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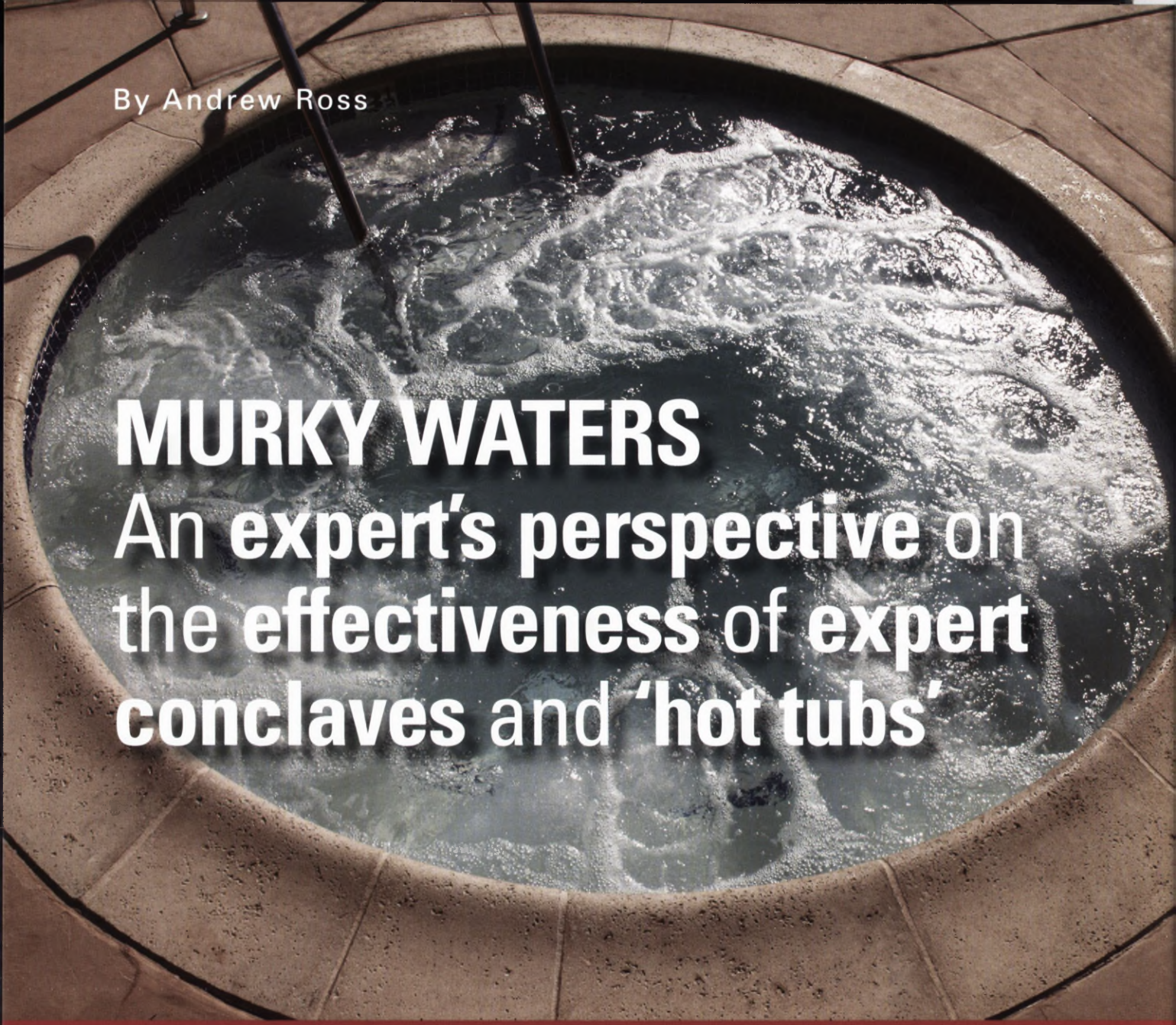

MURKY WATERS
An expert's perspective on the effectiveness of expert conclaves and 'hot tubs'

Expert evidence is frequently central, if not decisive, in many complex cases. However, obtaining and dealing with expert evidence can also be a difficult, expensive and time-consuming process. Not surprisingly, many Australian courts have taken steps designed to address these issues, including the increased requirements for pre-trial joint expert meetings (or 'conclaves') and the use of concurrent evidence (or the 'hot tub') for the hearing of expert evidence in court.

Despite the increased use of these processes, the experiences of legal practitioners and the experts they instruct have been mixed, with significant uncertainty surrounding whether they are in fact reducing the growing costs and delays of litigation and/or ultimately leading to better outcomes in the cases in which they are used.

This article examines how joint expert meetings and concurrent evidence are currently being employed by Australian courts, providing an accounting expert's 'inside perspective' on the efficacy of these methods in handling expert evidence.

THE CURRENT APPROACH TO EXPERT CONCLAVES AND CONCURRENT EVIDENCE IN AUSTRALIA

Expert conclaves and concurrent evidence are similar but distinct processes.

An expert conclave is a meeting, or series of private meetings, between experts engaged by opposing parties, typically designed to discuss differences in expert opinions already expressed in pre-existing expert reports in the hope that there can be (at best) a narrowing of those differences and (at worst) a clarification of what they are and why they arise. Expert conclaves generally occur without the presence of party-appointed legal representatives (although, as discussed below, they increasingly include a 'neutral' third-party facilitator).

Concurrent evidence usually involves the simultaneous provision of expert evidence from multiple party-appointed experts in court during the hearing of a matter. As such, it occurs in the presence of both the judge hearing the matter and the legal representatives for all parties. Unlike the proceedings in an expert conclave, concurrent evidence typically involves the giving of sworn evidence.

In many respects, these models of producing or adducing expert evidence are complimentary. They are also more likely to produce efficiency gains when used together. However, despite their increasing popularity in Australia, there is little guidance and consistency between courts and jurisdictions as to how these processes should be conducted.

EXPERT CONCLAVES

The use of expert conclaves is relatively widespread across Australia. Practice Notes or similar documents relating to the conduct of conclaves have been issued in the Supreme Courts of New South Wales[1] and Victoria,[2] the Federal Court of Australia[3] and the Queensland Planning and Environmental Court.[4] To some degree at least, the use of a pre-trial expert conclave is becoming the norm rather than the exception in many jurisdictions.

Notwithstanding the relative frequency of conclaves (and the existence of a variety of court-issued procedural documents in relation to them), problems can and do frequently arise. On some occasions, the experts are left to deal with these problems as best they can. Anecdotal evidence points to difficulties including:

- lack of consultation with experts when timetables are set for conclaves;
- uncertainty about what to do when it appears that a conclave timetable may not be met;
- lack of clarity as to the issues that are to be discussed in the conclave; and
- uncertainty as to the degree of contact that can or should occur between experts and instructing lawyers during the conclave.

Beyond these procedural issues, the efficacy of expert conclaves depends largely on whether the experts involved participate in good faith. Difficulties may arise where an expert:

- is not participating constructively and professionally in the conclave;
- demonstrates a disinterest in establishing any agreed positions on key issues;
- focuses on criticising their adversary's professionalism rather than providing an objective analysis of the merits of the issues in debate;
- introduces new issues, data, opinions or reasons during a conclave; and
- insists on a particular course of action to consider or to resolve an issue that arises during the conclave.

These difficulties are amplified when experts are, or perceive that they are, required to meet under conditions of confidentiality. Many experts are cautious about communicating with their instructing solicitors at all during the course of the conclave.[5] A 'gentlemen's agreement' is often adopted, which is intended to allow participating experts to freely express their opinions and explore each other's views without the fear that what is said in the conclave will be relayed to instructing solicitors or to the court.

Entering the conclave with these perceptions and understandings as to confidentiality may present an expert with an ethical dilemma when, for reasons such as those described above, it is perceived that the conclave is 'going off the rails'. How (if at all) should the expert communicate these views and to whom?

In broad terms, many of these challenges associated with the use of expert conclaves could be mitigated through more consultation with and between the experts in the planning phases of the conclave. Before the experts are sent off 'behind closed doors', both lawyers and experts need to have a clear understanding of the purpose of the conclave, how it will be conducted and what should occur if 'things go wrong'. >>

By way of contrast to this informal approach, on some occasions the courts have taken a more active role in designing and overseeing the conduct of expert conclaves. In a recent decision of the Supreme Court of Victoria, *Matthews v SPI Electricity Pty Ltd*,[6] Forrest J considered competing proposals for running a series of expert conclaves, holding that a flexible model with the following characteristics should be preferred:

- Where it is practical to do so, each party should appoint one expert for each issue in debate.
- Where experts are to discuss multiple complex issues, separate sessions should be held for each issue. This would also facilitate the production of joint expert reports on an issue-by-issue basis.
- A court-appointed person, such as an Associate Justice, could be employed to manage the conclave process. This appointee could also act as a moderator.
- A 'scribe' may be appointed at the discretion of the experts, although it was noted that such a role should be confined to recording discussions for the purposes of assisting the experts to produce a joint report.
- An agreed agenda should be provided to the experts.

It may not always be desirable for a court to be called upon to determine specifically the best approach to an expert conclave. But intervention in this case reflected the desire for parties to this dispute to consider in advance how the proposed expert conclaves might proceed, in the process identifying issues that required attention.

CONCURRENT EVIDENCE

Judicial orders to hear expert evidence concurrently are certainly not new in Australia. Indeed, the rules applicable to various Australian courts provide for the use of concurrent evidence.[7] In addition, some judicial comment suggests that, in the Australian context at least, the use of concurrent evidence is saving time and costs.[8]

However, none of the Australian courts has rules that provide detailed procedures as to how concurrent evidence should take place. One result is that the manner in which such 'hot-tubs' are run varies greatly between courts and jurisdictions. While practices differ considerably, concurrent evidence typically involves a combination of some or all of the following steps:

- Each expert is given an opportunity to prepare his/her own report.
- The experts may be required to meet and produce a joint report identifying areas of agreement and disagreement.
- During the trial, experts with differing opinions give their evidence at the same time, usually from the same witness box.
- The process will generally involve an open dialogue amongt the experts, with questions being asked by the judge, each parties' legal representatives and, sometimes, the experts themselves.

Although concurrent evidence usually takes a form which includes these basic elements, in practice most judges appear to deal with the precise format of concurrent evidence in each matter on a largely ad-hoc basis, no doubt seeking to fit those processes to the needs of each case. The table below highlights some of the differences in the way concurrent evidence has been used in 12 hot tubs across 8 Australian jurisdictions based on data collated from the experience of 7 KordaMentha Forensic partners who have participated in one or more 'hot tub'.[9]

Procedure	Approaches adopted
Subject matter	Accounting, valuation, damages and technology
Number of experts in hot tub	From 2 to 6 experts
Conclave and joint report prepared before hot tub	Yes, in 7 of the 12 instances
Experts given direction on operation of hot tub	Limited and broad guidance typically provided only on the day of the hearing
Adequate physical space and facilities	Generally adequate but some instances were problematic
Experts gave opening statements	Yes, in 2 of the 12 instances
Experts examined by counsel	Yes, in 10 of the 12 instances
Experts questioned each other	Yes, in 8 of the 12 instances
Judge questioned experts	Yes, in 10 of the 12 instances
Experts examined on joint report	Yes, in 6 of the 12 instances
Experts gave closing statements	No
Length of hot tub	1 to 8 days

In contrast to the lack of formal procedures in other jurisdictions, the Administrative Appeals Tribunal (AAT) has issued guidelines[10] which address both *whether* concurrent evidence should be used and, if so, *how* it should be conducted. These guidelines may provide a good starting point for other jurisdictions seeking to introduce similar guidance to experts and practitioners.

COMMON THEMES ARISING FROM THE 'INSIDER'S' PERSPECTIVE

Based on the experience of multiple KordaMentha Forensic senior personnel who have been involved in concurrent evidence:

- There is presently no consistency in how courts hear expert evidence concurrently.
- More often than not, experts are required to prepare a joint report before attending a hearing.
- Experts are often not given adequate forewarning that they

will be required to participate in a 'hot tub'.
- There is insufficient guidance provided to experts as to how the process will proceed.
- Judges will usually, but not always, ask questions of the experts.
- Experts will usually take the opportunity to discuss at least some matters with the other experts in the 'hot tub', providing they believe it appropriate to do so.
- Despite the production of joint reports, each expert's individual report typically remains the focus of concurrent evidence.
- The layout of the court or tribunal may not accommodate experts being heard concurrently. This is important because the visibility of an expert to a judge is a factor affecting the credibility of the evidence (and because the ability of any witness to give evidence is in part impacted by the environment in which that occurs).
- Hot tubs were generally shorter in duration than would be normally expected under the traditional model of cross-examination.

Anecdotal evidence suggests that this variety in the manner in which expert evidence is being heard concurrently is also leading to a degree of confusion among experts and legal practitioners, particularly in relation to:
- the order of events, and the cross-examination and expert questioning process;
- the use (if any) of 'opening statements', and their evidentiary status;
- How new issues, data or opinions that emerge in the course of concurrent evidence are to be dealt with;
- whether the other expert/s should be given time to consider and respond to new issues, data or opinions; and
- the extent to which experts are expected to comment on the evidence of other experts, ask questions of each other and raise matters with the presiding judge.

DO EXPERT CONCLAVES AND CONCURRENT EVIDENCE REDUCE COSTS AND DELAYS?

Many commentators, including judges, have highlighted the potential benefits and drawbacks of hearing expert evidence concurrently[11] and through expert conclaves.[12] The potential advantages cited for the continued use of concurrent evidence include:
- reducing the time required to hear expert evidence;
- allowing greater potential to focus on and distil key issues in dispute;
- avoiding problems of experts dealing with issues as 'ships in the night';
- giving experts more opportunity to convey their opinions in their own words and to test the robustness of responses from their peers in the 'hot tub';
- improving the prospects of experts making concessions and stating matters frankly; and
- facilitating the chance of opposing experts coming to an agreed position.

In concluding on the merits of concurrent evidence, the Australian Law Reform Commission summarised the Federal Court's favourable experience with hot tubbing, as follows:[13]

> 'It has been the [Federal Court] judges' experience that having both parties' experts present their views at the same time is very valuable. In contrast to the conventional approach, where an interval of up to several weeks may separate the experts' testimony, the panel approach enables the judge to compare and consider the competing opinions on a fair basis. In addition, the Court has found that experts themselves approve of the procedures and they welcome [them] as a better way of informing the Court. There is also symbolic and practical importance in removing the experts from their position in the camp of the party who called them.'

Similarly, expert conclaves may improve the efficiency of litigation, especially if used early on in the litigation process.[14] In our experience, there is a greater chance that opposing experts will come to an agreed position on key issues where concurrent evidence is utilised *after* experts have had an opportunity to participate in a conclave and to prepare a joint report.

However, not everyone endorses concurrent evidence. Critics highlight the potential drawbacks, including:
- no savings in costs and time due to the limited guidance provided to the parties involved;
- potential to turn an expert into an advocate;
- potential for one expert to dominate the process;
- too much flexibility given to experts reduces the ability of counsel to control proceedings; and
- the departure from traditional cross-examination may impede thorough examination of the issues.

To those who disagree with the benefits of concurrent evidence, the process can never be 'a panacea for partisanship, adversarial bias, or the difficulties created by expert disagreement and decision-making in the face of uncertainty'.[15]

IMPROVING THE PROCESS

This article has highlighted the benefits and potential pitfalls of using expert conclaves and hearing evidence concurrently. Despite concerns that have been aired in relation to both concepts, in the author's view they each have the potential to reduce the costs and delays of litigation as stakeholders become more familiar with, and refine, the processes being used.

From an expert's perspective, some of the drawbacks can be alleviated if changes are made to the way the process is managed. For example, expert conclaves and concurrent evidence could be improved by:
- joint reports being ordered well in advance of the hearing, ensuring that experts are dealing with common issues and bringing the key differences to light earlier in the process;
- suggesting or requiring the parties to agree in advance on a communication protocol including, for example, periodical updates as to progress of the conclave to be provided jointly by the experts to the parties and/or the court;
- clarifying the circumstances under which it is appropriate for an expert (or experts jointly) to communicate with instructing solicitors during the conclave;
- clarifying the circumstances when an expert (or experts jointly) should or may approach the court (as opposed >>

to instructing solicitors) for further directions during the conclave and, in that context, providing experts with contact information for the relevant court officer;
- foreshadowing the possibility that participating experts may need to attend court during the conclave period to explain the reasons why the conclave timetable needs to be changed;
- solicitors and barristers anticipating the need for concurrent evidence and becoming more proactive in managing its use;
- early and proactive consideration of the structure of the concurrent evidence process and the provision to experts of adequate and timely guidance of what to expect from that process
- parties agreeing on and advising their experts if opening statements are required as part of the concurrent evidence process; and
- judges actively managing the concurrent expert process and communicating their requirements to the parties well before that process begins.

As suggested by Judge Rackemann of the District Court of Queensland when he assessed the merits of concurrent evidence:[16]

> 'It is a tool, the usefulness of which will vary according to the context in which it is used, and the manner in which it is employed.'

CONCLUSION

The discussion above shows that the use of expert conclaves and concurrent evidence is no longer a novel concept in Australia. Rather, these concepts are part of an emerging trend which has the potential to reduce the costs and delays of litigation.

The experiences of legal practitioners and the experts they instruct have been mixed. However, this experience does suggest that these processes have the potential to yield efficiency gains. This article has examined the potential drawbacks that currently exist in the use of these processes, but has also explored potential responses to these concerns.

Ultimately, as this 'insider perspective' demonstrates, whether the use of concurrent evidence and expert conclaves can reduce the costs and delays in litigation will largely depend on how the process is managed by judges, lawyers and the experts they rely upon or instruct. ■

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Notes: **1** Supreme Court of NSW, Practice Note No. SC Gen 11, 'Joint Conferences of Expert Witnesses', 17 August 2005. Accessible at http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/991e2f2f3bcd8289ca2572ed000cec4b. **2** *Supreme Court (General Civil Procedure) Rules* 2005 (Vic), s44.06. **3** Federal Court of Australia, Practice Note CM7, 'Expert witnesses in proceedings in the Federal Court of Australia', 1 June 2013. Accessible at http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/cm7. **4** *Planning and Environmental Court Rules* 2010 (Qld), Rule 22, 27,28,30, and 34.Accessble at https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/S/SusPlanPECRu10.pdf. **5** For example, Rule 27 of the NSW SC Practice Note, requires that 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 the 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. **6** KordaMentha Forensic, 'Expert Matters, Expert conclaves: avoiding collisions of ships in the night', April 2013. Accessible at http://www.kordamentha.com/publications/FOR-13-02-Expert-conclaves. **7** For example, see Supreme Court of New South Wales, Practice Note SC CL 5, 'Supreme Court Common Law Division – General Case Management List,' http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/4cd3129c77a5419cca2572ed000ceca8; Federal Court Rules 2011 (Cth), r 23.15 and the *Uniform Civil Procedure Rules* 2005 (NSW) r31.35. **8** See J Rares, 'Using the Hot Tub – How Concurrent Expert Evidence Aids Understanding', New South Wales Bar Association Continuing Professional Development Seminar, 23 August 2010. Accessible at www.fedcourt.gov.au%2F__data%2Fassets%2Frtf_file%2F0004%2F21469%2FRares-J-20100823.rtf&ei=MHFLUs7NEoetiQe71oHQDQ&usg=AFQjCNG79y9P45O0RAFb0OdYhxUSI0eWvw&bvm=bv.53371865,d.dGI. **9** KordaMentha Forensic,' Some like it hot! Experts views on judicial orders to hear expert evidence concurrently', *Forensic Matters* , Issue 13-01. See http://www.kordamentha.com/docs/for-publications/issue-13-01-some-like-it-hot. **10** AAT, 'Guidelines for the Use of Concurrent Evidence in the AAT', 9 November 2011. Available at http://www.aat.gov.au/LawAndPractice/PracticeDirectionsAndGuides/Guidelines/ConcurrentEvidence.htm. **11** The Hon Justice Garling, 'Concurrent Expert Evidence, reflections and developments,' 17 August 2011. Paper presented to the Australian Insurance Law Association Twilight Seminar Series. Accessible at http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/garling170811.pdf. **12** Mr Neil J Young QC, 'Expert Witnesses: on the stand or in the hot tub – how, when and why? Formulating the questions for opinion and cross-examining the experts', Commercial Court Seminar 27 October 2010. Accessible at http://www.commercialcourt.com.au/PDF/Speeches/Commercial%20Court%20CPD%20Seminar%20-%20Expert%20Witnesses%20-%20Paper%20by%20Neil%20Young%20QC.pdf. **13** Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No. 89, tabled 17 February 2000. Accessible at http://www.alrc.gov.au/report-89. **14** See for example, Pre-litigation joint experts' conference as applied in Queensland Planning and Environmental Court. Hon Justice ME Rackemann, 'Expert Evidence Reforms – How are they working?' presented at the Annual Conference of the Bar Association of Queensland, 5 March 2011. Accessible at http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1053&Itemid=48. **15** Gary Edmond, Associate Professor, 'Merton and the Hot Tub: Scientific Conventions and the Expert Evidence in Australian Civil Procedure,' (2009) 72 *Law and Contemporary Problems* 159-89. Accessible at http://www.law.unsw.edu.au/sites/law.unsw.edu.au/files/pre/f/docs/pubs/unsw_edmond_merton-and-the-hot-tub.pdf. **16** Hon Justice ME Rackemann, 'The Management of Experts', presented at the Judical Conference of Australia Colloquium 14 - 16 October 2011. Accessible at http://www.jca.asn.au/colloquia/2011/RackemannPaper.pdf.

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