
Expert reports as evidence-in-chief — a curate's egg?

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While it is now normal practice in litigation and arbitration for the evidence-in-chief of technical experts to be given in the form of written expert reports, this may not always be the best way of communicating complex technical issues to the tribunal which has to decide between conflicting opinion evidence. This paper reviews modern approaches to the evidence of experts, and suggests that the written reports may need to be supplemented by an appropriately prepared oral presentation to better convey the full technical complexity and implications thereof to the tribunal.

In any litigation or arbitration on disputes with “technical” issues that are not within the common knowledge of the judge or arbitrator (the tribunal), expert evidence is essential to assist the tribunal in understanding the relevant facts. Unlike other witnesses of fact (lay witnesses), a properly qualified expert is permitted to give opinion evidence within the scope of their expertise and field of knowledge.

In Australian litigation or arbitration, it is normal for the opposing parties to engage their own experts. The universal position is that each expert owes a paramount duty to assist the tribunal, and that they are not an advocate for the party that engaged them. Notwithstanding this paramount duty, the traditional use of “opposing” experts is not without its problems. These include:

- not all experts are equal — in the relevant field of knowledge, in expertise, in technical or witness experience or in oral or written communication skills;
- some experts are “hired guns” who have a reputation of providing opinions that are invariably favourable to the party that engaged them;
- the briefs to opposing experts may not address the same issues and questions, or may specify a different set of factual assumptions;
- the experts may be inappropriately briefed with material that prejudices their objective view of the facts and the issues;
- the experts may not fully comprehend what their paramount duty to the tribunal entails.

The modern approach to the use of experts in complex disputes is based on a number of techniques that attempt to address these problems. These techniques may involve some or all of the following:

- written expert reports used as evidence-in-chief at the hearing;
- an “expert conference” prior to the hearing at which the opposing experts meet to discuss any differences between them and endeavour to reach common ground;
- a common brief to all experts, jointly prepared by the lawyers acting for the opposing parties, detailing a common set (or alternative sets) of facts on which the experts’ opinions are to be based;
- concurrent expert evidence in the hearing, colloquially referred to as “hot tubbing”.

Some issues that may arise from these techniques are discussed in the following sections.

Written expert reports

An expert required to produce an expert report on specific issues should be properly briefed by the lawyers responsible for managing the legal dispute. Such a brief should include all relevant documents, and details of any factual issues that are to be assumed by the expert. Further, the brief should contain the specific questions relevant to the case theory that the lawyers require an opinion on. In some complex cases, such questions may evolve over time as the case is prepared, and may be revealed by the work of the expert themselves.

While it is common practice for the experts’ brief to specify “assumed” facts, they must eventually be proved in the hearing by admissible evidence from relevant lay witnesses. In the authors’ experience, the factual evidence does not always exist to either support or deny the instructed assumptions. In such cases, the assumed “facts” may have been established from a hypothetical exercise of identifying one or more possible credible scenarios, which could be adopted as alternate explanations of events in the absence of any evidence to the

contrary. Such hypothetical assumed “facts” may well have been postulated to conform with the lawyers’ view of the case theory. An expert instructed in this way will inevitably have a radically differing starting point to their opposing expert. The resulting opposing expert reports may well be like ships passing in the night, not only because of the different “factual” assumptions on which they are based, but also because the questions posed by the instructing lawyers are completely different, being based on, perhaps, diametrically opposite case theories. As discussed below, one way of avoiding this is for the opposing lawyers to agree on specific questions to be answered by the experts, with alternate factual scenarios.

The tribunal normally makes orders that expert reports are to be served on the opposing party in sufficient time before the hearing, so that they can be responded to by expert reports in reply. Such reply reports may also be subject to rejoinder replies. In complex disputes where further issues requiring expert opinion are revealed as the case progresses, the totality of the opinion evidence from a single expert may be contained in a number of reports, perhaps prepared over an extensive time period, and comprising hundreds, perhaps more, pages.

It is now usual practice for such written expert reports to be presented as the evidence in chief of the expert, the extent of oral evidence in chief being confined to the witness confirming their identity and that they still hold to the opinions expressed in the written report. Counsel may also ask whether there are any alterations to be made, such as correcting typographical mistakes.

The veracity and credibility of the expert opinion set out in the report is then conventionally tested by opposing counsel by means of cross-examination. Detailed cross examination is beneficial to the tribunal in that through this process of testing, it concurrently teases out and better explains the intricacies and often significant technical subtleties of numerous technical points set out in the expert report. Such cross examination will also be beneficial to the party for whom it was adduced, provided the expert coherently articulates and explains their report, and does not resile from opinions already expressed.

However, if an expert is not subject to extensive cross-examination, in principle the tribunal should accept the expert witness report as being largely uncontested by the opposing side. In such a case, many of the significant technical points may be glossed over, or their importance discounted through being lost within the voluminous amount of heavy technical detail required to be set out in expert reports. Indeed, not contesting an expert’s report heavy in technical detail may be viewed as a clever strategy, whereby in closing arguments counsel does not question the accuracy or veracity of such expert

reports, but instead attempts to marginalise the direct relevance of such evidence by an appearance of disdain.

Experts’ conference

An experts’ conference provides the experts an opportunity of resolving any differences of opinion before the hearing, in an informal “without prejudice” meeting. Such meetings are usually held without lawyers being present, to enable the experts to have a free and frank exchange of views. To enable an appropriate outcome to be achieved by an expert conference, it is essential that there is an agenda that details the specific issues to be discussed between the experts, and preferably a number of specific questions to be answered.

If the experts have been individually briefed by their instructing lawyer, the resulting reports may not address the same issues, or they may be based on different factual assumptions. It is clearly desirable for the lawyers to agree on the issues, the factual assumptions and the questions to be addressed by the experts, difficult though obtaining agreement may be. If there are different views of what the relevant facts are, the experts may be asked their opinions on alternate factual bases.

Consistent with the experts’ overarching obligation to the tribunal, their participation in an experts’ conference must be based on their genuinely held opinions, and cannot be fettered by any instructions from their instructing lawyer as to a position to be held to.

The main “deliverable” of such an expert conference is one or more reports documenting the views of each of the experts on the questions and issues put to them. This may take the form of a joint report that identifies the areas of agreement and details the areas of disagreement, with the reasons for disagreement. Alternatively, the joint report may only document those areas of agreement and answers to questions where the experts are in accord. The intent of such a joint report is to narrow the areas in dispute, and ensure that hearing time is not taken up with issues that the experts are agreed upon. Typically, the joint report will be introduced in the hearing as evidence of what the experts have agreed on, leaving the issues on which there is no agreement for subsequent evidence in the hearing.

Clearly, an expert conference only makes sense if it is a meeting of experts in the same field of specialty, who will be giving evidence on the same issues in a hearing. Depending on their experience, expertise and personalities, such experts may be left essentially to their own devices, to come up with a joint report that addresses the questions and issues put to them.

However, in expert conferences where there are a number of experts, or where there are very complex technical issues and factual scenarios, or where one or more of the experts are forceful personalities, it may be

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appropriate to engage an independent facilitator to chair the conference. Such a facilitator should themselves be an expert or at least knowledgeable in the relevant technical field, and have appropriate skills to ensure that the meeting is conducted such that all experts have an adequate opportunity to express their views. In a facilitated conference, it may be logical for the facilitator to prepare the joint report, to be signed by all of the attending experts to signify their concurrence to its contents.

Expert conferences can be seriously derailed if the lawyers for one side set out a series of clearly legalistic (as opposed to technical) questions, which they then seek their own experts to deliver as proxies, particularly if the expert is an experienced “hired gun”. Such legalistic questions may be of such a generic nature, or leading in their desired outcomes, that it is entirely inappropriate for the experts to either ask such questions, or for the opposing experts to answer them, or provide anything other than highly constrained or qualified answers that do not assist resolution of the actual technical issues in dispute. An independent facilitator is essential to avoid such situations, particularly if the facilitator is given some discretion as to answering the questions as put, or revising the questions into a more appropriate format. Equally experts should be sufficiently well briefed as to what their responsibilities are to the tribunal, as opposed to their instructing lawyers, whereby they should recognise where they may be being asked to cross the line.

In the authors’ experience, it is not uncommon in expert conferences for one expert to agree to facts or technical opinions within the conference and signing off to that effect, even when such agreement may be prejudicial to the case being presented by the side engaging their expert services. Then, when the joint report or minutes from that conference are delivered to their instructing lawyers, the expert may seek to reverse his/her agreed common opinion arising from the conference. This may be “explained” as the expert not being fully aware of the implications of what was agreed at the time, or being tired or not fully attuned to the proceedings of the experts’ conference. However, such post-conference attempts to reverse opinions should be viewed as being driven by explicit or implicit advocacy by the expert, as well as in conflict with the expert’s own professional code of ethics. Clearly such behaviour can be very damaging to a party’s case, as the tribunal, aided by opposing counsel’s submissions, may well be persuaded that the experts’ revised evidence should have no weight attached to it.

The authors have also had experience in cases where the experts’ conference has delivered a clear and concise report on the agreed opinions between experts, then for

one party’s counsel to reject the legitimacy of their own expert’s agreement to such points, and seek to strike out the joint experts’ report. Such an act undermines the entire process, and is unlikely to be agreed to by the tribunal if the experts’ conference process has been properly conducted.

Evidence in the hearing

The order in which expert evidence is adduced depends on whether the traditional order of a hearing is followed, or a more modern variant, such as hot tubbing. The traditional order of presenting evidence in an adversarial proceeding is for the plaintiff (claimant) to present their lay witnesses, followed by the plaintiff’s expert witnesses. The defendant (respondent) then presents their lay witnesses, followed by the defendant’s expert witnesses. The clear downside to this order of proceeding is that many weeks may have passed between the time when one expert witness presents their evidence, and the time that the “opposing” expert on the same technical specialty presents their evidence. This makes it difficult for the tribunal to adequately weigh up conflicting views or inconsistencies.

It is now common practice in Australia for expert evidence on a specific technical issue to be given seriatim by the witnesses for the plaintiff and the defendant. This “concurrent” evidence may be presented on non-traditional lines, eg: the tribunal might ask questions of the experts, and the experts may be permitted to question each other before counsel has an opportunity to cross-examine opposing witnesses. The very flexibility of such a session may present counsel with a new set of challenges as to how best to present their client’s case. Should their own experts rely completely on their written expert reports as their evidence in chief, or should they prepare a presentation to assist the tribunal to understand the opinion evidence that has already been submitted in expert reports? To what extent is counsel’s cross examination necessary to supplement questions that have already been put by other experts in the “hot tub”? Such questions of forensic tactics are brought into sharp focus in “stop clock” or limited time hearings in which each party is given a specific period of time in which to present the totality of its case.

In complex technical cases, counsel should be aware that there are limitations in the use of expert reports as evidence in chief. While one can generally make the assumption that the tribunal has read the reports submitted as evidence, and can refer to it later when preparing the judgement or award, reading is not necessarily understanding. Cross-examination is unlikely to assist in putting the positive case for the client; by its nature it will be directed to finding weaknesses and inconsistencies, perhaps in a superficial way, but clearly from a

different perspective. If opposing counsel do not think they will make much impact on the credibility of an expert's evidence by cross-examination, it may be very brief or non-existent.

Where the extent of reports prepared by one expert are voluminous, it may be valuable for the expert to prepare a summary presentation for the tribunal to explain and summarise the conclusions reached and the opinions expressed. For anything with more than a slight degree of technical complexity, an appropriate presentation may use some or all of the tools of modern media, such as PowerPoint presentation, video animation or the use of models. Providing such a presentation is aimed at explaining evidence that has already been adduced in expert reports, and is not bringing in new issues that have not been known to the opposing experts, a tribunal should permit such a presentation in the context of "hot tubbing".

If only one expert in a hot tub made such a presentation, the evidence of the opposing experts may be under a serious disadvantage. Notwithstanding perhaps voluminous and cogent evidence to the contrary, it would not be surprising if the tribunal took particular note of a polished presentation in which the expert evidence was succinctly and clearly expressed. Particularly in a long-running hearing in which there is extensive written evidence, the power of concisely expressed oral evidence in chief should not be underestimated. It is

not suggested that we should go back to adducing complex technical evidence in chief orally, merely that the written expert reports should be supplemented by appropriately targeted and prepared presentations to assist the tribunal in fully comprehending the written reports.

Having such a presentation available at a hearing will avoid being "ambushed" by the other side that recognises the persuasive power of a carefully prepared and delivered presentation. It also ensures that the strategic tactic of not contesting expert testimony by cross examination is not given undue benefit by default.



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