CONCURRENT EXPERT EVIDENCE IN THE ADMINISTRATIVE APPEALS TRIBUNAL: THE NEW SOUTH WALES EXPERIENCE

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A BRIEF HISTORY OF CONCURRENT EVIDENCE

Difficulties with expert evidence

The difficulties with obtaining objective evidence of expert witnesses have been identified by a number of sources. Lord Woolf in the interim report, *Access to Justice*[1] said:

> Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients.

The problem is recognised by Australian judges, many of whom have expressed concern about a tendency on the part of some experts toward a lack of objectivity. In their study, *Australian Judicial Perspectives on Expert Evidence*, Dr Ian Freckleton and colleagues found that more than a quarter of judges report having encountered bias on the part of experts[2]. This lack of objectivity extended from an unwitting lack of neutrality to overt bias. Similarly, over one third of judges ranked expert bias as the most serious problem with expert evidence.

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[1] Lord Woolf MR, *Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales,* HMSO, London, 1995, p. 183.
[2] I Freckleton, P Reddy and H Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study*, Australian Institute of Judicial Administration, 1999, pp. 2–3; 23–29; 37–38.

Are Court appointed experts the solution?

One method of responding to these concerns is the use of court appointed experts. However, this solution seems to me to create its own problems:

It is wrong to imagine that the only cause for differences in expert opinion is partisanship. Thirty five years of dealing at the bar with experts and experts' reports causes me to think that few experts will agree on everything however, neutral they try to be.

Where disputes involving expert opinion give rise to litigation there is usually an area of expert disagreement. The risk of choosing an expert who is satisfied how a controversy within a discipline should be resolved is obvious, as are the problems associated with trying to select an expert who still holds an open mind. No impropriety is involved here. The first expert has simply moved to a concluded opinion before others. He may be right. But he may be wrong.

Experts are not generally trained in assessing or adjudicating upon differing views within their discipline. However, that is the expertise of judges and members of courts and tribunals. They have no baggage. Even expert tribunal members will often only have sufficient expertise to better understand the dispute because their expertise will be related to the discipline generally rather than the particular aspect being placed under the microscope. Expert tribunal members who do fully understand the expert issues will be better able, by training and experience, to put aside any concluded views and take a fresh look.

There are other, more practical problems with court experts, such as their selection. In a case which warrants it, the parties will have their own experts anyway. And if they are advised to do so they will make every effort to adduce evidence from their experts. Two experts are replaced by three.

In my experience, where there are no legitimate competing expert views parties will usually agree. I may be naïve but, unlike Lord Woolf, I do not think there are many cases where expert witnesses seek deliberately to present unsustainable opinions.

I will be interested to hear our Chairman's comments on these remarks because I believe I recently read newspaper reports that the NSW Land and Environment Court was proposing a system for appointment of single experts in less significant cases. I can understand, however, that court appointed experts might be appropriate in some non-controversial areas, areas where agreement is likely ultimately to be reached, such as in counting and measuring.

The Courts' Experience

As part of an attempt to overcome these difficulties, the Federal Court Rules were amended in 1998 to facilitate the use of "hot tubs"[3]. In that year, the Federal Court also issued a practice direction, developed in co-operation with the Law Council, providing guidelines for expert witnesses. The guidelines detail the form and content of expert evidence. The guidelines also specify the general duty of expert witnesses to the Court:

- an expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise;
- an expert witness is not an advocate for a party; and
- the expert witness' paramount duty is to the Court and not to the person retaining the expert.

About this time, similar procedures were introduced in other jurisdictions. For example, joint conferences between experts were introduced in the NSW Supreme Court in the Professional Negligence List in 1999 and were incorporated into the Supreme Court Rules in 2000.[4] The Supreme Court

[3] *Federal Court Rules 1979* Order 34A, Rule 3.
[4] *Supreme Court Rules 1970* Part 36, Rule 13CA.

also introduced a Code of Conduct[5], similar to the Federal Court's expert guidelines. The NSW Land and Environment Court has taken the same approach.

It has been reported that the Federal Court's experience is that the hot tub procedure narrows the issues in dispute, is beneficial for all of the expert evidence to be presented whilst fresh in the mind of the decision maker, reduces the level of partisanship of experts and results in a saving in hearing time.[6] For example, in the report *Managing Justice: a Review of the Federal Justice System*, the Australian Law Reform Commission (ALRC) quoted the Federal Court as follows:

> It has been the judges' experience that having both parties' experts present their views at the same time is very valuable. In contrast to the conventional approach, where an interval of up to several weeks may separate the experts' testimony, the panel approach enables the judge to compare and consider the competing opinions on a fair basis. In addition, the Court has found that experts themselves approve of the procedures and they welcome it as a better way of informing the Court. There is also symbolic and practical importance in removing the experts from their position in the camp of the party who called them.[7]

Australian Law Reform Commission Report 89 Recommendation 67

In their report the ALRC made the following recommendation:

> **Recommendation 67.** Procedures to adduce expert evidence in a panel format should be encouraged wherever appropriate. The Commission recommends that the Family Court and the Administrative Appeals Tribunal establish rules or practice directions setting down such procedures, using the Federal Court Rules as a model.

USE OF CONCURRENT EVIDENCE IN THE AAT

Administrative Appeals Tribunal Act 1975 s 33(1)

Concurrent evidence procedures have been used in the Tribunal for approximately four years now. As you are probably aware, the Tribunal has some flexibility in the manner in which it can hear evidence. The rules of evidence do not apply (section 33(1)(c)). Section 33(1) of the *Administrative*

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[5] *Supreme Court Rules 1970,* Schedule K.
[6] Justice P Heerey, *op cit.*, p. 9 and I Freckleton, P Reddy and H Selby, *op cit.*, pp. 109 & 161.
[7] http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/alrc/publications/reports/89/ch6.html.

Appeals Tribunal Act 1975 provides that a proceeding before the Tribunal shall be conducted with as little formality and technicality and with as much expedition as possible, subject to an overriding argument that proper consideration must be given to the matters before it. This provision was drafted with a view to maximising access to justice for the parties and minimising cost, delay and complexity. The Tribunal currently uses CE procedures where it is believed that the process will achieve these aims.

***Coonawarra Case* [2001] AATA 844**

Anecdotally, the benefit to the Tribunal and parties in using CE procedures is that it can reduce hearing time. A clear example of this in the Tribunal is of *Re Coonawarra Penola Wine Industry Association Inc and Others and Geographical Indications Committee*[8], in which the then President, Justice O'Connor, chose to use CE procedures. That matter involved review of a decision of the Geographical Indications Committee determining a geographical indication called "Coonawarra", pursuant to s 40Y of the *Australian Wine and Brandy Corporation Act 1980*. There were a very large number of parties representing different wine interests. The initial estimate of hearing time was six months, due to the number of expert witnesses who were to give evidence at the hearing. Using CE procedures, the hearing was completed in five weeks. As stated in the decision:

> At the hearing of this matter, the oral evidence of the experts (to supplement their voluminous written statements) was given and their views tested by way of a panel session called a "hot tub". Each of the experts was invited to make a presentation addressing their statements and identifying the important issues. The experts were able to consult, be challenged and discuss their views with the other experts on the panel. The Tribunal asked questions of the experts as necessary. Finally, counsel for the parties were given the opportunity to ask questions of the experts in relation to any matters raised during the "hot tub" interchange and from the written material (including the T documents). We found this method of dealing with such a large volume of expert material very helpful.

Purposes of using concurrent evidence

The purposes of using CE procedures in hearings in the Tribunal are to:

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[8] [2001] AATA 844 (on appeal *Beringer Blass Wine Estates Ltd v Geographical Indications Committee* (2002) 125 FCR 155).

- enable the evidence and opinions of experts to be better tested by the Tribunal, legal representatives and other experts, with the aim of the evidence being comprehensively explained, understood and analysed, thereby enhancing the Tribunal's capacity to make the correct or preferable decision;

- assist experts in fulfilling their role as independent advisers whose primary role is to assist the Tribunal; and

- enhance the efficient operation of Tribunal proceedings by reducing the time taken to resolve matters. This may also lead to a reduction in cost to the Tribunal and parties of each proceeding.

THE CONCURRENT EVIDENCE STUDY

The Purpose of the Study

To the best of the Tribunal's knowledge, no empirical studies have been conducted of the effectiveness of CE. The Tribunal therefore decided to implement a properly designed study to assess the criteria that should be used to select cases that are suitable for CE, to refine the proposed procedures for taking CE, and to assess the effectiveness of CE procedures within the Tribunal.

The main aims of the study are to:

- assist in determining and/or finalising the criteria to select cases suitable for CE;
- refine the proposed procedures for taking CE, including determining whether the same procedures should be used for all types of experts;
- enable a preliminary assessment to be made as to whether the CE procedures are consistent with, or achieve, the intended purposes;
- finalise the objectives of the CE process;

- assess whether CE procedures increase the likelihood of an early settlement;
- develop survey tools which may be used for future evaluative purposes; and
- evaluate the satisfaction, delay and cost variables in a group of Tribunal cases.

"Hot Tubs" in the Federal Court v Concurrent Evidence in the Administrative Appeals Tribunal

The so called "hot tubs" in the Federal Court are really devised to enable cutting edge controversies in big cases to be resolved. The idea was that the leading experts in the field would debate the current big issues in a way in which the judge and counsel could understand. That is not what concurrent evidence in the AAT is about. We are using it for the first time in ordinary cases – assessment of injuries and medical conditions and the like. What the AAT is discovering is whether the technique is useful in run of the mill cases.

Jurisdiction and venue for study

The Tribunal will examine the quantitative and qualitative outcomes of a number of matters, from a range of jurisdictions. It was anticipated (and seems to be the case) that most cases will come from the Veterans' Affairs and Compensation jurisdictions, although cases from all jurisdictions may be considered as suitable for the CE study (including taxation and customs matters).

Although CE procedures are used in the Tribunal throughout Australia, the CE study is being conducted only in New South Wales.

Research sample and criteria for inclusion

A sample of at least 50 cases is to be included in the study. Quantitative and qualitative data are being collected from the parties, their representatives, experts and Tribunal members to evaluate the identified purposes.

Only matters where both parties are represented are being included in the study. However, consideration will be given to how to measure the anticipated benefits and shortcomings of the process for unrepresented parties.

Tribunal Members may select cases that are considered suitable for CE at any stage prior to the hearing. In deciding if a matter is suitable to use CE procedures, Members take into account the following criteria:

- whether the major issues in the case turn upon the expert evidence;
- if some of the facts are in dispute, whether it is possible for CE to be given by presenting different possible fact scenarios to the experts;
- whether the experts are commenting upon the same issues;
- whether the experts are from "like disciplines"; and
- whether the experts have similar levels of expertise.

The Tribunal considers the parties' consent or objection to the CE process, but makes the final decision itself.

Procedures for the use of concurrent evidence

The procedure for expert witnesses giving CE is along the following lines, albeit with some flexibility in individual hearings:

Concurrent Evidence procedures: Prior to Hearing

- Prior to a callover, parties are requested to confer with each other and to submit hearing certificates which list the dates on which all expert witnesses are available to give evidence concurrently. Additionally, a pamphlet about CE is sent to the parties' representatives with the callover notice.
- Parties are expected to come to a callover with dates when their experts are available to give evidence concurrently.

- After a callover, members select cases which are suitable to use CE, based on the above criteria. Members then complete a “selection sheet” which provides data as to why a case was, or was not, selected for CE.
- The member's support staff then notify the parties that the case has been selected for CE and the background paper on CE is sent to those parties.
- Parties’ representatives are asked to notify the expert witnesses of the CE procedures, and they are encouraged to give the experts a copy of the CE pamphlet for their information.
- Parties are requested to exchange expert written reports prior to the hearing. The parties’ Statements of Facts and Contentions are sufficient to identify agreed facts and therefore no extra statement of agreed facts is required to be filed and served.

Concurrent Evidence procedures: On the Day

- Expert witnesses should arrive in time to confer before evidence is taken.
- The Tribunal welcomes and swears the expert witnesses.
- At the outset of the expert evidence, the Tribunal summarises orally, or in writing, the agreed and disagreed facts.
- The applicant’s expert witness gives a brief oral exposition.
- The respondent’s expert witness then gives a brief oral exposition.
- Alternatively, the Tribunal may proceed to ask questions of the expert witnesses.
- The respondent’s expert is invited to ask the applicant’s expert witness questions, without the intervention of counsel.
- The process is then reversed, so that a brief colloquium takes place.

- Each expert witness is invited to give a brief summary (including his or her view on what the other expert has said and identifying areas of agreement and disagreement).
- The parties' representatives may then ask any relevant or unanswered questions of the expert witnesses.
- At any appropriate time in the process the Tribunal may intervene and ask questions.

Evaluation of use of Concurrent Evidence

To evaluate the use of CE, data are being collected from cases finalised by the Tribunal where CE procedures were used. Survey tools have been developed to evaluate satisfaction, delay and cost variables in the empirical study group. These survey tools include:

Members' Selection Sheet:
When deciding whether a matter will use CE procedures, the presiding member completes a selection sheet. The information obtained from the selection sheet will enable the construction of a profile of cases Tribunal Members considered suitable and cases considered unsuitable for using CE. It will also provide reasons for case suitability or unsuitability.

Members' Evaluation Survey:
Once the case is concluded, each Tribunal Member completes an evaluation survey. The survey is designed to provide an account of the member's perspectives on the use of CE generally and how CE operated in the specific case.

For example, the evaluation survey covers:

- details of the case, such as its complexity and whether it was difficult for the Member to decide whether or not to use CE;
- details of case resolution and, in cases where settlement was achieved, details of the perceived influence of CE on the settlement process;

- the perceived impact of CE on the time it takes to hear cases, for example, whether the use of CE affected the amount of hearing time required and the amount of time experts took to give evidence;
- the perceived impact of CE on the evidence provided by experts during the hearing, for example, whether the expert evidence was more objective and whether evidence comparison was easier or more difficult using CE;
- whether the decision-making process was enhanced through CE, and if it was, in what way(s);
- whether the use of CE procedures had an impact on the writing and handing down of the decision (that is, was it easier or harder, faster or slower); and
- whether Members were satisfied with the use of CE in that case.

Parties' representatives and experts

Finally, there will be evaluation of CE by the parties' representatives and the experts themselves. Representatives and experts are being asked to provide feedback rating their satisfaction with the CE procedures, the quality of the evidence presented to the Tribunal and their perceptions of the fairness of the process and outcome. They are being asked for any suggestions that they may have for improving the process.

SOME PRELIMINARY RESULTS

- Small number of finalised matters that used Concurrent Evidence (to date) – c. 22
- Approximately half of matters chosen for CE did not go to hearing (majority settled)

Number of matters that have used concurrent evidence at hearing to date

To obtain sufficient data for the study it is necessary to have at least 50 cases that have used CE at hearing. As at the end of January 2004, CE has been used in approximately 30 hearings. However, some 8 matters where CE was

used are still reserved and, as we only obtain data from the files once the matter has been finalised, we currently only have data in relation to 22 cases.

Forty-five matters that met the criteria for consideration for the use of CE (that is, both parties are represented and each party has at least one expert) have been identified by Members as unsuitable to use CE.

Number of matters that have settled

Finally, at least 37 matters chosen for CE, were resolved without CE being used. Most of these cases were settled. CE may improve prospects of settlement.

PRELIMINARY FEEDBACK FROM MEMBERS

Where CE was chosen and where CE was not chosen

The small number of finalised cases that have so far used CE means that at the moment we can only generate qualitative, anecdotal information on the use of CE. The results are therefore of limited statistical importance, but may reflect some trends.

Feedback from Members who chose CE

- *Why matters are chosen to use CE*

  The most often stated reason for choosing a matter for CE is that the experts will be commenting on the same issues.

  Other main reasons given include that:

  - CE will clarify complex issues;
  - the experts have the same expertise; and.
  - CE will improve the objectivity of the evidence presented.

- *Jurisdiction and types of experts in matters chosen for CE*

  As far as I am aware, the matters chosen by Tribunal Members to date for CE have been in the Compensation and Veterans' Affairs jurisdictions. Approximately 60 per cent of matters chosen fir CE are from the

Compensation jurisdiction and the remaining 40 per cent of matters are from the Veterans' Affairs jurisdiction.

Although we would like to have a variety of experts giving CE, during the study to date the only experts that have given CE, that I am aware of, have been medical specialists. This obviously reflects the jurisdictions of the matters that are chosen for CE.

Orthopaedic surgeons are well represented, particularly in the Compensation jurisdiction. Psychiatrists are also well represented, particularly in the Veterans' Affairs jurisdiction. Rheumatologists and neurologists are the next most common experts in the cases selected by Members for CE.

- *Many matters do not go to hearing*
  Anecdotal reports from some Members suggest that CE contributes to settlement. Two examples of comments that we have received so far include:

> This matter settled the day before the hearing. … It is my view that the closeness of the medical experts' opinions combined with the prospect of having the doctors provide CE influenced both parties to settle rather than go through the lengthy and costly Tribunal hearing. … It is my view, however, that without the factor of the prospect of CE, the matter would probably have commenced on the day of the hearing and the matter in all probability would have settled on the actual day of hearing. This would still have been a more costly exercise than that of the matter settling early, prior to hearing. Hence, it is my opinion that with the individual circumstances of this case ie, narrowness of issues, closeness of medical experts' opinions and prospect of CE, the "minds" of the parties were turned to a more careful and expeditious consideration of the issues involved and a costs benefits analysis led to settlement.
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> This case settled after the first date of hearing and at the commencement of the second (of a three day hearing). CE was to occur on the day it actually settled. I believe the applicant's evidence on the first day, combined with knowledge of CE, exercised the parties' mind to settle. … I am convinced that the prospect of CE … [was a factor] leading to settlement.

Where Members did not choose to use CE

Data obtained for 32 matters:

- *It is worth looking at reasons given why matters have not been chosen for CE*

  The main reasons given to date are:

  – the experts do not have the same level of expertise (10);

  – the experts would not be commenting on the same issues (7);

  – the experts do not have the same area of expertise/different specialities (for example, rheumatologist and orthopaedic surgeon) (6);

  – CE would unduly increase costs (6);

  – CE would extend hearing time (5); and

  – the experts were not available to give evidence concurrently (5).

  Other reasons include:

  – the parties object to CE;

  – the experts object to CE;

  – one expert may dominate the process;

  – there were too many experts (for example, in one matter there were 7 doctors from 5 disciplines, in another there were 5 doctors from 3 disciplines); and

  – finally, on three occasions CE was not chosen by the Member because not enough detail was provided by the parties (for example, it was not disclosed whether the parties were calling experts, how many experts would be called and in which specialities the experts practised).

Members who have used CE at hearing

Data obtained for 26 responses:

What is the response from members who have conducted cases with CE?

- *Satisfaction with the use of CE*

The majority of Members (18 out of 26) stated that they were very satisfied with CE in the specific matter. The remaining 8 Members stated that they were satisfied. No Members stated that they were dissatisfied with CE.

- *Effect on hearing time*

  The majority of Members (17 out of 26) stated that the hearing took the same amount of time as it would take if CE had not been used. Eight Members stated that the hearing took less time. One Member stated that the hearing took more time.

- *Effect on time required for experts to give evidence*

  Just over half of the Members (14 out of 26) stated that when using CE the experts took about the same amount of time to give their evidence. Ten Members stated that the experts took less time and two Members stated that they took more time.

  Where the Members stated that the experts took less time to give their evidence, the time saved was estimated to be from one hour or less to two hours.

  Both of the Members who stated that the experts took longer to give their evidence estimated the extra time to be one hour or less. In one case, the cause of the extra time appeared to be counsel using traditional examination-in-chief and cross-examination when much of the material had already been covered by the experts while giving their evidence concurrently. The material was therefore repetitive.

- *Advantages of using CE in appropriate cases*

  All Members found that CE allowed the experts to provide their opinion on the facts as adduced in evidence rather than on notes taken in consulting rooms months earlier. Similarly, nearly all Members found that CE made it easier for them to compare the evidence of each expert and that it enhanced the decision-making process (24 out of 26 in both cases). The majority of Members stated that CE improved the objectivity of the expert's

evidence (21 out of 26) and CE improved the quality of the expert's evidence (19 out of 26). One great advantage of CE may be simply that each expert has to answer in a hearing on oath while facing a professional colleague and not merely answer to lawyers doing their best to appear to have a level of expert knowledge they plainly do not have.

Members who found that CE enhanced the decision-making process stated that it identified areas of contention, made the technical issues easier to understand, and distilled the issues more quickly.

For a majority of Members, CE made it easier for them to write and hand down their decisions (17 out of 26) and for a large number of the Members (11 out of 26) CE made it faster to write and hand down their decisions.

- *Feedback from legal representatives*

  Legal representatives have largely responded in a positive manner to CE. Indeed, Members report that a number of legal representatives have requested that CE be used in their hearings.

- *Feedback from expert witnesses*

  It appears that expert witnesses are also responding favourably to the use of CE procedures in Tribunal hearings. In particular, experts seem to appreciate the opportunity to expand on their opinions and answer fully the questions put to them. They report that this is in contrast to giving expert evidence in court, where they are often required to respond with "yes" or "no" answers only and their ability to expand upon, or more fully explain, their responses is severely curtailed by the traditional methods of adducing evidence.

CONCLUDING COMMENTS

Our study is raising some interesting data in relation to the use of concurrent evidence. Although the study is progressing at a slower pace than was initially anticipated, we expect the study to finish in the next couple of months and a final report will be generated shortly after that.

The experience of the AAT members to date is that when used in appropriate cases, concurrent evidence seems likely to become a very useful method to achieve our goal of reaching the correct or preferable decision in the matters that come before us.