The management of experts

ME Rackemann*

The increasing significance of expert opinion evidence has led to efforts, across jurisdictions, to find ways to maximise the quality of that evidence and to achieve efficiencies in the way that it is obtained and utilised in the litigation process. Those efforts have tended to focus on the beginning of the process, when the expert is retained, or the end, when opinion evidence is adduced at trial. This has spawned the single court-appointed expert model, to break the retainer relationship between an expert and one side of an adversarial dispute, and the concurrent evidence method of adducing evidence at trial, which promotes a discourse among differing experts. Queensland's Planning and Environment Court has instead focused on the management of experts in the period after their retainer but before trial reports are prepared. Experts formulate their opinions in a process of mutual peer review conducted at an early stage while quarantined from the parties and their representatives. The results of that process then inform the dispute resolution process. The success of this management approach challenges the assumptions which underlie the single court-appointed expert model while providing for a more satisfactory, useful and timely professional discourse than is achieved by reliance on concurrent evidence at trial.

INTRODUCTION

The formulation of a judgment involves the application of the law to the facts. Increasingly, however, the fact-finding role of a court or tribunal will involve consideration not just of evidence as to what someone said, did or observed, but also of expert opinion. Decisions must be made as to which opinion/s to accept or, in the case of conflicting expert opinion, which opinion/s to prefer.

The increasing significance of expert opinion evidence mirrors the explosion in specialisation across all professional disciplines. The scope of matters which lie within one or another field of expertise has broadened. Further, questions which may once have been the province of a single expert discipline may now fall within a range of sub-specialities.

The number and range of experts becoming involved in the litigation process has grown and there is a burgeoning litigation support industry. This trend has coincided with the rise of case management and alternative dispute resolution. Modern courts actively supervise their lists and individually manage cases towards resolution, usually on a consensual basis.

This article examines the intersection of those two developments in order to discuss the appropriate management of experts in the litigation process. The topic is described as the management of "experts" rather than the management of "expert evidence" because it is important to broaden our consideration beyond simply the means by which evidence is adduced at trial.

The concern of judges managing lists in the modern context extends (or should extend) to the entire process for resolution. Reforms in the area of expert evidence to date have, however, tended to focus either on the beginning of the process, when the expert is first engaged, or on the end of the process, in relation to the form of the expert's trial report and the means by which evidence is to be adduced at trial. Relatively less attention has been paid to the process between when the expert is engaged and when that expert produces a report for trial, yet this is the most important opportunity to enhance the prospects of obtaining well-informed, objective and helpful assistance from the experts retained by the parties. This article provides an overview of the particular way in which Queensland's Planning and Environment Court responds to that opportunity.

* Judge of the District Court of Queensland, Judge of the Queensland Planning and Environment Court. This article is based on a paper presented at the Judicial Conference of Australia Colloquium "Innovation in Court Procedures", Alice Springs, Northern Territory, 14-16 October 2011.

THE PLANNING AND ENVIRONMENT COURT

The Queensland Planning and Environment Court is a long-standing, specialist court, constituted by judges, which determines a range of planning and environment disputes, pursuant to State legislation. It was first created, under a former name, in 1966. There are more than 30 statutes which are relevant to its jurisdiction. They cover a broad range of topics which include:

- planning and development;
- environmental protection;
- coastal protection and management;
- fisheries;
- marine parks;
- maritime conservation;
- heritage;
- transport infrastructure; and
- vegetation management.

The majority of the Planning and Environment Court's work involves hearing appeals from decisions of local governments and government departments or agencies relating to development applications and approvals. It also hears a range of other matters, including proceedings for enforcement orders and for declarations.

Appeals are conducted by way of a hearing anew.[1] The court, in effect, "stands in the shoes" of the original decision-maker and makes a decision on the merits on the basis of the evidence before it. Much of that evidence is expert opinion evidence, including conflicting expert opinion evidence. The range of disciplines can be very diverse. Consequently, the proper and efficient management of experts is critical to the work of the court.

Practice in the Planning and Environment Court is characterised by active list supervision and individual case management towards dispute resolution. The court has its own ADR Registrar, who provides alternative dispute resolution services free of cost to the parties. The vast majority of matters are resolved by consensual agreement.

Before turning to a discussion of the Planning and Environment Court's approach to the management of experts, it is useful to review some of the more common approaches and the philosophy which underlies them.

BIAS: PERCEPTION OR REALITY?

Much of the reform which has taken place in various jurisdictions in the last decade has been driven by a perception that the most problematic aspect of expert evidence is the extent to which it is infected with adversarial bias. Further, it has been assumed that it is the retainer relationship which is the primary cause of that bias.

The allegation that experts retained by a party to an adversarial dispute inevitably become adversarial is not new. It is a charge that was levelled by Sir George Jessell MR as long ago as 1873.[2] More recently, the proliferation of expert witnesses and the birth and growth of the litigation support industry was criticised by Lord Woolf in his Access to Justice Report where he said:

> Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients.[3]

In the Australian context, similar criticisms were made by Justice McClellan in New South Wales and by the then Justice of Appeal Davies in Queensland.

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[1] *Sustainable Planning Act 2009* (Qld), s 495.

[2] *Lord Abinger v Ashton* [1873-74] 17 LR Eq 358 at 374.

[3] 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.

While it would be naive to suggest that expert opinion evidence is never tailored, either consciously or subconsciously, the extent of "adversarial bias" should not be overstated nor the effectiveness of the adversarial system in exposing such bias understated. The present author's experience, both as a barrister and as a judge, is similar to that of Justice Gary Downes AM who said:

> I must say that my impression from 32 years of examining expert witnesses and four years of listening to them is that, with very few exceptions, they do not deliberately mould their evidence to suit the case of the party retaining them. When they do, this emerges.[4]

It is often the "professional witness" (ie a person who regularly gives expert evidence and derives at least a significant part of that person's income from doing so) who is suspected of being a "hired gun". This suspicion often has little basis in fact. Indeed, the integrity of such a person is their currency, which can quickly be lost if significant adversarial bias is demonstrated. As one expert, who frequently gives evidence, attests:

> From my experience, expert witnesses who frequently and regularly give evidence in the P&E Court know perfectly well how thoroughly their evidence will be scrutinised by opposing experts, solicitors, barristers (and presumably the judges). Consequently, the risks associated with attempting to deliberately give one-sided or inaccurate evidence are well known to them, and they are too careful with their reputations and careers to take any such risks. Yet these are the experts usually labelled as "hired guns" in a derogatory sense (ultimately meaning I suppose that their opinions can bought).
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> To my mind, the real risk of inaccurate or biased evidence is much more likely to come from professionals who rarely, or perhaps only once give evidence. They have little to lose, and are not likely to know how closely their evidence will be scrutinised, yet they are unlikely to identify this "hired guns" with all that implies.[5]

It should not be assumed that the fact of the retainer relationship between client and expert is, of itself, an insurmountable hurdle to the expression of professionally objective opinions. Experience demonstrates to the contrary. The contention that expert opinions are able to be bought and sold is an inaccurate generalisation. It is also an unseemly one involving, as it does, a suggestion by lawyers that professionals of other disciplines are little more than "paid liars". There are those who regard such an allegation, coming from the mouths of lawyers, as somewhat ironic. Lawyers are not the only ones with professional ethics.

As Associate Professor Gary Edmond has observed, there is little empirical evidence to support the contention that adversarial bias is common.[6] To the extent that it does infect the evidence of an expert it should not be assumed to be the inevitable consequence of the retainer relationship alone. The perception that adversarial bias is pervasive, and that such bias is a function of the retainer relationship has, however, largely driven the discussion of reform in this area. The Planning and Environment Court's approach, which is discussed later, proceeds on the basis that the critical aspect is not necessarily the retainer relationship itself, but rather how the process after retainer is managed, so as to protect, and to extract the maximum benefit from, the professional objectivity of the expert who has been retained.

THE SINGLE EXPERT: A FLAWED MODEL

If one starts with the assumption that adversarial bias is the most pressing issue and that such bias is a necessary consequence of the retainer relationship itself, then it follows that reform must break the retainer relationship between an expert and a single party to an adversarial dispute. Accordingly, a cornerstone of reforms in a number of jurisdictions has been the encouragement, if not the requirement, for expert evidence, on any given issue, to be limited to one expert jointly retained by the parties or appointed by the court or tribunal. The rationale for reforms of that kind was explained by Davies who wrote:

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[4] Downes G, "The Use of Expert Witnesses in Court and International Arbitration Processes" (Paper presented at the 16th Inter-Pacific Bar Association Conference, 2006) p 7.

[5] Personal communication from Colin Beard, Traffic Engineer, authorised for republication.

[6] Edmond G, "Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure" (2009) 72 *Law and Contemporary Problems* 159.

> Let me return now to where I started. Perhaps the worst way, in any substantial adversarial system such as ours, of resolving a question involving expertise, is by presenting two opposing opinions to an arbiter, judge or jury, who more often than not, lacks expertise, and expect that arbiter, without independent assistance, to resolve it justly. Permitting cross-examination on these opposing views is as likely to polarise them further as it is to eliminate or reduce areas of difference.
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> If we accept, as I think we realistically must, that presenting evidence in an adversarial way is likely to induce and in most cases will result in adversarial bias in the witnesses, we must also accept that adversarial bias would be immediately eliminated, in the case of expert evidence, if those who gave such evidence gave it as witnesses of the court not as witnesses of one party or another …
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> *It follows, it seems to me inevitably that the only way in which we can ever eliminate adversarial bias in expert witnesses is by requiring, at least generally, that all expert evidence which will be received by the court must be that of an expert appointed by the court*.[7] [emphasis added]

The argument in favour of mandating, at least generally, the single expert model is based on assumptions which include:

(i) the evidence of experts retained by the parties is significantly affected by adversarial bias;
(ii) that bias is caused by the retainer relationship;
(iii) that adversarial bias represents a significant hurdle to the just resolution and matters in controversy;
(iv) adversarial bias cannot effectively be dealt with other than by requiring, at least generally, that all expert evidence be by those who are either jointly instructed by the parties or who are appointed by the court.

Those assumptions should not be accepted uncritically.

The first two of those assumptions have already been discussed. In the present author's experience the extent of adversarial bias among experts has been at least overstated and the cause of adversarial bias has wrongly been attributed to the fact of the retainer relationship alone.

The third assumption should also not be accepted uncritically. The contention that judges, who lack the technical expertise of expert witnesses, are not well-placed, without expert assistance, to resolve conflicting opinion evidence, some of which might be affected by adversarial bias, does not accord with the present author's experience.

While not sharing the technical expertise of the expert witnesses, judges are well experienced in assessing that evidence in the deliberative process. The fact that expert opinion evidence can be "deconstructed", to reveal the relevant factual assumptions and the process of analysis and reasoning leading to the expressed opinion, means that the resolution of competing expert opinion can often be undertaken with a greater level of confidence than for competing non-expert evidence of factual observations. There is ample research showing that judges are not nearly as good as might be imagined at separating fact from fiction when it comes to resolving conflicting evidence of fact which cannot be deconstructed in that way.

It is also wrong to suggest that bias can only effectively be dealt with by adoption of the single court-appointed expert model. Experience in the Planning and Environment Court, discussed later, is to the contrary. That experience suggests that it is the way in which experts are managed after their engagement which is more critical than the fact of retainer alone.

The most obvious limitation of the single court-appointed expert model is that it deprives the decision-maker of the benefit of competing views where, as is often the case in matters which proceed to trial, there is more than one available expert opinion. This limitation is acknowledged by McClellan.[8]

The model's usefulness, in practice, is generally restricted to circumstances in which the exercise to be carried out is unlikely to be controversial, with the consequence that engaging multiple experts

[7] Davies G, "Court Appointed Experts" (2005) 5 *Queensland University of Technology Law and Justice Journal* 89 at 100. See also Cannon A, "Courts Using Their Own Experts" (2004) 13 JJA 182.

[8] In a panel discussion at the Expert Evidence Conference at Australian National University, Canberra, 11 February 2011.

would be wasteful. The avoidance of unnecessary duplication can, however, often be accomplished in the course of case management, without the need for specific rules for single experts.

The elimination of adversarial bias, through the use of a single expert, does not eliminate all forms of bias, nor does it necessarily result in reliable expert opinion evidence. Unbiased incompetence, or even just fallibility, can be found in all disciplines.

Experts bring a range of biases, other than adversarial bias, to the task at hand. There is nothing improper about that. Engineers and scientists have their own professional biases in much the same way as lawyers do. Just as some lawyers apply a more "black letter" approach than others, so too do engineers or scientists have different professional perspectives. As Edmond observed:

> … but there is little evidence to suggest that adversarial bias is deliberate or consistently detrimental to civil practice. Although experts selected by the different parties may well take on aspects of a case, based *in part* on their contractual relationship, these experts will often be selected because they already adhere to particular assumptions and commitments or employ methodologies considered valuable. Even if not conspicuously or predictably aligned, experts, (including court-appointed experts) do not enter disputes without professional, institutional, and ideological "baggage".[9]

As one experienced expert witness has observed:

> I would not trust any of the traffic engineers with whom I regularly work as single experts, including me – we all have our individual biases, no matter how hard we try to overcome them. I believe that technical experts such as traffic engineers operate best as advisers to the legal process, not as de facto judges on technical issues. In my view, two or more professional opinions tested by rigorous cross-examination are much more valuable to the court than one untested opinion.[10]

It would appear that earlier enthusiasm for the single expert model is waning. For example, the expressed preference for that model in the Uniform Civil Procedure Rules in Queensland is not reflected in practice. That is not to say that it would never be a valid choice in a particular case, but the focus of the debate about the proper management of experts more generally is shifting in another direction.

THE MANAGEMENT OF EXPERTS: THE TRADITIONAL APPROACH

It has already been observed that reform has tended to focus either on the beginning of the process, when the expert is first engaged, or on the end of the process. Relatively less attention has been paid to the process between when the expert is first engaged and when the expert report is produced. Even in jurisdictions which profess to have implemented expert evidence reforms, the experts are often left in the hands of their client and their client's lawyers until their report is published.

Usually, an expert will be reliant upon the client, or the client's lawyers, not only for a retainer, but for instructions on the issues in dispute and for the briefing of relevant material. Once the expert has begun to form preliminary views (and sometimes earlier) a conference or conferences will typically be held with the client's lawyers. The lawyers, doing their job, will ensure that the expert is fully conscious of all of the matters of relevance which may be thought to favour their client and will tease out any preliminary views helpful to the client's case, while testing the expert on any doubts or misgivings that the expert may have about the client's position. The expert will then be asked to prepare a report, without reference to, or consultation with, professional colleagues retained by the other parties. Further conferencing may occur with the client's lawyers in the course of the expert settling the report. The experts retained by the other parties will typically be going through a similar process. Usually, it is only after the exchange of reports, in which the experts have committed themselves to particular opinions, that they are expected to engage in any form of consultative process, in terms of a pretrial meeting and perhaps the giving of concurrent evidence at the hearing.

The intention here is not to be unduly critical of litigation lawyers in this regard. Many lawyers, and perhaps most litigation lawyers, are control freaks, at least to some extent. That is probably a good

[9] Edmond, n 6 at 173.

[10] Personal communication from Colin Beard, traffic engineer, authorised for republication.

thing, given the task at hand. Their enthusiasm for control of the case can, however, if left unchecked, become inconsistent with fostering an environment in which the experts can best formulate professionally objective opinions.

This typical process might not be intended to produce differences in the expert opinions expressed in the reports, but it does little to respect, foster and protect the professional objectivity of the expert and even less to obtain the benefit of the combined expertise of the various experts in the resolution of the matter.

THE MANAGEMENT OF EXPERTS: THE PLANNING AND ENVIRONMENT COURT APPROACH

The management of experts in the Planning and Environment Court is underpinned by a belief that experts should be treated in an appropriately respectful way and that they can be expected to show professional objectivity if that objectivity is respected and protected by the process which they are asked to participate in. Further, the aim is to harness the combined experience of the experts for the benefit of dispute resolution more generally, not just for the purposes of a hearing, if the matter gets that far.

A key component in the Planning and Environment Court case management is the use of early joint meetings among the experts. The concept of joint meetings is not new, but the Planning and Environment Court uses them in a particular way.

In advocating the single expert model, Davies dismissed conferences of experts as applying too late in the process of the litigation to avoid polarisation. With this the present author respectfully agrees, insofar as the traditional approach to the timing of joint meetings is concerned. The Planning and Environment Court does not use that traditional approach.

In the Planning and Environment Court the experts are given the appropriate time and space, free from supervision or interference by the parties or their lawyers, to consider and to formulate their final opinions in consultation with one another, after they have been retained by the parties but before they have committed themselves to any opinions in trial reports. The benefit of their professional discourse is then fed into the dispute resolution process well prior to any final hearing.

Components of the Planning and Environment Court approach include the following:

(i) The overriding duty of the experts to the court is provided for in the rules and must be notified to each expert.[11]

(ii) Each party is permitted to engage one expert in relation to each field of expertise,[12] but must identify their experts at a very early stage.

(iii) While the parties must ensure that their expert is properly briefed and ready to participate in an expert meeting process,[13] they may not instruct the expert as to which opinions the expert is to accept or reject.[14] Each expert must verify that they have not received or accepted any such instructions.[15]

(iv) Once the experts have been retained, identified and briefed, they begin an expert meeting process which generally involves a series of meetings over a number of weeks and which results in a joint report.

[11] *Uniform Civil Procedure Rules 1999* (Qld), r 426; *Planning and Environment Court Rules 2010* (Qld), r 26(e).

[12] *Planning and Environment Court Rules 2010* (Qld), r 34.

[13] *Planning and Environment Court Rules 2010* (Qld), r 26.

[14] *Planning and Environment Court Rules 2010* (Qld), r 29.

[15] *Planning and Environment Court Rules 2010* (Qld), r 31(3)

(v) *Critically*, not only does this process take place *before* publication of any trial reports, but also, throughout the process, the experts are, in effect, "quarantined". That is, subject to very limited exceptions, the parties and their lawyers are not permitted to communicate with the experts from the time the process begins until it ends with the publication, by the experts, of their joint report.[16]

(vi) Save for the contents of the joint report, evidence may not be given of what transpired in the meetings.[17]

(vii) The results of the consultative process inform the dispute resolution processes well prior to any hearing. The experts generally accompany the parties in mediation.

(viii) It is only if the matter remains unresolved that the experts can then prepare separate reports for a hearing. Those reports are then limited to the areas of disagreement expressed in the joint report. Save by leave, an expert may not give evidence which departs from the opinions expressed in the joint report.[18].

The exceptions to the general "no communication" rule which applies during the expert meeting process are designed to ensure that the process does not become unnecessarily protracted or stall. For that reason there are processes for experts to seek further information and for the parties to enquire about the timely conduct or conclusion of the meeting process.[19]

The process gives the experts time and space to form their opinions in a process of mutual peer review, free from undue oversight or influence by the parties or their lawyers. This process has:

(a) virtually eliminated disputes about methodology (the experts, in consultation generally agree upon the methodology to be used in investigations, the data from which is then common to them);

(b) achieved a high degree of common ground with respect to the opinion evidence; and

(c) harnessed the combined experience of the two experts. Indeed there have been a number of cases in which the experts have subsequently said that they were better informed as a consequence of the collaborative process and that the results of their joint endeavours were more satisfactory than either of them could have achieved individually.

The process was trialled by the present author in a large case in 2004. It was then provided for in a practice direction in 2006 before being entrenched in the 2008 and 2010 versions of the Planning and Environment Court rules.

Neil Sutherland, a director and principal agricultural and environmental scientist with Gilbert & Sutherland, has recently examined the results of the joint meeting and report process in 104 cases in which members of his firm have been retained since 2006. He reports[20] that the joint meeting and report process resulted in complete agreement, among the experts, in all respects, in 48% of cases. That proportion had increased, over time, from 39% in 2006 to 66% in 2009. There was, of course, a higher proportion of cases in which some level of agreement was reached. The vast majority of cases settled. This confounds the notion that experts simply act as adversarial hired guns.

After comparing his experience giving evidence as an expert in different jurisdictions in different States, Sutherland observed that:

> One of the cornerstones of the Queensland process is preventing any interference by the parties or their representatives until the report is signed. Such quarantining of the experts during their joint report process often makes the difference between settling issues and arguing them in court. This is especially true of contentious evidence or where there are seemingly implacable, adversarial parties. It also forms a critical protection of the expert's independence that serves the process well, providing the experts do

[16] *Planning and Environment Court Rules 2010* (Qld), rr 22, 27.

[17] *Planning and Environment Court Rules 2010* (Qld), r 28.

[18] *Planning and Environment Court Rules 2010* (Qld), r 30.

[19] *Planning and Environment Court Rules 2010* (Qld), r 27.

[20] Sutherland N, "The Efficacy of Joint Reports in Narrowing Technical Issues During Litigation" (2011) 1 *National Environmental Law Review* 50 at 51.

> not use it to delay or obfuscate. The ability of peers to professionally critique, discuss and refine views, without legal pressure results in considered, not forced, outcomes.[21]

He went on to observe that: "this collaborative approach can and has resulted in superior outcomes, in my experience, without necessarily eroding any party's position".[22] That is consistent with feedback which the present author has otherwise received.

CONCURRENT EVIDENCE: SOLUTION OR HYPE?

The concurrent evidence process, by which experts expressing different opinions are called to give evidence at the same time, are invited to participate in a professional discussion among themselves in the witness box, as well as being questioned by the judge and the parties' representatives, is well known and established in a number of jurisdictions. Its history is briefly summarised by Edmond as follows:

> The basic concurrent-evidence technique emerged out of experiments in the 1970s. Since that time, with the support of Judges like Lockhart, Lindgren and Heerey, this technique was used intermittently in Tribunals and very occasionally in the Federal Court of Australia. The institutionalisation of concurrent evidence, however, is a far more recent development. In the last 5 years, concurrent-evidence procedures have been formally adopted in the Federal Court, the Administrative Appeals Tribunal, the Supreme Courts of New South Wales and the Australian Capital Territory, and the Land and Environment Court in New South Wales; and it has also been used selectively in superior courts of New Zealand.[23]

The proponents of this method of adducing evidence at trial have been quite enthusiastic about its virtues. Their enthusiasm led Edmond to observe that: "The institutionalisation of concurrent evidence has been accompanied by a publicity campaign dominated by senior members of the Australian judiciary".[24] Similarly, Freckelton SC remarked that: "Proponents of concurrent evidence have on occasions been evangelistic about its benefits".[25]

Proponents have tended to see concurrent evidence as a complete solution and a necessary feature of modern court practice. Some caution needs to be used with respect to this enthusiasm. As Freckelton SC points out, while the response of judges using the process is generally positive, not all evaluations of concurrent evidence have been so effusive and the practice has not been successful in all instances. Further, the process does not enjoy universal acclaim among experts called to give evidence in this way. For example, an experienced expert witness based in Melbourne, but who regularly gives evidence in Queensland, New South Wales and Victoria, says:

> My experience in the Land and Environment Court, and similar courts in New South Wales, has been less than appealing, due primarily to the preference for concurrent evidence or "hot tubbing". In my opinion, this is a waste of everyone's time and effort because it results in a far lower (level) of scrutiny and tends to result in more confusion and frustration than is the case in other jurisdictions.
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> It is important to recognise that technical experts have varying degrees of specialised knowledge. Scrutiny is therefore important in order for the decision-maker to understand the areas of technical strength and weakness, and the basis of opinions. Sometimes data and modelling is inferior, conflicting or simply wrong; and quite often access to factual data between experts can vary resulting in significant differences as between theory and practice.
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> In addition, expert opinion is necessary to ensure that inference and conclusions are correctly drawn. *In my experience "hot tubbing" does not result in focussed, structured or useful expert discourse, nor does it result in the level of scrutiny required to ensure that the decision-maker is well informed. Judges have openly expressed their confusion during proceedings*.
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> …

[21] Sutherland, n 20 at 52.

[22] Sutherland, n 20 at 52.

[23] Edmond, n 6 at 166.

[24] Edmond n 6 at 167.

[25] Freckelton I and Selby H, *Expert Evidence: Law, Practice, Procedure and Advocacy* (4th ed, Lawbook Co., 2009) p 494.

> I cannot offer a view as to which of the Victorian or Queensland systems results in a better outcome, although I would say, without hesitation that the concurrent evidence model in New South Wales is the worst process and experience when giving evidence, and is to be avoided, in my opinion.[26] [emphasis added]

The philosophy underlying the concurrent evidence model is similar to that underlying the case management approach of the Planning and Environment Court. Both aim to obtain the benefit of the professional discourse among the experts. It might be noted that some of those who now champion the benefit of obtaining the professional discourse among different experts in this way once championed the single court-appointed expert model. The concurrent evidence model is, however, too limited in its application and applies too late in the process to be considered as a viable substitute for appropriate management at an earlier stage.

Being a process for adducing evidence at hearing, the benefits of concurrent evidence are limited to the relatively small proportion of cases that proceed to hearing. It does not obtain the benefit of the objective professional discourse at a time when it can be used by the parties in a dispute resolution process, which is the means by which the majority of disputes are resolved.

Further, it is difficult to see the attraction of subjecting the experts to an unrestrained adversarial process until they have committed their opinions to a report, formulated in that context, while postponing endeavours to obtain the benefit of the professional discourse until trial.

The opportunity for genuine professional discourse at trial, through the concurrent evidence model, is inherently more limited than a case management approach. Why should experts be expected to conduct their professional discourse on a given day, in a courtroom, in the middle of a trial, while the lawyers and the judge not only spectate, but attempt to manage and participate in the process? A more professionally respectful approach is to give the experts the opportunity, unsupervised, unpressured and uninfluenced by the parties, to formulate their opinions in consultation over a period of time and before committing to opinions expressed in trial reports. Further, by having that professional discourse at an earlier time, matters of methodology are dealt with before they even arise.

None of this is to suggest that the concurrent evidence model is not a valid option for adducing evidence at trial. It is not, however, a substitute for appropriate management at an earlier time. One of the problems with the enthusiastic promotion of concurrent evidence is that it has tended to give the impression that it is "the" method for adducing expert evidence and is, in itself, a sufficient way to address concerns surrounding expert opinion evidence. In truth, it is neither. It is a tool, the usefulness of which will vary according to the context in which it is used, and the manner in which it is employed.

Use of concurrent evidence has its greatest attraction where pretrial management, to obtain the benefit of the professional discourse at an earlier time, has not occurred. In short, it is better to have some opportunity for expert discourse than none. Too little too late is generally better than nothing at all. While concurrent evidence is also an available tool to be used even where more extensive management has occurred at an earlier stage, many of the perceived benefits of concurrent evidence will already have been realised (and potentially to a greater degree) prior to trial in that event.

Following a trial of concurrent evidence in the Planning and Environment Court, a seminar was held by the Queensland Environmental Law Association, in 2008,[27] to discuss the experience and the merits of using concurrent evidence more extensively in the Planning and Environment Court. The seminar was attended by approximately 130 persons, drawn from the ranks of both lawyers and experts, who participated in a general discussion following three presentations. There was little enthusiasm for the use of concurrent evidence in the context of the Planning and Environment Court.

The views expressed fell into two main categories. There were those who were ambivalent about whether concurrent evidence was used or not, given that an earlier and better opportunity for genuine

[26] Personal communication from Ian Shimmin, economist and a director of property consulting firm Urbis, authorised for republication.

[27] *Concurrent Expert Evidence – 3 Views of a Hot Tub* (Queensland Environmental Law Association seminar, 27 October 2008).

professional discourse had already occurred prior to hearing. The majority were positively opposed to concurrent evidence at hearing, so long as the pretrial expert meeting and joint report process, as directed by the court, was in place.

Expert evidence in the Planning and Environment Court is generally adduced by calling experts individually in "blocks", according to their area of expertise, rather than concurrently. This provides a rigorous testing of the experts on any residual areas of disagreement which remain following the expert meeting process. The discretion to use different methods, including concurrent evidence, lies with the presiding judge.

CONCLUSION

Experience in the Planning and Environment Court suggests that it is the time between when the experts are retained and when they commit themselves to opinions expressed in trial reports which presents the greatest opportunity to ensure that professional objectivity is respected and protected and to maximise the benefit to be obtained from the combined professional expertise of experts engaged by the parties. By effectively "quarantining" the experts from the parties or their representatives for a significant time during that period and requiring them to formulate their final opinions in consultation with each other, the Planning and Environment Court's process for the management of experts obtains the benefit of the objective professional discourse at an early stage, for the benefit of the dispute resolution process, whether that be concluded by consensual agreement or by judgment upon a hearing.