



ADMINISTRATIVE APPEALS TRIBUNAL

An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal

November 2005

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Any enquiries regarding this report should be directed to:

Manager, Policy and Research
Administrative Appeals Tribunal
Level 7
55 Market Street
SYDNEY NSW 2000

Telephone: (02) 9391 2400
Email: aatweb@aat.gov.au

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Executive Summary

This is a report of a study undertaken by the Administrative Appeals Tribunal (the Tribunal) in relation to the use of concurrent evidence (CE) in hearings in the New South Wales Registry.

The CE procedure involves the taking of sworn evidence of more than one expert at the same time. It provides a forum in which, in addition to providing their own evidence, expert witnesses can listen to, question and critically evaluate other experts' evidence. While CE procedures have been used in the Tribunal in a small number of cases for at least a decade, until now there has never been a formal evaluation of their operation.

In preparing for the study, the objectives of CE procedures were identified as:

- enabling 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;
- assisting experts in fulfilling their role as independent advisers whose primary role is to assist the Tribunal; and
- enhancing 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 main aims of the study were 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 objectives set out above;
- 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.

The study involved a combination of qualitative and quantitative data gathering techniques, including surveys, focus groups and file audits. A total of 199 cases were examined for the purposes of deciding whether or not CE should be used at hearing. Of these cases, 138 were identified as being suitable for CE. CE procedures were actually used in 48 hearings.

The main findings of the study provide support for the continued use of CE in the Tribunal. In particular, there appear to be significant benefits for Tribunal decision-making in using the concurrent evidence procedure.

The study found that 94.9% of members were satisfied with the use of the CE process in the cases under review. Additionally, the study demonstrates that concurrent evidence had a number of advantages:

- 73.7% of members reported that the objectivity of the evidence presentation was improved due to the use of CE;
- members mainly reported (67.2%) that the quality of the expert evidence presented was better;
- 87.9% of members reported that CE made evidence comparison easier;
- most members reported (88.1%) that the decision-making process was enhanced by the use of the CE process; and
- members mainly reported (70.4%) that CE made it easier to write and hand down the decision in the case.

In relation to the impact of CE on the length of hearings and the time spent by experts giving evidence, members reported that:

- in approximately 30% of cases, the experts spent less time giving evidence and the hearing overall was shorter than would have been the case if expert evidence had been given in the traditional manner;
- in approximately 50% of cases, the time spent by the experts giving evidence and the overall length of the hearing was about the same; and
- the time spent by the experts giving evidence and the overall hearing was longer in approximately 20% of cases.

Significantly, the CE process did not impact adversely on hearing length in most cases and, in a reasonable proportion of cases, led to time savings. It is important to note, however, that individual experts tend to spend longer giving evidence even if the overall time for expert evidence is shorter. This can have an impact on costs for the parties.

A majority of both parties' representatives and experts expressed general satisfaction with the CE process and support for its continued use.

Despite the general support for the use of CE procedures, Tribunal members, representatives and experts expressed a number of concerns and made suggestions for improvement that are identified in the report. These issues have led to the following recommendations in relation to the continued use of CE in appropriate cases:

- guidelines be developed in relation to the identification and selection of cases in which CE procedures will be used;
- guidelines relating to the procedures for taking concurrent evidence be reviewed in light of the study to ensure the procedures are clear;
- information and training in relation to the use of CE procedures be provided for Tribunal members, representatives and experts; and
- adequate hearing room facilities be made available for taking concurrent evidence.

Chapter 1: Introduction

1.1 Background

The Administrative Appeals Tribunal recently completed a study in relation to its use of concurrent evidence (CE) in hearings in the New South Wales Registry. The CE procedure, also sometimes colloquially referred to as “hot tubs”, involves the taking of sworn evidence of more than one expert at the same time. It provides a forum in which, in addition to providing their own evidence, expert witnesses can listen to, question and critically evaluate other experts’ evidence.

1.2 The development of concurrent evidence

Difficulties relating to the objectivity of expert evidence have been identified by a number of sources. In a conference paper on expert evidence¹, Justice Heerey of the Federal Court of Australia referred to a quote from Lord Woolf (then Master of the Rolls) in the interim report, *Access to Justice*²:

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.

However, as Justice Heerey pointed out, the problem is not a recent one. His Honour went on to quote Jessel MR in the 1877 case *Thorn v Worthing Skating Rink Co*³:

... the mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the Court. The man may go, and does sometimes, to half a dozen experts... He takes their honest opinions, he finds three in his favour and three against him; he says to the three in his favour, will you be kind enough to give evidence? And he pays the three against them their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of 50. I was told in one case...that they went to 68 people before they found one... That is an extreme case no doubt, but it may be done, and therefore I have always had the greatest possible distrust of scientific evidence of this kind, not only because it is universally contradictory, and the mode of selection makes it necessarily contradictory, but because I know of the way in which it is obtained.

¹ Justice P Heerey, "Expert Evidence: The Australian experience"; paper presented to the World Intellectual Property Organisation Asia-Pacific Colloquium, New Delhi, 6 February 2002.

² 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.

³ (1877) 6 Ch D 415n.

Certainly, the issues have been 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 a study entitled *Australian Judicial Perspectives on Expert Evidence*, Dr Ian Freckleton and his colleagues found that over a quarter of judges often encountered bias on the part of experts.⁴ 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.

The traditional adversarial approach may also not be the most effective way of eliciting expert opinion. In its report, *Managing Justice: A Review of the Federal Civil Justice System*⁵, the Australian Law Reform Commission (the ALRC) stated:

It has been claimed that the manner of presentation of expert evidence, through examination and cross-examination, may be confusing and unhelpful to judges... Present hearing practices do not always allow experts to fully communicate their opinions to the decision maker. In many cases, experts complain that they are not given a chance to explain their written reports, but are exposed immediately to cross-examination by lawyers who have no interest in assisting the judge to understand the experts' views and may have an active interest in obscuring such views. Experts express frustration that they cannot put relevant information before the court.⁶

In an attempt to overcome these difficulties, the Federal Court Rules were amended in 1998 to facilitate the use of "hot tubs"⁷, a procedure apparently developed by Justice Lockhart when sitting as President of the Trade Practices Tribunal (now the Australian Competition Tribunal). In that year, the Federal Court also issued a practice direction, developed cooperatively with the Law Council of Australia, 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's paramount duty is to the Court and not to the person retaining the expert.

Around 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 general court rules in 2000.⁸ The Supreme Court also introduced a Code of Conduct⁹, similar to the Federal Court's expert

⁴ 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.

⁵ <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/alrc/publications/reports/89/ch6.html>.

⁶ *ibid.* at [6.113]. Footnotes omitted.

⁷ *Federal Court Rules*, Order 34A, Rule 3.

⁸ *Supreme Court Rules 1970* Part 36, Rule 13CA.

⁹ *Supreme Court Rules 1970*, Schedule K.

guidelines, which the engaging solicitor is required to give to his or her expert. The expert's report must include written acknowledgement that he or she has read the Code of Conduct and agrees to be bound by it.

The NSW Land and Environment Court initially responded to the identified problems with expert witnesses by articulating, through practice directions, the expectations which the Court had of the objective and impartial exposition of the issues requiring specialist expertise.¹⁰ The Court also moved to require experts to confer prior to the hearing to identify the matters on which they agreed and disagreed in order to narrow the issues and objectively define the views of the experts. This aimed to reduce hearing time and enhance the quality of the ultimate decision. From March 2004 the Court began the process of appointing expert witnesses where it is satisfied that there may be cost savings to the parties or where the integrity of the ultimate decision will benefit.¹¹ At this time the Court also changed the way in which expert evidence was given by introducing concurrent evidence.¹² This process is now used in all merit appeals in the Court.¹³

The NSW Land and Environment Court reports a number of advantages in using the concurrent evidence process.¹⁴ The Court has found that expert witnesses strongly support the use of CE in the Court, as they feel better able to communicate their opinions and that they can respond more effectively to the views of the other experts. The experts also feel that there is less risk that their evidence will be distorted by the skill of the advocate. Other advantages include saving hearing time and enhancement of decision-making. The Court estimates that CE takes half or as little as 20% of the time taken under the traditional method. Additionally, the capacity of the judge to decide which expert to accept is greatly enhanced.

When recently reviewing the use of concurrent evidence in NSW as part of its report on expert witnesses, the NSW Law Reform Commission concluded that:

¹⁰ Justice P McClellan, "Expert Witnesses — The experience of the Land & Environment Court of New South Wales", paper presented to XIX Biennial Lawasia Conference 2005, Gold Coast, 24 March 2005.

¹¹ As with the Administrative Appeals Tribunal, the NSW Land and Environment Court is required by legislation to conduct its merit review proceedings with "as little formality and technicality as possible" and it is not bound by the rules of evidence and "may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the court permits": subss 38(1) and (2) of the *Land and Environment Court Act 1979*. The Court is also provided with an express capacity to obtain the assistance of any person "having professional or other qualifications relevant to any issue arising for determination in the proceedings": subs 38(3).

¹² The concurrent evidence process in the Land and Environment Court operates in the following way. The experts are asked to confer before the hearing and produce a document defining the issues upon which they agree or disagree. The experts are sworn together and their written reports are tendered together with the document which reflects their pre-trial discussion. The Court then identifies, with the help of the advocates and in the presence of the witnesses, the topics which require discussion in order to resolve the outstanding issues. Each witness is then invited to briefly speak to their position on the first issue, followed by a general discussion of the issue during which they can ask each other questions. The advocates are invited to join in the discussion by asking questions of their own or any other witness. Once the discussion on one issue is completed, the next issue is then addressed until the discussion of all the issues has been completed.

¹³ Justice P McClellan, "The Value of Civil Claims — How should courts and tribunals allocate resources? The Recent Experience of the Land & Environment Court", paper presented to the 8th Annual AIJA Tribunals Conference, Sydney, 10 June 2005.

¹⁴ Justice P McClellan, *op cit*.

In the Commission's view, the giving of concurrent evidence has very significant potential advantages. Especially where there are more than two relevant experts, the process can save time, minimising the time spent on preliminaries and allowing the key points to be quickly identified and discussed. Perhaps more importantly, the process moves somewhat away from lawyers interrogating experts towards a structured professional discussion between peers in the relevant field. The experience in the Land and Environment Court indicates that the nature of the evidence is affected by this feature, and that experts typically make more concessions, and state matters more frankly and reasonably, than they might have done under the traditional type of cross-examination. Similarly, it seems that the questions may tend to be more constructive and helpful than the sort of questions sometimes encountered in traditional cross-examination.¹⁵

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.¹⁶ For example, in the *Managing Justice* report referred to above, the ALRC quoted the Federal Court as saying:

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.¹⁷

Indeed, 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.

1.3 Use of concurrent evidence in the Administrative Appeals Tribunal

CE procedures have been used in the Tribunal for at least a decade. One of the first cases in which the use of such procedures was reported was *Re Ciba Geigy Australia and Worksafe Australia Ltd.*¹⁸ The decision of the Tribunal (Justice O'Connor, President; Mr Gillham, Member; Professor Johnston, Member) included the following reference to its use:

¹⁵ NSW Law Reform Commission, *Report 109 — Expert Witnesses*, June 2005, http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/pages/LRC_r109toc at [6.56].

¹⁶ Justice P Heerey, *op cit.*, p. 9.

¹⁷ <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/alrc/publications/reports/89/ch6.html> at [6.117].

¹⁸ AAT 9385, 18 March 1994.

Counsel for both parties requested that the evidence given orally be done with the witnesses presented to the Tribunal in panels. This allowed a great deal of fruitful interaction between the parties and particularly the scientifically expert members of the Tribunal. It assisted the Tribunal greatly to come to grips with complex material and shortened the time of hearing. The parties and counsel are to be congratulated for this and their whole approach in assisting the Tribunal in its task.¹⁹

The Tribunal has some flexibility in the manner in which it can hear evidence. Subsection 33(1) of the *Administrative 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, within the requirements of the law. 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.

Anecdotally, the benefit to the Tribunal and parties in using CE procedures is that it can reduce hearing time. A clear example of this is the Tribunal hearing in *Re Coonawarra Penola Wine Industry Association Inc and Others and Geographical Indications Committee and Others*²⁰, in which the Tribunal (Justice O'Connor, President; Associate Professor Davis, Member) 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 section 40Y of the *Australian Wine and Brandy Corporation Act 1980*. 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.²¹

Experts that gave evidence using CE in the case were from a wide variety of fields, such as geography and geomorphology, soil science, hydrology, viticulture and mapping. The experts gave their evidence as panels. The first panel of experts giving CE included experts in the fields of viticulture, horticulture, hydrology and wine production. The second panel of experts

¹⁹ AAT 9385, 18 March 1994 at [9].

²⁰ [2001] AATA 844.

²¹ [2001] AATA 844 at [28].

traversed similar subject matter as the first, but with more emphasis on cartography, soil science and land systems. A third panel of experts then further elaborated on some points and two subsequent groups of experts dealt with the history of the region, the development of the wine industry and the marketing of the produce from the region.

In *Re Keenan and Repatriation Commission*²², the Tribunal (Justice O'Connor, President; Mr Way, Member; Dr Lynch, Member) also adopted the CE method when hearing several Veterans' Appeals Division applications involving evidence relating to the level of fat in the diets of veterans who were later diagnosed with prostate cancer. The expert dieticians in those cases gave their evidence using CE procedures, again reducing hearing time and allowing the Tribunal to test and better understand the expert evidence.

In another case, *Re Temple and Repatriation Commission*²³, Senior Member Dwyer suggested the use of CE procedures after expressing concern about the difficulty choosing between the different opinions of the expert witnesses, both of whom were eminent respiratory physicians. At the end of the decision, Senior Member Dwyer commented that:

The practice of calling two medical expert witnesses together is still unusual within the Tribunal. I consider it appropriate to record how helpful I found it to be and to express the Tribunal's appreciation to the doctors for their cooperation, and to the representatives for their assistance in making the necessary arrangements. I suggest that the approach be adopted more frequently. There is benefit in a more investigative and less adversarial approach.²⁴

²² [2000] AATA 707.

²³ [2001] AATA 490.

²⁴ [2001] AATA 490 at [67].

Chapter 2: Methodology of the Concurrent Evidence Study

2.1 Purpose of the study

The Tribunal's use of concurrent evidence over the past decade led to the identification of a number of perceived benefits in relation to the use of CE procedures in hearings in the Tribunal. The objectives of using CE were seen to be:

- to 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;
- to assist experts in fulfilling their role as independent advisers whose primary role is to assist the Tribunal; and
- to 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 Tribunal decided to implement a study with the aim of assessing the criteria that should be used to select cases that are suitable for CE, of refining the proposed procedures for taking CE, and of assessing the effectiveness of CE procedures within the Tribunal.

The aims of the study were 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 objectives set out above;
- 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.

2.2 Methodology

2.2.1 Venue and timeframe for the study

Although CE procedures have been used in the Tribunal throughout Australia, the CE study was conducted in New South Wales only.

The study commenced in December 2002 and was initially expected to run for a period of six months. However, due to the high settlement rate in the Tribunal, the study continued until March 2005, at which time a sufficient numbers of matters had used CE at hearing to allow a meaningful analysis of data.

2.2.2 Provision of information prior to commencement of the study

Prior to the commencement of the study, a Background Paper was developed and distributed to members and parties' representatives outlining the purposes of the proposed study, explaining how matters would be selected for the purposes of the study, how concurrent evidence would be taken and inviting comments and questions. A copy of the Background Paper is at Appendix 1 to this report.

In addition to the Background Paper, parties' representatives were also informed about the study through the Tribunal's regular liaison meetings, as well as through notification in the NSW Law Society Journal and the NSW Bar Association's Bar Brief.

2.2.3 Jurisdiction

The Tribunal has jurisdiction to review decisions made under many hundreds of Commonwealth Acts and legislative instruments. However, the bulk of the Tribunal's workload relates to the following four areas:

- decisions relating to workers' compensation under the *Safety, Rehabilitation and Compensation Act 1988* or the *Seafarers Rehabilitation and Compensation Act 1992*²⁵;
- decisions relating to family assistance and social security entitlements under the *A New Tax System (Family Assistance) Act 1999* and the *Social Security Act 1991*²⁶;
- decisions relating veterans' entitlements under the *Veterans' Entitlements Act 1986*²⁷; and
- decisions relating to taxation under a range of Acts.

It was anticipated, and it was in fact the case, that most matters to be included in the study would come from the Compensation and Veterans' Affairs jurisdictions. However, cases from any jurisdiction meeting the selection criteria were to be included in the study (including taxation and customs matters). The jurisdictions ultimately included in the study were limited by the case selection process. This is explored in more detail below.

²⁵ These matters are referred to in this report as Compensation matters.

²⁶ These matters are referred to in this report as Social Security matters.

²⁷ These matters are referred to in this report as Veterans' Affairs matters.

2.2.4 Research sample

A matter was deemed to be eligible for inclusion in the CE study if both parties were represented and each party had at least one expert witness. Matters were initially identified as eligible for inclusion in the study by the District Registrar and registry staff. This process usually took place prior to callover after each party had lodged a hearing certificate which included information as to the identity of the witnesses they intended to call at the hearing. Where relevant information was not provided prior to callover, the process took place after callover when the parties indicated whether they were intending to call expert witnesses.

Once a matter had been identified as eligible to be included in the study, a “CE members’ package” was inserted into the file and the file was provided to the presiding member so that he or she could decide whether or not the matter was suitable to use CE procedures at hearing. This package included:

- an explanatory minute relating to the study;
- a Members Case Selection Sheet;
- a copy of the template letter to parties notifying them that CE procedures would be used;
- a copy of the pamphlet about CE;
- Procedures for CE — A guide for members; and
- a Members Evaluation Survey.

It was open to the member to decide at a later time that CE would be suitable for use in a matter.

Once a matter was selected by a member to use CE procedures, the Tribunal registry sent a notification letter to both parties. A pamphlet was included with the notification letter which outlined the CE procedures. The pamphlet was designed to inform representatives about the CE process and they were encouraged to make the pamphlet and other relevant documents available to their expert witnesses prior to their appearance at the Tribunal. A copy of the CE pamphlet is included at Appendix 2.

It was anticipated that the CE study would include approximately 50 to 100 cases that had used CE at hearing. Due to the high rate of settlement of matters in the Tribunal, the total number of matters included in the study that ultimately used CE procedures at hearing was 48. Quantitative and qualitative data were collected from Tribunal members, the parties’ representatives and expert witnesses. A number of research approaches were used.

Although only matters where both parties were represented were included in the study, consideration will be given to how to measure the anticipated benefits and shortcomings of the process for self-represented parties.

2.2.5 *Criteria for identifying suitable matters for CE*

Tribunal members could decide that CE procedures would be suitable to use in a case at any stage up to the hearing. In deciding whether a matter was suitable to use CE procedures, the explanatory minute provided to members with each file asked them to take into account the following non-exhaustive list of factors:

- 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 of like disciplines;
- whether the experts have similar levels of expertise; and
- whether the parties' consent or object to the CE process (although this would not necessarily determine whether CE would proceed).

2.2.6 *Procedures for taking concurrent evidence*

The Tribunal developed a set of procedures to assist members in relation to taking CE. These procedures were also set out in the CE pamphlet provided to parties' representatives. A copy of the procedures is included at Appendix 3.

The procedures noted that the Tribunal is not bound by the rules of evidence and may hear evidence in any manner it thinks appropriate. They set out a suggested procedure for taking concurrent evidence but recognised the need for flexibility in an individual hearing.

The procedures outlined for the hearing were as follows:

- Expert witnesses have been asked to arrive in time to confer before evidence is taken.
- The Tribunal reminds experts of their overriding duty to assist the Tribunal on matters relevant to the experts' area of expertise; the expert is not an advocate for a party; the expert's duty to the Tribunal is paramount.
- Expert witnesses are sworn/take oath.
- The Tribunal summarises orally or in writing agreed and disagreed facts.
- The applicant's expert witness might give a brief oral exposition or the Tribunal may proceed to ask questions of the expert witnesses.
- The respondent's expert will be 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 will be 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 above process, the Tribunal may intervene and ask questions.

2.2.7 Control group

It was decided that a separate control group would not be included as part of the study. It was considered that the sample size was likely to be too small to provide empirical data to compare outcomes in comparable cases that did not participate in the CE process.

2.2.8 Quantitative evaluation of concurrent evidence

Data were collected at three stages during the CE study using survey tools which were developed to evaluate a range of variables in the empirical study group.

Members Case Selection Sheet

When deciding whether a matter would use CE procedures, the presiding member completed a self-administered selection survey which asked questions about the suitability or otherwise of the dispute to use CE procedures.

The survey requested the following information:

- the type of experts to be called by the applicant and the respondent;
- the type of issues in dispute in the case;
- the reason(s) why the case was, or was not, selected to use CE; and
- the stage at which the case was selected to use CE.

A total of 199 member selection surveys were completed. A copy of the Members Case Selection Sheet is included at Appendix 4.

Members Evaluation Survey

Once the case was finalised, each member who constituted the Tribunal (or the presiding member only where the matter settled prior to hearing) completed a self-administered evaluation survey. The survey was designed to provide an account of the member's perspectives on the use of CE and how CE operated in that case.

Members were asked to provide information in relation to the complexity of the case and whether it was difficult for members to decide to use CE or not. In relation to cases that settled, details were sought on the perceived influence of CE on the settlement process; for example, whether CE influenced the decision to settle and how CE influenced the timing of settlement.

Where CE procedures were used, information was obtained regarding the perceived impact of CE on the time it took 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. Information was also obtained on the perceived impact of CE on the evidence provided by experts during the hearing and, in particular:

- whether the expert evidence was more objective;
- whether CE affected the quality of evidence provision;
- whether experts were able to provide opinions on factual scenarios; and
- whether evidence comparison was easier or more difficult using CE.

Information was also sought about the impact of CE on the decision-making process including:

- whether the decision-making process was enhanced through CE, and if it was, in what way(s); and
- whether the use of CE procedures had an impact on the writing and handing down of the decision: that is, whether it was easier or harder and faster or slower.

Members were also asked general questions about the CE process including:

- their perception of the efficiency and effectiveness of CE: for example, whether CE was efficient in the case and whether CE was suitable with regard to the critical issues, expedition, fairness, jurisdiction and position clarification;
- whether general CE procedures were followed, and if not, what modifications were necessary in the particular case; and
- overall satisfaction with the use of CE in the case.

A total of 124 evaluation surveys were completed.²⁸ Of those, 62 surveys related to matters in which CE procedures had been used at hearing.²⁹

While the survey asked members to answer the questions in relation to a specific matter, there is some evidence to suggest that some of the questions may have been answered on a more general level.

A copy of the Members Evaluation Survey is included at Appendix 5.

²⁸ Please note that members' evaluation surveys were not completed for all 138 matters that had been identified as suitable for CE.

²⁹ For matters in which CE procedures were used at hearing involving a multi-member tribunal, all members were invited to complete a survey.

File-based Survey

Data collection was also undertaken to collect case and case processing information relating to the matters that were selected to use CE procedures. This involved the collection of information from the finalised case files of the matters that had been selected to use CE procedures (including those matters where CE did not end up being used).

The file-based survey sought information on:

- case background and case processing;
- details relating to the applicant and respondent and their representatives;
- experts to be called;
- whether concurrent evidence was given and the length of time experts spent giving evidence; and
- case resolution and appeals.

The file-based survey enabled a comparison of cases that did and did not use CE.

File-based information was collected for 116 matters including 48 matters in which CE procedures were used at hearing. A copy of the file-based survey is included at Appendix 6.

Final Member Survey

At the conclusion of the study, members were asked to complete a brief self-administered survey in relation to their overall perceptions of the CE process. Feedback was sought on issues such as the difficulty of selecting matters as being suitable to use CE procedures, whether opposition from representatives had been encountered, overall satisfaction with the process and suggestions for improving the selection of, and hearing process for, CE matters.

A total of 10 surveys were completed. A copy of the Final Member Survey is included at Appendix 7.

2.2.9 Qualitative evaluation of concurrent evidence

Focus Groups — Evaluation by Representatives

While it had been envisaged that representatives would be asked to complete a survey in relation to each matter that was completed, it was decided that the preferable approach would be to convene focus groups at the conclusion of the study to seek qualitative information.

All parties' representatives that had been involved in at least one matter that used CE at hearing were invited to attend a focus group conducted by the Tribunal. The parties' representatives were asked to provide feedback on a range of issues relating to the use of CE procedures including their satisfaction with the CE procedures overall, their perceptions as to whether

CE is more suitable for certain types of cases, the quality of the evidence presented to the Tribunal and their perceptions of the fairness of the process and outcomes. They were also asked whether they were in favour of its continued use in the Tribunal and for any suggestions for improving the process or modifying its use.

A total of 17 parties' representatives attended two focus group sessions in April 2005. Representatives included counsel, solicitors and advocates who represent both applicants and respondents.

A copy of the focus group topics is included at Appendix 8.

Telephone Survey — Evaluation by Expert Witnesses

Expert witnesses that had provided evidence using the CE procedures were invited to participate in a telephone survey that was conducted by the Tribunal. The survey asked expert witnesses for their views on a range of issues including the suitability of CE for the type of matters in which they give evidence at the Tribunal, their satisfaction with the CE procedures, the effect of CE on their preparation, the quality of the evidence they were able to present to the Tribunal and their perceptions of the fairness of the process and outcomes. They were also asked for any suggestions for improving the process.

A total of 13 expert witnesses completed a telephone survey. Another expert provided general comments about CE to the Tribunal. Six of the expert witnesses who participated in the survey were medical/psychiatric experts (i.e. psychiatrists and psychologists) and the remaining seven experts were medical/physical experts (three rheumatologists, two neurologists, one orthopaedic surgeon and one respiratory/thoracic physician). The experts had appeared both for applicants and respondents in the Tribunal.

A copy of the telephone survey is included at Appendix 9.

2.2.10 Caveats

The empirical analysis in this paper is based only on matters that were selected for inclusion in the CE study. As noted above, there is no comparative analysis of matters which used CE procedures and matters which did not use CE procedures. It is also important to note that the information provided regarding the time savings associated with CE matters is based on the perceptions of the members who completed the surveys. No actual time and cost comparisons were undertaken between matters that used CE procedures and matters that did not use CE procedures.

It should also be noted that during the study period CE procedures may have been used in a small number of matters that have not been included in the study. This was largely due to difficulties in monitoring those matters where CE was chosen by members to be used at a later stage.

2.3 Acknowledgements

The Tribunal expresses its gratitude to the members, staff, representatives and experts who assisted in the conduct of the study and provided valuable feedback on the operation of CE procedures. The Tribunal would also particularly like to thank Ms Tania Matruglio, who was engaged as the external research consultant for the CE study, and Professor Tania Sourdin for their assistance with the study design and methodology, data analysis and preparation of the final report.

Chapter 3: Case Characteristics

This chapter provides general information in relation to the cases involved in the study at each of its stages. That is:

- cases eligible for inclusion in the study;
- cases identified as suitable to use CE procedures; and
- cases in which CE procedures were used at hearing.

3.1 Cases eligible for inclusion within the study

3.1.1 Jurisdiction

A total of 199 matters were identified as eligible for inclusion in the CE study on the basis of the Tribunal's case selection criteria: that is, both parties were represented and each party intended to call at least one expert to give evidence at a hearing.

As set out in Table 1, of the 199 matters that were eligible for inclusion in the study, the majority were Compensation matters (132, 66.3%). A further 66 (33.2%) were Veterans' Affairs matters. There was one (0.5%) Aviation matter.

Table 1: Matters eligible for inclusion in the CE study

Case selection		n	% of total sample
Number of matters eligible for inclusion in the CE study		199	100.0
Case type	Compensation	132	66.3
	Veterans' Affairs	66	33.2
	Aviation	1	0.5

The proportion of matters identified as eligible for the study tends to reflect the overall proportions of Compensation and Veterans' Affairs applications that the Tribunal receives.

While the Tribunal anticipated that matters from a broader range of jurisdictions would be eligible for inclusion in the study, this did not in fact occur. The reasons for this are not clear but may relate to a number of factors. Levels of representation for the non-government party vary significantly between jurisdictions. In particular, the level of representation in Social Security matters is relatively low which is likely to have contributed to the fact that no Social Security matters were identified for inclusion in the study. Further, the need for expert evidence varies between jurisdictions and individual applications. Expert evidence is not always required in Tribunal applications and there can be cases in which expert evidence is obtained by only one of the parties. Further examination of this issue would be required to identify the reasons with greater particularity.

3.1.2 Types of experts in cases eligible for inclusion in the study

The Members Case Selection Sheet asked members at the time of deciding whether or not to use CE procedures to indicate the type of expert(s) being used by the applicant and the respondent in each case.³⁰ The Tribunal decided to draw a broad distinction between the following types of experts:

- medical/physical experts (such as cardiologists, neurologists, orthopaedic specialists and rheumatologists);
- medical/psychiatric experts (such as psychiatrists and clinical psychologists); and
- “other” types of experts.

Members were asked to specify the particular type of expert for medical/physical experts and “other” types of experts.

Table 2 shows that all but one of the experts included in the study were medical experts. In the majority of cases, only one type of expert was identified. There is broad similarity between applicants and respondents in relation to the type of experts being called by case type. There are differences, however, between case types in relation to the types of experts. In the majority of Compensation matters, the experts were medical/physical experts while Veterans’ Affairs matters had an almost equal number of medical/physical and medical/psychiatric experts.

Table 2: Type of experts used by applicant and respondent at the time matter was selected to use CE procedures

Case type	Applicant		Respondent	
Veterans’ Affairs	n=69		n=71	
• Medical/physical	30	43.5	33	46.5
• Medical/psychiatric	38	55.1	37	52.1
• Other	1	1.4	1	1.4
Compensation	n=131		n=137	
• Medical/physical	116	88.5	120	87.6
• Medical/psychiatric	15	11.5	17	12.4
• Other	0	0.0	0	0.0
Aviation	n=1		n=1	
• Medical/physical	1	100.0	1	100.0
Total	n=201		n=209	
• Medical/physical	147	73.1	154	73.7
• Medical/psychiatric	53	26.4	54	25.8
• Other	1	0.5	1	0.5

³⁰ Please note that, in some cases, the member was unable to identify the type of expert from the information available on the file.

The medical/physical experts included experts in the following disciplines: cardiology; dermatology; ear nose throat (ENT); endocrinology; gastroenterology; general practice; haematology; hand surgery; neurology; occupational medicine; orthopaedics; psychiatry; psychology; rehabilitation; respiratory medicine; rheumatology; spinal surgery; sports medicine; surgery; and thoracic medicine.

The only non-medical expert was noted to be an expert relating to occupational matters.

3.2 Cases considered suitable for CE

3.2.1 Jurisdiction

Of the 199 matters eligible for inclusion in the study, Tribunal members decided that a total of 138 matters (69.3%) were suitable to use CE procedures at hearing. Table 3 sets out the number of matters selected or not selected to use CE overall and by case type.

Table 3: Case selection for CE

Case selection		n selected	% of eligible matters	n not selected	% of eligible matters
Number of matters selected/ not selected to use CE		138	69.3	61	30.7
Case type	Compensation	83		49	
	Veterans' Affairs	54		12	
	Aviation	1		0	

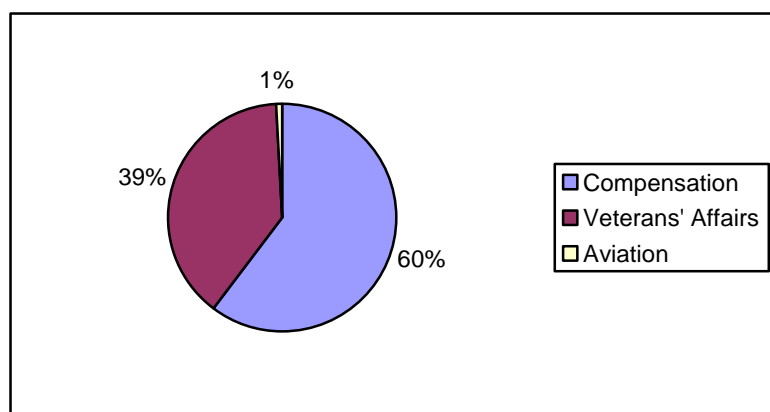
Table 4 identifies the proportion of matters selected to use CE by case type. The figures suggest there are some differences on the basis of case type, with a significantly higher proportion of Veterans' Affairs matters being selected to use CE procedures than Compensation matters.

Table 4: Case selection by case type

Selected?	Veterans' Affairs		Compensation		Aviation	
	n	%	n	%	n	%
Yes	54	81.8	83	62.9	1	100.0
No	12	18.2	49	37.1		
Total	66	100.0	132	100.0	1	100.0

Figure 1 shows the proportional breakdown of matters selected to use CE procedures by case type and demonstrates that the majority of matters considered suitable for CE were Compensation matters (83, 60.1%).

Figure 1: Matters chosen as suitable to use CE by case type



3.2.2 Other characteristics

The file survey, which was conducted in relation to 116 of the 138 matters considered suitable for CE, identified a range of other general information about these matters. Table 5 sets out the breakdown of matters in relation to which a file survey was conducted by case type.

Table 5: File surveys completed for matters considered suitable for CE

File surveys completed		n	% of total sample
Total file surveys		116	100.0
Case type	Compensation	68	58.6
	Veterans' Affairs	47	40.5
	Aviation	1	0.9

Year filed

The majority of matters analysed were lodged with the Tribunal in 2002. This was the same year that the CE study commenced. One third were filed in 2003 and just under one fifth in 2001.

Table 6: Year matters were filed

Year filed	n	%
2000	1	0.9
2001	20	17.2
2002	57	49.1
2003	38	32.8
Total	116	100.0

The parties and their representatives

All applicants in the sample were individuals. The respondents in all Veterans' Affairs matters and the one Aviation case were a government entity. The respondent was also a government entity in all but two Compensation matters, for which the respondent was recorded as being a business/company.

All applicant representatives in the Compensation matters were private solicitors. By comparison, in the Veterans' Affairs jurisdiction, representation by a private solicitor was recorded in 34 of the 47 cases (72.3%). In one case the representative was recorded as being a professional advocate and in the remaining 12 matters (25.5%) the applicant was represented by the Legal Aid Commission Veterans Advocacy Service.

Respondents in the Compensation matters were represented by private solicitors or the Australian Government Solicitor. In the Veterans' Affairs matters, the respondent was represented in all but one case by advocates from the Department of Veterans' Affairs. The respondent was represented by the Australian Government Solicitor in the other case.

Complexity

The Members Evaluation Survey sought the views of members in relation to the complexity of the cases that had been selected as suitable to use CE procedures. Of the 124 responses received to this question, only 24 (19.4%) reported matters as being "very complex". The remaining 96 responses described matters as being of average complexity (77.4%) and four responses (3.2%) reported that the matters were not complex at all.

3.3 Cases that used CE procedures at hearing

Concurrent evidence was used at hearing in 48 (41.4%) of the 116 finalised matters for which a file-based survey was conducted. This represents under half of the group that was selected to use CE procedures.

Information as to why CE was not used was available in the 68 cases for which file surveys were completed. In most cases (59, 86.8%), the dispute was settled by the parties prior to hearing and the giving of expert evidence was not required. In two matters, the applicant withdrew the application prior to hearing.

In relation to the other seven matters: in three the parties decided not to call expert witnesses; in two only one expert gave evidence or was available during the hearing; in the remaining two cases it was not possible to arrange for the doctors to give evidence concurrently.

On the basis of these figures, it appears that, once CE is selected for use, there are only a small proportion of cases that go to hearing that do not then use CE procedures.

3.3.1 Jurisdiction

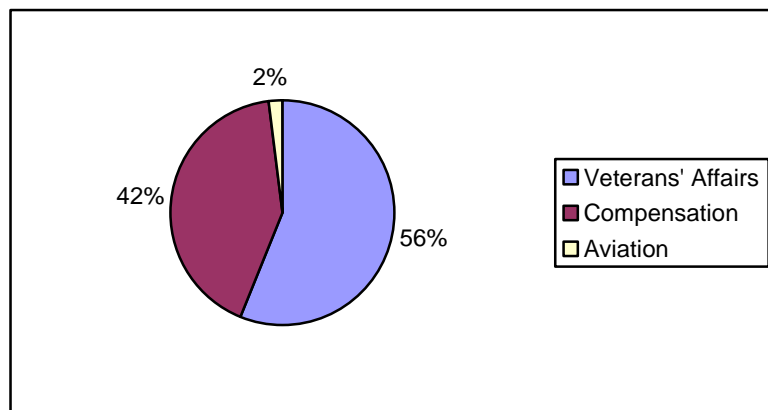
Table 7 sets out the breakdown of matters that used CE at hearing by case type.

Table 7: Cases in which CE procedures were used at hearing

Cases which used CE at hearing		n	% of total sample
Total cases		48	100.0
Case type	Veterans' Affairs	27	56.3
	Compensation	20	41.7
	Aviation	1	2.1

Figure 2 shows the distribution of cases that used CE by case type.

Figure 2: Cases that used CE at hearing by case type



The proportion of matters that used CE at hearing is contrary to the proportion of matters initially selected for inclusion in the CE study. That is, while proportionately more Compensation matters were selected for the study than were Veterans' Affairs matters, proportionately more Veterans' Affairs matters ultimately used CE than did Compensation matters.

The use of CE procedures following selection is also proportionally different across jurisdictions. Fifty per cent of Veterans' Affairs matters that were originally selected to use CE did so, compared with only 24% of Compensation matters. This difference on the basis of jurisdiction is statistically significant.

These results reflect general trends in the resolution of Compensation and Veterans' Affairs matters before the Tribunal. A lower proportion of Compensation matters are resolved by way of a Tribunal decision following a hearing than Veterans' Affairs matters.

3.3.2 Experts who gave evidence using CE procedures

Types of experts

Table 8 sets out the type of experts who gave evidence using CE procedures at hearing.³¹

Table 8: Type of experts who gave evidence using CE procedures

Case type	Applicant		Respondent	
Veterans' Affairs	n=27		n=27	
• Medical/physical	9	33.3	9	33.3
• Medical/psychiatric	18	66.7	18	66.7
• Other	0	0.0	0	0.0
Compensation	n=22		n=20	
• Medical/physical	19	86.4	17	85
• Medical/psychiatric	3	13.6	3	15
• Other	0	0.0	0	0.0
Aviation	n=1		n=1	
• Medical/physical	1	100.0	1	100.0
Total	n=50		n=48	
• Medical/physical	29	58.0	27	56.3
• Medical/psychiatric	21	42.0	21	43.8
• Other	0	0.0	0	0.0

The distribution of types of experts who gave evidence using CE procedures continues to reflect the differences between jurisdictions regarding the types of expert relied on at the Tribunal seen above in Table 2. The majority of experts who gave evidence in Veterans' Affairs matters were psychiatrists and psychologists. In Compensation matters, there was a significantly greater number of medical/physical experts.

Table 9 sets out the types of medical/physical experts who gave evidence using CE procedures.

³¹ Information relating to the type of expert who gave evidence concurrently was not available for two cases in which CE procedures were used.

Table 9: Type of medical/physical experts who gave evidence using CE procedures

Area of Specialty	Veterans' Affairs		Compensation		Aviation	
	Applicant	Respondent	Applicant	Respondent	Applicant	Respondent
Cardiology	-	-	2	1	-	-
Ear, Nose, Throat	-	-	1	1	-	-
Endocrinology	-	-	-	-	1	1
Neurology	4	4	3	2	-	-
Occupational medicine	2	2	-	-	-	-
Orthopaedics	1	1	5	2	-	-
Rheumatology	-	-	5	8	-	-
Respiratory/Thoracic	1	1	2	2	-	-
Not specified	1	1	1	1	-	-
Total	9	9	19	17	1	1

In three cases that used CE at hearing, the experts who gave evidence were not from the same specialty. In each of these three cases, one expert was an orthopaedic specialist and the other expert was a rheumatologist.

Number of experts who gave evidence concurrently

In all but two cases in the study, only two experts gave evidence at the same time: one expert for the applicant and one for the respondent. In two cases, however, three experts gave evidence concurrently. In both cases, there were two experts called by the applicant and one by the respondent. Both were Compensation matters. One case involved three cardiologists and the other involved three neurologists.

Chapter 4: The Selection Process

This chapter concerns the data and other information collected relating to the process of deciding whether or not CE procedures should be used for a particular case. It covers data collected from Tribunal members on their reasons for choosing or not choosing to use CE procedures, as well as general comments from Tribunal members, representatives and experts regarding factors considered relevant to deciding whether CE procedures should or should not be used.

This chapter also presents data relating to the perceptions of members as to the difficulty of deciding whether or not CE procedures should be used. Finally, it addresses issues relating to the stage of the proceedings at which this decision should be made and notifying parties that CE procedures will be used.

4.1 Reasons for choosing to use CE procedures

Members were asked in the Members Case Selection Sheet to identify up to three reasons for deciding that CE should be used in the particular matter and rank them in order of importance. At least one reason was specified in relation to 137 of the 138 cases that were identified as suitable for using CE procedures.³² The results are set out in the following table.

Table 10: Reasons for selecting cases to use CE

Reason for selection	Veterans' Affairs				Compensation			
	Rank order				Rank order			
	1st		2nd	3rd	1st		2nd	3rd
	n	%	n	n	n	%	n	n
Experts have same level of expertise	28	51.9	7	3	36	43.4	7	9
Experts would be commenting on the same issues	14	25.9	30	9	30	36.1	37	9
CE will clarify some complex issues	4	7.4	9	24	9	10.8	21	32
CE will improve the objectivity of evidence presented	6	11.1	6	10	8	9.6	12	15
Parties consent to the CE process	-	-	2	5	-	-	2	-
CE will reduce hearing time	-	-	-	1	-	-	2	6
CE will reduce costs	-	-	-	-	-	-	-	1
The process will promote settlement	1	1.9	-	1	-	-	1	6
Expert evidence is not that far apart	-	-	-	-	-	-	-	-
Other	1	1.9	-	1	-	-	-	-
Total	54	100.0	54	54	83	100.0	82	78

³² No reasons were provided for the Aviation matter which was considered suitable for using CE.

The “other” reason given by one member in a Veterans’ Affairs matter was that the experts were of the same specialty. This was also the “other” reason specified as a third reason in the second Veterans’ Affairs case.

The four reasons specified by members as the most important reason for deciding to use CE were the same for Compensation and Veterans’ Affairs matters:

- the experts have the same level of expertise;
- the experts would be commenting on the same issues;
- CE would improve the objectivity of the evidence; and
- CE would clarify some complex issues.

Some proportional difference is evident (although it is not statistically significant).

In relation to the second most important reason specified by members for selecting a matter to use CE procedures, the same four reasons were identified most often. The view that CE would clarify some complex issues was nominated in a slightly higher proportion of Compensation cases.

In relation to the third reason specified, there were some differences between the case types. The consent of the parties to the CE process featured as a more significant reason in Veterans’ Affairs cases. The views that CE would reduce hearing time and that CE would promote settlement featured in a greater number of Compensation cases.

4.2 Reasons for not choosing to use CE procedures

Where Tribunal members decided that CE would not be used, members were asked to provide up to three reasons, in order of importance, for deciding that the matter was not suitable to use CE procedures. At least one reason was provided in all 61 cases in relation to which it was decided not to use CE.

Table 11 outlines the reasons given by members including the number of “other” responses provided. Table 12 outlines the “other” reasons given as the main reason for not selecting a case.

Table 11: Members’ reasons for not choosing to use CE

Reason for non-selection	Veterans’ Affairs				Compensation			
	Rank order				Rank order			
	1st		2nd	3rd	1st		2nd	3rd
	n	%	n	n	n	%	n	n
Experts do not have same level of expertise	2	16.7	1	-	13	26.5	1	1
Experts would not be commenting on the same issues	1	8.3	1	-	10	20.4	10	-
One expert may dominate the CE process	-	-	-	-	2	4.1	1	2
Parties object to the CE process	-	-	-	-	-	-	1	-
Experts object to CE process	-	-	-	-	2	4.1	-	1
CE would extend hearing time	3	25.0	-	-	2	4.1	4	3
CE would unduly increase costs	-	-	3	-	3	6.1	2	1
Experts not available concurrently	1	8.3	-	-	4	8.2	1	-
Other (see Table 12)	5	41.7	1	3	13	26.5	1	9
Total	12	100.0	6	3	49	100.0	21	17

Table 12: “Other” reasons specified by members for not choosing to use CE

“Other” reasons provided	Veterans’ Affairs				Compensation			
	Rank order				Rank order			
	1st		2nd	3rd	1st		2nd	3rd
	n	%	n	n	n	%	n	n
Dispute factual only — no experts needed	2	16.7	-	-	1	2.0	-	-
Insufficient information (e.g. experts not identified)	1	8.3	-	-	9	18.4	-	1
Only one expert involved	1	8.3	-	-	-	-	-	-
One party decided not to call any experts	-	-	-	-	1	2.0	-	-
Too late for inclusion	-	-	-	-	1	2.0	-	-
Matter settled	-	-	-	-	1	2.0	-	-
Not enough time for CE: one day listing with an interpreter required	1	8.3	-	1	-	-	-	-
One expert would be giving evidence by telephone	-	-	1	-	-	-	1	1
Experts not of the same specialty	-	-	-	-	-	-	-	4
One expert not suited to CE	-	-	-	1	-	-	-	-
Experts not addressing primary issues in dispute	-	-	-	1	-	-	-	-
Matter likely to settle	-	-	-	-	-	-	-	1
CE would complicate hearing	-	-	-	-	-	-	-	1
Unequal number of experts for each party — CE would be unbalanced	-	-	-	-	-	-	-	1

In relation to Compensation matters, there was reasonable consistency in respect of the reasons for not choosing CE procedures. The three most common reasons were:

- the experts did not have the same level of expertise;
- the experts would not be commenting on the same issues; and
- there was insufficient information upon which the members could determine case suitability for CE.

Concerns that CE procedures would extend hearing time and that experts were not of the same specialty were nominated more commonly than other reasons.

Given the relatively small number of Veterans' Affairs matters not selected to use CE, it is difficult to identify any particular trends in the reasons for not choosing to use CE. The more commonly noted reasons for not using CE included concerns that CE could extend hearing time or increase costs as well as concerns that the experts did not have the same level of expertise.

4.3 General comments on factors relevant to whether CE is suitable

The information collected from the Members Case Selection Sheet identifies that there are a range of factors that will be relevant to deciding whether or not CE procedures are suitable for use in a particular case. Clearly, the most important factors relate to the nature of the issues in the case and the particular experts giving evidence. Factors relating to how the hearing overall will proceed will also be relevant.

In the qualitative information obtained in relation to the study, Tribunal members, representatives and experts provided comments of a more general nature relating to the suitability of matters to use CE procedures. These comments will also assist in settling the factors that should be taken into account.

A number of representatives remarked that CE is appropriate or seemed to work best where the medical experts are of the same specialty. One representative noted that CE did not work in one case in which a treating rheumatologist and an orthopaedic surgeon gave evidence because of differences in their approach.

Representatives and experts noted that differences in the level of expertise can present problems when using CE. There is a potential that a more junior expert may defer to the opinion of the more senior expert. It was suggested that, for this reason, the Tribunal should take into account views expressed by the parties as to the suitability of a matter for CE.

There were mixed views expressed about the value of CE for psychiatric evidence. Some considered that it worked well, while others considered that there can be difficulties. One of the comments included the following:

I agree that there is a difficulty with CE with psychiatric claims where the medical theory is not as black and white.

It was noted by one representative that psychiatric evidence is particularly problematic where there is no agreement on diagnosis.

Comments indicated that issues can arise in relation to particular experts. One representative noted that CE will not be as effective where there is tension between the experts. This was reflected in comments made by Tribunal members and two experts who noted that CE does not work well where one or other of the experts is unable to engage in constructive discussion about the issues.

A second issue raised relates to difficulties that can arise where one expert disagrees with the view of his or her colleague. One expert noted that he did not like giving evidence concurrently "because it means that if one differs from one's colleague then there's sort of actual confrontation at the Tribunal." Another expert remarked that it can be difficult to be critical of a colleague's opinion "which you may not feel as comfortable doing face-to-face as if you were giving it just on your own".

Another expert suggested that CE may not be suitable where the experts appear regularly in a jurisdiction and the divergent views that they take on particular issues are reasonably well-known. However, another expert explained that one of the advantages of CE is that, while colleagues may have differing views, they can assist the Tribunal to identify the areas of agreement and the reasons for any disagreement.

In relation to the way in which CE is given, there were differing views among representatives as to whether the fact that one expert was giving evidence in person and one by telephone had a negative impact on the quality of the evidence given. One considered that it worked well, while others expressed the opposite view. Comments included the following:

We had a bad experience in one case where the doctor was on the telephone and was not getting as good a reception as the doctor who was in the witness box.

One representative noted that, in general, it is difficult to question witnesses over the telephone.

Mixed views were expressed by representatives in relation to when CE works best in terms of the issues. One considered that CE is appropriate where there are particular issues of diagnosis and causation to resolve. Another representative agreed that CE is particularly useful for questions of diagnosis while another suggested that CE works best with a defined diagnosis. Two others suggested that it works well where the issues are simpler or narrower.

4.4 The ease of deciding whether to use CE

Members were asked in the evaluation survey how easy or difficult it was to decide whether the matter was appropriate for CE procedures. Members reported in 114 responses (93.4%) that making the decision was easy. Eight members (6.6%) reported that making the decision caused some difficulty.

4.5 Stage of case selection

4.5.1 Data relating to stage of case selection

As noted in section 2.2.4, cases that were eligible for inclusion in the study were referred to the presiding member immediately after hearing dates had been allocated at a callover to consider whether or not the matter was suitable to use CE procedures. In some cases, the decision that CE procedures would be used was made at a later time. The Members Case Selection Sheet asked Tribunal members to specify at which of the following stages it had been decided that CE would be appropriate to use:

- after callover;
- less than 1 week prior to hearing; or
- during the hearing.

Table 13 sets out the results for the 137 matters in relation to which responses were provided.³³

Table 13: Stage of case selection by case type

Stage of selection	All matters		Veterans' Affairs		Compensation		Aviation	
	n	%	n	%	n	%	n	%
After callover	131	95.6	48	88.9	82	100.0	1	100.0
Less than one week prior to hearing	3	2.2	3	5.6	-	-	-	-
During hearing	3	2.2	3	5.6	-	-	-	-
Total	137	100.0	54	100.0	82	100.0	1	100.0

The file survey reveals that the median duration from callover to notifying the parties that CE would be used was 20 days.

The reason for the late inclusion of the six Veterans' Affairs matters was provided in relation to four of the matters. In three matters it was considered that CE was suitable in light of the medical issues and, in the remaining case, use of CE was at the suggestion of the parties.

³³ A response was not provided in relation to one Compensation matter.

4.5.2 Comments relating to stage of case selection

Members and representatives provided comments in relation to the timing of the selection to use CE procedures in the qualitative information that was obtained.

Parties' representatives commented that a decision to use CE was not always made shortly after callover had occurred. A number of representatives noted that they had been informed on the day of the hearing that CE would be used. Representatives remarked that it is important to be notified as early as possible that CE procedures will be used to provide them and their experts with sufficient preparation time.

It was suggested by one representative that Conference Registrars could raise the issue with the parties at the stage of discussing the hearing. This was supported by a comment made by a member who noted that the availability of the experts to give evidence concurrently should be considered before hearing dates are allocated. One member confirmed that matters should be referred to the presiding member for consideration as to whether CE is suitable as early as possible.

4.6 Notification that CE would be used and provision of information about CE

As set out in section 2.2.4, the protocol for the study provided that, when a matter was selected as suitable to use CE procedures, the Tribunal registry sent a letter to the representatives confirming that the matter had been selected. A pamphlet outlining the CE procedure was included with the notification letter. The letter asked representatives to:

- provide to their expert copies of the report(s) of the other expert; and
- send a copy of the pamphlet to the expert.

It was evident from the focus groups and experts survey that information was not necessarily available to all participants in the process. In some cases, and particularly those in relation to which a decision to use CE was made close to the hearing, the Tribunal may not have sent information. In other cases, the primary representative may not have provided information to counsel or experts.

It was recognised by representatives generally that more information would be helpful. Although it was generally agreed by experts that information about the process would have been useful, its absence did not necessarily cause them difficulty.

Chapter 5: Impact on Resolution

This chapter examines the relationship between the selection of matters for CE and resolution. In particular, it examines whether selecting a matter to use CE procedures had any impact on those cases that settled and the impact of using CE procedures at hearing. For those matters in which CE was used at hearing, the chapter reports on the impact of CE on the length of time required to take evidence, whether or not the use of CE reduced or prolonged the duration of hearings and its impact on the assessment of evidence and Tribunal decision-making.

5.1 Resolution of cases selected as suitable to use CE procedures

5.1.1 Mode of resolution

The file survey collected information on the way in which cases selected to use CE procedures were finalised. The results are set out in Table 14. Of the 116 matters in relation to which a file survey was completed, 64 matters (55.2%) settled and a further two matters (1.7%) were withdrawn by the applicant. The remaining 50 matters (43.1%) were resolved by a Tribunal decision.

Table 14: Mode of resolution by jurisdiction

Resolution	All matters	Veterans' Affairs	Compensation	Aviation
Withdrawn by Applicant	2	2	-	-
Settled	64	18	46	-
Decision	50	27	22	1
TOTAL	116	47	68	1

5.1.2 Stage of resolution

The stage at which matters selected as suitable for CE were resolved was also examined. This was to assess whether notification that CE processes would be used in a hearing had any noticeable impact on resolution. The results are set out in Table 15 and Figure 3.

Table 15: Stage of resolution by case type

Stage of resolution	All matters		Veterans' Affairs		Compensation		Aviation	
	n	%	n	%	n	%	n	%
After CE notification	25	21.6	10	21.3	15	22.1	-	-
Day before hearing or on day of hearing	27	23.3	4	8.5	23	33.8	-	-
During hearing (before CE given)	10	8.6	4	8.5	6	8.8	-	-
During hearing (after CE given)	4	3.4	2	4.3	2	2.9	-	-
By Decision	50	43.1	27	57.4	22	32.4	1	100.0
Total	116	100.0	47	100.0	68	100.0	1	100.0

Figure 3: Stage of resolution, all matters

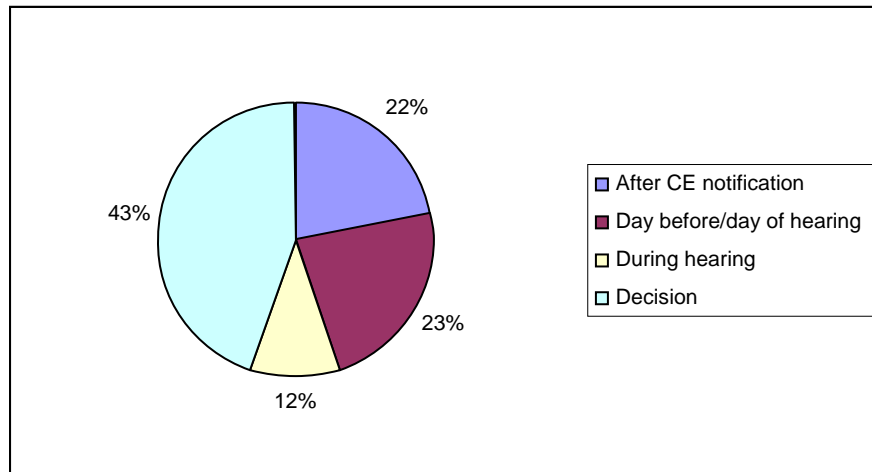


Table 15 illustrates that similar proportions of Veterans' Affairs and Compensation matters resolved after being notified that the case was to use CE. However, there is a significant difference between the jurisdictions in relation to the proportion of matters that resolved the day before or the day of the hearing. A substantially higher number of Compensation matters resolved between the parties on the day before or the day of the hearing. However, it is noted that this is a general feature of the Compensation jurisdiction in the Tribunal's experience.

There are no noticeable differences in the proportions of cases in each jurisdiction that settled after the hearing had commenced.

5.2 Concurrent evidence and case settlement

In approximately half of all the matters chosen to use CE for which a file survey was completed, resolution was by means of a settlement between the parties (64, 55.2%). In four of those matters, settlement occurred after concurrent evidence had been given at a hearing. Data was collected in relation to whether the selection of a matter to use CE procedures influenced the incidence or timing of settlement.

5.2.1 Whether CE influenced settlement

The Members Evaluation Survey asked members whether they considered that having a case chosen to use CE influenced the decision of the parties to settle the dispute. There were 54 responses in relation to this question. In 22 (40.7%) of the responses, CE was considered to have had an impact. In the remaining 32 responses (59.3%) it was not considered as a relevant factor.

Given that the Tribunal resolves the majority of its matters without proceeding to a hearing and decision by the Tribunal, there is a question as to whether these matters would have been resolved whether or not the matter had been selected to use CE procedures. In the 2003–04 financial year only 14% of Compensation matters and 29% of Veterans' Affairs matters were determined by the Tribunal following a hearing.

Parties' representatives were of the view that selecting a matter to use CE had no influence on whether or not a matter would settle. Comments from representatives included:

I can't see why there should be a relationship between the prospect of settlement and whether CE is used or not. I've not seen it impact on settlement in that way.

I do not think that hot-tubbing would affect settlement, especially pre-hot-tubbing.

Settlement is incidental to the process.

5.2.2 Whether CE influenced the timing of settlement

The Members Evaluation Survey also asked members whether they considered that choosing to use CE in a matter influenced when the case settled. In the 58 responses to this question, almost half of the members (26, 44.8%) considered that selecting a matter to use CE had influenced settlement timing.

Members were also asked to specify the ways they believed CE procedures influenced the timing of settlement including the following:

- the CE process encouraged representatives to consider issues at an earlier time than would have ordinarily been the case;
- the CE process enabled settlement of a key issue to occur; and
- the CE process provided an opportunity for the parties to hold settlement discussions.

Table 16 sets out the responses given by members to this question. The table provides multiple responses from single members.

Table 16: How CE influenced settlement timing

Influence on settlement timing	n
Encouraged representatives to consider issues at an earlier time	21
Enabled settlement of a key issue	14
Provided an opportunity for parties to hold settlement discussions	13
Other ³⁴	3

The most common response was that CE may have encouraged representatives to consider issues at an earlier time than would ordinarily have been the case. Selection to use CE was also considered to play a role in the settlement of key issues and provide an opportunity for the parties to hold settlement discussions.

While most representatives did not see a relationship between CE and settlement, some representatives indicated that CE encouraged them to consider issues at an earlier time, which might then have an influence on the timing of settlement. As one representative stated:

I felt that CE may be influencing settlement. At the initial preparation stage when the parties are first notified that CE will be used there is a flurry of activity back and forth.

5.3 Use of CE procedures at hearing

Members Evaluation Surveys and file surveys were completed in relation to the 48 cases which used CE at hearing. Information relating to the breakdown of these matters by case type and in relation to the experts who gave evidence at hearing is located at section 3.3. This section presents information relating to the use of CE procedures and their impact.

³⁴ The three “other” reasons stated by members were as follows: the matter was likely to settle; selection for CE may have caused a party to decide not to call the expert; and the parties did not want to use CE.

5.3.1 Guidelines for the use of CE

As set out in section 2.2.6, the Tribunal produced general guidelines for members to follow during a hearing involving the CE process.³⁵ The evaluation survey results indicate that the guidelines were followed in the majority of cases. In all but four matters, members stated that they had used these “standard” procedures for CE.

The following four modifications were noted by members:

1. The Tribunal initially provided a summary of the applicant’s evidence to both experts at hearing and then the applicant’s expert and the respondent’s expert provided a summary of their opinion. The applicant’s expert then discussed the respondent’s opinion and questioned the expert as required and then the respondent’s expert did the same. The Tribunal then asked questions and discussed the applicant’s and the respondent’s experts’ opinions and the parties then asked questions and discussed the experts’ opinions. Finally, the respondent’s expert, then the applicant’s expert, provided their concluding opinion.
2. There was no summary at the start by the Tribunal, as there were no new facts raised in evidence. However both counsel were invited to provide any information they thought relevant, although in this case there was none.
3. A telephone Directions Hearing was held to discuss issues related to the use of CE prior to the hearing.
4. The member decided that in future there was no need for the experts to summarise their position before the advocates were allowed their questions.

While Tribunal members reported that the guidelines had been followed in the majority of cases, representatives felt that a difficulty with the use of CE was that the process was not always dealt with in a consistent manner across the Tribunal. A number of representatives expressed the view that, even though variation between members had decreased over time, the process is still unclear. Representatives agreed that a clear and consistent CE procedure needs to be developed by the Tribunal for use in hearings. Comments from representatives included:

In the cases where it has not worked well, CE can be a procedural hotch-potch.

Consistency of process so that parties and experts know what to expect and consistency between members.

Unless it has structure, CE may breach procedural fairness.

³⁵ A copy of the document “Procedures for CE — A guide for members” is included at Appendix 3.

We need a map that identifies for the participants an order of dealing with the procedure.

[A] clear procedure is needed which can be varied with the consent of the parties.

This view was supported by a number of expert witnesses. One expert made the following comment:

I think a much better system, not just for the Tribunal but for expert evidence generally, is to have a clear and transparent process...

Tribunal members, representatives and experts provided comments on various aspects of the use of the CE procedures including:

- the expectation that experts will confer before giving evidence;
- the explanation of the process given by the member before the CE session commences;
- the summary of the relevant facts given by the member at the outset of the CE session; and
- general issues relating to the way in which CE proceeds.

These are discussed below.

Experts conferring prior to hearing

The CE procedures developed by the Tribunal provided that expert witnesses should arrive at the Tribunal in time to confer before evidence is taken. On some occasions the Tribunal invited expert witnesses to confer prior to giving their evidence concurrently to enable them to identify the areas in which they agreed and disagreed.

While the issue of experts conferring was not subject to particular comment during the focus groups, two representatives expressed concern about experts conferring together prior to giving their evidence. One stated:

...I think it is a very bad thing if the experts go into a huddle and come out in agreement without any explanation of why. Conferral between the experts should go on in the presence of the parties and the Tribunal. There should be transparency because, for example, their agreement may be based on false facts. They may be proceeding on totally wrong assumptions.

One expert noted that the Tribunal had asked the experts to confer briefly before giving evidence. He suggested that having some more time would have made it better and it could be done well before the hearing, either verbally or in writing.

Initial explanation of CE process by Tribunal

Representatives were asked whether the Tribunal had provided an explanation to the parties' representatives and expert witnesses about the CE process during the hearing prior to the CE session commencing. Comments from representatives indicated that this had occurred in some cases and not in others. One representative noted that in one case the presiding member did not provide any information about the process and this led to some confusion as to what was required of him during the CE session.

Experts were asked specifically whether the member had given an explanation. Most experts reported that the presiding member had provided an adequate explanation during the hearing of how the CE process would work. Two experts reported that they did not receive an adequate explanation and two experts could not recall whether an explanation had been provided.

Summary of evidence by Tribunal

The guidelines set out that the presiding member would summarise, orally or in writing, the agreed and disagreed facts prior to the expert witnesses providing their evidence concurrently. Representatives expressed the view that the practice of members of providing a summary of the evidence was useful when done well:

...the summary of the evidence was helpful. The evidence was distilled very well by the Tribunal.

Representatives expressed a number of concerns about summaries that had been given. One concern was that in some cases they were too lengthy, requiring the experts to absorb a significant amount of information. As one representative noted, this can lead to some confusion for experts about what they are being asked to respond to.

Representatives also noted that the requirement to provide an accurate and objective summary places a burden on the Tribunal. Representatives noted that, on occasion, they had disagreed with some aspects of the summary given. One representative suggested that comments should always be sought from the parties on the summary before the experts commence giving their evidence. The representative stated:

If the member gives the history and then asks counsel for any comments, this sets the scene.

The use of CE at hearing

Tribunal members and representatives provided general comments on elements that contributed to a more effective or less effective CE session. There was agreement among representatives that the process worked best where the Tribunal controlled the process and the issues to be discussed were clearly defined. Comments from representatives included:

If there is a stronger member or a medical member there are better results as there is a better understanding of the medical issues at hand and the evidence is kept on track and the experts do not drift into irrelevant issues.

Could it be helpful if issues were identified and then raised one at a time? Invite comments on one issue and then move onto the next issue. What can be off-putting is that often CE covers a whole range of issues together and in a sense with CE you have to go back and rework things.

Stronger control by the Tribunal member is needed to avoid rambling ...

The responses of members to the evaluation survey and final survey indicated that members recognised the need for the Tribunal to control and direct the process. Their comments included:

I directed the process and ensured doctors didn't go off the track - trying to refine matters in dispute and why.

Tribunal members expressed the view that for the CE process to be effective it must have the support and cooperation of the parties' representatives and the experts. Members noted that the use of CE was not as successful where representatives did not adjust their approach for the CE procedures. In particular, members reported that some representatives appeared to be uncomfortable with the loss of control that occurs in relation to the evidence given by their expert. Some representatives sought to continue to utilise the traditional modes of eliciting evidence.

Comments from representatives reflected these views. Two representatives noted the loss of control over the introduction of evidence and questioning of witnesses that occurs with CE. A number of representatives also noted that they felt uncertain about how they should conduct matters. One representative acknowledged, however, that, as the Tribunal improved the use of CE over time, he also improved how he deals with the process.

Comments from representatives and experts regarding uncertainty as to what was expected of them emphasise the need for consistent procedures and the need to ensure that all participants understand how the CE process is undertaken. As one member stated:

[CE] just does not happen. All parties need some "training" in the process.

A majority of representatives agreed that information sessions for representatives would be helpful.

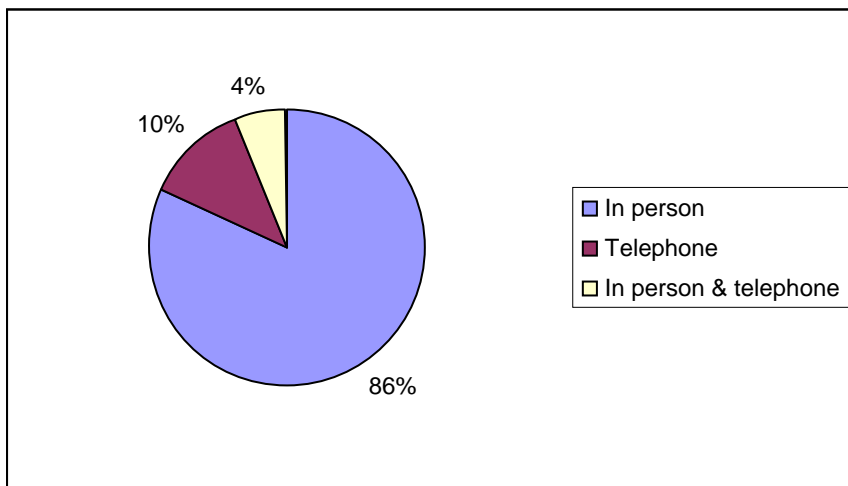
In relation to the preferable way of accommodating experts in the hearing room for concurrent evidence, a number of representatives noted that it would be preferable not to have them in the witness box together but in a round-table format.

5.3.2 Giving concurrent evidence in person or by telephone

Information was collected in relation to whether the experts giving evidence concurrently did so in person or by telephone.

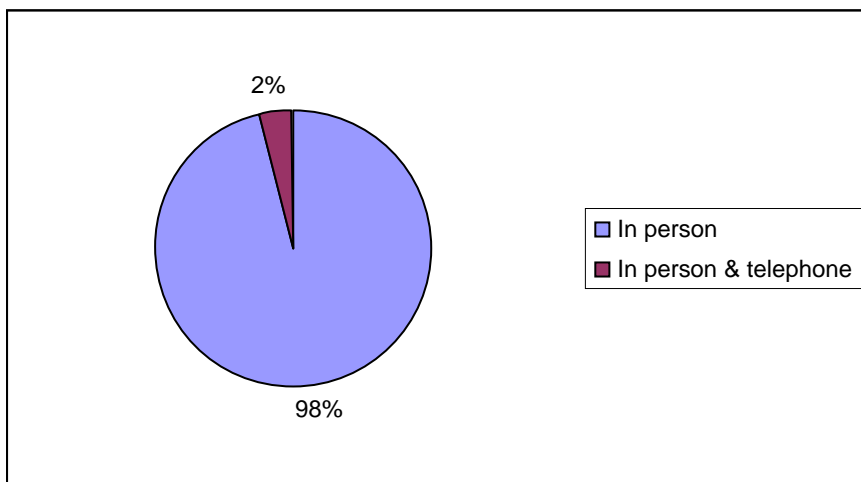
In the case of applicants, in the majority of matters in which CE was given, the evidence was given in person. In 26 of the 27 Veterans' Affairs matters (96.3%) CE was given in person, while in one matter the evidence was given over the telephone. In 14 of the 20 Compensation matters (70.0%) CE was given in person, in four matters it was over the telephone and in two it was recorded that the evidence was given both in person and over the telephone. In the Aviation matter, the applicant's expert gave evidence in person.

Figure 4: Applicant – mode of evidence presentation



All respondent experts in the sample gave their evidence under CE in person, except in the one Aviation matter in which evidence was given both in person and by telephone.

Figure 5: Respondent – mode of evidence presentation



The small number of cases in which expert evidence was not given in person precludes a comparative analysis of the impact of evidence delivery and the ease of information interpretation and the decision-making process as reported by the members.

As has been noted above in section 4.3, there was some concern amongst parties' representatives about telephone evidence, with a number suggesting that giving evidence by telephone may be disadvantageous due to the difficulty of questioning a witness over the telephone and because the expert attending in person may have a greater impact. As one representative stated:

[i]t is not the same when one expert gives evidence by telephone. I had an expert tell me that he would not do it again if it was by telephone. The person on the other end of the phone may not hear everything. The expert felt that he was at a serious disadvantage by being on the telephone. He was not sure if his message was getting across to the Tribunal. I would not be involved in telephone evidence with CE.

Additionally, it was felt by some representatives that the CE process was less effective where both experts are giving evidence by telephone. One representative stated:

it [CE] did not work, mainly because it was over the telephone.

5.3.3 Duration of expert evidence

In all but one case (47, 97.9%), concurrent evidence was given by only one set of experts during the hearing. In the other case, two sets of experts gave evidence concurrently in separate sessions.

Table 17 sets out the length of time taken to give concurrent evidence for all but two of the 49 occasions³⁶ on which concurrent evidence was given. In one case, no data was available in relation to the length of concurrent evidence. In a second case where three experts had been involved, the experts did not all spend the same amount of time giving evidence.

³⁶ Time has been recorded for both of the two sessions of CE that occurred during one hearing.

Table 17: Length of time spent giving concurrent evidence

Length of time	All matters		Veterans' Affairs		Compensation		Aviation	
	n	%	n	%	n	%	n	%
30 minutes or less	2	4.3	2	7.4	-	-	-	-
31 – 60 minutes	6	12.8	5	18.5	1	5.3	-	-
61 – 90 minutes	21	44.7	10	37.0	11	57.9	-	-
91 – 120 minutes	10	21.3	6	22.2	4	21.1	-	-
More than 120 minutes	8	17.0	4	14.8	3	15.8	1	100.0
Total	47	100.0	27	100.0	19	100.0	1	100.0

Table 17 demonstrates that, in the majority of cases, the amount of time spent giving concurrent evidence was between 61 and 90 minutes. This was consistent between the case types, although the proportion of Compensation cases falling within this time band was somewhat higher. In approximately one-third of cases, concurrent evidence took longer than 90 minutes to complete.

In terms of the range of times, the lowest recorded amount of time was 20 minutes and the longest time was 210 minutes.

In relation to the different types of experts, concurrent evidence was given by medical/physical experts on 26 occasions in relation to which time was recorded. Medical/psychiatric experts gave evidence on 21 occasions. Table 18 sets out the length of time spent giving evidence by expert type.

Table 18: Length of time spent giving concurrent evidence by expert type

Length of time	All matters		Medical/physical		Medical/psychiatric	
	n	%	n	%	n	%
30 minutes or less	2	4.3	2	7.7	-	-
31 – 60 minutes	6	12.8	4	15.4	2	9.5
61 – 90 minutes	21	44.7	13	50	8	38.1
91 – 120 minutes	10	21.3	4	15.4	6	28.6
More than 120 minutes	8	17.0	3	11.5	5	23.8
Total	47	100.0	26	100.0	21	100.0

Given the small size of the sample, it is difficult to draw any firm conclusions from the results. However, concurrent evidence given by medical/psychiatric experts was recorded as taking longer in a slightly higher proportion of matters. Without a control group, however, it is not possible to identify whether this is the result of using CE procedures or whether medical/psychiatric evidence given in the traditional format also generally takes longer.

5.3.4 Perceptions of duration of hearing and expert evidence

The Members Evaluation Survey asked members questions regarding their perceptions as to the impact of the use of CE procedures on:

- the length of the hearing overall; and
- the time spent by experts giving their evidence.

In relation to the amount of time spent by the experts giving evidence, members were asked to specify how much time was saved or how much additional time was required by having the experts give evidence concurrently.

Hearing duration

Table 19 sets out the responses of members in relation to the impact of CE on the length of the hearing: that is, whether CE procedures resulted in the hearing of the case taking more, less or about the same amount of time as it would have taken under the usual procedures for hearing expert evidence.

Table 19: Impact of CE procedures on the length of the hearing

Impact	All matters		Veterans' Affairs		Compensation		Aviation	
	n	%	n	%	n	%	n	%
Hearing took more time	10	17.2	6	19.4	4	15.4	-	-
Hearing took less time	17	29.3	9	29.0	8	30.8	-	-
Hearing took same time	31	53.4	16	51.6	14	53.8	1	100.0
Total	58	100.0	31	100.0	26	100.0	1	100.0

Members reported that, in approximately half of the cases in which they were involved, CE procedures had no impact on the length of the hearing. While a negative impact on the length of the hearing was recorded in some cases, a positive impact was recorded in a larger number of cases. There was no discernible difference between the different case types in relation to this response.

Some minor differences were noted when the results were examined by expert type. While the results followed a similar pattern, a slightly higher proportion of hearings involving medical/psychiatric experts (6, 22.0%) took longer than hearings involving medical/physical experts (4, 13.0%). However, given the small size of the sample and the absence of a control group, it is not possible to draw any firm conclusion in relation to these results.

Parties' representatives noted that the use of CE can decrease the total hearing time because the expert evidence is heard at the same time. This was not always the case, however, and depended to a large degree on how efficiently the CE procedure was undertaken.

Duration of expert evidence

Table 20 sets out the responses of members in relation to the impact of CE on the length of time spent by the experts giving evidence: that is, whether the amount of time spent by the experts giving evidence was more, less or about the same as it would have been using the usual procedures for hearing expert evidence.

Table 20: Impact of CE procedures on the length of time spent giving evidence

Impact	All matters		Veterans' Affairs		Compensation		Aviation	
	n	%	n	%	n	%	n	%
More time spent	13	22.4	7	22.6	6	23.1	-	-
Less time spent	18	31.0	8	25.8	10	38.5	-	-
Same time spent	27	46.6	16	51.6	10	38.5	1	100.0
Total	58	100.0	31	100.0	26	100.0	1	100.0

As with perceptions relating to the length of the hearing, members reported that, in approximately half of the cases in which they were involved, CE procedures had no impact on the length of time spent by experts giving evidence. While a negative impact on the length of the hearing was recorded in some cases, a positive impact was recorded in a slightly larger number of cases.

Some minor differences were noted when the results were examined by expert type. In relation to hearings involving medical/psychiatric experts, the number of responses indicating that the time taken to give evidence concurrently had been longer than would otherwise have been the case (8, 30.0%) was one greater than the number of responses indicating that the time taken to give evidence concurrently had been shorter (7, 26.0%). Taking evidence concurrently took longer in a slightly higher proportion of hearings involving medical/psychiatric experts (8, 30.0%) than hearings involving medical/physical experts (5, 16.0%). Again, given the small size of the sample and the absence of a control group, it is not possible to draw any firm conclusions in relation to these results.

Members were asked to identify how much time had been saved by using CE procedures or how much additional time was required. Where members reported that less time had been taken, the estimated time savings were most commonly reported as being between 1–2 hours. Where more time was reported, again, most commonly the response was an increase of 1–2 hours.

The perceptions of parties' representatives in relation to the length of time that experts spent giving concurrent evidence accords generally with the data obtained. A number of representatives reported that they advised expert witnesses to set aside 2 hours if they were giving their evidence concurrently.

In terms of the overall impact of CE on the length of time taken by experts to give evidence, representatives noted that the process can be shorter. As one stated:

... instead of two doctors appearing for one hour each there may be two doctors appearing for 1.5 hours, so the evidence takes 1.5 hours rather than 2 hours to present ...

Representatives also noted, however, that the time spent by individual experts giving evidence is longer than if they were giving evidence alone. For example, one representative stated,

[i]f evidence is given using CE the doctors are needed for a longer time. I normally tell doctors that they will be in the witness box for one hour if they are giving evidence in the traditional manner. However, if CE is being used I tell them it will take 2 hours.

Some representatives noted that the additional time required for experts to give evidence can increase costs. Others noted that it did not have an effect on their costs. This difference may relate to the way in which different parties engage and remunerate experts.

The experts themselves gave mixed responses in relation to the amount of time they spent giving evidence concurrently. They were equally divided as to whether it took more time or the same amount of time as giving evidence in the traditional manner. A minority felt that they were in the witness box for less time when giving evidence concurrently.

A number of experts felt that they were typically in the witness box for about 90 minutes when giving CE. Comments from experts included:

It took me longer, but I don't think it necessarily took the Tribunal longer because instead of having two people giving evidence one after the other, they had them both giving evidence at the same time. I would have thought that the total time was probably about the same for the Tribunal.

The main impact that I've experienced is in the actual length of the hearing. It's easier for me to go in and give evidence on my own and get out. A concurrent evidence hearing invariably takes longer.

... I can reasonably allow 2 hours for concurrent evidence and know that that will be the amount of time that is required as against an hour for giving evidence on my own and that's what I factor into my schedule.

It extends the amount of time that I allocate by one hour. So it increases the costs related to me attending the Tribunal by an hour.

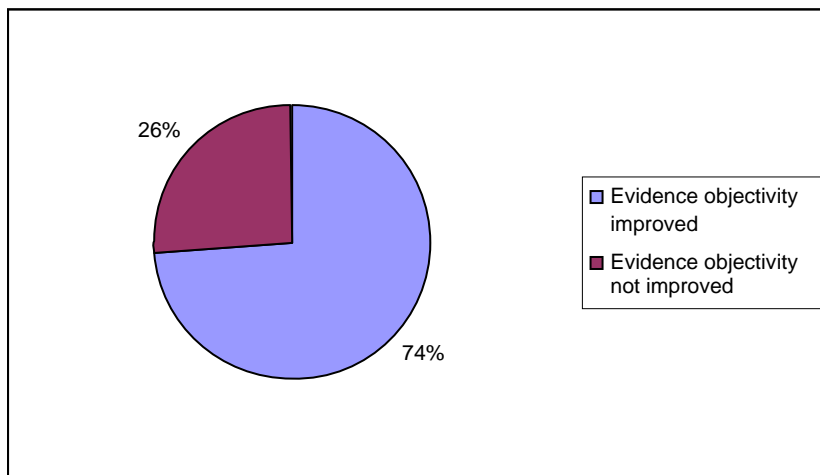
Interestingly, the majority of experts did not feel that CE had an impact on the costs associated with preparing and presenting their evidence.

5.4 Assessment of evidence, decision-making and writing decisions

5.4.1 Objectivity and quality of evidence

The Members Evaluation Survey asked members whether concurrent evidence improved the objectivity of the evidence provided by the experts. As set out in Figure 6, in most responses (42, 73.7%), members reported that the objectivity of the evidence presentation was improved due to the use of CE.

Figure 6: Objectivity of expert evidence and CE

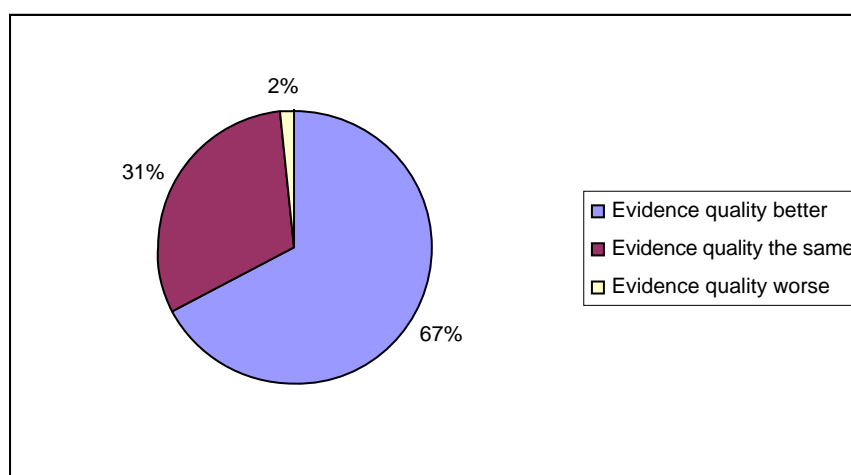


When the responses relating to objectivity of evidence are analysed by expert type, members reported in a greater number of hearings involving medical/physical evidence (26, 87%) that there had been an improvement in the objectivity of the evidence compared to medical/psychiatric evidence (16, 63.0%).

In many cases before the Tribunal, the facts underlying the claim are in dispute. Experts can be required to give an opinion on different sets of possible factual scenarios. Members were asked to record whether CE procedures enabled the experts to provide their opinion on interpretations of the factual scenarios. In almost all cases (55, 94.8%) members reported that the experts had been able to do so.

Members were also asked whether CE had any impact on the quality of the expert evidence submitted to the Tribunal. Members mainly reported that it was better (39, 67.2%). Eighteen responses (31.0%) stated that it was the same and there was only one report of evidence quality being inferior.

Figure 7: Evidence quality and CE



When the responses concerning quality of evidence are analysed by case type, members recorded that the quality of evidence had improved in a greater number of Veterans' Affairs matters (22, 71.0%) as opposed to Compensation matters (17, 65.4%). However, given the small sample involved, it is difficult to draw any firm conclusions concerning the significance of these results.

A number of representatives felt that the quality of expert evidence was of a higher standard under CE. Some of their comments included the following:

The more extreme positions are neutralised.

One good thing about CE is that it overcomes the limited medical knowledge of counsel. I can rely on my witness picking up on those types of things. If the expert on the other side gives evidence I don't understand, my witness can pick up on it and the issue can be discussed.

... the evidence was better because of the interchange between the experts. The result was better in that case.

Some representatives noted that the quality of evidence may not be as good if the CE procedures are not well-controlled and focussed on the issues in dispute. For example, one representative commented:

I've seen experts start to debate issues that they think are important but that are not strictly relevant to the matter before the Tribunal. ... it can be difficult to rein the proceedings in in those cases.

As was noted in section 4.3, some representatives expressed concern about the quality of the evidence where one expert is participating by telephone and also in those cases where there were concerns about an expert deferring to the view of a more senior expert.

Experts were asked whether the use of CE impacts on the objectivity of the evidence provided by experts. Five experts agreed while eight disagreed.

The experts were almost equally divided as to whether CE affected the quality of the evidence they gave to the Tribunal: 7 of 13 (53.8%) considered that it did impact on the quality of evidence. Of those experts, the majority stated that the quality of the evidence was improved.

Comments from the experts included:

I think it keeps the expert opinions more honest. I think it's much more difficult for people to say things that they find difficult to defend and perhaps wouldn't say with their colleague there ...

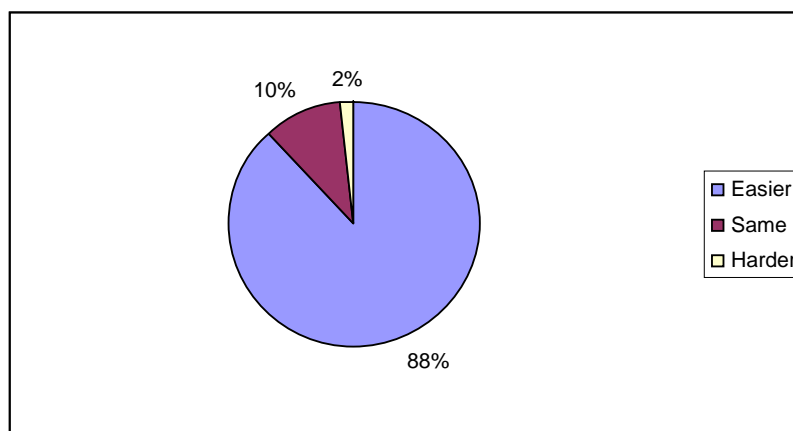
... it's not always the case that all the fine details are understood by a Tribunal and if you're working together with a colleague, even though you may have differing conclusions about the case, I think it was a very useful exercise on a number of occasions to be able to give evidence together and to be able to see what the large areas of agreement [were] and be able to explain where the disagreement lay.

As noted in section 4.3, experts considered that the quality of the evidence they gave could be negatively affected by the behaviour of the experts during the CE session and issues of professional courtesy.

5.4.2 Comparing evidence

Members were asked whether CE made it easier or harder to compare the evidence of each of the experts than the usual presentation of expert evidence. In most responses (51, 87.9%), members reported that CE made evidence comparison easier. Six reported that it was the same (10.3%) and only one reported that it was made harder. It is noted that the member who reported that the evidence comparison was harder was not the same member who identified the quality of evidence as being inferior.

Figure 8: Evidence comparison using CE



5.4.3 Overall impact on decision-making

Members were asked whether the decision-making process was enhanced by the CE process and, if so, how it was enhanced. Most members (52 responses, 88.1%) reported that the decision-making process was enhanced by the use of the CE process. The ways in which the use of CE procedures served to enhance the decision making process are set out in Table 21.

Table 21: The decision making process and CE

How was the decision making process enhanced?	n	%
Less background research was required	4	7.7
Technical issues were easier to understand	30	57.7
The issues were distilled more quickly	35	67.3
Areas of contention were identified	40	76.9
The reasons did not require a lengthy investigation of 'non issues'	19	36.5
Other reasons	6	11.5

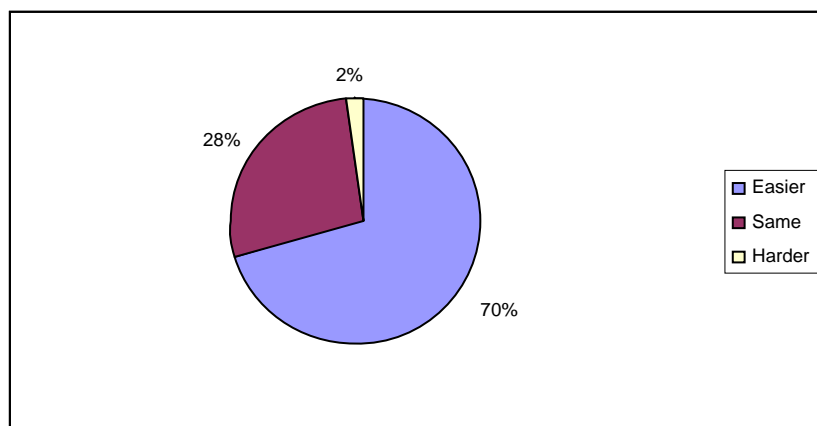
The three main ways in which CE enhanced decision-making were by:

- identifying areas of contention;
- distilling the issues more quickly; and
- making technical issues easier to understand.

5.4.4 Impact on decision-writing

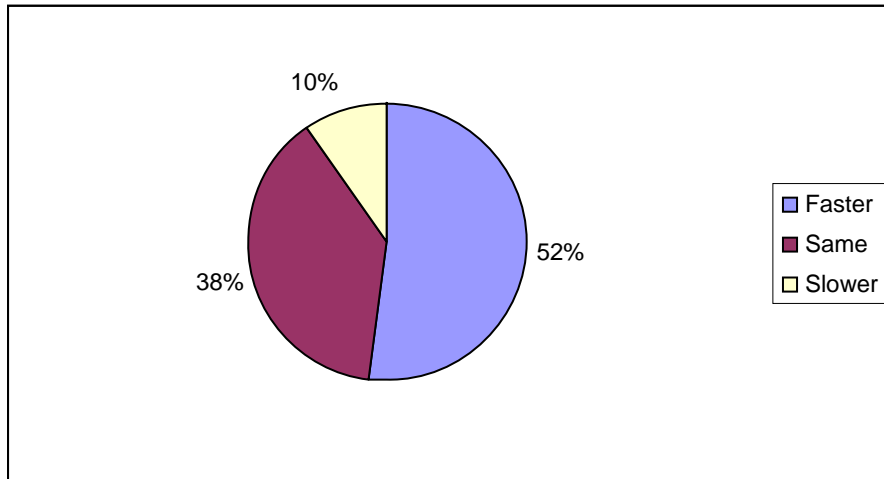
In most responses (38, 70.4%), members reported that the process of writing a decision was easier as a result of CE being used at the hearing. In 15 cases (27.8%), members reported that there was no difference. In one case it was reported that the writing of the decision was harder following the use of the CE process.

Figure 9: Was writing a decision easier or harder?



In just over half of the responses (27, 51.9%) members reported that the writing of the decision was faster. In 20 responses (38.5%) members indicated there was no difference and in five responses (9.6%) it was reported that the writing of the decision was slower as a result of the case using CE at hearing.

Figure 10: Was writing a decision faster or slower?



5.5 Appeals

An appeal was lodged with the Federal Court under section 44 of the *Administrative Appeals Tribunal Act 1975* in relation to five of the 44 matters that used CE procedures at hearing and were finalised by a decision. Of these five appeals, three were Veterans' Affairs matters (one applicant and two respondent appeals) and two were Compensation matters (both respondent appeals).

As set out in Table 22, two of the three Veterans' Affairs matters were dismissed. One matter was remitted to the Tribunal by consent of the parties. One of the Compensation matters was remitted to the Tribunal and the second matter was dismissed by consent.

Table 22: Matters that used CE that were appealed to the Federal Court

Jurisdiction	Matters appealed	Dismissed	Remitted
Veterans' Affairs	3	2	1
Compensation	2	1	1

The use of CE was not raised as an issue by any of the parties in the appeals. Similarly, the Federal Court did not comment on the use of concurrent evidence in any of its three decisions, although in one case the Court did note that "joint evidence" was given by the medical experts.

Chapter 6: Satisfaction with concurrent evidence

This chapter examines the extent to which members, representatives and experts involved in a matter which used CE in a hearing considered that the CE process was efficient and effective. In particular, it assesses whether the CE process was useful in distilling issues, clarifying positions and in supporting a fair process and outcome. This chapter also provides information on overall satisfaction with the CE procedures.

6.1 Efficiency and effectiveness

The evaluation survey asked members to report on how efficient CE was as a procedure to deal with and decide a case in the jurisdiction. Members all reported that the procedure was efficient, with 27 of the 62 responses (43.5%) reporting CE to be very efficient and 35 (56.5%) that it was somewhat efficient. Members viewed CE as being equally as efficient in both Veterans' Affairs and Compensation matters.

A series of questions asked members to indicate how effective they believed CE to have been in the individual case they dealt with. The following table provides these results.

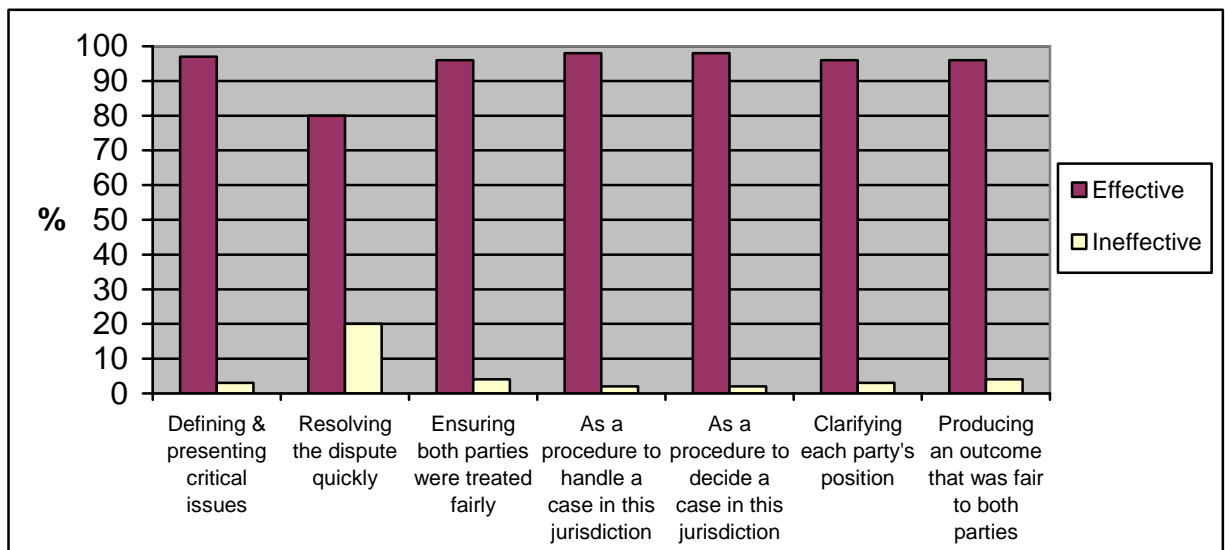
Table 23: How effective is CE?

How effective are CE procedures with regard to the following <i>in this case</i> :	Very effective		Somewhat effective		Somewhat ineffective		Very ineffective	
	n	%	n	%	n	%	n	%
Defining & presenting critical issues	39	67.3	17	29.3	1	1.7	1	1.7
Resolving the dispute quickly	7	12.5	38	67.8	9	16.1	2	3.6
Ensuring both parties were treated fairly	30	58.8	19	37.3	2	3.9	-	-
As a procedure to handle a case in this jurisdiction	29	50.0	28	48.3	1	1.7	-	-
As a procedure to decide a case in this jurisdiction	28	48.3	29	50.0	1	1.7	-	-
Clarifying each party's position	35	60.4	21	36.2	2	3.4	-	-
Producing an outcome that was fair to both parties	32	60.4	19	35.8	2	3.8	-	-

Table 23 shows that CE was perceived as being effective in the majority of cases. It was considered to be particularly effective in:

- defining and presenting critical issues;
- clarifying each party's position; and
- both ensuring that parties were treated fairly and producing a fair outcome.

Figure 11: How effective is CE?



The main issue where there was some negative response to the CE procedures related to whether it resolved the dispute quickly. Of the 11 matters where CE was seen as somewhat or very ineffective in resolving the dispute quickly, there were six Veterans' Affairs matters and five Compensation matters. Seven of the 11 matters involved medical/psychiatric evidence while the remaining four related to medical/physical evidence.

Several representatives made comments concerning the efficiency of CE. In relation to the benefits of CE in defining and presenting critical issues, comments included:

I felt that CE was helpful for the member to narrow the issues.

It is good having the doctors ask each other questions, especially when technical issues are involved, because it helps the Tribunal come to the correct and preferable decision.

Where it is good, it narrows issues and limits witnesses.

It is helpful to have both witnesses together as it brings into sharper relief the differences between the experts, it encourages dialogue and it saves a lot of time.

Some representatives noted that this did not always occur, particularly where the Tribunal did not exercise sufficient control over the proceedings. One representative noted:

It can be very difficult to control the amount of evidence that comes out in the CE process. At times CE has expanded the areas of disagreement.

It is not useful when there is unstructured discussion ...

In relation to the fairness of the process, representatives did not raise any general problems with the way in which the Tribunal managed the CE procedures during the hearing. Issues relating to possible difficulties where one expert is giving evidence by telephone have been canvassed in section 4.3. One representative also remarked that CE tends to advantage the side with the greatest resources because the party who prepares the expert better will have the advantage.

As noted in section 5.3.1, two representatives raised concerns about the experts conferring in the absence of the parties or the Tribunal.

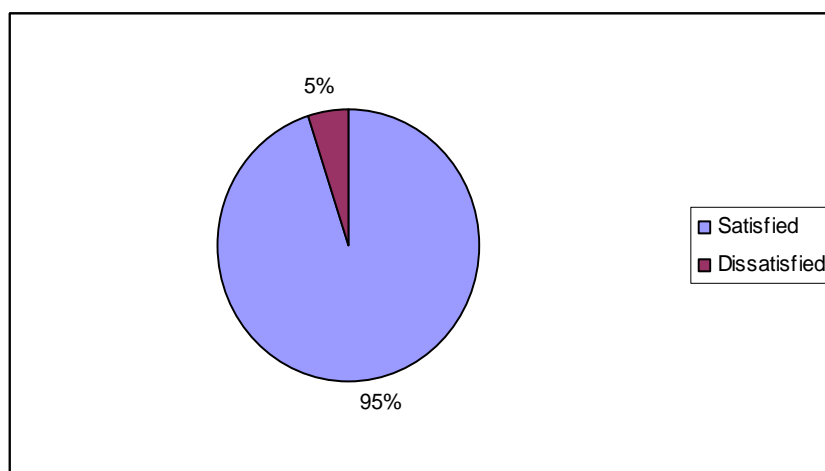
All but one of the experts surveyed considered that CE gives both sides an equal chance to give their opinion during the hearing. Nine of the 13 experts considered CE is generally fair and equal to both sides. Eight of the 13 experts did not believe that CE inhibited Tribunal members from giving appropriate attention to the evidence of each expert.

In terms of the impact of the use of CE on preparation time, responses from representatives varied. Some thought it made no difference while others suggested that it is necessary to spend more time briefing the experts. It was acknowledged, however, that this may change if CE is used more. Among experts, nine of the 13 surveyed stated that CE has no impact on their workload.

6.2 Overall satisfaction

Satisfaction with the use of CE in the cases under review was reported by members in 56 (94.9%) responses. Dissatisfaction with the use of CE was reported in only three cases (5.1%). In these cases members expressed dissatisfaction with the process because of the way in which the experts or representatives had approached the concurrent evidence session.

Figure 12: Member satisfaction with CE



While representatives and experts had a number of suggestions about the way in which the CE procedures could be improved, a majority of both representatives and expert witnesses expressed general satisfaction with the CE process and support for its continued use in the Tribunal.

Comments from representatives included:

Overall, I thought that in the right type of case CE is very productive, especially for the members' benefit.

Generally my experience has been good and I feel that the other solicitors in my office think it is good.

My overall impression is that it is a good thing worth having in the Tribunal's "armory".

Overall it is a good idea ... Overall, CE will work and does make it cheaper and more efficient in the right case.

Comments from experts included:

I just feel that there's a much more open discussion in concurrent evidence situations than with the old system. I think the consultants that are called giving the concurrent evidence can discuss the matter through the Tribunal and resolve the issues more easily.

As I said before, I would think that the parties and the AAT are going to be better off because the evidence given before the Tribunal is going to be more to the point and be more carefully delivered.

I think that it is suitable but it might be more suitable in some circumstances than in others depending on the nature of the witnesses, the nature of the presiding member or the nature of the solicitors, I mean all of those things make it more or less suitable.

It's certainly easier I would think for the AAT to have two people there answering questions and listening to each other and coming to conclusions. It's more efficient and I think it's quicker. I like to think that the AAT could probably profit from it.

I think it does give the Tribunal an extra level of inquiry which isn't present when expert evidence is given one at a time, but I think it should be used sparingly because of the time constraints and because of it being a more demanding procedure for the expert.

From a doctor's perspective, it's an entirely suitable procedure. I'm not able to comment on whether it's suitable from a legal perspective. Doctors usually reach decisions by discussion and by consensus rather than by an adversarial process which is a very alien process to us.

Chapter 7: Conclusions

The findings of the study suggest that the use of CE procedures is broadly consistent with the objectives that were identified by the Tribunal. The responses from Tribunal members make clear that CE procedures enhanced their capacity to make the decision in most cases. Their responses in relation to perceived improvements in the objectivity and quality of expert evidence and comments from experts tend to support a conclusion that CE procedures assisted experts to fulfil their role as independent advisers. In relation to the impact of CE procedures on the efficient conduct of Tribunal proceedings, the results of the study were more mixed but can be considered positive overall.

Looking firstly at the time taken to resolve matters, the impact of CE procedures can be considered both in relation to the settlement of cases and the finalisation of cases that used CE procedures at hearing. In relation to the settlement of cases, the study suggests that asking parties to consider at an early stage whether a matter is suitable to use CE procedures led to the settlement of some matters earlier than would otherwise have been the case. In relation to cases that proceeded to hearing, the use of CE procedures did not impact negatively on the length of the hearing or the overall time taken to give expert evidence in most cases. In a significant number of cases, the hearing was shorter and the overall time taken to give expert evidence was also shorter. Additionally, Tribunal members reported that the use of CE procedures enabled the decision to be written more quickly in approximately half of the cases.

In relation to the cost of proceedings, there are some efficiencies for the Tribunal in relation to those matters that took less time to hear and in which the time required to write a decision was less. For the parties, however, the study shows that the use of CE procedures meant that individual experts spent longer giving evidence. This can have an impact on the costs incurred by each party.

While the use of CE procedures will not always lead to the case being heard or finalised more quickly, the advantages for the Tribunal in terms of consideration of the evidence and decision-making appear to be significant. Tribunal members expressed satisfaction in almost all cases. Representatives and expert witnesses also expressed general satisfaction with the CE procedures. These taken together provide support for the Tribunal continuing to use CE procedures. However, it is clear from the study — not only from the findings but also from the comments from Tribunal members, representatives and expert witness — that there are ways in which the CE procedures can be improved. Consideration should be given to a number of matters in relation to the continued use of CE.

- Guidelines for identifying and selecting cases in which CE procedures will be used

The study has identified the factors that were considered to be most important in deciding which cases are suitable or not suitable for CE. Comments from members, representatives and experts have provided additional insight into issues that impact on whether CE will be successful. The results of the study can be used to develop guidelines for selecting matters to use CE that set out the factors to be taken into account and particular indicators as to whether CE may or may not be suitable in particular cases.

The guidelines for selecting matters to use CE should be made generally available so that parties, their representatives and experts are aware of the approach adopted by the Tribunal in relation to deciding which matters may be suitable for CE. This will also assist parties and their representatives to consider whether CE may be suitable in their case and to make representations to the Tribunal in relation to whether or not CE should be used.

Any guidelines developed in relation to identifying and selecting cases to use CE should also address how and when the decision will be made. Particular issues to consider in this regard include the way in which the parties will be involved in the decision-making process and the time at which the decision is to be made.

- Guidelines relating to the procedures for taking concurrent evidence

The study revealed some concerns that, despite the existence of a set of guidelines for taking concurrent evidence, the procedures for taking concurrent evidence during a hearing were not consistent between Tribunal members. Tribunal members and representatives also identified that representatives were not always certain about their role during the hearing.

It will be necessary to review the guidelines prepared for the study and ensure that they contain a clear set of procedures for the CE process. In particular, the guidelines must address the roles and expectations of the Tribunal members, representatives and experts in relation to giving evidence concurrently. Providing a clear set of guidelines will assist to make the taking of concurrent evidence as consistent and efficient as possible. In particular, it may assist to reduce the instances in which CE takes longer than if the evidence were given in the traditional manner.

- Provision of information and training in relation to the use of CE

The provision of information and training in relation to the use of CE will assist to make the taking of concurrent evidence consistent and efficient. The CE procedure involves a departure from the traditional way in which expert evidence is given and it is likely to be more effective if participants share an understanding of how it is to operate. Without the support of the participants, the CE process may not be effective as it could be.

Tribunal members play a central role in controlling how the procedure operates and ensuring that it works effectively. If CE is to be used consistently across the Tribunal, it will be important to ensure that Tribunal members are provided with information and training in relation to selecting matters where CE may be suitable and the procedure for using CE at hearing.

The provision of information and training will also be important for representatives who appear regularly in matters where CE may be used. For experts, the provision of information regarding the procedure will assist them to prepare for giving evidence in this manner.

Information and training strategies for Tribunal members, representatives and experts should be developed. These may include written materials, information sessions and demonstrations of the use of CE.

- Providing adequate hearing room facilities for taking concurrent evidence

Consideration should also be given to the hearing room facilities that are best-suited for CE. In particular, the witness box in more formal hearing rooms may not comfortably accommodate more than one expert giving evidence. The Tribunal's hearing rooms comprising one continuous oval-shaped table would appear to be better suited to accommodating a number of experts. The Tribunal will need to ensure that appropriate hearing room facilities are available when CE is to be given.

Appendices: Surveys and other documentation

Appendix 1: Background Paper on Study

Appendix 2: CE Pamphlet

Appendix 3: Procedures for CE — A guide for members

Appendix 4: Members Case Selection Sheet

Appendix 5: Members Evaluation Survey

Appendix 6: File-based Survey

Appendix 7: Member Final Survey

Appendix 8: Focus Group Topics for Representatives

Appendix 9: Experts Telephone Survey



ADMINISTRATIVE APPEALS TRIBUNAL

Background Paper Concurrent Expert Evidence Study

Purpose

The Tribunal in Sydney is conducting a study of its use of concurrent evidence (CE) in hearings. It is anticipated that the use of CE procedures for expert evidence will improve the standard of evidence and the efficiency of decision making in the Tribunal. The Tribunal seeks your assistance in making the study a success. This background paper provides an outline of the way in which the study will be implemented and how those procedures will affect legal practitioners and their clients.

Background

Observations of difficulties with obtaining objective evidence of expert witnesses has been identified by the Australian Law Reform Commission ("the ALRC"). In its report, *Managing Justice*¹, the ALRC demonstrated that current methods of presentation of expert evidence, through examination and cross-examination, may be confusing and unhelpful to judges and do not always allow experts to fully communicate their opinions to the decision maker.

Proposal

The Tribunal is conducting a study of the efficiency and effectiveness of CE procedures in cases in NSW. It is expected that cases that go to hearing between December 2002 and 30 June 2003 will be included in the study, and that 50–100 cases will use CE procedures during that time.

Discussion

What is concurrent evidence?

CE involves the taking of sworn evidence of more than one expert at the same time. It provides a forum in which, in addition to providing their own evidence, expert witnesses can listen to, question and critically evaluate, other experts' evidence. CE is currently being used in the Tribunal and the Federal Court,² and similar procedures have been used with success in other jurisdictions, for example, joint conferences between experts in the NSW Supreme Court.³

¹ <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/alrc/publications/reports/89/ch6.html>.

² *Federal Court Rules 1979* Order 34A, Rule 3.

³ *Supreme Court Rules 1970* Part 36, Rule 13CA.

Anecdotally, the benefit to the Tribunal and parties in using CE procedures is that it can reduce hearing time. The Federal Court's experience is that the procedure narrows the issues in dispute, that it is beneficial for all of the expert evidence to be presented whilst fresh in the mind of the decision maker, that it results in a reduction in the level of partisanship of experts, and that it results in a saving in hearing time.⁴

In the Tribunal hearing of *Re Baltersan Investments Pty Ltd and Others and Geographical Indications Committee*⁵, CE procedures (sometimes colloquially referred to as "hot tubs") were used. 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 5 weeks. In another case, the then President also adopted the CE method when hearing several Veterans' Division applications involving dietary evidence of the level of fats in the diets of veterans who were later diagnosed with prostate cancer. The expert dieticians in those cases gave their evidence using CE procedures, thus reducing hearing time and allowing the Tribunal to test and better understand the expert evidence.⁶

Tribunal statutory provisions

Section 33(1) of the *Administrative 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, within the requirements of the law. This provision was drafted with a view to maximising access to justice for the parties, and with a view to minimising cost, delay and complexity. The Tribunal currently uses CE procedures where it is believed that the process will achieve these aims.

Why is a CE study being conducted?

To the best of our knowledge, no empirical studies have been conducted of the effectiveness of CE. As in many jurisdictions, experts are used extensively in matters that are heard by the Tribunal.⁷ Much expert evidence is complex and difficult to understand, particularly where it is of a scientific or technical nature.⁸ It is anticipated that the introduction of CE procedures will:

- (a) 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;

⁴ Australian Institute of Judicial Administration, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study*, 1999, p. 109 & 161. Justice P Heerey, "Expert Evidence: The Australian Perspective", Paper delivered to the WIPO Asia-Pacific Colloquium, New Delhi, 6 February 2002, p. 9.

⁵ [2001] AATA 844.

⁶ *Re Keenan and Repatriation Commission* [2000] AATA 707.

⁷ In June 1999, 84% of compensation cases sampled used expert witnesses, 77.9% in veteran's affairs and 20.8% in social welfare. See Alston, B., Sourdin, Dr T. & Repton, A., *Part one: Empirical information about the Administrative Appeals Tribunal*, ALRC, June 1999, p. 32.

⁸ In a study conducted by the AIJA, 29.4% of magistrates who responded to the survey said that they "often" experience difficulties in understanding the expert evidence and 54.8% of respondents said that they "occasionally" experienced difficulty; Australian Institute of Judicial Administration, *Australian Magistrates' Perspectives on Expert Evidence: A Comparative Study*, 2001, p. 45.

- (b) assist experts in fulfilling their role as independent advisers whose primary role is to assist the court or tribunal;⁹
- (c) enhance the efficient operation of Tribunal proceedings by reducing the time taken to resolve matters.¹⁰ This may also lead to a reduction in cost to the Tribunal and parties of each proceeding.¹¹

This study aims 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. Survey tools have been developed to evaluate satisfaction, delay and cost variables in the empirical study group.

Which cases will use CE procedures?

Only matters where all parties are represented will participate in the study. Tribunal members will select cases that are considered suitable for CE procedures. In making such selection, members will take into account:

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

The procedures for taking Concurrent Evidence

The Tribunal is not bound by the rules of evidence and may hear evidence in any manner it thinks appropriate. However, it is anticipated that the procedure for expert witnesses giving CE will be along the following lines, albeit with some flexibility in an individual hearing.

Prior to the hearing

- Prior to callover, a party will be requested to confer with the other party and to submit a hearing certificate that lists dates on which all expert witnesses are available to give evidence concurrently.
- After callover, members will select suitable cases for CE. The parties will be notified that CE procedures are to be used in the case. Parties' representatives will be asked to notify expert witnesses of these procedures.

⁹ Lord Woolf, *Access to Justice: Final Report*, Chap 13.

¹⁰ CE has resulted in shorter hearing times in the Federal Court; Justice P Heerey, *Op Cit*, p.9. It is anticipated that it will have the same result in the Tribunal, reducing the cost of hearings to parties and the Tribunal. The empirical study will assess whether this objective is being achieved.

¹¹ *Ibid*. The Woolf Report identified expert evidence as one of the main causes of excessive expense in the civil justice system. Similarly, the cost to the applicant of using an expert in Tribunal matters has been documented; For example, it has been found that in veteran's affairs cases, the longer a case takes to resolve, the more cost there is to the applicant: Alston, B., Sourdin, Dr T & Repton, A., *Part two: Empirical information about the Administrative Appeals Tribunal*, ALRC, June 1999, pp. 33.

On the day expert evidence is heard

- Expert witnesses should arrive in time to confer before evidence is taken.
- The Tribunal will summarise orally or in writing agreed and disagreed facts at the outset of the expert evidence.
- The applicant's expert witness might give a brief oral exposition or the Tribunal may proceed to ask questions of the expert witnesses.
- The respondent's expert will be 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 will be 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 above process, the Tribunal may intervene and ask questions.

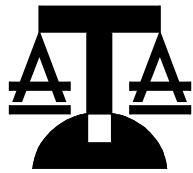
After the decision is handed down

Data will be collected from cases finalised by the Tribunal where CE procedures were used. The parties' representatives will be asked to complete a survey about their satisfaction with the CE procedures, the quality of the evidence presented to the Tribunal, and perceptions of the fairness of the process and outcomes. Parties will also be asked to comment on whether the critical issues were adequately defined and presented, and their perceptions of whether the Tribunal properly understood and analysed the expert evidence. They should also provide any suggestions for improvement.

In addition to the parties' representatives survey, the presiding member of the Tribunal will be asked to complete a questionnaire once the case is concluded. Information will be collected from files and from the Tribunal's computer database ("AATCAMS"). At the end of the study, a consultation meeting will be held with those expert witnesses who participated in the study.

Comments

The Tribunal welcomes your questions and comments in relation to the concurrent evidence study. We seek your views about the structure of the study, the data sample, the procedures and the collation of data. Please contact Katie Valentine or Sofia Frew, Policy & Research Unit, Principal Registry, Administrative Appeals Tribunal, Level 7, 55 Market St, Sydney NSW 2000 on (02) 9391 2444 or 9391 2538 or email katie.valentine@aat.gov.au or sofia.frew@aat.gov.au



Administrative Appeals Tribunal

Concurrent Expert Evidence

A Guide to the Use of Concurrent Evidence Procedures in the Tribunal

Under section 33(1) of the *Administrative Appeals Tribunal Act 1975* the Tribunal is to conduct proceedings with as little formality and technicality and with as much expedition as possible, within the requirements of the law. The Tribunal is not bound by the rules of evidence and may hear evidence in such manner as it thinks appropriate.

The Tribunal sometimes uses concurrent evidence procedures where it is believed that the process will achieve these aims. The Tribunal may decide that your case is appropriate for the taking of expert evidence by concurrent evidence procedures.

This pamphlet is designed to let you know about what concurrent evidence is and how expert witnesses may be required to give their evidence to the Tribunal.

What is concurrent evidence?

Concurrent evidence (colloquially sometimes also known as "hot tubs") involves the taking of sworn evidence of experts at the same time. It provides a forum in which, in addition to providing their own evidence, expert witnesses can listen to, question and critically evaluate other experts' evidence.

The Tribunal and the Federal Court currently use concurrent evidence and similar procedures have been used with success in other jurisdictions, for example, joint conferences between experts in the NSW Supreme Court. A particular benefit in using concurrent evidence is that it can have the effect of reducing hearing time. The Federal Court's experience is that the procedure also narrows the issues in dispute and reduces any partisanship on the part of experts.

What are the procedures for taking concurrent evidence?

It is anticipated that the procedure for expert witnesses giving concurrent evidence will be as follows:

Prior to the hearing

- Prior to callover, a party will be requested to confer with the other party and to submit a hearing certificate that lists dates on which all expert witnesses are available to give evidence concurrently.

- After callover, members will select suitable cases for CE. The parties will be notified that CE procedures are to be used in the case.
- Parties' representatives will be asked to notify expert witnesses of these procedures and to ensure that experts have had the opportunity to consider the other experts' reports, prior to hearing.

On the day expert evidence is heard

- Expert witnesses should arrive in time to confer before evidence is taken.
- The Tribunal will summarise orally or in writing agreed and disagreed facts at the outset of the expert evidence.
- The applicant's expert witness might give a brief oral exposition or the Tribunal may proceed to ask questions of the expert witnesses.
- The respondent's expert will be 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 will be 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 above process, the Tribunal may intervene and ask questions.

Questions?

If you have any questions about concurrent evidence procedures, please contact:

Sofia Frew, Research Officer
Principal Registry
Administrative Appeals Tribunal
Level 7, 55 Market St
Sydney NSW 2000
(02) 9391 2538
sofia.frew@aat.gov.au

Procedures for CE — A Guide for members

These procedures are recommended to assist members to hear expert evidence using concurrent evidence procedures.

The Tribunal is not bound by the rules of evidence and may hear evidence in any manner it thinks appropriate. However, it is anticipated that the procedure for expert witnesses giving CE will be along the following lines, albeit with some flexibility in an individual hearing.

Prior to the day expert evidence is heard

- Parties have been notified by the Tribunal that CE procedures will be used to hear expert evidence.
- Parties will have exchanged expert reports and parties' experts will have been given the opportunity to consider the other experts' reports.

On the day expert evidence is heard

- Expert witnesses have been asked to arrive in time to confer before evidence is taken.
- The Tribunal reminds experts of their overriding duty to assist the Tribunal on matters relevant to experts' area of expertise; the expert is not an advocate for a party; the expert's duty to the Tribunal is paramount.
- Expert witnesses are sworn/take oath.
- The Tribunal summarises orally or in writing agreed and disagreed facts.
- The applicant's expert witness might give a brief oral exposition or the Tribunal may proceed to ask questions of the expert witnesses.
- The respondent's expert will be 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 will be 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 above process, the Tribunal may intervene and ask questions.

Note: When transcribing the hearing, Auscript may find it difficult to know which witness is speaking during concurrent evidence. Where possible, please address the witness by name.

Appendix 4

CONCURRENT EVIDENCE STUDY: MEMBERS CASE SELECTION SHEET

The presiding member is to complete this form after callover ONLY in cases where both parties are represented and both parties have expert evidence to present

Part A Case details

1 Member _____

2 File Number _____

3 Date: _____/_____/_____

Part B Expert details

4 Please indicate the type of expert(s) being used by both the applicant and the respondent in this case

(a) Applicant

Medical - physical []1

Specify medical specialty: _____

Medical – psychological []2

Other []3

Specify other type/s of expert being used:

(b) Respondent

Medical - physical []1

Specify medical specialty: _____

Medical – psychological []2

Other []3

Specify other type/s of expert being used:

5 Which of the following issues are in dispute?

Medical/scientific evidence []1

Factual issues []2

Both medical/scientific evidence and factual issues []3

Other (specify below) []4

Part C Selection for the CE study

6 Has the case been selected for inclusion in the CE study?

Yes []1

No []2

Id number: _____

If the matter WAS NOT included in the CE study, please complete question 7 only. If the matter WAS selected for inclusion, complete questions 8 on.

7 Based on their order of importance, please rank (1,2,3) your 3 most relevant reasons for NOT including this case in the CE

- Experts do not have the same level of expertise []1
- Experts would not be commenting on the same issues []2
- One expert may dominate the CE process []3
- Parties object to CE process []4
- Experts object to CE process []5
- CE would extend hearing time []6
- CE would unduly increase costs []7
- Experts were not available to give evidence concurrently []8
- Other (please specify below) []9

8 Based on their order of importance, please rank (1,2,3) the 3 most relevant reasons for including this case in the CE study.

- Experts have the same level of expertise []1
- Experts will be commenting on the same issues []2
- CE will clarify complex issues []3
- CE will improve the objectivity of evidence presented []4
- Parties consent to CE process []5
- CE will reduce hearing time []6
- CE will reduce costs []7
- The process will promote settlement []8
- Expert evidence is not that far apart []9
- Other (please specify below) []10

9 At what stage was the case selected for CE?

- After callover (Survey complete) []1
- Less than 1 week prior to hearing []2
- During the hearing []3

10 Why was the case selected for CE at this later stage?

- Expert witnesses became available []1
- CE identified unexpectedly as suitable []2
- Other []3

11 Please explain why CE was identified unexpectedly as suitable, or if an "other" reason applied:

Thank you for your assistance.

CONCURRENT EVIDENCE STUDY: MEMBERS EVALUATION SURVEY

Part A This case

1 How complex would you say this case was?

- Very complex []₁
Of average complexity []₂
Not complex at all []₃

2 How easy or difficult was it for you to decide whether this matter was appropriate for concurrent evidence procedures?

- The decision was easy []₁
Had some difficulty making the decision []₂
The decision was very difficult []₃

Part B Case Resolution

3 Did the case settle?

- Yes []₁
No []₂ Go to 9

4 Do you think the use of concurrent evidence procedures influenced the decision to settle?

- Yes []₁
No []₂

5 Do you think the use of concurrent evidence procedures influenced when the case settled?

- Yes []₁
No []₂ Go to 7

6 In what way/s did concurrent evidence influence the timing of settlement? (Tick all that apply)

- The concurrent evidence process:
Encouraged representatives to consider issues at an earlier time than would have ordinarily been the case []₁
Enabled settlement of a key issue to occur []₂
Provided an opportunity for the parties to hold settlement discussions []₃
Other, please specify: []₄

7 Do you consider that the concurrent evidence process saved hearing time by prompting an early settlement?

- Yes []₁
No []₂ Go to 17

8 How much hearing time do you estimate was saved?

- 1 hour or less []₁
Between 1-4 hours []₂
Between 4-8 hours []₃
More than one day []₄

Part C Timeliness

9 Do you think the concurrent evidence procedures resulted in the hearing of this case taking more, less or about the same amount of time as it would have taken under the usual procedures for hearing expert evidence?

- The hearing took more time []₁
The hearing took less time []₂
The hearing took the same amount of time []₃

10 Do you think the amount of time spent by the experts giving evidence was more, less or about the same as it would have been using the usual procedures for hearing expert evidence?

- More time was spent []₁
Less time was spent []₂
About the same amount of time was spent []₃

11 If less time was spent, how much time do you estimate was saved in hearing expert evidence?

- 1 hour or less []₁
Between 1-2 hours []₂
Between 2-4 hours []₃
More than 4 hours []₄

12 If more time was spent, how much more time do you estimate was spent in hearing expert evidence?

- 1 hour or less []₁
Between 1-2 hours []₂
Between 2-4 hours []₃
More than 4 hours []₄

Part D The evidence provided

13 Did concurrent evidence improve the objectivity of the evidence provided by the experts?

- Yes []₁
No []₂

14 Did concurrent evidence enable the experts to provide their opinion on interpretations of the factual scenarios?

- Yes []₁
No []₂

15 Did concurrent evidence have any impact on the quality of expert evidence submitted to the Tribunal?

- Evidence quality was better []₁
Evidence quality was worse []₂
Evidence quality was the same []₃

16 Did concurrent evidence make it easier or harder for you to compare the evidence of each of the experts than the usual presentation of expert evidence?

- Easier to compare []₁
Harder to compare []₂
There was no difference []₃

Part E The concurrent evidence process

17 In your opinion, how efficient is concurrent evidence as a procedure to handle and decide a case in this jurisdiction?

- Very efficient []1
- Somewhat efficient []2
- Somewhat inefficient []3
- Very inefficient []4

18 For each of the following statements, please indicate whether you believe the concurrent evidence procedures were very effective; somewhat effective; somewhat ineffective; or very ineffective in this case:

VE= very effective; SE = somewhat effective
SI = somewhat ineffective; VI = very ineffective

	VE	SE	SI	VI
Defining & presenting critical issues	[]1	[]2	[]3	[]4
Resolving the dispute quickly	[]1	[]2	[]3	[]4
Ensuring both parties were treated fairly	[]1	[]2	[]3	[]4
As a procedure to handle a case in this jurisdiction	[]1	[]2	[]3	[]4
As a procedure to decide a case in this jurisdiction	[]1	[]2	[]3	[]4
Clarifying each party's position	[]1	[]2	[]3	[]4
Producing an outcome that was fair to both parties	[]1	[]2	[]3	[]4

Part F The decision making process

19 Was your decision making process enhanced by the concurrent evidence process?

- Yes []1
- No []2 **Go to 21**

20 In what way/s was your decision making process enhanced? (Tick all that apply)

- Less background research was required []1
- Technical issues were easier to understand []2
- The issues were distilled more quickly []3
- Areas of contention were identified []4
- The reasons did not require a lengthy investigation of non issues []5
- Other, please specify: []6

--	--

21 Did concurrent evidence make it easier or harder for you to write and hand down your decision in this case?

- Easier []1
- Harder []2
- No difference to usual []3

22 Did concurrent evidence make it faster or slower for you to write and hand down your decision in this case?

- Faster []1
- Slower []2
- No difference to usual []3

23 Did you follow the standard procedures recommended to members for implementing concurrent evidence procedures or was it necessary to modify the procedures in this case?

- Followed standard procedures []1
- Modified procedures []2

24 If procedural modification was necessary, what modifications did you make?

25 Overall, were you satisfied with the use of the concurrent evidence process in this case?

- Very satisfied []1
- Satisfied []2
- Dissatisfied []3
- Very dissatisfied []4

26 Do you have any additional comments about the concurrent evidence process or about the use of concurrent evidence in this case?

Thank you for your time

File-based Survey

ID# _____	Coder: <input type="text"/>	Date: <input type="text"/>	Checked: <input type="checkbox"/>	Entered: <input type="checkbox"/>
CONCURRENT EVIDENCE PROGRAM CODING SHEET - AAT				
FILE INFORMATION				
1	File number	N	<input type="checkbox"/>	<input type="text"/>
2	Linked file number/s		<input type="checkbox"/>	<input type="text"/>
3	Jurisdiction	Use code	<input type="checkbox"/>	<input type="text"/>
4	Date application lodged	(dd-mm-yy)		<input type="text"/>
5	Type of applicant	Use code	<input type="checkbox"/>	
6	Type of respondent	Use code	<input type="checkbox"/>	
7	Is the dispute based on multiple issues	Use code	<input type="checkbox"/>	
8	Interpreter required?	1= yes 2= no	<input type="checkbox"/>	
PARTY DETAILS				
Applicant				
9	Gender	1= male 2= female	<input type="checkbox"/>	
10	Date of birth	(dd-mm-yy)		<input type="text"/>
11	Type of representative	Use code	<input type="checkbox"/>	
12	Contact details	Organisation		<input type="text"/>
		Family name		<input type="text"/>
		name/initials		<input type="text"/>
		No. & street		<input type="text"/>
		Suburb/Town		<input type="text"/>
		Postcode		<input type="text"/>
		Telephone		<input type="text"/>
Respondent				
13	Gender	1= male 2= female	<input type="checkbox"/>	
14	Date of birth	(dd-mm-yy)		<input type="text"/>
15	Type of representative	Use code	<input type="checkbox"/>	
16	Contact details	Organisation		<input type="text"/>
		Family name		<input type="text"/>
		name/initials		<input type="text"/>
		No. & street		<input type="text"/>
		Suburb/Town		<input type="text"/>
		Postcode		<input type="text"/>
		Telephone		<input type="text"/>

PRE-HEARING DETAILS

17	Date of callover		<input type="text"/>
18	Date notified of inclusion in CE study		<input type="text"/>
Applicant			
19	Number of experts to be called		<input type="text"/>
20	Type/s of experts		<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
21	Were amended experts statements lodged following case inclusion in the CE pilot?	1= yes 2= no	<input type="checkbox"/>
Respondent			
22	Number of experts to be called		<input type="text"/>
23	Type/s of experts		<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
24	Were amended experts statements lodged following case inclusion in the CE pilot?	1= yes 2= no	<input type="checkbox"/>

CASE DISPOSAL: SETTLEMENT OR HEARING

25	First date of hearing	(dd-mm-yy)	<input type="text"/>
26	Last date of hearing	(dd-mm-yy)	<input type="text"/>
27	Was concurrent evidence given?	1= yes 2= no 3= partial	<input type="checkbox"/>
28	If not, why not?	Use code	<input type="checkbox"/>
29	Hearing duration	hrs/mins	hr <input type="text"/> min <input type="text"/>
30	Method of applicant's expert evidence presentation	Use code	<input type="checkbox"/>
31	Method of respondent's expert evidence presentation	Use code	<input type="checkbox"/>
32	Length of time applicant experts in witness box:		
(a)	Expert 1	Minutes	<input type="text"/>
(b)	Expert 2	Minutes	<input type="text"/>
(c)	Expert 3	Minutes	<input type="text"/>
33	Length of time respondent experts in witness box:		
(a)	Expert 1	Minutes	<input type="text"/>
(b)	Expert 2	Minutes	<input type="text"/>
(c)	Expert 3	Minutes	<input type="text"/>
34	Stage of resolution	Use code	<input type="checkbox"/>
35	Date of resolution/decision	(dd-mm-yy)	<input type="text"/>
36	Case outcome	Use code	<input type="checkbox"/>
37	Was the decision appealed to the Federal Court?	1= yes 2= no	<input type="checkbox"/>

**CONCURRENT EVIDENCE STUDY
AAT MEMBER FINAL SURVEY**

Reference number:

MEMBER: _____

Section 1: CONCURRENT EVIDENCE CASE SELECTION IN THE AAT

1. How easy or difficult was it for you to select AAT matters as being suitable for CE?

DECISION WAS EASY / HAD SOME DIFFICULTY / VERY DIFFICULT

Please explain:

2. (a) Did you find there was opposition from representatives when CE was suggested as being suitable for their case/s?

YES / NO

(b) If yes, what were the main reasons for their opposition? If no, what did they like about it?

Section 2: THE CONCURRENT EVIDENCE PROCESS

These questions relate to your opinion regarding the use of CE procedures in the AAT generally.

3. Were you satisfied or dissatisfied, overall, with the CE process:

VERY SATISFIED / SATISFIED / DISSATISFIED / VERY DISSATISFIED

Please explain why:

4. Do you have any suggestions on how the AAT could improve the selection or hearing process of CE matters?

5. Do you have any further comments to make about the CE process?

6. (a) Had you any experience with the concurrent evidence procedures or alternative processes relating to expert evidence (eg. tribunal/court appointed experts, expert pre-hearing conferral/conferencing) prior to the AAT study?

YES / NO

(b) If yes, in which legal setting/jurisdiction?

(c) How would you compare the different processes?

Focus group topics for representatives

CE IN THE AAT

1. Did you anticipate that the use of CE in the AAT would create problems? If yes, what problems did you anticipate, and did they occur? Did any unanticipated problems occur?
2. What is your opinion of the CE case selection process in the AAT:
 - is CE suitable for all case types?
 - is CE suitable for all types of expert evidence?
3. Do you think that having a matter selected to use the CE process had any impact on pre-hearing settlement? If yes, in what way/s

CE AND THE HEARING PROCESS

4. Did the use of CE impact on any of the following during the hearing of matters:
 - the over-all length of hearings? (were they shorter/longer)
 - the number of experts used? (were there more/less)
 - the quality of evidence provided by the experts at hearing? (was the quality better/worse)
5. Did both sides have an adequate opportunity to present their case? Was equal attention paid to the experts from both sides?
6. Do you consider that case *outcomes* were affected by the use of CE? That is, would case outcomes have been different in the absence of CE? If yes, in what ways/s?
7. Do you believe the use of CE was of benefit or detriment to your clients — or did it have little or no impact at all? Generally, were your clients satisfied with the case outcomes?
8. Did the use of CE impact upon the costs associated with conducting an AAT matter?
If yes, how?

PREPARING FOR CE HEARINGS

9. Were representatives provided with adequate information about the introduction and operation of CE? Was the information received in enough time for you to adequately prepare for CE?
10. Did the use of CE change the nature of the work, work requirements or the workload compared to what would normally be associated with preparing for and conducting a case at hearing in the AAT? If yes, for whom — and in what way/s?

11. Did you find any aspects of the CE process particularly difficult? If yes, for what reasons?

GENERAL QUESTIONS

12. What do you see as being the main advantages/disadvantages of the CE process?
13. Are you in favour of the continued use of CE in the AAT? Has your perception of CE changed since you have had experience with it?
14. Are there any changes that you would suggest in regard to the operation of the CE process that would improve effectiveness or efficiency?
15. Had you any experience with concurrent evidence procedures or alternative processes relating to expert evidence (eg. tribunal/court appointed experts, expert pre-hearing conferral/conferencing) prior to your experience with CE in the AAT? How would you compare the different processes?

EXPERTS TELEPHONE SURVEY

Reference number:

Section 1: BACKGROUND

1. What type/s of AAT cases (eg. Vets, Comp) are you usually called to provide expert evidence for?

2. (a) Do you believe that you were given adequate information about the CE process prior to the first occasion on which you gave evidence?

YES / NO

(b) If no, explain:

3. (a) Do you believe that the presiding member gave an adequate explanation during the hearing of how the CE process would work? YES / NO

(b) If no, explain:

4. (a) Do you believe CE is suitable for the type of matters you give evidence in at the AAT?

YES / NO

(b) Explain:

Section 2: PREPARING FOR A CE HEARING/THE CE HEARING PROCESS

5. (a) Does preparing for a CE hearing impact on your workload?

YES / NO

(b) If yes, in what way/s?

6. (a) Does the use of CE affect the preparation of expert reports? (for example, are more revisions or supplementary reports required?)

YES / NO

(b) If yes, explain why this occurs:

7. (a) In your experience, do the experts on both sides get an equal chance to give their opinion during a CE hearing?

YES / NO

(b) If no, explain

8. (a) Do you believe the CE process generally to be fair and equal to both sides of a dispute, or does it favour one or other side?

FAIR AND EQUAL / FAVOURS ONE OR OTHER SIDE

(b) Please explain:

9. (a) In your view, does the CE process inhibit the Tribunal members from giving appropriate attention to the evidence of each expert?

YES / NO

(b) If yes, explain

10. (a) Did the CE process give rise to any concerns about the impartiality of the Tribunal members hearing the case?

YES / NO

(b) If yes, explain:

11. (a) Does CE have any impact on the costs associated with preparing and presenting evidence in an AAT matter?

YES / NO

(b) If yes, do the costs increase / decrease? Explain

12. (a) Did the CE process impact on the quality of the evidence you were able to give to the Tribunal?

YES / NO

(b) If yes, how/ in what way/s?

13. (a) Do you believe that the use of CE procedures impacts on the objectivity of the evidence provided by the experts? YES / NO

(b) Explain: (prompt – does it improve or worsen it?)

14. (a) Does giving expert evidence under CE take more, less or about the same amount of time as giving evidence under the usual evidence procedure?

MORE / LESS / THE SAME

(b) If more or less time, please explain why:

15. (a) For you personally, does the CE process deter you from, or attract you to, giving expert evidence in AAT cases?

DETERS / ATTRACTS / HAS NO EFFECT

(b) Can you explain this effect?

16. (a) Are you comfortable with presenting expert evidence under a CE procedure?

YES / NO

(b) If no, why does the process make you uncomfortable?

17. (a) Did you find any aspects of the CE process particularly difficult?

YES / NO

(b) If yes, in what way?

18. (a) Are you in favour of the continuation of the use of CE in the AAT?

IN FAVOUR / NOT IN FAVOUR

(b) Why/why not?

19. (a) Has your perception of CE changed since you have had experience with it?

YES / NO

(b) If yes, in what way/s?

20. Are there any changes that you would suggest in regard to the operation of the system that would improve its effectiveness or efficiency?

21. (a) Prior to your experience with the CE study in the AAT had you had any experience with concurrent evidence procedures or other processes relating to expert evidence (such as tribunal or court appointed experts; expert pre-hearing conferral/conferencing)?

YES / NO

(b) If yes, what type of process and where?

(c) How would you compare the different processes?

Thank you very much for taking the time to participate in this survey.