

EXPERT EVIDENCE IN THE LAND AND ENVIRONMENT COURT OF NSW: A SYNOPSIS

The Hon. Justice Malcolm Craig
Judge of the Land and Environment Court of NSW

Australasian Conference of Planning and Environment Courts and Tribunals

Perth, 28 August – 2 September 2012

A specialist court or tribunal, exercising jurisdiction under environmental planning legislation, has for many years been a forum in which the evidence of expert witnesses has been the norm in almost every case. This observation is particularly relevant to cases in which the court or tribunal has been exercising a merit review function.

In recent years, those courts and tribunals, along with other courts exercising a general civil jurisdiction, have grappled with the necessity to exercise some control over the manner in which expert evidence is to be prepared and given. Too often it was perceived (fairly or unfairly) that the retained expert became an advocate from the witness box for the cause of the party by whom the expert was retained.¹ This was not always the ‘fault’ of the witness. At times it was the consequence of collaboration with those instructing the expert witness, either by limiting the material with which the expert was provided or by the manner in which the expert statement was “settled” prior to its provision to the court and the other parties. The need for reform was apparent if courts or tribunals were to be appropriately assisted in the resolution disputes that called for evidence from experts.

Expressed at a level of generality, it can be accepted that the intended role of an expert has been to provide the court or tribunal with impartial and objective assistance in drawing inferences and conclusions from primary facts in respect of which the court is not able to do so without the assistance of a person possessing expert knowledge. The obligations of an expert witness have recently been

¹ cf *Dasreef Pty Ltd v Hawchar* [2011] HCA 21 per Heydon J at [56]

stated by the New South Wales Court of Criminal Appeal² in a series of propositions, summarised in the following way:

- (i) Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation.
- (ii) An expert witness should provide independent assistance to the court by way of an objective, unbiased opinion in relation to matters within his or her expertise. An expert witness should never assume the role of an advocate.
- (iii) An expert witness should state the facts or assumptions upon which his or her opinion is based. That witness should not omit to consider the material facts which could detract from his or her concluded opinion.
- (iv) An expert witness should make it clear when a particular question or issue falls outside the expertise of that witness.
- (v) If an expert's opinion is not properly researched because that expert considers there to be an insufficiency of available data, this must be stated, with an indication that the opinion is no more than a provisional one. In cases where an expert who has prepared a report cannot assert that the report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.
- (vi) If, after exchange of reports, an expert witness changes his or her opinion on a material matter, having regard to the

² Wood v R [2012] NSWCCA 21 per McClellan CJ at CL at [719]

other side's expert reports, or for any other reason, such change of opinion should be communicated (through legal representatives) to the other side without delay and, when appropriate, to the court.

- (vii) Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

These obligations upon expert witnesses are of longstanding. It was the perceived failure of experts in many cases to observe these obligations which identified the need for reform, directed to the manner in which evidence should be prepared and presented to a court or tribunal vested with jurisdiction to resolve a dispute.

The manner in which courts and tribunals in various jurisdictions have grappled with the need to preserve the integrity of expert evidence has differed in its detail. However, at a level of generality there can be no doubt that achievement of the obligations upon expert witnesses that I have identified has informed the measures taken in many jurisdictions. I seek to address those taken and currently applicable in the Land and Environment Court of NSW.

Regulation of expert evidence

The regulation of evidence that may be given by an expert is found in several Acts, rules of court and practice notes. The substantive evidence that may be given by an expert and the qualification to give such evidence is founded both in the common law and in the *Evidence Act 1995* (NSW). However, my focus, for the purpose of this paper, is upon the procedural requirements governing the manner in which expert evidence is to be prepared and then given in the course of a hearing before the Court. The principal sources of regulation in that regard

are the *Civil Procedure Act 2005*, the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR) and the Court's Practice Notes.

Uniform Civil Procedure Rules

The UCPR are made under the provisions of the *Civil Procedure Act 2005* (NSW). They are rules that apply to courts in New South Wales exercising civil jurisdiction, including the Land and Environment Court.³

The rules pertaining to expert evidence generally are found in Division 2 of Pt 31 of the UCPR. The stated purposes of that Division include:

- (a) to ensure that the Court has control of the giving of expert evidence,
- (b) to restrict expert evidence in proceedings to that which is reasonably required to resolve the proceedings,
- ...
- (d) if it is practicable to do so without comprising 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,
- ...
- (f) to declare the duty of an expert witness in relation to the Court and the parties to proceedings.⁴

Effect is given to the purpose of declaring the duty of an expert by prescribing a code of conduct with which the expert must comply.⁵ Primarily, the code of

³ UCPR Pt 1 r 1.5

⁴ UCPR r 31.17

conduct stipulates that the “overriding duty” of an expert is “to assist the court impartially” and to identify the “paramount duty” of that expert as being a duty to the court and not to any party to the proceedings⁶. The code also requires that an expert witness must abide any direction of the Court and when preparing any report or conferring with other experts in accordance with directions must do so by exercising his or her independent, professional judgment and must not act on any instruction or request to withhold or avoid agreement upon an issue raised among experts.⁷

Adherence to this code of conduct by an expert witness is sought to be secured by the requirement that the expert be provided with the code as soon as practicable after he or she is engaged or appointed. Subject to a contrary order of the Court, the evidence of the expert so retained cannot be received either orally or in written form unless there is an acknowledgement by that witness that he or she has read the code of conduct and agrees to be bound by it.⁸

There is an emphasis in the UCPR upon directions made by the Court pertaining to expert evidence. A party intending to adduce expert evidence at trial must “promptly” seek directions from the Court for the calling of that evidence. Unless those directions are sought, expert evidence may not be adduced at trial, subject to a contrary order being made.⁹ The purpose of that requirement is to fulfil the objective of restricting expert evidence in proceedings “to that which is reasonably required to resolve the proceedings” and to ensure that the proceedings are disposed of justly, quickly and cheaply¹⁰.

Directions that may be given in relation to the expert evidence includes directions:

- (i) limiting the number of expert witnesses that may be called;

⁵ UCPR r 31.23 and sch 7

⁶ UCPR Sch 7(2)

⁷ UCPR Sch 7(c)l 4 and 6)

⁸ UCPR r 31.23 (3) and (4)

⁹ UCPR r 31.19

¹⁰ *Shellharbour City Council v Minister for Planning* [2011] NSWCA 195 at [35]

- (ii) concerning the engagement and instruction of a parties' single expert in relation to a specified issue;
- (iii) requiring experts in relation to the same issue to confer, either before or after preparing experts' reports in relation to a specified issue;
- (iv) fixing the time for service of expert reports; and
- (v) making "any other direction that may assist an expert in the exercise of the expert's functions".¹¹

The directions that may be made also include a direction to expert witnesses to confer, with a view to reaching agreement on any matters in issue, and to prepare a joint report specifying matters agreed, matters upon which agreement cannot be reached and reasons for that disagreement. Directions may also be given that the joint report be based on specified facts or assumptions of fact. The Court is also empowered to direct who, if anybody, may attend the conference held between or among experts.¹²

Separate provision is made in the UCPR for the appointment either of a parties' single expert or for the appointment of a court-appointed expert. A parties' single expert is selected by agreement between the parties or, failing agreement, in accordance with directions of the Court.¹³ Where a parties' single expert is appointed, the parties are required to endeavour to agree on the instructions and documents to be provided to that expert, including those facts and assumptions upon which the report is to be based. In default of agreement, the Court's directions must be sought.¹⁴

Thereafter, the single expert may seek directions from the Court in relation to the performance of his or her function and, having performed that function, must

¹¹ UCPR r 31.20

¹² UCPR r 31.24

¹³ UCPR r 31.37

¹⁴ UCPR r 31.38

provide a copy of his or her report to each party.¹⁵ The parties are afforded the opportunity to seek clarification of that report. However any such clarification must be sought within 14 days after the report is provided to the parties. In the absence of any further order by the Court, each party may seek clarification only once and that is to be done in the form of questions, “no more than 10 in number”.¹⁶

While the parties’ single expert may be required for cross-examination by any party affected by that expert’s report, evidence from another expert directed to issues addressed by the parties’ single expert may not be given, except by leave.¹⁷

The provision of the rules pertaining to court appointed experts are similar in many respects to those pertaining to the appointment of the parties’ single expert. The basis upon which a court appointed expert may be engaged is expressed in broad terms. UCPR r 31.46 relevantly provides:

- “(1) If an issue for an expert arises in any proceedings the Court may, at any state of the proceedings:
 - (a) appoint an expert to enquire into and report on the issue, and
 - (b) authorise the expert to enquire into and report on the facts relevant to the enquiry, and
 - (c) direct the expert to make further or supplemental report or enquiry and report, and
 - (d) give instructions, including instructions concerning any examination, inspection, experiment or test (as the Court thinks fit) relating to any enquiry or report of the expert or give directions concerning the giving of such instructions.”

The court-appointed expert may be one selected by the parties, selected by the court or “selected in a manner directed by the court.”¹⁸

¹⁵ UCPR r 31.40

¹⁶ UCPR r 31.41

¹⁷ UCPR r 31.44

¹⁸ UCPR r 31.46(2)

There would appear to be an important qualification applying to the appointment of a parties' single expert or a court-appointed expert. That qualification is expressed in UCPR 31.17 identifying the "main purposes" of the Division in which the Rules appear. The qualification appears in paragraph (d) of that Rule which provides:

“(d) **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.” (Emphasis added)

According to my researches, there has not, to date, been any judicial exegesis upon the interrelation between the apparent qualification expressed in that clause and the provisions of the Rules pertaining to the appointment of either a parties' single expert or court-appointed expert.

Practice Notes

The Chief Judge of the Land and Environment Court has issued a series of Practice Notes for case management of matters in each of the principal classes of proceedings in which the Court exercises civil jurisdiction. The issue of practice notes by the senior judicial officer of the Court is sanctioned by the *Civil Procedure Act*.¹⁹ Relevantly, the Practice Notes include provisions directed to expert evidence. They seek to give 'flesh and bone' to the empowering provisions of the UCPR.

All Practice Notes issued by the Chief Judge, so far as they relate to expert evidence, are to similar effect. Those most usefully referred to for present purposes are applicable to the merit review functions of the Court exercised in Classes 1, 2 and 3 of the Court's jurisdiction. What follows in the ensuing paragraphs is a reflection of the provisions of those Practice Notes.

At the outset, the parties are required to consider whether expert evidence "is genuinely necessary" to resolve any issue that arises in the proceedings. Self

¹⁹ s 15

evidently, this consideration is required because expert evidence unnecessarily prepared and led increases the time and cost of the proceedings. This consideration is important not only from the point of view of principle but also because those conducting most of the merit review matters within the Court are Commissioners whose statutory qualification for appointment to that role is special knowledge, qualification or experience in one or more of the expert disciplines necessary to consider a majority of the merit review applications which the Court has jurisdiction to determine.²⁰ Too often parties are apt to overlook the availability of that expertise among Commissioners who are able to hear and determine merit review matters.

Having determined that expert evidence is necessary to be called in order to address an issue or issues arising in proceedings, the parties are encouraged by the Court to use a parties' single expert. In making the determination as to whether such an expert should be engaged, consideration is required to be given to the following matters:

- (i) the importance and complexity of the subject matter in dispute in the proceedings;
- (ii) the likely cost of obtaining expert evidence from a parties' single expert compared to the alternative of obtaining expert evidence from individual experts engaged by each of the parties;
- (iii) the proportionality of the costs in (ii) to the importance and complexity of the subject matter in (i);
- (iv) whether the use of a parties' single expert in relation to an issue is reasonably likely either to narrow the scope of the issue or resolve the issue;

²⁰ s 12 *Land and Environment Court Act 1979*

- (v) the nature of the issue, including:
 - (a) whether the issue is capable of being answered in an objectively verifiable manner;
 - (b) whether the issue involves the application of accepted criteria (such as Australian Standards) to ascertainable facts;
 - (c) whether the issue is likely to involve a genuine division of expert opinion on methodology, or schools of thought in the expert discipline; and
 - (d) whether the issue relates to the adequacy or sufficiency of information provided to the administrative body from whose decision merit review is sought;

- (vi) whether the evidence of the parties' single expert involves the provision of aids to assist in the assessment of the application that is the subject of the appeal proceedings (such as shadow diagrams, view lines or photo montages in the case of a proposed building or structure);

- (vii) whether the parties' single expert would be required independently to obtain further information or to undertake monitoring, surveys or other means of obtaining data before being able to provide expert evidence;

- (viii) whether the parties are prepared at the time to proceed to hearing on the basis of a parties' single expert report about the issue and no other expert evidence about that issue;

- (ix) whether the integrity of expert evidence on the issue is likely to be enhanced by evidence being provided by a parties' single expert instead of individual experts retained independently by each of the parties; and

- (x) whether the Court is likely to be better assisted by expert evidence on the issue from a parties' single expert instead of individual experts engaged by the parties.

Where a parties' single expert is appointed, the only report to be provided by that expert is a final report. Without the leave of the Court, the expert is not to provide a preliminary report to the parties. Moreover, where the parties' single expert has provided a report, no other expert evidence directed to that issue may be adduced by the party without the leave of the Court. Any such leave must be sought by a notice of motion, supported by an affidavit which includes the qualifications of the additional expert, the matter proposed to be addressed by that expert, the perceived reason for calling the additional expert and how calling of that additional evidence will promote "the just, quick and cheap resolution of the proceedings". The party seeking to call the additional evidence is required to indicate its position in relation to additional costs that might be incurred by the calling of that expert.

If the parties cannot agree upon the identity of a single expert or if the Court determines that the particular issue or issues requiring expert evidence is appropriately addressed by a parties' single expert, a direction is given for the parties to file and serve the names, qualifications, experience and fee estimates from three appropriately qualified experts able to address the issue or issues in contention. The selection is made by the Court from those nominated by the parties. Once that selection has been made, directions are given for the parties to brief that single expert and for that expert to provide the required report.

If a parties' single expert is not appointed, with the consequence that each party engages an expert, the Practice Notes identify two options for the preparation and service of evidence by those experts. In the ordinary course, directions are given nominating the time by which experts are to file and serve their individual reports, with a further direction identifying the time by which those experts, grouped in areas of expertise, are to confer and then prepare for service their joint report. The joint report is to include evidence in reply.

If, in the context of a particular case, either the parties or the Court considers it more appropriate that experts proceed directly to joint conference and preparation of a joint report, without having prepared an individual report, a direction is made as to the time by which such a conference is to be held and a joint report prepared. In that circumstance, individual expert reports are not to be prepared and only the joint report can be relied upon at the hearing unless leave is sought and obtained to do otherwise.

An important requirement of the Practice Directions in relation to experts' joint conferences is that legal representatives for the parties are not to attend any such conference or be involved in the preparation of joint reports, unless the leave of the Court so to do is obtained. It would be rare for such leave to be given.

There are two further directions of importance that are invariably given at a directions or case management hearing. The first is expressed as follows:

“If experts are directed by the Court to confer, experts are to ensure that any joint conference is a genuine dialogue between experts in a common effort to reach agreement with the other expert witness about the relevant facts and issues. Any joint report is to be a product of this genuine dialogue and is not to be merely a summary or compilation of the pre-existing positions of the experts.”

The further direction of significance is the requirement that where expert evidence from more than one expert in relation to the same or similar issue is to be given in Court, the experts are to give that evidence concurrently. This direction is subject to any order by the Court to the contrary. In practice, a contrary order is only likely to be made if it becomes apparent at the hearing that concurrent evidence is inappropriate. The making of a 'contrary order' is not unknown but is rare.

The requirements in practice

Given that courts and tribunals outside New South Wales do not have precisely the same requirements for the manner in which expert evidence is prepared and given, it is appropriate to make some brief observations about aspects of the

present practice adopted in the Land and Environment Court. As might be expected, application of the paradigm reflected in the UCPR and Practice Notes does not, without exception, yield its intended purpose. That purpose is not only to engender confidence in the integrity of expert evidence as an appropriate tool in aid of decision making but also to ensure that proceedings are resolved in a manner that is “just, quick and cheap”.²¹ In spite of the occasional falter, the experience of judges of both the Supreme Court and of the Land and Environment Court is that the requirements imposed do achieve those objectives in the great majority of cases.

Parties’ single expert

I have earlier identified the encouragement given to parties, through the Court’s Practice Notes, to agree to the appointment of a parties’ single expert in order to address an issue or issues arising in proceedings. Notwithstanding that encouragement, there are now very few cases in which a parties’ single expert is appointed. That was not always the case. In 2011 there were only three interrelated matters in which a parties’ single expert was appointed. As at 30 June of this year, there is only one matter in which a parties’ single expert has been appointed. The current position is understandable although it is also to be regretted.

It can readily be accepted that the issues arising in every case will not readily lend themselves to being addressed by a parties’ single expert. However, the manner in which the evidence from an expert is used by the Court is, I suspect, often overlooked by those whose approach to the determination of a dispute is that every step along the path to determination must be conducted on an adversarial basis, which includes matching expert for expert.

The advantage gained by the appointment of a single expert is twofold. First, it offers the prospect of reducing the cost of proceedings not only because the cost of the expert is shared but also because the length of hearing is likely to be

²¹ cf s 56 *Civil Procedure Act 2005*

reduced. Second, it provides the Court with the benefit of evidence from an expert whose neutrality is apparent, in that he or she is not engaged by only one party. Any suspicion of adversarial bias is eliminated, thereby affording greater confidence in the Court that the issue being considered by the expert is likely to have been addressed in a manner that is not influenced by the identity of any one party.

However, it does not follow from these observations that the Court receives such evidence uncritically. The evidence received from a parties' single expert is material that is considered along with all other evidence tendered at the hearing and weighed along with that evidence when reaching a decision. In particular, no particular credence is given to the expression of opinion by an expert, whether that expert be a parties' single expert or retained by one party, if that opinion is expressed as to the ultimate outcome of the proceedings being determined.

The approach which the Court takes to the evidence of any expert is reflected in the judgment of Preston CJ in *Pyramid Pacific Pty Ltd v Kur-ring-gai Council*²² where his Honour said:

“81 ... , the real utility of expert evidence provided by a court appointed expert, or indeed any expert, is not an opinion on the ultimate issue in the case but the intermediate opinions on each matter within the expert's field of expertise together with the factual foundation of each opinion and the reasoning process by which the expert moves from that factual foundation to the opinion expressed.

82 The factual foundation and the reasoning process for the opinions established in the expert evidence can be used, legitimately, by the parties either to support the conclusion expressed by the expert or to derive an alternative conclusion to that reached by the expert. The court can similarly use the factual foundation established in the expert evidence and the reasoning process from that factual foundation to arrive at the same or different conclusions to that expressed by the experts.”

²² [2006] NSWLEC 522 at [81] – [82]

The resistance of parties to the appointment of a parties' single expert is understandable in some instances. A number of the expert disciplines that are brought to bear upon the determination of merit review matters, particularly in areas of planning and environmental assessment, involve evaluative judgment when addressing a particular issue or issues. Without attempting to be exhaustive, disciplines involving the assessment of impact by proposed development from a town planning, urban design or ecological perspective frequently involve the exercise of an evaluative judgment about which experts of integrity can reasonably differ. Cases involving those disciplines readily lend themselves to the retaining of experts on both sides of the debate. Equally, where more than one analytical process could legitimately be employed to yield a result relevant to the consideration of an issue in proceedings, evidence from competent experts directed to those analytical processes is likely to be appropriate.²³ In cases of this kind, the Court is often assisted in the resolution of the issues by having the competing opinions and the reasons for them debated between or among experts.²⁴

Not all expert evidence calls for evaluative judgment of the kind that I have identified. Some expert disciplines which are founded in the sciences, such as in the law of physics or chemistry or in some of the earth sciences would more readily lend themselves to the greater utilisation of a parties' single expert. Examples could include the measurement of ambient noise at a given location, the analytes in a particular water body or the profile of soil, rock or groundwater at a given location.

I have earlier referred to the Court's Practice Note which requires leave to be obtained by a party seeking to lead expert evidence following receipt of the report from the parties' single expert. When such applications have been made, the leave sought has generally been granted once it is demonstrated that there is an arguable basis to challenge the opinion expressed by the parties' single expert and the Court is likely to be assisted by the ensuing debate between experts.

²³ *Port Securities Pty Ltd v Wollongong City Council* (2006) 145 LGERA 285

²⁴ *Ancher, Mortlock, Murray and Woolley Pty Ltd v Hooker Homes Pty Ltd* (1971) 2 NSWLR 278 at [286]; *Bright v Acrocert Pty Ltd* [2012] NSWLEC 173 at [17]

Joint conferences and joint reports

There can be little doubt that the requirement for experts in comparable disciplines to meet prior to hearing in order to identify and discuss the issues between them has generally proved to be invaluable in the resolution of the dispute between the parties engaging those experts. The overall experience of the Court has been that in a large number of cases involving experts, the joint conference has resulted in agreement upon some matters that were initially in issue between them, while issues that remain are often refined so that they can more readily be identified than would have been the case were an attempt made to distil those issues from the experts' original reports.

However, there remains room for improvement in the process of joint conferencing and, more importantly, the result of that process, namely the joint conference report. While I recognise that in a busy professional practice the scheduling of a face to face meeting with a counterpart may seem inconvenient, such a meeting should be the norm among experts who have accepted a retainer to provide evidence in proceedings before the Court. Anecdotally, I understand that a meeting of that kind is the exception rather than the norm.

This situation is to be regretted. A face to face meeting with focussed attention to the issues between experts and, importantly, the settling of a joint statement or report is the manner of meeting to be encouraged. The Court's Practice Note requires that there be a "genuine dialogue" with a view to reaching agreement. While exchange of emails or discussion by telephone may be the means by which issues can be identified and summarised, critical to the utility of the joint report resulting from the process of conferencing is the manner of its preparation. Too often, it is apparent that the joint report identifying reasons for disagreement has involved little more than a "cut and paste" exercise from the report first prepared by each expert.

As the Practice Notes require, the joint report is intended to reflect the dialogue that has taken place. It is not to be "a mere summary or compilation of the pre-existing positions of the experts." The articulation of the reasons for

disagreement following dialogue are critical to the utility of the joint report, not only for the assistance it is intended to provide for the ultimate determination of the proceedings at hand, but also for the assistance it provides in controlling the content and length of evidence to be given by those experts.

Concurrent evidence

As my summary of the Court's Practice Notes indicates, the usual method by which oral evidence is received from two or more experts in the same or related disciplines is by means of evidence given concurrently by those experts. This has also become the normal practice by which expert evidence is received in the Supreme Court of New South Wales.

Although there might be slight variations of practice among different Judges or Commissioners, the usual procedure involves the following:

- (i) having each been sworn, the experts are seated together in the witness box or at a table in the Court if the witness box is not sufficiently large to accommodate them;
- (ii) each witness is invited to summarise the issues between the experts, as he or she sees the issues to be, and briefly addresses reasons for agreement and disagreement on issues joined between or among them;
- (iii) the advocates appearing in the matter are then required to provide the Court with topics upon which they propose to question the experts;
- (iv) subject to the leave of the presiding judicial officer, the experts are questioned on each of those topics in turn, with all questions related to a particular topic being exhausted before questions commence on the next topic. In the course of this process, each expert can be asked to comment upon

the response of their counterpart to questions asked and the experts may ask questions of each other.

The process of concurrent evidence has been described by the Honourable Justice Peter McClellan²⁵ in the following way:

“Where resolution of the issue is not possible, a structured discussion, with the judge as chair-person, allows the experts to give their opinion 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.”²⁶

That statement aptly describes both the manner in which and the advantages with which the Court pursues the process of concurrent evidence. This said, the procedure is not so inflexible as to preclude, in an appropriate case, the traditional method of cross-examining a witness. However, the advantages generally perceived from the giving of evidence concurrently include:

- (i) it assists the experts, through interaction with each other, to articulate their opinions without the rigidity of the traditional adversary process;
- (ii) the contemporaneity of their evidence and their physical juxtaposition to each other promotes disciplined presentation of reasons, knowing that any statement made or answer given is potentially subject to the immediate response of a peer;
- (iii) for the same reason, any methodology that is seen to be unsustainable is likely to be more readily and immediately exposed;

²⁵ Chief Judge at Common Law of the NSW Supreme Court and former Chief Judge of the Land and Environment Court

²⁶ *Effectius Newsletter* Issue 14, 2011

- (iv) any adversarial bias, subconscious though it may be, tends to be balanced out by the immediate opportunity for response;
- (v) if appropriately managed, it results in the efficient use of court time with a consequent saving of costs; and
- (vi) it provides a convenient and rational transcript for judgment writing in that all of the evidence directed to the expert issue is contained within the one passage of evidence.

General support for the present procedure for the giving of concurrent evidence by experts is not confined to the Land and Environment Court. Advantages of the kind to which I have referred have been identified as supporting that process both in the Supreme Court of New South Wales ²⁷ and in the Federal Court of Australia. ²⁸

Ultimately, the success of the procedure requires the active management of the presiding judicial officer, not only at the time of trial, but ideally also in pre-trial management, so as to ensure that the joint report produced at, or as a result of, the joint conference provides an appropriate agenda for the oral evidence to be given. That “agenda” if appropriately prepared, should narrow the debate to be had at trial.

²⁷ “Concurrent expert evidence: reflections and development”, the Hon Justice Peter Garling, (2011) 49 *Law Society Journal* 59

²⁸ *Strong Wise Ltd v Esso Australia Resources Ltd* (2010) 185 FCR 149 at [94] – [96]