

# **‘HOT-TUBBING’: THE USE OF CONCURRENT EXPERT EVIDENCE IN THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES AND BEYOND**

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# **‘HOT-TUBBING’: THE USE OF CONCURRENT EXPERT EVIDENCE IN THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES AND BEYOND<sup>1</sup>**

## **AN INTRODUCTION TO THE RULES GOVERNING EXPERT EVIDENCE IN THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES**

1. Because of its jurisdiction the Land and Environment Court deals with complex, specialised environment and planning matters, across both its criminal and civil jurisdictions. The purpose of the expert is to provide the Court with the expertise and knowledge that is required to understand, and resolve, disputes between parties. Where each of the parties present their own experts that are qualified in a particular scientific or professional discipline and, with each arriving at different opinions, it can be difficult for the Court to synthesise and apply the evidence to the legal issues before it.<sup>2</sup>

2. The traditional approach to hearing expert evidence has been critiqued by a number of sources as transforming the position of the expert into one of an advocate.<sup>3</sup> As pointed out by McClellan J, “only the most extraordinary person who has been engaged to prepare and give evidence for a client would, when cross-examined, readily confess error, accept their view was wrong and that the client’s money was wasted.”<sup>4</sup>

3. As acknowledged in *Wood v R*,<sup>5</sup> this bias is an almost inevitable result of the adversarial system:

Once an expert has been engaged to assist in a case, there is a significant risk that he or she becomes part of “the team” which has the single objective of solving the problem or problems facing the party who engaged them to “win” the adversarial contest.

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<sup>1</sup> Paper presented at the 2015 Annual Alaskan Bar Association Conference in Fairbanks, Alaska, United States of America on 14 May 2015. I gratefully acknowledge the assistance of my tipstaves, Ms Sophie Duxson and Mr Sharangan Maheswaran, in the preparation of this paper. All errors and other infelicities are, however, mine.

<sup>2</sup> The Hon Justice Peter McClellan, *Expert Witnesses – the Experience of the Land & Environment Court of New South Wales* (paper presented at XIX Biennial LawAsia Conference 2005, Gold Coast, 24 March 2005), p 8.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> [2012] NSWCCA 21 at [715].

4. The Land and Environment Court is particularly vulnerable in this respect as there is a limited pool of experts to give evidence on matters within its jurisdiction. Thus it is likely that experts will endeavour to maintain good relations with those that retain them, as there is likely to be subsequent litigation for which their services will be required.<sup>6</sup> It is trite to state that a continued connection, together with remuneration, naturally encourages an expert to do their best for the party engaging them. Another term for this phenomenon is ‘adversarial bias’.

5. The Land and Environment Court has employed several methods in order to respond to the difficulties surrounding expert evidence, including: the use of parties’ single or joint experts or court appointed experts, the use of concurrent evidence procedures, and the employment of specialised Commissioners.

6. This paper will, first, provide a brief overview of the rules governing expert evidence in the Land and Environment Court; second, discuss the Court’s practice and procedure in relation to expert evidence; third examine the merits and criticisms of court appointed and parties single experts; fourth, discuss the process of concurrent evidence, or as it is colloquially know, ‘hot-tubbing’; and fifth, make the argument for its adoption outside the Land and Environment Court, especially in the United States.

### **Rules Governing Expert Evidence in the Land and Environment Court**

7. The rules governing experts, and their evidence, in the Land and Environment Court are found in the:

- (a) *Evidence Act 1995* (NSW);
- (b) *Civil Procedure Act 2005* (NSW) (“CPA”);
- (c) *Uniform Civil Procedure Rules 2005* (NSW) (“UCPR”);
- (d) *Land and Environment Court Act 1979* (NSW);
- (e) *Land and Environment Court Rules 2007* (NSW); and
- (f) Land and Environment Court Practice Notes.

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<sup>6</sup> McClellan J, above n 2, p 10.

8. In this context it is particularly worth examining the relevant rules of evidence and procedure.

### ***Evidence Act***

9. Expert evidence is generally governed by the *Evidence Act*, in particular, ss 76-79. Although s 76 sets out a general prohibition on opinion evidence, s 79 provides that evidence provided by an “expert”, or someone with “specialised knowledge based on training, study or experience”, is an exception to this principle. In establishing the exception, it is first necessary to identify the fact in issue on which expert evidence is to be adduced, as the initial question that arises in relation to s 79 is whether the subject matter of the opinion is such that a person without experience in the area would not be able to form a sound judgement on the matter without the assistance of a person possessing specialised knowledge, which is in a field that is sufficiently recognised as a reliable body of knowledge.<sup>7</sup>

10. For an expert’s opinion to be admitted into evidence on a particular issue, three requirements must be satisfied. First, the expert must have specialised knowledge that they are able to demonstrate to the court is based on the person’s training, study or experience, and the evidence must be wholly or substantially based on that specialised knowledge.<sup>8</sup> It is helpful to identify with precision the issue on which the expert opinion is being proffered, as this will aide in identifying the specialised knowledge, based on training, study or experience, which the expert will need to possess.<sup>9</sup>

11. The rationale behind this requirement was outlined by Gleeson CJ in *HG v The Queen*<sup>10</sup>:

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<sup>7</sup> *R v Bonython* (1984) 38 SASR 45 at 46-47 per King CJ, *Clark v Ryan* (1960) 103 CLR 486 at 491 per Dixon CJ, *Murphy v The Queen* (1989) 167 CLR 94 at 111 per Mason CJ and Toohey J and at 130 per Dawson J, *Farrell v The Queen* (1998) 194 CLR 286 at 292-294 per Gaudron J, *Osland v The Queen* (1998) 197 CLR 316 at 336 per Gaudron and Gummow JJ and *HG v The Queen* (1999) 197 CLR 414 at 432.

<sup>8</sup> *Evidence Act* 1995 (NSW), s 79(1).

<sup>9</sup> See, The Hon Justice Cathy Branson, *Expert Evidence: a Judge’s perspective* (paper presented at the Inaugural Australian Women Lawyers Conference, Sydney, 29-30 September 2006).

<sup>10</sup> (1999) 197 CLR 414 at [44].

Experts who venture 'opinions' (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted.

12. In the now seminal decision of *Dasreef Pty Ltd v Hawchar*,<sup>11</sup> the High Court of Australia unanimously held that a failure to demonstrate that an opinion expressed by a witness is based on his or her training, study or experience is a matter that goes to the admissibility of the evidence, not its weight.<sup>12</sup> For this reason, the Court held that the trial judge erred in failing to make a ruling regarding the admissibility of evidence contained in a report by the expert witness, Dr Basden, as to the quantitative level of Mr Hawchar's exposure to silicon dust.<sup>13</sup> Dr Basden had given evidence of his training, study and experience, but he had not given evidence asserting that this training and experience permitted him to provide anything more than a "ballpark figure" estimating the amount of silica dust to which a worker using an angle grinder would be exposed. Neither had he taken any direct measurements or performed any inferential calculations to determine the likely level of silica dust exposure. There was, therefore, no footing upon which the judge at first instance could conclude that a numerical opinion expressed by Dr Basden was wholly or substantially based on his specialised knowledge, training, or experience.<sup>14</sup>

13. Second, the expert is required to set out all the assumptions upon which the opinion is proffered. If the opinion is based on facts 'observed' by the expert, they must be identified and proved by the expert, or if the opinion is based on 'assumed' facts, they must be identified and proved in some other way.<sup>15</sup> Unless the facts upon which the opinion is based can be established, the expert's opinion will be inadmissible, or if admitted, given very little weight.<sup>16</sup>

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<sup>11</sup> (2011) 243 CLR 588.

<sup>12</sup> *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [42]. See also *Gilham v R* [2012] NSWCCA 131 at [345].

<sup>13</sup> *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [19].

<sup>14</sup> *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [40].

<sup>15</sup> *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85], *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [64] per Heydon JA and *Gilham v R* [2012] NSWCCA 131 at [186].

<sup>16</sup> *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [66] per Heydon JA and *Gilham v R* [2012] NSWCCA 131 at [186].

14. Third, the expert must also set out all of the reasoning he or she has engaged in to arrive at his or her conclusion. A report that simply states the opinion given or conclusion reached, without elucidating how the expert arrived at this conclusion will usually be rejected by the Court.<sup>17</sup>

15. The rules contained in ss 135-137 of the *Evidence Act* are also relevant as they provide the final discretionary barrier that a party seeking to tender evidence must overcome before that evidence is admitted. These rules provide that the evidence will not be admitted unless its probative value substantially outweighs the danger that it might otherwise mislead, or confuse, or be unfairly prejudicial to a party.

16. The rules of evidence do not apply to all Classes of the Land and Environment Court's jurisdiction. For example, the Court may choose not to be bound by the *Evidence Act* in Class 1, 2 or 3 proceedings (merits based administrative decision-making).<sup>18</sup> This is also the case in Class 5 sentencing matters.

### ***Uniform Civil Procedure Rules***

17. Part 31, Div 2, Subdiv 5 r 31.17-54 of the UCPR provides a comprehensive and prescriptive outline of the practice and procedure in relation to expert evidence. Importantly, the UCPR states that the expert witness' paramount duty is to the Court and not to any party to the proceedings.<sup>19</sup>

18. Under UCPR r 31.17 the main purposes for the provision of expert evidence are set out. These include for the Court: to have control over the giving of expert evidence;<sup>20</sup> to restrict expert evidence in proceedings to only that which is reasonably required;<sup>21</sup> to avoid unnecessary costs associated with retaining different experts;<sup>22</sup> to

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<sup>17</sup> *Makita (Australia) Pty Ltd v Spowles* (2001) 52 NSWLR 705 at [85], *R v Tang* (2006) 161 A Crim R 377; *HG v The Queen* (1999) 197 CLR 414 and *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [100] per Heydon JA.

<sup>18</sup> *Land and Environment Court Act 1979* (NSW), s 38(2).

<sup>19</sup> UCPR r 31.23 and Sch 7 cl 2(2).

<sup>20</sup> UCPR r 31.17(a).

<sup>21</sup> UCPR r 31.17(b).

<sup>22</sup> UCPR r 31.17(c).

ensure a fair trial of proceedings, and allow for more than one expert if necessary;<sup>23</sup> to declare the duty of an expert witness in relation to the Court and the parties to proceedings;<sup>24</sup> and, according to r 31.17(d) (emphasis added):

if it is *practicable* to do so *without compromising the interests of justice*, to enable expert evidence to be given on an issue in proceedings by a single expert engaged by the parties or appointed by the court.

19. Any party looking to adduce expert evidence must promptly seek directions in this regard.<sup>25</sup> A court may give directions regarding expert witnesses, including directions: limiting the number of expert witnesses who may be called;<sup>26</sup> providing for the engagement and instruction of a parties' single expert;<sup>27</sup> providing for the appointment and instruction of a court appointed expert;<sup>28</sup> requiring experts in relation to the same issue to confer, either before or after preparing experts' reports in order to endeavour to reach an agreement on any matters in issue,<sup>29</sup> or any other direction that may assist an expert in the exercise of the expert's functions.<sup>30</sup>

20. Under the UCPR, as soon as practicable after an expert has been appointed he or she must be provided with a copy of the expert witness' code of conduct. The code is contained in Sch 7 of the UCPR.

21. The default position is contained in UCPR r 31.23(3), according to which a failure to acknowledge the code will result in expert evidence, including an expert's report, being inadmissible.<sup>31</sup> However, the decision in *Wood v R*<sup>32</sup> now clarifies that an expert's evidence is not automatically rendered inadmissible merely because the expert has overlooked the code.<sup>33</sup> The question of admissibility is ultimately to be

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<sup>23</sup> UCPR r 31.17(e).

<sup>24</sup> UCPR r 31.17(f).

<sup>25</sup> UCPR r 31.19.

<sup>26</sup> UCPR r 31.20(2)(e).

<sup>27</sup> UCPR r 31.20(2)(f).

<sup>28</sup> UCPR r 31.20(2)(g).

<sup>29</sup> UCPR rr 31.20(2)(h), 31.24(1)

<sup>30</sup> UCPR r 31.20(2)(i).

<sup>31</sup> *Investment Source Corp Pty Ltd v Knox Street Apartments Pty Ltd* [2007] NSWSC 1128 at [43].

<sup>32</sup> [2012] NSWCCA 21.

<sup>33</sup> *Wood v R* [2012] NSWCCA 21 at [728]. See also *United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* [2003] NSWSC 870 at [12], *Australian Securities and Investments Commission v Rich* (2005) 218 ALR 764 at [33] and *Sydney South West Area Health Service v Stamoulis* [2009] NSWCA 153.

determined in accordance with the principles underlying the law of evidence.<sup>34</sup> Therefore, the fact that an expert has failed to acknowledge the code should be taken into account as a factor in determining whether, under ss 135-137 of the *Evidence Act*, the probative value of that evidence substantially outweighs the danger that it might mislead or confuse or be unfairly prejudicial to a party.<sup>35</sup> A positive answer to this question will result in that evidence being admissible; a negative answer may result in it being rejected.

## **EXPERT EVIDENCE IN THE LAND AND ENVIRONMENT COURT**

22. Prior to the appointment of any expert in any proceeding in the Court, the Court Practice Notes require that parties consider whether expert evidence is necessary to resolve the dispute.<sup>36</sup> In some case, such as judicial review proceedings in Class 4 of the Court's jurisdiction, leave of the Court is required by a party seeking to rely on expert evidence.

### **Traditional Individual Party Experts vs Court Appointed or Joint Party Experts**

23. The increasingly frequent use of expert evidence in the Land and Environment Court has highlighted the limitations of the traditional model of cross-examining each of the party's experts. Concerns have arisen in relation to experts feeling like they were unable to explain their evidence properly due to the fact that they were constrained by having to answer the cross-examiner's questions; evidence remaining difficult to understand or ambiguous post cross-examination; experts being biased or acting as advocates; and the process being lengthy and taking too much time to get to the point of difference or disagreement between the experts.<sup>37</sup>

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<sup>34</sup> *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33 at [15].

<sup>35</sup> *Wood v R* [2012] NSWCCA 21 at [728]-[729] and *Lopmand Pty Ltd* [2003] NSWSC 870 at [15].

<sup>36</sup> *Practice Note Class 1 Development Appeals* at [42], *Practice Note Class 1 Residential Development Appeals* at [53], *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals* at [30] and *Practice Note Class 3 Valuation Objections* at [34].

<sup>37</sup> For a more expansive list see The Hon Justice Steven Rares, *Using the "Hot Tub" – How Concurrent Expert Evidence Aids Understanding Issues* (paper presented at the New South Wales Bar Association Continuing Professional Development Seminar, Sydney, 23 August 2010), p 2.



24. As previously mentioned, the Land and Environment Court has employed several strategies in order to overcome the difficulties associated with expert evidence. The merits and criticisms of two of these strategies will be discussed below.

25. The problem of adversarial bias in relation to expert witnesses has been identified by a number of sources. It was noted in an empirical study, carried out by the Australian Institute of Judicial Administration, that more than a quarter of judges have experienced bias on the part of experts.<sup>38</sup> One of the identified ways of responding to the difficulty in obtaining objective expert evidence is through the use of joint experts or court appointed experts.<sup>39</sup>

26. However, Downes J of the Federal Court believed in the adversarial model and treated with caution the encouraged use of parties' joint experts and court appointed experts. His Honour believed the adversarial method of cross-examination<sup>40</sup> crystallised more accurately the criteria required to evaluate issues than a single opinion can.<sup>41</sup> His Honour opined:<sup>42</sup>

I do not find anything untoward in expert witnesses presenting different perspectives. This is what counsel do all the time. The limitation is that they must be sustainable perspectives presented in a way which can be evaluated. I do not even mind experts who are "hired guns" provided that they are not presenting evidence that is unsustainable ...

27. Further, it has been noted that the fact that the different experts do not reach the same conclusion is not an inherently bad thing.<sup>43</sup> The differing criteria exposed by the different experts will enable the judge to reach his or her own conclusion.

28. A joint party, or court, appointed expert, by contrast, has no interaction with the parties other than to clarify evidence or to be cross-examined on it and this will only

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<sup>38</sup> I Freckleton, P Reddy and H Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (Australian Institute of Judicial Administration, 1999), p 38.

<sup>39</sup> The Hon Justice Garry Downes AM, *Concurrent Expert Evidence in the Administrative Appeals Tribunal: The New South Wales Experience* (paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, Hobart, 27 February 2004).

<sup>40</sup> The Hon Justice Garry Downes AM "Problems with expert evidence: are single or court-appointed experts the answer?" (2006) 15 *Journal of Judicial Administration* 185, p 188.

<sup>41</sup> *Ibid*, p 187.

<sup>42</sup> *Ibid*, p 187.

<sup>43</sup> The Hon Justice Steven Rares, above n 37, p 7.

happen when both parties are present. Separated from the environment of one party, a court appointed or joint expert is more likely, in my view, to be disinterested in the result of a case and, therefore, give more neutral evidence.

### **The Use of Court Appointed and/or Joint Single Experts in the Land and Environment Court**

29. Nevertheless during McClellan J's tenure as Chief Judge of the Court, his Honour encouraged the use of court appointed and joint party experts. Indeed during the period between March 2004 and April 2005 there were 171 court appointed experts in this Court.<sup>44</sup> In 2010, by contrast, there were only five joint single experts and no court appointed experts. This change in practice reflects, in part, perceptions of fairness concerning court appointed experts and the decision by the Court to utilise Commissioners with expertise in specific areas.

30. The position of the current framework, as outlined in the Court Practice Notes for Class 1, 2, 3 (merits review) and 4 (judicial review) proceedings is, first, to encourage parties to use a parties' joint expert, and should the parties disagree, then the Court may appoint an expert if appropriate to do so. Typically, matters relating to more objective issues such as noise, traffic, parking, overshadowing, engineering, hydrology and some contamination issues are seen as suitable for a parties' joint expert.

31. If parties do not wish to use a joint expert, but the Court finds that a single expert would be appropriate in that case, the Court may at any stage of the proceedings appoint a court appointed expert to, inquire into, and report on the issue.<sup>45</sup> On the other hand, when both parties do agree to have one expert presenting evidence this is called a "parties' single expert" or a "joint expert".<sup>46</sup> Both "court appointed experts"<sup>47</sup> and "parties' single [or joint] experts"<sup>48</sup> are remunerated by the parties.

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<sup>44</sup> New South Wales, Attorney General's Law Reform Commission, *Report 109 Expert Witnesses* (June 2005), p 37.

<sup>45</sup> UCPR r 31.46.

<sup>46</sup> UCPR r 31.37.

<sup>47</sup> UCPR r 31.53.

<sup>48</sup> UCPR r 31.37.

32. In terms of parties' joint experts, "the parties affected must endeavour to agree on written instructions to be provided to the parties' joint expert concerning the issues arising for the expert's opinion and concerning the facts, and assumptions of fact, on which the report is to be based." If the parties are unable to agree they must seek directions from the Court.<sup>49</sup>

33. Rule r 31.17(d) of the UCPR sets two criteria for the appointment of a court appointed expert. First, it must be practical to use a court appointed expert, and second, their engagement must be made without compromising the interests of justice.

34. In most cases where a party objects to a court appointed expert, it is unlikely that the Court will not allow the parties to call their own experts, or use a joint expert, as a matter of fairness.

35. In considering whether it is appropriate to use a parties' joint expert, the Court will have regard to a number of criteria, including:

- (a) the importance and complexity of the subject matter in dispute;
- (b) the costs involved in obtaining a parties' single expert compared to individual party experts;
- (c) whether the parties' joint expert is reasonably likely to narrow the scope of the issue(s) in dispute;
- (d) the nature of the issue, including whether it may be answered in an objectively verifiable manner, involves the application of accepted criteria (such as the Australian Standards) or is subject to varying methodologies or schools of thought;
- (e) the timing of appointment, whether the single expert has sufficient data to provide a report and whether the parties are prepared to proceed to hearing on the basis of that report; and

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<sup>49</sup> UCPR r 31.38.

(f) whether the integrity of the expert evidence is likely to be enhanced.<sup>50</sup>

36. Some commentators argue in cases where legal and factual issues are complex or the quantum of any damages is large, it is not appropriate to use court appointed or parties' single joint experts. Rather, in these cases each party should separately be heard on their own evidence.<sup>51</sup>

37. The main arguments for parties' joint experts or court appointed experts are that first, when the issue is one that usually requires only one answer (such as noise) there is no need for more than one expert. Second, it save costs and time. Third, it has been argued that the Court has the benefit of hearing from at least one expert who is unaffected by adversarial bias.

38. Where the parties have agreed to a parties' joint expert in relation to a specific issue they may not adduce evidence of another expert without the leave of the Court, in relation to that issue.<sup>52</sup> In determining whether to grant leave, the Court will consider the issues involved in the dispute and whether the cost involved in obtaining further evidence is proportionate to the length and complexity of the dispute.

39. An apprehension of bias may be sufficient to ensure a grant of leave. In granting leave, the Court will also consider whether the party thinks that the joint expert may be wrong because another expert takes a different view.<sup>53</sup>

40. It is important that this facility remains for parties to adduce further evidence so that trial by a parties' joint expert, or court appointed expert, does not become a substitute for trial by a judge.<sup>54</sup> The Court must balance the need to restrain the costs of litigation against the need for the parties to be fully heard on the matters in dispute.

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<sup>50</sup> *Practice Note Class 1 Development Appeals* at [42]–[43], *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals* at [30]–[31], *Practice Note Class 3 Compensation Claims* at [28] and *Practice Note Class 3 Valuation Objections* at [35].

<sup>51</sup> Mia Louise Livingstone, "Have we fired the 'hired gun'? A critique of expert evidence reform in Australia and the United Kingdom" (2008) 18 *Journal of Judicial Administration* 39, 40.

<sup>52</sup> *Practice Note Class 1 Development Appeals* at [47], *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals* at [35], *Practice Note Class 3 Compensation Claims* at [31] and *Practice Note Class 3 Valuation Objections* at [39].

<sup>53</sup> *Cosgrove v Pattison* [2000] All ER 2007

<sup>54</sup> *Tomko v Tomko* [2007] NSWSC 1486 at [9].

41. In cases where parties agree to use a joint expert, but disagree as to the identity of that expert, the Court Practice Note directs each party to put forward three names each with accompanying *curriculum vitae* to the Court.<sup>55</sup> The Court usually makes a selection from that pool.<sup>56</sup> For court appointed experts the Court follows the same procedure.

## **CONCURRENT EXPERT EVIDENCE ('HOT-TUBBING') IN AUSTRALIA**

42. The prevailing approach of the Land and Environment Court, and in many other jurisdictions in Australia (including the Federal Court of Australia), of receiving expert evidence is to do so concurrently, or together, rather than individually in the course of each party's case.<sup>57</sup> It is the norm rather than the exception.

### **What is Concurrent Expert Evidence?**

43. Concurrent evidence is defined by the ability of a court (or other forum) to order experts to collaborate and collectively give evidence to the court. While the precise process will vary between jurisdictions, concurrent evidence usually comprises a seven stage process (elaborated on below), in which competing experts will give evidence together in the witness box under examination by opposing counsels to resolve the outstanding issues of fact<sup>58</sup>. The phrase 'hot-tubbing' is often used to

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<sup>55</sup> *Practice Note Class 1 Development Appeals*, Sch D, A 5(c), *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals*, Sch A, A 5(c); *Practice Note Class 3 Compensation Claims*, Sch A, 3(c), *Practice Note Class 3 Valuation Objections*, Sch B, 8(c) and *Practice Note Class 4 Proceedings*, Sch A, B 1A (ii).

<sup>56</sup> *Practice Note Class 1 Development Appeals*, Sch D, C 1A (iii), (iv), *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals*, Sch A, C 1A (iii), (iv), *Practice Note Class 3 Compensation Claims*, Sch B, 1A, *Practice Note Class 3 Valuation Objections*, Sch C, 1A and *Practice Note Class 4 Proceedings* Sch A, B 1A (iii), (iv).

<sup>57</sup> UCPR r 31.35(c); *Practice Note Class 1 Development Appeals* at [56], *Practice Note Class 1 Residential Development Appeals* at [63], *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals* at [44], *Practice Note Class 4 Proceedings* at [48], *Practice Note Class 3 Compensation Claims* at [39] and *Practice Note Class 3 Valuation Objections* at [48].

<sup>58</sup> Hon Justice Peter McClellan, "New Method With Experts – Concurrent Evidence" (Winter, 2010) *Journal of Court Innovation* 259-268.

colloquially describe the process because the expert witnesses physically sit together in the witness box at all times.

44. While two decades ago concurrent evidence was restricted to a few civil, commercial and regulatory matters in Australian courts, favourable experience<sup>59</sup> has seen it widely adopted throughout Australia, as the table annexed at 'A' demonstrates.<sup>60</sup> Concurrent expert evidence is now used in both judge-alone trials and jury trials, in both criminal and civil proceedings.

## **Methodology**

45. The procedure aims to direct expert evidence to the issues which are genuinely contentious and to subject expert evidence to expert criticism. By reducing the quantity of evidence, and increasing the quality of discussion, the Court avoids unnecessary adversarialism, delays and cost<sup>61</sup>. The relevant experts are sworn-in together and remain together during the entirety of their evidence, as opposed to the traditional approach where each expert presents his or her evidence and is separately made available for cross-examination. This approach facilitates a discussion between the experts, the advocates and the judge, and helps to narrow the issues in dispute.

46. As stated above, the giving of concurrent evidence typically involves seven distinct stages:

- (a) first, identification of the issues upon which expert evidence is required;
- (b) second, the preparation of individual expert reports;

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<sup>59</sup> See, for example, The Hon Justice Garry Downes, *Concurrent Expert Evidence in the Administrative Appeals Tribunal: The New South Wales Experience* (paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, Hobart, 27 February 2004) <hosted at <http://www.aat.gov.au/Publications/SpeechesAndPapers/Downes/concurrent.htm>>.

<sup>60</sup> Korda Mentha Forensic, *2012 List of Concurrent Evidence Case*, additional publication to *Some Like it Hot! Expert views on judicial orders to hear expert evidence concurrently*, Publication No 13 – 01.

<sup>61</sup> Nigel Wilson, "Concurrent and court-appointed experts? From Wigmore's 'Golgotha' to Woolf's 'proportionate consensus'" (2013) 32(4) *Civil Justice Quarterly* 493, 495.

- (c) third, a conference between the experts, without lawyers, in order to prepare a joint report that sets out the matters upon which there is agreement and the matters upon which there is disagreement, including, where possible, short reasons as to why they disagree;
- (d) fourth, the preparation of the joint report (again, without lawyers);
- (e) fifth, the experts are called to give evidence together, at a convenient time in the proceedings, usually following the tendering of the lay evidence;
- (f) sixth, the experts are given an opportunity to explain the issues in dispute in their own words. Each expert is then allowed to comment on or question the other expert; and
- (g) seventh, cross-examination of the experts. During this process, each party is permitted to rely on their own expert for clarification of an answer.<sup>62</sup> The parties usually prepare and hand up to the trial judge a list of cross-examination topics (written at a high level of generality) prior to the commencement of the cross-examination.

47. The purpose of the third stage, the joint expert conferencing (or expert conclave, as it is sometimes known as), is important and is designed to allow the experts to discuss the issues in dispute in a neutral context where questions can be asked and the issues in dispute narrowed and clarified. This facilitates the identification, investigation and resolution of the real issues in contest between the experts.<sup>63</sup> Discussions between the experts should be full and frank. The content of discussions between the experts

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<sup>62</sup> See The Hon Justice Steven Rares, above n 37, p 7, Neil J Young QC, *Expert Witnesses: On the Stand or in the Hot Tub – How, When and Why?* (paper presented at the Commercial Court Seminar, Melbourne, 27 October 2010), p 2; The Hon Justice Peter Biscoe, *Expert Witnesses: Recent Developments in NSW* (paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, 16 September 2006), p 6, and *Strong Wise Ltd v Esso Australia Resources Ltd* (2010) 185 FCR 149 at [93].

<sup>63</sup> The Hon Justice Peter Biscoe, *Land and Environment Court of New South Wales: Practice and Procedure* (paper presented at the Australasian Conference of Planning and Environmental Courts and Tribunals, Christchurch, New Zealand, 21 August 2009) at [19].

cannot be disclosed at the hearing unless the parties agree, or bad faith during the conclave is alleged.<sup>64</sup>

48. The advantages of an expert joint conference are that:

- (a) any extreme or biased views adopted by experts are quickly moderated when they need to be justified before peers;
- (b) factual concessions are easier to make in private rather than in Court where there is pressure, in front of the client, on the expert to adhere to the original opinion;
- (c) they often disclose facts and/or relevant information not always known or appreciated by other experts; and
- (d) significant points of disagreement can be identified and more adequately defined, while peripheral issues are often isolated and agreed upon.<sup>65</sup>

49. The conference should result in a joint report stating what is agreed and what remains in dispute and why.<sup>66</sup> Depending on the case, it may be appropriate to produce a table setting out the issues that are agreed upon and the issues that are in dispute, together with brief reasons as to the nature of the dispute.

50. It is important that at the conference the experts make a concerted effort to agree. On occasion, experts have met and refused to agree on matters which are subsequently agreed upon on the first day of the hearing. This merely puts the parties to extra cost with no beneficial outcome.<sup>67</sup> It is also a likely breach of the Expert Code of Conduct.

51. It is also important that experts maintain their independence throughout the process. Legal representatives are not to attend joint conferences of experts or be

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<sup>64</sup> UCPR r 31.24(6).

<sup>65</sup> The Hon Justice J Wood, "Forensic sciences from the judicial perspective: the expert witness in the age of technology" (2003) 23 *Australian Bar Review* 137.

<sup>66</sup> UCPR r 31.26.

<sup>67</sup> The Hon Justice Peter McClellan, above n 2, p 11.



involved in the preparation of joint reports without the leave of the Court.<sup>68</sup> There have been instances where experts have agreed at the conference, but subsequently withdrawn or modified their position after further discussions with lawyers. If this occurs, it defeats the purpose of expert evidence as the experts are no longer giving their opinion, but an opinion “filtered by the lawyers.”<sup>69</sup> It will also subject the expert to rigorous cross-examination that may damage his or her credit.

52. The procedure for giving expert evidence concurrently is not presently prescribed in the Court’s Practice Notes, but is a flexible process that varies from case to case and judge to judge. This has been succinctly summed up as whichever expert “has the microphone has the floor.”<sup>70</sup>

### **The Benefits of Concurrent Evidence**

53. Proponents of concurrent evidence, including Garling J (Supreme Court of New South Wales) and Rares J (Federal Court of Australia), argue that the procedure narrows the issues in dispute, allows all evidence to be presented to the decision-maker at the same time, reduces the likelihood of adversarial bias, and saves costs and time.<sup>71</sup>

54. Justice Rares notes that this procedure is beneficial because it reduces the chance of the first expert “obfuscating in an answer” and, because “each expert knows his or her colleague can expose any inappropriate answer immediately, and can also reinforce an appropriate one, the evidence generally proceeds to the critical...points of difference.”<sup>72</sup> It has been noted that expert evidence in the Land and Environment Court can now be taken in at least half the time when using the concurrent evidence procedure.<sup>73</sup>

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<sup>68</sup> *Practice Note Class 1 Development Appeals* at [55], *Practice Note Classes 1, 2 and 3 Miscellaneous Appeals* at [43], *Practice Note Class 4 Proceedings* at [47], *Practice Note Class 3 Compensation Claims* at [38] and *Practice Note Class 3 Valuation Objections* at [47].

<sup>69</sup> The Hon Justice Peter McClellan, above n 2, p 12.

<sup>70</sup> The Hon Justice Steven Rares, above n 37, p 11.

<sup>71</sup> The Hon Justice Peter Garling, “Concurrent Expert Evidence: Reflections and Development”, (2011) 49(10) *Law Society Journal* 59, p 60 and The Hon Justice Rares, above n 37.

<sup>72</sup> The Hon Justice Steven Rares, above n 37, pp 10-11.

<sup>73</sup> The Hon Justice Peter McClellan, above n 2, p 19.

55. The benefits of concurrent evidence may be summarised as follows:

<b>Savings in time</b>	Use of concurrent evidence generally leads to a reduction in the time required to hear expert evidence.
<b>Greater focus on the issues in question</b>	<p>All the experts on the topic are together in the witness box at the same time, answering the one question on the same basis or assumption, or explaining why a different assumption or basis was used.</p> <p>The whole process, including the joint conference and joint report, generally narrows the issues which remain in dispute to a significant extent.</p> <p>All of the evidence concerning each issue is dealt with in a logical progression and can be found in one place in the transcript.</p>
<b>Reduced opportunity for experts to obfuscate</b>	<p>After opening statements by the experts, counsel may be invited to identify the topics upon which they will cross-examine. This has the advantage of reducing the chance of the first expert obfuscating in an answer; each expert knows his or her colleague can expose an inappropriate answer, and the presence of other experts induces an expert to be precise and accurate.</p> <p>Extreme expert opinions and 'pseudo-experts' have become rare.</p>
<b>Greater control of proceedings</b>	The discussion between the experts is managed by the judge or commissioner, and not the lawyers.
<b>Opportunity for experts to convey their opinions</b>	Concurrent evidence allows the experts to express in their own words the view they have on a particular subject.

### **The Potential Disadvantages of Concurrent Evidence**

56. Whilst concurrent expert evidence has enjoyed significant support in the Land and Environment Court, and elsewhere in Australia, it must be noted, in the interests of fairness, that it has its critics in Australia. Critics of concurrent evidence procedures, such as Davies J, note that it only serves to increase the adversarial nature of the proceedings. Justice Davies argues that the 'hot-tub' turns expert witnesses into

expert advocates, with the likely result of producing one of two undesirable consequences:

The first is that the judge will be left with two opposed but apparently convincing opinions by equally well-qualified experts, neither of them has been shaken in the process. The second and, unfortunately more likely, consequence is that the judge will be unwittingly convinced by the more articulate and apparently authoritative personality. The likelihood of this latter consequence increases as the complexity of the question in issue increases.<sup>74</sup>

57. Furthermore, critics of concurrent evidence note that, due to the fact the structure of concurrent evidence varies from court to court, the utility of such procedures is greatly dependant on the ability of the judge to direct the discussion, to ensure that all points of view are aired, and that it does not degenerate into an argument between the experts or an unstructured free-for-all.<sup>75</sup>

58. Whilst commending the underlying philosophy of concurrent evidence, Rackemann DCJ of the Queensland Planning and Environment Court argues that the method is “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”<sup>76</sup>. His Honour warns that:<sup>77</sup>

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.

59. Experts in the Queensland Planning and Environment Court are, by contrast, required to confer at an earlier stage in the process, without individual reports being prepared and with their opinions being formulated in a process of mutual peer review while quarantined from the parties and their legal representatives. His Honour Judge

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<sup>74</sup> The Hon Justice Davies, “Recent Australian Developments: A Response to Peter Heerey” (2003) 23 *Civil Justice Quarterly* 388, [400].

<sup>75</sup> Lisa Wood, “Experts Only: Out of the Hot Tub and into the Joint Conference” (2007) *Anti-Trust* 89.

<sup>76</sup> The Hon Judge M E Rackemann, “The Management of Experts” (2012) 21 *Journal of Judicial Administration* 168, p 176.

<sup>77</sup> *Ibid.*

Rackemann argues that this provides a more satisfactory, useful and timely professional discourse than is achieved by reliance on concurrent evidence at trial.<sup>78</sup>

60. The potential disadvantages of concurrent evidence are perceived to be:

<b>Turning expert into advocates</b>	The ‘hot-tub’ may turn an expert witness into an expert advocate, leaving the judge with two opposed but apparently convincing opinions by equally well-qualified experts.
<b>Potential for one expert to dominate</b>	Courts need to ensure that confident and assertive experts do not unfairly dominate the panel processes.
<b>Issues of credit</b>	The conduct of a cross-examination about an expert’s credit can be difficult in a concurrent evidence setting, and some other arrangements are needed to deal with such issues.

61. But while these concerns point to certain weaknesses in some models for hearing concurrent evidence, in practice, the procedure has had considerable success in increasing the efficiency of court proceedings, especially in cases where there are more than two experts.<sup>79</sup> It may be that in terms of some issues, the traditional method of cross-examination of each expert separately, or consecutively, is more appropriate, but this is not constrained under the concurrent evidence model, and in my opinion the Court greatly benefits from having the other expert in the room to clarify the point of disagreement.

62. Justice McClellan, a former Chief Judge of the Land and Environment Court, a former Chief Judge of the Common Law Division of the Supreme Court of New South Wales and a current Court of Appeal judge, has praised concurrent evidence procedures, and is in fact responsible for instigating the widespread use in the Land and Environment Court and in the Supreme Court of New South Wales. He notes that, “experience shows that provided everyone understands the process at the outset, in particular that it is to be a structured discussion designed to inform the judge and not

<sup>78</sup> Ibid, p 168.

<sup>79</sup> The Hon Justice Peter Garling, above n 71, p 60.

an argument between the experts and the advocates, there is no difficulty in managing the hearing.”<sup>80</sup>

63. In addition, concurrent evidence procedures have received enthusiastic support from the experts themselves, as they enable experts to communicate their opinions more effectively, because they are not confined to answering the questions of the advocates. This in turn, increases the capacity of the judge to decide which expert to accept.<sup>81</sup>

64. Thus in *Strong Wise Ltd v Esso Australia Resources Ltd*,<sup>82</sup> where Rares J directed eight expert witnesses to give concurrent evidence, his Honour noted that the joint reports:<sup>83</sup>

...were extremely useful in crystallising the real questions on which the experts needed to give oral evidence. Experience in using this case management technique generally demonstrates considerable benefits in practice. First, the experts usually will readily accept the other’s opinion on the latter’s assumptions... Second, the process then usually identifies the critical areas in which the experts disagreed.

65. As his Honour observed:

...the great advantage of this process is that all the experts are giving evidence on the same assumptions... and can clarify or diffuse immediately any lack of understanding the judge or counsel may have about a point. The taking of evidence in this way usually greatly reduces the court time spent on cross-examination because the experts quickly get to the critical points of disagreement.

66. And in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority*<sup>84</sup> the oral evidence by the six town planning and architectural experts took only two days when heard concurrently.

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<sup>80</sup> The Hon Justice Peter McClellan, above n 2, p 18.

<sup>81</sup> The Hon Justice Peter McClellan, above n 2, p 18.

<sup>82</sup> (2010) 185 FCR 149.

<sup>83</sup> Ibid at [94].

<sup>84</sup> *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2004] NSWLEC 170 at [1] per Talbot J.

## THE USE OF CONCURRENT EXPERT EVIDENCE OUTSIDE AUSTRALIA

67. Positive experiences with experiments in concurrent evidence in Australia have led to other common law jurisdictions, for example the United Kingdom, Canada and Singapore, in addition to international arbitration courts, to either adopt, or strongly consider adopting, the concurrent evidence procedure in recent years.

### United Kingdom

68. The impetus for reform of expert evidence in the United Kingdom stems from the 1995 and 1996 Woolf Reports,<sup>85</sup> which found that the civil justice system in England and Wales was “too costly, too slow, too unfair, too complex and too uncertain for many litigants.”<sup>86</sup>

69. Sir Rupert Jackson, in his 2010 report reviewing civil litigation costs (“the Jackson report”), recommended that concurrent evidence processes be adopted in England and Wales in an effort to reduce the costs of, and the time spent on, litigation, to reduce the size of experts’ reports and to improve the objectivity of expert evidence.<sup>87</sup> He recommended the establishment of a pilot scheme trialling the use of concurrent evidence.

70. The pilot scheme ran in Manchester’s Technology and Construction Court and its Mercantile Court between December 2010 and December 2011. It involved identifying suitable cases for the use of concurrent evidence and inviting the parties to adopt this procedure at trial. As part of the pilot scheme, concurrent evidence was only used in cases where the judge considered it to be appropriate, and where the parties, experts and lawyers consented to such a course. All parties involved were asked to fill out questionnaires assessing their experience of the process.

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<sup>85</sup> Lord HK Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Lord Chancellor’s Department, 1995); Lord HK Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Lord Chancellor’s Department, 1996).

<sup>86</sup> M Livingstone, above n 51, p 43.

<sup>87</sup> Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (Ministry of Justice, December 2009) 384 and 469.

71. While the fifteen cases that used the process over a year were deemed insufficient to make robust conclusions on the efficacy of the procedure, tentative findings on the benefits of concurrent evidence were included in an interim report of the scheme published in January 2012.<sup>88</sup> Some of the benefits of the scheme recognised by its participants were summarised by Dame Hazel Genn to include the efficiency of the process, the ease with which the evidence could be given, and the ease with which differences in opinion could be examined and assessed.<sup>89</sup> It was found that forcing the judge, counsel and experts to focus on the issues prior to commencement resulted in a speedier and more targeted trial. The ability of the judge to evaluate disagreements was enhanced with all areas of the dispute being clearly identified from the outset.<sup>90</sup>

72. An expert participant in the pilot program described the experience of giving concurrent evidence as follows<sup>91</sup>:

The main benefit I found was when the other expert said something with which I did not agree, I could immediately explain my disagreement directly to the trial judge rather than have to explain it to my counsel and for him then to cross-examine the other expert... the use of concurrent evidence where I could talk directly to the judge was a great improvement, in my opinion, and allowed points of disagreement to be cleared up quickly.

73. Preliminary conclusions about the scheme included that there were “time and quality benefits to be gained” from the process and that no significant disadvantages had been identified by those who had participated in the study.<sup>92</sup> As a result, the Jackson Report recommendations included that concurrent evidence be included in the Pt 35 Practice Direction of the *Civil Procedure Rules* as an optional procedure. Those amendments came into force in April 2013<sup>93</sup>.

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<sup>88</sup> Dame Hazel Genn, *Manchester Concurrent Evidence Pilot: Interim Report* (University College London Judicial Institute, January 2012).

<sup>89</sup> Dame Hazel Genn, “Manchester “hot-tubbing” pilot: evidence so far”(March/April 2012) *The Commercial Litigation Journal* 4, 5.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> Genn, Interim Report, above n 88, 8.

<sup>93</sup> 35 Practice Direction 11.1-11.4.

74. Academic and industry responses to the pilot scheme were largely positive. Peter McHugh, a partner at the law firm Challinors, stated that “the advantages will outweigh the disadvantages if this procedure is introduced into our system” and that “there should be no fear for the expert who has fully prepared themselves and knows the other side’s case inside and out.”<sup>94</sup> Dr Chris Pamplin, editor of the UK Register of Expert Witnesses, expressed his support for the program, explaining that “even if the hot tub stands little chance of saving money, the better handling of opinion evidence ought to be reason enough to welcome its arrival to our shores.”<sup>95</sup>

## Canada

75. The serious and endemic nature of the issue of the biased expert witness was illustrated in Canada by the *2008 Inquiry into Paediatric Forensic Pathology*, in which the expert testimony of Dr Charles Smith relating to defective autopsies of children resulted in the wrongful conviction of several people for murder.<sup>96</sup> Through the Inquiry it was revealed that Dr Smith, previously regarded as an eminent pathologist in paediatric deaths in Ontario, fundamentally misunderstood the role of an expert witness, which was to be an advocate for the crown in order to “make a case look good”<sup>97</sup>.

76. The strongest proponents of concurrent evidence in Canada have been the judiciary. In a 2009 patent infringement case involving a contest between two experts, Federal Court Justice Johanne Gauthier remarked in the judgement that “the use of hot-tubbing would have been particularly useful”.<sup>98</sup> In an article on the subject, Supreme Court Justice Ian Binnie wrote that “a court should be able to require opposing experts to testify on the same panel and to be subject to questioning in the presence of each other, with the right to question each other in the presence of the

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<sup>94</sup> Peter McHugh, “Pass the soap” (March/April 2012) *The Commercial Litigation Journal* 10, 12.

<sup>95</sup> Chris Pamplin, “The heat is on” (July 2012) *New Law Journal* 967, 968.

<sup>96</sup> Jeff Gray, “Why judges Like ‘hot-tubbing’”, *The Globe and Mail* (online), 19 April 2011

<<http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/why-judges-like-hot-tubbing/article577733/>>; Stephen Goudge, *Inquiry into Paediatric Forensic Pathology in Ontario* (Ontario Ministry for the Attorney General, 2008) (“Goudge Inquiry Report”), 120-126.

<sup>97</sup> Goudge Inquiry Report, 179.

<sup>98</sup> *Eli Lilly and Co v Apotex Inc* [2009] FC 991; 80 CPR (4th) 1 at footnote 234 (Gauthier J).



trier of fact.”<sup>99</sup> In particular, his Honour noted that experts testifying in the presence of one and another were more likely to be measured and truthful in anticipation of criticism from other experts<sup>100</sup>.

77. In what has been described as “almost in response”<sup>101</sup> to judicial expressions of frustration with the status quo and endorsement of concurrent evidence, the Canadian *Federal Courts Rules* were amended in 2010 to expressly permit concurrent evidence in order to promote the delivery of evidence in the most efficient, least expensive and most fair manner.<sup>102</sup>

78. These reforms are codified in rr 52.6 and 282.1 of the *Federal Court Rules* which allow the Court to order expert witnesses to confer pre-hearing to narrow the issues; to prepare a joint statement of evidence; and to require experts testify as a panel. Rule 282.2 permits experts to freely give evidence and question other panel members, or to be directed to comment on the evidence of another expert. Finally, all experts must agree to the Code of Conduct for Expert Witnesses which requires an expert witness to exercise independent, impartial and objective judgment on the issues addressed” and “must endeavour to clarify with the other expert witness the points on which they agree and the points on which their views differ.”<sup>103</sup>

79. Similar reforms were implemented earlier in 2006 in Canada’s federal *Competition Tribunal Rules*.<sup>104</sup>

80. Likewise in Ontario in 2010 in that Province’s *Rules of Civil Procedure*.<sup>105</sup> Hence in *Paul v Oliver Fuels Ltd* before the Ontario Supreme Court in 2012, Edwards J advised

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<sup>99</sup> Ian Binnie, “The Changing Role of the Expert Witness” (2010) 49 *Supreme Court Law Review* 179, 191.

<sup>100</sup> Ibid.

<sup>101</sup> Bryan Finlay QC and Kristi Collins, “*New Tools for Managing Evidence in Complex Litigation*”, (WeirFoulds LLP, 2011) 10.

<sup>102</sup> *The Path to Justice: Preventing Wrongful Convictions* (Report, Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, 2011) 139.

<sup>103</sup> *Federal Courts Rules*, SOR/1998-106, Schedule, s 5.

<sup>104</sup> *Competition Tribunal Rules*, SOR/2008-141, ss 75-76.

<sup>105</sup> *Rules of Civil Procedure*, O reg RRO 1990, Reg 194, ss 50.07(1)(c) and 20.05(2)(k). The Rules allow judges to direct that experts have a pre-trial meeting to decide on those issues about which they agree and disagree and to prepare a joint statement outlining such. See also s 4.1.01, which sets out the duty of the expert witness.

counsel to conduct “some sort of ‘hot tubbing’ of the experts” to come to a resolution about the conflicts in their evidence, and he posited whether the case could be one which proceeded on the basis of an agreed statement of facts .<sup>106</sup>

## Singapore

81. For a six month period in 2011, Singapore’s Subordinate Courts ran a pilot program where concurrent evidence was used to assist parties to streamline neutral evaluations<sup>107</sup> in matters with extensive documentary or conflicting expert evidence. <sup>108</sup>

82. Following the success of the trial, the procedural rules of the Supreme Court of Singapore were amended in 2012 to adopt concurrent expert evidence practices<sup>109</sup>.

83. The new O 40A<sup>110</sup> allows, with the consent of the parties, for expert witnesses to appear as a panel, to make comments on other panel members’ evidence, to question other panel members, and to be cross-examined as part of a panel. The aim of the new provisions is the expeditious identification and resolution of issues, either by agreement or contest, in the case<sup>111</sup>.

84. In addition, practice directions for intellectual property and International Commercial Court<sup>112</sup> proceedings provide that counsel must address the presiding judge on the appropriateness of adopting concurrent evidence procedures, and if so, prepare an agreed list of issues in contention for the experts to discuss.<sup>113</sup>

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<sup>106</sup> *Paul v Oliver Fuels Ltd* [2012] ONSC 978 at [45]-[46].

<sup>107</sup> *Registrar’s Circular No 3 of 2011: Pilot Programme for Neutral Evaluation as an Alternative Dispute Resolution Option* (Subordinate Courts of the Republic of Singapore, 2011) at [13].

<sup>108</sup> Justice Dorcas Quek and Justice Seah Chi-Ling, “Finding the Appropriate Mode of Dispute Resolution: Introducing Neutral Evaluation in the Subordinate Courts”, *Law Gazette, Law Society of Singapore* (2011).

<sup>109</sup> *Rules of Court (Amendment) Rules* (2012) (Singapore).

<sup>110</sup> *Supreme Court of Judicature Act 2007* (Singapore), Ch 322, O 40A, R.6.

<sup>111</sup> *Supreme Court Note* (Singapore) “Addition of a new O 40A”(April 2012).

<sup>112</sup> *Singapore International Commercial Court Practice Directions*, accessed 10/03/2015 (hosted at <https://www.supremecourt.gov.sg/data/doc/ManagePage/5681/Singapore%20International%20Commercial%20Court%20Practice%20Directions.pdf>).

<sup>113</sup> *Intellectual Property Court Guide* (Singapore) <hosted at <https://www.supremecourt.gov.sg/data/doc/ManagePage/43/IP%20Court%20Guide.pdf>>.

85. Chief Justice Sundaresh Menon has acknowledged that while concern exists that the format favours more assertive and confident experts, this “alleged drawback seems to pale in comparison to its virtues”<sup>114</sup>. And as jury trials were abolished in Singapore in 1969, at least one academic in Singapore has raised the prospect of concurrent evidence being “clearly a viable tool that should be legislatively introduced into criminal proceedings as well.”<sup>115</sup>

## THE CASE FOR ADOPTION OF CONCURRENT EXPERT EVIDENCE IN THE UNITED STATES

86. Given the increasing weight of positive experience of concurrent evidence from foreign jurisdictions there exists, in my opinion, a strong basis for the implementation of concurrent evidence in the United States in a manner that is both consistent with the principles of evidence espoused in *Daubert v. Merrell Dow Pharmaceuticals*<sup>116</sup> with a view to maintaining the fundamentally adversarial nature of the courtroom.

87. In addition to the problems identified above with the traditional reception of expert evidence, it is not uncommon in both Australia and the US, for instance, for lawyers to interview several potential experts before finding the one that best conforms to and supports their client’s case, and who is most willing to tailor their evidence to be as helpful as possible.<sup>117</sup> There exists, regrettably, an industry where experts can earn in excess of \$1000 per hour for giving evidence<sup>118</sup>. The result is a system where experts are treated by juries, lawyers and judges with understandable mistrust,<sup>119</sup> and which is contrary to the object of receiving testimony from a person with expertise or knowledge in a matter that the court does not have.

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<sup>114</sup> Chief Judge Sundaresh Menon, “The Common Law Litigation Process: Time for a Rethink?” (paper presented at Australian Academy of Law Patron’s Address, Sydney, 23 October 2014) ([https://www.supremecourt.gov.sg/data/doc/ManagePage/5622/AAL%20Address%20-%20The%20Common%20Law%20Litigation%20Process%20-%20Time%20for%20a%20Rethink%20on%2023%20October%202014%20\(Final%20edition%20-%20281014\).pdf](https://www.supremecourt.gov.sg/data/doc/ManagePage/5622/AAL%20Address%20-%20The%20Common%20Law%20Litigation%20Process%20-%20Time%20for%20a%20Rethink%20on%2023%20October%202014%20(Final%20edition%20-%20281014).pdf)).

<sup>115</sup> Ronald J Wong, “Judging Between Conflicting Expert Evidence: Understanding the Scientific Method and Its Impact on Apprehending Expert Evidence” (2014) 26 *Singapore Academy of Law Journal* 169, 188.

<sup>116</sup> *Daubert v Merrell Dow Pharmaceuticals* 509 US 579 (1993).

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> Samuel Gross, “Expert Evidence” (1991) 5 *Wisconsin Law Review* 1113.

88. Thus in one of the first US cases in which concurrent evidence was employed, Judge Cohen noted “the cottage industry of experts” that burden both the court and parties with “unreasonable, unreliable, and irrelevant testimony”,<sup>120</sup> and which flies in the face of the court’s role as a gatekeeper to ensure the efficiency of trials and the logical applicability of evidence adduced.

89. The lack of any real progress in reducing the incidence of biased experts is well documented<sup>121</sup>. The problem is perhaps amplified in the United States due to the prevalence of jury trials in civil matters, a practice abandoned in the majority of common law countries (except in defamation matters). Juries often struggle to understand technical or scientific evidence and have a tendency to make decisions based on an expert’s bearing and qualifications.<sup>122</sup>

90. Concurrent expert evidence assists by shifting the focus of expert evidence from the credentials of experts to the substance of their arguments and methodology by subjecting their testimony to cross-examination in the presence of a peer. In narrowing evidence to the issues in contention and forcing experts to defend their positions in court before another expert, concurrent evidence procedures limit the opportunity obfuscate and encourage concessions to be made where appropriate to do so.

91. To illustrate the deficiencies inherent the current system, Michael Devitt uses the apt analogy of a boxing match “where the rules do not allow for a face-to –face slugfest” between the experts, but rather a competition in which “the first boxer hits a punching bag for thirty-six minutes before the judge. A week later, in the same judges’ presence, the opponent-boxer hits the same for 36 minutes. Months later, the group of judges who witnessed the bag punching declare a winner”<sup>123</sup>.

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<sup>120</sup> *Boltar, LLC. v. Commissioner*, 136 T.C. 326 (2011) at 335.

<sup>121</sup> Yarnall, above n 15, 311, citing Jennifer Mnookin, “Expert Evidence, Partisanship and Epistemic Competence” (2008) 73 *Brooklyn Law Review* 1009.

<sup>122</sup> Adam Liptak, “In US, Expert Witnesses are Partisan”, *The New York Times* (online), 11 August 2008 <[http://www.nytimes.com/2008/08/12/us/12experts.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/08/12/us/12experts.html?pagewanted=all&_r=0)>.

<sup>123</sup> Michael Devitt “A dip in the Hot Tub: Concurrent Evidence Techniques for Expert Witnesses in Tax Court Cases” (October 2012) 117 JTAX 213.

## Concurrent Evidence and US Federal Evidence Law

92. The dominant discussion relating to expert evidence in the United States over the past twenty years has centred on the US Supreme Court's adoption of the *Daubert* Standard<sup>124</sup> (also adopted by the Supreme Court of Canada<sup>125</sup>).

93. As an analytical framework for the admissibility of expert evidence, the *Daubert* Standard stresses the importance of the Court as a 'gatekeeper' whose function is to ensure the logical relevance, reliability and scientific integrity of expert opinion heard by juries and admitted into evidence<sup>126</sup>.

94. The Standard is now codified in r 702 of the US *Federal Rules of Evidence*<sup>127</sup> which states that:

A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or other if,

- a) the expert's scientific, technical or other specialised knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- b) the testimony is based on sufficient facts or data;
- c) the testimony is the product of reliable principles and methods; and
- d) the expert has reliably applied the principles and methods to the facts of the case.

95. Writing in dissent in *Daubert*, Rehnquist CJ noted a dissonance between the principles espoused in the majority and their practical application in an adversarial court. That is, the requirement for a judge to assess the scientific cogency of expert evidence imposes "the obligation...to become amateur scientists in order to perform that role"<sup>128</sup>. Concurrent expert evidence therefore offers a vehicle through which the validity of scientific evidence may be probed by experts in that field, thereby assisting the court in determining its value, reliability, and its admissibility.

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<sup>124</sup> *Daubert v Merrell Dow Pharmaceuticals* 509 US 579 (1993).

<sup>125</sup> *R v Chikmaglur Mohan*[1994] 2 SCR 9.

<sup>126</sup> *Daubert v Merrell Dow Pharmaceuticals* 509 US 579 (1993) at II.B.1, II.B.3, IV and footnote 7.

<sup>127</sup> *Federal Rules of Evidence*, r 702.

<sup>128</sup> *Daubert v Merrell Dow Pharmaceuticals* 509 US 579 (1993) Rehnquist CJ.

96. While the introduction of concurrent expert evidence in US courts would pose some procedural challenges, especially those relating to the right of counsel to bar certain evidence from being heard by the court, in my view, concurrent evidence is consistent with, and reinforces, the overarching principles relating to expert evidence in the US as elucidated in *Daubert*.

97. Concurrent evidence serves to reorient expert evidence back toward the central purpose of the *Federal Evidence Rules* as expressed in r 102, namely, "to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination" and to use an expert's specialised knowledge or expertise to "help the trier of fact to understand the evidence or to determine a fact in issue".<sup>129</sup>

### **Statutory Basis for Concurrent Evidence in the *Federal Rules of Evidence***

98. Scott Welch<sup>130</sup> argues that a liberal interpretation of the *Federal Rules of Evidence* and the *Federal Rules of Civil Procedure*, in addition to recent case law, indicate that concurrent evidence is permissible under the present statutory regime in the United States.

99. The basis of this position rests initially in rr 611 (A) and 614 of the *Federal Rules of Evidence*, which grant the court discretion over the manner, order and calling of witness testimony. Recent cases suggest that r 611 includes an inherent right to "question witnesses, elicit facts, clarify evidence and pace the trial"<sup>131</sup>. Similarly, courts have held that there is no abuse of discretion under r 614 "for [a trial] court to question witnesses in order to clarify questions and develop facts, so long as questions are

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<sup>129</sup> *Federal Rules of Evidence*, r 702.

<sup>130</sup> Scott Welch, "From Witness Box to the 'Hot Tub': How the 'Hot Tub' Approach to Expert Witnesses Might Relax an American Finder of Fact" (2011) 5 *Journal of International Commercial Law and Technology* 3.

<sup>131</sup> *Cranburg v Consumers Union of the US Inc*, 756 F 2d 382, 391 (5<sup>th</sup> Cir 1985), in Welch, above n 15, 160.

non-prejudicial in form and tone, and the court does not become personally overinvolved.”<sup>132</sup>

100. Similarly, higher courts have upheld trial court decisions to order, pursuant to r 702, experts to explain the reasoning and methods underlying their conclusions by way of affidavits<sup>133</sup>. In addition, the Advisory Committee Notes to the *Federal Rules of Evidence* provide that the finder of fact should consider the extent to which “the expert has adequately accounted for obvious alternative explanations”<sup>134</sup>.

101. Welch therefore concludes that the weight of these rules and appellate court authority demonstrate a broad discretion afforded to trial judges “to explore alternatives to understanding an expert’s testimony and the nature of the claims in front of the court”<sup>135</sup>. This discretion would permit the adoption of concurrent expert evidence.

102. Moreover, the objectives of the US *Federal Rules of Civil Procedure* (“FRCP”) are to be “construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding”<sup>136</sup>. Rule 83 of the FRCP provides that local civil courts may adopt and amend rules governing their practice as long as these rules do not remove rights from parties to litigation.<sup>137</sup> The Advisory Committee Notes in respect of r 83 state that the rule “provides flexibility to the court in regulating practice when there is no controlling law”.<sup>138</sup> This has again led Welch to conclude that this discretion means that judges in local courts have the freedom to hear evidence concurrently, should they find it appropriate to do so.

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<sup>132</sup> *United States v Velasquez-Ramirez*, 619 F 2d 789, 795 (9<sup>th</sup> Cir 1979), in Welch, above n 15, 160.

<sup>133</sup> *Claar v Burlington Northern Railroad Company* 29 F 3d 499, 502–05 (9th Cir 1994).

<sup>134</sup> *Federal Rules of Evidence*, r 702, Advisory Committee Notes.

<sup>135</sup> Welch, above n 15, 161.

<sup>136</sup> *Federal Rules of Civil Procedure*, Pt 1.

<sup>137</sup> *Federal Rules of Civil Procedure*, r 87

<sup>138</sup> *Federal Rules of Civil Procedure*, r 87, Advisory Committee Notes.

## Is Concurrent Evidence Problematic in Jury Trials?

103. The involvement of a jury as the trier of fact is perceived to be the most difficult challenge facing the implementation of concurrent evidence in American courts. The concurrent evidence process is meant to involve a free flowing discussion between the decision maker, the experts and counsel, largely directed by the decision maker. The right of counsel to object to a jury hearing certain testimony, combined with significant restrictions on jury questioning of witnesses<sup>139</sup>, which vary substantially from State to State, may present as an obstacle to the use of concurrent evidence processes in jury trials.

104. Academics such as Megan Yarnall therefore suggest that concurrent evidence methods be used, initially at least, in judge alone trials, which eliminates these procedural and practical concerns. These test trials would accordingly reveal those elements of concurrent evidence that could be modified to better suit American litigation.<sup>140</sup> She also advocates the use of concurrent evidence processes in pre-trial depositions, which would avoid the need to conform to the rules of evidence, allow the experts to converse with one another directly, and narrow down the issues about which there is dispute before the beginning of the trial itself, thus saving time during the trial. The less intimidating setting of the pre-trial deposition may also serve to put experts more at ease.<sup>141</sup>

## The Experience of the US Tax Court

105. The use of concurrent expert evidence has emerged somewhat organically within the United States Tax Court. In several instances, judges of that Court have, with the consent of the parties, received concurrent evidence from expert witnesses.

106. In *Rovakat v Commissioner*,<sup>142</sup> Judge Laro explained the procedure as follows:

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<sup>139</sup> Yarnall, above n 15, 336.

<sup>140</sup> Ibid, 338.

<sup>141</sup> Yarnall, above n 138, 339.

<sup>142</sup> *Rovakat, LLC v Commissioner, TC Memo 255 TCM 29, XIV C (2011)*.



...to implement the concurrent testimony, the Court sat at a large table in the middle of the courtroom, with all three experts, each of whom was under oath. The Court then engaged the experts in a three-way conversation about the ultimate issues of fact. Counsel could, but did not, object to any of the expert's testimony.

107. The principal purpose of the expert evidence in *Rovakat* was to ascertain whether or not there was 'economic substance' to international securities transactions which the Internal Revenue Service alleged was motivated primarily by tax-avoidance, rather than any business, or regulatory reality. The case involved assessing the pre-tax worth of financial securities transactions, and taking into account currency exchange rates and other economic conditions, to prove that the transactions held a limited non-tax related business purpose. Concurrent evidence procedures were adopted to overcome the sheer volume of evidence, which included "trial testimony of seven law and three expert witnesses...and over 600 exhibits".

108. Judge Laro concluded that "by engaging in this conversational testimony, the experts were able and allowed to speak to each other, to ask questions and to prove weaknesses in any other expert's testimony". The process resulted in a discussion that was "highly focused, highly structured and directed by the court".

109. The process in *Rovakat* was applied in *Crimi v Commissioner of Internal Revenue*<sup>143</sup>, where, at request of the parties, expert witnesses were directed to testify concurrently.

110. At issue in *Crimi* was a part-gift, part-sale transaction of a parcel of land where the petitioners claimed the difference between the property's value and the sale price, as a charitable deduction. The IRS challenged the valuation of the property, deemed to be excessive, on various grounds including its development potential, the need for remediation, and the potential presence of an endangered species, amongst other factors, to establish the properties' market value at highest and best use.

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<sup>143</sup>*Crimi v Commissioner of Internal Revenue* 51 TCM (2013).

111. The use of concurrent evidence allowed the essential differences in the expert valuations to become immediately apparent. Having isolated the issues in dispute, the judge in *Crimi* rejected some of the expert valuations due to their flawed assumptions, as identified by other experts during the course of the concurrent evidence.

112. In his concluding remarks, his Honour observed that, “the importance of concurrent testimony in these cases cannot be overstated; the experts’ dialogue straightaway focused on the core issues in dispute”<sup>144</sup>.

### **The Experience of the Federal District Courts**

113. Similar adoptions of concurrent expert evidence have occurred in the Federal District Court, with Woodlock J pioneering the use of the concurrent evidence method in a number of “non-jury cases over the years, including in patent and business cases”<sup>145</sup> having heard of the method from Australian Justice Peter Heerey (of the Federal Court of Australia).

114. In the case of *Black Political Task Force v William Francis Galvin*, for example, concurrent evidence was employed with little advance notice to counsel. In that case, the Court, comprising of Selya, Woodlock and Posner JJ, was asked to determine whether electoral redistricting in Massachusetts impermissibly infringed the rights guaranteed to minorities in the Constitution and under the *Voting Rights Act*<sup>146</sup>. At trial, the judges heard from two political scientists concurrently.

115. At the end of the process Selya J remarked<sup>147</sup>:

...this has been a rather innovative procedure. I'm tempted to say unprecedented. But speaking for all three of us [the judges], we have found it very helpful. Sometimes when we are able to get the experts untethered from

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<sup>144</sup> *Crimi v Commissioner of Internal Revenue* 51 TCM 12, IV A (2013).

<sup>145</sup> Lisa Wood, “Experts in the Tub” (2007) 21(3) *Anti-Trust* 95, 97.

<sup>146</sup> *Voting Rights Act* (VRA) 42 U.S.C. § 1973(b).

<sup>147</sup> Transcript of trial: *Black Political Task Force v William P Galvin* No 02-11190-DPW (14 November 2003). The decision of the trial court is at 300 F Supp 2d 291 (D Mass, 2004). A second related voting case was decided in which the expert testimony was used: *Meza v Galvin* 322 F Supp 2d 52 (D Mass, 2004). Wood, above n 145, 98-100.

the constrictions of the lawyers and their questions and their pet theories of the case, it helps to illuminate for us the matters we have to decide.

116. It is worth noting that Woodcock J had applied concurrent evidence procedures prior to *Black Political Task Force* to mitigate the effect of testimony that was overly prepared and controlled by counsel.<sup>148</sup> Although his Honour has only used the technique for bench trials to date, he has nevertheless stated that he would not rule out using the process in a jury trial, noting, however, that in such a trial he would act to supervise the delivery of evidence.<sup>149</sup>

### **Anti-Trust Cases and Other Instances of the Use of Concurrent Evidence in the United States**

117. While Rares J of the Federal Court of Australia has observed concurrent evidence's utility as a "technique of general application", applying to a broad range of topics including, "accounting, quantity surveying, fire protection requirements, wildlife paths... (or) where expert questions of similarity, economics or copying arise"<sup>150</sup>, both academic Lisa Wood<sup>151</sup> and, most recently, Judge Susan Illston of the Northern District of California have noted its particular potential in anti-trust matters.

118. Judge Illston has implemented 'hot-tubbing', including engaging in frequent case management conferences to resolve issues of mutual disagreement, in addition to having the plaintiff's and defendant's experts testify "back to back on particular, difficult issues"<sup>152</sup>. Judge Illston argues that this and other procedures create an order to the evidence which, in turn, allows the jury to "retain a better understanding of what those [disputed] issues are".<sup>153</sup>

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<sup>148</sup> Wood, above n 145, 97.

<sup>149</sup> Ibid.

<sup>150</sup> The Hon Justice Steven Rares, *Expert Evidence in Copyright Cases – Concurrent Expert Evidence and the "Hot Tub"* (paper presented to 14<sup>th</sup> Biennial Copyright Law and Practice Symposium, 15 October 2013), p 2.

<sup>151</sup> Wood, above n 145, 97.

<sup>152</sup> Melissa Lipman, "Judge Illston's Tips for Economic Experts in Antitrust Cases" (16 April 2015) <hosted at <http://www.law360.com/articles/644194/judge-illston-s-tips-for-economic-experts-in-antitrust-cases>>.

<sup>153</sup> Ibid.

119. Similarly, Justice Lawrence Block of the US Court of Federal Claims has employed the technique, also with limited notice to counsel, in a case involving complex evidence on financial valuations. The process allowed Block J to ask questions to clarify his understanding of the methodology used by the experts in order to aid his understanding of the evidence<sup>154</sup>.

120. In that case (*Anchor Savings Bank FSB v The United States of America*)<sup>155</sup>, before the US Court of Federal Claims, at issue was the quantum of damages owed to Anchor Savings Bank by the Federal Government as a result of the latter's 'supervisory merger contracts', in which the Federal government offered regulatory incentives ('regulatory goodwill') for solvent companies to take on bad debt, but some years later reneged on those arrangements.

121. The Court was required to resolve whether Anchor Savings Bank would have purchased the distress assets unless induced by the 'regulatory goodwill'; the extent to which the decision to dispose of those assets was driven by the removal of the 'regulatory goodwill'; and the resulting quantum of any damages. To answer these questions, Block J was required to take into account complex economic and statistical evidence. Concurrent evidence was utilised to interrogate and examine the underlying methodology employed by expert witnesses who testified to a range of issues, including the state of the secondary mortgage market, risk analysis, and the calculation of damages.

## CONCLUSION

122. In conclusion, across various countries where concurrent evidence has been implemented, including the United States, judges, practitioners and experts have lauded the utility of concurrent evidence in narrowing the focus of the expert evidence

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<sup>154</sup> According to his own comments in the transcript: *Anchor v United States* and as cited in John Emmerig et al, "Room in American Courts for an Australian Hot Tub" (April, 2013) <hosted at [http://www.jonesday.com/room\\_in\\_american\\_courts/](http://www.jonesday.com/room_in_american_courts/)> .

<sup>155</sup> *Anchor Savings Bank FSB v United States of America* No 95 – 39 C US CFC (2004).

to only those matters genuinely in dispute and in testing the credibility of that evidence against the opinion of other experts.

123. It is now indisputable that the quality of expert evidence has been significantly improved by the use of concurrent evidence. Rather than detracting from the adversarial nature of the courtroom, concurrent evidence embraces and enhances this adversarialism by focusing on the substantive areas of disagreement between the parties.

124. In my opinion, the weight of positive experience in the use of concurrent evidence is now overwhelming, and jurisdiction in the United States, including Alaska, should give serious consideration to its adoption as a means by which the efficient administration of justice can be reinforced and strengthened.

**28 April 2015**

**Justice Rachel Pepper  
Land and Environment Court of New South Wales**