Expert Conferences or Conclaves and Joint Reports

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Introduction

Expert conferences, or conclaves, are used in a number of jurisdictions. This article is a reflection on what in my experience works and does not work in the conduct of conclaves and the preparation of the joint report.

Conclaves can take anything from less than a day to two or three days and there may be further meetings during the drafting process. Drafting may take several weeks depending on the availability of the experts particularly for supplementary meetings.

While the process is governed by court rules, there are operational differences. These differences include:

- The use of a chair or moderator to police the conduct of the conferences and the handling of recalcitrant experts;
- The inclusion of assistants in the conferences;
- The role of lawyers;
- The responsibility for drafting the topics or questions to be considered by the experts;
- The process for drafting the joint report and the extent to which this can be a joint task.

With the rapid evolution of the court process as a result of innovations to cope with the Covid 19 pandemic, I thought it might also be useful if I considered:

- The use of technology in the conduct of expert meetings;
- The introduction of new facts into the conference.

This is an anecdotal reflection of my experience from three matters and, because in one matter audit was dealt with separately from accounting, four expert conferences: three of the conferences had five participants each (excluding assistants) and one involved only myself and the defendants' expert.

Three of the conferences had a retired judge as a moderator who attended part of the time and one had no moderator. One had an independent note taker, in another, one of the members of the conference assumed the note taking and drafting function and in two most of the drafting of the report was undertaken by way of electronic document sharing.

The use of a chair or moderator to police the conduct of the conferences

By the term moderator I mean an independent party whose sole purpose is to control the function of the meeting and not participate in discussions other than to ensure the peaceful and timely conduct of the meeting(s). The moderator is not a mediator nor does the role involve any facilitation of a conclusion. My two experiences of a moderator were with retired judges in the role. In both cases the moderator was absent for much of the time in which experts were involved in detailed discussion.

In each case the moderator:

- Opened with some initial principles derived from the Expert Evidence Practice Note[1];
- Provided some rules of engagement, such as not to talk over each other;
- Invigilated early discussions to ensure conflict was minimal or resolved;
- Ensured an equitable drafting process; and
- Acted as a reference point for the conduct of the conference and as go-between between the experts and the court or instructing solicitors.

While the resultant joint experts' reports were a concise tabulation of the experts' different views on the topics discussed, the presence of a moderator did encourage the identification of a number of points of agreement.

My first experience of an experts' conference was of a five-person meeting, with no moderator. The in-person meetings lasted two days, followed by roughly two weeks of drafting which included some phone conferences.

The process was difficult for a number of reasons:

- The pleadings were not ad idem;
- New facts were introduced at the meeting;
- The egos of the participants;
- The partiality of the self-elected drafter of the joint report, one of the experts.

From my experience, a moderator can be a very useful adjunct to expert conferences, particularly where there are a large number of participants. Much depends on the skills of the moderator; previous judicial experience may have helped my two experiences. An interventionist moderator could be disruptive, hamper discussion and possibly even distort the outcome.

I have not encountered a really obdurate fellow expert but in cases where new evidence was introduced I, and sometimes my fellow experts, have felt pressured and ambushed by the new evidence. This induces a reluctance to deal with the new evidence and maybe we were at risk of becoming obdurate and recalcitrant. The presence of a moderator can ease the tension more positively than leaving the matter to the experts.

Inclusion of assistants

A feature of my most recent experts' conference was that not only were the experts present but, at the request of one of the other experts, we were allowed to include in the electronic meetings, colleagues who had assisted in the report preparation (notwithstanding paragraph 7.4 of the Practice Note, which states "the conference is attended only by the experts"). This posed some risks:

- The multiplication of people at the table increased the risk of cacophony during discussions;
- There might be doubts as to whose views were being presented in the joint report - those of the expert or those of the assisting person.

As a consequence of the inclusion of assistants, there were up to nine people at the virtual table. The assistants were mainly silent and provided documentary support where it was needed.

[1] https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-expt

In this instance the inclusion of assistants was not disruptive – in part perhaps due to the discipline brought to the conference by the moderator.

The benefits of having assistants present were that it was possible to include real time fact checking when the experts needed it and it allowed the participants to share drafting with their assistants which may have speeded the process. Nevertheless, each expert still had to read the expert reports in detail to ensure their views and mode of articulation had been used.

The experience of participation may also have provided the assistants with a training experience that could enable them to become experts in their own right.

Even so, I am not sure that the inclusion of assistants introduced sufficient benefits to outweigh the risks. In other circumstances I can see that the inclusion of assistants could be disruptive and raise questions about the authorship of the joint report.

The role of the lawyers

Although lawyers are included in the process in other jurisdictions, they are not involved in the conclave or drafting the joint report in Australia. I suspect that the presence of instructing lawyers in the conference or their participation in report drafting would reduce the open sharing of views under Chatham house rules which I take to be the purpose of the expert conferences.

The lawyers' role in Australia is limited to two activities:

- The drafting of questions and issues for discussion among the experts; and
- Dealing with procedural issues such as the introduction in the conference of new material.

My experience of receiving instructions from solicitors before going into a conference is that they can be very concerned that the expert will agree to or espouse views that they, the lawyers, have not anticipated. This is the very reason the lawyers should not be in the meeting. Otherwise their presence could inhibit, or be perceived to inhibit, the experts' capacity to act as amicus curiae.

The responsibility for drafting the topics or questions to be considered by the experts

In all of the expert conferences in which I have participated the drafting of the questions or issues to be considered by the experts has been left to the experts.

In my view, this is not useful. Philosophically my view is that to be amicus curiae the expert needs to deal with the matters that the court (that is the judge and counsel) believe are important, not those that reflect either the questions put to the expert by their instructing lawyers or those facts that the expert thinks are important. That is not to say the experts cannot participate in the drafting of the questions, but this should be as advisers to counsel.

As already mentioned, in the first experts' conference I participated in, the pleadings were not ad idem. The plaintiff asserted that the respondent audit firm was negligent because it had failed to identify and report on an error of material significance to the financial statements; the defendant's position was that in the particular legislative circumstances pleaded by the plaintiff, vicarious liability was not relevant. The question, in the defendant's view, was, did the audit partner who signed the auditor's report do all that a reasonable audit partner should do? If the audit failure was because staff did not raise matters with the partner, had the partner exercised reasonable supervision and provided proper instruction?

The experts struggled with this dichotomy in pleadings; the result was in essence two reports with limited space for eliciting points of agreement.

A much better approach was adopted when we came to give concurrent evidence in court. By that stage the judge, with the assistance of counsel, had set out questions on which the court needed to have the experts' views.

I have found that leaving the determination of matters to be discussed to the experts has the following defects:

- Accountants are often inarticulate, and the questions lack precision;
- An unaccustomed level of politeness between experts can allow the inclusion of a medley of questions driven by each expert's views; and alternatively
- The experts are wedded to their views so there is no synthesis of the matters with which the experts could assist the court.

The introduction of new facts into the conference

I have had two conferences where new facts have been introduced to the conference.

In my first conference, on the second day, a fellow expert presented to me a document I had not seen before. From recall several of the other experts had also been briefed with the document. There was collective badgering for me to read the document which was not, on the face of it, helpful to the party for whom I was acting. I did not know the provenance of the document and refused to give an opinion - thereby maybe becoming a recalcitrant expert.

I sought advice from my instructing solicitors as to the provenance of the document. It was not forthcoming, so I continued to refuse to opine on it.

In my most recent conference, another expert sought to introduce in the meetings a new document which he categorised as a report in reply that he had been unable to give earlier. Another expert and I were a little affronted by this and felt it to be an abuse of process, partly because the expert introducing the new material had already written several reports, including in reply to our reports for the defence and supplementary reports.

Collectively we sought the view of the moderator who in turn sought the views of the instructing solicitors. The outcome was that he was allowed to introduce the material but two of us commented in the joint report that we had not had time to consider his extensively detailed revised calculations, but we did not agree with the principles that he was applying. He was later permitted to issue a further report, to which we all responded.

These two experiences clearly demonstrate the benefits of a good moderator; a moderator would have helped to manage the tension between the experts in the first example and in the second example he was able to defuse potential acrimony.

The process for drafting the joint report: the extent to which this can be a joint task and the use of technology in the conduct of expert meetings

I have put these two topics together because based on my recent experience new technology will continue to be a very present part of all future expert conferences.

When it was first suggested that I would be participating in an electronic conference with four other participants I had some concerns. This was in part because my previous experience of a large experts' conference was that it was ill disciplined and a forum for grand egos. Video conferencing seemed to provide an opportunity for more dissonance.

In fact, the electronic meetings went very well. Contrary to my expectations:

- Technology (mainly Zoom and Teams) held up and when it did not the experts dealt courteously with each other;
- In the main discussions were courteous and experts were allowed to finish before another expert spoke. The moderator set the tone, but this was self-policed when the moderator was not there; and
- Technology allowed the ready sharing of documents that were being discussed.

The meetings were also significantly enhanced by the use of electronic shared report writing whereby each participant had an opportunity to work directly on the drafting process.

The process was to start each topic with a summary of the factual and regulatory information. This was drafted initially by the expert that the group felt had a particular affinity with the topic or had the time. This was followed by a landscape table in which each expert entered a synopsis of their views in respect of each question or issue and their agreement (or not) with the views expressed by the other experts. The protocol for the sequence in which entries were made in the table was plaintiff's experts first , followed by the several defendant experts.

There were some technological problems with the shared document and some experts typed faster than others, but my overall experience was that process provided:

- A centrally hosted common document;
- A basis for a collective rather than combative approach to the report; and
- A faster process because drafting and review could be concurrent.

Consequently discussions flowing from each expert's review of the other experts' input could follow quickly.

Collective discipline was necessary particularly towards the end to ensure that there was a point at which experts stopped playing with minutiae and the report could be collectively agreed.

The end product was less a statement of points agreed and more a comparative abbreviated statement of each person's views under topic heads. This in my experience is the output of many joint experts' reports.

Conclusion

Over the period in which I have been acting as an expert witness, the conference/conclave process has evolved. While it has in my experience had some teething troubles, it is becoming an effective way for very long and disparate reports to be distilled into much shorter expressions of each expert's views in a joint report.

The joint report is organised under headings which, in the best cases, address matters useful to the court. The process works particularly well when the key topics for consideration by the experts have been agreed by counsel with expert input.

Technology can enhance the process. Video conferencing continues to improve and can work well and an electronically shared document can aid cooperation and speed the writing of the joint report. The process is also enhanced by the use of an independent, experienced and fair moderator.