ACCESSIBILITY TO LAW: ADJUSTING COURT PROCEEDINGS TO THE MODERN ERA – NOVEL PRACTICES AND PROCEDURES FROM DOWN UNDER

Bertus De Villiers*

Australia has for some time been experimenting with techniques to facilitate access to law, to enable litigants in person to run their own cases, to simplify court proceedings and to deal with expert evidence in a manner where issues are more effectively defined and reasons for disagreement clearly articulated. In this article, two major elements of law reform in Australia are investigated, namely: (a) the introduction of super-tribunals with vast review, civil, commercial and vocational jurisdictions; and (b) the use of expert conferral and concurrent expert evidence to better utilise and assess expert evidence in courts and tribunals. The article relies on opinions expressed in literature and anecdotal evidence, as well as empirical research that has been done by the State Administrative Tribunal of Western Australia to demonstrate how super-tribunals and creative ways of dealing with expert evidence have led to greater transparency, accessibility and participation by litigants in person in legal processes.

I INTRODUCTION

Contemporary court systems universally face challenges to adjust to the modern era where the public demands accessible justice, affordable resolution of disputes, less adversarial court proceedings with greater emphasis on settlement and a relaxation of what is often perceived as old-fashioned court procedures and practices. In a nutshell, where representative institutions have adjusted over the years to become more accessible, accountable and user-friendly, the court system as the third arm of government remains, in many respects, anchored in the past.

* Member of the State Administrative Tribunal of Western Australia and Adjunct Professor of the Law School of Curtin University.

Australia, which is a federal constitutional system, has, during the past two decades or so, witnessed wide-ranging efforts by the federal and state governments to introduce flexible arrangements in courts, simplification of proceedings, and policies to encourage and facilitate self-representation by litigants (litigants in person). The flexibility that a federal system offers has enabled the respective states to experiment with various techniques to facilitate citizens' access to courts and to simplify court processes, for example by the introduction of so called super-tribunals, relaxing the application of the rules of evidence, shifting the focus from adversarial to alternative dispute resolution, revisiting the role of the presiding officer during a hearing, and simplifying and modernising the way in which expert evidence is approached.[1]

In the recent report by the Australian Productivity Commission, an overview is given of some of the changes that have been made in the legal system and the effect of those reforms.[2] Notwithstanding the positive progress that has been made, the Productivity Commission nevertheless expressed concern at the high cost of litigation and made several recommendations about further improvements to effect law reform.

The reforms enacted in Australia have already reverberated in some common law jurisdictions. In this article, consideration is given to two areas of law reform in Australia that may be of relevance to common law jurisdictions and beyond, namely:

- the introduction of super-tribunals to facilitate administrative review of governmental decisions and simplified procedures for commercial and civil litigation; and
- dealing with expert evidence by way of conferral of experts prior to hearings and concurrent expert evidence during hearings so as to better utilise their expertise.

The reasons why these two themes are chosen for this article are that the techniques are said to simplify legal processes, to facilitate access to the courts, to promote self-representation, and to save time and costs in legal proceedings. The article reflects on views expressed in literature about these reforms. The article also refers to qualitative and quantitative research done undertaken by me into

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1 Refer for background information and relevant additional literature to the following publications by this author, as well as references within those publications: Bertus De Villiers "Burden of Proof and Standard of Proof in the WA State Administrative Tribunal – A Case of Horses for Courses" (2013) 32 UQLJ187; Bertus De Villiers "Experimenting in Federal Systems – The Case of the *State Administrative Tribunal* of Western Australia and Accessibility to Justice" (2013) 73 HJIL 427; Bertus De Villiers "The State Administrative Tribunal of Western Australia – Time to End the Inquisitorial/Accusatorial Conundrum"(2014) 37(2) UWA Law Review 182; Bertus De Villiers "Self-represented litigants and strata title disputes in the State Administrative Tribunal: an experiment in accessible justice" (2014) 24 JJA 30 ("Self-represented litigants"); and Bertus De Villiers "Accessibility to the Law – The Contribution of *Super-tribunals* to Fairness and Simplicity in the Australian Legal Landscape" (2015) 39(2) UWA Law Review 239.

2 See "Access to Justice Arrangements: Public Inquiry" Australian Productivity Commission <www.pc.gov.au>.

the views and opinions of expert witnesses and litigants in person about their experience in a super-tribunal such as the State Administrative Tribunal of Western Australia.

II SUPER-TRIBUNALS: CREATURES OF A MIXED CHARACTER

Common law jurisdictions such as the United Kingdom, Australia, Canada, New Zealand and South Africa are closely associated with "administrative review tribunals" where the decisions of government departments at national, state and local levels are reviewed.[3] The review tribunals are, in general, part of the executive and do not discharge a judicial function. The objective of a tribunal is to produce the "correct and preferable" decision based on the facts at the time of review. The review tribunal is placed in the shoes of the original decision-maker to review a decision de novo and, if necessary, substitute the decision of the original decision-maker with a new decision, refer the decision back to the original decision-maker for reconsideration or affirm the original decision. This process is generally referred to as 'merits review', because it is the merit and not the legality of an administrative decision that is being reviewed.

In common law jurisdictions, a plethora of review tribunals has developed over decades.[4] There has been confusion among the public about which tribunal is responsible for which reviews, lack of training of members of tribunals and some degree of inconsistency in tribunal decisions. As a result, major initiatives have been launched in Australia,[5] New Zealand[6] and the United Kingdom to simplify administrative review by creating single, integrated review tribunals.[7] In doing so, administrative review is nowadays generally undertaken by one-stop tribunals of which the membership is permanent, expertise of members covers a wide spectrum, and the processes, albeit not of a court, are court-like.

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3 Tribunals date back to the English Act of 1532 and the basis of the modern day tribunals to the 19th century, when the review of decisions by administrative decision-makers became more common. This contrasts with civil law systems, where administrative review is also a function of the judiciary, albeit that some civil law systems such as France and Germany have created specialist courts to deal with administrative review.

4 In the State of Western Australia, more than 50 boards and tribunals existed prior to the amalgamation process under the State Administrative Tribunal.

5 For a useful overview of the Australian administrative review system and those of some other common law jurisdictions, see Robin Creyke (ed) *Tribunals in the Common Law World* (Federation Press, Annandale (NSW), 2008).

6 Regardless of the efforts to rationalise tribunals, New Zealand has 28 different tribunals, boards and committees where administrative decisions are reviewed; "Tribunals" Ministry of Justice <www.justice.govt.nz>.

7 The Australian Administrative Appeals Tribunal (AAT) played a leading role in this regard. See Australian Administrative Appeals Tribunal <www.aat.gov.au>. The AAT is currently undergoing further change by expanding its jurisdiction through the inclusion of other Commonwealth tribunals, for example the Refugee Review Tribunal.

The federal states of Australia have, however, gone further than the amalgamation of review tribunals into a single tribunal. The states have expanded the jurisdiction of the amalgamated tribunals to create what are generally referred to as 'super-tribunals'. Super-tribunals have a dual function as administrative review tribunals as well as adjudicators of a wide range of civil and commercial disputes. The word "tribunal" can therefore be misleading because many of the functions of super-tribunals are of a judicial and not only of an administrative review nature.[8] The super-tribunals are often likened to a small claims court system, but this is not a proper characterisation. The super-tribunals are not courts, but do have an adjudicative function like courts, Legal representation is allowed in super-tribunals although self-representation is encouraged, Often there is no monetary limit to the jurisdiction of super-tribunals. Super-tribunals are in many respects unique creatures: arguably combining the positive attributes of courts and tribunals into a single institution. The key driving factors for establishing super-tribunals have been accessibility to justice for ordinary people and encouraging self-representation.

In Australia, the State of Victoria initiated in 1988 a so-called "super-tribunal",[9] called the Victoria Civil and Administrative Tribunal (VCAT). Since then all the states of Australia have followed.[10]

Three characterising features of super-tribunals are that: (a) they include in their jurisdiction administrative review as well as the determination of civil and commercial disputes; (b) they form part of the judiciary and not the executive; and (c) their processes and procedures are flexible and highly modernised to make them more accessible to the public, more user-friendly to litigants and less rigid as far as court formalities are concerned.[11]

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8 This means that the super-tribunals dispose of disputes on the basis that courts would, for example as an adjudicator following a hearing where the civil standard of proof applies, where the rules of evidence are not binding but must be adhered to as far as possible, where questions of fact are determined by the tribunal and where decisions are appealed to the Supreme Court.

9 There is no consistent terminology in Australia to describe the super-tribunals. Generally, the concept that has developed the most traction is super-tribunal, but in the literature, the new tribunals are also referred to as chameleon-tribunals, hybrid-tribunals, even 'schizophrenic' tribunals. See for example Peter Johnston "State Administrative Tribunal (WA): Model Non-Adversarial Tribunal or Split Personality" (2005) 8(3) ADR Bulletin 1 at 4.

10 Since the establishment of the VCAT, all states of Australia have enacted super-tribunals, albeit that the powers, functions and jurisdictions of the respective tribunals differ, since they are established pursuant to state legislation.

11 The super-tribunals of the respective states share certain practical features as far as design and procedures are concerned, for example: hearing rooms are very modern in design, painting, decorations and lighting; the presiding member sits at the same level as the parties; the parties do not necessarily stand when the member enters; the member is referred as 'member', 'sir' or 'madam' but not 'your honour' or 'your worship'; the dress attire is informal with no dress requirements for parties and their representatives and members not being robed; and parties remain seated when addressing the tribunal. In addition to these practical arrangements, the super-tribunals are not bound by the rules of evidence, but they are nevertheless guided by those rules; the

The super-tribunals have in some respects the appearance of courts, but the flexible and pragmatic way in which they deal with disputes is more in tune with the modern-day demands for informality, pragmatism, simplicity and alternative dispute resolution. They are called 'tribunals' which may suggest, incorrectly, that their powers are limited to administrative review. However, most of the powers of super-tribunals are exercised in the civil and commercial areas.[12]

The super-tribunals in Australia are, in effect, both a product and a catalyst of the major changes that characterise the Australian legal landscape. The jurisdiction of the super-tribunals is noteworthy particularly for the following four reasons.

First, a vast range of tribunals and boards have been amalgamated into single, administrative review tribunals, which means that the public has the benefit of a one-stop-shop to seek a review of administrative decisions. Such decisions occur in areas such as planning, development, aspects of taxation, compensation for expropriation of land, firearm licences, and drivers and taxi licences. Whereas previously there had been a multitude of tribunals and boards for the public to navigate, the super-tribunals have an established office, permanent staff and membership, and consistency in decision-making. All these elements contribute to overall improved access for the public to review processes, enhanced administration of government, consistency of decision-making, and effective and speedy review of decision-making.[13]

Secondly, the super-tribunals include a wide range of civil and commercial matters in their jurisdiction.[14] These matters, which were previously dealt with by the traditional court system, have been transferred to the super-tribunals since policy makers were of the view that those matters closely affecting the daily lives of citizens should be removed from the formality of the courts, should be dealt with in a more cost-effective and speedy manner, should fall within the capacity of average citizens to represent themselves and should be resolved in a more informal, investigative manner than is generally the case in the adversarial system that underlies Australian court processes.

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members of the tribunal may inform themselves; members of the tribunal may use their own knowledge to determine a dispute; and membership of the tribunal may include experts from other disciplines than the law.

12 In the State Administrative Tribunal of Western Australia, the non-review jurisdiction comprises about 90 per cent of the Tribunal's workload.

13 Generally speaking, the processes of super-tribunals are as follows: (a) a directions hearing two weeks after lodgement of a matter; (b) a hearing or mediation within four weeks after the directions hearing; and (c) a decision within 60 days after the hearing. See for example the State Administrative Tribunal of Western Australia, where in civil and commercial matters 80 per cent of matters are finally resolved within 25 weeks of lodgement: State Administrative Tribunal of Western Australia *Annual Report 2014–2015* (30 September 2015) at 5.

14 In the case of the State Administrative Tribunal of Western Australia, a total of close to 150 statutes falls within its jurisdiction. Proposals are on foot to further expand the jurisdiction of the Tribunal due to the positive responses received from the public about its functioning.

The range of civil and commercial matters that are included in the jurisdiction of super-tribunals differs among the states, but the following are examples of the jurisdictions: commercial and residential tenancy disputes; building and construction disputes; and strata (community) title and retirement village disputes. Most of the super-tribunals also include in their jurisdiction vocational disciplinary matters[15] as well as guardianship and administration matters.[16] The jurisdiction of the super-tribunals far exceeds the jurisdiction of traditional tribunals found in other common law systems.

Thirdly, there is notably an absence of an overarching rationale or philosophy that guides the Australian states as to what civil and commercial matters should form part of the jurisdiction of super-tribunals and what jurisdictions should remain with the courts. None of the respective states has adopted a formal list of criteria or guidelines, be it in policy or statute, to determine what jurisdictions are transferred from the courts to the super-tribunals. The jurisdiction of super-tribunals in the respective states resembles a smorgasbord, with little inter-state consistency. While this may be the result of typical Australian pragmatism, from the perspective of the public a confusing picture is presented by the respective states since there are large variances among the jurisdictions of the super-tribunals in the respective states. This allows on the one hand for experimentation where states can see what works and what not, but on the other hand it can be confusing from the eyes of the public if a matter is dealt with by the courts in one state while in another state it is dealt with by a super-tribunal.

Fourthly, the establishment of super-tribunals with civil and commercial jurisdictions inevitably raises two fundamental questions: why have those jurisdictions been removed from the courts, and why have the procedures and practices of the courts not been adjusted to allow for the flexibility and informality that is sought from super-tribunals? The answer to these questions is not obvious but in regard to the first question there is no coherent or consistent rationale across the states for reducing the jurisdiction of the courts and transferring jurisdiction to the super-tribunals. None of the states has a developed policy, guideline or other principles to guide which jurisdictions should remain within the court-system and which should be transferred to the super-tribunals. The general rule of thumb seems to be that civil and commercial jurisdictions that affect ordinary persons on a day-to-day basis are transferred to super-tribunals. In regard to the second question, it seems as if there is acknowledgement at a policy level that the reform of the court system would have been more complex and challenging than to create new institutions that are grounded in a new philosophy. The informality and flexibility associated with traditional review tribunals seem to have been attractive to policy makers and as a result the answer to reform lies not in adjusting the existing courts but rather in

15 The disciplinary mechanisms of many vocations have been amalgamated into the super-tribunals, for example, those of lawyers, doctors, dentists, builders, painters, travel agents and accountants. The disciplinary boards of those vocations have been abolished and their functions transferred to the respective super-tribunals.

16 These proceedings deal with persons who are in need of a substitute decision-maker for purposes of managing their estate (administrator) or making decisions about their person (guardian).

creating new super-tribunals. The outcome of the reform is the creation of super-tribunals that in name are limited to administrative review but in practice are akin to courts. This outcome unfortunately reflects negatively on the faith of decision-makers in regard to the ability of courts to adjust to the changing environment.

The super-tribunals have been a remarkable success story. This is evidenced by the following:

- In 1988 only one of the federal states had a super-tribunal, while in 2016 all states have super tribunals.
- The jurisdiction of super-tribunals has increased in scope as a result of the positive feedback received from policy makers, the legal community and users of the super-tribunal services.[17]
- By far the majority of litigants in super-tribunals represent themselves.[18]
- The level of satisfaction by users of super-tribunals is high. For example, in recent research undertaken by the State Administrative Tribunal of Western Australia, 89 per cent of parties said that, regardless of the outcome of the proceeding, it was the right decision to represent themselves.[19]

The super-tribunals have changed the face of the Australian legal landscape. The most likely place where the average citizen nowadays encounters litigation, other than through family and criminal courts, is via a super-tribunal. These tribunals have been people-courts since they are so accessible, tailor-made for public use and modern. George Barrie, after an assessment of the functioning of the State Administrative Tribunal of Western Australia, observed as follows about the relevance of the super-tribunals to the South African milieu: "The State Administrative Tribunal has achieved speed, cheapness and efficiency, and functions much more informally than the ordinary courts."[20]

III MAKING GREATER SENSE OF EXPERT EVIDENCE – LET THEM WORK TOGETHER

Dealing with expert evidence has long been recognised as challenging to the judiciary, experts, legal representatives and clients. The potential bias that experts bring into the courtroom, the advocacy of which they are often perceived and the highly technical nature of their evidence, combine to create

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17 It has been recommended by a recent parliamentary overview of the functioning of the State Administrative Tribunal of Western Australia that its jurisdiction should be further expanded. See Parliament of Western Australia Legislative Council Standing Committee on Legislation *Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal* (Report 14, May 2009) 491.

18 In the State Administrative Tribunal of Western Australia, for example, it is estimated that in at least 95 per cent of cases, at least one of the parties is self-represented. See State Administrative Tribunal of Western Australia, above n 13, at 13.

19 De Villiers "Self-represented litigants", above n 1, at 34.

20 George Barrie "The State Administrative Tribunal of Western Australia: An example to follow?" (2010) 25 SAPL 630 at 644.

what can be described as an often 'love-hate' relationship between experts and the judiciary.[21] The complexity of the relationship is explained as follows by Justice JRT Wood:[22]

> It involves too great a leap of faith to assume that the right of cross-examination, seen as the common law's answer to artifice and untruth, is sufficient to overcome bias in experts.

The legal profession is often focused on absolutes, whereas experts find greater comfort in nuances and in qualified statements. As a result, the judiciary can sometimes (perhaps more often than not) perceive experts as evasive or ambiguous, while experts in turn may sometimes (perhaps more often than not) find the judiciary as lacking flexibility and being single-minded. Although experts have a principal obligation to assist the court, in practice it is no coincidence that the views of experts generally coincide with the interests of their clients.[23] At the same time, it must be acknowledged that reasonable minds may disagree, that courts are reliant on expert opinion and expertise, and that different opinions can arise from the same facts.[24] Chief Justice McClellan has observed, after many years of hearing expert evidence, that in the overwhelming majority of cases:[25]

> The fact that ultimately they [experts] disagreed on critical issues was not due to anything other than a genuine difference of opinion about the appropriate conclusion to be drawn from the known facts.

Courts and super-tribunals in Australia have in recent years been experimenting with two principal techniques to better assess expert evidence and to simplify the process of dealing with expert evidence to ordinary persons, particularly litigants in person. The techniques are (a) conferral of experts prior

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21 See the overview by Ian Freckelton "Expert Evidence Law Reform" (2005) 12 JLM 393f.

22 JRT Wood "Forensic Sciences from the Judicial Perspective" (2003) 23 Aust Bar Rev 137 at 151.

23 This reality was acknowledged by the Australian Law Reform Commission in 1999. It observed that "it is often assumed that the expert is likely to exhibit a tendency to give evidence which favours that side [who retains the expert]". See Australian Law Reform Commission *Review of the Federal Civil Justice System* (Discussion Paper 62, 1999) at [13.68].

24 Downes observes that in 32 years of examining expert witnesses he has concluded that, with few exceptions, "they do not deliberately mould their evidence to suit the case of the party retaining them. When they do so, this emerges." Garry Downes "The Use of Expert Witnesses in Court and International Arbitration Processes" (paper presented to the 16th Inter-Pacific Bar Association Conference, Sydney, 3 May 2006) at 7.

25 See *Halverson v Dobler* [2006] NSWSC 1307 at [101]; and the discussion by Raylee Hartwell and Rachel Kelly "Breach, causation and expert evidence – an examination" (2007) 3 Australian civil liability 77 at 77–82.

to hearings and (b) concurrent evidence[26] by experts during hearings.[27] Although the techniques are employed at different stages of a proceeding, both processes are aimed at creating a platform whereby experts can engage each other collegially and in reduced adversarial conditions. The aim is to identify the areas of agreement, reduce the scope of disagreement, identify areas of disagreement and clarify the reasons for the disagreement. These processes are generally viewed as reducing the adversarial nature of expert evidence, reducing time required for expert evidence, creating an immediacy of peer review and ensuring a better informed court or tribunal.[28]

It must be noted, however, that reference to concurrent expert evidence and expert conferral does not refer to a static set of rules or processes. Courts and tribunals in Australia have adopted a variety of practices to facilitate the proper assessment of expert evidence but, in general, the

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26 The term 'hot tub' is colloquially used in Australia about the process whereby experts give concurrent or joint evidence. The author prefers the term 'concurrent evidence' to refer to the process of experts giving evidence in joint sessions. Although 'hot tubbing' has become part of the common vocabulary, it is not a term of art in Australia. The term was referred to more than 30 years ago for the first time by Rogers J in the matter *Spika Trading Pty Ltd v Royal Insurance Australia Ltd* (1985) 3 ANZ Ins Case 60-663 (in the Commercial List of the Supreme Court of NSW). See also for example Administrative Appeals Tribunal *An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal* (November 2005). Also note, for developments in the United Kingdom, Lord Woolf MR *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (July 1996); and Hazel Genn "Getting to the truth: experts and judges in the 'hot tub'" (2013) 32 CJQ 275. See also, in Canada, Paul Michell "Pre-Hearing Expert Conferences: Canadian Developments" (2011) (30) CJQ 93; and Megan A Yarnall "Dueling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary?" (2009) 88 Or L Rev 311.

27 See for example Catherine Aird "Compulsory conferences, expert conclaves and 'hot tubs'" (2009) 19 JJA 119. There are also other techniques being used such as single, court-appointed experts and the use of so-called Scott Schedules. In regard to the latter refer to Richard Manly "The Use of Scott Schedules in Technology, Engineering and Construction Litigation" (2011) 27 BCL 151; and Paula Gerber and Diana Serra "Construction Litigation: *Are* We Doing It Better?" (2011) 35 MULR933.

28 Bertus De Villiers "From Advocacy to Collegiality – The View of Experts of 'Concurrent Evidence' and 'Expert Conferral' in the State Administrative Tribunal" (2015) 25JJA 11.

underlying elements of what happens during an expert conferral and during concurrent expert evidence are consistent.[29]

A Conferral of Experts

The process of expert conferral entails that experts from the same or related disciplines are directed by the court or tribunal to meet prior to a hearing and to produce a joint report for the purposes of the hearing wherein the areas of agreement and disagreement and reasons for disagreement between them are set out. The conferral can be chaired by a court-appointed person or the experts can meet on their own. The experts are responsible for setting their own meeting arrangements and procedures and nominating one of the experts to keep notes and to write a joint report. Once the joint report is signed by the experts who participated in the conferral and given to the court and parties, an expert may not give evidence that is inconsistent with the joint report.

The intention behind the notion of expert conferral is to create circumstances wherein experts, without the attendance of parties or legal representatives, may meet in a collegial atmosphere rather than as adversaries, with the aim either to reduce the issues in dispute or at least to explain succinctly and clarify the reasons for the remaining disputes.

Generally speaking, conferral of experts is widely used in Australian courts and tribunals and there is much enthusiasm for the technique within the judiciary and the legal and the expert communities. Expert conferral is no panacea to prevent experts from locking horns, but it provides a potential mechanism to better identify issues in dispute, save time and clarify complex issues for clients, lawyers and the judiciary. Although expert conferral does not necessarily reduce the number of issues in dispute, it can at least provide a basis for the reasons for disagreement to be clearly articulated: thereby assisting the judiciary with the examination and weighing of expert opinion. In research undertaken amongst experts who have appeared in the State Administrative Tribunal between 2005 and 2015, 96 per cent of experts said that the conferral was either "helpful" or "extremely helpful" to identify areas of agreement between the experts and to reduce issues in dispute.[30]

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29 Refer for example to Gary Edmond "Secrets of the 'Hot Tub': Expert Witnesses, Concurrent Evidence and Judge-led Law Reform in Australia" (2008) 27 CJQ 51. One of the areas in which expert conferral and concurrent evidence has contributed to a marked change in courtroom culture is in native title (land rights) litigation. See for example Bertus De Villiers "Native Title Down Under: From Hot Tub to Preservation of Evidence - Mediation in Complex Land Claims" (2004) Southern African Public Law 440. See also the more recent observations of Vance Hughston and Tina Jowett "In the native title 'hot tub': expert conferences and concurrent expert evidence in native title" (2014) 6 Land, Rights, Laws: Issues of Native Title 1 at 10. The authors observe that, since the introduction of these techniques, court time has been reduced, disputes have been resolved in a more just manner and as quickly, inexpensively and efficiently as possible. See also Bertus De Villiers "Native Title and Expert Witnesses – Conferral and Concurrent Processes" (paper presented to the Australian Institute of Judicial Administration conference on Diversity and Law, Sydney, 13–14 March 2015).

30 De Villiers, above n 28, at 20.

There is some ambivalence about the status of experts who appear as an agent and an expert for a party in dispute. It often happens in relatively simple disputes, such as in the planning, valuation and building jurisdictions, that the expert who investigates and reports on a matter for a client also assists the client to commence proceedings in the relevant court or tribunal. This presents the judiciary with a challenge: on the one hand, the emphasis is on reducing cost of litigation and therefore leave is often given for the expert to act as agent, but on the other hand, the independence of the expert may be tarnished as a result of him or her acting on behalf of a party.[31] In general, courts and tribunals would caution a client and an expert at the earliest opportunity that the primary obligation of the expert is towards the court or tribunal and that it may therefore not be in the interest of the client if the expert were also acting as his or her agent in a proceeding.

The dynamics of an expert conferral can inevitably be influenced by factors such as the personalities of experts involved, whether the conferral is chaired by an independent person and the seniority of experts. A chairperson of a conferral may be able to bring some neutrality to the discussion. At the same time, it must be noted that a conferral is not a mediation, and the role of a chairperson should therefore be to facilitate a discussion rather than to attempt to develop common ground. In the experience of the State Administrative Tribunal of Western Australia, a chairperson in complex matters, particularly when the chairperson has some expertise in the area, can assist to develop an agenda for discussion, manage complex personalities and egos and ensure that experts are focused on the issues in dispute.[32] Experts and legal representatives from time to time express unease about the conferral process whereby experts are placed in conclave without being able to discuss their opinion or the opinion of other experts with clients or legal representatives. Although the courts and tribunals emphasise that experts have a primary obligation to the court or tribunal, it is often heard that experts, clients and legal representatives feel that they lose control of a proceeding if experts confer in isolation from the parties and lawyers.

The legal privilege, if any, that attaches to discussions during an expert conferral, the production of material for and during a conferral and notes taken during the conferral, can give rise to uncertainty. The conferral is, generally speaking, not protected by lawyer/client privilege. Expert conferral also

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31 See for example the observation by McClellan CJ in *Wood v R* [2012] NSWCCA 21, 84 NSWLR 581 at [715]: "Once an expert has been engaged to assist in a case, there is a significant risk that he or she becomes part of 'the team' …. It is an almost inevitable result of the adversarial system."

32 The super-tribunals such as the State Administrative Tribunal of Western Australia have, in addition to their full time Members, a wide range of Sessional Members who are appointed by reason of their expertise in an area of relevance to the jurisdiction of the Tribunal. Section 9 of the State Administrative Tribunal Act 2004 (WA) authorises members to "make appropriate use of the knowledge and experience" in the resolution of disputes. A senior legal practitioner who participated in the State Administrative Tribunal research said that "*the* essential difference between SAT and processes in the Supreme Court" is the "knowledge base SAT has at its disposal through sessional members". He said that it was "fundamental" to the success of super-tribunals that Members use their expertise and knowledge to facilitate speedy outcomes in conferrals and concurrent hearing processes. See De Villiers, above n 28, at 19.

does not form part of a process of mediation, since the purpose of the conferral is not primarily to facilitate a settlement between parties[33] but is for experts to clarify their evidence and opinions with a view to identifying the real areas of disagreement.[34] Experts, their clients and legal representatives can be confused about whether the content of an expert conferral is without prejudice (as if in mediation) or on the record.[35] Several jurisdictions in Australia have attempted to bring certainty to this question by enacting rules or by making orders to the effect that nothing said or produced during an expert conferral may be relied upon during a hearing other than the joint report of the experts.[36]

A controversial yet essential aspect of expert conferral is that experts meet without their clients or legal representatives in attendance and without the experts taking instructions or discussing the content of the joint report with clients or legal representatives prior to it being filed in the court or tribunal. While on the one hand this ensures that experts are treated as witnesses of the court and not advocates of a client, clients can easily feel alienated since they may lose control of the process if, for example, experts reach agreement on issues for which the reasons are not adequately clear to a client.[37] The joint report produced by the experts is usually handed to the court and parties simultaneously, and as a result thereof, clients and legal representatives may be caught by surprise by the content of the report.[38]

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33 Note that experts may also attend a mediation with parties. This allows parties to utilise the expertise of experts to explore settlement options, but the process is fundamentally different from an expert conferral where clients and legal representatives are not present.

34 The research done by the State Administrative Tribunal found that experts agreed that the primary purpose of conferral is aimed at clarifying areas of agreement, disagreement and reasons for disagreement, but nevertheless 32 per cent of respondents said that conferral may assist to settle a proceeding. De Villiers, above n 28, at 20.

35 See for example in this regard the Planning and Environment Court Rules 2010 (Qld), r 28 which provides that the content of expert conferral shall not be referred to at the hearing or trial unless the parties affected agree and that no evidence may be given at the hearing of what transpired during the conferral.

36 The State Administrative Tribunal *Guide to giving expert evidence* (Info Sheet 11) explains as follows: "An expert conferral, whether or not it is before a SAT member, *is not a mediation* and its purpose is not to settle the matter or compromise on issues by negotiation. Rather, the purpose of an expert conferral is to assist the Tribunal to resolve the matter correctly, quickly and with minimum costs to the parties" (emphasis added). See also David Parry "Revolution in the West: the transformation of planning appeals in Western Australia" (2008) 14 LGLJ 119 at 133–134; and David Parry "Maximum Value with Minimum Cost: Developments in the Use of Expert Evidence in the State Administrative Tribunal of Western Australia" (2008) 35(1) Brief 25.

37 In some jurisdictions, the court may direct that legal representatives do attend.

38 Interviewees in the SAT research were generally not concerned with meeting other experts without their clients or lawyers being present. Ninety-four per cent said that it was easy for them to explain to a client why conferral had to take place, while six per cent said that they found it difficult to explain the conferral process to a client. Note in this regard how, in Queensland, experts are formally quarantined so as to prevent any party or representative influencing the content of a report: Planning and Environment Court Rules 2010 (Qld), rr 22 and 27.

In research done by the State Administrative Tribunal of Western Australia into the experiences of experts who have participated in conferrals, the following findings were made:

- Conferral of experts has contributed to a less adversarial exchange between experts, since the experts generally analyse issues as colleagues rather than as adversaries. Several experts who had been interviewed by the author commented that the "tone" of conferral was much different from that of a hearing.
- Substantial hearing time has been saved as a result of issues in dispute being reduced, the reasons for disagreements being clarified and non-contentious matters being removed from hearings.[39]
- Conferral of experts reduces the time required for hearings, since the real issues are better identified prior to a hearing and that enables the court and parties, particularly litigants in person, to focus on the real issues at hand.
- Factors such as gender or seniority of an expert do not generally play a large role during conferrals, with experts generally feeling that they could express their views freely and independently.
- Experts generally found it easy to explain to their clients why the conferral had to take place in the absence of clients and legal representatives and, overall, clients did not seem to be unhappy with the content of joint reports that had been produced.
- The joint report produced by experts generally sets the scene for the hearing, since the issues on which there are disagreements are clearly defined and the reasons for the disagreement are set out. This not only saves time, it also distils, particularly for litigants in person, what the real issues are and therefore simplifies the examination of expert witnesses.
- The immediacy of peer review during a conferral contributes to experts adopting a more professional and less litigious approach within the privacy of a conferral, since the merit of a particular opinion is immediately open for scrutiny and debate by colleagues.
- Even in the event that a conferral of experts does not succeed in reducing the number of issues of disagreement, it can at least assist to better and succinctly clarify the reasons for disagreement.[40]

Conferral of experts is not a flawless process, but it has been used successfully by courts and tribunals to reduce the scope of issues on which experts disagree, clarify the reasons for disagreements, reduce hearing time, enable litigants in person to better understand the complexity of expert evidence and to examine experts based on the joint report and reduce costs of proceedings.

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39 One senior lawyer who participated in the research conducted by the State Administrative Tribunal said that the process of conferral was "almost unequivocally a good thing" and that it often reduces hearing time by 50 per cent or more. See De Villiers, above n 28, at 40.

40 See De Villiers, above n 28, at 16–20.

B Concurrent Expert Evidence

Concurrent expert evidence is a process during a hearing whereby experts, from the same discipline or related disciplines, give evidence to a court or tribunal during a joint session of those experts.[41] Although courts and tribunals may have varying practices, in general the experts (two or more) are called together, sworn or affirmed, and given the opportunity to answer the same questions, to comment on each other's replies, to enter into a dialogue with each other and to put questions to each other. According to Justice Rares the process of concurrent evidence:[42]

> … offers the potential, in many situations calling for evidence, of a much more satisfactory experience of expert evidence for all those involved. It enables each expert to concentrate on the real issues between them. The judge or listener can hear all the experts discussing the same issue at the same time to explain his or her point in a discussion with a professional colleague. The technique reduces the chances of the experts, lawyers and judge, jury or tribunal misunderstanding what the experts are saying.

Concurrent expert evidence is often preceded by conferral of experts whereby the joint report produced during a conferral sets the agenda for the concurrent evidence and the examination of experts.[43] The process of concurrent evidence is designed to encourage a less adversarial atmosphere during a hearing, to encourage greater focus on actual disagreements and reasons for those disagreements, to contribute to more collegial interactions between experts and to assist the court and parties to better focus on the real issues in dispute.[44]

There is widespread agreement in courts and tribunals in Australia that, generally speaking, concurrent evidence saves "considerable court time"[45] and crystallises areas of agreement and

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41 David R Parry and Bertus De Villiers *Guide to Proceedings in the WA State Administrative Tribunal* (Thomson Reuters, Sydney, 2012) at 175–176; and David R Parry "Concurrent Expert Evidence" (paper presented at the Council of Australasian Tribunals, Sydney, 31 May 2010).

42 Steven Rares "Using the 'Hot Tub' – How Concurrent Evidence Aids Understanding Issues" (paper presented to the New South Wales Bar Association Continuing Professional Development Seminar: Views of the "Hot Tub" from the Bar and the Bench, Sydney, 23 August 2010) at 3. This view was echoed by an interviewee who regularly appears in the State Administrative Tribunal and other courts when he said, in research undertaken by the Tribunal, that the process of concurrent evidence is "not aimed to trip people up" but to give them the best opportunity to give their opinion; at 22.

43 See ME Rackemann "The management of experts" (2012) 21 JJA 168 at 176, who expresses the view that the sooner the conferral takes place the better, since the opinions of experts may harden as a dispute draws close to a hearing.

44 Rares, above n 42, at 2.

45 Peter Biscoe "Expert Evidence: Recent Developments in NSW" (paper presented to the Australasian Conference of Planning and Environmental Courts and Tribunals, Brisbane, 16 September 2006) at [16].

disagreement more effectively than traditional processes of cross-examination.[46] In these traditional processes, the atmosphere is often more litigious, experts feel constrained due to their close relationship with their client and substantial time is spent on issues of credibility of expert witnesses rather than the merits of disagreement between the witnesses. The following observations can be made about the process of concurrent evidence.

The concurrent giving of evidence by experts tends to highlight that experts have an obligation to assist the court rather than be an advocate for the client. No system can completely remove the risk of bias on the part of an expert, but at least concurrent evidence enables the court to hear from experts at the same time, thereby creating an atmosphere of immediate peer review.[47] The opportunity for experts to comment on the evidence of another, as part of a collaborative process, establishes a basis for immediate and direct exchange of opinions and reasons for disagreement. By these means, the court is allowed to assess and weigh the opinions perhaps more effectively than may be the case where experts are called separately and separated by time to give their evidence.[48]

Concurrent evidence generally enables experts to identify areas of disagreement quicker, particularly when the evidence is preceded by a conferral of experts. In this way, substantial costs and time can be saved, since a hearing focuses on the real issues rather than becoming entrapped by matters that are not directly relevant or issues on which there is no real disagreement between the experts. In general, the examination of experts focuses on a specific issue, and once it is completed, the hearing moves to the next item in dispute. Courts and tribunals tend to take a more proactive and participatory role in the examination of experts during concurrent evidence, particularly so in the

46 Garry Downes "Problems with expert evidence: Are single or court-appointed experts the answer?" (2006) 15 JJA 185 at 188.

47 See De Villiers, above n 28, at 22. Several experts who participated in the research by the State Administrative Tribunal observed that the process of concurrent evidence was "less bruising" and "less hostile" than when experts were called individually.

48 Justice Rares observes that in his experience "experts quickly get to the critical points of disagreement" and by doing so time is saved in cross-examination; Rares, above n 42, at 13.

case of the super-tribunals, where experts often make up the membership of the tribunal.[49] The active involvement of the court or tribunal in the examination of experts is, according to Judge Parry, illustrative of the "real world" since:[50]

> In the real world, in order to analyse and resolve an issue involving expertise, the people who can contribute to the discussion meet with one another and work through the issue. This is essentially the process that occurs with concurrent expert evidence.

The process of concurrent evidence, although it has been explored in Australian courts and tribunals for some time, remains novel to many experts and legal practitioners. The process can seem foreign and can also intimidate where experts comment immediately on each other's evidence. The irony is that this process is more familiar to litigants in person because the exchanges between experts resemble a discussion rather than a proverbial 'dog fight'. The concurrent evidence not only gives experts an opportunity to respond to the same questions, it also opens the door for them to comment on each other's answers and pose questions to one another. Australian courts and tribunals make available reading material and detailed orders at the earliest opportunity, with the aim of informing experts of the process that is to be followed. In this regard, standard orders and reading materials have been made available by courts and tribunals, and presentations have taken place at continued professional development of various disciplines to explain the concept of concurrent evidence to legal practitioners and other professionals.[51] Courts and tribunals also spend considerable time at the early stages of a proceeding with litigants in person to explain to them the processes of conferral of witnesses and concurrent evidence. It is particularly in the case where expert witnesses are called by litigants in person that courts and tribunals may play an active role in the examination of the experts to ensure that issues in dispute are properly and exhaustively considered. Wilson emphasises, however, that concurrent evidence does not automatically bring about all the positive aspects that it is often said it should, but if there is a "willing involvement of participants in the litigation process,

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49 Several interviewees told the State Administrative Tribunal that, as a result of the expertise of its members, the Tribunal often understood the issues in dispute so well that the questioning by the Tribunal is generally speaking "more effective" than by counsel for the parties. A large number of interviewees said that legal representatives often do not understand the technical jargon and end up "asking the wrong questions or they don't understand the answers". These comments coincide with the observation by the Deputy President of the Administrative Appeals Tribunal**,** that expert members of the Tribunal "customarily ask pertinent questions … Their involvement provides invaluable assistance to the legal members of the Tribunal." DG Jarvis "The practice of the Administrative Appeals Tribunal in relation to medical evidence" (2012) 86 ALJ 34 at 41.

50 Parry, above n 41, at 14. Respondents in interviews conducted by the State Administrative Tribunal said by a large margin (85 per cent to 15 per cent) that they did not feel it strange that the Tribunal commenced with examination or that it played an active part in examining experts. See De Villiers, above n 28, at 23.

51 See for example the standard orders made available by the State Administrative Tribunal as well as the reading material prepared by the same tribunal: State Administrative Tribunal of Western Australia "A Guide for experts giving evidence in the State Administrative Tribunal" State Administrative Tribunal website <www.sat.justice.wa.gov.au>.

including counsel and the experts themselves", concurrent evidence does promise to save time, reduce costs and assist the judiciary.[52]

The super-tribunals often use subject-matter experts to form part of the tribunal that hears a matter: for example, builders, architects, medical specialists and engineers.[53] A question that arises is how expert witnesses perceive such experts who sit on a tribunal, and whether the expert tribunal members contribute to the fair and just resolution of disputes. Administrative review tribunals are known to comprise non-legally trained persons, but, in the case of super-tribunals with their wide civil and commercial jurisdiction, it is novel for experts to be part of the make-up of the panel that hears a matter. These experts often take an active role in examination during concurrent evidence, and thereby utilise their knowledge to assess the evidence before the tribunal. Although tribunal members may rely on their knowledge when a matter is determined, the rules of natural justice require that such knowledge be put to the parties so that they can respond to it. If a tribunal makes a finding based on knowledge that was not put to the parties, it is an error in law.[54] Experts interviewed by the State Administrative Tribunal of Western Australia responded overwhelmingly positively to being examined by a panel that includes subject-matter experts.[55] Experts also observed that, in the case of litigants in person, the leading role played by the Tribunal in examination, and the expertise available to the Tribunal, greatly assisted to identify the correct issues and structure examination around those issues, which in itself made the hearing easier to

52 Nigel Wilson "Concurrent and court-appointed experts—From Wigmore's 'Golgotha' to Woolf's 'Proportionate Consensus'" (2013) 32 CJQ 493 at 507.

53 Note s 9 of the State Administrative Tribunal Act 2004 (WA) authorises the Tribunal to use its knowledge in order to comply with its objectives. The Tribunal may use its knowledge provided that such knowledge is relevant and that the rules of natural justice and procedural fairness are adhered to. See Randall Kune and Gabriel Kune "Expert medico-scientific evidence before tribunals: Approaches to proof, expertise and conflicting opinions" (2006) 13 AJ Admin L 69 at 74.

54 It was emphasised by the Court of Appeal in the matter of *Dekker v Medical Board of Australia* [2014] WASCA 216 at [71]–[74] that the Tribunal, regardless of utilising the expertise of its members, must ensure that the rules of natural justice are complied with, and in the case where a specific, rather than a general, medical duty was said to exist, a finding of fact to that effect must be made based on the evidence before the Tribunal. The Tribunal could therefore not rely on the knowledge, expertise or opinions of its expert panel unless those opinions are put to the witnesses for their response.

55 De Villiers, above n 28, at 23–26.

follow for litigants in person. A substantial majority of experts felt that the presence of an expert-member enhances the trust and confidence of the experts in the hearing process.[56] There was general agreement among the interviewees that the involvement of an expert-member on a panel may contribute to the Tribunal being better prepared for a hearing and more capable of asking relevant questions.[57] In response to a question whether the presence of a subject-matter expert on a tribunal was a positive, negative or neutral perception in the mind of the expert, 91 per cent responded that it was positive factor, with 6 per cent saying that it was negative and 3 per cent saying that it was neutral.

Concurrent expert evidence is not a magic wand that renders practical results in all possible instances of complex expert evidence. Although some courts and tribunals have adopted concurrent expert evidence as a default position, others are more selective in their use of the mechanisms. Anecdotal evidence, supported by opinions expressed in literature and research done by the State Administrative Tribunal, suggests that concurrent expert evidence does in general bring with it the following benefits: hearing time being shortened, issues in dispute being identified with greater clarity, less time being spent on credibility of expert witnesses, an assessment of divergent opinions being facilitated as a result of the immediacy of responses of experts and litigants in person being able to better understand and more effectively participate in examining expert witnesses.

IV CONCLUSION

Australia has been experimenting at the federal and state levels with innovations to increase accessibility to the law and to assist litigants in person to better understand and participate in court and tribunal processes. Two important developments in this regard are: (a) the establishment of super-tribunals within all the states, and (b) adopting new approaches at the federal and state levels to deal with expert evidence.

The super-tribunals have struck a middle ground between the legality and traditions of courts and the flexibility and expertise of traditional tribunals. The super-tribunals, which have a dual function of administrative review and judicial dispute resolution, have become the first point of call for millions

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56 Several interviewees, who had been retained by litigants in person, commented how constructive both processes were since the Tribunal took such a leading role in the hearing, for example by directing the experts, leading in examination of experts and assisting the parties and experts to clearly identify the issues that were to be determined. An interviewee, who has had more than a hundred appearances in the State Administrative Tribunal, said that the way in which the process of concurrent evidence assisted litigants in person to properly examine the expert witnesses is "fantastic". See De Villiers, above n 28, at 25.

57 Several experts who were interviewed by the State Administrative Tribunal commented on the complexity of scientific data and the challenge to give an opinion in a manner that the judiciary, legal representatives and litigants in person can comprehend. This observation is consistent with the caution expressed by Justice Allsop when he said that judges who utilise concurrent expert evidence have "to be well prepared and very familiar with the technical issues in order to absorb and participate in the professional exchange. The hot tub is not necessarily the best way of filling an intelligent vessel with expert knowledge." James Allsop "The judicial disposition of competition cases" (2010) 17 CCLJ 235 at 241.

of Australians who engage with the legal system. Although little empirical research has been done on public satisfaction with the super-tribunals, the available evidence and relevant literature suggest that the super-tribunals have simplified accessibility to the law, have encouraged self-representation and are seen by policy-makers as institutions which should have an expanded jurisdiction.

Adopting new approaches to assessing expert evidence has been pursued by federal and state courts and tribunals. It is becoming the norm rather than the exception in many jurisdictions for experts to be referred to conferrals prior to hearings and for experts to give evidence concurrently rather than separately. Both these processes have contributed to time being saved, to the atmosphere of hearings becoming less adversarial and more collegial and to litigants in person being able to better conduct and manage their cases since the issues are clearly identified and experts give evidence concurrently.