

'HOT-TUBBING'—A USEFUL METHOD OF OBTAINING EXPERT EVIDENCE

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Expert evidence is usually in a written form, for example, an affidavit annexing an expert report, which is filed in court proceedings on behalf of a party to the proceedings and served on the other party before the formal hearing. At the hearing, the experts are generally required for cross-examination by the legal representative of the opposing party.

For a number of years, a mechanism has also been in place whereby experts attend a conclave to confer and produce a joint report on technical issues, detailing their agreement and their differences of opinion. This process aims to narrow the issues in dispute between the parties and ultimately shorten the time needed for expert evidence to be presented at the final hearing.

In recent times, however, a new and somewhat different approach has been taken regarding expert testimonies given at hearing. 'Hot-tubbing' is a procedure by which two or more experts give evidence concurrently. To achieve this, all the experts for a particular topic are sworn into evidence immediately one after the other and remain together in court while giving oral evidence and being cross-examined.

The giving of evidence becomes more of a discussion and questions may be asked by the legal representatives and the

presiding judge. In addition, each expert is permitted to ask questions of the other experts sworn into evidence at the same time. The discussion is controlled by the judge and focuses on the technical topic of the written expert reports.

The Land and Environment Court has been successfully using the hot-tubbing procedure for some time and it is found to be significantly more time-efficient than the traditional method of experts giving evidence and being cross-examined one by one. It has been estimated that evidence which may have required days of chief examination in and cross-examination can now be taken in as little as 20 per cent of the time.

In *Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority*, the 'hot-tubbing' procedure was adopted. In this matter there were several major issues in contention between the parties, the main one being the extent of development potential for the land in question. Six expert witnesses concurrently gave oral evidence in relation to town planning issues and the development potential issue using the hot-tubbing process, which, astoundingly, took only two days of hearing time.

Another potential benefit of hot-tubbing is that, because of the experts' technical qualifications and experience, allowing them to communicate directly with each other and phrase questions in their own words is likely to facilitate a more fruitful discussion about the technical issues and increase the potential to narrow the issues between the parties and crystallise the areas in dispute.

One of the challenges for those involved in hot-tubbing that should be guarded against is the potential for confusion of the roles of experts in court proceedings.

A party's case could be damaged if, for example, an expert were to cross the line between being an independent expert and an advocate. This is something all parties should remain conscious of and endeavour to avoid at all costs.

Notwithstanding the potential pitfalls, hot-tubbing is certainly an attractive option in the current climate of increasing litigation and with the growing need to 'cut to the chase' and use Court time more efficiently.

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