

## Health insights

# Reflections on a recent experience with 'hot tubbing' in the Coroner's Court

'Hot tubbing' expert witnesses has been a growing trend in the Victorian judicial system and particularly in the Supreme Court of Victoria, where it is advocated as an expedient and illuminating method of adducing expert evidence (in the appropriate circumstances). Now it seems this trend is expanding beyond its traditional use in the civil courts into other forums of justice, as Meridian Lawyers recently experienced in the Coroner's Court of Victoria. In this article, we have shared our recent experience of 'hot tubbing', together with reflections as to its potential strengths and shortcomings in the administration of justice.

### Our Experience

In a recent Coroner's Court directions hearing, the order was made that the four expert witnesses in the case would give their evidence at inquest concurrently. All four witnesses were medical professionals, however they each held slightly different areas of expertise – two were general practitioners, one was a cardiologist and the fourth was a physician.

The Coroner directed that the parties be provided with a draft list of questions for the experts before inquest, and invited the parties to suggest any additional questions or alterations. It is worth noting here, that we are aware that different Coroners conduct the process of 'hot tubbing' slightly differently and in some instances, the questions may only be provided to the parties on the day of inquest itself.



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Upon commencement of the inquest, the Coroner provided the finalised list of questions to the four experts. After the inquest hearing commenced, the witnesses were instructed to enter another room to discuss their responses.

Importantly, before the experts entered the conclave Her Honour gave the experts several instructions. Firstly, she reminded them that the standard of proof is on the balance of probabilities, and that the rules of evidence do not apply to the Coroner's Act. The Coroner identified the key issues that they were to examine (which were also encapsulated in the list of questions), The Coroner instructed the experts to focus their discussion on the list of questions and encouraged them to consider the opinion of the other experts and the medical records.

The Coroner instructed the witnesses that if they did not feel capable of answering any of the questions, they did not have to participate in the discussion or answer the question, and reminded them that they are not expected to resolve any factual disputes. The experts were reassured that they were not expected to become an expert in an area that is not their expertise, or to discard expertise which they did in fact have. While they should listen to each other, and try to reach a consensus, it was not required that they do so.

The Coroner asked the witnesses to elect a spokesperson to answer each question on behalf of the consensus or the majority view if no consensus could be reached (this person could be the same or different for each question). If the group could only reach a majority view, the spokesperson's role was to identify who held that view, and who dissented. The remaining person(s) (ie, the dissenter(s)) would then be given an opportunity to explain their dissenting view. After the court's questions had been answered, counsel for the represented parties would then have an opportunity to ask further questions.

Finally, the Coroner instructed the experts that once they had finished their discussion in the conclave, they would be sworn in as witnesses. Each question on the list would be put to them, and after all the questions had been asked then any party would be given an opportunity to ask questions, as well as the Coroner may also ask questions.

After deliberating for approximately one to two hours, the experts in this case returned from the conclave to deliver their answers to the questions provided. They were seated in the witness box in a panel, sworn in, and each of their written reports were tendered as evidence. Of the questions provided to them, several were answered with unanimous consensus and the spokesperson briefly elaborated on the reasons why. Where the group could not reach consensus, the spokesperson delivered the majority view and the dissenting witness also explained his position. The responses to the questions were fairly succinct and although there was some discussion amongst the panel over the most hotly contested matters, on the whole the court only heard from the spokesperson and any dissenter. Counsel for each party then had the opportunity to ask questions of any of the witnesses. The Coroner also asked questions aimed at clarifying the evidence. The entire inquest, including the evidence of all four experts and a further witness, was concluded before lunchtime, with the expert evidence taking approximately an hour.

## Our Reflections

There is no doubt that the use of 'hot tubbing' to adduce the expert evidence in this case, was incredibly efficient. It saved time and money for all parties involved, minimising not only the costs to have the experts in court, but also counsels' and legal practitioners' fees for attending the hearing. Another clear advantage was that it also helped to isolate the issues of contest, and to keep the responses to the questions succinct and to the point. All persons in court had a copy of the questions prior to the hearing, so the evidence was easy to follow, and the experts moved through the questions swiftly – particularly where there was a consensus view on the answer.

However, achieving such brevity and clarity likely means that the evidence which would have been acquired from each expert individually, has been somewhat truncated in the interests of delivering a singular response for the court. By taking evidence in this way, at least in some cases, there is the potential for the Court to miss out on an examination of each individual's reasons for their view from the basis of their personal experience, and qualification, which can be so revealing as to the weight that ought to be attributed to their opinion (although we note that that even in a 'hot tubbing' scenario, each witnesses written report is still tendered as evidence). It begs the question as to whether, without an oral examination of each witnesses opinion, the parties lose the opportunity to properly understand and explore the probative value of the evidence itself.

A further point of concern, arises out of the role that difficult personalities and/or varying levels of expertise may have in the conclave environment (ie, when experts are placed a room together, without a court official, to discuss their views). It is easy to imagine a scenario where a general practitioner who is 'hot tubbed' with three cardiologists, for example, and asked questions regarding a patient's heart condition, may concede to the expertise of his or her colleagues. Dominating or aggressive personality types too, may impact upon the debate behind closed doors, eroding the likelihood that less confident personality types will defend their view and partake in robust discussion. Perhaps the presence of a court official to mediate would assist with this. However, we anticipate that the increased use of 'hot tubbing' will impact upon the basis for legal practitioners selecting their expert witnesses in the future, for example, by approaching stronger personalities or with experts with specialty training, so as to hold greater sway in a conclave environment.

It will be fascinating to see what role the use of 'hot tubbing' plays in our justice system over the coming years, and the way in which some of these potential pitfalls will be managed - or whether at least in some instances, the traditional method of taking expert evidence will still hold true.

**THIS ARTICLE WAS WRITTEN BY PRINCIPAL KELLIE DELL'ORO AND ASSOCIATE ANNA MARTIN. PLEASE CONTACT US IF YOU HAVE ANY QUESTIONS OR IF YOU WOULD LIKE FURTHER INFORMATION.**