

NEW METHOD WITH EXPERTS – CONCURRENT EVIDENCE

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The title of this journal captures two certainties: first, that no court system is perfect; second, that through joint endeavors, we are better placed to reach perfection. The launch of the International Judicial Institute for Environmental Adjudication provides a unique opportunity for judges, practitioners and academics to share insights from their own court systems and to benefit from hearing those of their overseas counterparts.

The New South Wales Land and Environment Court

The New South Wales Land and Environment Court (Court) was established under the Land and Environment Court Act 1979 (N.S.W.). At the time of its inception, the Court was described as “a somewhat innovative experiment in dispute resolution mechanism.”¹ The Court provides a specialized forum for the determination of land, environmental and planning disputes and has jurisdiction over judicial and merits reviews, civil and criminal enforcement and

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1. P. Ryan, *Court of Hope and False Expectations: Land and Environment Court 21 Years On*, 14(3) J. ENVTL. L. 301 (2002) (U.K.) (citing N.S.W. Parliamentary Debates, Legislative Council, 21 Nov 1979, 3349-50 (Hon. D.P. Landa).

appeals.

When conducting merits reviews, the Court is not bound by the rules of evidence. Rather, Section 38(2) of the Land and Environment Court Act provides that the Court “may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits.” In merits appeals, both judges and commissioners (who have specialized expertise in relevant environmental fields) preside to determine the matters that come before the Court.

Problems with Expert Evidence in the Land and Environment Court

The Land and Environment Court Act made plain Parliament’s intention that the Court should not be bound by conventional adversarial principles in its operation. Initially, discomfort and, on occasion, resistance from within the legal profession hampered the implementation of this intention but over time these have diminished. The debate is reflected in two differing opinions of the New South Wales Court of Appeal.² Public concern about the operation of the Court became so intense that in 2001 the Hon. Jerrold Cripps QC, a former Chief Judge of the Court, was asked to conduct a public review of the Court’s procedures and make recommendations for change (known as the “Cripps Inquiry”).³ Following issuance of the “Cripps Inquiry” report, some procedural changes were implemented while other concerns remained unaddressed.⁴ Many of the unaddressed concerns related to the handling of expert evidence in proceedings. Duplication of evidence, and inefficient and unnecessary cross-examination were common. Similarly, as with many common law jurisdictions, there were legitimate concerns regarding the impartiality and integrity of expert evidence.⁵

Difficulties with the integrity and reliability of expert evidence have been recognized by many commentators over a long period. Learned Hand challenged the accepted utility of expert evidence and

2. *Residents Against Improper Dev. Inc v. Chase Prop. Investments Pty. Ltd.* [2006] NSWCA 323; *cf. Hunter Dev. Brokerage Pty. Ltd. v. Cessnock City Council (No 2)* [2006] NSWCA 292.

3. Report of the Land and Environment Court Working Party (Sept. 2001).

4. *See also* McClellan CJ at CL, *Land and Environment Court – Achieving the Best Outcome for the Community*, Paper presented at the EPLA Conference, Newcastle, N.S.W. (Nov. 28-29, 2003).

5. McClellan CJ at CL, *Problems With Evidence*, Speech delivered at the Government Lawyers’ Annual Dinner, N.S.W. (Sept. 7, 2004).

the procedures by which it was received in court in his well-known article written in the *Harvard Law Review* in 1901:

No one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best. In early times, and before trial by jury was much developed, there seemed to have been two modes of using what expert knowledge there was: first, to select as jurymen such persons as were by experience especially fitted to know the class of facts which were before them, and second, to call to the aid of the court skilled persons whose opinion it might adopt or not as it pleased. Both these methods exist at least theoretically at the present day, though each has practically given place to the third and much more recent method of calling before the jury skilled persons as witnesses. No doubt, there are good historical reasons why this third method has survived, but they by no means justify its continued existence, and it is, as I conceive, in fact an anomaly fertile of much practical inconvenience.⁶

The article contains a comprehensive discussion of the history and use of experts in the common law system, and the perceived difficulties. These difficulties include the expectation that in the adversary system the expert becomes the hired champion of one side. These problems have been acknowledged by many commentators, including myself.⁷

Learned Hand was writing at a time when the complexity of litigation and the issues to be decided were significantly less than today. The growth in complexity has of course been accompanied by an enormous increase in the available knowledge in all areas of intellectual endeavor, not least in the environmental sciences. Environmental courts and tribunals are required to resolve disputes between experts with respect to a large catalogue of other complex matters, including the impact of past and future development on the natural and built environment, the causes and consequences of

6. Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 40 (1901).

7. See, e.g., McClellan CJ at CL, *Recent Changes and Reforms at the Land and Environment Court*, Speech delivered to the Local Government Association of N.S.W. (July 27, 2004); McClellan CJ at CL, *Expert Witnesses: the recent experience of the Land and Environment Court*, 17 JUD. OFFICERS BULL. 83 (2005) (N.S.W.); McClellan CJ at CL, *Environmental Issues: How Should We Resolve Disputes?*, 1 NAT'L ENVTL. L. REV. 36 (2005) (Austl.); McClellan CJ at CL, *Problems with Evidence*, *supra* note 5.

pollution and contamination, and the related social and financial issues. The resolution of these matters may significantly impact the experts' reputations and, consequently, have significant financial consequences.

The Process of Change in the Land and Environment Court

In response to these concerns, the Land and Environment Court began modifying its Practice Directions to clarify the duties and expectations of expert witnesses. In 1999, it introduced a pre-hearing conference that required experts to meet prior to the hearing to discuss those matters upon which they agreed and to identify the points on which they disagreed. Although this proved beneficial, notwithstanding the expectations in the Land and Environment Court Act, the adversarial nature of the proceedings continued to underpin the "culture" of the Court.

In a speech to the National Conservation Council of New South Wales in 1999, one former chief judge stated:

First, the Court is a court. The hearings conducted in it involve the traditional hallmarks of a court, that is, an adversarial proceeding at the end of which the judge or commissioner reaches a decision on the evidence adduced during the hearing, and in the result there will be a winner and a loser.⁸

By the time I commenced as chief judge, it was plain that further change was necessary. Public concerns about the adversary process and its perceived failure to provide for the most desirable community outcomes from a dispute led to the "Cripps Inquiry." Personally, I was concerned that the Court's continued focus on the traditional winner versus loser dichotomy conflicted with its public function. Most importantly, in a specialized environmental court, community outcomes must be given appropriate emphasis, generally beyond the interests of the private litigants. To address these concerns, during my term as chief judge, the Court altered many of its procedures including changes designed to increase the integrity and efficiency of expert evidence. One such procedural change was the introduction of a presumption in favor of court-appointed single experts, adopted by

8. Hon. Mahla L Pearlman AM, *The Role and Operation of the Land and Environment Court*, 37 L. SOC'Y J. 58, 58-59 (1999) (N.S.W.).

the Court in March 2004. I have spoken of the benefits of this change elsewhere.⁹

The most significant procedural change however was the introduction of the concurrent method of receiving expert evidence. Adopted by many other courts, concurrent evidence is one of the most important recent reforms in the civil trial process in Australia. It was first used in a few cases in the Australian Trade Practices¹⁰ and Administrative Appeals Tribunals. Apart from its use in the Land and Environment Court,¹¹ concurrent evidence is now utilized extensively in the Common Law Division of the New South Wales Supreme Court,¹² the Queensland Land and Resource Tribunal, the Federal Court of Australia,¹³ and, to a lesser extent, in many other Australian courts and tribunals.

To facilitate the use of concurrent evidence, provision has been made in the Uniform Civil Procedure Rules 2005 (N.S.W.). Those rules apply to all courts in New South Wales. In the Land and Environment Court, concurrent evidence is now the default procedure for all matters requiring evidence from more than one expert in the same field.¹⁴ The same is true of the Common Law Division of the Supreme

9. See, e.g., McClellan CJ at CL, *Expert Witnesses – The Experience of the Land & Environment Court of New South Wales*, Paper presented at the XIX Biennial LAWASIA Conference, Gold Coast (Mar. 20-24, 2005).

10. The Australian Trade Practices is now known as the Australian Competition Tribunal.

11. See, e.g., *Jamison Investments Pty Ltd v. Penrith City Council* [2010] NSWLEC 1194; *Scarf v. Randwick City Council* [2010] NSWLEC 1205; *Reavill Farm Pty Ltd v. Lismore City Council* [2010] NSWLEC 1207; *Marana Developments v. Botany Bay City Council* [2010] NSWLEC 1237; *Berringer Road Pty Ltd v. Shoalhaven City Council* [2010] NSWLEC 1140; *O’Keefe v. Water Administration Ministerial Corporation (No 2)* [2010] NSWLEC 89.

12. See, e.g., *Harris v. Bellemore* [2010] NSWSC 176; *Thompson v. Haasbroek* [2010] NSWSC 111; *Hollier v. Sutcliffe* [2010] NSWSC 279; *Reeves v. State of New South Wales* [2010] NSWSC 611; *Wallace v. Ramsay Health Care Ltd* [2010] NSWSC 518; *Konstantopoulos v. R & M Beechey Carriers Pty Ltd* [2010] NSWSC 753; and *SW v. State of New South Wales* [2010] NSWSC 966.

13. See, e.g., *Seven Network Limited v. News Limited* [2007] FCA 2059; *Ackers v. Austcorp International Ltd* [2009] FCA 432; *Peterson v. Merck Sharpe & Dohme (Austl.) Pty Ltd & Anor* [2010] FCA 180; *Strong Wise Ltd v. Esso Austl. Resources Pty Ltd* [2010] FCA 240; *Danisco A/S v. Novozymes A/S* [2010] FCA 995.

14. See, e.g., Land and Environment Court of New South Wales, *Practice Note – Class 1 Development Appeals*, 14 May 2007, [56]; Land and Environment Court of New South Wales, *Practice Note – Classes 1, 2 and 3 Miscellaneous Appeals*, 14 May 2007, [44]; Land and Environment Court of New South Wales, *Practice Note – Class 3 Compensation Claims*, 14 May 2007, [39]; Land and Environment Court of New South Wales, *Practice Note – Class 3 Valuation Objections*, 14 May 2007, [48]; Land and Environment Court of New South Wales, *Practice Note – Class 4 Proceedings*, 14

Court of New South Wales.¹⁵

Concurrent Evidence: How does it Work?

Concurrent evidence is essentially a discussion chaired by the judge in which the various experts, the parties, the advocates and the judge engage in a cooperative endeavor to identify the issues and arrive where possible at a common resolution of them. Where resolution of issues is not possible, a structured discussion, with the judge as chairperson, allows the experts to give their opinions without the constraints of the adversarial process and in a forum which enables them to respond directly to each other. The judge is not confined to the opinion of one advisor but has the benefit of multiple advisors who are rigorously examined in public.

How does concurrent evidence work? Although variations may be made to meet the needs of a particular case, concurrent evidence requires the experts retained by the parties to prepare a written report in the conventional fashion. The reports are exchanged and, as is now the case in many Australian courts, the experts are required to meet without the parties or their representatives to discuss those reports. This may be done in person or by telephone. The experts are required to prepare a bullet-point document incorporating a summary of the matters upon which they agree, but, more significantly, matters upon which they disagree. The experts are sworn together and, using the summary of matters upon which they disagree, the judge settles an agenda with counsel for a “directed” discussion, chaired by the judge, of the issues in disagreement. The process provides an opportunity for each expert to place his or her view on a particular issue or sub-issue before the court. The experts are encouraged to ask and answer questions of each other. The advocates also may ask questions during the course of the discussion to ensure that an expert’s opinion is fully articulated and tested against a contrary opinion. At the end of the discussion, the judge will ask a general question to ensure that all of the experts have had the opportunity to fully explain their positions.

Some Personal Reflections on the Use of Concurrent Evidence

May 2007, [48]; Land and Environment Court of New South Wales, *Practice Note – Class 2 Trees*, 23 July 2010, [43].

15. Supreme Court of New South Wales, *Practice Note – SC CL 5*, 5 Dec. 2006.

I have utilized the process of concurrent evidence on many occasions, both when I was in the Land and Environment Court and in the Supreme Court. In 2006, I presided over a trial involving an eighteen-year-old male who had suffered cardiac arrest, resulting in catastrophic and permanent brain damage.¹⁶ He sued his general practitioner. The claims required expert testimony regarding the defendant doctor's duty of care to the plaintiff as well as a major cardiological issue.

Five general practitioners were called to give expert opinion and they gave their evidence concurrently. Sitting together at the bar table for a day and a half, they discussed in a structured and cooperative manner the issues falling within their expertise. Prior to this courtroom discussion, the doctors had conferenced together for some hours and prepared a joint report which was tendered to the Court. In all likelihood, if the expert evidence had been received in the conventional manner, it would have taken at least five days. More importantly, the Court would not have had the benefit of the questions which the experts asked of each other, and, of even greater value, the responses to those questions.

Four cardiologists also gave evidence together – one by satellite from the United States, the others sitting in the courtroom at the bar table. This evidence took one day. Under the conventional adversary process, it would probably have taken at least six. The doctors were able to distill the cardiac issue to one question which they identified and, although they held different views, their respective positions on that question were clearly stated. Later discussion with the advocates indicated that the process was welcomed by both the doctors and the parties' advocates.

Concurrent evidence provides the means by which the decision-making process conventionally adopted by professionals can be utilized in the courtroom. If a person suffered a life-threatening injury which required hospitalization and the possibility of major life-saving surgery, a team of doctors would come together to make the decision as to whether or not to operate. The team would include a surgeon, anesthetist, physician, and other related specialists who had a professional understanding of the particular problems. They would meet, discuss the situation and the senior person would ultimately

16. Halverson v. Dobler [2006] NSWSC 1307.

decide on the appropriate response. It would be a discussion in which everyone's views were put forward, analyzed and debated. The hospital would not set up a court case, much less an adversarial contest. If this is the conventional decision-making process of professionals, why should it not also be the method adopted in the courtroom?

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 an argument between the experts and the advocates, there is no difficulty in managing the hearing. Although not encouraged, very often the experts, who will be sitting next to each other, address each other informally by first names. Within a short time of the discussion commencing, you can feel the release of the tension, which infects the conventional evidence-gathering process. Those who might normally be shy or diffident are able to relax and contribute fully to the discussion.

I have had the opportunity of speaking with many witnesses who have been involved in the concurrent process and with counsel who have appeared in cases where it has been utilized. Although counsel may be hesitant about the process initially, I have heard little criticism once they have experienced it. The change in procedure has been met with overwhelming support from the experts and their professional organizations. They find that they are better able to communicate their opinions and, because they are not confined to answering the questions of the advocates, are able to more effectively convey their own views and respond to those of the other experts. Because they must answer to a professional colleague rather than an opposing advocate, experts readily confess that their evidence is more carefully considered. They also believe that there is less risk that their evidence will be unfairly distorted by the advocate's skill. Additionally, the process is significantly more efficient than conventional methods. Evidence which may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as twenty percent of the time which would otherwise have been required.

Under concurrent evidence, the number of experts who can effectively give evidence together varies. The most common number

is four but I have had eight witnesses at one time¹⁷ and know of a case where there were twelve.¹⁸ From the decision-maker's perspective, the opportunity to observe the experts in conversation with each other about the matter, together with the ability to ask and answer each others' questions, greatly enhances the capacity of the judge to decide which expert to accept. Rather than have a person's expertise translated or colored by the skill of the advocate, and as we know the impact of the advocate can be significant, the experts can express their views in their own words. There also are benefits which aid in the decision-writing process. Concurrent evidence allows for a well-organized transcript because each expert answers the same question at the same point in the proceeding.

I am often asked whether concurrent evidence favors the more loquacious and disadvantages the less articulate witnesses. In my experience, this does not occur. Since each expert must answer to their professional colleagues in their presence, the opportunity for diversion from the intellectual content of the response is diminished. Being relieved of the necessity to respond to an advocate, which many experts see as a contest from which they must emerge victorious, rather than a forum within which to put forward their reasoned views, the less experienced, or perhaps shy person, becomes a far more competent witness in the concurrent evidence process. In my experience, the shy witness is much more likely to be overborne by the skillful advocate in the conventional evidence gathering procedure than by a professional colleague with whom, under the scrutiny of the courtroom, they must maintain the debate at an appropriate intellectual level. Although I have only rarely found it necessary, the opportunity is of course available for the judge to intervene and ensure each witness has a proper opportunity to express his or her opinion.

Conclusion

As increases in "scientific" knowledge are expected to accelerate, it seems likely that courts will have to reconsider whether professionals, assessors or advisers should be available to assist the

17. *Ironhill Pty Ltd v. Transgrid* [2004] NSWLEC 700; *Attorney-General (NSW) v. Winters* [2007] NSWSC 1071.

18. Note that the case referenced here was settled, and consequently, no citation is available.

judge's understanding of the "scientific" evidence to provide greater public confidence in the decision-making process. Concurrent evidence is a significant innovation which moves in that direction, by providing a more efficient process to receive expert evidence and improve its quality. It has many advantages for the parties, the witnesses and the decision-maker.