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Experts in the Australian hot tub

The Australian concurrent evidence reform and why it should be adopted by the Swedish legal system

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Summary

Concurrent expert evidence is a modern method of hearing expert witnesses in court that was created in Australia over the last decade. Concurrent evidence is about a new way of hearing expert witnesses that promises profound and well-needed change to expert evidence jurisprudence in Australia and conceivably the world.

Expert witnesses are court actors with specialized expert knowledge. The idea behind having expert evidence presented at trial is that experts will be able to communicate this expert knowledge to the members of the court and thus enable the judges to better understand complex issues in a particular case. Over the years significant problems inherent to expert evidence jurisprudence including soaring costs and time constraints as well as overt expert bias has festered in legal systems all over the world. Concurrent evidence seeks to mitigate these problems.

In both Australia and Sweden expert witnesses have traditionally been heard one by one in a sequential manner at trial. The novel invention of the Australian concurrent evidence reform is that the court hears two or more experts simultaneously, saving significant amounts of time and expense for the court. During the hearing, experts are also allowed and encouraged to ask each other questions and are made to emphasize the differences and similarities of their views. The open and collegial setting of this method, as opposed to the often confrontational and partisan atmosphere of traditional expert hearings, has led to the coining of the term “hot tubbing”.

It has also led to positive effects for the expert witnesses themselves who find it easier to present their findings in a less partisan setting and for the members of the court who are able to understand complex matters much better with the help of the questions the experts ask each other and by minimizing the influence of the parties’ lawyers.

This thesis deals with expert evidence in both Australia and Sweden. The differences between the two are significant in many fields, including the field of expert evidence jurisprudence. In Australia the hearing of expert witnesses have traditionally been dominated by the parties at trial while in Sweden, judges have historically had the leading role. Though significant differences remain to a certain extent, this thesis will show how many of the same problems regarding expert evidence exists in the two countries and how concurrent evidence could cure, not only Australia’s ills but also Sweden’s.

In Sweden, expert evidence is governed mainly by Rättegångsbalken’s 40th chapter, legislation written in the 1940’s and not significantly amended since. The law paints a wholly outdated picture of expert evidence jurisprudence in Sweden and my voice join that of many others in calling

for immediate expert evidence reform in Sweden. Within the context of wholesale Swedish expert evidence reform concurrent evidence could easily be created within the new law and would give Swedish courts a valuable tool to use in expert evidence court procedure.

Sammanfattning

”Concurrent expert evidence” (bäst översatt som ”samverkande sakkunnigbevis”) är en modern metod för hörandet av sakkunniga i rättsprocesser som växt fram i Australien under det senaste decenniet. Det samverkande sakkunnigbeviset utgör ett nytt sätt att höra sakkunniga på och visar lovande resultat.

Sakkunniga är rättsaktörer med specialkunskap i ämnen av intresse i en rättsprocess. Den grundläggande idén bakom sakkunnigbeviset är att sakkunniga skall kunna kommunicera denna specialkunskap till rättens ledamöter och på så vis kunna möjliggöra en bättre förståelse av komplicerade frågor utanför ledamöternas juridiska kunskap. Ur ett historiskt perspektiv har det länge existerat allvarliga problem med sakkunnigbeviset, framförallt höga kostnader, stor tidsåtgång samt sakkunnigas partiskhet och avsaknad av objektivitet. Det samverkande sakkunnigbeviset söker att mildra och motverka dessa problem.

I både Australien och i Sverige har sakkunniga traditionellt hörts var och en för sig i rättsprocesser. Den samverkande sakkunnigbevisemetodens viktigaste reform är att rätten hör två eller flera sakkunniga på samma gång. Genom att använda denna metod sparar rätten tid och kostnader. Under sakkunnigförhöret är de sakkunniga också tillåtna, och uppmuntrade, att själva ställa frågor till de andra sakkunniga samt att jämföra och kontrastera deras åsikter för att hitta gemensamma uppfattningar.

Den öppna och kollegiala atmosfären som skapas vid användandet av denna metod står i klar kontrast mot den ofta laddade och partiska stämning som det traditionella hörandet av sakkunniga ofta fört med sig. Denna positiva förändring har också lett till att det samverkande sakkunnigbevisets i gemene mans mun kallas ”jacuzzi-metoden”.

Den nya metoden har också positiva effekter för dels de sakkunniga själva som känner att metoden gjort det enklare för dem att presentera sina åsikter i en mindre partisk atmosfär och dels för rättens ledamöter som känner både att deras förståelse av komplicerade vetenskapliga frågor förenklas genom de sakkunnigas utfrågning av varandra samt genom att man minskar de juridiska ombudens involvering i förhöret.

Detta examensarbete behandlar sakkunnigbeviset i både Australien och Sverige. Skillnaderna mellan de två ländernas rättssystem är stora och så även inom sakkunnigbevisets fält. I Australien har hörandet av sakkunniga traditionellt dominerats av parterna medan rättens ledamöter historiskt sett har haft den ledande rollen i Sverige. Även då dessa fundamentala skillnader till viss del kvarstår så skall detta arbete visa hur den nya metoden för hörandet av sakkunniga kan bota eller motverka många problem som de två ländernas rättssystem har gemensamt.

I Sverige regleras sakkunnigbeviset främst genom Rättegångsbalkens 40:e kapitel, lagtext som formulerats på 1940-talet och som inte undergått noterbara förändringar sedan dess. Lagtexten målar en uppseendeväckande gammalmodig och felaktig bild av det moderna svenska sakkunnigbeviset och jag instämmer med dem som förordar en omedelbar reform. Inom ramarna för en genomgripande svensk reform av sakkunnigregleringen skulle den samverkande sakkunnigbevismetoden enkelt kunna införas i den svenska lagen och komma att utgöra ett värdefullt instrument för svenska domstolar i framtiden.

Abbreviations

ADR
AAT
CE
FCR
NSW
RB
UCPR

Alternative dispute resolution
Administrative Appeals Tribunal
Concurrent evidence
Federal Court Rules
New South Wales
Rättegångsbalken (SFS: 1942:740)
Uniform Civil Procedure Rules of
2005

1 Introduction

“Concurrent evidence is essentially a discussion chaired by the judge in which the various experts, the parties, advocates and the judge engage in an endeavour to identify the issues and arrive where possible at a common resolution to them. In relation to the issues where agreement is not possible a structured discussion, with the judge as chairperson, allows the experts to give their opinions without constraint by the advocates in a forum which enables them to respond directly to each other. The judge is not confined to the opinion of one advisor but has the benefit of multiple advisors who are rigorously examined in a public forum.”¹

I first came across the term “concurrent evidence” in an article by Adam Liptak in the *New York Times* on August 11, 2008.² The article was comparative in nature, discussing American expert evidence jurisprudence and contrasting it to an interesting modern expert evidence reform that had been developed in Australia over the last two decades known as “concurrent evidence”. On its most basic level concurrent evidence is about a new way of hearing expert witnesses that promises profound and well-needed change to expert evidence jurisprudence in Australia and conceivably the world.

Expert witnesses are court actors, either hired by a party to a suit or appointed by the court itself with specialized expert knowledge in a given field. The idea behind having expert evidence presented at trial, either through testimony or written submissions, is that experts will be able to communicate this expert knowledge to the members of the court and thus enable the judges to better understand complex issues in a particular case and help them reach a just verdict regarding technical issues the judges might know nothing about. Expert witnesses fields of expertise can include everything from cartography to calligraphy but among the most frequently called experts are found medical doctors and psychiatric professionals. Expert witnesses can be used in both civil and criminal matters, but as will be described below the idea of concurrent evidence is most fully applicable to the use of experts in civil matters.

Traditionally, expert witnesses have been heard one by one in a sequential manner at trial. The order in which the experts were heard, often determined by factors like what issue the expert would give evidence about and which party the expert had been called by. In complex court cases it is not uncommon for the court to first hear one parties’ expert witness and then having to wait days or even weeks before hearing the other parties’ expert

¹ McClellan, Peter “Medicine and Law Conference keynote address: Concurrent Expert Evidence”, 2007, p.19.

² Liptak, Adam “American exception: In US, expert witnesses are partisan”, August 11, 2008.

testifying on the same matter.³ The novel invention of the Australian concurrent evidence reform is that the court hears two or more experts simultaneously, saving significant amounts of time and expense for the court. The experts are also allowed and encouraged to ask each other questions and are made to emphasize the differences and similarities of their views, all in an attempt to enable members of Australian courts to more easily comprehend and evaluate the expert testimony as well as to foster a more collegial atmosphere. The open and collegial setting of CE, as opposed to the often confrontational and partisan atmosphere of traditional expert hearings, has led to the coining of the term “hot tubbing” to describe concurrent evidence. In this context the hot tub symbolizes a more laid-back setting where experts can relax and discuss complex issues in a thoughtful manner while feeling comfortable as well as professional.

This thesis deals with expert evidence in both Australia and Sweden. Australia is a common law-country while Sweden is a civil law-country and the differences between the two are significant in many fields, including the field of expert evidence jurisprudence. In Australia the hearing of expert witnesses have traditionally been dominated by the parties at trial while in Sweden, judges have historically had the leading role. Though significant differences remain, this thesis will show how many of the same problems regarding expert evidence exists in the two countries and how concurrent evidence could cure, not only Australia’s ills but also Sweden’s.

1.1 Topic and purpose

The topic of this thesis is a fairly new and internationally largely unknown Australian expert evidence reform regarding the hearing of expert witnesses, called concurrent evidence. The general purpose of this thesis is to answer two questions regarding this modern method of hearing expert witnesses: “What is concurrent evidence?” and “Should concurrent evidence procedures be adopted by the Swedish legal system?”

1.2 Method and material

In order to answer these questions, this thesis will be both descriptive and analytical in nature. It will describe in detail the practice of the hot tub-hearing and other related procedures as well as analyze the underlying ideas and concrete results. The analytical elements of the thesis will not be separated from the descriptive parts but will instead be interwoven with the descriptive parts so as to facilitate an interesting read.

In order to describe and analyze this new method of hearing expert witnesses at Australian courts I will focus on laws, regulation as well as court practice. I will also examine the historical development of expert

³ Judicial Commission of New South Wales, “Instructional DVD: Concurrent evidence, new methods with experts”, 2005.

evidence in general and concurrent evidence in particular from an Australian common law-perspective as well as examine modern-day concurrent evidence regulation in Australia on both the state and federal level as well as in judicial bodies outside the traditional court-structure.

I will analyze, not only the hot tub-hearing, but also two other crucial modern developments that enable concurrent evidence to work in the Australian legal system; the expert witness' "duty to the court" as well as the pre-trial hearing and writing of joint reports.

Since concurrent evidence is a fairly recent reform very little doctrinal materials have been written about the practice. There have been no books written exclusively about concurrent evidence and instead the bulk of this thesis' sources are articles from Australian law reviews and papers presented at meetings and symposiums of law professionals. In this regard the concerted effort by a few Australian judges to "spread the word" of concurrent evidence has proven invaluable. Especially the work of the Hon. Justice Garry Downes AM and the Hon. Justice Peter McClellan has been crucial to my understanding of concurrent evidence.

My investigation of concurrent evidence in Australia also relies heavily on legislation, both on the state and federal level. Though the Swedish tradition of having voluminous preparatory works accompanying legislation is somewhat lacking in the Australian common law system, I will also focus on the different reports and investigations conducted in Australia regarding concurrent evidence. The most important of these reports and investigations were carried out on the state level by the various states' Law Reform Commissions and presents the most complete and voluminous sources available about concurrent evidence. Another important source of information regarding the everyday workings of concurrent evidence is found in so-called "guidelines", "recommendations", "Practice Notes", "Practice Directions" and "codes of conduct" issued by various Australian courts. The fact that these instruments are non-binding character does however have to be acknowledged.

In my effort to show why concurrent evidence procedures should be adopted by the Swedish legal system I will describe the historical development of expert evidence in Sweden and compare and contrast this to the development in Australia and other common law countries. I will also analyze current Swedish expert evidence law in detail and investigate whether concurrent evidence procedures could work within the framework of current Swedish law.

I will show how and why concurrent evidence should be adopted by the Swedish legal system. Though the many problems concerning expert evidence testimony might be slightly different and slightly less alarming in Sweden than in Australia, there still are plenty of reasons to change Swedish expert evidence law. Especially the terribly outdated RB 40 is in dire need

of a reform and concurrent evidence could easily be made a part of a wholesale reform in this regard.

Answering these questions will require the careful study of Swedish expert evidence law, i.e. RB 40. Though further expert evidence regulation can be found in some supplemental Swedish legislation it does not apply to the topic of concurrent evidence. I will also consult preparatory materials as well as several general commentaries on Swedish court procedure law. In my study of the historical development of expert evidence in Sweden a special mention should be made of Dr. Henrik Edelstam's crucial dissertation "*Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet*", the only current wide-encompassing scholarly work on Swedish expert evidence jurisprudence.

1.3 Delimitations

It is important to point out that concurrent evidence is just ONE modern way of dealing with the many problems associated with expert evidence. Other modern reform ideas in this field include; ways of limiting the number of expert witnesses allowed to be called at trial for example by having the court limiting the parties to one expert each in simple cases, the process of moving away from experts hired by parties and towards court-appointed experts as well as requiring the parties to disclose all payment arrangements made with experts in order to illuminate eventual bias. This thesis will only mention these other ideas in passing and only to the extent that it applies to concurrent evidence. This thesis does not suggest that concurrent evidence is a panacea that will cure every problem associated with expert evidence but it does suggest that concurrent evidence is an interesting reform with great promise that works well in Australia and that could work equally splendidly in Sweden.

The comparison between Australian and Swedish expert evidence jurisprudence is a crucial part of this study, but at the same time this thesis is not a comprehensive study of the many similarities and differences between the Swedish and Australian legal systems. For this reason it is important to limit the comparative aspects of this thesis to the issue of expert evidence jurisprudence. Though there are many other important and interesting differences between the systems, only the ones with a direct impact on expert evidence will be handled.

1.4 Disposition

In Chapter 2 I start by presenting the concept of concurrent evidence (the hot tub-hearing) as well as the larger term "CE procedures". CE procedures is a term that includes both the hot tub-hearing and certain other modern procedural ideas that enable the hot tub-hearing to function in the Australian legal system; the expert witness' general duty to the court, the pre-trial

conferences of several experts and the writing of joint reports between several experts.

Chapters 3 and 4 describe the historical context of expert witness evidence in general and CE procedures in particular in both Australia and Sweden. I focus particularly on the differences in expert evidence jurisprudence between the two countries in order to assess their importance for the prospects of CE procedures being adopted in Sweden. The most crucial difference between the two is the profound difference between a country like Sweden where there has traditionally been a strong bias towards experts appointed by the court and Australia where the tradition has tended more towards experts hired by the parties to a suit and the differences this has helped foster. Weight is also given to the analysis of current expert witness regulation in Sweden and Australia in order to highlight the differences and similarities. A subsection of Chapter 3 is dedicated to a largely unknown and seldom-used paragraph in RB 36 that in the author's opinion opens the door for CE procedures in Sweden and signals an acceptance of certain underlying principles of CE.

Chapter 5 deals with the empirical evidence for the positive effects of CE procedures. Only one study has been completed on the subject but that study is described and analyzed in detail along with a discussion regarding whether these results tell us much about the prospect of CE procedures in other jurisdictions, including within the Swedish legal system.

Lastly, in Chapter 6 the main question of the thesis regarding whether CE procedures should be adopted in Sweden is answered. I find the prospects of CE procedures in Sweden good, though they would most probably come about only through a wide-encompassing and well-needed reform of RB 40. CE procedures would fit neatly into current and future Swedish court procedure and would not necessitate profound changes to the Swedish system. The reason why CE procedures none the less are most likely to be instituted in Sweden through wide-encompassing reform of RB 40 is that the law is terribly outdated and lacking in many crucial regards, and that scholars have called for its reform for decades.

2 Concurrent Evidence and “CE procedures”

“Concurrent evidence” (henceforth CE) is a term most commonly equated with the simultaneous hearing of two or more expert witnesses at Australian courts, a practice also known by its sobriquet: the hot tub-hearing. It is a very modern method of hearing expert witnesses with great promise. But my close examination of how CE works in the Australian legal system shows that saying that concurrent evidence equals the simultaneous hearing of two or more experts is not adequate. In order for the simultaneous hearing of several experts to have the many positive effects to be outlined shortly, CE cannot exist in a vacuum – CE must exist within a greater framework of other modern ways of dealing with the problems inherent to expert evidence jurisprudence like bias and cost. The hot tub-hearing is doubtlessly the most striking and significant new development associated with CE, but without the help of other new reforms CE would never work. In order to address this I use the term “CE procedures” in this thesis. This is a new term that includes both the hot tub-hearing and these OTHER modern ideas that are central to the day-to-day workings of the hot tub-hearing. Besides the hot tub-hearing itself the term “CE procedures” include;

- *the modern emphasis on the “expert’s duty to the court”
- *the compiling of a joint reports by the experts at pre-trial conferences
- *the preparation of experts and parties before the hot tub-hearing

What CE procedures primarily do is present the Australian legal system with a promising new way of dealing with the problems of traditional expert evidence testimony. The goals and aspirations of courts’ using CE procedures are often presented as:

1. *To enable judges, legal representatives and other experts to better understand expert testimony and facilitate effective analysis of the testimony so as to help the judges make the correct (or preferable) decision in an given case.*
2. *To assist experts in fulfilling their role as independent advisors whose primary role is to assist the court.*
3. *To enhance the efficient operation of the court; to keep costs down and reduce the time needed for taking expert testimony.*⁴

If CE procedures can live up to these lofty goals, the benefits of using CE include:

1. CE procedures can save time, both at trial where the hot tub-hearing helps members of the court quickly identify and discuss key issues

⁴ AAT, “An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal”, 2005, p.4.

and at the pre-hearing stage where the writing of the joint report helps the court understand contentious issues. In the famous *Coonawarra Wine Region* case⁵, the use of CE procedures in a highly complex case is said to have saved the Australian Administrative Appeals Tribunal an astonishing 4 months and 3 weeks of hearing time allotted for the hearing of expert witnesses.⁶

2. CE procedures limits the role and influence of the parties' lawyers in the court process and instead helps foster a more professional and collegial discussion between experts, chaired by a judge.
3. Expert witnesses experience this new way of hearing their testimony as less confrontational and have been found to make more concessions, state matters more succinctly and identify more shared views between experts during the hearing.
4. Due to the information gathered in the joint report and nature of CE, the questions asked between the experts, between the judge and experts as well as between parties and experts are more constructive and helpful to the court's understanding of the matters at hand and wrestle much of the control of the traditional cross-examination away from the lawyers.⁷
5. There is also some evidence that the prospect of CE procedures encourage parties to settle out of court.⁸

In this chapter I will describe and elaborate on both the hot tub-hearing and the other new ideas that make up "CE procedures". Although there is no all-encompassing law or regulation governing CE procedures in Australia I will use both federal and state law as well as "guidelines" and "codes of conduct" that many Australian courts have issued regarding the use of CE procedures at trial to describe the inner workings of CE procedures. I will structure the presentation of the different features of CE procedures, not by which features are the most important (in which case the hot tub-hearing would obviously be the first and most important feature in my opinion) but instead chronologically; first the "duty to the court" which is an overriding theme that exists outside of court procedure, then the writing of joint reports on the pre-trial stage and lastly the hot tub-hearing with its many different stages of the hearing.

I will also give a concrete detailed example of how, step-by-step, CE procedures work in an Australian judicial body, going through every step of the process through the eyes of the members of the Australian Administrative Appeals Tribunal.

⁵ *Coonawarra Wine Industry Association Inc and Others v. Geographical Indications Committee and Others*(2001 AAT 844)

⁶ Downes, Garry "The use of expert witnesses in court and international arbitration processes", 2006, p.12.

⁷ McClellan, Peter "Expert assessment: the NSW Supreme Court's progress", *Lawyer's Weekly*, 2007, p. 3f.

⁸ See 5.1.3.

2.1 The features of CE procedures – something old, something new

As has been described above, CE procedures do not exist in a vacuum or in a legal universe of its own. CE procedures are just one out of many modern ideas in the field of expert evidence jurisprudence that aim to mitigate problems associated with expert evidence like soaring cost and apparent bias. Other interesting modern developments in expert evidence court procedure in common law as well as civil law countries across the world include⁹:

*Modern ideas to limit the number of expert witnesses to be called, for example by having the court limiting the parties to one expert each in simple cases (in common-law countries often so-called fast-track cases).

*The process of moving away from experts hired by parties towards court-appointed experts (or “joint-party appointed experts”).

*Requiring the parties to disclose all payment arrangements made with experts as well as the (in common-law countries) controversial idea of prohibiting all contingency-fee arrangements with experts.

*Imposing heavier sanctions on experts for various kinds of misconduct.

*Developing training programs for expert witnesses.

*Developing expert evidence jurisprudence through case law rather than statute in the American manner exemplified presently in US case law by “the *Daubert* test” regarding the admissibility of expert evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁰

*The trend towards a class of “professional experts”, professionals who spend significant parts of their professional career being expert witnesses before courts (most significantly in the United States) and ways to deal with the problem of overt partisanship in these situations.¹¹

To the extent that these other modern developments apply to CE procedures they will be discussed in this thesis (for example the idea of imposing heavier sanctions on experts for various kinds of misconduct has been made a part of the new “duty to the court” included in CE procedures) but otherwise they will not be discussed further.

One of the most interesting things with CE procedures is their hybrid nature; CE procedures include something old and something new, something invented and a lot of things borrowed. CE procedures in Australia include features that are totally new and unique to the Australian legal system while other features are procedural rules with a grand tradition in western legal societies. The parts of CE procedures that are unique, like the compilation of the joint report and the interesting physical setup and ideas behind the hot tub-hearing are naturally the most interesting features to discuss. But other

⁹ Victorian Law Reform Commission, “Civil justice review”, 2008, p.483.

¹⁰ Mnookin, Jennifer “Expert evidence, partisanship, and epistemic competence”, Brooklyn Law Review, vol. 73.3, 2008 and Bernstein, David “Expert witnesses, adversarial bias, and the (partial) failure of the *Daubert* revolution”, Iowa Law Review, vol. 93, 2008, p.102ff.

¹¹ Ibid

features of CE procedures that are not necessarily unique to CE are also of great interest if one aims to fully understand this new method of hearing experts. One of these features of CE procedures that are not unique to CE but used throughout the Australian legal system is the modern idea of a “general duty to the court”. But since this new duty to the court is an integral tool that enables CE procedures to function it will be discussed in this thesis. On the other hand, the issue of reimbursement of experts and legal aid to parties, which works in the exact same way when experts are heard concurrently as when they are heard using the traditional manner, will not be investigated any further in this thesis since it has no influence on CE procedures.

2.2 The expert’s “general duty to the court”

One recent development within the field of expert witness jurisprudence in common law countries that has had a profound influence on CE is the modern emphasis on the expert witnesses’ “general duty to the court”. The reform, which was pioneered in England but spread to the Australian legal system signifies a new focus on the expert’s overriding duty to the court and not to the parties (even if the expert is retained by the parties). It was sparked by the proposals in a highly influential British procedural reform report spearheaded by the respected British scholar Lord Woolfe, called the *Access to Justice Report*, or *the Woolfe Report* as it is more commonly known.¹² The report and the ensuing reforms it warranted in Britain more or less instantaneously spread to the Australian legal system. Its primary aim was to battle and counteract one of the most serious problems with expert evidence jurisprudence, the view that expert witnesses were “hired guns” without moral or professional fiber and that they simply were highly biased court actors that were paid by parties to make their case before a court.¹³

This central problem with expert evidence is discussed at length below.¹⁴

This modern idea of a “general duty to the court” has three main points that originated with Rule 31.23 and Schedule 7 of the Uniform Civil Procedure Rules of 2005 (henceforth the UCPR, the UCPR is Australian legislation governing civil procedure rules in the Australian state of New South Wales. Even though it only applies to the NSW region it has served as a blueprint for other regions’ codes of conduct. NSW is the most metropolitan region of the Australian continent, it includes Sydney)¹⁵:

¹² Department for Constitutional Affairs (UK), Lord Woolf, “Access to justice”, 1996.

¹³ NSW Law Reform Commission, “Report 109: Expert witnesses”, National Library of Australia, 2005, p.40ff.

¹⁴ See 3.2.3.

¹⁵ See for example NSW Land & Environment Court, “Practice Direction: Expert witnesses”, May 14, 2007, Federal Court of Australia, “Practice Direction: Guidelines for

1. An expert witness has an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise.
2. An expert witness's paramount duty is to the Court and not to the person retaining the expert.
3. An expert witness is not an advocate for a party.

This new duty to the court is a fundamental basis for the hot tub-hearing in that it lays down a foundation for improving the reputation of experts and by helping the experts more efficiently and clearly communicating their knowledge to the court. If members of the court as well as the public at large have no confidence in the integrity and professional bona fides of expert witnesses CE could never have the positive effects it strives for. Therefore the legitimacy that the new general duty to the court helps foster in the Australian legal system is crucial to CE. This new duty to the court exists for all expert witnesses in Australian courts regardless if they are tasked to give evidence concurrently or in the traditional sequential manner. Some legal commentators have chosen to view CE and the new duty to the court as two separate ways of dealing with the problems of expert witness partisanship¹⁶, but since the goals and aims behind this general duty corresponds to (some of the many) aims of CE I have chosen to view the new duty as a part of CE procedures.

Expert witnesses are provided with information (i.e. a code of conduct or a guideline issued by the court they are to testify at) about this duty to the court as soon as possible after having entered into agreement with the party retaining the expert (or in rare instances having been contracted by the court to give expert evidence, a situation that is more common in Sweden than in Australia and that is very rare even in Sweden). From this follows that the expert should receive a copy of the appropriate guidelines or codes of conduct even before they start to prepare a report or in any way start consulting with a party to the proceedings.¹⁷ For obvious reasons however it is almost impossible to ascertain whether this is actually the working practice throughout Australia.

According to UCPR Rule 31.23-24 regarding expert evidence at courts in New South Wales, expert evidence in either the form of a written report submitted to the court or oral evidence elicited at trial cannot be admitted before the expert has agreed to be bound by these rules, usually through a written declaration to be bound by the code of conduct.

In their everyday use of the codes of conduct it would, in my view, be preferable that Australian experts moved towards the practice of their British colleagues and their use of codes of conduct. In Britain, societies and

Expert Witnesses in the Federal Court of Australia”, vers. 6, 2008, NSW UCPR of 2005, Schedule 7.

¹⁶ For example, AAT, “An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal”, 2005.

¹⁷ Federal Court of Australia, “Practice Direction: Guidelines for Expert Witnesses in the Federal Court of Australia”, vers. 6, 2008, p.1.

interest groups for professional experts like the Academy Of Experts require its members to always include a declaration about the expert's duty to the court in their forensic reports and this certainly seems like an efficient and economical way of dealing with the issue.¹⁸ It should also be mentioned that the contents of the Academy Of Experts declaration goes far beyond the short statements required by Australian law and demand much more of the experts and their work further signaling the direction in which this issue is probable and applauded to develop.

Lastly it is important to keep in mind that this duty to the court should not be viewed as a rule pertaining to the admissibility of evidence. Thus, the (very frequently occurring) situation where an expert witness have a substantial connection to a party (for example it is not uncommon for large corporations to use their own employed scientists and experts in a field to serve as their expert witnesses) and thus may be charged with being biased, does not bar the admissibility of the expert's evidence. As was shown in *Australian Securities and Investment Commission v Rich (2005) NSWSC 149*, the courts are still free to evaluate the expert witness testimony as they see fit, even if the expert might be biased. In short, bias does not affect the admissibility of evidence but certainly does affect the weight given to that evidence and the way in which judges evaluate the merits of the testimony. Therefore, these codes of conduct does not bar evidence from being entered into a proceeding, they are recommendations that seek to increase the quality and reliability of the expert evidence.¹⁹ If a party to a suit wants to compromise the integrity of the evidence they are to present by having an employee give expert testimony it is in their absolute right to do so. This is oftentimes the case and if the employee presents highly qualified findings that cannot be refuted by the other party's expert then obviously nothing was lost and everything gained for the party.

The general duty to the court has been incorporated into many different documents and directions before different Australian courts and tribunals over the last decade. In fact, this new duty has become an essential part of modern expert evidence jurisprudence reform in all Australian states that has gone through civil procedure reforms in the last ten years and has been incorporated into civil procedure rules in the Australian states of Victoria, New South Wales, Queensland, South Australia, Western Australia and in the Commonwealth (meaning the system of federal jurisdiction) as well as in both the British and Canadian court systems.²⁰

The three general points outlined above exist, more or less verbatim, in all the different expert witness codes of conduct that exist throughout the

¹⁸ Freckelton, Ian "Australian judicial perspectives on expert evidence: an empirical study" p.9.

¹⁹ NSW Law Reform Commission, "Report 109: Expert witnesses", National Library of Australia, 2005, p.27f, Federal Court of Australia, "Practice Direction: Guidelines for Expert Witnesses in the Federal Court of Australia", vers. 6, 2008, p.1.

²⁰ Victorian Law Reform Commission, "Civil justice review", 2008, p.488ff.

Australian states. There are however other instructions in these codes of conduct that is not necessarily the same in all different states.

In some states, the courts have decided to issue expert witness codes of conduct that comprise just a few paragraphs in a larger document dealing with other issues connected to expert witness testimony.²¹ In other jurisdictions the codes of conduct include the three points above as a short but succinct instruction to the witnesses and very little other information for the witnesses.²²

I would however hesitate from paying too much attention to these subtle differences between the different codes of conduct since I believe the differences to be largely superficial. They seem to stem less from different views of how an expert witness should conduct himself, and more from stylistic concerns.

Even if I pay little attention to the stylistic differences between the different codes of conduct they do serve an important purpose. As will be shown in Chapter 3.2 detailing the historical context of expert evidence jurisprudence in Australia, common law countries have long been plagued with problems regarding overt expert witness bias stemming from the courts' lack of control of the proceedings. What the modern codes of conduct do is emphasize the overall duty of the expert to the court, and by doing so the Australian legal system is moving closer to the civil law tradition of tighter court control of the giving of expert witness testimony and tighter safeguards against expert bias. The idea is not to outright ban what objectively could be called "biased" expert testimony. Much like in Sweden where there is no ban on who any party can call as an expert witness as long as he or she lives up to certain professional standards. What the Australian courts try to do with the codes of conduct is foster an atmosphere where overt bias and "junk science" is minimized, and when it does exist like in the example of big corporations with their own contracted experts, that the bias is obvious, noted by the court and factored into the evaluation of the testimony.²³

The new general duty to the court goes hand in hand with CE in that they share the goal of fostering this more collegial and professional atmosphere in the court room and in creating a setting where experts are less partisan

²¹ NSW Land & Environment Court, "Practice Direction: Expert witnesses", May 14, 2007 and Federal Court of Australia, "Practice Direction: Guidelines for Expert Witnesses in the Federal Court of Australia", vers. 6, 2008.

²² NSW District Court, "Expert witness code of conduct" no date available (current)

²³ Edmond, Gary and Mercer, David, "Keeping 'junk' history, philosophy and sociology of science out of the court room: problems with the reception of *Daubert v. Merrel Dow Pharmaceuticals Inc*, UNSW Law Journal, vol. 20, p.20, 1997, Edmond, Gary, "Judicial representations of scientific evidence", *The Modern Law Review*, vol. 63, p.216, 2000 and Edmond, Gary, "Science, law and narrative: helping the 'facts' to speak for themselves", *Southern Illinois University Law Journal*, vol. 23, p.555, 1999.

and biased. However, since CE aims to do much more than just create this more collegial setting I have chosen to include the general duty to the court as one of the important features of the term CE procedures.

In this regard it is also interesting to compare the Australian use of the codes of conduct to the Swedish use of the special “expert witness oath” found in RB 40: 9. As will be outlined in Chapter 3.1.4 (some) expert witnesses in Sweden are sworn in using a different oath than regular witnesses. The Swedish oath in its succinctness emphasizes that there is a special relationship between the expert and the court (i.e. the task of giving expert evidence testimony) and thus there is an emphasis on how the expert’s overriding duty is to the court and not to anyone else. Though the duty to the court-reform in Australia has taken a different approach to the issue than the Swedish swearing of a separate oath, the underlying idea is the same. If Sweden were to adopt CE, the special expert witness oath would be a central foundation for the functionality of CE in Sweden (and as will be shown below, the practice of swearing a special oath would certainly have to be extended to all expert witnesses in Sweden which is not currently the case).²⁴

2.3 The joint report and pre-trial conference

In both Australian and Swedish courts, it has long been the practice to have parties disclosing the outlines of what kind of information their experts will testify to before the court in advance. By doing so the court seeks mainly to prevent the confusion and waste of time that can occur when experts talk “over each others’ head”, or seem to have wildly different assumptions of fact and circumstance as well as save valuable time at trial and facilitate an easier understanding of complex issues.²⁵

In Australian courts, before an expert can give regular expert evidence in most civil and criminal cases they are thus required to prepare a document outlining among other matters their qualifications as an expert and the facts and matters upon which the experts bases his testimony.²⁶

The joint report is a feature of CE procedures that substitutes two or more of these expert witness outlines for one concise document. It is an idea that does not exist outside the hot tub-hearing and that is uniquely crafted to

²⁴ For a thorough history of the development of the expert witness code of conduct in common law countries, see The Hon. Justice H.D. Sperling “*Expert evidence: the problem of bias and other things*”, 1999.

²⁵ NSW Law Reform Commission, “Report 109: Expert witnesses”, National Library of Australia, 2005, p. 87 and Fitger, Peter, “Rättegångsbalken: en kommentar”, Norstedts juridik, 2008, 40:15.

²⁶ For an exhaustive list of what a report should include, see NSW District Court, “Expert witness code of conduct” no date available (current), § 5-9 NSW Land & Environment Court, “Practice Direction: Expert witnesses”, May 14, 2007, Sched. 2.5-9.

enable CE to be carried out in an efficient manner. The idea behind the concept of the joint report is that when two (or more) experts have been tasked with giving CE at trial, instead of writing their own reports separately and submitting the reports to the court separately, they get together and complete a joint report for the court that they then submit together. This joint report is a written document compiled by the experts at a pre-trial meeting (conference). The aim of the report is mainly to present what they will testify to at trial, but also importantly to outline the points of agreement and disagreement between the experts. By doing so the report clarifies for the members of the court in advance what to expect from the testimony and what kind of professional agreements and disagreements exist between the experts. Knowing before the proceedings commence which questions will be contentious and in what ways the experts disagree help the members of the court formulate their questions and aid in their evaluation of the different testimonies.²⁷ Furthermore, by mapping out the already agreed-upon facts before the hearing, the parties and the court save precious time and costs.²⁸ These are all aspects of the pre-trial conference and the joint report that are very positive for the court, but the practice also results in positive effects for the experts themselves. Though it is hard to empirically prove, it has been stated that when experts meet beforehand and have to justify their opinions and conclusions to fellow experts, extreme views are often moderated and bias or adherence to “junk science” becomes apparent. Furthermore it is easier to concede a point in a friendlier, non-confrontationist environment at a pre-trial conference than in a charged court room. Therefore experts have been said to be more accepting of different views and more likely to accept another expert’s input under these circumstances.²⁹

Lastly, during the conference and writing of the report, the experts are able to talk about the issue on a much more sophisticated and expert-favored plane than in the court room where the discussion is traditionally led by counsel who are certainly not as proficient in the matter as the experts and more geared towards winning a case than to discuss matters of science.³⁰

Rules about the completion of joint reports and pre-trial conferences exist in New South Wales, Queensland, South Australia, Western Australia and the Commonwealth (federal level) as well as in large parts of the British court system and in some Canadian provinces.³¹

Of particular interest in this regard is a Practice Note (a document akin to a guideline or a Practice Direction), issued by the New South Wales Supreme Court describing in detail the compilation of joint reports before the court³²:

²⁷ Australian Law Reform Commission, “Report number 89, Managing justice: a review of the federal civil justice system”, 2000, chapter 6.

²⁸ NSW Law Reform Commission, “Report 109: Expert witnesses”, National Library of Australia, 2005, p. 93f.

²⁹ Judicial Commission of New South Wales, “Instructional DVD: Concurrent evidence, new methods with experts”, 2005.

³⁰ Wood, James “Expert witnesses – the new era”, 2001, p. 3f.

³¹ Victoria Law Commission Report: “Civil justice review” p.488ff.

³² NSW Supreme Court, “Practice Note: SC Gen. 11”, August 17, 2005.

22. Pursuant to (...), the report should specify matters agreed and matters not agreed and the reasons for non agreement.

23. The joint report should, if possible, be signed by all participating experts immediately at the conclusion of the conference and, otherwise, as soon as practicable thereafter.

24. Prior to signing of a joint report, the participating experts should not seek advice or guidance from the parties or their legal representatives except as provided for in this Practice Note. Thereafter, the experts may provide a copy of the report to a party or his or her legal representative and may communicate what transpired at the meeting in detail if they wish.

25. The report of the joint conference should be composed by the experts and not the representatives of the parties. The report should be set out in numbered paragraphs and should be divided into the following sections:

(a) Statement of agreed opinion in respect of each matter calling for report.

(b) Statement of matters not agreed between experts with short reasons why agreement has not been reached.

(c) Statement in respect of which no opinions could be given e.g. issues involving credibility of testimony.

(d) Any suggestion by the participating experts as to any other matter which they believe could usefully be submitted to them for their opinion.

(e) Disclosure of any circumstances by reason of which an expert may be unable to give impartial consideration to the matter.

26. The joint report, when signed by all participating experts, should be forwarded to the Court.

Though this practice note only applies to one court in NSW it still serves as the premier detailed example of how pre-trial conferences should be carried out and how joint reports should be written and submitted. There is my opinion no reason to believe that these rules could not just as well apply to other courts and it is just matters of practicality and style that has made this particular Practice Note one of the most comprehensive on the issue.

In most instances the joint report conference between the experts take place a few days before the court date, probably in order for the parties to not have

to retain the experts for longer periods of time. However, in certain types of cases, for example those concerning children before the Family Court of Australia, these conferences are held earlier and spans over longer periods of time in order to give the experts extra time to evaluate their differences as well as make sure that fundamental facts of the case (like the mental or physical health of a child) remain steady over a certain period of time.³³ In these cases the wish to save the parties time and funds is subservient to the needs of the child, an example of how CE procedures should remain fluid and adaptable to different case types and always adhere to what the NSW Attorney General's working party on civil procedure called "*maximum possible flexibility*".³⁴

2.3.1 Joint reports and pre-trial conferences at the NSW Land and Environment Court

When discussing pre-trial conferences and the compilation of joint reports extra attention should be given to the NSW Land and Environment Court. The court has exclusive jurisdiction over most environmental, building and planning disputes in Australia. It reviews administrative decisions, enforces civil rights relating to planning and imposes penalties for breaches of environmental law.³⁵

The court's procedural rules give the writing of joint reports interesting extended reach and importance even compared to the detailed rules from the NSW Supreme Court described above. A closer study of the writing of joint reports at the NSW Land and Environment Court helps us understand the crucial details of this part of the CE procedure, even if some of these rules are not followed in all other courts. It is my belief that these more detailed rules signal the way other Australian courts will move in coming years and will show how CE procedures can develop slowly but surely towards consensus between jurisdictions.

The extended rules for the writing of joint reports in the NSW Land and Environment Court include³⁶:

1. A party may not, without the leave of the court, elicit testimony from an expert that contradicts points of agreement in the joint report. From this follows both that an expert may not "change" his opinion regarding the matters that have been agreed to (without adequate

³³ Australian Law Reform Commission, "Report number 89, Managing justice: a review of the federal civil justice system", 2000, recommendation 105.

³⁴ NSW Attorney General's Working Party on Civil Procedure, "Report: reference on expert witnesses", November 14, 2006, p.1.

³⁵ AAT, "An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal", 2005, p.8f.

³⁶ NSW Land & Environment Court, "Practice Direction: Expert witnesses", May 14, 2007, Sched. 2.13-23.

explanation) and also that a party representative may not direct questions to an expert that leads that expert to contradict the findings of the joint report. In those instances when an expert at trial seems to have changed his mind, the other party may use the joint report during cross-examination to point this out.

2. Furthermore experts are instructed to think about the questions they think would be fruitful or themselves to answer during the procedure and present these questions to the court in the joint report. The court instructs the expert to formulate questions that aim to resolve an issue or issues in the proceedings. If possible, questions should be capable of being answered Yes or No, or by a very brief response.
3. Expert's must exercise their independent, professional judgment in relation to the joint report conference and the writing of the report, and must not act on any instruction or request to withhold or avoid agreement.
4. The experts must accept as fact the matters stated in other witness' statements or in filings by the parties. It is not the experts' role to decide any disputed question of fact or the credibility of any witness (it is important to emphasize that this regulation pertains to witness testimony, not expert witness testimony).
5. The report of the joint conference (i.e. the joint report) should be composed by the experts (and not the representatives of the parties). The report should be set out in numbered paragraphs and should be divided into the following sections:
 - (a) statement of agreed opinion in respect of each matter calling for report;
 - (b) statement of matters not agreed between experts with short reasons why agreement has not been reached;
 - (c) statement in respect of which no opinions could be given e.g. issues involving credibility of testimony;
 - (d) any suggestion by the participating experts as to any other matter which they believe could usefully be submitted to them for their opinion; and
 - (e) disclosure of any circumstances by reason of which an expert may be unable to give impartial consideration to the matter.

The NSW Land and Environment Court's rules also include detailed regulations about how the joint report pre-trial conference is to be conducted. For example, if the experts agree one of the experts can be tasked with secretarial duties (the experts will have to be sure this will not bias the report), otherwise they might retain an outsider (in effect non-expert) for secretarial duties. Furthermore the conference may be adjourned for no more than seven days. The court has the right to give the parties and experts directions on when and how to find a date for the conference all parties can agree to. The conference in itself is most fittingly held in person, but videolink and teleconference alternatives are also acceptable. The court can direct the conference to be held without representatives of the parties, if it feels this to be called for. The experts should however always be allowed to communicate with representatives of the parties before conference in

order to seek clarification from counsel as well as to receive any and all materials the parties think they ought to be privy to.³⁷

There has been no empirical studies of the joint reports and pre-trial conferences in Australia, but even if there exists no empirical evidence regarding the positive effects of joint report-writing in Australia, empirical studies from England shows that at least the practice of having experts meeting before trial and outlining points of agreement and disagreement have had a very positive impact on British expert evidence jurisprudence. Interestingly, this practice was also found to be highly useful in giving the parties an incentive to settle matters out of court.³⁸

Yet there remain some problems with joint reports and pre-trial conferences. Anecdotal evidence from the court suggests that in some circumstances, the effectiveness of joint reports suffer³⁹:

1. If there is hostility between experts real communication might be hard to accomplish and a clear mapping out of differences and similarities might be impossible to accomplish. If the expert cannot reach agreement on even the most rudimentary facts of a case, the conference and the report is likely to turn into a shouting match.
2. More senior, experienced and well-known experts might dominate the conference and the joint report might thus be lopsided in one direction.
3. It is crucially important that both experts at conference know exactly what is asked of them and the purpose of the joint report, otherwise it might not be a fruitful venture.

If these, probably rarely occurring problems, can be avoided the practice of writing joint reports and using pre-trial conferences can serve as a crucial and rewarding part of CE procedures. If the pre-trial conference is conducted in a thoughtful manner and the joint report is prepared with all due consideration and care the court can benefit greatly from the practice. With a good joint report to help them understand the complex questions, different perceptions of issues and underlying problems the court is ready to conduct a hot tub-hearing that will benefit everyone involved and save significant amounts of time and expense. If the practice of writing joint reports throughout Australia moves even more towards the extended rules used at the NSW Land and Environment Court it will become even more efficient and practical. It is however possible that this is already the case and that the only difference is that the practice has been codified at the NSW

³⁷ NSW Land & Environment Court, “Practice Direction: Expert witnesses”, May 14, 2007, Sched. 2.

³⁸ NSW Law Reform Commission, “Report 109: Expert witnesses”, National Library of Australia, 2005, p. 94.

³⁹ Ibid p.94 ff and McClellan, Peter, “Expert witnesses – the experience of the Land & Environment Court of NSW”, 2005, p.11f.

Land and Environment Court while remaining un-codified custom at other courts. As with the general duty to the court, it is crucial that the practice of conducting pre-trial conference and compiling joint reports is governed by “*maximum possible flexibility*” so as to enable different courts to adopt practices that work with their routines.⁴⁰

2.4 The hot tub-hearing

The most important part of CE is undoubtedly the simultaneous hearing of two or more expert witnesses in the court room, the so-called hot tub-hearing, or more precisely the giving of concurrent evidence (CE). During this hearing two or more expert witnesses give testimony concurrently, that is they sit together in the court room, oftentimes next to each other at a table or in a witness box (witnesses in Australian courts are traditionally seated in a “box”, but it has very little if any practical implications). The hearing is chaired by the judge (or judges) who directs questions to the experts with the assistance of the joint report. The judge also encourages the experts themselves to ask each other questions to better clarify the points of contention and create a more collegial and professional atmosphere. It would perhaps be easy to look at the hot tub-hearing as simply a hearing of several experts at once and it would be equally easy to assume that the only goal of the hot tub-hearing was to save time and money. But as has been described above that would be a gross simplification of a complex procedure that aspires to do a lot more. In fact the hot tub-hearing strives to have many different positive effects not only for the court, but also for the experts. The hot tub-hearings does aim to save significant amounts of time and expense by enabling the members of the court to quickly identify and discuss key issues, but it also seeks to limit the role and influence of the parties’ lawyers in the court process and helps foster a more professional and collegial discussion between experts, chaired by a judge. By doing so expert witnesses will experience the courtroom as a less confrontational setting and this will enable the members of the court as well as the parties and experts themselves to ask more insightful and illuminating questions that help the judges reach a just verdict. By creating a system where the members of the court get to hear both parties’ experts at roughly the same time, not separated by days or weeks, their evaluation of conflicting expert testimony is also made significantly easier.⁴¹

Hot tub-hearings are used in some form, in most Australian courts including the Federal Courts, in New South Wales, Victoria, South Australia and

⁴⁰ NSW Attorney General’s Working Party on Civil Procedure, “Report: reference on expert witnesses”, November 14, 2006, p.1.

⁴¹ Judicial Commission of New South Wales, “Instructional DVD: Concurrent evidence, new methods with experts”, 2005 and Judicial Commission of New South Wales, “Instructional DVD: Concurrent evidence, new methods with experts”, 2005.

Western Australia as well as in specialized courts like the Land and Environment Courts.⁴²

I divide the hot tub-hearing into four distinct stages;

1. The preparatory stage
2. The swearing-in and seating in the hot tub
3. The oral exposition
4. Questions between the court, experts and party representatives.

All four have to be closely examined in order to fully understand how the hot tub-hearing functions.

2.4.1 The preparatory stage

In order for the hot tub-hearing to succeed in its goals and aspirations it is imperative that the members of the court as well as the expert witnesses and the parties are adequately prepared. Without adequate preparation the hot tub-hearing risk yielding fruitless results.⁴³

The preparation of expert witnesses:

It is crucially important during the preparatory stage of the hot tub-hearing for the expert witnesses to be informed of what are expected of them. Expert witnesses should be intimately acquainted with the goals and aspirations of CE in order to understand the positive effects of the hot tub-hearing. They should understand their own relationship with the party that might have hired them as well as to the court and should understand the importance of cooperation between the experts in the fostering of a more collegial atmosphere. As was the case with the experts' general duty to the court as well as with the pre-trial conferences and compilation of joint reports, there exists many guidelines, models and codes of conduct that different Australian courts have issued dealing with the preparatory stage of the hot tub-hearing. These different documents present a range of ideas aimed at educating the experts about what is expected of them and how they should participate in CE processes. However, just sending the expert a copy of the code of conduct is far from enough to ensure an efficient hot tub-hearing. When it comes to outlining the day-to-day workings of how experts are prepared for hot tub-hearings, the NSW Land & Environment Court again serve as the best example. As was also the case with the writing of joint reports and pre-trial conferences above, the NSW Land and Environment Court go to great extents to educate all experts on exactly what they should know about CE processes.⁴⁴

⁴² Victorian Law Reform Commission, "Civil justice review", 2008, p.489ff.

⁴³ Stockton, Paul, "Comment: some lessons from Australia", *Adjust* (Council on Tribunals newsletter), July 2006 and McClellan, Peter, "Expert witnesses – the experience of the Land & Environment Court of NSW", 2005, p.18.

⁴⁴ McClellan, Peter, "Expert witnesses – the experience of the Land & Environment Court of NSW", 2005, p.18ff

In the court's "Practice Direction: Expert witnesses" of May 14, 2007 we find the single most thorough guideline on exactly how expert witnesses are prepared for the hot tub-hearing. The guideline lists a range of materials to be provided experts before their day in court⁴⁵:

- (a) *this Practice Direction;*
- (b) *an agreed chronology, if appropriate;*
- (c) *relevant witness statements or, preferably, a joint statement of the assumptions to be made by the experts, including any competing assumptions to be made by them in the alternative.;*
- (d) *copies of all expert opinions already exchanged between the parties and all other expert opinions and reports upon which a party intends to rely;*
- (e) *such records and other documents as may be agreed between the parties or ordered by the Court.*

From the outset, the expert should know about the timeframe set by the court including dates and how many hours the expert should budget for. It is preferable to have the expert take part in the pre-trial conference and joint report-writing process outlined above, but if that for some reason has not been found possible the expert should at least be given a copy of the other expert witnesses' individual reports. Similarly, reports from other experts with whom the individual expert will not participate in a hot tub-hearing with but who are still part of the trial should be communicated to the expert. For example, in complex cases there might be two hot tub-hearings with medical experts in one hot tub and psychiatric experts in another hot tub. As a general rule all experts should therefore have all other experts' reports.⁴⁶

The preparation of the members of the court:

For the members of the court it is crucial for the smooth and efficient operation of the hot tub-hearing to know exactly what they should expect from the expert witnesses. Questions, like what kind of testimony the experts will give and what kind of questions the members of the court should pose to the experts at trial in order for the members to more fully understand the complex issues being debated in the courtroom, are essential. Without a strong and sure hand guiding the proceedings, the simultaneous hearing of several experts could disintegrate into chaos. A very real fear is that without adequate authority being wielded by the court, some experts could end up getting more time and more questions than others and thus appear more knowledgeable as a result. This would be a gross corruption of the goals and aspirations of CE procedures. Without adequate preparation and a thorough understanding of the matters at hand, the members of the court might make even less sense of two experts concurrent testimony than they would make with one expert's, and all aspirations for the hearing to lead to greater understanding would vanish.⁴⁷

⁴⁵ NSW Land & Environment Court, "Practice Direction: Expert witnesses", May 14, 2007, Sched. 2.6.

⁴⁶ The most notable example here is the aforementioned *Coonawarra Wine Region* case.

⁴⁷ Judicial Commission of New South Wales, "Instructional DVD: Concurrent evidence, new methods with experts", 2005.

How then do members of the courts and tribunals that utilize CE procedures become adequately prepared for the task at hand? In my opinion it seems certain that judges in Australia have material and instructions given to them as to the merits and procedure of CE at conferences, symposiums and workshops. However, the different ways in which members of the court might be instructed on how to use CE procedures at trial are internal matters of the court and for this reason near impossible to discuss further in this thesis. In this context however it is important to point out that there has been no indication that a weakness of CE procedures might be a lack of information or experience on behalf of the members of the court. To the extent that judges at Australian courts would be found lacking in this regard, one would assume that problems on the preparatory stage would be more likely to have to do with tight schedules and high caseloads. It is undoubtedly so that preparing for CE procedures and learning to understand the complex matters experts will testify to, as well as which questions to ask and how to evaluate the answers take time and effort. Therefore it is very much encouraging that I have not come across any mention of Australian judges lacking in preparation or skill in my studies of CE.

The preparation of the parties and their legal representatives:

It is also crucially important that the parties and their representatives also understand the basic tenants of CE before they are thrown into what could be the confusing setting of the hot tub-hearing. They must understand and more importantly accept that the expert witnesses' overriding duty is to the court and not to the party that hired them. The parties and representatives must also understand that one of the goals of CE procedures is to diminish the lawyers' role in the hearing of expert witnesses. Compared to the traditional model of sequential expert witness hearings and the way they have developed in the common law countries (see Chapter 3.2) the legal representatives' roles are not as leading as they once were. It must be especially underlined how their traditional common law-role as the de facto leaders of the hearings has changed. Though they still are allowed to direct questions to the experts during the hot tub-hearing, their questions and directions play a significantly smaller role in the hot tub-hearing than in the traditional expert witness hearing.⁴⁸

2.4.2 Swearing-in and seating in the hot tub

The physical setup of a hot tub-hearing is not radically different from the traditional expert witness hearing setup. The experts (usually two, although there oftentimes are more, the Hon. Justice Peter McClellan has written about hot tubs with as many as eight experts present⁴⁹) are individually

⁴⁸ NSW Law Reform Commission, "Report 109: Expert witnesses", National Library of Australia, 2005, p.92ff

⁴⁹ McClellan, Peter, "Medicine and Law Conference keynote address: Concurrent Expert Evidence", 2007, p.17.

sworn in and then seated side by side at a longer table or next to and behind each other in a witness box (since Swedish courts are not familiar with the practice of using witness boxes and there is no reason why CE procedures in Sweden would necessitate witness boxes this practice will not be mentioned further, more than to say that it seems more beneficial for all concerned to seat the experts along tables instead of in cramped witness boxes⁵⁰). This new way of having several experts at the stand at once and having them seated in this special manner is likely to appear more confusing to lawyers and judges than the experts themselves. Expert witnesses are likely to be familiar with this common collegial setting from conferences, expert panel discussions and symposiums. For experts, the traditional way of hearing and cross-examining experts at trial is instead the setting which probably appears more alien and imposing. Similarly, lawyers and judges might be initially confused with the practice of having experts ask each other questions and outline points of agreement and disagreement, but this is a method of discussion that are likely to appear more familiar to experts from the same kind of expert panels and discussions. It seems quite appropriate that the exact physical layout of an expert witness hearing is not regulated in law. For example in the UCPR rules governing the NSW region of Australia, the seating arrangements for the hot tub-hearing are not regulated in detail but instead are left for the different courts to decide in a manner that suits their court. Another important factor in this regard is certainly also the size of the hot tub. If several experts are involved the small confines of the traditional Australian witness box excludes itself and the court must instead use some kind of large table. To the limited extent that this is handled in Australian law the regulation is consciously vague and adaptable:

(the expert witnesses) when giving evidence, occupy a position in the courtroom (not necessarily the witness box) that is appropriate to the giving of evidence,⁵¹

These arrangements, superficial as they might seem, actually appears to go along way towards creating a more collegial and less adversarial setting based on anecdotal evidence.⁵² It is obviously hard to distinguish the positive effects of the seating in particular from the positive effects of other parts of the hot tub-hearing, or indeed other parts of CE procedures in general. But the fact is that experts have expressed an appreciation for the particular seating arrangements of the hot tub-hearing. One should avoid making grand statements about the effect of something as trivial as whether experts sit next to each other or across a court room. Yet common sense considerations alone would support the idea that it is much easier to have a constructive conversation with questions being fielded back and forth when the conversing experts sit next to each other. This in stark contrast to the

⁵⁰ Judicial Commission of New South Wales, “Instructional DVD: Concurrent evidence, new methods with experts”, 2005.

⁵¹ UCPR Rules 31.35 c ii.

⁵² AAT, “An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal”, 2005, p.58.

traditional seating arrangement, where the two parties sit fairly far apart at tables across from each other.⁵³

2.4.3 Oral exposition

The oral exposition is the first stage of the expert witness' actual testimony. This is the part of the trial proceeding where the expert, after having been sworn in and seated, present opinion evidence regarding the issues at hand to the members of the court. Traditionally, witnesses giving evidence at trial are explicitly warned against giving what is termed "opinion evidence", that is evidence about "*a witness' belief, thought, inference or conclusion concerning a fact or facts*".⁵⁴ But opinion evidence is exactly what expert witnesses are tasked to give, and indeed signifies the most important difference between expert witnesses and regular witnesses.⁵⁵ For example, an expert witness within the field of medicine testifying at court regarding some injuries a driver has sustained in a car crash has usually not witnessed the car crash in question himself. Instead the expert uses his professional knowledge, belief and skill to reach conclusions about a range of issues like how the damages were sustained or whether the installed airbags were faulty and seriously hurt the driver.

The oral exposition in the traditional model of expert testimony as well as in the hot tub-hearing, usually serves as the expert witness' opening statement. The expert presents his basic views of the issues that the expert has been asked to comment upon without being interrupted by questions or directions from the court or the parties. The oral exposition usually serves to let the expert present what is essentially contained in the report (or joint report in CE cases) that the expert (or in the case of CE, jointly with other experts) have submitted to the court and parties.⁵⁶ Though this is material that the court or tribunal as well as the parties already should know, the oral exposition frames the expert's opinion evidence and sets the stage for the court or tribunal's questions and the opposing party's cross-examination.

Traditionally, the oral exposition is the foundation of the expert witness hearing. Most commonly, expert hearings have started with party representatives in Australia (and instead members of the court in Sweden) initially asking the experts to present their findings to the court. A new approach CE has taken is to impress upon members of the court greater freedom in directing the hearing, suggesting that sometimes it is better for the court to more forcefully direct the hearing of experts and cut down on the time spent on oral exposition in order to save time and make the proceedings more efficient.⁵⁷

⁵³ AAT, "An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal", 2005, p.58ff

⁵⁴ Black's Law Dictionary, Thompson & West, 2004, p.598.

⁵⁵ See 3.2.2.

⁵⁶ Judicial Commission of New South Wales, "Instructional DVD: Concurrent evidence, new methods with experts", 2005.

⁵⁷ Ibid.

This ability to forcefully direct expert witness hearings is a prerogative that has been within the courts' power for a long time in both Australia and Sweden.⁵⁸ But it is a practice that is given increased importance in hot tub-hearings. Because even though it presumed to most often be very worthwhile for the court to hear oral expositions, by no means is this stage of the process a necessity for the hot tub-hearing. If the court feels it has understood the issues in the experts' joint report and wishes to skip the oral exposition in order to save time and proceed to questioning that option is available. In some instances the complexity of the expert's testimony lends itself poorly to an oral exposition and instead the judge more decisively leads the hearing by way of directing questions from the very beginning of the hearing. Although the length and scope of oral expositions certainly vary with a host of factors, most notably the complexity of the case and testimony, Justice Heerey of the Federal Court of Australia has stated that a ballpark figure for the length of oral exposition is usually as short as ten minutes.⁵⁹

How then is the oral exposition in a hot tub-hearing different from an oral exposition using the traditional method of hearing expert witnesses? Even though there is no research available on this issue and thus the conclusions on this point remain highly speculative, some points should be made. In essence, the notable differences between oral exposition in CE proceedings and oral exposition in the traditional model would have to do with the unique features of the other CE procedures that occur before the hot tub-hearing, especially the pre-trial conference and the preparation of the joint report. According to the traditional model of hearing expert evidence, experts are given a chance to present their findings to the court during their oral exposition. They are given time and attention to present their findings, presumably working with their submitted report (in effect the written piece of evidence submitted to the court) as an outline. It seems highly unlikely that members of the court would make a habit of interrupting experts at this stage of the process, instead the experts get to take the time they need to present their findings and then prepare to answer questions from the party representatives and the court. That members of the court are disinclined towards rudely interrupting expert witnesses during their oral exposition is likely to be as true in CE proceedings as in the traditional model. But in this regard the physical setup of the hot tub-hearing might have an interesting effect on the expert. It can be assumed that when an expert is facing a court in the traditional model of expert hearing the expert feels free to take the kind of time he finds necessary. However, when the expert is part of the hot tub-hearing, sitting next to one or several other experts, the way the expert presents his findings and the time it takes can be assumed to be influenced by the surroundings.

⁵⁸ In Australia this can be seen in UCPR Rule 31.35 i and in Sweden this follows from RB 40:10.

⁵⁹ Heerey, Peter "Expert evidence: the Australian experience" p.166, quoted in O'Sullivan, Phillip, "A hot tub for expert witnesses", *Judicial studies institute journal*, vol. 4:1, 2004, p.4.

The expert might feel that since his colleague who is testifying on the exact same point only took five minutes for his oral exposition it would be awkward for him to take the full ten minutes he would have in a traditional model for his oral exposition. Furthermore, when two experts are commenting on the same issue the first expert to proceed with oral exposition might spend significant parts of the exposition to present circumstances and facts that are not in dispute, thus the next expert will not have to spend time on these circumstances and facts in his oral exposition. Thus, even though the oral exposition is just one small component of the hot tub-hearing (and indeed one that can be discarded entirely by the will of the court) it still shows yet another way in which CE procedures can save time and make the hearing of expert evidence a more effective process. Though there is no research available on this particular point except some anecdotal evidence from a report by the Administrative Appeals Tribunal (henceforth the AAT)⁶⁰ that will be discussed in Chapter 5, this remains a promising feature of CE procedures.

It should be mentioned that the new approach to oral expositions found in the hot tub-hearing is a new development that is probable to have more of an effect in Australia than in Sweden. In Swedish civil procedure the court has the powers to delegate the hearing of experts to party council according to RB 40:10, but this option is not used nearly as often in civil law systems as in common law jurisdictions.⁶¹ As will be described in Chapter 3.2, in Australia the hearing of expert witnesses have traditionally been dominated by party counsel while in Sweden the judges have had the strongest role. Therefore the forceful intervention of the court in the proceeding is likely to signal a greater change in Australia than in Sweden. By the same argumentation, this reform might make more of a positive difference in Australia than in Sweden, but even in the Swedish system the reform would have positive results.

2.4.4 Questions between the experts, members of the court and party representatives

The different extents to which courts have involved themselves in the hearing of expert witnesses between the Australian common-law model and the Swedish civil law-model cannot be underestimated. Traditionally, Australian courts have left the hearing of expert witnesses largely in the hand of counsel. While the court has always had the right to lead the questioning of the witnesses, this has not been the practice and instead counsel has had a significant role to play in leading the hearing. In the Swedish model, the roles have traditionally been reversed. Though the court traditionally has had the ability to delegate the hearing of experts to party

⁶⁰ AAT, “An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal”, 2005, p.58.

⁶¹ Langbein, John H., “The German advantage in civil procedure”, University of Chicago Law Review, vol. 52:4, 1985, p. 824ff .

counsel, this has rarely been the case. In this sense, the development of CE procedures in Australia signifies a strong shift towards a more civil law-like hearing of experts in a common law-country. Indeed, though it is certainly not CE's primary goal, CE seems in my opinion on one level to work as an effort by Australian courts to wrestle away the control of expert-hearings from party representatives and to the courts. At the center of this shift towards greater court involvement is the ability of the court to direct the hearing by asking questions. By having members of the court ask more questions and lead the hearing in a more hands-on manner, as well as by empowering the experts themselves to exchange questions and opinions, CE procedures help wrestle control of the expert witness hearing from lawyers and to the court.⁶²

The issue of how and when members of the court questions of experts is another part of the hot tub-hearing that for obvious reasons is not heavily legislated. A strict codification of exactly how members of the court should ask their questions and lead the expert witness hearings would in my opinion severely hurt a process that needs to be versatile and adaptable. To the extent that there are codifications of this practice, the most wide-encompassing are found at the AAT and in the UCPR rules governing state courts in New South Wales.

Before the AAT party representative have to wait not only for the members of the court to have asked their questions, but also have to wait for the questions between the experts themselves before they can direct queries to the experts.⁶³ In most other Australian jurisdictions that use CE procedures, the party representatives are not formally forced to ask their questions last, but their ability to direct the hearing is significantly smaller than the court's and smaller than it would have been employing traditional expert hearing procedures.⁶⁴

The UCPR includes a set of rules governing the questions from the court and party representatives as well as questions between the experts. Even though these rules are limited to the jurisdiction of the UCPR I find no reason to believe that these rules could not serve to describe how this part of the CE process is conducted in other jurisdictions. According to the UCPR the powers of the court in hearing expert witnesses include:

Rule 31.35

- (e) a direction that each expert witness give his or her opinion about the opinion or opinions given by another expert witness,*
- (f) a direction that each expert witness be cross-examined in a*

⁶² Judicial Commission of New South Wales, "Instructional DVD: Concurrent evidence, new methods with experts", 2005.

⁶³ Downes, Garry, "Concurrent expert evidence in the AAT: the NSW experience", 2004, p.10.

⁶⁴ Judicial Commission of New South Wales, "Instructional DVD: Concurrent evidence, new methods with experts", 2005.

particular manner or sequence,
(g) a direction that cross-examination or re-examination of the expert witnesses giving evidence in the circumstances referred to in paragraph (c) be conducted:
(i) by completing the cross-examination or re-examination of one expert witness before starting the cross-examination or re-examination of another, or
(ii) by putting to each expert witness, in turn, each issue relevant to one matter or issue at a time, until the cross-examination or re-examination of all of the expert witnesses is complete,
(h) a direction that any expert witness giving evidence in the circumstances referred to in paragraph (c) be permitted to ask questions of any other expert witness together with whom he or she is giving evidence as so referred to,
(i) such other directions as to the giving of evidence in the circumstances referred to in paragraph (c) as the court thinks fit.

Finally, at the end of the hearing, the judge usually poses a general question to all the experts, making sure they feel that they have been able to fully explain their positions and have nothing further to contribute.⁶⁵

The way in which questions are asked by the members of the court in CE procedures is not the only significant new feature of CE during this phase of the hearing. I would argue that the most important feature as well as the most inventive one is the experts' ability to ask each other questions at trial.

This is an important new feature that has two main positive effects:

A positive effect for the expert witnesses

The opportunity to ask questions of other experts has anecdotally been shown to contribute to a much more collegial and friendly atmosphere than the traditional setting.⁶⁶ Instead of being questioned and (sometimes harshly) cross-examined by the parties and forced to answer questions often tailored towards a "win" for the parties, the ability to ask questions of each other enables the experts to raise issues and deal with inquiries that might be more pertinent to the issue at hand. Expert witnesses have reported that the hot tub-hearing creates a very different setting from the traditional court hearing of an expert. In the traditional model of hearing, Australian experts often have little or no experience of court procedure. They have reported feelings of nervousness and uncertainty about how they should prepare for the hearing and answer questions at trial. The hot tub-hearing in general and the experts' ability to ask questions in particular helps create a more

⁶⁵ McClellan, Peter "Medicine and Law Conference keynote address: Concurrent Expert Evidence", 2007, p.16.

⁶⁶ AAT, "An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal", 2005, p.58.

comfortable setting for the experts, and one that they are used to from conferences and debates.⁶⁷

“Having appeared in the courts over many years, I have experienced the strict formality of the adversarial system, but in my view the (CE reform) creates an atmosphere of informality, allowing an open discussion and a free flow of ideas. I believe this is an environment where the expert can more readily fulfill their primary responsibility to the court to best inform the court about their knowledge and experience and deliver the highest possible level of intellectual integrity in providing their evidence.”⁶⁸

A positive effect for the members of the court

The expert witnesses hired by a party (or appointed by the court although that is rare in the Swedish legal system and exceedingly rare in the Australian legal system) are undoubtedly more knowledgeable on the particular issues than the party representatives. Therefore, by letting the experts ask and answer questions relevant to the proceedings instead of having the proceedings dominated by lawyers, the court is given opinion less skewed by the party representatives. The dialogue between the experts and the court also becomes less focused on one party “winning” a case and more geared towards fulfilling the experts’ primary duty to the court: the expert’s “*overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise*”⁶⁹.

By using the CE method, these questions and answers enable the court to more accurately assess the merits of a case and reach a “just” verdict.⁷⁰

A positive effect for the parties and their legal representatives

CE also has a positive effect for the parties and their legal representatives. It is true that an important effect of CE is to wrestle power away from the lawyers who traditionally have had a dominant

⁶⁷ Judicial Commission of New South Wales, “Instructional DVD: Concurrent evidence, new methods with experts”, 2005.

⁶⁸ Frequent expert witness Peter Dempsey, from Judicial Commission of New South Wales, “Instructional DVD: Concurrent evidence, new methods with experts”, 2005.

⁶⁹ See for example NSW Land & Environment Court, “Practice Direction: Expert witnesses”, May 14, 2007, Federal Court of Australia, “Practice Direction: Guidelines for Expert Witnesses in the Federal Court of Australia”, vers. 6, 2008, NSW UCPR of 2005, Schedule 7.

⁷⁰ Judicial Commission of New South Wales, “Instructional DVD: Concurrent evidence, new methods with experts”, 2005.

role in the hearing of expert witnesses before Australian courts, and this is certainly a development that the lawyers themselves do not appreciate. CE does however have another positive effect for the lawyers. By using the joint reports and simultaneous hearing of experts the lawyers can more easily understand what the important differences between the experts are and focus their questions on these topics instead of extraneous issues that lead nowhere.⁷¹

2.5 How does CE work in practice? A real life example of CE procedures at the AAT

The most complete and exhaustive description of how CE procedures are used in Australia today comes from Justice Garry Downes of the AAT in a paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals in 2004.⁷² This step-by-step account of how CE procedures work will deal with exactly the same issues as I have outlined above, but what this account will add is a dimension of practicality to the largely hypothetical arguments above.

2.5.1 At the pre-hearing stage

1. At the outset, prior to callover (*to request the appearance and participation of several people*⁷³, in effect the first initial meeting between the parties and the tribunal), the parties are requested to confer with each other and to create certificates which lists the date on which both party's expert witnesses are available to give CE. They bring these certificates to callover.
2. After callover, members of the tribunal decide whether this particular case is suitable for CE. This selection is made based on a range of qualifications including whether the experts have similar levels of expertise and whether they are commenting upon the same issues (for a discussion of the factors relevant to the choice of using CE procedures, see chapter 5.1.2)
3. If the case is chosen for CE procedures the parties are informed about this, sent a background paper on the practice of CE and asked to notify their expert witnesses about the CE procedures.
4. Parties are requested to exchange reports, written by the expert witnesses. The tribunal believes that these communications are enough to ascertain the agreed facts and differences between the witnesses (as described above, in most courts the witnesses are

⁷¹ Justice Lockhart, from Judicial Commission of New South Wales, "Instructional DVD: Concurrent evidence, new methods with experts", 2005.

⁷² Downes, Garry, "Concurrent expert evidence in the AAT: the NSW experience", 2004.

⁷³ <http://legal-dictionary.thefreedictionary.com/call+over>.

tasked to participate and write a joint paper on this question before the hearing).

2.5.2 On the day of the hearing

1. The experts are welcomed and sworn-in, one by one.
2. The tribunal summarizes the agreed upon facts and differences between the experts in the CE procedure (as stated in the submitted reports).
3. The applicant's expert witness(es) gives a brief oral exposition of his view of the contentious issue.
4. The respondent's expert witness(es) gives a brief oral exposition of his view of the contentious issue. (Alternatively, as discussed above, the tribunal can elect to start the hearing off by asking questions and skip over the oral expositions.)
5. The respondent's expert(s) is invited to ask the applicant's expert(s) questions, without the intervention of party counsel.
6. The applicant's expert(s) is then invited to ask the applicant's expert(s) questions, again without the intervention of party counsel. At any point, before or after this stage of the proceedings, members of the court may direct questions to either or the witnesses or to them both.
7. Each expert is invited to give a brief summary over what has been said, the areas of agreement and disagreement that remain.
8. The parties' representatives may then ask any relevant and unanswered questions of the witnesses.

2.5.3 How applicable is the practice at the AAT in other jurisdictions?

Although this outline of every-day CE procedures only concerns one court (actually a tribunal) it helps us more fully understand the inner workings of the CE process. But to what extent should we generalize this description of CE procedures at the AAT to other courts?

Some of the details of the practice described above is undoubtedly uniquely suited to this particular tribunal and would not be the same before other courts. At the pre-hearing stage, the fact that the tribunal asks the parties to compile lists of dates to submit to the tribunal certainly have a lot to do with the character of a tribunal and would not be the same before a state or federal court. At a regular court, the parties would have far less control of the proceedings and would have to yield to the will of the court. Similarly, at the pre-hearing stage, the AAT's insistence on using separate reports instead of the joint report is curious. As will be shown in Chapter 4.1.2, the AAT has consistently been on the vanguard of CE and helped develop the

practice for over ten years⁷⁴. For this reason it seems strange that they would choose not to utilize one of the most promising features of CE procedures – the joint report. Presumably, the members of the tribunal feel that it would inconvenience the parties to use joint reports since it can be assumed to be an added expense to an already expensive venture.

In my opinion there is no reason to believe that most of these detailed descriptions of CE procedures at the AAT would not be just as applicable to other jurisdictions. This step-by-step description of the inner workings of CE is a crucial tool in visualizing how CE concretely works and is a valuable source of information into court formalia and the layout of the hot tub-hearing.

⁷⁴ AAT, “An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal”, 2005, p.4.

3 A historical look at expert evidence

Since Roman times the maxim *jura novit curia*, or “the judge knows the law” has been a cornerstone of legal thinking and practice. However, the modern adjudication of disputes or criminal matters often involve more than the application of laws, regulation and sound judgment. Oftentimes it also involves technical matters outside the field of law that a qualified judge cannot possibly be supposed to master; be it medicine, geology or marine biology. Lest the judge in question be biblical King Solomon himself, able to answer all questions “*without anything being hidden from him*” (Kings 10:10), the court will somehow have to find a way to incorporate expert and specialist knowledge into court procedure. In trying to do so, courts have sought to utilize various sources of expert knowledge since earliest medieval times. Over the centuries, expert knowledge has come in different guises; expert “assessors” tasked to help judges understand complex issue at hand, juries made up of experts to enable their fuller understanding of contentious issues, specialist courts comprised of judges with specialist knowledge as well as expert witnesses.⁷⁵

This thesis deals with an interesting and highly promising modern reform regarding expert witness testimony in Australia, known as concurrent evidence. Moreover, this thesis seeks to make the case why CE should be adopted by the Swedish legal system. In order to understand CE as well as why it should be adopted in Sweden, one must first understand the historical context and development of expert evidence, in Australia as well as in Sweden.

Australia is a common law-country and Sweden a civil law-country. The two present two very different legal traditions with notably different practices regarding expert evidence. The central difference between the two concerns the extent to which the court involves itself in the production and presentation of expert evidence at trial. In the common law tradition, expert evidence has been left largely to the parties before the court, with the parties’ lawyers in a leading role. In the civil law tradition, much more emphasis has historically been placed on the court in appointing “unbiased” witnesses without allegiance to either party. Understanding the historical context of expert evidence as well as these differences will be crucial to the analysis of the Australian concurrent evidence procedure and whether it should be adopted in Sweden.

Since one of the primary goals of this thesis is to investigate whether CE could work within the Swedish legal system, this chapter will first describe the historical development of expert evidence in Sweden, starting in the 17th

⁷⁵ NSW Law Reform Commission, “Report 109: Expert witnesses”, National Library of Australia, 2005, chapter 2.

century and leading up to this day. It will be followed by an analysis of the historical development of expert evidence-evaluation in the Swedish legal system and will lastly include a thorough analysis of expert evidence regulation in Sweden today. This subchapter will have a special emphasis on RB 39: 6 § 2 stanza, a paragraph that in my opinion opens the door wide for the adoption of CE in Sweden.

Later in the chapter, the historical development of expert evidence in Australia (and to a certain extent in other common law countries) will be discussed. Following that is a discussion of the historical problem of expert bias in Australia. The historical development of CE is not discussed here and is instead dealt with in detail in Chapter 4.

3.1 The development of expert evidence in Sweden

Expert evidence has been an integral part of Swedish court procedure since the 17th century but was not codified in law until 1934. Today expert testimony in court is governed mainly by Rättegångsbalken (SFS: 1942:740) 40th chapter (henceforth RB 40). Even though some Swedish expert witness regulation exists outside RB 40, these have no influence on the issues discussed in this thesis and will therefore not be mentioned further.⁷⁶

Perhaps the strongest single reason for the comparatively late development and codification of expert evidence procedures in Sweden was the rich plethora of specialist courts that historically have been a characteristic feature of the Swedish legal system. These specialist courts have historically included admiralty (maritime) courts, wartime courts and port courts (dealing with issues of trade and tariffs). The judges at these courts had specialized knowledge and education in order to enable an efficient and just adjudication of complex cases. Up until roughly the onset of industrialization in Scandinavia, the judges at these courts were considered sufficiently well-versed in their particular field of expertise and thus need for other sources of expert knowledge was low. The tradition of specialist courts lives on in Sweden (as well as in Australia) to this day, but these courts have significantly altered their stance towards expert evidence. In fact, even though judges at these courts today have significant specialist knowledge, they have cultivated an environment that encourages the giving of expert evidence. As I will show in this thesis, specialized courts in Australia were crucial in the development of CE procedures.⁷⁷ Another reason for the comparatively late development of expert witness procedures in Sweden was the historically strong Swedish faith in the knowledge and prudence of a class of supporting members of the court, called “nämndemän”. These men were often appointed to their posts at the court

⁷⁶ Edelstam, Henrik, “Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet”, Iustus, 1991, p.35ff.

⁷⁷ See 2.3.2.

(and not only specialized courts but also within the regular court structure) because of their expertise and knowledge in particular fields.⁷⁸

The fact that the Swedish civil law legal framework has had a strong influence on the late development of expert witness jurisprudence cannot be denied. In civil law countries courts have traditionally had a more prominent role in deciding when and how to elicit expert witness testimony while that power in civil law jurisdictions has rested with the parties. In short, the crucial difference between the two systems is found in the role of judges and the power they wield. Following that argument, there is little argument that civil law countries' penchant for court-appointed expert witnesses have had a significantly stifling effect on the development of expert evidence procedures in these countries. This is however not necessarily for the worse. Common law countries in general and the United States in particular have historically battled serious problems with their more "lawyer-led" method of hearing expert witnesses.⁷⁹

Lastly, another reason for the Swedish expert witness jurisprudence's comparatively late 17th century development is the aforementioned industrialization of Western Europe. The ensuing modern development of "qualified expert knowledge" within the fields of forensic medicine and similar fields of study convinced judges as well as the public that the judges' own knowledge was no longer enough. The age of industrialization brought wholesale change to the very fabric of society and actualized many legal matters like patent cases and complex commercial disputes that required significant specialist knowledge. Knowledge the judges themselves could not be argued to possess and somehow would have to have produced at court.⁸⁰

3.1.1 1600-1800

Though there was no mention of expert evidence in early sources of Swedish law, by the early 17th century cases emerged where courts sought guidance from reliable sources of expert knowledge. The earliest recorded cases speak of "experts", such as "sensible and prudent women" on whether a woman suspected of murdering a newborn had recently conceived and members of the council of land surveyors on the qualities and properties of a parcel of land. The latter part of the 17th century saw the first instances of expert witness testimony in our modern sense being taken by Swedish courts when the higher courts of the land started asking members of the *Collegium Medicum* (the first Swedish medical society) to testify before the court. The *Collegium Medicum* had been instituted to deal with charlatans and con-artists within the fledgling medical community as well as to license

⁷⁸ Edelstam, Henrik, "Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet", Iustus, 1991, p.35ff.

⁷⁹ For a full discussion, see: Langbein, John H., "The German advantage in civil procedure", University of Chicago Law Review, vol. 52:4, 1985.

⁸⁰ Edelstam, Henrik, "Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet", Iustus, 1991, p.35ff.

medical doctors and had nothing to do with Swedish courts or law. Soon after the practice's inception however, *Collegium Medicum* grew into their roles as purveyors of medical expert knowledge in court cases, especially concerning wrongful deaths.⁸¹

During the 18th century the use of doctors with various medicinal specialties as something akin to expert witnesses grew exponentially within the Swedish legal system. Though expert witnesses had not been the target of particular rules in the wide-encompassing *1734-års lag* (Law of 1734), a range of paragraphs including 28:6 and 39:1 in the law's *Missgärningsbalken* (literally the "misdeed rules") directed the court to seek guidance from Collegium Medicum when a person had been murdered or the death otherwise was suspicious. 24:2 *Rättegångsbalken* (court procedure law) also laid out a blanket prerogative for the court to appoint "goda män" (literally "good men" or "men of good standing") if the court could not fully understand, for example a complicated business transaction. Furthermore, according to 5:2 *Ärvdabalken* (inheritance law) a widow who at the time of her husband's death was pregnant would receive certain preferential treatment from the estate. In cases where the exact date of the widow's conception was in doubt the court routinely had a midwife testify to the approximate time of the conception. None of these examples show the use of expert witnesses in the manner we use them today, but they all show how modern ideas about expert witnesses slowly grew within the Swedish legal system. In the early part of the 19th century sweeping law reforms were being contemplated in Sweden. At the time, the foremost propagators of reform proposals were the *lagkommittén* (the Swedish law committee) and during the 1820's and 30's the committee published a slew of important propositions for new laws which included rules regarding expert witnesses: In 1822 the committee published the groundbreaking proposal "*Förslag till Utsöknings-Balk, så ock till Rättegångs-Balk*", an investigation and proposition for new rules concerning, among other things, civil and criminal court procedure. This proposal marked the first instance of expert witness testimony being considered a unique type of evidence and not the equivalent of ordinary witness testimony as had previously been the case. It should however be mentioned that this only applied to experts appointed by the court. To the limited extent that parties themselves presented expert evidence in court, this testimony was still regarded as ordinary witness testimony.⁸²

In the same proposal, the committee also addressed the traditional view that judges should themselves have expert knowledge in other fields than law and that this made expert evidence superfluous. This old idea was fuelled by the Swedish tradition of having specialized courts with specialized judges but was also doctrinally elaborated at the time by the Swedish scholar

⁸¹ Edelstam, Henrik, "Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet", Iustus, 1991, Chapter 2.3.

⁸² Ibid

Melker Falkenberg.⁸³ *Lagkommitéen* made the sage point that a major problem with this view of the court's role was that the parties to a conflict could never know what was "in a judge's head" and could therefore never address beforehand at trial the personal knowledge of the judge. By using expert evidence presented at court this problem could be eliminated and leader to greater predictability and justice. The committee proposed a rule that stated that if knowledge outside the judge's sphere of knowledge were to be incorporated into the case, the court should seek this knowledge from venerable experts (in effect through expert testimony, though it should be noted again that this applied only to court-appointed experts). It is also worth mentioning that the rules regarding expert testimony in the *lagkommitéen* proposal, for the first time was collected in one chapter of the law, much the same way as is done to this day. This too seems to have signaled a stronger focus on the importance and unique character of expert evidence.⁸⁴

As has been described above, the Swedish civil law-model is one that historically has favored court-appointed experts over experts hired by parties. Since these early Swedish proposed rules only applied to these court-appointed experts it is not surprising to find quite detailed rules in the proposal concerning the particular kind of experts that should be appointed by the court to give expert testimony. The courts should appoint "ämbetsmän", meaning literally "public officials" or "civil servants". Beyond that, the term suggests a professional employed by the state or a man of venerable stature, not just anyone who happens to know a lot about an issue. If no "ämbetsmän" were available, two other expert witnesses (that thus did not have to be civil servants or employed by the state) would be appointed by the court. Interestingly, the committee suggested that in certain types of cases involving for example maritime law or some trade issues, two experts should always be appointed. Suggesting, in fact, the fallibility of having a single expert address complex issues and thus, perhaps unconsciously, voicing a criticism of single expert testimony that would be central to the expert witness-debate for centuries to come.⁸⁵ Another interesting and somewhat antiquated notion presented in the report was the committee's view of interpreters. According to the thinking of the times interpreters were to be considered expert witnesses.⁸⁶

In 1826 *lagkommitéen* published "*Förslag till Allmän Civillag*", a proposed new civil procedure law that further helped develop the expert witness concept in Sweden. The new proposal included rules about how experts should be compensated and how the court should punish experts who, for

⁸³ Falkenberg, Melker "Tal, om vetenskapernas nytta uti lagfarenheten" Stockholm, 1775 cited in Edelstam, Henrik, "Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet", Iustus, 1991, p. 46.

⁸⁴ Edelstam, Henrik, "Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet", Iustus, 1991, p.47ff.

⁸⁵ See Downes, Garry, "Expert evidence: the value of single or court-appointed experts", 2005

⁸⁶ Edelstam, Henrik, "Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet", Iustus, 1991, p.50ff .

example did not show up for trial. In line with previous proposals from the committee, separate rules were laid down for “*ämbetsmän*” (public officials) and experts hired by parties. Public officials already were bound by employment contract to appear before courts in expert fashion and therefore different and harsher rules had to exist for the case where a public official did not appear when called. It should also be mentioned that neither the “*Förslag till Utsöknings-Balk, så ock till Rättegångs-Balk*” of 1822 nor the “*Förslag till Allmän Civillag*” of 1836 resulted in the promulgation of said reform proposals. But the two still served to develop Swedish expert evidence jurisprudence by furthering scholarly debate and working out sustainable plans for the reforms of the future.⁸⁷

During the latter half of the 19th century Swedish judicial doctrine also slowly started working towards the development of a more modern view of the expert witness concept. J.C. Lindblad⁸⁸, F. Schrevelius⁸⁹ and especially J. Kreüger wrote extensively about expert evidence and started to argue for important distinctions between regular witness testimony and expert witness testimony. As Kreüger put it, somewhat lacking in eloquence perhaps: “(Regular) witnesses have, as opposed to expert witnesses, usually gained knowledge about the matter at hand out of chance.”⁹⁰ In the same article Kreüger also argued forcefully for the idea of free evaluation of expert testimony in the modern vein. However, he also made the central point that if a judge discards expert testimony and rules against it the judge must present his reasons for doing so.

In 1884 the *Nya Lagberedningen* (literally, the new law preparatory group) published an influential paper on civil and criminal procedural reform called the “*Betänkande angående rättegångsväsendets ombildning*”. The paper addressed the heated question of whether expert knowledge should be communicated to the court either through expert witness testimony or through more specialized courts and specialized judges, as had traditionally been the Swedish preference. Flying in the face of conventional wisdom, this report came down soundly on the side of expert witness testimony as the best method for expert evidence development to take in the years to come. The report also included the first specific mention of non-court appointed expert witnesses (in effect experts hired by the parties). However, the rules dealing with the modern idea of experts hired by the parties included both rules with a somewhat antiquated character stating that the court should only allow parties to present expert evidence in “special

⁸⁷ Edelstam, Henrik, “Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet”, Iustus, 1991, p.51f.

⁸⁸ Lindblad, J.C. ”Läran om bevisning inför rätta”, 1842 cited in Edelstam, Henrik, “Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet”, Iustus, 1991, p.53f.

⁸⁹ Schrevelius, F ”Lärobok i Sveriges nu allmänna gällande civilprocess”, 1853 cited in Edelstam, Henrik, “Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet”, Iustus, 1991, p.55f.

⁹⁰ Kreüger, J. ”Hvad förstås med sakkunnige och huruvida är domaren bunden af sakkunniges utlåtande?”, 1867 cited in Edelstam, Henrik, “Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet”, Iustus, 1991, p.56f .

circumstances” as well as some rules with a slightly more modern character about how the court should not appoint an expert without the parties’ consent. The *Nya Lagberedningen* published another important study of the Swedish legal system in the “*Förslag till lag om bevisning inför rätta*” (proposition for a law of evidence at court) of 1889. This study furthered the idea of expert evidence as separate and different from regular evidence. It included a crucial reform in the modernization of the regulation of the payment to experts. Previously these rules had been essentially the same for regular witnesses and expert witnesses: they were paid for their time in court and nothing else. These new rules also allowed the court to pay experts for time spent preparing the case, an idea that has become a pillar of expert evidence jurisprudence to this day.⁹¹

The issue of why experts historically had only been paid for their time spent in court but not for the preparation of materials is one that has not been discussed in Swedish doctrine. In my opinion it probably had its basis in the Swedish tradition of having “*ämbetsmän*” appointed as experts by the court and not hired independently by the parties. Since these civil servants and public officials already had employment contracts that governed their duty to appear as experts at court (see above), it follows logically that they were already paid by their employer (the state or some entity connected to the state) for their work, some of which went into preparing material for trial. Thus, once Swedish legislators started recognizing the importance of experts hired by parties it follows that there had to be a system of reimbursement for these expenses as well and the modern idea of expert reimbursement was born.

3.1.2 1900-modern times

During the early parts of the 20th century, Swedish doctrine had gradually started to move towards a more nuanced and modern idea of expert evidence. E. Trygger⁹² and R.A. Wrede⁹³ had given somewhat differing accounts of the roots and function of expert evidence but both had divided the greater concept of “expert witnesses” into smaller factions mainly along the lines of whether an expert was appointed by, and thus should only serve, the court or whether the expert was called by the parties and had some kind of employment contract with the party. The doctrinal focus on this issue is a telling example of how Swedish expert evidence jurisprudence has been pre-occupied with the issue of distinguishing between court-appointed experts and party-appointed experts in a way that is totally different from the historical context in Australia. Furthermore, it goes a long way towards explaining the differences in expert evidence procedures that remain to this

⁹¹ Edelstam, Henrik, “Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet”, Iustus, 1991, p.59f.

⁹² Trygger, E ”Om sakkunnige”, 1889 cited Edelstam, Henrik, “Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet”, Iustus, 1991, p.63f.

⁹³ Wrede, R.A ”Grunddragen af bevisrätten enligt gällande lag”, 1894 cited in Edelstam, Henrik, “Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet”, Iustus, 1991, p.65f.

day and how court-appointed experts are still treated in a preferential manner even in 21st century Sweden.⁹⁴

In 1926 *processkommissionen* (literally the process commission) published the “*betänkandet angående rättegångsväsendets ombildning*” (ideas on the transformation of the Swedish court structure) which further suggested reforms that would modernize Swedish expert evidence procedure. The commission took the 1889 suggestions one step further and recommended that the default type of expert witness testimony should be through written, not oral, submission.⁹⁵

This basic process-economical idea that works to save time and expense before the court has changed little over the years and exist in some form in both Australia and Sweden today. The commission also proposed more detailed rules regarding the reimbursement of expert witnesses. Seen from an economical fairness-perspective, the matter of whether financially challenged parties can receive financial support from the state for the presentation of expert evidence is in my opinion crucial to the future of the adversarial model, both in Sweden and in Australia.

Finally, in 1934 the “*Lag om bevisning genom sakkunnig*” (law regulating expert evidence) was signed into law. The law was the product of decades of development within this field of legal process and worked as a stop-gap measure until thorough process reform could be advanced. The law’s main aim was to counteract the growing view of experts at trial as lackeys of the parties’. This proves that even at this early point in the modern development of expert evidence the issue of expert bias was thus a central concern also in Sweden.⁹⁶ Between 1934 and 1942 when the new “*Rättegångsbalk*” (civil and criminal trial rules in effect to this day that will be dealt with in detail in 3.1.4), the “*Lag om bevisning genom sakkunnig*” regulated a slew of important matters connected with expert witness testimony including the lingering problem of experts’ reimbursement. The legislators argued that many of the issues concerning expert evidence had been left up to the courts for too long and that there had to be uniform rules. As always, these rules covered court-appointed experts exclusively and did not cover experts hired by the parties.⁹⁷

⁹⁴ Fitger, Peter, “Rättegångsbalken: en kommentar”, Norstedts juridik, 2008, 40:3.

⁹⁵ Edelstam, Henrik, “Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet”, Iustus, 1991, p.66ff .

⁹⁶ Fitger, Peter, “Rättegångsbalken: en kommentar”, Norstedts juridik, 2008, 40:3.

⁹⁷ Edelstam, Henrik, “Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet”, Iustus, 1991, p.68f.

3.1.3 The historical development of the evaluation of expert evidence in the Swedish legal system

Parallel to the historical development of expert evidence as a procedure and source of evidence there has also been a slow, gradual development of how Swedish courts have evaluated expert witness testimony. This development has been advanced through legislation, legislative proposals and doctrine. In order to understand the development of expert evidence in Sweden and the prospect for CE being adopted by the Swedish legal system it is crucial to understand this development.

That a court is not bound by expert witness testimony, or any other witness testimony for that matter, is a time honed legal tradition in both Sweden and Australia. Swedish courts take expert evidence under consideration, but in the end expert evidence is just like any other piece of evidence and thus may be given great weight or limited applicability according to the Swedish principle of “*Fri bevisvärdering*” (the court’s right to freely evaluate any piece of evidence presented to it).⁹⁸ Even though the principle of free evaluation of evidence is a comparatively modern legal development and evidence historically have been evaluated in different ways, the idea that the court had to evaluate and discern to what extent to trust expert evidence has always been a fundament of Swedish jurisprudence. Therefore a central issue in the analysis of the use of expert evidence over the years is whether the courts have been found to actually have given great weight to expert testimony. A full analysis of the extent to which Swedish courts have heeded expert evidence over four hundred years would be a massive undertaking that obviously would not fit into this thesis. An overview of Swedish court practice over these four hundred years however paints an interesting picture of the courts’ adherence to expert testimony. In the 17th century the skepticism against full reliance on expert testimony was especially strong and it has been becoming gradually more tempered ever since. At the time, a strong school of thought in Swedish doctrine argued that judges should themselves have other scholarly knowledge than law (for example medicine, geology etc) and therefore ought to be able to do well without expert evidence. This argument was most forcefully made by Melker Falkenberg in his seminal work “*Tal, om vetenskapernas nytta uti lagfarenheten*” (1775). Today this seems a thoroughly antiquated notion, much too simple in scope for the 21st century (and I suspect much too simple in scope even for the 17th century). But the fact remains that it constituted a strong undercurrent of Swedish legal thinking in the latter part of the 18th century. Whether Falkenberg’s assertions were widely shared by judges of his time is impossible to ascertain, but records show how prominent judges like Matthias Calonius (of the Swedish Supreme Court) routinely discarded expert evidence brought by doctors and even the *Collegium Medicum*. In all likelihood Calonius shared Falkenberg’s belief

⁹⁸ Ekelöf, Per Olof, “Rättegång IV”, Norstedts juridik, 1992, p.228.

in the Solomon-esque nature of wise and multi-talented judges and probably believed his knowledge of medicine to be the equal of any doctor's.⁹⁹

Though some uncertainty remain of the practice of the day, rules were laid down as early as the in the *1734-års lag* stating that two sources of evidence testifying to one fact were to be considered enough to settle that fact for the court. Since expert witness testimony at the time was not yet considered separate and different from regular witness testimony (though there are some scholarly debate on this point¹⁰⁰), it follows that two experts at trial (or one expert and one witness as was surely the norm) reaching the same conclusion settled a matter before the court. This could hypothetically lead to a wholly absurd situation. If four or more experts testified at trial and two experts were opposed by two other experts, the court would have to consider two conflicting facts to be settled.¹⁰¹ This shows how the development of both expert testimony as a procedure and the principle of free evaluation of evidence together helped develop and modernize Swedish legal thinking, and in the end, legislation. During the 19th century Swedish courts still adhered to this older theory of evidence evaluation, but some developments could be seen in the committee propositions of the early 19th century. In 1832's "*förslag till allmän kriminallag*" (proposition for a common criminal law) expert testimony in criminal cases were deemed to have no absolute value and should instead be freely evaluated by the courts. This very modern development had been discussed in 1822's civil process proposition but had not made it to the final draft. It still however signaled an important shift in Swedish expert evidence procedure that heralded a new day in Swedish judicial history.¹⁰²

The issue of the differing views of expert evidence between Sweden and Australia should be mentioned in short. The fact that expert evidence in modern-day civil law countries like Sweden is considered a unique type of evidence signals a profound difference between the Swedish civil law-model and the Australian common law-model. In common law countries expert witness testimony is not considered a unique source of evidence but instead a separate subset of witness evidence.

The significance of this view of expert evidence is profoundly hard to quantify. There are of course some notable superficial differences between the competing systems; in Sweden there is a separate oath for (court-appointed) expert witnesses than the one regular witnesses swear¹⁰³ and the hearing of experts is done in a slightly different manner from the hearing of regular witnesses to name but two. But most of these characteristics also exist in the Australian common law system. There, Practice Directions and

⁹⁹ Edelstam, Henrik, "Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet", Iustus, 1991, p.45f .

¹⁰⁰ Ibid, p.46.

¹⁰¹ Ibid, p.41ff.

¹⁰² Ibid, p.45f .

¹⁰³ RB 40:9.

Guidelines from courts have effectively done what the law has not – made a clear distinction between expert witnesses and “regular” witnesses. Experts in Australia might not swear a separate oath, but in all significant matters they seem to be viewed the same in the eye of the law as their Swedish colleagues. This leads me to believe that this, seemingly important distinction between Swedish and Australian jurisprudence has less of an effect than one might think. What this difference however has helped nurture is a profoundly negative disconnect between court-appointed experts and experts hired by parties in the eyes of the Swedish law, as will be elaborated upon below.

3.1.4 Current expert evidence regulation in Sweden

How best to enable expert witnesses to communicate their expert knowledge to courts is a matter of central concern to the Swedish legal system in the 21st century. It is also a matter that in the light of technical and scientific advances is likely to grow even more important in the years to come.¹⁰⁴

The use of expert evidence at Swedish trials in both criminal and civil matters today is governed by *Rättegångsbalken*'s 40th chapter (SFS: 1942:740). Even though RB 40 collects most of the expert evidence regulation in one place - and saves the legal practitioner of the confusing multi-jurisdictional complexities of parallel state and federal legislation we find in common law countries like Australia - a full understanding of expert evidence law and procedure in Sweden still requires close attention to the word of the law as well as an understanding of the its historical development.

RB 40 has remained almost entirely unchanged for more than sixty years, and even when some revisions were made in 1987 the changes were limited to expelling two minor paragraphs. The fact that the chapter's language seems somewhat dated is a minor concern. What is of greater importance is the skewed and out-dated view of expert evidence that oftentimes shines through the law. At the center of this out-dated view of expert evidence is the historical Swedish penchant for having court-appointed expert witnesses instead of experts hired by parties. One could rightfully ask how there could remain a bias against experts hired by parties in a legal system that permits both court-appointed expert witnesses and experts hired by parties. That question becomes even more galling, and in fact absurd, when one realizes that in the Swedish legal system of the 21st century, Sweden is very much like Australia in that court-appointed experts are exceedingly rare and experts hired by parties is the norm. By creating a law that recognized both court-appointed experts as well as experts hired by parties, RB 40 sought to reach a middle ground between the two extremes of how to deal with expert witness testimony at trial. In the French legal system expert witnesses can

¹⁰⁴ Ekelöf, Per Olof, "Rättegång IV", Norstedts juridik, 1992, p.225.

only be appointed by the court and in the British (and Australian) legal system experts are almost always hired by parties.¹⁰⁵

What RB 40 did in my opinion was place Sweden on a precarious ledge between the two. But even though the idea behind allowing both kinds of expert evidence was a noble one, the wording and structure of the law as well as the historical developments outlined in the previous chapter showed how the Swedish legal system was clearly tilted towards court-appointed experts. This historical bias lives on to this day and expresses itself in many ways, not the least of which is the fact that out of the chapters' twenty paragraphs, the first eighteen do not even mention party-appointed experts.

In this subchapter I will chronologically discuss and analyze the paragraphs in RB 40 that are important to the issues discussed in this thesis.

1 §

The wording of the chapter's introductory paragraph is a fitting example of the kind of expert evidence legal framework that existed at the time of the law's writing in 1942 but which seems wildly out of touch today. Not only does the paragraph only address court-appointed experts, it specifically states that primacy in the matter should be given to public servants and government agencies. As has been shown in the previous chapter, this was the prevailing belief and an astute observation of expert evidence procedures in 1942. Today however, party-appointed experts are used to a much greater extent than court-appointed experts and this is a dynamic that is probable to grow rather than diminish in the years to come.¹⁰⁶

Furthermore, it was made clear in the law's preparatory works as well as in doctrine that party-appointed experts simply were "*less reliable*"¹⁰⁷ than court appointed experts and that if two parties presented contrary expert witness testimony the preferred way of solving the matter was by having the court appoint an "unbiased" expert.¹⁰⁸ Also in the "*Lag om bevisning genom sakkunnig*" of 1934 the preparatory materials emphasize that courts should always turn to public officials or government agencies when looking for an expert witness.¹⁰⁹

This signals a great Swedish belief in the righteousness of court-appointed experts. Since those experts in the 1940's were public servants and government entities to an overwhelming extent, by extension it also signals a profound belief in government employees and elected officials. This fundamental belief can also be seen in a subtle difference in 1 § regarding court-appointed expert witnesses who are public servants as opposed to

¹⁰⁵ Ekelöf, Per Olof, "Rättegång IV", Norstedts juridik, 1992, p.230.

¹⁰⁶ Fitger, Peter, "Rättegångsbalken: en kommentar", Norstedts juridik, 2008, 40:4, 40:25 and Ekelöf, Per Olof, "Rättegång IV", Norstedts juridik, 1992, p.234.

¹⁰⁷ Hassel "Bevisrätten och de extraordinära rättsmedlen", 1951, p. 76 cited in Edelstam, Henrik, "Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet", Iustus, 1991.

¹⁰⁸ Fitger, Peter, "Rättegångsbalken: en kommentar", Norstedts juridik, 2008, 40:6.

¹⁰⁹ *Ibid*, 40:9.

experts without public employment. Since the admissibility of expert evidence in Sweden rests heavily on whether the court finds the expert to be suitable it is also noteworthy that the legislator actually included wording to the effect that a public servant was considered suitable for giving expert witness testimony on the sole basis of his employment. Other, non-public officials experts would have to be “*men known for honesty/integrity and skill*” in order to be considered. These words have little practical application since surely most public officials tasked with giving expert testimony are “*men known for honesty/integrity and skill*”, but it still signals a profound Swedish bias towards public servants and government officials as experts.

2 §

RB 40:2 § also includes stringent rules against (court-appointed) expert bias that fit well with the thinking in the 1940’s but seem out of date today. When it comes to expert witnesses hired by parties, stringent rules against bias are not possible (or at least not preferable) since the very fact that they are hired and compensated by the party makes them appear more or less biased. The way modern courts in Sweden as well as Australia deal with this problem is by freely evaluating the expert’s testimony. In the instance when a party presents expert evidence from, for example an employee of the party, the credibility of that expert suffers.¹¹⁰ RB 40:2 works well when it comes to court-appointed experts, but in modern-day Swedish expert evidence jurisprudence it seems terribly outdated since these experts are hardly ever used in court. The fact that RB 40:2 still is the law of the land signals the antiquated nature of RB 40.

3 §

The law’s 3 § states that the parties should have some influence on the court’s choice of expert to be appointed. This is an interesting paragraph since it incorporates a fairly modern idea – the parties’ ability to influence the court on procedural matters – into the thoroughly old-fashioned idea of court-appointed experts. This is a very positive development since there undoubtedly remain certain situations (though they are few) where a single court-appointed expert is to prefer to several experts hired by parties. This can be the case especially when dealing with fairly simple issues where the facts of the case are not in serious question or when both parties are concerned about spiraling court costs. In these instances it is obviously positive that the parties are allowed to have influence on the choice of expert to be appointed by the court.

7 §

This paragraph includes an interesting rule regarding experts’ submission of reports of their findings to the court and parties. These reports should include the “reasons and circumstances” for the experts’ findings and is submitted in order for the court and parties to decide whether the expert should also be heard at trial and cross-examined (8 §). This writing and submitting of reports signals a point where Australian and Swedish legal

¹¹⁰ Karnov, Online ed., 2008, p.2953.

tradition converges. Interestingly for the purposes of this essay, 7 § shows how a crucial part of CE procedures (the writing of joint reports, see 2.3) easily would fit into Swedish legal procedure. The reports should be written so as to enable laymen to understand even the more technical aspects of the report.¹¹¹

9 §

In the chapter's 9 § expert witnesses are given a particular oath for their swearing-in. Until changes in a 1975 reform the oath were sworn "*before God almighty and his holy word*" but has since been wholly secularized.¹¹² It is interesting to consider that since this paragraph only applies to court-appointed experts, experts hired by parties are sworn-in using the traditional witness oath found in RB 36: 11 § (in Australia all expert witnesses swear the same traditional witness oath). If the oaths were different in style but more or less similar in meaning and the differences were of no real consequence this would not have been a significant problem. But there is a very real difference between swearing the expert witness-oath like court-appointed experts do and swearing the witness oath like experts hired by parties do. When expert witnesses hired by parties are sworn in using the regular witness oath, they are not held criminally liable for their testimony to the extent that court-appointed experts swearing the expert witness oath is. Thus this paragraph serves as yet another example of the Swedish legislators' bias against experts hired by parties, but this time it is a bias that can actually be said to be in the experts hired by parties' favor.¹¹³ Even if it is in the experts' favor however, it is obvious that this is a discrepancy that has to be corrected since it compromises the integrity of expert witness testimony. Another example of this blatant bias has to do with the parties and their right to pose leading questions to expert witnesses. Since there are no rules in RB 40 limiting the parties' right to ask leading questions of court-appointed experts such questions are allowed. Party-appointed experts however are treated as witnesses in this regard and therefore only the party cross-examining the expert witness is allowed to ask leading questions of the expert.¹¹⁴

10 §

In 10 § the methods used in hearing court-appointed experts is outlined in some detail. The hearing is conducted by the court in the civil law-tradition but the expert may also be questioned by party counsel if the court decides so. If the expert has submitted a written report (which is the norm for both court-appointed experts and experts hired by parties), that report can be read aloud in court (presumably it can be used for cross-examination if the expert deviates from his report in his oral statement). The court has the right to decide which questions the expert should answer, but doctrine emphasizes

¹¹¹ Gärde, Natanael "Nya rättegångsbalken", Norstedts juridik, 1949, p.551.

¹¹² Ibid, p.552.

¹¹³ Ekelöf, Per Olof, "Rättegång IV", Norstedts juridik, 1992, p.234.

¹¹⁴ Edelstam, Henrik, "Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet", Iustus, 1991, p.335.

how courts should be careful not to reject questions from counsel that might be technical in nature and hard for the court to fully understand.¹¹⁵

17 §

The reimbursement of expert witnesses is handled in 17 § and includes an interesting but old-fashioned rule about the difference between experts that are public servants in government employment and other experts. Experts that are not in government employment are reimbursed, not only for their time in court but also for time spent preparing reports for the court and other time spent on the case. Experts in government employment however are only reimbursed for the time spent in court due to the fact that their government employment governs their duty to serve as experts.

19 §

Experts hired by parties are finally mentioned in the chapter's 19 §. It is obvious from the wording of the law that the legislator cared little for this kind of expert and it has been argued doctrinally that the chapter's scant attention to party-appointed experts signal that legislators did not "*want to tempt parties to use (party-appointed experts)*".¹¹⁶ The paragraph simply says that rules about the filing of reports (7 §) and whether the expert witness should be heard at trial (8 §) also applied to expert witnesses hired by parties. The way in which these experts were heard however was not the same as with court-appointed experts but instead was the same as for ordinary witnesses (governed mainly by RB's 36th chapter). Interestingly, though there is no law against parties hiring civil servants or government officials as experts, some government councils has denied this practice (*Rättsmedicinalverket* and *Socialstyrelsens rättsliga råd*) mainly because this could put increased strain on these entities' workload.¹¹⁷

However, this practice raises some very real questions in my mind:

In a hypothetical situation where a citizen has committed a crime and the court has appointed a public servant as expert witness, it is highly troublesome that an accused looking for a "second opinion" to counteract the public servant's expert testimony cannot get a second opinion from the same government agency. This becomes a significant problem in a legal system like the Swedish where public servant's testimony traditionally has been valued so much higher than the kind of hired expert the citizen looking for a second opinion will invariably have to turn to. It may very well be that judges in Sweden in fact do not value public servants' expert testimony any higher than that of private experts hired by parties, but the word and spirit of the law certainly does suggest so.

¹¹⁵ Ibid, p.333.

¹¹⁶ Ekelöf, Per Olof, "Rättegång IV", Norstedts juridik, 1992, p.233.

¹¹⁷ Fitger, Peter, "Rättegångsbalken: en kommentar", Norstedts juridik, 2008, 40:26.

3.1.5 RB 40:11 and 36:9 § 2 stanza

Among the paragraphs in RB 40 is one that, to the apparent surprise of legal professionals I have talked to, actually seems to open the door to CE hearings within current Swedish court procedure. RB 40:11 states that in expert witness hearings (of court-appointed experts) it is not only the rules in RB 40 that are applicable. In fact, four paragraphs from RB 36 (regarding regular witness testimony) also govern the giving of expert witness testimony. One of the referrals in this paragraph is to RB 36:9 § 2 stanza which states that in cases where there are two or more witness at trial, the default procedure is that they should be heard separately. This is not unexpected since hearing witnesses one by one in a sequential manner certainly has been the historical tradition in both Sweden and Australia. However, the paragraph goes on to say that if the witnesses' testimony is unclear/vague, contradictory or otherwise special circumstances call for it, the witnesses can be heard simultaneously (literally "against each other"). Does this mean that CE procedures already exist in Sweden? The short answer is "no", but the wording of the law is interesting and in order to address it fully we need to investigate the language in the paragraph, the intent of the legislator as well as how the paragraph has been used in the past and continues to be used to this day.

First of all, the wording of the law seems somewhat vague. What does really hearing two or more witnesses "against each other" mean? On the surface, the term itself seems to vaguely suggest some sort of adversity between the witnesses that certainly does not exist in the Swedish (or Australian) legal system. Simply put there is no basis in modern judicial language for saying that witnesses are heard "against each other" as if they were competing for a price. Thus, since this "adversarial approach" to the simultaneous hearing of witnesses seems alien to the legal system and cannot be understood in the context of other rules in RB, this initial analysis of the wording of the law will not be investigated further.

Consultation of RB's preparatory materials as well as commentaries to the law similarly fails to explain the wording of the law. It is perhaps not entirely surprising to find preparatory materials from sixty years ago lacking in this respect but it is unfortunate that this point has not been discussed therein. These sources do however have some illuminating things to say about the intent of the Swedish legislator.¹¹⁸

In fact, the preparatory materials give an illuminating example of the special circumstances under which hearing witnesses "against each other" would be preferable: If a court case involves for example several items in a bill or contract that would have to be handled one by one and gone through chronologically, the traditional way of hearing expert witnesses separately can be cumbersome and unpractical. Sometimes a traditional sequential approach to this kind of a hearing would have to mean that the experts were

¹¹⁸ Fitger, Peter, "Rättegångsbalken: en kommentar", Norstedts juridik, 2008, 36:32f .

heard once about every post in the bill or contract, then would be forced to leave the stand in order for another expert to be heard and then be brought back again and again. In these circumstances the experts could instead be heard simultaneously and by doing so the Court could save time and expense.¹¹⁹

From this example it seems likely that the intent of the Swedish legislator for hearing witnesses (and experts) “against each other” according to RB 36:9 § 2 stanza is not entirely the same as the intent of Australian legislators when they created CE procedures. As has been discussed above, CE has several purposes including saving time and expenses for the court, creating a more collegial and less confrontational atmosphere for the experts as well as wresting some of the control of the expert witness-hearing away from party counsel. The basic belief is that CE procedures have a positive effect for everyone at trial; the court, the parties as well as the experts themselves. The intent of the Swedish legislator in crafting RB 36:9 § 2 stanza however seems solely to be to benefit the court. The law aims to make court procedures more efficient and enable the court to save time and money, nothing in the law suggests that it aims to create a different setting for the hearing of expert evidence or that it somehow seeks to create a less confrontational atmosphere. Though RB 36:9 § 2 stanza is an interesting paragraph that signals the Swedish legal system’s openness and acceptance of certain new ideas regarding court procedure, nothing in the law, the preparatory materials or the commentaries suggest that it means to facilitate the kind of significant reform that CE procedures have created in the Australian legal system.

3.2 The development of expert evidence in Australia

The debate over how to best use expert knowledge and expert evidence has raged back and forth in common law jurisdictions since medieval times, significantly longer than in civil law countries like Sweden. Many of these historical differences have helped shape modern expert evidence jurisprudence in common law countries and contributed to creating significant differences in expert evidence procedure between two countries like Australia and Sweden. In order to better understand these differences and the impact they might have on the prospects of having CE adopted by the Swedish legal system the historical development of expert evidence jurisprudence in Australia is very important to study. It should at the outset be pointed out that a historical view of Australian legal matters cannot be limited only to Australia. It is in the nature of the common law system that legal developments, especially in Britain but also to some extent in the United States, also factor into developments in Australia.

¹¹⁹ Gärde, Natanael ”Nya rättegångsbalken”, Norstedts juridik, 1949, p.503 and Fitger, Peter, “Rättegångsbalken: en kommentar”, Norstedts juridik, 2008, 36:32f.

3.2.1 1200-1800

The earliest documented examples of expert evidence presented before courts in common law countries originated in late 13th century England.¹²⁰ At this time, trial by jury in both criminal and civil matters had become the norm and when a case before the British courts dealt with particularly complicated issues, deemed too complicated for the general populace, so-called “expert juries” were assembled. These juries consisted, completely or partially, of citizens considered reliable sources of expert knowledge. There are examples from the early 14th centuries of juries in London consisting of fishmongers (in a case of a fellow merchant selling bad fish) and females (in cases of disputed pregnancies). The fact that apparently any female was considered knowledgeable enough to be an expert on pregnancies aside, the fact that these kinds of juries did not start appearing in Sweden until three hundred years later make for an interesting comparative study of the development of modern legal philosophy in separate regions of Europe.

The use of expert juries remained strong in British society for centuries, especially in big cities and trade hubs like London particularly regarding issues such as trade practices and customs. Even though there seems to have been a significant winnowing down of the types of cases considered suitable for expert juries over the centuries, by the 18th century the practice of having well-respected merchants serve as expert jurors in complicated civil cases had become widespread. Especially under the direction of the renowned Chief Justice Lord Mansfield of the Court of King’s Bench the common law came to develop practices regarding civil cases with a strong emphasis on expert evidence. This was an emphasis thoroughly lacking in the development of civil dispute jurisprudence in civil law countries like Sweden.¹²¹

By the 14th century some British courts and especially the Admiralty Court (maritime law) started utilizing a new way of eliciting expert knowledge - the assessor. The assessor’s role has shifted somewhat over the years but in essence he is “*someone who advises a judge or magistrate about a scientific or technical matter during a trial*”.¹²² The importance of developments in admiralty courts should not be underestimated when considering the historic importance of maritime law to the British legal system and society at large. Assessors at the Admiralty Courts were neither members of the jury nor voting members of the Court, instead they were tasked to help members of the Court understand complicated issues dealing with seafaring, ships and geography. Even as courts within the traditional British court structure started taking over jurisdiction over maritime law from the Admiralty Court, the practice of using assessors remained strong. This even though questions

¹²⁰ McClellan, Peter “Medicine and Law Conference keynote address: Concurrent Expert Evidence”, 2007, p.2f.

¹²¹ NSW Law Reform Commission, “Report 109: Expert witnesses”, National Library of Australia, 2005, p.8ff.

¹²² Black’s Law Dictionary, Thompson & West, 2004, p.125.

were raised about the advisability of having judges abdicating their responsibility to assessors, experts the parties at trial knew little about.¹²³

At the same time as the use of expert juries were flourishing in the British legal system and assessors were starting to be trusted with great responsibility in the Admiralty Court, another source of expert evidence started to grow in the British legal system – the expert witness. As was the case some years later in Sweden, the first scientific field to start contributing expert witnesses to the legal world was medicine. Early records show cases from the 14th century in which surgeons were consulted concerning matters such as whether a wound was fresh or not in disputed deaths. During the late 17th century, at the same time as the *Collegium Medicum* in Sweden was becoming a source of important expert witness testimony before Swedish courts, British doctors and surgeons were being called as court-appointed experts with ever greater frequency. These medical professionals were tasked with giving evidence on a range of issues such as whether a death had been wrongful and whether fits suffered by a child could be the result of witchcraft on the mother's behalf. Earlier during the 15th and 16th century British courts had also started utilizing grammarians as experts on issues such as the precise meaning of a technical Latin term in a contract.¹²⁴

3.2.2 1800-present day

The courts use of the expert jury declined steadily over the latter half of the 19th century and gave way to the modern practice of instead using expert witness testimony. Reforms that virtually eliminated jury trials in civil cases also contributed to this development. Expert juries were finally abolished in Britain by statute in 1971 and in Australia, where expert juries had never been used quite to the extent that they had in Britain and where they were first permitted in 1832, the practice was abolished in 1947. Similarly, objection towards the use of assessors in maritime cases was growing ever stronger during the early 19th century. At this time, the idea that the judge should be a thoroughly impartial court actor had become a bedrock foundation of the common law. Therefore, the idea that judges by using assessors abdicated some of their decision-making powers was seen as highly unseemly. Assessors remained in frequent use in Australian jurisdictions all through the 19th century, but the practice was largely ignored and discarded in the early 20th century.¹²⁵

The fact that the Australian legal system rid itself of this particular (and peculiar) source of expert evidence earlier than the British legal system speaks a lot about the limited effect the use of assessors had had on the Australian legal system over the years.

¹²³ NSW Law Reform Commission, "Report 109: Expert witnesses", National Library of Australia, 2005, p.12f.

¹²⁴ Ibid, p.15ff.

¹²⁵ Ibid, p.11ff .

At the same time as the common law was changing its views about expert juries, assessors and expert witnesses another equally profound transformation were taking place. By the late 18th century the “adversarial revolution” had swept the British legal system and indicators of the modern trend towards stronger party-control over expert evidence had started to emerge. Although both British and Australian courts always has and to this day continues to have, the right to appoint experts in the same way as Swedish courts do, by the late 18th century the practice of having parties call experts had come to totally dominate court proceedings. The old method with having expert juries gave way to a new approach where the jurors were supposed to bring no special knowledge to the jury and instead all available and pertinent evidence should be presented before the court. Gradually the members of the court in the common law system went from leading the proceedings in the way Swedish judges traditionally did, towards a different approach where they adopted a more passive role as impartial referees.¹²⁶ As was mentioned above, witnesses in common law courts have traditionally been forbidden from presenting opinion evidence at trial. That is, evidence taking into account their opinions, thoughts or conclusion regarding a fact or set of facts. Opinion evidence is however by definition exactly what modern expert witnesses are asked to give the court, and as the use of expert witnesses grew within the Australian legal system the system also had to deal with this issue. Instead of reforming expert evidence procedures by way of legislation (as had been done in Sweden, in line with civil law tradition) the common law came to instead make a crucial distinction between ordinary witnesses and a “special” class of witnesses that were allowed to present opinion evidence – these were the expert witnesses.¹²⁷

In Australia, case law has historically stipulated certain limitations on the kind of opinion evidence that an expert could present at trial¹²⁸:

1. The evidence had to have a factual basis (the Basis Rule)
2. The evidence had to have to do with the ultimate issue to be decided by the court or tribunal (the Ultimate Issue Rule)
3. The evidence presented by the expert must not be “common knowledge” (the Common Knowledge Rule)
4. The knowledge the expert uses to present his testimony must be a part of a recognized field of professional expertise (i.e. not astrology) (the Field Of Expertise Rule)
5. The expert must have enough knowledge in his field of expertise so as to make him an “expert” (the Expertise Rule)

Though the continued development of case law has altered the understanding of these rules significantly over the years they still serve the

¹²⁶ NSW Law Reform Commission, “Report 109: Expert witnesses”, National Library of Australia, 2005, p.16f.

¹²⁷ McClellan, Peter “Medicine and Law Conference keynote address: Concurrent Expert Evidence”, 2007, p.4 .

¹²⁸ Dahdal, Andrew “The admissibility of expert opinion economic evidence in judicial review” p.66f.

important purpose of defining a) which experts as well as b) what evidence can be presented at trial. Interestingly, the Australian legal system makes no distinction between court-appointed experts and experts hired by parties in this regard. As was discussed above, in Sweden RB 40 includes certain limitations on the kind of opinion evidence an expert can present at trial, but in RB there was a subtle difference in this regard between court-appointed experts and experts hired by parties.¹²⁹

During the late 18th century there had been little if any specific criticism against the use of expert witnesses hired by parties. This can probably be explained by the Australian society's great belief in the integrity and professionalism of experts themselves as well as a profound belief in the objectivity of science. But by the mid 19th century, contentious discussions regarding the objectivity of expert witnesses had started to emerge. The explosion-like development of science and industry during the century had led to new and complex issues having to be decided by courts, and in this setting expert evidence became ever more important. A negative caricature of the "expert witness" swept the legal world:

*"As argued by Chief Justice James Fitzjames Stephen, the spectacle of leading scientists contradicting each other on the witness box was attributable to their want of moral fibre rather than professional disagreement; most of them, he said, were 'all but avowedly advocates, and speak for the side which calls them'."*¹³⁰

The modern development of concurrent evidence procedures in Australia is just one of many modern strategies for dealing with the problems associated with expert evidence, including soaring costs and time constraints as well as the issue of bias. A closer look at virtually any country's expert evidence jurisprudence can be a confusing study, and so is also the case with the Australian legal system's expert evidence jurisprudence; oftentimes it seems that within every modern legal system there are ideas and reforms that seem to be wholly contradictory. How can there be separate modern reforms in Australia suggesting the use of both concurrent evidence, where many experts are involved in a panel hearing, as well as other reforms aimed at promoting the use of single court-appointed experts instead of multiple experts hired by parties? How can Swedish expert witness jurisprudence be so overtly tilted towards court-appointed experts when in fact the data shows that the experts appointed by the court are in a miniscule minority?

The answer is deceptively simple: I believe it is this way because there is no silver bullet, no panacea that will cure all the problems with expert evidence. Expert evidence jurisprudence is plagued with many problems, chief of which is high costs and jarring cases of expert-bias. In order to deal with these problems, the legal world continues to develop new ideas and

¹²⁹ Dahdal, Andrew "The admissibility of expert opinion economic evidence in judicial review" p.66f.

¹³⁰ NSW Law Reform Commission, "Report 109: Expert witnesses", National Library of Australia, 2005, p.19.

reforms. Whether or not a certain modern idea about how to deal with expert evidence problems should be used in a certain case depends on a range of factors: it depends on the character of the case before the court, it depends on the members of the court, it depends of the complexity of the legal issue and it also depends on restraining factors like money and time. In many different situations CE procedures is a great tool to use to battle these problems, but sometimes the characteristics of a case dictate otherwise. Though it is not a part of the scope of this thesis there certainly exists situations where a single court-appointed expert witness is to be preferred instead of a hot tub-hearing of experts (for example when dealing with fairly straight-forward and easily understood matters). Even though the idea of CE and the idea of the single court-appointed expert might seem entirely contradictory it is important to point out that just because you believe strongly in CE it does not imply that you totally discard the positive effects of the use of single court-appointed experts.

There is simply put no easy, all-encompassing answer to the old problems of expert evidence. There is no silver bullet to make expert witnesses unbiased, their testimony easy to understand and evaluate for the court and enable it all at little cost. Therefore there must be many competing – sometimes contradictory - tools available for dealing with expert evidence within countries' legal systems. Instead of a dogmatic approach to dealing with the problems of expert evidence, an invigorating sense of pragmatism seems to be sweeping through the legal systems of the world. In the words of the New South Wales Attorney General's working party on civil procedure report on sweeping expert evidence reform to the UCPR: "*expert evidence should be governed by 'maximum possible flexibility'*".¹³¹

3.2.3 The historical problem of expert bias

*"Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves (expert witnesses), rather considers themselves as the paid agents of the person who employs them."*¹³²

The problem of "adversarial bias", the bias that might follow from the fact that an expert is hired by a party to present evidence at trial, has been a recognized and widely discussed problem in common law (and to a lesser degree civil law) countries for nearly two hundred years.¹³³

The Australian CE-reform, as well as other modern development regarding expert evidence, works towards creating a setting where expert witnesses

¹³¹ NSW Attorney General's Working Party on Civil Procedure, "Report: reference on expert witnesses", November 14, 2006, p.1.

¹³² *Lord Arbing v Ashton (1873) 17 LR Eq 358 at 374*, quoted in Sperling, H.D., "Expert evidence: the problem of bias and other things", 1999, p.1.

¹³³ NSW Law Reform Commission, "Report 109: Expert witnesses", National Library of Australia, 2005, chapter 2.

hired by parties will one day be viewed as professional and unbiased court-actors and not as “hired guns”. Even though CE procedures have many goals and aspirations, this urge to create a procedure that will enable the experts to become less biased is a central concern. The root of the problem with expert witness bias is rooted deep within the fundamental framework of the common law system. At its most basic level, the common law legal tradition is governed by the “adversarial system”. The adversarial system (or the adversarial model or approach) has been defined as “*a procedural system, such as the Anglo-American legal system, involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker*”¹³⁴ and is traditionally contrasted with the European civil law “inquisitorial model” which at its most basic is “*a system of proof-taking used in civil law, whereby the judge conducts the trial, determines the questions to ask, and defines the scope and the extent of the inquiry*”¹³⁵.

In the context of expert witness testimony, the mechanisms of the adversarial approach seem deceptively simple at first glance. Since it is up to the parties to present expert evidence at trial the parties both have the opportunity and the incentive to present the best possible experts. Over the years, this approach has led to a certain obvious tendency in the parties’ choice of experts. The parties hire expert witnesses whose views are the ones they want to hear. There is neither something strange in that basic truth, nor something wrong. This “bias” is balanced out by the fact that the opposing party also has the ability to present evidence and by the wisdom and skill of judges (and especially in American common law, juries) to evaluate the testimony. The way the adversarial system thus has shaped expert testimony jurisprudence in common law countries has been termed “the sporting theory”. Even though this approach to expert evidence in one sense can be said to promote partisanship, since both parties have the same opportunity to present partisan experts the playing field is even and both parties have a “sporting chance”.¹³⁶

It should be mentioned that the adversarial system in general and the sporting theory in particular obviously does not fully apply in criminal as opposed to civil matters. When the court in a common law-country is dealing with a case where the accused is a person and the accuser is the state the playing field is far from even. Since CE procedures, even though they certainly are possible in many criminal matters, are focused heavily on civil cases this complication will not be discussed further.

¹³⁴ Black’s Law Dictionary, Thompson & West, 2004, p.58.

¹³⁵ Ibid, p.809.

¹³⁶ Mnookin, Jennifer “Expert evidence, partisanship, and epistemic competence”, Brooklyn Law Review, vol. 73.3, 2008, p.1015ff.

Expert witness bias has historically been divided into three separate categories that were identified (if not actually named) as early as 1873 in Britain by Sir George Jessel in *Abinger v. Ashton* 17 L.R. Eq. 358¹³⁷:

Deliberate partisanship

The most blatant and morally questionable partisanship is deliberate partisanship. It is also for understandable reasons the rarest form of partisanship. Partisanship in this sense would mean that the expert tailored his findings or his conclusions to the will of the party that hired him, or conceivably tailored the conclusions in one way or the other in a situation where the expert was court-appointed. In the latter scenario it is however hard to see what the expert would have to gain from his partisanship and there lays the essence of deliberate partisanship; in instances of deliberate partisanship the expert should reap some kind of direct gain from his partisanship.

Unconscious partisanship

If an expert does not intentionally tailor his conclusions to mislead the court, but unconsciously is influenced by the party to give testimony in way that benefits that party, he has committed an act of unconscious partisanship. This very common bias is considered natural to the adversarial system and can take many forms; an unconscious pressure to “join the team” and to subtly tailor one’s view of the facts the way the party that has hired you, pays you and that you have worked with for weeks, prefer. It has been identified as a major problem within the Australian legal system.¹³⁸

Selection bias

This sort of bias does not describe the actions of the experts themselves but instead the parties that hire them. This is the (natural) bias that occurs when a party chooses between a several expert witnesses and decides to hire one that they know supports their view of the facts.

*“A man may go, and does sometimes, to half-a-dozen experts. I have known it in cases of valuation within my own experience at the Bar. He takes their honest opinions, he finds three in favour and three against him; he says to the three in his favour, will you be kind enough to give evidence? And he pays the three against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they found one.”*¹³⁹

¹³⁷ Bernstein, David “Expert witnesses, adversarial bias, and the (partial) failure of the *Daubert* revolution”, Iowa Law Review, vol. 93, 2008, p.104ff.

¹³⁸ NSW Law Reform Commission, “Report 109: Expert witnesses”, National Library of Australia, 2005, p.71ff.

¹³⁹ *Thorn v Worthing Skating Rink Co (1877)* 6 Ch D 415 at 415n, quoted in Sperling, H.D., “Expert evidence: the problem of bias and other things”, 1999, p.2.

On the same note, the famous (and infamous) American trial lawyer Melvin Belli once said: “*If I got myself an impartial (expert) witness, I’d think I was wasting my money.*”¹⁴⁰

CE procedures and other modern Australian reforms trying to make expert evidence more objective and less biased aim mainly at Unconscious Partisanship, aims somewhat at Deliberate Partisanship and virtually not at all at Selection Bias. Selection Bias is considered a natural and unavoidable part of the adversarial system and the underpinning for the “sporting theory” of expert evidence. The way modern reforms in Australia and Britain have aimed to counteract Deliberate Bias is by having the experts reminded of their overriding duty to the court and not the parties as well as by instituting stiff penalties for experts’ misconduct (having been found deliberately biased). By changing the atmosphere of the court room, by changing the dynamics of the hearing and by fostering a feeling of collegiality and genuine debate proponents of CE procedures aim to turn the tide of blatant partisanship that has enveloped expert witness jurisprudence over the last few decades.

Historically in common law countries, reform ideas seeking to change or mitigate the highly adversarial nature of expert testimony procedure and the resulting bias has been met with hostility. In 1862 the British Association for the Advancement of Science published a collection of recommendations, aimed at counteracting the perception that expert witnesses were becoming too biased in favor of the party that hired them. They recommended that assessors be utilized to a greater extent as well as emphasized the use of court-appointed experts instead of experts hired by parties. These proposals were considered inconsistent with the fundamentals of the common law system and soundly ignored. The same sort of adversity to changes in expert evidence procedure can be seen in Australia. There the problem of expert bias has mirrored the problems in Britain since at least the latter part of the 19th century. One Australian judge said, in reference to experts being heard in workers’ compensation matters: “*one only had to hear the name of the (expert) witness and one could have written the report oneself and, indeed, the script for examination.*”¹⁴¹

Since one of the stated goals of CE procedures is to create a setting where expert evidence can become less biased, the conclusion must first be that modern Australian legislators believe that there remains a problem with bias in expert witness testimony today. Furthermore, Australian legislators believe that CE procedures could help cure or mitigate this significant problem. Within Australian academia however, modern common law scholars have for years nurtured a strong philosophical distrust for this “search for absolute objectivity” in expert evidence jurisprudence. The prominent Australian scholar Gary Edmond has spent many years

¹⁴⁰ Liptak, Adam, “American exception: In US, expert witnesses are partisan”, New York Times, August 11, 2008, p.5.

¹⁴¹ NSW Law Reform Commission, “Report 109: Expert witnesses”, National Library of Australia, 2005, p.19.

describing and critiquing the idea that there is an “absolute objectivity” in expert evidence jurisprudence that Australian legislators should try to reach. Edmond certainly does not contest the fact that expert witnesses sometimes show tendencies to strong partisanship, but he stresses that even in the 21st century there remains significant honest disagreement within scientific fields. On many issues, be it climate change or the harmful effects of certain pesticides, there remains very real discrepancies between different experts’ beliefs. To strive for absolute objectivity in these fields – particularly by blunt instruments like single court-appointed experts – is naïve and counterproductive. Edmond quotes historian Randall Albury as saying “*matters of disagreement between scientific expert are not typically conflicts between objectivity on one side and bias on the other, but conflicts involving two rival concepts of objectivity – that is, two different ways of assigning relevance to the available data and of interpreting their meaning.*”¹⁴² In fact, Edmond argues that what is considered “objective” depends on the assumptions of the observer. Indeed he argues that there exists no stable and universal scientific doctrine that would enable objectivity.¹⁴³

Gary Edmond’s work has had a direct and tangible impact on the development of CE procedures in Australia when it was cited and recognized in the NSW Law Reform Commission report on Expert Evidence.¹⁴⁴

There is no reason to presume that Australian legislators challenge Gary Edmond’s strict belief that there exists no “absolute state” of total lack of bias. Instead the legislators seem to believe that the effects of bias can be mitigated through modern reforms and procedural developments. In short there might not be a way to eradicate all sources of partisanship and bias in expert evidence jurisprudence, but that does not mean that legislators should not try to minimize the problem.

In fact, in the only wide-ranging study on the issue of Australian expert witness bias, Dr. Ian Freckelton outlined the extent to which expert witness bias was a problem for the Australian legal system in a report entitled *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (1999). The study surveyed Australian judges and had a response rate of 51% out of 478 Australian judges and reported three key findings:

1. 68.1% of judges reported that they “occasionally encountered” expert witness bias and 27.59% said they encountered expert witness bias “often”.
2. 34.84% of the judges (the largest proportion) singled out “expert bias” from a list of factors as the most serious problem with expert witness testimony.

¹⁴² Quoted in Edmond, Gary, “After objectivity: expert evidence and procedural reform”, *Sydney Law Review*, vol. 25, 2003, p.136.

¹⁴³ Edmond, Gary, “Whigs in court: historiographical problems with expert evidence”, *Yale Journal of Law and Humanities*, vol. 14, 2002, p.131.

¹⁴⁴ NSW Law Reform Commission, “Report 109: Expert witnesses”, National Library of Australia, 2005, p.70.

3. 76.72% of the judges reported that that they “occasionally” encountered expert witness evidence that they found difficult to understand while 14.22% of respondents said this was “often” the case.

The Freckelton report made a strong case for the contention that expert witness bias remained a strong and destructive factor in 21st century Australia. The report has since been quoted extensively in legislative proposals concerning CE in both New South Wales and Victoria. It should however be mentioned that Gary Edmond mounted a forceful criticism of the survey’s findings, arguing that the survey was flawed and did not suggest what the legislators quoting it in their proposals wanted it to propose.¹⁴⁵

Serious public concerns about the role of expert witnesses, their bias and their place in the Australian justice system were stoked in 2004 when the Australian media started investigating the practice of paying experts through contingency fees. That is, a method of expert payment where the expert is only paid (and often extravagantly so) if the case is won in court or favorably settle out of court.¹⁴⁶

Contingency fee arrangements (which are frowned upon even for lawyers in civil law countries like Sweden and certainly would be considered a gross ethics violation if considered for expert witnesses in my opinion) have grave implications for the issue of expert witness bias. The Australian media was sometimes vicious in their criticism of expert witness jurisprudence:

“When expert witnesses give paid evidence, they are part of a system that is an affront to common sense. Experts paid by parties to court cases may be unbiased but they are not disinterested. So, it should be no surprise that the evidence presented by expert witnesses is in most cases entirely predictable: it favours those who pay the bills.”¹⁴⁷

These media reports as well as the public uproar that followed led to several recommendations for serious change. The most forceful change was crafted through the UCPR of 2005 in New South Wales. Prior to the enactment of the law, the NSW Law Reform Commission published a report aimed at forcing parties to disclose the way in which they paid their expert and this recommendation was incorporated into Rule 31.22 of the UCPR of 2005.¹⁴⁸ It is interesting from a comparative perspective that the Australian legislator did not fully outlaw the practice of expert witness contingency fees after the issue had drawn such public concern. Instead, the belief was that underfunded parties would not be able to pay their expert witnesses if contingency fees were not allowed and therefore the rule should be that the fees should be allowed but always disclosed to the court. By disclosing it to

¹⁴⁵ Edmond, Gary, “Judging surveys”, *Federal Law Review*, vol. 33, 2005, p.97.

¹⁴⁶ Black’s Law Dictionary, Thompson & West, 2004 , p.338.

¹⁴⁷ Merrit, Chris “Put paid to the hired witnesses” *The Australian* (Sydney), 3 Feb 2006, p.7, quoted in Victorian Law Reform Commission, “Civil justice review”, 2008, p.484.

¹⁴⁸ McClellan, Peter, “The new rules”, 2007, p.5.

the court (and the opposing party) underfunded parties could still present expert evidence but the court should take the contingency fees into account when evaluating the evidence presented at trial. However, since this issue had drawn such public concern it is probable that Australian judges in the future will evaluate expert testimony paid through contingency fees very harshly and that the inequality between a well-funded party and an underfunded party that had to rely on contingency fees to some extent will remain.

All in all, the problem of expert witness bias remains strong in the 21st century. Modern common law legal systems have come to grudgingly accept one kind of expert bias (Selection Bias), have started to more forcefully punish another kind (Deliberate Partisanship) but still struggles with the most important source of expert bias (Unconscious Partisanship). CE processes is one of many modern ideas aimed at dealing with the problem of Unconscious Partisanship and is in my opinion the most promising by far. At its most basic level, CE in Australia aims to mitigate the problems outlined in the disputed Freckelton report. Though criticized for its methodology, the report all things considered, made a convincing case for using legislative action to deal with expert witness bias. As will be shown in Chapter 5, there is promising evidence of CE procedures' success in this regard.

4 The historical development of concurrent evidence

The historical development of CE procedures in Australia warrants a chapter of its own. This even though it can certainly be seen as part of the larger story of the development of expert evidence jurisprudence, described in the previous chapter. By analyzing the historical development of CE in practice, proposals and finally legislation a more complete picture of CE presents itself. Understanding this picture and the interesting way CE went from an abstract idea to a concrete practice is crucial to the prospect of CE in Sweden.

In this chapter I will outline the development of CE procedures in Australia, initially by describing the Federal Court Rules of 1998 that were the first Australian legislative effort to deal with CE and then proceeding to developments in other Australian jurisdictions. Lastly I will describe in detail current Australian CE regulation.

4.1.1 Justice Lockhart and the Federal Court Rules of 1998

The process that became known as concurrent evidence was invented by the Australian jurist, The Honourable Justice John Lockhart A.O. and the economist Maureen Branton. Justice Lockhart was the President of the Australian Trade Practices Tribunal between 1982 and 1999. The tribunal administers justice under the Australian Trade Practices Act and deals with telecommunications matters among other things. It was re-named the Australian Competition Tribunal in 1995.¹⁴⁹ Justice Lockhart who passed away in 2006 was a prominent lawyer and respected judge in Australia.¹⁵⁰

It is unknown exactly when Justice Lockhart first conceived of CE and the hot tub-hearing. What is known is that the procedure started at the Australian Trade Practices Tribunal sometime in the early to mid 90's and had developed far enough and enjoyed enough positive notoriety to suffice the inclusion of CE early rules in the revised Federal Court Rules of 1998 (henceforth FCR). The FCR governs the practices of the Federal Courts of Australia which are the Australian courts in which most federal civil disputes and some minor federal criminal matters are handled. Interestingly enough the Federal Courts are also the appeals instance for these matters, the only higher court in the Australian court system is the High Court of Australia. From the perspective of Swedish legal thinking, the scarcity of

¹⁴⁹ http://www.lawyersweekly.com.au/articles/Profession-pays-tribute-to-Justice-Lockhart_z67690.htm and http://www.nswbar.asn.au/docs/resources/publications/bn/bn_spring00.pdf

¹⁵⁰ AAT, "An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal", 2005, p.7.

preparatory and explanatory materials that accompany Australian laws is troublesome. Swedish legal scholars are accustomed to voluminous publications, explaining in detail the background, reason and applicability of new laws. This is not the common law tradition and therefore little is known exactly why the FCR of 1998 came to include CE rules. Speculatively it can be assumed that the Australian legislators had heard positive things about the practice from Justice Lockhart's court. It is however curious that the first codification of CE procedures in Australian law came on the wide-encompassing federal level and not in, for example specialized courts like the NSW Land and Environment Court or other state courts. This curious fact does however speak volumes about how convinced the legislators must have been about the positive effects of CE. If there had been considerable doubts about the effectiveness of CE it would seem more likely that the practice would not have been codified so early on the federal level.

What the FCR came to include regarding CE was Order 34A, Rule 3. The rule includes a broad outline of what we today know as "concurrent evidence", including the first more or less explicit legal basis for the peculiar hot tub-hearing. These rules are fit to reproduce in their entirety in this context because even though the term "concurrent evidence" is not used, a closer examination of Order 34A, Rule 3 shows the embryo of many of the modern cornerstones of CE procedures.

FEDERAL COURT RULES - ORDER 34A RULE 3
Evidence by expert witnesses

- (1) *This rule applies if 2 or more parties to a proceeding call, or intend to call, expert witnesses to give opinion evidence about the same, or a similar, question.*
- (2) *The Court or a Judge may direct:*
 - (a) *that the expert witnesses confer; or*
 - (b) *that the expert witnesses produce for use by the Court a document identifying:*
 - (i) *the matters and issues about which their opinions are in agreement; and*
 - (ii) *the matters and issues about which their opinions differ; or*
 - (...)
 - (f) *that each expert witness give an oral exposition of his or her opinion, or opinions, on the question; or*

(g) that each expert witness give his or her opinion about the opinion, or opinions, given by another expert witness; or

(h) that the expert witnesses be cross-examined in a certain manner or sequence; or

(i) that cross-examination, or re-examination, of the expert witnesses be conducted:

(i) by completing the cross-examination or re-examination of an expert witness before starting the cross-examination or re-examination of another; or

(ii) by putting to each expert witness, in turn, each question relevant to one subject or issue at a time, until the cross-examination or re-examination of all the witnesses is completed.

What Order 34A, Rule 3 does is grants the courts great freedom in how it elicits expert testimony at trial. Everything in the rules is not necessarily new to the Australian court system (or the Swedish), the oral exposition has historically been the preferred way of starting off expert hearings in both Swedish and Australian courts. The new features of Order 34A, Rule 3 is the way in which it specifically points out that the court can decide HOW to hear a witness; In which order witnesses should be heard, who should be allowed to ask questions and how physically the hearing should be set up. It is important to point out that Order 34A, Rule 3 did not mandate that expert witnesses must or should be heard using CE procedures. But it enabled judges to use these new procedures at their personal discretion. It is also worth noting that the FCR includes explicit mention of the pre-trial conferences as well as the compilation of joint reports in Rule 3, 2 a-b. Though it is not mentioned specifically in this legislative context, Australian Federal courts at this time already used modern expert witness codes of conduct and thus the FCR was the first legal document that enabled not only the hot tub-hearing but also what I have come to call CE procedures.

4.1.2 The development of CE in other jurisdictions

A year after the promulgation of the FCR distinct features of CE procedures started to spread into other Australian jurisdictions. Although there is a conspicuous lack of written material on CE from this time, one would assume that it spread mainly due to the good reputation and positive results of the practice in the federal courts and in Justice Lockhart's Australian Competition Tribunal. An explanation for the lack of written material at the

time could also be that legal scholars wanted to give CE some time to prove itself before they started publishing on the matter.

Even if questions remain as to how the word of CE spread, spread it undoubtedly did. First to the NSW Supreme Court that started using pre-trial conferences and joint reports along with hot tub-hearing in 1999 and the practice was incorporated into the Supreme Court Rules in 2000.¹⁵¹ These new rules also included a new experts' code of conduct and thus all the elements of CE procedures have been in practice in the NSW Supreme Court since 2000. The NSW Land and Environment Court started issuing Practice Directions that included CE procedures soon thereafter. These included pre-trial conferences and the writing of joint reports as well as the hot tub-hearing. It did however also, interestingly enough, revive the heavily-criticized¹⁵² concept of court appointed single-expert witnesses (which as has been described above is a concept diametrically opposed to CE but one that has strong traditional basis in both Australia and Sweden and is still used, to limited extent, in both countries to this day). The NSW Land and Environment Court has exclusive jurisdiction over most environmental, building and planning disputes in the NSW. It reviews administrative decisions, enforces civil rights relating to planning and imposes penalties for breaches of environmental law. In the context of the historical development of CE procedures it is important to point out that the court was the first and as of yet only to issue rules *demanding* the use of CE procedures in all applicable cases before the court.¹⁵³

Another judicial body important to development of CE procedures in Australia was the AAT. The AAT is a tribunal that reviews administrative decisions by the Australian federal government. The tribunal is not a part of the Australian court hierarchy since it has no base in the Australian Constitution but was created by statute in 1975. The tribunal's decisions are subject to review by the Federal Court of Australia. The Administrative Appeals Tribunal Act of 1975 includes a rule in subsection 33(1) that states that proceedings before the tribunal shall be conducted with as little formality and technicality as possible. Thus, the AAT is not bound by the rules of evidence in the manner a court is and can hear evidence in any manner it thinks appropriate. This sense of pragmatism and procedural freedom on behalf of the AAT undoubtedly was a contributing reason to why the tribunal was in a position to help pioneer the use of CE procedures in Australia and crucially help play an important role in the evaluation of the effectiveness of CE. In fact, CE procedures have been used in many of the tribunal's most important cases over the last decade, including *Coonawarra Wine Industry Association Inc and Others v. Geographical Indications Committee and Others*(2001 AAT 844) and *Re Keenan and Repatriation*

¹⁵¹ NSW Supreme Court Rules 1970, Part 36, Rule 13CA (later repealed, CE rules for the NSW Supreme Court now found in the NSW Uniform Civil Procedure Rues of 2005) .

¹⁵² For a forceful criticism of this concept, see Downes, Garry, "Expert evidence: the value of single or court-appointed experts", 2005.

¹⁵³ AAT, "An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal", 2005, p.8f.

Commission (2000 AATA 707). Curiously enough, the AAT has not included information about CE procedures in their Practice Directions.¹⁵⁴ This might possibly have to do with the long time the tribunal has utilized CE procedures and these procedures having become general knowledge with tribunal practitioners. However, several Justices at the tribunal has described their use of CE in particular detail in various papers and speeches (see Chapter 2.5) and in fact these papers with its detailed account from the pre-hearing stage to the conclusion of the conference (the AAT does not use the term trial for their proceedings) serve as some of the best information available to the every-day workings of CE procedures in Australia. More importantly it is from the AAT we find the only scientific and empirically sound evaluation of the effectiveness of CE procedures, which will be described in detail in the next chapter. The AAT also serves as an interesting example of how CE procedures spread to new Australian courts and tribunals. In the first CE case before the tribunal it was actually the parties that requested use of CE procedures and especially the hot tub-hearing.¹⁵⁵

Over the last few years, as CE procedures spread through the court system and the AAT it also started to appear as a valuable tool for the ever-expanding field of alternative dispute resolutions (ADR). The Australian Institute of Arbitrators and Mediators published a report in 2003 where they argued that “*the relaxing qualities of the hot tub are well known, and assuming that the experts are competent, honest and genuine (hot tubbing will achieve) narrowing of the differences between the parties.*”¹⁵⁶ With ADR’s focus on limiting expenses for parties it is understandable that they find great promise in the idea of CE procedures. According to Justice Lockhart CE is also in the process of being adopted by a number of international tribunals although it is unclear exactly which international tribunals Justice Lockhart is referring to.¹⁵⁷

CE procedures have also started to slowly spread internationally. In Canada the use of panels of experts instead of the traditional sequential hearing of experts was recommended as early as 1996 by the Canadian Bar Association¹⁵⁸ and has been further developed and put into practice in some Canadian provinces. There has also been scholarly debate on the issue of CE procedures in Ireland, though it seems to have led to no legislative reform or even proposal of such reform.¹⁵⁹

¹⁵⁴ The latest Practice Direction of March 26, 2007 does not include any mention of CE procedures (<http://www.aat.gov.au/PracticeDirectionsAndGuides/PracticeDirections.htm>).

¹⁵⁵ AAT, “An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal”, 2005, p.10.

¹⁵⁶ Nosworthy, Ian D., “The future of arbitration and mediation”, 2003, p.10.

¹⁵⁷ Judicial Commission of New South Wales, “Instructional DVD: Concurrent evidence, new methods with experts”, 2005.

¹⁵⁸ Canadian Bar Association, “Systems of civil justice task force report”, 1996, p.44.

¹⁵⁹ O’Sullivan, Phillip, “A hot tub for expert witnesses”, *Judicial studies institute journal*, vol. 4:1, 2004, p.1ff.

It is important to point out that the hot tub-hearing has not made its way to the British isles as of yet. This is significant considering how these two legal systems have developed virtually side-by-side and step-by-step in modern times. This fact could also be used as an argument against the idea of the prospective international spread of CE procedures. If they will not even adopt the hot tub-hearing in Britain, probably the legal model in the world most closely associated to the Australian, why would any other country want to try it? This is a fair question, especially considering how the British legal system already has in place other features CE procedures (namely the duty to the court and the pre-trial conference and writing of joint reports). But I suspect that the lack of hot tub-hearings in the British legal system has less to do with the merits of CE procedures and more to do with chronology. The fact of the matter is that the highly influential *Woolfe report* that helped steer the British legal system towards reform (and helped spark the development of CE procedures in Australia) was published in 1996, several years before the positive effects of CE procedures in Australia started to become well known. Similarly, as a result of the *Woolfe report* Britain underwent a wide-encompassing civil procedure reform in 1998 that reformed expert evidence jurisprudence by introducing a whole host of modern expert evidence ideas aimed at combating bias and saving time and money for the court. In the context of the new British rules there seems to be ample space for the hot tub-hearing, and the major reason why this was not accomplished was simply because the reform took place before the positive effects of CE had been convincingly proven internationally. There is unquestionably a stronger tendency in Britain towards single court-appointed witnesses than in Australia, but to the still-large extent that multiple experts give evidence in the British legal system CE procedures would certainly seem to be a good fit.¹⁶⁰

4.1.3 CE procedures today

As was described above, CE procedures were not created in one bold act by an Australian legislator. In fact the CE grew slowly over the years, from its beginnings at the hands of Justice Lockhart at the Australian Trade Practices Tribunal to the State courts as well as specialized courts like the New South Wales Land and Environment Court. CE procedures started with the limited jurisdiction of the Australian Trade Practices Tribunal and went on to the wide-encompassing, general jurisdiction of the Federal court system through the FCR.

Due to the common law nature of the Australian legal system there exists neither a single law or statute governing expert evidence procedures in Australia, nor a definite and wide-ranging model for how CE procedures should be used. Today, the use of CE procedures is wide-spread in the Australian legal system and is used frequently on both the federal and state levels. It is especially prevalent in the metropolitan NSW where the practice was partially pioneered by the state Supreme Court, the Land and

¹⁶⁰ Victorian Law Reform Commission, "Civil justice review", 2008, p.498ff.

Environment Court as well as the region's AAT. However, certain discrepancies between the states remain, in the state of Queensland for example the courts make ample use of pre-trial conferences but do not appear to be using the hot tub-hearing itself.¹⁶¹

In lieu of the civil law's traditionally wide-encompassing laws many of the courts and tribunals that utilize CE procedures have developed their own guidelines for how practitioners and instructions should deal with CE procedures. This has positive implications for the legal bodies in question (and by extension, positive effects for the further development of CE) since it gives them room to tailor the rules of CE to the specific rules governing that particular legal entity and what fits their routines and work environment. But this lack of a unified code of CE certainly makes the study of CE more challenging. It will also make it harder in the future to point to concrete results of CE procedures since it might be problematic to compare CE at one court with CE at another court. Guidelines, models and codes of conduct for CE procedures have been issued in various forms by several courts and tribunals in the Australian legal system including the Federal Court of Australia (guidelines that seek to clarify the FCR rules), the State Administrative Tribunal, the New South Wales District Court, the NSW Supreme Court, the NSW Land and Environment Court as well as the AAT. As the term "guidelines" suggest they are not binding in nature:

*"The guidelines are, as their title indicates, no more than guidelines. Attempts to apply them literally in every case may prove unhelpful. In some areas of specialised knowledge and in some circumstances (...) their literal interpretation may prove unworkable."*¹⁶²

The guidelines issued by the Federal Court are arguably the most important since they appeal to the largest federal jurisdiction. Their stated intent is to:

*"facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is hoped that the guidelines will assist individual expert witnesses to avoid the criticism that is sometimes made (whether rightly or wrongly) that expert witnesses lack objectivity, or have coloured their evidence in favour of the party calling them."*¹⁶³

It should also be emphasized that these different guidelines are all somewhat different in scope. Some seek to explain what CE aims to do and give an easily comprehended step-by-step tutorial for the parties and experts involved. Others give a more general overview of the duties and expectations of expert witnesses and often limit their handling of CE to a clause ordering witnesses to accept giving their testimony jointly with other witnesses and simply comply with the court or tribunal's further instructions

¹⁶¹ Victorian Law Reform Commission, "Civil justice review", 2008, p.494f.

¹⁶² Federal Court of Australia, "Practice Direction: Guidelines for Expert Witnesses in the Federal Court of Australia", vers. 6, 2008, , p.2.

¹⁶³ Ibid

in this regard. The reasons for these differences are obvious. Different courts in different parts of Australia have different needs and different means. The beauty and efficiency of CE lays in the flexibility and pragmatism of the procedure – it can be used both in supremely complex cases regarding controversial scientific findings like many cases before the Federal Courts that sometimes are docketed to stretch over months, but it can also be used in the kind of simple personal injury cases that often finds its way to the AAT.

Regarding the future of CE procedures, Australian as well as foreign legislators should pay heed to the aforementioned idea of flexibility and pragmatism. The words, found in a report from the New South Wales Attorney General’s working party on civil procedure, serve well to be repeated: CE should always strive towards “*maximum possible flexibility*”.¹⁶⁴ As has been shown in the NSW Land and Environment Court, CE procedures can work well even within the larger framework of other modern developments in expert evidence jurisprudence that sometimes might even seem contradictory. In the hands of capable, flexible and above all else pragmatic members of the court, CE procedures can become a crucial tool in many different kinds of cases. A remarkable case in point regarding the flexibility of the Land and Environment Court’s approach to expert evidence has to do with single court-appointed expert witnesses. The use of court-appointed expert witnesses is oftentimes viewed as the opposite of CE procedures since the basic idea behind court-appointed experts is that one expert rather than many should be able to solve the issue with less belief in the adversarial process. It is a concept much more grounded in the inquisitorial system of law and one that seem alien to the application of CE procedures. At the Land and Environment Court there were cases where members of the court appointed a single expert that it turned out the parties did not accept for various reasons. What the court did when faced with this impasse was let the parties hire their own expert and have them all (including the single court-appointed expert) give concurrent evidence using the “hot-tub”-model. In essence they applied the proven positive effects of CE procedures even to situations that would seem to have little to do with the “ideal” case for CE. They did this in a nimble and smart way that showed not only their skill with CE procedures, but also the pragmatic way in which CE procedures ought to develop in the years to come.¹⁶⁵

¹⁶⁴ NSW Attorney General’s Working Party on Civil Procedure, “Report: reference on expert witnesses”, November 14, 2006, p.1.

¹⁶⁵ Engineers Australia Court Users Group, “Changes in the Land & Environment Court”, 2005, p.1.

5 Research on the effectiveness of CE procedures

In order to assess the effectiveness of CE procedures and to ascertain whether CE should be adopted by other legal systems it is important to look at empirical evidence of the procedures' positive effects. Any study aimed at empirically assessing the effectiveness of CE procedures will face significant problems due to the very nature, goals and aspirations of CE procedures.

In Chapter 2, the overarching goals of CE were identified as:

1. *To enable judges, legal representatives and other experts to better understand expert testimony and facilitate effective analysis of the testimony so as to help the judges make the correct (or preferable) decision in an given case.*
2. *To help experts strive towards being independent advisors whose primary role is to assist the court or judge.*
3. *To enhance the efficient operation of the court; to keep costs down and reduce the time needed for taking expert testimony.*¹⁶⁶

Scientific studies of CE will thus face some very challenging questions including: How do you assess and quantify whether a member of the court has “better understood” an expert? How do you know whether the court made a “correct” decision? How do you know whether an expert has truly been independent and objective? The answer is of course that these questions cannot always be answered. In fact, many of these questions can never be answered with absolute certainty. There simply is no scientifically sound way of assessing whether a “correct” decision has been reached or whether a court has evaluated expert testimony in a “correct” way. Indeed legal philosophers have been debating the meaning of cornerstones like “correct” and “objective” for decades, most noteworthy in this context the Australian legal scholar Gary Edmond.¹⁶⁷

Studies of CE's effectiveness will have to recognize the fact that some of these issues can never be empirically proven. However, studies of this sort can investigate whether or not the participants (members of the court,

¹⁶⁶ AAT, “An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal”, 2005, p.4.

¹⁶⁷ Edmond, Gary, “Science, law and narrative: helping the ‘facts’ to speak for themselves”, Southern Illinois University Law Journal, vol. 23, p.555, 1999, Edmond, Gary, “Supersizing *Daubert science for litigation* and its implications for legal practice and scientific research”, Villanova Law Review, vol. 52, p.856, 2007 and Edmond, Gary, “Judicial representations of scientific evidence”, The Modern Law Review, vol. 63, p.216, 2000.

parties, experts etc) themselves *subjectively* believe that CE, for example has helped them better understand an expert witness.

Therefore the study described in this chapter will provide less-than-scientifically-perfect evidence of CE's effectiveness on a range of issues but will still be able to supply convincing anecdotal and subjective evidence of the procedures' effects.

The results to be presented in this chapter are from a comprehensive study of CE at the AAT. As has been discussed earlier the AAT is a tribunal that reviews administrative decisions by the Australian federal government and that is not a part of the regular Australian court hierarchy. Even though these results should not be interpreted as being universal in application, they do give a strong indication of how CE has worked in a particular court (tribunal), under particular circumstances. Since this study is the only source of evidence available regarding CE's concrete results it is a crucial source of information.

5.1 The AAT Study

Although CE procedures had been developing for more than a decade within the Australian legal system, the first systematic evaluation of the procedures was conducted by the AAT between December 2002 and March 2005.

The study was limited in scope and focused its investigation on cases at the New South Wales Registry branch of the AAT and was published in 2005.

The aims of the study included¹⁶⁸:

1. To determine the criteria that should be used to select cases suitable for CE
2. To refine the proposed procedures for taking CE, including determining whether the same procedures should be used for all type of expert witnesses
3. To assess whether the CE procedures increase the likelihood of an early settlement
4. To evaluate the effectiveness (on a range of issues) of CE procedures, both from the viewpoint of the members of the tribunal, the party representatives and the expert witnesses themselves.

The study utilized a combination of different data gathering techniques. Both qualitative and quantitative data was collected through the use of surveys, focus groups and file audits. Though data was gathered from members of the tribunal as well as from party representatives and expert witnesses, the majority of empirical findings were collected from members of the tribunal. During two and a half years of data collection close to two hundred cases before the Tribunal were examined for inclusion in the study. Out of these, CE procedures were used in 48 cases. If the total number of cases (n=48) seems surprisingly small considering the number of cases

¹⁶⁸ AAT, "An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal", 2005, p.4.

eligible for inclusion in the study (n=199) it should be noted that in 59 cases the issue was settled by the parties before the issue went to court.¹⁶⁹

The cases included in the study almost exclusively dealt with veterans' affairs and medical compensation. Because of the limited types of cases included in the study, all expert witnesses included in the study were either experts in the field of medicine or psychiatry.

5.1.1 Positive effects of CE procedures for members of the AAT

One of the most central problems with expert evidence, as has been discussed above, is undoubtedly the perception that expert witnesses are "hired guns" and often highly biased. In order to deal with this, one of the most important goals of CE procedures is to improve the objectivity and reliability of expert evidence. In the study, members of the Tribunal were surveyed on whether they felt that CE procedures had improved the objectivity of the evidence provided by the experts. A clear majority of members (76%) said that the objectivity had improved. While breaking the results down by expert type it was revealed that members felt that the objectivity had improved more regarding medical/physical evidence as opposed to medical/psychiatric evidence (by 87% to 63%). Members of the tribunal were also asked whether CE procedures improved the overall quality of expert evidence. In 67.2% members reported that CE indeed improved the quality of the testimony, in 31% of the cases members reported that the quality was the same and only in one case did members report that the quality of the evidence had been inferior. The study also asked whether CE procedures made it easier or harder for the members of the Tribunal to compare one expert's testimony against the testimony of another. In 87.9% of the cases members reported that CE made evidence comparison easier, in 10.3% if the cases it was reported as being the same and in only one case it was reported to have made evidence comparison harder.¹⁷⁰

The members of the tribunal were asked whether their overall decision-making process was enhanced by the utilization of CE procedures. And if so, in what ways CE procedures helped improve their decision-making. 88.1% of the members of the Tribunal answered that CE procedures had helped their decision-making process. With the results broken down further, the most common ways in which CE had helped included

1. Areas of contention were more easily identified
2. The issues were distilled more quickly
3. Technical issues were easier to understand
4. The reasons did not require a lengthy investigation of "non-issues"

¹⁶⁹ AAT, "An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal", 2005, p.25.

¹⁷⁰ Ibid, p.50ff .

Members of the tribunal were also asked whether the use of CE evidence had helped them in their writing of tribunal decisions. 70.4% answered that the decision-writing process was helped by the Tribunal's use of CE procedures. 27.8% of the members reported that the use of CE had made no difference in the matter. In one single case CE procedures had made the decision-writing harder.

Regarding the actual time needed for the decision-writing, 51.9% of the members answered that CE procedures had made their writing faster and more efficient. 38.5% of the members reported that there was no difference in the matter and 9.6% of the members said that CE had slowed down the process. Members were asked whether CE procedures were efficient in dealing with issues and deciding cases in the Tribunal. 43.5% of the members reported that CE procedures were very efficient and 56.5% said that CE procedures were somewhat efficient. It was considered to be especially efficient in "defining and presenting critical issues", "clarifying each party's position", "ensuring that parties were treated fairly" and "helped produce a fair outcome". When asked about their overall satisfaction with CE procedures, 94.9% of the members of the Tribunal stated that they were satisfied with CE and 5.1% reported as being dissatisfied.¹⁷¹

5.1.2 When should CE be used?

In the previous chapter the broad questions surveyed were ones like "how has CE procedures had a positive effect on different aspects of tribunal procedure?" The results suggested many substantially positive effects of the use of CE procedures. This subchapter instead focuses on an equally important question, "when should CE procedures be used?" The results presented below do not prove that CE is a fruitful and modern way of hearing expert witnesses, instead these results take for granted CE's effectiveness and focuses on other important questions like "under what circumstances should CE procedures be used?" and "under what circumstances are CE procedures the most effective?"

Members of the Tribunal, experts and the party representatives were asked a range of questions dealing with the tribunal's decision whether to use CE procedures or not. The members of the tribunal were asked to identify the strongest factors that made them choose to use CE procedures. The results showed that the strongest factors were¹⁷²:

1. That the two (or more) expert witnesses had the same level of expertise
2. That the expert witnesses would be commenting on the same issues at the tribunal

¹⁷¹ AAT, "An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal", 2005, p.53ff.

¹⁷² Ibid, p.29 ff .

3. That CE would improve the objectivity of the evidence presented
4. That CE would help clarify some complex issues

Out of the factors that were deemed to have little or no influence on the choice to use CE were; “CE will reduce hearing time”, “CE will reduce costs”, “the CE process will promote early settlement” and “expert evidence is not that far apart”.

From these results it seems clear that the Tribunal members, when deciding whether to use CE:

1. Focused less on the potential economic effects of CE (less time needed for hearings of expert witnesses, CE could reduce costs).
2. Focused more on the positive factors CE might have for the members of the Tribunal themselves (CE will improve the objectivity of the evidence presented, it will help clarify complex issues for the members of the Tribunal) and the smooth operating of the hearing (the experts will be commenting on the same issues at the Tribunal, the experts have the same level of expertise and thus it will be helpful from a comparative perspective for the Tribunal to hear their evidence concurrently in order to assess the merits of their testimony).

In interviews conducted as part of the qualitative approach of the study, a number of tribunal members remarked that CE worked best when the expert witnesses in the hot tub were of the “same specialty” as opposed to when they were of two different specialties (in the context of this study, for example one rheumatologist and one orthopedic surgeon). It was remarked that sometimes the big difference in approach between two specialties made it less suitable for CE. It should however be noted that no respondents in the survey expressed the opinion that CE is simply not good even in these situations, only that it is less so.¹⁷³

Experts and representatives of the parties broadly agreed that using telephone conferences for hot tub-hearings was a bad idea. One representative remarked that “*We had a bad experience in one case where the doctor was on the telephone and was not getting as good a reception as the doctor who was in the witness box.*”¹⁷⁴

5.1.3 Does CE influence parties to settle?

Another interesting question related to CE procedures is whether the choice to use CE in any way influences the parties to settle instead of going to trial. Out of the 199 cases originally deemed eligible for inclusion in the AAT study, 116 were chosen at a preliminary stage for some investigation and in the end the sample was narrowed down to 48 cases. The largest single factor in this winnowing down of the case material was settlement between the parties. 55.2% of the cases at the preliminary stage were resolved by way of

¹⁷³ AAT, “An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal”, 2005, p.32f.

¹⁷⁴ Ibid, p.33.

settlement. 4 cases were settled during trial and after expert CE testimony had been given, 60 were settled before the trial date. Representatives of the parties were asked whether or not the prospect of CE procedures (in the 60 cases that had not yet made it to trial) or the CE procedures at trial (in the 4 cases that settled after a trial where CE had been used) influenced their decision to settle. 40.7% of the respondents considered the CE to have had an impact, 59.3% did not consider it relevant.

There might also be some evidence of CE's effect on settlements when taking a closer look at on what stage of the process a case was settled. If for example a case was settled before the parties involved were told their expert witnesses would present their evidence concurrently, then CE cannot be said to have had an effect. Out of the 60 cases settled, 25 cases were settled after the parties had received a notification that CE would be used at court, 27 were settled on the day before the hearing or on the day of the Tribunal hearing itself, 10 cases were settled during the Tribunal hearing but before CE procedures, 4 cases were settled at the hearing, after the CE testimony had been taken. In a follow-up survey representatives of parties were asked whether the use of CE procedures had influenced the timing of their settlement. 44.8% considered that the Tribunal's use of CE had influenced the timing of the settlement. Representatives reported a few different ways in which the prospect of CE had influenced the timing of their settlement; by "encouraging representatives to consider issues at an earlier time", by "enabling settlement of a key issue" and by "providing an opportunity for parties to hold settlement discussions".¹⁷⁵

These results strongly suggest that the use of CE has a positive effect on the parties willingness to settle in a sizeable, albeit minority, of cases. Why then would the Tribunal's use of CE procedures influence settlement rates? Speculatively, the reason for CE to influence parties in this regard might be that when parties are told CE will be used in the Tribunal they understand that the Tribunal has read all the preparatory material submitted by the parties and their experts and deemed both parties to have witnesses with strong cases. In section 5.1.2 we learnt that the strongest factors that influences the tribunal's use of CE was:

1. That the two (or more) expert witnesses had the same level of expertise
2. That the expert witnesses would be commenting on the same issues at the tribunal
3. That CE would improve the objectivity of the evidence presented
4. That CE would help clarify some complex issues

Hypothetically from the perspective of a decision whether to take the matter to court or settle, the fact that the Tribunal feels that 1) the experts have the same level of expertise, that 2) they will be commenting on the same issue and that 4) there exists genuinely "complex issues" – any or all of these

¹⁷⁵ AAT, "An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal", 2005, p.35ff.

factors alone or cumulatively should suggest to the parties that this is a case without a sure resolution. That means that the party might indeed win the case, but perhaps they could just as easily lose. Under these circumstances, perhaps a settlement is to be preferred rather than this perilous gamble. Therefore, this indication from the Tribunal that it will use CE procedures would thus serve to facilitate the parties' settlement. The fact that over 40% of the parties' representatives felt that CE had influenced both the timing of the settlement and the settlement itself supports this theory.

5.1.4 Length of time spent giving concurrent evidence

Expert evidence testimony has been identified as one of the major sources of cost, complexity and delay in Australian civil proceedings.¹⁷⁶ One stated goal of the practice of CE is to promote a speedy and efficient hearing of experts as a way to save time and money.¹⁷⁷

The time-saving characteristic of a procedure where two experts are heard simultaneously instead of separately is logical and to be expected. As has been the case all through the AAT study however, it is impossible to say with certainty whether time has been saved since there has been no "control group" using traditional expert hearing procedures. Out of the 48 cases in the study, data about the length of time spent giving concurrent evidence was available in 47 cases. In one case two separate panels of experts were heard and in two other cases the length of the hot tub was not recorded.¹⁷⁸

Length of CE hearing:	n	%
30 minutes or less	2	4,3
31-60 minutes	6	12,8
61-90 minutes	21	44,7
91-120 minutes	10	21,3
More than 120 minutes	8	17
Total	47	100

The shortest time spent on hearing CE in one case was 20 minutes and the longest 210 minutes. Although the sample is obviously comparatively small (n=47), there also exists evidence suggesting a difference in time needed for different experts. Experts in the field of psychiatry spent significantly longer time in the hot tub than did medical doctors.¹⁷⁹

In the follow up survey representatives of the parties were asked about how they had perceived that CE procedures had influenced a) the length of the

¹⁷⁶ Victorian Law Reform Commission, "Civil justice review", 2008, p.483

¹⁷⁷ AAT, "An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal", 2005, p. 4.

¹⁷⁸ Ibid, p. 45.

¹⁷⁹ Ibid, p. 46.

hearing overall and b) the time spent by experts giving evidence before the Tribunal. The survey revealed some unexpected results. Results whose logical inconsistency raises some serious questions about the empirical integrity of this part of the study. In order to explain this logical inconsistency a hypothetical example will be employed.

Hypothetical example

There is a trial where two experts have been tasked to give expert evidence. Using the traditional method of hearing experts their testimony would take one hour each for a total of two hours.

If instead the expert were heard in a hot tub-hearing concurrently the experts would be heard in one hearing. Even if that hearing would take 1.5 hours that would still mean a net gain of 30 minutes for the court or tribunal.

The court or tribunal would save time, but for the individual experts the time spent at trial would be 30 minutes longer than it would have been using the traditional method of hearing experts.

The essential dynamic in this example which is presumed to be a fair representation of an average expert hearing is that even if the CE procedures are found to save time for the court, it would still in all probability mean more time spent in court for the individual experts.

This dynamic is an assumption that is at the heart of the widespread belief that hot tub-hearings save time for the court.

The AAT study showed that members of the Tribunal, representatives of the parties and experts reported that, in their estimation, the hot tub-hearing took less time than a traditional hearing would have in only 29.3% of the cases and actually took more time in 17.2% of the cases. Though this showed that the hot tub-hearings took somewhat less than “normal” time in more cases than it took more than “normal” time, the difference were not as dramatic as one would expect. According to the hypothetical case outlined above, this would mean that instead of having two experts heard for an hour each (for a total of 2 hours), the hot tub- hearings at the AAT took about 2 hours in majority of the cases, less than 2 hours in about 30% of the cases and more than 2 hour in about 20% of the cases. This would logically mean, following the hypothetical model above, that the experts should be expected to report that their own personal time testifying in hot tub-hearings before the Tribunal was substantially longer than it would have been using traditional methods of expert hearing. Since they individually testify for about an hour in a ”normal” proceeding, and since the survey showed that the CE procedure did *not dramatically* save time, then they should be expected to spend about 2 hours in front of a Tribunal in the hot tub-hearing. Since they would have spent 1 hour individually using the traditional way of hearing experts they should individually report having spent significantly more time in the hot tub than using the traditional method. But this is not what the survey reports. Instead the survey shows that evidence given by experts in hot tub-hearings takes about the same amount of time as in “normal” hearings in 46.6% of the cases. Furthermore it is reported that experts actually report spending LESS time in CE hearings more cases than

the ones where they spent MORE time. That would mean that in almost half the cases, the hot tub-hearing took equally long time as it would have taken the court to hear *one* expert individually (in my hypothetical example 1 hour). Furthermore, the hot tub-hearing took less than 1 hour in more cases than those where it took more than 1 hour.

Obviously both these statements cannot be true. The hot tub-hearings cannot logically have taken, both on average more time than two traditional expert hearings all the while the experts report having on average spent less time in the hot tub-hearing than they would have individually have spent using the traditional method of hearing experts. It seems under these circumstances likely that the respondents in the survey did not fully understand the difference between the question regarding the overall length of the hearing on the one hand, and the question about the impact of CE procedures on the length of individual expert testimony on the other.

These findings suggest some serious problems with this part of the AAT study. Generally, the absence in the study of a control group, or information regarding how long time the tribunal usually spent on hearing expert evidence would constitute a glaring omission. When beyond that, the survey findings seem counter-intuitive and illogical, one must seriously question the results. Thus one should hesitate before analyzing these findings or drawing conclusions. Instead the study's result regarding CE procedures' goal of saving time should be used for descriptive purposes only.

5.1.5 Limitations and caveats

The AAT study is not universal in scope and does not set out to be. Therefore the applicability of the study's findings may not be general. On the most basic level of analysis, it should be noted that the tribunal is not a court and there are elements inherent to the process before the Tribunal that might not exist before a court. The most important of these factors are probably that the AAT is not bound by the rules of evidence. In order to assess the applicability of this study's result to CE procedures in other venues and/or countries some of the particulars of the study therefore to be discussed and taken into account.

First of all, the AAT is a fairly specialized legal entity that deals with a limited number of case-types. Mainly cases relating to taxation, immigration, social security, industrial law, corporations and bankruptcy.¹⁸⁰ Out of the total number of cases deemed eligible for inclusion in this study (n=199), 66.3% of the cases in this study were compensation matters, 33.2% were veteran's affairs cases and 0.5% dealt with aviation. Furthermore, out of the total numbers of expert witnesses in these cases (n=410) only one expert was not a doctor. Out of the cases that finally made it to hearing and inclusion in the study (n=48), 41.7% were compensation matters, 56.3% dealt with veteran's affairs and 2.1% concerned aviation. Among the expert

¹⁸⁰ Administrative Appeals Tribunal Act of 1975.

witnesses in the cases that were selected for inclusion in this study (n=98), all were medical professionals (56.3% medical/physical, 43.7% medical/psychiatric). All applicants in these cases were individuals and in all but two of the compensation matters the respondents were a government entity.¹⁸¹

It should also be noted that a wide range of findings in this study are based upon the perception and expectations of the parties. The issue of whether time was saved through the use of CE or whether the employment of CE procedures saved the parties money are examples of questions where the results of the study were based solely on speculation on the parties' behalf.¹⁸²

These factors underline how the results of this study should be interpreted carefully. This study is comprised cases before a single tribunal (the New South Wales Registry of the AAT in Sidney), it includes cases of few case types, and only one type of expert witness is included. However, since this is the only study available on the positive effect of CE its results are still of great importance. Though limited in scope, and materially flawed on the issue of time saved using CE, the AAT study is crucial for the evaluation of CE. Hopefully further investigations into the merits of CE will be completed in the near future, further advancing the case for CE's spread, both within Australia and internationally.

¹⁸¹ AAT, "An evaluation of the use of concurrent evidence in the Administrative Appeals Tribunal", 2005, p. 21 ff .

¹⁸² Ibid, p.19.

6 The prospect of CE procedures in Sweden

This thesis poses the question whether the CE procedures that have been pioneered in Australia over the last decade should be adopted by the Swedish legal system. In order to answer this question some important matters must first be discussed in this chapter;

*Are there problems with expert witness evidence in Sweden that CE procedures could help mitigate or cure?

*Would CE procedures, as has been developed in different Australian jurisdictions, fit into Swedish law governing expert witness evidence (i.e. RB 40)?

*Is there in fact need for a thorough reform of RB 40 and a modernization of Swedish expert evidence procedure?

*If CE procedures were to be adopted in Sweden, would all the procedures need to be implemented in Swedish law and if not, which should?

6.1 CE procedures, a cure for Swedish ills?

The extent to which there exists a serious problem with expert evidence in Sweden today is hard to gage. The Swedish legal system's historical tendency toward court-appointed expert evidence as opposed to experts hired by parties, along with the obvious bias shining through RB 40 has nurtured a legal society where the "evils" of expert bias are less obvious than in common law countries like Australia and most notably the United States. At the same time, the Swedish legal system is moving more and more towards the Anglo-American tradition of using experts hired by parties every day and thus the problems are destined to grow greater by each day.

Unfortunately there have been no studies conducted in Sweden about the scope and severity of the problem of expert witness bias, like the Freckelton-survey of judges in Australia. It would however be naïve to assume that the problem does not exist to some extent just because there have been no studies on the subject.

In fact, most legal scholars seem to agree on the fundamental fact that the legal societies of the world seem to be growing closer together through international development, and that the traditional civil law-countries of western Europe are adopting many ideas with strong roots in common law. Modern Swedish expert evidence jurisprudence is a perfect example of this. Though the legislators' intent and the roots of the law heavily favored court-appointed experts according to the traditional inquisitorial model, over the years the actual practice before Swedish courts have changed dramatically.

Today the use of experts hired by parties instead of appointed by the court, though marginalized in the wording of the Swedish law and in the intent of the lawmaker has come to totally dominate expert witness jurisprudence, just like in common law countries.¹⁸³

Even though the issue of expert witness bias might be hard to prove in Sweden at this time due to the lack of research on the subject, other problems that has been identified in Australia appear to be equally prevalent in Sweden. There does not have to be commissioned any surveys or empirical studies to know that Swedish courts (along with courts in virtually any other legal system) have serious troubles with the soaring costs of holding trials and dealing with cases in an expedient manner. Furthermore, as Swedish expert evidence jurisprudence grows ever more sophisticated and complex, the structure of CE lets the members of the court hear both parties' experts within a relatively short period of time, not the days or weeks that the hearing might take using the traditional model. Therefore, even if the issue of expert evidence bias might be somewhat less important in the context of the Swedish legal system, the other positive effects that CE procedures present should fit the needs of the Swedish legal system perfectly. In short, the need for urgent expert evidence reform measures that led to the creation of CE procedures was certainly higher in Australia than in Sweden – that is obviously why the practice of CE procedures was pioneered there – but the need also exists in Sweden. If the symptoms of expert evidence problems are left untreated in Sweden, the problems will grow more acute with every year that passes in a country with expert evidence rules from the early 1940's. Expert bias and the soaring costs of expert evidence at trial are just two of the more obvious examples of the problems connected with expert evidence that will face the Swedish legal system in the years to come. If you dig deeper you find even harder issues to tackle. As science develops throughout the 21st century, so the complexity of expert evidence presented at trial will increase and the problems facing judges in Swedish courts to fully understand and evaluate the testimony given at trial will only fester and grow worse.¹⁸⁴ CE procedures, if implemented in Sweden could help deal with these problems before they reach critical mass and present the acute problems they did in Australia.

6.2 Would CE procedures fit within the framework of Swedish expert evidence law (RB 40)?

A convincing argument regarding the positive effects CE procedures could have on the Swedish legal system is only the first step towards reform. Another central issue is whether CE procedures could fit neatly into current Swedish law. Fortuitously, it is my contention that the fundamentals for the

¹⁸³Ekelöf, Per Olof, "Rättegång IV", Norstedts juridik, 1992, p.234.

¹⁸⁴Ibid, p.225.

adoption of CE procedures in Sweden already exists within Swedish law, as shown in the discussion of RB 36:9 § 2st. Even though this is a largely unknown legal provision without much current practical use in Sweden, what its inclusion in RB shows is that there already exists an understanding that hearing witnesses (or by extension, expert witnesses) simultaneously can save time and expense and that this method could be used at trial without unfettered chaos ensuing. As has been discussed above, CE procedures certainly are about more than just saving time and money but with this basic fundamental belief, the many other positive effects of CE procedures would only serve to make the practice appear even more rewarding to Swedish legislators.

Since there seems to have been no scholarly discussion of CE procedures in Sweden it is surprising to find a comment in the respected court procedure expert Peter Fitger's latest commentary on Swedish court procedure law that in quite clear terms seems to promote a procedure akin to CE. In the commentary from 2002 Fitger stated, without much by way of explanation or discussion, that the hearing of especially experts hired by parties oftentimes would benefit from being heard "*in each others' company*".¹⁸⁵ Even if "*in each others' company*" is a somewhat vague term it seems highly likely that Fitger had something like CE procedures in mind. Fitger's few words should definitely not be viewed as a full-throated support of CE (and it is even unclear how internationally renowned CE procedure were in 2002) but it signals an interest in the positive effects CE has, not only for the court but also for the experts. Fitger also stressed that expert witnesses should never be heard "*in each others' company*" without proper consultation with the parties. This too signals a very modern and well-needed move away from the traditional Swedish model of strict court-control over court procedure. Similarly, the idea of having expert witnesses questioning other experts is alien to the Swedish legal system. However, within the current law experts are already allowed to question parties and ordinary witnesses. Opening up the avenue for experts to also be able to question other experts should not be an insurmountable hurdle for the legal system to handle.¹⁸⁶

The fact of the matter is that CE procedures, although they present a modern and promising new way of dealing with problems regarding expert evidence, is only one of many modern ideas of how to mitigate the problems of expert evidence procedures. If the only way to institute CE procedures in Sweden was wholesale reform of the Swedish legal system it is a safe bet that legislators, scholars as well as the public would find the problem too small to necessitate huge reform. However, if it could be created as a part of a big Swedish expert evidence reform (i.e. a reform of RB 40) then we might yet see CE procedures in Sweden.

That leaves the prospect of a Swedish CE reform with two alternative ways forward.

¹⁸⁵ Fitger, Peter, "Rättegångsbalken: en kommentar", Norstedts juridik, 2008, p.254.

¹⁸⁶ Ekelöf, Per Olof, "Rättegång IV", Norstedts juridik, 1992, p.232.

1. CE procedures are instituted as a small but important part in a wholesale reform of RB 40.
2. CE procedures are created through a small addition to the current RB 40 without the big changes necessitated by wholesale reform.

Though I do not believe that CE procedures are important enough to by itself warrant Swedish expert evidence reform, if a Swedish reform were to be undertaken then CE could certainly be a part of the well-needed change.

Considering the two options for CE reform in Sweden inevitably leads me to believe that the adoption of CE procedures in Sweden in all likelihood would not happen through simply adding a paragraph to RB 40. Instead I believe that wholesale change is a much more attractive prospect. Easy as a single paragraph added to RB 40 would seem, it is not likely that CE procedures could be made to fully work in the context of the current RB 40. In my opinion there is a very simple reason why CE procedures could not work within the context of current Swedish expert evidence law. In order for CE procedures to fit in the current RB 40, the Swedish legal system would have to change its outdated view of court-appointed experts and expert witnesses hired by parties. The most glaring example of this inequality concerns the different oaths court-appointed experts and experts hired by parties swear and the shocking reality that these different oaths lead to different levels of criminal liability for false testimony (see 3.1.4). But as has been outlined above, even though the wording of the Swedish law needs to be changed, a broader understanding and acceptance of the tenets of CE already exists within the Swedish legal system. Thus, the realistic option for adopting CE procedures in Sweden involves the well-needed reform of RB 40, a reform that Swedish legal scholars have sought for nearly two decades.¹⁸⁷ Such a reform could easily be made to include CE procedures and by doing so CE could also get a thorough debate and investigation through the Swedish legislature's committee work and preparatory materials. This would be the best way to proceed since the practice of CE is largely unknown and would have to be discussed in full within the Swedish legislature before ever being considered for legislation.

Another interesting option for the development of CE procedures in Sweden would be a pilot program at one or more Swedish court. By completing this pilot study of how CE would work in a Swedish setting, valuable results and evidence would be collected for assessment by legislators when deciding whether to include CE in a larger reform of RB 40. A pilot program in this mould would most fittingly be carried out at a court that dealt with matters of a highly technical nature, like the Swedish Miljödomstolen (the rough equivalent of the Australian Land and Environment Court). Courts such as Miljödomstolen constantly look for new and innovative ways for the Court to better facilitate their understanding of highly complex expert evidence. In this environment, the hot tub-hearing might be a welcome addition to court procedure. The Australian CE experience shows how judicial bodies outside

¹⁸⁷See for example, Ekelöf, Per Olof, "Rättegång IV", Norstedts juridik, 1992, p.235.

the normal federal and state jurisdictions, like the Land and Environment Court and the AAT, with their less rigid procedural rules and strong focus on expert evidence were a great place for CE to develop and grow. The same could very well be true for the Swedish legal system and is definitely worth exploring. All in all, there seems to have been little if any scholarly debate on CE procedures in Sweden and it is doubtful whether Swedish legislators have an earthly idea what the term means. None the less I believe that the Swedish legal system is ready for change. CE procedures are just one way of dealing with the many problems connected with expert evidence and it can serve as one tool in a tool box housing many. But it is one with great promise and one that could realistically adopted in Sweden since there is both a precedent for the positive effects CE would have in saving time and money (RB 36:9 § 2 stanza) as well as the positive effects for the court and the experts argued by Per Olof Ekelöf.

It seems most likely that CE would only come about in Sweden through a thorough reform of RB 40, but even beside the issue of CE, reform of RB 40 is a legislative effort that is desperately needed and has been championed by Swedish scholars for a long time. When that reform is finally undertaken by Swedish legislators it would be productive to have some results from a Swedish pilot program on CE to prove the positive results of the practice and enable its inclusion in the new RB 40.

6.3 Which CE procedures would need to be adopted in Sweden?

Since there remain many important differences between Swedish and Australian expert evidence jurisprudence, it is important to ask whether all the CE procedures described in this thesis would have to be adopted in Sweden for the hot tub-hearing to work in Swedish courts. Pre-trial conferences and writing of joint reports are features of CE procedures that I believe must be instituted in Sweden for the hot tub-hearing to work efficiently. It seems highly likely that the Swedish legal system could institute this practice without great obstacles. The routine of having expert witnesses submit their evidence in writing to the court beforehand already exists in Sweden. Changing this to enable two or more experts to meet and do this work in a pre-trial conference seems practical. By conducting an efficient information campaign aimed at experts tasked with giving evidence at court, or conceivably a pilot program at one or more Swedish courts, I am confident that the eventual minor problems with the practice could all be worked out. Furthermore there is no reason to tamper with the structure of the hot tub-hearing in order to fit it to the Swedish legal system. The practice of informing the experts and parties on the preparatory stage seems just as applicable in Swedish courts as in Australian courts. The same can be said for the seating arrangements at the hearing. Though the hearing of experts in panel-like settings would surely be a notable change in court procedure, the fact remains that this opportunity already exists with regular

witnesses and court-appointed expert witnesses as has been discussed above.

As has been discussed above, the oaths expert witnesses swear before Swedish courts would have to change for the hot tub-hearing to work well in Sweden. Having all expert witnesses swearing the same oath would be a minor reform that could easily be accomplished, preferably by legislating in RB 40 that both experts hired by parties as well as court-appointed experts swear the oath in the current RB 40:9 §. If this reform was carried out in Sweden the need for a reform along the lines of the Australian “overriding duty to the court” would in my opinion not be necessary.

Due to the differences in nature between the Swedish and Australian oaths sworn at trial, the Swedish expert witness oath (if also encompassing being sworn by experts hired by parties) does everything that the Australian “duty to the court” does. Even if the duty to the court goes somewhat farther in its instructions and reminders to the expert, the fact is also that the problems that warranted the creation of the modern duty to the court is far less pressing in Sweden than it was in common law countries. Therefore I believe that Sweden would not have to undergo a duty to the court-reform in order for the hot tub-hearing to work within the Swedish legal system.

Lastly, the innovative way of asking questions in the hot tub-hearing is another feature of CE procedures that I believe would be easily instituted in Sweden. Though especially the opportunity for experts to ask questions of other experts is a revolutionary idea, the fact is that, as outlined above, there is some limited precedent for this in Swedish law. As the law reads presently experts can, under certain circumstances, direct questions to regular witnesses and in the hot tub-setting I believe this ability could easily be extended to enable experts to ask questions of other experts.

6.4 A call for Swedish expert evidence reform

As previously mentioned, CE procedures are just one, fairly small, idea in the grand scope of expert evidence jurisprudence and therefore it seems unlikely that Swedish legislators would go through the harrowing process of proposing sweeping changes to the law and seeing them through solely for this small reform measure. Instead it seems more likely that a reform aimed at creating CE procedures in Sweden would come about through a serious and wide-encompassing Swedish expert evidence reform (i.e. a reform of RB 40). A thorough reform of RB 40 would be a monumental legislative task to tackle, and one that would carry a high cost. Making the case for Swedish reform solely on behalf of the creation of CE processes would therefore be a ludicrous idea, but including a paragraph enabling CE in the context of a whole new RB 40 seems more realistic.

The call for a reform of RB 40 is not a new one. Not only was the law crafted in the 1940’s and has not been significantly amended since, as has

been discussed above the law also shows a very old fashioned view of court-appointed experts and expert witnesses hired by parties. Already two decades ago the Swedish legal scholar Per Olof Ekelöf argued that due to the serious changes Swedish expert evidence custom had gone through, moving away from the early historical dominance of court-appointed experts to a situation where the vast majority of experts are hired by the parties and not the court, that wholesale reform of RB 40 should be considered.¹⁸⁸

At the time CE procedures did not exist and thus Ekelöf never considered their inclusion in a new RB 40 but he did propose a slew of changes to the law that would seem perfectly fitting to an argument for the inclusion of CE procedures in Swedish law. The most important of these changes was that he wanted to level the playing field between court-appointed experts and expert witnesses hired by parties by having all experts swear the same oath. He also voiced strong arguments against the traditional Swedish demand for experts hired by parties to be “absolutely unbiased”. This idea of “absolutely unbiased” experts is an idea that in reality never works and has been discussed and criticized heavily in this thesis.

The Swedish scholar Henrik Edelstam has also criticized RB 40 for its heavy-handed and biased approach to expert witnesses hired by parties and suggested that the law be reformed to better suit modern times. He even went as far as to suggest that the structure of the chapter was adapted to emphasize experts hired by parties over court-appointed experts since these are used to a vastly greater extent in the modern Swedish society.¹⁸⁹

In my opinion Swedish expert evidence law has to be updated and changed. This change can most thoroughly and effectively be accomplished through a wholesale reform of RB 40. Reform measures would include a radically different view of experts hired by parties that is more in line with modern legal developments and far from the outdated view present in the current RB 40. Other important changes would include an understanding that expert witness testimony can never be “absolutely unbiased” and that the law should not strive to promote this impossible goal and that all experts should swear the same expert witness oath. Within this large reform of RB 40, CE procedures could easily be included in the law as a small but important tool for Swedish courts to develop and use. To aid legislators in their momentous work it would be helpful to have a pilot study of CE at a Swedish court like Miljödomstolen to use as proof of CE’s positive effects when it comes to dealing with the many problems connected with expert evidence; high costs, time constraints and the ever-growing problem of knowing how to deal with expert bias.

¹⁸⁸Ekelöf, Per Olof, ”Rättegång IV”, Norstedts juridik, 1992, p.235.

¹⁸⁹ Edelstam, Henrik, “Sakkunnigbeviset: en studie rörande användningen av experter inom rättsväsendet”, Iustus, 1991, p.239.

7 Conclusion

In this thesis I have described and analyzed the Australian method of hearing expert witnesses simultaneously at court, known as concurrent evidence or by its sobriquet - the hot tub-hearing. The purpose of this thesis has been two-fold: first to describe and analyze the practice of concurrent expert evidence in Australia and then to investigate whether this reform should be adopted by the Swedish legal system.

I have found CE to be a complex but highly interesting modern idea to deal with the problems inherent to the use of expert witnesses, including soaring cost for the state, increasing complexity of scientific expert evidence as well as overt expert witness bias. Though the hot tub-hearing is the most important part of the concurrent evidence idea, I have also used the broader term “CE procedures” to include two other modern developments that are crucial for the hot tub-method to work; the expert witness’ duty to the court as well as the pre-trial conferences and writing of joint reports. The goals and aspirations of CE procedures are lofty and even though there is only one comprehensive source of empirical evidence for CE’s positive effects I still find CE to be a highly promising expert evidence reform measure.

In order to answer the question whether CE should be adopted in Sweden I have investigated the historical context and development of expert evidence jurisprudence in both Sweden and Australia. At the root of the differences between the two countries I have found the Swedish historical bias towards court-appointed experts. Unfortunately this crucial difference also remains in current Swedish expert evidence law. In my close study of RB 40 I find legislation written in the 1940’s that is in dire need of a revision and reform. RB 40 gives the impression that court-appointed experts are still the norm in the country, while in reality it is the opposite. Most surprisingly, even today there remain serious discrepancies between court-appointed experts and expert witnesses hired by parties in the Swedish legal system. These include different liabilities for false testimony at trial and cry out for wholesale reform.

Buried within a paragraph in RB 40 and outside any doctrinal discourse is an interesting reference to RB 36:9 § 2 stanza. What this paragraph turns out to enable is a method of hearing expert witnesses that is very much akin to CE but much more limited in scope. According to anecdotal evidence from Swedish practitioners it is also a tool that is hardly ever used and not widely known. Though this is the case, what this paragraph signals is an understanding of the ideas behind CE.

In my opinion this opens the door for the adoption of CE procedures in the Swedish legal system. Furthermore I believe CE would fit nicely into Swedish law, most favorably as a part of a significant reform of RB 40. In

order to aid Swedish legislators in their work, a pilot study of CE at a Swedish court should preferably be undertaken as soon as possible.

It is my belief and contention that a thorough reform of RB 40 will soon be undertaken by the Swedish legislature. Within this larger reform CE procedures could easily be instituted in Sweden and give Swedish courts a modern and effective tool to use to mitigate and counteract the many problems that are connected with the use of expert evidence, including soaring costs and overt bias.

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