



**THE MANAGEMENT OF EXPERT EVIDENCE IN THE KILMORE EAST
BUSHFIRE PROCEEDING**

COLLECTED RESEARCH PAPERS

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PRE-TRIAL MANAGEMENT OF EXPERT EVIDENCE IN THE KILMORE EAST BUSHFIRE PROCEEDING

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This paper, the first in a series on the management of expert evidence during the Kilmore East bushfire proceeding, considers the pre-trial management of experts. This case was the largest class action in Victoria’s history, and expert evidence played a central role. Despite the volume and complexity of this evidence, the Court in this proceeding was not particularly interventionist in the management of experts prior to trial. This paper considers whether the management of experts by the Court prior to trial usefully contributed to running of the proceeding. It records the reflections of a range of participants in the proceeding, including the presiding judge, barristers and solicitors. This material was gathered in interviews conducted after the case settled. While the judges thought a more hands-on approach by the Court in the selection and briefing of experts would have been reduced the volume of expert evidence, the legal practitioners were not convinced that this kind of intervention would be useful. They noted how difficult it would be for the Court to choose the best experts and navigate disputes between experts about the appropriate methodology for developing their evidence. This is not to say that some intervention is not useful, and the participants in the Kilmore East bushfire proceeding identified a number of procedures that could be adopted to improve the effectiveness of the expert evidence. This paper considers some of these proposals, such as case management conferences and increased sharing of information between parties about the expert evidence they will be using in the proceeding.

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I. INTRODUCTION

Matthews v SPI Electricity Pty Ltd (the ‘**Kilmore East bushfire proceeding**’) was the largest civil trial in the history of Victoria. It was one of the cases arising from the devastating ‘Black Saturday’ bushfires of 7 February 2009. The direct cause of the Kilmore East bushfire was common ground at the trial: the parties all accepted that it started when a section of power line broke and upon striking the ground, ignited a fire.¹ It was an extremely hot and windy day after a hot and dry summer, and the conditions allowed the fire to spread rapidly. It eventually killed 119 people, injured more than 1,000, and damaged or destroyed approximately 1,772 homes and properties.² One of the notable features of the trial was the role that expert evidence played in the proceedings, and the number of experts – 40 in total – called to provide evidence. The Supreme Court of Victoria commissioned a research project into the management of expert evidence in the proceeding, and in particular to capture the experience and reflections of the participants in the proceeding. This is the first in a series of four papers, and considers the pre-trial management of experts.

The primary material for the paper was gathered in interviews with some of the judges, barristers and solicitors involved in the proceeding. They record the reflections of the participants about the decisions they made about the management of experts prior to the commencement of the trial. In addition, the interviews also canvassed a number of other issues: the possibility of limiting the number of experts; the appropriate role for the court in choosing and briefing experts; the level of

¹ *Matthews v AusNet Electricity Services Pty Ltd*[2014] VSC 663, [1]-[9].

² *Ibid* [7].

disclosure between the parties about the choice of expert and the material used to brief them; and the value of case management conferences. The participants had differing views on what impact, if any, a more interventionist court would have had on the pre-trial management of experts. Generally speaking, Justice Jack Forrest and Associate Justice Rita Zammit³ thought that a more hands-on approach could have reduced some of the procedural issues that arose as a result of the large number of experts. The legal practitioners were much more sceptical about an expanded role for the Court.

Before turning to the material gathered from the interviews, the first section of the paper provides a brief outline of the legislative regime in place in Victoria dealing with the pre-trial management of expert evidence, as well as a brief overview of the relevant literature. This overview is not comprehensive, but includes a review of Law Reform Commission reports as well as other relevant sources. It identifies some of the factors judges and academics look to when assessing the necessity of pre-trial intervention.

It is important to note that this paper does not intend to offer any 'perfect' or 'ideal' way for a court to manage experts prior to trial. Each case will have unique features, and it is important that courts are responsive to the circumstances of the matter before them. Therefore, a degree of flexibility is desirable. The paper seeks to identify some successes of the Court's approach in the Kilmore East bushfire proceeding, as well as to recognise some of the concerns raised by the participants. The aim of the paper, and the research project generally, is to assist judges and lawyers involved in large cases in the future by setting out record of what happened, from a procedural perspective, during these significant proceedings.

This paper has an appendix that provides some context and further background for this research. The first section sets out the view on the pre-trial management of expert evidence of four Victorian judges who were not involved in the Kilmore East bushfire proceeding. This material was gathered in interviews in late 2014, and shows some of the different judicial perspectives on the pre-trial management of experts. The second section sets out the methodology of the paper.

³ While at the time of the proceeding and interviews conducted for this research project she was an associate justice, Justice Zammit was appointed a judge of the Supreme Court Trial Division in February 2015.

II. SNAPSHOT OF ISSUES REGARDING THE PRE-TRIAL MANAGEMENT OF EXPERTS

A. Legislative framework in Victoria

The Victorian Supreme Court has significant power to manage how parties use experts in the pre-trial phase of the proceedings. The wide range of management options available to the Court allows Judges to give parties as much or as little autonomy over appointing experts as is necessary to ensure that the process is just and efficient. It is important to note that the following legislative framework was not in place when the Kilmore East bushfire proceeding commenced in 2009, and the powers available to the Court were not as clear as they are now. Nevertheless, it is useful to set out what a court can currently do to manage expert witnesses.

Section 65G(1) of the *Civil Procedure Act 2010* (**‘the Act’**) requires that unless the court otherwise orders, a party must seek the direction of the court “as soon as practicable” if the party intends to adduce expert evidence at trial, or becomes aware that it may adduce expert evidence. Section 65H grants very wide powers to the Court in the lead up to the trial to manage how expert evidence is used. It provides:

- 1) A court may give any directions it considers appropriate in relation to expert evidence in the proceeding.
- 2) A direction under subsection (1) may include, but is not limited to –
 - a) The preparation of the expert’s report;
 - b) The time for service of an expert’s report;
 - c) Limiting expert evidence to specified issues;
 - d) Providing that expert evidence may not be adduced on specified issues;
 - e) Limiting the number of expert witnesses who may be called to give evidence on a specified issue;
 - f) Providing for the appointment of –
 - i. Single joint experts; or
 - ii. Court appointed experts;
 - g) Any other direction that may assist an expert witness in the exercise of his or her functions as an expert witness in the proceeding.
- 3) Any direction under subsection (1) may be given at any time in a proceeding.⁴

As is clear, the powers granted to the Court by the above section gives the judge a broad framework within which to deal with experts. The Explanatory Memorandum for the 2012 Bill explained the purpose of s 65G:

⁴ *Civil Procedure Act 2010* (Vic).

This section emphasises the important role of the courts in determining the most effective and proportionate use of expert evidence from an early stage of the proceeding, rather than leaving it solely to the parties to determine.⁵

It goes on to explain that s 65H:

... provides that a court may at any time give any direction that it considers appropriate in relation to expert evidence. This makes it clear that the courts have the power to give appropriate directions and impose reasonable limits in actively managing and controlling expert evidence.⁶

Victorian courts therefore have a considerable amount of leeway in managing expert evidence. As the above sections came into force shortly prior to the commencement of the trial, the pre-trial directions may have been different had these powers been available in the two years preceding the trial.

B. *Overview of literature on pre-trial management of experts*

In its 2005 report on expert witnesses, the New South Wales Law Reform Commission addressed the expected benefits of active judicial management of experts. One of the most striking recommendations of the Commission was a proposal that parties should be required to get the permission of the Court before leading expert evidence.⁷ While this recommendation was not adopted by the Victorian Parliament, it gives an indication of the aims of promoting more active management of trials by judges. The Commission explained:

... Australia has participated in the widespread trend referred to by Zuckerman as the “shift towards the imposition of a stronger control by the judges over the progress of civil litigation.” Much effort by judicial officers and other court personnel now goes into “case management”. In general, the courts are actively involved in making a variety of pre-trial orders associated with the preparation of the case for trial. The primary goals of case management are to minimise delay and reduce public and private costs. The new activism is intended to assist early settlement of cases, by ensuring that mediation or other dispute settlement mechanisms are available, and that the real issues in dispute are identified as clearly and as early as possible. [...] The close scrutiny of the preparation of the case for trial is designed to ensure, as far as possible, that evidence is available on time and cases are not adjourned because a party is taken by surprise at the last moment, and that the issues have been clearly defined so that time is not wasted with irrelevant or marginally relevant evidence.⁸

⁵ Explanatory Memorandum, Civil Procedure Amendment Bill 2012.

⁶ Ibid.

⁷ New South Wales Law Reform Commission, *Expert Witnesses*, Report No 109 (2005), 6.1-6.11.

⁸ Ibid, 6.6.

It is thought that a more interventionist approach to pre-trial management by Courts will “have a moderating effect on the excesses of the warring parties”, particularly during mega-litigation.⁹ Such intervention is rarely straightforward; Justice Ronald Sackville of the Federal Court of Australia, while being supportive of increased judicial intervention into the pre-trial management during mega-litigation, noted that:

The fundamental difficulty facing a court in seeking to exercise stringent control over the use of expert evidence in mega-litigation is the information-deficit. [...] [T]he most diligent judge cannot know in advance anything like as much about a party’s case as that party’s legal representatives.¹⁰

It is thought by some that active pre-trial management of experts can help reduce the risk of biased experts who are tainted by their relationship to the party that retained them.¹¹ Edmond has written that the view that judges can reliably assess the bias of scientific experts is more fraught than is usually recognised.¹² This opinion is not universally shared, and some judges and practitioners view this risk is overstated. Judge Michael Rackemann of the District Court of Queensland, wrote that in his experience it rarely happened and that when it does it was obvious and could be dealt with. He explained that:

The contention that expert opinions are able to be bought and sold is an inaccurate generalisation. It is also an unseemly one involving, as it does, a suggestion by lawyers that professionals of other disciplines are little more than ‘paid liars’. There are those who regard such an allegation, coming from the mouths of lawyers, as somewhat ironic. Lawyers are not the only ones with professional ethics.¹³

With the new legislation, courts in Victoria are able to control how many experts the parties call in the case, with even the possibility of only permitting a single expert give evidence in a case. Justice Allsop, the then President of the New South Wales Court of Appeal, warned of the dangers of this approach in competition cases,¹⁴ saying that as the expert evidence in those cases is generally about economics, and as economics is a social science where the evidence is “argumentative and

⁹ Justice Ronald Sackville, ‘Mega-Litigation: Towards a New Approach’, speech given to the Supreme Court of New South Wales Annual Conference, 17-19 August 2007, Central Coast, New South Wales.

¹⁰ Justice Ronald Sackville, ‘Expert Evidence in the Managerial Age’, paper given to the Forensic Accounting Conference, Friday 14 March 2008, Sydney.

¹¹ See New South Wales Law Reform Commission, *Expert Witnesses*, Report No 109 (2005); Justice Ronald Sackville, ‘Expert Evidence in the Managerial Age’, above n 10.

¹² Gary Edmond, ‘Judging Surveys: Experts, Empirical Evidence and Law Reform’ (2005) 33(1) *Federal Law Review* 95.

¹³ Judge Michael Rackemann, ‘The management of experts’ (2011) 21 *JJA* 168, 170.

¹⁴ Justice James Allsop, ‘The judicial disposition of competition cases’ (2010) 17 *Competition & Consumer Law Journal* 241-2.

contestable”, ordering a single expert is problematic.¹⁵ However, where “the relevant field is relatively stable in principle and technique (such as the valuation of land) the choice of a single expert may go a long way to determine the answer to the question under consideration.”¹⁶ Similarly, Judge Rackemann notes that a serious limitation of the single-expert model is that it deprives the judge of competing views, and its usefulness is “generally restricted to circumstances where the exercise to be carried out is unlikely to be controversial.”¹⁷

III. EXPERTS IN THE KILMORE EAST BUSHFIRE PROCEEDINGS

The Kilmore East bushfire proceeding dealt with very complex expert evidence. The experts were called to give evidence on six important factual issues: the ignition of the fire; the failure of the conductor; power network asset management; the impact of prescribed burning; the impact of fire suppression; and warnings. The most difficult of these from a scientific perspective was the failure of the conductor, which required qualitative and quantitative evidence from physicists and industry experts. The volume of expert evidence required the Court and the parties to confront a number of difficult procedural questions prior to the trial. How should experts be chosen, and should any limit be placed on how experts gave evidence to the Court? Is it better for the parties to control the process (which is what happened in these proceedings), or would it have been better if the trial judge, Justice J Forrest, had more closely managed the process of choosing experts, or even chosen the experts himself? Once the experts were selected, should they have received a briefing from the Court prior to providing their report, and should there have been full disclosure about how the experts were briefed and the material they saw? Were directions hearings the best way to resolve these procedural questions, or were case management conferences preferable? This paper explores the different responses some of the participants had to each of these questions.

A. *Number of experts*

It was apparent from an early stage of the Kilmore East bushfire proceeding that expert evidence would be critical, and there would be many experts called on a wide range of matters relevant to liability. One solicitor explained:

[I]t was apparent to us reasonably early that it was going to be a complex metallurgical case involving evidence from some of the leading scientists in their field. Even though we knew that, we

¹⁵ Ibid 242. Justice Garry Downes, President of the AAT, made a similar point in ‘Problems with expert evidence: Are single or court-appointed experts the answer?’ (2006) 15 JJA 185.

¹⁶ Ibid 242; Justice Downes added at 187 that single experts are appropriate if it is a question to which there “only one answer.”

¹⁷ Judge Rackemann, ‘The management of experts’, above n 13.

didn't know quite how complex it would be because each time we would present an assumed factual outline to the expert as to what happened, there would be a corresponding answer which would tend to take it into a new scientific field.¹⁸

Both barristers interviewed as part of this research¹⁹ said that general mass tort claims involved a substantial amount of expert evidence and the parties knew from the outset that this case was going to require a substantial number of experts.²⁰ In addition, one barrister pointed out that the economics of class actions made it more likely that the parties would decide to go to the expense of expansive expert evidence:

In other words, if you've just got a one off individual claim of \$50,000 you're not going to go off and spend half a million on expert evidence. But, if you've got a class action where you've got hundreds, if not thousands of claims, and you've got a total quantum of \$20m through to \$2 billion or something, the cost benefit analysis means that parties are going to look at expert evidence if that's at all relevant²¹

The Royal Commission into the 2009 Black Saturday Bushfires also provided an indication of what the expert evidence would cover.²² Associate Justice Zammit said this "gave a flavour" of the matters that would be before the Court, making it clear the scope of expert evidence would be broad.²³ Both barristers agreed, saying the Royal Commission helped them appreciate the scope of the case.²⁴ One said it was used as a "fact finding exercise for the lawyers on both sides" and was "helpful in giving us some early insight into the kinds of problems we were likely to be dealing with in the litigation."²⁵ However, he said that the scale of the Supreme Court trial was entirely different:

You can't compare the Supreme Court trial to the Royal Commission. In terms of the discipline, and the level of interrogation, the Supreme Court was just on a different scale compared to the Royal Commission. It was much, much more intensive in the court. But, the point is that because of the

¹⁸ Interview with solicitor involved in proceeding (20 February 2015, Melbourne) ('Interview with solicitor A').

¹⁹ One barrister was from the plaintiff side, the other was from the defendant side. See the Methodology section of the appendix for further detail.

²⁰ Interview with barrister involved in proceeding (Morning of 24 February 2015, Melbourne) ('Interview with barrister A'); Interview with barrister involved in proceeding (Afternoon of 24 February 2015, Melbourne) ('Interview with barrister B').

²¹ Interview with barrister B, above n 20.

²² See Victoria, 2009 Victorian Bushfires Royal Commission, *Final Report* (2010).

²³ Interview with Associate Justice Zammit (13 August 2014, Supreme Court of Victoria, Melbourne).

²⁴ Interview with barrister A, above n 20; Interview with barrister B, above n 20.

²⁵ Interview with barrister A, above n 20.

Royal Commission we knew from the start with the Supreme Court case that we were likely to having to deal with, just in our case, 10 or 12 different topics for experts.²⁶

Once the proceeding had commenced, the documents filed by the parties also indicated the volume of expert evidence would be substantial. Associate Justice Zammit said the pleadings showed that “liability issues were going to be of a very technical nature” and would therefore require different experts from different areas. Justice Forrest said that it became obvious there would be very large number of experts involved in the proceeding when the parties filed the expert reports with the Court.²⁷

The expert evidence did not remain static after the filing the report. One solicitor said that the areas of expertise and complexity of the evidence evolved over the course of the proceeding. He said this occurred “largely in response to the reports produced prior and as part of the conclave process” by the experts of another party, and this continued right up until the start of the concurrent evidence.²⁸

Since the recent reforms to the Victorian *Civil Procedure Act 2010*²⁹, a judge clearly has the power to limit the number of experts called and the topics on which they are to provide evidence.³⁰ As Justice Forrest noted, this was not an option available to him at the beginning of the Kilmore East bushfire proceeding. He said that if it were, he would have more tightly controlled the number of experts.³¹ He said:

Certainly on the issue as to what caused the fracture of the piece of wire that led to the bushfire I would have limited the number of experts. We had a concurrent evidence session of 10 or 11 experts, which was far too many. I endeavoured to encourage the parties to reduce their numbers. [One party] complied in general terms but the [other party] did not. That meant that I had to decide whether to limit them using a general discretion and I was dubious as to whether I should do so. Certainly now, with the changes to the Act, I would be far more confident.³²

²⁶ Ibid.

²⁷ Interview with Justice J Forrest (8 August 2014, Supreme Court of Victoria, Melbourne).

²⁸ Interview with solicitor involved in proceeding (9 June 2015, by letter) (‘Interview with solicitor B’).

²⁹ The relevant parts of the *Civil Procedure Act 2010* were amended in December 2012 by the *Civil Procedure Amendment Act 2012*.

³⁰ See the first section of the appendix to this paper for further information.

³¹ Interview with Justice J Forrest, above n 27.

³² Ibid.

Justice Forrest said that he thought that in almost all cases the parties should be limited in the number of experts they call to provide evidence on a certain issue.³³ Associate Justice Zammit was also in favour of limiting the number of experts in proceedings:

Narrowing down the number of expert witnesses I think is something that again should be done front-end rather than parties being allowed to call as many witnesses as they want on a particular topic. They should be required to say you get one or you get two and that's it. Again, because it avoids – you put ten people in a room they're all going to have a different view.³⁴

The practitioners were much more cautious about this possibility. The complexity of the material meant that limiting the number of experts called on a particular issue could prevent the Court from properly understanding the scientific evidence, and the different nuances in expertise. The Kilmore East bushfire proceeding is a good example of this: there was a division between experts who were 'quantitative' and experts who were 'qualitative'; the lab-based experimental physicists, and the experts who had worked in the field for many years. Even though these experts were all experts in metallurgy, they brought substantially different kinds of expertise to the Court. One solicitor explained:

It is very hard to circumscribe the number of experts because they all have nuanced expertise. So, translating into law, there might be someone who is expert on State powers, Commonwealth constitutional powers, and human rights – so you could call three different experts, by and large speaking to the same topic from different perspectives.

[This shows] the idea that you can simply say I'm going to allow you to have one metallurgist, for example, would miss the point, because within metallurgy we quickly learnt that there were the people that were really specialised in fracture mechanics and people that really do not know very much about it. [...] [T]he idea that you can say "here's the discipline" and confine it to one [is problematic] – in fairness to the judge, he tried to achieve that, and to varying extents people worked around him, because they would choose someone who was a metallurgist but had lots of field expertise. So, their discipline was yes, he's a metallurgist, but not in a quantitative sense, he's got some qualitative qualifications in the field to bring to bear. So it's hard for the Court to say 'no you can't call that person', even though you're talking about essentially the same discipline.³⁵

One barrister said that it would have been problematic for the Court to be deciding on a number of experts with such a complex matter "like fracture mechanics on power lines, [where] about 90% of

³³ Ibid.

³⁴ Interview with Associate Justice Zammit, above n 23.

³⁵ Interview with solicitor A, above n 18.

[...] [the] current learning on that topic was developed in the course of this litigation in order for the experts to be giving their evidence.”³⁶

The other barrister said that in large cases involving complex causation, it would be unlikely that the court could only appoint one expert, but could find it had to find and select a number of experts.³⁷ The barristers thought that multiple experts assist the fact-finding process by allowing for dialogue and debate to take place between the experts, which in turn allows the court to better assess the evidence. One barrister explained:

Where you’ve got a scientific question which is a live issue in a class action, you usually are at the cutting edge of a particular scientific area or its application, and you have competing paradigms. So as you say, there’s no one objective truth that’s somehow instilled in the one court appointed expert who’s out there and going to give a neutral view – it’s just not possible. As I was saying, you might find an expert, but if he or she is expert enough, they’re likely to have committed themselves to a particular area, which then entrenches a particular bias for or against one of the parties, which is quite unsatisfactory. [...] So, as I say, other than in the most simple case where the scientific theories are pretty well established and agreed to, and all that you’ve got are a mechanistic application of the science, if you’ve got something simple like that you might have a court appointed expert but not otherwise. ³⁸

The Kilmore East bushfire proceeding was a case where it was possible to tell from relatively early on that a significant amount of expert evidence was going to be required. While limiting the number of experts might have reduced the amount of evidence the Court had to grapple with, this can be a risky approach where the relevant scientific discipline is unclear or underdeveloped. A limit on numbers is a blunt instrument that could, on occasion, leave a party in a position where they could not provide an accurate view to the Court of the all the evidentiary complexity and nuance of the case. Nevertheless, if the areas of expertise can be identified with sufficient clarity, it is something that should be considered.

B. *Choosing experts*

The parties had complete autonomy as to how they chose their experts prior to the trial. One solicitor set out the efforts his team undertook to find experts:

³⁶ Interview with barrister A, above n 20.

³⁷ Interview with barrister B, above n 20.

³⁸ Ibid.

[W]e try to find the best expert, and we have a strong preference for that person to be in Australia, but sometimes they're not. Normally once we have identified a discipline, we will do a thorough search and try to identify the 20 best people in the world, wherever they are located. We tend to interview the top five to eight to check whether their expertise lines up with their CV, and as best you can tell as a lawyer.

[...]

The hours that are spent identifying the right person for the actual critical question – [...] I'm not sure how close even senior counsel get to [understand] that. Very often they'll say "that person will stack up" or not, but they haven't realised that behind there there's a schedule of the 20 best people, and careful analysis of their criteria, detailed research about whether they've given expert evidence before, and whether it has been accepted, and therefore whether they are going to be useful. It is really hard on the parties to circumscribe that [by having court-appointed experts].³⁹

He said it was not just a lawyer's exercise, and that they worked with their clients to identify the leaders in the field. He said that "[t]he client quite often brings industry know-how that wouldn't be accessible to the courts."⁴⁰ All of the legal practitioners acknowledged that choosing experts, particularly for a matter as complex as the Kilmore East bushfire proceedings, is a difficult, lengthy and costly process.

Deciding what level of judicial intervention is appropriate in the choice and briefing of experts is difficult. Associate Justice Zammit identified a number of factors that she considers important when managing experts prior to the trial, including:

- The role the expert evidence in the proceedings, and how important they would be to the critical findings;
- The number of experts likely to be called;
- The matters and issues the experts would be addressing to be sure that the evidence given matched what the Court was going to need to make a final determination;
- Ensuring that the parties would have sufficient warning about all of the expert evidence to be given at trial;

³⁹ Interview with solicitor A, above n 18.

⁴⁰ Ibid.

- Ensuring the experts were aware that their responsibility was to the Court, not their clients;
- Ensuring the experts had sufficient direction to produce evidence that would genuinely assist the Court.⁴¹

These factors are a useful starting point for thinking about what sort of intervention by the Court is necessary. Nevertheless, her Honour warned against being “overly prescriptive” in how experts should be managed because “it will always be fact specific and will always turn on the nature of the case and the issues” being dealt with.

This raises an important question: could the choice of experts be made more efficient and fair through more significant intervention by the Court? Both Justice Forrest and Associate Justice Zammit thought that increased control would probably have been beneficial. Associate Justice Zammit said from her experience in the Kilmore East bushfire proceeding she would recommend that more “front end management about the type of witnesses, their expertise and the issues to be considered” occur earlier rather than later.⁴² Justice Forrest said that limiting the autonomy of parties may have made the trial more just and effective by reducing expert bias. He thought it was:

... inevitable because of the close contact between the lawyers and the experts over many months, indeed years in this case, that the expert, notwithstanding his or her desire to be independent, is inevitably consciously or subconsciously taking on the cause of [the party that retained them].⁴³

His Honour said that this was “as good a reason as any for courts to contemplate ... the exercise of power to appoint experts ourselves or alternatively, to have parties agree as to joint reports [...] free from influence by the lawyers.”⁴⁴ He noted that while it is necessary for each case to be treated according to its merits, “it is singularly important to endeavour to reduce the number of experts and to endeavour to narrow the issues”, and thought that the *Civil Procedure Act 2010*, if utilised, “should go a long way to furthering those aims.”⁴⁵

The barristers and solicitors interviewed were sceptical about the value of the Court choosing experts. This was for a number of reasons. First, they did not think that biased experts were a real problem in the choice of experts. They did not accept that they deliberately selected ‘partisan’

⁴¹ Interview with Associate Justice Zammit, above n 23.

⁴² Ibid.

⁴³ Interview with Justice J. Forrest, above n 27.

⁴⁴ Ibid.

⁴⁵ Ibid.

experts, and so saw intervention to prevent it as unnecessary. One solicitor was adamant that their aim in finding experts was not to find one who said the right thing, but rather to find the very best expert to find the correct answer. He said that this was because “we regard it as inevitable that if they are not up to scratch, it will become clear.”⁴⁶ He also disputed the idea that a biased expert was in any way helpful or desirable for a party:

We take the exact opposite view – the most harmful thing an expert can do is indicate an unprincipled preference for your client’s case. It becomes immediately apparent that they are an advocate more than they are an expert, and they are permanently damaged in terms of their standing with the court. [...] [F]rom our point of view I would disqualify as an expert anyone who during the interview processes was tending to tell us what they think we want to hear.

[...]

We want to avoid the experience where the expert turns around and says “that’s what I thought you wanted to hear” even though they know in their heart of hearts that’s not the right answer – well, that’s disaster because based on the foundation that you think you’ve got a respectable case from the expert evidence point of view, you’ve told your client to organise themselves to [proceed with] the case [...] and you find yourself in a completely compromised position. So, our inclination is anyone who is in that interview process who obviously is trying to tell us what we want to hear, they are out straight away. We have no interest in engaging them.⁴⁷

He said that is not always easy to know when an expert is modifying their opinion to suit your case, explaining that “[t]he problem is some of these disciplines are so involved it is very hard for you as a practitioner to work out when they are being slightly intellectually flexible and when they are not.”⁴⁸

One of the barristers interviewed was a little more circumspect, but came to a similar conclusion. He said that “any expert is naturally going to be inclined to some extent to be an advocate for the party calling them” but that “in large litigation [...] parties are usually fairly sensible and try and go for the best expert [...] rather than for the best advocate, on the basis that the best advocate is just simply going to be unravelled.”⁴⁹ In addition, he said that the adoption of expert codes of

⁴⁶ Interview with solicitor A, above n 18.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Interview with barrister B, above n 20

conduct had disciplined experts, and that this meant that it was not as much of a problem as it used to be.⁵⁰

The parties have a strong interest in choosing the best experts whose evidence will survive the trial process. If the expert evidence is particularly important to a case, they can devote more resources to find the right experts. One barrister explained that the parties are “usually likely to go off and search for the right type of experts, even internationally, whereas a court appointed experts it is difficult to see that you would go off to the United States or the Imperial College London and get your expert.”⁵¹

An added difficulty for the court controlling or intervening into expert choice is that sometimes not enough is known about the subject matter of the case to make an appropriate expert selection. One barrister said that:

I still think the judges frequently do not have enough information at a pre-trial stage, and it’s not practical to expect them to get enough information, at the pre-trial stage, to be able to make the level of nuanced decisions that the parties know are going to be [required].

[...]

The problem rears its head when you get to trial, because if the court has stopped a party from leading a particular point, and as the evidence comes through at trial it turns out the party was right to be pressing that point, it’s then on the court’s head that something has gone wrong. That is a less happy situation than when it is on a party’s head for something going wrong.⁵²

The effort the parties put into finding experts probably reflects, in part, the size and significance of the Kilmore East bushfire proceeding. In smaller cases, a more interventionist court might make more sense. One solicitor said that:

Obviously, we are talking about substantial litigation. There may well be a case, efficiently run, where the court could – say it is a very standard [...] business valuation case, and we’ll know the ten leading people in Victoria, and it doesn’t require anyone of international standing to give evidence on that question. [...] So I think the answer to [whether the court should control the number of experts] has to reflect that the cases can be of substantially different scale and complexity.⁵³

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Interview with barrister A, above n 20.

⁵³ Interview with solicitor A, above n 18.

Similarly, one barrister said that “in a relatively straightforward case” it could work for a judge to be “quite imperative” in terms of what was going to be allowed with experts, but that this was very difficult in novel cases.⁵⁴ Other participants were more open to the idea of the Court limiting the number of experts. One solicitor said that in “large and complex proceedings there may be a case for the Court limiting the number of experts” but that the Court would have to be careful “to ensure that the parties have a genuine opportunity to present their case consistent with their own views as to what expert evidence is required.”⁵⁵ He said that the difficulties with expert evidence in the Kilmore East bushfire proceeding was not due to the number of experts, but rather “the evolution of the volume, breadth, complexity and most significantly the timing of the expert reports introduced into the proceeding.”⁵⁶

C. Briefing experts

The parties had autonomy in how they briefed their experts. The parties were required to disclose to each other the engagement letters to experts, which showed what experts they proposed calling, and the questions they proposed to ask. The legal practitioners supported this requirement. One solicitor explained:

Most parties observed that appropriately, [but] some parties then sought to negate the contents in the written instructions, and obviously they had just handed over a whole lot of documents and gave verbal instructions, so it is capable of being worked around. But, personally I found it useful, and that was the first instance that a judge had ordered it, and we have since replicated it in other cases. You have to overlook ‘small issues’ like privilege in the instructions, but if you just do it the parties tend to go along, and we’ve done it in subsequent cases and it is good practice.⁵⁷

Associate Justice Zammit said requiring the parties to exchange all of their letters of instruction before they were sent to the experts ensured that they were “comparing apples with apples”.⁵⁸ However, it may not have been enough; despite this intervention, she said one of the difficulties in the expert conferences was that the experts were not aware what the other experts had been instructed to investigate.⁵⁹

⁵⁴ Interview with barrister A, above n 20. Barrister B made a very similar point.

⁵⁵ Interview with solicitor B, above n 28.

⁵⁶ Ibid.

⁵⁷ Interview with solicitor A, above n 18.

⁵⁸ Interview with Associate Justice Zammit, above n 23.

⁵⁹ Ibid.

One barrister thought that enforcing transparency at an early stage benefited the parties and the proceeding.⁶⁰ He said that this was more useful than the Court truncating what the experts are engaged to do:

I think the more useful route was to regard that exchange of questions as an opportunity of each party to get an idea of what the opposing expert was likely to be covering, and possibly adjust their own question so that they were trying to ensure that the experts' reports didn't pass like ships in the night.⁶¹

He added that:

The fact that the court was prepared to [...] order the parties to be transparent about the way the experts engaged was really useful, because it meant that the parties in their correspondence sort of knew that it was going to come out in the open pretty quickly so you might as well just deal with it candidly straight up. That helped a lot. It meant there were exchanges of information about the experts, there were exchanges of the questions, you had to give notice to the other side of all the material that was made available to your expert, so people could constantly be ensuring that their experts were aware of the likely enquiries being made by the opposing experts. And, when there were problems, we could raise it with the court quickly, so that helped a lot.⁶²

He said that there could be further benefits in more significant involvement by the court in the framing of questions for experts:

I think there is a lot of potential for that kind of approach to be developed a bit - where perhaps the court might spend some time itself interrogating the questions, not necessarily to say yes or no, but for the judge to express some views as to whether it seems like a sensible question, [...] whether it is appropriately focussed, and [...] to have that discussion in court with the benefit of the judge's input [...] would perhaps have helped the parties on both sides [...] to work on the questions and maybe reframe them more precisely. [...] [T]he more that the experts can be briefed with the same questions, the better the reports hopefully will meet each other head on.⁶³

The other barrister said he thought it was unnecessary to control the questions asked of the experts or require a common list of questions. Instead, it was "probably sufficient that there is transparency about the parties each knowing how the other experts have been retained and the

⁶⁰ Interview with barrister A, above n 20.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Interview with barrister A, above n 20.

questions they have been asked.”⁶⁴ He said that this would be enough to make sure the reports were “matching in terms of addressing each other’s issues and making sure that nothing comes out of left field.”⁶⁵ He said was a real risk in trying to control the questions that the parties put to their experts too early in the proceeding as the science can evolve and any “unnecessary rigidity” can impede this.⁶⁶ If the Court does want to impose some common questions for the experts to answer, he said it should occur just before the expert evidence phase of the trial starts because everyone is much better informed at that stage.⁶⁷

One solicitor did not think that the disclosure in the proceeding was sufficient. He said the lack of transparency about how the experts briefed by other parties were conducting testing “introduced significant complexity to the expert evidence that was ultimately led in trial.”⁶⁸ He said that the introduction of one expert witness in particular was uncontrolled, with the expert going beyond the material to which he was called to respond and the evidence itself emerging quite late in the proceeding.⁶⁹ He said these were matters were “within the knowledge and upon the instructions” of one of the other parties, and “capable of alternate pre-trial management.”⁷⁰ He contrasted this from other significant evidentiary complexity caused by “the rolling investigations” of various matters during the expert conferences, which was in his view “more properly a product of the expert conferences and less readily containable.”⁷¹

He said another difficulty faced by the experts of the parties was that they started with different evidence. The Court had ordered that there were to be no witness statements for the technical lay witnesses in the proceeding, and the solicitor explained that this “impacted upon [our] ability to assess the scale of the trial and the complexity of the evidence that would ultimately be led and which would need to be responded to”.⁷² He said that a significant proportion of the critical evidentiary material that would normally be contained in these witness statements was only provided to his party a few days before it was to be adduced in trial. It was therefore impossible to brief the experts with this material, leaving his party at a “significant forensic disadvantage.”⁷³ He

⁶⁴ Interview with barrister B, above n 20.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Interview with solicitor B, above n 28.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

said that at least some of the material that came before the Court in this way would have been “more efficiently raised and considered by the experts during the conclave process.”⁷⁴

One way of reducing the likelihood of this occurring might be to meet with the experts earlier in the proceeding. Associate Justice Zammit suggested that it might be useful to have the lawyers and expert witnesses in a case management conference before they prepared their reports:

[...] so that they get to hear from the Court what issues the Court considers are important; they get to hear from the Court right from the beginning what their role is as expert witnesses in a trial, that their obligation is not to the client but to the Court; where they’re given time to think about the issues that need to be addressed, given the liability issues that are alive and, again, where everybody’s there hearing it from the Court right at the beginning so that when we get to the conclaves or even the reports, everybody’s coming along having at least understood what information the Court might need.⁷⁵

The interviews with participants show a clear difference in opinion between the judges and the legal practitioners. Both Justice Forrest and Associate Justice Zammit thought that if they had exercised more control over the number and choice of experts, it would have improved the effectiveness of the expert evidence. However, if partisan experts and the volume of expert evidence is not seen as a problem, then intervention is an unnecessary limitation on the capacity of the parties to run their case. There was consensus that there should be more transparency in how parties briefed their experts. It seems that in the right circumstances, a case could benefit from the presiding judge working more closely with the parties to decide how the experts should be briefed by assisting with framing questions and ensuring that the information that forms the basis for the expert reports is available to all experts reporting on the one issue. However, there is always a risk of the Court exercising too much control over the case and preventing the parties calling the experts that would best assist with the factual issues in dispute.

D. *Case management conferences*

One notable feature of the proceedings was the extensive use of case management conferences prior to the commencement of the trial. The conferences were conducted by either Justice Forrest or Associate Justice Zammit, or both together, and were attended by the barristers and solicitors of the parties. The conferences were substantially more informal than traditional directions hearings

⁷⁴ Ibid.

⁷⁵ Interview with Associate Justice Zammit, above n 23.

and instead of occurring in a courtroom, were held in a conference room where all the participants sat around a large table.

Justice Forrest said they were “extraordinarily beneficial”, explaining that the informality of the process meant that it was much easier to get agreement between the parties, and to discuss “mundane matters as well as matters of [...] principle.”⁷⁶ His Honour added that:

The impact and the informality of the process is significant because it enables you to discuss with the lawyers on a first name basis exactly how the case is progressing. [...] this is particularly the solicitors who become far more involved in the case management conferences, are far more forthcoming. [...] Often they know a lot more about the procedural aspects or the administrative aspects of the case than do counsel.⁷⁷

Associate Justice Zammit was also convinced of the value of the case management conferences. Her Honour explained that as directions hearings involved parties giving submissions about the position of the parties, they made it more difficult for collaborative decision-making. In contrast, case management conferences allowed for an informal process for the parties to share their views, and work out with each other and the Court how best to manage the case.⁷⁸ Her Honour said that:

I found it a really useful tool in terms of the parties formulating processes, formulating steps that had to take place, timelines, things which we can do in a directions hearing, but given the complexity of the case management conference was a very good tool.⁷⁹

Associate Justice Zammit said the informality of the conferences was particularly helpful:

My observation was that [...] as it was not just counsel addressing the Court [but also the] solicitors, [who] have the real running and day to day conduct of the file (and previously being a solicitor, perhaps that was something I was acutely conscious of), [...] contributed in a way that they just do not when you are in Court and they have got counsel as their advocate. So [it] was inclusive of everybody working on the trial. That was a real positive. I thought it allowed people to share views without, perhaps, the fear that they are going to be shut down, or being embarrassed, because it was, the whole idea of it was for us to be able to test ideas and come up with practical solutions.

It allowed me to not be in a role of “I am here to decide things” but rather “I am here to help you”, and to really share with them my views on how it might be done. [...] It was a team approach as

⁷⁶ Interview with Justice J. Forrest, above n 27.

⁷⁷ Ibid.

⁷⁸ Interview with Associate Justice Zammit, above n 23.

⁷⁹ Ibid.

opposed to a party approach. [...] We didn't invite written submissions, we did not invite the usual reams of folders and I think that made it a lot easier and far more pleasurable for people to participate in.⁸⁰

Increased involvement of the solicitors made the process more inclusive. Associate Justice Zammit said solicitors are often more used to dealing with each other as they have to have ongoing relationships, and as a consequence can be less adversarial than barristers.⁸¹ It "ensured that those people who ultimately had to answer to the client participated" in the Court's decision-making process.⁸²

Associate Justice Zammit pointed out that this informal approach succeeded despite the fact that the case was bitterly fought at times. She recounted that during one of the discovery applications, one of the senior solicitors was put in the witness box and cross examined for over one day, and that there were many subsidiary proceedings on privilege, trespass to land and other matters.⁸³ Nevertheless, the parties managed to cooperate in the case management conferences concerning the expert witnesses.⁸⁴

Justice Forrest said that case management conferences were a "far more effective tool" than a directions hearing for some matters, and that a mix of the two procedures worked well.⁸⁵ He explained:

[We] used a mix of case management conferences and directions hearings generally depending upon what we thought the issues were likely to be. The case conferences were used a lot to flesh out problems with timing, flesh out problems with delivery of material. [...] Directions hearings were used more for at times matters of procedural principle, as well as some nuts and bolts [issues].⁸⁶

Justice Forrest said having Associate Justice Zammit involved in the case conferences was useful for two reasons. First, her Honour was able to make rulings in some of the case conferences, and second it gave her an insight into how the trial was progressing, enabling her to better intervene at a later stage.⁸⁷

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Interview with Justice J Forrest, above n 27.

⁸⁶ Ibid.

⁸⁷ Ibid.

The solicitors saw the value of case management conferences. One solicitor said the most useful aspects of the process was reducing the need for lengthy and costly legal documents:

I'm personally not interested in huge affidavits on interlocutory applications and submissions. They are woefully inefficient. [The parties in Kilmore East] adopted a template which was extremely useful in case management conferences [...]. It was a template to identify the issue and set out the parties views on each issue. What it removed was formal applications, most of which are entirely unnecessary. Some are absolutely necessary, but a lot of them aren't. It removed wasted supporting affidavits. It removed submissions and responding submissions and further submissions, all of which are elaborate and expensive and ultimately inutile. What it lead people to do was simply state a position in half a dozen lines or less on each issue, allowed the trial judge to quickly see "right, we have four out of five parties on agreement on issue one, one party has this point to make, let's have it out".⁸⁸

He said that such an approach would still be possible in a directions hearing, but that case management conferences had a different emphasis that was helpful:

[...] a directions hearing implies a degree of formality with applications in a conventional way. A case management conference implies it is a management discussion, so [it requires the parties to] talk about the issues and roughly [their] position [...]⁸⁹

Further, he said that directions hearings require an amount of work that is "often disproportionate" to the value that is extracted:

We literally set aside the four or five days leading up to the directions hearing for submissions and affidavits, most of which are historic footnotes by the time you actually get to the directions hearing. The less of that you can have the better, and I thought we did that quite effectively in the case management conference.⁹⁰

The other solicitor said that in general they were a "useful mechanism for progressing the pre-trial issues in relation to expert witnesses" but "where they involve contested issues it is preferable to have the formality and levels of proof required by directions hearings."⁹¹ The informality of the conferences was "found to be productive".⁹² Speaking more generally, he said the involvement of the Associate Judge was a "good idea" in "very complex litigation of this scale" but that there

⁸⁸ Interview with solicitor A, above n 18.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Interview with solicitor B, above n 28.

⁹² Ibid.

should be a mechanism to allow the parties to raise matters critical to the proceedings arising from pre-trial matters directly with the trial judge.⁹³

The barristers interviewed were sceptical about the difference that the case management conferences made to the proceedings. One acknowledged that it worked “very well” but said he thought the “only difference between a case management conference and a directions hearing was that in a case management conference he called me by my first name, and then in the directions hearing it was Mr [...]”⁹⁴ He said it was the informal style of Justice Forrest and Associate Justice Zammit and the level of experience of the participants that was important, and noted that this had an impact in directions hearings as much as case management conferences.⁹⁵ However, he said the case management conference format does differ from a directions hearing as it:

[...] lends itself more to a free-flowing discussion [and that] having conversations about these issues rather than a sequence of people making submissions and submissions in response and then submissions in reply, [...] is a much better way of doing it.⁹⁶

Additionally, he saw merit in allowing the solicitors to actively participate in the conference because it saved time as it allowed them to be immediately consulted and give their opinion on matters within their field of expertise.⁹⁷

He said what was crucial was that the court remained very involved throughout the pre-trial stage of the proceeding, and that this was possible with a directions hearing or a case management conference. This meant it had much better information about the proceeding, which in turn made the control the court exercised more informed and more useful. He also said court involvement in the process holds “the parties to a much greater discipline in terms of the need to be sensible in what they do, otherwise you get all of the usual, perfectly proper, litigation tactics.”⁹⁸

The other barrister said that he did not find the case management conferences more advantageous than directions hearings.⁹⁹ He said the personality of the judges was much more important, and how they decided what “directions were necessary for getting the thing on for trial, in a way that was accommodating to the pressures that both parties were facing.”¹⁰⁰ Further, he said that the

⁹³ Ibid.

⁹⁴ Interview with barrister A, above n 20.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Interview with barrister B, above n 20.

¹⁰⁰ Ibid.

formality of the directions process was sometimes better in multi-party cases because “if you’re all sitting around a long board table, sometimes it can be a bit more imprecise.”¹⁰¹ However, he said that this was a “subjective position” and that “different counsel and different judges will have their own views of the world.”¹⁰²

IV. PRE-TRIAL MANAGEMENT: CONCLUDING REMARKS

The Court in the Kilmore East bushfire proceedings was not particularly interventionist in the management of experts prior to trial. With the notable exception of case management conferences, the court took a fairly standard approach in dealing with expert evidence. The parties had almost complete autonomy over which experts they retained to provide evidence. Justice Forrest and Associate Justice Zammit thought that if the Court had been more hands-on in the selection and briefing of experts, the overwhelming volume of expert evidence might have been reduced. This in turn would have made the trial run more efficiently. But would it have been more just?

The interviews with the parties illustrate the risks of treating this approach as a panacea to problems arising from the volume of expert evidence. The account one solicitor gave of the considerable effort he and his team undertook to find the best experts raises the question of the resources necessary for the Court to replicate that task. Moreover, it would be challenging (to say the least) for the Court to navigate disputes between experts about the appropriate methodology for developing their evidence, as well as the inevitable disputes between the parties and any procedural issues. Judges are, for the most part, not equipped at the beginning of a complex proceeding like the Kilmore East bushfire proceeding to make determinations about expert evidence that could see lines of enquiry in a case shut down. Therefore, any intervention by a court must be done with full attention to the risks involved.

This is not to say that some intervention is not useful. It would certainly be possible in some cases to impose a limit on the experts called on a particular issue, and in some situations it will be necessary to ensure the costs generated in the pursuit of expert evidence are not overwhelming or disproportionate. This, in fact, is an obligation of the court, the lawyers and the parties under the *Civil Procedure Act 2010*.¹⁰³ There is, after all, always the possibility of making an application for leave to admit more evidence if it becomes clear that it is necessary. A requirement for parties to share the issues and basis on which they are briefing their experts seems essential to ensuring that

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ ss 24, 65F.

the expert reports address the same material. There are a number of ways this could be achieved, from sharing letters of instruction, to the Court helping the parties agree to a common document to be sent to all experts on a particular issue. Some flexibility in the procedure adopted by the Court to work through issues is also productive. Case management conferences were useful in this case, particularly when dealing with administrative issues amenable to consensus.

A just trial requires a balance between competing needs: the judgment needs to be based on the best information available, but the cost of gathering that information should not be so high, in terms of time or money, as to overwhelm the entire proceeding. This is also what the *Civil Procedure Act 2010* mandates. It is not always an easy balance to strike, particularly at the beginning of a trial when so much is unclear. The different views of the participants in the Kilmore East Bushfire Proceeding are testament to the difficult decisions that confront a judge in such a case.

V. APPENDIX

A. *Section one: view from the Victorian bench*

The decision that judges have to make about how to manage experts prior to trial is a complex one. The contemporary perspective of judges in Victoria about pre-trial management of experts was sought to complement the views set out above from the literature. In order to capture this information, and to help understand how different judges saw pre-trial management, four judges of the Victorian Supreme Court with experience in managing expert evidence were interviewed in late 2014. It is clear from these interviews that their views differed about when intervention is necessary, the considerations that should be taken into account when dealing with experts prior to trial, and the value of case management conferences. It shows that much depends on the particular style of the judge and, even more importantly, the particular circumstances of the case.

1. *When is intervention necessary?*

Some judges prefer the traditional approach of leaving it to the parties, and others were supportive of an interventionist approach. Justice Hargrave was firmly in favour of the Court being involved from the beginning of the trial:

Expert evidence, if it is not properly managed, wastes a lot of time and the sooner the experts get on the same page, especially before mediation, the more prospect there is of either settling the case or at least reducing the issues in the case.¹⁰⁴

His Honour said that parties had a tendency to only ask enough questions of their expert witnesses based on their client's view of the facts, and that meant that there often needed to be "proper consultation, almost mediation" between the parties to determine what the questions should be.¹⁰⁵

In contrast, Justice Beach explained that his preferred approach is not to intervene until it becomes apparent that the approach of the parties is not working:

I think all parties should be given an opportunity to run the case they want to run and in the way they want to run it until it becomes apparent that this isn't working, it's either not working for them, or it will consume too many court resources and it's not working for us. So, I give them all the autonomy they can handle up until I'm unhappy with the way they're doing it, and then I put a stop to it and do something else.¹⁰⁶

¹⁰⁴ Interview with Justice Hargrave (6 October 2014, Supreme Court of Victoria, Melbourne)

¹⁰⁵ Ibid.

¹⁰⁶ Interview with Justice Beach (2 September 2014, Supreme Court of Victoria, Melbourne)

Justice Beach was more circumspect about the value of proactive pre-trial management of experts. He explained that while proactive management could sometimes be helpful it “really does depend”. He said:

There’s always the possibility that you’ll do something that’ll cause someone to say, ‘Oh, I need to get another expert’ or, ‘I need to get expert evidence on a topic that I hadn’t thought was in play but clearly is in play’. The overriding message, if I had a message to give you, is that there’s no ‘one size fits all’; every case is different, dependent on its own issues, dependent on the people who are running it and their resources and dependent upon the quality and competence of their lawyers.¹⁰⁷

Justice Almond said that while it was difficult to assess the impact of pro-active pre-trial management of expert evidence, he suspected that it was effective at reducing the number of issues requiring expert evidence at trial. He said that it can help to ensure the parties had turned their minds to whether they actually needed experts and encourage them to be more “confined and considered” in their approach.

The Judges were generally supportive of limiting the number of experts in certain circumstances. Justice Almond said that the parties should be limited in the number of experts they call to give evidence on particular issues:

There is no point in having three experts come along to say the same thing, and to hope that having three experts saying the same thing will give three times the weight to the evidence. In nuanced cases where the views of multiple experts could contribute to the calculus of decision-making, different considerations would apply. But often one suitably qualified expert is sufficient.¹⁰⁸

However, Justice Beach noted that it is not often that such a limitation is necessary. He explained:

[...] it’s not often that you actually have to limit someone. It costs a lot of money to retain an expert. Sensible parties and sensible lawyers don’t go retaining numerous experts just for the sake of it. If you detect that a party seems to be retaining more experts on the one topic, my first question for them in a directions hearing is why; if you’re just witness-shopping, your first choice didn’t produce what you liked, your second choice didn’t produce what you like, what makes you think your third or your fourth or your fifth? Put a stop to it. And if you don’t put a stop to it, I’ll put a stop to it. You’re not going to be allowed to just call repetitive evidence on the one topic.¹⁰⁹

Justice Croft said he would only limit the number of experts a party would call “reluctantly”, and that he would want to be very sure that the Court was not “actually removing part of the subject

¹⁰⁷ Ibid.

¹⁰⁸ Interview with Justice Almond (13 October 2014, Supreme Court of Victoria, Melbourne)

¹⁰⁹ Interview with Justice Beach (2 September 2014, Supreme Court of Victoria, Melbourne).

matter of the expert evidence, because you might have a whole lot of different aspects that are subject to expert evidence.”¹¹⁰

In contrast, Justice Hargrave said that parties should “absolutely” be limited to one expert per issue, and that he found it difficult to think of a case where more than this would be necessary.¹¹¹

2. *General considerations for the management of experts prior to trial*

Each judge was careful to point out that the scale, complexity and volume of expert evidence in any given court case depends on the facts of that case. It can be difficult for a judge to assess at an early stage what approach is appropriate to manage this expert evidence when all the relevant facts are not clear. Justice Hargrave said the ease of assessing at an early stage the role that experts would play in the proceeding depended on whether the case was on a managed list.¹¹² If it was, he said it would be apparent very soon because the judge will ask questions that would identify the major issues of the case. He said that the sooner and the more the judge knows about the experts being used in the proceeding, the better.¹¹³ Justice Croft said that it was usually “pretty clear right from the start” from the nature of the case and the directions process.¹¹⁴ For example, expert evidence is very likely to play a central role in a case about a hydro-electric scheme or a tunnel failure.¹¹⁵

Justice Beach indicated that it was sometimes possible to assess the number of experts in the trial at an early stage, particularly if the lawyers and judges have a considerable amount of experience in dealing with the type of case.¹¹⁶ However, in other cases it can be much more difficult, particularly where the defence have taken an old-fashioned approach and said little more in their pleadings apart from ‘not admit, deny.’ Justice Beach noted it was possible to intervene to make the lawyers tell the Court what experts they planned to call, but was cautious about recommending such an approach:

[...] that’s a pretty heavy-handed way to manage a case, and at least managing a major torts case. I never wanted to do anything that might provoke the parties into thinking ‘Oh my, we’ve got to get more experts [...]’, you know, ‘the judge thinks this is a heavy expert case, well, it must be, so

¹¹⁰ Interview with Justice Croft (14 October 2014, Supreme Court of Victoria, Melbourne).

¹¹¹ Interview with Justice Hargrave (6 October 2014, Supreme Court of Victoria, Melbourne).

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Interview with Justice Croft (14 October 2014, Supreme Court of Victoria, Melbourne).

¹¹⁵ Ibid.

¹¹⁶ Interview with Justice Beach (2 September 2014, Supreme Court of Victoria, Melbourne).

therefore we'll get some experts', so, as I say, good lawyers will expose how many experts of the scale of expert evidence issues very early on, but less good lawyers will take longer.¹¹⁷

Justice Almond said that the judge should encourage parties to consider whether "an expert is really necessary", and if so, have the parties identify which issues will require expert evidence.¹¹⁸ In addition, he said he would try to determine early on whether there would be any issues before trial that would impact on the "smooth running of the trial and the hearing of the expert evidence", such as challenges to qualifications of an expert, so these could be dealt with prior to the trial.¹¹⁹ Furthermore, he said that he would emphasise from the very beginning that an expert's duty was to the court, not the party that retained him or her. He explained:

Expert evidence is compromised unless the expert has a deep and fundamental understanding of that proposition. [...] Experts need to understand the fundamentals behind such a regime in order to make any worthwhile contribution.¹²⁰

Justice Beach explained that along with the issues in the trial, and the complexity of those issues, it was critical to consider the level of sophistication of the parties and their legal representatives. His Honour said:

I have managed trials from what could be said to be from two extreme positions: one, where I heavily regulated the management of the trial because it was long and complicated and had been going for more than 20 years, [...] and I had no great faith in some of the lawyers, [it] was such a mess that I was entirely prescriptive. And then at the other end of the spectrum, I had the Abalone class action, which had some of the best and most efficient lawyers in it, and when I went to manage it and make what might be called 'prescriptive orders', they said "Stop, don't make any orders, trust us and it'll be okay and we'll come back and see you every few months [...] and if you don't like what we are doing at any time you can jump in and make prescriptive orders". It's the best trial I've ever conducted; it was so efficient. Probably more than anything, [the most important consideration is] who are the lawyers and how good are they and how good are they at managing their own problems, because the judge intervening is a pretty blunt instrument because the judge never knows, you never know a tenth of what good lawyers know about their own case, and if they're good lawyers and they're experienced, they also know how to manage it.¹²¹

¹¹⁷ Ibid.

¹¹⁸ Interview with Justice Almond (13 October 2014, Supreme Court of Victoria, Melbourne)

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Interview with Justice Beach (2 September 2014, Supreme Court of Victoria, Melbourne)

Justice Almond also noted that the level of sophistication of the parties was an important consideration:

I tend to be quite liberal in the sense that, if parties want to run their cases in a particular way, I will generally not stand in the way. But that's to be qualified by saying that if they're well represented, experienced litigants I'm likely to give more autonomy than if they're inexperienced and need guidance. If they're self-represented, I am likely to be more closely engaged in evaluating the need for expert evidence and the type of expertise required.¹²²

Justice Hargrave said that while the pre-trial management of experts always had to occur on a case-by-case basis, the Judge and the parties should "think very carefully about what questions the experts should be asked to give an opinion on."¹²³ He has found that the "biggest problem is when the parties slant the questions in a particular way for their own expert, and [the Court] ends up with two expert reports which don't address the same issues."¹²⁴ He explained that:

I think it is very important that experts, if they're going to prepare their own individual reports to form a joint report, both are expressing opinions on the same questions which accommodate both sides of the equation and the questions are broad enough to encompass the range of possible factual findings.¹²⁵

He further said that where the parties cannot agree as to what questions to ask the experts, it is better for the Court to be involved to settle any differences, and that sometimes it is a "good thing to go straight to a joint report because it saves a lot of money. It saves people getting into entrenched positions."¹²⁶

As can be seen from the above, when judges are deciding on how best to manage experts prior to the trial, they must be highly responsive to the nature of the case before them, as well as the competency and experience of the parties. There is no 'one size fits all' solution for the management of experts, but rather a series of factors that should be taken into account.

3. *Case Management Conferences*

There were differing views about the value of using case management conferences to manage experts instead of directions hearings. Justice Hargrave said that in his personal view there was no difference between a case management conference and a long directions hearing, and preferred the

¹²² Interview with Justice Almond (13 October 2014, Supreme Court of Victoria, Melbourne)

¹²³ Interview with Justice Hargrave (6 October 2014, Supreme Court of Victoria, Melbourne)

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

latter approach.¹²⁷ He said that a directions hearing ensures that the judge is in control, and can progress through the issues one by one, resolving disputes as they arise.

Justice Beach was not convinced that the informality of case management conferences was helpful to the efficient and just management of proceedings. He explained that he generally preferred directions hearings:

There's obviously good things that can be achieved in case management conferences, but there's got to be discipline. There's got to be an agenda. I'm not of the school of thought that says everybody in the room gets a chance to talk on every topic on the agenda because, at some point, you start saying why are we doing this. I much prefer to focus the parties and say, 'Look, this is the next issue, what are the competing positions, why shouldn't I, after hearing short submissions from each of you, rule and make an order?' and let's move on.¹²⁸

Justice Beach said he thought the discipline and formality of directions hearings caused people to prepare more fully as it made the stakes of the particular hearing more apparent.¹²⁹ Justice Almond was also sceptical about the value of case management conferences, explaining that in his experience they "ultimately end up as directions hearings."¹³⁰ He also said that the discipline of the directions hearing process was helpful as it forced the parties to refine their proposals in writing.¹³¹

¹²⁷ Interview with Justice Hargrave (6 October 2014, Supreme Court of Victoria, Melbourne)

¹²⁸ Interview with Justice Beach (2 September 2014, Supreme Court of Victoria, Melbourne)

¹²⁹ Ibid.

¹³⁰ Interview with Justice Almond (13 October 2014, Supreme Court of Victoria, Melbourne)

¹³¹ Ibid.

B. *Section two: methodology*

The primary source of material for this research project was gathered in interviews with some of the participants of the Kilmore East bushfire proceeding and some judges of the Supreme Court of Victoria. The interviews were conducted in late 2014 and early 2015 in person and by email. The judges selected were either involved in the proceeding (Justice Forrest and Associate Justice Zammit) or were chosen as they represented a range of different views about the management of expert evidence (Justice Beach, Justice Croft, Justice Almond and Justice Hargrave). The participants from the Kilmore East bushfire proceeding interviewed were selected to ensure that the research took account of both the plaintiff and defendant sides, as well as covering the different roles within the proceeding. To this end, two barristers and two solicitors were interviewed. They agreed to be interviewed on the basis that they would remain anonymous due to the sensitive nature of some of their comments, accordingly all identifying information has been removed from their answers.

Interviews in person were semi-structured and the questions were reasonably broad (for example, “When did the scale of the trial and the number of experts that would be needed become apparent?” and “What were the benefits, if any, of case management conferences to directions hearings in the management of expert witnesses by the Court?”). Interviews conducted by email or letter were by response to questions provided to the interviewees. The research project has some obvious limitations: it was not possible to interview all the judges of the Supreme Court or all the participants in the Kilmore East bushfire proceeding. It does not in any way assess the experience of the many plaintiffs, whose tragic experiences were the basis of the case. It only tells the story of one case, and the case itself was very unusual. This paper is not intended to be a source of comprehensive empirical data, but rather to ensure the experience of the Court is recorded and that any lessons that were learnt during the proceeding are captured for posterity. It is hoped that this record will be of value to other judges of the Supreme Court of Victoria, as well as in other jurisdictions, and to legal practitioners. One of the aims of the project was to better understand what methods of managing expert evidence were used by the court and how they perceived by those who were using them – and the Kilmore East bushfire proceeding was a good opportunity to assess some of these issues.

EXPERT CONFERENCES IN THE KILMORE EAST BUSHFIRE PROCEEDING

SIMON MCKENZIE*

This paper, the second in a series on the management of expert evidence during the Kilmore East bushfire proceeding, considers the use of expert conferences. Most of the expert evidence in the proceeding went through this process, and the scale of the conferences and extent of their use was a distinctive aspect of the proceeding. This paper is based on material from interviews with some of the judges, barristers, solicitors and experts who were involved in the proceeding, and explores their experience regarding the use of expert conferences in this case. They agreed that the expert conferences and the production of joint reports was a useful exercise. The joint reports provided a summary of the lengthy and complex expert evidence, and gave a clearer picture of the issues that remained in dispute between the experts. The experts also found the conferences valuable, permitting them to have robust and technical discussions about the evidence. The role of the Associate Justice as a moderator in the larger conferences was seen as very helpful, even essential. This is not to say all the participants were completely satisfied by how the procedure was adopted. The paper shows that separating experts into conferences covering different areas of expertise can be difficult to get right, and also the importance of the Court properly consulting with the parties if a requirement for further testing emerges from the expert conferences. It suggests that experts were sometimes adversarial and positional during the conferences when the moderator was not present, which indicates that care should be taken to ensure the experts properly understand their role in the trial process. Nevertheless, the use of expert conferences was a success and the experience in the proceeding is testament to the procedure's benefits.

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I. INTRODUCTION

One of the most widely used of the new procedures for the management of expert evidence are expert conferences (otherwise known as conclaves).¹ An expert conference gathers the experts who are to give evidence in a proceeding, prior to the commencement of the trial, to discuss their evidence and produce a joint report. The joint report sets out the areas of agreement and disagreement between them. The vast majority of the expert evidence given in *Matthews v SPI Electricity Pty Ltd* (the ‘**Kilmore East bushfire proceeding**’) went through this process.² The scale of the expert conferences and the extent of their use was a distinctive aspect of the proceeding. At the conclusion of the trial, 40 experts had been called to give evidence, and there had been many expert conferences. These conferences involved between two and nine experts. This paper explores the experience of some of the participants in the expert conferences in the Kilmore East bushfire proceeding.

The material for this paper was gathered in interviews conducted with a small number of the participants in the trial. Capturing the reflections of these participants ensures that there will be a

¹ The popularity of expert conferences is clear from the literature summarised in the first section of the paper.

² For more detail on the factual basis for the case see the first paper in this series, *Pre-Trial Management of Expert Evidence in the Kilmore East bushfire proceeding*, or *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663 (23 December 2014), [1]-[9].

record of how the expert conferences were run, and shows some of the expectations, concerns and conclusions of the judges, lawyers and experts. It provides an opportunity to identify some features that make conferences more, or less, likely to be successful. Before addressing this, however, it is necessary to explain the procedure adopted for the management of the conferences in the Kilmore East bushfire proceeding. The first section of the paper provides a brief and limited overview of the legislative framework as well as the view of expert conferences from the literature, including from Law Reform Commissions, practitioners and academics. It then sets out the rulings of the trial judge, Justice Jack Forrest, regarding the expert conferences, explaining his rationale for the timing of the conferences, which experts should participate in each conference, and why he delegated the administration and moderations of the expert conferences to an associate justice, Associate Justice Rita Zammit. This sets the framework for the reflections of the lawyers and experts.

The record of the participants' experiences were gathered in interviews with Justice Forrest and Associate Justice Zammit, as well as two barristers, two solicitors and two experts. From these interviews, it is clear that most of the participants were convinced that expert conferences were a valuable tool that improved the hearing of expert evidence. This was particularly the case for the legal practitioners, who (with one exception) said that the summary of expert evidence provided by the joint reports was invaluable for their preparation for trial. There were, however, differing views on the merits of the approach taken by the Court to the composition of each conference, the use of an Associate Justice as moderator, and the quarantining of experts during the conferences. It identifies a number of issues that the Court should consider when using the procedure in the future.

The paper also has an Appendix, split into two sections, that contains some additional information that is relevant to this paper. In order to provide a sense of the range of views held by judges of the Court, the first section outlines the opinion of a number of other Victorian Supreme court judges about expert conferences. The second section sets out the methodology used in the interviews with the participants in the proceeding, as well as acknowledging some of the limitations of this research.

II. BRIEF OVERVIEW OF RELEVANT LAW AND SCHOLARSHIP

Expert conferences are a well-established tool in Australia for the pre-trial management of experts. They provide an opportunity for the experts to meet and prepare joint reports that summarise for

the Court the areas in which they agree and disagree. There has been much written about their effectiveness and potential to substantially improve the capacity of the Court to reach just outcomes efficiently. A few examples will suffice. Justice Peter Heerey of the Federal Court explained that:

I have found the court-directed conference a particularly useful exercise with accounting evidence. A conference can produce from a bewildering barrage of figures a concise statement as to the underlying concepts or assumptions which are really at issue.³

Neil Young QC said that expert conferences have “been a very effective way of identifying and explaining the points of agreement and disagreement between the experts.”⁴ He said the joint reports produced by the conferences had “by identifying and narrowing the areas of disagreement, [...] [laid] the groundwork for oral evidence that is more focused and likely to be less protracted.”⁵ The Irish Law Reform Commission said that experts may be more willing to make compromises and concessions in a conference rather than during cross-examination because “the expert would feel under less pressure to defend his viewpoint if it not being discussed in terms of direct conflict with the other side.”⁶

In Victoria, the *Civil Procedure Act 2010* (‘the Act’) gives the Court broad powers to give directions to experts regarding pre-trial conferences and joint expert reports. This enables the Court to order the experts meet and prepare joint reports prior to trial. Section 65I of the Act provides that:

- 1) A court may direct expert witnesses in a proceeding –
 - a) to hold a conference of experts; or
 - b) to prepare a joint experts report; or
 - c) to hold a conference and prepare a joint experts report.
- 2) The court may direct that a conference of experts be held with or without the attendance of all or any of the following –
 - a) The parties to the proceeding; or
 - b) The legal practitioners of the parties; or
 - c) An independent facilitator.
- 3) A direction to prepare a joint experts report may include but is not limited to the following –

³ Justice Peter Heerey, ‘Expert Evidence: the Australian Experience’ (Paper delivered to the WIPO Asia-Pacific Colloquium, New Delhi, 6 February 2002) 94.

⁴ Neil J Young QC, ‘Expert Witnesses: On the Stand or in the Hot Tub – How, When and Why?’ (Paper presented to the Commercial Court Seminar, 27 October 2010) [16].

⁵ Ibid.

⁶ Ireland Law Reform Commission, *Consultation Paper – Expert Evidence*, (2008) CP52-2008, 5.103.

- a) That the joint experts report specifies –
 - i. The matters agreed and not agreed by the experts; and
 - ii. The reasons for any agreement or disagreement;
 - b) The issues to be dealt with in the joint experts report by the expert witnesses;
 - c) The facts, the assumptions of fact, on which the joint experts report is based.
- 4) A direction may be –
- a) General or in relation to specified issues;
 - b) Given at any time in a proceeding, including before or after the expert witnesses have prepared or given reports.

The relevant Explanatory Memorandum explained that the provisions would enable the “real issues in the dispute between experts to be identified and narrowed from an early stage of the proceeding.”⁷

Despite their wide usage, expert conferences are not appropriate for every case, and they do carry some risks. The New South Wales Law Reform Commission (NSWLRC) emphasised that the appropriate approach for the management of the expert conference would depend on the particular facts of the case. While some cases could require lawyers be present, or require a detailed agenda or an independent chair, these measures would not always be necessary.⁸ The NSWLRC recommended courts have flexibility to make orders suitable for particular cases, with the possibility of developing rules or practice directions relating to categories of cases.⁹ It also noted some of the risks with pre-trial conferences between experts:

[...] in some circumstances, the effectiveness of such conferences may be compromised. Hostility between experts might undermine real communication, more senior or experienced experts may dominate and intimidate more junior colleagues, and the conference may be unsuccessful where one or more of the experts are uncertain about their role as expert witnesses, or about the nature and purpose of the conference.¹⁰

Gary Edmond points out that the rationale of expert conferences appear to be based on untested assumptions about the relationship between scientific evidence and litigation:

Expert conferences [...] are predicated on the belief that litigation accentuates disagreement. Implicitly, experts released from substantive legal and procedural constraints will be able to broker

⁷ Explanatory Memorandum, Civil Procedure Amendment Bill 2012 (Vic).

⁸ New South Wales Law Reform Commission, *Expert Witnesses*, Report No 109 (2005), 6.43.

⁹ *Ibid* 6.44.

¹⁰ *Ibid* 6.41. Also see Mia Louise Livingstone, ‘Have we fired the ‘hired gun’? A critique of expert evidence reform in Australia and the United Kingdom’ (2008) 18 JJA 39, 55-6.

agreement (or limit the extent of disagreement). This assumes that much expert disagreement is the result of communication problems, distortion caused by legal practices or the restricted orientations encouraged by the commitments of clients. We should not forget, however, that there is considerable scientific controversy beyond legal and regulatory fora. In addition, those few cases that eventually get to trial – the ‘tip of the iceberg’ that are not settled or abandoned – often involve disputes in areas presented as uncertain or controversial. Can we expect expert meetings to expose or satisfactorily resolve what cross-examination, an oath, or duty, and extra-legal processes often cannot?¹¹

There are some cases where courts have decided against holding expert conferences, and these decisions are revealing. For example, in *Broadman v South Eastern System Area Health Service*¹² Studdert J refused to order a joint conference of four medical experts because there was a “clear firm and considered divergence of opinion between the experts” on the central medical and factual issues in the case.¹³ In a later case, Studdert J refused to order a conference when there was no reasonable expectation it would result in any agreement on issues for consideration and would involve considerable expense.¹⁴

The Victorian Law Reform Commission’s *Civil Justice Report* considered a number of submissions on the impact of expert conferences and ways to make them more effective.¹⁵ Some of the submissions were particularly interesting:

- One submission¹⁶ suggested that it be compulsory that a court-appointed facilitator participate in pre-trial conferences of experts with the purposes and form of the conference clearly identified.¹⁷ The purpose of the facilitator would be “to facilitate meetings between experts and ensure that the process of preparing a joint expert report to the Court identifying the issues which remain contested occurs.”¹⁸
- This submission also proposed that ‘standard protocols’ be adopted regarding who attends the conferences and who was responsible for preparing the first draft of the joint report.¹⁹
- The Forensic Accounting Group indicated a concern that the “lack of consistency and timeliness” in the application of conferencing provisions was problematic. They instead preferred that a conference

¹¹ Gary Edmond, ‘After Objectivity: Expert Evidence and Procedural Reform’, (2003) 25 *Sydney Law Review* 131, 150.

¹² [2001] NSWSC 930.

¹³ *Ibid* [30].

¹⁴ *Spasovic v Sydney Adventist Hospital* [2002] NSWSC 164.

¹⁵ Victorian Law Reform Commission, *Civil Justice Review: Report* (2008), 508-510.

¹⁶ This was only identified in the VLRC Commission Report as ‘The Group Submission’.

¹⁷ Victorian Law Reform Commission, *Civil Justice Review: Report* (2008), 509.

¹⁸ *Ibid*.

¹⁹ *Ibid*.

be called as soon as opposing parties proposed to call experts and those experts have had sufficient time to form preliminary views on the evidence.²⁰

Mia Livingstone was generally supportive of joint conferences, but said they have the potential to increase time, cost and delay. She explained:

... if the parties oppose a joint conference, the procedure can increase the time, cost and delay involved with litigation, particularly because the court must read the expert reports closely to determine whether or not a joint conference would yield any 'utility'. Joint conferences themselves can be very costly, which is often submitted to oppose a joint conference. Even when a joint conference has occurred the parties may apply to adduce further expert evidence, although they are unlikely to succeed in the absence of unusual circumstances.²¹

Justice McClennan of the New South Wales Supreme Court, while being very supportive of the use of expert conferences, has found that two main problems can arise. First, some experts have a tendency to meet but not agree; and second, the withdrawal or modification of part of an agreed joint report after the expert has discussed the matter with the client's lawyer.²²

III. THE RULINGS ON EXPERT CONFERENCES IN THE KILMORE EAST BUSHFIRE PROCEEDING

Justice Forrest had to make a number of decisions about the management of the expert conferences in the Kilmore East bushfire proceeding. When should the conferences be held? How should the experts be grouped for the conferences? How should they be managed, particularly in the larger conferences of up to nine experts? How could the experts be encouraged to produce material that would be useful in the concurrent evidence sessions? Given the number of experts and the importance of their evidence to the trial, these rulings had the potential to have a profound impact on the proceeding. Justice Forrest addressed these issues in three rulings: the first concerned the timing of the conferences; the second was a ruling on the management of the conferences; and the third decided that the experts should provide brief answers to assist the Court during the concurrent evidence session. These rulings show what Justice Forrest expected the expert conferences to achieve. They are a starting point for assessing the experience of the participants to analyse whether the predictions made by his Honour stand up to scrutiny.

²⁰ Ibid.

²¹ Mia Louise Livingstone, 'Have we fired the 'hired gun'? A critique of expert evidence reform in Australia and the United Kingdom' (2008) 18 JJA 39, 57 (citations omitted).

²² Justice Peter McClennan, *Expert Evidence – The Experience of the Land and Environment Court of New South Wales*, presented at the XIX Biennial Lawasia Conference 2005, Gold Coast, 20-24 March 2005, p. 6.

A. *Timing of the conferences*

Justice Forrest had to decide whether the experts' conferences should be held before or after the final mediation before trial. The defendants had objected to holding the conferences before this mediation, arguing that it was an unnecessary expense as the issues of agreement and disagreement could be figured out by an exchange of expert reports prior to the mediation.²³ His Honour did not accept this submission, identifying five reasons why holding the conferences prior to this mediation was preferable:

1. It would promote the "just, efficient, timely and cost-effective resolution of the real issues in dispute" by identifying these issues as early as possible, and increasing the chances of success at mediation.²⁴
2. Once the experts have committed their thoughts to paper, it is "highly desirable they meet in a lawyer-free environment" to sort out the issues upon which they agree and disagree. His Honour observed that sometimes this produced a consensus that was not apparent in the original reports.²⁵
3. There is a "distinct positive" to conducting a mediation where there have been joint reports setting out areas of agreement and disagreement between experts rather than letting the "lawyers debate what the experts mean or do not mean in their reports". His Honour said that this could only "enhance the prospects of a successful mediation."²⁶
4. His Honour rejected the argument of the defendants that the exchange of reports was a satisfactory alternative to holding conferences. He explained that "the exercise would merely cause a flurry of lawyer-inspired reports which, if anything, may make the prospect of agreement on issues less likely".²⁷
5. The potential for additional costs in the context of the case were not significant. The trial was already going to be very expensive, and the potential damages award could be enormous; as such, his Honour held that concerns about the expense of the conferences could be put to one side.²⁸

²³ [2011] VSC 613 [14].

²⁴ Ibid [15].

²⁵ Ibid [16].

²⁶ Ibid [17].

²⁷ Ibid [18].

²⁸ Ibid [19].

B. *Management of the conferences*

One of the difficulties the Court faced was determining how to group the experts into different conferences. The parties had divergent views on whether the expert witnesses should be required to “participate in discrete sub-issue conclaves or whether the conclave should consist of a larger group of experts.”²⁹ Six general topics of expert evidence were agreed: fire ignition, conductor break, asset management, prescribed burning, fire suppression, and warning. Despite agreement on these topics, the parties differed on the appropriate model for the conferences. The plaintiff argued that the conferences should take place within the six general topics, with one conference involving as many as 11 experts. In contrast, the model proposed by the first defendant was more detailed, and involved specific issue-by-issue conferences and was expected to require fourteen separate conferences. The difference this would make is evident when considering how the plaintiff divided up the general topic of ‘conductor break’. This general topic was divided up into six separate conferences:

1. Conductor failure:
 - a) What were the various fracture types (e.g. fatigue, ductile)?
 - b) What features did the fractures exhibit?
 - c) What was the sequence in which the fractures finally failed?
2. Role of lightning:
 - a) Presence of lightning strike; and
 - b) Potential damage caused by a lightning strike.
3. Impact of loads on fractures (role of ill-seated helical termination and absence of vibration dampers):
 - a) quantitative analysis
 - i. by reference to tests undertaken metallurgical analysis of cause(s) of the failures including explanation of the various features of the fracture surfaces; and
 - b) qualitative analysis
 - i. analysis of likely role of ill-seating and absence of dampers on the fractures by reference to research and other experience.
4. Quantification of loads/stresses:
 - a) finite element modelling;
 - b) field test;
 - c) physical model; and
 - d) research based calculations.
5. Quantitative analysis of appropriate line design and construction based on industry practice.

²⁹ Ruling No 10 [2012] VSC 379, [2].

6. Role (if any) of OCR³⁰ settings on fire ignition:
 - a) quantitative analysis (Kilmore East fire);
 - i. as to possible OCR settings; and
 - ii. as to their possible impact on likelihood of fire ignition.
 - b) quantitative analysis (hypothetical fire); and
 - i. explanation of other experiments in which the impact of OCR settings on fire ignition was investigated.
 - c) qualitative analysis;
 - i. purpose of an OCR; and
 - ii. OCR settings industry practice.³¹

As can be seen, the model proposed by the first defendant allowed for conferences that were substantially more specific, rather than one very large conference covering all of the above topics.

Justice Forrest considered the defendant's approach to be the preferable one. This was despite the fact it would "result in double the number of conclaves and be challenging administratively".³² He was careful to point out that given the administrative complexity, the model should have a degree of flexibility in its implementation.³³ He identified a number of reasons why the more complex model was preferable:

1. If each conference dealt with a specific issue there would be "no question about the expertise of the particular witnesses" responsible for authoring the joint report.³⁴ His Honour was concerned that if the plaintiff's model was accepted, it had the potential to:

...lead to the production of a joint report where there are issues about the capacity of the authors to express the opinion contained in the report. [...] The suggestion that parts of the report be signed off by only those experts with expertise in the relevant field has little, if any, attraction.³⁵

³⁰ OCR stands for Oil Circuit Recloser. They are "one of the primary equipments used on distribution feeders to manage overcurrents caused by distribution line faults with a minimum level of supply distribution to consumer": Grahame Holmes, *Independent Expert Report on Automatic Circuit Reclosers (ACR) for Single Wire Earth Return (SWER) distribution lines*, submitted to the Powerline BushFire Safety Taskforce of Victoria, 15 September 2011, 1.

³¹ Ibid [5].

³² Ibid [6].

³³ Ibid.

³⁴ Ibid [7].

³⁵ Ibid.

2. It was consistent with an earlier direction that the trial not become a “battle of numbers” between experts. His Honour explained that his “clear indication to the parties was not to engage a bevy of experts and rely upon weight of numbers to get them over the line.”³⁶ He was particularly concerned that under the plaintiff’s model, there would be one conference of experts with five expert witnesses engaged by the plaintiff, and only one from the first defendant.³⁷ In contrast, the first defendant’s model did not lead to the same potential imbalance in any particular conference.³⁸
3. The provision of joint reports on specific and discrete issues would hopefully “refine the issues and [have] a greater prospect of leading to clearer identification of the issues that are in dispute and those that are not.”³⁹
4. There would be scope to expand the conferences if the experts considered that it would be helpful. Justice Forrest determined that he would have a judicial officer available to the parties and the experts in the weeks prior to the conferences to help resolve any issues regarding the appropriate procedure.⁴⁰
5. The provision of joint reports using the first defendant’s model would not determine the composition of concurrent evidence sessions at trial. His Honour noted that it might be considered appropriate to hold concurrent evidence sessions involving experts from more than one conference.⁴¹
6. He said that the submissions of the plaintiff misunderstood the role of the expert and that of the Court:

This is not a trial by expert. It is for the Court to determine the issues having regard to all the evidence whatever the source. If the expert evidence, or for that matter the evidence generally, emerges in a piecemeal fashion then that is a problem Courts regularly meet and resolve.⁴²

³⁶ Ibid [8].

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid [9].

⁴⁰ Ibid [10].

⁴¹ Ibid [11].

⁴² Ibid [12].

Justice Forrest referred the remaining questions relating to the operation of the conferences to Associate Justice Zammit.⁴³ The issues his Honour said should be determined through discussions with the relevant experts and Associate Justice Zammit included:

- whether the conferences should be assisted by a moderator (who would be Associate Justice Zammit)⁴⁴;
- whether there should be a scribe to record the conferences;⁴⁵ and
- whether the experts should participate in the conferences via video link, or in person.⁴⁶

His Honour was sceptical about the worth of a list of questions being provided to the experts, but thought that an agenda to guide discussions would be helpful at “the experts keeping on track”.⁴⁷

Was this division into the issues-based conferences helpful? The interviews suggest that the division of the experts into the different conferences had mixed effects: although it ensured that only experts of like expertise were in conference together, it also meant that evidentiary problems to which there were simple solutions from other areas of expertise were magnified. For example, engineers that had substantial industry experience could quickly dismiss some of the theories of the physicists due to their knowledge of industry practice, and vice versa. It shows the complexity and necessary artificiality of any decision to divide up experts into different categories: it is necessary to draw a line somewhere, and there will be benefits and drawbacks to each grouping. The other important aspect of this ruling was the appointment of the Associate Judge to manage the operation of the conferences. This proved to be critical, particularly in the larger conferences.

C. Use of questions in conferences and quarantining of experts

Justice Forrest made two further interventions to attempt to ensure that the results from the expert conferences were useful to the Court. He set a series of questions that the expert witnesses in conferences 1, 3 and 4 were required to answer. The questions were formulated with the assistance of the assessors⁴⁸ and in consultation with the parties.⁴⁹ The experts were asked to provide “brief

⁴³ Ibid [13-14].

⁴⁴ Ibid [15].

⁴⁵ Ibid [16].

⁴⁶ Ibid [17].

⁴⁷ Ibid [19-20].

⁴⁸ Justice Forrest appointed assessors to assist him with the most complex expert evidence material. The fourth paper in this series sets out how the assessors were used as well as what the participants in the proceeding thought about their usefulness to the proceeding.

⁴⁹ Ruling No 32 [2013] VSC 630, [15].

preliminary responses” to the questions, limited to one paragraph.⁵⁰ His Honour intended the questions to “serve as a guide to the evidence adduced” during the concurrent evidence session, and to give him a “sense of the lay of the land” in advance of this session.⁵¹ Justice Forrest explained that these responses were only preliminary, and would not preclude the experts from discussing other matters of relevance to the failure of the conductor.⁵² In addition, the experts were precluded from communicating with the parties or the parties’ solicitors while the conferences were occurring, with one exception allowing the parties to consult with the experts prior to the concurrent evidence session.⁵³

IV. REFLECTIONS OF PARTICIPANTS

As has been seen, the rulings by Justice Forrest were intended to improve the effectiveness and probative value of the expert conferences. He thought the production of joint reports would narrow the issues in dispute, and help the court focus on those that were the most important. Moreover, he thought the joint reports would provide a much better groundwork for the concurrent evidence sessions (and before that, the pre-trial mediation) than the exchange of expert reports. He also said that allowing the experts to meet without lawyers present would make it easier for them to reach agreement. He divided the experts into smaller groups for the conferences to try to ensure those in a single conference had similar expertise. He decided against managing the administrative issues of the conferences himself, and instead allocated that responsibility to Associate Justice Zammit. She acted as a moderator in some of the larger expert conferences, expecting that this would increase the efficiency of these conferences. It was also thought that giving the experts a list of questions to answer at the conclusion of the conference would make it easier to understand how they agreed and disagreed. Finally, Justice Forrest sought to minimise the influence of legal practitioners by preventing them from communicating with the experts for the duration of the conference.

The interviews of participants in the proceeding, conducted after the conclusion of the trial, gives an indication of usefulness of Justice Forrest’s approach. These interviews focussed on the following five issues:

⁵⁰ Ibid [17-18].

⁵¹ Ibid [17].

⁵² Ibid [18].

⁵³ Ibid [19-20].

1. the efficacy of the expert conferences and joint reports, and in particular whether they were helpful in reducing the number of issues in dispute;
2. the effect of the involvement of a Judicial Officer as a moderator in expert conferences;
3. whether the administration of the conferences was appropriate;
4. the impact of the personalities and attitudes of the experts in the expert conferences; and
5. the effect of the quarantining of experts on the relationship between the experts and the parties.

It is important to note the limitations of the reflections of the participants interviewed for this paper. Only a small proportion of the total number of participants were interviewed⁵⁴, and while they were chosen in order to represent diverse points of view, there will be other perspectives not captured in this paper. Nevertheless, the interviews do give a sense of how the procedural decisions of the Court impacted the expert conferences.

A. Did the expert conferences and joint reports help the proceeding?

The most important question is whether the expert conferences and the joint reports actually helped the judge and the parties in the proceeding. Did they help the participants better prepare for mediation and the concurrent evidence sessions? Reflecting on this afterwards, Justice Forrest and Associate Justice Zammit both said expert participation in expert conferences and the preparation of the joint reports greatly assisted the Court. Justice Forrest said that the conferences “clearly reduced the number of issues before the court” due to the agreement of the experts and the joint reports.⁵⁵ Associate Justice Zammit also affirmed the value of experts producing joint reports:

[...] issues were narrowed in the joint reports [and] by the end of the conclaves and the production of the joint reports the parties had in effect agreed on a very significant amount of information, so that the Court was able to dispose of that in the running of it because ultimately, things they agreed upon, there was no point traversing it unless it was for the benefit of educating the Court.⁵⁶

⁵⁴ Two barristers, two solicitors and two experts, from both the plaintiff and defendant sides, were interviewed for the research project. For more information see the explanation of the methodology set out in the third section of the Appendix.

⁵⁵ Interview with Justice J Forrest (8 August 2014, Supreme Court of Victoria, Melbourne).

⁵⁶ Interview with Associate Justice Zammit (13 August 2014, Supreme Court of Victoria, Melbourne).

Similarly, most of the legal practitioners said that the participation in expert conferences and the production of joint reports was useful as it focussed the parties' attention on the key liability issues. From their remarks it is possible to identify three key benefits to the procedure: first, it narrowed the issues in dispute; second, it encouraged greater accuracy and honesty from the experts; and third, it assisted in their preparation for trial. The specific comments of the participants are revealing. One solicitor said that they were "extremely helpful" as they "crystallised the debate".⁵⁷ He explained that the second joint report from the largest expert conference "contained a succinct identification of where there was agreement and non-agreement" between the experts, summarising 2000 pages of expert reports into 40 or 50 pages.⁵⁸ Similarly, one barrister said the joint reports were a "huge time saver" and "hugely advantageous" because by the time the experts were giving evidence in court "all that was left to argue about were the things that they had confirmed were the issues between them."⁵⁹ Speaking more generally, he said that he thought the default position is that joint reports "will always be useful" and that while in some cases the cost of getting the experts together might outweigh the benefit, this would be "the exception rather than the rule."⁶⁰

The other barrister said that expert conferences and joint reports were "essential" because when experts met without the lawyers "there's likely to be a greater honesty, less posturing because they are speaking with their own peers, and so if one of them says something silly or is clearly an advocate, the other one can easily undermine it."⁶¹ He said that he thought the process it "injects great discipline" and "can only be productive of a narrowing of the issues."⁶² It allows them to more properly deal with the issues raised in the other experts' reports and to assist each other in understanding the evidence they are putting before the Court.⁶³ He explained that this also helped the parties:

I think that everybody saw an advantage; those who thought they were stronger on the science saw an advantage, would see that in a conference their experts were likely to be more persuasive and persuade the others to the benefit of their views; and those that thought they were weaker on the

⁵⁷ Interview with solicitor involved in proceeding (20 February 2015, Melbourne) ('Interview with solicitor A').

⁵⁸ Ibid.

⁵⁹ Interview with barrister involved in proceeding (Morning of 24 February 2015, Melbourne) ('Interview with barrister A').

⁶⁰ Ibid.

⁶¹ Interview with barrister involved in proceeding (Afternoon of 24 February 2015, Melbourne) ('Interview with barrister B').

⁶² Ibid.

⁶³ Ibid.

science might have thought well, better that we know that now rather than later. It's all going to be exposed at some later stage, so let's crystallise it and see what the issues are.⁶⁴

It reduced the debate by encouraging consensus between the experts. This was very helpful to trial counsel because it provided a foundation for the concurrent evidence sessions and could be used in preparation for cross-examination.⁶⁵ He said that:

[...] instead of having two thousand pages of expert reports from everybody on different topics, I could take the joint report and realise there's quite a bit more consensus on this than you would realise if you just picked up the separate expert reports. So I thought that was very useful, and it crystallised my focus [for] cross examination.⁶⁶

The other barrister similarly said the joint reports "enabled the judge and the parties to document an agenda for the concurrent evidence sessions" and for the parties to "prepare the cross examination by reference to the sequence of topics that were expected to be canvassed."⁶⁷

However, one barrister did express significant reservations and concerns about how the experts were divided up in the expert conferences, a decision that also had consequences in the concurrent evidence session. He said that the division of the experts into more specific areas of expertise had some problematic consequences. He said that the "separation" and "artificial distinctions" had the effect of "people in one silo who had expertise were not able exercise any kind of check on another silo that didn't have that expertise but was starting to go into that area."⁶⁸ He thought that this was one of the main reasons why the need for more testing arose in the conferences, and was of the view that if there had been more experts in the conference together sharing their expertise, some of the testing would have been avoided.⁶⁹ He said he did not know what the solution to this problem would be, but that it was important for the Court to bear in mind.⁷⁰ His critique indicates how difficult it can be for the legal process to divide up areas of expertise into different groups for expert conferences, and suggests there will be artificiality in any decision. After all, the experts are all going to be dealing with the same factual situation so there are likely to be areas of overlap.

As the expert conferences are meant to help the Court better understand the areas of agreement and disagreement between the experts, the perspective of the experts is particularly important.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Interview with barrister A, above n 59.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

Both experts interviewed found the expert conference process and the production of joint reports valuable. One said it improved the accuracy the expert evidence, and clarified the issues for consideration by the experts. He said that:

[...] points were debated, rechecked, and corrections made to drafts of conclave reports where necessary. Our reports often went through half a dozen drafts before we submitted them. We did not always agree at the end.⁷¹

He said that the joint reports ended up being a fair representation of the opinion of the experts:

I think the conclave reports were reasonable summaries, although pretty long-winded, of the various interpretations of the physical facts of the events leading to the conductor failure and fire. To a reasonable extent the ideas came together, and some initial views were modified as the result of these exchanges. But after all some differences of opinion remained. If individual presentations had been made to the court it would have been even less efficient than what actually transpired.⁷²

The other expert interviewed expressed similar views. He said the conference and joint reports were “very useful” and that they “provided insight into how the data or analysis of others was being used and interpreted.”⁷³ It allowed the experts to “work as a team to extract the good bits of all our work.”⁷⁴ He said that the experts worked together to conduct a “technical review of all of the available data” and that this allowed them to “assess and appropriately award certainty or uncertainty based on the inputs.”⁷⁵ He said that the process “did a great job of providing widespread dismissal of really bad science.”⁷⁶ They also “allowed the court to focus on the areas of disagreement” and that the experts made “very significant headway on most areas of technical interest.”⁷⁷ The process allowed the experts to “[dig] deep into the nuances of terms and the minutia of some of the methodologies [...] and present a cohesive story that would have been difficult territory and very fine detail for the general court proceedings.”⁷⁸ He said that the expert conferences shaped his reports and analysis and gave him an opportunity to “enter into dialogue and understand how my analysis was feeding into or contradictory to the work of others.”⁷⁹ He

⁷¹ Interview with expert (23 February 2015, by email) (‘Interview with expert A’).

⁷² Ibid.

⁷³ Interview with expert (24 March 2015, by email) (‘Interview with expert B’).

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

said that if they had a couple more days to consolidate their views, they could have avoided “roughly a week of cross-examination.”⁸⁰

Despite these positive remarks, he did have some criticisms. He said:

It is also naïve to think the conclave was not adversarial; it was. We were trying hard not to form teams, but the three parties who had employed experts were not mixed physically or in argument, and generally the [experts] abstained rather than contradict[ing] weak argument put forward by someone working for the same parent client.⁸¹

He said that problems were caused by experts having “little to no overlap on the specific fields of discussion”. This remark is particularly interesting given the criticism that the conferences should have been less specific and more general. In addition, the professional reputations of the experts were such that “there was such a high cost to backing down that the opportunity for concept development was very limited.”⁸²

The interviews conducted suggest that the expert conferences and joint reports fulfilled the purpose of Justice Forrest’s rulings. They narrowed the issues in dispute by showing where experts agreed and disagreed. The interviews with the experts indicates that this was because it allowed the experts to have a technical discussion about their evidence, permitting a discussion about methodology and starting assumptions. This suggests splitting up of experts into smaller groups was an appropriate strategy; if the conferences had been larger including people from different areas of expertise, this would have caused greater difficulty. Nevertheless, the criticism of the barrister about the risk of over-fragmentation ought to be borne in mind when deciding how to group the experts.

B. Involvement of a Judicial Officer as a moderator

Justice Forrest tasked Associate Justice Zammit with managing the administration of the expert conferences, and she sat in the larger expert conferences as a moderator. The participants’ experience suggests that having an independent person in expert conferences is beneficial, particularly when there are more than three or four experts. Associate Justice Zammit was able to help the experts with managing the dynamics of the discussions, as well as deal with difficult personal situations that arose. The perspective of the experts is particularly instructive: one

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

thought that the conference he participated in would have been compromised without her involvement.

Justice Forrest and Associate Justice Zammit both said having a judicial officer as a mediator was useful. Justice Forrest said the process had demonstrated to him “the need to have an impartial person assisting the experts.”⁸³ He explained that:

It was far better that Associate Justice Zammit was either in the room with the experts or alternatively directly accessible to the experts if they needed assistance. Having someone with the stamp of judicial authority, I perceive has assisted greatly in the management of the conferences and I would recommend that course if resources permit to any case or significant case requiring expert conferencing.⁸⁴

He said the appointment of Associate Justice Zammit as a moderator of the larger expert conferences was very helpful:

There is no doubt, having spoken to the experts in court, that her role was vital. She became a liaison point with my staff and myself. But she also gave them quite clear advice and assistance in relation to how the case would proceed, how they would give their evidence and as to how to manage. [...] It was clear that appointing an Associate Justice to assist was a very wise move because she was able to exercise some judicial authority over the experts and at times was also open to deal with matters on a [judicial] basis. So, her impact was significant.⁸⁵

Associate Justice Zammit said her involvement, particularly in the larger conferences, offered significant advantages. She reported she was able to help resolve many uncertainties the experts had about their role, and regularly had to reassure them that they were going about the process in a sensible way that was going to be of assistance to the Court. Her involvement meant the Court could have confidence that the large conferences were kept on track, and ensure that if they proposed further scientific investigation, this was considered carefully by the experts, and that it was necessary rather than only desirable.⁸⁶

It also allowed her to avoid delay by exercising her judicial power to quickly deal with situations as they arose. The consequences of any delay was significant due to the size of the proceeding. She explained:

⁸³ Interview with Justice J Forrest, above n 55.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Interview with Associate Justice Zammit, above n 56.

Well I think what it enabled me to do was it was a one-stop shop. If we had an independent moderator who was a senior member of the bar or a senior solicitor, they would have been limited in what they could do or decisions they could make. I think the real advantage [of] what we did is took it out of the hands of the lawyers and put it straight into the hands of the court, and said the court is now managing this part of the process, because the court knows what it wants.⁸⁷

This allowed her to make, where required, orders for further testing, and to do so understanding how such an order would affect the overall timeline of the trial. For example, at one stage a close relative of one of the expert witnesses died and an exercise of judicial power was needed to ensure that the parties could make submissions on whether the conference could continue, and a decision be made as quickly as possible.⁸⁸

A related benefit to having a judicial officer as moderator was that it helped the experts feel comfortable with the process. Associate Justice Zammit said that a recurring concern of the experts was that if they veered from their given opinions during the conferences, they would face repercussions from their own lawyers and it could make them a target for cross-examination (particularly as some of them had “been victims of fairly horrific experiences in court”). Her Honour explained:

While clearly they have got to give their evidence and parties must be able to test the strength of an expert’s evidence and opinion, I was able to reassure them that in the context of concurrent evidence the Judge leads the way, so the first person to talk to them and ask questions of them is the Judge and the Judge would be directing and guiding that very carefully, and then would invite cross-examination on certain topics [...].⁸⁹

Associate Justice Zammit said that different management styles were required depending on the size of the conference, the complexity of the issues and the background of the experts.⁹⁰ While she did say that the personalities of the experts did have an impact on how the conferences proceeded (an issue addressed below), the main difficulty was “the experts’ sense of conflict between their obligation to their client and the Court”.⁹¹ She said that many of the experts were concerned about how their instructing solicitors and barristers would react to the joint report:

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

While it may have never been specifically articulated, the fact that I spent an inordinate amount of time having to reassure them that the production of a joint report was ordered by the Court and their lawyers understood that they would produce the joint report together and that they would not come under any criticism. [They were] quite concerned saying things in one conclave and making concessions if it was going to be detrimental to their instructing party. Their role as a party's expert and their role to help the court did not always sit comfortably with them and you can understand why.⁹²

These concerns were somewhat offset by her involvement in the conferences. The experts could be reassured by someone with both the authority and knowledge to provide that reassurance. It is easy to imagine that in other conferences where there is no moderator or input from a judicial officer, experts could feel very isolated and unsure of their obligations and the court process.

The lawyers were broadly supportive of the role of the Associate Judge in moderating the larger expert conferences. One barrister explained that:

I thought that was essential [...] [as it] focussed the issues, organised the timing of the process because we had multiple experts, so there were mechanical issues like that. She assured that there was no misbehaviour from the experts. Her presence was a disciplining approach, and she could assist in working out the mechanics of the joint report production. I thought that was extremely useful, particularly [...] [as] one of our conclaves [...] had about 8 experts or something like that, and you need somebody to corral that, otherwise one person who's got a strong personality takes over and in part diminishes the process [...]⁹³

He also said that the involvement of an associate judge can help the experts in producing joint reports that are "crystallised to the form that is more suitable for the end product, which is lawyers using it" and that he thought that "Associate Justice Zammit's conduct in these conclaves was nothing short of excellent in that regard."⁹⁴ He said that it should be a standard procedure in class actions where there are three or more experts in the expert conference.⁹⁵

It is important to properly describe and define what is an appropriate role for a judicial officer in an expert conference. One solicitor objected to describing the role of the Associate Justice in the expert conference as a 'mediator'. He said that the role more properly thought of as a facilitator who assists with "the preparation of a joint report that enables each expert to express their opinion

⁹² Ibid.

⁹³ Interview with barrister B, above n 61.

⁹⁴ Ibid.

⁹⁵ Ibid.

having heard and considered the views of the other participants.”⁹⁶ To this end, the joint report should identify “the issues remaining in dispute in a manner consistent with the discussion in conference, and [...] adequately [detail] the extent, basis and impact of the differing opinions.”⁹⁷

Connected to this was his concern about the influence of the Associate Judge distorting the outcome of the conferences. He said that the influence of the Associate Judge in the expert conferences meant there was a risk of the experts would feel pressured into making compromises and reaching agreement. He said that “care needs to be taken to ensure the desirability of reaching agreement is not overstated.”⁹⁸ He said that some of the expert witnesses retained by his party “were clearly under the impression as a result of the Associate Judge’s comments that it was their responsibility to endeavour to agree with [the other experts] and that disagreement was discouraged.”⁹⁹ He said that this had led to situations where experts “agreed with matters relating to new testing where they had not been provided with the underlying data” and did not have sufficient time to consider the proposal. He further said:

It also led, on occasions, to experts agreeing with propositions on the basis that they agreed with most of what was said, and didn’t feel that qualifying their agreement was consistent with the spirit of co-operation they had been asked to embrace.¹⁰⁰

The risk of the ‘spirit of cooperation’ pressuring experts into compromising their positions is, at least to some degree, probably inescapable in an expert conference. However, experts should be reminded that it is most important they give their full view of the evidence, even if it means disagreeing with the other experts.

Most importantly, the experts found the involvement of the Associate Justice very helpful. One expert was surprised, saying that he “expected the Associate Justice to be a grumpy crotchety old bloke with no interest in the process of the discussion or science, and who would quickly control the discussion to keep it progressing.” In contrast to his expectations, he said that:

Within the conclave Associate Justice Zammit was a kind and caring influence to keep things moving and gave us clues into legal language. In this way the guidance was great, and the open

⁹⁶ Interview with solicitor involved in proceeding (9 June 2015, by letter) (‘Interview with solicitor B’).

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

scope for the work allowed us to navigate and document the disagreements and agreements very well.¹⁰¹

He said that having the Associate Judge as moderator was “essential” as she “kept all parties honest”, “reduced bullying and assisted in the flow of the discussion”. He complimented Associate Justice Zammit’s “stern yet compassionate” moderation of the conference. He said when the Associate Judge left the room “there was a clear power vacuum and the discussion generally stalled.” He said that “at times various experts engaged in destructive or bullish behaviour”, but this was quickly corrected by the general assembly and reinforced by the Associate Justice as “unhelpful”.¹⁰²

Despite the involvement of Associate Justice Zammit, this expert identified “two significant vulnerabilities inherent in the conference process as 1) time wasting and 2) the inequitable power residing in the group report editor.”¹⁰³ He said “time wasting was difficult to control as the inclusive and open nature of the conclave required all parties to have a voice even if that voice lacked clear focus or supporting data, and the Associate Justice was not across the technical content enough to identify and curtail the strategy.”¹⁰⁴ The possibility of inequitable editorial power was addressed by “continual review of the position by the assembly and careful observation of the Associate Justice.”¹⁰⁵

The other expert was also of the view that having an associate justice as moderator was useful in the larger conference:

The associate justice was very helpful in guiding us through the procedures, keeping us somewhat to schedule - not an easy task with several strong minded, and verbose, individuals on the panel. [...] The technical discussions proceeded somewhat independently of the associate justice.¹⁰⁶

This is common sense: trying to manage a discussion of nine people with different views without any moderation is very difficult. This difficulty is increased when the material being discussed is highly complex and is the discussion is taking place in the context of high-pressure litigation. The person moderating the conference may not have to be a judicial officer, although the comments of Associate Justice Zammit suggest that this may be helpful in some situations. The most important

¹⁰¹ Interview with expert B above n 73.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Interview with expert A, above n 71.

thing is for there to be a person who has the skills necessary to help ensure the conversation is productive, that the opinions of the experts are respected and they are not pushed into a false compromise, and that the report produced is in a form that is useable by the legal practitioners and ultimately the Court.

C. Administration of the conferences

Many of the problems caused by the scale of the expert conferences were not strictly legal in nature. This included identifying what documents each expert had accessed in writing their reports, or helping the experts understand their role within the expert conference. The solicitors raised concerns about the lack of oversight the parties had over the amount of money spent on extra testing during the conferences, suggesting the parties should have been able to make submissions to the court about whether it was necessary. Associate Justice Zammit said there are a number of lessons to draw from the administration of the expert conferences in the Kilmore East bushfire proceedings. Some are basic: for example, she quickly found that there was “no point getting an independent scribe” as “when you were dealing with such technical matters [...] dictat[ing] it would have been so difficult”, so instead it was necessary to rotate the scribe role amongst the experts.¹⁰⁷ The ease or difficulty of managing the conferences was somewhat dependent on the size of the conference. Her Honour said that in contrast to the larger expert conferences, the smaller ones “ran almost independently” and required very little outside input apart from some brief instructions and an agenda to guide discussions.¹⁰⁸

Associate Justice Zammit said that an “inordinate amount of time” was spent at the beginning of each conclave making sure the experts had access to and had read all the necessary information, including all of the expert reports, the scholarly articles that had been relied upon, and the letters of instruction.¹⁰⁹ Her Honour recommended that in the future there should be a defined process for ensuring that these documents are provided to the experts well before a conference takes place. She noted there were some significant dangers in failing to ensure that all experts had the same set of documents:

[The] danger was that they were handing each other documents in the conclaves. I was concerned about what they were giving each other, and whether the documents had been discovered, [I had

¹⁰⁷ Interview with Associate Justice Zammit, above n 56.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

real] concerns about this informal process may be waiving documents that have been given in confidence, all of a sudden to one another.¹¹⁰

In addition, she said more information prior to the conference about the background of the experts and a summary of contents of their reports would have assisted in managing the conferences:

[...] the difficulty is that the reports were of such a complex nature that really sitting there and reading them on my own was of limited benefit, so I think a summary of what each of their reports addressed would have been extremely useful, and again one which the lawyers might prepare with the assistance of the expert. [...] Perhaps documentation which specifically, and again if you are doing this front end and saying here are the issues, here are the questions we need to ask, you can then say well expert X has provided this opinion which addresses this particular issue. Expert Y on the other hand says this. From my point of view if I had that at the beginning that would certainly have been of assistance. More importantly it would have been of great assistance to the experts.¹¹¹

Her Honour said the court should at an early stage in the proceeding provide all the experts with an explanation of the role of experts, how their reports would be used during the expert conferences, and how it would be pulled into a joint report and submitted to the Court. Experts often struggled with the concept of the joint report, with some thinking that they had to come to agreement on everything. She thought that some of this misunderstanding might be mitigated with better instructions.¹¹² She said:

I think that if they understood that process at the beginning they may in fact draft their individual reports a bit differently. Because [...] I think experts draft a report as we all do, thinking your audience is the lawyer that has instructed you. It might make it into a courtroom, but it might not. But, if from day one you are writing that report knowing that it is on the basis that before it gets to the courtroom it is going to also be analysed and discussed with your peers in an informal setting and that collectively a joint report is to be prepared [it may influence the way that report is written].¹¹³

To this end, Her Honour said that it would have been helpful to provide the experts with a sample joint report from another case with confidential information redacted.¹¹⁴ The issue could also be addressed by holding a meeting with all the proposed experts prior to the commencement of the expert conferences. Her Honour explained:

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

[...] it would be useful to actually meet with the experts [before the conclaves], maybe even inviting them into Court [...] to assess what information they received, [...] what instructions they had received at that stage so that I [could be] sure that all the experts are fully equipped with all the information they need and that we are comparing apples with apples.¹¹⁵

Such a meeting would have a number of other benefits, including enabling the Court to provide the experts with a list of issues that needed to be addressed. It could also provide an opportunity for the experts to have some input into the agenda for the conferences, and the questions in that agenda. As Associate Justice Zammit pointed out, they are “better equipped to formulate those questions” than the Court or the parties. Further, it would give the Court staff an opportunity to discuss with the experts the equipment they would need for the conference, whether that be computers, projectors, whiteboards or any other necessary material aids.¹¹⁶

The lawyers were generally satisfied that the process had worked well. The running of the conferences was left in the control of the Court. One solicitor said that the only guidance he could recall giving to the experts was that “if [they were] not writing the joint report [...] [they] should check it extremely carefully” and to make sure that “they weren’t rushed, and if they were signing a joint report make sure it precisely reflected their view”.¹¹⁷ The other solicitor said that they “provided guidance to [...] experts on what the conference process was likely to involve” but that “the quarantining process prevented any ability to manage the expert expectations during the conference.”¹¹⁸

One solicitor made some general observations about the process. He said that the questions considered by the conference should be “very specific” as “high level questions were of limited utility in attempting to identify the issues ultimately in dispute between the experts.”¹¹⁹ The lack of specificity in one conclave resulted in the evidence of two experts “passing like ships in the night” as one expert had not addressed the issues with sufficient specificity. He also said that smaller conferences with narrow issues were preferable to large ones,¹²⁰ presumably for a similar reason. He said it was important that expert conferences were scheduled “sufficiently far enough in advance of trial, or the trial timetable adjusted, to allow further [conferences]” where expert

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Interview with solicitor A, above n 57.

¹¹⁸ Interview with solicitor B, above n 96.

¹¹⁹ Ibid.

¹²⁰ Ibid.

witnesses “seek to set out in the joint report significant material in support of their position, where those issues had not been properly considered” in the expert conference.¹²¹

The legal practitioners expressed concern about some aspects of the expert conference process. The first was the amount of money that was spent during the further testing required by some of the expert conferences, with one solicitor raising the “disconnect between the further work [of the experts] required and who was paying for it.”¹²² He said:

[W]e [saw] on a couple of occasions coming out [of expert conferences] that there were three or four months further work being authorised, and frankly there’s a point of diminishing return. [...] [T]he experts would always caveat “well, I could do this to firm up this point” and the court would say yes, you should do that, it would help us with the trial, and at times the cost was pretty substantial [...]. Now, in our case, it turns out that was tolerable, but in a lot of cases you’d have the client saying “well, I actually didn’t budget for any of this.” [C]lients all the time say to us, “we know you as lawyers want to have that, but we’re not spending the money, we’re not satisfied on a cost-benefit analysis that that’s a useful exercise” and we’d say we’d really like to run the case, and they say “no, we’re not authorising you to do it.”

It is something to be aware of [...] [in this case] my sense was there was no discussion of what’s the cost, who’s paying it, what’s the likely benefit before [going ahead with the further work].¹²³

The other solicitor echoed these concerns, saying that one conference in particular had been a “rolling maul of further reports and testing” due to the “notion that the entire process would be ‘expert-driven’ rather than ‘lawyer-driven.’”¹²⁴ He made two points about an ‘expert-driven’ process:

- a) First, as a matter of principle it is imperative that the parties through their lawyers have a chance to address the court on the utility and fairness of further reports and testing. This did not occur.
- b) Secondly, it emerged from [...] documents that far from being ‘expert driven’ many of the further reports and testing were at the request or instigation of the [another party’s] lawyers.¹²⁵

It was his firm view that assessing whether further reports or testing was required

¹²¹ Ibid.

¹²² Interview with solicitor A, above n 57.

¹²³ Ibid.

¹²⁴ Interview with solicitor B, above n 96.

¹²⁵ Ibid.

[...] should not be made by experts alone, and not in the absence of the parties and their legal representatives properly informing themselves as to the appropriateness of the proposed course of action and being afforded an opportunity to address the Court on the issue.¹²⁶

The second issue, raised by one of the barristers, was that the restriction placed on the experts preventing them from introducing new material during the expert conference stood in the way of providing the best information to the Court. He said that in cases where the scientific evidence is evolving over the course of the proceedings, more leeway should be given to the experts.¹²⁷ Noting that the Court did “a wonderful, wonderful job with this litigation” he said that:

There was a couple of instances where it was clear that very important lines of discussion were sought to be raised in the conclaves, and were shut down because the moderator, or someone else, saying “that’s not covered in a report that was written a year ago, therefore we’re not touching it.” Well hang on a second: that was a year ago, and we’ve had a twelve month trial in the interim, and there’s a lot of stuff that’s come out. The control over the content of the concurrent sessions was too dogmatic and given the importance of this litigation [...] and the fact that there had been at different times questions as to whether a party was entitled or allowed to file a reply or a supplementary report for an expert or not, we got [...] inconsistent messages about what we were expected or allowed to do.¹²⁸

He said that there had been occasions where an expert was refused permission to provide a supplementary report on a particular issue, or raise it in the expert conference, only for the issue to be recognised at trial as actually being critical to the determination of the case.¹²⁹ He said that:

That was infuriating [...] and there should be clearer procedures and expectations firstly as to when reply reports are to be prepared. And this can be done efficiently – there’s any number of ways it can be done – reply reports can be prepared, and the conclaves can include a recognised ability for an expert to raise a matter that the expert considers relevant.¹³⁰

The other barrister did not share this view. He said “there was nothing to stop that expert when the quarantining order was lifted [from] going back to his or her party and saying ‘look, there is this other issue that I’ve thought about’” and then this information being the subject of a supplementary report and dealt with under the procedures for the late filing of evidence.¹³¹ He

¹²⁶ Ibid.

¹²⁷ Interview with barrister A, above n 59.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Interview with barrister B, above n 61.

said that it must be remembered that expert evidence had to strike a balance between finding the ‘truth’ and the practical restrictions of litigation. He said that even though there is “always a further investigation, always a further test, perhaps even a further theory to come up with” there has to be a point where the experts stop their investigation.¹³²

There are always going to be aspects of the way that a court manages a case that leaves the parties unsatisfied. Nonetheless, the concerns raised by the lawyers are important to note. It seems the starting position should be that if extra resources are going to be devoted to additional testing, the Court should give the parties the opportunity to make submissions on whether it is necessary.

The two experts interviewed were generally happy with the conference process, with some reservations. As neither expert had previously participated in expert conferences, they did not really know what the process would entail. One said that he:

[...] expected an Ego-fest with balding grey haired men each backing themselves and being unprepared to learn or listen. This was partially true of [some experts who did not] significantly add to any insight on the topic, but was quite wrong of [a number of] the conclave meetings.¹³³

He said that he received almost no information about how the conference was to proceed, and what he would be required to do during the process:

I had very little to no guidance on how to interact, or what was expected from the conclave. The legal team indicated they could offer no guidance, and there was no guidance or counsel within my parent company. I read through the contract carefully and used this as the rules for engagement.¹³⁴

He said that most of the experts conducted themselves appropriately, explaining “we had a number of good and experienced folk in the conclave that allowed the flow of discussion to continue and showed leadership in concessions and thinking.”¹³⁵ They decided on process for working through the evidence. He explained:

We developed an editorial process where people could recommend the improvement of any paragraph they agreed with. These basic rules (and a few to follow) would have been helpful as “guidance notes” i.e. non-prescriptive methods for facilitating conclave success.¹³⁶

¹³² Ibid.

¹³³ Interview with expert B above n 73.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

He said that this process changed throughout the conference. For example, in response to one expert providing a page of text into the draft only 12 hours before submission, the experts imposed limits on when new material could be included into the draft.¹³⁷

One expert explained that material and opinions were shared during the conferences in conversations, through the written editing of the documents, as well as the provision of supporting documents and emailed commentaries.¹³⁸ The expert explained that while teleconferencing was “not as effective as face to face meetings” it was “still a reasonable and necessary compromise for a foreign expert.” He said that:

With some creativity even a demonstration of the physical behaviour of a model could be communicated this way. The [significant] time difference was hard to manage. [...] There is a half second or so time lag in the communication over the internet which impedes the natural flow of questions and answers.¹³⁹

The other expert said that having the experts meet after the experiments underlying the expert evidence were either well developed or concluded was “not ideal as the experiments at times did not address the requirements of the analysis.”¹⁴⁰ He said in order to be “truly collegiate” in their work, the experts should have met “early and often” to “discuss ways the data could be viewed and analysed.”¹⁴¹ He said that this could also have been accomplished through emails and the sharing of working documents.¹⁴² He did say that this had occurred to some extent “through the iterative publication of reports, where the reports could draw on the previous work, and the work of others to view or review a particular topic.”¹⁴³ The expert acknowledged that a longer and more collaborative investigation process would run the risk of allowing parties to game the system. Nevertheless, he was still of the view that “meeting early and often, ideally before anyone publishes anything”, and allowing discussions about the broad aims of the research, would lead to “less diverging methodologies, or at least experiments and publication that aimed at addressing common perceived hypotheses.”¹⁴⁴

¹³⁷ Ibid.

¹³⁸ Interview with expert A, above n 71.

¹³⁹ Ibid.

¹⁴⁰ Interview with expert B above n 73.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

The comments of the experts draw our attention to the tension between the needs of science and the needs of the trial. While it may be better from the perspective of the experts to meet earlier in the proceeding to plan how best to conduct experiments to try and answer the scientific questions of the case, this would not be feasible in many, if not most, trials. Moreover, a trial and a scientific inquiry have different aims: a trial seeks to allocate responsibility on the basis of probability; whereas scientific inquiry aims for a more complete and certain understanding, and one that is not so constrained by the need to reach judgment. On a more mundane note, the expert's comments also indicate the Court should do more to help experts understand their role in the proceeding, and the role of the expert conferences.

D. Impact of personalities and attitude of experts

One of the major concerns raised about expert conferences is that the personalities of the experts could have an adverse impact on how accurately the joint report reflects the views of the participants. The experience of Associate Justice Zammit as moderator in the larger expert conferences suggests that this concern is warranted. She said she found herself actively managing the conference she was involved in to ensure everyone had an opportunity to contribute:

There were definitely stronger personalities, and sometimes even if it was not personalities there were people who were regarded as being leaders in their field of work, and so people automatically gravitated to their view. We had one gentleman who was [...] eminently qualified and he was quite assertive in his control, compared to one other fellow who was just a very timid individual and I think felt quite intimidated and overwhelmed. [...] You had to really allow him the opportunity [to contribute].¹⁴⁵

Her Honour said she was careful to ensure that the experts who were quieter had an opportunity to be heard during the conference, and that each expert could be confident that their view was going to be recorded. She thought this was a particular concern with larger conclaves:

There would be a real danger in conclaves where there is more than two or three [...] that voices would get lost and less confident people may not in fact be represented as well.¹⁴⁶

Associate Justice Zammit said that the attitude of the experts was critical to the success of the conferences and that she was impressed with the seriousness with which they approached their

¹⁴⁵ Interview with Associate Justice Zammit, above n 56.

¹⁴⁶ Ibid.

role. Further, the conferences helped the experts move from an adversarial approach to a more scientific one:

The more time they spent together [...] the easier they found it to move into that [the scientific] role as opposed to an adversarial role, and [...] they were able to be critical of one another and their work, but in a more scientific rigorous way as opposed to an adversarial way, [...] you saw them transform back into that and want to share their scientific experience to solve the problem. It suddenly became the big problem solving exercise [...] ¹⁴⁷

This had real benefits as it allowed the experts to control their problem solving, and they had the autonomy to be proactive in identifying information they needed to resolve differences in their evidence. The experts themselves worked out some management issues, with the natural leaders taking control of the conferences to ensure they were effective. In one of the larger conferences one expert took it upon himself to prepare defined questions and issues for the other experts to start discussion. Associate Justice Zammit said this was very helpful as she would not have had the scientific knowledge to prepare that kind of document.¹⁴⁸

The lawyers were not overly concerned about the risk that the personalities of the experts would have a detrimental impact on the conferences. One barrister said that personality was a factor practitioners always had to take into account when retaining expert witnesses as it is important to have an expert who will stand up in the witness box for the view they have properly formed. ¹⁴⁹ He said the same was likely to be true in expert conferences: an expert who is too timid or too bombastic will probably not be selected to provide evidence.¹⁵⁰ He said that during the conferences, as long as the moderator is “sufficiently across the competing reports” they will be able to see when an expert is “either being bombastic or possibly evading the real questions” or if an expert “is perhaps timid by personality and maybe agreeing to things that don’t reflect the expert’s actual agreement.”¹⁵¹ He said that:

The moderator is not there to shore up the expert, but they can ensure that the level of debate does not involve bullying. And, that the experts’ joint report reflects the genuine views of the experts. Now, there is only limited scope for the moderator to do that, because as I say, the experts kind of need to stand up for themselves.¹⁵²

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Interview with barrister A, above n 59.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid.

He said this did not mean there should be a moderator in all expert conferences. In smaller conferences with only two or three experts, he said that the risk of personality affecting the outcome was just a risk the court and parties had to manage. He explained:

Everyone has got to be alert to the possibility, and you know, if an expert has been telling you something for months and then they go into a conclave, and out comes this joint report that's taking a different line, you're going to be sitting down with your expert and [asking them to explain themselves]. [...] And if the expert answers "well, I didn't mean [to agree to that]", well then you've got a conclave that has gone awry, and then you've got a problem that you'll just have to deal with openly with the Court. [...] [T]he expert is rightly going to be criticised by the judge for signing the report in those circumstances. Now hopefully that sort of thing isn't going to happen very often as the lawyers should have chosen the expert who can defend him or herself and prepare the expert for the experience.¹⁵³

He said that the risk was not going to be much more significant than during cross examination, and that as such, there was not a need to be "too overly protective".

I don't think that risk requires any higher level of precautions than what I've already described: the parties need to be alert to the risk, if there's a moderator they need to be alert to the risk, and when the joint report comes out, everybody is going to be careful to have a good look and see how it responds to what they've been getting told by their expert on their way through.¹⁵⁴

The experts had two quite different perspectives. One expert did not find that the personality of the experts had a detrimental impact on the expert conferences. He said:

Each person was treated with respect, and the tone of the conclave meetings was quite positive. While some members were quite outspoken, in my opinion everyone had the opportunities to present their interpretation of the facts, their simulations and their theories.¹⁵⁵

In contrast, the other expert made extensive remarks on the impact of the personality of the other experts on the conferences. He said that the experts were quite partisan, and that "without really intending to we fell into teams by default [and] sat opposite each other in the room".¹⁵⁶ This was indicated by his own reflections on the conferences: he praised another expert for "effectively [carrying] the flag for the claimant" as he was the most technically proficient "in that team".¹⁵⁷ He

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Interview with expert A, above n 71.

¹⁵⁶ Interview with expert B above n 73.

¹⁵⁷ Ibid.

also said that this expert “showed us how to concede by not defending weak argument.”¹⁵⁸ He said that the experts understood that there was a “sense of giving ground and [the experts] were all aware that other parties had paid well for advice that we were dismissing or reinterpreting” and that “some people would have some explaining to do at the release of the conclave reports.”¹⁵⁹

The impact of the personalities of the other experts did not surprise him, and he saw it as an inevitable part of working with other people. He explained that:

Each person used features of their personality to push a particular argument (again I think this is normal). From my perspective this generally was not a big problem, and we were able to moderate each other. I was glad that the most bombastic individual was aligned to my thinking, and appreciated the team strategy used in the discussions. The conclave environment is not for the meek and to play a role you had to be agile and attentive.¹⁶⁰

Nevertheless, he did mention a number of issues that did cause some problems. He gave an account of the various strategies experts used to try and affect the outcome of the conferences. He thought one expert used “unclear communication” as a strategy to “infer possibility and complexity.”¹⁶¹ He said that time wasting was a significant problem, as “[w]ith the loose governance and inclusive intent of the conclaves cunning people with weak arguments could waste a lot of time on things of no benefit.”¹⁶² He added that a real difficulty in the conferences was “stupid people”. He explained that:

I don’t mean this as a triviality, or to be particularly harsh, and it is not really coupled directly to the question of personality, but the people that couldn’t keep up, or that were inflexible in their thinking consumed a lot of effort, and provided little to no insight into the science.¹⁶³

He thought that if these people could be somehow excluded from the conferences, they would have worked much better. He said that some people “didn’t get the concept of the group reports at all” and were unwilling to express clear agreement or disagreement with parts of the report, or would otherwise refuse to participate.¹⁶⁴

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Interview with expert B above n 73.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

The expert's view of the impact of personalities in the conference is not surprising. Expert conferences do not escape the effect of normal group dynamics: there will still be people that do not get along, or have a personality clash with others. Some people will find it easier to contribute to group discussions than others. The view of the lawyers that it is just another thing to be managed is a sensible one. It does strongly suggest, however, that a moderator in larger conferences is important. The presence of an independent third party in the room who has the authority to manage the discussion is good insurance against the detrimental effects of personality.

E. *Quarantining of experts and relationship between the experts and the parties*

The final issue that was discussed in the interviews was the effect of the quarantining the experts, and the relationship between the experts and the party that retained them. There were different views amongst the lawyers about quarantining experts. One solicitor said that it actually "made it easier for us." He said that:

We are at such pains to try not to create an expectation or a desire for them to express some view, and we try to engage so neutrally with them, it actually made our life relatively easy with the court saying, well, tell me why you think this. We try to be as careful as possible with experts, you have to imagine kid gloves, because there is a tendency to read things into your communications.¹⁶⁵

Both barristers said that the quarantining was "beneficial" to the process. One barrister said that the "non-involvement of legal representatives was absolutely crucial" as to do otherwise would contaminate the process.¹⁶⁶ He said that his view on this could be a result of the confidence he had in the experts his party had retained:

[...] I was pretty confident that I had some of the best experts that could ever be called in the area, so I suppose my happiness in not having legal representatives there was a function of the confidence I had in my own experts. Putting it another way, if you don't have confidence in your own experts, you're going to be less happy about being excluded as a lawyer, aren't you? So that was how I approached it, but I thought it was invaluable. You got honesty, you got rigour and you got a focus on the issue.¹⁶⁷

The other barrister said quarantining was sensible as it allowed the experts to concentrate on their own opinions, and that the fact the Court protocol allowed them to speak to the experts afterwards

¹⁶⁵ Interview with solicitor A, above n 57.

¹⁶⁶ Interview with barrister A, above n 59.

¹⁶⁷ Interview with barrister B, above n 61.

about what had happened during the conclaves was sufficient.¹⁶⁸ His only suggestion was that Court and the parties should explicitly recognise that the experts are “not trained (usually) to dissect language in the way that lawyers are.”¹⁶⁹ Such a recognition requires “the joint report [...] be acknowledged to be an indication of the experts view on a particular issue” and probably a little loose in the language used.¹⁷⁰ In the Kilmore East bushfire proceeding this led to some difficulty as:

The expert might have thought that they’d touched on a point, and then they were cross examined for an hour by someone [...] as to whether, you know, the location of the comma meant this, that or the next thing – you know, really finicky stuff. Excellent cross examination [...], don’t get me wrong – but when the experts are doing their separate reports, the lawyers get to look at them, and say well hang on, what do you mean by that, that’s not clear, you’ve got to do it more clearly, and so the written reports can be reliably a little bit more tight in their language. But, you’re given a day in a conclave, a half day to write the joint report, a half day to finalise the joint report, it’s going to be pretty loose in its language.¹⁷¹

He said this could be addressed by having a relevant scientist engaged not as an expert, but as a scribe to ensure the report was clearly written. He explained it did not justify the involvement of lawyers because “you can imagine how it would end up. You’d never get agreement on anything, really. So it’s better for the experts to do it, but everybody needs to recognise that it is rarely their forte to be super super precise in the language they use, particularly when it is contentious.”¹⁷²

The other solicitor was more circumspect about the value of quarantining the experts. He said it exacerbated some of the issues with the expert conferences by limiting the parties’ “ability to assess either the forensic utility to the determination of the common questions on the balance of probability or the cost benefit analysis in advance of the further reporting and testing.”¹⁷³ He was also concerned that new evidentiary material was introduced during the expert conferences. He said the introduction of “new material in this manner denied [my party] an opportunity to properly respond to the new material” and that it “inappropriately cloaked this new material and testing with the authority of having genuinely arisen out of the desire of the participating conclave experts to obtain it.”¹⁷⁴

¹⁶⁸ Interview with barrister A, above n 59.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Interview with barrister A, above n 59.

¹⁷² Ibid.

¹⁷³ Interview with solicitor B, above n 96.

¹⁷⁴ Ibid.

Quarantining the experts from the lawyers did create some difficulties for the experts as they could not ask questions of the people that had retained them. One explained that as it was his first experience of being an expert witness, he was not sure of the procedure and what documents he was permitted to refer to. He said that:

For instance, I did not know that there was a “court book” containing all documents until very late in the process. I am still not sure if I was allowed to access it. There was also a room of evidential items from the failed line. I never saw that either.¹⁷⁵

He also noted how the role of the expert in the legal system is somewhat fraught, and it can be difficult to know what the role entails:

[T]here is an inherent conflict between the lawyers’ adversarial role, representing the interests of their client, compared to the role of engineer, which is to ensure the safety of the public.¹⁷⁶

The other expert said that quarantining was “essential” as it allowed him to focus on the conference. He explained that “[a]nswering enquires, and the possibility of influence by legal teams would not have been helpful.” In addition, he said that “[t]he lack of lawyer presence also allowed a softening of consequence to the opinions facilitating concessions and agreement.”¹⁷⁷

V. CONCLUDING REMARKS

The participants in the Kilmore East bushfire proceeding agreed that the expert conferences and the production of joint reports was useful. For the judges and lawyers, having a summary of the voluminous expert evidence and a clear picture of where the experts agreed and disagreed was critical in their preparation for the trial. We can probably assume that it was also helpful for the final mediation. The experts managed to reduce the number of issues that the court had to deal with, allowing the focus to be properly on the areas of disagreement between them. The experts also found the conferences valuable, saying that the joint reports accurately reflected the expert views and that it allowed them to better understand reasoning of the other experts through robust and technical discussions about the evidence. The experience in the proceeding is testament to the benefits of expert conferences.

This does not mean that the participants were completely satisfied with the way the Court managed the conferences. It is clear that splitting up experts into different areas of science can be

¹⁷⁵ Interview with expert A, above n 71.

¹⁷⁶ Ibid.

¹⁷⁷ Interview with expert B above n 73.

challenging to get right, particularly where there are experts with different kinds of expertise over the same issue – such as the failure of a conductor. It is something the Court has to figure out based on the nature of the expert evidence and the facts of the case. The most substantive critique of the Court’s approach was that it failed to adequately consult the parties when the work of one of the expert conferences indicated that further testing was required. This is a fair point: if there is going to be the delay and cost that extra testing entails, the starting point should be that the parties be given the opportunity to make submissions on whether it is justified.

The involvement of Associate Justice Zammit as moderator in the larger conferences appears to have been very helpful, even essential. Indeed, it is easy to see how difficulties could arise with so many people in one room without someone independent and experienced to manage the discussion. However, the moderator must ensure that they do not use their position to push experts into agreement where there is none.

The impact the personalities of the experts might have on the outcome of the conference did not greatly trouble the lawyers, but one expert, unsurprisingly, noted some friction during the conferences. He also made it clear that the experts became somewhat adversarial and positional when the moderator was absent. Care should be taken that the experts do not misunderstand their role within the conference, and feel able to resist compromise and stick to their position where they think it is the best view of the evidence. The Court could address this by providing more information and perhaps even training to the experts prior to the commencement of the conferences. In addition, the court and the parties should remember that experts do not usually have legal training, and so do not think and write like lawyers. This problem will be particularly acute where the experts do not have any experience in giving evidence to a court. The Court should do more to prepare the experts for the expert conferences, perhaps having a training session prior to the commencement of the conference, and developing resources to assist them understand their role in the process.

The comments of the experts show that the process forced upon them by the court is not necessarily one that leads to the best scientific outcome. They noted the limitations of bringing experts together after experimentation, particularly where the experiments were on the cutting edge of scientific knowledge. However, it is difficult to see how the experts could be brought together to conduct experiments at the beginning of the proceeding – but where possible, it should be considered.

Overall, the expert conferences in the Kilmore East bushfire proceeding were a success. The experience of the court and the participants shows that it is a useful procedure for courts, particularly where the evidence is as complex as it was in this case. All participants said that it substantially reduced the expert material that the court had to deal with during the trial. While care should always be taken to ensure that the process is just, effective and does not distort the evidence that ends up before the court, it is a powerful tool for courts dealing with complex expert evidence.

VI. APPENDIX

A. *Section one: view from Victorian bench*

In the process of preparing for the interviews with the participants in the Kilmore East bushfire proceeding, a number of judges not involved in the Kilmore East Bushfire proceedings were asked to comment generally on expert conferences, with a particular focus on the issues that came up in Kilmore East bushfire proceeding. This included their thoughts on managing the expert evidence in such a large case, the value of quarantining of experts from the parties during the expert conferences, and the role of the judicial moderator. There was considerable diversity of opinion.

1. *General comments on expert conferences*

All of the judges interviewed acknowledged that expert conferences were a useful tool for the court in some cases. There was, however, significant disagreement about the extent to which they should be used. As will be seen, some judges said expert conferences should always be used when you have multiple experts giving evidence on the same area; others thought that it was only useful for large trials or particularly complex evidence. All pointed out that the appropriate approach depends on the facts of the case before the Court.

Justice Beach said that for cases of the scale of the Kilmore East Bushfire proceeding, expert conferences were a powerful tool to handle the expert evidence:

I can't imagine in a case as complex as the recent bushfire case, with so many areas of expertise, how it might sensibly have been conducted if you had eight months of plaintiff's experts, one after the other, on different topics, just getting one side, one side, one side, and then suddenly eight months' later the plaintiff closes the case and the defendants start calling people who say the exact opposite. I can't imagine how burdensome that might be to a trial judge. Clearly [the expert conferences] worked very well.¹⁷⁸

Justice Almond was positive about the potential value of expert conferences, saying that in the "best case" they could resolve the case by removing issues from dispute, or narrowing and confining the issues, revealing what is "truly in dispute".¹⁷⁹ Justice Hargrave said that it "stops experts being infected by their instructions" and "trying to put something which is pushing the

¹⁷⁸ Interview with Justice Beach (2 September 2014, Supreme Court of Victoria, Melbourne).

¹⁷⁹ Interview with Justice Almond (13 October 2014, Supreme Court of Victoria, Melbourne).

boundaries” because they know they will be accountable to their colleagues in the conference.¹⁸⁰ He said expert conferences also have the potential to “drill down to what the real difference” between the experts is, and thereby reducing the work of the judge.¹⁸¹ Furthermore, he said that the joint reports were often essential in saving judges’ time:

Judges can waste a lot of time reading very detailed expert reports which appear to differ but in the end there is only a few things standing between them. In most cases, judges shouldn’t have to bother with the individual reports. The joint report which comes up following the conclave should be all the judge needs to be taken to, unless someone refers to the individual report (if there is one) during the course of examination.¹⁸²

Justice Beach and Justice Almond were careful to point out some of the limitations of the procedure. Justice Almond said that expert conferences were not a failsafe way of managing expert evidence:

If the experts aren’t truly engaged in the process of exchange and open listening and are unable to refrain from being too positional, then the process can work fairly poorly and end up blurring the lines and entrenching the conflict between the parties. I have had cases where the joint engagement between experts in conclaves or at trial is reduced to two individuals grating against each other and getting annoyed.¹⁸³

Justice Beach said the benefits of the traditional method of managing experts should not be discounted.¹⁸⁴ He was concerned that conferences could allow the personalities of some experts to impact on the way the case is determined, rather than having their evidence tested in court. He also warned that in small cases expert conferences could prove costly to the parties but not achieve any real benefit over having the experts give evidence in the traditional way.¹⁸⁵ He emphasised that the judge should consider whether it will actually be helpful:

Just think why you’re doing it and what are the real benefits and, if there aren’t, the way we’ve been running cases before conclaves, it’s developed over hundreds of years by very clever people, it works very well. Just be a bit careful, that’s what I’d say.¹⁸⁶

¹⁸⁰ Interview with Justice Hargrave (6 October 2014, Supreme Court of Victoria, Melbourne).

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ Interview with Justice Almond (13 October 2014, Supreme Court of Victoria, Melbourne).

¹⁸⁴ Interview with Justice Beach (2 September 2014, Supreme Court of Victoria, Melbourne).

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

It is clear from the comments of the judges that expert conferences are a useful tool, particularly in cases as large as the Kilmore East bushfire proceeding. All acknowledged their effectiveness in some situations. However, their comments identify some risks involved in expert conferences, and there will be occasions where the more traditional approach will work better.

2. *Quarantining of experts*

Justice Hargrave said that he always orders that the parties have “nothing to do” with the experts once the expert conferences have commenced, and only permits communication to the experts signed by both parties.¹⁸⁷ He said he takes this approach because he has seen examples of the parties or their lawyers seeking to influence experts to take certain positions.¹⁸⁸ This is the standard order in the Commercial Court, and it recognises that the experts are officers of the Court rather than representatives of the parties.¹⁸⁹

3. *Need for independent chair or moderator in conferences*

Justice Hargrave, Justice Croft and Justice Almond were supportive of using independent chairs or moderators in at least some expert conferences. Justice Hargrave said that having a court appointed moderator was valuable:

[...] especially in very large litigation where the conclave may go for days and so on, I think having an Associate Justice or a Judicial Registrar involved would be good to put the experts on the right page in interpreting the court’s [instructions] or, where necessary, arranging to approach the Court for clarification.¹⁹⁰

Justice Croft said it would be necessary to “lay down the parameters for the conclaves fairly carefully” to ensure the process was effective.¹⁹¹ He went on to say that determining whether to appoint a mediator to the conclave depended on the size of the case, and whether the experts had experience in providing evidence to the Court, and their personalities.¹⁹²

Justice Almond said that some judicial intervention was desirable in running expert conferences to “formalise the process” and ensure the experts were kept on track.¹⁹³ He said it would sometimes

¹⁸⁷ Interview with Justice Hargrave (6 October 2014, Supreme Court of Victoria, Melbourne).

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ Interview with Justice Croft (14 October 2014, Supreme Court of Victoria, Melbourne).

¹⁹² *Ibid.*

¹⁹³ Interview with Justice Almond (13 October 2014, Supreme Court of Victoria, Melbourne).

be preferable to have a neutral person chairing expert conferences, and if it were a “highly contested matter” he would consider using an associate judge.¹⁹⁴

B. *Section Two: Methodology*

The primary source of material for this research project was gathered in interviews with judges of the Supreme Court of Victoria and some of the participants of the Kilmore East bushfires proceeding. The interviews were conducted in late 2014 and early 2015 in person and by email. The judges selected were either involved in the proceeding (Justice Forrest) or were chosen as they represented a range of different views about the management of expert evidence (Justice Beach, Justice Croft, Justice Almond and Justice Hargrave). The participants from the Kilmore East bushfire proceeding interviewed were selected to ensure that the research took account of both the plaintiff and defendant sides, as well as covering the different roles within the proceeding. To this end, two barristers, two solicitors and two experts were interviewed. They agreed to be interviewed on the basis that they would remain anonymous due to the sensitive nature of some of their comments, and so all identifying information has been removed from their answers.

Interviews in person were semi-structured and the questions were both broad (“Did expert participation in expert conferences and production of joint reports improve the effectiveness and justice of the proceedings?”) and more focussed (“Did you have to provide [the experts] with any guidance as to what to expect [in the expert conferences]?”). Interviews conducted by email or letter were by response to questions provided to the interviewees. The research project has some obvious limitations: it was not possible to interview all the judges of the Supreme Court or all the participants in the Kilmore East bushfire proceeding. It does not in any way assess the experience of the many plaintiffs, whose tragic experiences were the basis of the case. This paper is not intended to be a source of comprehensive empirical data, but rather to ensure the experience of the Court is recorded and that any lessons that were learnt during the proceeding are captured for posterity. It is hoped that this record will be of value to other judges of the Supreme Court of Victoria, as well as in other jurisdictions, and to legal practitioners. One of the aims of the project was to better understand how newer methods of managing expert evidence were used by the court and perceived by those who were using them – and the Kilmore East bushfire proceeding was a good opportunity to assess some of these issues.

¹⁹⁴ Ibid.

CONCURRENT EVIDENCE IN THE KILMORE EAST BUSHFIRE PROCEEDING

SIMON MCKENZIE*

This paper, the third in a series on the management of expert evidence during the Kilmore East bushfire proceeding, considers the use of the concurrent evidence procedure. During this case, the largest class action in Victoria's history, the parties and the Court were confronted with challenging factual issues that generated a substantial amount of expert evidence. The volume and complexity of this evidence led to the adoption of more innovative methods of managing expert evidence, including hearing the evidence concurrently at trial. This paper considers whether the adoption of the concurrent evidence procedure usefully contributed to the trial. It records the views of a range of participants in the proceeding, including the presiding judge, barristers, solicitors and experts, material gathered in interviews conducted after the case settled. These interviews indicate that the use of concurrent evidence was a success. It was seen as a useful tool to help the Court deal with complex expert evidence. The experience in the Kilmore East bushfire proceeding also illustrated some of the challenges of very large concurrent evidence sessions, including resourcing issues and the need to protect the well-being of the experts. Notwithstanding these concerns, the procedure should be considered by judges in all cases where there are multiple experts giving evidence on the same issues.

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I. INTRODUCTION

Perhaps the most important stage of any court’s management of expert evidence is at trial. This is when the judge and the parties test the validity of the experts’ opinions through examination and cross-examination. Traditionally, evidence is taken from experts one at a time and with the plaintiff and defendant sides presenting their whole cases separately. However, the scale of *Matthews v SPI Electricity Pty Ltd* (the ‘**Kilmore East bushfire proceeding**’) meant that the Court had to adopt non-traditional procedures for hearing expert evidence. The Court heard evidence from the experts concurrently, with some concurrent sessions involving as many as nine experts. This paper – the third in a series on the management of expert evidence in the proceeding – assesses the experience of some of the participants during the concurrent evidence sessions and their views about the effectiveness of concurrent evidence in delivering a just result by a just process.

This material was gathered in interviews conducted in person and by email with some of the participants: Justice Jack Forrest (the trial judge), as well as two barristers, two solicitors and two experts. These participants considered hearing evidence concurrently was valuable to the proceedings, making it easier for the judge and parties to assess the persuasiveness of the expert evidence. Compared to the traditional method of giving expert evidence, the participants found it better represented the views of the experts and the areas of their agreement and disagreement between them and saved time. Nevertheless, this powerful procedural tool is not appropriate for every case, and the experience in the Kilmore East bushfire proceeding helps show when it should be used and how a court should manage it.

The paper focuses on a number of issues. The first section provides a snapshot of the relevant law and scholarship regarding concurrent evidence. It then sets out the participants’ view on the level of judicial intervention exercised by Justice Forrest during the concurrent evidence sessions, going on to explore the impact of a large number of experts giving evidence concurrently, the impact of

the personalities of experts, as well as other administrative issues such as the quarantining of experts. Finally, it sets out the participants' reflections on the general value of concurrent evidence in this proceeding.

The paper also has an appendix that provides further context and information about concurrent evidence. The first section sets out the thoughts of four Victorian judges, collected in interviews conducted by the author, about when and how courts should use and manage concurrent evidence. The second section sets out the methodology of the paper.

II. BRIEF OVERVIEW OF RELEVANT LAW AND SCHOLARSHIP

Concurrent evidence is a procedure where experts give their evidence to the court at the same time. A concurrent evidence session is usually preceded by expert conferences – otherwise known as expert conclaves – where the experts meet and produce a joint report that identifies the areas of agreement and disagreement. Concurrent evidence enables an approach substantially different to the traditional method by which experts gave evidence in court which requires experts to first write reports, and then appear in court giving evidence in chief, being cross-examined and finally re-examined by counsel. This is a time consuming process. The New South Wales Law Reform Commission (NSWLRC) explained concurrent evidence:

... the relevant experts in a particular area are sworn in at one time and remain together in court. The giving of evidence becomes a discussion rather than a series of exchanges between a lawyer and a witness. In the discussion, questions may be asked not only by the lawyers and the judge, but also by one expert of another, a departure from the traditional approach in which only the cross-examining lawyer asks questions. The discussion is focused, highly structured, and controlled by the judge.¹

According to Justice Hargrave of the Supreme Court of Victoria:

This is not a passing fad. Practitioners and experts should be in no doubt that courts will continue to adopt this approach in the future, and not just in commercial cases. The landscape will also change for common law cases, and even criminal cases subject to appropriate safeguards.²

In Victoria, the Court is able to give directions setting out how experts are to give their evidence, including giving it concurrently. This power was explicitly granted to the courts in Victoria in s 65K of the *Civil Procedure Act 2010* (Vic). This section provides:

¹ New South Wales Law Reform Commission, *Expert Witnesses*, Report No 109 (2005), 6.48.

² Justice Kim Hargrave, 'Expert Witnesses/Hot Tubbing', Commercial Court Seminar, Melbourne, 27 October 2010.

- 1) A court may give any direction it considers appropriate in relation to the giving of evidence by any expert witness at trial.
- 2) Without limiting subsection (1), the court may direct that any expert witness –
 - a) Give evidence at any stage of the trial, including after all factual evidence has been adduced on behalf of all parties;
 - b) Give evidence concurrently with one or more expert witnesses;
 - c) Give an oral exposition of his or her opinion on any issue;
 - d) Give his or her opinion on any opinion given by other expert witnesses;
 - e) Be examined, cross-examined or re-examined in a particular manner or sequence, including by putting to each expert witness, in turn, each issue relevant to one matter or issue at a time;
 - f) Be permitted to ask questions of any other expert witness who is concurrently giving evidence.
- 3) A court may question any expert witness to identify the real issues in dispute between 2 or more expert witnesses, including questioning more than one expert witness at the same time.

The relevant Explanatory Memorandum explained the section was to provide the court with the power to “at any time give any direction that it considers appropriate in relation to the giving of expert evidence at trial.”³ This included “innovative approaches to the management of expert evidence” which aimed to “improve the quality and integrity of expert evidence and increase the usefulness of expert evidence to the courts”.⁴

Concurrent evidence has been a feature of complex litigation in Australia for many years.⁵ It was introduced in the late 1990s, partly in response to a study that found that the majority of judges felt they did not understand the expert evidence before them, with 20% admitting they ‘often’ faced difficulties in evaluating different expert opinions.⁶ It was thought that concurrent evidence would assist judges in this task.⁷

³ Explanatory Memorandum, Civil Procedure Amendment Bill 2012, 7.

⁴ Ibid.

⁵ For instance, Justice Garry Downes provided a summary of the use of concurrent evidence in the AAT in ‘Concurrent Evidence in the Administrative Appeals Tribunal: the New South Wales Experience’ (Paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, Hobart, 27 February 2004).

⁶ Mia Livingstone, ‘Have we fired the “hired gun”? A critique of expert evidence reform in Australia and the United Kingdom’ (2008) 18 JJA 39, 50.

⁷ Ibid.

The NSWLRC reported that the experience of the New South Wales Land and Environment Court of concurrent evidence had been very positive as it allowed the experts to answer questions from the court, from the parties and from their colleagues.⁸ The procedure had “overwhelming support” from experts and their professional organisations as they found they were better able to communicate their opinions to the Court, and they also thought there was less chance their opinions would be distorted by the advocate’s skills.⁹

The NSWLRC supported the procedure, noting it offered significant potential benefits, including saving time by allowing key points to be quickly identified and discussed. The NSWLRC considered it particularly important that the:

... process moves somewhat away from lawyers interrogating experts towards a structured professional discussion between peers in the relevant field. The experience in the Land and Environment Court indicates that the nature of the evidence is affected by this feature, and that experts typically make more concessions, and state matters more frankly and reasonably, than they might have done under the traditional type of cross-examination. Similarly, it seems that the questions may tend to be more constructive and helpful than the sort of questions sometimes encountered in traditional cross-examination.¹⁰

The NSWLRC noted that the success of the procedure will depend on the skill of the judge in structuring and controlling the discussion to ensure all points of view are heard and counsel has adequate opportunity to test the expert evidence.¹¹

Livingstone found that the majority of commentators supported the procedure as it gave better clarity and coherence to expert evidence, and it assisted judges in understanding expert evidence by presenting the information in a collaborative and connected way.¹² A comprehensive review undertaken by the Administrative Appeals Tribunal (AAT) in 2005 found that 67.2% of members reported that the quality of expert evidence had improved and 87.9% of members reported that the task of comparing different experts’ evidence on each issue was easier, and 88.1% of members believed that the decision-making process was enhanced.¹³

⁸ New South Wales Law Reform Commission, *Expert Witnesses*, Report No 109 (2005), 6.50.

⁹ *Ibid* 6.51.

¹⁰ *Ibid* 6.56.

¹¹ *Ibid* 6.57.

¹² Mia Louise Livingstone, ‘Have we fired the ‘hired gun’? A critique of expert evidence reform in Australia and the United Kingdom’ (2008) 18 JJA 39, 50.

¹³ *Ibid* 51. Cf the critique of this study in Gary Edmond, ‘Judging Surveys: Experts, Empirical Evidence and Law Reform’ (2005) 33(1) *Federal Law Review* 95.

Published judicial commentary on the procedure has been favourable. Justice Hargrave identified benefits of the procedure:

[The benefits] can be simply stated. Counsel's job is made easier and less time consuming, in preparation, in conducting cross-examination of experts and preparing final submissions. For the judge, there is an increased burden prior to the trial if the judge is involved in managing the joint report process and in formulating the questions for the joint report; and during the trial the judge must master the material so as to be in position to control the concurrent evidence [...]. However, once the trial is over, the real benefits accrue to the judge. The issues are simplified and the relevant evidence is easy to find. The joint report and the self-contained transcript for each issue make the judgment writing process much easier and assist in decision-making.¹⁴

Similarly, Justice Peter McClellan said that concurrent evidence allows the courtroom to provide "the decision-making process which professional people conventionally adopt."¹⁵ The evidence session becomes a "discussion in which everyone's views [are] put forward, analysed and debated."¹⁶

Some do have concerns about adverse consequences of giving evidence concurrently. Livingstone notes the possibility that a group discussion among experts will result in only the most insistent voices being heard, and the process will advantage experts with dominating and forceful personalities.¹⁷ There is also the potential for the enhanced role of the judge to cause difficulty. Neil Young QC said that it is important that the "panel discussion is a structured one", with each expert able to give their opposing expert opinions "without interruption by the other experts or from the Bench".¹⁸ He also said he had seen cases where the judge "tries to control the direction of the debate unduly or intervenes excessively." He said that this can result in "messy and even unintelligible transcript of evidence" due to the missed dialogue or inadequately explained opinions.¹⁹

¹⁴ Justice Kim Hargrave, 'Expert Witnesses/Hot Tubbing', Commercial Court Seminar, Melbourne, 27 October 2010.

¹⁵ Justice Peter McClellan, 'Sworn together: A discussion of concurrent evidence' (2009) 93 *Precedent* 17, 18.

¹⁶ *Ibid.*

¹⁷ Justice Kim Hargrave, 'Expert Witnesses/Hot Tubbing', Commercial Court Seminar, Melbourne, 27 October 2010.

¹⁸ Neil J Young, 'Expert Witnesses: On the Stand or in the Hot Tub - How, When and Why?' (Paper presented to the Commercial Court Seminar, 27 October 2010), [19].

¹⁹ *Ibid* [20].

Gary Edmonds raises more fundamental questions about the validity of the fears of expert partisanship and bias, arguing they may “not present particularly serious problems in civil cases.”²⁰ He explains that:

Adversarial procedures – which include scope for rigorous cross-examination – constantly remind us of the limitations of expertise; the intractable nature of expert disagreement; the prevalence of alignments, commitments, and interests; and other potentially biasing factors. Expert disagreement creates problems primarily because there are no simple means of resolving disagreement in socially legitimate ways. Attributions of bias (and objectivity and impartiality) are unlikely to produce bright lines for understanding or assessing particular proffers of expert evidence. They are of limited value in determining the reliability of expert-opinion evidence or the authenticity of disagreement and, without more, do not present constructive bases for law reform.²¹

Nevertheless, Livingstone reports that these concerns do not seem to be shared by participants in concurrent evidence sessions.²² Justice McClennan, who has been a strong advocate of the procedure, said that the process actually assists those who are shy or indifferent to participate to the structured discussion as the debate will occur on an intellectual level (as opposed to cross examination).²³ It also allows the judge to observe the experts discuss the matters in issue with each other.²⁴

Justice Downes, President of the AAT, said while in his experience most experts “do not deliberately mould their evidence to suit the case of the party retaining them”, when this happened it was clear from the evidence they adduced.²⁵ According to his Honour, this was one of the strengths of the traditional approach: it exposed “different expert points of view for evaluation by the judge.”²⁶ He said that concurrent evidence also allows for the same testing of different expert viewpoints. In addition to this, Justice Downes explained that it “can have a number of virtues” over the traditional approach:

- The evidence on one topic is all given at the same time;
- The process refines the issues to those that are essential;

²⁰ Gary Edmond, ‘Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure’ (2009) 72 *Law and Contemporary Problems* 159, 188.

²¹ *Ibid*, 188.

²² Mia Louise Livingstone, ‘Have we fired the ‘hired gun’? A critique of expert evidence reform in Australia and the United Kingdom’ (2008) 18 *JJA* 39, 50.

²³ Justice Peter McClellan, *Concurrent Expert Evidence*, keynote address presented at the Medicine and Law Conference, Law Institute of Victoria, 29 November 2007.

²⁴ *Ibid*.

²⁵ Justice Garry Downes, ‘Problems with expert evidence: Are single or court-appointed experts the answer?’ (2006) 15 *JJA* 185, 186.

²⁶ *Ibid* 186.

- Because the experts are confronting one another, they are much less likely to act adversarially;
- A narrowing and refining of areas of agreement and disagreement is achieved before cross-examination; and
- Cross-examination takes place in the presence of all the experts so that they can immediately be asked to comment on the answers of colleagues.²⁷

Justice James Allsop, then President of the New South Wales Court of Appeal, wrote that the technique has “great potential”, but made the point that for it to be effective, “the judge has to be well prepared and very familiar with the technical issues in order to absorb and participate in the professional exchange.”²⁸ It is also widely thought that the process reduces time, cost and delay by allowing issues to be quickly identified and discussed.²⁹

III. CONCURRENT EVIDENCE SESSIONS IN THE KILMORE EAST BUSHFIRE PROCEEDING

Justice Forrest was prescriptive as to how the concurrent evidence sessions in the Kilmore East bushfire proceeding would be run. He provided a protocol to the barristers and the experts setting out how each topic would be examined, and the procedure for questioning by the other experts, counsel, the judge and the assessors. His Honour described the process:

We adopted a formula which we applied to expert evidence concurrent sessions whether there were two or eight [experts], which was to allow the expert to make an opening statement and allow counsel calling that expert to ask a few questions, a limited number of questions, perhaps to elucidate on matters in the report, then to allow cross-examination and then to permit the experts to question each other before making closing statements on a particular topic.³⁰

Justice Forrest noted it was difficult for him to assess whether the level of judicial control exercised helped the trial to run more effectively, and whether the protocol was adequate in the circumstances.³¹ He nevertheless said the procedure appeared to be very effective. He said that even with the protocol, it was important to be flexible and “from time to time adapt to what might

²⁷ Ibid 188.

²⁸ James Allsop, ‘The judicial disposition of competition cases’ (2010) 17 *Competition & Consumer Law Journal* 241.

²⁹ Mia Louise Livingstone, ‘Have we fired the ‘hired gun’? A critique of expert evidence reform in Australia and the United Kingdom’ (2008) 18 *JJA* 39, 52.

³⁰ Interview with Justice J. Forrest (8 August 2014, Supreme Court of Victoria, Melbourne).

³¹ Ibid.

be said. It may well be that you need to change the order in which evidence is being given because [of] the priorities [of the Court] and because of the way in which the evidence has emerged.”³²

Justice Forrest said one “drawback” to the procedure was the need for the judge to be very proactive in managing the concurrent evidence sessions:

In each of the bushfire cases, it was necessary to be on top of the reports and the joint reports and ensure, as best we could, the judge take, at least at the outset, an active role in adducing the evidence and extracting from the experts what their views were on particular topics. It was necessary to draw up a list of topics to be considered by the experts and get them to go through each topic in order. To do that, it was necessary to understand the expert reports and the likely views or opposing views of the experts.³³

Through this substantial amount of work he acquired a sophisticated understanding of the expert evidence prior to the concurrent evidence session. He said it enabled him to seek clarification as early as possible from the experts regarding any confusion or misunderstanding. To this end, Justice Forrest had some of the experts prepare a two-day tutorial on material that would be the subject of the most difficult part of the expert evidence. He said this was quite effective in helping to better understand the material.³⁴

The legal practitioners who were interviewed said the level of judicial involvement in the concurrent evidence session was appropriate. One barrister explained how it worked in practice:

The judge had done his reading, he’d thought about the agenda issues, he circulated agendas weeks in advance of the concurrent evidence sessions. The parties [then] got an opportunity to feed in to the agendas (which was helpful), and by the time the experts hopped into the box, the judge was across their reports [...] [the judge] led off with the questions, and then counsel got an opportunity, and then the judge would jump in again as he saw fit. [...] [T]he protocol that Justice Forrest laid out for the procedure to be followed during the concurrent evidence sessions worked, I thought, very well. And it should form the basis for the standard model in the future.³⁵

The other barrister agreed, saying the protocol Justice Forrest put in place for concurrent evidence, and his interventions during the concurrent evidence sessions, were “critical” and “excellent” as it

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Interview with barrister involved in proceeding (Morning of 24 February 2015, Melbourne) (‘Interview with barrister A’).

ensured the Court had control over the process.³⁶ He said the protocol would work with any number of experts:

I can't see a reason why you would change those sorts of protocol, whether you had three experts for a subject area, or eight or ten. I mean obviously the problems get magnified the larger the number, and for cross-examining counsel you've got to be fairly nimble in terms of how you deal with a larger number, but there you go. I think the process worked extremely well and I can't think of a good reason to change it, quite frankly.³⁷

Both barristers emphasised that concurrent evidence required the Judge to do a considerable amount of preparation before trial. One barrister said you needed "a judge who has mastered the material, and who is not shy about exercising his or her control" to make sure the experts gave useful evidence.³⁸ However, the other barrister noted that concurrent evidence requires more work from the judge "only in the sense that it requires the time before the evidence [is given in court] rather than time after the evidence."³⁹ It means that the judge knows the questions that he or she will need answered when the expert is giving the evidence, rather than realising the evidence "hasn't answered the questions [when] he tried to read the transcript six months later."⁴⁰

One solicitor raised the inability to re-examine as an issue: in the trial it was "a function that in practice was left to the experts in the process of summing up at the end of each question."⁴¹ He said that while this was useful it should "not replace the role of counsel in leading evidence that is relevant to the determination of the issues in dispute in the proceeding" as it is "a function that cannot be delegated to non-legal experts".⁴²

The experts seemed mostly satisfied with the overall approach of Justice Forrest. One expert said Justice Forrest mainly listened to the evidence, and "did not intrude significantly while the experts were giving their evidence and replying to the lawyers' questions."⁴³ He did, however, say that experts were not always able to provide to the Court evidence they considered relevant. He noted that one expert wished to present papers to the Court, but was at first denied and later on permitted to submit summaries.⁴⁴ The other expert said the level of judicial intervention was

³⁶ Interview with barrister involved in proceeding (Afternoon of 24 February 2015, Melbourne) ('Interview with barrister B').

³⁷ Ibid.

³⁸ Ibid.

³⁹ Interview with barrister A, above n 35.

⁴⁰ Ibid.

⁴¹ Interview with solicitor involved in proceeding (9 June 2015, by letter) ('Interview with solicitor B').

⁴² Ibid.

⁴³ Interview with expert (23 February 2015, by email) ('Interview with expert A').

⁴⁴ Ibid.

appropriate, saying that Justice Forrest did a “really great job of giving people a break, and letting us take a beating when appropriate.” He said that the “occasional direct judicial questioning or comment was always appreciated, and [I] admired the intellect and social intelligence of the bloke.”⁴⁵

The lawyers and the experts supported allowing the experts to ask questions of one another. One barrister said that experts asking each other questions “was always exciting”, and that it helped the parties in a number of ways. It meant that if the cross-examining counsel was given an answer he or she did not understand, but was nevertheless incorrect or unsustainable, they had their expert there to bring it to the attention of the Court.⁴⁶ The barrister explained:

[I]t imposes an actual discipline on all experts in that they can't put one over counsel because [it] will be picked up by the other side's experts [who have] the capacity to ask each other questions [...]. Whereas if I was just cross-examining a [...] mechanical engineer there might be something there that I hadn't heard of, [or was] outside my area of expertise or preparation, and he or she might get away with it. But they can't get away with it as easily in a concurrent evidence session.⁴⁷

He said he was “very happy” to have “my own experts there picking up on a ridiculous answer that a witness gave to one of my questions that I didn't pick up on.”⁴⁸ He described it as a “good insurance policy for counsel.”⁴⁹

One expert explained that he was strategic about when he questioned other experts, and said that he “used these questions only when I knew the outcome to emphasise particular points within the discussion.”⁵⁰ He said at one stage of the evidence he asked another expert whether “a particular nuance of their analysis” was a “done-deal”, knowing from previous discussions with that expert that “the topic was not a done-deal at all”.⁵¹ He said that the:

[...] flustered half answer with the introduction of new material highlighted that this was not at all a done-deal, and the deliberate coupling to the argument in the question was sneaky. Justice Forrest saw it all for what it was and stopped further questions.⁵²

Reflecting on this experience, he said that “there is something in the gaming of the rules that biases this to clever witnesses that seems inappropriate.”⁵³ He thought that if the experts had

⁴⁵ Interview with expert (24 March 2015, by email) (“Interview with expert B”).

⁴⁶ Interview with barrister B, above n 36.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Interview with expert B, above n 45.

⁵¹ Ibid.

⁵² Ibid.

competitive personalities, “any rule of engagement will be analysed and used, [and] lenience may give unfair opportunity.”⁵⁴ He said that “the strategies and casual language outlined were developed by thinking [on] the communication problem overnight [while] editing multiple drafts of questions and statements” and that it was “a developed strategy for communication.” But, he did not think that, on balance, this was a problem: “these opportunities were so rare that I felt these opportunities added to the process by providing a vector for a witness to undermine incorrect or weak arguments as they developed.”⁵⁵ This shows that expert witnesses can sometimes be as tactically minded as the lawyers, and that the process allows them to exercise this skill.

A. *Impact of a large number of experts giving evidence*

The most significant impact of the large number of experts giving evidence concurrently was the time each concurrent evidence session took. Some concurrent evidence sessions went for over a week, which was particularly difficult for the experts who were sitting in the session each day. In addition, Justice Forrest said that managing eight or nine experts at once was “very difficult” and that even if he were on top of the material, it would be better to “be handling expert evidence in a concurrent evidence session of three or four people rather than double that.”⁵⁶

The legal practitioners interviewed saw this as an inevitable consequence of the scale and complexity of the expert evidence, and were not overly concerned. The benefits of concurrent evidence meant that it was worthwhile. One solicitor explained that he thought the Court did “pretty well.” He said that:

The way I would test [the process is to ask whether] I [was] satisfied at the end of the process that the half-baked ones looked half-baked, that the true experts truly looked expert, I thought the answer was by and large yes. It was pretty apparent to everyone who knew their stuff, who was pretty good but not quite as good, and who maybe should have been doing something else with their time.⁵⁷

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Interview with Justice J Forrest, above n 30.

⁵⁷ Interview with solicitor involved in proceeding (20 February 2015, Melbourne) (‘Interview with solicitor A’).

Similarly, the other solicitor said that it “worked reasonably well” but that “it may have been possible to reconfigure those sessions into smaller groupings, which may have been more beneficial.”⁵⁸

The number of experts made the job of the barristers more challenging. One barrister said that it was “extremely difficult” and that it required him to “be very flexible” and “much more dynamic” than during a traditional cross-examination. He said “you had to move with the flow a bit – sometimes what was said during the concurrent evidence session [...] came out of left field.”⁵⁹

The large and lengthy concurrent evidence sessions were difficult for the experts as well. One said the amount of time it required was challenging:

I expect that the process was economical for the court, but it was an uneconomical use of time for the experts. All experts had deadlines and tasks, related to their university or industrial roles, and were clearly over-burdened by having the court related work on top of that. The questions from the assessors required “homework” most evenings to prepare for the responses the next day. Overall compared to normal working environments the court appears extremely inefficient.⁶⁰

The other expert said large concurrent evidence sessions resulted in “a lot of ‘dead-time’ in working through each witness”, and that “if the topic areas were more focussed this would have made a smaller group and increased efficiency.”⁶¹

B. *Impact of personalities of experts*

Justice Forrest said that the different personalities of the experts had an “interesting” impact on the proceedings. Some experts were more confident in how they expressed themselves, and it was clear that some had dominant personalities. There were “robust differences of opinion” during the concurrent evidence which was what “one might hope for.” He was not convinced that this meant “it was possible for one person [...] to dominate the session.”⁶² While on some occasions he had to step in to ensure that all the experts had the opportunity to contribute, he said that the protocol ensured that each expert made an opening and closing statement, and had the opportunity to question others. He said that this ensured that passive personalities were not lost in the mix.⁶³

⁵⁸ Interview with solicitor B, above n 41.

⁵⁹ Interview with barrister B, above n 36.

⁶⁰ Interview with expert A, above n 43.

⁶¹ Interview with expert B, above n 45.

⁶² Interview with Justice J Forrest, above n 30.

⁶³ Ibid.

The other participants had differing views about the impact of the personalities of the experts on the proceedings. One solicitor said that he “did not discern any difference in relation to the impact of different personalities as between joint or individual expert evidence sessions.”⁶⁴ The barristers did not think that the impact of the personalities of the experts was any more significant than it was in other cases. One said even though personality plays a role in how the experts give their evidence, it was just something that the parties and the judge needed to anticipate and be alert to.⁶⁵ He explained that it is the judge’s responsibility to manage personalities of the experts to ensure that evidence is given in an appropriate way:

[...] the Judge who has done the work before the concurrent evidence session will be in a position to evaluate whether the bombastic expert is answering the question or not, and if the timid expert is being timid, the judge can detect it and [...] reassure the expert that this is the place where they are going to get the free and final chance to express their actual view, and they better do it clearly without fear or favour because that’s what’s going to be the evidence. So, in Court it’s not so much of a problem because it is open – the lawyers can see what’s happening, [and] the judge can see what’s happening [...]⁶⁶

He said that there was no need to be “overly protective” about it: while it will give rise to problems on occasions, it is something that the parties and the Court can work together to address.⁶⁷ He did not think that “the risk requires any higher level or precautions than [...] the parties [being] alert to the risk”.⁶⁸

The other barrister said personality was not the critical issue, but rather that the level of expertise of the expert giving evidence was much more significant.⁶⁹ He found that in concurrent evidence sessions “the witnesses that came across the best were the ones who were really on top of their science.”⁷⁰ He said that “even someone who had a quiet personality, [...] [if they] demonstrated they knew the science *par excellence*, they were going to be much more persuasive than a strong personality who didn’t really know that much when they were prodded or poked.”⁷¹ The experts who knew less about the topic “waffled” and “came unstuck a bit”.⁷²

⁶⁴ Interview with solicitor B, above n 41.

⁶⁵ Interview with expert A, above n 43.

⁶⁶ Interview with barrister A, above n 35.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Interview with barrister B, above n 36.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

One solicitor said there “was a complete lack” of adverse impact from the personalities of experts during the concurrent evidence sessions. He explained that:

There was essentially an intellectual respect. I did worry about that in the court-administered process, but I think it is just the fear of the unknown more than anything. I had enough confidence that we’d picked people of great integrity and intellect, it was very unlikely they would be overborne by anyone. I understand the conceptual worry, but I didn’t see it in this case.⁷³

He said the “calibre of the people” involved in the sessions meant that they were not “people who, in an intellectual sense, were going to be easily overwhelmed”.⁷⁴

The difference in opinion between the two experts interviewed was particularly stark. One expert was not concerned, saying that:

While each expert had his own character, the process was very fair in allotting time for each one to make presentations without much interaction between the experts. There were a few inter-expert questions and these were mainly issues of technical methodology and fact checking. Almost invariably, these exchanges were done in a very courteous manner.⁷⁵

The view of the other expert was quite different. He had the most difficulty with experts that “couldn’t keep up” or were “inflexible in their thinking”, saying they “consumed a lot of effort, and provided little to no insight into the science.”⁷⁶ He said that there appeared to be “a risk of personality bias in the court’s conclusions dismissing work that was either bombastic, or presented poorly.”⁷⁷ He said that the trial process took a toll on some of the experts, with some experts struggling with fatigue, particularly when faced with an “onslaught of continual cross examination”. He said that one expert found it particularly challenging:

Poor [expert name] took a thrashing almost every day, and he was physically and emotionally exhausted by the end of proceedings. We were given fair warning that it was to be a marathon trial and cross-examination, but some people are not good at that sort of event.⁷⁸

He said that the friendship he developed with the other experts made it “heartbreaking to watch them get torn apart in the stand” and “made me reluctant to assist in dismissing their work.”⁷⁹ He said that at times he “felt the whole process was immoral and my association with it, or at least my

⁷³ Interview with solicitor A, above n 58.

⁷⁴ Ibid.

⁷⁵ Interview with expert A, above n 43.

⁷⁶ Interview with expert B, above n 45.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

lack of opposition to the ruthlessness demeaning.”⁸⁰ However, unlike some of the others he felt that he was able to “use the lenience and flexibility in the method of concurrent cross-examination to my advantage.”⁸¹

C. *Administrative issues*

The number of people in the room during a concurrent evidence session can make it difficult to ensure that everyone can properly participate in the session: one expert said he struggled to hear the judge properly in the courtroom as the judge did not always talk into the microphone.⁸²

Justice Forrest ordered that the experts be quarantined from the parties for the duration of the concurrent evidence session. His Honour said that this caused no difficulties, and if anything the experts were “delighted to be precluded from seeing the lawyers”, and welcomed it.⁸³ The legal practitioners were supportive of this decision. One solicitor described it as “appropriate”⁸⁴, and the other solicitor said that while it did pose some administrative challenges, “the benefits far exceeded any difficulties.” He explained that:

I think it is both the fact and the perception that this is truly their own opinion, unadulterated. It is mostly perception – experts who are inclined to be led by lawyers quickly get found out, I think, in the rigorous process that is a trial, but mostly it is perception. It gives a judge comfort it is genuinely the expert’s view. I personally have no difficulty with it.⁸⁵

One of the barristers described quarantining as “essential to the integrity of the process” and said it was no different to lawyers not being able to speak to an expert while they were being cross-examined.⁸⁶ It was important not to contaminate the process.⁸⁷ The other barrister agreed: he said it ensured there was “no funny business” and that it was “sensible, and it didn’t impede things, and it meant that the experts were able to concentrate on their own opinions, which [...] believe it or not, the lawyers actually want.”⁸⁸

The quarantining did pose some challenges for the experts. One expert said that while quarantining was “essential during the trial to avoid influence”, he struggled when he was quarantined from one of his friends participating in a different concurrent evidence session. He

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Interview with expert A, above n 43.

⁸³ Interview with Justice J Forrest, above n 30.

⁸⁴ Interview with solicitor B, above n 41.

⁸⁵ Interview with solicitor A, above n 58.

⁸⁶ Interview with barrister A, above n 35.

⁸⁷ Ibid.

⁸⁸ Interview with barrister A, above n 35.

said that as he knew this person's "written material intimately" he wanted to help them but was unable to.⁸⁹ He thought "greater insight and more representative answers could have resulted from the relaxation of the quarantining [of experts from each other] during direct cross-examination."⁹⁰

He said quarantining made it more difficult for the experts to be properly supported, particularly when the concurrent evidence session went across many weeks. He suggested "getting really strict with meal-times, bed times, forced exercise and returning home on most weekends just to stay sane and ready."⁹¹ He said the experts did help each other in the process: he invited the other experts back to his accommodation during lunch breaks to "eat real food (bread, cheese, tomatoes, etc.) and talk sport". He said that:

This was a welcome relief from the cafes and court scene. I found it a welcome solace to have a picnic each day with people in a similar privilege and sufferance and it was an important part of my social day and health. However, I was very careful with hygiene: I took care each morning to leave the flat with no notes, reports, calculations or plots in clear view. We were all careful about the talk and spent time either chatting about other fields or catching up on newspapers.⁹²

He thought that sometimes the social interaction was not so benign. He said that some experts who were in the same expert conference met with each other and "shared stories and technical discussion over a bottle or two of red wine." He said that:

This continued contact with each other resulted in people changing their opinions on some topics, and being more ready to defend or reinforce opinion on work that they had not contributed to or shown interest or previous opinion. This seemed like poor hygiene and I thought it was not entirely innocent i.e. some people were working the social play for influence.⁹³

He suggested that the Court should pass on a "cautionary note" to experts taking part in concurrent evidence emphasising "the risks of talking out of school", and warning that they should avoid direct discussion on the topic.⁹⁴ Any such warning, however, should acknowledge the need for social support.⁹⁵

⁸⁹ Interview with expert B, above n 45.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

D. *Value of concurrent evidence*

The participants were generally positive about the value of the concurrent evidence sessions. None took the opportunity to question whether the expert evidence should have been given in the traditional manner, and all saw significant advantages with hearing all the experts on a particular issue at once. The lawyers said the number of experts and complexity of their evidence meant that giving evidence without using concurrent evidence would have been enormously challenging. It was harder for the experts to make this kind of assessment as they had not had the same amount of court experience as the legal practitioners. Nevertheless, one expert said that while he did not have any prior experience of traditional adversarial proceedings, he did watch a day of solo cross-examination during the trial. He thought “the subject, method and strategy employed by [the barrister] were a waste of time and exhausting.” He said that “[r]elative to this the concurrent evidence and conclaves gave a significantly more accurate view of the experts’ opinions.”⁹⁶

IV. CONCLUDING REMARKS

The use of concurrent evidence in the Kilmore East bushfire proceeding appears to have been a success. The testimony of the participants supports the widely held view that it is a useful tool in cases with complex evidence and many experts. For the judge, it does require more work prior to the trial and the concurrent evidence session. The judge’s preparation should include being familiar the expert material as well as preparing or assessing proposed agendas. However, the benefits are significant as it means that all the evidence on one topic is heard together and will therefore appear in the transcript together, making judgement writing much more straightforward. There are other advantages: the experts can question other experts and respond directly to the arguments raised, holding each other to account. The comments of one expert who gave evidence in the Kilmore East bushfire proceedings confirmed that experts are very aware of the competence of other experts, and use the opportunity of concurrent evidence to show the court that their view is the most persuasive. As one of the barristers said, the parties also benefit as there is someone with expertise in the subject matter that can catch the technical obfuscation or mistakes of the experts of the other side.

The experience in the proceeding does indicate there are some issues with concurrent evidence that should be borne in mind. Larger concurrent evidence sessions that take a long time can be very demanding on everyone concerned. The resources and planning required to have so many experts in court at once are substantial. The court and participants should also ensure that

⁹⁶ Ibid.

adequate consideration is given to the well being of the experts. This is particularly the case when experts are quarantined as they are often away from home for long periods. Spending many days in a witness box, even alongside other people in a concurrent evidence session, is exhausting. The personality of the experts will impact on the concurrent evidence session, but this does not really pose a new challenge to the trial judge. It does not raise the same concerns as expert conferences (which occur behind closed doors) because any adverse interaction between the experts can be seen by the judge and the parties. It is interesting that some experts are as tactically minded and strategic as the lawyers, 'gaming' the concurrent evidence session in an attempt to convince the court that their view of the evidence is the best one.

There can be little doubt that in the Kilmore East bushfire proceeding, if the court had heard each of the nine experts who participated in the largest concurrent evidence session, separately and possibly months apart, it would have posed a substantial challenge to Justice Forrest and the lawyers to synthesise the results. It would have required them to revisit and closely familiarise themselves with the same scientific evidence multiple times during the proceeding. During judgement writing, it would have taken an enormous amount of work to bring all that material together to evaluate it and make factual findings. In these circumstances there is no doubt that concurrent evidence is a useful way of cutting down some of this work. The procedure should be considered by judges in all cases where there are multiple experts giving evidence on the same issues.

V. APPENDIX

A. *Section one: view from the Victorian bench*

The four judges interviewed who did not participate in the Kilmore East bushfire proceeding acknowledged there was a place for concurrent evidence in modern civil litigation, but some expressed reservations about applying it too broadly. Justice Beach said that it was necessary to be a “bit careful” with concurrent evidence. He said that he had not presided over a case where he felt there was a need to hear evidence concurrently:

There’s a lot to be said for just putting witnesses in the box one at a time and focusing on someone and saying ‘Well, how do you justify this particular opinion in cross-examination?’[...] [P]eople have written since time immemorial [that] the loneliest place in this whole court complex is the witness box in any court where you’re on your own, you’re an expert, [and] you justify your professional opinion.⁹⁷

His Honour added that there was a risk concurrent evidence could obscure whether an expert really knew the subject on which they were giving evidence:

[T]he expert witness who’s not quite as well qualified as the others gets a chance to hide his or her lack of knowledge, while someone else speaks the real detail, and then she gets the chance to say ‘Ah, yes, but you’re wrong about this for that reason’ without first of all having to have put the foundations in and demonstrate that they’ve got true expertise.⁹⁸

Justice Almond also expressed some caution about the procedure. He said it was necessary to explore with the parties during the pre-trial process whether it would be appropriate to hear the evidence concurrently.⁹⁹ This would allow the judge to evaluate the utility of the procedure in the particular case.¹⁰⁰ His Honour added that the judge always reserves the right to change tack and hear the expert evidence individually if the judge thinks that would best promote justice in the case.¹⁰¹

Judges who had used the procedure acknowledged that the comprehensive preparation required could be demanding on the judge. Justice Almond said that engaging fully with the concurrent evidence session required a “considerable amount of preparation to gain an understanding of the real issues in dispute”, including “a level of technical understanding by reading the reports in

⁹⁷ Interview with Justice Beach (2 September 2014, Supreme Court of Victoria, Melbourne).

⁹⁸ Ibid.

⁹⁹ Interview with Justice Almond (13 October 2014, Supreme Court of Victoria, Melbourne).

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

advance”.¹⁰² Preparation is important to ensure the judge is able to fully engage in the process, and to ensure the procedure is explained in detail to the expert witnesses who will be participating in the session.¹⁰³ Ideally, this should include a description of the intended sequence of the evidence and how the court will ensure everyone will have an opportunity to be heard.¹⁰⁴

1. *Level of judicial intervention*

As would be expected, views differed on what level of intervention from the bench was appropriate. Justice Hargrave said that “total” intervention from the bench was necessary for a concurrent evidence session to be effective. He said it was the judge’s responsibility to manage it and “to work through it in a structure way, issue by issue”.¹⁰⁵ He explained his standard approach:

The first thing is to divide it into the issues, to stage it, to go issue by issue. The second thing is that on each issue to summarise the Court’s perception of what the agreement is and what the disagreement is and ask the expert to comment on that so that the judge knows he’s got it right. The third thing is to ask them to comment upon each other’s rival view where there is a disagreement, to ask questions between themselves and see if they can resolve anything by agreement at that stage. The judge, I think, then should also enquire and that sometimes leads to agreement being reached which wasn’t reached in the conclave. Then lastly, the parties can ask some questions. I normally limit the questions just to that issue. Sometimes if I give leave to allow cross-examination as to credit on a particular issue but normally I would say save it up for the end [of the concurrent evidence session]. And then at the end of each issue, I then summarise where the evidence stands on that issue in the logical framework of issues and ask the experts to comment on that, and for a general comment they require on that issue and then we move on to the second issue.¹⁰⁶

His Honour explained that this ensured that the individual issues did not overlap, and that the reasoning of the experts was set out in a clear and transparent manner. He said that despite this control, it was still “an informal process” and the experts had a considerable amount of autonomy as to how they interacted within the above structure.¹⁰⁷ He said informality made it more likely for the evidence to address the “real nub of the issue.”¹⁰⁸ In addition, it does not prevent the parties

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Interview with Justice Hargrave (6 October 2014, Supreme Court of Victoria, Melbourne).

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

from cross-examining as they see fit, it just ensures that it is done in a structured way and that it does not become needlessly adversarial.¹⁰⁹

Justice Hargrave said that the reason for the judge exercising this level of control was the judge as the ultimate decision-maker, had to make sure that he or she understood the expert evidence presented. He endorsed the view that it was an advantage that for each issue “all the evidence [...] is in the joint report and one piece of transcript”, which “makes the judge’s judgment writing task much easier.”¹¹⁰ Further, with such a process there is “less room for error, at least in the sense of misunderstanding as to what the experts are actually saying.”¹¹¹ He agreed there was “no question” that hearing evidence concurrently substantially shortens the trial.¹¹²

Justice Almond said that the most important concern for the judge was to ensure that each of the experts had a “fair opportunity to contribute” and that the judge “needs to be firmly in command of the issues between the parties who have provided expert reports”.¹¹³ He said proper preparation allows the judge to better control the flow of questions, which is essential to ensure the utility of the concurrent evidence session:

There needs to be a structured approach; otherwise it can become difficult for transcribers to identify the people who are engaging in what might be described as debate with the consequence that the evidence can become difficult to follow later on, on transcript.¹¹⁴

In contrast, Justice Croft said that “not a lot” of intervention was necessary. He said aside from having an agenda set, he would leave it to counsel to work through the issues.¹¹⁵ He explained:

I think in some respects it’s better if you sit on the side [...] I don’t really like the witness staring at me all day. I’m quite happy to see them interacting with counsel, and you often get a better view from the sidelines as to what’s going on and to form a view, so I think to some extent that’s a good way to do it in a [concurrent evidence session].¹¹⁶

The difference in approach between the judges appears to be mostly dependent on the style of the trial judge, and what works for one may not work for all.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Interview with Justice Almond (13 October 2014, Supreme Court of Victoria, Melbourne).

¹¹⁴ Ibid.

¹¹⁵ Interview with Justice Croft (14 October 2014, Supreme Court of Victoria, Melbourne).

¹¹⁶ Ibid.

2. *Impact of personalities of experts*

The judges acknowledged that the personalities of the experts could have an impact on the effectiveness of the concurrent evidence session, but were sure this could be managed by the Court. Justice Almond said the fear that personalities could adversely affect the concurrent evidence session was overstated as it just presented the judge with a challenge the judge would face with any witness. He explained that:

Part of the role of the judge is to make sure everybody has a fair opportunity to be heard, so that if somebody was dominating then it is really a judge's role to intercede to make sure that the less dominant person has a fair opportunity to contribute. Personality plays a part in the giving of evidence whether there's concurrent evidence or not. Strong personalities may give their evidence in a more robust fashion than other people. That doesn't mean that the judge will accede to the evidence given by the dominant personality.¹¹⁷

However, his Honour emphasised that the personality and behaviour of the experts sometimes did have a significant impact on the trial:

Sometimes experts giving evidence concurrently become irritated with each other. They may tend to slide off point into positional arguments with another party's expert. This can be distracting and indicates that the expert does not truly understand their role and duty to the court. I have become less of a proponent of concurrent evidence partly because I have had instances where the individuals themselves become argumentative. Although this can be readily controlled by judicial intervention, a base level of irritation existing between individual experts tends to compromise the quality of their evidence. If I thought there was likely to be a significant personality clash between experts I would tend not to allow the evidence to be given concurrently. Sometimes, it is just better to keep the experts apart.¹¹⁸

He said there were some useful indicators as to when this might occur. If there is a "lot of heat along the Bar table" it can be a sign that "the parties might end up having highly positional experts."¹¹⁹ Another indication is the "tenor of the criticism directed to the other expert" in expert reports in reply or in joint reports.¹²⁰ This can give a "strong signal that an expert might behave disparagingly or highly positionally at trial", and that was an "indicator to me as a judge that it may be preferable to keep the experts apart."¹²¹

¹¹⁷ Interview with Justice Almond (13 October 2014, Supreme Court of Victoria, Melbourne).

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

Justice Hargrave also said that managing the different experts could be “difficult” in a concurrent evidence session, but that it was usually apparent when there was a mismatch in personality or experience.¹²² He compared the situation to when the parties have barristers of differing levels of skill, and in particular hearings where an inexperienced barrister fails to ask the right question, and the judge has to step in to ensure that it is asked. It was about how the judge managed the situation, rather than being about stopping it from occurring.¹²³

B. *Section two: methodology*

The primary source of material for this research project was gathered in interviews with judges of the Supreme Court of Victoria and some of the participants of the Kilmore East bushfire proceedings. The interviews were conducted in late 2014 and early 2015 in person and by letter and email. The judges selected were either involved in the proceeding (Justice Forrest) or were chosen as they represented a range of different views about the management of expert evidence (Justice Beach, Justice Croft, Justice Almond and Justice Hargrave). The participants from the Kilmore East bushfire proceeding who were interviewed were selected to ensure that the research took account of both the plaintiff and defendant sides, as well as covering the different roles within the proceeding. To this end, two barristers, two solicitors and two experts were interviewed. They agreed to be interviewed on the basis that they would remain anonymous due to the sensitive nature of some of their comments, and so all identifying information has been removed from their answers.

Interviews in person were semi-structured and the questions were focussed on the particular procedural challenges the court faced (for example “What was the impact of having a large number of experts giving concurrent evidence at the same time?”). Interviews conducted by email were by response to questions provided to the interviewees. The research project has some obvious limitations: it was not possible to interview all the judges of the Supreme Court or all the participants in the Kilmore East bushfire proceeding. It does not in any way assess the experience of the many plaintiffs, whose tragic experiences were the basis of the case. This paper is not intended to be a source of comprehensive empirical data. Rather, it aims to ensure the experience of the court during these significant proceedings is recorded and that any lessons that were learnt during the proceeding are captured for posterity. It is hoped that this record will be of value to other judges of the Supreme Court of Victoria, as well as judges in other jurisdictions, and to legal

¹²² Interview with Justice Hargrave (6 October 2014, Supreme Court of Victoria, Melbourne).

¹²³ Ibid.

practitioners. One of the aims of the project was to better understand how newer methods of managing expert evidence were used by the Court and perceived by those who were using them – and the Kilmore East bushfire proceeding was a good opportunity to assess some of these issues.

ASSESSORS IN THE KILMORE EAST BUSHFIRE PROCEEDING

SIMON MCKENZIE*

This paper, the fourth and final in a series on the management of expert evidence during the Kilmore East bushfire proceeding, considers the use of assessors. During the proceeding, Justice J. Forrest appointed assessors to assist him with some of the most complex aspects of the expert evidence. The assessors played a significant role in the proceeding, helping to guide the expert conferences, sitting with Justice J. Forrest during the largest concurrent evidence session and participating in the examination of the experts. This paper is based on interviews conducted with some of the judges, barristers, solicitors and experts involved in the proceeding, and it records their reflections on whether the use of assessors was valuable. It appears that the use of assessors was a success, and all the participants interviewed regarded them as being beneficial to the trial. They were satisfied that the method of selection adopted by the Court was appropriate. The assistance the assessors provided Justice J. Forrest with understanding the expert evidence was essential, and having people capable of engaging in technical dialogue with the experts while they were giving evidence was useful. This paper suggests that the appointment assessors should be considered in future cases of similar complexity to help the trial judge deal with very difficult expert evidence.

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I. INTRODUCTION

The case of *Matthews v SPI Electricity Pty Ltd* (the ‘**Kilmore East bushfire proceeding**’) required the Victorian Supreme Court to confront highly complex expert evidence. The trial judge, Justice Jack Forrest decided it was necessary to appoint two assessors to assist him with the most complex parts of the evidence. These assessors played a significant role in the proceeding: they helped guide the most complex expert conference by providing questions to the experts while they were in conference; they sat with Justice Forrest during the largest concurrent evidence session and participated in the examination of the experts; and they were available to Justice Forrest when writing the judgment (even though the case ultimately settled). They were an essential part of the Court’s response to the challenge posed by the voluminous and highly technical expert evidence.

This is the fourth and final paper in a series about the management of expert evidence in the Kilmore East bushfire proceeding. It considers the role of assessors in the proceeding, and records the perspectives of the participants on the assessors’ impact on the proceeding, and the value of their appointment. The first section provides an overview of the use of assessors in common law jurisdictions, and some of the advantages and disadvantages of their appointment. This research shows that the value of assessors is widely recognised, but that there are fears that their use might amount to an abdication of judicial power. As such, some have argued that tight limits should be placed on their interaction with the judge and that there should be complete transparency with any information they provide by revealing that information to the parties in full. However, Australian judges and scholars have tended to be more relaxed than their overseas peers about the interaction between assessors and judges, comparing it to the relationship between associates and judges, or between judges.

The paper goes on to explain how the assessors were used in the Kilmore East bushfire proceeding, summarising how Justice Forrest determined they were required, and how Associate Justice Zammit went about selecting them. It then addresses the experience of the participants, and their reflections on four issues: the appointment of the assessors; the interaction between the assessors and the experts at the expert conferences; the role the assessors played in the concurrent

evidence sessions; and finally, whether the appointment of assessors could amount to an abdication of judicial power.

This material was gathered through interviews conducted with the judges, and some of the barristers, solicitors and experts involved in the proceeding. Even though the plaintiff was initially opposed to the appointment of assessors, these interviews show that in hindsight the appointment of assessors was one of the least controversial aspects of the proceeding. All parties were ultimately convinced they were useful as they assisted Justice Forrest in managing the expert evidence. They were satisfied that the limitations placed on the interaction between the judge and assessors were appropriate, and that the use of assessors did not amount to an abdication of judicial power. The interviews indicate that using assessors can be a convenient way of dealing with complex expert evidence. It helps the judge cope with the difficult task of making sense of technically complex expert evidence in cases like the Kilmore East bushfire proceeding, and therefore to better exercise his or her judgement.

There is an appendix to this paper to ensure that the reader can have a more complete picture of the use of assessors. The first section sets out the views of Victorian judges who were not involved in the Kilmore East bushfire proceeding about the use of assessors, with a particular focus on some of the concerns raised in the literature as well as the issues that arose in the proceeding. The judges recognised assessors could be useful in some circumstances, and that it was a more appropriate mechanism than a special referee when the relevant expert evidence was at the heart of the determination of liability. They did not think that appointing an assessor, properly handled, would amount to an abdication of judicial power. The second section sets out the methodology used for the paper, including an acknowledgement of some of the limitations of this research.

II. OVERVIEW OF RELEVANT LAW AND SCHOLARSHIP

Common law courts have been using assessors to assist judges with highly specialised and technical evidence and testimony for many years, particularly in admiralty cases.¹ In Victoria, the power to appoint an assessor is provided by s 77 of the *Supreme Court Act 1986* and s 65M of the *Civil Procedure Act 2010*. Section 65M states that a court can appoint an expert to “assist the court” and to “inquire into and report on any issue in a proceeding”. Section 65M(3) sets out a number of factors the court must consider in making such an order:

- (3) In making an order to appoint a court appointed expert, the court must consider –

¹ See Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Report 89 (2000), 13.144-5. Also see Justice James Allsop, ‘The judicial disposition of competition cases’ (2010) 17 *Competition & Consumer Law Journal* 248-9.

- (a) whether the appointment of a court appointed expert would be disproportionate to –
 - (i) the complexity or importance of the issues in dispute;
 - (ii) the amount in dispute in the proceeding;
- (b) whether the issue falls within a substantially established area of knowledge;
- (c) whether it is necessary for the court to have a range of expert opinion;
- (d) the likelihood of the appointment expediting or delaying the trial;
- (e) any other relevant consideration.

Even though it uses the word “expert”, this provision encompasses the appointment of an assessor. Justice Heerey of the Federal Court of Australia neatly explained the role of the assessor, and its basic limitations, in his decision in *Genetic Institute Inc v Kirin-Amgen Inc (No 2)*²:

An assessor is to assist the judge, both in hearing and trial and/or in determination of any proceeding. The judgment in the case, the exercise of the judicial power, remains that of the judge.³

Assessors have a different role from other court appointed expert witnesses, such as special referees. The Australian Law Reform Commission (“ALRC”) set out the differences between assessors and expert witnesses:

- Assessors are not sworn and cannot be cross-examined;
- Their advice is usually given to the judge in private and is only disclosed to the parties at the discretion of the court and at the end of the case in the judgment;
- It is “simply an expert available for the judge to consult if the judge requires assistance in understanding the effect or meaning of expert evidence”.⁴

The judge sets the limits on the participation of the assessors in the proceedings, and it differs from case to case. Assessors have been permitted to comment in open hearing about any evidence raised,⁵ and at other times they have been given the responsibility of making inquiries and reporting back to the court on particular issues.⁶ They are someone the judge can confer with about the complex and technical evidence that comes before the court.

The value of appointing assessors in some circumstances is widely recognised. It assists a judge in dealing with difficult expert evidence in the trial. The ALRC explained that:

² (1997) 78 FCR 368.

³ Ibid 371.

⁴ Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Report 89 (2000), 13.147.

⁵ See *Beecham Group Ltd v Bristol-Myers Company (No 2)* [1980] 1 NZLR 185.

⁶ Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Report 89 (2000), 13.151.

Technical evidence needs to be presented in a comprehensive, clear way, [but] the examination and cross-examination processes and the sequential presentation of evidence does not always assist this aim. One response to this difficulty is for the court to appoint an assessor or other expert assistant to advise the judge or other decision maker.⁷

This is also recognised in case law. In the English case of *Richardson v Redpath, Brown & Co*⁸ Viscount Simon explained the value that assessors can provide to the Court. He said that:

[Treating an assessor] as though he were an unsworn witness in the special confidence of the judge, whose testimony cannot be challenged by cross examination and perhaps cannot even be fully appreciated by the parties until judgment is given, is to misunderstand what the true functions of an assessor are. He is an expert available for the judge to consult if the judge requires assistance in understanding the effect and meaning of technical evidence. He may, in proper cases, suggest to the judge questions which the judge himself might put to an expert witness with a view to testing the witness's view or to making plain his meaning. The judge may consult him in case of need as to the proper technical inferences to be drawn from proved facts, or as to the extent of the difference between apparently contradictory conclusions in the expert field. It would seem desirable in cases where the assessor's advice, within its proper limits, is likely to affect the judge's conclusion, for the latter to inform the parties before him what is the advice which he has received.⁹

In *Genetic Institute Inc v Kirin-Amgen Inc (No 2)*¹⁰, Heerey J said that in helping resolve disputes between experts, who "can contest issues with the enormous advantage of a lifetime of experience in the discipline", the judge was likely be assisted by an assessor.¹¹ He said that:

No doubt the judge could reach a decision without such assistance, but that is not the point; [the relevant provision] does not posit a criterion of total judicial inadequacy as a pre-condition of appointment of an assessor. It is simply a question of whether the judicial task can be better performed.¹²

Justice James Allsop, then President of the New South Wales Court of Appeal, has expressed the view that a private consultation between the judge and the assessor could be very helpful in competition law cases:

A degree of assistance in the interpretation of expert evidence would often be of significant assistance to the judge making it likely that time taken to resolve cases would be shorter and the physical energy demanded of judges to command the facts would be relieved. If one contemplates

⁷ Ibid 13.139.

⁸ [1944] AC 62.

⁹ Ibid 70-1.

¹⁰ (1997) 78 FCR 368.

¹¹ Ibid 373.

¹² Ibid 373.

the size of many competition cases, the sometimes platoon-like manning of each side with expert witnesses, solicitors, junior counsel, senior counsel and the recognition that one judge will decide the case at first instance, leads one to conclude that it is often quite unfair to expect a judge to be able to deal with these without some degree of assistance.¹³

The ALRC echoed this point, noting that while judges can specialise in particular categories of cases, they can still face technical evidence of enormous complexity in their area of legal expertise.¹⁴

Courts in other jurisdictions in Australia also have the power to appoint assessors to assist with complex evidence.¹⁵ Despite this being available to judges, Justice Allsop comments that he has “never seen the [relevant Federal Court] order used”.¹⁶ Justice Allsop says the “tool of the assessor, if carefully and thoughtfully used, could be of great utility to the modern judge hearing a case about any expert discipline”.¹⁷

There is a concern that the assessor might have too much influence over the judge, and express views that the parties might wish to challenge but have no opportunity to do so.¹⁸ It was mainly for this reason that the Ireland Law Reform Commission (“ILRC”) recommended against increasing the use of assessors in litigation, finding it was unlikely to be beneficial.¹⁹ The ILRC was concerned that the parties would not be able to challenge the information provided by the assessor, and that there was no way for the parties to form a view as to whether the assessor was undertaking their role with sufficient independence.²⁰ The costs of the proceeding could also substantially increase by adding another expert, as an assessor, to the trial.²¹ The ILRC explained its preferred approach:

It is submitted that a better way to increase the knowledge of the judiciary in technical or scientific matters is to encourage members of the judiciary to attend continuing professional development courses in such areas, rather than the use of specialist advisors in individual cases who remain unaccountable to either party or the court.

¹³ Allsop, ‘The judicial disposition of competition cases’, above n 1, 250.

¹⁴ Ibid 13.141.

¹⁵ See for instance Order 34B of the *Federal Court Rules* which allows for the Court, with the consent of the parties, to appoint an expert assistant to assist the judge on any issue of fact or opinion.

¹⁶ Allsop, ‘The judicial disposition of competition cases’, above n 1, 243.

¹⁷ Ibid 249.

¹⁸ Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Report 89 (2000), 13.152.

¹⁹ Ireland Law Reform Commission, *Consultation Paper – Expert Evidence*, CP52-2008 (2008), 5.330.

²⁰ Ibid, 5.327-30.

²¹ Ibid.

As mentioned in Chapter 1, in the patent infringement case *Kirin-Amgen Inc and Ors v Hoechst Marion Roussel Ltd and Ors*²² the House of Lords were, with the consent of the parties, given a series of seminars *in camera* prior to the case by a Professor of Biochemistry at Oxford University to explain the relevant aspects of recombinant DNA technology.

This, it is submitted, is a preferable approach to the use of assessors, as the information given in a series of seminars is likely to be generalised information on the subject and not specifically applied to the facts of the case at hand so will thus avoid the taint of bias of the person providing the expert information.²³

The IRLC is not alone in preferring an approach that severely limits the interaction between the judge and any assessor. In the English Admiralty case of *The Bow Spring v The Manzanillo II*,²⁴ the Court of Appeal of England and Wales held that principles of natural justice, as found in both the common law and the European Convention on Human Rights, required a transparent interaction between judge and assessor.²⁵ As the parties should have the opportunity to know the evidence on which the case is decided, which includes material put by the assessor before the judge, “any consultation between the assessors and the court should take place openly as part of the assembling of evidence.”²⁶ In practice, this means that both the questions that the assessors are asked, as well as the answers they give, must be disclosed to the parties.²⁷

Justice Allsop thought that this approach was not necessary to protect the rights of the parties. He said that:

... as long as it is clear that the task of consultation and its extent is to be disclosed, it is difficult to see why the judge should not have the availability of the assessor out of court as well as in court. The scope and difficulty of the evidence in many cases, [...] is such that a single judge is often left with a vast task which can take months to unravel. The availability of a consultative agency such as assessor would be of considerable assistance. It is not as if judges do not talk to others.²⁸

Justice Heerey made a similar point in *Genetic Institute Inc v Kirin-Amgen Inc (No 2)*²⁹, noting that “[i]n exercising judicial power, a judge is routinely assisted by persons who are not judges: counsel, solicitors, witnesses, the judge’s associate and secretary and other Court staff.”³⁰ Judges are able to manage the assistance offered by other people in a way that does not delegate their

²² [2004] UKHL 46.

²³ Ireland Law Reform Commission, *Consultation Paper – Expert Evidence*, (2008) CP52-2008, 5.331-3.

²⁴ [2005] 1 Lloyds Rep 1, [57]-[65].

²⁵ [2005] 1 Lloyds Rep 1, [57]-[65].

²⁶ *Ibid* [59].

²⁷ *Ibid* [61].

²⁸ Allsop, ‘The judicial disposition of competition cases’, above n 1, 249-50.

²⁹ (1997) 78 FCR 368.

³⁰ *Ibid* 371.

judicial authority. The ALRC was also convinced that courts should use assessors more often, and that they could play a helpful role in complex proceedings.³¹ The Victorian Law Reform Commission also recommended giving the power to the Court to appoint experts to assist the court as it “may be useful” in some circumstances.³²

III. THE DECISION TO APPOINT ASSESSORS IN THE KILMORE EAST BUSHFIRE PROCEEDING

Justice Forrest decided that he would appoint assessors to assist him with some of the expert evidence³³ after a briefing by two experts on the critical scientific concepts regarding the cause of the failure of the conductor.³⁴ He decided that he would be unable to understand properly the expert material without the assistance of assessors during the hearing of the evidence.

The plaintiff had submitted that the judge would be able to understand the evidence about scientific and engineering concepts with the assistance of the expert witnesses. Justice Forrest did not accept this submission, explaining that he was not confident that he would be able to understand all the evidence, or resolve any disagreement between experts without assistance.³⁵ He considered whether he should refer the relevant matters to a special referee, or sit with assessors. All the parties were against the appointment of a special referee.³⁶ While his Honour noted that this would not preclude him from appointing a special referee (which would provide the Court with a finding about what expert evidence should be accepted), he nevertheless decided against it for a number of reasons:

1. The cause of the failure of the conductor, which would be the issue that the special referee would assist with, was critical to the case.³⁷ He said in such circumstances, “I should be wary of abdicating responsibility for the determination unless absolutely persuaded as to the necessity of that course”.³⁸ His Honour preferred the alternative course of seeking the assistance of an assessor.
2. It was likely that issues of reliability and credit would be one of the factors in assessing the evidence of the expert witnesses, and this was an assessment better made by a judge than a

³¹ Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Report 89 (2000), 13.161.

³² Victorian Law Reform Commission, *Civil Justice Review: Report* (2008), 512.

³³ Ruling No 19 [2013] VSC 180 (18 April 2013).

³⁴ *Ibid* [2].

³⁵ *Ibid* [15].

³⁶ *Ibid* [21].

³⁷ *Ibid* [23].

³⁸ *Ibid*.

legally unqualified expert.³⁹ In addition, it could require an assessment of the evidence given in the trial outside the expert evidence session.⁴⁰

3. The question to be resolved would be a hybrid of legal and factual issues and a special referee would have to understand both the factual situation and legal concepts of breach and causation.⁴¹
4. The appointment of a special referee would cause further delay as the proceedings would have to wait for the referee to provide his or her report.⁴²
5. His Honour held that the process by which the report of the special referee was adopted could pose a real challenge to the Court. He was concerned that he might not be able to understand the calculations and reasoning underpinning any conclusions, and that it would therefore be very difficult to assess the report, particularly in the face of an attack on the report by either party.⁴³

Instead, Justice Forrest decided that assessors should be appointed to assist him. He held that they would enable him to “seek advice and guidance on scientific and engineering points which are beyond my ken” and was certain that “the judicial task can be better performed with such assistance and the likelihood of a fair determination enhanced.”⁴⁴ He delegated the selection of the assessors to Associate Justice Zammit, as she had been managing the expert conferences on the failure of the conductor and so was well placed to manage the appointment of assessors to assist with the same issues.⁴⁵

The assessors were chosen in close consultation with the parties. Associate Justice Zammit asked each of the parties to submit a list of names to the Court. She explained that:

Each party had an opportunity to present their six names and they basically said this is who we recommend first, second, third and why we think this is the best person given the issues in this case. [...] Their concerns were obviously, I think, the same as the Court’s: having the right people with the right experience and background.⁴⁶

From this list of names, Associate Justice Zammit worked with the parties to identify who was conflicted and so could not be appointed, and who was not available to participate in the

³⁹ Ibid [24].

⁴⁰ Ibid.

⁴¹ Ibid [25].

⁴² Ibid [26].

⁴³ Ibid [27-28].

⁴⁴ Ibid [34].

⁴⁵ Ibid [37].

⁴⁶ Interview with Associate Justice Zammit (13 August 2014, Supreme Court of Victoria, Melbourne).

proceeding due to other commitments, before settling on the two assessors that Justice Forrest went on to appoint in October 2013. The costs of the assessors were paid by the plaintiff, the first defendant and the second defendant in equal shares.⁴⁷

After they were appointed, Justice Forrest clarified what their role would be in the proceeding:

The primary role of the assessors is to assist the court in understanding the evidence of the experts. Applying the [*Civil Procedure Act*], combined with the principles of natural justice and guidance from the cases I have referred to, I set out below the scope of the role of the assessors in this case:

- a) The assessors' role is to assist the judge. The decision is for the judge alone.
- b) The assessors will sit with me during the concurrent evidence sessions. If they wish, they may question the experts (or counsel) in this context. Such questioning however will be limited to clarification of the evidence; that is, where they consider the evidence to be ambiguous, unclear, or incomplete.
- c) I may consult with the assessors while sitting if I find a point of evidence unclear and seek their immediate input as to an appropriate or useful inquiry to make.
- d) I will consult with the assessors whilst in chambers on matters raised by the experts in their oral evidence and in their individual and joint reports. This may include advice as to any questions the assessors think I should ask counsel or the experts in order to determine the questions at hand.
- e) I will seek the guidance of the assessors on technical matters upon which I lack the requisite knowledge to understand without qualified assistance. This may include "lessons" on matters fundamental to, for example in this case, fracture mechanics or vibration.
- f) If the assessors raise a theory or opinion that has not previously been identified by the parties, I will discuss this with counsel.
- g) The assessors may from time to time provide me with advice on matters over which there is a dispute between the experts. Such advice is not binding and the determination of a particular issue rests with the judge.
- h) I anticipate that I will consult with the [assessors] immediately after the conclusion of the concurrent evidence session and, from time to time, while drafting the judgment. This is likely to include seeking confirmation from them that I have properly understood the meaning of the expert evidence of conclaves 1, 3 and 4. I repeat, however, that their role is

⁴⁷ Order made 25 September 2013 and 3 October 2013.

confined to providing advice and ensuring that I have comprehended the evidence given. I also repeat that the decision on these issues is mine and mine alone.⁴⁸

This ruling ensured that the parties fully understood the limitations that Justice Forrest placed on his interaction with the assessors.

The assessors' first interaction with the experts was drafting questions for one of the expert conferences.⁴⁹ This conference was discussing part of the evidence that would be heard by the Court in one of the concurrent evidence session where Justice Forrest was going to be assisted by the assessors sitting alongside him. The questions were provided to the experts on the final day of the conference, and the experts were then instructed to work on them individually, to give yes or no answers, and if they wanted to they were able to explain their answers in the limited space provided.⁵⁰ The aim of the process was to gain a manageable overview of the individual opinions of the experts as opposed to their collective view.⁵¹ They participated in the concurrent evidence session by asking questions of the experts.

Aside from the questions provided at the conference and posed during the concurrent evidence session, the assessors had no real interaction with the parties or the experts. Legal counsel did not talk to them in court, the experts did not interact with the assessors outside of the conference and concurrent evidence session, and the assessors' interactions with Justice Forrest remained private.

IV. REFLECTIONS OF PARTICIPANTS

A. *Appointment of assessors*

Justice Forrest said he decided to appoint assessors once he was satisfied that he "could not manage the case" without the assistance of engineering experts with knowledge of the most complex parts of the expert evidence.⁵² He said the correctness of this decision was borne out by the evidence that emerged from the relevant concurrent evidence sessions. The experts told him the information produced by the case could have been the subject of "three or four PhDs".⁵³ It is difficult to see how he would have handled this level of complexity, as well as all the other issues the trial brought up, without assistance.

⁴⁸ *Ruling No 32* [2013] VSC 630, [27].

⁴⁹ Interview with Justice J Forrest (8 August 2014, Supreme Court of Victoria, Melbourne).

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

Justice Forrest made an order appointing Associate Justice Zammit to select the assessors, which she did with the input of the parties. She said that the concern of the Court was to ensure that the assessors appointed “understood their role” (in providing advice rather than making decisions) and had the “requisite knowledge to be able to assist the Court”.⁵⁴ It was also important that the assessors had “personalities that would be flexible enough and accommodate what was a fairly unusual sort of setting.”⁵⁵ A particular problem that arose in the Kilmore East bushfire proceeding was that part of the expert evidence the assessors would be assisting with involved a number of different areas of expertise. Associate Justice Zammit said that two assessors were appointed because it was clear that no one assessor was going to be able to “adequately traverse the range of issues”.⁵⁶

Her Honour said involving the parties made the process much more straightforward, and yielded good results:

I could never have put the list of names together. [...] [T]he parties [...] had access to the experts who knew who the leaders [in their fields] would be. [...] I felt that they [the experts] knew both locally and internationally who could deal with the sorts of issues that they had to deal with. [I]n terms of time and finding these people, it would have been a needle in a haystack for me. We were looking for people with very particular skill sets and [the parties] were able to effectively do all the work for the Court, pull together all their resumes, provide me with some of their published papers, put a summary of it together.⁵⁷

Justice Forrest said the way Associate Justice Zammit handled the appointment of the assessors was “totally appropriate”: the parties had an opportunity to participate in the process, and the assessors appointed were very helpful to the Court.⁵⁸

The legal practitioners were also satisfied with how the assessors were selected. One solicitor said the process was “pretty sound”, particularly as everyone had an opportunity to put forward names.⁵⁹ The other said the process was “appropriate”.⁶⁰ One barrister said it was essential for the Court to select the assessors, but he thought it was sensible to base this choice on lists provided by the parties. He said:

⁵⁴ Interview with Associate Justice Zammit, above n 46.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Interview with Justice J Forrest, above n 49.

⁵⁹ Interview with solicitor involved in proceeding (20 February 2015, Melbourne) (‘Interview with solicitor A’).

⁶⁰ Interview with solicitor involved in proceeding (9 June 2015, by letter) (‘Interview with solicitor B’).

I thought the Court was very good at selecting what I'll describe as a qualitative expert and a quantitative one. The parties set out the areas over which the assessors should have a background, sent out CVs, the court made its selection. I thought it was a very useful idea.⁶¹

There was some suggestion that the Court could have appointed assessors earlier in the proceeding.⁶² Associate Justice Zammit said greater "front end" involvement could have "truncated" the proceeding. In particular, they would have been able to assist with the setting of the agendas for the expert conferences, a task requiring substantial technical expertise.⁶³ While the experts also had that technical expertise, the assessors may have been more efficient as they were able to be more responsive to the needs of the Court.⁶⁴ They would have been able to assist the judge to determine what items were likely to be helpful in advancing the issues and to stay focussed on the critical issues that had to be resolved.⁶⁵ Similarly, one barrister said appointing assessors earlier in the case was "certainly [...] worth considering in an appropriate case" to help manage complex expert evidence. In particular, he thought the impartial expertise would have been very useful to assist the judge in dividing up the experts into the various expert conferences appropriately.⁶⁶

B. *Value of assessors*

The interviews with Justice Forrest and Associate Justice Zammit give a fuller understanding of the role the assessors played in the proceeding. Justice Forrest said each assessor had a different and complementary style and that they "assisted immeasurably in understanding the expert evidence."⁶⁷ He explained:

Each was extraordinarily helpful in terms of briefings prior to starting the expert evidence session, and [we] would spend a day to a day-and-a half going through the material and with the assessors using whiteboards [and] digital screens to assist me in understanding it. In terms of the actual trial, we conferred at virtually every break and prior to and after the core sitting days, and then on days when the court wasn't sitting we had the opportunity to talk.

[...]

⁶¹ Interview with barrister involved in proceeding (Afternoon of 24 February 2015, Melbourne) ('Interview with barrister B').

⁶² Interview with Associate Justice Zammit, above n 46.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Interview with barrister involved in proceeding (Morning of 24 February 2015, Melbourne) ('Interview with barrister A').

⁶⁷ Interview with Justice J Forrest, above n 49.

[After the two assessors left Melbourne] we then had several Skype sessions with [them]; one who was in Oxford and the other in Sydney. Essentially, those sessions were to endeavour to formalise [my] thoughts on some of the significant issues concerning the concurrent evidence session and [my] conclusions.⁶⁸

While the parties understood the assessors were not sitting in a judicial role, Associate Justice Zammit said that the experts giving evidence “struggled” with it, seeing them almost as equal to the Judge.⁶⁹

Most of the external participants all saw value in the appointment of assessors in the proceeding. The legal practitioners expressed some relief that Justice Forrest had access to experts to assist him understand the evidence the other experts were putting before the Court. One solicitor said that it was “necessary” to have assessors as it was “really hard for any single person to get on top of the vast range of disciplines that were at stake”.⁷⁰ He said that while his party had “some confidence in [their] scientific thesis” they worried about a “persuasive scientist” who managed to convince the Court to accept contrary evidence. He said they had “great confidence that the more qualified the scientific mind assisting the court, the better the process [would work].”⁷¹ The other solicitor said they were “of benefit to the trial.”⁷²

One barrister said that the presence of assessors helped the Court stay on topic:

[...] having [assessors] who were acknowledged experts in the relevant fields was a superbly effective way of cutting through the verbiage, cutting through the bullshit, and reassuring the parties that the judge was going to be able to understand evidence that was beyond PhD levels of sophistication.⁷³

The other barrister said that using assessors in highly technical or scientific cases was “a very useful idea” that “can only be of advantage to a judge.”⁷⁴ He said that assessors were “essential” for parts of the expert evidence in the Kilmore East bushfire proceeding as this evidence was extremely complex quantitative science, heavily reliant on sophisticated mathematical

⁶⁸ Ibid.

⁶⁹ Interview with Associate Justice Zammit, above n 46.

⁷⁰ Interview with solicitor A, above n 59.

⁷¹ Ibid.

⁷² Interview with solicitor B, above n 60.

⁷³ Interview with barrister A, above n 66.

⁷⁴ Interview with barrister B, above n 61.

modelling.⁷⁵ It does, however, depend on the nature of the expert evidence: he noted that Justice Forrest was able to sit without assessors for the more straightforward areas of expert evidence.⁷⁶

The experts also supported the role of the assessors in the proceeding. One said that he thought they were “great” and “both clever and lively and well over the subject material”.⁷⁷ Perhaps more problematically, his view was that they “quickly put together the arguments and had their own theories on most topics we covered”.⁷⁸ He said that:

My own view is that having these people sitting next to the Justice was a very clever strategy designed to do justice, and prevent gobbledygook tech-talk from bamboozling the court. It prevented or reduced my own enthusiasm to push the QC into a technical field as a means of defence, and encouraged me to answer the question with technical accuracy knowing that the Justice would have the answer explained if required.⁷⁹

He said that the assessors provided “a vector for technical communication”, and that “[s]everal of [his] own answers to questions during cross-examination, or in statements within the section summaries were directed at the Justice via the assessors.”⁸⁰ It was possible to have “gloves-off technical dialogue.”⁸¹ He saw considerable value in being able to provide “dense specific technical dialogue” to the Court and have it understood, but that not all experts exploited this possibility.⁸²

The other expert was more circumspect. He acknowledged that they “probably helped the judge a great deal”, but questioned whether they had the appropriate qualifications, saying “the science of the vibration of conductors, which was central to the failure, was outside their expertise.”⁸³ He said that while they were “well grounded in engineering and physics”, they “showed no experience of the procedures and functions of an electrical utility” and that they lacked industry experience.⁸⁴ He said that they shared this inexperience with many of the other experts.⁸⁵

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Interview with expert (24 March 2015, by email) (‘Interview with expert B’).

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Interview with expert (23 February 2015, by email) (‘Interview with expert A’).

⁸⁵ Ibid.

C. *Assessors and the expert conferences*

The assessors drafted questions on the critical issues for the experts in one of the larger expert conferences to answer at the conclusion of the conference.⁸⁶ Associate Justice Zammit said that while the summary of expert opinion this produced was helpful, the process adopted did not give enough warning to the experts that they would have to do the task at the end of the conclave. She explained:

The experts I think were pretty put out that [...] they were suddenly asked to do things individually again without any real notice. They thought the questions were [too simplistic], and it may have just been [...] that they were exhausted. Again, [...] in hindsight it would have been [better] to forewarn them that at the end [of the conclave] they would be asked to spend a day on their own with a set of questions.⁸⁷

This shows the importance of properly explaining to the experts what is expected of them during the process. It also suggests that the earlier appointment of assessors could be helpful in providing a framework for the expert conferences.

D. *Interaction between the assessors, the Court and the parties*

The assessors worked very closely with Justice Forrest for the month that the relevant expert evidence was presented to the Court. Justice Forrest said the assessors “effectively lived with me” during this period, and had desks in his chambers.⁸⁸ The main limit he placed on their interactions with him and the Court was the request they not ask questions about topics not raised in the expert reports.⁸⁹ He said that this was sometimes difficult as the assessors had particular views about aspects of the evidence not canvassed in the expert reports.⁹⁰ During the concurrent evidence session, he had to consider carefully whether each question asked by the assessors should be allowed, because he needed to ensure the assessors did not go outside the scope of the pleadings in the case or the expert reports. He said, however, that this caused no major difficulties.⁹¹

The legal practitioners thought the extent of the assessors’ involvement in the proceeding, and the limits placed on their interaction with the judge, were appropriate. One solicitor said he had “no complaint”, and that he could “tell from what their question was what their area of interest was,

⁸⁶ Interview with Associate Justice Zammit, above n 46.

⁸⁷ *Ibid.*

⁸⁸ Interview with Justice J Forrest, above n 49.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ Interview with Justice J Forrest, above n 58.

and it generally seemed to be about right.”⁹² He said he “didn’t perceive there to be a strong limit” on their interaction with the experts, so they were able to follow up with questions if “they were unsatisfied as to something”, and that this “was appropriate.”⁹³

He thought having the assessors asking questions of experts was “useful” as it was “an indication to us of what issues they thought were important [...] to understand the expert’s view fully.”⁹⁴ He went on to say that the questions asked made it “obvious” that one assessor was more across the material than the other, saying this assessor “understood the points, and knew exactly where were the soft points in someone’s case or the strong points”.⁹⁵ He said that he “wouldn’t say the other didn’t understand”, it was just that it was particularly obvious that one assessor had mastered the expert material.⁹⁶ Nevertheless, he said that his party “actually got confidence through the process and the questions that they fully understood what was being said” and that this was “helpful.”⁹⁷

The other solicitor said that the limitations on the assessors’ role were “appropriate.” He said the safeguard in the relevant ruling requiring the Court to discuss with counsel if the assessor “raised a theory or opinion that had not previously been identified by the parties” was particularly important “[g]iven the leading expertise of the appointed assessors.”⁹⁸

One of the barristers said a judge could use assessors for “a whole host of reasons”: to give “the judge a primer in the science beforehand”; to talk with the judge about questions to ask the experts during concurrent evidence sessions; to give separate advice on the evidence; or even to “assist with the draft judgment”.⁹⁹ He said that the critical thing was that there was transparency with the parties, and ensuring there was no delegation of judicial power.¹⁰⁰ Referring specifically to the assessors in the Kilmore East bushfire proceeding, he said their “actual performance [...] was very good”. He explained:

They were sitting there, they listened, they were allowed to ask questions, I thought their questions were very well targeted – particularly [one assessor] – and I thought that was very useful, and also just the sheer presence of two assessors there disciplined the experts. Even if they thought they could put it over counsel or the judge, if you have a professor on [both] side[s] of the judge, [...] and you’re an expert, you’re less likely to say something that you think you can get away with that’s

⁹² Interview with solicitor A, above n 59.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Interview with solicitor B, above n 60.

⁹⁹ Interview with barrister B, above n 61.

¹⁰⁰ Ibid.

pretty dodgy, [as] you're going to be picked up and made to look like an idiot. So I thought the assessors here were actually good in disciplining the performance of the expert witnesses in the concurrent evidence session.¹⁰¹

He said it was not necessary for Justice Forrest to reveal the advice he was given by the assessors, but noted it would have been appropriate if it had been about material that had not been the subject of evidence or had not been raised in front of the parties.¹⁰² He said it was understood by the parties that the assessors were there to "assist the judge to understand the evidence as it [...] unfolded", and that this was appropriate.¹⁰³ He explained that strict controls were not necessary and it was better just to "trust the judge a little bit." He said it is important for the judge to disclose in broad terms what role the assessors will be playing in the judge's chambers and in the judgment writing process, but the parties "don't have to know chapter and verse of what the assessor has said to the judge behind closed doors." He said that:

[...] I don't see difficulty in a judge saying to an expert behind the scenes saying the concurrent evidence session is over, "look I didn't quite understand how the Strouhal number fits into the sequence of Aeolian vibration, can you just take me through that formula again?" - that's not something I would expect a judge would need to disclose.¹⁰⁴

He said that this was not unlike judges informally speaking with other judges or their associates to "road test a particular proposition". He said "as long as the judge is not taking into account something the parties have never had an opportunity to answer" there was no difficulty in the assessors providing assistance.¹⁰⁵

One expert said the "assessors befriended people who demonstrated technical capacity," and that "their frustration at questioning people who misinterpreted the question, or couldn't answer a question on notice, was obvious."¹⁰⁶ He also said that the assessors, somewhat problematically, showed an "enthusiasm to follow their own pet argument or interpretation of the data."¹⁰⁷ He said that this seemed to "overstep their duty and put them in a position where their argument [...] needed to be cross-examined, or questioned."¹⁰⁸ The expert said that he was unwilling to do this as "when [...] [it] occurred it felt like I would appear to be picking a fight with the Justice, something

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Interview with expert B, above n 77.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

I was told not to do.”¹⁰⁹ He said, however, that he was “saved from this by the Justice who stopped the [assessor asking] questions” and moved the proceeding along.¹¹⁰

E. *Abdication of judicial power*

Justice Forrest did not accept that the appointment of assessors placed him at risk of an abdication of judicial power. He said that after his experience in the Kilmore East bushfire proceeding, he remained convinced that the appointment of assessors was valuable:

[...] whilst there is a criticism that the assessors have too much or may have too much non-transparent influence on the judge, the judge is well aware [...] that it is his or her decision alone, whatever the assessors might say, and that the assessors’ role is simply to assist in the evaluation of the expert evidence.

[...] If assessors were not appointed I would have blundered through the expert evidence and I think at one point of time or at least a number of points of time would simply be incapable of understanding the concepts being advanced by the experts. And it’s all very well to talk about transparency; it’s fundamental that the parties get a just result. And if they have a judicial officer that doesn’t understand the arguments that they are making on factual issues then they will not get a just result. So I reject emphatically the idea that assessors should not be used or should not be part of the judicial process. On the other hand, I think it’s important to bear in mind that it is the judge’s role alone to determine the evaluation of the expert evidence.¹¹¹

Justice Forrest said he was careful to provide the assessors with guidance about their procedural and substantive role in the trial, giving them copies of the various rulings and explaining on multiple occasions the limitations of their role. He said that they were “able to follow without any real encouragement or further clarification the different roles we all fulfilled”.¹¹² This is a prudent approach: the assessors will have opinions about what evidence should be accepted, but the judge should be careful to ensure they understand their role is not to decide the case, but to assist the judge.

None of the other participants viewed the use of the assessors as an abdication of judicial power. One solicitor said that it was “nonsense” that the appointment of the assessors would be an abdication of judicial power.¹¹³ The other solicitor said it was “completely appropriate that

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Interview with Justice J Forrest, above n 58.

¹¹² Ibid.

¹¹³ Interview with solicitor A, above n 59.

assessors were involved in this proceeding.”¹¹⁴ He said that the role of the assessors in assisting the judge was clear to the parties. He said their presence ensured that “having heard all this evidence [Justice Forrest] assimilated it correctly and understood it” and was weighting evidence appropriately, appreciating when a particular issue was determinative or “simply a consideration amongst the vast number of considerations to take into account in working out what had happened.”¹¹⁵ The solicitor “never had any sense the judge would simply be applying someone else’s views.”¹¹⁶

Similarly, one barrister said that he “never had any concern that Justice Forrest was going to be dictated to by anybody, an assessor or anyone else.” He said that with a “highly experienced, highly regarded judge who we know was trying to do the best he could in the case”, he trusted the process. He said he “understood that the assessors were there to listen to the evidence and be in a position to discuss with the judge” and that he considered this was “a sensible solution to a really difficult problem.”¹¹⁷ The other barrister agreed, saying it is a “nonsense argument” that the judge was abdicating judicial power; in this case there was no doubt that “ultimately it [was] for the judge to make the decision.”¹¹⁸ As long as the way in which the judge informed himself was transparent and consistent with procedural fairness to the parties, it was not a real issue.¹¹⁹

V. CONCLUDING REMARKS

The appointment of assessors in the Kilmore East bushfire proceeding appears to have been a success. All the participants interviewed, and particularly Justice Forrest, regarded them as being beneficial to the trial. The assistance they provided Justice Forrest in understanding the expert evidence coming from the most scientifically complex expert conference was essential. The suggestion that assessors be appointed earlier in the proceeding to help plan the expert conferences may be worth considering in cases of similar complexity in the future.

The assessor selection process adopted by Associate Justice Zammit worked well in this case. Requiring the parties to produce the list of candidates and then make submissions on which to appoint ensures the parties have input into this decision. Her Honour recognised that she would have found it very difficult to put together a list herself, and that the parties were much better

¹¹⁴ Interview with solicitor B, above n 60.

¹¹⁵ Interview with solicitor A, above n 59.

¹¹⁶ *Ibid.*

¹¹⁷ Interview with barrister A, above n 66.

¹¹⁸ Interview with barrister B, above n 61.

¹¹⁹ *Ibid.*

placed to make an assessment of who were the leading scholars in the field. In addition, including assessors from the two different professional backgrounds represented in the relevant expert conference was an appropriate way of ensuring the advice received by Justice Forrest was balanced and comprehensive.

The order made by Justice Forrest defining the role of the assessors set appropriate limits. The barristers expressed relief that there were experts sitting as assessors alongside the Judge to ensure that he properly understood the evidence. Similarly, the experts said the ability to engage in a technical dialogue before the Court made providing accurate evidence easier. The experts picked up that one assessor had a pet theory that he was trying to put before the court, but this seems to have been adequately dealt with by Justice Forrest.

None of the participants thought that the appointment of assessors in this case amounted to an abdication of judicial power. This was despite the parties not knowing everything the assessors and Justice Forrest discussed, nor what conclusions the assessors reached about certain issues. As noted by one of the barristers, requiring disclosures of this kind would have made it much more difficult for the assessors to provide the kind of on-the-spot advice the judge sometimes needs as he or she is working through the expert evidence produced to the Court. It is clear that a seminar prior to the commencement of the trial would not have been nearly as useful to Justice Forrest in working through and understanding the expert evidence.

It is important to recognise a crucial limitation of using this case as an example: it was settled prior to a final decision being handed down. It is possible that if one of the parties or their experts had detected that the conclusions of Justice Forrest in a final judgment were derived from one of the assessors, they would have been much less positive about the use of assessors. Notwithstanding this limitation, the Kilmore East bushfire proceeding suggests that the use of assessors can be valuable in cases dealing with highly complex expert evidence.

VI. APPENDIX

A. *Section One: View from the Victorian bench*

The judges interviewed who were not involved in the Kilmore East bushfire proceeding did not have any experience with the use of assessors in civil trials. They thought assessors could be useful in some cases, but that it was critical for the role of the assessor to be fully explained to the parties with the limits of any interaction between the judge and the assessor made clear.

Justice Almond said he had never used an assessor, but that he did not have any “philosophical objection to the use of them.” He said they could be particularly useful for cases like the Kilmore East bushfire proceeding that are of a “different order of magnitude altogether” and are “highly technical.”¹²⁰ Justice Croft said that he had not used an assessor either, but that he would certainly contemplate it after some difficult experiences with cost determinations.¹²¹ He said that it could be “very, very useful” in managing concurrent evidence and help fill any gaps in the judge’s knowledge of the evidence.

Justice Hargrave said he understood assessors just sit with the judge so the judge can consult with them, and that their “role in the judge’s final reasons will be unknown.”¹²² It was a much more sensible option than having the parties called back in every time the judge confronted a problem in writing the judgment with understanding the expert evidence, which would substantially increase the cost and time the proceedings would take.¹²³

Justice Croft noted that the appointment of assessors would be “very tricky.” It would be necessary to be “very careful how that process is handled” and the “parties must know very clearly what the role of the assessor is.”¹²⁴

1. *Distinction between Assessors and Special Referees*

Justice Hargrave said that assessors and special referees could both assist the Court, but that they served different needs:

It depends on how large the reference is, I suppose. If it’s purely technical, and the disputed facts relate to the expertise of the special referee, I see no reason why they can’t determine the facts. They’re much better at doing that and the court’s not bound to accept the referee’s report. If there are critical facts which are bound up with the credit of the witnesses who are giving evidence at the

¹²⁰ Interview with Justice Almond (13 October 2014, Supreme Court of Victoria, Melbourne).

¹²¹ Interview with Justice Croft (14 October 2014, Supreme Court of Victoria, Melbourne).

¹²² Interview with Justice Hargrave (6 October 2014, Supreme Court of Victoria, Melbourne).

¹²³ *Ibid.*

¹²⁴ Interview with Justice Croft (14 October 2014, Supreme Court of Victoria, Melbourne).

main trial, then assessors are a really good idea to sit there and help the judge and when he or she comes to decide that factual issue.¹²⁵

He said that parties were normally happy to have specific factual matters sent to a special referee or court-appointed expert as long as it was appropriate to the facts in the case and the process fully explained.¹²⁶ Special referees or court appointed experts are particularly useful where, for instance, there is a significant amount of accounting calculations but the underlying facts have been determined.¹²⁷ He said this is much more efficient and can save the parties money.¹²⁸

2. *Assessors as an abdication of judicial power*

The judges did not consider that using an assessor was necessarily an abdication of judicial power. Justice Almond was not convinced there was a risk as long as the assessor has a “confined role” to assess on a particular aspect of the case.¹²⁹ Justice Croft said that while the parties may be concerned about the risk of delegation of judicial authority, in the end they will have to trust the Court that the “internal processes” are appropriate.¹³⁰ His Honour likened it to the role that associates and researchers can play in assisting judges in the judicial process:

How far do you need to go with the case summaries or submission summaries, drafts of bits of judgments before you say, “Aha, you’ve crossed the line. In fact, you’re not actually deciding this; you’ve delegated the function”. Now, I think as long as everyone’s aware of the potential problem, and that you really do read the evidence, and read the cases and direct your mind to it as a judge, and you sign off on it, you can’t seriously say it’s an abdication of the judicial function. [This is particularly] having regard to the massive resources that litigants have with law firms [...], you have one judge “versus” hundreds of people from two major law firms delivering material. [It is necessary to] be a bit sensible.¹³¹

Similarly, Justice Hargrave said that the appointment of an assessor is not an abdication of responsibility.¹³² It is something that can assist the judge to deal with very complex evidence.

¹²⁵ Interview with Justice Hargrave (6 October 2014, Supreme Court of Victoria, Melbourne).

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ Interview with Justice Almond (13 October 2014, Supreme Court of Victoria, Melbourne).

¹³⁰ Interview with Justice Croft (14 October 2014, Supreme Court of Victoria, Melbourne).

¹³¹ Interview with Justice Almond (13 October 2014, Supreme Court of Victoria, Melbourne).

¹³² Interview with Justice Hargrave (6 October 2014, Supreme Court of Victoria, Melbourne).

B. *Section Two: Methodology*

The material for this research project was gathered in interviews with judges of the Supreme Court of Victoria and some of the participants of the Kilmore East bushfire proceeding. The interviews were conducted in late 2014 and early 2015 in person and by email and letter. The judges selected included Justice Forrest and Associate Justice Zammit (as she then was), who presided over parts of the proceeding, and other judges, who were chosen as they were thought to represent a range of different views about the management of expert evidence (Justice Beach, Justice Croft, Justice Almond and Justice Hargrave). The participants of the Kilmore East bushfire proceeding who were interviewed were selected to ensure that the research took account of both the plaintiff and defendant sides, as well as covering the different roles within the proceeding. To this end, two barristers, two solicitors and two experts were interviewed. They agreed to be interviewed on the basis that they would remain anonymous due to the sensitive nature of some of their comments, and so all identifying information has been removed from their answers.

Interviews in person were semi-structured and the questions were both broad (e.g. "What are your views on the use of assessors in the trial?") and focussed (e.g. "What are your views on the method of selection of the assessors?"). Interviews conducted by email or letter were written responses to the same questions asked in the in-person interviews. The research project has some obvious limitations: it was not feasible to interview all the judges of the Supreme Court or all the participants in the Kilmore East bushfire proceeding. It does not in any way assess the experience of the many plaintiffs, whose tragic experiences were the basis of the case. This paper is not intended to be a source of comprehensive empirical data. Rather, it aims to ensure the experience of the court during these significant proceedings is recorded and that any lessons that were learnt during the proceeding are captured for posterity. It is hoped that this record will be of value to other judges of the Supreme Court of Victoria, as well as judges in other jurisdictions and legal practitioners. One of the aims of the project was to better understand how less common methods of managing expert evidence were used by the court and perceived by participants - and the Kilmore East bushfire proceeding represents an excellent opportunity to assess some of these matters.