



SAT

State
Administrative
Tribunal

Western Australia

*ASSESSING EXPERT EVIDENCE IN THE MODERN ERA
– CONFERRAL AND CONCURRENT PROCESSES*

Research Methodology

by Dr Bertus de Villiers (Member: SAT)

Law School (UWA)

21 October 2016



INTRODUCTION

1999: 35% judges concerned about lack of objectivity of experts; 35% judges considered testing of expert evidence as serious problem.

“First of all the Court has to find an unbiased expert. That is very difficult.”

“Today they (expert witnesses) are in practice hired guns.”

“How then is objective expert assistance to be obtained? The answer has to be: by modification of the adversarial system.”

“...matters of disagreement between scientific experts are not typically conflicts between objectivity on the one side and bias on the other, but conflicts involving two rival conceptions of objectivity...”

“The new regimes for the admission of expert evidence ... are all premised upon the possibility and desirability of obtaining (more) objective expert opinion evidence.” References: De Villiers JJA 25(1): 2015 at 12.



CONTENT

1. Traditional experiences with expert witnesses
2. **Conferral** of experts *prior* to a hearing
3. **Concurrent** expert evidence *during* a hearing
4. Perceptions of experts of new processes (research by SAT)
5. Summary



SAT

State
Administrative
Tribunal

Western Australia

TRADITIONAL EXPERIENCES WITH EXPERTS

- Expert evidence heard in adversarial context
- Expert evidence increasing complex and technical
- Experts focus on strengths of their client and weaknesses of other party (part of the “team”)
- Concerns about role of “expert” v “advocate”
- Often excessive time spent on credibility of expert
- Expert evidence separated by time – days or weeks
- Expert evidence limited value with winner/loser



SAT

State
Administrative
Tribunal

Western Australia

CONFERRAL (conclave) OF EXPERTS

- *Pre-hearing* meeting of experts in same or related fields
- May be chaired by neutral person appointed by SAT
- Experts meet without clients or legal reps present
- Joint report: areas agree, disagree, reasons for disagreement
- Identify areas where more research or evidence may be required
- Parties may use joint report for mediation and even settlement
- Joint report sets agenda for expert evidence during hearing
- Exchanges between “experts” rather than “advocates” = collegiate
- More relaxed since issues that really matter can be explored
- SAT Standard Orders and Reading Material



SAT

State
Administrative
Tribunal

Western Australia

CONCURRENT EXPERT EVIDENCE

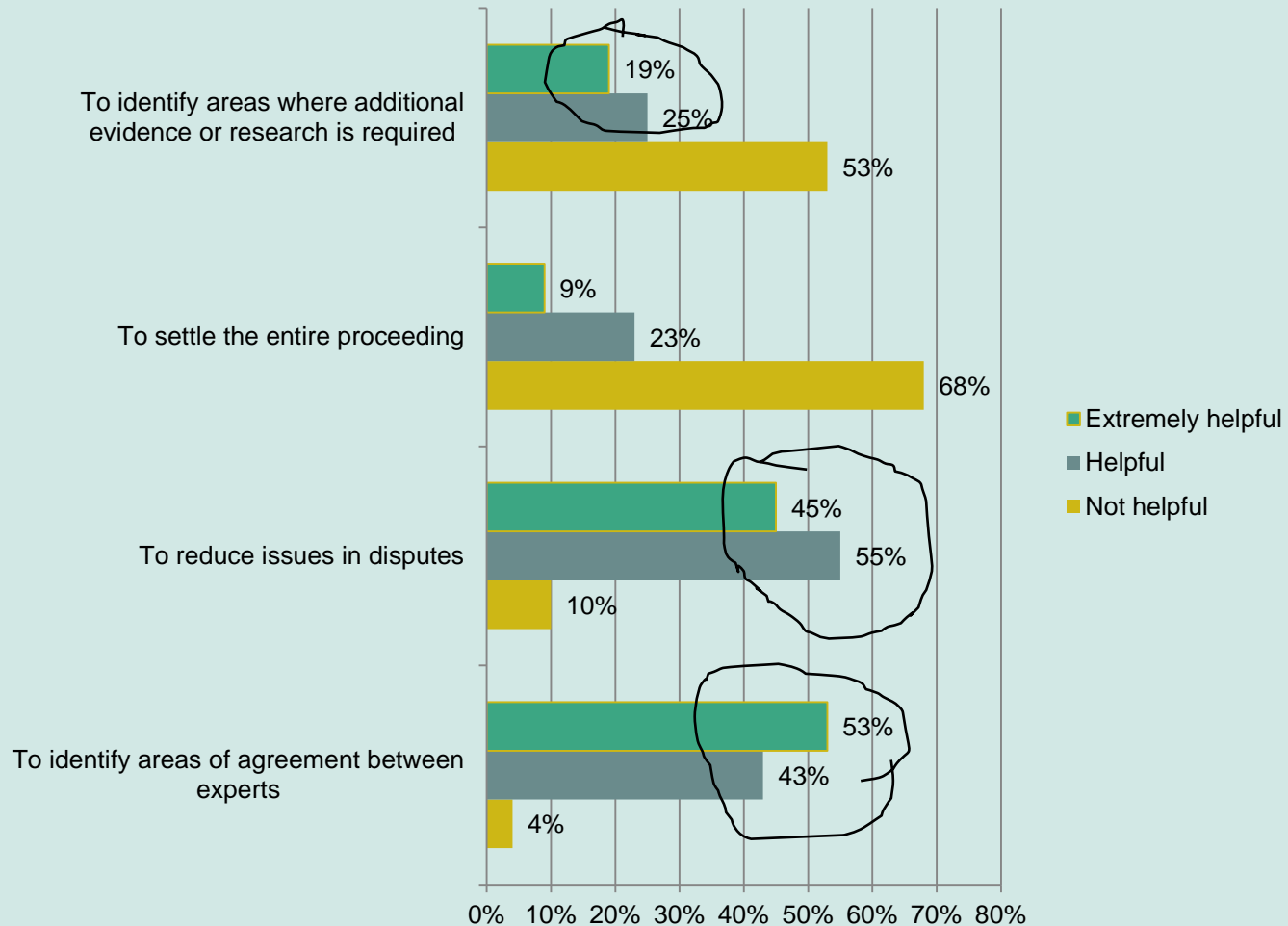
- Experts give evidence concurrently with others in same or related fields
- “Issues” identified prior to hearing (often through joint report)
- Emphasis on duty towards SAT
- SAT generally takes lead in examination
- SAT may “use knowledge” to examine experts
- Greater emphasis on investigative rather than adversarial process
- Experts get idea of what SAT wants, level of understanding, areas to clarify
- All experts answer same questions – immediacy
- Experts can engage each other – questions, comments, discuss, reasons for disagreement
- Credibility and expertise easier to ascertain – immediate peer review



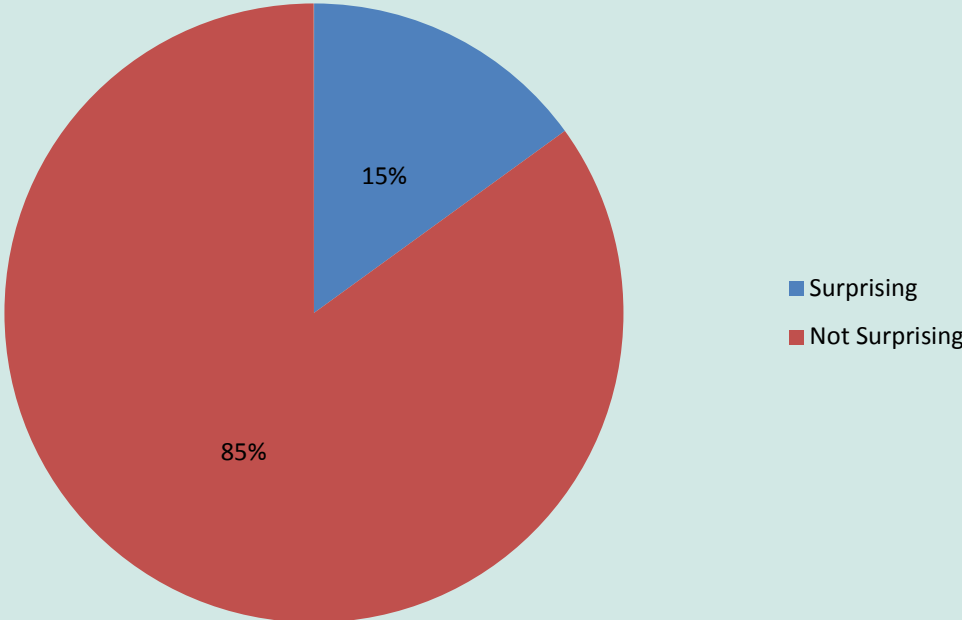
Research Methodology

- Need for qualitative and quantitative data
- Identified 60 experts who regularly appear in SAT
- Develop standard questionnaire in consultation with Members
- Questionnaire comprises free answers and multiple choice
- Small groups invited – 3-6 per session (interdisciplinary)
- 3 hour interview
- Notes kept (UWA law student)
- Opinions and perceptions compared with multi-choice responses

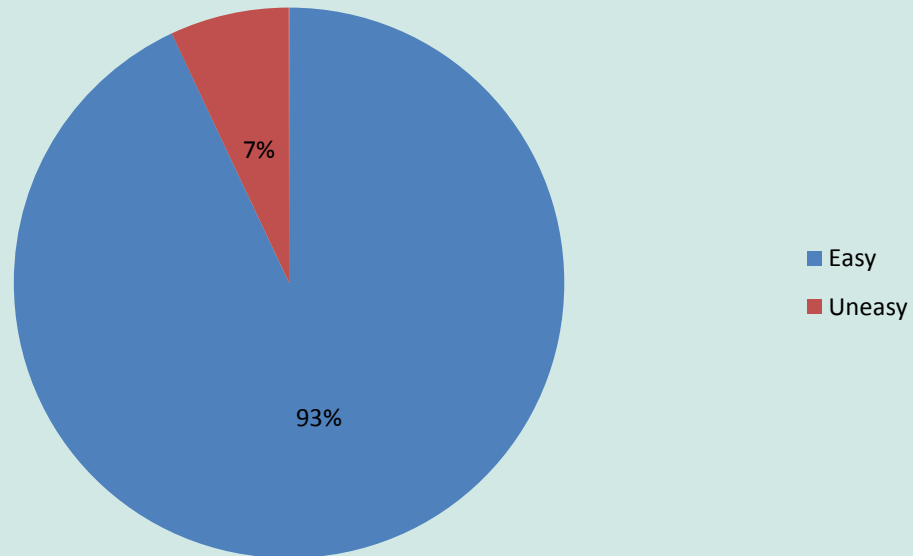
In your experience is Expert Conferral “not helpful”; “helpful;” or “extremely helpful” in regard to the following:



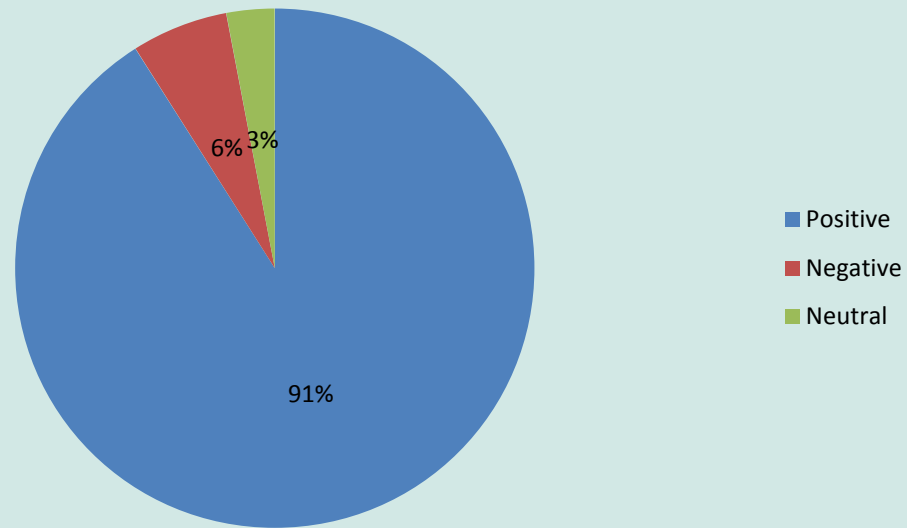
Did you find it surprising that the Tribunal commenced with examination of experts during Concurrent Evidence?



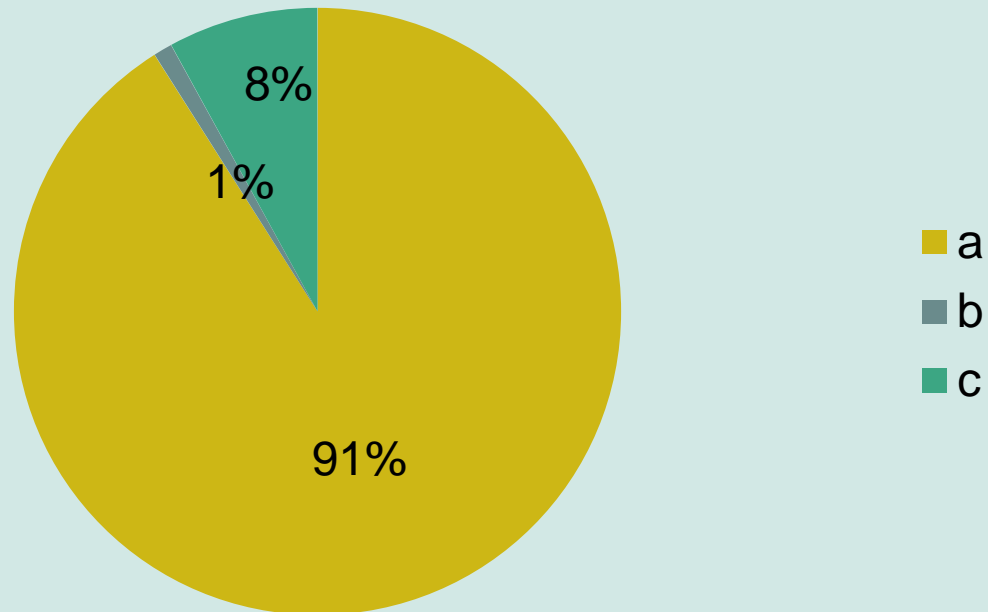
Did you feel “easy” or “uneasy” about the process of giving evidence concurrently with other experts?



Did you find it positive, negative or neutral that a member of the Tribunal who is an expert in the subject field, participated as a member during the hearing?



Overall, in your view, do the techniques of expert conferral and concurrent expert evidence (a) reduce time required for a hearing, (b) add to time required for a hearing or (c) make no difference in time required for a hearing?





SUMMARY

- SAT active with new approach (default) for assessing expert evidence
- Emphasis on investigative rather than adversarial approach
- Collegiate but robust environment (as far as possible)
- Emphasis on witness of SAT rather than advocate for party
- Baseline is areas of agreement – positive start – but no magic wand
- Contributes to mediated outcomes or at least clarification or reduction of issues
- Sense of “immediacy” with experts answering to same questions at the same time
- Experts give opinion in context – parts fit together
- Litigants in person find process easier to follow and to participate
- Time and costs saved
- Research finding confirms the hypotheses that these two techniques contribute to (a) more collegiate atmosphere; (b) better clarity of issues; and (c) experts feeling more valued.