

In the native title 'hot tub': expert conferences and concurrent expert evidence in native title

Vance Hughston SC and Tina Jowett

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Abstract

In the native title 'hot tub' outlines the history and development of expert conferencing and expert concurrent evidence in Australia, including in the Federal Court. These approaches to expert evidence are a major development of the last decade, greatly reducing the hearing time of native title proceedings and the costs to the parties involved. The authors explore how expert conferences and concurrent evidence can narrow the issues in the native title claims of Aboriginal and Torres Strait Islander people, discussing in particular their experiences in four recent cases.



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Introduction

This paper explores the increasing use of expert conferences¹ and concurrent expert evidence² in native title proceedings, where these techniques have been successful in narrowing, clarifying and, in some cases, resolving the issues in dispute between expert witnesses.³ The resolution of issues between experts may nevertheless leave outstanding legal issues for the court regarding what is to be made of the facts and opinions provided by the experts.

Four recent native title cases where the court has ordered expert conferences and concurrent evidence are discussed in this paper. Those cases are: *Banjima People v Western Australia (No. 2)* [2013] FCA 868 (*Banjima*), *Graham on behalf of the Ngadju v Western Australia* [2012] FCA 1455 (*Ngadju*), *Clara George (Badimia) v Western Australia (WAD 6123 of 1998)* (*Badimia*) and *Wyman on behalf of the Bidjara People v Queensland (No. 2)* [2013] FCA 1229 (*Bidjara*).

Background

The need to call on expert evidence to address issues that are technical, scientific or otherwise outside the knowledge of the ordinary person (and hence of the court) has long been commonplace.

In native title proceedings experts such as anthropologists, linguists, historians, archaeologists and even ethno-botanists may be called to give evidence within the area of their expertise. In *Sampi v Western Australia* [2005] FCA 777 (*Sampi*) at [964], French J observed that 'the mode of proof of continuity in traditional laws and customs and the society to which they relate involves consideration of the historical, archaeological, linguistic and anthropological evidence in the light of the direct testimony of Aboriginal witnesses.' The evidence of Aboriginal or Torres Strait Islander people is the most important evidence in native title proceedings.⁴ While Aboriginal witnesses may be able to recount the content of laws and customs acknowledged and observed in the past, the collective memory of living people will not extend back to sovereignty. In practice, the expert evidence of anthropologists will most frequently be relied upon to overcome the inherent forensic difficulties in proving the content of pre-sovereignty laws and customs and the continuous acknowledgment and observance of those laws and customs down to the present day.⁵

The traditional adversarial process for adducing and testing expert evidence, while longstanding, has been subject to the following criticisms:

- Courts have from time to time expressed concerns that experts may give evidence that is partisan or biased.⁶ This can be an inherent, if not conscious, consequence of the fact that

1 Federal Court of Australia, Federal Court Rules 2011 (Cth), rr. 5.04(3) and 23.15(a), <http://www.comlaw.gov.au/Details/F2011L01551>.

2 *ibid.*, r. 23.15(f)–(g).

3 We thank Michael Robinson, Wendy Asche and Dr Kingsley Palmer for their assistance in providing us with information regarding the claims in which they gave evidence in the late 1990s and in early 2000, as well as the feedback they provided for drafts of this paper.

4 In *Sampi v Western Australia* [2010] FCAFC 26; (2010) 266 ALR 537 French J stated at [48] that the Aboriginal witnesses' evidence regarding the laws and customs and rights and interests of the claim group with respect to land and waters was of the highest importance and all other evidence was second order evidence. On appeal, the Full Court agreed, saying that the Aboriginal 'testimony is of the highest importance in a determination of the evidence of native title': *Sampi* at [57]. See also *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No. 2)* [2010] FCA 643 at [100], Finn J; *Yarmirr v Northern Territory (No. 2)* (1998) 82 FCR 533 at [560], Olney J; *De Rose v South Australia* [2002] FCA 1342 at [351], O'Loughlin J.

5 *Alyawarr, Kaytetye, Warumungui, Wakay Native Title Claim Group v Northern Territory* [2004] FCA 472 at [89].

6 *Jango v Northern Territory* (2006) 152 FCR 150 at [315]–[338], esp. [319].

experts are briefed by only one party to the proceeding. In the case of anthropologists the concern may be compounded by a longstanding association between the expert and the group.

- There have been instances of experts giving evidence about matters extending beyond their professional expertise.⁷
- Expert evidence may be highly technical and difficult to understand, making the key issues difficult to identify, let alone resolve. This is a particular issue in relation to an anthropological report, which might traverse a vastly wider range of matters than, say, a report on a blood stain.
- When evidence is given in a strictly adversarial setting, considerable court time is expended in each expert being taken through their assumptions and their opinions, both in examination-in-chief and in cross-examination.
- Experts have, from time to time, expressed concern that giving evidence in an adversarial context does not necessarily allow them to best assist the court, nor to give the court the opportunity to properly assess competing opinions. The competing hypotheses are not clearly juxtaposed. Rather, the views of particular experts are often presented in a quagmire of related and unrelated matters; they may be discredited or lost in the process of giving evidence and misconceptions may arise.⁸ This is especially the case when experts are subjected to lengthy, difficult and sometimes hostile cross-examination.
- Experts have also noted, when giving evidence in the adversarial context, that their expertise is not always accorded appropriate respect.

Supporters of the use of expert conferences and concurrent expert evidence (also known as the 'hot tub' method) believe that the above concerns can be reduced. A number of courts and tribunals have incorporated both approaches into their practice and procedure rules.⁹ Australian courts have the most experience with the concurrent evidence method and it seems to be gaining momentum across most jurisdictions.¹⁰ We believe that most, if not all, native title proceedings heard over the last two years have incorporated expert conferences and concurrent evidence. Most proceedings that have included concurrent evidence have not discussed its merits or shortcomings. The judgments do, however, refer to how issues were traversed or narrowed by its use.¹¹ It appears that concurrent evidence has saved the courts time in comparison to proceedings that used the conventional adversarial process.¹²

7 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 7)* (2003) 130 FCR 424 at [41] and *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 9)* (2007) 238 ALR 1 at [459]–[468].

8 *Makita v Sproules* (2001) 52 NSWLR 705.

9 The Federal Court of Australia, the Administrative Appeals Tribunal, the NSW Land and Environment Court, the Supreme Court of NSW and the County Court of Victoria are some examples.

10 J Temple-Cole & S Farthing, 'Some like it hot', *Hearsay*, Queensland Bar Association, February 2013.

11 In *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No. 4)* [2012] FCA 1268 at [414] Bennett J stated, 'The expert anthropologists participated in a "hot tub", in that they each explained some key aspects of their opinions and then engaged in a commentary and answered questions. This "hot tub" process was particularly helpful in drawing together some of the threads in their written reports and oral evidence.' See also *Banjima People v Western Australia (No. 2)* [2013] FCA 868, where the court refers to concurrent evidence at [140], [152], [168], [169], [173], [239], [242], [245], [355], [589] and [635], and *Wyman on behalf of the Bidjara People v Queensland (No. 2)* [2013] FCA 1229 at [374] and [507].

12 For example, before the use of concurrent evidence, Dr Palmer gave evidence for the applicants in *Rubibi Community v Western Australia (No. 7)* [2006] FCA 459 over five days and was then recalled for another hour after the state's anthropologist, Professor Sansom, gave his evidence; Dr Rory O'Connor gave evidence for one day for a separate applicant; and Professor Sansom gave evidence for one and a half days for the state. At the hearing of *Griffiths v Northern Territory (No. 2)* [2006] FCA 1155 in 2005, Dr Palmer gave evidence for the applicant for two and a half days, Dr Asche gave evidence for the applicant for nearly a whole day and Professor Sansom gave evidence for the Northern Territory for approximately four hours. Anthropologist Michael Robinson also informs us that when he appeared for the applicant in *Daniel v Western Australia* [2003] FCA 666 he gave evidence for nearly six days, which included a number of voir dices; Jan Turner gave evidence for half a day for the applicant; Dr O'Connor

Court-directed expert conferences and concurrent evidence in the Federal Court

Under r. 23.15 of the Federal Court Rules 2011 (Cth), if two or more parties to a proceeding intend to call experts to give opinion evidence about a similar question, any of those parties may apply to the court for one or more of the following orders:¹³

- (a) that the experts confer, either before or after writing their expert reports;
- (b) that the experts produce to the Court a document identifying where the expert opinions agree or differ;
- (c) that the expert's evidence in chief be limited to the contents of the expert's expert report;
- (d) that all factual evidence relevant to any expert's opinions be adduced before the expert is called to give evidence;
- (e) that on the completion of the factual evidence mentioned in paragraph (d), each expert swear an affidavit stating:
 - (i) whether the expert adheres to the previously expressed opinion; or
 - (ii) if the expert holds a different opinion;
 - (A) the opinion; and
 - (B) the factual evidence on which the opinion is based.
- (f) that the experts give evidence one after another;
- (g) that each expert be sworn at the same time and that the cross-examination and re-examination be conducted by putting to each expert in turn each question relevant to one subject or issue at a time, until the cross-examination or re-examination is completed;
- (h) that each expert gives an opinion about the other expert's opinion;
- (i) that the experts be cross-examined and re-examined in any particular manner or sequence.

The court is making increasing use of its power to order that the experts retained by the parties meet under the supervision of a registrar with a view to compiling a report that identifies the issues or propositions on which the experts agree as well as those on which they disagree. Where the experts cannot agree, Practice Note CM7 provides that they should specify their reasons for being unable to do so. The report will then usually form the focus of the experts' concurrent oral evidence. The benefits of having the experts meet in this way is described in *Gumana v Northern Territory of Australia* (2005) 141 FCR 457 (*Gumana*) [173] (Selway J):

I have already referred to the agreement reached between the senior anthropologists. That agreement significantly reduced the extent of the factual disputes between the parties and the time involved in hearing the witnesses. Before any pleadings were filed in these proceedings procedural orders were made for the exchange by the parties of draft anthropological reports. Orders were then made for a 'hot tub' involving each senior anthropologist for each party under the supervision of the Deputy Registrar. The purpose of the 'hot tub' was to enable the experts to identify the issues and principles about which they agreed or disagreed. Legal advisers were

gave evidence for an overlapping applicant; and Professor Maddock gave evidence for five days for the state. Mr Robinson also informs us that in *Ben Ward v Western Australia* [1998] FCA 1478 six anthropologists gave evidence. They were Mr Akerman and Associate Professor Christensen for the first applicant, Dr Palmer for the second applicant, and Mr Kim Barber for the first applicant, second applicant and fifth respondent. He also assisted Ms Doohan in the preparation of the genealogical charts tendered by the fifth respondent. Ms Dohan gave evidence for the third applicant, and Professor Maddock was the State of Western Australia's expert anthropologist. In *Bennell v Western Australia* (2006) 153 FCR 120 Dr Palmer gave evidence for the applicant over two days and Dr Brunton gave evidence for the state for two days.

¹³ Federal Court of Australia, Federal Court Rules 2011 (Cth), r. 23.15, <http://www.comlaw.gov.au/Details/F2011L01551>.

not present. The result of those discussions between the anthropologists was an agreement between them as to certain propositions.

Expert conferences

Orders for concurrent evidence under r. 23.15(f)–(i) are almost invariably preceded by orders for a joint expert conference to be held prior to the concurrent evidence.¹⁴ The expert conference involves the experts meeting to discuss the main issues and produce a report to the court identifying where the expert opinions agree or differ.¹⁵ In some instances the process has involved the exchange of draft reports followed by a conference of experts before the final reports are completed.¹⁶ Expert conferences can have the benefit of resolving, or at least narrowing, the issues which the court must decide. It can also promote a collegiate environment in which the experts can see their role more clearly as one of assisting the court rather than advocating a party's case.

In our experience, it is important to ensure that there is a list of relevant questions to be addressed by the experts at the conference and in their subsequent report.¹⁷ The experts should be provided with this list well in advance of the conference to allow them time to prepare. Ideally, a list should be prepared by counsel in collaboration with the expert and agreed by all parties. A single agreed list saves the court and the experts considerable time. In our experience, again, the list of questions put to the experts should be kept as brief as possible and should be directed towards the legal matters that need to be established in order to prove native title.¹⁸ Unnecessary and time-consuming debate about collateral or purely academic issues should be avoided.

It is equally important to ensure that lawyers are not present during the experts' conference or, if they are, that they do not ask questions of the experts or otherwise participate in the experts' discussion of the issues.¹⁹ Our experience shows that one reason lawyers should not be present is that it hinders free flowing and open discussion between the experts. To this end, orders should be sought from the court beforehand that, with the exception of the report to be produced to the court, evidence may not be given and statements may not be made about what was said at the conference.

How expert conferences work

Although expert conferencing operates slightly differently in each case, the procedures that are generally adopted are as follows:

- Each expert witness prepares an individual report.²⁰
- A pre-trial order is made that the experts confer together without lawyers.²¹
- At the joint expert conference a registrar takes notes of the points of agreement and disagreement between the experts.

14 Federal Court of Australia, Federal Court Rules 2011 (Cth), r. 23.15(a), <http://www.comlaw.gov.au/Details/F2011L01551>.

15 *ibid.*, r. 23.15(b).

16 See *Gumana and Akiba v Queensland (No. 2)* [2010] FCA 653 at [129].

17 Dr Kingsley Palmer has emphasised that a structured format with a realistically short list of key questions would be most advantageous in an expert conference.

18 In contrast to Dr Palmer's comments at fn. 16, in *Gumana* 86 issues were considered by three anthropologists.

19 Neither of the authors has attended an expert conference and we have discouraged our instructors from doing so unless a respondent party's lawyer insists on attending.

20 Federal Court of Australia, Federal Court Rules 2011 (Cth), rr. 23.11, 23.12(1), <http://www.comlaw.gov.au/Details/F2011L01551>.

The Federal Court's Practice Note CM7, *Expert witnesses in proceedings in the Federal Court of Australia*, was developed in large part to make the legal profession and expert witnesses aware that: the primary obligation of the expert witness is to the court, not to the party calling the expert; the reasoning process and factual premise behind each of their opinions must be transparent; and an expert witness should never play the part of advocate.

21 Federal Court of Australia, Federal Court Rules 2011 (Cth), r. 23.15(a), <http://www.comlaw.gov.au/Details/F2011L01551>.

- A joint report is produced by the registrar and provided to the experts for comment and signature.²²

The report from the joint expert conference will identify:

- the matters and issues on which the experts' opinions concur
- the matters and issues on which their opinions differ
- the reasons for any differences.²³

In the event that the expert witnesses agree on all points, their role is likely to come to an end and they may not be required to give evidence.²⁴ However, after the experts have agreed on a number of issues, in the vast majority of cases the joint report will serve as the starting point for addressing the remaining outstanding issues between the parties during the hearing and concurrent evidence.²⁵

Concurrent expert evidence

Concurrent expert evidence can provide a court or tribunal with a more practical and efficient means of comprehending and resolving complex and technical issues compared with the usual adversarial approach.²⁶ Concurrent evidence allows the experts to present their views together; they can explain their reasoning and respond to questions from counsel and the court alongside a professional colleague. The experts can ask questions of each other and respond to and comment on evidence in circumstances where, if necessary, a further report or response can be made quickly.

While the Federal Court Rules 2011 make provision for the use of concurrent evidence, they do not set down detailed or particular procedures for how it is to occur. This can, and does, lead to considerable uncertainty as to how the concurrent evidence session will be conducted, and much will depend on the presiding judge, practitioners and experts.²⁷

A procedure for giving concurrent evidence which, in our experience, has generally produced successful results is as follows:

1. The expert witnesses are all sworn in at the same time and their individual written reports tendered together with the report of their pre-trial discussion at the joint expert conference.
2. The court first explains to the experts the procedure that will be followed and then identifies, with the help of counsel, the topics requiring discussion in order to resolve outstanding issues. It can be useful for these matters to be reduced to a series of written questions or propositions that can be circulated among the parties and provided to the court before the concurrent evidence is conducted.²⁸

22 *ibid.*, r. 23.15(b).

23 *ibid.*, r. 23.1, r. 5.04 item 18, and Practice Note CM7.

24 *Australasian Performing Right Association Ltd v Monster Communications Pty Ltd* (2006) 71 IPR 212 is an example of a case where this occurred, as was the archaeologists' expert conference in Bidjara (see p. xxx).

25 In an email on 17 February 2014 Dr Kingsley Palmer stated that he considers that an expert conference should be seen as a part of the current evidence procedure and a precursor to the expert's actual time in court.

26 Rule 23.15 of the Federal Court Rules 2011 (Cth) allows for considerable flexibility in the procedure or procedures adopted when expert evidence is to be given concurrently. For example, each expert can give evidence in turn or the judge can cross-examine and re-examine them by putting, to each expert in turn, each question relevant to one subject or issue at a time until cross-examination or re-examination is completed. Each expert may give an opinion about the other expert's opinion, and they can be cross-examined and re-examined in any particular manner or sequence.

27 As counsel in proceedings, we are invariably asked by our client's expert witnesses for guidance as to what they should expect when giving concurrent evidence. As the process has varied depending on the judge, we have only been able to describe a range of possibilities. This uncertainty can create anxiety for the expert witnesses who have experience otherwise in cross-examination.

28 In circumstances where the court considers it appropriate to draft questions for the experts, for procedural fairness it may be necessary to supply the questions in advance to allow parties time to prepare their expert for giving evidence. It may be

3. The topics to be addressed in the concurrent evidence having been identified, each expert is asked by the court to give their views on each issue in turn. Each expert may also comment on and ask questions about the evidence or report of the other expert or experts, or they may supplement information already provided.
4. The court then invites counsel to question their own or any other witness on that issue. Having completed the discussion, the court moves on to the next issue, and so on, until evidence on all of the issues has been completed.
5. Next, counsel is given the opportunity to identify topics upon which they will cross-examine and these are addressed in turn by the counsel questioning the experts individually.
6. At the conclusion of this process, the court usually asks the experts if they have had an opportunity to fully explain their positions and, if they have not, invites them to do so.

The result is a respectful and open exchange of views. It is 'essentially a discussion chaired by the judge'²⁹ that allows experts to direct the course of the discussion, respond directly to one another and often reach a consensus.³⁰ This alleviates the all too common scenario whereby counsel, who may not fully understand the technical subject matter, proceeds with a line of questioning that does not assist the court and may also undermine the expert.

Some examples of 'hot tubbing'

From our experience, both joint conferencing and concurrent expert evidence have greatly assisted the Federal Court, particularly when the experts and counsel have made a contribution to the formulation of the issues or questions to be discussed, as was the case in *Ngadju, Banjima* and *Badimia*.³¹ In these proceedings the experts were apprised of the issues to be determined well in advance of the expert conferences, and at each conference a significant proportion of the issues were narrowed or resolved.³² The concurrent evidence then narrowed or reduced the issues even further. In each of the matters, the list of issues to be discussed at the expert conference was kept brief and focused on the essential legal or factual issues in dispute, as opposed to collateral or academic anthropological issues.

In the *Banjima* proceeding, two expert conferences were held. The first included overlapping claims. The issues before the experts were numerous and a significant number remained outstanding at the conclusion of the conference. The second *Banjima* conference was held between the anthropologist for the state and the applicant's anthropologist. In the time between the two expert conferences the overlapping claim groups had merged. The court received for consideration a list of issues from the state and a shorter list of issues from the applicant. The court directed the anthropologists to confer on the shorter list of issues drafted by the applicant. It would seem that, where the court does not decide on the range of issues to be discussed, the experts are required to consider all issues

necessary for the court to afford procedural fairness to the parties by providing the questions to them earlier, allowing them enough time to prepare the expert before they give evidence.

29 P McClellan CJ, 'New methods with experts: concurrent evidence', *Journal of Court Innovation* 3(1): 259, 264, <https://www.nycourts.gov/court-innovation/Winter-2010/index.shtml>.

30 A respectful and open exchange may be disrupted by an uncooperative and recalcitrant expert.

31 In his 2011 AIATSIS paper entitled 'Anthropologist as expert in native title cases in Australia', Dr Kingsley Palmer cautioned that 'those seeking the services of anthropological experts should seek an understanding of the special and sometimes complex issues that surround the use of expert anthropologists as well as sound understanding of the role of anthropology, particularly in native title cases.' <http://www.aiatsis.gov.au/ntru/connection.html>.

32 There were two expert conferences of the parties' anthropologists in the *Banjima* proceeding and it must be said that the first conference was less than successful.

presented by each party, which is time-consuming and unnecessary. If this occurs then the time taken in court by the experts' evidence may not be reduced.

In *Banjima* and *Badimia*, Barker J initially took an active role in questioning the experts. Once His Honour had completed his questions he instructed counsel to question the experts by addressing each issue with each anthropologist.

In the *Ngadju*, *Banjima* and *Badimia* proceedings, a considerable saving in court time was brought about by the clarification and narrowing of issues at the (respective) experts' conferences and by the procedure adopted in hearing concurrent evidence. In each case, the expert anthropological evidence took less than two days.³³

Before the concurrent evidence in the *Ngadju* proceeding, Marshall J circulated a paper by Rares J and indicated that the evidence would be given in the manner described in the paper.³⁴ The experts were provided with both the state's and the applicant's draft issues to address before the hearing. The experts then had the opportunity to prepare a responsive *aide memoire* referencing sections of their reports relevant to each of the issues. As they had considered the issues before the concurrent evidence commenced, the experts could go immediately to the sections of their reports that addressed the particular issues and the time spent in court was considerably shortened.³⁵

Due to the three overlapping claims in the *Bidjara* proceedings, six participants attended the first *Bidjara* expert anthropologists' conference.³⁶ The conference was held over two days and was convened by two registrars of the Federal Court.³⁷ The first day of the conference resulted in neither agreement nor disagreement between the experts. It was not until the second day of the conference that a report reflecting some points of agreement and disagreement was drafted and agreed on. Due to time constraints, not all issues could be addressed on the second day of the conference. It is notable that, prior to the conference, the parties were unable to agree on a list of issues for the experts to consider. This resulted in a broad range of issues for consideration, some of which were not necessarily relevant to proving native title. It seems to us that the multiple experts and overlapping claims in both *Bidjara* and *Banjima* may account for the conference's relative lack of success.

At the second expert conference the court took a somewhat different approach, perhaps because of the three overlapping claims and, by then, two unrepresented Indigenous applicant parties. There were only four experts at the second conference, which was held on a Saturday during the trial after most of the lay evidence had been given. The court itself formulated and provided the anthropological experts with four questions for discussion, which had not been considered earlier by the lawyers or the experts. The experts redrafted the court's four questions into six, for apparently methodological reasons, and provided the court with a signed report containing responses to the six questions ahead of giving their concurrent evidence.

For the *Bidjara* concurrent evidence the court provided a further 12 issues for the anthropological experts to comment on. Counsel for the parties were able to ask some questions at the end of the process after the experts had addressed the 12 issues.

33 The saving of time in court should not be considered on its own. Joint conferences, usually conducted by a court registrar, should also be factored into the time taken to resolve conflicting expert opinions in proceedings.

34 S Rares J, 'Using the "hot tub": how concurrent expert evidence aids understanding issues', paper presented at the NSW Bar Association Professional Development Seminar, 23 August 2010. This paper was updated and presented at the IPSANZ lunchtime seminar at Gilbert + Tobin on 2 August 2013 and at the Judicial Conference of Australia Colloquium on 12 October 2013, and appeared substantially in that form in the December 2013 edition of *Intellectual Property Forum*.

35 This was advantageous, as each expert had drafted two reports and much time could have been wasted while they searched through their reports for those sections that were relevant to the particular issue concerned.

36 One of those persons who attended the first expert conference was ruled by Jagot J on 5 April 2013 not to be considered an expert, and the receipt of that person's reports were objected to as they were therefore not opinion evidence under s. 79 of the *Evidence Act 1995* (Cth).

37 One of the registrars was from the Brisbane Registry and the other was from the Victorian Registry.

There were also archaeological matters at issue between two of the overlapping claim groups in the *Bidjara* proceeding. An expert conference of the archaeologists was convened before they were due to give concurrent evidence. Counsel for the represented applicant prepared the issues for discussion in that conference and, with some redrafting, the archaeologists were able to agree on all of the identified issues, thus avoiding the need for them to give evidence at all.

Some problems with concurrent evidence

Experts who have provided concurrent evidence in forensic accounting cases complain that there is not enough physical space for the concurrent evidence method.³⁸ The criticism is that the courts and tribunals are not adequately equipped to accommodate experts in a 'hot tub' (problems include lack of witness table space, unavailability of microphones and difficulties with shared access to documents), leading to distractions for the court, the experts and others.³⁹ Experts have also complained that there is no guidance as to what is to take place during the hearing of concurrent evidence as opposed to the well-known adversarial process.⁴⁰

It is notable that in its guidelines the Administrative Appeals Tribunal (AAT) specifies that expert witnesses should be made comfortable when giving evidence and so should those participating in the questioning. This can be difficult, as courtrooms are not currently designed to accommodate multiple experts and multiple counsel in the same space.⁴¹ As concurrent evidence is used more and more, consideration needs to be given as to whether guidelines like those promulgated by the AAT should be employed for the concurrent evidence format in all jurisdictions. The current ad hoc approach can potentially confuse the expert witnesses and leave both experts and counsel unprepared and physically, as well as procedurally, marginalised. Further, assertive personalities can divert an expert conference or dominate a concurrent evidence session and this may render the process less effective. Hence, much will depend on the facilitators and whether they can focus the experts on the main issues rather than irrelevancies that can divert the process.

While the concurrent evidence process usually reduces the time taken to hear expert evidence, it should not be forgotten that the adversarial system is the method by which all proceedings in this country are conducted. Whether concurrent evidence is an advantage is questionable if it is rushed and the opportunity to cross-examine on all topics is not available. The process of concurrent evidence should allow for adequate and appropriate cross-examination to occur, as contemplated by s. 27 of the *Evidence Act 1995* (Cth). If concurrent evidence is properly combined with a joint expert report with clearly formulated questions, these two processes can significantly assist the court in understanding and assessing the respective views of the experts.

Benefits of expert conferences and concurrent evidence

The use of expert conferences and concurrent evidence in litigation allows the court, the lawyers and the parties to hear all of the experts within a particular discipline discussing the same issues at the same time. This is substantially different from the adversarial approach used prior to the advent of concurrent evidence, whereby experts within the same discipline were cross-examined days or weeks apart, with other evidence given in the interim.

38 In an email on 17 February 2014 Dr Palmer said, 'I have only one criticism [of concurrent evidence]. This relates to space. In my experience witness boxes are designed for one person. Empanelling two or more experts along with their papers makes for a crowded and uncomfortable space. Perhaps the court could bear this practical matter in mind.'

39 J Temple-Cole and S Farthing, 'In the hot tub', *Hearsay*, Queensland Bar Association, January 2013, under the heading 'Observations'.

40 *ibid.*

41 It is essential that a larger courtroom be used when concurrent evidence is being given, even if that means moving the proceedings temporarily to an appeal courtroom or one that has space for a jury. In *Ngadju* the experts sat in the jury area, which afforded them space and comfort, and counsel remained at the Bar table. In *Bidjara*, the four experts sat at the Bar table and counsel and the unrepresented parties sat in the small witness box. This was far from ideal.

The hot tub method can serve to narrow the issues to those genuinely in dispute and can facilitate intelligent and relevant consideration of expert opinion evidence. The approach enables experts to explain their reasoning alongside a professional colleague, minimising the chance that their evidence will be misunderstood or misconstrued. The judge and other listeners have the benefit of multiple advisers who are 'rigorously examined in public'.⁴²

This may mean that experts are more likely to focus on assisting the court to understand the substance of the points at issue, rather than resorting to defending themselves and their opinions and perhaps deflecting or straying from the issues.⁴³ Another possible benefit of experts appearing together is that they may be compelled to be more precise and accurate. Significantly, McClellan CJ⁴⁴ has noted that the change in procedure in the NSW Land and Environment Court has been 'met with overwhelming support from the experts and their professional organisations'.⁴⁵

The concurrent approach to giving expert evidence also assists counsel. They are able to examine their client's expert on the particular issues in dispute, particularly when agreed to beforehand, and at the same time address the concerns of the other parties' experts. Concurrent evidence facilitates the process of cross-examination because counsel can immediately invite a response from either expert with respect to the matters in question. Counsel can also be confident that any obfuscation or misinformation will be quickly exposed because statements can be corroborated or clarified by their own expert. The important rider to this, though, is that counsel and the experts must participate in drafting the issues that are to be considered by the court.

The concept of concurrent expert evidence is of general application. Rares J has said that he has seen it used to deal with 'topics as diverse as accounting, quantity surveying, fire protection...metallurgy, naval architecture, expert navigation [and] mechanical engineering'.⁴⁶ It has been our experience that divergent opinions expressed in different expert reports can become less contradictory and more mollifying when the experts are brought together in discussion. Underpinning all of the characteristics of expert conferences and concurrent evidence are the important considerations of case management and the expert's obligation to the court. As well as facilitating agreement on issues, concurrent expert evidence and expert conferences enable points of disagreement to be reached quickly, thereby saving the court substantial time and costs.⁴⁷

These principles are clearly exemplified in the case of *Re Coonawarra Penola Wine Industry Association Inc. and Geographical Indications Committee* [2001] AATA 844, in which concurrent expert evidence was ordered. The initial estimate for hearing time was six months, largely due to the number of expert witnesses who were to give evidence; however, through the use of concurrent expert evidence the hearing was completed in five weeks.⁴⁸ Such an outcome was firmly in line with modern case management principles and enabled the expert witnesses and legal practitioners to fulfil their obligations to the court.

42 P McClellan CJ, 'New methods with experts: concurrent evidence', *Journal of Court Innovation* 3(1): 259, 264, <https://www.nycourts.gov/court-innovation/Winter-2010/index.shtml>.

43 In an email on 17 February 2014 Dr Palmer stated that concurrent evidence places the expert more firmly in a position as a witness whose primary task it is to assist the court rather than a party. He indicated that when asked questions by a judge in a concurrent evidence hearing he will know what issues the judge considers important rather than those which counsel would like to advance. This in turn creates less adversarial interaction and more direct addressing of the issues. Dr Palmer makes the point that, in his experience, counsel tends to ask the same question of their own expert as the other side's expert during concurrent evidence hearings, running the risk of getting the wrong answer from their own witness. Questioning directed by the judge reduces the potential for endless (and, to his mind mostly useless) cross-examination.

44 As he was then.

45 P McClellan CJ, 'Expert witnesses: the experience of the Land and Environment Court of NSW', speech delivered at the XIX Biennial LAWASIA Conference, 20–24 March 2005, p. 18.

46 S Rares J, 'Using the "hot tub": how concurrent expert evidence aids understanding issues', paper presented at the NSW Bar Association Professional Development Seminar, 23 August 2010, para. 5.

47 *Federal Court of Australia Act 1976* (Cth), ss. 37M–37N.

48 TG Downes J, AM, 'Concurrent expert evidence in the AAT: the New South Wales experience', paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, Hobart, 27 February 2004, p. 5.

Conclusion

A review of native title cases prior to the practice of concurrent expert evidence indicates that, in most cases, court time has been dramatically reduced by utilising concurrent evidence.⁴⁹ The practice also promotes the fulfilment of obligations imposed upon parties by ss. 37M and 37N of the *Federal Court of Australia Act 1976* (Cth) to facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible. Expert conferences and concurrent evidence benefit the court, counsel, parties, expert witnesses and the claimants by reducing the issues and saving time. This means that the claimants' case is determined more quickly, thereby lessening the strain of litigation.⁵⁰ Considering that most current native title claims were filed in the late 1990s and have been on foot for over 15 years, any reduction in the time taken to conclude proceedings must be beneficial for the claimants.

⁴⁹ See fn. 12 above. Please note that the days spent in a joint expert conference before a hearing should also be included in the calculation of time taken to resolve an issue considered by experts through concurrent evidence. Further, earlier native title cases should not be considered indicative of the number of experts required to give evidence nor the time it requires in current proceedings, as the case law has developed considerably since those cases were heard in the first instance. Perhaps *Bennell*, which was heard in 2005 and 2006, is more indicative: two anthropologists gave evidence separately over two days each. More recently in *Ngadju*, the concurrent anthropological evidence took less than two days following two prior one-day expert conferences. In both cases the experts' and the court's time was occupied for four days. In an email on 17 February 2014, Dr Palmer said, 'for anthropologists at least this approach [expert conferences and concurrent evidence] continues to be new, so there may be much yet to learn about it. Overall, however, I'd not want to go back to the old way of doing things and I hope the court will continue to develop the present approach.'

⁵⁰ *Bomanite Pty Ltd v Slatex Corp Aust Pty Ltd* (1991) 32 FCR 379 at [392]; referred to with approval in *Aon Risk Services v Australian National University* (2009) 258 ALR 14 at [100]–[101] (Gummow, Hayne, Crennan, Kiefel & Bell JJ).

About the authors

Vance Hughston SC came to the New South Wales Bar in 1982 and took silk in 2001. Since 1994, Mr Hughston SC has advised on and appeared in native title claim and compensation hearings throughout Australia at both trial and appellate level. He is a leading native title practitioner and has appeared in the High Court of Australia in many native title cases. He is often asked to present papers and write articles about native title and is a specialist in expert evidence.

Tina Jowett was admitted to practise as a solicitor in 1995 and worked at the Indigenous Law Centre at the University of NSW with Professor Garth Nettheim. She was also a member of the NSW Equal Opportunity Tribunal from 1993 to 2003. She has been practising as a barrister since 2003 and has been briefed to appear in a large number of native title matters for applicants and respondents. Ms Jowett specialises in preparing Indigenous evidence for native title trials, including compensation proceedings.

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Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)
GPO Box 553, Canberra, ACT 2601
Phone: (61 2) 6246 1111
Fax: (61 2) 6261 4288
Email: researchpublications@aiatsis.gov.au
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