of power are actually exercised and enacted, for example, the court [emphasis added] (Fairclough 1989, p.36).

According to Chouliaraki and Fairclough (1999), Critical Discourse Analysis considers “discourse or language but also other forms of semiosis, such as visual images” as an element of social practice. Fairclough (2001b) and, Blommaert and Bulcaen (2000) argue the major goal of Critical Discourse Analysis is to examine the connections between language use and unequal relations of power.

When relating case law to the concepts of power, it is an expert opinion that can be accepted or rejected by a judge. In a criminal case, a judge acts as a gatekeeper, determining what the jury takes into consideration in determining guilt or innocence. This is the situation in the United States, United Kingdom and Australia, but not necessarily elsewhere. In a civil case, a judge is the trier of fact in jurisdictions in the United Kingdom and Australia. This means a judge presides over the case and reaches a decision without reference to a jury. Hence, a judge has sole power to determine the outcome of a case, including the quantum of damages awarded. In the United States, civil matters are heard before a judge and a jury. While the
jury decides the outcome of the case, a judge acts as a gatekeeper by determining the admissibility of expert opinion. In both situations the decision of a judge demonstrates the “power of language.” The power of a judge can be limited in jurisdictions where precedent applies. However, the power of discourse allows a judge to distinguish one case from another, based on the facts of the case. This coincides with the meaning of intertextuality. The acceptance, rejection and admissibility of an expert opinion about the accounting-related matter are rooted in the relationship of forces of power.

It is imperative to note from *Makita (Australia)* and section 79 (*Evidence Act 1995 (Cth)*) that specialised knowledge is based on training, study or experience of a witness and an expert opinion of a witness is based wholly or substantially on that specialised knowledge. These criteria of admissibility have been specified further in *Dasreef Pty Ltd v Hawchar* [*2011 HCA 21 (Dasreef)*]. The High Court upheld findings by the Dust Diseases Tribunal of New South Wales (“the Tribunal”) and the Court of Appeal of New South Wales that a company (Dasreef Pty Limited) was liable to pay compensation to one of its former workers (Mr Hawchar) for silicosis. In overruling the decision in the New South Wales Court of Appeal, the High Court found that consideration should not only be given to the qualifications of the expert witness, but also the manner or purpose in which expert evidence was used in court.

Expert witnesses have to comply with court guidelines such as the Federal Court Rules *Practice Note CM 7* and professional pronouncements from the Accounting Professional and Ethical Standards Board, for example, *APES 215*, in addition to the requirements for admissibility of expert opinion evidence expressed in the legislation. The role of an independent expert has been well defined in case law. In each example below, case law is

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7 The Australia Federal Court Rule is used to demonstrate the role of the expert.
8 The Australia accounting professional pronouncement is used to demonstrate the role of the expert.
specifically stated, for example, the Federal Court Rules *Practice Note CM 7*. The definition of an expert witness, and paragraph 5.4 in *APES 215* dealing with the duties imposed on a member acting as an expert witness, reflect case law, for example, paragraphs 79 and 85 of *Makita (Australia)*, and *Ikarian Reefer (UK)* paragraphs 81 and 82. The Federal Court Rules *Practice Note CM 7* does not cite *Makita (Australia)*. It cites three cases: *Dasreef*; *Evans Deakin Pty Ltd v Sebel Furniture Ltd [2003] FCA 171*; and the *Ikarian Reefer (UK)*. *APES 215* does not refer to *Makita (Australia)* or the *Ikarian Reefer (UK)*. However, the definition of an expert witness incorporates the principles enunciated in those cases, for example:

Expert Witness means a Member who has been engaged or assigned to provide an Expert Witness Service. As an Expert Witness, the Member may express opinions or provide Other Evidence to the Court based on the Member’s *specialised knowledge derived from the Member’s training, study or experience* on matters such as whether technical or professional standards have been breached, the amount of damages, the amount of an account of profits, or the amount of a claim under an insurance policy. Generally all *opinion evidence is expert evidence if it is wholly or substantially based on the specialised knowledge derived from the Member’s training, study or experience*, however not all expert evidence is opinion evidence. Expert evidence may be opinion or Other Evidence [*emphasis added*].

The duties of an expert witness as set out in *APES 215* are drawn from case law.

5.4 A Member who is acting as an Expert Witness shall comply with the following:
(a) the paramount duty to the Court which overrides any duty to the Client or Employer;
(b) a duty to assist the Court on matters relevant to the Member’s area of expertise in an objective and unbiased manner;
(c) a duty not to be an advocate for a party;
(d) a duty to make it clear to the Court when a particular question or issue falls outside the Member’s expertise.

The *Evidence Act 1995 (Cth)* also does not make specific reference to case law. However, section 79 reflects *Makita (Australia)* and the *Ikarian Reefer (UK)*.

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The implications for purposes of this thesis are that even if an expert meets all the requirements, their opinion may not be accepted by the court. Judges evaluate expert testimony differently and therefore their judgements may be different (Welch 2006). Hand (1901) acknowledged the need for expert knowledge to assist the court. He also identified two anomalies; “first, that logically the expert is an anomaly; second, that from the legal anomaly serious practical difficulties arise.” Expert evidence is not based on facts but on “uniform physical rules, natural laws, or general principles which the jury must apply to the facts (Hand 1901, p.50). It is not mandatory that the jury accepts the expert opinion and the jury may determine the possible weight of an expert opinion (Hand 1901, p.52). The court will determine and evaluate whether an expert’s opinion is grounded on a reliable foundation and based wholly or substantially on the expert’s specialised knowledge foundation (Daubert (USA), the Ikarian Reefer (UK) and Makita (Australia)).

2.4 Developments in Forensic Accounting as a Legal Concept

Accounting has a long history as a social (discursive) practice. It was practised during “7500B.C.E. when early farmers became concerned with keeping track of goods” (Schmandt-Besserat 2002). Farmers made counters out of clay in a dozen shapes and meanings were assigned to them. Shapes included cones, spheres, disks, cylinders, tetrahedron and ovoids. The practice continued four millennia later during Ancient Mesopotamian and Egyptian times; two countries that already had well established accounting practices during 3300B.C.E. and 3500B.C.E. (Schmandt-Besserat 2002). According to archaeological evidence, accountants or scribes recorded commercial monetary transactions using tokens, damp clay tablets or papyrus. Accounting was also practised during Biblical times (Ezzamel & Hoskin 2002, Baker 2006). The adoption of accounting during ancient times as a means of determining commercial monetary transactions signifies the long history of accounting
practice to determine a person’s financial position (Baker 2006). Although the term “forensic accounting” was not known during ancient times, it was evident accountants have been engaged to appear as witnesses in court in cases, including fraud and the forfeiture of properties (Nurse 2002). According to Rabinow and Hurley (1997), discursive practices are modes of manufacture of discourse, they are shaped and formed by institutions that impose and maintain them.

Accountants use double-entry bookkeeping, a discursive practice shaped and formed by accounting as an institution. Double-entry bookkeeping formed the foundation of modern accountancy. It was developed into business practice and published as a system by Luca Paccioli in 1494 (Ellerman 2014). Each business transaction is recorded as a debit and a credit journal entry. They should be equal indicating the books are balanced. Accountants engaged in any investigation use double-entry bookkeeping as an avenue of investigation.

The historically close relationship between the law and accounting was stated by Baker (1945, p.887). He argued it is:

…”assumed that clear lines mark off the functions of accountants and lawyers. Concerning corporate finance and accounts, the supposed lines are non-existent; decisions in the particular case and the ultimate working out of general principles (or "conventions") call for joint contributions from the skills and judgment of both professions. It is fortunate, therefore, that an accountant, so entirely competent to do so, has undertaken to define and analyse so many of the more difficult phases of the ever-increasing complexity of corporate accounting, and to do so in terms the legal profession can understand, and by clear and incisive writing." It is as distinctly worthwhile as it is essential to bring the two professions into a close working association, and it is not entirely to the credit of the lawyers that the most significant efforts in this direction have been by accountants [italics added].

In the United Kingdom, accounting bodies began issuing practice statements after the Royal Mail case (R v Kylsant & Otrs [1932] 1 KB 442) for the same reason. Accounting bodies in Australia used meetings to which they invited business people and politicians to overcome negativity towards auditors in the wake of the Victorian land boom in the 1880s. It was also
anticipated that accounting was used to conceal impending failures. Accountants falsified balance sheets, dividends paid from non-existent profits and misleading optimistic forecasts were published (Cannon 1972, p.28). This demonstrated that duly audited financial statements were misleading and that accounting had not served the interests of the public. According to May (1972), the Securities Exchange Commission, usually in response to criticism from government, consistently threatened to take over the regulation of accounting and auditing from accounting bodies from 1933/34 until the 1990s. May’s (1972) views helped to establish acceptance of how a member of the accounting profession could assist the court. This discourse demonstrates the evolution of recognition of forensic accounting.

Recognition of the concept of forensic accounting had its genesis in the 19th century. The term forensic accounting was unknown until the 19th century although accounting historians have unveiled references to forensic accountant experts giving evidence in the courts of Europe and Great Britain between the 17th and 18th centuries. For example, an accountant who investigated an accounting fraud identified after the stock collapse of Britain’s South Sea Company in 1720 was engaged to give evidence in court. This was history’s first records of a burst market bubble (Buckstein 2000). However, the first documented case of what would now be seen as the opinion of an expert accounting witness materialised in 1817 after a Canadian Court decision in Meyer v Sefton (1817) 2 Stark 274. Meyer was a declared bankrupt. The issue before the court was to determine the value of his estate. An expert witness who testified had examined the bankrupt’s books to ascertain the value of the property. The evidence was admissible and the trier of fact argued:

…such an enquiry could not be made in court, and therefore evidence on such a point must be given by someone who had a means of inquiry, and who could state the result [p.276].


In 1824, James McClelland of Glasgow, a 25-year old Scottish accountant, advertised his availability to provide “statements for laying before arbiters, courts or council” (Nurse 2002). The advertisement shows an early example of an accountant offering to act as an expert.

Nurse (2002) claimed Elmer Irey, chief of the US Treasury Enforcement Branch and head of the Internal Revenue Service Special Intelligence Unit was the “first high-profile forensic accountant”, even though that term was not (specifically) used at that time. He played a key role in the investigation of Al Capone, a notorious American criminal. Elmer and other employees of the Internal Revenue Service were responsible for the investigation and conviction of Al Capone for tax evasion on October 17, 1931. According to Nurse (2002), Elmer and his team “used their superior investigative and analytical skills to piece together an irrefutable chronicle of Capone’s financial malfeasance.”

Buckstein (2000) stated the Federal Bureau of Investigation (FBI) used accountants during World War II. Accountants were hired to trace potentially suspicious financial transaction dealings with enemy countries. The term “forensic accounting” was not known until 1946 when Maurice E. Peloubet, a leading 20th century accountant invented the term in New York, in his article ‘Forensic Accounting - Its Place in Today’s Economy’. Peloubet was a partner at Peloubet & Co., a public accounting firm in Pogson, New York (Peloubet 1946). Seven years later, Max Lourie, a lawyer employed in the New York Supreme Court claimed to be the first person to use the term “forensic accounting” in an article that appeared seven years after Peloubet used the term. The important issue is Lourie’s use of “forensic accounting”. He was not the first person to use this term. Interest in forensic accounting continued to spread in United States, England and around the world.

May (1972) expressed how accounting practice gained acceptance in the preparation and audit of legislatively prescribed financial statements. Accounting standards used as the basis
of recording transactions are what is an asset, liability, revenue, expense, profits, and so forth. Accounting bodies conducted various principle studies and conceptual framework projects from the 1930s onwards. Members of those bodies were the only ones capable of determining the manner transactions should be recorded, what constitutes an asset, liability and measurement (Cooper 1994). Results of the studies were provided to the Securities Exchange Commission and society.

New laws and regulations on forensic accounting, confiscation of assets, unexplained wealth and matrimonial disputes (discursive practices during ancient times) have been refined and are currently practised today. For example, the Evidence Act 1995 (Cth), Proceeds of Crime Act 2002 (Cth), Criminal Property Confiscation Act 2000 (WA), Property Forfeiture Act 2002 (NT), Family Law Act 1995 (Cth) and, Court Guidelines and Accounting Pronouncements. It is these laws and their implementation in respect of forensic accountant experts in the United Kingdom, United States and Australia, with which this thesis is concerned.

The enactment of the legislation including the Proceeds of Crime Act 2002 (Cth)\(^\text{10}\), and the need to assist the court to understand accounting transactions have increased interest in forensic accounting services. As a result, courts have now engaged forensic accountants to appear as expert witnesses. For example, in *Duke Group Limited (In Liquidation) v Pilmer & ORS (1998) 16 ACLC 567* (*Duke Group*) the court engaged forensic accountants as expert witnesses.

\(^{10}\) Division 1—Making unexplained wealth orders

179B Making an order requiring a person to appear

(1) A court with *proceeds jurisdiction may make an order (a *preliminary unexplained wealth order*) requiring a person to appear before the court for the purpose of enabling the court to decide whether or not to make an unexplained wealth order in relation to the person if:

(a) a *proceeds of crime authority applies for an unexplained wealth order in relation to the person; and

(b) the court is satisfied that an *authorised officer has reasonable grounds to suspect that the person’s *total wealth exceeds the value of the person’s *wealth that was *lawfully acquired; and

(c) any affidavit requirements in subsection (2) for the application have been met.
witnesses. Forensic accountants are regarded as professionals. The next section discusses why forensic accounting is a profession.

2.5 Autonomy

The Ancient Greek concept of autonomy is regarded as an important dimension of professionalism (Engel 1970, p.12). It means “self-law” and refers to an “individual’s ability to make a decision that is rational, informed, and not subject to coercion” (Kte’pi 2016, p.1). Individuals follow a logical process during the decision making process and the decisions are normally based on reasons and facts. The decision making process involves formulating goals, reviewing facts, observations and making final decisions. In order to make informed decisions, an individual should have the knowledge and facts in the area. Hall (1968) and Lengermann (1972) argue an individual has the freedom to make his/her own judgment in accordance with their body of knowledge. The body of knowledge can be achieved through training, study and experience.

Engel (1970) and Kalbers and Cenker (2008) argue autonomy is regarded as an important attribute of professionalism. Professionals work with members of society and their work requires specialized knowledge, skill and independent decision making. Decisions should be made freely and not subject to certain restrictions. But, according to Johnsson and Eriksson (2016, p.1), although a person has the opportunity to decide what to do in a situation that matters to him/her, the decision is “subject to certain restrictions if the decision affects the freedom and dignity of others.” Restrictions include compliance with certain rules and regulation. Decisions by professionals possess a risk to members of the public and citizens should be protected from harm. This demonstrates that members of the public are increasingly dependent upon professional services and needs to be protected. Members of the public are increasingly dependent upon professional services. The enactment of any
legislation or rules and regulation protects the public interest. Performance and decisions professionals make are subject to legislation or rules and regulation. Although individuals have the freedom to make rational decisions, their decisions or behaviours are controlled by certain laws and regulation enacted by a country, state or professional body.

The word autonomy can refer to the ability of a country or professional body to exercise their power to enact their decided rules and regulation. Autonomy focuses on power to make decisions and power is derived from rules and regulation. Further, autonomy is the state of being self-governed or having self-rule. Governments enact mandatory rules in the legislation and they have interest in professional bodies and professionals. Professional bodies are self-governed. They ensure that professional practice is conducted in accordance to the required standards, for example, the standard of work to be performed and the issue of license for relevant members. Professionals have the freedom to make decisions based on professional training, experience and skills. Although the aim of the enactment of the legislation is to protect public interest, it is “detrimental to professional autonomy since it limits autonomy, an important element of professionalism” (Engel 1970, p.12). For example, professionals should remain within the boundaries of the legislation during professional engagements.

Professional bodies promulgate their own professional standards and members are required to comply with these rules and regulations. They “operate independently from any central or controlling authority” (Kte’pi 2016). Professional bodies have the freedom to perform their responsibilities without restrictions to their actions and desires that can impact the decision-making process. According to Engel (1970), autonomy is the ability of a professional body to regulate rules that relate to the profession. These rules or standards are created to safeguard and assist members in the performance of their activities. Although, the professional bodies promulgate their own rules and regulation, the rules and regulation are subject to comply with the legislation and scrutiny by government. The activities of an individual or organisation are
controlled by law. Autonomy refers to the individual’s ability to make their own decisions without interference from their clients, non-members and employing organisations. There is a positive relationship between work experience and job performance (Kalbers & Cenker 2008). The control of the client or individual might reduce the quality of work provided. Autonomy and independence both concern the freedom an individual has in making decisions.

**Independence**

Independence is “the freedom from being governed or ruled by another” (Cambridge Advanced Learner’s Dictionary 2008). It can refer to sovereign statehood and focuses on the idea of not being dependent, but being separate and not subject to any law, rules or influence from others. Individuals or entities are free and have the freedom to make their own decisions without being subject to any rules or regulations. It is a sovereignty to make one’s own decisions and the freedom to think and act at will. Independence is the right of a competent person to make decision. According to Gelderen (2016), independence means having a free decision including freedom from your superior’s decision-making and control.

Individuals have the freedom to choose whatever they reckon is appropriate to them without following any rules and regulations. According to Johnsson and Eriksson (2016), individuals need to be self-governing, independent and free from external causation. But it is difficult for individuals to be free since their performance affects the public and it should be subject to public scrutiny (Lengermann 1972). It is difficult for any state, entity or individual to be independent since they are subject to the power of politics. Government enacts the legislation to safeguard public interest. Professional organisations also promulgate codes of conduct for professionals. Professionals cannot be independent since they are subject to the Code of ethics.
The word independent can be misleading since a person exercising professional judgement should be free from economic, financial and other relationships. This is impossible since members of the society have relationships with one another in terms of professional activities. There is a tension between the public, client and self-interest. The boundaries between these interests are opaque (Lengermann 1972). Individuals can be independent in particular circumstances but not in other circumstances. When individuals are engaged by their clients, these individuals are paid monetarily and are subject to follow their clients’ instructions. Clients have the power over the professionals. Professionals are not independent in terms of financial gains. According to Peshori (2014), “independence implies that the judgement of a person is not subordinate to the wishes or direction of another person who might have engaged him/her, or to his own self-interest.”

Institutional and personal obligations are the levels of a professional’s obligation (Abbott 1983). Institutional obligation relates to professionals’ willingness to act according to the professional standards of the profession. Professionals are required to follow the rules and regulations of the profession. Professionals should not be detached from institutional decisions or institutional service on the grounds that s/he lacks personal, political, or ideological commitment to fundamental institutional goals (Spaulding 2008).

Self-interests which relates to personal obligation threatens a professional’s independence (Gaffikin 2008). Conflict of interest arises when individuals pursue their own interest as compared to the institutional obligations. Codes of conduct are enacted to safeguard independence and an organisation’s interest. This is designed to secure public interest, faith and confidence in a professional’s engagement. Independence is structured to avoid conflicts of interest. Decisions by individuals can be dictated by self-interest. Professionals should be independent in both fact and appearance. This means that professionals should not be engaged in activities that would affect their integrity, objectivity and professional scepticism.
"A profession is defined as a community of people bounded by the activities they perform, founded on a common theoretical background acquired through formal education” (Dellaportas et al. 2005, p.58). These individuals have a common interest and have satisfied certain criteria for becoming a profession. The nature of professions revolves around the professional model which distinguishes it from other occupations (Hall 1968, p.92). The model has two basic types or dimensions; structure of the occupation and attitudinal dimension. The characteristics of the structure of occupation include “formal education and entrance requirements.” According to Dellaportas et al. (2005, p.13), professionals are:

educated to possess competence and skills to deliver their services in the public interest. They are regarded as professionals who have a fiduciary relationship with those whom they serve.

The levels of formal education are not consistent allowing individual professions to develop their own criteria. For example, some professions prefer to have a general level of education including a successful completion of high school and tertiary education. Tertiary qualifications include the award of a degree or diploma from a government recognized tertiary institution. According to (Huber 2012, p.270), “certification by itself is not the mark of a profession, but is one of several factors associated with a profession.” Other professions nominate certain subjects that individuals need to pass during tertiary studies. This is an example of the structural approach Ritzer (1975) demonstrated in the three sociological approaches for defining a profession. They are the structural, the processual and power approaches. The structural approach refers to static characteristics of professions. The processual approach refers to the stages one adopts before becoming a profession. Power approaches refer to the monopoly over work related activities and the right of having such monopoly. The processional and power approaches will be discussed later.
The attitudinal dimension of the professional model includes the “sense of calling the person to the field and the extent to which s/he uses colleagues as his major work reference” (Hall 1968, p.92). An individual becomes a member of a profession by satisfying requirements identified by the profession. These requirements include relevant skills and attitudes required for performing the work. Training and work experience in a relevant field are examples of a criteria for skills required in a profession. Goode (1960, p.903) had noted similar sentiments by stating “prolonged specialised training in a body of knowledge and service orientation” are two core characteristics of professionalism. Specialised training in a body of knowledge is an example of the processual approach Ritzer (1975) identified.

Several scholars such as Hall (1968) and Dellaportas et al. (2005) have identified certain attributes of a profession. Hall (1968) stated the attributes include full time occupation, establishment of training institutions, formation of a professional association and self-regulation, a code of ethics, services to the public, and dedication to respective duties and autonomy. Dellaportas et al. (2005) identified other characteristics including a systematic body of theory, professional authority, community sanction, code of ethics and professional culture. The characteristics are described in Table 1.

<table>
<thead>
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<th>Table 1: Defining characteristics of a profession</th>
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<td>1.</td>
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<td>2.</td>
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41
Professions are expected to have the ability to deal with important issues and work in a team environment. This is how professionals view their work. They are expected to use their judgments during decision making. Professionals have the freedom to exercise their own judgment and decision making in accordance to the rules and regulation. Kalbers & Cenker (2008) argued similar sentiments by stating personal freedom and moral are two important attributes of an individual’s performance. Personal autonomy is the “freedom to conduct tangential work activities in a normative manner in accordance with one’s own discretion” (Engel 1970, p.13). Specialised training in the relevant field gives an individual the freedom to practice in that field. Clients expect that specialised training in a relevant field improves the quality of work performed by any individual. According to Engel (1970, p.13):

> [w]ork-related autonomy for the professional is freedom to practice his profession in accordance with his training. It is this type of autonomy which appears to be important for the professional, since a loss of work-related autonomy or control to his client, or to any lay individual or group, might reduce the quality of the services he renders.

Professions develop their own code of conduct and membership. Professional membership is an example of “occupational group of the profession” (Engel 1970). The criteria for professional membership are decided by individual professions. Having a code of conduct is an example of power approach identified by Ritzer (1975). Power approaches refer to the monopoly over work related activities and the right of having such monopoly. Power is a significant dimension of professionalism.
The main function of a profession is to provide service to the public (Pound 1953). A code of conduct demonstrates a member of a profession “will offer their services to the public and work in the public interest” (Gaffikin 2008). However, there is increasing debate on what is public interest. Professions cannot satisfy individual members of the public since individuals are unique, therefore, interests amongst these individuals will be different. A professions’ code of ethics assumes there is one common public interest. For example, members of the public require professionals to display personal attitudes including honesty and transparency. The interests are incorporated in a profession’s code of conduct. It is important to note that there are other members of the public who have different interests. Public interest is also linked to political interest. Members of a profession are required by legislation to be licensed. The increase in licensing was due to the corporate collapses and the need to safeguard public interest. Professionals are not allowed to pursue their self-interest. According to Cooper and Robson (2006), the professionalisation processes are also influenced by their institutional alignment. Memberships in these professional bodies require formal education and qualification.

2.6 Historical development in forensic accounting

This section examines the historical development of the term forensic accounting, exploring its origins. In doing so, the developments of forensic accounting in the United Kingdom, United States and Australia are addressed. Case law from these jurisdictions is used to analyse the evolution of the forensic accountant expert, and how they are now differentiated from auditing. Finally, the expanding scope of forensic accounting from investigation of fraudulent activities to the investigation of financial affairs and litigation support services is discussed.
Origin of Forensic Accounting

Historically, accountants conducted investigations and appeared in court during ancient Egyptian times (Nurse 2002). They watched Pharaohs’ inventories such as grain, gold and other assets, and were called the “eyes and ears” of the Pharaoh. The practice of probity checking continued, and as discussed in section 2.4, accountants gave evidence in court in the 17th and 18th centuries. For example, an accountant investigated accounting fraud after the stock collapse of Britain’s South Sea Company.

The term “forensic accounting” was not known during this time until Maurice E Peloubet invented it in 1946. Nunn et al. (2006) and Smith (2015) also noted similar sentiments by stating “forensic” accounting was first developed in the 1900s when Federal Income Tax was adopted to curb income tax evasion. Table 2 outlines a chronology of the developments in forensic accounting.

Table 2: Developments in forensic accounting

<table>
<thead>
<tr>
<th>Year</th>
<th>Historical Developments</th>
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<tbody>
<tr>
<td>1720</td>
<td>An accountant investigated accounting fraud after stock collapse of Britain’s South Sea Company.</td>
</tr>
<tr>
<td>1817</td>
<td>First documented case of expert accounting witness in <em>Meyer v Sefton</em> (1817) 2 Stark 274.</td>
</tr>
<tr>
<td>1824</td>
<td>James McClelland advertised to provide “statements for laying before arbitrators, courts or council.”</td>
</tr>
<tr>
<td>1931</td>
<td>Al Capone was found guilty by the all-male jury (Illinois didn’t allow female jurors until 1939) and he was sentenced to 11 years behind bars and fined $50,000. Investigation conducted by agent Frank Wilson.</td>
</tr>
<tr>
<td>1935</td>
<td>Bruno Hauptmann was convicted of murder and executed. Investigation</td>
</tr>
</tbody>
</table>
conducted by agent Frank Wilson.

1939 - 1945 FBI employed about 500 accountants during World War II to examine and monitor financial transactions (Nunn et al. 2006).

1946 The term “forensic accounting” was first used by Maurice E Peloubet.

1953 Max Lourie claimed to be the first person to use the term “forensic accounting.”

2001 Enron (USA) and HIH Insurance (Australia) collapsed – investigation by forensic accountants.

2001 - 2004 Enactment of the legislation and formal education in forensic accounting in the United States and Australia.

**Historical development in the United Kingdom**

In the early 1900s, the auditor’s duty was to safeguard their clients’ assets and to detect and prevent fraud (Smith 2015). Forensic accounting then emerged to cater for fraud prevention and detection. Forensic accounting activities can involve financial investigation into individual affairs or broader issues involving company financial transactions. According to Smith (2015), the responsibility of fraud detection by auditors was fairly rejected by the 1950.

Forensic accounting in the United Kingdom has grown over the years. Chancellor of Exchequer Gordon Brown, former Prime Minister of the United Kingdom stated, “What the use of fingerprints was to the 19th century, and DNA analysis was to the 20th century, so financial information and forensic accounting has come to be one of today’s most powerful investigative and intelligence tools available” (Brown 2006). Forensic accounting has been
used in tracking transnational criminal activities, terror suspects, piercing criminal structures, tracking bank accounts and provides evidence for prosecution.

**Historical development in the United States**

United States developed the auditing profession during the early years of the 20th century and followed the United Kingdom profession in emphasizing fraud detection in corporate accounts (Smith 2015). In the 1930s, the auditing profession became standardised due to the expansion and complexity of large corporations resulting in auditing firms moving away from their fraud detection role. International investors from Europe held large holdings in the American West and accountants were hired to closely scrutinize those holdings. Smith (2015) commented the aim was to safeguard businesses expanding to North America. Accountants were also responsible for investigation into any suspected fraud. More than 500 forensic accountants were engaged during World War II by the Federal Bureau of Investigations (FBI) to examine and monitor financial transactions (Nunn et al 2006).

The origins of forensic accountants investigating criminal activities in the United States can be traced to the engagement of agent Frank Wilson by the US Treasury Department in 1914 (Dreyer 2014, Louwers 2015, Williams 2014,). Frank, a trained lawyer masterminded the financial investigation of notorious criminals Al Capone and Bruno Hauptman. Al Capone’s illegal activities include gambling houses, brothels, breweries and money laundering. Coded ledgers seized during raids on Al Capone’s illegal casinos were scrutinised to trace the financial trail of illegal activities to bank deposits. In another case, Bruno, a German-born carpenter was responsible for kidnapping and murder of the 20-month-old son of famous American aviator Charles Lindbergh. The Lindbergh family received notes requesting ransom money. Frank compared Bruno’s handwriting to those of the kidnapper and conducted net worth analysis which convinced the jury. Some of the methods Frank used
during the investigation are currently used today, while other methods have been improved through the use of technology. For example, forensic accountants use computer assisted audit tools such as IDEA and ACL to search tedious accounting records (Louwers 2015, McMullen et al 2010, Nunn et al. 2006). This is in line with the recommendations by Smith (2015), Van Akkeren (2016) and Van Akkeren (2013) that forensic accountants require computer expertise including “e-discovery, computer investigative skills and general IT skills.”

United States’ financial legislation changed after the great corporate collapses such as Enron, WorldCom Inc. and Arthur Anderson (Akkeren et al. 2016, Dreyer 2014). For example, the Sarbanes-Oxley Act (2002) and new accounting rules in SAS 99 were enacted as a result of the corporate collapses. SAS 99 stipulates specific steps auditors must follow during audit engagements. A new Patriot Act was also enacted and signed by President George W. Bush in 2001 to curb terrorist acts, money laundering and other financial crimes in the United States. The new laws increased the demand for forensic accountants due to the skills and expertise required in following the financial trails.

Forensic accountant experts were engaged during investigation into the accounting scandals in Enron and WorldCom. Experts who pierced together the financial puzzle in these companies testified during the trial (Williams 2014). The trial in the Enron case featured public scrutiny of the credibility of forensic accountant experts. It also highlights the motives and impartiality of forensic accountant experts and their evidence. For example, forensic accountant experts hired by Jeffrey Skilling and Ken Lay argued Enron complied with accounting standards. Although Jerry Arnold and Walter Rush testified that Enron conformed to GAAP, it was noted that GAAP does not facilitate a fair presentation. Actions of the forensic accountant experts symbolised they were “hired guns” or advocates of the party calling them as witnesses (Craig et al. 2014). These types of actions can create a risk that courts may not reach correct conclusions.
Adrogue and Ratliff (2000) identified six factors courts accept as admissible in a forensic accountant expert opinion. The nature of forensic accountant expert evidence presented during the Enron trial satisfied only four factors as follows:

1. The accounting profession applies a concept of “general acceptance” to its “principles”.
2. The sources of accepted accounting authority are the SEC, FASB and AICPA.
3. There is a recognised hierarchy of GAAP.
4. When the underlying subject to which a CPA’s testimony relates is based upon a substantive accounting issue, the standard reflected in GAAP may apply, making knowledge of GAAP relevant (Craig et al. 2014).

Other developments in the United States include the issue of certification in relation to forensic accounting and fraud related matters offered by two professional accounting bodies including ACFE Certified Fraud Examiners (CFE) and AICPA Certified in Financial Forensics (CFF). Universities also offered specialised certifications and forensic accounting courses. There is no government-issue licence required to enter the forensic accounting field (Van Akkeren (2013). Forensic accountants in the United States require a broad range of skills to perform the multi-disciplinary services including accounting, law, and IT. In order to meet these demands, forensic accounting firms provide professional training or employ legally educated and IT educated professionals to manage investigations and computer forensic teams respectively. For example, the FBI has a long history of hiring lawyers and accountants to provide assistance and expert advice as well as litigation support services (Williams 2014).

According to DiGabriele (2011), forensic accounting experts are classified according to the following groups; expert witness, consulting expert and fact witness. An expert witness provides an opinion or testimony in a court before the trier of fact (judge and/or jury). The expert witness acts as advocates of the trier of fact. A consulting expert provides additional
support including advice on an attorney’s work. They are advocates of the party which engages them.

Historical development in Australia

Australia adopts the Anglo-US Common Law tradition which was inherited in 1766 by the early settlers. Sections 51 of Australia’s Constitution provide powers to the Commonwealth Government and individual States. A majority of the financial and corporate practices are governed by the Commonwealth which resulted in major legal struggles between Commonwealth and States to identify an effective regulatory balance.

The country’s financial regulatory landscape changed after the corporate collapses such as HIH Insurance, One.Tel and Harris Scarf (Akkeren et al. 2016). Mandatory requirements were enacted in Australia’s Corporate Law Economic Reform Program Act 2004 (Cth). The Corporations Act 2001 (Cth) was updated to include the auditor’s responsibility to consider fraudulent activities. Accounting standards were also updated to improve the performance of the members of accounting firms during engagements. According to Akkeren et al. (2014), the legal weight of Australia’s Accounting Standards improved after the enactment of this legislation.

There was a new development in formal education in the discipline. Universities included forensic accounting degrees and fraud courses in their curriculum. Questions have been raised as to whether “university offerings provide industry with the desired knowledge, skills and capabilities the accounting profession seek” (Van Akkeren et al. 2014). The Institute of Public Accountants (IPA), CPA Australia (CPA) and the Institute of Chartered Accountants of Australia (ICAA) provide professional education and memberships to its members. Other forensic accountants are members of international accounting organisations such as the US Association of Certified Fraud Examiners (ACFE) and the Association of Certified Forensic
Investigators (ACFI). It is mandatory for forensic accountants working for government agencies to have a license provided by government organisations such as Australian State Police and Federal Police. It is not mandatory for accountants to have investigative license when employed by non-governmental agencies.

Forensic accountants operate in a reasonably complex regulatory environment covering fraud, commercial disputes and analytics areas (Akkeren et al. 2016). In order to mitigate the complexity, Australian accounting firms diversified from examination of financial documents to litigation services during the 1990s. For example, the “Big 4” accounting firms such as PriceWaterhouseCoopers, KPMG, Deloitte and Ernst and Young formed independent forensic accounting or forensic services units while the small accounting firms expanded their operations to forensic accounting and advisory services. According to Van Akkeren et al. (2014), “the multi-skilled nature of forensic accounting industry creates challengers in regard to standard setting, governance, regulation and education.” Furthermore, Van Akkeren (2013) stated, the top eight forensic accounting services in Australia are fraud investigation, expert witness services, commercial litigation and dispute services, valuation and calculation of damages, technology services, risk management, corporate misconduct and business analytics.

Forensic Accounting and Auditing

Historically, forensic accountants were employed to investigate and analyse financial documents and transactions (Williams 2006). Forensic accountants become successors of public accountants when public accountants are unsuccessful in protecting the public, for example, during financial statement frauds. Public accountants, for example, auditors and forensic accountants are professions in accounting. According to Huber (2012), any profession must be perceived by society to be an essential part of society. Forensic
accounting is a profession due to its importance to the public and the practice require highly specialised knowledge and skill derived through education and training (Van Akkeren et al. 2013). Although the criteria of becoming a profession is far from universally accepted, notable scholars such as Huber (2012) and Van Akkeren et al. (2016) have identified different attributes of the accounting profession. Horn (1978) identified seven characteristics of a profession including a commitment to high ethical standards; educational preparation and training; formal association or society; independence; and public recognition as a profession. Similarly, Carey (1969) also argued there are seven characteristics of a profession including specialised body of knowledge; a formal educational process; standards governing admission; a code of ethics; and a public interest in the work that the practitioner performs.

Forensic accounting literature defined forensic accounting in various ways signifying its complexity. According to APES 215, members perform various services such as consulting expert services, expert witness service, lay witness services and investigation services. Notable scholars such as Akkeren (2014), DiGabriele (2011) and Huber (2012) have argued forensic accounting is the application of accounting knowledge and investigative skills to identify and resolve legal issues in financial affairs. Houck et al. (2006) noted, forensic accounting “is the science of using accounting as a tool to identify and develop proof of money flow.” The tools are useful during fraud and forensic accounting investigations. According to Williams (2002), forensic accounting is a sphere of professional practice that spans the boundaries of law, accounting, business, and the economy. Bologna and Lindquist (1995) commented forensic accounting is the application of financial skills and investigative mentality to unresolved issues, conducted within the context of the rules of evidence of that country.
According to Van Akkeren (2016, p.4), forensic accountants require knowledge-based skills and personal attributes. Hopwood et al. (2008) stated “forensic accounting is the application of investigative and analytical skills for the purpose of resolving financial issues in a manner that meets the standards required by the court.” The definition does not make any reference to fraud investigations. Crumbley et al. (2009) commented:

[f]orensic accounting is the action of identifying, recording, settling, extracting, sorting, reporting, and verifying past financial activities for settling current or prospective legal disputes or using such past financial data for projecting future financial data to settle legal disputes….

The definitions signify that fraud investigation is narrow in scope and a part of the broader scope of forensic accounting (Singleton & Singleton 2006). Forensic accounting also includes the gathering of non-financial information. Di Gabriele (2010) defined forensic accounting as “confluence of accounting, economics and finance while applying an investigative mindset within the framework of a litigation setting.” Williams (2002) suggested forensic accounting provides cultural mediation for economic and political logics. Crumbley (2009) commented forensic accounting applies to the evaluation of accounting information in accordance to the generally accepted accounting principles (GAAP).

The definitions of forensic accounting by organisations and scholars include the attributes of a profession indicating forensic accounting is a profession. For example, APES 215 address forensic accounting as individuals or companies providing expert and lay witness service, consulting expert service and investigations service. The AICPA (2010) defines forensic accounting as services that involve the application of specialised knowledge and investigative skills to collect, collate, analyse, evaluate and communicate the evidence to interested parties, for example, court of law. Forensic accounting informs economic disputes while fraud investigation focuses on fraud and direct allegation of financial misrepresentation.
The most comprehensive definition of forensic accounting was provided by Huber and DiGabriele (2014).

Forensic accounting is a multidisciplinary field that encompasses both a profession and industry, where civil or criminal economic and financial claims, whether business or personal, are contested within established political structures, recognized and accepted social parameters, and well defined legal jurisdictions, and informed by the theories, methods, and procedures from the fields of law, accounting, finance, economics, psychology, sociology and criminology.

The definitions vary demonstrating that fraud examination and valuation are domains of forensic accounting. Huber (2012) stated forensic accountants have played an increasingly important role in the litigation and other legal disputes caused by corporate frauds and failures. It is the application of specialised knowledge in any forensic accounting engagement. Two major components of forensic accounting are investigative and litigation services. Investigative services deal with use of forensic accountant skills and may require courtroom testimony while litigation services involve the role of accountants as expert consultants.

Courts engage forensic accountant experts to provide litigation support and investigative accounting. Forensic accountant experts provide litigation support in civil cases (such as quantifying economic damages in cases involving a breach of contract, motor vehicle accidents and matrimonial disputes). Investigative accounting often involves a criminal-related investigation concerning matters including fraud, money laundering and unexplained wealth. Forensic accountant experts are required to offer opinion in social practices including fraud, divorce, bankruptcy, matrimonial disputes, insurance casualty claims, wrongful death suits, personal injury claims, motor vehicle accidents, professional malpractice, business losses, professional negligence, shareholder and partnership disputes, business valuations tied to a sale, and commercial litigation. This demonstrates that forensic accounting involves a wide range of social activities and forensic accountant experts prepare expert reports on
matters pertaining to social activities. Forensic accountants make no assumptions, are more sceptical and proactive in their approach as compared to auditors (Crumbley & Apostolou 2002).

An auditor’s duty is different from a forensic accountant’s responsibilities. According to Skalak et al. (2011), an auditor’s duty is similar to that of a police patrolman while a forensic accountant’s role is similar to that of a detective. A forensic accountant, like a detective investigates fraudulent activities and attends court. In contrast, an auditor, like a police patrolman “sits outside the client company looking at its operations” and recommends any controls and improvements to client operations. An auditor assumes client firms comply with GAAP and uncovers deviations from it. S/he also verifies that client firms have accepted accounting and auditing practices used in preparation of financial statements (Crumbley & Apostolou 2002). S/he also follows guidelines specified in the generally accepted auditing standards (GAAS).

2.7 Forensic accounting as a social practice


[t]he hallmark of a profession is the belief that it is an occupation of considerable public importance, the practice of which requires highly specialized, even esoteric, knowledge that can be acquired only by specialized formal education or a carefully supervised apprenticeship, hence an occupation that cannot responsibly be entered at will but only in compliance with a specified, and usually, exacting protocol and upon proof of competence. Because of the importance of the occupation, and therefore the professional's capacity to harm society, it is often believed that entry into it should be controlled by government: that not only should the title of [forensic accountant expert] etcetera be reserved for people who satisfy the profession's own criteria for entry to the profession, but no one should be allowed to perform the services performed by the members of the profession without a license from the government. For the same reasons (i.e.,
the profession's importance and its capacity to do harm), but also because the arcane skills of the professional make his performance difficult for outsiders to monitor and therefore facilitate exploitation, it is usually believed that the norms and working conditions of a profession should be such as to discourage the undiluted pursuit of pecuniary self-interest [italics added].

The importance of professional membership, knowledge, training, and education in a specified field carries questions of admissibility of expert opinion. It is appropriate to outline how accounting bodies achieved social recognition and dominance as a profession to enable them to determine appropriate accounting practices in the preparation of financial reports. Social acceptance of forensic accounting could not have been achieved if this had not occurred. For example, accounting, through the audit requirement in Corporations Law, gained social recognition/acceptance. However, as indicated by May (1972), for accounting practice to gain the same recognition, accounting had to be recognised as a profession. The professionalisation literature, (for example, Posner (1999)) specifies a profession as opposed to an occupation. A profession is based on a body of esoteric knowledge formulated within a theoretical framework. For example, Lubell (1978, p.62-63) drew on Montagna (1968), Barber (1963) and Greenwood (1957) to describe the process as follows:

[b]ecause professional services are built upon esoteric knowledge; the public tends to regard members of a profession with a certain degree of mystique. It is felt that the professional practitioner is better prepared than the client to determine the client's needs and the nature of services appropriate for a given situation. The client does not tell the professional what services are required. Rather, the professional tells the client what services are necessary.

Similarly, Goldstein (1984, p.175) argues that the possession of "a body of esoteric knowledge" is essential to the designation of a profession:

... the sociological conception of a profession posits a previously given intellectual core and a subsequent, multifaceted social process which takes place around that core: the application of the body of knowledge to social needs; the social strategies by which a certain group comes to monopolise that application; the prestigious social niche which that group carves for itself, in part a function of that contact with the world of learning which serves as the basis of its claim to
have been elevated above mercantile concerns and to have become a kind of secular analogue of the clergy [bolding and italics in original in earlier uses].

The discourse demonstrates that members of a profession develop esoteric knowledge of their particular field through specialised formal education, extensive training and experience. For example, forensic accountant experts require unique work-based skills and personal attributes gained through qualification and training (Makita (Australia)).

This thesis explores the esoteric knowledge of forensic accountant experts as detailed by the courts. The thesis also expounds the different types and standards of qualification, education, training and experience of forensic accountant experts and decisions of courts in weighing expert opinion evidence. Courts have the power to accept or disregard forensic accountants’ expert opinion. The powers of a court are determined through the application of Fairclough’s three-tier Critical Discourse Analysis (discussed in chapter 3) - the research framework of this thesis. Critical Discourse Analysis is the study of a social phenomenon. It addresses social questions concerning discourse and power in social class (Chouliaraki & Fairclough 1999, Wodak & Meyer 2009).

Accounting is complex. When using accounting technology to calculate the value of assets, forensic accounting experts become “official communicators of reality”, demonstrating accounting as a social practice (Hines 1988, p.255). Forensic accounting is the application of any accounting technique for courtroom purposes (Nicholas et al. 2009, DiGabriele 2011, Sanchez & Wei Zhang 2012, Van Akkeren et al. 2013). Forensic accountant experts testify in court, prepare expert opinion evidence, and assist the court to understand accounting and financial issues (Heitger & Heitger 2008). According to Lubell (1978), the professional practitioner is better prepared than the client to determine the client’s needs and the nature of services appropriate for a given situation. A forensic accountant expert’s testimony should assist the trier of fact in making decisions on any scientific connection to the facts in issue,
including matters of relevance and reliability. In some cases “those decisions impact the survival of an enterprise, future rights, or the livelihood of others” (Preber 2014, p.3). Forensic accountant experts have to be aware that their opinion will be scrutinised by opposing forensic accountant experts and attorneys whose aim is to discredit their expert opinion. This is practiced in the United Kingdom and Australia. However, in the United States, forensic accountant experts are advocates of the party engaging them. Case law (for example, R v Cox (No 1) [2005] VSC 157) demonstrates acceptance by the court of pronouncements by accounting professional bodies as evidence of expert knowledge and practice. Forensic accounting is a profession by virtue of the court’s recognition of accounting concepts and principles.

Forensic accountant experts do not accept financial information at face value. They use accounting, auditing and investigative skills to assist in legal matters and financial disputes. Forensic accountant experts search for evidence to support or refute allegations of fraud or misconduct and actions taken to determine the amount of damages. Further, forensic accountant experts perform engagements including determining amounts misappropriated by fraudsters, valuation of matrimonial assets and following the financial trail. As discussed by Posner (1999), Lubell (1978) and Goldstein (1984), this is the role of an individual with "a body of esoteric knowledge", not a lay person. It is imperative forensic accountant experts are independent in their work. They should demonstrate independence of mind and appearance. Independence of mind is the “state of mind that permits the expression of a conclusion without being affected by influences that compromise professional judgement, thereby allowing an individual to act with integrity, and exercise objectivity and professional scepticism” (APES 110). Independence in appearance is the “avoidance of facts and circumstances that are so significant that a reasonable and informed third party would be likely to conclude, weighing all the specific facts and circumstances, that a “forensic
accountant’s “integrity, objectivity, or professional scepticism has been compromised” (APES 110, APES 215).

Forensic accountant experts have a body of esoteric knowledge. They gather facts relating to accounting-related matters, using methods drawn from accounting practice and legislation (Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)). Furthermore, forensic accountant experts comply with regulations derived from legislation and legal precedent. For example, the Australian Evidence Act 1995 (Cth) and Makita (Australia). Legislation and legal precedent are examples of a body of esoteric knowledge by legal practitioners and judges. It is mandatory for forensic accountant experts to comply with these laws. This is an example of how members of accounting bodies use discourse to establish accounting as a profession equipped to determine acceptable accounting and auditing principles and practices. Forensic accountant experts comply with accounting standards and laws or rules of evidence during the extraction of accounting facts to enhance the validity and admissibility of facts during court proceedings. This will be discussed further during the application of Fairclough’s three-tier framework in chapter 3.

Several contentious issues in court arise from “following-the-money-trail” to prove the ownership of specific assets by individuals. For example, those arise with matters concerning matrimonial assets and unexplained wealth11. The intent is to deter criminals from profiting through illegal activities. This is the “hallmark of a profession” (Posner 1999) - a matter “of considerable public importance.” The admissibility of, and weight accorded to, a forensic accountant’s expert report is determined by a trier of fact. This is despite the courts’ lack of expertise and difficulties in understanding financial issues in question. For example, financial

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11 Unexplained wealth is the value of an individual’s total wealth which is greater than the value of wealth acquired through legal means (Criminal Property Forfeiture Act 2002 (Northern Territory), ss. 68(1) & 69).
crimes often involve large volumes of complex transactions. This makes crimes difficult to trace, since perpetrators often conceal financial facts through obfuscating transactions (Brooks et al. 2005). The complexities of accounting measurement issues are further compounded by a court selectively picking and choosing opinions or parts thereof. The choice of measurement is contentious too. The trier-of-fact’s selection of opinion(s) is subjective. Forensic accountant experts should be able to provide evidence that details the financial trail of the issues in question. Although the role of forensic accountant experts and the law are disparate, a description has been offered for them. Mill’s (1860, p.3) idea is applicable in some way, since both the trier of fact and forensic accountant experts have a duty to “form the truest opinion they can; to form them carefully, and never impose them on others unless they are quite sure of being right.”

The preceding discussions demonstrate accounting as a social practice and as a profession. Acceptance and recognition of accounting concepts and principles by a court signal the acceptance of forensic accounting as a profession (discussed in section 2.6). This thesis on the role of forensic accountant experts in assisting a court also examines power relations in court, the objective of Critical Discourse Analysis. Accounting and forensic accounting both meet the requirement of a social practice in Critical Discourse Analysis.

2.8 Summary

The historical background of forensic accounting as a social practice demonstrates accounting was first practised during the ancient Mesopotamian and Egyptian times. Forms of accounting are evident in all ancient civilisations. Social recognition of accounting emerged in the 19th century with, for example, legislation prescribing the preparation and audit of financial reports. The role of forensic accountant experts is to assist a court to judge social practices, including matrimonial disputes, fraud, valuation and confiscation of assets.
Forensic accounting is a profession. According to Dellaportas et al. 2005, p.58, “a profession is defined as a community of people bounded by the activities they perform, founded on a common theoretical background acquired through formal education.” These individuals have a common interest and have satisfied certain criteria for becoming a profession. It includes qualification, training and experience. A profession also have various attributes including full time occupation, establishment of training institutions, formation of a professional association and self-regulation, a code of ethics, services to the public, and dedication to respective duties and autonomy (Hall 1968). Professionals have the freedom to exercise their own judgment in accordance with their body of knowledge. Members of the public depend on decisions professionals make. It is imperative that decisions professionals make comply with the legislation, accounting pronouncements and rules and regulation. These decisions affect members of the public who needs to be protected. The enactment of any legislation or rules and regulation protects public interest.

Expert evidence is not admissible in Australian courts under section 76 of Evidence Act 1995 (Cth). However, there are exceptions to this requirement stipulated under section 79 of Evidence Act 1995 (Cth). Three leading cases dealing with admissibility of expert evidence in courts in the United States, United Kingdom and Australia are (1) Daubert (USA); (2) the Ikarian Reefer (UK) and (3) Makita (Australia). In these cases expert opinion was only admissible in court if the expert has appropriate qualifications based on training, study, and experience. Methods adopted by a forensic accountant should be accepted by the scientific community. Furthermore, evidence is relevant and reliable to the facts at issue. The High Court of Australia in Dasreef added that courts should also consider the manner or purpose in which expert evidence is used in court, in addition to the qualification of the expert. It is also important experts comply with court procedures and pronouncements.
Forensic accountant experts in Australia and United Kingdom are advocates of the court. However, forensic accountant experts are advocates of the party engaging them in the United States. For example, forensic accountant experts who testified for the defendant in the Enron case argued that the accused complied with GAAP. Financial legislation in the United States changed after Enron collapsed. For example, Sarbanes-Oxley Act (2002) and new accounting rules in SAS 99 were enacted. SAS 99 outlines specific steps auditors must follow during audit engagements. A *Patriot Act* to curb terrorist acts, money laundering and other financial crimes in the United States was also enacted 2001.

The next chapter addresses Fairclough’s three-tier discourse analysis as the research framework for this thesis. The application of each tier is discussed, together with Goodrich’s Critical Discourse Analysis. The chapter also explores Critical Discourse Analysis and qualitative research strategy as methods for analysing primary and secondary data.
CHAPTER 3

RESEARCH FRAMEWORK

3.1 Introduction

This chapter addresses the theoretical and methodological approach to the thesis, the rationale
for choosing the methodology, and the nature of the methods used. Critical Discourse
Analysis (CDA) is used as a methodology; that is a “theory of how inquiry should proceed”
(Schwandt 2007, p.193). Goodrich (1984c, p.523) argued that “linguistic methodology may
also aid in the practical endeavour of explaining the intricacies of rule interpretation and rule
application.” Critical Discourse Analysis explains how a judge interprets and applies rules
pertaining to issues of interest. Bazeley (2013) and Neuman (2014) assert that methods are
the tools or specific techniques employed by a researcher to identify and investigate a
problem, determine what makes it a problem, demonstrates how it is a problem worthy of
research, and what is needed to do so, and to collect, analyse and report on data.

Critical Discourse Analysis is useful for qualitative research of complex situations, since it
provides rich descriptions. According to Wodak and Meyer (2009, p.5):

CDA has never been and has never attempted to provide one single or specific
type. Neither is one specific methodology characteristic of research in CDA.
Quite the contrary, studies in CDA are multifarious, derived from quite different
theoretical backgrounds, oriented towards different data and methodologies.

Critical Discourse Analysis brings social theories and linguistic theories into dialogue
(Chouliaraki & Fairclough 1999). It highlights social life as social practices, and discourse as
an element of social practices involved in “dialectical relationships” (Fairclough 1993b,
Wodak & Meyer 2009). For example, the adducing of forensic accountant expert evidence in
court demonstrates a dialectical relationship between individuals and companies. The
discourse in a forensic accountant expert’s report is shaped by the social structure of the court system which internalises the expert report.

While analysing case law, the thesis uses Fairclough’s (1993b, 1995, 2001b) three-tiered framework of analysing discourse: analysis of discourse as text, discursive practice, and social practice. These three tiers relate to communicative processes in court, the pragmatics of discourse, and the interpretation of social power. The chapter concludes by demonstrating the way in which the admissibility of expert opinion evidence has been shaped by discourse.

The power of a court/law is revealed by an analysis of the discourse of judicial reasoning and decisions regarding the evidence of an independent forensic accountant expert witness. According to Goodrich (1984a, p.189):

> [s]emantic appropriation is, in brief, the power of the legal text to define its own, very narrow, conceptions of meaning, and simultaneously to exclude alternative meaning, accents and contexts.

Goodrich (1984a, p.192) articulated legal discourse embrace the interrelationships of power and truth or knowledge through evidence. Legal discourse is a language of power, it also addresses the delimitation of power (refer to section 3.4 for further discussions).

In this thesis, power/authority comes from the duties and responsibilities delegated to a position holder to make decisions: for example, the power/sovereignty of the court (Goodrich 1984a). The judge/court has sovereignty over legislative interpretation to recognise the power of a court in interpreting legislation and distinguishing the facts of one case from those of another, effectively providing an interpretation of precedent (Archer 2002). Forensic accountant experts are authorised by legislation and case law to proffer opinions to a court dealing with matters within their area of expertise, education and training (Evidence Act 1995 (Cth), Daubert (USA); the Ikarian Reefer (UK)) and Makita (Australia). As discussed in
chapter 2 section 2.3, an expert is authorised to give opinion evidence in court if the expert has knowledge, skill, training and expertise relevant to a specific set of facts in a specific context. This thesis addresses how Critical Discourse Analysis makes evident the influence of authority on the determination/formulation of rules of evidence. The thesis also examines power relations in issues surrounding education, training and experience. The strength/authority of each of these in a particular case depends on how the trier(s) of fact interpret them. According to Fairclough (1989), Critical Discourse Analysis emphasises the power behind discourse rather than just the power in discourse. This is how people with power shape the ‘order of discourse’ as well as the social order in general, versus how people with power control what happens in specific interactions.

The chapter outline is as follows. Section 3.2 presents an overview of Critical Discourse Analysis. Section 3.3 examines examples of studies in accounting and law that have adopted Fairclough’s three-tier framework. Section 3.4 explores how Fairclough adapted Critical Discourse Analysis to develop his three-tier framework (Fairclough 1993b, 1995, 2001b). The section also discusses Goodrich’s legal discourse analysis. Section 3.5 examines the application of the framework in forensic accounting demonstrated during the dissection of case law. Section 3.6 addresses data collection and analysis issues.

3.2 Critical Discourse Analysis

Critical Discourse Analysis emerged in Europe in the early 1990s by Norman Fairclough (1993b) (Three-tier framework), Ruth Wodak (1996) (Discourse Sociolinguistics), Teun van Dijk (1985) (Socio-cognitive Model) and others. Since then, Critical Discourse Analysis has become an influential paradigm of discourse analysis internationally. The theories upon which Critical Discourse Analysis are based and the methods it uses have not been “explicitly
and systematically spelt out” (Chouliaraki & Fairclough 1999, p.1). The purpose of Critical Discourse Analysis is to:

[s]ystematically explore often opaque relationships of causality and determination between (a) discursive practices, events and texts, and (b) wider social and cultural structures, relations and processes; to investigate how such practices, events and text arise out of and are ideologically shaped by relations of power and struggles over power; and to explore how the opacity of these relationships between discourse and society is itself a factor securing power (Fairclough 1995, p.132-133).

According to Fairclough (1993b), individuals’ interpretations and subjective views shape their language and conduct. Their experience as reality is constructed from the outcome of a constant process of actions and interpretations. It is impossible to create general laws of social life and laws that govern all people and places. Carefully considered interpretations of specific people in specific settings is the best knowledge about the world one can produce (Neuman 2014). It is impossible to have one law for all people. One has to think about how social practices within that society are constructed for the cohesion of a society based on particular values, behaviours and beliefs (Fairclough 1993b).

### 3.2.1 Application of Critical Discourse Analysis

The application of Critical Discourse Analysis in this thesis is based on the philosophical assumptions of critical accounting research. Critical theory is a brand of social philosophy which seeks to operate simultaneously at philosophical, theoretical and practical levels. The theory lays the foundations for human emancipation through deep-seated social change (Burrell & Morgan 2001). The importance of critical theory as applied to accounting is its technical role, concept of value, accounting calculus and wealth transfer, and “ideological ideas embedded in mainstream accounting thought” (Chua 1986).

Critical Discourse Analysis is significant in determining the role of forensic accountant experts in court. As Wass (2015, p.3) argues, “scientific findings are not some universal truth
handed down from the heavens”. A court can rule an opinion is not admissible. Even if an opinion is admissible, a court does not have to accept it. According to Kirby (2011), the way in which judicial reasoning operates in Australia today:

[i]s no longer based, in civil trials, on intuitive responses founded in the impression of witnesses. Nor is it now based on jury verdicts. It is based now (as in my opinion it should be) on the logic of the circumstances; by the trail left by correspondence and email records; by the believable testimony about contemporaneous conduct; and by the assessment of the entirety of the facts.

3.2.2 Significance of Critical Discourse Analysis

Titscher and Jenner (2000), Wodak (1996) and other notable scholars have offered some reasons for using Critical Discourse Analysis. Titscher and Jenner (2000) and Wodak (1996) argued, Critical Discourse Analysis relates to social problems and the linguistic character of social and cultural processes. This thesis uses their work to justify the use of Critical Discourse Analysis. A forensic accountant’s expert report deals with social problems, for example, fraud and disputes. The resolution of social problems such as these lies with the law. The opinion by a forensic accountant expert is formed by accounting practice. The character of accounting and law is linguistic (Belkaoui 1978, Schane & Shuy 2006).

3.3 Application of Fairclough’s Critical Discourse Analysis in Accounting Research

Historically, research in accounting concentrated primarily on explaining what happened in the past, rather analyse how and why accounting practices have developed and influenced society (Stewart 1992). More recently, accounting researchers such as Gallhofer et al. (2001), Llewellyn and Northcott (2005), Craig and Amernic (2004), Seal (2010), Nielsen and Madsen (2009) and Cortese et al. (2010) have used Fairclough’s Critical Discourse Analysis
in their studies of social issues, management and financial accounting, and standard setting processes.

While studying social issues, Gallhofer et al. (2001) analysed Fairclough’s three-tiers: analysis of text, analysis of discourse and analysis of social practice in their study of the struggles over takeover legislation in New Zealand. Llewellyn and Northcott (2005) studied the use of the National Reference Costing Exercise (NRCE) to benchmark hospital costs in the UK after Government introduced it in 1998. They analysed “text and talk in relation to issues of control, power and resistance” common in average hospitals, but frequently “masked by ostensibly neutral language” (2005, p.563). Craig and Amernic (2004) examined discursive struggles surrounding the privatization of Canadian National Railway (CN). Accounting language, concepts and information deployed by Paul Tellier, CEO of CN were analysed with a particular focus on text from Tellier’s article in CN’s monthly internal employee newspaper. Burchell and Cook (2006) applied Fairclough’s Critical Discourse Analysis framework to demonstrate that the discourse surrounding corporate social responsibility (CSR) has broader implications. They found CSR provides new opportunities for social actors to “assimilate strategies” (such as companies emphasising their ability to act responsibly as corporate citizens). This enables social actors to “scrutinise, question and oppose the business practices of global corporations and challenging them to prove that there is more to CSR than merely corporate rhetoric” (2006, p.121).

Other researchers used the framework to study management accounting. Seal (2010) investigated the influence of management accounting concepts on practice. He noted “the way that academic theories in management accounting affect practice depends on the origin of the early texts, the extent to which the texts become discourses and the relative institutional support for the discourse” (2010, p.1).
Fairclough’s three-tier framework has also been used in studying financial accounting and standard setting processes. Ferguson et al. (2009) analysed the typical modes of ideology in introductory financial accounting textbooks and training materials. Nielsen and Madsen (2009) examined the intellectual capital reporting debate. They did not systematically scrutinize journals, for example, but focussed on texts that suggested ways of creating visibility of the invisible. Gray (2010) explored accounting for sustainability by examining the meanings and contradictions of sustainable development. In doing so, he provided a nuanced understanding of sustainability. Cortese et al. (2010) studied the influence of powerful “actors” above players in the setting of International Financial Reporting Standards (IFRS) 6. Zhang and Andrew (2016) analysed the adoption of fair value accounting in China in the context of the three tiers in Fairclough’s model. These studies demonstrated that the application of Fairclough’s three-tier framework of discourse analysis depends on the areas of research and objectives of the researcher.

3.4 Fairclough’s Three-tier Framework and Goodrich’s approach

Goodrich (1984a, 1984b, 1984c, 1987) provided a critical account of the relationship between language and law. He argued that law, as a species of discourse, is responsible for its political and social context. The law can also be analysed using Critical Discourse Analysis. Goodrich’s approach provided:

a critical linguistic methodology [that] can read within the structure of legal discourse, with the … political affinities and conflicts that led to the emergence of the myth of law as a unitary language and as a discrete scientific discipline. [Goodrich’s study] contributed to the deconstruction of that myth and to its displacement by a more adequate and critical concept of legal discourse as a language of power, as the pursuit of control over meaning and as instrument and expression of domination (1987, p.ix) [italics added].

Figure 2 demonstrates diagrammatically the relationship between Fairclough’s framework and Goodrich’s approach in legal discourse analysis.
Figure 2: relationship between Fairclough’s framework and Goodrich’s approach
According to Goodrich (1984a, p.192):

[legal discourse … is wholly imbricated within the interrelationships of power and truth or knowledge. Even in terms of its self-articulation, legal discourse is paradigmatically concerned with truth, both in terms of evidence or verification, and also, more generally, in terms of the definition or delimitation of power and powers in the discourse of the rights, duties, capacities and procedural forms generally of both public and private law [italics added].

Goodrich (1987, p.7) continued by arguing that legal practice and discourse is structured to be understood by specialists in the legal field.

[S]ocial practice is founded upon an ideology of consensus and clarity – we are all commanded to know the law – and yet legal practice and legal language are structured in such a way as to prevent the acquisition of such knowledge by any other than highly trained elite of specialists in the various domains of legal study [italics added].

To understand the complexity of legal practice and discourse, it should be viewed as the study of legal texts as communication process. As noted by Goodrich (1987, p.7), legal study:

requires a critical and interdisciplinary approach to legal texts, the analysis of law as a social discourse, as a rhetoric or dialogue between legal speaker, legal institution and the various codes, contexts and audiences of the law.

Fairclough (2005b) noted texts are micro-level discourses located in the macro-level discourses. Discourse refers to the “language use conceived as social practice” including “visual images” and “a way of signifying experience from a particular perspective” (Fairclough 1993a, p.138). According to Figure 1, analyses of text (description) and power relations among the people in the event (interpretation) are limited by the discourse practice of the institution (Fairclough 2001b). The third dimension is an “explanation” of the relationship between the discursive practices and the social practices.

Goodrich (1987) analysed language and law by adopting the methodologies of current critical theory. He demonstrated his views of a rhetoric of legal language by analysing the
categorisation of the rhetoric mechanisms of legal discourse and authority. The law is general with various bases. According to Goodrich (1984b, p.220):

the law is the language of time - honoured tradition. In at least two senses, the law is already written; it has its primary basis in custom, and its vocabulary is correspondingly governed by doctrines of memory, recognition and usage, defined in turn by reference to expensive and obscure etymologies, inert and calcified meanings and procedures, and finally an epistemology, in the last resort, of sources of law in which words are transmitted by a dogmatics of quotation, reference, citation and specialised and restricted commentary….

Goodrich (1987) presented a methodology of legal discourse analysis on the discursive processes or practices of language. He also discussed discursive formations or the meanings that are restricted to particular discourse types. Discursive processes are the manner in which diverse linguistic practices produce divergent meanings within (and according to) the historical context and social purposes of group and class interaction (1987, p.137). Furthermore, discursive formations were categorised into three different areas. First, institutional formations refer to the social authorisation of legal language. Second, intra-discourse formations relate to the self-articulation of the language of law. Finally, inter-discourse formations concern the relation of legal language to other types of discourse. Goodrich discussed the institutionalisation of legal language and the function of its structure. He further argued that law, as a species of discourse, is responsible for its political and social context. In addition, law and legal discourse can be viewed as a social practice connected to disciplines and discourses.

Fairclough’s framework on Critical Discourse Analysis and Goodrich’s approach are eminently suited to this thesis. This is because the thesis focuses on how courts have determined the admissibility of expert opinion evidence and because of the emphasis placed on its relevance to individual facts and circumstances. The two approaches are compatible in this thesis because Fairclough and Goodrich conducted discourse analysis using a critical
approach. Although Goodrich’s approach to legal discourse is broad, the analysis will be thorough when Fairclough’s approach is adopted. The latter separates legal discourse in three different layers. Dissecting each layer during legal discourse analysis will make it easier to focus on key areas: for example, the requirement for admissibility of forensic accountant expert opinion. Therefore, use of Fairclough’s three-tiered Critical Discourse Analysis framework is compatible with Goodrich’s approach to legal discourse. According to Blommaert and Bulcaen (2000, p.451), Critical Discourse Analysis displays a:

[v]ivid interest in theories of power and ideology and the most common are the use of Foucault’s orders of discourse and power-knowledge…Althusser’s (1971) concepts of ideology. In Fairclough (1992a), for example, these theories and concepts are given a linguistic translation and projected onto discourse objects and communicative patterns in an attempt to account for the relation between linguistic practice and social structure, and to provide linguistically grounded explanations for changes in these relationships.

Similarly, Goodrich (1984a, p.174) argued that:

[l]egal language, like any other language usage, is a social practice and: its texts will bear the imprint of such practice or organisation background, and further, as a discourse or genre, legal discourse, is inevitably answerable to or responsible for its place and role within the political and textual commitments of its time.

Analysis of spoken texts and written language texts is a central part of Fairclough’s work. Fairclough used the term ‘technology of discourse’ when referring to Foucault’s analysis of social sciences and structures of power (Fairclough 1995, p.102). The technologies of discourse address the strategies, techniques and procedures, and different forces which operate programmes and networks that connect authority objectives with activities of individuals and groups (Fairclough 1995, p.102). In this thesis, “accounting technology” refers to the accounting techniques, socially organised semiotic practices (inclusive of discourses and genres), that a forensic accountant expert uses during the reconstruction of facts pertaining to accounting-related matters (Burchell et al. 1985, Miller & O'Leary 1987, Dillard 1991). Fairclough’s discourse analysis of social and cultural change is “textually (and
therefore linguistically) oriented discourse analysis” (Fairclough 1993b, 1995, Blommaert & Bulcaen 2000, Fairclough 2001b). In principle, his work is concerned with any sort of discourse, conversation or courtroom discourse. This relates to Goodrich’s approach. Fairclough’s approach supplements Goodrich’s legal discourse.

3.4.1 Critical approach in Fairclough’s framework

Fairclough’s approach is critical since it addresses, makes visible and criticises through discourse analysis connections between the nature of social processes and properties of text, and the links between social practice and relations (ideologies and power relations) (Fairclough 1995). These properties of text are not ‘obvious’ to people who produce and interpret those texts (Fairclough 1995). The approach facilitates the integration of micro and macro analysis of discourse. This approach to discourse analysis can contribute to the gap in “language analysis which is both theoretically adequate and practically usable in studies of social and cultural change” (Fairclough 1993b, p.1). Critical Discourse Analysis addresses social questions concerning discourse, such as questions of power in social class, gender and race relations, and linguistic and semiotic analysis of texts, and interactions (Chouliaraki & Fairclough 1999). It is based on a view of semiotics (the study of human communication especially signs and symbols) as an irreducible part of social processes. As Fairclough (2000, 2005b) notes, every practice has a semiotic element.

Discourse is an opaque power object in modern societies. The aim of Critical Discourse Analysis is to make it more visible and transparent. According to Chouliaraki and Fairclough (1999, p.4):

[i]t is an important characteristic of the economic, social and cultural changes of late modernity that they exist as discourse as well as processes that are taking place outside discourse, and that the processes that are taking place outside discourse are substantially shaped by these discourses.
Discourse refers to “language use conceived as social practice” and “a way of signifying experience from a particular perspective (Fairclough 1993a, p.138). Goodrich (1984a, p.189) argues, “in semantic terms, legal discourse is a site of a coherent set of synonyms, paraphrases, substitutions and equivalences generally.” According to Fairclough (2005b, p.925), a discourse is a particular way of representing particular parts or aspects of the physical, social, psychological world. It refers to pervasive and often invisible sets of values, beliefs and ideas in that social circumstance. Discourse analysis is an:

[a]nalysis of relations between discourse and other elements of social, linguistic/semiotic elements of social events and linguistic/facets of social structures and social practices (Fairclough 2005b, p.916).

Discourse has three constructive effects: first, the formation of social identities, subject positions for “social subjects” and images of the self; second, the establishment of social relations between people; and finally, the creation of systems of knowledge and belief. According to Fairclough (1995), discourse/text can be viewed from a multifunctional perspective namely “identity”, “relational” and “ideational”. The “identity” function represents modes in which social identities are established in discourse; the “relational” function demonstrates the way social relations between discourse participants are enacted and negotiated; and the “ideational” function expresses the methods by which texts demonstrate the world and its processes, entities and relationships (Fairclough 1993b, p.64). Any discourse can be analysed in terms of the articulation of these functions. As Fairclough (2005b, p.920) argues, discourse analysis is concerned with the relationship between processes/events and practices (as well as structures), texts and discourses (as well as genres and styles).

3.4.2 Aim of the three-tier framework

The aim of Fairclough’s three-tier framework is:
In the court system, a judge is the discourse participant holding authority due to his/her social role. The defendant or parties in dispute and witnesses in criminal, civil and dispute resolution cases act as participants. According to Archer (2002), the trier(s) of fact have a recognised power to control the courtroom since they have the legal sanction rights to speak and a recognised position of authority. The power of the court to accept or reject a decision of a lower court and an expert opinion is demonstrated by case law. For example, in *Dasreef*, the High Court of Australia overruled the decision of the Court of Appeal\textsuperscript{12} and upheld findings by the Dust Diseases Tribunal of New South Wales. According to the High Court [at paragraph 4]:

\begin{quote}
[i]n respect of his claim for damages for contracting silicosis the Tribunal found *Dasreef* 20 in 23 parts responsible for Mr Hawchar's silicosis, the balance of responsibility resting with his work in Lebanon and the work he had done in Australia on his own account. The accuracy of this apportionment of responsibility was not in issue in the appeal to this Court. The Tribunal entered judgment for Mr Hawchar against *Dasreef* for damages in an amount of $131,130.43, together with an order pursuant to s 11A of the Dust Diseases Tribunal Act that an award of further damages may be made with respect to certain silica-related diseases [italics added].
\end{quote}

However, the authority of a forensic accountant to act as an expert witness comes from acceptance by the court of training, education, expertise, and experience as well as appropriate application of a body of knowledge. According to Stygall (2001, p.334):

\begin{quote}
\textsuperscript{12}[48]For these reasons, the Court of Appeal was wrong to conclude that the evidence of Dr Basden was admissible for the purposes for which that Court and the primary judge used it. Further, the Court of Appeal was wrong to conclude that the primary judge was entitled to take account of his experience as a member of a "specialist" court in determining what caused Mr Hawchar's silicosis. Those errors having been established, it by no means follows, however, that the Court of Appeal was bound to set aside the orders of the primary judge and remit the matter for rehearing.
\end{quote}
The three-tier analysis is also important in understanding the discursive change in connection with social and cultural change (Fairclough 1993a, p.62). Similarly, to determine: 

\[\text{explanatory connections between ways (normative, innovative, and so on) in which texts are combined and “interpreted, how text are produced, distributed and consumed in a wider sense, and the nature of the social practice in terms of its relation to social structures and struggles” (Fairclough 1993a, p.72).}\]

Discourse analysis is concerned with power relations and how power relations and power struggles shape and transform the discourse practice of a society and institution (Fairclough 1993b, p.36). Corson (2000, p.97) asserts, “any exercise of power by human actors is affected by the discursive nature of power itself”. Titscher and Jenner (2000) argue that discourse is a form of social behaviour and discourse analysis is interpretive and explanatory. Discourses do not just reflect or represent social entities and relations; they construct or constitute them and are connected intertextually to other discourses. Fairclough (1993b, p.4) noted that different discourses constitute key entities in different ways and position people in different ways as social subjects. For example, the trier of fact presides over cases during court proceedings and forensic accountant experts present their opinion. A court prescribes the nature and role of expert opinion in general and (as discussed in subsequent chapters) in respect of accounting-specific matters. Interpretations in Critical Discourse Analysis are dynamic and open to new contexts and new information (Titscher & Jenner 2000).

Theories pertaining to Critical Discourse Analysis address other aspects of Critical Discourse Analysis: for example, language use in court in the case of forensic accountant experts, reference to accounting pronouncements or demonstrating the application of assumptions.
recognised by a professional body. Accounting pronouncements exemplify the authority of a recognised field of knowledge in court. It also identifies the domination of one group (professional accountants) as members of the professional accounting bodies.

3.5 The three-tier framework and forensic accountant experts in court

This section addresses the application of Fairclough’s three-tier framework. It specifically focusses on Goodrich’s legal discourse analysis because the analysis of the role of forensic accountant experts covers both Fairclough and Goodrich. Figure 3 demonstrates the application of the framework. As shown in Figure 3, the relationship between social practice and text is mediated by discursive practice; that is, the nature of the discursive practice and how texts are produced depends on the social practice in which they are embedded.

According to Fairclough (1992, p.8):

[t]here is no set procedure for doing discourse analysis; people approach it in different ways according to the specific nature of the project, as well as their own views of discourse.

Goodrich (1984a, p.188) also noted:

[t]he self-contained highly cohesive and localised character of the legal text are best analysed in terms of specialisation and the avoidance of agency… nominalisation, thematisation… the syntax of impersonality and distance, producing indirect control in terms of attitude and generalisation rather than direct command or speech act.

The subjectivity and power vested in the different roles of the trier(s) of fact and forensic accountant experts are also addressed in Figure 3. Discourse analysis maps a systematic analysis of spoken or written text on to a systematic analysis of social contexts (Fairclough 1992).
Figure 3: Application of Goodrich and Fairclough’s framework
Here, discourse is analysed as a social practice comprising the interaction of two genres, law and accounting. The analysis focuses on case law, dealing with how a forensic accountant expert assists the court. Figure 3 demonstrates the processes used to produce a decision, including interpretation and analysis of expert opinion. The diagram also explores what institutional, situational and societal factors inform the decision-making process of the court.

3.5.1 First tier: Analysis of discourse as text

This tier involves analysis of accounting discourse and technical features of accounting (spoken or written) perceived as texts or keywords which the trier of fact used to supplement the admissibility of forensic accountant expert opinion evidence. The answers to the second secondary research question address the texts.

(ii) What is required to supplement the criteria for admissibility of an expert opinion?

Text is the concrete realisation of abstract forms of knowledge. It reflects and expresses the roles, purposes and ideologies of its participants or subjects (Goodrich 1984a). According to Fairclough (2005b), text represents linguistic/semiotic elements of social events. Text is characterised by a configuration of heterogeneous and contradictory properties (Fairclough 1995, p.99). As Fairclough (1992) argues, textual analysis can be recognised within a framework for discourse analysis under theoretical, methodological, historical and political reasons.

Text constitutes one important form of social action (theoretical reason)….[and] a major source of evidence for grounding claims about social structures, relations and processes (methodological reason)….Texts are sensitive barometers of social processes, movement and diversity, and textual analysis can provide particularly good indicators of social change….Text provides evidence of on-going processes such as the redefinition of social relationships between professionals and publics, the reconstitution of social identities and forms of self, or the constitution of knowledge and ideology (historical reason)….It is increasingly through text that social control and social domination are exercised. Textual analysis as part of
discourse analysis, can therefore be an important political resource (political reason) (Fairclough 1992, p.211-212) [italics added].

The texts of legal decisions provide persuasive and mandatory principles to be applied in future cases involving similar issues. For example, the three leading cases on admissibility of expert opinion evidence are ubiquitously cited in cases dealing with expert opinion evidence13.

Analysis of text is influenced by the tradition of close textual analysis within linguistics. This focuses primarily upon the formal features of texts because they address the criteria for admissibility of forensic accountant expert reports in court (Gallhofer et al. 2001). According to Fairclough (1992), textual analysis has an important role to play in social scientific research. It consists of two types of complementing: linguistic analysis and intertextual analysis. According to Fairclough (1995, p.16), linguistic analysis is “descriptive in nature whereas intertextual analysis is more interpretive”.

**Linguistic analysis**

Linguistic analysis examines closely grammar, vocabulary and semantics. Vocabulary deals mainly with individual words. Grammar deals with words combined into clauses and sentences. Cohesion deals with how clauses and sentences are linked. Finally, text structure deals with large scale organised properties of text (Fairclough 1993b, p.75). The ‘forces’ of utterances are the types of speech acts, the ‘coherence’ of texts and ‘intertextuality’ of texts are used in addition to the four main elements resulting in seven elements for analysis and interpretation of text. These seven elements constitute the framework for analysis of texts and cover their production and interpretation. Intertextual analysis mediates Fairclough’s three-

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tier framework for discourse analysis (Fairclough 1992). While analysing case law, the individual keywords judges use during judgements are analysed. In addition, the analysis also focusses on how the judges use keywords from legal precedent to support their judgement. The semantics of the judge’s decision in relation to the issues of interest are also analysed, together with the pragmatics of the discourse forensic accountants used in their expert reports.

The power of language or text and its interpretation by the court is evident in Davies v The State of Western Australia [2005] WASCA 47. Justice Williams used the word ‘supply’ to ascertain the application of the Proceeds of Crime Act 2002. This case dealt with the confiscation of the home of an elderly couple whose son was convicted of drug-related crimes. The son lived in the home and used the premises to manufacture drugs. Even though the couple denied knowledge of their son’s criminal activities, they were also convicted on drug-related charges and their home was confiscated. The reasoning behind the decision was based on the word ‘supply’. In other words, by supplying the premises to manufacture drugs, they had facilitated their son’s illicit activities. It was reasonable to assume their son was engaged in criminal activities given he had money, even though he did not have a job and was not receiving a pension or other government benefits to fund his lifestyle (Davies v The State of Western Australia [2005] WASCA 47).

This micro-level analysis involves the critical examination of the actual content, structure and meaning of case law. Data analysis includes content and specific facts of the case, expert reports, court records, verbal evidence, dialogue of prosecution/defense, definition and interpretation of laws, language of the judge and written judgements. According to Fairclough (1993b) and Kryk-Kastovsky (2006), courtroom discourse is a linguistic and a social and discursive act. For example, leading cases on admissibility of expert opinion
evidence have been incorporated in statutes and as court guidelines, for example, (the Federal Court of Australia *Practice Note CM 7*).

### 3.5.2 Second tier: Analysis of discourse as discursive practice

Analysis in this tier is focused on discursive practices that facilitate admissibility of forensic accountants’ expert opinion evidence. The analysis addresses the first secondary research question:

*(i) What is required to facilitate the admissibility of an expert opinion?*

The analysis involves the processes of discourse production, discourse distribution or articulation and meanings, consumption or interpretation of case law, and forensic accountant expert reports. These discursive practices address the criteria the judiciary have set for the admissibility of expert opinion evidence. According to Fairclough (1993a), the key to the three-tier framework is the inclusion of processes of production and consumption, (for example, interpretation). The production and consumption of text and discourse practice is viewed as part of a system that connects language and power, and includes individuals and institutions. The nature of these processes varies between types of discourse according to social factors (Fairclough 1993b, p.78). Analysis of discourse as discursive practice draws from the interpretivist or micro-sociological tradition of understanding social practices to be actively produced. They are made sense of by people on the basis of a shared rational idea or understanding and are affected by generation, religion and ethnicity (Fairclough 1993b, Gallhofer et al. 2001). Intergenerational changes are demonstrated by the judge’s decision in *Frye* regarding the inadmissibility of expert scientific evidence that was reversed in *Daubert (USA)*. It is simply changes to evidence laws and permitting opinion evidence.
The discursive practice tier addresses the relationship between text and discursive practice. This is shaped by institutions that impose and maintain the discursive practices (Rabinow & Hurley 1997). For example, as Kirby (2011, p.18) argued:

[Some judges in Australia who were raised like me in this traditional deference to factual conclusions of trial judges adhered to such opinions well into the 1990s. During that decade, three important decisions were delivered by the High Court of Australia in Jones v Hyde; Abalos v Australian Postal Commission; and De Vries v Australian National Railways Commission. Those decisions laid down a rule that appellate courts should not disturb the conclusions of trial judges where they have been made with the advantage of seeing witnesses. This permitted trial decisions to be affirmed on appeal, even in instances where the overwhelming force of the evidence appeared to the appeal court to demonstrate that the trial judge had simply got the facts wrong, even seriously and obviously wrong.

In the court system, discursive practice also includes adducing expert evidence in court. Its admissibility depends on the criteria the judiciary have set. This dimension examines the form of discursive interaction used to communicate meanings and beliefs of case law and of forensic accountant expert opinion (Grant 2004, p.11).

Knowledge of accounting-related matters is derived through systems of rules or ordered procedures for discursive practice, including professionally-acknowledged accounting principles and practices. The rules of discursive practice involve several procedures. First, forensic accountant experts use their skills to explain the facts to the sources of the accounting-related matter. Second, relevant skills are used to analyse the series of transactions or financial trail using the technology of accounting to interpret data. Third, the forensic accountant expert must comply with relevant laws or regulations, before formulating an opinion on the accounting-related matter (Practice Note CM 7). Facts determined by forensic accountant experts can be used by the trier of fact, “controller of the systems”, when making decisions pertaining to the accounting-related matter (Evidence Act 1995 (Cth)).
According to Fairclough (1993b), the focus of analysis in this layer is three variables; the “field” (the social event of which the discourse is part), the “tenor” (the social participants involved and the relations between them) and the “mode” (the part discourse plays in the activity). In this thesis, the “field” relates to the case law. Analysis involves critical examination of legislation, rules and regulation, accounting standards and legal precedent.

The “tenor” involves the trier(s) of fact and forensic accountant experts. Legal counsel becomes part of “tenor” if the opposing counsel tries to discredit an expert report. The judge can either rule the argument is appropriate, or reject it. Analysis focuses on how the trier(s) of fact used discourse in the legislation, rules and regulation, accounting standards and legal precedent to address admissibility of forensic accountants’ expert reports. There is also a feedback loop based on legal precedent. Legal precedent helps determine admissibility and weight assigned to an expert opinion. The “mode” refers to the part discourse plays in the case law and its relations with other social practices in terms of their role in sustaining or challenging existing hegemonies. For example, the defense counsel challenges a forensic accountant expert opinion. A trier of fact has the power to accept or reject a forensic accountant’s expert opinion based on the facts of the case (R v Cox (No. 2) [2005] VSC 224). This decision may be supported or rejected on appeal or become accepted as a binding requirement applicable to similar cases. The three variables will be discussed further in section 3.5.3 since the three tiers in Fairclough’s framework are interrelated during case law analysis.

Analysis of discursive practices also focusses on intertextual analysis and intertextuality. In the court system, the judge will often cite previous court judgements or legal precedent during deliberation on matters pertaining to issues of interest. The analysis also focusses on how the powers of legal precedent influence the judge’s decision.
Intertextual analysis and Intertextuality

According to Fairclough (1995, p.16):

[Intertextual analysis focuses on the borderline between text and discourse practice in the analytical framework. Intertextual analysis is looking at text from the perspective of discourse practice, looking at the traces of the discourse practice in the text.

Intertextual analysis focuses on the citings judges make of previous judgements. Fairclough (1993a, p.84) also stated:

[Intertextuality is basically the property texts have of being full of snatches of other texts, which may be explicitly demarcated or merged in, and which the text may assimilate, contradict, ironically echo, and so forth.

The intertextuality of text refers to the influence and presence of other texts in the construction of the new text, therefore, “potentially other voices than the author’s own” or the network of texts (Fairclough 2003). There are two types of intertextuality, "manifest intertextuality" and "constitutive intertextuality" (Fairclough 1993b, p.85). Manifest intertextuality refers to the “heterogeneous constitution of texts by which specific other texts are overtly drawn upon within a text”; for example, the trier of fact uses explicit signs such as “quotation marks” or case citations to designate the presence of other texts from legal precedent, legislation or forensic accountant expert reports. Constitutive intertextuality refers to the "heterogeneous constitution of texts out of elements of orders of discourse”. This type of intertextuality focusses on the structure of discourse conventions when included in the new text production.

The intertextual analysis focusses on case law in which judges address forensic accountants’ expert opinion evidence. The analysis of case law will determine whether there are linguistic forms that explicitly represent the forensic accountants’ expert report; and, whether there are linguistic and semantic signs demonstrating the merging of a forensic accountant’s expert opinion evidence and judgement by a judge. A forensic accountant expert can use graphs to
explain the money trail. A judge can accept expert opinion evidence completely by repeating it or rephrasing it and using his/her own words and language, or s/he can disregard it. Judgement can be based on previous texts (expert opinion evidence or legal precedent on expert reports) ascertained through ‘quotation marks’, an example of "manifest intertextuality". In addition, a judge respond to future users (consumption) of his/her judgement (case law) by configuring the original text (case law/legal precedent) into its own discourse type - an example of "constitutive intertextuality" (Fairclough 1993b, p.85).

The intertextual analysis shows how texts selectively draw on orders of discourse such as genres and discourse. Genre is the use of language associated with a particular social activity (Fairclough 1993a, p.138). It is a particular way of acting socially, that is acting together or interacting (Fairclough 2005b, p.925). Genre refers to how the trier of fact and forensic accountant experts use language during court proceedings. The analysis focusses on how forensic accountant experts use language in the opinion evidence to demonstrate the issues of interest. Genre provides a framework within which texts are produced and interpreted. A forensic accountant expert’s opinion evidence is textual type, intended for a court audience. Genre refers to how the trier of fact and, the opposing counsel, address the report during direct and cross-examination.

The “genre” of a forensic accountant’s expert report is derived from accounting practices, processes, standards and assumptions. A forensic accountant expert’s knowledge is drawn from education, training and experience (Daubert (USA); the Ikarian Reefer (UK); Makita (Australia)). Accounting facts and accounting numbers synchronize to address the accounting-related activity. However, forensic accountant experts can have different opinions, depending on the assumptions and accounting processes adopted. Admissibility and weight accorded to forensic accountants’ expert opinion evidence is also analysed. Genre assists a court during the deliberations of forensic accountants’ expert opinion evidence. The
admissibility of forensic accountant expert opinion evidence depends on several issues including genre. This is considered on a case by case basis. Genres of the court are important in connecting the stakeholders of the court and sustaining relationships between the trier(s) of fact, forensic accountant experts, and other stakeholders. For example, (as will be discussed in more detail in section 3.5.3.1), in a damages case, *JP Arrow v The Electricity Commission of New South Wales* [1994] NSWLEC 91, the judge ruled in favour of the plaintiff rather than the respondent. The plaintiff was awarded higher damages.

The analysis of case law also focuses on consumption of the texts. Consumption refers to how readers of text comprehend these texts. Analyses of the consumption or interpretation of discourse addresses the power of the legislation and legal decision/precedent on a forensic accountant’s expert opinion evidence.

### 3.5.3 Third tier: Analysis of discourse as social practice

Analysis in this tier explains the interaction between the judge and forensic accountant experts, (two of the stakeholders) in court hearings, an institutional setting. The analysis addresses the third secondary research question:

*(iii) How do the social practices of a court affect forensic accountant experts and the trier(s) of fact?*

Court hearings as a social practice are a stabilised form of social activity. According to Goodrich (1984a, p.187):

> [t]he most obvious feature of legal discourse is its production within specific, highly restricted, institutional settings….legality would be nothing if it were not supported by a network of institutions, a tradition of ideas which always encloses and delineates the domain within which legal discourse can exercise its textual practice.
Wodak and Meyer (2009) argue Critical Discourse Analysis is the study of a social phenomenon which is necessarily complex. They infer it has the perspectives of the dominant groups in society. Titscher and Jenner (2000) assert Critical Discourse Analysis is understood as a social scientific discipline which deals with explicit interests and applies its discoveries to practical questions. According to Blommaert and Bulcaen (2000, p.447), Critical Discourse Analysis “explicitly intends to incorporate social-theoretical insights into discourse analysis and advocates social commitment and interventionism in research.”

This social practice level “stresses features of discourse that it shares with social practice more generally” (Gallhofer et al. 2001, p.125). According to Fairclough (1995, p.62), analysis in this dimension involves three aspects of the sociocultural context of a communicative event: economic, political (power and ideology) and cultural (social issues).

While addressing economic matters, the analysis focusses on decisions by the trier(s) of fact on issues concerning financial affairs of individuals and companies. In addressing politics, the case law analysis focusses on the inference power of forensic accountant experts and the sovereignty of the courts. Accounting professional bodies (and others) have created a discourse recognised by the judiciary as signifying a body of knowledge comparable to scientific knowledge. Therefore, accounting ideology and membership of a recognised professional association, for example, CPA\(^{14}\) Australia, has achieved a dominant position over other forms of ideology in the context of the expertise of the witness and the facts of the case. For example, in *R v Cox (No 1) [2005] VSC 157* and related case law, the expert could not apply an ideology drawing on spending patterns outside his/her area of expertise. However, s/he could use an accounting ideology incorporated into a pronouncement of the accounting professional bodies. The analysis of cultural issues/social practice addresses the

\(^{14}\) Certified Practising Accountants
“ideological effects” in which the discourse/trier of fact’s judgement is a feature (Blommaert & Bulcaen 2000, p.448).

Discourse as social practice is demonstrated in relation to ideology and power (Fairclough 1993b, p.78). Critical Discourse Analysis makes ideologies and power relations more visible by questioning the taken-for-granted assumptions about social institutions and society. Power relations, including power in discourse and power over discourse, are also addressed. The power of the court and reasons for accepting and disregarding expert opinion evidence is an example of power relations in court. In addition, power/authority in the legislation, (for example, the Australian Evidence Act 1995 (Cth) which is comparable with those in other jurisdictions and legal precedent) is also addressed during Critical Discourse Analysis.

The following discussions address the ideological effects in court, how are they enacted, how are they maintained/supported, and how are they transgressed.

3.5.3.1 Ideology

Courts exercise ideology during the application of the law. As Goodrich (1984a, p.190), argues:

[m]ore significantly perhaps in relation to ideology, the law fixes legal meaning to individual acts, conceived in the abstract terms of intention and responsibility, and in so doing it constantly evades the question of its own material and historical genesis or basis and effects [emphasis added].

According to Corson (2000, p.98), Althusser’s concept of ideology refers to any “system of ideas, expressed in discursive practices, that distorts reality in order to serve the interests of a privileged individual or group”. This was Althusser’s contribution to the theory of ideology. It has been developed by Pecheux into a theory of discourse and a method of discourse analysis (Fairclough 1995, p.70). For example, JP Arrow v The Electricity Commission of New South Wales [1994] NSWLEC 91 concerned the claim for compensation and damages
consequent upon the construction and maintenance of an electricity transmission line by the Electricity Commission of New South Wales (the respondent) over a land known as “Foxlea”, rural grazing land owned by Arrow (the applicant). The construction destroyed the potential for subdivision of part of the property. The Electricity Commission of New South Wales’ right to use the land was effected by a notice published in the Government Gazette dated 19 October 1990 pursuant to the provisions of the Electricity Commission Act 1950 (NSW) and the Public Works Act 1912 (NSW). The court later awarded compensation for the entire destruction of the concessional lot subdivision potential of the land at the date of resumption. Compensation was awarded for additional injurious affection to the property as a grazing property containing a modern residence. This is an example of how the trier(s) of fact can use forensic accountant expert evidence to explain the financial activities of companies and individuals.

During the judgement, the judge detailed the “difficulties in determining compensation for the resumption of electricity easements” by referring to a recent decision of Jacobs J in the South Australian Supreme Court in Longeranong Pty Ltd v Electricity Trust of South Australia (1990) 71 LGRA 316. The judge also argued:

…there is no difficulty in understanding the relevant principle, however, there is difficulty experienced in determining injurious affection….Rather the difference essentially turns on the disparate opinions of the valuers concerning the quantification of injurious affection. What has made the resolution of these competing opinions particularly difficult in the present case is the fact that the valuers have sought to reason to their ultimate opinions from evidence of diverse sales, which ultimately I have found to be inconclusive and not really helpful to the task of assessing compensation in this case [italics added].

The awarding of the compensation demonstrates the courts exercise of ideology. According to Goodrich (1984a, p.190):
[courts] treat legal disputes according to the rhetoric of individual acts, the legal text reifies its meaning and obscures or mystifies the real relations which form the context of such actions and the explanation of their motives [emphasis added].

Goodrich (1984a, p.191) continued by saying:

...y means of a process of individualism or subjectification and subsequent generalisation the categories of legal argument work to manipulate and transpose existent human beings – the diffusion, complex and changing biographical entities of motivated interaction – into the ethical and political subjects of legal rationality and formal justice.

Ideologies are domination-related constructions of a practice. They are determined by specifically discursive relations between two practice (Chouliaraki & Fairclough 1999, p.27).

In addition, Fairclough (1995, p.71) stated that ideology is both a property of structures and property of events. According to Kirby (2011, p.17) during the forensic accounting conference at the Hilton Hotel in Sydney:

...n my life as a barrister, the rule that was applied in appellate courts was that appellate courts would not disturb factual conclusions reached by a trial judge which the trial judge had either expressly or by necessary implication arrived at on the basis of his or her impression of the witness.

Ideology can operate in the macro-level of social structure and the micro-level of social action. They are:

...ignifications/constructions of reality – the physical world, social relations, social identities – which are built into various dimensions of the forms/meanings of discursive practices, and which contribute to the production, reproduction or transformation of relations of domination (Fairclough 1993b, p.87) [italics added].

Ideology will be explored during the analysis of case law. For example, when relating the judge’s decision in JP Arrow v The Electricity Commission of New South Wales [1994] NSWLEC 91 to the statements by Goodrich (1984) and Kirby (2011, p.17), it is evident the judge treated the facts in issue according to their availability. Legal discourse confirmed the material existence of the facts in issue. The appellate courts did not interfere with the trial
judge’s factual conclusions in this case, thus demonstrating dominance in the courts. This practice demonstrates to forensic accountant expert witness that appellate courts will not overrule a trial judge’s decision of not accepting expert opinion. The sovereignty of the court (as conferred by the *Australian Constitution* and similar governance instruments in other countries) affect the power of discourse, as discussed previously. The jurisdiction a court is located determines the sovereignty of the court. Statute laws in the United Kingdom are examples of similar governance instruments. This is an example of how people with power shape the order of discourse and control what happens in specific interactions (Fairclough 1989).

Critical Discourse Analysis focusses especially on the role of discourse in the production and reproduction of power, abuse or domination (Wodak & Meyer 2009). Furthermore, Wodak and Meyer (2009) argued the objects under investigation do not necessarily relate to negative or exceptionally serious social or political experiences or events. Corson (2000, p.98) stated, Critical Discourse Analysis goes beyond other forms of discourse analysis by focussing directly on macro and micro power factors that operate in a given discursive context.

Forensic accountant experts distinguish accounting facts through the systems of ideas utilised in expert reports that are prepared to assist the trier of fact understand accounting-related matters. These ideas are addressed in the opinion of the expert, as articulated in the report tendered to the court, in accord with the engagement document ascertaining the accounting-related matters in question. The intricacies of accounting in the accounting-related matter are addressed in accounting standards and procedures. The judgement of the court, and underlying reasoning for accepting or rejecting an expert opinion as expressed by the judge, has influenced the literature (and training, education of potential experts, and legal counsel). This is reflected in an analysis of forensic accounting and other expert witnesses/documents. This is the subject of chapter 4.
This thesis demonstrates that ideology is addressed past events and conditions for current events. Ideology has a material existence in the practices of institutions opening up ways to investigate discursive practices as material forms of ideology (Fairclough 1993b). Corson (2000) argues that ideology distorts human communications and effective reasoning of power relations. A judge can admit expert opinion into evidence or reject it. While there are exceptions, such as that noted by Kirby (2011, p.17), the decision is entirely at the discretion of the judge. As a result, a judge interprets legislation, regulations and case law, in the context of the given case.

A judge determines the admissibility of expert evidence on the basis of whether the expert meets the required education, training and experience criteria - except where judges have agreed to a particular course of action. Without acceptance of the expert status of the witness, the opinion is irrelevant. The next step is when the trier of fact accepts or rejects the opinion of the expert, for example, the relevant assumptions and methods/practices are stated and accepted, by the court in the context of the particular set of circumstances. These are important issues in the application of Critical Discourse Analysis. The flexibility and ambiguity in accounting standards and practices also contribute to the need of the court for expert assistance.

Critical Discourse Analysis identifies the context of language as crucial in any study and as intricately related to beliefs, opinions and ideologies (Wodak & Meyer 2009). Language is a material form of ideology, and language is informed by ideology (Fairclough 1995, p.71). As Pelinka (2007) argues:

[Language reflects...and has an impact on power structures...[it] can be seen as an indicator of social and therefore political situations and a driving force directed at changing politics and society. Language is both an input and output factor of political systems. It influences politics and is influenced by politics...Language can be an instrument for or against enlightenment, for or against emancipation, for or against democracy, for or against human rights (p.130 and 131).]
Wodak and Meyer (2009) assert discourse denotes a historical monument, a policy, a political strategy, narratives in a restricted or broad sense of the term, text talk, a speech (for example, Kirby (2011)), topic-related conversations and language. The study of discourse focusses on its constructive ideological effects. As Goodrich (1984a, p.191) stated:

[t]he legal use of language rewrites the individual, as it rewrites speech, in terms of a notional and static unity of reasoned intentions, the basic precondition of the law as the political-administrative discourse of liberal individualism.

Language/ideology issues ought to figure in the wider framework of theories and analysis of power (Fairclough 1995, p.70). The power of the judiciary is established by society by virtue of the Australian Constitution\(^\text{15}\), separation of powers, and acceptance by the community of the authority of the court to make binding decisions. According to Goodrich (1984a), legal discourse prescribing the roles of the trier(s) of fact is socially and institutionally authorised. To be awarded a judicial position, you have to be accepted by your peers as stipulated under section 72 of the Australian Constitution. Courts have specified the role of forensic accountant expert witnesses. For example, compliance with court procedures, accounting standards and procedures support the expert’s opinion, assumptions and methods providing legitimacy or credibility of the expert opinion.

### 3.5.3.2 Social practice and issues

The third tier is a “difficult layer of analysis addressing the nature of the social practice” and the “effects of the discourse practice upon a social practice” (Fairclough 1993a, p.237). The analysis examines the social influence of discourse and the interpretation of the law on social terms focussing on fairness, justice, and equity. Analysis of discourse as a social practice recognises that discourse is socially constructed and that it helps establish aspects of the social structure and engenders change and continuity therein (Gallhofer et al. 2001, p.128).

\(^{15}\) The Australian Constitution is used to demonstrate where the power of the trier of fact is established.
According to Wodak and Meyer (2009), since Critical Discourse Analysis is a school or paradigm, it is represented by various principles including all approaches are problem-oriented, and thus interdisciplinary and eclectic. They infer Critical Discourse Analysis is demonstrated by common interests in de-mystifying ideologies and power through the systematic and investigation of semiotic data including written, spoken or visual.

Analysis in this macro-level focuses on the social context in which the discursive event takes place. Fairclough (1993b, p.4) argues that this dimension examines issues of concern in social analysis, such as the:

[i]nstitutional and organisational circumstances of the discursive event and how that shapes the nature of the discursive practice, and the constitutive/constructive effects of discourse.

Similarly, Goodrich (1984a, p.188) stated:

[l]egal discourse is socially and institutionally authorised – affirmed, legitimated and sanctioned – by a wide variety of highly visible organisational and sociolinguistic insignia of hierarchy, status, power and wealth. These insignia, the identifications of a privileged class, are what initially differentiates the legal institution and its discourse from the closely related domains of political, religious and ethical discourse.

The issues of concern in the court system relate to power relations between the trier(s) of fact and forensic accountant experts. The analysis focusses on the examination of the powers of the trier(s) of fact and the role of forensic accountant experts in using accounting technology to address accounting-related matters, and to act as an acceptable witness. Examination of the performance of the forensic accountant expert includes perceived independence, performance under cross-examination, and ability to demonstrate the veracity of their opinion. Forensic accountant experts use the power conferred on the accounting profession to assist the court in accounting-related matters. According to Fairclough (1989), discourse is a form of power. Forensic accountant experts’ use the power of expertise based on education, training and
experience, in a specific area or body of knowledge to pursue and explore discursive practices that derive the accounting-related matters. The analysis also examines whether forensic accountant expert reports complied with accounting standards, court guidelines and relevant legislation. The power of a forensic accountant expert is derived from a recognised body of knowledge, the application of assumptions and practices recognised or accepted by that area of knowledge and demonstrated through experience in similar circumstances. This is an example of power behind discourse. According to Fairclough (1989), power behind discourse includes the power to shape and constitute orders of discourse. In cases of accounting-related matters, forensic accountant experts, depending on the engagement use (or analyse) procedures for completing documentation pertaining to relevant facts, trace mechanisms for registration, and use techniques of discipline applied to behaviour to ascertain the accounting-related matter. The analysis of forensic accountants’ expert reports cannot be generalised since it relates to different issues of interest. However, the results can be interpreted and generalised to explain the work of other forensic accountant experts.

Critical Discourse Analysis analyses the form and the content of text and its connection to society. The thesis examines how forensic accountant experts use accounting discourse to explain connections between issues of interest and their ramifications for individuals and society. While discussing a court’s decision and its effect on society, the thesis draws on the views of the trier(s) of fact on the forensic accountant expert’s report. The ramifications of the court’s decision on the individual and society are also examined. This is addressed when answering the third secondary research question

Whether dealing with civil or criminal matters, the power of an expert witness is derived from acceptance by the court of an opinion drawn from the application of the principles and assumptions of a recognised field of knowledge and expertise. The acceptance of the court is
an example of power in discourse: that is the exercise of power where one participant controls the contributions of others (Fairclough 1989). Forensic accountant experts can use professional judgement within the context of their area of expert knowledge/experience. The authority and bases for the exercise of professional judgement must be drawn from a recognised body of specialised knowledge and expertise or training. Expert witnesses have a duty to the court. They are bound by the code of conduct issued by the court, as well as by accounting standards and the rules of evidence issued by the legislature. These networks of forensic accounting practices are “held in place by social relations of power” (Chouliaraki & Fairclough 1999, p.24).

The power of a judge in determining who is an expert, whether to accept or reject an opinion, and social effects of a judge’s decision, are also explored. According to Wodak and Meyer (2009, p.35), “discourses exercise power in a society because they institutionalize and regulate ways of talking, thinking and acting.” The discourse event may take place in court but the issues of interest and surrounding facts are different, therefore the trier of fact considers matters on a case-by-case basis. As van Dijk (1985) argues, social reality is not to be analysed in general and objective terms but rather in terms of the interpretations of the social environment by the members themselves. The analysis explores the relationship between discourse, power and inequality in real-world situations.

Dissection of case law involves examination of power and unequal relations of power between individuals and institutions. For example, power lies more in the power of the judiciary to by-pass precedent and to ignore expert opinion even if it is ruled admissible. The power of the court focussing on the power of the trier(s) of fact and power of the court as an institution is also analysed. The powers of accounting discourse demonstrated in numbers are
also analysed, together with forensic accountant experts using the power of accounting as an institution. According to Mouritsen (1994, p.204):

> [a]ccounting as institution is an outcome of the intertwinement between accounting technology, the regulatory aspirations of its users, and the overall character of the social system of which it is not only part but indeed also a facility in its reproduction.

Discourse analysis explores the power of the trier of fact in discursive practices pertaining to civil and criminal matters. The trier of fact has the power to explore precedent and make determinations, rather than be manipulated by political power or precedent. Power has a wider scope than truth and the principal area of focus for power is the mutual relations between systems of truth and modalities of power, the way in which there is a political regime of the production of truth (Foucault 1972, Davidson 1986). Foucault (1972) emphasised power as a property of networks and relationships. In the case of accounting-related matters, the network of power involves the judiciary, prosecution, defense counsel, investigator/police, suspect (in criminal proceedings) and the respondent and plaintiff in civil cases, and forensic accountant experts. As Fairclough (1995, p.102) argues:

> [t]his discussion points to the necessary interdependence of ‘micro’ analysis of specific discourse sample and ‘macro’ analysis of longer term tendencies affecting orders of discourse…. These macro dimensions constitute part of the context of the discursive event, and are necessary for each interpretation. Micro and macro analysis of discourse and discursive change are mutually dependant.

These networks of power between those presiding over court cases, prosecuting them and bringing charges are interdependent. Forensic accountant experts’ tender expert reports which are utilised by the prosecution/defense and the trier of fact to draw conclusions. The judge may sometimes disregard the expert opinion due to circumstances beyond the powers of the prosecution/defense and forensic accountant experts. The power of the judge is derived from the Australian Constitution and society’s acceptance of the authority of the court to make binding decisions. In this regard, the power of the judge exceeds that of the expert. The trier
of fact would be expected to lack expertise in accounting matters. However, by virtue of being appointed to the bench, s/he is deemed to possess superior knowledge of the law and its application to specific circumstances.

The three-tiers in Fairclough’s Critical Discourse Analysis are interrelated. The process by which the forensic accountant expert formulates an opinion on accounting-related matters, and the power of the court to exercise judicial discretion, are examined in this stage. Foucault, in his theory of discourse, introduced the concept of reality as an “analysis of systems of knowledge” that were to be understood as a “system of ordered procedures for the production, regulation, distribution, circulation and operation of statements” (Rabinow 1991, p.74). This is a “historical ontology of ourselves in relation to reality through which we constitute ourselves as subjects of knowledge” (Rabinow 1991, p.351). In the case of accounting-related matters, the forensic accountant expert has to demonstrate a sound basis for opinions rather than what is ‘true’ or ‘not true’. These conditions of reality are products of the systems designed to “discover” the fact in issue. Reality is “linked in a circular relation with systems of power which produces and sustains it, and to effects of power which it induces and which extend it” (Rabinow 1991, p.74). The “reality” of the prosecution, defendant, or plaintiff’s accounting practice is determined by the court, but can rely on the forensic accountant’s expert opinion in reaching a conclusion. Generally, it is accepted by courts that there can be more than one “reality” depending on assumptions and methods. For example, in Nigel Gray & Others v Braid Group (Holdings) Limited, P560/13, [2015] CSOH 146, 2015 WL 6966279, Duke Group and Cheal Industries Pty Ltd – Fitzpatrick v Cheal [2012] NSWSC 595 (Cheal 2), forensic accountant experts deduced conflicting views of reality (issue of interest) due to the different valuation methods and assumptions used. They demonstrated multiple possibilities of reality when dealing with measurement/valuation in accounting. The trier(s) of fact considered the conflicting views of value (reality) and
determined which was the most appropriate. These cases will be discussed further in chapters 4 to 6.

Case law analysis also focuses on style; a particular way of being or a particular identity (Fairclough 2005b, p.925). This includes ways discourse features broadly in this social practice, such as how discourse features as part of a social activity within a practice, how discourse figures in representations, and how it is a semiotically constituted way of being. Case law analysis addresses the identity of forensic accountant experts in court and how forensic accountant experts and trier(s) of fact use language in a particular way. These can be classified as different styles in court. According to Chouliaraki and Fairclough (1999), social actors in any practice incorporate other practices and represent them (recontextualize) differently depending on how they are positioned within the practice. Case law analysis focuses on legal precedent trier(s) of fact adopt during court proceedings. While analysing discourse as ways of being, the analysis focuses on the identity, styles and how society positions a specific forensic accountant as an expert and trier(s) of fact presiding over cases in court and exercising their authority (Fairclough 2000).

The next section focuses on the methods used for data collection and analyses. In addition, the different types and sources of primary and secondary data are discussed, together with the different codes used for the themes identified during the analysis of case law. These codes and themes are tailored to capture what the judiciary have said of the role of forensic accountant experts in assisting the court and admissibility of expert opinion evidence.

3.6 Data collection and analysis

This study is qualitative in nature. According to Lee and Humphrey (2006, p.183), qualitative research in accounting focuses on the “origins and role of accounting in its specific historical, social and organisational context.” This qualitative study relies on critical

The application of the qualitative research strategy adopts stages identified by Creswell (2007, p.37):

> qualitative research begins with assumptions, a worldview, the possible use of theoretical lens, and the study of research problems inquiring into the meaning individuals or groups ascribe to a social or human problem. To study this problem, qualitative researchers use an emerging qualitative approach to inquiry, the collection of data in a natural setting sensitive to the people and places under study, and data analysis that is inductive and establishes patterns or themes. The final written report or presentation includes the voices of participants, the reflexivity of the researcher, and a complex description and interpretation of the problem, and it extends the literature or signals a call for action.

The qualitative research focusses on the research problem, research question, objectives of the research, and the three broad phases of designing and conducting evaluations: initial design, data collection and analysis, and evaluation reporting and utilization (Stake 1995, David 2007, Schwandt 2007, Yin 2009, Bazeley 2013). The case law analysis focussed on answering the primary and secondary research questions. The primary research question is: 

*How does the role of forensic accountant experts assist the trier(s) of fact in understanding financial transactions?* The first secondary research question is: 

*What is required to facilitate the admissibility of an expert opinion?* The second secondary research question is: 

*What is required to supplement the criteria for admissibility of an expert opinion?* The third secondary research question is: 

*How do the social practices of a court affect forensic accountant experts and the trier(s) of fact?* The thesis examines the role of forensic accountant experts in clarifying complex financial transactions - the objective of this thesis.
3.6.1 Sources of data

Published judgements of fifteen cases, (five cases each from the United Kingdom, United States and Australia) were selected and analysed. Selection of these countries and total sample was based on the availability of case law, and existence of relevant legislation. These countries also adopt common law principles. Similarly, these countries have strong links with commerce and professional accounting bodies, and have similar accounting and audit standards. Differences between these countries are not great due to the application of international accounting and audit standards (Cooper 2014). Collection and analysis of case law continued during the study. As Wodak and Meyer (2009, p.27) argue:

[t]here is no CDA way of gathering data … data collection is not considered to be a specific phase that must be completed before analysis begins: it is a matter of finding indicators for particular concepts, expanding concepts into categories and, on the basis of these results, collecting further data.

Primary and secondary data

Documents forming primary and secondary data (Miles & Huberman 1994, Galvan 2006, Schwandt 2007, Yin 2009, Bazeley 2013) collected were analysed during comparative analysis to determine the role of forensic accountant experts in accounting-related matters. Documents extracted from case law (which forms the primary data) include court judgements and judicial reports, and relevant documentary evidence a judge referred to during court proceedings (such as forensic accountant expert reports, valuation reports, witness statements and other exhibits). Data collection and analysis continued until data saturation. Data saturation was determined when no new facts were gathered.

When gathering secondary data, the research utilised relevant journal articles, handbooks, previous research reports, media reports, conference papers and any other reports relating to the role of forensic accountant experts in assisting the court. Secondary data were used to reconfirm unclear information found in primary research data. Some advice on the ways of
conducting research, identifying of relevant documents, and analysing data was also gathered from the legal profession since this research also covers their area of expertise.

During the process of analysis, data gathered was coded and stored in a database which was organised systematically for easier access during analytical and reporting processes (Miles & Huberman 1994, Yin 2009). Table 3 outlines the different codes used during data collection and discourse analysis.

**Data analysis**

Data analysis focussed on answering the research questions. The procedure for analysing case law was based on the three levels of Fairclough’s framework beginning with tier 2, discourse as discursive practices before the focus shifted to tier 1 and tier 3. While analysing textual and discursive practice, judgements and case law reports were read meticulously to determine the discursive practices courts have identified for the admissibility of forensic accountant expert opinion and texts that supplement the admissibility. The intention was to answer the questions “How” and “Why” the courts have used these texts for discursive practices - and to supplement the admissibility of expert opinion. There were various texts in the case law that could be used in the analysis but selection of the text was based on discursive practices courts have identified for admissibility of expert opinion. The analysis of discursive practices also focussed on intertextuality: for example, the different case law or legal precedent judges use to support their judgement. While analysing social practices, the focus was on the sovereignty of the court, as identified in the constitution. The analysis also focusses on “How” the courts interpret texts (tier 1) and discursive practices (tier 2) and “How” they distinguish facts of one case from another, demonstrating their own preception. The analysis also explored the social implications of the court’s decision and the role of forensic accountant experts in assisting the court.
Case law was also analysed using thematic analysis. The aim was to identify themes within the case law (Miles & Huberman 1994, Schwandt 2007). Appendix 1 shows an example of how case law was analysed. The focus of thematic analysis was to identify a “rich and detailed, yet complex, account of the data” (Braun & Clarke 2006, p.78). The themes are admissibility, specialised knowledge, measurement and valuation methods, accounting assumptions, technology and practice, evidence and legal precedent, expert report or opinion, facts and omission.

“Admissibility” refers to the criteria the judiciary have set for admissibility of forensic accountant expert reports. Selected case law was scrutinised to identify the different criteria and analysis focussed on, the types and level of education/qualification, training and experience. The selected criteria concern case law on fraudulent activities, money laundering, unexplained wealth, valuation and matrimonial disputes. The analysis also focussed on relevant legislation concerning discursive practices which were identified by a court. The different powers/authorities of the court and forensic accountant experts were also analysed to determine whether there was an opaque relationship between forensic accountant experts and their clients.

“Specialised knowledge” focusses on the criteria the trier of fact referred to when discussing a forensic accountant expert’s specialised knowledge. Analysis of case law explored the facts in issue and the relevant expert knowledge required and identified by the court. When forensic accountant experts were engaged by opposing parties, the relevant experience of forensic accountant experts and whether their knowledge and experience were suitable in the area of interest were examined. Analysis of case law also determined specialised knowledge as opposed to common knowledge.
“Measurement and valuation” explores the different valuation methods a forensic accountant expert uses and has accepted by a court. Analysis of different case law focussed on how a forensic accountant expert measured the interest, valuation amount derived, and the trier of facts comments. Opposing forensic accountant experts can use the same valuation method but apply different assumptions. In such instances, the analysis focussed on why experts adopt different assumptions and have different values of the facts in issue. The analysis also focussed on the courts’ comments on why experts derive different values. The dissection of case law also explored whether a forensic accountant expert had expertise in the relevant field.

“Accounting assumptions”, “technology” and “practice” illustrate the different assumptions and technology employed by the forensic accountant expert during engagement. Assumptions and technology are examples of processes a forensic accountant expert used to address the admissibility of expert opinion. Analysis focussed on the trier of fact’s comments on the relevance, reliability and reasonableness of forensic accountant experts’ assumptions and methodology. The analysis also identified different technologies forensic accountant experts used during engagements to demonstrate the facts in issue; whether these technologies were suitable; and whether they assisted the trier(s) of fact in understanding the obfuscation of financial trails. The authority of the process and the methods forensic accountant experts use during the reconstruction of facts were also analysed. The analysis also focussed on whether the forensic accountant expert had complied with, and exercised, the codes of conduct, (for example, being independent during engagements).

“Evidence” and “legal precedent” refer to the different cases the trier of fact referred to during judgement. The analysis focussed on intertextual analysis and intertextuality of the judge’s decision. How to conduct the analysis was discussed under section 3.5.2. “Expert
“report or opinion” describes a forensic accountant expert report and the views of the trier(s) of fact on the report. The analysis focussed on different accounting discourses forensic accountant experts used in expert reports and the chronology of events. Appendix 2 shows an example of the chronology of events in Hart. The expert report also contains “facts” which represent the different accounting evidence gathered and used by a forensic accountant expert in the expert report. Analysis of “facts” focussed on the relevance and reliability of evidence identified by a judge. Forensic accountant experts sometimes omit evidence that are relevant and reliable and are important ingredients to explain the facts in issue. The analysis also focussed on the scope of the engagement and whether the facts were outside the scope of engagement. The omitted evidence is represented by the code “omission”. The dissection of case law also explores whether a forensic accountant expert had addressed the ultimate issue, for example, to form conclusions on issues which will be the subject of determination by the trier(s) of fact.

The themes were coded to assist in managing, locating, identifying, sifting, sorting, and querying data during the analysis (Fisher & Buglear 2010, Bazeley 2013). The relationships between these codes were identified and sorted to focus on the three layers of analysis. Memos were written during data analysis to capture analytical analysis of the data and to assist in further enquiries and insights (Miles & Huberman 1994, Schwandt 2007). Data analysis also focussed on “contextualising strategies”, focussing on the relationships between accounting methods addressed in the case law (Miles & Huberman 1994, Schwandt 2007, Bazeley 2013). According to Hyatt (2005, p.518), “context can be seen as an interpretation not of the text, but of the social situations in which the text is produced and received.”
Table 3: Codes used in the critical discourse analysis.

<table>
<thead>
<tr>
<th>Codes</th>
<th>Description of the codes</th>
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<tbody>
<tr>
<td>Admissibility</td>
<td>The criteria the judiciary have set for admissibility of the forensic accountant expert report/opinion evidence. These include qualifications based on training, study or experience, independence and area of expertise.</td>
</tr>
<tr>
<td>Specialised knowledge</td>
<td>Criteria used by the court to address ‘what is specialised knowledge’.</td>
</tr>
<tr>
<td>Measurement/valuation methods</td>
<td>Value of any accounting-related matter and the valuation/measurement method/criteria (e.g. historical cost, fair value, etc.) forensic accountant experts used and accepted by the court.</td>
</tr>
<tr>
<td>Accounting assumptions, technology and practice</td>
<td>Accounting assumptions referred to in case law – accrual basis assumption, going concern, period assumption, relevance, reliability, faithful representation, comparability, understandability, and materiality. Accounting technology brings into the study the different accounting technology used by forensic accountant experts. Accounting practice such as Codes of Conduct and Practice Notes.</td>
</tr>
<tr>
<td>Evidence/legal precedent</td>
<td>Any legislation or legal precedent the judge mentioned to support the role of the forensic accountant expert.</td>
</tr>
<tr>
<td>Expert report/opinion</td>
<td>Contents, structure and bases of the forensic accountant expert’s report.</td>
</tr>
<tr>
<td>Facts</td>
<td>Documentary evidence forensic accountant experts used when preparing the expert report.</td>
</tr>
<tr>
<td>Omission</td>
<td>Things that the forensic accountant expert missed and, recommended by the judge to be included in the forensic accountant expert’s report.</td>
</tr>
</tbody>
</table>

Contents of the report (including results of data analysis) were separated from the database and used as the basis of the role of the forensic accountant expert in assisting the court. The written report which encompassed “explicit presentation of the key evidence used to draw
conclusions” (Yin 1992, p.137) was used. The results of the analysis were written in three chapters following Fairclough’s three-tier framework.

3.6.2 Application of the framework

Tier 2 - Analysis of discourse as discursive practice

The focus of the analysis was to identify discursive practices that facilitate the admissibility of a forensic accountant expert opinion. Discursive practices include the discourses pertaining to admissibility of expert opinion described in the legislation, rules and regulation, accounting standards and legal precedent. The analysis was tailored to answer the first secondary research question: what is required to facilitate the admissibility of an expert opinion?

The admissibility of exert opinion includes compliance to the legislation, rules and regulation, accounting standards and legal precedent. The analysis also focused on the types of qualification, professional membership, methods of financial analysis and assumptions identified by a judge. These discursive practices were discussed in section 3.5.2.

Tier 1 - Analysis of discourse as text

The focus of the analysis was to identify the accounting discourse or text that supplement the admissibility of a forensic accountant expert opinion. The text includes a case law, sentence or paragraph a judge used to identify the role and qualification of a forensic accountant expert. The analysis is tailored to answer the second secondary research question: what is required to supplement the criteria for admissibility of expert opinion?

The analysis also focused on accounting discourses identified by a judge to enhance the understanding of expert opinion. For example, forensic accountant expert reports containing visual aids such as graphs, tables and cash flow analysis to assist a judge in understanding the
financial trail. This demonstrated the power of accounting discourse. Examples of these texts were discussed in section 3.5.1.

**Tier 3 - Analysis of discourse as social practice**

The focus of the analysis was to identify social practices of the court that affect forensic accountant experts. Social practices in court include compliance to court procedures pertaining to the performance of a judge and a forensic accountant expert. The analysis is tailored to answer the third secondary research question: *how do the social practices of the court affect forensic accountant experts and the trier(s) of fact?*

The analysis also focused on the different ideologies a judge used to describe the role of the forensic accountant expert and how the trier of facts decision affected society. In addition, the different institutional authorities of the court and accounting were analysed. These social practices were discussed in section 3.5.3.

**Data sources**

*Primary data*

The fifteen cases or primary data are listed in Table 4 below. The table also outline supporting case laws a judge used to clarify the text, discursive practice or social practice of a forensic accountant expert.
Table 4: List of primary data

<table>
<thead>
<tr>
<th>No.</th>
<th>United States of America</th>
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<tbody>
<tr>
<td>1</td>
<td>Daubert v Merrell Dow Pharmaceuticals, Inc, 509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469, 1993 U.S. (No. 92–102)</td>
</tr>
<tr>
<td>2</td>
<td>Estate of Reva N. WOLF, Deceased, Sherwin F. Wolf, Petitioner and Appellant, v. Estate of Reva N. WOLF and Robert S. Wolf. 1999 WL 33902468, Court of Appeal, Second District, Division 4, California</td>
</tr>
<tr>
<td>3</td>
<td>Frye v United States 293 F. 1013; 54 App. D.C. 46; 1923 U.S</td>
</tr>
<tr>
<td>5</td>
<td>Kumho Tire Co. v Carmichael (1999)</td>
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<tr>
<td>7</td>
<td>United States v. DeRose Indus., Inc., 519 F.2d, 1066, 1067 (5th Cir.1975)</td>
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<th>No.</th>
<th>United Kingdom</th>
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<td>3</td>
<td>Nigel Gray &amp; Others v Braid Group (Holdings) Limited, P560/13, [2015] CSOH 146, 2015 WL 6966279</td>
</tr>
<tr>
<td>4</td>
<td>R. v Lewis (Mark) 2014 WL 5833973,Court of Appeal (Criminal Division) 2014-10-31</td>
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<td>6</td>
<td>Sunrise Radio limited [2009] EWHC 2893 (Ch)</td>
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<th>No.</th>
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<tr>
<td>1</td>
<td>ASIC v RICH [2005] NSWSC 149</td>
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<tr>
<td>3</td>
<td>Australian Securities Investments Commission v Australian Investors Forum Pty Ltd (No. 2)</td>
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<tr>
<td>4</td>
<td>Capricorn Diamonds Investments Pty Ltd v Catto and Ors [2002] VSC 105 (10 April 2002)</td>
</tr>
<tr>
<td>5</td>
<td>CDPP v Hart &amp; Ors; Yak 3 InvestmentsP/L as t/see for Yak 3 Discretionary Trust &amp; Ors v Commonwealth of Australia [2013] QDC 60 (2 April 2013)</td>
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<td>6</td>
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<td>34.</td>
<td>The Duke Group Ltd (in liquidation) v Pulmer &amp; Ors No. SCGRG - 92 – 1874</td>
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Secondary data

The secondary data (table 5) were used to reconfirm unclear information in the primary data.

Table 5: List of secondary data

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<thead>
<tr>
<th>No.</th>
<th>Legislation and Regulation</th>
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<td><strong>Accounting standards</strong></td>
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<td>1.</td>
<td><strong>APES 110 Code of Ethics for Professional Accountants</strong></td>
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<td>2.</td>
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<td><strong>APES 215 Forensic Accounting Services</strong></td>
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<td>4.</td>
<td><strong>APES305 Terms of Engagement</strong></td>
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3.7 Summary

The chapter discussed the research framework, Fairclough’s three-tier concept of discourse focussing on Critical Discourse Analysis, and Goodrich’s legal discourse analysis. Fairclough’s Critical Discourse Analysis emulates much of critical discourse analysis in general, but the methodological emphasis has created greater appreciation of sophisticated linguistic constructs in the analysis of discourse. The three-tier framework demonstrates ideology whereby the law fixes legal meaning to individual acts. Qualitative research was also discussed to provide insights in the research method.

The findings of this thesis are discussed in the following chapters. The next chapter presents the results of the application of the second tier. This analysis focusses on discursive practices courts have set for the admissibility of forensic accountants’ expert opinion evidence. Chapter 5 addresses the results of the application of the first tier of discourse analysis, “analysis of discourse as text”. The analysis focusses on the “texts” courts have identified to supplement the criteria for admissibility of expert opinion evidence (discussed in Chapter 4). Chapter 6 explores the third tier: “analysis of discourse as social practice”. The chapter addresses the social influence of accounting demonstrated through legal discourse and its impact on society.
CHAPTER 4

FORENSIC ACCOUNTANT EXPERT IN COURT: DISCURSIVE PRACTICE

4.1 Introduction

The evidence of an expert is … evidence of “a belief or judgement which seems likely to be true, but which is not based on proof …” or “a conclusion, usually judgmental or debatable, reasoned from facts” and as “an inference from observed and communicable data”…. Opinion evidence would not be admissible to prove the existence of a fact …unless an exception …in s 79(1): “If a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.” (Commissioner of Taxation), [para 490]).

The discourse above demonstrates expert opinion as a discursive practice that can be debated in court and similar formal arenas (such as dispute resolution tribunals) since it is based on the expert’s belief or judgement. There are some exceptions to the admissibility of expert opinion. Courts interpret the different discourses arising from disputes and litigation, “legal precedent”, on a case-by-case basis.

This chapter presents the second layer, “discourse as discursive practice.” It focusses on how the general principles of Fairclough’s Critical Discourse Analysis can be applied to forensic accounting to demonstrate how legal discourses on requirements for admissibility of expert opinion have evolved. Legal discourse is analysed in terms of the process in which “text is produced, distributed and consumed” (Fairclough 1993b). This involves legal precedents on admissibility of expert opinion, how they are used in the case law analysed, and how discursive practice is consumed by forensic accountants appearing in court as expert witnesses. These discursive practices are interpreted with respect to the criteria for admissibility of forensic accountant expert opinion evidence in court. Criteria for admissibility are decided through the first secondary research question:
(i) What is required to facilitate the admissibility of an expert opinion?

Admissibility of expert evidence in the United Kingdom and Australian courts was based previously on common law. The Australian Evidence Act 1995 (Cth) “sets out the federal rules of evidence”\(^{16}\), consistent with the requirements of the legislation in other jurisdictions. However, the exception to this rule is “expert opinion based on specialised knowledge.”\(^{17}\) As the Evidence Act 1995 (Cth) does not provide detailed rules for the admissibility of expert opinion, the courts have decided, (on a case by case basis), what makes an individual an “expert” and what constitutes “specialised knowledge”. Discourse is created by following previous court judgements or legal precedent/authority, or distinguishing previous case facts from the present case. In accord with Fairclough (1993b), this is “discursive practice.”

The history of admissibility in court of expert opinion based on “scientific evidence” can be traced to the late 20\(^{th}\) century. Expert opinion based on scientific evidence was first admitted as evidence in United States in 1993, based on the judgement in Daubert (USA). United Kingdom courts also accepted expert opinion based on scientific evidence in 1993 in the Ikarian Reefer. Furthermore, Australian courts admitted expert evidence based on scientific evidence in 2001 based on Makita (Australia). These three cases demonstrate discursive practices or similar basic principles of admissibility of expert evidence have been adopted in each of the jurisdictions addressed in this thesis.

The three cases highlight examples of discursive practices in Fairclough’s second layer of his framework. The discursive practices are cited by the court in the various case law analysed to

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\(^{16}\) **The opinion rule** - (1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

\(^{17}\) **Exceptions: opinions based on specialised knowledge** - (1) If a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.
assist in evaluating the weight and admissibility of forensic accountants’ expert opinion. The findings identified during case law analysis and answering the first secondary research question are discussed below in four sections. First, section 4.2 outlines admissibility of forensic accountant expert opinion evidence based on the attributes of the expert. The discussion focusses on education/qualification, training and experience (section 4.2.1), what constitutes expert specialised knowledge and skill (section 4.2.2). The expert must not address the ultimate issue, including fraud, guilt or innocence (section 4.2.3). According to section 2.5, specialised knowledge can be equated with the professionalisation literature. To be a ‘profession’ requires “a body of esoteric knowledge”. This means it requires judgement, and cannot be reduced to a definitive step-by-step process, such as trades or crafts. Section 4.3 deals with admissibility of forensic accountant expert opinion evidence based on the attributes of the process. The two attributes presented are authority for processes/methods, relevance to the facts of the case (section 4.3.1), and appropriateness of assumptions (section 4.3.2). Section 4.4 focusses on the independence of the forensic accountant expert.

### 4.2 Admissibility based on the attributes of the expert

There is no “one-fix-approach” for admissibility of expert opinion evidence identified during case law analysis. Courts will first establish the relevant expertise of the forensic accountant expert before establishing the boundaries of that expertise. Having an accounting qualification is required to facilitate the admissibility of expert opinion. Accounting qualification is also one of the attributes of becoming a forensic accountant expert. However, according to the trier of fact in *Commissioner of Taxation*:

> [h]aving accountancy qualifications may not be enough for they may have led a person to follow a variety of careers that require those qualifications but also require other skills and experience. An accountant may specialise, for example, in management accounting, public sector accounting …[para 499]
The trier of fact also argued that courts will “ensure that the accountant called as an expert has the expertise that matches the issues under consideration in the case” [at 499]. The trier of fact in Commissioner of Taxation argued:

> [o]nce the relevant expertise is established, the boundaries of that expertise must also be established. For example, unless he or she has skills and expertise outside accountancy, an accountant will not be accepted as an expert on the duties of a company director. As Austin J said in Australian Securities and Investments Commission v Vines: “The second proposition is that ‘specialised experience’ connotes something beyond the product of the observation of a non-participating onlooker, at any rate where the knowledge is about a standard of competence in doing a job that requires the exercise of judgment.” (italics added) [para 500].

Forensic accountant experts have to demonstrate they have specialised knowledge that is based on training, study and experience to facilitate the admissibility of their opinion. Courts have identified that a qualification does not make a person an expert. A qualification must be supported by experience and training. The forensic accountant expert must also demonstrate expertise in the specific area in which expertise is required.

### 4.2.1 Education/qualification, training and experience

Case law analysis identifies acceptance of a forensic accountants’ expert evidence on the bases it is inclusive of their experience, training and qualification. There is no “set standard” for experience, training and qualification. A forensic accountant expert’s academic qualifications have some credibility in court. Academic qualification is required to facilitate the criteria of admissibility. A judge also considers a forensic accountant’s experience and training. For example, in Denning & Denning and Anor (No 3) [2011] FamCA 160, Young, J commented:

> I do not accept the husband’s concerns and I have no hesitation in finding that the experience, training and qualifications of this witness [the expert] are wholly appropriate for [the expert] to prepare a report and give evidence on the matters within [the expert’s] affidavit and reports (para 285).
In this case, the forensic accountant expert, John (not his real name), a chartered accountant in private practice, was engaged by Denning’s wife and her solicitors to review the assets and liabilities in the matrimonial pool and to report on related property and financial dealings by the husband. John filed three affidavits as his annexed reports on 26 May 2009, 30 June 2010 and 19 November 2010. John’s curriculum vitae accompanied his report. This identified that he had over 30 years’ experience in professional and commercial accounting and finance and specialised in forensic accounting, including Family Law matters. His qualifications were a Diploma of Business Studies at the Warnambool Institute of Advanced Education, (now Deakin University). Further, he was an associate member of the Institute of Chartered Accountants of Australia and a member of that body’s forensic accounting and business valuation special interest groups. Young, J mentioned his qualifications and experience in detail because the husband initially objected on the basis that the expert held no university degree and had no postgraduate training. As is evident from Young J’s comments [at paragraph 285], the forensic accountant’s expert report was admitted as evidence even though he did not have a university degree.

The issue of whether an expert’s qualification is supported by training and experience was also highlighted by Kaye, J in R v Cox (No 1) [2005] VSC 157:

[t]he fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does .... [para 13]

Curtin’s evidence was admitted in court since the court recognised he was a member of the accounting profession and his credentials satisfied its study and training criteria. His qualifications were used to supplement his professional membership. He was able to cite accounting practice authority, APS 11 Statement of Forensic Accounting Standards to support
his methodology. Demonstrating an understanding of using forensic accounting technology based on assumptions and methodology of the accounting profession during the reconstruction of facts is required to facilitate admissibility of evidence. Forensic accountant experts must follow appropriate systems or knowledge, use skills to trace appropriate data to legitimate sources, and base opinions wholly or substantially on the experts’ specialised knowledge gained through training, study or experience (R v Cox & Saddler [2006] VSC 443).

Forensic accountant experts should not accept any engagement if they have limited experience, required expertise and qualification. Mullighan, J in Duke Group noted these sentiments.

Having considered all of the evidence, I do not think [the expert] had sufficient expertise for the task at hand. His background was relatively limited and the conclusions which he reached were so far wide of the mark that they indicate inexperience and lack of expertise.

4.2.2 Specialised knowledge versus common knowledge

Courts have identified specialised knowledge (as opposed to common knowledge) as another important discursive practice required to facilitate admissibility of forensic accountant expert opinion. Expert knowledge is not essential in circumstances whereby common knowledge can be used to address the issue in question. The trier(s) of fact will consider the work of a forensic accountant expert to be a mathematical exercise. For example, in Fuller v The Queen [2013] NTCCA 6, the judge argued:

[b]oth grounds relate to what is said to be expert opinion, however, for the most part, [the expert’s] evidence comprised what is essentially a mathematical exercise judge [para 50].

The forensic accountant expert opinion was not based on expert knowledge or expertise, but a mathematical exercise. It did not require expert knowledge, training or expertise.
Forensic accountant experts have to demonstrate they have expertise in relevant industries in order to provide costing for such industries. A forensic accountant expert’s credentials can be challenged by the opposing party but courts have the power to determine an expert’s credentials. For example, the trier of fact in *Commissioner of Taxation* argued:

I find that [the expert] had experience in service industries of types other than the relevant service industry in which Freanert was engaged. That experience, together with his expertise as a forensic accountant qualified him as an expert witness in this case and he did not need to have experience in or a detailed knowledge of the relevant service industry required by Dr Orow (para 484).

Courts refer to (and adopt) discursive practices identified in previous cases/legal precedent to support their judgements. This is the power/authority of discourse as discursive practice. For example, in *R v Cox (No 1) [2005] VSC 157*, Kaye, J deliberated on the admissibility of evidence. He expressed the rule of evidence by referring to *R v Bonython (1984) 38 SASR 45* at 46 (per King CJ):

[i]t is a fundamental rule of evidence that a witness is only entitled to give evidence relating to what the witness heard or saw, and is not entitled to give evidence as to the witness's opinion, unless the opinion is one which is appropriate to be given by an expert, and the witness is qualified as an expert to give that evidence (para 12).

Kaye, J suggested admissibility of opinion evidence involves two issues. First, “the opinion evidence must be evidence in respect of which the tribunal of fact would not be able to form a correct judgment, without the assistance of a suitably qualified expert.” In such circumstances, a forensic accountant expert opinion is only required in circumstances in which the case of interest is outside the experience of the judge or jury. Kaye J (citing *Clark v Ryan; J.W. Smith in the notes to Carter v Boehm*) commented:

‘[o]n the one hand’ that author wrote, ‘it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when
it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of the knowledge of it.’ Then after the citation of authority the author proceeds: ‘While on the other hand, it does not seem to be contended that the opinions of witnesses can be received when the enquiry is into a subject-matter the nature of which is not such as to require any particular habits or study in order to qualify a man to understand it’.

Kaye J (citing R v Turner; Lord Mansfield in Folks v Chadd) further clarified the criteria for admissibility of expert evidence by stating:

[a]n expert’s opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult.

The second and related principle according to Kaye, J (at paragraph 14) refers to cases where inexperienced persons would unable to provide correct judgements, and as a result, opinion evidence becomes the essence of enquiry. In such situations, a witness who is suitably qualified to be an “expert” may be called to give opinion evidence on that matter. Kaye, J (citing R v Silverlock) stated “the profession or course of study undertaken by the witness”, including the witness’s particular experience in that profession, must give the witness "more opportunity of judging than other people.” When considering this issue “it is not sufficient to determine that, in a general sense, the witness is qualified to give opinion evidence on a particular subject-matter.” The critical aspect is the “witness is appropriately qualified to give expert evidence in the form of the particular opinion which is sought to be adduced.” Kaye, J referred to the first principle. He stated that the expert witness would not be required to express opinions on matters which the jury could determine for themselves without the evidence of the expert, notwithstanding that the witness is qualified as an “expert”. Kaye, J in R v Cox (No. 2) [2005] VSC 224 commented:

The jury will be instructed that they are to take into account all of the limitations specified by [the expert], and any other limitations revealed in evidence. Further,
the jury will be instructed that it is for them to critically analyse and assess the criteria and assumptions relied upon by the expert (italics added) [para 50].

Curtin’s criteria were based on “reasonableness and fairness” and on a “normal” person’s spending behaviour which would not require expert opinion. According to Kaye J, the “essential role of a jury is to bring into the court’s adjudicative processes the common sense, proportion and reasonableness of the normal person in our community.” Curtin’s views are similar to those of anyone in our society including that of a juror, and nothing in the evidence suggests those views are derived from Curtin’s specialised area of learning or experience. It was not also shown that there is a specialised field of learning an appropriately qualified expert might draw on in cases where s/he has been required to make assumptions regarding the ordinary spending behaviour of individuals. Importantly, Curtin did not show, in regard to the cash payments in respect of which a "judgment call" must be exercised, that a jury would be unlikely to make an incorrect judgment without the aid of "expert" evidence. In summing up R v Cox (No 1) [2005] VSC 157, Kaye, J notes:

[37] For the reasons which I have set out above, I accordingly rule as follows:

1. In its present form the evidence of [the expert], proposed to be adduced by the Crown, is inadmissible as it fails to properly and sufficiently identify the facts, assumptions and methodology relied upon by [the expert] in reaching each conclusion contained in his three reports…as to unsourced cash payments and unsourced cash deposits.

2. In its present form the evidence of [the expert], proposed to be adduced by the Crown, is inadmissible, as, and to the extent that, it is based on assumptions by [the expert] as to the spending conduct of "normal" individuals. Those assumptions have not been shown to me to be assumptions which are within the province of some specialised field of learning experience or expertise. Nor has it been proven to me that, in any event, [the expert] is qualified as an expert to give evidence as to the spending conduct of "normal" individuals.

Kaye, J also referred to the most widely used criterion for admissibility of expert evidence. This was used by Heydon J in Makita (Australia) (at paragraph 85): the expert must demonstrate that the field of “specialised knowledge” was based on training, study or
experience. The trier of fact [at paragraph 491] in Commissioner of Taxation cited Gaudron J in HG v The Queen when referring to admissibility of expert opinion.

That is consistent with the position at common law as explained by Gaudron J in HG v The Queen: “...The position at common law is that, if relevant, expert or opinion evidence is admissible with respect to matters about which ordinary persons are unable ‘to form a sound judgment ... without the assistance of [those] possessing special knowledge or experience ... which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience’.”

A forensic accountant’s expert opinion evidence must be within his/her recognised body of knowledge to facilitate admissibility. A forensic accountant expert has to demonstrate that their opinion is based on their body of knowledge, accounting. For example, Kaye, J in R v Cox (No. 2) [2005] VSC 224, referred to the accounting profession when deliberating on a forensic accountant’s expert report.

The evidence would be admitted on the basis that [the expert], using [the expert’s] expertise and experience, was analysing the transactions as an accounting exercise. In other words, [the expert] would not be permitted to express views which might usurp the role of the jury. Rather the evidence of [the expert] would be admitted to provide guidance to the jury as to how an accountant might approach the exercise [para 50].

The judge commented further and agreed that the expert’s methodology was based on an accountant’s methodology:

As an accountant [the expert] … not be at liberty to off-set the two transactions because they did not evidence a transfer of funds from one account to another….Those …responses, in my view, make it clear that, whatever similarity [the expert] exercise bears to an assessment of the ordinary spending habits of a family unit, nonetheless the exercise performed by [the expert] was based on an accountant’s methodology [para 31].

The court explored the criteria on the nature of a recognised body of knowledge by arguing that forensic accountant experts cannot give opinion evidence on matters such as “spending habits” of individuals if it is not within their body of knowledge. Kaye, J in R v Cox (No. 2) [2005] VSC 224 noted:
[f]urther and importantly, if the evidence of [the expert] is to be admitted, it will be on the basis that the witness is not expressing views based on assumptions as to the spending habits of ordinary people [para 50].

The discussions on discursive practice imply that forensic accountants’ expert opinion is not required in areas where common knowledge can be used to address the facts in issue.

4.2.3 Addressing the ultimate issue

Forensic accountant experts have to address the ultimate issue to facilitate admissibility of evidence. They are required to adduce expert evidence and must not presume to give an opinion as to guilt or innocence of an individual. This is only appropriate in criminal matters, for example, in fraud cases to prove guilty or innocent of any party. The ultimate issue of individuals is to know whether they are guilty or innocent. The roles of the trier of fact are to determine this. A court has the power to make decisions on the ultimate issue after considering evidence adduced by opposing parties. The judge [at paragraph 117] stated in Perpetual Ltd -v- Buttarelli [2012] WASC 512, a court will “separately consider the most significant...matters” produced by opposing counsel and “their implications for the ultimate issue to be determined.” The judge [at paragraph 43] in Westcott -v- Minister for Health [2015] WADC 122 (23 October 2015) argued, “I am required to make findings on the ultimate issues on the balance of probabilities based on a body of direct and circumstantial evidence.”

Kirby J, (2011, p.13) noted the importance of tendering expert evidence and compliance with the five basic rules including the ultimate issue rule:

the expert is forbidden from usurping the role of the decision-maker and expressing, in the form of an expert opinion, a conclusion on the ultimate issue which is reserved to the tribunal of fact. This rule emphasises the subordinate and role of the expert, which is to assist the decision-maker with special opinions, not to take over the decision-maker’s functions....
The Australian Law Reform Commission (2005b, para 9.103), noted “at common law the expert witness cannot be asked the central question or questions which the court has to decide, that is, the ultimate issue in the case.” It is imperative forensic accountant experts’ tender expert opinion evidence or “scientific evidence” that is relevant to the facts at issue. For example, in *Tranquility Pools & Spas Pty Limited v Huntsman Chemical Company Australia Pty Limited [2011] NSWSC 75*, the trier of fact [at paragraph 5] argued, “more particularly, scientific evidence that is relevant to an ultimate issue … must still be adduced.”

A forensic accountant expert’s ultimate issue in court is to form conclusions on issues which will be the subject of determination by a court. The importance of addressing the ultimate issue in court is expressed in section 80 of the *Evidence Act 1995 (Cth)*. The ultimate issues were noted by the judge in *National Telecoms Group Ltd v John Fairfax Publications Pty Ltd (No 1) [2011] NSWSC 455*:

[n]or is [the expert] assisted by s 80 of the *Evidence Act 1995* that enables an opinion to be given about a fact in issue or an ultimate issue, because in coming to the conclusions he does [the expert] is not reaching those conclusions as a result of his expertise. Rather he is drawing inferences and reaching conclusions in the way that any other informed person might do [para 34].

The judge in *ASIC v Rich [2005] NSWSC 149* also argued:

[a]n expert is in no position unilaterally to usurp the court's function, since the court has a discretion to reject expert opinion evidence even if the evidence has not been challenged at the hearing. Moreover, it is no objection to the admissibility of the expert's evidence that it goes to the *ultimate issues*, having regard to s 80: *ASIC v Vines [2003] NSWSC 1095; (2003) 48 ACSR 291* at [27]. *Thus, an accounting expert giving evidence in an insolvent trading case may give an opinion as to whether the company was insolvent at a particular date, even though insolvency is one of the statutory ingredients for liability* (italics applied) [para 288].

The trier of fact in citing section 80 of the *Evidence Act 1995 (Cth)* and *ASIC v Vines [2003] NSWSC 1095; (2003) 48 ACSR 291* demonstrated “intertextuality” (Fairclough 1993a). The
judge is using the influence and presence of the text from the legislation and case law in the construction of the new text, addressing the ultimate issue in insolvent trading. The intertextual analysis shows how texts selectively draw on orders of discourse such as genre. Genre positions the court during the deliberations of the ultimate issue.

4.3 Admissibility based on process attributes

Admissibility of expert opinion in court is also based on processes forensic accountants use during the reconstruction of facts pertaining to issues in question. Demonstrating understanding of process attributes are required to facilitate admissibility of evidence. Bases of the processes or accounting technology are the legislation, acts and regulations, and accounting standards. Acceptance of the processes by a court demonstrates the power of discursive practices expressed by the legislation, acts and regulations, legal precedent or accounting standards.

4.3.1 Authority for processes and methods

Forensic accountant experts apply assumptions, processes, and procedures recognised by the specialised body of knowledge during the reconstruction of facts pertaining to issues of interest. This is the bases of admissibility in court of forensic accountants’ expert opinion. Forensic accountant experts comply with acts and regulations, and accounting standards during their course of engagement. For example, in Australian jurisdictions, APES 110, APES 215 and APES 305. Forensic accountant experts also comply with the legislation and legal precedent/authority regarding the gathering and tendering of evidence, and admissibility of expert reports in court, (for example, in Australian courts, the Evidence Act and Federal Court Rules Practice Note CM 7).
Discursive practices or legal precedent identified in *Makita (Australia)*, also guide the judge and forensic accountant experts during court proceedings in Australia. The judge interprets the legislation, not only the *Evidence Act 1995 (Cth)*, but other legislation relevant to the Act, for example, the *Corporations Act 2001* in cases of valuation disputes, the *Family Law Act 1975* in matrimonial cases, and the *Proceeds of Crime Act 2002 (Cth)*.

Integrity and honesty in the application of forensic accounting technology are required to facilitate admissibility of evidence. They are two important criteria courts require forensic accountant experts to demonstrate during the submission of expert witness reports. This is identified while answering the first secondary research question. In Australian jurisdictions, the criteria are expressed in the Accounting Standard *APES 110*. The expert must acknowledge any limitations to the opinion expressed in the report. Vincent, a forensic accountant expert, declared [at paragraph 64] in *Hart*, there were significant deposits from entities alleged to have loans and that he was unable to verify the participants of the scheme through banking records. Presumably, his comments were based on his professional opinion.

I was unable to identify any record of these amounts in the client files of those participants. For this reason, I was unable to positively ascertain whether such payments were made to UOCL in relation to the schemes, or for another reason.

The banking records were important documents required to corroborate company records (such as client files) in order to authenticate the transaction. The result of the authentication would have assisted a forensic accountant expert in formulating his/her opinion.

Vincent used *APES 110* as authority for his approach. The forensic accountant expert’s actions were consistent with professional and court requirements because he acknowledged he did not have access to all relevant material. However, did he also acknowledge this in his report? If he did, then that is appropriate. If he did not, and it had to be drawn out during cross-examination, then the reliability of the expert report would be questionable. For
example, in *Orrong Strategies Pty Ltd & Ors v Village Road Show Ltd* [2007] VSCA 320, the forensic accountant expert witness breached the Expert Code of Conduct by being influenced by the prosecution and legal counsel. He provided an opinion that was irrelevant to the true issue in question.

### 4.3.2 Appropriateness of assumptions and methodology

Demonstrating understanding of the bases of methods, assumptions underlying expert opinions, and how conclusions were derived are required to facilitate admissibility. This is noted while answering the first secondary research question. In *R v Cox (No 1) [2005] VSC 157*, Curtin’s expert report was not admissible after he was questioned on the methodology and assumptions used during a cash flow analysis. At paragraphs 9 and 10, Curtin expounded that he “took into account assumptions concerning the normal spending behaviour by a person with a special level of income.” He does not have expertise in this area. Curtin’s opinion evidence was eventually accepted in *R v Cox (No. 2) [2005] VSC 224* [at paragraph 14]. The forensic accountant expert demonstrated his expertise and assumptions by referring to his work at the Victoria Police and the then *APS 11 Statement of Forensic Accounting Standards* (clause 23), published by the Institute of Chartered Accountants in Australia.

[The expert] referred to *Statement of Forensic Accounting Standards – APS 11* – published by the Institute of Chartered Accounts in Australia. In particular he referred to clause 23 of that standard which provides: … in such circumstances, members should ensure that the use of such estimates or assumptions is:

(a) reasonable in the circumstances; and

(b) suitably qualified and disclosed.

Kaye, J in *R v Cox (No. 2) [2005] VSC 224* referred to *R v Mitchell; Butera v DPP*, when confirming expert opinion is required on matters a jury cannot verify. At paragraph 25, Kaye, J noted “…the compilation of such a document is classically a role performed by a qualified accountant…. The forensic accountant expert used the “direct method” derived from the
accounting body of knowledge during his cash flow analysis. A normal person without any expertise in accounting would not be expected to possess knowledge of this method. Curtin demonstrated the expertise gained through training and qualification as an accountant. The court also noted that Curtin and other accountants “are required to develop and apply criteria based on the accounting concept of reasonableness” during cash flow analysis. Kaye, J in R v Cox (No. 2) [2005] VSC 224 stated these sentiments:


[the expert] has brought to bear the expertise which he has gained through his training and qualification as an accountant….In conducting cash flow analysis [the expert], and indeed other accountants, are required to develop and apply criteria, based on the accounting concept of reasonableness. …The accountant calls upon his or her experience and expertise (para 30).

Kaye J continued and stated the expert must demonstrate the methodology in which specialised knowledge was used in order to arrive at the expert opinion.

The opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert’s evidence must explain how the field of ‘specialised knowledge’ in which the witness is expert by reason of ‘training study or experience’, and on which the opinion is ‘wholly or substantially based’ applies to the facts assumed or observed so as to produce the opinion propounded.

Curtin’s expert opinion was not admissible in court. He failed to demonstrate and identify the facts, assumptions, criteria and methodology used or relied upon in forming the conclusion that various cash payments and deposits in the accounting records of each accused were unsourced. The forensic accountant expert’s conclusions did not contain information that would allow the jury to draw conclusions - they do not have expertise in assessing the issue of interest. The conclusions in the report should be based on the expert’s background, field of study and experience, (for example, in this case, the normal person's spending habits). This would qualify him to give “expert evidence” as to the “validity and suitability” of the criteria and assumptions he used.
Curtin re-formulated and re-submitted his expert report in *R v Cox (No. 2) [2005] VSC 224*.

Kaye, J in accepting Curtin’s expert report commented:

[i]n his second draft reports [the expert] has set out, in significantly greater detail, the methodology and assumptions employed by [the expert] in reaching those conclusions. [The expert] also gave evidence before me as to the basis upon which [the expert] formulated the assumptions on which [the expert] relied (para 8).

Kaye, J in *R v Cox (No. 2) [2005] VSC 224* stated a jury would have considerable difficulty in analysing financial transactions without a forensic accountant expert’s guidance. The jury would also be unable to provide a fair conclusion to the case.

… it is self-evident that a jury would be unlikely to be able to form a correct or meaningful judgment on the accounts …without assistance from (the expert) who compiled the document (emphasis added) [para 27].

The judge in *Pilmer v Duke Group Ltd (In Liq) [2001] HCA 31; 207 CLR 165; 75 ALJR 1067; 38 ACSR 122*, referred to a forensic accountant expert’s responsibility to clients.

According to "ethical guidelines" of the Institute of Chartered Accountants in Australia … the principles binding on persons … included those of "integrity, objectivity, independence, confidentiality and professional competence". The adoption of those rules reflected the fact that… clients and persons dependent upon clients of chartered accountants will be extremely vulnerable to the discharge of their duties [para 139].

In *R v Cox (No 1) [2005] VSC 157*, Kaye, J [at paragraph 15] (citing *Makita (Australia)*; Lord President Cooper in *Davie v Lord Provost, Magistrates and Councillors of the City of Edinburgh*) relates to the form in which an expert witness is permitted to give evidence. Courts have reservations and ensure that experts do not assume the role of juries (or judges) by merely stating their conclusions, without properly identifying the facts on which the opinions are formed, and the methodology and assumptions used by the expert in forming those conclusions. Thus a criterion for admissibility of evidence is “the expert must specify the precise criteria relied upon by the expert in order to enable the jury to evaluate, for itself, the validity of the expert’s conclusions.”
4.3.3 Valuation methods

Valuation is an important and contentious issue in court. Measurement becomes more complicated if direct evidence of the value of individual assets is not available. Because courts lack the required expertise in valuation, experts (including forensic accountants) are often engaged to assist the courts. However, a would-be expert witness must demonstrate expertise in valuation/measurement in the specific area before expert reports are admitted as evidence. There is no set standard for valuation methods and forensic accountants adopt professional pronouncements, standards and legal precedent for guidance. Valuation fields that require forensic accounting assistance include valuation of properties owned by individuals and companies, dissolution of a business partnership, matrimonial disputes, bankruptcy proceedings and, shareholder and management disputes.

Courts have accepted several valuation methods as suitable under different circumstances depending on the type of property being valued. Simply, in aggregate all “valuation” cases need to at least distinguish real property from business assets, from company shares. For example, in Hart, a forensic accountant expert was engaged to estimate the value of the relevant company interest in the asset. The issue encountered was complicated since that value was diminished by the value of charges over the assets to secure payments. The value of an asset can be determined at particular times during investigation. In some cases the market value of an asset at the time of the forfeiture can be used as the value of the asset. In other cases, the value can be used to measure the proportion of the owner’s interest in the asset. This view was noted by the judge [at paragraph 475] in Hart:

Market value of a charged asset at the date of forfeiture seems prima facie relevant to measuring the proportion of the owner’s interest at the time of forfeiture. There was no issue expressly raised in the pleadings about dates when the value of any company’s interest in an asset should be valued.

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18 Where an expert in one area, for example, valuation of shares in a closely held entity as opposed to widely dispersed ownership.
The contentiousness of using market value during valuation of properties was also evident in *Roads Corporation v Love [2010] VSC 32* in which [at paragraph 331] Brown and Dudakov, the valuers called to give evidence on behalf of the Corporation, adopted a comparable sales approach when seeking to determine the “before” and “after” value of Love’s land. At [paragraph 332] “they identified the highest and best use of the land as future industrial use or, as Dudakov sometimes put it, urban use for industrial or business purposes…” as some items to be considered during damages claims. The forensic accountant expert used the discounted cash flow methods and assumptions and [at paragraph 658] the value of trees, access tracks and residential amenity. Osborn J [at paragraph 798] awarded damages of $414,000 to Love. Components of the award included market value and special value of the property, and compensation for disturbance and non-financial disadvantage (solatium) arising from the compulsory acquisition of land. Osborn J mentioned the need to consider “special value” in some circumstances, by referring to legal precedent - an example of the power of discourse as discursive practices cited by Wells J in *Brewarrana v Commissioner of Highways (No 2)*:

> It is general valuation practice for sales characterized as comparable sales to be used as bases for the valuation of lands said to be similar. But allowances must always be made before such sales can be so used. No two parcels of land are identical in all respects: the sale price of any given piece of land is not necessarily the price at which it ought to have been sold, or the same thing as its true value [para 337].

The court also highlighted other matters a forensic accountant expert can consider in relation to “special value” issues.

> … in relation to the land itself and the circumstances appertaining to it, it may be necessary to consider such matters as topography, location, size, shape, slope, view, land use (actual and potential), scope for, and difficulties of, development, services and amenities….

If the land is sold, the valuer must:
weigh such things as the character, business and relationships of the parties, their motives, the terms and conditions in their contract of sale, and any other special considerations that induced or may have induced them to conclude the contract at the selling price agreed, as well as the dates when the contract of sale and the transfer were concluded or effected.

Mullighan J in *Duke Group*, accepted the views of experts that “valuation was an art not a science.” There are variations on “market value”, issues such as “special value”, and the need to specify a range rather than a minimum or maximum amount. Current value can be represented by different valuation techniques such as those based on replacement cost, exit value, discounted cash flow and historical cost (Friedman 1978).

Forensic accountant experts measure properties using current values, a practice accepted by courts. In the matrimonial case *Piatek v Piatek; Piatek v Piatek & Anor [2010] QSC 412*, [at paragraph 104], the court used current value to value matrimonial property. The court in *Capricorn Diamonds*, accepted the use of “fair value” in valuing the remaining minority units in the company. Ward J in *Cheal 2* addressed the nominal value attributed to goodwill associated with use of company name. The attributes of goodwill were also noted by Mullighan J in *Duke Group*.

…goodwill …in the takeover price… is the difference between the price paid for the issued capital … and the value of the net tangible assets of the company….The existence of goodwill is attributable to intangibles, such as management, strengths, distribution networks, location on market shares…. As goodwill is tied almost entirely to profits, its entire value may be lost in the event of a decline in profit.

The forensic accountant expert referred to Lonergan during valuation.

In the valuation exercise the market value of the merchant banking business had to be determined in accordance with well accepted principles. According to Lonergan : The Valuation of Business, Shares and Other Equity at p6: … the circumstances of the valuation are hypothetical. Therefore the valuation is prepared without particular regard to the identity of either buyer or seller (emphasis added).
The judge accepted the forensic accountant expert’s views by referring to the power of discursive practice/legal precedent by citing observations of Griffiths CJ in *Spencer v Commonwealth of Australia* [1907] HCA 82; (1907) 5 CLR 418 where he mentioned:

“In my judgment the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, ie, whether there was in fact on that day a willing buyer, but by inquiring: ‘What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell? (emphasis added) [para 432].

Valuation has been discussed as a method. A forensic accountant expert can use different valuation methods depending on the property being valued. For example, real property, business assets or company shares.

### 4.4 Independence of the Expert

Independence of forensic accountant expert is required to facilitate admissibility of evidence. Forensic accountant experts need to display independence, “independence of mind” and “independence in appearance”, as stipulated in *APES 110*. The importance of independence of experts in court was highlighted in a survey of Australian judges (Freckelton et al. 1999). The survey found experts provide useful quality evidence. Courts also benefit from the insights and perspectives of experts from other disciplines.

Mullighan J in *Duke Group*, expressed the view that “independence also means that the person must in fact be independent and also must act independently.” The level of discursive practices for accounting-related matters must be theoretically independent, although it has intricate relations with the techniques and forces of power. For example, in *Duke Group*, the potential validity of different values of wealth was acknowledged by the court. Mullighan J declined a submission by the defense that the expert was not independent; and that the conflicting expert report was due to the expert’s association with the client company and legal advisors prior to the trial. The expert’s association included preparation of valuations
and a critique of the report of another expert; and preparation of the client’s case. The judge affirmed that the expert was independent and that it is the responsibility of the legal counsel to ensure the credibility of experts. As a result Mullighan J commended the expert witness stating “I regard him as an excellent witness and he gave not the slightest hint of bias or lack of independence at any stage of his evidence.” As for legal advisors, the court noted:

[legal advisers who engage an expert to assist in the assessment of information and the preparation and presentation of cases assume a responsibility of ensuring that the expert does remain objective and that his or her opinions are reliable.

The judge in Pilmer v Duke Group Ltd (In Liq) [2001] HCA 31; 207 CLR 165; 75 ALJR 1067; 38 ACSR 122 (31 May 2001) commented:

[a] precondition for the provision of the report, obvious from the circumstances but also expressly stated, was the complete independence of the appellants from those proposing the takeover. [para 107].

Mullighan J in Duke Group deliberated on two issues a court can consider when assessing the credibility of an expert.

The issue about [the expert] is to be resolved by the consideration of two matters. First, his qualifications, manner of undertaking his work and giving evidence, the quality of his work and the soundness of his approach and opinions and, secondly, the particular tasks which he undertook by way of advice and assistance in the preparation and presentation of the plaintiff’s case.

In ASIC v Rich [2005] NSWSC 149, Paul Carter’s expert opinion evidence in ‘the Carter Report’ was not admissible in court since he was a former employee of the Australian Securities and Investments Commission (ASIC) and had a prior relationship with ASIC. The Commission brought civil proceedings against One.Tel director and joint chief executive Jodee Rich and One.Tel’s finance director Mark Silbermann for breach of the statutory duty of care of company directors and officers. The directors failed to disclose the true financial position of One.Tel. ASIC engaged Paul Carter, a forensic accountant expert to testify on their behalf. This case highlights the views of the court on the essence of maintaining independence
during engagements and the difficulties encountered by forensic accountant experts who are engaged to act as experts in cases they have previously been engaged to assist in.

4.5 Summary

This chapter addressed the powers of discourse as discursive practices, the second layer in Fairclough’s framework. The “powers of discourse as discursive practices” on requirements for admissibility of forensic accountant expert opinion was noted by the courts. Criteria for admissibility were identified while answering the first secondary research question:

(i) What is required to facilitate the admissibility of an expert opinion?

Courts used legal precedent/authority to assist in their judgement when the legislation is silent on matters of interest. There is no “one-fixed” criterion for admissibility of expert opinion evidence in court. Criteria are determined on a case-by-case basis. The role of an independent expert has been well defined and documented in case law. Legal decisions have been incorporated in professional pronouncements (APES 215, for example) and court guidelines such as Practice Note CM 7. The main criteria for admissibility of expert opinion were based on legal precedent/authority derived from the three legal decisions; Daubert (USA), the “Ikarian Reefer” (UK) and Makita (Australia). These criteria or discursive practices/legal precedent were highlighted by the courts to determine admissibility of expert opinion, including that of forensic accountants.

Admissibility of forensic accountant evidence is based on two criteria. First, the attributes of the expert demonstrated through the importance of education/qualification, training, experience and skill, specialised knowledge as opposed to common knowledge. There is no set standard for qualification and forensic accountant experts can either have university
degree or a diploma in accounting. Further, it is not the responsibility of experts to address the ultimate issue.

Second, admissibility of expert opinion was also based on the attributes of the process experts’ use during the reconstruction of facts. The discussion focussed on the authority for process/methods used and the appropriateness of assumptions. It is important for forensic accountant experts to comply with relevant laws and accounting standards. For example, as stipulated in *APES 110*, they have to display “independence of mind”, and “independence in appearance.” Courts have argued forensic accountant experts can use various valuation methods. For example, current value to value matrimonial assets and nominal value for goodwill. Finally, although forensic accountant experts have all the attributes for admissibility of expert opinion evidence, a court has the power to accept/disregard an expert opinion.

The next chapter presents the results of the application of Fairclough’s first layer of discourse analysis, “analysis of discourse as text.” The analysis focusses on the “dominant or keywords” courts have identified to supplement the criteria for admissibility of expert opinion evidence.
CHAPTER 5

FORENSIC ACCOUNTANT EXPERT IN COURT: TEXTUAL ANALYSIS

5.1 Introduction

This chapter addresses the first layer of Fairclough’s critical discourse analysis, “analysis of discourse as text.” It focuses on results of the analysis of accounting discourse and accounting technology or text/keywords articulated by the trier(s) of fact in valuation, matrimonial disputes and criminal activities. The texts, “dominant or keywords”, supplement discursive practices for admissibility of expert opinion evidence discussed in Chapter 4. Different accounting technologies or accounting texts discussed by the trier(s) of fact when forensic accountant experts follow the money trail are presented. As discussed in Chapter 3, according to Fairclough (2003, p.2), Critical Discourse Analysis uses “text in a broad sense” to include visual images and sound. Discourse analysis also includes “the multimedia text of television and the internet” (Fairclough 2005b, p.916). Similarly, as Fairclough (1993b, p.4) mentioned, the text dimension, micro-level, “attends to the language analysis of text” and refers “to any product whether written or spoken.” Furthermore, “language affects what people see, how they see it, and the social categories and descriptors they use to interpret their reality” (Fabrizio et al. 2005). Texts constitute an important form of social action. They are a major source of evidence about social structures, relations and processes. The texts are seen as products of text production and interpretation (Fairclough 1993a). Textual analysis can provide good indicators of social change and re-definition of social relationships (Fairclough 1993b, p.211-212). Text therefore expresses how people use discourse in their social interaction and communication. Analysis of text provides an example of a critical approach to Critical Discourse Analysis. The critical approach identifies the relations
between social practice and language, and links between the nature of social processes and properties of language texts (Fairclough 1995). Word meanings relevant to the admissibility of forensic accountant expert reports were also discussed. According to Fairclough (1995, p.4 & 135), “text is traditionally understood to be a piece of written language or, the written or spoken language produced in a discursive event.”

The chapter outline is as follows. Section 5.2 addresses the difficulties trier(s) of fact encounter in their endeavour to understand expert opinion evidence. Section 5.3 discusses the role of forensic accountant experts in following the money trail focussing on relevance of accounting facts to issues of interest (section 5.3.1). Section 5.4 addresses reliability of forensic accountant expert opinion evidence. The chapter concludes in section 5.5 examining the concept of reasonableness in accounting.

5.2 Expert opinion evidence

Expert opinion evidence is “the most controversial and most litigated issue in expert evidence law in modern times” (Freckelton & Selby 2009). This is evident when forensic experts present tedious and conflicting expert reports in court. Contrasting expert reports have added more complexity to the issue of understanding expert opinion evidence, resulting in trier(s) of fact encountering difficulties in understanding an expert report and its relevance. For example, accounting as one of the complex, highly technical aspects of business has contributed to the difficulties courts have had in understanding financial transactions. These sentiments were argued by the Honourable Justice Catherine Branson, a judge of the Federal Court of Australia, in a speech in 2006 at the inaugural Australian Woman Lawyers Conference in Sydney.

Australia’s superior courts are increasingly required to deliver judgements concerning complex or highly technical subject matters including … business…. If public confidence in the outcomes of these trials is to be ensured, the public
needs to know that judges get the assistance that they need by way of expert evidence to understand, and then to resolve, the disputes that come before them (Branson 2006).

The text demonstrates business and by association, accounting transactions as “complex or highly technical subject matter.” Trier(s) of fact do not have the expertise to analyse and understand the technical aspects of financial transactions. Therefore, they require forensic accountants’ expert advice. The role of a forensic accountant expert is to assist a court in understanding “the nature and meanings” of complicated accounting transactions (Shepherd 1993). Trier(s) of fact need to first understand forensic accountant expert opinion evidence before such evidence is used to resolve or deliver judgements on the issue of interest. Giving evidence in court deals with communicating accounting information to trier(s) of fact who often have limited experience or understanding/exposure to such testimony (Barry 2006). Case law analysis has revealed how different expert evaluations on tax matters caused confusion for the trier(s) of fact in the United States (Billings & Crumbly 1996). Forensic accountant experts have to note that as advocates of the court, their responsibility is to facilitate the courts’ understanding of the phenomenon being measured. But in the United States, they are “hired guns” representing the interest of the parties. The credibility of expert opinion evidence can be achieved through the demonstration of the “relevance” and “reliability” of accounting facts/evidence to the facts in issue. The relevance and reliability of accounting facts are important text used for evidence that supplement discursive practices for admissibility of expert opinion/evidence discussed in the previous chapter. In this thesis, the discussion of relevance and reliability will be divided by source and/or application.

The importance of expert opinion evidence and the difficulties encountered by the trier(s) of fact in understanding such evidence was noted in a survey of judges in Australia (Freckelton et al. 1999). The study highlighted that judges presiding over cases in civil and family courts encounter difficulties in understanding accounting evidence. The study also noted a forensic
accountant expert witness should have the ability to communicate accurately and clearly with a court (Craig & Reddy 2004). The quality of expert evidence can be determined through the forensic accountant expert’s understanding of the financial transactions and documents concerned. For example, criminals are likely to obscure financial aspects of crime by using complex structures and transactions. In such cases, the role of a forensic accountant expert is to deconstruct complex financial transactions and present the results in a manner understandable by the trier(s) of fact (Telpner & Mostek 2002).

Demonstrating understanding and relevance of accounting facts to issues of interest by using communication devices, such as flow charts, are required to supplement the criteria of admissibility (see section 5.3.2 for further discussion). The communication devices can also be used when forensic accountant experts are engaged to follow the money trail. This is an example of forensic accountant experts using modern technologies to facilitate the production of texts which combine language with visual images (Fairclough 1992).

5.3 Following the money trail

Forensic accountant experts follow the money trail during engagements to deconstruct financial activities. These activities are reconstructed to determine the source of funds and, where and how money was used. As noted by Telpner and Mostek (2002), due to the contrived complexity of transactions, the material available to a forensic accountant expert is often inaccurate, incomplete or invalid. Investigation of complex accounting information and disputes requires forensic accountant experts to apply accounting principles to find relevant documentation to substantiate their expert opinion. Forensic accountant experts also use forensic accounting tools such as accounting information systems (AIS) and Forensic Toolkit (FTK) to analyse, interpret and communicate financial information in court with expert
opinion/evidence. One of the aims of forensic accountant experts is to determine the relevance of their opinion evidence to issues of interest.

**5.3.1 Relevance and Issues of interest**

Accounting discourse or keywords/texts have been developed for admissibility of forensic accountant expert opinion evidence. The discourse was revealed in the answers to the second secondary research question. This section focusses on the relevant factors trier(s) of fact have addressed to construct “knowledge” for admissibility of forensic accountant expert opinion/evidence: accounting language, concepts and Generally Accepted Accounting Principles (GAAP). First, the trier of fact and forensic accounting interpretations of relevance in the context of the facts in question in the specific case and as a foundation of the expert’s opinion. Second, the interpretation of relevance as they appear in the legislation. Third, what the accounting profession describe about relevance in the accounting standards and connections made by the trier(s) of fact and forensic accountant experts. These connections are substantiated by relevant accounting documentary evidence. According to the trier of fact in *Commissioner of Taxation*:

Relevance was a matter touched upon by McHugh J in Goldsmith v Sandilands. Only part of what his Honour said is immediately relevant: “Under the common law rules of evidence, evidence is generally admissible only if it tends to prove a fact in issue or a fact relevant to a fact in issue. A fact is relevant to another fact when it is so related to that fact that, according to the ordinary course of events, either by itself or in connection with other facts, it proves or makes probable the past, present, or future existence or non-existence of the other fact. ... Whether a fact is a fact in issue depends upon the pleadings and particulars of each party’s case. The facts in issue reflect the material facts that constitute the claimant’s cause of action – which may be defined as the set of facts to which the law attaches the legal consequences that the claimant asserts. ... The facts in issue also include those material facts that provide any justification or excuse for, or a defence to, the cause of action” [para 335].
Relevance of expert qualification

Each of the three leading cases on admissibility of expert opinion evidence addresses the concept of relevance. For example, the court noted in *Daubert* (USA), the experts’ qualification should be relevant to the issue of interest. Similarly, in the *Ikarian Reefer* (UK), Cresswell J addressed the importance of the text/keyword relevance when deliberating on the expert witnesses’ opinion evidence. Furthermore, in *Makita* (Australia), the court referred to legal precedent/authority for the relevance of expert opinion evidence to the facts at issue.

The relevance of forensic accountant expert witness qualifications, experience and training was argued by the trier of fact in *Hart*.

I have no hesitation in accepting his evidence. It can readily be seen that he is a highly and suitably qualified expert for the task. [The expert] has worked extensively in the field over many years. [The expert] has been a chartered accountant for about 40 years. [The expert] qualified in 1958 at a university in South Africa after five years of training. [The expert] was admitted to the Institute of Chartered Accountants in 1959 and subsequently as a Fellow of the Institute in the United Kingdom. He came to Australia in 1974 and worked throughout his professional life extensively in fields of practice relevant to his tasks in the present case and at a senior level. He gave extensive evidence about his background, training and experience [italics added].

Trier(s) of fact can consider various relevant factors for qualification, pursuant to the second secondary research question. They include the expert’s working experience as an accountant, membership of an accounting profession, and university degree in accounting. The trier of fact will seek to determine whether the expert could construct the knowledge required for specialised knowledge based on his/her training, education and experience. Membership and qualification as an accountant was also argued to be relevant by Kaye, J in *R v Cox (No. 2)* [2005] VSC 224. Curtin, the forensic accountant expert was a Certified Practicing Accountant working for the Victoria Police. The forensic accountant expert used the accounting discourse of “match cash deposits and payments with cash withdrawals” to ascertain the relevance of accounting facts to the case. The trier of fact noted:
however the evidence now before me, and to which I have referred earlier in these reasons, does satisfy me that, in seeking to "match" cash deposits and payments with cash withdrawals, [the expert] has brought to bear the expertise which he has gained through his training and qualification as an accountant...

In another case, as discussed in section 4.2.1, Young, J in Denning & Denning and Anor (No 3) [2011] FamCA 160, accepted John’s (not his real name) expert opinion although he had a Diploma of Business Studies and no university degree. The trier of fact argued that John’s qualification was relevant to the issue of interest. The texts by the trier(s) of fact in the three cases demonstrated no set standard or criteria for forensic accountant experts’ qualification. The relevance of the experts’ qualification to the facts of the case was the important issue. It follows that the relevance of an expert’s qualifications will be decided on a case by case basis.

**Evidence and facts in issue**

Demonstrating the relevance of forensic accountant expert opinion to the facts in issue is required to supplement the criteria of admissibility. Expert opinion evidence can be deemed irrelevant and inadmissible if the expert fails to prove the factual basis for it. The importance of relevance of expert opinion to facts in issue was highlighted in Dasreef. The trier of fact [at paragraph 31] expressed the views that expert opinion evidence must first be relevant to a fact in issue for it to be admissible in court. The judge then referred to two criteria that must be satisfied for expert opinion evidence to be admissible under section 79(1) of the Australian Evidence Act 1995 (Cth)\(^\text{19}\). First, experts have to demonstrate their specialised knowledge is based on training, study or experience relevant to their opinion. Second, opinion evidence expressed by the expert is wholly or substantially based on that knowledge. The case does not

\(^{19}\) **79 Exception: opinions based on specialised knowledge**

(1) If a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.
recommend a new legal principle for admissibility of expert evidence but re-emphasised the need for expert opinions to be based on specialised knowledge actually possessed by expert witnesses. The text implies that forensic accountant experts must use their knowledge based on training, study and experience to determine the relevance of accounting facts to the facts in issue.

The essence of determining evidence relevant to the factual issue was addressed in *Commissioner of Taxation*. The trier of fact argued [at paragraph 334] courts establish the relevance of the documentary evidence and its admissibility in accord with the legislation, before relying on such evidence. Trier(s) of fact do not consider hearsay evidence to be relevant to the issue of interest since it does not satisfy the criteria for expert opinion evidence.

When produced in a proceeding in a court, a document or thing admitted into evidence is given an Exhibit number (or letter in the case of an applicant). *Before being admitted into evidence, its provenance must be established as must its relevance. So too must be its admissibility for the law has developed rules to ensure that evidence is “safe” to rely upon. That means that evidence that is hearsay, amounts to an opinion given by a person not qualified as an expert in the area, is character evidence or evidence of prior conduct may well be ruled as inadmissible. In this case, I need only consider relevance. These are now the subject of the Evidence Act 1995 (Evidence Act) [italics added].*

The trier of fact in *Hart* also explains the importance of relevance of the documentary evidence to the facts in issue. Accounting language was essential in proving the case and the forensic accountant expert used the accounting discourse of “asset”, “money”, “buy the asset” and “pay off the loan” to construct knowledge for relevance of accounting facts. The trier of fact when determining the relevance of assets to unlawful activities noted:

[u]ltimately, for each asset it becomes necessary to consider what money was used over the fourteen years or so that the assets were collectively acquired, to buy the asset, or maintain it, or pay off the loan which was used to buy it or to payoff a later loan secured by a mortgage over the asset and then to consider whether that money was not derived directly or indirectly from unlawful activity.
For each asset those issues are relevant to the factual issue of whether the asset was derived from unlawful activity [italics added] [para 25].

The trier of fact referred to keywords, “acquire” and “relevant”, and detailed important information forensic accountant experts require when determining relevance between assets and unlawful activities. The text were identified while answering second secondary research question. Acquire means “to buy or obtain (an asset or object) for oneself” (http://www.oxforddictionaries.com/definition/english/acquire). Accordingly, acquire is a discursive practice for purchasing or obtaining assets for personal gain. The trier of fact in the case was referring to the accounting discourse purchase of assets or other mechanisms used to possess the asset, for example, by way of gift. In cases whereby assets were acquired, it is important forensic accountant experts investigate the funds used to purchase the asset, maintain it, pay off the loan used to purchase the asset, or pay off a later loan secured by a mortgage over the asset. Results of these investigations can reveal the relevance of the assets such as direct or indirect to the facts in issue. It can reveal the source of funds for the assets, lawful or unlawful activity. Similarly, forensic accountant experts can determine whether the company and their directors benefited from criminal activities. For example, the trier of fact in Hart stated, “the amounts and proportions of benefits received by companies and their directors personally may be relevant”.

The dominant keywords have demonstrated the trier of fact used accounting language expressed in the forensic accountant expert’s evidence to reconstruct knowledge for relevance of the expert opinion to the facts in issue. The trier of fact can construct their accounting discourse to demonstrate the knowledge for relevance and admissibility of forensic accountant expert opinion. The forensic accountant expert opinion evidence can be deemed to be irrelevant and inadmissible if the expert does not prove the relevance of accounting facts to the facts in issue.
Legislation

The importance of having evidence relevant to issues of interest is stipulated under section 56 of the Australian Evidence Act 1995 (Cth). The trier(s) of fact have interpreted relevance of evidence in accord with the legislation. This was evident in ASIC v Rich [2005] NSWSC 149 when the trier of fact cited section 56 of the Evidence Act 1995:

[subsection 56(1) says that except as otherwise provided by the Act, evidence that is relevant in a proceeding is admissible in the proceeding. Subsection 56(2) says that evidence that is not relevant in a proceeding is not admissible [para 249].

The trier of fact clarified the meaning of relevant evidence by also citing the legislation.

"Relevant evidence" is defined in s 55(1), which says that "the evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of the facts in issue in the proceeding".

The text denotes the power/authority of the discourse in the legislation. The text implies that it is important forensic accountant experts’ aim for admissibility of expert opinion evidence in court by using accounting facts which are relevant to the fact in issue. According to the USA Federal Evidence Rule 702, the accounting expert report will assist the trier(s) of fact to understand the evidence and assess the facts in issue. Relevance is also addressed by the accounting profession.

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20 56 Relevant evidence to be admissible
(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
(2) Evidence that is not relevant in the proceeding is not admissible.

21 Rule 702. Testimony by Experts
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.
Accounting profession and legislation

Relevance is a fundamental qualitative characteristic of useful financial information. According to the International Accounting Standards Board Conceptual Framework for Financial Reporting (2010, QC6), “relevant financial information is capable of making a difference in the decisions made by users” and will help them evaluate past, present or future events, or confirming, correcting past evaluations. In addition, relevance requires financial information to be relevant to the decision making needs of the users. The trier(s) of fact have made connections between the text relevance expressed in the accounting profession and legislation. In *Capricorn Diamonds*, the forensic accountant expert used the accounting discourse of “fair value”, “minority security holders”, “majority shareholders”, “compulsory acquisition” and the “discounted cash flow (DCF)” method while deliberating on the relevance of the facts in the expert report to the facts in issue. The case concerned minority security holders in a compulsory acquisition. The amounts they were offered by majority shareholders were alleged to not provide fair value. Capricorn proposed to compulsorily acquire the outstanding Western Australia Diamond Trust units for $2.00 per unit. This was supported by the independent expert appointed to value the units. He concluded that $2 per unit was “fair value” because the unit price exceeded its range of assessed value for Western Australia Diamond Trust which was $1.06 – $1.22 per unit. Other unit-holders who collectively held approximately 60% of the outstanding units rejected this proposal. Warren, J used accounting to clarify Capricorn’s proposed acquisition constituted fair value. In the trier of fact’s judgement, Warren, J [at paragraph 201] used the accounting ideology of “$2 offer was reasonable” and the unit holders accepted the offer.

Demonstrating an understanding of accounting technology, such as the discounted cash flow (DCF) method, to value a company’s interest are required to supplement the criteria of admissibility. A forensic accountant expert can also use exchange rates KPMG derived due to
their expertise in the area. The accounting discourse of “exchange rate” can assist the trier of fact in determining the area of expertise in which expert knowledge is essential.

The [expert] said that \textit{exchange rate was a field of expertise in valuation} that he felt comfortable with. He said that he had relied on KPMG and had adopted their recommendation concerning the long term exchange rate because of their expertise and because it agreed with his own assessment [italics added].

While demonstrating the meaning of fair value, the trier of fact referred to relevant sections in the legislation, 	extit{Corporations Act 2001 (Cth)}, and cited power/authorities of text expressed under case law. The trier of fact argued that the meaning of accounting discourse of “fair value” or “fair and reasonable” or “fair price” has limited meaning under section 667C of the \textit{Corporations Act 2001 (Cth)}. Section 667C addresses issues of fairness and valuation of consideration offered under compulsory acquisition of securities. The valuation of securities is a complex issue. Courts have to deal with issues involving accounting discourse or terminology, for example, “fair value”, “fair and reasonable” and “fair price”. It is imperative courts first understand the meanings of these accounting terms before addressing the issue of interest. ASIC’s view on the meaning of “fair value” and “fair and reasonable” for the purpose of section 640 of the \textit{Corporations Act 2001 (Cth)} is expressed in ASIC’s Regulatory Guide 2011 but its effect on other similar phrases is vague. This gives credence to the courts to adopt authority/power of text from previous court decisions or case law, in order to address the meanings of “fair value” and “fair and reasonable”. Accordingly, the meaning of fair value in section 667C was addressed by Warren, J when citing Douglas, J in \textit{Pauls Limited v Dwyer}, and Santow, J in \textit{Winpar} and in \textit{Holt v Cox}. The meaning of the accounting term of “fair and reasonable” differs when applied in other sections of the \textit{Corporations Act 2001 (Cth)} after Warren, J cited the authority from Santow, J in \textit{Winpar}. As Santow, J noted in \textit{Winpar v Goldfields Kalgoorlie (2000) 34 ACSR} and \textit{Kelly-Springfield Australia Pty Ltd v Green and Ors (2002) NSWSC 53} (unreported 14 February 2002), when calculating the total
value of a company, “special value” derived from 100 per cent ownership should be included, but allocated pro rata within a particular class of securities and fairly between securities.

According to Warren, J the view of Douglas, J in *Pauls Limited v Dwyer & Ors [2001] QSC 067*, that neither the value of synergies, nor the value of any other “special benefits” that might be available to a particular acquirer should be considered in valuing the acquired entity as a whole. This is important because the legislation clearly prohibits the valuer from considering whether the remaining securities of the offer class should attract a premium or discount. In addition, the explanatory memorandum to the legislation also addressed the omission of any premium arising from the “special benefits” to the acquirer from acquiring the outstanding securities. Although the institution, legislation and case law can have different interpretations of the accounting discourse, it is the role of forensic accountant experts to interpret them in the context of accounting expressed in the accounting standards and pronouncements.

**Valuation and Fair Value**

The accounting technical role of “valuation of securities” and “fair value of assets” can be demonstrated through the combination of the accounting language, legislation and legal precedent. This was revealed while answering the second secondary research question. Warren, J in *Hart* established eight principles applicable to establish fair values, citing relevant case law summarised below.

In the first principle, the court referred to the accounting discourse of “fair equivalent in money” and “willing buyer and seller” or voluntary bargaining. The fair value of assets can be demonstrated through its fair equivalent in money, if sold. The selling and purchasing between the vendor and purchaser should be conducted voluntarily. No one should be worried about the action and there is no forced sale or purchase. Warren, J also cited the
text/authority from McCathie v FCT and forensic accountant experts can use this amount when determining the fair value of assets. The second principle refers to the accounting discourse of “disposal of assets at fair values”. The text demonstrated forensic accountant experts should not be distracted by the fact that the property should be disposed at fair values. This should not be a factor for determining any discount or, premium or higher valuation. Warren, J also cited the text/authority from Holt v Cox (1994) 15 ACSR 313, 334. Third, the text demonstrated the accounting discourse of “ransom value or a power of veto”. Furthermore, Warren, J cited authority from Edwards v Minister of Transport. Fourth, the court referred to the accounting discourse of “value of special benefits to the acquirer”. Warren, J argued that the value of special benefits to the acquirer/purchaser should not be included in determining of the value of the company as a whole. Warren, J also cited the authority in the case concerning Pauls Limited.

The fifth and sixth principles for fair value refer to the accounting discourse of “value of special benefits” and “pro rata basis amongst securities”. Warren, J argued that fairness is demonstrated when the value of special benefits is allocated pro rata among securities in the same class. Similarly, Warren, J cited Winpar and Pauls Limited when addressing the authority for this text. Warren, J also addressed the inclusion of the value of special benefits expressed under s.667C of the Corporations Act 2001 (Cth). In the seventh principle the court noted the accounting discourse of “fair to all shareholders” and “particular or class of shareholders”. The trier of fact also referred to several factors derived from case law when deliberating on fair value. For example, the first factor that trier(s) of fact will consider in their endeavour to determine fair value is to take a holistic view and consider whether it is fair to all shareholders, rather than being fair to a particular shareholder or class of shareholders. Warren, J cited the authority in Elkington v Vockbay Pty Ltd when deliberating on this. The accounting discourse of “liberal estimate of value”, “range of possible values”
and “compulsory acquisition of property” were argued by the court in the eighth and final principles for fair values. The trier of fact also cited text/authority derived from *Commissioner of Succession Duties (SA) v Executor Trustee & Agency Co of SA Ltd (Re D Clifford)*. The principles demonstrated the roles of accounting and accounting discourse in creating fair value of assets.

Fair value was also noted by the judge in *Nigel Gray & Others v Braid Group (Holdings) Limited, P560/13, [2015] CSOH 146, 2015 WL 6966279:*

> "...on the basis of my finding that the value of the company is £32,000,000, the cumulative value of the petitioners' holdings would be £20,614,400. The second to fourth respondents, supported by the fifth respondent, submit that because of Mr Gray's participation in the CFT and Sapesco bribery offences, he is a Bad Leaver in terms of the articles of association of BGHL, entitled on disposal of his shares to be paid only whichever is the lesser of their fair value or their subscription or par value. It is contended that to give appropriate relief under section 996 an order should be made for the purchase by the company of the petitioners' shares at par value, ie £2,444,000 [italics added] [para 153]."

The court used the accounting discourse of “cumulative value” to ascertain the basis of finding the value of the company. The trier of fact also used the accounting discourse of “articles of association”, “disposal of his shares”, “subscription or par value” while deliberating on this issue. The accounting discourse highlights how accounting can be used to construct the value of a company.

Demonstrating an understanding of the application of fair value accounting and market value are required to supplement the criteria of admissibility. These methods should be tailored for existing situations, engagements and scrutiny in court. For example, in *Denning & Denning and Anor (No 3) [2011] FamCA 160*, the judge noted:

> "I accept that a fair value for the wife’s motor vehicle 1 is $9,000. That is a “Red Book” value and the wife’s counsel did not disagree with or object to that sum [para 320]."
The trier of fact [at paragraph 667] in *Commissioner of Taxation*, stated the forensic accountant expert used fair value accounting to determine the fair value of the loan to be recorded.

**Irrelevant factors**

In the seventh principle, the trier of fact noted the different approaches required for individual shareholders. For example, a shareholder's individual taxation position provides premium for forcible taking the acquirer's individual circumstances. The market price cannot be a safe indicator of fair value as the market cannot provide a fair indication of the value of shares in circumstances of limited trading. Warren, J referred to the authority in *Catto v Ampol Ltd* (1989) 7 ACLC 717 when addressing this factor. In this case, Kirby, J held that the reduction of capital provision and the takeover provisions should be interpreted in a way ‘‘which affords an harmonious, practical and mutually supportive operation to each.’’ Finally, Warren, J accepted the market as an indicator of value by referring to the authority in *Kingston v Keprose Pty Ltd [No 2]*. He commented that there is any effect of a takeover offer on the market then the market may not be a fair indicator of value. In the eighth principle, Warren, J citing the text/authority in *Holt v Cox* commented any forcible taking will not permit or require any premium. The Australian authorities have taken a more liberal approach to the estimate of value.

The texts/keywords demonstrated that the trier(s) of fact combined relevance (expressed in the accounting profession) and legislation during valuation of properties and securities. This denotes that discourse on relevance for opinion evidence is built around discourse expressed in the legislation and accounting standards. In addition, there are issues in measurement of properties and securities. Forensic accountant experts can use fair values and historical costs
depending on existing circumstances. They need to be aware of the different criteria trier(s) of fact have addressed during issues concerning measurement of assets and shares.

Connections

Demonstrating connections and relevance of accounting evidence to the facts at issue are required to supplement the criteria of admissibility. According to the judge in *Hart*, it is imperative for forensic accountant experts to demonstrate the connections and relevance of accounting data to the facts in issue. The forensic accountant expert was engaged to determine “any connections”, “direct or indirect”, between assets and unlawful activities, and valuation of the proceeds of criminal activities. The trier of fact [at paragraph 279 & 789] used the accounting discourse of “connection between … assets and possible unlawful activity” and “connection between the unlawful activity and the derivation of property with funds borrowed” to address the importance of ascertaining any existing connections and their relevance to the facts in issue.

Forensic accountant experts will need to explain how specialised knowledge applies to the facts or assumptions and any existing connections. According to Kumar (2011), the disclosure of the expert’s reasoning and assumptions to establish this connection is a question which governs admissibility not weight. The trier of fact’s decision [at paragraph 142] in *Hart*, was aided by accounting expressions. Accounting terms was adopted to rule how to distinguish tainted funds from untainted funds and the necessary relevant information required. While ascertaining the source of funds the trier of fact used the accounting discourse of “ordinary running expenses”, “directly derive or realise an asset”, and “acquired funds”. The trier of fact used the metaphor “running expenses” to demonstrate the continuity of incurring expenses in the operation of the business.
I accept that where tainted funds spent on an applicant's *ordinary running expenses*, enable an applicant to *directly derive or realise an asset* with lawfully *acquired funds*, the *asset* is also indirectly derived or realised by the tainted funds. This is so even though the *ordinary running expenses* do not directly acquire, derive or realise an asset...[italics added].

The text addressed how forensic accountant experts can determine the connections between tainted/untainted assets and tainted/untainted funds. Criminals use the business, a legal entity, as a mechanism for deriving or realising assets, or hiding ill-gotten gains. They can argue that these assets are untainted due to the legal mechanism used to derive such assets. The court noted that when tainted funds are used for producing assets, the assets are deemed to be tainted. They are indirectly derived or realised from tainted funds - even though mechanisms utilised for deriving or realising the assets were legally sourced. In addition, the trier of fact [at paragraph 142] referred to accounting discourse of “running expenses”, “indirectly derive or realise an asset” and keywords “depend on the circumstances”, “proportions”, “dates of the use of tainted funds” and “the length of the period”. These accounting expressions and dominant keywords/texts ascertain the connection or relevance of the assets and tainted funds to the issue of interest.

* Tainted funds spent on a company's *running expenses* may *indirectly derive or realise an asset*. It will *depend on the circumstances*. Obviously relevant are: the *relevant proportions* of tainted and untainted funds used to derive the property; the *dates* of the use of tainted funds and of the *length of the period* during which the *asset was derived or realised*...[italics added].

The confirmation of connections between assets and unlawful activities can be ascertained by accounting language. For example, the trier of fact used accounting discourse of “if a company had untainted funds to derive an asset without the need to resort to tainted funds” to ascertain there is no connection between assets and tainted funds. The trier of fact used accounting discourse “tainted funds were used for unrelated running expenses might mean that the asset was not derived from tainted funds.” Courts also addressed the keywords/text “control” while trying to ascertain the connections between unlawful activities and tainted
properties. The trier of fact [at paragraph 266] argued that Mr. Hart was in control of Yak and Bubbling.

Forensic accountant experts have to demonstrate the connections between accounting facts/evidence and issues of interest to supplement admissibility. The determination will assist the courts, as users of accounting information, to assess the weight and admissibility of forensic accountants’ expert opinion evidence. Forensic accountant experts can use accounting technology, for example flow charts and cash flow analysis, when assisting the court to understand financial transactions, and “to form a correct or meaningful judgement on the accounts” or “appropriate conclusion” (R v Cox (No. 2) [2005] VSC 224).

5.3.2 Flow charts

Accounting is a “language of business” (Lavoie 1987, p.579). Forensic accountant experts are interpreters of accounting language in court. It is imperative that forensic accountant experts understand and interpret accounting documents correctly during the reconstruction of financial transactions and following the money trail. This is required to supplement the criteria for admissibility of evidence. Forensic accountant experts can demonstrate the link between the relevance of accounting facts and issues of interest by using accounting technologies such as flow charts, diagrams and other means of visual communication. Flow charts are communication devices required to facilitate an understanding of the documents (Shari Helaine 2009). Andrews, SC DCJ set out the benefits of flow charts in Hart. The text articulated by the trier of fact demonstrates flow charts can include a “mixture of words, colours and arrows” representing accounting transactions and money trails. Each picture replaced “exactly 1000 words” and detailed accounting transactions. This made it easier for the trier(s) of fact to understand transactions described by the forensic accountant expert. Flow charts can be used to translate accounting facts. They provide a visualisation of the
financial trails of accounting and unlawful activities, and arrange them in a coherent and logical manner. In this way, a flow chart facilitates communication between trier(s) of fact and forensic accountant experts.

Flow charts prepared by forensic accountant experts also reflect conclusions drawn from documentary evidence and electronic records, and can provide a pictorial representation of the issues in question. The trier of fact in *Hart* argued:

(i) [e]ach of the four Applicants is the *trustee of a discretionary trust*. The beneficiaries are set out in *Exhibit 25 (the flow chart)* and include relatives of Ms. Petersen, Mr. Hart’s parents and his children. All beneficiaries are linked to him by personal or family relationships [italics added].

The trier of fact demonstrated visualisation of the accounting discourse of “trustee of a discretionary trust” through the technology of the flow chart. In addition, the text demonstrated flow charts, document and communicate processes pertaining to issues in question using standard graphic symbols to represent core activities. Detailed steps in the illegal process can be clearly and explicitly detailed in flow charts. This helps to communicate different types of illegal activities adopted by a suspect individual or business adopted. Flow charts are designed in natural order. This makes it easier to follow and understand the sequence of events. Decisions pertaining to different steps in illegal activities are also communicated through flow charts. It is important for forensic accountant experts to standardise the different symbols used in the flow chart to enable the court to understand and follow the activities pertaining to issues in question. Activities are streamlined in flow charts. This reduces the risk of complications. Forensic accountant experts can use flow charts to achieve a specific purpose during court proceedings since they detail a better understanding of complex processes or events. For example, according to the judge in *R (Cth) v Milne (No. 1) [2010] NSWSC 932*:
any flow chart or charts prepared by [the expert] might be accompanied by statements of any alternative defence scenario, which may be argued as arising with respect to the transactions summarised in the chart or charts. *I make this point to emphasise the utility of summary documents and charts to assist the jury at the time when evidence is tendered, as well as during closing addresses and during summing up.* All of this, it might be thought, *will serve to assist the jury and to concentrate on the real issues in the trial, as well as having the important and incidental effect that the trial may be confined reasonably to the four-week estimate agreed between the parties* [italics added] [para 245].

Forensic accountant experts need to note that events are listed in logical or chronological order (Appendix 2 for example) and the flow chart is clear, neat and easy to follow. Flow charts should be comprehensive and devoid of ambiguity. As noted by the judge in *R v Cox (No. 2) [2005] VSC 224*:

> [the expert] then proceeded to offset some of the *transactions contained in the accounts against other transactions*. Those offsets are set out in Annexure 2 to each of the three reports. They are also *recorded, by appropriate colour coding*, in Annexure 1 to each report [italics added].

This text revealed the technical roles of accounting as an integral part of communication in court; for example, flow charts can also use “colour coding” to demonstrate the accounting discourse of “transactions contained in the accounts against each other” and other financial activities.

### 5.3.3 Diagrams

Demonstrating an understanding of financial trails and how they are connected to the issues of interest by using diagrams is required to supplement the criteria of admissibility. As Douglas, J in *Piatek* notes:

> [t]here is a *useful diagram showing the movement of the money* on p. 6 of Ex. 29, a report of a forensic accountant, [the expert] who was called as a witness for Mrs Piatek [italics added].

The trier of fact used the accounting metaphor “movement of the money” to reveal the different accounting transactions and how individuals move money through different
organisations or countries. Albert Loots, forensic accountant at PKF Chartered Accountants, analysed the movement of funds in bank accounts; confirmed the accuracy of the evidence of Eugene Piatek (Stanislaw Waldemar Piatek’s brother); calculated Renata Anna Piatek’s entitlement in relation to items of property; and calculated the extent of Renata Anna Piatek’s entitlement in relation to joint funds. Stanislaw Waldemar Piatek and Renata Anna Piatek were married in Poland on 5 February 1983 and divorced by a Polish court. Their matrimonial property dispute extended over three continents: Australia, America and Europe. A diagram was used to assist the court to understand the movement of money.

The importance of using diagrams to reveal financial transactions was also noted by the judge in Ramzan v HM Advocate, 2015 S.C.L. 300 [2015] HCJAC 9:

[the Crown case concluded with a HMRC witness speaking to schedules detailing the trading conducted by the appellant's companies, which were said to exemplify the operation of typical MTIC fraud. Michael O’Hagan, a forensic accountant with HMRC, testified over many days, about various trades detailed by him in these schedules. These were said by him to constitute the links in a chain, or sequence of trades. There were many hundreds of these deals, each detailed on a separate page setting out the parties, the nature of the trade and its size, the goods and dates; all in diagrammatic form. The source of the information in the diagrams, that is the underlying documentation, was also produced. In instances where there was a lack of source information, and the link in the chain could accordingly only be by inference, that was acknowledged [italics added] [para 12].

The accounting metaphor of “witness speaking to schedules detailing the trading conducted” revealed the importance of using schedules in court. It is the responsibility of the forensic accountant expert to be a ventriloquist for schedules. The trier of fact also argued the importance of displaying the financial events in chronological order, for example, dates and time. Forensic accountant experts have to prepare supporting documentation for the diagrams.
5.3.4 Specialised computer programs

Forensic accountant experts when demonstrating their “expertise as an accountant” can use output from programs like Analyst Notebook\(^{22}\) to “explain” the linkages/relationships or connections between accounting information and facts at issue. An Analyst Notebook helps organisations to:

- Rapidly piece together disparate data into a single cohesive intelligence picture.
- Identify key people events, connections and patterns with innovative features like social network analysis, "list most connected" and "find connected networks".
- Increase understanding of the structure, hierarchy and method of operation of criminal, terrorist and fraudulent networks.
- Simplify the communication of complex data to enable timely and accurate operational decision making.
- Capitalize on rapid deployment that delivers productivity gains quickly using a well-established visual analysis solution.
  o (http://www-03.ibm.com/software/products/en/analysts-notebook

The information is vital to address or reconstruct connections, or relevance between financial activities pertaining to individuals and companies. It also supplements the criteria for admissibility of evidence.

Flow charts, diagrams, output from programs like Analyst Notebook facilitate the courts’ understanding of forensic accountant expert reports. The expert opinion evidence can meet all criteria for admissibility in court but can be disregarded if the court does not understand the connections of financial activities to the facts in issue. In determining the connections or relevance of accounting facts, the forensic accountant expert identifies and uses the accounting discourse of “transaction in the accounting documents”, “organises the data”, and “characterises that data by reference to the type of transaction revealed” (\textit{R v Cox (No. 2) [2005] VSC 224}). Similarly, in \textit{Hart}, the court revealed (at paragraph 26) forensic accountant

\(^{22}\) Analyst Notebook is a software from IBM used for data analysis and investigation. It delivers timely, actionable intelligence to help identify, predict, prevent and disrupt criminal, terrorist and fraudulent activities.
experts should determine “whether an asset, not derived from unlawful activity, was used in connection with unlawful activity”.

5.3.5 Cash flow analysis

Demonstrating an understanding of cash flow analysis to trace the trail of financial activities is required to supplement the criteria of admissibility. Cash flow analysis is a technology of accounting or “an enterprise based formal system which expresses in fundamentally numerical terms, past, present, and future financial actions” (Laughlin 1987, p.479). A number of accounting technologies and practices can be used to trace the financial trail and identify, record, classify and summarise each transaction. The results of using these technologies or practices add weight to the relevance and reliability of expert opinion evidence. In R v Ferguson; R v Sadler; R v Cox [2009] VSCA 198 (8 September 2009), Curtin, while engaged as a forensic accountant expert, used cash flow analysis as an accounting technology to determine the spending habits of the accused persons and their families.

[53] As to the second question, we think his Honour was clearly correct to conclude that the opinions which [the expert] expressed in his reports were reflective of his expertise as a forensic accountant. This is apparent, in our view, both from the nature of the task which [the expert] undertook and from the manner in which he carried it out. As described earlier, the subject matter of [the expert’s] enquiry was whether, and to what extent, cash payments and deposits made by the relevant family unit could be offset against prior withdrawals of cash from the known resources of the family unit. The method he adopted was that of cash flow analysis, of which he had extensive prior experience [italics added].

Accounting language formed an integral part in the court’s decision, for example, the trier of fact explored the accounting discourse of “cash flow analysis” to demonstrate the courts requirement for forensic accountant experts’ expertise in the method used during the reconstruction of financial trails. In addition, the text also illustrated the importance of forensic accountant expert’s opinion reflecting expertise as forensic accountants and
expressing the nature of the task, and the way it was conducted, (for example cash flow
analysis).

The importance of using cash flow analysis and schedules was also stated by the trier of fact
[at paragraph 4] in *Her Majesty's Advocate v Mohammed Younas, 2014 WL 5833920, [2014]*
*HCJ123.* The trier of fact used accounting language to explain his judgement by arguing “as
is usual, there are a number of schedules setting out details of the respondent's assets,
expenditure and income”.

Cash flow analysis can be used to determine whether the person or company has “control”
over the issue of interest. The text “controlled” may be used by the court to supplement the
admissibility of expert opinion evidence. In *Hart,* the Commonwealth appointed Vincent, a
forensic accountant, to assist in determining the source of funds for acquiring assets that was
believed to be tainted property controlled by Steven Irvine Hart. Vincent conducted cash flow
analysis and ascertained tainted funds were used to acquire these properties (Appendix 3).

Similarly, Vincent also investigated Steven Irvine Hart, an accountant promoting tax
minimisation schemes. The Commonwealth Director of Public Prosecutions (CDPP)
suspected Hart of crimes in the way he operated some schemes. The CDPP obtained
restraining orders for numerous assets “controlled” by Hart. Eighteen of the restrained assets
(including aeroplanes, aeroplane hangar leases, land and a car) were forfeited to the
Commonwealth in accord with the *Proceeds of Crime Act 2002 (Cth)* (“POCA”) section 92.
Hart was later convicted of criminal offences relating to some schemes. Five companies had
collectively paid about $5.5m between 1991 and 2003 to buy, maintain or improve the
eighteen assets. Mr. Hart did not own all the assets and each of the five companies claimed to
have been the owner, at the time of forfeiture, of one or more assets. Each of the five
companies applied to get its asset or assets back, or their value. This dispute involved an
original application by the five companies (pursuant to the Proceeds of Crime Act (Cth) (POCA) section 102(1)(c)) to transfer to them their interests in the property or the value of their interests. The Companies appealed to the courts to order the property be restored to them or to order the Commonwealth to pay them the value of their interests.

Forensic accountant experts can apply cash flow analysis to determine the connections between properties, companies and financial activities. The trier of fact [at paragraph 873] in Hart, addressed the importance of determining connections between the various companies and financial transactions/funding. The text demonstrates the accounting discourse of cash flow analysis is essential for determining whether properties were tainted through the sources of funds. Forensic accountant experts have to determine the proportion of funding that was tainted to assist the court in their judgement. The tainted portion can be relevant to determining the facts in issue such as benefits derived by individuals and companies. From a review of case law, it is clear a forensic accountant expert’s avenue of investigation is the principal activities of the company. Further, a forensic accountant expert has to comply with the requirements of the engagement letter. The forensic accountant expert must look beyond the obvious even if recognised accounting practices have been used and demonstrate whether the accounts reflect substance over form.

5.3.6 Documentary evidence

Forensic accountant experts compile evidence and the “evidence of the accountant” will assist the trier of fact to understand the accounting transactions (R v Cox (No. 2) [2005] VSC 224). The trier(s) of fact have used the keywords/text “directly or indirectly”, “full tracing”, “interwoven” and “satisfy me” in relation to the collection and collation of accounting facts required in the formulation and admissibility of expert opinion evidence. During the course of reconstructing the financial trail, forensic accountant experts are advised to search for
information or documentary evidence that has connections to the fact at issue in the proceeding. The information when admitted during court proceedings are considered to be relevant and appropriate for decision-making by the trier(s) of fact. As the judge in *Hart* notes, it is imperative forensic accountant experts demonstrate to the trier(s) of fact the relevance between the money used “directly or indirectly” to purchase the asset, pay costs associated with the asset, to pay interest on funds borrowed to acquire an asset or to repay funds borrowed to acquire an asset. More generally, forensic accountant experts are required to use various computer programs (such as Analyst Notebook) for the purpose of showing the relationships or connections. The trier of fact noted that to enable a “full tracing” of the source of funds; forensic accountant experts have to collect documentary evidence by following the money trail. The forensic accountant experts’ role in following financial trails is not easy, since operations performed by individuals or companies are “interwoven” in such a way as to make it extremely difficult to follow thoroughly even the simplest of transactions.

Tracing of funds depends very much on the availability of documentary evidence and electronic copies. The evidence can be lost or destroyed. The complexity of tracing the source of funds can be further compounded by the “long period during which assets were acquired, maintained or paid off”. Any assumptions the forensic accountant expert makes must be supported by reference to relevant accepted practice within the area of expertise, for example, methods of calculating present value and cash flow. These sentiments were noted by the judge in *R v Cox (No 1) [2005] VSC 157*, discussed in chapter 4, section 4.3.2. The judge rejected the assumptions and methodology the forensic accountant expert used in the expert’s first report. The aim of the forensic accountant expert is to provide opinion evidence in court. For example, the trier of fact in *Hart* noted:

Ms Petersen and Mrs Hart, for example, have accepted that the Companies are *not in a position to dispute [the expert’s] conclusion* that funds obtained from
Merrell that were used in the acquisition of the aircraft in turn had been sourced from UOCL [italics added] [para 188].

Trier(s) of fact have also addressed that the “sale agreement” can be used as evidence to ascertain connections between assets and unlawful activities. The sale agreement is the documentary evidence for any sale.

The importance of documentary evidence in accounting used by forensic accountant experts is also evident in matrimonial cases. For example, in Piatek, Douglas J [at paragraph 92] invokes accounting to explain the best documentary evidence. He argued “the best evidence, in that connection, is the evidence of Loots, (a forensic accountant expert engaged as a witness for Mrs Piatek). The report was prepared having regard to all available cheque butts and bank statements.” The court also used accounting discourse when referring to the importance of documentary evidence forensic accountant experts’ use in their expert reports. As Douglas J notes, [at paragraph 94] “in the absence of documentary evidence I am not prepared to accept that the money was spent partly or at all for the benefit of Mrs Piatek.”

The importance of documentary evidence was evident in The Duke Group Ltd (in liquidation) v Pulmer & Ors No. SCGRG - 92 – 1874 when the trier of fact noted “the vast body of documentary evidence establishes those matters conclusively.” The documentary evidence is essential for proving issues before the courts and forensic accountant experts utilise them during cash flow analysis. In addition, documentary evidence affects the weight of the forensic accountant expert opinion/report if the documents are not supported by primary documentary evidence, such as invoices. For example, in Commissioner of Taxation, the trier of fact argued:

[4] ...Again in essence, I have not done so because they have not kept contemporaneous records in relation to an account from which they withdrew a considerable proportion of the moneys paid to them from Freanert. The records they have kept are reconstructed records unsupported by primary documentary
material such as invoices. The inadequacies in their record keeping necessarily affect the weight I can give expert evidence based upon it.

The keywords/texts discussed demonstrated trier(s) of fact used accounting language to confirm the importance of ascertaining the relevance and connections of accounting data to the facts in issue. The relevance and connections can be addressed through accounting documentary evidence and demonstrated through flow charts, diagrams, output programs and cash flow analysis.

5.4 Faithful representation - Reliability

Courts continue to use the text “reliability”, although “faithful representation” or “presents fairly” were previously used by the accounting profession. Reliability is now replaced by the previously used concepts. According to the International Accounting Standards Board’s conceptual framework (IASB 2010, QC12), “financial reports represent economic phenomena in words and numbers. To be useful, financial information must not only represent relevant phenomena, but it must also faithfully represent the phenomena that it purports to represent”. The representation must be free from any bias and financial information should be true and fair, and free from misstatement.

The “quest for expert evidence to be accountable and reliable,” not being “misconstrued and mis-evaluated” has been stated by trier(s) of fact since “the mid-19th century” (Freckelton 2011). The trier(s) of fact depend on the quality of forensic accountant expert evidence, but the reliability of expert evidence is currently a matter of concern in court (Edmond 2010). Legal precedent/authority has demonstrated that for evidence to satisfy the standard of evidentiary reliability, a trier of fact must ascertain that it was “grounded in the methods and procedures of science” (Daubert (USA)). In addition, the expert’s methodology should be sufficiently “reliable”, referred to as the “Daubert test”. The trier(s) of fact also noted that
they will analyse “proffered expertise” and the objective of the analysis is to “ensure that what is admitted is not only relevant but reliable”; a two-prong test for admissibility of expert opinion.

Demonstrating the relevance of expert qualification and accounting analysis, such as methods, processes and principles, to the facts in issue are required to supplement the criteria of admissibility. The trier(s) of fact used different accounting text to ascertain the reliability of expert opinion evidence. For example, the trier of fact used the accounting discourse of “probative value” to ascertain admissibility of expert opinion evidence. Probative value of the documentary accounting evidence supplements the admissibility of expert opinion evidence and is sufficiently useful to prove the issue of interest. It is imperative for forensic accountant expert opinion evidence to have probative value when determining financial activities of organisations/individuals. Similarly, the expert opinion should faithfully represent the financial transactions that address the facts in issue. According to Kaye, J in R v Cox (No. 2) [2005] VSC 224:

Notwithstanding the submissions of Mr Young I do not consider that the evidence of [the expert] in respect of his client is of slight probative value. As I have already stated, the limitations on the information available to [the expert], and the assumptions made by him, do not of themselves render the evidence of tenuous weight. Nor do I consider that the other matters adverted to by Mr Young and to which I have already referred reduce the evidence of [the expert] to that of only limited or little probative value [para 58].

The text identifies the probative value of forensic accountant expert opinion depends on the availability of documentary evidence used for the expert opinion. The connections between evidence, financial activities and assumptions by forensic accountant experts provide extra weight to the expert opinion. In addition, Kaye, J in R v Cox (No. 2) [2005] VSC 224, affirmed:

It is clear that the exercise undertaken by [the expert] has its limitations, deriving from the limited amount of information available to him. Further, it is evident that
the accuracy and validity of [the expert’s] analysis depends upon the appropriateness and validity of the criteria and assumptions utilised by him [para 44].

The text asserts the forensic accountant expert’s financial analysis should faithfully represent the issues in question, although there are some limitations due to unavailability of financial evidence. Faithful representation can be supported by the accuracy and validity of the criteria and assumptions used.

**Issues of reliability**

The reliability of evidence can be affected by forensic accountant experts’ discursive practices. Mulligan J in *Duke* stated the importance of not being biased during forensic accounting engagements. Any element of bias will affect the admissibility of expert opinion in court.

The question is whether [the expert] became contaminated, influenced or biased, so as to affect the reliability of his evidence. It has not been suggested that his evidence was inadmissible due to lack of independence and no objection to his evidence was taken on that account. In some cases the state of lack of independence and the consequence of unreliability may not be readily apparent and may not even be appreciated by the witness [italics added].

The trier of fact associated the text to the definition of reliability in the IASB’s conceptual framework (IASB 2010, QC12). The text demonstrates reliability of evidence can be affected by many elements: for example, forensic accountant experts becoming biased. Elements of bias take various forms, such as being contaminated or influenced by others, (such as the engaging lawyer or legal representative of the client). This will affect the reliability and admissibility of expert opinion evidence. Lack of independence is another element of bias and forensic accountant experts will encounter its consequences in court. These dominant or keywords, bias and independence, were noted by the trier of fact in *Orrong Strategies Pty Ltd v Village Roadshow Ltd* [2007] VSC 1.
I also consider that experts should be entitled to think through the issues and change their mind without being castigated for giving into pressure from the client or lawyers. Nevertheless, the changes in the amount of the valuations are extraordinary. If this particular criticism stood alone I would be more prepared to accept Mr Lom's evidence that the earlier figures did not represent his opinion. But it does not stand alone [italics added] [para 985].

In my opinion, the …criticisms of [the expert’s] lack of independence are devastating. I do not understand how a person of [the expert’s] standing could have allowed his report to go forward without any qualification to, or expression of his opinion about, the values obtained using the VRP gearing. As it stood, the report was quite misleading and the true picture only emerged during cross-examination. Equally, I consider that [the expert] was derelict in not stating in his report that it was his opinion that a minority interest/lack of marketability discount should be applied in valuing Orrong’s interest. Once again, the true picture only emerged during cross-examination [italics added] [para 986].

The reliability and admissibility of expert opinion evidence can also be affected when working as a team during investigation and preparing of expert reports. This will affect the independence of the expert opinion/evidence, for example the “Carter Report” inASIC v Rich [2005] NSWSC 149. Mulligan J in Duke Group, also stated the effects of working as a team. The trier of fact cited the text by Lonergan23 when deliberating on this issue. According to Lonergan (1994, p.6), experts have different opinions and exercise different judgements in formulating a valuation opinion due to different “purpose of valuation and the methodologies used.” Similarly, forensic accountant experts working in a team will encounter different attitudes and opinions that sometimes affect the reliability and admissibility of expert opinion evidence. For example, a forensic accountant expert engaged to form an opinion on valuation of an asset would realise such cases involve personal opinions and judgements. Therefore, a team approach to formulation of an opinion augments the difficulty in the objective valuation of an asset. In addition, the complexity of valuation and ambiguity of the meaning of value resulted in different values for properties, shares or business in issue.

23 Wayne Lonergan is an internationally distinguished practitioner, is widely recognised within and beyond Australia as a leading expert in the field of corporate and business valuation. Lonergan did not participate as an expert in this case but was cited by the judge and forensic accountant expert.
Although forensic accountant experts have the required training, study and experience, expert’s opinion cannot be admissible in court if the facts used to formulate the report were not relevant to the facts in issue. In *Capricorn Diamonds*, the trier of fact argued:

I observe that the LEA Report as prepared by Lonergan was based upon factors that do not usually form a part of valuation methodology or accord with normal market practice. To the extent that Lonergan’s evidence relied on a premium for forcible taking or a disproportionate allocation of value in favour of the units to be acquired it was erroneous. To the extent it relied on the addition of the *value of items* that do not go to the value of WADT as a whole, such as special benefits and synergies, to increase that value, it proceeded on a misconceived basis [italics added] [para 230].

The text denotes admissibility of expert opinion is determined on a case-by-case basis. The trier of fact used accounting discourse of “disproportionate allocation of value” and “value of items” to address factors used in the expert opinion evidence. These factors should be used, or form part of the valuation methodology or normal price practice. The trier of fact also argued that expert opinion evidence is erroneous and misconceived if forensic accountant experts include irrelevant items in the value of assets, shares or business. Lonergan’s reputation was not considered in the judgement [at paragraph 230], although the judge cited Lonergan’s text in *Duke Group*. The text demonstrates the trier(s) of fact determine the weight and reliability of expert opinion evidence even though they do not have the necessary expertise in valuation. Similarly, the trier(s) of fact have the authority to “pick and choose” expert opinion evidence. The judge in *Capricorn Diamonds* stated:

[i]t follows from the analysis of the expert evidence that the evidence relied upon by the defendants is rejected. Hence, even if the construction placed upon the statutory regime as to the *assessment of fair value* was erroneous, *I nevertheless do not accept the evidence of Lonergan*. In my view, the evidence of Lonergan was not substantiated and was contrary to normal market and valuation practice and methodology. The *expert evidence elicited by the plaintiff is to be preferred* [italics added] [para 231].

The trier of fact used the accounting discourse of “assessment of fair value” and “was contrary to normal market and valuation practice and methodology” to ascertain the area of
expertise and methodology of the forensic accountant expert. In addition, the trier of fact used the keyword/text “not substantiated” when disregarding the forensic accountant’s expert opinion. It is imperative for forensic accountant experts to use accounting documentary evidence that substantiates the reliability of expert opinion. Further, forensic accountant experts should adopt normal market and valuation practices. The court does not elaborate on what is normal market and valuation practice. Valuation is conducted on a case-by-case basis. The relevance of normal market and valuation practices depend on existing circumstances. The trier of fact [at paragraph 232] can pick and choose expert opinion and adopt the approach they wish to adopt. The text demonstrates forensic accountant expert opinion evidence should be extensive and thorough, but not exhaustive. A forensic accountant expert’s approach can differ to the courts approach, but it is imperative forensic accountant experts maintain the reliability and integrity of evidence.

5.5 Reasonableness

Demonstrating an understanding of the reasonableness of accounting evidence to prove the facts at issue are required to supplement the criteria of admissibility. For example, forensic accountant experts must ascertain that cash flow analysis for individual/companies is reasonable. This test determines the validity of an action or process (http://www.businessdictionary.com/definition/reasonable-test.html). The noun “reasonableness” and in particular the attribute “reasonable” and the adverb “reasonably” are employed with reference to theoretical reasoning notably in order to describe theoretical attitudes and endeavours (Picinali 2013).

Measurement of cash flow must be based on relevant and reliable data. It is imperative forensic accountant experts approach cash flow analysis with an attitude of professional scepticism in order to determine the reasonableness of cash flows. The cost incurred by
individuals/companies is reasonable if its nature and amount does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. A forensic accountant experts’ responsibility is to determine whether the expenses are reasonable. There are various factors involved in the determination of the reasonableness of the costs. Forensic accountant experts should determine whether expenses are generally recognised as necessary for family expenses or operation of the business. As for businesses, whether expenses are incurred due to government regulations, or terms and conditions of the business agreements, and the incurrence of the costs are consistent with established company policies and practices. While determining the costs individuals incur, forensic accountant experts should determine whether individuals have acted with due prudence in the circumstances, considering responsibilities to their families or business. The role of forensic accountant experts in criminal cases is to present an opinion to assist the court to be “satisfied beyond reasonable doubt” while in civil cases through balance of probabilities (R v Cox (No. 2) [2005] VSC 224).

Forensic accountant experts have to demonstrate they adhere to the accounting concept of reasonableness during the reconstruction of facts. As Kaye, J in R v Cox (No. 2) [2005] VSC 224 notes:

\[
\text{[the expert], and indeed other accountants, are required to develop and apply criteria, based on the accounting concept of reasonableness. While in each case, different criteria and assumptions may be developed, nevertheless the accountant calls upon his or her experience and expertise in developing and applying those criteria, informed as he or she must be by the requirement of reasonableness [italics added] [para 30].}
\]

The court used the accounting discourse of “accounting concept of reasonableness” to address the concept of reasonableness and its practical meaning in accounting. The text demonstrates that although forensic accountant experts apply different criteria and
assumptions based on their experience and expertise, it should be based on the accounting concept of reasonableness. Determining the reasonableness of the forensic accountant expert’s actions is a complex task. Forensic accountant experts have to consider individual circumstances in which financial transactions occurred.

Reasonableness in accounting can be categorised in many ways, using objective and subjective standards. Tests of reasonableness in accounting are based on averages and estimates. The determination of reasonableness by the trier(s) of fact focussed in the context of accounting. A forensic accountant’s expertise can be “reasonably” measured through their training, study or experience. Since accounting is subjective, reasonableness can be measured on a case-by-case basis depending on the forensic accountant experts’ opinion during the reconstruction of facts pertaining to individual circumstances.

The trier(s) of fact addressed the text reasonableness on a case-by-case basis depending on circumstances relevant to the facts in issue. In ASIC v Rich [2005] NSWSC 149 the trier of fact [at paragraph 221] articulated the importance of using the accounting discourse of “working papers”. The text demonstrates that reasonableness of forensic accountant expert opinion can be proved through accounting documents and working papers that support the financial trail. It is important that the combination of working papers and accounting documents are consistent or corroborate each other. Similarly, forensic accountant experts have to disclose procedures or “methods and procedures of science” (Daubert (USA)). Further, the reasoning process for the forensic accountant’s expert opinion should be disclosed in the expert report.

**Issues in reasonableness**

The importance of having reasonable documentary evidence and issues of concern in reasonableness of forensic accountants’ expert opinion evidence was addressed by the trier(s)
of fact in some case law. In *Orrong Strategies Pty Ltd v Village Roadshow Ltd [2007] VSC 1*, the judge argued:

> [t]here was no evidence provided of the method of compilation or basis of assessment. No evidence was led from witnesses concerning their view as to the reasonableness of the allocation of their time spent on VRP matters in the 2000 to 2002 financial years. VRL pointed out that Ms Raffe had said that the document reflected *a reasonable allocation of the time and charges incurred and reasonably expected to be incurred* [italics added] [para 485].

The trier of fact used the accounting discourse of “method of compilation or basis of assessment” to address the reasonableness of the allocation of economic resources. There was insufficient documentary evidence to support the reasonableness of the claim, although Julie Raffe, the Chief Financial Officer of Village Roadshow Limited (VRL) and member of the executive committee for Village Roadshow Pictures (VRP) had expressed her opinion on the documents. It is important that forensic accountant experts prove through accounting documentary evidence that their opinion is reasonable. There is no assumption in court since the trier(s) of fact rely on documentary evidence.

Gregory Meredith, Chartered Accountant and partner in the firm Ferrier and Hodgson appeared for Village Roadshow Limited (VRL) in court. He prepared calculations and expressed his opinion on issues relating to the quantum of the profit shares, based on assumptions. Mr. Meredith’s opinion that the assessment was fair and reasonable was challenged by Orrong. The trier of fact disregarded Meredith’s opinion, since he did not perform any assessment of the reasonableness of the information and simply accepted it on face value. The forensic accountant expert’s opinion was unsubstantiated. Forensic accountant experts have to perform their own documentary analysis to determine its reasonableness. They should not rely on the face value of the documents or instructions provided. In addition, if forensic accountant experts receive assistance during the compilation of their expert report, then they should state the type of assistance received. This would
enable them to persuade the trier(s) of fact to rely on expert opinion evidence. The trier of fact demonstrated that when the forensic accountant expert receives assistance, the person providing the assistance must state the purpose of the document, how the figures were compiled, the role played in assessing the reasonableness of the figures, and whether the document was a final document or draft only. Forensic accountant experts can seek assistance from senior executives during the assessment of financial facts and compilation of expert reports. The forensic accountant expert must be able to access sufficient information on which to base an opinion. Access depends on senior executive assistance. However, the expert must also not be content to simply accept what executives say.

The reasonableness of the assumptions in calculating overhead expenses and profits was also expressed by the trier of fact:

> [i]t therefore seems to me that the deductions of $2.3 million, $2.602 million and $3.406 million respectively made by VRL for corporate overhead expenses in its calculation of VRP’s profits for the financial years 2000 to 2002 were not correct. There should be no adjustments to VRP’s profits for this item [italics added] [para 488].

The trier of fact cited authority from Palmer J in *Australian Securities Investments Commission v Australian Investors Forum Pty Ltd (No. 2)* when addressing the test for the text reasonableness and when the legislation on the issue of interest is broad or silent. The court noted:

> [I] respectfully adopt what Palmer J said in Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd (No. 2). The test prescribed by s.210(a) is expressed broadly and I am aware of no decision of the Courts which gives it consideration. It is clear, nevertheless, that in applying the test the Court is required to assess the terms of the subject transaction against objective standards: what the parties themselves thought about the reasonableness of the terms is relevant as an explanation of the transaction but is not decisive as to whether the terms were reasonable for the purposes of the section [para 747].
The trier of fact argued that when applying the test for reasonableness, they assess the terms of the “subject transaction against objective standards”. That is, the court will assess the reasonableness of forensic accountant expert opinion as to whether the opinion is relevant in explaining the financial transaction.

The test for reasonableness of accounting evidence was commented on by judges in other courts. In *R v Ferguson; R v Sadler; R v Cox [2009] VSCA 198*, the court [at paragraph 48] addressed the importance of reasonableness in documentary accounting evidence. The trier of fact argued forensic accountant experts need to develop and apply criteria based on the accounting concept of reasonableness when conducting cash flow analysis. The criteria and assumptions are applied on a case-by-case basis depending on the experts’ experience and expertise, and requirements of reasonableness. As the trier of fact in *R v Ferguson; R v Sadler; R v Cox [2009] VSCA 198 (8 September 2009)*, notes:

> [w]hether the assumptions were ‘reasonable in the circumstances’ was a matter which the jury could decide for itself. It was of course a condition of the admissibility of the evidence that the jury be able to determine for themselves the appropriateness of the assumptions adopted. The fact that the jury could make judgments for themselves about the subject-matter of one of those assumptions – the likely speed of dissipation of an amount withdrawn in cash – did not render [the expert’s] opinions inadmissible. Moreover, an expert opinion does not lose its character as such merely because it is based on an assumption of fact concerning a matter which jurors would be capable of deciding for themselves. The position might be different if the subject-matter of the opinion itself were a factual matter of that character. But that is not this case [italics added] [para 58].

The trier of fact affirmed that a condition for admissibility of forensic accountant expert opinion is when assumptions were reasonable in the circumstances of the case in issue. For example, the trier of fact used the accounting discourse of “amount withdrawn in cash” to ascertain the reasonable assumption applicable in this situation. Forensic accountant expert can say what they have done was reasonable, but a court has the authority to decide whether the assumptions were reasonable or not.
5.6 Summary

This chapter examined the first layer in Fairclough’s framework. It focusses on addressing the second secondary research question:

(ii) What is required to supplement the criteria for admissibility of an expert opinion?

The “analysis of text as textual analysis” revealed different types of accounting text that trier(s) of fact used to supplement the criteria for admissibility of expert opinion. Forensic accountant expert opinions can satisfy the criteria for admissibility (Chapter 4) but it will not be useful if the expert does not communicate the evidence accurately and clearly. Expert opinion evidence will assist trier(s) of fact “to form a correct or meaningful judgement on the accounts” or “appropriate conclusion” (R v Cox (No. 2) [2005] VSC 224).

Forensic accountant expert evidence can be communicated clearly through accounting technologies such as cash flow analysis, diagrams and flow charts. These accounting technologies supplement the criteria for admissibility. For example, Curtin used cash flow analysis to determine the spending habits of the accused persons and their families in R v Ferguson; R v Sadler; R v Cox [2009] VSCA 198 (8 September 2009). Accounting technologies are effective in addressing connections between forensic accountant expert evidence and facts at issue. For example, the judge in Ramzan v HM Advocate, 2015 S.C.L. 300 [2015] HCJAC 9 addressed the importance of using diagrams to reveal the connections of financial transactions to the facts at issue. Further, the importance of using diagrams to show the movement of money was noted by Douglas, J in Piatek.

Forensic accountant experts can use accounting technology to demonstrate the relevance and reliability of forensic accountant expert opinion to the facts at issue. Case law analysis has revealed relevance and reliability of forensic accountant expert opinion were two important
texts required to supplement admissibility. For example, the judge in *Hart* noted the importance of using flow charts in assisting trier(s) of fact in understanding complex financial transactions. A forensic accountant expert’s conclusion must be reasonable and based on accounting facts. For example, in *Capricorn Diamonds*, the forensic accountant expert used the accounting technology of the discounted cash flow (DCF) method to value the company’s interest. However, the judge in *Denning & Denning and Anor (No 3) [2011] FamCA 160*, accepted the fair value method when the forensic accountant used it to value the wife’s motor vehicle. The practice shows that trier(s) of fact consider different valuation methods on case-by-case basis.

It is imperative for a forensic accountant expert to develop and apply criteria based on the accounting concept of reasonableness when conducting cash flow analysis. Facts can be gathered through the use of accounting technology including accounting information systems (AIS) and Forensic Tool Kit (FTK). The criteria and assumptions are applied on a case-by-case basis depending on the experts’ experience and expertise, and requirements of reasonableness. Moreover, accounting is subjective and tests of reasonableness in accounting are based on averages and estimates. According to Kaye J, any “underlying transactions must be proven by admissible evidence” (*R v Cox (No. 2) [2005] VSC 224*).

The next chapter presents the results of application of Fairclough’s third layer of discourse analysis, “analysis of discourse as social practice.” The analysis focusses on the social influence of discourse and the interpretation of the law on social terms.
CHAPTER 6

FORENSIC ACCOUNTANT EXPERT IN COURT: SOCIAL PRACTICE

6.1 Introduction

Plato argues in *The Laws* “…legislation is entirely a work of art, and is based on assumptions which are not true”. In other words, laws do not occur in nature but according to the agreement of those who make laws; … mankind are always disputing about laws and altering them; … the alterations which are made by art and by law have no basis in nature, but are of authority for the moment and at the time at which they are made (Jowett 1892, p.274).

This thesis addresses the critical discourse analyses of social practices that materialise when human beings “assign meanings to reality” and “how we bring reality into existence”. Human beings do not create the raw matter of material reality but “shape and use these raw materials” (Wodak & Meyer 2009, p.39). Both Plato and Wodak and Meyer (2009, p.39) argue legislation is a social construction and humans assign meanings to reality. Humans do not create nature (raw materials) but they create art and law, bringing them into existence (social practice). Those who have authority shape reality. For example, legal precedent demonstrates the authority at the time at which the interpretation was made, and is only relevant to the specific facts of the case. This gives members of the legal profession and the judiciary justification for assigning new meanings in legislation. Members of the legal profession and the judiciary, as stakeholders of the authority, often dispute meanings. The results of such disputes have caused changes to legislation.

This chapter focusses on the final stage of Fairclough’s framework, “analysis of discourse as social practice”. According to the Stanford Encyclopedia of Philosophy (2015):
social practices, … can be—and often are—aimed at finding the truth. Such social practices have a hit-or-miss record; but the same could be said of individual practices.

When relating this discourse to Plato (1892) and Wodak and Meyer’s (2009, p.39) comments, social practice is the way in which the judiciary uses legal precedent in interpreting legislation and similar pronouncements. The aim of the social practice is to find the reality of issues of interest. However, reality cannot be found at all times since the authority the trier of fact uses is relevant only to certain facts of the case, and so often changes and new meanings are assigned to how legislation is interpreted. For example, the reality ascertained by the trier(s) of fact in social practices such as valuation, matrimonial disputes and criminal activities are sometimes questionable, due to the complexity of the issue. The criteria for admissibility of evidence were identified in Chapters 4 and 5 through the first and second secondary research questions. These are important elements for addressing the complexity. However, as previously noted, a judge has the ultimate sovereignty to accept or disregard a forensic accountant expert opinion/evidence. This judicial sovereignty provides a new interpretation of “reality” based on a unique set of circumstances. They were identified through the third secondary research question:

(iii) How do the social practices of a court affect forensic accountant experts and the trier(s) of fact?

This chapter proceeds as follows. Section 6.2 presents the meaning of social practice, using the method of Critical Discourse Analysis and Fairclough’s framework. Section 6.3 addresses the court/law as an institution; what makes it an institution; and, how the court, as an institution, is demonstrated. Section 6.4 discusses accounting as an institution, and how forensic accounting and the independent expert fit in the third tier of Fairclough’s framework,
dealing with social practice. This includes qualifications, training, and experience used to arrive at, and express, an opinion.

6.2 Social practice – Courts and forensic accounting

This section focuses on the social practices relating to forensic accountant experts adducing expert evidence and the role of the trier(s) of fact during court proceedings. The practice symbolises the ‘orders of discourse’ associated with the court as an institution. According to Fairclough (1993a, p.138), orders of discourse concern the “totality of discursive practices of an institution and relationship between them.” As discussed in chapter 3, using Fairclough’s framework, ‘analysis of discourse as social practice’, focusses on the three aspects of the sociocultural context of a communicative event: political (power and ideology); economic; and, cultural (social issues/issues of value) (Fairclough 1995, p.62). A discussion of political matters (power and ideology), focussed on the inferred power of forensic accountant experts and the sovereignty of a court. A discussion of economic issues focussed on the analysis of a court’s decision in addressing financial matters pertaining to individuals and companies. The discussion on cultural matters focussed on social issues pertaining to matrimonial disputes. Although valuation in matrimonial disputes is not distinct from valuation in other contexts, it is used in this section to demonstrate the interpretation of social power in a cultural context or social issue.

Social practice in a court demonstrates power relations between a forensic accountant expert witness and the trier(s) of fact. Forensic accountant experts can be members of accounting professional bodies such as AICPA or CPA Australia which symbolises “accounting as an institution” (Mouritsen 1994). The aim of a forensic accountant expert is to have his/her expert opinion accepted by the court. S/he must use what the court sees as appropriate social practices: that is, having specialised knowledge in the issues of interest, and adopting an
authority process (assumptions and methodology) acceptable by a court. A forensic accountant expert uses accounting language, a social event when formulating his/her opinion while acceptance of a court is guided by the legislation. According to Shuy (1993, p.17):

[...]language is a social event, not just a cognitive one. There are socially accepted patterns of life, ones we have absorbed so fully and completely that we don’t even know we know them.

Fairclough (1989, p.15) noted language as social practice is determined by social structures. For example, courts are the guardians of the enforcement of the rule of law (Brennan 1995b). Court proceedings and forensic accounting have become, and are accepted by society to be, patterns of life guided by rules and regulations. Social practices do not just appear as patterns of social life. They are contested areas where the battle for power is fought in order for the victor to implement the pattern. There is also a relationship in these patterns of social life between forensic accounting as a social practice and the court as an institution.

Governance instruments in other countries affect the power of discourse. This is the legal system founded on the principles of natural justice. It is a social event which “involves decision-makers informing people of the case against them or their interests, giving them a right to be heard (the ‘hearing’ rule), not having a personal interest in the outcome (the rule against ‘bias’), and acting only on the basis of logically probative evidence (the ‘no evidence’ rule)” (New South Wales Ombudsman 2004). Clearly, this reflects the principles surrounding admissibility of opinion evidence as determined by a court.

6.2.1 The modes of social practice

The social practice discussed below focuses on examples of the modes of social practice that are taken from Australian, United Kingdom and United States contexts. Further, the roles of forensic accountant experts and courts/law as institutions are addressed, focussing on social practices.
According to Van Dijk (2007) and van Dijk and Terlouw (1996), social events exist and affect society. In this thesis, social events that exist and affect society include valuation of assets, matrimonial disputes, criminal activities and confiscation of assets. The social activities are brought before a court to finalise the facts at issue. Individuals seek the assistance of a court to determine the reality of the social activities. The third secondary research question examines the types of assistance. Courts use the legislation and legal precedent as a basis of judging reality. For example, crime is a fact of society and criminals who commit and profit from criminal activities deprive society of rights and benefits (Lusty 2002).

Forensic accountant experts are engaged by lawyers, insurance firms, banks, law enforcement agencies, government regulatory agencies, the business community and the courts to reconstruct financial activities. They appear in a court to present expert reports in civil and criminal actions. For example, as discussed by the trier of fact in Commissioner of Taxation:

> an expert may advise a party and his or her legal advisers during a hearing, comment on the evidence or suggest issues that they may wish to pursue during cross-examination of witnesses called by the other party or to pursue in some other way. They are among the legitimate roles of an expert as is the more administrative role of managing documentary information [para 493].

The application of Fairclough’s CDA framework in the third secondary research question ascertained the meaning of social practice in court. Social practice, as an institution in court, refers to the role of the trier(s) of fact and forensic accountant experts in dealing with matters concerning the financial affairs of individuals and businesses. These are the various discursive practices involved during court proceedings in which the contribution of forensic accountant experts’ might be required. The role of forensic accountant experts in assisting a court is demonstrated through discourses expressed in the legislation, and which the trier(s) of fact refer to in court proceedings. The discourses trier(s) of fact use are general and require interpretation. The judgement of a court can be appealed, depending on the level of the court
in which the dispute is heard. This is addressed in the next section which focusses on the power relations in a court between the trier(s) of fact and forensic accountant experts.

6.3 Courts and accounting as institution(s)

This section focusses on a court and accounting as institutions. It examines the different institutional powers they can adopt. They are determined through the third secondary research question.

6.3.1 Courts as an institution

This sub-section examines the court/law as an institution, what makes it an institution, and how the court, (as an institution) is addressed in the third secondary research question. The way courts exercise judicial power is separated from legislative and executive power. This is an example of separation of legislative, executive and judicial powers of government. The Australian Constitution, the Constitution of the United States of America and a number of statutes in the United Kingdom, (for example, the Constitutional Reform Act 2005 and Human Rights Act 1998), adhere closely to the separation of powers. Under the Commonwealth of Australia Constitution Act:²⁴

[I] legislative power is the power to make laws. Executive power is the power to administer laws and carry out the business of government, through such bodies as government departments, statutory authorities and the defence forces. Judicial power is the power to conclusively determine legal disputes, traditionally exercised by courts in criminal trials and litigation about such things as contracts and motor accidents [italics added].

This implies that the courts are independent of the legislative and executive functions of government. Independence of a court, and, building public confidence, are essential. According to Brennan (1996):

²⁴ Australia’s Constitution is used to demonstrate the powers of the court.
[i]t has not got, nor does it need, the power of the purse or the power of the sword to make the rule of law effective, provided the people whom we serve have confidence in the exercise of the power of judgment…. (the Australian Judicial Conference, Canberra)

Brennan (1995a) outlined the function of a court at the Mason Court & Beyond Conference in Melbourne.

The function of the Courts in safeguarding - much less creating - the fabric of peace, order and good government, is like the air we breathe: it is known to be important, pollution is objected to, but it does not feature greatly in our consciousness. Yet, without a competent and independent judiciary and, I would add, without a competent and independent legal profession to administer the law that protects our freedoms and regulates our relationships with Government and with one another, our society would be hostage to the holders of power and human rights and fundamental freedoms would vanish like desert snow.

Brennan (1995a, 1996) demonstrated that there are opposing forces meeting in court, including the power of a court as an institution, the power of accounting as an institution, the power of the trier(s) of fact, the power of a forensic accountant expert, and the power of money. The power of both the trier(s) of fact and forensic accountant experts comes from their role, and within these roles there are particular legal and historical practices such as legal precedent. Although there may be a lot of forces meeting in court, it is the responsibility of a court, as an institution, to uphold public confidence, safeguard and protect individual freedom, and to be seen to be competent and independent. The responsibilities are demonstrated when courts comply with authorities based on court rules and legal precedent. The social practices are identified through the third secondary research question. The general task of the court is to decide which case is preferred once facts are noted (Commissioner of Taxation, [para 336]. Further, the trier of fact [at paragraph 337] advised the power of the court by stating that it does not confine its decision to evidence adduced in court, but has the power to consider other evidence they deem to be relevant.

I began this section of my reasons by saying what the position is generally. A court is not necessarily confined to spoken evidence, documents admitted in
evidence and what it has seen heard or noticed during a demonstration, view or inspection. It may look at other material but only if the parties were aware that it would do so.

Courts deliberate on different types of social practices, for example, matrimonial disputes with large financial values, following authorities such as the Ancillary Relief Rules to assist them during judgement. The authorities express several issues courts have to consider. For example, in James Paul McCartney v Heather Ann Mills McCartney 2008 WL 678052, [2008] EWHC 401 (Fam), the judge argued:

[in giving judgment I said: Rule 2.6(1) (d) of the Ancillary Relief Rules require the first appointment to be conducted with the object of defining the issues and saving costs. This is so for a number of sensible reasons, including in big money cases. There has been in some cases a marked tendency for the costs to run out of control. The assets in this case are enormous and probably at the very top end of big money cases to come before the Family Division [italics added] [para 118].

Courts have the sovereignty to determine the admissibility of forensic accountant expert opinion by considering several issues including the expert’s qualification. An advertisement or website does not warrant any qualification and admissibility of a forensic accountant expert opinion. For example, in Southern Management Corporation Retirement Trust, Plaintiff–Appellee v., Charles Timothy Jewell, Defendant–Appellant, and Robert Fulton Rood, IV, Defendant, and Gary A. Rosen, Trustee. No. 12–2319, the judge argued:

[his court reviews the lower court's decision to admit expert testimony under Fed.R.Evid. 702 for abuse of discretion. United States v. Wilson, 484 F.3d 267, 273 (4th Cir.2007) (citing Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)). Here, the bankruptcy court had reviewed Hillman's experience and expertise during the preliminary injunction hearing and found that she qualified to testify as an expert in forensic accounting. Faced with the challenges to her objectivity and the fact that her website failed to list her as a forensic accountant, the bankruptcy court found these objections insufficient to overcome the determination that Hillman qualified as an expert. We find no abuse of discretion in the bankruptcy court's decision to qualify Hillman as an expert. See United States v. Johnson, 617 F.3d 286, 293 (4th Cir.2010) (noting the process of forensic data extraction requires “some specialized knowledge or skill or education that is not in the possession of the jurors”) [italics added].

25 The United Kingdom court rules are used to demonstrate the authorities of the court.
26 The criteria for admissibility of forensic accountant expert opinion were discussed in chapter 4.
When making the decisions, courts use their sovereign power and refer to legal precedent and ideology of the bankruptcy court.

Courts demonstrate their power as an institution when determining the criteria for admissibility of an expert opinion. The discourse in the expert report is shaped by the social structure of the court system which internalises the expert report. Courts also interpret the law on social terms such as justice, fairness and equity demonstrating the power of the court as an institution. Fairness in court relates to several matters including individuals having a fair trial, fairness in court judgements and economic fairness in situations such as the distribution of assets in matrimonial disputes. Although the trier of fact has the ultimate power in court, they maintain public confidence through several social practices including fairness in their judgement.

6.3.1.1 Admissibility test for expert opinion/evidence

Forensic accountant experts have to be aware of the report by the Law Reform Commission of England and Wales titled “Expert Evidence in Criminal Proceedings” (2011). Courts have admitted expert evidence without adequate scrutiny (Law Commission 2011). The Report proposed the creation of a “statutory admissibility test” or “reliability-based admissibility test” for expert opinion evidence (Law Commission 2011). They will only be admissible in criminal proceedings if it is sufficiently reliable. The Law Reform Commission Report addressed expert evidence as sufficiently reliable if “the opinion is soundly based, and the strength of the opinion is warranted having regard to the grounds on which it is based” (Law Commission 2011). In addition, the Law Reform Commission Report (2011) suggested examples of instances where expert opinion evidence is not reliable:

a) the opinion is based on a hypothesis which has not been subjected to sufficient scrutiny or which has failed to stand up to scrutiny;
b) the opinion is based on an unjustifiable assumption;
c) the opinion is based on flawed data;
d) the opinion relies on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case; the opinion relies on an inference or conclusion which has not been properly reached.

The Law Reform Commission Report (2011) argued the “reliability-based admissibility test” would assist experts to provide sufficient material to reassure a court their expert opinion evidence is sufficiently reliable to be admitted. This proposed test differs from the “Daubert test” addressed in Daubert (USA). As previously discussed in chapter 2, courts in Australia have identified additional criteria for admissibility of expert opinion evidence in Dasreef. The High Court argued the qualifications of the expert witness, and the manner or purpose in which expert evidence was used in court, will be scrutinised by a court.

The Law Reform Commission report and case law, for example, Dasreef provided an example of the power of a court as an institution and ideology (or system of ideas) expressed in discursive practices. The law fixes legal meaning to expert opinion evidence, an example of social practices in court identified through the third secondary research question. This is a feature discourse shares with social practice and by which it serves the interests of a court and the Law Reform Commission. The “statutory admissibility test” or “reliability-based admissibility test” for expert opinion evidence is an example of social practice by forensic accountant experts that will be exercised by a court. The discourse also features the effects of the discourse practice over a forensic accountant expert - a social practice. The acceptance of the proposal demonstrates the production of legal discourse, supported by a network of institutional settings (the court and Law Reform Commission). The construction of the legal ideology has achieved a dominant position over other forms of ideology, including forensic accounting. The judge can use the ideology when it is incorporated into the legislation or court pronouncements.
6.3.2 Accounting as an institution

This sub-section focusses on forensic accounting as an institution and a forensic accountant expert and how they are addressed in the third secondary research question. They are qualifications, training, experience and/or the means used to arrive at, and express, an opinion. There is no all-encompassing definition of a forensic accountant or forensic accounting. The important issue is “what is an expert.” This is for a court to decide (as discussed in chapter 4). It appears that what makes someone an expert in a given case is “social practice.” The trier of fact in Commissioner of Taxation cited Freckelton when addressing the role of the forensic accountant expert.

In Chapter 56 of Expert Evidence Law: Practice, Procedure and Evidence, Ian Freckelton SC summarised circumstances in which accountants had given evidence as experts. Those circumstances included “the financial activities of firms and companies, for instance, in relation to insolvency, share dealings or commercial fraud, especially by reference to the accounts and account books.” They are circumstances of the sort that may arise in forensic accounting: “... accounting that set out to determine the nature of past business activity, often on the basis of incomplete documentation” [para 501].

Accounting is a socially-constructed practice used for seeing the world and making individuals and their certain behaviours calculable (Burchell et al. 1985, Miller & O’Leary 1987). Accounting does not have any basis in nature, like law and art. Accounting is a human creation. It is a social phenomenon and has a dominant technological component within its various meanings (Wodak & Meyer 2009). According to Dillard (1991, p.9),

Technology is some system of axioms, laws, rules and/or relationships, which are applied in order to affect some transformation having practical significance. Identifying, measuring and communicating imply a technology directed toward converting, or translating, economic activity into quantifiable representations to be used as decision inputs.

This implies that accounting is a technology that is not “ideologically sterile.” The systems or rules are “not based on observed phenomenon” but eventuate from the “social sphere” (Dillard 1991, p.9). According to Mouritsen (1994, p.204), “accounting technology is an
institution in as much as it is a typified response.” Accounting can be objective but does not have a physical base to verify the technology. The framework for accounting is “social construction”, and the technology is framed by ideology” (Dillard 1991, p.9). The third secondary research question revealed the different technologies of accounting that forensic accountant experts use during the reconstruction of facts/financial records pertaining to issues of interest. Results from the implementation of accounting technology are interpreted by forensic accountant experts acting as expert witnesses.

Kirby (2011) noted that “the role of forensic accountant is critical to the proof before courts of the validity and quantum of the claims.” Courts engage forensic accountants as expert witnesses to show objective reality of financial affairs. As such, they are recognised by the court as “authorities in a particular field” (Smith & Bace 2003, p.195). Judges are not scientists. They should be strongly encouraged to utilise their inherent authority to appoint experts (General Electric Co v Joiner 522 U.S. 136 (1997)). As the trier of fact notes in Duke, they encounter “the many issues raised by the pleadings and the evidence are complex.” Issues can also be argued by opposing counsel. It is important that the forensic accountant expert also anticipate the ‘other parties’ cross-examination.

Several scholars have written that forensic accountants prepare expert reports in compliance with the context of the rules of evidence (Bologna & Lindquist 1995, Heitger & Heitger 2008, Van Akkeren et al. 2013), for example, section 79 of the Australian Evidence Act 1995 (Cth). Other authors have based their analysis on a literal interpretation of what the court might have indicated in judgements, for example, Warren, J in Hart, referring to several cases or judgements. The accounting profession wants to nominate professional membership such as Certified Public Accountants (CPA) or Chartered Accountants (CA). The accounting profession also advises a member to have specialised training, study or experience. For example, according to APES 215:
[e]xpert witness means a Member who has been engaged or assigned to provide an Expert Witness Service. As an Expert Witness, the Member may express opinions to the Court based on the Member’s specialised training, study or experience on matters such as whether technical or professional standards have been breached, the amount of damages, the amount of an account of profits, or the amount of a claim under an insurance policy.

The trier of fact in *Commissioner of Taxation* also referred to the courts’ recognition of accountancy as a field of expertise:

[i]n the past, courts have recognised accountancy and auditing as fields of expertise. Speaking of forensic accountants, Austin J said in Australian Securities and Investments Commission v Rich (Rich): “This broader field of expertise, generally relating to understanding the financial health of a business enterprise, is the realm of forensic accountants. It has been said that ‘their role is really to assist the court to understand the financial information, using their skills to organise, display and communicate financial information’ ... or to ‘help explain complex financial and accounting issues raised in criminal and civil proceedings’ .... Thus, in modern litigation forensic accounting evidence is admitted to assist, not only in determining the state of insolvency of the company at the particular time as in Quick v Stoland, but in a variety of other broadly similar financial tasks, exemplified from Australian cases decided in the recent past ...” [para 498]

A courts’ recognition, for example, was evident in *Denning & Denning and Anor (No 3) [2011] FamCA 160*. A forensic accountant expert witness was “an associate member of the Institute of Chartered Accountants and is a member of both forensic accounting and business valuation special interest groups”.

6.3.2.1 Accounting technology

Forensic accountant experts use various accounting technologies. What a forensic accountant expert actually does depends on the nature of the engagement. So, the process and technologies used differs from engagement to engagement. Although forensic accountant experts undertake different forms of engagement, they need to keep within their area of expertise and demonstrate their expertise in a specific area. This is a crucial link to claims of the accounting profession that a forensic accountant expert needs to be a CPA or CA (*APES 215, Commissioner of Taxation*). Expertise in a specific area must be demonstrated. The
saying, “a jack of all trades but master of none” fits what the accounting profession is attempting to impose. That is, their members are masters of all things accounting/forensic accounting. Forensic accountant experts can be engaged to look at one specific aspect rather than the entire reporting system, demonstrating the different forms of engagement they undertake. They need to know where the boundaries of their investigations are and ensure the subject matter is within their area of expertise.

Case law on the essential attributes of an expert witness, including forensic accountant experts, has emerged over several decades. Case law increasingly informs literature dealing with the role of a forensic accountant as an independent expert witness as well as the scope of forensic accountant engagements. For example, the judge in Taniguchi v. Kan Pacific Saipan, Ltd. 132 S.Ct. 1997 U.S., 2012 argued the role of a forensic accountant expert is “necessary for communication between litigants, witnesses, and the court”. According to the trier of fact in Commissioner of Taxation:

[i]f an expert is to be called to give evidence or if an expert’s opinion is to be tendered in evidence, the expert’s role changes. Independence and objectivity become essential. The expert becomes a witness who may be approached by either party before any hearing takes place. The expert must not favour either party or be an advocate for either. It can be expected that the expert will be an advocate for his or her own opinion in the sense that he or she will be expected to explain it, expand upon it and justify it but not to the extent that he or she has a closed mind. With this in mind, Austin J thought it prudent advice that an expert should not accept instructions that required him or her to act both as independent witness and as a consultant to a party [italics added] [para 494].

Forensic accountant experts often testify in court. They provide expert opinion in several areas about an individual’s or company’s financial status (Sanchez & Wei Zhang 2012). The determination of accounting-related matters in a court demonstrated the “importance of using accounting as a method of determining a person’s or company’s financial position” (Ezzamel & Hoskin 2002, Baker 2006). The determination of financial affairs is a complex issue. Forensic accountant expert opinion evidence on the matters normally encounters “brutally
aggressive challenge in court” (Lennhoff & Downey 2012, p.217). This is an example of social practices happening in court identified through the third secondary research question.

Forensic accountant experts clarify the obfuscation of financial trails by answering questions beginning with ‘Who’, ‘When’, ‘Where’, ‘What’, ‘Why’, and ‘How’? For example, when following the money trail concerning fraudulent activities, a forensic accountant expert will ask the following questions:

Who committed the fraud?
When did s/he commit the fraud?
Where did s/he commit the fraud?
What is the cost of the fraud?
Why did s/he commit the fraud?
How did s/he commit the fraud?

Following the financial trail is not simple because forensic accountant experts need to find their way through cobwebs created by the money trail. The answers to the questions can assist a forensic accountant expert in gathering and collating crucial documentary evidence pertaining to the issues in question. These can be used in a forensic accountant expert report and expert opinion evidence. As the trier of fact in Commissioner of Taxation argued:

[i]t seems to me that forensic accounting is the relevant expertise…. it is to be expected that a forensic accountant would set out the assumptions made in the course of the investigation as well as matters such as the foundation on which the investigation proceeded, any relevant observations made during it and the basis for any opinions expressed [para 502].

Forensic accountant experts are appointed by their clients. They operate according to their clients’ instructions. Discussions between a forensic accountant expert and opposing counsel could result in unfavourable results. These sentiments were stated by the judge in James Paul McCartney v Heather Ann Mills McCartney 2008 WL 678052, [2008] EWHC 401 (Fam):
The problem to my mind with that approach is that accountants operate on the instructions of their clients, perfectly properly. One party's accountant may make demands which are quite unreasonable, and the other may refuse demands which are quite reasonable. I suspect that any further investigation would lead to confusion, not clarity, and I have no reason to suppose that the broad picture of the husband's vast — I repeat vast — wealth is substantially inaccurate [para 118].

Forensic accountant experts have to be aware that they need to adopt a sound methodology while answering questions beginning with ‘Who’, ‘When’, ‘Where’, ‘What’, ‘Why’, and ‘How’? For example, a person’s unexplained wealth can be calculated by deducting his/her normal expenditure from the normal earnings. The unexplained wealth will be the wealth derived from the surplus expenditure. In *Her Majesty's Advocate v Mohammed Younas, 2014 WL 5833920*, [2014] HCJ123, the judge argued:

> [t]here was no dispute over the soundness of the *methodology employed in the Crown's statement of information; it is the standard methodology used in confiscation proceedings*. The approach involves calculating the amount of the respondent's benefit from his general criminal conduct…done by working out the respondent's total known expenditure….From the total of his expenditure there is then deducted the respondent's ascertainable income from known sources….The resultant figure is taken as the amount of the respondent's benefit from his general criminal conduct and as being the recoverable amount [italics added] [para 4].

It is important forensic accountant experts use financial information prepared for the purpose of the engagement. Otherwise, it is not admissible in a court. In *Estate of Reva N. Wolf, Deceased, Sherwin F. Wolf, Petitioner and Appellant, v. Estate of Reva N. Wolf And Robert S. Wolf, 1999 WL 33902468, Court of Appeal, Second District, Division 4, California*, the judge contended:

> [t]he only evidence in the record respecting damages came from a forensic accountant hired by Robert who utilized records [compiled] by the Haas accounting firm as the basis for his opinion. The *Haas accounting records*, however, were not created for the purpose for which they were used by the Plaintiff's expert; did not reflect what the Plaintiff's expert said they reflected; and the expert's conclusions, therefore, fail to constitute substantial evidence [italics added] [para B].
Forensic accountant experts are required to untangle obfuscated financial trails. Sometimes the financial trails are so complicated they cannot fully untangle them. For example, in Enron or similar cases where multiple entities were involved, this generated difficulties in investigation. It is imperative forensic accountant experts admit that they cannot honour their engagement after experiencing such difficult situations. This will avoid embarrassment in court when cross-examined by the opposing counsel. For example, in *United States and Exchange Commission, v. Jason A. Halek No. 12–11045 (Aug. 5, 2013)*, the judge argued:

> [t]he court relied on the declaration of the SEC's forensic accountant, who analyzed the financial records of the three defendants and determined that the investors' funds were commingled among the defendants' bank accounts and treated as one economic unit. The accountant also noted that Halek had signature authority to receive and disburse funds from all the relevant accounts. Her report concluded that “[b]ased on the large volume of transactions, the commingled uses of funds, and the inaccuracy of accounting records and financial statements,” she would be unable to divide the profits among the parties [italics added].

Forensic accountant experts have to be aware that people can interpret evidence differently. So, it is important for them to gather crucial evidence and interpret the evidence in accord with the rules of evidence. Unsupported assumptions are not accepted by the court. Assumptions have been accepted as long as there is adequate support for them. According to Telpner and Mostek (2002, p.241), forensic accountant experts have to support their conclusions with relevant and reliable facts and supporting authorities. For example, when determining the proceeds of crime under the *Proceeds of Crime Act 2002 (Cth)* and similar legislation, the trier(s) of fact expect forensic accountant experts to determine the illegal source of funds. It is important for forensic accountant experts to address two issues when determining whether property was derived from unlawful activity. First, whether funds provided by the company (creditor) were repaid; and second, whether the proportion of funds used to derive the assets was from the creditor. Andrews, J contented this statement in *Hart*. 


The typical submission from the Commonwealth did not go further, to consider whether the funds from Merrell were repaid or whether the proportion of funds used to derive the assets was from Merrell. Both are relevant to whether property was derived from unlawful activity [italics added] [para 83].

The importance of determining whether assets were derived from borrowed funds, and the source of borrowed funds, was discussed in the case. Andrews, J stressed the importance of confirming whether money was lent and repaid, and the conditions of these loan agreements.

If Merrell’s money was lent not given, repaid not retained, the extent to which an asset was derived from it would differ. Submissions by the Companies asserted that Money was borrowed from Merrell. The Commonwealth’s submissions related to the forfeited Merrell charges were premised on money from Merrell being borrowed. *Neither side touched upon how that affected the issue of whether an asset was derived from borrowed funds* [italics added].

The trier of fact also argued that if money used to repay any advance by the company was not derived from unlawful activity, then the assets were not derived from unlawful activity. The accounting discourses of rates, insurance, repairs and maintenance, and interest may be irrelevant to the acquisition of assets, but are important elements to consider when ascertaining whether assets were derived or realised directly or indirectly from unlawful activity. It is imperative for forensic accountant experts to ascertain whether assets were derived from lawful activities and funds used for repayment/service of the loan for these assets were derived or realised from unlawful activities. When tainted funds are used in a business for some purposes, (for example, to pay for day to day expenses), it can allow the business to use lawfully acquired funds for other purposes such as acquiring assets. Three important issues forensic accountant experts consider during investigation of the source of funds are: “the relevant proportions of tainted and untainted funds used to derive the property, the dates of the use of tainted funds and length of the period during which the asset was derived or realised.” This advice was stated by Andrews, J in *Hart*:

*I accept* that where tainted funds spent on an applicant’s ordinary running expenses, enable an applicant to directly derive or realise an asset with lawfully
acquired funds, the asset is also indirectly derived or realised by the tainted funds. This is so even though the ordinary running expenses do not directly acquire, derive or realise an asset. Tainted funds spent on a company's running expenses may indirectly derive or realise an asset. It will depend on the circumstances [italics added] [para 142].

Further, Andrews, J argued the relevant facts that forensic accountant experts have to consider are:

[o]bviously relevant are: the relevant proportions of tainted and untainted funds used to derive the property; the dates of the use of tainted funds and of the length of the period during which the asset was derived or realised.

Andrews, J also argued that the asset is deemed to be untainted if tainted funds are used for unrelated expenses.

If a company had untainted funds to derive an asset without the need to resort to tainted funds then the fact that tainted funds were used for unrelated running expenses might mean that the asset was not derived from tainted funds.

Tainted funds can be used for the ordinary operation of the business, enabling the business to derive or acquire assets through lawfully acquired funds. Forensic accountant experts examine these activities. They must demonstrate during the course of investigation that funds used were paid direct to recipients, and were recorded in the general journal. Corroborating evidence is important to confirm activities in the company. Facts forensic accountant experts use to explain any dispute should withstand the vigorous cross-examination of opposing counsel. For example, if sales are made, a forensic accountant expert should search for supporting evidence (such as withdrawal slips and a bank statement) to demonstrate receipt of money from the customer. Deposit slips will prove that money was paid to a customer. Andrews, J in Hart identified total indebtedness is relevant information for forensic accountant experts to consider when determining the value of a company’s interest in an asset at the date of forfeiture.
To calculate the value of a company’s interest in an asset at the date of forfeiture the total indebtedness of the Companies to Merrell in April 2006 is relevant [italics added] [para 472].

It is important that forensic accountant experts show professional scepticism when following the money trail and find all relevant information that the trier(s) of fact would rely on. For example, the judge in *R. v Lewis (Mark) 2014 WL 5833973*, noted:

> [t]here was evidence from a forensic accountant, who could find no sign of any investment in property other than Shingle Cottage. He found evidence of high level of personal spending by the appellant and very substantial unidentified receipts into his bank accounts [para 14].

A forensic accountant expert can search for evidence of investments, expenditures and banking when following the financial trail.

### 6.3.2.2 Responsibility of forensic accountant experts

Forensic accountant experts encounter systems of ideas expressed by individuals or groups. These sometimes distort reality to serve the interests of a privileged individual or group. A forensic accountant expert, as an advocate of the court, should not be influenced by other individuals, groups, political pressure or their clients. For example, it is important forensic accountant experts are seen to be independent during engagements, as demonstrated in *Duke*. The potential validity of different values of wealth was acknowledged by the court. However, Mulligan J declined a submission by the defense that the expert was not independent and the conflicting expert report was due to the expert’s association with the client company and legal advisors prior to the trial. An expert’s association included preparation of valuations, a critique of the report of another expert, and preparation of the client’s case. The trier of fact affirmed that the expert was independent. It is the responsibility of legal counsel to ensure the credibility of experts.
Forensic accountant experts do not need to work in the industry to have expertise in that industry. For example, the trier of fact in *Commissioner of Taxation* argued:

That is not to say that comparison with competitors’ cost structures might not be relevant in undertaking a forensic exercise but to say that a forensic accountant must have skill and expertise in a business of the same type seems to me to be going too far. The assumptions and facts on which a forensic accountant relies, including any comparisons with competitors, should be apparent in the report….I am not satisfied that he needed to have worked in the industry as an accountant or otherwise to have the expertise required for the task required of him. For these reasons, I did not allow Dr Orow’s objection to my receiving [the expert’s] evidence [italics added] [para 508].

Further, forensic accountant experts have to answer relevant questions by the opposing counsel during cross-examination. They can use their skill and expertise in relevant areas to assist the opposing counsel in answering questions during cross-examination.

If Dr Orow wanted to explore different assumptions and facts in the course of cross-examination of [the expert], it was open to him to do so. It was for [the expert] to have regard to the assumptions and facts put to him and to express his opinion. It was his skill and expertise as a forensic accountant that was required to answer those questions. His task was to give an opinion as to what had actually happened in the business in so far as he could ascertain it by his investigation. If matters relevant to benchmarking, such as the hourly rates paid to employees of competitors, were relevant, [the expert] could obtain that information and, with his skills and expertise as a forensic accountant, understand it (*Commissioner of Taxation*).

**Moral values**

Forensic accountant experts have to demonstrate they are ethical in their engagements. Ethics is the “kind of relationship you ought to have with yourself…and which determines how the individual is supposed to constitute himself as a moral subject of his own actions” (Rabinow 1991, p.352). This is a “historical ontology in relation to ethics through which we constitute ourselves as moral agents” (Rabinow 1991, Rabinow & Hurley 1997, p.262). Ethics is also a part of the study of morals (Davidson 1986, Rabinow & Hurley 1997, O-Farrell 2005). Morals consist of people’s actual behaviour, morally relevant actions, and moral codes imposed on them. Moral codes are the rules that determine accepted behaviours and codes of
conduct for values of possible behaviours. The trier of fact is bound by the Evidence Act, court rules, and legal precedent, although they have the power to accept or reject expert opinions.

Forensic accountant experts can demonstrate that they comply with court rules by showing professional ethics such as integrity, objectivity, professional competence and due care, confidentiality and professional behaviour. Ethics can also be demonstrated through gathering data, calculating facts and formulating opinions based on professional practices. These terms are related to systems of power. The decision of Teague J in R v Bruce Ivar Dowding, Victorian Unreported Judgments 1420 of 1999, Supreme Court of Victoria, rejected the original report and stated deficiencies included “inadequate identification of documents, defining of terms, and references to principles and sources”. Theoretically, based on the definition of a profession, and assuming compliance with Codes of Conduct and APES 110, it is axiomatic that members of accounting professional bodies should be ethical during engagements. In addition, because of the subjective nature of accounting, a forensic accountant expert can, in good faith, determine the accounting-related matter, but could be mistaken. Dishonesty will cause embarrassment. It can tarnish the expert’s image, thus causing the inadmissibility of the forensic accountant expert report if the court proves that the expert has breached court rules such as the Federal Court of Australia Practice Note CM 7.

Forensic accountant experts should be professional in their work. The trier of fact in Duke Group referred to the standard of work to be displayed by forensic accountant experts.

Nevertheless in undertaking his work, [the expert] employed professional standards of the highest order and in his reports and evidence spoke of the standards to be applied by experts undertaking this task.
A forensic accountant expert’s credibility is sometimes challenged in court. The trier(s) of fact consider several factors during assessment of their credibility. The trier of fact in *Duke Group* referred to several issues they will consider.

I commence consideration of this submission by saying that [the expert] is a highly qualified expert of considerable experience. I regard him as an excellent witness and he gave not the slightest hint of bias or lack of independence at any stage of his evidence. Indeed, it can safely be said that he gave his evidence, including under cross-examination, without any regard for the consequence to any party of what he was saying. He carefully considered various hypotheses and suggestions and expressed opinions and made concessions appropriately.

The trier of fact referred to factors necessary for the authenticity of a forensic accountant expert opinion evidence. This includes experience/qualification, independence, whether various hypotheses used, and ability to withstand cross-examination. The trier of fact continued by referring to further issues that can affect a forensic accountant expert’s credibility.

At no stage did he exhibit any of the apparent characteristics of lack of independence or bias, such as lack of objectivity, defensiveness, assertiveness, obduracy, stubbornness, barracking, or the making of statements about matters outside his expertise.

Courts ensure that individuals such as shareholders are protected when investing in share markets. The independence of experts appearing in court proceedings dealing with takeovers is critical for the protection of security holders. Mullighan J argued in *Duke Group*:

> [It may be seen that a *true state of independence on the part of the expert is crucial* to the efficacy of the [takeover] process and for the *protection of the public* generally and the company and its members in particular [italics added] [para 265].]

It is evident from the discourses discussed in the case law that a court intends to achieve societal objectives through proper exercise of the law during court proceedings and judgement. This practice is demonstrated in a court when trier(s) of fact listen to stories presented by opposing parties and weigh their evidence before making appropriate decisions.
Courts achieve their societal objectives through the assistance of forensic accountant experts. They cannot cherry pick the facts examined in order to form an opinion. That is not consistent with independence, (for example, only including facts favourable to the client). The terms of the engagement usually specify the areas to be covered. If the scope is too narrow, the court is likely to reject the opinion. Experts are obliged to form an opinion if they accept an engagement and proceed to issue a report, for example, in *Orrong Strategies Pty Ltd v Village Roadshow Ltd [2007] VSC 1 (25 January 2007)* and other similar cases previously discussed in chapter 4.

Individuals having specialised knowledge based on their training, study or experience are eligible for appointment as experts. It is mandatory that expert evidence is based wholly or substantially on an expert’s specialised knowledge (*Federal Court Rules 2011 (09/Jan/2014), Evidence Act 1995 (Cth))*). Forensic accountant expert reports outline the experts’ opinion on specific questions at issue in the proceeding. Opinions expressed must be based wholly or substantially on an expert’s specialised knowledge gained through training, study or experience (*Federal Court Rules 2011 (09/Jan/2014), Practice Note CM 7, The Ikarian Reefer (UK), Makita (Australia)*27. An expert report outlining the opinion of a forensic accountant expert is admissible as evidence if it is based on specialised knowledge (*Evidence Act 1995 (Cth), section 79 and 177*). The factors are not exhaustive for admissibility of a forensic accountant expert opinion discussed in chapter 4, other factors are relevant for admissibility which courts consider, for example, having expertise in the issue of interest.

Forensic accountant experts have the power to influence the jury. The status of a witness as an expert could influence the opinion of the jury and as a result the expert report is accorded more weight. This can result in the risk of miscarriage of justice in court. Such a situation is

27 The Australian Act, Regulation and Case Law are used to demonstrate the requirement for the admissibility of an expert opinion.
avoided if the judge advises the jury before the commencement of a court hearing, during and after the hearing before summing up their verdict. A judge informs the jury that their role is to scrutinise and assess the forensic accountant expert evidence, not his/her status. Judge Kaye, J stated these sentiments in *R v Cox (No. 2) [2005] VSC 224*:

> [t]here is, of course, always a risk that a jury, in any case, might be beguiled by any expert, and tend to give the views of that witness excessive weight simply because of the status of the witness as an expert. However, as in any case, I consider that such a risk can be appropriately counteracted by judicial direction, both during the trial, and in final directions, as to how the jury is to scrutinise and assess the evidence of the expert for itself [para 49].

**Forensic accountant expert engagements**

Forensic accountant experts can be engaged by both the prosecution and defense, and instructions prescribed by both parties should be clear and concise. Experts rely on financial documentary evidence to prepare expert opinion and exercise their implied authorities based on qualification and professional memberships. Case law has demonstrated opposing counsel may target the process. For example, the judge contended in *Commissioner of Taxation*:

> [n]one of these principles leads to the conclusion that [an expert] must possess skill and experience in the day to day operation of the business he or she is investigating and examining. *Certainly, he or she would have to know something of the business and any facts assumed or observed should be identified. Those observations and assumptions can be cross-examined upon and others relating to the particular business can be put to [an expert] for consideration* [italics added] [para 504].

Experts can be required to demonstrate how access to relevant documents was acquired, especially where access is not readily forthcoming. The forensic accountant expert cannot compel access to documents but can be able to enlist the support of the court through law enforcement or similar power to subpoena documents. For example, the court noted in *Hart*:

> [t]he Commonwealth appointed a forensic accountant, [the expert], and offered to assist him to find and access such records as he required including but not limited to the records of the applicants…and [the expert] *have the freedom* to request the AFP to obtain documents [italics added] (parag 37(ii)).
The forensic accountant expert in *Duke Group* “was instructed to undertake various tasks and he did so with extensive thoroughness”. Vague instructions undermine forensic accountant experts’ duties to the court. As a result the expert, opinion becomes useless. This view was argued by the judge in *Hart*:

"The Commonwealth's instructions to its forensic accountant did limit the accountant's duties to an extent which was sometimes unhelpful for the court. For example, [the expert’s] task 4 report set out that his instructions were in effect to determine if funds from unlawful activity were used, but his instructions were not to determine the proportion of unlawful funds. In effect, the Commonwealth's expert looked only deep enough to opine whether some unlawfully derived money was directly or indirectly used to derive an asset (para 52)."

It is important forensic accountant experts’ confine themselves to their area of expertise during engagements. New activities or findings that emerge during engagements that are not expressed in their current engagement letter should be considered differently. The forensic accountant expert should seek variation of the engagement scope. For example, as stated in *APES 305 Terms of Engagement* [paragraph 5.2]:

5.2 When determining the need to reissue or amend an Engagement Document for a recurring Engagement, a Member in Public Practice should consider the following factors:
(a) any indication that the Client misunderstands the objectives and scope of the Engagement;
(b) any significant changes in the Engagement;
(c) any significant changes in the Professional Services to be provided or the Terms of Engagement;
(d) a recent change of Client management or ownership;
(e) a significant change in the nature or size of the Client's business;
(f) any significant changes to Professional Standards or applicable accounting or auditing and assurance standards; and
(g) any changes to legal or regulatory requirements.

Parties engaging forensic accountant experts require accounting data to ascertain facts in issue. Forensic accountants use several accounting technologies to gather these data.
6.4 Power relations in court

This section addresses ‘power and ideology’; the first aspect in the third tier of Fairclough’s framework. Power relations in court, and the institutional power of the court and accounting, are examples of social practice demonstrated by Fairclough (1993b). Goodrich (1984b, p.188) noted “legal discourse is socially and institutionally authorised… by hierarchy, status, power and wealth.” Critical Discourse Analysis focusses especially on the roles of discourse in the production and reproduction of power, abuse or domination (Wodak & Meyer 2009). Discursive practices have demonstrated that the power of the court as an institution or legal authority is established under the law and legal precedent. According to Shuy (1993), “law is a culture of the written word, not the spoken”. Modality of power within the court as an institution exists in many ways, for example, the trier(s) of fact has to comply with court rules although they have legal powers in court. Powers to accept or reject expert opinion remains with the trier of fact, demonstrating that social conditions determine properties of discourse. The trier of fact’s role as a “gatekeeper” is to interpret the law and to weigh the evidence forensic accountant experts adduce in court. Trier(s) of fact exercise their powers after due consideration of all evidence adduced in court and the credibility of key witnesses, for example, forensic accountant experts. The judge in Duke Group stated similar sentiments.

The reason that the primary judge withheld relief under the claim for breach of fiduciary duty was his understanding of the law established by this Court for the ascertainment of fiduciary obligations, most notably in Breen… He had expressed his conclusions about the facts in strong terms. Those conclusions depended upon his assessment of the credibility of key witnesses, … and the common relevance of the facts [italics added] [para 111].

On conclusion of a case the court can ignore the expert report completely, even if the expert’s report is accepted as admissible. For example, the judge [at paragraph 243] in Cheal 2 did not accept Stephen McMahon’s forensic accountant expert opinion and stated due to the “absent any valuation of that amount, the appropriate purchase price would be $55,000. When
determining the value assigned for the company or goodwill, the court in Cheal 2 took into account the money used by Cheal in establishing his new company. The court ignored forensic accountant expert opinion evidence in the case and argued that the reason for using the company name was due to its value.

The weights given to forensic accountant expert reports can be different depending on how the courts view the expert report. The jury has the responsibility of weighing a forensic accountant expert opinion and determining the credibility of the expert witness. For example, the judge in United States of America v. Lawrence T. Tyler, No. 14–20546 when citing United States v. DeRose Indus., Inc., 519 F.2d, 1066, 1067 (5th Cir.1975); see also Grant, 683 F.3d at 642 demonstrated “the jury retains the sole authority to weigh any conflicting evidence and to evaluate the credibility of the witnesses.” These sentiments were also argued by Kaye, J in R v Cox (No. 2) [2005] VSC 224:

[u]ltimately an assessment of the weight of the evidence is a matter for the jury….Further and importantly the evidence is directed to a central issue in the case…. [para 45].

Juries have the authority to accept or reject the forensic accountant expert’s methodology. For example, in Fuller v The Queen [2013] NTCCA 6, the trier of fact in this unexplained wealth case argued:

[a]t several points her Honour pointed out that the jury could reject the opinions of an expert where not satisfied of underlying facts or assumptions [para 68].

The forensic accountant expert’s responsibility is to prepare a report based on a methodology that would satisfy the jury and prove the case beyond reasonable doubt. In R v Cox (No. 2) [2005] VSC 224, Kaye, J noted:

[e]ssentially it is a matter for the jury whether they are satisfied beyond reasonable doubt ….The jury may or may not accept the methodology of the accountant [para 47].
The value of a forensic accountant’s expert report is contingent on its acceptance (R v Cox & Saddler [2006] VSC 443) or rejection (Cheat Industries Pty Ltd - Fitzpatrick v Cheal) by the court.

Forensic accountant experts owe fiduciary duties to their clients but have a duty to a court when appearing as expert witnesses. Courts have the power to determine the imbalance of power existing between the principal and their clients. For example, the judge in Duke Group articulated the imbalance of power in Australian courts by citing Breen v Williams (1994) 35 NSWLR 522.

The primary point for which Breen stands in relation to fiduciary duties is that, in Australia, attempts to elevate a relationship between medical practitioner and patient effectively to a special one which, without more, will import fiduciary obligations has, for the moment, failed. Proving that the relationship involves an imbalance of power, and even vulnerability on the part of the patient, was not sufficient [italics added] [para 122].

It is evident that there is an imbalance of power in court. Although the forensic accountant expert has power to formulate and present expert opinion, the court has ultimate power. The court demonstrated its omnipotence in Duke when the trier of fact argued:

[e]ven though Easton and Hall adopted the same basic approach in reaching their conclusions, there were some differences not only in approach but in judgment…. these valuations are different. It is wrong in principle to take the mean of their valuations and adopt it as my conclusion. I must make a choice. I am unable to discern any error in the work of either of them and so it comes down to the matter of their judgment [italics added].

The power in court to choose between two opposing experts was also evident in an unexplained wealth case R v Barker [2015] QCA 215. The trier of fact contended:

The report of Ms Hamer, a forensic accountant, assessed the applicant’s income for the period 1 January 2008 to 23 April 2009. The unexplained income for that period was $1,775,928.55. In cross-examination, Ms Hamer stated that she saw no evidence of cash holdings prior to 1 January 2007 but agreed she could not say how long the notes had been stored. She could not find a source for that money. For the period 1 January 2008 to 30 June 2008, Ms Hamer discovered
unexplained income of $151,000. For the period 1 July 2008 to 23 April 2009, the unexplained income was some $1.6 million, which included the $995,250.50 found at the applicant’s property [italics added] [para 15].

The trier of fact used the power of a court to reduce the amount of unexplained income. The trier of fact considered other factors while determining the new amount.

In respect of the third issue, the sentencing judge reduced the quantum of the unsourced income to $1.61 million, bearing in mind the shortened trafficking period, and found that the cash of $995,250.50 located on the property was derived from the trafficking. The sentencing judge had regard to the forensic evidence of Ms Hamer for the period 1 January 2008 to 23 April 2009… [italics added] [para 19].

Two types of judgement occur here; the judgement of opposing forensic accountant experts and the judgement of the judge. However, the judge has ultimate power assumed from the institution and the law. This excerpt demonstrates how the power of the court as an institution overrides the judgements of the experts. Trier(s) of fact have the power to say forensic accountants’ expert opinion is “wrong” even though the trier(s) of fact do not have the specialised knowledge based on qualifications, training or experience in the issues of interest. The discourse demonstrates the trier(s) of fact have the power during decision making on the different interpretations of accounting-related matters. Trier(s) of fact consider different factors while weighing forensic accountant experts’ opinion/evidence on valuation of assets. They analyse forensic accountant expert approaches and judgements prior to making their judgements. In addition, the opposing parties can make recommendations to the court. The trier(s) of fact have the power to agree or disagree with such recommendations. Courts have the power to adjust findings adduced by forensic accountant experts. The trier of fact requires some measurements based on legal precedent as a benchmark for their decisions. In *Lenz Nominees Pty Ltd v Commissioner of Main Roads* [2012] WASC 6 the trier of fact argued;

> However, the prohibition against a court becoming a “third valuer” does not, and cannot, prevent the court from making its own adjustments to the valuations….Judicial adjustment to the valuation may sometimes be unavoidable
because a court cannot adopt adjustments which it has rejected; the court would otherwise be left with no basis to assess the value of the subject land: McKay v Commissioner of Main Roads at [2484] (Beech J) [italics added] [para 12, p.7].

In addition, the trier of fact contended in Duke Group that experts can assist the court:

[t]he plaintiff submits that I am to be assisted by both witnesses and that I must reach my own conclusion. Of course, as a matter of principle that is true particularly when both experts are suitably qualified and experienced and are not in error.

Trier(s) of fact have the power to declare the value of any property, conditional under the legislation. The court will not decide the terms of measurement. For example, the judge in Hart noted:

[t]he court’s power to make a declaration under POCA s 102(1)(c) is conditional upon the declaration including a declaration of value. Whether value be measured in terms of money or as a proportion of the whole of a property I need not decide. On either basis, if a court declares the value of an applicant’s interest it obviates the need for another proceeding to finally determine the parties’ rights in respect of property [italics added] [para 465].

The judge in Hart also stated that trier(s) of fact have the power to issue orders according to the legislation.

[a]lternatively, it is within the power given to a court making orders under POCA s 102(1) in these particular circumstances, subject to submissions as to the appropriate form of orders and directions, to give the Companies or any of them liberty to pay to the Commonwealth an amount which represents $1,600,000 [italics added] [para 856].

It is imperative for forensic accountant experts to have background information of the issues of interest. For example, in cases of alleged fraudulent activities, the person engaging a forensic accountant expert would provide information regarding the engagement in the engagement letter. A forensic accountant expert would need to determine what documentation or other information was required to prove or refute the allegations. If the documents or information are not available the expert needs to determine what impact this
has on formulating an opinion. For example, in *United States of America v. Lawrence T. Tyler No. 14–20546*, the judge argued:

>[a] forensic accountant expert testified that Tyler used that money to purchase a cashier's check. The [expert] further testified that most of the withdrawn money was derived from Medicare and Medicaid deposits....*The evidence thus supports the jury's conclusion* that Tyler knew the funds withdrawn from the Wachovia account were derived from illegal activity *[emphasis added]*.

Lawrence T. Tyler (Defendant–Appellant) was the owner and manager of a company called “ICPAYDAY”. The company was contracted by the government to provide durable medical equipment (such as wheelchairs and similar equipment) to patients. Tyler submitted fraudulent claims for reimbursement and was charged and convicted with one count of conspiracy to commit health care fraud, eight counts of health care fraud, and one count of money laundering. A forensic accountant expert traced the financial trail of the alleged criminal activities and testified accordingly. The expert argued that the primary source of deposits into the bank account Tyler used was from Medicare and Medicaid reimbursements, paid pursuant to ICPAYDAY’s fraudulent claims. This case demonstrated it is imperative for forensic accountant experts to be aware of other surrounding facts in addition to the issues of interest, since unique individuals preside over court proceedings and “what is unreliability to one person can be invalidity to another, or of low probative value to someone else” (Freckelton 2011). The trier of fact in *Hart* argued the objective of forensic accountant experts is to satisfy the court by way of expert opinion evidence.

The judge demonstrated the sovereignty of the court as an institution by using the text/discourse “satisfy me” when referring to the admissibility of the forensic accountant expert opinion. Forensic accountant experts have to satisfy the court while clarifying the obfuscation of financial trails. Satisfaction of the court can be demonstrated by connecting the issues of interest through the value, month and year of individual transactions. It is
imperative forensic accountant experts also measure the funds invested by interested parties in committing the fraudulent activity, if this is within the bounds of the engagement.

Trier(s) of fact require forensic accountant experts’ assistance in circumstances whereby they cannot determine the value of the suspect’s interest in any property. For example, the judge in *Hart* noted:

> [h]owever, *I am satisfied* that the collective value of the interests of Fighters, Yak, Nemesis and Bubbling in the 9 assets can be valued, although not in dollars because there is no evidence of the value in dollar terms. [italics added] [para 856].

Forensic accountant experts have to be aware that evidence compiled should be relevant and reliable so that it is admissible and accepted by the trier(s) of fact. A forensic accountant expert can use a ‘table’ to outline and itemise the assets with their value. For example, tables 6 and 7 below show the sources of funds and payments.

Table 6: Table of sources of funds

<table>
<thead>
<tr>
<th>Date</th>
<th>Ref</th>
<th>Details</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>24.10.94</td>
<td>234</td>
<td>Income from Tukadale Pty Ltd - fees received</td>
<td>$50,000.00</td>
</tr>
<tr>
<td>25.11.94</td>
<td>307</td>
<td>Income from Bomibco Pty Ltd - fees received</td>
<td>$6,000.00</td>
</tr>
<tr>
<td>16.12.94</td>
<td>349</td>
<td>Income from fixed deposit</td>
<td>$35,369.53</td>
</tr>
<tr>
<td>16.12.94</td>
<td>385</td>
<td>Income from sale of Pitts and Laser</td>
<td>$161,422.90</td>
</tr>
<tr>
<td>17.02.95</td>
<td>485</td>
<td>Dep-Maurice Hannan - Bal plane purchase</td>
<td>$30,000.00</td>
</tr>
<tr>
<td>18.04.95</td>
<td>644</td>
<td>Income from Ord Minnet - sale of Yardmin shares</td>
<td>$32,300.70</td>
</tr>
</tbody>
</table>

Adapted: Confidential and Commissioner of Taxation [2013] AATA 112 (1 March 2013)
Itemising the assets can assist the court in understanding the transactions pertaining to the issues of interest. Douglas J [at paragraph 98] in *Piatek*, discussed the courts power/authority as an institution by using the text/discourse “which I accept” when referring to the admissibility of the forensic accountant expert opinion.

Trier(s) of fact base their judgement on different factors, including ensuring society is not deprived of the benefits of wealth gained when criminals manipulate the legal system to their advantage and achieve illegal objectives. In *R v Cox (No 1) [2005] VSC 157*, the forensic accountant expert was engaged to assist the court in determining whether the accused obtained economic profit through illegal activities. In addition, the judge has the power to direct juries during court proceedings to consider certain areas in the areas of interest. Juries have the power to make decisions based on the expert opinion evidence. They rely on forensic accountant expert evidence during deliberation of accounting matters since they lack relevant expertise in these areas. As Hand (1901, p.52) notes:

[i]t is of course not necessary for the jury to accept the expert’s opinion, but were it not really of possible weight with them, it would not be relevant, and if of possible weight, it is only because it furnishes to them general propositions which it is ordinarily their function and theirs only to furnish to the conclusion which constitutes the verdict.
The sentiments addressed by Hand (1901) were also noted by Kaye, J in *R v Cox (No. 2) [2005] VSC 224*:

[u]ltimately, however, *the jury will be directed that it is a matter for them to determine* in each case whether or not a particular cash transaction has been shown not to be derived from a known source of funds of each accused [italics added] [para 50].

Forensic accountant experts can formulate conflicting expert opinions during valuation of shares. The conflicting opinions can be caused by the adoption of different valuation methods including the discounted cash flow (DCF) income approach. For example, the judge contended in *Nigel Gray & Others v Braid Group (Holdings) Limited, P560/13, [2015] CSOH 146, 2015 WL 6966279*:

forensic accountant expert ―Ms Porter agreed with Mr Beber that the most appropriate method of valuation of BGHL was on the basis of maintainable earnings. However, she considered it appropriate to use earnings before tax (EBITDA) as the basis of the calculation, as opposed to Mr Beber's use of post-tax earnings‖ [para 148].

The court can be disappointed when forensic accountant experts present conflicting expert opinions. The court also understands that the valuation of a company is subjective.

*I find it surprising, and somewhat disappointing, that two share valuation experts could arrive at such radically different opinions on the value of the company, especially as they agreed that a valuation method based upon maintainable earnings was the appropriate one, and that it ought not to matter much whether one used profits before or after tax. There is, of course, no “correct” answer to the valuation of a company. I am, however, driven by the size of the gulf between the respective valuations to conclude that this is not attributable entirely to acceptable differences of judgment, but rather that one or other or both of the witnesses has or have adopted an erroneous approach in some way. I do not feel able to accept either opinion in its entirety [italics added] [para 150].

The court has suggested that forensic accountant experts can value the shares according to the pro rata share of the value of the company. They should not apply any minority shareholding
discount. For example, in *Nigel Gray & Others v Braid Group (Holdings) Limited*, P560/13, [2015] CSOH 146, 2015 WL 6966279, the judge contended:

[t]he experts’ views on the value of the company differed very widely. It was, however, common ground between the parties that in valuing the shares of any of the members for present purposes, it was appropriate to value them at a *pro rata* share of the value of the company, and not to apply any minority shareholding discount [para 142].

The judge [at paragraph 152] argued “I find that figures not too far apart from one another have been produced. I therefore find, on an analysis of all of the company valuation evidence presented to me, that BGHL may reasonably be valued, as at the date of conclusion of the proof, at £32,000,000”.

Courts have the power to pick and choose expert reports they accept when different forensic accountant experts engaged by opposing counsels have varying qualifications, experience and opinions. The trier of fact’s decision in accepting or disregarding forensic accountant expert opinion is based on whether the forensic accountant expert has expertise pertinent to the issue of interest. In addition, the trier of fact considers the basis of the forensic accountant experts’ opinion evidence. Forensic accountant experts have to influence the trier(s) of fact through their work and evidence when they are both suitably qualified through education, training and experience. Courts may accept the evidence presented by an experienced forensic accountant expert when other credentials they have, for example, qualification are the same. As the trier of fact in *Duke Group* argues:

*I make no criticism of Hall of any nature but I prefer the conclusions of Easton. He was more intimately aware of Western United and Kia Ora. He has greater experience. I was greatly impressed by him and his evidence. I am more inclined to rely on his judgment about the appropriate price earnings multiples and the assessment of maintainable earnings than that of Hall and I do so* [italics added].
The discourse explained courts do not take into consideration the qualification of forensic accountant experts only; they refer to other factors should forensic accountant experts credentials be the same. The approach by courts differs depending on circumstances. For example, the court in this situation relied on forensic accountant expert opinion. In other situations, the court can decline to rely on the expert opinion. For example, in *Capricorn Diamonds*, the judge accepted the opinion/evidence of the plaintiff basing his judgement on the expert’s expertise in a particular area.

It follows from the preceding analysis as to the consideration by the various experts upon the use and application of trading history that *I do not accept the evidence of Lonergan*. To the extent that Lonergan relied on trading prices of the WADT units from 9 November 2000 to support his conclusions as to fair value, *I prefer the views of Appleyard and Perry*. Perry is an expert in share market practice and investment behaviour. *I consider that Lonergan did not have expertise in respect of investor behaviour* commensurate with that demonstrated by Perry. I accept the evidence of the expert witnesses on behalf of the plaintiff [italics added] [para 199].

According to the cases *Nigel Gray & Others v Braid Group (Holdings) Limited, P560/13, [2015] CSOH 146, 2015 WL 6966279, Duke Group* and *Cheal 3*, the trier of fact can take conflicting views of value and determine which is the most appropriate in a given case. All the trier of fact is saying is that, on the facts of the case, one interpretation is more acceptable than the other; the ruling establishes one “reality” in the particular circumstances. The ‘power’ is manifest where the trier of fact can ignore the experts and decide their own opinion. Thus power lies in being able to choose one valuation over another, or as in the case *Cheal 2* rejecting all opinion and the judge uses his/her own discretion.

The trier of fact has the power to ascertain the amounts to be considered when measuring financial benefits individuals derive from unlawful activities. This happens in situations whereby forensic accountant experts cannot ascertain the exact source of funds. For example, the judge in *Hart* contended:
The flaw in the challenge is that [the expert’s] figure of the $19,168,097.77 which was recorded by UOCL in the client files of the participants does not include the "additional deposits…not recorded in the database." It is clear to me that [the expert] declined to include the $1,974,165.75. They should perhaps have been included as further benefits derived [italics added] [para 64].

The trier of fact demonstrated a forensic accountant expert’s avenue of investigation is not limited only to examination of client files. It should include other databases that record company transactions, for example, banking records.

**Power of accounting**

The accounting profession’s authority was demonstrated when the court accepted Curtin’s work as an accepted process. In *R v Cox (No. 2) [2005] VSC 224*, Kaye, J commented:

> The unqualified use by [the expert] of the word "unsourced" expresses a conclusion or inference by the accountant from that exercise. It is not an inference or conclusion which he is permitted as an expert to express. The reaching of that conclusion is a matter for the jury [para 40].

The accounting profession’s authority was also evident when forensic accountant experts used different valuation methods during valuation of assets and shares, as reflected in several judgements. For example, forensic accountant experts used fair value accounting in *Duke*. Another forensic accountant expert used the discounted cash flow (DCF) method in *Capricorn Diamonds*.

The authorities of the accounting profession and trier(s) of fact were also detailed in *R v Cox (No. 2) [2005] VSC 224*, when Kaye, J noted:

> if the jury were to accept [the expert’s] analysis, it would accept that [the expert] … by using the accounting criteria identified … sources of income. What conclusion is to be derived from such evidence is essentially a matter for the jury [italics added] [para 39].

Case law analyses reveal that although the accounting profession’s authority exists during court proceedings, it is the trier of fact or the power of a court that makes the final decision.
The analyses also reveal accounting has power as an institution. Methodologies forensic accountant experts use should be recognised in the forensic accounting field and by the accounting profession. Forensic accountant expert opinion evidence is regarded by the court as proffered scientific testimony. For this expert evidence to satisfy the standard of evidentiary reliability test, a judge must ascertain it was “grounded in the methods and procedures of science” such as the methods and procedures of the accounting profession (Daubert (USA), Berger 2011, p.12).

Forensic accountant experts ensure that estimates or assumptions are reasonable in the circumstances and suitably qualified and disclosed. Kaye, J in R v Cox (No. 2) [2005] VSC 224 argued two reasons for rejecting the claims:

*I reject the submissions* made on behalf of each of the accused that the evidence to be adduced from [the expert] is inadmissible. That conclusion is subject to the qualifications expressed in these reasons, namely: (1) In so far as [the expert’s] conclusions are based on transactions which do not appear in the accounting documents, but which are derived from depositional material, the conclusions must be so expressed by [the expert], and the underlying transactions must be proven by admissible evidence [italics added] [para 65].

The discussion of the different discourses demonstrates the ideology of a judge during application of the legislation and legal precedent. This is an example of social practices identified while focusing on the third secondary research question. They are fixing legal meaning to the forensic accountant expert report and its admissibility in court. The trier of fact is using his/her ideas to express the different discursive practices happening in court. The discourses also demonstrate social practice and discursive practices are intertwined in particular ways. For example, the trier of fact is the protagonist in court and his/her decision can be supported by the forensic accountant expert. The trier(s) of fact listen to the forensic accountant expert who is a member of the accounting profession. The power of the accounting institution does not have effect in court when the trier(s) of fact refuse to accept
the forensic accountant expert opinion by using their own discretion during judgement. The trier(s) of fact should have respect and understanding in court but since individuals are unique, judges will have different perspectives. For example, as previously discussed, new judges react differently from old judges. Some judge focus on expert evidence while other judges focus on moral values. These types of reactions influence the results in court proceedings. The discussions demonstrate the social setting of social practices in court.

6.5 Economic fairness in court

The analysis of an economic matter is the second aspect of the third tier in Fairclough’s framework (Fairclough 1995). Economic issues such as economic fairness are examples of social issues existing in court proceedings. They were identified during the application of the third secondary research question. Individuals have the right to a fair trial (Article 6 European Convention on Human Rights). Fairness was commented by the judge [at paragraph 154] in Nigel Gray & Others v Braid Group (Holdings) Limited, P560/13, [2015] CSOH 146, 2015 WL 6966279, by citing HH Judge Purle’s QC [at paragraph 283] ideology in Sunrise Radio Limited [2009] EWHC 2893 (Ch), that “fairness” includes the avoidance of unjust enrichment. Court judgements on economic issues should also be fair, as expressed in the Commonwealth of Australia Constitution Act. This statement was contended by the trier of fact in Capricorn Diamonds:

[t]he defendants relied upon Commonwealth v Western Australia where Kirby J stated that the language of the Constitution requires that federal law should include appropriate terms to ensure economic fairness to the State or person [italics added] [para 109].

The importance of fairness in judgements relating to the opinion of the forensic accountant expert was evident in Duke.
Which of these values should be selected? As both are clearly open, I think *fairness dictates* that damages should be assessed on the basis of the higher value [emphasis added].

The judgement recognises acceptable valuations in valuation opinions expressed by forensic accountant experts and suggests resolution of cases be based on selecting the highest valuation rather than an average of the opinion of each expert.

Fairness during court hearings can be maintained through the instruction of the trier of fact. The trier of fact has the power to instruct forensic accountant experts in determining the value of wealth, for example, to estimate and allocate the suspects’ properties individually and not collectively. In *R v Cox (No 1) [2005] VSC 157*, the trier of fact treated assets for individual suspects differently. This practice encourages a fair hearing and judgement. Juries sometimes deduce evidence collectively and not separately during joint trials - a risk suspect’s encounter during court proceedings. As Kaye, J in *R v Cox (No 2) [2005] VSC 224* notes:

> the primary prejudice argued by Mr Young is based on the proposition that the jury will "lump together" the evidence of [the expert] in respect of Ferguson, Sadler and Cox. In a joint trial there is always some risk that a jury will fail to treat each accused separately [para 59].

The court decides fairness or otherwise. Forensic accountant experts give an opinion on the dollar value. It is up to the court to decide whether unfair prejudice has occurred based on the evidence adduced; and if there has been unfair prejudice, what is the financial impact indicated by expert opinions. In *Nigel Gray & Others v Braid Group (Holdings) Limited, P560/13, [2015] CSOH 146, 2015 WL 6966279*, the judge argued:

> the tasks of the court in an application under sections 994 and 996 are, firstly, to decide whether conduct that is unfairly prejudicial to the interests of a petitioner has been proved, and, secondly, if and only if such conduct has been proved, to make such order as it thinks fit for giving relief in respect of the matters complained of. In this case, the parties were at issue as to (i) whether conduct unfairly prejudicial to the interests of the petitioners had been established, and, if so, (ii) the value of BGHL and (iii) the price at which it would

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28 Sections 664 and 996 United Kingdom *Corporations Act 2006*. 

be fair and equitable to require the company – or any or all of the second to fourth respondents – to purchase the petitioners' shares [italics added] [para 3].

When deciding fairness the judge cited a belief based on a particular type of ideology by Lord Hoffmann in *Saul D Harrison & Sons plc [1995] 1 BCLC 14*:

[i]n deciding what is fair or unfair for the purposes of [what is now section 994], it is important to have in mind that fairness is being used in the context of a commercial relationship… Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point in any case under [section 994] will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association [italics added].

According to the trier of fact, a forensic accountant expert would be able to interpret articles of association if part of the expert’s expertise is in interpreting articles of association. Further, in *Cheal 1*, the judge [at paragraph 15] argued that measurement can be conducted by “an appropriate intellectual property expert.”

Accounting information should be fair to assist stakeholders such as the judge, jury or investors in making financial decisions. Trier(s) of fact have the power to decide necessary fairness in accounting information. Fairness in court can be controlled by the judge on continuous occasions during, and at the conclusion of, the trial. The judge has the power to instruct the jury on the approach taken in assessing expert evidence in order to achieve necessary fairness (*R v Cox (No 2) [2005] VSC 224*).

Forensic accountant experts have to note that it is important to provide the court with relevant information pertaining to the facts in issue. The adducing of relevant information facilitates the exercise of procedural fairness when courts decide the outcome of the case. It also ensures equity exists during court proceedings and allowing the legal system to take its course.
6.6 Sociocultural issues in court- Matrimonial disputes

Matrimonial disputes are examples of social issues existing in any cultural environment. The analysis of social issues is the third aspect of the final tier in Fairclough’s framework (Fairclough 1995). Valuation in matrimonial disputes is not distinct from valuation in other contexts. This is a social practice identified through the third secondary research question. It is used in this section to demonstrate the court as a socio-cultural environment, accounting as an institution, and the interpretation of social power in a cultural context or sociocultural issue. According to Mouritsen (1994, p.205):

> accounting is an institution in as much as it is a cultural object which transmits criteria of appropriateness across different organisational and social contexts, for example in the form of financial criteria of rationality [italics added].

There is no presumption in Australian law that matrimonial assets must be divided equally between husband and wife. Instead, the court has broad powers to make Orders for a just and equitable division of assets. The Australian *Family Law Act 1975*29 is:

> [a]n Act relating to Marriage and to Divorce and Matrimonial Causes and, in relation thereto and otherwise, Parental Responsibility for Children, and to financial matters arising out of the breakdown of de facto relationships and to ascertain other Matters.

The distribution of matrimonial assets is covered under section 79 of the Australian *Family Law Act 1975* and was contended by the court in *Stanford v Stanford* [2012] HCA 52:

> [s]ection 79(4) identifies seven matters that a court must take into account in considering what order (if any) should be made under this section in property settlement proceedings”. Paragraphs (a), (b) and (c) each refer to various forms of contribution made by parties to a marriage; par (d) refers to the effect of any order on either party's earning capacity; par (e) requires consideration of the matters to be taken into account under s 75(2) of the Act in relation to spousal maintenance "so far as they are relevant; and pars (f) and (g) refer to orders already made under the Act and child support. Not all of these matters were said to be relevant in this case [para 22].

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29 The Australian *Family Law Act 1975* is used to demonstrate how the court determines the distribution of matrimonial assets.
In deciding how matrimonial assets are distributed, since 2003 the court has adopted the four step approach under section 79. It is imperative forensic accountant experts observe the facts addressed in this section during their engagements. Section 79(4) outlines steps 1 to 3 while step 4 is addressed in section 79(2). Under step 1, the court is required to identify all assets and liabilities including superannuation, entitlements, and assets held personally, and those held in partnership, trusts, or companies. Under step 2, the court identifies any contributions by each party to the acquisition, preservation, improvement or maintenance of any assets. These contributions include financial and non-financial contributions, and contributions as a parent and homemaker. Step 3 deals with any adjustments necessary for future needs of each party, taking into account matters such as child care, disparity in income earning capacity, health, age and availability of financial resources. Under step 4, an order by the court for the proposed distribution of assets must be just and equitable.

The responsibility of the court is to apply the law. In *Hickey and Hickey and Ors [2007]* ACTSC 31, the trier of fact [at paragraph 5] argued, “I can only apply the law, rather than make it. The law that I must apply is the law laid down by the High Court in *Amadio*” or legal precedent. Powers of the trier(s) of fact are limited only to certain jurisdictions. The trier of fact in *Piatek* noted the plaintiff has the freedom of choosing jurisdictions to pursue the matter and the trier of fact has the power to decide the amounts payable to each party.

The claim based on Mr Loots’ evidence needs to be reduced by $390,000.00, however, because of my view that Mrs Piatek has successfully traced that sum into the property vested in her at Buckley in Washington State. *It seems to me that she has elected to pursue those rights in that jurisdiction and should be held to that election*. Mrs Piatek’s counsel argued that I should only deduct the net amount after the deduction from the $390,000.00 of her legal costs of vindicating her claim in those proceedings [italics added] (para 107).

The trier of fact further argued that this practice of leaving financial resolution to a court in another jurisdiction avoids double compensation for losses incurred in separate jurisdictions.
It seems neater, in my view, however, to leave the financial resolution of that issue to the American courts and it was not clear to me that the valuation evidence of the Buckley property was so reliable as to demonstrate that Mrs Piatek would not receive her entitlements to that sum from it. Otherwise there is too strong a chance that she will be reimbursed twice for the same loss. If there is a loss to her from that American litigation then that would, I expect, be relevant to the final resolution of the Polish matrimonial property proceedings [italics added] (para 107).

The court also considers pre-marital assets, gifts and inheritances. However, in many circumstances credit is given to the party responsible for bringing the asset to the marriage. For example, in James Paul McCartney v Heather Ann Mills McCartney 2008 WL 678052, [2008] EWHC 401 (Fam), a divorce case between Sir Paul McCartney and his then wife, Heather Mills, the judge took into consideration the assets Sir Paul McCartney had before his marriage. The judge referred to some relevant factual issues that he would take into consideration:

[t]he major factual issues as to the history of their relationship that I must determine are these. First, at the time the parties met, was the wife a wealthy and independent person? This is linked to the third issue. Second, did the parties cohabit from March 2000 or from the date of the marriage? The relevance of this issue is to the length of their relationship and to the further issue of “marital acquest”. Third, did the husband constrict the wife's career after cohabitation (whether at March 2000 or June 2002)? This is relevant to the issue of “compensation” for an allegedly lost or restricted career of the wife [para 11].

The couple were married for almost four years during which time Sir Paul’s wealth increased by £39.6 million. According to Sir Paul, this was due to the increase in the value of properties he purchased before marrying his wife and royalties from recordings by the Beatles and Wings. He argued that his wife did not contribute anything to the wealth. Sir Paul’s accountant, Ernst and Young, valued the former Beatle’s total assets at £387 million. This amount was not disputed by forensic accountants hired by Heather Mills because they could not find evidence that he was worth more than that. When crossed-examined by his wife (who represented herself in court), Sir Paul denied earning profits from writing and publishing new work during the marriage. The court also took into consideration future
earnings over the course of the next 12 months, since Sir Paul expected to earn £5.3 million from live shows and royalties or £14,676 per day. Heather Mills sought an award of almost £125 million but was unsuccessful. The judge decided that Sir Paul McCartney should pay his wife a lump sum of £16.5 million. Heather Mills’ assets during the marriage were worth £7.8 million but the court also considered a deemed figure of £500,000 for her overspending during the period of separation. The lump sum of £16.5 million included £14 million as the capitalised figure for the wifes’ income needs, assessed at £600,000 p.a., and £2.5 million for the purchase of a property in London. Financial provision for their child Beatrice consisted of a periodical payments order of £35,000 p.a. Sir Paul McCartney agreed to pay for her nanny and her school fees. The judge based his authority for this judgement on section 25 of the Matrimonial Causes Act 1973, which expressed that the needs of the wife were important.

The valuation of Sir Paul McCartney’s wealth includes matrimonial assets and future earnings. This is the amount opposing parties contest in court. It forms the bases for the determination and distribution of matrimonial assets. Areas considered for the distribution include the wife’s lost income during marriage, and future income needs, children livelihood, and payments for the child’s nanny. Valuation amounts adduced by the couple are deemed to differ since they normally engage different forensic accountant experts but the court has the power to decide the amount to be distributed. Forensic accountant experts cannot draw conclusions from other facts existing from the dispute other than the valuation amounts, for example, the claim that the reasons Heather Mills married Sir Paul McCartney was to inherit his wealth.

Forensic accountant expert reports detailing documentary evidence consisting of estimates of the value of all matrimonial properties are important to assist the court in making decisions. Trier(s) of fact treat matrimonial properties separately during court proceedings. As the judge
(at paragraph 114) in *Piatek* noted “… this presents an issue in that immovable property may, on a choice of law analysis, be treated separately from moveable property.” In addition, the trier of fact has the power to share matrimonial properties equally when there is no existing agreement for sharing of properties. In *Piatek*, the couple were entitled to a 50% share of matrimonial property since there was no agreement on the sharing of the properties. The wife was also entitled to the value of her personal belongings, clothing and jewellery, acquired during her marriage, furniture, boat and the vehicle or its value. Commission paid to the selling agent was deducted from the couple’s earnings in cases where the service of the agent was required when property was sold. The wife was also entitled to a half share of the rental income. Expenses incurred before any profit sharing between the couple, and interest on property sold and rental income, should also be considered.

A new approach by the courts in deciding the distribution of matrimonial assets was addressed in *Stanford v Stanford* [2012] HCA 52. The couple separated after the wife became seriously ill. She required full-time care and her husband continued to support her. The disabled wife, per a case guardian, applied for orders dividing the properties they owned. The wife died before final orders were made. Her legal personal representatives continued to pursue the matter. The court decision suggested a new approach to section 79, whereby a court has the options to take into account both parties legal and equitable interest, rather than their properties as currently practiced.

The judges’ decisions in the matrimonial dispute cases demonstrate the ideology of the court. Legal meanings are attached to forensic accountant expert reports and social practices of the married couples. The judges’ formulated and used their own systems of ideas and expressed them in discursive practices or court judgements.
6.7 Summary

This chapter addressed the third secondary research question.

(iii) How do the social practices of a court affect forensic accountant experts and the trier(s) of fact?

It was ascertained through the answers to the research question that there are different modes of social practice and power relations in courts. Opposing forces are meeting in court, including the power of the court as an institution, the power of accounting as an institution, the powers of the trier(s) of fact and the powers of the forensic accountants. Although there are many opposing powers, the courts have ultimate power. Courts also have the freedom to be protected from the tyranny of political rulers expressed under the Commonwealth of Australia Constitution Act and laws in United Kingdom and United States. Societies can voice opinions on the court’s decision but courts should not be influenced by such pressure.

There is a power struggle among other participants in court. For example, forensic accountant experts have limited power although their contributions are required in court. Forensic accountant experts use the power of accounting as an institution and adopt accounting pronouncements. However, it is mandatory to comply with court rules while presenting evidence in court. This demonstrates that a forensic accountant expert is not telling the facts of the case, but the laws, rules and regulation to which the judge must apply to the facts. Although there is power struggle in court, it is advisable for forensic accountant experts to focus on their ultimate role to assist the court by way of expert opinion evidence.

It was noted while answering the third secondary research question that the discourse/language in the legislation is subject to various interpretations. The legislation is subject to many meanings and can be interpreted in different ways by the trier(s) of fact. The interpretation of the legislation is tailored to be relevant and to accord with the issues in
question. Although there are many interpretations of the legislation, courts have the responsibility to uphold public confidence, safeguard and protect individual rights. For example, individuals have the right to a fair trial. Further, in matrimonial cases, the couple are entitled to a 50% share of matrimonial property if there was no agreement on the sharing of the properties.

The thesis noted various judgements occur in court. They are the judgement of a court and opposing forensic accountant experts. Forensic accountant experts exercise judgements when formulating their opinion. Sometimes opposing forensic accountant experts provide conflicting reports. Reasons for conflicting forensic accountant expert opinions are due to various reasons including the different valuation methods used, complexity of the issue of interest or different methodology adopted. The weights given to a forensic accountant expert opinion can be different depending on how it is interpreted by the trier(s) of fact. Further, forensic accountant experts are cross-examined to ascertain the relevance and reliability of expert opinion. Cross-examination also focussed on determining the credibility of a forensic accountant expert.

The next (and final) chapter highlights the findings of the thesis and the contribution to accounting literature, methodology and forensic accounting practice. The chapter ends with discussions on the limitations of the study and areas for further research.
CHAPTER 7

CONCLUSION

This thesis focussed on the discursive construction of the role of forensic accountant experts in assisting courts in Australia, United States and United Kingdom. Forensic accountant experts assist courts in litigation and investigative roles in civil and criminal matters. They can be engaged by different parties. An expert’s primary duty in Australia and United Kingdom is to the courts. However, in the United States, experts are “hired guns” representing the interest of one of the parties. Forensic accountant experts are engaged in discursive practices including matrimonial disputes, valuation and criminal activities (such as fraudulent activities, money laundering and unexplained wealth). They prepare expert reports and opinion evidence should first meet the admissibility requirements of the courts before it can be adduced as evidence.

The chapter outline is as follows. Section 7.1 summarises the chapters and the criteria for admissibility of forensic accountant expert opinion in court that was identified through the discursive construction of legal discourse. Section 7.2 addresses the key research findings. Section 7.3 focuses on the research contribution. Section 7.4 discusses the research limitations/challenges. The chapter concludes in section 7.5 by focussing on research opportunities in forensic accounting.

7.1 Chapter summary

Chapter 1 focussed on the background of the thesis, to explore the discursive construction of the role of a forensic accountant expert witness. A forensic accountant expert’s role is based on the use of accounting technology and practice when reconstructing facts and requirements
pertaining to the admissibility in court of an expert opinion. The chapter discussed a primary and three secondary research questions. The secondary research questions are designed to supplement the primary research question.

The primary research question was tailored to address the role of forensic accountant experts in assisting a court. It forms the basis of the major empirical work of the thesis.

“How does the role of forensic accountant experts assist the trier(s) of fact\(^3\) in understanding financial transactions?”

The first secondary research question addressed tier two of Fairclough’s framework and the question is tailored to address the criteria the judiciary have set for admissibility of forensic accountant expert opinion.

(i) What is required to facilitate the admissibility of an expert opinion?

The second secondary research question addresses tier one of Fairclough’s framework and the analysis only focuses on accounting discourses or keywords/texts that supplement the admissibility of a forensic accountant’s expert opinion addressed in tier two.

(ii) What is required to supplement the criteria for admissibility of an expert opinion?

The third secondary research question explores relationships between a court and forensic accountant experts and the sovereignty of a court in addressing issues before them. The analysis of case law focusses on tier three of Fairclough’s framework.

(iii) How do the social practices of a court affect forensic accountant experts and the trier(s) of fact?

\(^3\) Includes the judge and jury
As discussed in Chapter 1, the significance of the thesis is to demonstrate the role of forensic accountant experts in assisting a court to arrive at a decision. Forensic account experts also address the complexity of measurement/valuation of assets and other complex accounting issues.

Chapter 2 discussed the background of the thesis focusing on information pertaining to the historical background of forensic accounting as a legal concept and laws pertaining to the admissibility in court of forensic accountant expert opinion. The thesis draws on the analysis of case law in Australia, United Kingdom and United States. It is evident from the legislation that expert opinion evidence is inadmissible in court but there are certain exceptions to this law. Examples of the law pertaining to inadmissibility of expert opinion evidence and exceptions were drawn from sections 76, 55, 56, 136 and 79 of the Australian Evidence Act 1995 (Cth). This section ends with a discussion of the contentiousness of measurement and its relevance to the research question.

Chapter 3 explored the use of Fairclough’s (1992) framework of discourse analysis; the analysis of discourse as “text”, “discursive practice” and “social practice” as the research framework. Goodrich’s legal discourse analysis was also addressed since this thesis analyses case law, an example of legal discourse, to determine the role of forensic accountant experts in assisting a court. The chapter also focused on Critical Discourse Analysis as the research methodology and the qualitative research method and case study research strategy as the methods used to analyse case law. The analysis is framed by a primary and three secondary research questions.

Chapter 4 focused on tier two of Fairclough’s framework by addressing the discursive practices or criteria the judiciary have set for admissibility of forensic accountant expert opinion evidence. The results of the analysis were framed by the first secondary research
question. The analysis involved case law/legal precedent on admissibility of expert opinion, how they are used in the case law currently analysed, and how the discursive practice is consumed by forensic accountants appearing in court as expert witnesses. Intertextuality practices by the trier(s) of fact were also discussed. They use discourses from previous court judgements/legal precedent when deliberating on current cases before them. The discursive practices are interpreted to demonstrate the criteria for admissibility of forensic accountant expert opinion evidence in court. The criteria were based on legal precedent from the following cases: Daubert (USA), Ikarian Reefer (UK) and Makita (Australia). Legal precedents are cited by a court in various case law analyses to assist them in evaluating the weight and admissibility of forensic accountants’ expert opinion. The chapter also discussed the importance of qualification(s) and its connection to experience and training.

Of all parties involved in a court case, a court has the most authority per se, that is the trier(s) of fact does not have to accept the expert’s opinion. Depending on a court, precedent can be either ignored outright or, a court can depart from precedent by distinguishing the facts of the instant case from previous ones giving rise to new precedent. The client or legal counsel has a certain amount of authority in the selection of an expert and the terms of the engagement. However, care must be taken to ensure the expert has the relevant expertise, knowledge and training and care must also be taken to ensure the independence of the expert’s opinion. The expert can choose the method and so forth in reaching an opinion but whatever the expert does it must be consistent with the underlying body of knowledge.

The discussion concluded by focussing on the independence of forensic accountant experts and the admissibility of expert evidence as considered by a court on a case-by-case basis. Courts have expressed the importance of forensic accountant experts being independent, having “independence of mind” and “independence in appearance”, (APES 110 Code of
Ethics for Professional Accountants). Independence can be breached through the forensic accountant expert’s association with clients and lawyers. The chapter noted that the ‘genre’ of the forensic accountant’s expert opinion is derived from accounting practices, processes, standards and assumptions.

Chapter 5 focused on tier one of Fairclough’s framework addressing the accounting discourse and dominant keywords that supplement the criteria for admissibility of forensic accountant expert opinion evidence discussed in chapter 4. The discussion in this chapter was framed by the second secondary research question. Courts have noted they require forensic accountant expert reports but encounter difficulties in understanding accounting language and the complexity of financial transactions. They need the assistance of forensic accountant experts in understanding such difficulties. The assistance of forensic accountant experts will contribute to the achievement of the courts’ objective of building public confidence.

Forensic accountant experts use accounting discourse to facilitate the court’s understanding of the complex financial transactions and accounting issue(s) in question. The credibility of the accounting discourse can be achieved through its relevance and reliability to the facts in issue. While determining the interpretation of relevance and reliability the trier(s) of fact adopted the interpretation as it appears in the legislation and legal precedent while forensic accountant experts apply the accounting principles.

Forensic accountant experts comply with the requirements outlined in the engagement letter to address only those aspects nominated in it and within the specific area of expertise. The expert must demonstrate professional scepticism and look beyond the obvious even if recognised accounting practices have been used and demonstrate whether the accounts reflect substance over form. This is to demonstrate the reasonableness of the forensic accountant expert’s conclusion to the facts in issue. Forensic accountant experts need to develop and
apply criteria based on the accounting concept of reasonableness when conducting cash flow analysis. The criteria and assumptions are adopted on a case-by-case basis depending on the expert’s experience and expertise and requirements of reasonableness. The forensic accountant expert can say what they have done was relevant, reliable and reasonable, but the court has sovereignty to decide whether they agree or disagree.

Chapter 6 focussed on tier three of Fairclough’s framework addressing the social practice in court regarding the relationship between responsibilities of the trier(s) of fact and forensic accountant experts. The analysis is framed by the third secondary research question. Courts and accounting as institutions were discussed. Further, the thesis deliberated on how a court interpreted the findings addressed in chapters 4 and 5. The chapter also addressed legal precedent a court referred to during deliberations of each case and a judge distinguishing facts of one case from another. The chapter ends with a discussion of power relations in a court and the sovereignty of the trier(s) of fact to use their own preception, because they can.

The Law Commission (2011) proposed the creation of a “statutory admissibility test” or “reliability-based admissibility test” for expert opinion evidence in criminal proceedings. According to the proposal, the expert evidence is sufficiently reliable if “the opinion is soundly based, and the strength of the opinion is warranted having regard to the grounds on which it is based” (Law Commission 2011).

Courts have sovereignty under Australia’s Constitution, United Kingdom and United States laws to conclusively determine legal disputes exercised during civil and criminal trials. This explains that a court’s decision cannot be overturned by political tyrants but can only be overruled by a higher court. Individuals have the right to a fair trial. Courts are vigilant in the public interest in criminal cases due to public interest. Fairness in a court refers to a number of issues including the role of the trier(s) of fact during a trial and application of procedural fairness, awarding of compensation and judgement. A trier of fact’s judgement is assisted by
the ideology of another judge or legal precedent. Fairness in a court also applies to the opposite party having reasonable time in scrutinising a forensic accountant’s expert report and opinion. While there is no presumption in Australian law that matrimonial assets must be divided equally between husband and wife, a court has broad powers to make Orders for a just and equitable division of assets under the Australian *Family Law Act 1975*.

Forensic accountant experts are also engaged to assist a court in matrimonial disputes. Examples of matrimonial dispute cases such as *James Paul McCartney v Heather Ann Mills McCartney 2008 WL 678052*, [2008] EWHC 401 (Fam) were used to demonstrate socio-cultural issues in court. Case law analysis revealed it is imperative forensic accountant experts are aware of the four step approach under section 79 of the Australian *Family Law Act 1975*. The law was adopted by the court since 2003 when deciding how matrimonial assets were distributed. The role of forensic accountant experts in addressing steps 1 to 3 is expressed under section 79(4). Section 79(2) addresses step 4 focussing on the role of the court in making the Order for the proposed just and equitable distribution of assets. Under step 1, forensic accountant experts have to identify all assets and liabilities including superannuation, entitlements, assets held personally, in partnership, in trusts, or in companies. Step 2 requires a forensic accountant expert to identify any contributions by each party to the acquisition, preservation, improvements or maintenance of any assets. Contributions include financial and non-financial, and contributions as a parent and homemaker. Finally, in step 3 forensic accountant experts have to identify any adjustments necessary for future needs of each party. They consider matters pertaining to the care of the children, disparity in income earning capacity, health, age and availability of financial resources.

While calculating matrimonial assets, forensic accountant experts have to be aware of pre-marital assets, gifts and inheritances. Courts also leave the judgement on matrimonial disputes to courts in other countries if the matrimonial assets are located there. The practice
avoids double compensation. A new approach under section 79 of the Australian *Family Law Act 1975* was also decided in *Stanford v Stanford* [2012] HCA 52. Courts can take into account both party’s legal and equitable interest rather than their properties as currently practiced.

### 7.2 Key findings

This section addresses the key findings of the thesis. Discussion will first focus on the answers to the secondary research questions before the primary research question. The aim of highlighting the answers to the secondary research questions is to inform forensic accountant experts the importance of complying with the criteria for admissibility expert reports. Further, it is imperative for forensic accountant experts to understand the need to effectively communicate expert evidence. Finally, forensic accountant experts have to identify the different social practices happening in court. An understanding of the key findings addressed through the secondary research questions will enlighten a forensic accountant expert’s role in assisting a court. It also reveals the answers to the primary research question.

The first secondary research questions is:

*(i) What is required to facilitate the admissibility of an expert opinion?*

The thesis noted that forensic accountant experts assist a court through opinion evidence. Expert opinions must be admissible in court before they can be used. The criteria for admissibility of a forensic accountant expert opinion were based on the attributes of an expert and the process used to gather the evidence. They address the first secondary research question. The attributes of an expert include his/her specialised knowledge gained through training, study or experience. A forensic accountant expert opinion should be based wholly or substantially on their specialised knowledge. A forensic accountant expert’s qualification should be connected to experience and training. There was no set standard for experience,
training and qualification. It can include working experience, membership of an accounting profession, university degree and Diploma of Business Studies (Denning & Denning and Anor (No 3) [2011] FamCA 160, R v Cox (No. 2) [2005] VSC 224). Forensic accountant expert opinion must be relevant to the facts in issue and may be deemed irrelevant and inadmissible if the expert fails to prove the factual basis of the opinion. A forensic accountant expert’s academic qualification alone does not carry a lot of weight in a court since a qualification does not make a person an expert, it should be supported by experience and training.

A forensic accountant expert must demonstrate his/her specialization in the specific area in which expertise is required. The criteria for admissibility were specified further in Dasreef. The High Court argued that consideration should not only be given to the qualifications of an expert witness, but also the manner or purpose in which expert evidence was used in a court. Expert opinion was not required in areas where common knowledge can explain the facts at issue.

The second attribute identified when answering the first secondary research question was the assumptions made and methodology used by a forensic accountant expert during an investigation and subsequent formulation of an expert opinion. A forensic accountant expert can use authority based on accounting pronouncements to support his/her methodology. Compliance with court procedures and accounting standards is imperative for admissibility of an expert opinion. The thesis noted that relevance and reliability of a forensic accountant’s expert evidence was important in the admissibility of evidence. Further, independence of an expert was an important issue for admissibility of a forensic accountant expert opinion.

The second secondary research question is:
(ii) What is required to supplement the criteria for admissibility of an expert opinion?

Although opinion evidence was admissible, the thesis noted that it should be communicated clearly and accurately. A forensic accountant expert report should be presented in a manner that a court can understand. Forensic accountant experts can use accounting discourse or texts to assist a court in understanding opinion evidence. The types of accounting discourse or text supplement the admissibility of expert evidence. They also address the second secondary research question. Forensic accountant expert opinion evidence can be communicated clearly in a court by using accounting technology and language. For example, a forensic accountant expert can use accounting technology and communication devices such as flow charts, diagrams and cash flow analysis. Flow charts and diagrams document and communicate in detail processes pertaining to issues in question using standard graphic symbols to represent core activities. Cash flow analysis, diagrams and the results of using other accounting technologies or practices add weight to the reliability of expert opinion evidence.

Communication and understanding of a court can be improved by communication devices and forensic accounting tools such as accounting information systems (AIS) and Forensic Toolkit (FTK). Output from programs like Analyst Notebook can also assist the trier(s) of fact to understand complex financial transactions. The tools are important devices for analysing, interpreting and communicating financial information in a court. Accounting technologies demonstrate the connections between accounting facts and facts at issue. The thesis identified that accounting discourse and technologies express the relevance and reliability of accounting facts to the issues of interest. It was also noted through the research question that accounting discourse assist valuation in court. For example, the accounting discourse of discounted cash flow was used during the valuation of shares, and representations of fair value and historical cost in the valuation of assets.
The third secondary research question is:

(iii) How do the social practices of a court affect forensic accountant experts and the trier(s) of fact?

A forensic accountant expert opinion can be admissible and communicated clearly, but a court has the authority to accept or disregard the opinion. The reasons for accepting or disregarding expert opinion were identified while answering the third secondary research question. The thesis noted that social practices in court affect the trier(s) of fact and forensic accountant experts. A court as an institution has sovereignty over the acceptance and use of accounting in their jurisdiction and institutional practices. For example, courts demonstrate their power as an institution when determining the criteria for admissibility of an expert opinion. The discourse in the forensic accountant expert report is shaped by the social structure of a court system which internalises it. A judge attaches legal meanings to the report, formulates, used his/her own systems of ideas and expressed them in court judgments. This is an example of an ideology of a court in resolving a case.

The thesis noted that trier(s) of fact comply with authorities based on court rules and legal precedent. A judge does not confine his/her decision to evidence adduced in court, but has the power to consider other evidence s/he deems to be relevant. Findings from the third secondary research question identified that a court interprets the law on social terms such as justice, fairness and equity highlighting the sovereignty of a court as an institution. The responsibility of a court as an institution is to uphold public confidence, safeguard and protect their freedom and be seen to be competent and independent (Australia’s Constitution).

As noted in Hickey and Hickey and Ors [2007] ACTSC 31 and Lenz Nominees Pty Ltd v Commissioner of Main Roads [2012] WASC 6, the power of a judge comes from his/her role, and within these roles there are particular legal and historical practices such as legal
precedent, court guidelines and pronouncements. Courts have power to accept or reject expert opinion demonstrating social conditions determine properties of discourse. A trier of fact is a “gatekeeper” and his/her role is to interpret the law and weigh evidence presented by forensic accountant experts. Courts have sovereignty to accept or criticise and reject a forensic accountant expert opinion and determine whether an expert’s methodology is reliable.

The thesis noted that measurement is a complex and contentious issue in court. As a result, forensic accountant experts produce conflicting expert opinions in a court. In such situations, a court can choose a report produced by an expert who specialises in a specific area if both experts have the same specialised knowledge based on education/qualification, training and experience. A court can also disregard both opinions and use their own discretion. For example, the trier of fact [at paragraph 231] in Capricorn Diamonds, disregarded Wayne Lonergan’s expert report and accepted the “expert evidence elicited by the plaintiff.” While the trier of fact in Cheal 2, rejected all opinion and used his own discretion. A judge can take conflicting views of value and determine which is the most appropriate in the given case. For example, the judge decided the value of the issues of interests in Nigel Gray & Others v Braid Group (Holdings) Limited, P560/13, [2015] CSOH 146, 2015 WL 6966279 and Duke Group.

The findings of the third secondary research question also identified that a forensic accountant expert has a responsibility to determine the value of matrimonial assets and the contribution by each partner during matrimonial disputes. Criteria for the identification of matrimonial assets were discussed in Section 7.1. Forensic accountant experts use power vested in accounting as an institution to value matrimonial assets. They should be in a position to defend the veracity of their opinion. Although an expert has the authority to value
matrimonial assets, a court has the power to make an Order for a just and equitable distribution of assets.

The primary research question is:

**iv) How does the role of forensic accountant experts assist the trier(s) of fact in understanding financial transactions?**

The thesis noted trier(s) of fact will have considerable difficulty in analysing financial transactions without a forensic accountant expert guidance. However, a forensic accountant expert opinion should first meet various criteria for admissibility of evidence before it can be used in court. Furthermore, a forensic accountant expert’s opinion should be communicated accurately and clearly in court. Although forensic accountants use communication devices including diagrams and cash flow analysis, their language in court can affect the trier of fact’s understanding. It is imperative for forensic accountant experts to speak clearly in court. These are the discursive practices a forensic accountant expert will need to address while performing his/her role of assisting a court.

Admissibility of forensic accountant expert opinion will be based on the attributes of the expert and process or methodology. The attributes of the expert refers to his/her qualification based on study, training and experience. Although the attributes have been identified, courts have not determined a set criterion for qualification, training and experience. Courts determine qualification on a case-by-case basis. For example, in two separate cases, a court accepted having a diploma in accounting in one case (*Denning & Denning and Anor (no. 3)* [2011] FamCA 160) and a degree in accounting in another (*R v Cox (No. 2)* [2005] VSC 224). Thus, it is not guaranteed a forensic accountant’s qualification will be accepted in all cases tried in court. Admission of the forensic accountant expert opinion depends on the expertise required in the facts at issue.
Further, a forensic accountant expert’s specialised knowledge should be used in the methodology for formulating an expert opinion. For example, forensic accountant experts must demonstrate they have expertise in valuation/measurement in a specific area including valuation of shares, dissolution of partnership and matrimonial disputes. However, there are no set standard for valuation methods. Forensic accountant experts use different valuation methods for a fact at issue, for example, current value (Piatek) and fair value (Capricorn Diamonds). The practice has added more complexity to the trier of fact’s understanding. A forensic accountant expert’s methodology will also include compliance with various laws, regulations and accounting pronouncements. In addition, there are court procedures a forensic accountant expert has to comply with. These are added responsibilities for forensic accountant experts. They study accounting and are trained to explain financial transactions, not laws and regulation. Forensic accountant experts will encounter difficulties in knowing all the required laws and regulation. Furthermore, a court has the power to accept or disregard forensic accountant expert opinion. Although forensic accountant experts encounter various difficulties, it is imperative to focus on their role of assisting the trier(s) of fact.

7.3 Research contribution

The thesis makes a substantial contribution to the disciplines of accounting and law. It includes the methodology, theory, literature, and practice in both disciplines.

7.3.1 Contributions to methodology

The thesis demonstrated how Fairclough’s Critical Discourse Analysis can be used as a methodology for research in other disciplines. Fairclough’s CDA is used in linguistics but rarely applied in social practices in court. It can be used as a research framework for understanding key factors influencing the role of forensic accountant experts, particularly the requirements for admissibility of expert opinion evidence. The framework can determine the
influence of power during a court’s decision regarding measurement/valuation or confiscation of assets. This is the theoretical and methodological contribution of this research.

### 7.3.2 Contributions to accounting literature

The thesis makes a significant contribution to literature on the role of forensic accountant experts. While there is substantial accounting literature dealing with financial affairs in financial reporting, there is a dearth of literature dealing specifically with forensic accountant experts engaging in legal disputes. The thesis critically explores this role. The accounting literature focuses on how forensic accountant experts can assist a court in criminal and civil trials. It also deliberates on the application of accounting technology in dealing with financial affairs in court. The literature informs forensic accountants who are intending to appear as expert witnesses the requirements for admissibility of expert opinion.

### 7.3.3 Contributions to practice

The thesis makes a significant contribution to the criteria for admissibility and the weights accorded to a forensic accountant expert opinion in court. Practically, forensic accountant experts are engaged by either party to appear as expert witnesses in legal matters. They present expert opinion evidence to assist a court in understanding the complexity of financial affairs. They are advocates of the court. However, in the United States, forensic accountant experts are “hired guns.” They are advocates of the party engaging them. The thesis revealed the requirements for admissibility of expert evidence. Although, qualification was identified, the thesis noted that there is no set standard for it. Qualification will be supplemented with the expert’s experience and training. Further, the thesis discovered that accounting techniques can be used to effectively communicate evidence in court. It is recommended to use accounting technology such as diagrams and cash flow analysis to improve the effectiveness of communicating expert evidence.
Finally, although the research may be limited only to Australia, United Kingdom and United States, the findings of this thesis can also be applied in other jurisdictions that adopt common law principles.

7.4 Research limitations/challenges

There is almost no literature on accounting for the role of a forensic accountant expert in assisting a court in the interpretation of accounting related matters including matrimonial disputes, fraudulent activities and confiscation of assets since this is a new area of research. Literature on these matters mostly focuses on the legal aspect while the accounting perspective is limited. Sanchez and Wei Zhang (2012) echoed similar sentiments by stating academic literature addressing the role of accountants as expert witnesses is limited. To address the limitation of the paucity of accounting literature, the thesis used literature dealing broadly with measurement for accounting purposes; for example, historical cost and fair value accounting.

Information relating to the legal disputes were expressed in case law and related legal literature. Gaining access to available information was sometimes difficult. Some information was not available for public review. For example, under the Supreme Court of Victoria, civil files under the restriction of the judge may be searched only under a Court Order. Criminal files cannot be searched. The information is considered to be confidential and accessible only for nominated individuals.

7.5 Future research

The thesis focussed on case law analysis to determine the role of a forensic accountant expert in assisting a court in the interpretation of financial matters. However, further research on the
role of a forensic accountant expert can be conducted in specific areas relating to insurance and investment. This was beyond the scope of this thesis.

An untapped area of research would be to investigate how forensic accountant experts determine the movement of wealth by criminals to obfuscate the source of income or wealth. The role of a forensic accountant expert is to clarify the obfuscation of the source of criminal wealth. Criminals engage in illegal activities and hide their ill-gotten gains through money laundering, unexplained wealth, purchasing insurance policies and investments. Criminals can use unexplained wealth investing in areas including properties and purchasing of shares. While analysing insurance, the focus is on the role of a forensic accountant expert in finding the financial connections between arson and insurance claims.

Fairclough’s framework and case study were used as the research framework and method, although there are various ways of conducting research which can be used in any study. Future researchers in the role of forensic accountant experts in assisting the court can use interview as a method for qualitative research. Information can be gathered by interviewing the judges, legal counsel and forensic accountant experts.

7.6 Concluding comments

The thesis identified the requirements for admissibility of forensic accountant expert opinion, but a lot has been left to be argued in court. For example, although a judge argued that a criterion for admissibility of expert opinion is specialised knowledge based on an expert’s training, study and experience; the years and level of training, study and experience is not confirmed. The criteria are subjective and considered on a case by case basis. According to the trier of fact [at paragraph 485] in Commissioner of Taxation, “the law relating to expert witnesses is extensive”. The role of forensic accountant experts in civil and criminal cases is
to explain the obfuscation of financial transactions that may not be understood by the trier(s) of fact. Forensic accountant experts should demonstrate the veracity of expert opinion and withstand cross-examination by opposing counsel. Finally, forensic accountant experts have to expect circumstances beyond their control happening in court and should commit in engagements that are suitable to their area of expertise.
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## APPENDICES

### Appendix 1 – Case Law Analysis

### Australia

<table>
<thead>
<tr>
<th>Case Law</th>
<th>Codes/Themes</th>
<th>Text</th>
<th>Discursive Practice</th>
<th>Social Practice</th>
<th>Memo</th>
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<tbody>
<tr>
<td>CDPP v Hart &amp; Ors; Yak 3 Investments P/L as t/tee for Yak 3 Discretionary Trust &amp; Ors v Commonwealth of Australia [2013] QDC 60 (2 April 2013)</td>
<td>Measurement/ Valuation methods</td>
<td>value of the relevant company’s interest in the asset</td>
<td>[23]...there is an issue about whether the companies can prove the value of the relevant company's interest in the asset. The issue was complicated because that value is arguably diminished by the value of charges over the assets to secure payment by the company's of amounts due to Merrell.... There remains an issue as to whether the companies can prove the value of the former owner’s interest in a charged asset where there is no evidence of the value of any individual asset.</td>
<td>Social practice has various modes - economic, political, cultural and ideological. In this case, the role of the forensic accountant is to assist the court to determine that the accused does not obtain economic profit through illegal activities.</td>
<td>The forensic accountant has to prove the value of the relevant company's interest in the asset. The forensic accountant will encounter difficulties since this value is diminished by the value of charges over the assets to secure payment. Another difficulty the forensic accountant encounters is to prove the value of the former owner’s interest in a charged asset due to insufficient evidence of the value of any individual asset.</td>
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<td>Measurement/ Valuation methods/ Accounting technology, Relevance</td>
<td>relevant</td>
<td>[25] Ultimately, for each asset it becomes necessary to consider what money was used over the 14 years or so that the assets were collectively acquired, to buy the asset, or maintain it, or pay off the loan which was used to buy it or to payoff a later loan secured by a mortgage over the asset and then to consider whether that money was not derived directly or indirectly from unlawful activity. For</td>
<td></td>
<td>It is the responsibility of the forensic accountant to search for facts to determine that the money used to acquire the asset, maintain it or pay off the loan used to buy the asset or pay off a loan secured by mortgage over the asset was not derived directly or indirectly from unlawful activity.</td>
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<td>Accounting technology, Relevance</td>
<td>connection</td>
<td>[26]...whether an asset, not derived from unlawful activity, was used in connection with unlawful activity.</td>
<td>A forensic accountant should determine the connection between the asset and unlawful activity.</td>
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<tr>
<td>Facts/Measurement/Valuation methods</td>
<td>financial records, financial transactions, evidence</td>
<td><a href="b">37</a> The ATO conducted further audits from 1990 to 2001 perusing and copying all financial records of each of the applicants, Harts Consulting P/L (&quot;Consulting&quot;) and all companies in the Harts Australasia Limited (&quot;HAL&quot;) Group, (&quot;HAL group&quot;) including Bomilscio Pty Ltd (&quot;Bomilscio&quot;) and investigated financial transactions undertaken by them during that period. Evidence shows that ....requested Mr. Hart to provide copious documents for the period....Those documents were copies of annual reports, a full set of group accounts, including reconciliations, general ledger, trial balance and general journal in respect of each member of the HAL Group and each of the five applicants. I find it is likely...asked Mr. Hart and the</td>
<td>These documents are imperative facts in the determination and estimation of wealth.</td>
<td></td>
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<tr>
<td>Facts/Measurement/Valuation methods</td>
<td>financial records</td>
<td>[37] (c) I find financial records including banking records, contracts and correspondences for the period....</td>
<td>These documents are imperative facts in the determination and estimation of wealth.</td>
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<tr>
<td>Facts/Measurement/Valuation methods</td>
<td>financial records</td>
<td>[37] (d) the records including banking records, contracts, and correspondences for the period....</td>
<td>These documents are imperative facts in the determination and estimation of wealth.</td>
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<tr>
<td>Power</td>
<td>forensic accountant assist</td>
<td>[37] (i) The Commonwealth appointed a forensic accountant, Mr. Vincent, and offered to assist him to find and access such records as he required including but not limited to the records of the applicants, UOCL, Merrell, Consulting and all companies in the HAL group.</td>
<td>Forensic accountants do not have the power to access documents, should be assisted by law enforcement staff, e.g. AFP. Subpoena power over documents resides with the courts and law enforcement. Forensic accountants have no capacity to solicit documents independently.</td>
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<tr>
<td>Liberty/Power</td>
<td>liberty</td>
<td>[37] (i) Mr. Vincent was at liberty to request the AFP to obtain documents.</td>
<td>Forensic accountants have the freedom to ask for assistance from enforcement staff, e.g. AFP.</td>
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<tr>
<td>Power execution of search warrants</td>
<td><a href="j">37</a> Because of the execution of search warrants many records were removed from control of the applicants.</td>
<td>The AFP, as administrators of the law, have powers under the search warrant to search and remove documents held by the defendant.</td>
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<tr>
<td>Expert witness/Power /Authority</td>
<td>strong position, expert witness, forensic accountant</td>
<td>Forensic accountants can be engaged as expert witnesses. As such, they are recognised by the court as authorities.</td>
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<td>Accounting technology ultimate source of income, directly of indirectly</td>
<td>[38] ... the Commonwealth was in a strong position through their expert witness, the forensic accountant, Mr. Vincent....</td>
<td>Forensic accountants trace the financial trail of all company assets acquired to determine the original source of funds for payments for purchases of assets, loans and interest.</td>
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<td>Case Law</td>
<td>Codes/Themes</td>
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<td>Discursive Practice</td>
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<td>Estate of Reva N. WOLF, Deceased, Sherwin F. Wolf, Petitioner and Appellant, v. Estate of Reva N. WOLF And Robert S. Wolf, 1999 WL 33902468, Court of Appeal, Second District, Division 4, California.</td>
<td>Facts</td>
<td>B. The only evidence in the record respecting damages came from a forensic accountant hired by Robert who used records compiled by the Haas accounting firm as the basis for his opinion. The Haas accounting records, however, were not created for the purpose for which they were used by the Plaintiff's expert. They did not reflect what the Plaintiff's expert said they reflected. The expert's conclusions, therefore, fail to constitute substantial evidence. Evidence Code Section 801; <em>Pacific Gas and Electric Co. v. Zukerman</em> (1987) 189 Cal.App.3d 1113, 1134, 234 Cal.Rptr. 630.</td>
<td>Forensic accountants should use financial information that was prepared for the purpose of the engagement.</td>
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The court relied on the declaration of the SEC's forensic accountant, who analyzed the financial records of the three defendants and determined that the investors' funds were commingled with the defendants' bank accounts and treated as one economic unit. The accountant also noted that Halek had signature authority to receive and disburse funds from all the relevant accounts. Her report concluded that "[b]ased on the large volume of transactions, the commingled uses of funds, and the inaccuracy of accounting records and financial statements," she would be unable to divide the profits among the parties.

Forensic accountants sometimes encounter difficulties due to the complexity of the financial trail.

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<tr>
<th>Case Law</th>
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<th>Text</th>
<th>Discursive Practice</th>
<th>Social Practice</th>
<th>Memo</th>
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<tbody>
<tr>
<td>United States Court of Appeals, Fifth Circuit. UNITED STATES SECURITIES and EXCHANGE COMMISSION, Plaintiff–Appellee, v. Jason A. HALEK, Defendant–Appellant. No. 12–11045. Aug. 5, 2013.</td>
<td>Facts</td>
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<td>The court relied on the declaration of the SEC's forensic accountant, who analyzed the financial records of the three defendants and determined that the investors' funds were commingled with the defendants' bank accounts and treated as one economic unit. The accountant also noted that Halek had signature authority to receive and disburse funds from all the relevant accounts. Her report concluded that &quot;[b]ased on the large volume of transactions, the commingled uses of funds, and the inaccuracy of accounting records and financial statements,&quot; she would be unable to divide the profits among the parties.</td>
<td>Forensic accountants sometimes encounter difficulties due to the complexity of the financial trail.</td>
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<td>Taniguchi v. Kan</td>
<td>Facts</td>
<td>Congress might also have concluded that a document translator is</td>
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<td>Forensic accountants are translators between litigants, witnesses, and the court</td>
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<td>Pacific Saipan,</td>
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<td>more akin to an expert or consultant retained by a party to decipher</td>
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<td>Ltd. 132 S.Ct. 1997</td>
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<td>documentary evidence. For instance, a forensic accountant to an</td>
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<td>U.S., 2012, May 21</td>
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<td>interpreter whose real-time oral translation services are necessary</td>
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<td>2012 (Approx. 15</td>
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<td>for communication between litigants, witnesses, and the court.</td>
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<td>pages)</td>
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### United Kingdom

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<th>Case Law</th>
<th>Codes/Themes</th>
<th>Text</th>
<th>Social Practice</th>
<th>Memo</th>
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<tr>
<td>Nigel Gray &amp; Others v Braid Group (Holdings) Limited, P560/13, [2015] CSOH 146, 2015 WL 6966279</td>
<td>Power of the court/Accounting technology</td>
<td>[153] ...On the basis of my finding that the value of the company is £32,000,000. The cumulative value of the petitioners' holdings would be £20,614,400. The second to fourth respondents, supported by the fifth respondent, submit that because of Mr Gray's participation in the CFT and Sapesco bribery offences. He is a Bad Leaver in terms of the articles of association of BGHL. He is entitled on disposal of his shares to be paid only whichever is the lesser of their fair value or their subscription or par value. It is contended that to give appropriate relief under section 996, an order should be made for the purchase by the company of the petitioners' shares at par value, ie £2,444,000.</td>
<td>Courts have the power to nominate the value of the shares.</td>
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</table>
“Fairness” includes the avoidance of unjust enrichment: Re: Sunrise radio limited [2009] EWHC 2893 (Ch), HH Judge Purle QC at paragraph 283.

The judge determines the value of fairness.

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<th>Case Law</th>
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<th>Discursive Practice</th>
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<th>Memo</th>
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<tr>
<td>R. v Lewis (Mark) 2014 WL 5833973, Court of Appeal (Criminal Division) 2014-10-31 (Approx. 3 pages)</td>
<td>Facts</td>
<td>14 There was evidence from a forensic accountant, who could find no sign of any investment in property other than Shingle Cottage. He found evidence of high level of personal spending by the appellant and very substantial unidentified receipts into his bank accounts.</td>
<td>14</td>
<td>14</td>
<td>Forensic accountants should search for evidence of investment, personal spending and receipts into bank accounts.</td>
</tr>
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</table>
Appendix 2 - Chronology

Chronology

1. On 28 April 1981 Laura Hart was appointed as a director of Nenesis Australia Pty Ltd ([Q00060024]).
2. On 1 August 1982 Mr Hart was appointed director of Bubbling Springs Pty Ltd ([Q00060018]).
3. On 20 May 1983 Laura Hart was appointed director of Bubbling Springs Pty Ltd ([Q00060018]).
4. Also, on 20 May 1983 Mr. Hart was appointed principal executive officer of Bubbling Springs P/L ([Q00060018]).
5. On 10 October 1983 Shirley Petersen was appointed director of Nenesis Australia P/L ([Q00060024]).
6. On 21 October 1983 Shirley Petersen was appointed Director of Bubbling Springs P/L ([Q00060018]).
7. On 6 September 1985 Pitts aircraft VH-SIS was purchased with a loan facility from NatWest (Laura Hart’s affidavit 23/7/2010, [Q00064089] para 57(a)(vi)(aa). Appendix 38 [Q00064132]; and Cap 232, TAB 10).
8. The property known as 6 Merriwa Street was purchased in the 1986 financial year for $69,470.72. The mortgage over that property was paid out in 1993 (Vincent’s Report 2 September 2009 21.1,1, [Q00060117]; Laura Hart’s affidavit 17/10/2006, [Q00060221] para 122, Annexure LEH 1 [Q00060223] pp. 325-326; and Laura Hart’s affidavit 23/7/2010, [Q00064089] para 63, Appendix 48 [Q00064142]; and 6 Merriwa Street, TAB 15).
11. Between 30 June 1990 and 30 June 1991 Mr. Hart committed nine offences of fraud and defrauding the Commonwealth contrary to section 29D of the Crimes Act 194 (Cth) (the Mevton offences). He was convicted of these offences on 25 May 2005. He derived $706,402.93 from the commission of those offences (CDPP v Hart [2010] QDC 457 at [557]).
12. In about 1990 the VH-SDL Baron aircraft was purchased. The mortgage over that aircraft was paid out in 1995 (Vincent’s Report 2 September 2009 23.1.3 [Q00060117]; and Laura Hart’s affidavit 17/10/2006 [Q00060221] para 137(c) and Doonan’s Road Grandchester, TAB 17).
13. On 29 August 1990 Laura Hart was appointed a director of Yak 3 Investments P/L ([Q00060019]).
14. On 29 August 1990 Shirley Petersen was appointed a director of Yak 3 Investments P/L ([Q00060019]).
15. In November 1990 funds from the Mevton arrangement were used to pay wages that Harts Australia Group was unable to pay (Ian Stevens cross-examination T6-71, L13&14).
17. In September 1991 Big Country Equipment constructed a shed on land known as Hangar 607 on behalf of Nenesis Australia P/L (Laura Hart’s affidavit 17/10/2006 [Q00060221] para 20(d)).
18. On 5 September 1991 $19,000 is deposited into Nenesis Australia P/L’s Commonwealth Bank overdraft facility. Laura Hart states that this is proceeds from the sale of a Nissan motor vehicle (Laura Hart’s affidavit 23/7/2010).

Adapted: CDPP v Hart & Ors; Yak 3 InvestmentsP/L as t/tee for Yak 3 Discretionary Trust & Ors v Commonwealth of Australia [2013] QDC 60 (2 April 2013).
Appendix 3 – Cash flow analysis

Adapted: CDPP v Hart & Ors; Yak 3 InvestmentsP/L as t/tee for Yak 3 Discretionary Trust & Ors v Commonwealth of Australia [2013] QDC 60 (2 April 2013)

Table 1: Funds used to purchase shares in the assets

<table>
<thead>
<tr>
<th>Cash Flow</th>
<th>Date</th>
<th>Payer</th>
<th>Payee</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>22.01.96</td>
<td>Fighters</td>
<td>Kim Rolph-Smith</td>
<td>$ 20,000</td>
</tr>
<tr>
<td>2</td>
<td>23.02.96</td>
<td>Fighters</td>
<td>Kim Rolph-Smith</td>
<td>$ 30,000</td>
</tr>
<tr>
<td>3</td>
<td>03.06.96</td>
<td>Nemesis</td>
<td>AGC &amp; Kim Rolph-Smith (via Klooger Trust Account)</td>
<td>$ 80,000</td>
</tr>
<tr>
<td>4</td>
<td>1996</td>
<td>Fighters</td>
<td>Unknown</td>
<td>$ 3,000</td>
</tr>
<tr>
<td>5</td>
<td>23.10.98</td>
<td>Merrell</td>
<td>Geoff Klooger</td>
<td>$ 83,100</td>
</tr>
<tr>
<td>6</td>
<td>07.12.98</td>
<td>Fighters</td>
<td>AGC &amp; MP Rolph-Smith (via Klooger Trust Account)</td>
<td>$ 64,000</td>
</tr>
<tr>
<td>7</td>
<td>14.04.99</td>
<td>Fighters</td>
<td>Kim Rolph-Smith</td>
<td>$ 2,000</td>
</tr>
</tbody>
</table>

Table 2: Funds used to purchase the aeroplane – T-28 VH-SHT

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>[537] 1</td>
<td>[538] 25.05.99</td>
<td>[539] Merrell (by loan to Fighters)</td>
<td>[540] Alpine</td>
<td>[541] $ 150,000.00</td>
</tr>
<tr>
<td>[542] 2</td>
<td>[543] 23.06.99</td>
<td>[544] Merrell (by loan to Fighters)</td>
<td>[545] Alpine</td>
<td>[546] $ 155,000.00</td>
</tr>
</tbody>
</table>

| [556] $545,493.12 |
Table 3: How CDDP funded the purchase of assets

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>10.04.00</td>
<td>Fighters</td>
<td>Ri Richard Goode</td>
<td>$39,107.99</td>
</tr>
<tr>
<td>2</td>
<td>17.07.00</td>
<td>FFMR</td>
<td>Richard Goode</td>
<td>$109,561.08</td>
</tr>
<tr>
<td>3</td>
<td>28.09.00</td>
<td>Nemesis for Fighters</td>
<td>Richard Goode</td>
<td>$279,120.40</td>
</tr>
<tr>
<td>4</td>
<td>28.09.00</td>
<td>N( Nemesis for Fighters (in (interest)</td>
<td>[663]</td>
<td>$11,241.09</td>
</tr>
<tr>
<td>5</td>
<td>28.09.00</td>
<td>Nemesis for Fighters (parts)</td>
<td>[667] Unknown</td>
<td>$76,645.00</td>
</tr>
<tr>
<td>6</td>
<td></td>
<td>Fighters (parts)</td>
<td>[672]</td>
<td>$17,422.73</td>
</tr>
<tr>
<td>7</td>
<td>ReAfter restraining or order</td>
<td>[675] Fighters</td>
<td>[676] Unknown</td>
<td>$3,355.00</td>
</tr>
</tbody>
</table>

[679] $537,101.22

Table 4: Income from different companies

<table>
<thead>
<tr>
<th>Date</th>
<th>Ref</th>
<th>Details</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>24.10.94</td>
<td>234</td>
<td>Income from Tinkadale Pty Ltd - fees received</td>
<td>$50,000.00</td>
</tr>
<tr>
<td>25.11.94</td>
<td>307</td>
<td>Income from Bomilsco Pty Ltd - fees received</td>
<td>$6,000.00</td>
</tr>
<tr>
<td>16.12.94</td>
<td>349</td>
<td>Income from fixed deposit</td>
<td>$35,369.53</td>
</tr>
<tr>
<td>16.12.94</td>
<td>385</td>
<td>Income from sale of Pitts and Laser</td>
<td>$161,422.90</td>
</tr>
<tr>
<td>17.02.95</td>
<td>485</td>
<td>Dep-Maurice Hannan - Bal plane purchase</td>
<td>$30,000.00</td>
</tr>
<tr>
<td>18.04.95</td>
<td>644</td>
<td>Income from Ord Minnett - sale of Yardmin shares</td>
<td>$32,300.70</td>
</tr>
</tbody>
</table>
### Table 5: Funds used for construction of building

<table>
<thead>
<tr>
<th>Cash Flow</th>
<th>Date</th>
<th>Amount</th>
<th>Details</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>16/5/2000</td>
<td>$94,633</td>
<td>Manual cash book of Nemesis shows a payment of this amount to FE&amp;R Construction Solutions.</td>
<td>76</td>
</tr>
<tr>
<td>2</td>
<td>31/5/2000</td>
<td>$163,887</td>
<td>The manual cash book of Nemesis shows a payment of this amount to FE&amp;R Construction Solutions (“FE&amp;R”)</td>
<td>76</td>
</tr>
<tr>
<td>3</td>
<td>26/6/2000</td>
<td>$7,600</td>
<td>The manual cash book of Nemesis shows a payment of this amount to Whybird Farr Engineers.</td>
<td>77</td>
</tr>
<tr>
<td>4</td>
<td>28/7/2000</td>
<td>$23,505</td>
<td>The NAB statement of account number 60-873-2664 of Yak lists cheque number 000390 for this amount being presented on 14 August 2000. An extract from the general ledger account of Yak lists cheque number 000390 being paid to AAC for this amount.</td>
<td>78 &amp; 79</td>
</tr>
<tr>
<td>5</td>
<td>17/7/2000</td>
<td>$172,010</td>
<td>NAB statement of account number 60 873-2664 of Yak lists cheque number 000386 for this amount being presented on the 19 July 2000. An extract from the general ledger for Yak 3 lists this cheque number being paid to FE&amp;R.</td>
<td>80</td>
</tr>
<tr>
<td>6</td>
<td>9/8/2000</td>
<td>$204,036</td>
<td>NAB statement of account number 60 873-2664 of Yak lists cheque number 000390 for this amount being presented on the 10 August 2000. An extract from the general ledger for Yak lists cheque number 000390 being paid to FE&amp;R.</td>
<td>81 &amp; 79</td>
</tr>
<tr>
<td>7</td>
<td>6/9/2000</td>
<td>$169,995</td>
<td>NAB statement of account number 60 873-2664 of Yak lists cheque number 000398 for this amount being presented on the 12 September 2000. An extract from the general ledger for Yak 3 lists this cheque number being paid to FE&amp;R.</td>
<td>82 &amp; 79</td>
</tr>
<tr>
<td>8</td>
<td>13/10/2000</td>
<td>$70,027</td>
<td>NAB statement of account number 60 873-2664 of Yak lists cheque number 000410 for this amount being presented on the 17 October 2000. An extract from the general ledger for Yak lists this cheque number being paid to FE&amp;R.</td>
<td>84-79</td>
</tr>
<tr>
<td>9</td>
<td>15/5/2001</td>
<td>($6,000)</td>
<td>An extract from the general ledger lists a reimbursement of taxiway costs as a reduction of the costs of construction of the hangar.</td>
<td>79</td>
</tr>
<tr>
<td>10</td>
<td>30/6/2001</td>
<td>$139,279</td>
<td>An extract from the general ledger account for Hangar 400 in the accounts of Yak lists a number of payments made by FFMR totalling $139,279.56 for fixtures and fittings for Hangar 400.</td>
<td>79</td>
</tr>
<tr>
<td>11</td>
<td>20/7/2001</td>
<td>$1,000</td>
<td>An extract of the general ledger account for hangar 400 in the accounts of Yak lists a payment made by FFMR for $1,000 for fixtures and fittings for Hangar 400.</td>
<td>79</td>
</tr>
</tbody>
</table>