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CASENOTE
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Concurrent Economic Evidence

The use of and case for the 'hot tub' in competition litigation

The presentation of 'complex economics' in court and regulatory proceedings has attracted recent interest. There is more of it, and courts and tribunals are searching for ways of making this evidence more accessible to judges and lawyers, and to limit the bias and advocacy of experts. This *Casenote* describes the history, practice, and reception of the use of concurrent evidence in Australian and New Zealand competition litigation, and the case for its adoption in the UK.

History

The use of concurrent evidence, or as it is sometimes called the 'hot tub', is an Australian invention. Its origin can be traced back to Woodward J's reading of an article by the then President of the Commonwealth Arbitration Commission (Kerr, *J Indus Relations*, 1961) who noted the reluctance of economists to appear before the Commission under cross-examination. Kerr suggested that it be replaced by the *'the well-known intellectual and academic discipline of criticism and counter-criticism'*.

Concurrent evidence was introduced to the (then) Trade Practices Tribunal by Woodward J and Prof Brunt (then an economist member of the Tribunal) in *QCMA* ((1976) ATPR 40-012). The technique was further developed by Lockhart J, and then *via* him introduced to the Federal Court by amendment to its rules in 1998 (34A, Rule 3(2)). Since then concurrent evidence has been formally adopted not only by the Federal Court, but the Administrative Appeals Tribunal, Supreme Court of New South Wales, Supreme Court of the ACT, and other courts/tribunals, and the High Court of New Zealand.

The Australian 'hot tub'

The hot tub is a two-stage process - the first involves presentations by and exchanges between economists; the second stage the more traditional cross-examination.

The use of the hot tub by the Australian Competition Tribunal can be seen from Goldberg J orders in *Qantas Airways* ((2004) ACompT 9). After written evidence in chief had been filed with the Court, the economists at trial were given the following instructions:

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."

The New Zealand 'hot tub'

Not all hot tubs are the same. The technique is also sometimes used in New Zealand High Court competition proceedings. For example in *Todd v Shell* (NZHC 2010) counsels and the Court agreed to the following: Each of five economists was given 45 minutes to summarise their evidence in chief. At the conclusion of the summaries each economist was given 15 minutes to reply to any criticisms or points raised by opposing economists. Then each economist was cross-examined for a pre-agreed period. During cross-examination counsel often turned to his economist expert(s) to comment on the reply. The economist was then re-examined. At any stage the bench

could ask questions. The judgment states [339] that the court *'found the hot tub a convenient form in which to understand the competing opinions, and test the relative strengths and weaknesses of them.'*

The major difference between the New Zealand and Australian practice in *Qantas* was that the economists were not permitted to ask questions of or interrogate one another.

Judicial Views

Maureen Brunt has set out the principal attractions of the Australian hot tub:

- It makes positive use of the adversarial nature of economists' evidence.
- It uses the economists to criticize each other.
- It permits the economists to develop their views in connected argument.
- The testing process tends to reveal the quality and integrity of the economists' views.
- Any antitrust judgment should make economic sense. It is more likely to do so when economists' views have been cogently expressed.

Concurrent evidence has also been well-received by Australian judges. Lockhart J believed that it defined "*more precisely the true issues of fact, law and expertise*". Heerey J in *Boral* and *BHP* found it a useful way to deal with the economic evidence. Middleton J has said: '*if properly controlled by the judge,* [the hot tub] *narrows the issues in dispute, allows the judge to assess the expert more readily, whilst allowing each party the opportunity to put and test expert evidence.'* In addition it has been claimed that the procedure reduces the costs and length of trials (McClellan J claims that it has reduced the number of trial days for expert evidence by between 50% to 80%; see also NSW Law Reform Commission, Report 109), and because all the expert evidence is heard at the same time, it assists in drafting judgments. Indeed, a number of Australian judges (McClellan, Downes, Preston, Heerey) have been proponents of the procedural virtues of the hot tub.

Prospects in UK

The Jackson Report on legal costs in the UK proposed the use of the 'hot tub' on a trial basis in commercial litigation. This has met with a cool reception from the English & Welsh Bar Council which has expressed '*considerable doubts about the perceived benefits'* identifying three particular dangers: lack of preparation by the judge; favouring the expert advocate; and will increase '*scrutiny of judicial intervention on appeal'*. Others have questioned whether it would significantly reduce costs given the high costs and delay attributed to expert evidence.

These concerns are overblown. The concern that the judge will not be prepared seems silly and insulting, and goes against the experience of Australian judges. Moreover, research has shown that poor cross-examination by Counsel has often served as a major impediment conveying expert evidence to the judge. Even Sackville J, a strong critic of expert evidence, has commented that had the hot tub been used in the *C7* trial (the Respondents opposed its use) '*the market definition issues would have been exposed more starkly ... than in fact occurred through the orthodox process of cross-examination'*

The second concern –'the expert advocate' – is a problem in all adversarial proceedings. Those economists who have acted as advocates for their clients in hot tubs have been strongly rebuked, and their evidence dismissed or given little weight (*Qantas*). The hot tub may give an advantage to the more persuasive and controlling economist. However, it relies, like all well-run trials, on good case management by the judge(s) as stressed by Middleton J above. In *Qantas* the Competition Tribunal clearly gave considerable thought to the structure of the hot tub instructing the economist witnesses to address specific questions, and placed time limits on its different phases.

The claim that concurrent evidence will increase the likelihood that a judgment will be appealed is weak. If concurrent evidence is adopted as a procedural rule and the process run properly, then it will be appeal proof. This, of course, does not stop one side appealing, only that their chances of success will be low.

Conclusion

The case in favour of concurrent economic evidence in competition litigation is strong. The judges and economists like it where it has been used, and so will counsel eventually, as long as it favours their case.

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