Hot tubbing: concurrent expert evidence

By Elizabeth Cheeseman

What is 'hot tubbing' in the curial context?

The advent of 'hot tubbing' in the courts has excited some publicity in legal circles and for reasons that extend beyond suggestive word play.[1] Hot tubbing, which is the practice of the court receiving concurrent expert evidence, represents a significant departure from the traditional adversarial method of presenting expert evidence and is likely to become more widely utilised in New South Wales courts. It is important to be cognisant of the emerging practice and to focus on the ramifications the practice may have to the manner in which experts are prepared to give evidence.

Traditionally, in cases in which expert evidence is led, the expert witnesses are called as part of each party's respective case, usually after the evidence of each party's lay witnesses is completed. The party calling the expert will have obtained and served a report detailing the expert opinion evidence to be given by the witness. Often the report in effect constitutes the expert's evidence in chief and the expert will then be cross-examined. On occasion, directions may be made that the experts of both parties be called out of sequence so that they give evidence one after the other.

The New South Wales Law Reform Commission noted:

> In recent years, however, there has been considerable interest in a different approach, in which the relevant experts in a particular area are sworn in at one time and remain together in court. The giving of evidence becomes a discussion rather than a series of exchanges between a lawyer and a witness. In the discussion, questions may be asked not only by the lawyers and the judge, but also by one expert of another, a departure from the traditional approach in which only the cross-examining lawyer asks questions. The discussion is focussed, highly structured, and controlled by the judge. [2]

The Australian Law Reform Commission described the process of concurrent evidence (the 'hot tub' panel) as follows:

- experts submit written statements to the tribunal, which they may freely modify or supplement orally at the hearing, after having heard all of the other evidence
- all of the experts are sworn in at the same time and each in turn provides an oral exposition of their expert opinion on the issues arising from the evidence
- each expert then expresses his or her view about the opinions expressed by the other experts
- counsel cross-examine the experts one after the other and are at liberty to put questions to all or any of the experts in respect of a particular issue. Re-examination is conducted on the same basis.[3]

An intermediate step that may be interposed between the first two steps described above is to require the experts to confer before giving evidence and to produce a joint memorandum which summarises the matters upon which they disagree after the conferral process is complete. The expert conferral process typically occurs in the absence of the parties' legal representatives. An emerging practice in cases involving a number of separate fields of expertise which interlock in the legal context is to engage an independent legal practitioner to act as a facilitator during the expert conference. The independent legal practitioner's role is facilitate and to assist in structuring the experts' discussion so that all expert issues relevant to the legal framework of the dispute are addressed.

Justice McClellan, who played a significant role in the establishing the practice of concurrent evidence in the Land and Environment Court, described the process as follows:

> all experts in relation to a particular topic are sworn to give evidence at the same time. What follows is a discussion, which is managed by the judge or commissioner, so that the topics requiring oral examination are ventilated. The process enables experts to answer questions from the court, the advocates and, most importantly, from their professional colleagues. It allows the experts to express in their own words the view they have on a particular subject. There have been cases where as many as six experts have been sworn to give evidence at the same time.
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> For hearings in my court, the procedure commonly followed involves the experts being sworn and their written reports tendered together with the document which reflects their pre trial discussion - matters upon which they agree or disagree. I then identify, with the help of the advocates and in the presence of the witnesses, the topics which require discussion in order to resolve the outstanding issues. Having identified those matters, I invite each witness to briefly speak to their position on the first issue followed by a general discussion of the issue during which they can ask each other questions. I invite the advocates to join in the discussion by asking questions of their own of any other witness. Having completed the discussion on one issue we move on until the discussion of all the issues has been completed.
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> Experience shows that provided everyone understands the process at the outset, in particular that it is to be a structured discussion to inform the judge and not an argument between the experts and the advocates, there is no difficulty in managing the hearing. Although I do no encourage it, very often the experts who will be sitting next to each other, normally in the jury box in the courtroom, end up referring to each other on first name terms. Within a short time of the discussion commencing, you can feel the release of the tension which normally infects the evidence gathering process. Those who might normally be shy or diffident are able to relax and contribute fully to the discussion.

> This change in procedure has met with overwhelming support from the experts and their professional organisations. They find that they are better able to communicate their opinions and, because they are not confined to answering the questions of the advocates, are able to more effectively respond to the views of the other expert or experts. They believe that there is less risk that their expertise will be distorted by the advocate's skill. It is also significantly more efficient. Evidence which may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as 20 per cent of the time which would have been necessary.
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> As far as the decision-maker is concerned, my experience is that because of the opportunity to observe the experts in conversation with each other about the matter together with the ability to ask and answer each other's questions, the capacity of the judge to decide which expert to accept is greatly enhanced. Rather than have a person's expertise translated or coloured by the skill of the advocate, and as we know the impact of the advocate is sometimes significant, you actually have the expert's own views expressed in his or her own words.[4]

Potted 'hot tub' history

The practice of taking the evidence of experts concurrently appears to be an Australian innovation[5] and is reported to have developed initially under Justice Lockhart when sitting as president of the Trade Practices Tribunal (now the Australian Competition Tribunal).[6] The tribunal, chaired by a Federal Court judge, decides whether authorisations should be given on public benefit grounds to arrangements that would otherwise be contrary to competition law.

The Administrative Appeals Tribunal has used concurrent evidence since at least 1994.[7] The potential advantage of using concurrent evidence in the tribunal was illustrated by *Coonawarra Penola Wine Industry Assoc Inc v Geographical Indications Committee* [2001] AATA 844. That case related to the use of the name 'Coonawarra' by wine producers. An estimated six months hearing was reduced to five weeks. More recently, Justice Downes, President of the AAT, utilised the concurrent technique in proceedings relating to the importation of Asian elephants to zoos in Sydney and Melbourne - 16 experts gave evidence and were cross-examined by three senior counsel in a total of four hearing days.[8]

The practice of taking the evidence of experts concurrently was pioneered in New South Wales by the Land and Environment Court under Chief Judge McClellan (as he then was). In *BGP Properties Pty Limited v Lake Macquarie City Council* [2004] NSWLEC 399 at [121] - [122], McClellan CJ observed:

> The issues which were ultimately defined in the proceedings required resolution of the different views of experts in relation to a number of significant matters. As will become commonplace in proceedings in this court, the oral testimony of the experts was taken by a process of concurrent evidence. This involved the swearing in of the experts with similar expertise, who then gave evidence in relation to particular issues at the same time. Before giving evidence, the experts had completed the joint conferencing process, which enabled the court to identify the differences which remained and which required resolution through the oral evidence. Each witness was then given an opportunity to explain their position on an issue and provided with an opportunity to question the other witness or witnesses about their position. Questions were also asked by counsel for the parties. In effect, the evidence was given through a discussion in which all of the experts, the advocates and the court participated.
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> Both Commissioner Watts and I found this to be an efficient and effective method to receive expert evidence. It enabled ready identification of fundamental issues and it ensured that court time was devoted to understanding those issues and providing the court with the material necessary to resolve them. Apart from enhancing the quality of the court's decision, it ensured that a number of days of hearing time were saved.

In *Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority* [2004] NSWLEC 315 at [14] Talbot J observed that:

> The conduct of the case has contemporary interest as a consequence of the successful use of concurrent evidence techniques that resulted in the oral evidence being confined to four days of the 13-day hearing. In particular, the oral evidence of the six expert witnesses in respect of town planning issues and development potential took only two days of hearing time. The other witnesses who assisted the court by giving evidence in a concurrent session were experts in relation to SEPP 5 development, contamination, design modelling and the respective valuers.

In September 2004, the attorney general for NSW, the Hon Bob Debus MP, commissioned the New South Wales Law Reform Commission to inquire into and report on the operation and effectiveness of the rules and procedures governing expert witnesses in New South Wales.[9]

In September 2005, the NSW Law Reform Commission[10] released its report in relation to expert witnesses.[11] The report reviewed the emerging practice of experts giving concurrent evidence but made no recommendation in relation to altering the existing rules.[12]

The commission made the following observations with respect to the significant potential advantages[13] of giving expert evidence concurrently:

- the Land and Environment Court's experience indicated that experts typically make more concessions, and state matters more frankly and reasonably, than they might have done under the traditional type of cross-examination; and
- if used effectively, concurrent evidence has considerable potential to increase the likelihood of the court achieving a just decision. It was considered to be more likely to decrease costs and delay than to increase them.

The commission observed that the efficacy and attendant success of the process 'may well depend on the extent to which it is embraced by judicial officers', noting that:

> An important factor is the structuring and control of the discussion by the judge. This requires considerable skill, and often a significant amount of preparation, so that the issues are identified and arranged in a way that lends itself to a fruitful discussion. The

> conduct of the discussion needs to encourage some freedom of exchanges, but nevertheless ensure that all points of view are aired, and that counsel have an adequate opportunity to test opposing experts. The overall success of the technique must also depend on the skills, preparedness and co-operation of the lawyers and experts involved.[14]

Although the commission declined to recommend that the rules be amended to stipulate that expert evidence be given concurrently unless otherwise ordered[15], the commission noted that the wider application of the process of taking evidence concurrently would be beneficial and surmised that 'it may well be that, in the future, the taking of expert evidence concurrently will become the norm rather than the exception.'[16] This is particularly likely given that Justice McClellan who was instrumental in introducing the use of concurrent expert evidence in the Land and Environment Court is now chief judge at Common Law of the Supreme Court. It is expected that he will be an advocate of the broad use of concurrent evidence in the Supreme Court.[17]

Recent Examples

Order 34A rule 3 of the *Federal Court Rules 1979* (Cth), introduced in 1998, empowers the court or a judge to direct that the evidence of expert witnesses called in relation to the same or similar questions be given concurrently.

Federal Magistrate McInnis delivered a recent paper in which he provided an overview of current issues concerning expert evidence in the federal courts, namely the Federal Court, the Family Court and the Federal Magistrates Court.[18] In that paper he described the following innovative orders being made under Order 34A rule 3 in relation to the presentation of expert evidence:

Example 1:

In Qantas Airways Ltd (2004) ACompT 9 (12 October 2004) Goldberg J made the following orders:

1) The parties deliver to the experts later this afternoon or early this evening a number of questions or issues to which the tribunal wishes to direct the expert's attention and which it will ask them to address tomorrow.
2) Each of the experts, when he receives the list of questions or issues, is not to discuss those matters with anyone before being sworn in to give evidence tomorrow.
3) Those questions and issues will be made available to counsel overnight, but the tribunal does not wish the dissemination of the questions or issues to go any further at this stage.
4) The tribunal proposes to adopt the following procedure in relation to the giving of the expert's evidence tomorrow.
   a) the five experts will be sworn in at the same time;
   b) each of them be invited to make an opening statement of around 15 minutes as to how they see the issues in terms of their evidence and the core issues in the proceedings at this stage;
   c) then the experts will be invited to ask questions of any of the other of the experts;
   d) then the tribunal will open the floor between the five experts for any dialogue which they wish to undertake, having regard to what has preceded that dialogue earlier in the morning;
   e) the experts will then have the opportunity of about 10 minutes to sum up the position as they see it from their point of view in relation to the issues in respect of which their evidence and their participation is relevant;
   f) then counsel would be given the opportunity to cross-examine. So far as cross-examination is concerned, or questioning, depending on who asks the questions, the extent to which questions might be leading is a matter of flexibility. Each counsel would cross-examine what I might call the five witnesses who are called by the opposing parties, but not their own witnesses. After that range of cross-examination has been completed, then give a final opportunity for re-examination;
   g) during the procedure the tribunal may ask questions for the purpose of its own clarification. The tribunal will also ask the witnesses to address the specific issues that it has raised in its issues paper.

Example 2:

Directions made on 20 September 2004 by Goldberg J in proceedings before the Australian Competition Tribunal concerning Sydney Airport included the following directions as to the mode of expert conferral which might precede evidence being given concurrently:

3. There be a meeting of each of the parties' experts in Sydney on 15 October 2004 at 8am, at a place to be notified, which meeting will be chaired by Registrar Efthim. The experts should arrive between 7.30am and 7.45am in preparation for the 8 am start.
4. Secretarial or administrative assistance should be provided by the parties to the meeting of the experts if required.
5. The experts are to consider the expert evidence which they have filed and also the evidence generally which is before the tribunal.
6. The meeting will follow such procedures as are determined

by Registrar Efthim after consultation with the experts and the meeting is otherwise to be informal.

7. Legal counsel will not be present at the meeting.
8. The experts must at all times exercise independent judgment.
9. The experts must not act upon instructions to withhold agreement on any matter.
10. The experts are not advocates and are not to act as such.
11. The meeting is not a negotiation as such, nor is it directed to achieve a compromise outcome. The meeting is for the purpose of the experts acting to identify areas of agreement between them and areas of disagreement between them. They are to clarify the scope and extent of any disagreement between them and to assist the tribunal in an impartial manner.
12. The experts are to prepare a joint statement under the supervision of Registrar Efthim and, if they can agree, the first draft is to be prepared by one of their number and circulated to others.
13. The content of the joint statement will be along the following lines:

    (i) A brief statement of the issues considered by the experts at their meeting.

    (ii) A statement of the matters upon which they have reached agreement. Reasons are not required in respect of those matters, but rather a statement of the matters is to be set out so that the subject matter of agreement can be identified.

    (iii) A statement of matters upon which they have not reached agreement, including a brief outline of the reasons for the disagreement and any suggestions for resolution of such disagreement.

    (iv) The experts are to sign that joint statement and give it to Registrar Efthim who will file it in the tribunal and arrange for it to be circulated to the parties, if possible, by 5pm on the day the meeting was held or, if not possible, as soon as possible thereafter as can be arranged.

    (v) The statement should also identify the extent to which there is unanimous agreement on issues if not otherwise identified and, to the extent to which there is disagreement, the nature of the disagreement should be set out in outline, identifying which experts are on which side of the disagreement.'

Example 3:

Similarly, orders made by Lindgren J in a native title case provided for experts to confer according to their respective areas of expertise:

(a) separate conferences of anthropologists, historians and linguists in the absence of lawyers;

(b) lawyers were permitted to assist in setting the agenda; and

(c) the conferences were presided over by an officer of the court.[19]

A good illustration of the flexibility provided by use of concurrent evidence is the procedure adopted by Downes P in recent proceedings in the AAT:

I recently used concurrent evidence in a hearing concerning proposals by Melbourne and Sydney Zoos to import eight Asian elephants. There were 16 expert witnesses and three senior counsel to examine them. The evidence of all 16 witnesses was concluded within four hearing days. This was achieved notwithstanding that, although the experts all had doctorates in disciplines associated with animal behaviour, one group had worked in zoos and the other group had worked in the wild. As one senior counsel said: '[I]t's very clear to all concerned that there is a great degree of polarisation of views on this subject matter.'

Nevertheless, the process enabled areas of agreement to be readily discovered and set to one side, and issues of disagreement then to be effectively addressed. This happened although there were up to four witnesses giving evidence at the same time, including on occasion when one of a group of four gave evidence by telephone from New Delhi. We also took concurrent evidence from two witnesses in the United Kingdom by video link, although the two witnesses were in different parts of the United Kingdom.

All the witnesses had prepared extensive reports which became evidence. The process we adopted was to ask the witnesses to meet together to identify areas of agreement and disagreement. They were asked to produce a document setting this down. At the beginning of their evidence, the document was admitted as an exhibit. Each witness was then asked to outline the essence of their evidence on matters not agreed. The witnesses were then invited to ask questions of one another. During the whole process, members of the tribunal asked questions when they thought it appropriate. Finally, counsel for the three parties were invited to question any of the witnesses, including those they had called to give evidence.

The process of asking the experts to find areas of agreement and disagreement was very successful. The two who gave evidence from England both had doctorates. One was head of wildlife for the RSPCA. The other was the Director of the British and Irish Association of Zoos and Aquariums. They definitely gave evidence from different perspectives. They could only meet by telephone. They were a long way from the lawyers and any guidance as to how they should go about their meeting. Yet they produced a comprehensive multi-page document of points of agreement and disagreement.

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Concurrent evidence can have a number of virtues over the traditional process:

- the evidence on one topic is all given at the same time;
- the process refines the issues to those that are essential;
- because the experts are confronting one another, they are much less likely to act adversarially;
- a narrowing and refining of areas of agreement and disagreement is achieved before cross- examination; and
- cross-examination takes place in the presence of all the experts so that they can immediately be asked to comment on the answers of colleagues.[20]

Conclusion

In November 2005, the Administrative Appeals Tribunal published its report evaluating the use of concurrent evidence in the NSW Registry.[21] The study supported the continued use of concurrent evidence in the tribunal and noted in particular that there appeared to be significant benefits for the decision-making process in using concurrent evidence, such as: improved objectivity of the evidence presentation; improved quality of evidence; easier comparison of competing expert evidence; enhanced decision-making and easier preparation and delivery of judgments. Interestingly, the findings suggested that the use of concurrent evidence only reduced the overall length of the hearing in 30 per cent of cases; in 50 per cent of cases the length of the hearing was about the same and in the remaining 20 per cent of cases it was perceived that the use of concurrent evidence increased the length of the hearing.

The study made a number of recommendations in relation to the continued use of concurrent evidence which included:

- the development of guidelines in relation to:
  - the identification and selection of cases in which the procedure would be used; and
  - the procedure to be followed;
- the provision of information and training to tribunal members, representatives and experts in relation to the use of the procedure.

In the study the four factors most commonly identified as making a matter suitable for concurrent evidence were that:

- the experts had the same level of expertise;
- the experts would be commenting on the same issues;
- concurrent evidence would improve the objectivity of the evidence;
- concurrent evidence would clarify some complex issues.

While it remains to be seen whether the practice of taking expert evidence concurrently becomes the norm rather than the exception, it is likely to be encountered with greater frequency for the foreseeable future, particularly as the procedure is trialled and modified to suit different types of dispute. In the Supreme Court, concurrent expert evidence has been used in medical negligence cases.[22] It has also been used where the expert matter in issue was the forgery of a signature on a guarantee.[23] The use of concurrent evidence in medical cases is reminiscent of the introduction of joint conferences between experts in the Professional Negligence List in 1999, an innovation that was incorporated into the general court rules in 2000. The provision of effective training to all involved in the procedure will influence the success of a broader implementation of concurrent evidence in the courts. As identified by the Law Reform Commission, effective utilisation of the procedure will depend heavily on the degree to which the procedure is embraced by the bench and will require significant preparation to ensure that the flow of evidence is controlled in such a way as to focus on the relevant issues before the court.

1 Justice P Heerey, 'Recent Australian Developments' (2004) 23 *Civil Justice Quarterly* 386 referred to 'the hot tub' as an 'irreverent soubriquet'. Paul Stockton, Director of Reviews and Legislation, Department of Constitutional Affairs, UK, acknowledged that concurrent evidence was a fascinating innovation but commented that 'the hot tub' label was possibly used to stimulate interest at otherwise dull legal events: P Stockton, 'Comment: Some Lessons from Australia', Council on Tribunals, *Adjust Newsletter*, July 2006

http://www.council-on-tribunals.gov.uk/adjust/item/comment_australia.htm

2 New South Wales Law Reform Commission, *Expert Witnesses*, Report No 109 (2005) [6.48] (references omitted).

3 Australian Law Reform Commission, *Managing Justice: a Review of the Federal Justice System*, Report No 89 (2000) [6.116] (references omitted). The commission cited Lockhart J, 'Memorandum to the Registrar of the Federal Court' (21 April 1998).

4 Justice P McClellan, 'Expert Witnesses: The Experience of the Land & Environment Court of NSW' (Paper presented at the XIX Biennial LawAsia Conference, Gold Coast, 20 - 24 March 2005).

5 See: P Stockton at n 1 above.

6 Justice P Heerey, above n 1; Federal Magistrate M McInnis, 'Expert Evidence and the Federal Courts Current Developments' (paper presented at the International Institute of Forensic Studies Conference on 'Experts and Lawyers: Surviving in the Brave New World', Broome, 16 - 19 October 2005) and Administrative Appeals Tribunal 'An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal' November 2005 http://www.aat.gov.au/SpeechesPapersAndResearch/Research/AATConcurrentEvidenceReportNovember2005.pdf.

7 *Re Ciba Geigy Australia and Worksafe Australia Ltd* AAT 9385, 18 March 1994 - cited in AAT Report at n6 above.

8 Both examples are drawn from Justice G Downes AM, 'Problems with Expert Evidence: Are Single or Court-Appointed Experts the Answer?' (2006) 15 *Journal of Judicial Administration* 185. See also Justice G Downes AM 'Concurrent Expert Evidence in the Administrative Appeals Tribunal: The New South Wales Experience' (Paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, Hobart, 27 February 2004).

9 The terms of reference were as follows:

1. To inquire into and report on the operation and effectiveness of the rules and procedures governing expert witnesses in New South Wales.
2. In undertaking this inquiry, the commission should have regard to:
   * recent developments in New South Wales and other Australian and international jurisdictions in relation to the use of expert witnesses, including developments in the areas of single or joint expert witnesses, court-appointed expert witnesses, and expert panels or conferences;
   * current mechanisms for the accreditation and accountability of expert witnesses for the purposes of court proceedings, including the practice of expert witnesses offering their services on a 'no win, no fee' basis;
   * the desirability of sanctions for inappropriate or unethical conduct by expert witnesses; and any other related matter.
3. The commission to report no later than 31 March 2005. See New South Wales Law Reform Commission, above n 2.

[10] Pursuant to s12A of the *Law Reform Commission Act 1967* (NSW) the chairperson of the commission constituted a division for the purpose of conducting the reference: Professor Richard Chisholm (Head of Division); The Hon Justice Michael Adams; Professor Michael Tilbury; Dr Duncan Chappell; The Hon Justice David Kirby; The Hon Gordon Samuels AC CVO QC; and The Hon Hal Sperling QC.

[11] New South Wales Law Reform Commission, above n 2.

[12] Pt 31 r 25 *Uniform Civil Procedure Rules 2005* (NSW) makes provision for the court to direct that expert evidence be taken concurrently.

[13] Although much has been written proclaiming the benefits of concurrent expert evidence, the process is not universally acclaimed: see for example Justice G L Davies, 'Recent Australian Developments: A Response to Peter Heerey' (2004) 23 *Civil Justice Quarterly* 396. See also discussion within of the decision of the Australian Competition Tribunal in *Qantas Airways Limited* [2004] ACompT 9.

[14] New South Wales Law Reform Commission, above n 2, [6.57].

[15] In the Western Australian State Administrative Tribunal the default position is that all evidence given by experts in the same field is given concurrently.

[16] New South Wales Law Reform Commission, above n 2 [6.60].

[17] See Justice P McClellan, above n 4.

[18] Federal Magistrate M McInnis, above n 6.

[19] McInnis DCM cited this example from Heerey J's article above n 11.

[20] I*nternational Fund for Animal Welfare (Australia) Pty Ltd v Minister for Environment and Heritage* [2006] AATA 94, which is described in Justice G Downes AM, 'Problems with Expert Evidence', above n 8.

[21] Administrative Appeals Tribunal, 'An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal' (November 2005) Administrative Appeals Tribunal <http://www.aat.gov.au/SpeechesPapersAndResearch/ResearchPapers.htm> at 3 October 2006.

[22] Justice P Biscoe, 'Expert Witnesses: Recent Developments in NSW' a paper delivered to the Australasian Conference of Planning and Environment Courts and Tribunals on 16 September 2006.

[23] *Jeans v Cleary* [2006] NSWSC 647 (28 June 2006).

Verbatim

Burge & Ors v Swarbrick [2006] HCATrans 573

Gleeson CJ: Yes, Mr Garnsey.

Mr Garnsey: If your Honour pleases. Your Honours, when the poet enunciated the self-evident truth that a thing of beauty is a joy forever, no one doubted that statement and it gave one a comfortable feeling and one says 'How true' automatically. When one enunciates the proposition that the hull and deck mouldings made from the moulds made from a plug for a racing yacht designed to be manufactured, industrialised, marketed and, if possible, raced in a class, when one says that such a yacht or the hull and deck mouldings of it are works of artistic craftsmanship, one does not have the same immediate confidence that, if those words are ordinary English words, they bear a meaning which is appropriate for a racing yacht or its component parts.

The proposition which we advance in this case is to advance a proposition which contains a positive test for work of artistic craftsmanship based on the legislative history and the authorities and we invite your Honours to set the boundaries to that term, because at present, your Honours, it is our respectful submission that the horse is out of the stall, is running around the stable yards and it is high time that someone put a halter on it and got it back.

Kirby J: Could you not have thought of a nautical analogy instead of an equine one? Seeing as you began with the poet and I was lifted into a higher plane, suddenly I am getting mixed metaphors here.

Mr Garnsey: Well, your Honour, I do not know if the amount of paper we are going to inflict on your Honours will lift your Honours to a higher plane.

Gleeson CJ: No, it will not. Somebody on your side of the record seems to think that the word 'lengthy' when applied to submissions is a badge of honour. We have read the written submissions.

Leichhardt Municipal Council v Montgomery [2006] HCATrans 462 (30 August 2006)

Kirby J: Was there a danger for you in the questions and answers – the questions to you from the chief justice and the answers you gave that the subcontractor is committing a nuisance unless it is relevantly performing the statutory functions as the road authority?

Mr Garling: I would not put it quite that way, your Honour. I would accept – and I certainly would not accept there is any danger in any question that his Honour the chief justice ever puts, but - - -

Hayne J: You will learn.

Kirby J: You always have to watch these questions.