



# Use of Concurrent Evidence in the AAT

## 1. About this Guideline

### ***Application***

- 1.1 This Guideline relates to the use of concurrent evidence in the Administrative Appeals Tribunal (AAT).
- 1.2 The concurrent evidence procedure involves two or more experts giving evidence at the same time in an AAT hearing. It provides a forum in which, in addition to providing their own evidence, experts can listen to, question and comment on the evidence of the other expert(s).
- 1.3 The objectives of using the concurrent evidence procedure in the AAT are to:
  - create a setting in which the evidence and opinions of expert witnesses can be better explained, analysed and understood thereby enhancing the AAT's capacity to make the correct or preferable decision;
  - assist expert witnesses in fulfilling their role as impartial advisers whose duty is to assist the AAT; and
  - enhance the efficient operation of AAT proceedings by reducing the overall time taken to hear and determine applications.
- 1.4 This Guideline outlines how the concurrent evidence procedure operates in the AAT. It includes information on:
  - factors that may be taken into account in deciding whether or not the concurrent evidence procedure will be used;
  - the process for deciding whether or not the concurrent evidence procedure will be used;
  - how the concurrent evidence procedure usually operates; and
  - the roles of the participants in the hearing.
- 1.5 The Guideline has two purposes:
  - to ensure that AAT members and staff, parties and their representatives and experts have a clear understanding of the concurrent evidence procedure; and
  - to encourage consistency in its application.

## 2. Identification and selection of cases

### *Suitability of cases*

- 2.1 The concurrent evidence procedure may be used in any case where both parties will call oral evidence from experts. Its use is not limited to particular jurisdictions or to particular kinds of expert evidence.
- 2.2 The presiding member of the Tribunal constituted to hear the case will decide whether or not the concurrent evidence procedure is to be used. A range of factors may be taken into account in deciding whether or not the concurrent evidence procedure should be used in a particular case. These include:
- the nature and complexity of the issues in relation to which expert evidence is to be given;
  - the areas of expertise and level of expertise of the experts who will be giving evidence;
  - the likely impact of using the concurrent evidence procedure on the length of the hearing and the costs of the parties;
  - whether both parties are represented; and
  - the views of the parties.

The presiding member may take into account other factors that he or she considers relevant to deciding whether or not to use the concurrent evidence procedure.

- 2.3 The concurrent evidence procedure is more likely to be considered suitable for use where:
- expert evidence is central to the issues in dispute in the case;
  - experts will be commenting on the same issues;
  - the concurrent evidence procedure will assist in clarifying and understanding areas of difference in the expert evidence;
  - experts are of like disciplines;
  - experts have comparable levels of expertise; or
  - use of the concurrent evidence procedure will reduce the length of the hearing.

## 3. The process for deciding whether the concurrent evidence procedure will be used

- 3.1 The potential use of the concurrent evidence procedure should be considered as early as possible in the proceedings. The AAT or a party may raise the issue for discussion during the pre-hearing process. A Conference Registrar or member may record that the concurrent evidence procedure may be appropriate for use in the case.
- 3.2 In cases where the concurrent evidence procedure may be suitable for use, the parties must confer and endeavour to provide to the AAT dates on which the experts can appear at the same time. The AAT will endeavour to list the case for hearing at a time when the experts would be available to give evidence at the same time.

- 3.3 If the presiding member of the Tribunal constituted to hear the case considers that the concurrent evidence procedure may be suitable, a directions hearing may be convened to discuss its use. The presiding member will issue a direction as necessary. The direction may require the parties to provide to the experts copies of relevant reports and other documents and confirm the availability of the experts to give evidence concurrently.
- 3.4 The AAT prefers that experts participate in the concurrent evidence procedure in person. However, a party may request that an expert participate by telephone or video link. The presiding member will determine whether this is appropriate in the circumstances of the case.
- 3.5 In general, a decision that the concurrent evidence procedure is to be used should be made as early as possible and, in any event, not less than a week before the listed hearing date.

## 4. The concurrent evidence procedure

### ***Experts' conference***

- 4.1 The presiding member may direct that the experts who are to give evidence concurrently are to confer prior to the day of the hearing or, as set out in paragraph 4.6, on the day of the hearing as part of the concurrent evidence procedure.
- 4.2 The purpose of the conference is for the experts to identify any areas of agreement and clarify areas of disagreement in relation to the issues before the AAT. The presiding member may direct the parties to prepare a joint written memorandum identifying areas of agreement and disagreement.
- 4.3 Where the presiding member has directed the experts to confer, it would be improper for an expert to be given, or to accept, instructions not to reach agreement.

### ***Facilities***

- 4.4 The AAT will ensure that appropriate hearing room facilities are available when concurrent evidence is to be used so that there is sufficient space for the experts to give evidence.
- 4.5 The AAT will also ensure that appropriate conference room facilities are available in the event that the presiding member directs the experts to confer.

### ***The concurrent evidence procedure***

- 4.6 This section of the Guideline sets out the way in which the concurrent evidence procedure will generally be conducted in the AAT. The presiding member may determine that a departure from the standard procedure is appropriate in the circumstances of a particular case.
- The experts will each take an oath or make an affirmation.
  - When necessary, the presiding member will outline the way in which the concurrent evidence procedure will proceed.
  - The presiding member will identify any significant factual matters that have arisen in the evidence already given in the hearing and may clarify the issues in relation to which the experts should direct their evidence. The parties or their

representatives will be invited to comment on, add to, or seek to clarify any matters raised by the presiding member. The hearing may be adjourned for a short time to allow the experts to confer in light of this discussion to identify any areas of agreement and clarify areas of disagreement.

- Each expert will be given the opportunity to express his or her views on the issues and to engage in a dialogue with the other expert which may involve asking questions of the other expert. The AAT member(s) will facilitate the process and may ask questions of the witnesses. In general, this stage of the procedure will occur without the intervention of the parties or their representatives.
- The parties or their representatives will then be invited to ask questions of the expert witnesses. (See paragraph 5.5 for more information in relation to this aspect of the procedure.)
- Each expert witness will be invited to give a brief final summary of their views on any of the issues before the AAT.
- At any stage of the process, the AAT member(s) may intervene and ask questions.

4.7 The expert witnesses should generally be addressed by name. This will assist in the preparation of any transcript from the hearing.

## 5. Role of the participants

### ***The role of the AAT***

- 5.1 It is the responsibility of the AAT member(s) hearing the matter to ensure that the use of the concurrent evidence procedure is considered and determined as early as possible so that the parties and experts are given sufficient notice that it will be used.
- 5.2 The presiding member is responsible for managing the concurrent evidence procedure to ensure that it proceeds fairly and efficiently.

### ***The role of the parties and their representatives***

- 5.3 Parties and their representatives should be prepared to consider the use of the concurrent evidence procedure during the pre-hearing process and to suggest its use where it may be appropriate.
- 5.4 Parties and their representatives must ensure that all relevant matters are undertaken to facilitate the use of the concurrent evidence procedure. This includes endeavouring to provide to the AAT dates on which the experts can appear at the same time as well as complying with any directions relating to the use of the procedure.
- 5.5 The concurrent evidence procedure involves a departure from the traditional method of taking evidence from expert witnesses. Representatives are expected to adjust their approach to take account of the procedure outlined in paragraph 4.6 and any specific directions given by the AAT member(s). Representatives may ask questions of the experts to ensure that all relevant views and material are clarified and put to the AAT member(s).

### ***The role of experts***

- 5.6 Experts must comply with the AAT's Persons Giving Expert and Opinion Evidence Guideline.

- 5.7 The AAT expects that experts will participate in the concurrent evidence procedure in good faith. Experts should be willing to consider and comment on alternative factual premises and opinions.

**Justice Duncan Kerr**  
**President**

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