



CONCURRENT EXPERT EVIDENCE

Angus Stewart SC



NEW/CHAMBERS

Outline

1. History of Expert Evidence
2. Purpose and technique of concurrent expert evidence
3. Innovations in practice
4. Technique's criticisms and virtues



The history of expert evidence:

Traditional expert evidence

- Expert bias
- Time consuming cross examination
- Experts feel their skill and knowledge are not accorded appropriate respect
- Experts often proceed on different assumptions
- Evidence is technical and difficult to understand

Failed efforts at reform

1. Court appointed experts

- Help to remove bias
- May be difficult for court to find unbiased expert
- Experts are often selected from a pool of “established and conservative” members of the profession who are likely to take a traditionalist approach
 - *Potentially suppressing more progressive views*

2. Expert judges

- Expensive
- Difficult to find expert judge knowledgeable in every scientific issue that comes up in a trial



3. Technical advisors (US)

- Advise judges on complex technical matters that arise during the case
- Not witnesses who give testimony
- Not subject to cross-examination
- May supply evidence directly to the judge

4. Science courts

- Would consist of experts capable of evaluating scientific arguments
- Never implemented due to expense

What is concurrent expert evidence?

*“... 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** of them ... 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.”*

Justice McClellan



The purposes of concurrent expert evidence

1	Reduce expert partisanship
2	Reduce confrontational nature of conventional hearing process and cross-examination
3	Increase efficiency
4	Reduce costs
5	Reduce misunderstandings of the experts' opinions

A blurred background image showing three business professionals in a meeting. A man in a suit is pointing at a document held by a woman with glasses. Another man is visible in the foreground on the left.

Concurrent expert evidence in practice

Pre-trial

- Experts appointed by the parties prepare their evidence
- Joint conference
 - Identify common ground
 - Distil issues in dispute
 - Create a joint report entailing the above
- Joint expert report
 - *Alerts counsel to any contentious factual issues*
 - *Narrows the need for cross-examination during the trial*

In the courtroom

- Each expert's report and joint report are tendered
- Advocates and judge develop list of issues
- Experts outline their views on the first issue, identifying where they differ
- Judge may seek clarification
- Advocates cross-examine on the issue
- Experts have the opportunity to comment on each other's answers, and seek clarification
- Judge ensures that each expert can address the same questions, and the same assumptions
- When an issue is exhausted, move on to the next issue



Australian courts

Federal Court Practice Note 2016

- Objective of expert evidence is “for the Court to receive the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge”
- To facilitate this overarching purpose, the courts may require concurrent expert evidence, joint conferences, joint reports

Supreme Court NSW

- Uniform Civil Procedure Rules have similar provisions



Concurrent expert evidence in foreign jurisdictions

Canada

- Concurrent expert evidence identified as potentially useful
- Federal Court Rules were amended in 2010 to permit concurrent evidence

Singapore

- Pilot programme ran for 6 months in 2011
- Procedural rules of the Supreme Court of Singapore were amended in 2012 to adopt concurrent expert evidence practices

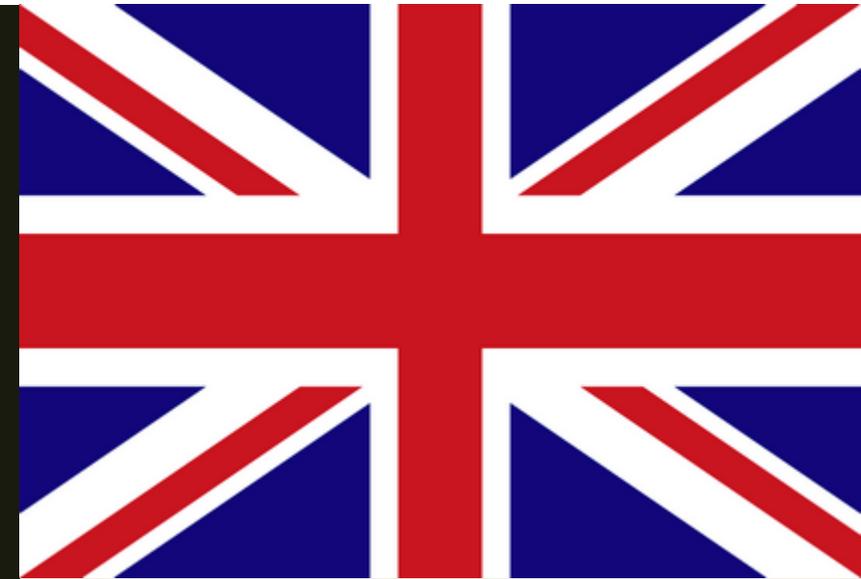


United Kingdom

- Sir Rupert Jackson's 2010 report reviewing civil litigation costs recommended that concurrent expert evidence be adopted in England
- Trial undertaken in the Manchester Technology and Construction Court 2010-2011
- Lawyers, judges and experts found it beneficial
 - *Efficiency*
 - *Ease of presenting evidence*
 - *Targeted trial*
- Introduced as an optional procedure under Pt 35 Practice Direction of the *Civil Procedure Rules*

United States

- Many recommendations have been made for the US to adopt the use of concurrent expert evidence



Australian examples of concurrent expert evidence

- Has been used in native title, intellectual property, medical negligence and personal injuries, shipping, competition, securities class actions, the land and environment court, criminal trials with a judge only, administrative appeals tribunal

***Strong Wise Ltd v Esso Australia Resources Ltd: The APL Sydney* (2010) 267 ALR 259**

- Rares J commented that joint reports “were extremely useful in crystallising the real questions on which the experts needed to give oral evidence”
- The process allows experts to immediately diffuse misunderstandings that the judge or counsel may have

***Samsung Electronics Co Ltd v Apple Inc.* (2011) FCAFC 156**

- Dowsett, Foster and Yates JJ required concurrent evidence from groups of experts in competition, technology, patent, licensing, standards organisation and foreign law

Criticisms

- Disrupts the adversarial procedure as the judge becomes more inquisitorial
- Assertive experts dominating conference
- More articulate expert can prevail
- Advocates feel they have less control over the process

Virtues

Efficient

Evidence in each discipline is given at the same time
Points of difference and consensus emerge quickly

Better outcomes

Opinions based on common assumptions
Opinions tempered by peer presence – not dependent of advocate's expertise

Reduces expert partisanship

Experts discuss the issues with each other rather than advocating for a client

Why experts prefer concurrent expert evidence

- Scientific attitudes and values are afforded appropriate weight
- Experts are able to more effectively communicate their opinions
- The process is less tense





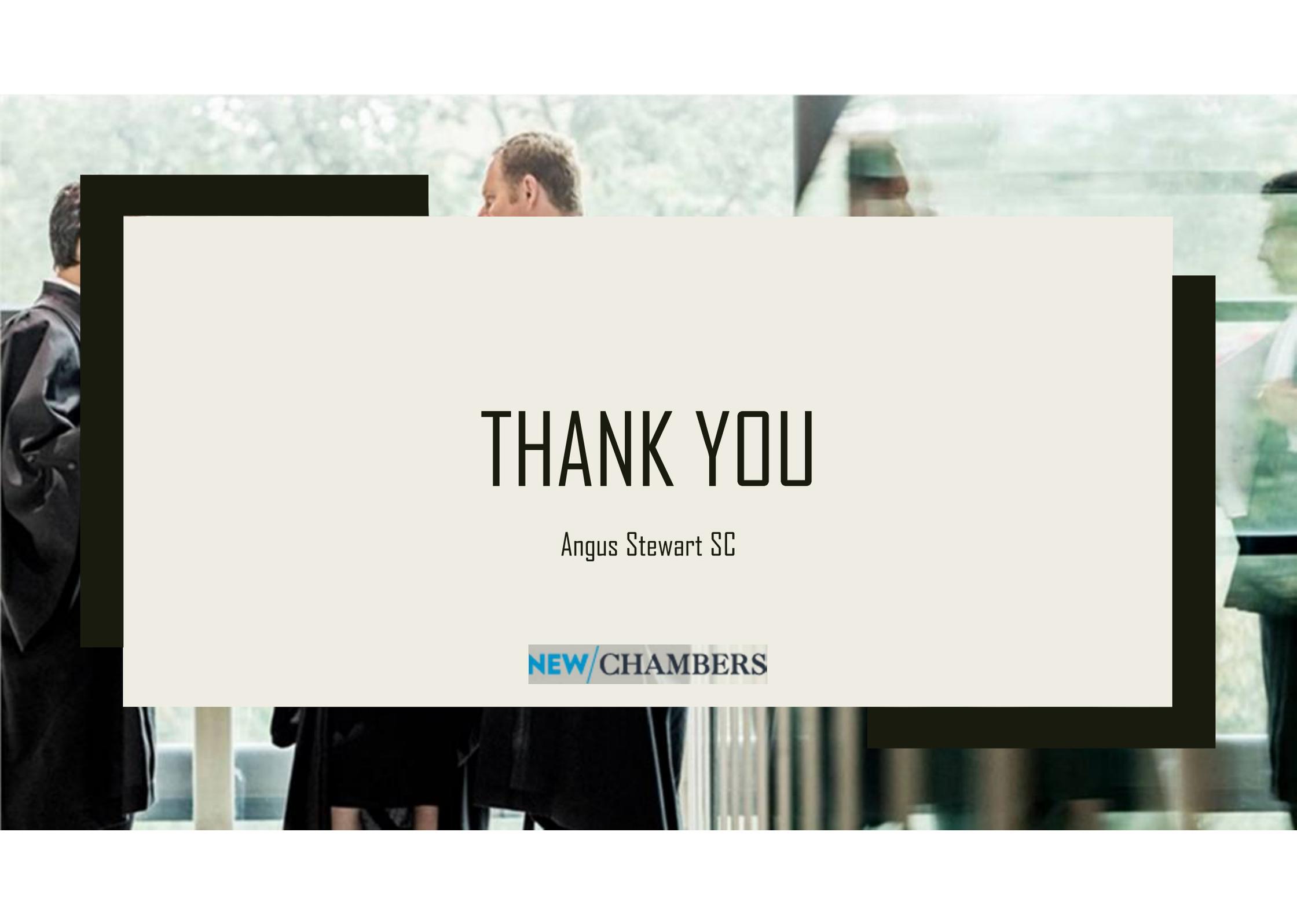
Why judges prefer concurrent expert evidence

- Procedure makes it easier to compare evidence
- Ability to clarify issues, direct questions to the relevant issues that need to be resolved
- Increased objectivity
- Enhances judges' ability to fulfil the role of fact-finding
- Higher quality of expert evidence

Why lawyers prefer concurrent expert evidence

- Joint reports and pre-trial conferences assist early settlement
- Process is more focused
- Less need for the advocate to know the technical subject better than the expert
- Less opportunity for obfuscation and confusion from one's opponent





THANK YOU

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