Economists in Court

A comparative assessment of procedures and experience in Australia and England & Wales from an economist's perspective

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Abstract: This paper undertakes a comparative assessment of the use of expert economic evidence in courts and related competition authorities' proceedings drawing on the experience and literature of two jurisdictions – England & Wales and Australia.

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'The age of chivalry is dead … that of sophists and calculators is upon us'.

Edmund Burke

I. INTRODUCTION

This paper will examine the increasing use of economics and economists in litigation outside the US in several major common law countries – England and Wales[1] (E&W) and Australia (and eventually New Zealand, and Ireland). Obviously one cannot hope to fully represent the legal, procedural and jurisprudential basis of the provision of expert evidence generally, and in competition litigation in Australia and E&W, especially since I am not a lawyer. However I will attempt to provide observations on a number of issues as an economist and based on my experience in the two jurisdictions (see Annex A), and offer some proposals that may enable more cost effective economic evidence.

This draft of the paper is confined to the issues raised by expert economic evidence in the High Courts of Australia and E&W, namely the Federal Court in Australia (and the

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[1] Scotland has a different legal system although UK and EC competition laws apply and many of the procedural rules are similar. However, while there have been a number of actions started in the Scottish Courts none to my knowledge have reached the court and been reported.

equivalent State's courts), and the High Court in E&W (i.e. Chancery Division, Queens Bench Division and the Commercial Court) respectively

The discussion therefore excludes consideration of:

- Economic evidence filed with competition and regulatory agencies in either country which have competition law responsibilities

- The treatment of economic evidence in specialist tribunals which hear appeals on regulatory and competition authorities' decisions, namely the Competition Tribunal in Australia (ACT) and the Competition Appeal Tribunal (CAT) in the UK.[2] However, I will refer to the procedural innovations of the Australian Competition Tribunal (and its predecessor the Trade Practices Tribunal) as they have influenced the Federal Court and provide a model for economic evidence.

- The use of economic evidence in judicial review cases.[3]

- Appeals against merger decisions in the CAT and courts.

- With respect to E&W I will not consider the practices and decisions of the European Courts. As this audience will be aware, E&W's laws operate within the framework provided by EC competition law, and the appellate courts which are able to undertake merits review of European Commission and other national decisions which have a European dimension. This covers the decisions and practices of the European Court of First Instance (CFI) and the European Court of Justice (ECJ).

It is hoped at a later stage to include New Zealand and Ireland, to extend the coverage to specialist tribunals, and to undertake a survey of economists' experience, views and proposals in the four jurisdictions.

The paper is organised as follows:

- **Section II** outlines the proposals for reform of court proceedings.

[2] In these fora the economic argumentation, evidence and judicial treatment can be very sophisticated. It shows that judges can, with the right conditions and assistance, deal with complex economic arguments. See, for example, *Albion Water Limited v Director General of Water Services* [2006] CAT 23 very sophisticated analysis and questioning of the opinions of two experienced economists on ECPR, margin squeezes and the various concept of costs.

[3] Economic evidence has been admitted recently in Australian judicial review proceedings. *Visa International Services Association v. Reserve Bank of Australia* (*Visa*) 2003] FCA 977.and *Australian Retailers Association v. Reserve Bank of Australia* (*ARA*) 2005] FCA 1707.

- **Section III** briefly reviews the rise of the economic approach to competition law in the USA, Europe, the UK and Australia, and the increasing use of economists in Court in Australia and the UK.

- **Section IV** discusses the concerns regarding the use of expert witness testimony in Courts.

- **Section V** compares the expert witness guidelines and practice directions in Australia and the UK.

- **Section VI** looks at the admissibility, and problems of bias, quantitative evidence and presentation.

- **Section VII** undertakes an assessment and makes a number of proposals.

II. OVERVIEW

There are considerable similarities between Australia and E&W over the conduct of trials and competition law. Both are common law jurisdiction where competition law is based on statute and legal proceedings are adversarial. Both jurisdictions have more or less the same rules governing expert opinion evidence of economists in competition law litigation. And both these rules have arisen from the same concerns regarding the lack of independence, bias, and advocacy of expert witnesses.

There are also significant differences in the application of the same rules and the way 'expert opinion evidence' is treated. In a nutshell, Australian judges appear stricter in their rulings on admissibility of economic evidence while English judges seem to give the economist a wide berth, but at the same time take a fairly robust view as to the weight to be given to this evidence.

However, in my view and addressing my comments mainly to a mainly Australian audience, there seem to be grounds for modification of the present rules to get the most out of the economists' contribution while at the same time ensuring cost-effective 'justice'. I make ten provisional (and non-exhaustive) proposals, some which only differ from present practice in terms of emphasis and general application (Box 1 below)

These proposals and the analysis of the economic evidence in court are based on several propositions or assumptions which while not new bear repetition.

The first is that competition law is 'economic law'. By this I mean that the law and economics are so intertwined in the structure of competition law today that it is not possible, or useful, to talk of separate economic and legal approaches. It is true that there many areas of the law that do not have an economic content, and there are some that should have an economic content but do not. The most glaring example of the

latter is cartel prosecutions which in both jurisdictions are based on the law of conspiracy and attempts rather than economic facts.

Box 1: Ten Proposals

Before Trial

1. Adopt the English rule of requiring the court permission to introduce expert opinion evidence.

2. Give the judge the power to set the reasonable costs of expert evidence.

3. Allow only one expert economist witness per party. The practice of multiple witnesses achieves little and suggests that there is a weakness in the party's case. Often the presence of several witnesses has muddied the waters and has been counter productive e.g. *Seven v. News* where the plaintiff's witnesses offered contradictory opinions; *Mastercard* where economists for MasterCard took different approaches.

4. Instructing solicitor should agree common areas to be covered, and be allowed to comment on drafts of the expert witness report and draw attention to relevant information and other material.

5. Require experts' joint report and conference which identify areas of agreement and disagreement, and a summary of the reasons for the latter.

6. Allow oral summary of written evidence in chief by the expert at the beginning of his cross-examination under clear constraints.

7. In larger cases and/or more contentious cases use concurrent evidence i.e. the hot tub.

Admissibility & Submission

8. Allow economists expert to make submissions as to the application of economics to the law and the implications of the economic assessment to the legal position.

9. Reduce the distinction between adviser and expert. It does not assist the court to have an economist developing expert witness material to tight deadlines which does not correspond and/or support the case theory being advanced by the party.

And the Judges

10. Generalist judges should have a basic familiarity with economics.

Notwithstanding this, I am in agreement with Maureen Brunt views on this score and its implications for the expert witness rules in competition law litigation:

> *'The Rules* [of evidence] *proceed on the basis that the expert's discipline is something that stands apart from the law. But whatever may be the case for other disciplines, this cannot be so for economics. For economics, …, enters into the very fabric of the law: competition law is properly to be conceived as a blend of economics and law.'*[4]

Maureen Brunt has commented that to the great credit of the Australian judiciary they early on recognised that trade practices law was 'economic law', and admissible of economists' expert opinion.

The second proposition is that the sharp distinction between expert opinion and 'advocacy' and witness bias which form the basis of the expert witness rules in both jurisdictions is inappropriate in competition law. This derives both from the preceding proposition, and the nature of economics as an 'approach' rather than a 'settled body of facts' or 'opinions'

III. THE RISE OF THE ECONOMIC APPROACH

I am tempted to give a history of the role of economics in framing antitrust and merger laws in Australia and E&W, and indeed the two major competition law systems of the USA and Europe, to explain the similarities and differences.

Over the last decade the economic approach to antitrust has been on the rise. Increasingly competition and merger laws are seen as 'economic laws' whose main, and in the case of the former, sole objective is to increase consumer welfare (and in some cases economic efficiency). This ascendancy of the economic approach to competition law is well established.[5] Some have even called it an 'antitrust revolution'[6].

It is most pronounced in the USA. The USA has the oldest antitrust laws beginning with the *Sherman Act 1890.* This was not the brainchild of economists, and indeed many economists at the time were hostile or indifferent to it and the need for such regulation. The reasons are not entirely clear although Stigler suggested that, perhaps

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[4] Maureen Brunt, *Economic Essays on Australian and New Zealand Competition Law*, Kluwer, 2003, p. 50 (hereinafter Brunt, *Essays*).

[5] Paolo Buccirossi, ed., *Handbook of Antitrust Economics*, MIT Press, 2008. The increasing role of economics in US is discussed in Lawrence J. White, **"**The Growing Influence of Economics and Economists on Antitrust: An Extended Discussion." New York University School of Law, Law & Economics Research Paper Series, WP No. 08-07, February 2008 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091531&rec=1&srcabs=1023494

[6] John E. Kwoka and Lawrence J. White, *The Antitrust Revolution – Economics, Competition and Policy,* 4th edn, Oxford University Press, 2004.

tongue in cheek, one reason may have been that economists at the time '*underestimated the income they would receive as antitrust consultants'*. [7] However, with well over a century to try every approach and many dead ends, US antitrust have emerged with a strong economic logic. Richard Posner, who in the past has been highly critical of US antitrust law calling it an '*intellectual disgrace'* was able to write in 2001 that '*Today,* [US] *antitrust law is a body of economically rational principles'*,[8] continuing:

> *Almost everyone professionally involved in antitrust today – whether as litigator, prosecutor, judge, academic, or informed observer – not only agrees that the only goal of antitrust laws should be to promote economic welfare, but agrees on the central tenets of economic theory that should be used to determine the consistency of specific business practices with that goal*.[9]

The USA is perhaps unique in that the courts have also embraced both economics[10] and 'economists' by appointing lawyers to the bench who have contributed to law-and-economic scholarship when academics e.g. Bork, Easterbrook, Posner, Stewart, Scalia, Breyer.

The other great system of antitrust is EC competition law. This has a direct bearing on the position in E&W which must enforce EC law and although there are specific UK laws they are generally consistent with the EC position. In any case both laws can be enforced in the UK.

EC law differs in several respects from the US system – it is administrative as opposed to one grafted onto the common law[11], relies on public enforcement rather than private litigation (and juries), and it is newer as it was established in 1957 under the Treaty of Rome.

European competition law also has a different philosophical tradition being heavily influenced by German law and the OderLiberal philosophy which has imprinted a more structural and formalistic approach and enforcement.

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[7] George Stigler, 'The Economists and the Problem of Monopoly', *American Economic Review*, Vol. 72, 1982, pp. 1-11.

[8] Richard A. Posner, *Antitrust Law*, 2nd edn, University of Chicago Press, 2001, p. viii.

[9] Ibid., p. ix.

[10] Einer Elhauge, 'Harvard, not Chicago: Which Antitrust School Drives Recent Supreme Court Decisions?', *Competition Policy International,* Vol. 3, 2007, www.ssrn.com/sol3/papers.cfm?abstract_id=1010769 5 April 2009, at 1.

[11] As Kovacic and Shapiro comment on US antitrust: '*No other country has adopted an antitrust statute that contains equally broad substantive provisions and relies so heavily on a common law methods of judicial interpretation to implement them'*. William E. Kovacic and Carl Shapiro, 'Antitrust Policy: A Century of Economic and Legal Thinking, *Journal of Economic Perspective*, Vol. 14, 2000, pp. 43-60 at p. 58.

European competition law, however, shares one thing in common with the US approach, brevity. The competition provisions of the EC Treaty are encapsulated in three succinct provisions - Article 81EC (anticompetitive practices), Article 82EC (abuse of dominance or monopolisation) and Article 87EC (illegal State aids or public subsidies).

Over the last decade or so a more 'an economic approach' has been adopted by the European Commission.[12] The EC Market Definition Notice[13] of 1997*, which* borrowed heavily from the US *Horizontal Merger Guidelines*[14]*,* and the activities of the European Commission's Merger Task Force which enforced the (then) EC Merger Regulation[15] and championed the introduction of economics, although the latter was not in the end a great success and was abolished. While there was a greater acceptance of economics and economists, they were not central.

The real sea change came at the turn of the decade under the European Commission's 'modernisation programme'. Two developments catapulted economics to the forefront.

The first was a clash between US and EU antitrust authorities over the nature and purpose of competition law generated by the interventionist approach of the European Commission to the GE/Honeywell[16] merger.

The second, and much more important, factor was the European Court of First Instance's (CFI) unprecedented annulment of three European Commission merger decisions[17] within several months of each other in 2002. This sent shock waves through the competition directorate of the European Commission. The CFI was uncompromising in its criticism of the European Commission's approach. It found that it had ridden roughshod over the facts, failed to satisfy the requisite standard of proof, and had not undertaken adequate factual and economic analyses. The response was that the proposed reforms of EU competition law went farther and deeper – a new EC

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[12] Clearly UK law is largely modelled on EC law. For the increasing role played by economics approach in European competition law see Damien J. Neven, 'Competition Economics and Antitrust in Europe', *Economic Policy*, Vol.21, 2006, pp.741-791.

[13] EU *Commission Notice on the definition of the relevant market for the purposes of Community competition law*, 1997/C372/05.

[14] US Department of Justice/Federal Trade Commission, *Horizontal Merger Guidelines* (1982, rev. 1997). Also Department of Justice, '20th anniversary of the 1982 Merger Guidelines: the contribution of the Merger Guidelines to the evolution of antitrust doctrine'.

[15] European Commission, *Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings*, *Official Journal*, No.395, 1989.

[16] Case COMP/M.2220 General Electric/Honeywell [2001].

[17] Case T-342/99 *Airtours* v. *Commission* (2002); Case T-310/01 *Schneider Electric* v. *Commission* (2002); Case T-5/02 *Tetra Laval BV* v. *Commission* (2002).

Merger Regulation,[18] the reformulation of the legal standard for mergers from 'dominance' to '*significantly impeding effective competition'*,[19] the appointment of the first Chief Economist to the European Commission's competition directorate,[20] new guidelines which made clear that the purpose of competition law intervention is to be economic and to promote consumer welfare at least for mergers and anticompetitive agreements,[21] and the decentralisation of competition law enforcement to the member states, and its privatisation by allowing those harmed to claim damages through the courts. The adoption of an economic approach to abuse of market power/dominance has been slower and less complete.[22]

The critical point here was that impetus for these changes occurred not because of the efforts of the EC Commission or economists, but Europe's judges.[23]

UK competition law has also evolved within these development and indeed the UK competition agencies have been great advocates of an economic approach, often to the (great) annoyance of other Member States.

UK law was originally legalistic and formalistic with limited economic content. The *Restrictive Trade Practices Act 1956* was triumph of form over substance. This changed with the *Competition Act 1998* and *Enterprise Act 2002* which ushered in a more economic approach to market definition, and the assessment of competition. Economists were appointed to head or hold senior positions in the enforcement agencies – the Office of Fair Trading (OFT) headed recently by economists John Vickers and then John Fingleton) and the Competition Commission (the late Paul Geroski and today a lawyer with great sympathy for the economic approach, Peter

[18] *Council Regulation (EC) No. 139/2004 on control of concentrations between undertakings.* This replaced Regulation 4064/89 on 1 May 2004.

[19] EU *Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, 2000/C 31/03 (2004).

[20] Lars-Hendrik Röller and Pierre A. Buigues, *The Office of the Chief Competition Economist at the European Commission*, May 2005.

[21] European Commission Notice, *Guidelines on Vertical Restraints,* 2000/C29/01*,* 13 October 2000; Commission Notice*, Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements*, 2001/C 2/02. Commission Notice, *Guidelines on the application of Article 81(3) of the Treaty*, 2004/C 101/08.

[22] *An Economic Approach to Article 82 – Report by the Economic Advisory Group on Competition Policy (EAGCP)*, July 2005. Communication from the Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,* C (2009) 864 Final. February 2009. This now mirrors the current confusion in the USA.

[23] Damien J. Neven, 'Competition Economics and Antitrust in Europe', *Economic Policy*, Vol. 21, 2006, pp.741-791; Hans W. Friederiszick, 'Economic Analysis in EU Competition Cases', in Josef Drexl, Laurence Idot and Joël Monéger ed., *Economic Theory and Competition Law*, Edward Elgar, 2009; Ioannis Lianos, 'Judging' Economists: Economic Expertise in Competition Law Litigation - A European view' in Ioannis Lianos & Ioannis Kokkoris, eds, *New Challenges in EC Competition Law Enforcement,* Kluwer, 2009.

Freeman) - and concerns over the accountability of regulators led to an appeal systems through the Competition Commission and a new Competition Appeal Tribunal (CAT).

There is no need at this conference to describe the development and structure of Australian competition law. There are, however, several differences. The first and obvious one is that it has a different label – 'trade' practices as opposed to the E&W (and European) term competition law, and the USA equally archaic label of 'antitrust'. The second is that it is relatively new. The *Trade Practices Act* dates from 1974. Indeed when I was a student at Monash in the early '70s there was no case law as such. As Maureen Brunt has quipped in order to teach her trade practices course she had to make up the cases. The third is that it is much more case bound and formalistic than European and E&W law. This arises first and foremost from the Australia Federal constitutional requirement, as I understand it, that the Courts are the ultimate and only legitimate decision-making body. In this regard it is more like the US system (bar the juries). The whole mode of discussion amongst trade practice lawyers is different from the conversations in the UK and Europe, and this is no more evident in discussions over the role and admissibility of expert witness evidence in trade practices litigation.

Notwithstanding these differences there is a convergence occurring between all four legal regimes. As far as Europe is concerned there has been a process of 'Americanisation' of the law, although this interpretation would be vigorously resisted in Europe. Second, the basic principles of competition laws are sufficiently similar now that the economist can apply his toolkit, and indeed experience, across these jurisdictions. This is not to deny that there are significant differences, or that simply boiler plating the analysis would not get one into serious trouble given these differences and national sensitivities. An example concerns a criticism of 'international economists' who have ignored the fact that they are giving evidence to an Australian (or New Zealand) court. Third, the Courts have been given a much greater role. Here E&W has played catch-up with Australia. While there has always been the right to seek a merits appeal before the European courts, and to enforce the competition provisions of the EC Treaty through the national courts the latter was rarely used. The break came with *Crehan*[24] which confirmed the right to enforce competition law in European and national courts. This arises both as to the enforcement of the substantive law (so called 'standalone actions'), and in respect of follow-on damage actions. The European Commission in particular has been a great advocate of private enforcement as a means of complementing its activities and of the rights of plaintiffs to claim damages. [25]

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[24] *Crehan v. Inntrepreneur/Courage* [2003] EWHC 1510 (Ch).

[25] EC Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, 2008, COM(2008) 165 final, http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf *Green Paper – Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 final, December 2005; and EC *Commission Staff Working Paper*, Annex to Green Paper, 2005. White Paper - *Damages actions for breach of the EC antitrust rules*, COM (2008) 165 Final, April 2008. OFT, *Private actions in competition law: effective redress for consumers and business,* Discussion Paper, OFT916, April 2007.

The Use of Economics in Court

The upshot of these developments is that as in Australia, economists in E&W are increasingly being thrust, or lured, into Court. This has brought the position of Australia and the E&W (and the UK) closer together, and resulted not only in common experiences of those working in the competition law, area but many similar substantive and procedural rules.

Today, economists have been used in a number of areas such as mergers, antitrust, judicial review, and damages in competition law, in regulatory law, and other areas such as contract disputes, copyright infringement, arbitration, tax cases, and in some jurisdictions personal injury cases.

The economists' contribution to trial has been in several areas:

1. As an adviser developing a case theory, advising on strategy, and marshalling analysis and evidence to be used by Counsel;

2. Defining terms and providing basic economic analysis to the judge

3. Providing expert testimony in court as to liability

4. Providing empirical analysis

5. The calculation of damages.

6. Expert testimony in appeals of regulatory decisions and competition agency decisions.

The Courts have recognised the admissibility of expert evidence since 1554.[26] The first economist giving evidence in a US antitrust case was *Maple Flooring* in 1925.[27] Economists routinely appeared before the UK Restrictive Practices Court[28] established in 1956 (and which heard its last case in 1999).[29] However, it was rare for an economist

[26] Saunders J (1554) 1 Plowden 118 at 124: 75 ER 182 at 192.

[27] *Maple Flooring Manufacturers' Association v. United States*, 268 U.S. 563 [1925]. Judge Harlan Fisk Stone former dean of Columbia law School favoured social sciences literature to resolve legal issues.

[28] Robert B. Stevens and Basil S. Yamey, *The Restrictive Practices Court – The Judicial Process and Economic Policy*, Weidenfeld & Nicolson, 1965.

[29] Individual academics were used in EC decision such as *Soda/Ash* and *Wood Pulp*. Citations Economic arguments have been examined by the Courts in recent cases, mostly in the merger field, however (e.g., Case T-464/04, *Impala v. Commission* [2006] ECR II-2289; Case T-209/01, *Honeywell International Inc v. Commission* [2005] ECR II-5575; Case C-12/03 *Commission v. Tetra Laval* [2005] ECR I-987) as well as in antitrust e.g., Case T-201/04 *Microsoft v.*

in E&W to appear in court throughout the 1980s and 1990s.[30] This contrasts with Australia (and New Zealand) where economists seemed to have much more exposure to legal proceedings. In Australia the first expert economist in a trade practices case was (probably) Maureen Brunt in *Books*[31] in 1972.

There is, however, a marked difference between E&W and Australia. In Australia there is considerable case law, literature and public debate on expert witness testimony in competition litigation by lawyers[32], judges[33], economists[34] and law reform

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Commission [2007] 5 CMLR 846; T-168/01, *GlaxoSmithKline Unlimited v. Commission* [2006] ECR II-2969).

[30] D.J. Slottje, ed., *The Role of the Academic Economist in Litigation Support*, Elsevier Science, 1999.

[31] *In Re Books* (1972) 20 FLR 256. Also the UK case of *Net Book Agreement* (1962) LR3 RP246.

[32] Karen Yeung, 'The Court-Room Economist in Australian Antitrust Litigation An underutilized resource', Australian Business Law review, Vol. 20, 1992, 461.Murray McInnis, *Expert Evidence and the Federal Courts Current Developments* Paper presented to a conference conducted by the International Institute of Forensic Studies "Experts and Lawyers: Surviving in the Brave New World" 16-19 October 2005, Broome, Western Australia. Andrew Dahdal, 'The Admissibility of Expert Opinion Economic Evidence in Judicial Review', *Macquarie Journal of Business Law*, Vol. 3, 2006, pp. 63-77.

[33] Robert S French, 'Judicial Approaches to Economic Analysis in Australia', *Review of Industrial Organization*, Vol. 9, 1994, pp. 547-568; Lockhart, J 'Effective case Management in Complex Commercial Litigation' in Megan Richardson, and Philip Williams, eds., *The Law and the Markets*, Federation Press, 1995; Heydon J. 'Expert Evidence and Economic Reasoning in Litigation under Part IV of the Trade Practices Act: Some Theoretical Issues, Competition Law Conference, 2003; Christopher C. Hodgekiss, ' Expert Evidence in Competition Litigations', The Hon. John Middleton, 'Expert Economic Evidence', *5th Annual University of South Australia Trade Practices Workshop,* 16 October 2007. http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_middleton1.html; Robert French, 'Expert Testimony, Opinion, Argument and the Rules Of Evidence', *Australian Business Law Review*, Vol. 36, 2008, pp. 263 – [] ;Garry Downes, "Expert Evidence: The value of single or court-appointed experts", paper delivered to the Australian Institute of Judicial Administration Expert Evidence Seminar, 11 November 2005; John Mansfield, 'Opportunities & Challenges: Evidence in cases under the Trade Practices Act 1974', *Trade Practices Law Journal*, Vol. 17, 2009, pp. 7- [] http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_mansfieldj2.html

[34] Maureen Brunt, "The Use of Economic Evidence in Antitrust Litigation: Australia" *Australian Business Law Review,* Vol. 14, 1986, pp. 261-; David Peters and Anthony Casey, 'Smiley Faces and Frowning Professors: Economic Modelling in the Qantas-Air NZ Case,' presented to the 2005 Industry Economics Conference, La Trobe University, September 29-30; Tim Hazledine, *Competition Policy for the Trans-Tasman Air Travel Market: The 2005 ACT Decision and its implications*, Department of Economics, University of Auckland *August, 2006;* Henry Ergas, 'Reflections on Expert Economic Evidence', *Bar News - The Journal of the New South Wales Bar Association*, Summer 2006–2007, http://www.nswbar.asn.au/docs/resources/publications/bn/bn_summer0607.pdf
Philip L. Williams, "Economic Experts", paper to 2009 ACCC Regulatory Conference, Gold Coast, July 2009; Simon Uthmeyer And Nadia Cooke, "Economic Experts: How Necessary Are They?" paper to 2009 ACCC Regulatory Conference, Gold Coast, July 2009.

commissions.[35] This is not the case in E&W where there is little discussion although the concerns are similar[36], and the general literature on evidence large.

IV. PROBLEMS WITH EXPERTS

The role of an expert witness is to assist the court. As the Australian Law Reform Commission has stated:

> *'The ultimate criterion for the admission of opinion evidence should be whether it will assist the trier of fact in understanding the testimony, or determining a fact at issues'* [37]

The courts in Australia and E&W have had to deal with common problems with the use of experts.[38] These relate mainly to their lack of independence as extensively discussed in the Woolf Report[39] in the UK which has been influential in Australia. Hodgekiss, referring to an article by Cooper J[40], summarises these concerns:

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[35] Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper 62, 2003; NSW Law Reform Commission, *Expert Witnesses*, Report 109, June 2005.

[36] Tim Ward and Kassie Smith, *Competition Litigation in the UK*, Sweet & Maxwell, 2005 has only a page on expert witness testimony and a whole chapter on basic economics. Other work discusses the role of experts generally Louis Blom-Cooper, ed., *Experts in the Civil Courts,* Oxford University Press 2006; Deirdre Dwyer, *The Judicial Assessment of Expert Evidence,* Cambridge University Press, 2008. John Fingleton, "The Application of Economics in Court," speech to Joint IBA and European Commission Conference, Brussels, 11 March 2005. Peter Freeman, 'Competition Law and Economics - A Partnership of Equals or a Struggle for Supremacy?' Talk to ESRC Centre for Competition Policy, University Of East Anglia, 22 March 2006. Juan D. Gutiérrez, 'Expert Economic Testimony, Economic Evidence And Asymmetry Of Information In Antitrust Cases', CEDEC Competition Law & Economics Working Paper No. 07-04, October 2007. Available at SSRN: <ssrn.com/abstract=1023494>

[37] Australian Law Reform Commission, Report 26, *Evidence*, Vol. 1, pp. 739/740.

[38] For US economists and lawyers perspective see: Diane P. Woods, 'The Role of Economics and Economists in Competition Cases," *OECD Journal Competition Law and Policy*, Vol. 1, 1999, pp. 82-104; Richard A. Posner, 'The Law and Economics of the Economic Expert Witness', *Journal of Economic Perspectives*, Vol. 13, 1999, pp 91-99; Herbert Hovenkamp, 'Economic Expertise in Antitrust Cases' in David L. Faigman, David H. Kaye, Michael J. Saks and Joseph Sanders, eds., *Modern Scientific Evidence: The Law and Science of Expert Testimony,* 2nd edn, West Group, 2002, Chap. 44; Jonathan B. Baker, "Economists' Roundtable (moderator)," in D.A. Garza, ed., "From Theory to Practice: Working with economic experts," *Antitrust*, Vol. 17, 2003, pp. []-[]; J.E. Lopatka and W.H. Page, "Economic Authority and the Limits of Expertise in Antitrust Cases," *Cornell Law Review*, Vol. 90, 2005, pp. 617-703; Gregory J. Werden, 'The Admissibility of Expert Economic Testimony in Antitrust Cases', Prepared for ABA Section of Antitrust Law, Issues In Competition Law And Policy, Chapter 35 Diane P. Wood, "Square Pegs in Round Holes: The interaction between judges and economic evidence", *Competition Policy International*, Spring 2009.

[39] Lord Woolf, *Final Report: Access to Justice*, 26 July 1996.

[40] Cooper J, 'Federal Court Expert Usage Guidelines', *Australian Bar Review*, Vol. 16, 1997/98, 203.

- Experts had lost their independence and become partisan[41];
- Were frequently polarised in their view and issues and unwilling to acknowledge common ground; and
- Adopted the role of advocates, and used to argue the merits of the case and the flaws in the other sides case.

The AIJP survey of 480 Australian judges in 1999 reiterated these concerns. [42]

However, these concerns were directed at experts generally and not specifically at economists.

Writing almost a decade later Sackville (then retired from the Federal Court) felt that things have not improved.[43] He notes that the Learned Hand, in his youth at least, regarded expert evidence in courts as an '*anomaly fertile of much practical inconvenience*'[44], continuing:

> *10. 'In the intervening century, Learned Hand's misgivings have been amply borne out. Judges, commentators and professional associations (lawyers and non-lawyers alike), not to mention law reformers, have railed against the evils associated with the use of expert evidence in the adversary system. There is a general, if not universal, recognition that the court system has failed to achieve its objective of producing just results without a disproportionate expenditure of time and resources.*
>
> *11. The problems presented by the use of expert evidence in litigation are well-known and widely documented. They include the following:*
>
> - *too many experts are willing to act as 'hired guns' and to give opinions that are the product of partiality, rather than provide an objective and independent assessment of the questions presented;*

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[41] As a unfortunate illustration of the prevalent view pre-Woolf in the UK Cooper J refers to the UK copyright *Cala Homes* (Ch D 13-16 June, 5 July 1995) where the expert wrote an article for Chartered Institute of Arbitrators before trial describing his position as a '*hired gun',* and the judge as an '*innocent rustic'* that was '*fair game'*.

[42] *Australian Judicial Perspectives on Expert Evidence: An empirical study*, Australian Institute of Judicial Administration, 1999.

[43] Sackville J, 'Expert Evidence in the Managerial Age' Forensic Accounting Conference, Sydney, 14 March 2008.
http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_sackvillej24.html

[44] L. Hand, 'Historical and Practical Considerations Regarding Expert Testimony*' Harvard Law Review*, Vol. 15, 1901, pp. 40-[]. Hand was a young practising lawyer when he wrote this.

- *expert evidence is selected by the parties, not necessarily because it is reliable, but because it is thought to advance the interests of one of the litigants;*
- *the adversarial system of resolving disputes is: 'calculated to bring forward unrepresentative opinions in cases where a range of opinions exist';*
- *experts sometimes influence the way in which a case is framed, with the consequential risk they become the 'front line soldier[s]', propounding the case on behalf of the client, further detracting from their objectivity;*
- *the preparation of experts' reports can be extremely expensive and can therefore confer an advantage on well-resourced litigants over their less fortunate opponents;*
- *over-zealousness or excessive caution in the conduct of litigation frequently lead to wasteful duplication in the preparation and tendering of experts' reports;*
- *the testing of expert opinion by cross-examination can be extremely lengthy and thus can contribute not only to disproportionate expense, but to substantial delays in resolving the proceedings;*
- *reliance on expert evidence has led to the creation of a 'large litigation support industry' among various professions, which offends 'all principles of proportionality' and creates barriers to access to justice; and*
- *even if experts give their opinions on the basis of an objective analysis of the relevant material, it may be difficult for the court to resolve satisfactorily conflicting opinions on complex technical questions.*

He concludes that:

> '*The co-called Woolf reforms in England and similar procedural changes in Australia are predicated on the assumption that if conduct of litigation is left entirely or largely in the hands of the parties, the consequences will inevitably include unacceptable delays, undue expense and the waste of substantial public and private resources. The age of the managerial judge has arrived, conferring on courts the duty to ensure, to the extent consistent with the attainment of justice, the speedy and efficient disposition of cases.'*

This is a strident and uncompromising condemnation by a senior Australian judge. It is no doubt coloured by his experience in *Seven v. News* which he defined as a 'mega-litigation'.[45] That case hit the headlines with reported legal costs of AUD$200m, and a

[45] In *Seven v News* Sackville J defined mega-litigation as *'civil litigation, usually involving multiple and separately represented parties that consumes many months of court time and*

fed-up judge who issued a scathing 24 page foreword to his judgment criticising the litigants, and in particular their use and the limited contribution.

Lest I be accused of misrepresenting the position of the Australian Federal judiciary I note others are not as pessimistic. Middleton J, speaking at this workshop two years ago, said: '*The use of expert economic testimony to explain and interpret economic concepts relevant to legal proceedings can be a good thing and, in the appropriate case, is to be encouraged*.'[46]

These concerns are not confined to economists. For example, a major source of concern (scandal) in the UK has been the evidence of medical practitioners and social workers which have resulted in a number of high profile miscarriages of justice.[47]

V. EXPERT WITNESS GUIDELINES

Following the Woolf Report both the E&W and Australian courts issued expert witness guidelines.

In E&W the duties of an expert had already been summarised beforehand in *National Justice Compania Naviera SA v. Prudential Assurance Co. Ltd* ("*The Ikarian Reefer*")[48]. The court there found that a disproportionate amount of time had been spent on expert witness testimony which was partisan and biased. The expert requirements as set out in *The Ikarian Reefer* were amplified in the High Court's CPR35 and the 35 Practice Direction (35PD).[49]

Similarly the Australian Federal Court issued guidelines in 1998[50], which were revised in 2003, 2004, twice in 2007, 2008 and the current (version 7 or CM7) was issued in 25

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generates vast quantities of documentation in paper or electronic form'. Sackville J in *Seven v. News.* Also R. Sackville, '*Mega-Litigation: Towards a New Approach*', Annual Conference of the Supreme Court of New South Wales, 17-19 August 2007, pp. 7-12.

[46] Middleton J, 'Expert Economic Evidence', *5th Annual University of South Australia Trade Practices Workshop,* 16 October 2007, p, 1

[47] Neil Hodge, 'Unreliable Evidence', *International Bar News*, December 2005, pp 13-15.

[48] *National Justice Compania Naviera SA v. Prudential Assurance Co. Ltd* [1993] 2 Llyod's rep 68.

[49] Also see Civil Justice Council, *Protocol for the Instruction of Experts to give Evidence in Civil Claims*, June 2005 http://www.justice.gov.uk/civil/procrules_fin/contents/form_section_images/practice_directions/pd35_pdf_eps/pd35_prot.pdf

[50] *Guidelines for Expert Witnesses*, 15 September 1998.

September 2009.[51] There are of course the guidelines of other Federal and the states' courts.[52]

There are strong similarities between Australian Federal Court and E&W High Court guidelines. CM7 make the duties of the expert crystal clear:

> "***1. General Duty to the Court***
> *1.1 An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.*
> *1.2 An expert witness is not an advocate for a party even when giving testimony that is necessarily evaluative rather than inferential.*
> *1.3 An expert witness's paramount duty is to the Court and not to the person retaining the expert.* "

This is similar to the duties provisions in CP35. The rest of the CM7 will be familiar to this audience but the major features are that the expert evidence in chief is in written form and must state the assumptions, assumed facts, material relied on and reasoning etc.

There are also significant differences between the Australian and E&W guidelines:

- The Australian CM7 makes clear that it concerns the admission of 'opinion evidence'; this distinction is not referred to in PD35;
- Under PD35 (para 35.4) the parties must seek the Court's permission to file an expert's report and the court may limit the expert's fees that may be recovered from the other party;
- Under PD35 (para 35.7) the court may direct that evidence be given by a single joint expert to which all relevant parties may give instruction, and the parties are jointly and severally liable for payment of the expert's fees and expenses; and
- The power of the court to direct the production of a written statement or joint report which sets the areas of agreement, disagreement and a summary of the

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[51] *Practice Notes issued by the Chief Justice - CM 7 - Expert Witnesses in Proceedings in the Federal Court of Australia*, 25 September 2009.

[52] In contrast the US has developed a demanding system that seeks to ensure the quality of expert testimony and economic evidence generally. One main element is the *Daubert (Daubert v. Merell Dow Pharmaceuticals Inc.*, 509 US 579 (1993)) line of cases (as incorporated into the revised Federal Rules of Evidence). *Daubert* holds that experts must be qualified to provide an expert opinion by knowledge, skill, experience, training, or education and that the expert's testimony must be based upon sufficient foundation of facts or data, that the testimony is the product of reliable principles and methods and that the expert has applied the principles and methods reliably to the facts of the case.

reasons for the disagreement (35.12) This is similar to (CM7, para 3.1) but more specific.

The expert is then required to appear in court to be cross-examined. The nature of this procedure has a bearing on the way economic evidence is received.

[Addendum: In Australia the introduction of the expert rules was seen by economists and others as a retrograde step. This is because the Australian Trade Practices Tribunal (which is not a court) had developed its own approach to economic evidence that took into account many of the concerns expressed by Woolf (see below). However the major difference between the courts and the Tribunal, is that the latter has economist members who can independently assess the economic evidence (although we shall see that the Federal Court has adopted some of the procedural techniques developed by the Tribunal).

VI. PROBLEMS WITH ECONOMISTS

Admissibility

The Australian position is governed by the *Evidence Act 1995* (Cth).[53] Section 56 provides that *'evidence that is relevant in a proceeding is admissible in the proceeding'* if it *'is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'*. That is opinion evidence is not admissible.

The Act (sec 79) establishes a specific exception to the inadmissibility of opinion evidence:

> *'If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge'.Most UK economists would not appreciate that their evidence is 'opinion-based evidence' as such.*

The questions surrounding admissibility of expert economic evidence seems to be of much more concern in Australia than E&W.

Australian judges seem more anxious and angry about the nature and deployment of economists in the courtroom. One just has to sample recent judicial and extra-judicial writings to get this impression. The comments of Sackville, both quoted above and in his judgment in Sev*en v. News,* are pretty unforgettable in this regard. Australian

[53] For economic approaches to the law of evidence see: Jeffrey S. Parker, 'Economics of Evidence and Proof' in David S. Clark, ed., *Encyclopaedia of Law and Society*, Sage Publications, 2007; Richard A. Posner, 'An Economic Approach to the Law of Evidence' *Stanford Law Review.*

judges evince a heightened sensitivity to admissibility and the need for expert evidence to distinguish facts, assumptions, opinions and reasoning.

Professor Maureen Brunt, based on a review of economics in cases, and her own experience observed in 1986: '*the common law rules relating to hearsay and expert opinion evidence might almost have been designed to frustrate the reception of economic evidence, especially the testimony of economists.*'[54]

A few years after Brunt's comments Australian judges seemed to get angrier at economists. Wilcox J in *TPC v Australian Meat Holdings* declared:

> *'I deprecate the course ... of supplying to economists proof of the evidence given by the witnesses and a listing of those economists opinions as the proper conclusion of the definition of the market. Economists are able to assist the Court in relation to economic principles. But, once the relevant principles are expounded, their application to the facts of the case is a matter for the Court. The proper definition of a market is entirely a matter of fact, the determination of which ought not to be made more protracted and expensive by the adduction of unnecessary expert evidence.'* [55]

This concern was heightened by events in *Arnotts*[56] where the court seemed to adopt a restrictive approach to the admissibility of economist evidence. In that case one economist was asked to attend court and read all the testimony. He was then cross-examined as to his views as to the economics and presumably whether it infringed the *Trade Practices Act 1974*. The judge saw this as failing to distinguish facts from assumptions, and making clear on what 'assumed facts' his evidence was based on.

There is nothing exceptional about the proposition that courts decide and experts opine, and it is the standard judicial position whether it is in Australia, England or Europe.[57]

There has, to my knowledge, been less concern over this in competition litigation in the E&W courts. The admissibility of economists' evidence is fairly relaxed and robust. In my experience, economists in E&W litigation tend to provide more of an economists'

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[54] Maureen Brunt, 'The Use of Economic Evidence in Antitrust Litigation: Australia' *Australian Business Law Review,* Vol. 14, 1986, pp. 261 – [] at p. 304.

[55] *TPC v Australian Meat Holdings (*1988) ATPR 40-876; 49- 479). **Check**

[56] *Arnotts Ltd v Trade Practices Commission* (1990) 24 CFR 313. G. Blunt *et al*, 'From *Arnotts* to *QIW* - A Study of expert evidence in Trade Practices cases' *Competition and Consumer Law Journal,* Vol. 1, 1994, pp.181-[].

[57] Case T-15/89, *Chemie Linz v. Commission* [1991] ECR II-867, 957, '*the findings of economic experts cannot take the place of legal assessment and adjudication… It is for the Court to consider what is prohibited under Article 85(1) and the evidence for the commitment of prohibited acts, and not for economic theorists'*.

analysis than a legally constrained analysis of the facts and economics, and it is often the case that the economist will conclude whether there has been an abuse or violation of the relevant law. Indeed, E&W judge's whole demeanour during trial is one of tolerance to such evidence even if they are not inclined to accept or base their judgment on it.

The recent so-called *BAGS* case illustrates this; and perhaps this audience can say whether an Australian judge would have reacted similarly.

In *Bookmakers' Afternoon Greyhound Services v Amalgamated Racing*[58] three reputable economists gave evidence. Issues of admissibility were raised and dealt with by the judge.

1. The judge relied heavily on the joint report written by the experts.

2. One expert discussed in the joint report matters he had not discussed in his written evidence in chief. His comments in the joint report were ruled inadmissible.

3. That same expert witness had based his report on an 'assumed fact' given in his instructions which turned out to be incorrect.

4. That same expert was not instructed by solicitors to provide a supplementary report which addressed the omitted areas in his evidence in chief.

5. The two other experts gave inadmissible evidence on legal principles and conclusions resting on these principles, and policy issues. This was treated as matters of submission (from economists) and useful to the judge.

So far this may seem unexceptional to the Australian legal eye – economists' playing judge, and failing to comply with the expert guidelines. But it is worth quoting Morgan J to see what happened next:

> *"287. I have now described the evidence given by the three economists. Some of the matters discussed by the economists, in particular by Dr Niels and Dr Bishop, went beyond the normal scope of expert evidence, as I understand it. Those two witnesses did not confine themselves to matters of micro economics on which they could give admissible opinion evidence for*

[58] *Bookmakers' Afternoon Greyhound Services Ltd and others v Amalgamated Racing Ltd and others* [2008] EWHC 1978 (Ch); [2009] UKCLR 547, ChD ("BAGS"). (Rejected allegations by media group BAGS, and bookmakers, William Hill, Ladbrokes and Betfred, that a new broadcaster, AMRAC, and its associated racecourses were in breach of Article 81EC. AMRAC was formed as a joint venture between 31 of the 60 British racecourses and a technology company, Alphameric plc, to supply betting shops with a new televised horse-racing service, *Turf TV*. JV not collective effort to fix prices and foreclose future competition by concluding exclusive media rights agreements.)

the assistance of the court. They also summarised their understanding of the legal principles which fell to be applied and then offered their conclusions as to the result of applying those legal principles to this case. They also commented on some of the policy questions which might be said to arise. Whilst I found their reports helpful to me when I came to consider the legal principles and their application in this case, the fact remains that such topics are not matters for expert evidence but, if anything, they are submissions as to what the law is and how it ought to be applied.

288. In the course of the trial, I did seek assistance from the parties as to which parts of the evidence were truly admissible expert evidence on matters of micro economics and which went beyond the proper bounds of expert evidence. None of the parties attempted to distinguish between what was admissible and what was not. The parties dealt with the evidence of the experts in a general way as if it was all available as evidence which could be relied upon by the court. Nonetheless, in considering my judgment I have attempted to distinguish in my own mind between what is evidence (where my decision must be whether I do or do not accept that evidence) and what are contentions as to the law (which I can consider as submissions and which I may or may not find helpful)."

What is particularly striking is that the parties did not challenge or comment on the admissibility of expert evidence which was technically 'inadmissible' – "*The parties dealt with the evidence of the experts in a general way as if it was all available as evidence which could be relied upon by the court."* [59]. This is even more remarkable given the quality and expertise of counsel.[60]

Referring back to Wilcox J outrage at economists usurping the judicial role of defining the relevant market this issue arose coincidently in the BAGS appeal.[61] There Appeal

[59] Question of admissibility were raised in *Tesco plc v. Competition Commission*, Case No 1104/6/8/08 [2009] CAT 6; [2009] CompAR 168, CAT. At para 9 the Tribunal states "…*hardly any reference was made by any party to the substance of this evidence in the course of the hearing. At the outset of his opening submissions to us, and again at the end of them, Mr Nicholas Green QC, who represented Tesco, emphasised that whilst the allegations of inadmissibility levelled at the evidence filed by Tesco were not accepted, it was not necessary to address the points made in that evidence as these were reflected in the Report itself. The best approach was, he said, to stick to the Report. In the light of this it has not been necessary for the Tribunal to consider the admissibility of Tesco's expert evidence or indeed to consider that evidence in any detail."*

[60] 13 barristers appeared in *BAGS* - Nicholas Green QC, Pushpinder Saini QC, Mark Hoskins, Sarah Abram and Emily Wood for the Claimants. Peter Roth QC (now elevated to the High Court), Brian Doctor QC, Paul Harris QC, Ronit Kreisberger QC and Ewan West QC for the Defendants. Charles Hollander QC, Helen Davies QC and Victoria Wakefield QC for the Third Party.

[61] *Bookmakers' Afternoon Greyhound Services Ltd and others v Amalgamated Racing Ltd and others* [2009] EWHC Civ 750; [2009] UKCLR 863, CA.

Court chastised the judge for not explaining why he had rejected the economic evidence on market definition and relied instead on an EC Commission decision.

Take another example. In *Chester City v. Arriva*[62] (concerning allegations of predation) the admissibility of expert witness opinion was, as the judge said, '*harshly*' challenged by Counsel for the Claimant on the grounds that the expert witness was only an 'industry expert' and not an economist, and was too close to the industry to be unbiased. The Court gave short shrift to this attempt to exclude his evidence:

> *147. TAS is a specialist public transport consultancy, of which there are only a few. It is obvious that Mr Foster has a wide understanding of the bus industry and how it operates, as well as a wealth of experience of that industry. Whilst the concepts required to be investigated in a competition law case are no doubt most easily grasped, explained and opined upon by trained economists, they are concepts drawn from and related to the operation of the markets of the real world; and I regard it as unreal the thought that it is only trained economists with a list of learned articles to their name who have the expertise necessary to understand them and to help the court on their application to a particular case. I have no doubt that Mr Foster has sufficient expertise, no doubt largely absorbed in the college of life, to entitle him to offer his opinion to the court on the matters in question; and it is for the court to decide whether or not, or to what extent, that opinion, tested by cross-examination, is one which is as expert as Dr Niels's and which the court can accept. As I shall explain, in one respect Dr Niels was himself directly influenced by Mr Foster's expertise, in relation to a 30-minute "dead run" drive time: Dr Niels was happy to regard that as supporting his own, still somewhat uncertain, assessment. I say simply that I was satisfied that Mr Foster had a sufficient understanding of the relevant economic issues, as well as a vast knowledge of the bus market and industry, to qualify him as an expert and I reject Mr Sharpe's submissions that he was not so qualified.*
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> *148. As regards Mr Sharpe's second line of attack on Mr Foster, I recognise that Mr Foster's undoubted closeness to the action would make him unsuitable to give expert evidence if the relevant test were that he should display the same absence of connection with the party calling him as, for example, must anyone engaged in a judicial function. But that is not the test when considering the ability of someone to give expert evidence. There is, for example, no automatic basis for a successful challenge to an expert witness that he is an employee of the party calling him. Mr Foster is not even as close to the claimants as that. He is an employee of TAS, and there is no evidence that he has any financial interest in the outcome of the case. As it seems to me, Mr Sharpe's submissions on this come down to the proposition that, putting it at its lowest, I should*

[62] *Chester City Council & Ors v. Arriva Plc & Ors* [2007] EWHC 1373 (Ch) and at http://www.bailii.org/ew/cases/EWHC/Ch/2007/1373.html. Eight witness reports were examined (para 188-195).

assume that there is a material risk that Mr Foster would, by his evidence, be dishonestly advancing an economic case he knew to be untrue in order to better the interests of the claimants. Indeed, in his closing submissions Mr Sharpe in terms submitted that Mr Foster was "part of the home team. He was a safe pair of hands. He could be relied upon to find Arriva dominant and abusive."

149. These are harsh submissions and I do not regard them as carrying the day. Mr Foster made it clear that he recognised that his duty was to the court rather than to the client and he was aware of the obligation to consider whether the claimants' instructions placed him in any conflict with his duties as an expert. He was aware of his duty not to promote the claimants' cause or to engage in the role of an advocate, and said he had adhered to that throughout. He said his views would have been no different in the, admittedly unlikely, event that Arriva had asked him to act as an expert. I was satisfied that Mr Foster was giving his evidence honestly and was doing so in proper recognition of his duties to the court. I recognise also, however, that he has been very close to the action on the claimants' side of the record, and that there is therefore a risk that his opinion may perhaps have become unconsciously coloured by the claimants' interests. I have come to the conclusion, therefore, that whilst I should reject this part of Mr Sharpe's submission as well, I should nevertheless bear this risk in mind in assessing the weight to be given to Mr Foster's evidence. That was, in effect, the essence of Mr Brealey's submission as to how I should approach the matter.

I would say (based on my limited experience) this is the usual approach in the E&W High Courts. It is commonplace for economists not to confine their analysis to the economics but to make statements as to how their findings and opinions relate to the competition rules. And what is evident in the judgments is that the generalist judges have, more or less, found this useful. This is because the generalist judge will often not have been exposed to competition law let alone economics, and he is (often) big enough to be assisted by economists who routinely analysis and consider competition and competition law matters.

Contrast this with my own experience in the Australian Federal Court in *MasterCard*.[63] First, half a day was taken with submission about the admissibility of certain parts of my report resulting in sections being redacted. I, like the economist in *BAGS* above, was given specific narrow instructions as to the scope and structure of my report. This limited the areas I was instructed to cover. In cross-examination when the questioning exceeded the scope of my instructions and hence evidence I responded to this effect. This was taken as 'retreating' and unhelpful.

[63] *MasterCard International v Reserve Bank of Australia* [2003] FCA 977.

Procedural Differences

What is written is often not what is done. Thus while the experts' guidelines are very similar they have been applied by lawyers in the two jurisdictions differently.

It would be fair to say that English lawyers pay more attention to the guidelines and are less inclined to take a proactive approach in the drafting of the expert economists' evidence in chief. Indeed they tend to steer a wide course around the witness after preliminary inquires about the expert's suitability and preliminary opinions.

In Australia the relationship between lawyers and economist is more, shall we say, symbiotic. There is often an active dialogue which could be construed as 'leading' the witness at times. There is more commentary on drafts and discussions about the nature and focus of the expert's opinion.

There is also a tendency for the experts report to be 'framed' so to speak. By this I mean that the parameters of the expert's report are limited either to the issues considered and the facts. Experts are often given very specific instructions as to the issues to be addressed and the evidence that is relevant. Thus instead of being asked to give his or her expert opinion on the competition law infringement at the heart of the case, the instructions will cover specific issues say, market definition only.

One striking example, in my experience, is the role played by 'assumed facts' in the instruction of Australian litigators. I have seen witness statements in Federal Court cases, and have been given instructions by Australian lawyers, setting out a list of 'assumed facts' on which I am required to base my expert opinion, no doubt a direct result of *Arnotts.* I have known of an expert economist who has been give instructions filled with 37 pages of 'assumed facts'.

This approach and level of specificity in instructions is highly unusual in E&W cases. There the expert is required to address the substantive issues of market definition and competitive effects drawing on evidence from his or her understanding of the facts of the industry as taken from the documents that have been provided, the instructions by lawyers as to the facts revealed in the documents, and the economists' own research.

Witness Bias

As noted above one of the major concerns with the use of experts has been witness bias. This is obviously not confined to economists or trade practices litigation.

The *Explanatory Memorandum* to CM7 offers advice to economists to avoid the accusation of 'bias':

"Ways by which an expert witness giving opinion evidence may avoid criticism of partiality include ensuring that the report, or other statement of evidence:

(a) is clearly expressed and not argumentative in tone;

(b) is centrally concerned to express an opinion, upon a clearly defined question or questions, based on the expert's specialised knowledge;

(c) identifies with precision the factual premises upon which the opinion is based;

(d) explains the process of reasoning by which the expert reached the opinion expressed in the report;

(e) is confined to the area or areas of the expert's specialised knowledge; and

(f) identifies any pre-existing relationship (such as that of treating medical practitioner or a firm's accountant) between the author of the report, or his or her firm, company etc, and a party to the litigation".

The issue of bias and advocacy has come to the fore in a number of recent Australian cases, and to a lesser extent (as far as I can determine) E&W cases[64]. Indeed, (some) economists in Australia have come in for a 'bashing', to quote Bob Baxt the former Chairman of the Trade Practices Commission now at Freehills. [65]

One of these 'bashings' highlights that the concerns identified by Woolf has apparently not gone away. Goldberg J had this to say of the performance of two economists before the Australian Competition Tribunal in *Qantas Airways Ltd*[66]*:*

"THE ROLE OF THE EXPERT

216 The role of expert witnesses appearing before the Tribunal is to instruct on areas of specialist knowledge in a manner that is ultimately

[64] *Leeds City Council v. Watkins* [2003] UKCLR 467 (Economists acting as advocates and exhibiting bias; failure to comply with CPR35). *Aberdeen Journals v. OFT* (No. 2) [2003] CAT 11 (failure of comply with CPR35).

[65] Baxt cites the adverse comments by judges in *Qantas Airways (*Goldberg J), *Pacific National v. Queensland R*ail (Jacobson J), and *Seven Network v. News* (Sackville J). Bob Baxt, 'The Law and Economics of Tying, Bundling and Other Political Restraints: Does and should the Chicago School rule the Australian perspective?' *Competition Law Journal*, Vol. 3, 2007, pp. 32-40.

[66] (2004) ACompT 9 (12 October 2004). Economists Henry Ergas and Tim Hazledine were severely criticised. For 'defence' by one see Tim Hazledine, 'Competition Policy for the Trans-Tasman Air Travel Market: The 2005 ACT Decision and its Implications', Department of Economics, University of Auckland, August, 2006 http://www.transport.govt.nz/assets/NewPDFs/3-August-06-paper-from-Prof-Hazledine-re-competition.pdf . David Peters and Anthony Casey, 'Smiley Faces and Frowning Professors: Economic Modelling in the Qantas-Air NZ Case,' presented to the 2005 Industry Economics Conference, La Trobe University, September 29-30, 2005.

designed to inform rather than to advocate a particular view. Obviously, parties will call upon experts whose opinions support their view of the case. However, it is not appropriate for an expert witness to act as an advocate for the instructing party at all costs, and professional witnesses should be willing to concede points which, whilst not advancing the case of the party engaging them, they believe to be open as a fair and reasonable assessment on the material before them. The Tribunal will be assisted by expert witnesses who can clearly explain the relevant issues and concepts and can pinpoint the differences between opinions in the profession and the reasons for such differences so that an informed decision can be made as to which opinion should be accepted on the available evidence. The Tribunal will not be assisted by experts who uncritically push a party line, avoid challenging questions, and seek to obscure the real issues in contention.

221 Generally, whether an expert's opinion is confined to his or her area of expertise and whether experts state the factual basis upon which they have formed their opinion, are useful considerations in determining at what point an expert witness ceases to be impartial and has moved beyond the bounds of legitimacy into advocating for a party. Another indicator is the willingness of an expert to respond to questions whose answers may provide support for a view which is contrary to the interests of the party calling them."

…

227 Thus, whilst we were, in general, assisted by the evidence provided by most of the experts, we were concerned that on many occasions the expert opinions lapsed into advocacy, there were occasions when crucial assumptions underlying various factual calculations were not spelled out in as much detail as we would have liked, and the use of supporting empirical literature was at times selective. In addition, it was clear to us that some experts were not particularly well informed about the various airline markets pertinent to the present proceeding, leading them to base much of their testimony on their experience in airline markets distant in both geography and time to the markets under consideration and by reference to outdated material of limited assistance, and we adjusted the weight we gave to their evidence accordingly."

There is little positive to be said about this approach to giving evidence in court. It has been pointed out that unlike lawyers economists cannot be disbarred.

Quantitative Analysis

Another issue is court's reception of a treatment of empirical evidence. In the usual antitrust case this is often fairly limited. In the principle areas of market definition,

market power and the effects of market power, the data often is limited and the economic evidence usually qualitative. Indeed the recent introduction and widespread use of the so called SSNIP test, which has a strong quantitative ring to it, is often applied in the most general terms.

In some cases, and particularly appealed merger cases, complex statistical techniques have been introduced as evidence in the E&W and European courts. [67] This can take the form of simulation analysis and econometrics.[68] In Australia this is less the case.[69]

Chief Justice Posner, referring to econometric analysis used in the *FTC* v. *Staples*[70] declared that '*Economic analysis of mergers had come of age'*.[71] Notwithstanding Posner's affection for econometrics, he has stated that "*econometrics is such a difficult subject that it is unrealistic to expect the average judge or juror to be able to understand all the criticisms of an econometric study, no matter how skillful the econometrician is in explaining the study to a lay audience*."[72] As far as E&W is concerned he is pretty much correct. The introduction of econometrics into court (as opposed to specialist competition tribunals) has not been unusual or particularly successful.

In E&W the tone for the judicial reception of such evidence was set by Mr Justice Ferris in the *Premier League* where econometric evidence was presented by both sides to show the impact of television football fixtures on attendances:

> *"I speak only for myself and I do so without criticising anybody, but I have to say, I have never listened to evidence in any court for an hour and understood*

[67] Econometric models have been filed with the European Commission in Case COMP/M. 3083 *General Electric/Instrumentarium*, (2004); Case COMP/M.4439 *Ryanair/Aer Lingus* (2007) ; Case COMP/M. 1672 *Volvo/ Scania* (2001); COMP/M.4854 *Tom/Tom/Tele Atlas (*2008); Case COMP/M. 3333 *Sony/BMG* (2004). International Competition Network, 'Role of economists and economic evidence in merger analysis', 2003, at www.internationalcompetitionnetwork.org/Role%20of%20Economists.pdf.

[68] *Quantitative Techniques in Competition Analysis*, UK Office of Fair Trading Research Paper no. 17, 1999; Jonathan B. Baker and Daniel L. Rubinfeld, 'Empirical methods in antitrust litigation: review and critique', *American Law and Economics Review*, 1999, Vol. 1, pp. 386–435.

[69] Stephen P. King, 'The Use of Empirical Methods in Merger Investigations', *Australian Business Law Review*, Vol. 34, 2006, pp. 227-[]

[70] *FTC* v. *Staples Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

[71] Richard A. Posner, *Antitrust Law*, University of Chicago Press, 2nd edn, 2000, p. 158. For recent examples from US merger decisions see John E. Kowka, Jr, and Lawrence J. White, eds, *The Antitrust Revolution*, 4th edn, Oxford University Press, 2004.

[72] Richard A. Posner, 'The Law and Economics of the Economic Expert Witness', *Journal of Economic Perspectives*, Vol. 13, 1999, pp 91-99.

> *so little of it as I have understood during the last hour. It may all be as clear as daylight to my colleagues. "All I can say is that anybody who really wants to make sure that I understand and have the ability to make an evaluation of this kind of material that we have has a very long way to go in educating me as to how I should deal with it. [....] I will sit here quietly and let it all wash over me for a reasonable amount of time, but I think that those who are asking the court to rely on this must be under no illusions that at the moment, so far as I am concerned, this is all washing over my head".* [73]

He continued

> *I am thinking of buying a little flag which I can raise when we get to a part of the case that I just do not understand, but perhaps a national flag will do. It is up at this part of the case.*

In the end the 'incomprehensibility' of the econometric evidence cancelled it all out,[74] with the judge drawing on the 'common sense' approach of his ex-LSE economics teacher Professor Basil Yamey. The position in Australia has been discussed.[75]

Commonsense and Clarity

While economics as a discipline has become more technical, the basic concepts are not rocket science, and nor is the economics which is influential in competition law, perhaps with the exception of merger simulations and econometrics. However, it is also the case that competent economists, even in the absence of litigation, can come to very different conclusions on the same facts. Moreover, they can propound different theories of the same phenomenon. Examples of this can easily be found in the case law and development of competition law itself e.g. vertical restraints.

In the presentation of economics in court there may be a tendency for the economist to over complicate the analysis. `One particular problem is the use of theory to rationalize

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[73] *In the matter of an agreement between the Football Association Premier League Ltd and the Football Association Ltd & the Football League Ltd & their respective member clubs: in the matter of an agreement relating to the supply of services facilitating the broadcasting on television of premier league football matches & the supply of services consisting in the broadcasting on television of such matches* (Judgment 27 August 1999), [2000] E.M.L.R. 78 RPC.

[74] '*Having regard to this fact, the highly technical nature of the statistical discipline which was being applied, the limited scope of the underlying data and the difficulties involved in taking proper account of all the factors which may affect a person's decision whether or not to attend a football match, we do not feel able to prefer the evidence of one of the experts to that of the other.'*

[75] Charles Sweeny and Deirdre Hay, 'Quantitative Economic Evidence in Australian and New Zealand Courtrooms', *Competition and Consumer Law Journal,* Vol. 10, 2003, pp. 284-[].

a party's case which does not appear consistent (i.e. alien to) the way the industry views the market and the industry practice.

The use of fancy pants theory to provide such justifications is not good practice. If the theory is inconsistent with the way the industry describes its practices and motivations then it is not going to be accepted by the court.

A recent example of this was considered by the CAT in *Napp*[76]. There a theory was developed that the sale of a drug would lead to follow-on sales, and hence the sale was not at a price (revenue) which would constituted a 'margin squeeze'. The revenues of the follow-on sales should be taken into account in the assessment of margins. The CAT knocked this approach on the head as not being consistent with any internal documentation of Napp. It concluded that the follow-on effect was a concept that *'appears to have been coined by Napp's advisers for the purposes of this case':*

> *254 While expert's reports are often relevant and helpful to understanding the issues with which this Tribunal has to deal, we find in this case that the idea of a 'follow-on' effect in the narrow or mechanistic sense relied on by Napp flows not from any internal documents from Napp but from the work done by Napp's economic advisers for the purposes of the present case. In our view such work does not carry matters any further forward in the absence of any evidence that Napp in fact took the theory upon which it is based into account in setting its prices: see Tetra Pak II, in the judgment of the Court of First instance, [1994] ECR II at p. 843.*

In *Hendry v. WPBSA*[77] the judge similarly concluded that evidence given by the defendant's expert economist seemed to '*defy common sense'* (his argument that there was no market for pool and billiard players, and/or pool and billiard tournaments), and that economists' evidence generally risked *'not seeing the wood for the trees'*.

Overcomplicating the analysis and introducing technical arguments (mathematics) can also rebound against the expert. The Federal Court in *ARC v. RBA* treated the evidence of Professor Farrell on behalf of the Reserve Bank of Australia as '*so* technical and incomprehensible that it was inadmissible[78], a view not confined to the court or lawyers.[79] It is hard to fathom why an economist would seek to over complicate the analysis in this way.

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[76] *Napp Pharmaceutical Holdings Ltd v DGFT (No. 4)* [2002] CAT 1; [2002] Comp. A. R.

[77] *Hendry v The World Professional Billiards and Snooker Association Ltd* [2002] UKCLR 5. See Cento Veljanovski, 'Markets in Professional Sports - *Hendry & ors v WPSBA* and the Importance of Functional Markets', *European Competition Law Review,* 2002, Vol. 23, pp. 273-280.

[78] *Australian Retailers Association v. Reserve Bank of Australia* [2005] FCA 1707.

[79] Philip L. Williams, "Economic Experts", paper to 2009 ACCC Regulatory Conference, Gold Coast, July 2009

One proposal that has been made is that lawyers present the economics to the judge by way of submission. This appears the practice of the OFT which rarely uses external or internal economists to present its economic evidence. Rather it briefs its lawyers to present the evidence. It admits that this takes substantial preparation time '*However, a major advantage of this strategy is that our lawyers – once convinced of an economic case – are typically better at describing it to a court in terms that judges not versed in economics find compelling'.*[80]

This is not an entirely satisfactory solution as it runs the risk of bastardising the economics. Further, it assumes that the lawyer is a good advocate. The AILR study revealed that one-third of judges found '*deficient advocacy'* a significant problem, with one judge saying *'many counsel have no idea how to cross-examine an expert*'.

The better solution is for instructing solicitor to make clear to the expert witness that his or her report must be comprehensible and be addressed to the judge rather than to other economists. Remarkably, economists have little training for their role as expert witnesses, and on the job training can sometimes be at the client's cost.

There are moves to make clear to economists and legal advisers what is expected and the form the evidence should take. For example, the UK Competition Commission has recently published guidance on the submission of 'technical economic analysis'[81] based on three overriding general principles 'clarity and transparency', 'completeness' and 'replication of results'. The OFT has made suggestions.

Box 2: OFT's essential features of good economic evidence.

- Explain underlying intuitions.
- Ensure that economic theories are grounded in the facts of the case.
- Know and explain the limits of your data.
- Carry out sensitivity analysis.
- Employ (and develop) simple rules.
- Use plain, non-technical language.
- Where possible, draw on the established stock of economic theory, not the latest advances.
- Make sure the economic case is well aligned with the legal case.
- Don't try to use complex economics as a smokescreen for weak arguments.
- Be well prepared and do not hector or talk down to the Judge.

[80] OECD 2008, p. 58.

[81] Competition Commission, *Suggest best practice for submission of technical economic analysis from parties to the Competition Commission,* 2009.

Source: OFT submission to OECD Policy Roundtable, *Presenting Complex Economic Theories to Judges*, Paris, 2008.

And one lawyer has simply set out what he regards as the virtues which should be possessed of the ideal economist (and one suspects lawyer):

> *In summary, the economist should posses perfect predictive powers, be lucid and logical in their explanation and analysis, be client-centered in their approach; act appropriately in reacting to competition regulator; confidential in their handling of the material and information they receive; as well as cogent in their argumentation and explanation*[82]

VII. PROPOSALS

General

There seem to be three areas of concern which have recurred in discussions of expert witnesses in Australia – bias, admissibility, and costs.

Australian judges and lawyers have been very public about the problems, flaws and limitations of expert economists in the courtroom. One detects in the writings of some hostility to economists and desire to put them back in their place; which presumably is outside the court room. There is no such equivalent overt hostility in E&W, either in the courtroom and extra-judicially. Indeed the English judiciary seem prepared to take it as it comes and deal with excesses of the parties and experts on the spot.

There is a question whether the courtroom is the appropriate forum to determine economic questions, a position taken by French J.[83] First the adversarial process jars with the scientific approach of economics. The rivalry between competing hypotheses and empirical verification of those hypotheses in a critical system of peer assessment *(via* learned Journals) is the norm. This is fodder for the good advocate where he can seek to drive a wedge between the expert opinions of the economist and the possibility of competing opinions of the same facts.

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[82] Vincent Power, 'Briefing an Economist: What a lawyer is looking for in an Economist', paper to 'Why Lawyers and Economists Should be Friends', Irish Law Society for European Law/Competition Authority Conference, Dublin, 30 September 2005, p. 9.

[83] French J, 'Judicial Approaches to Economic Analysis in Australia in the Trade Practices Act 1974' in David K. Round, ed., *Propscriptions and Prescriptions for a More Competitive Economy*.

Notwithstanding this key difference between the two jurisdictions, I think the 'modern' thinking is that there is a genuine partnership to be had between lawyers and economists. Economists correctly deployed in trial are likely to assist the legal process, and lead to better outcomes generally.

The question is to what extent the concerns over biases and advocacy, and indeed 'junk science', can be attributed to economists in court. While the view of judges and lawyers have been canvassed those of economists have been less prominent There is, however, some recent research commissioned by the American Bar Association (ABA) as to economists' experience and proposals for reform.

The ABA Economic Evidence Task Force[84], which reported in 2006, was asked to consider the following questions:

> *"Are judges, juries and enforcers persuaded by economic evidence? Do they understand it? Do they need additional resources to help the decipher it? Do economic experts present their findings in a way that juries and generalists judges can understand and evaluate the evidence? Are there ways to do it better? How would the courts like to deal with economic testimony?"*

The ABA Task Force reached a (unsurprising) general consensus "*regarding the importance of economics in modern antitrust law and the recognition, therefore, that it is critical that judges and juries understand economic issues and economic testimony in order to reach sound decisions"*. It identified a number of problems '*which can seriously affect the adversarial process by skewing judicial outcomes, by leading decision makers to ignore conflicting economic testimony or come to 'wrong' conclusions, and can increase litigation costs."*

The ABA Task Force's survey of 42 US antitrust economists found that:

- Only 24 per cent believe that judges "usually" understand the economic issues in a case.

- 57% said that '*unprofessional argument*' '*defined as argument so far out of the mainstream that they do not count as serious economics*' sometimes occurred, with 10% saying it occurred 'frequently' or 'usually'. The most common examples given were expert opinion inconsistent with the facts or lacking factual support (78%) and flawed empirical analysis (68%). Three other types of problems were identified – errors in economic reasoning, claims inconsistent with economic theory, and opinions offered outside economic expertise. A majority of respondents reported that expert economists had given mutually inconsistent conclusions in evidence.

[84] Jonathan B. Baker and M. Howard Morse, *Final Report of the American Bar Association Antitrust Division Economic Evidence Task Force,* 1 August 2006 (available at:http://www.abanet.org/antitrust/at-reports/01-c-ii.pdf.

- When asked whether there was a need for additional remedies to deal with unprofessional evidence the sample was equally split. However, when asked to suggest remedies two-thirds, which included those who did not see the need for additional remedies, suggested the judges should have independent expert support, and half that they should have more resources or greater education.

The ABA Task Force made a number of recommendations (see Box 3 above) to increase the resources and education to generalist judges, and greater use of joint reports, pre-trial conferences, and evidence in reply (rebuttal evidence).

Box 2: ABA Economic Evidence Task Force Recommendations

Our specific recommendations for the Antitrust Section include the following:

1. Systematically evaluate the availability of Section materials about antitrust law and economics to judges, in order to ensure that judges can quickly identify and obtain relevant publications when confronted with a major antirust case, potentially working with the Federal Judicial Center.

2. Develop Section publications and programs on best practices in presenting expert testimony in court, and consider developing programs for economists to teach practical skills for deposition and trial testimony, with an emphasis on the clear articulation of economic analysis.

3. Develop Section publications and programs on the use of *Daubert* (Rule 702) in antitrust litigation, and ask an appropriate Section committee to address what factors should be considered in deciding whether to exclude economic testimony in antitrust cases, with the goal of identifying antitrust-specific criteria courts might use in ruling on *Daubert* motions.

4. Develop a Spring meeting program and articles in the Antitrust Law Journal, Source or Magazine, or a monograph, on the pros and cons and use of court-appointed experts in antitrust litigation, and ask a Section litigation committee to consider drafting a guide for judges considering the use of court-appointed experts that reviews their past use, identifies their advantages and disadvantages, describes alternative models, and suggests the parameters for judicial scheduling orders.

5. Consider developing Section publications and programs addressing methods of encouraging or requiring testifying experts to clarify their differences, such as requiring experts to write a joint report indicating where they agree and disagree, encouraging judges to hold economic pre-trial conferences, and use of economic rebuttal testimony.

Ten Proposals

A number of proposals and alternatives have been tried to deal with the problems identified above, and other concerns. These include:

- Exclusion of expert witness (CPR35; Australian Family Court)
- Joint sole expert witness (Qld)
- Court appointed expert witness (none)
- Hot tub/concurrent testimony (ATC, Federal Court)
- Lay assessor/members (New Zealand and Ireland)
- Specialist tribunal (ATC, CAT)

I do not propose to discuss all of these in detail. The courts in both jurisdictions have been reluctant to appoint their own experts largely because this jars with the adversarial nature of adjudication. On the other hand Queensland has moved to appointing one joint expert to reduce the possibility of conflicting evidence and expense. Economists sitting as lay members of the court have been used extensively in the New Zealand High Court (and recently in Ireland), and of course the use of the specialist tribunals with interdisciplinary panels of lawyers, economists and others exist in both jurisdictions.

In the light of the above discussion and to end on a positive note, I set out ten 'modest' proposals' largely directed at the Australian position:

Before Trial

1. Adopt the English rule of requiring the court permission to introduce expert opinion evidence.

2. Give the judge the power to set the reasonable costs of expert evidence.

3. Allow only one expert economist witness per party. The practice of multiple witnesses achieves little and suggests that there is a weakness in the party's case. Often the presence of several witnesses has muddied the waters and has been counter productive e.g. *Seven v. News* where the plaintiff's witnesses offered contradictory opinions; *Mastercard* where economists for MasterCard took different approaches.

4. Instructing solicitor should agree common areas to be covered, and be allowed to comment on drafts of the expert witness report and draw attention to relevant information and other material.

5. Require experts' joint report and conference which identify areas of agreement and disagreement, and a summary of the reasons for the latter.

At trial

6. Allow oral summary of written evidence in chief by the expert at the beginning of his cross-examination under clear constraints.

7. In larger cases and/or more contentious cases use concurrent evidence i.e. the hot tub.

Admissibility & Submission

8. Allow economists expert to make submissions as to the application of economics to the law and the implications of the economic assessment to the legal position.

9. Reduce the distinction between adviser and expert. It does not assist the court to have an economist developing expert witness material to tight deadlines which does not correspond and/or support the case theory being advanced by the party.

And the Judges

10. Generalist judges should have a basic familiarity with economics.

First a brief word on the thinking behind these proposal:

- Proposals 1, 2 and 3 are measures to contain costs and give the judge the power to properly manage expert witness evidence;

- Proposals 4-7 are designed to ensure that expert opinion evidence is focused and that the written briefs, affidavits and/or reports of all parties deal with the same areas requiring expert evidence, and that the court is able to clearly identify the points of agreement and disagreement, and the reasons for the latter;[85]

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[85] The E&W Bar Council, *Review of Civil Litigation Costs - The Bar Council's response,* 31 July 2009) has recently proposed something along these lines:

> "*133. We recommend that consideration be given to a proposal that, in appropriate areas of work, at the first case management conference:*
>
> *a. the parties and the Court, based upon the list of issues, should identify and formulate the issues upon which expert evidence is required before experts are instructed, so as to avoid the risk (which too frequently materialises) that experts from the same discipline address wholly different issues and the further risk that permission is given without fully informed consideration as to whether it is required at all;*

- Proposals 8-9 take on board the uniqueness of expert economic evidence and allow economists to assist the court in applying economics to the law; and

- Proposal 10 deals with concerns over judge's competence in this specialised area.

I regard Proposals 1-5 as fairly self-explanatory, and propose (in this draft) to briefly discuss Proposals 6 to 10.

Proposal 6: Oral Presentation of Evidence in Chief

Allow oral summary of written evidence in chief by the expert at the beginning of his cross-examination under clear constraints.

The testing of evidence and opinion in a court is a good way of resolving a dispute. It is however not a fun way of doing it, and places considerable stress on all the parties.

This is not appreciated by most lawyers and judges who have not been witnesses. The few that have seemed not enjoyed the experience. Mr Justice Lightman, a Chancery Judge recently retired, is one:

> "*It is important to appreciate the stress and strain that these places on all concerned, and in particular witnesses. Those who give evidence stand in public view in an unfamiliar surrounding to answer (often hostile) questions which may admit of no clear or simple answer. I have only once given evidence - whether I had concluded a compromise with my opposing counsel. Though in an entirely familiar surrounding, and though I knew the judge well and he knew me, I was more nervous and afraid than when addressing as counsel the most daunting tribunal. I recall distinctly in the split second between being asked a question and answering it puzzling how it should be answered, conscious of the difficulty to give an answer, let alone to give an immediate answer, conscious how easy it was innocently to give the wrong answer and that throughout the exercise my credibility was under scrutiny".*"[86]

> *b. the Court should determine whether there should be a single joint expert, or the number of experts to be called by each party;*
> c. where possible, either a common letter of instruction to the experts should be formulated by the parties (with such assistance from the Court as may be necessary), or a direction from the Court as to the precise question to be addressed should be given, where more than one expert is instructed;
> d. the Court should consider whether there is to be sequential exchange of experts' reports."

[86] Mr Justice Lightman, 'The Civil Justice System and Legal Profession - The Challenges Ahead', The 6th Edward Bramley Memorial Lecture, University of Sheffield, 4 April 2003. http://www.judiciary.gov.uk/publications_media/speeches/pre_2004/jl040403.htm. Reprinted with same title in *Civil Justice Quarterly*, Vol. 22, 2004, pp. 235-247.

Most economists have mixed experiences of cross-examination. Sometimes their opinions have been effectively tested, other times they have got of lightly, and at other times they could not see the relevance of half the questions put to them or were in their view unfairly roughed up. On the other side of the coin the prospect of cross-examination (together with the procedural rules) increases dramatically the care an economist will take in expressing their opinions since it is not pleasant to be made a fool of in court, to have flaws in your reasoning or facts exposed, and to have a judge publicly say that you did a bad job. The reputational effects are significant as many experts are repeat players.

What is difficult for the court is often to get a real sense of the experts' opinion since he or she is not asked to orally present it in court. The expert evidence in chief is in a written report, left to reading time and selective critical examination under cross-examination. Further, the Q&A of cross-examination, and its frequent aimlessness often gives a patchy picture of the expert's opinions, and creates a defensive posture on the part of the witness.

This point has recently been picked up by US DoJ in its contribution to the OECD roundtable on complex economics in court:

> *"In retrospect, one aspect of the expert presentation was not particularly effective. The parties had agreed to provide the direct testimony of the experts through written statements. There was no live direct examination of the economic experts, meaning that Professor Katz (and the defendants' experts), upon taking the stand, immediately were subject to cross-examination by counsel for the opposing party. Although the judge had previously been provided the experts' written direct testimony, this procedure made for a somewhat confusing courtroom presentation of the important economic issues. While it may be impractical (indeed, tedious) to present an expert's entire direct testimony through live questions and answers, it would be worthwhile to petition the court for an abbreviated live direct examination where the expert could provide the court an overview of his or her written statement prior to hostile cross-examination."*[87]

Proposal 7: In larger cases and/or more contentious cases use concurrent evidence/ hot tub.

Heerey J has referred to "the hot tub"[88] as being an "*irreverent soubriquet*". It was developed in the Trade Practices Tribunal (now the Australian Competition Tribunal),

[87] OECD 2008, p.68 referring to *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 543 U.S. 811 (2004).

[88] Heerey, J, 'Recent Australian Developments', *Civil Justice Quarterly*, Vol. 23, 2004, pp.386-395.

and introduced into the Federal Court where it tends to be referred to as 'concurrent testimony', and has migrated to the UK being experimentally used in the CAT but not so far by the E&W High Court.

The first thing to note is that the approach of Expert Guidelines was a backward step to the procedural approach that had been developed in Australia by the Trade Practices Tribunal. The 'hot tub' was introduced by Woodward J in the first modern Australian trade practices' case (*QCMA*[89]) under the 1974 Act.[90] Woodward J was influenced by the criticisms of procedures made by John Kerr (later Sir John Kerr, the Governor General of Australia) in receiving evidence from economists in general wages cases in the Commonwealth Arbitration Commission.[91] Kerr noted the reluctance of economists to appear before the Commission, and their criticism of cross-examination. He suggested that it should be abandoned and that *'the well-known intellectual and academic discipline of criticism and counter-criticism'* should be adopted.

This led to introduction of the so-called 'hot tub' or 'panel/seminar approach' of the Tribunal. Economists submitted written reports, they then submitted their final views after the oral evidence of non-opinion witnesses, then followed an oral debate where economists presented their evidence and commented on the views of other economist views, and the 'seminar' concluded with questions from Counsel. The technique was further developed by Lockhart J and then *via* him introduced to the Federal Court by amendment to its rules in 1998 (*Federal Court Rules*, Order 34A, rule 3(2))

An example of the way the hot tub is used today by the ATC can be seen in *Qantas Airways Ltd*[92] where Goldberg J made the following orders during the course of the hearing:

> *"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.*

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[89] *Re QCMA and Defiance Holdings* (1976) ATPR 40-012.

[90] Brunt, *Essays*, pp 44-50.

[91] John R Kerr, Procedures in General Wage Cases in the Commonwealth Arbitration Commission, *Journal of Industrial Relations*, Vol. 3, 1961, p. 81-[].

[92] (2004) ACompT 9 (12 October 2004).

(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 hot tub has a good reception amongst Australian judges.[93] Lockhart J believed that it defined "*more precisely the true issues of fact, law and expertise*". Heerey J. in *Australian Competition and Consumer Commission v Boral Ltd*[94] and in *BHP*[95] found it a useful way to deal with the economic evidence. Middleton J has said:

> *'In my view, this technique combines both good case management principles and the interests of justice. It is a system that invites a series of exchanges between expert and expert and expert and lawyer, is focused and structured if properly controlled by the judge, 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.'* [96]

Maureen Brunt has set out what she regards as the principal attractions of the 'panel-seminar approach':

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[93] Set down in *Re AGL Cooper Basin Natural Gas Supply Arrangements (1997) ATPR 41-593.*

[94] *Australian Competition and Consumer Commission v Boral Ltd* [2001] FCA 30.

[95] *BHP Billiton Iron Ore Pty Ltd v The National Competition Council* [2006] FCA 1764.

[96] Middleton, J., 'Expert Economic Evidence', *5th Annual University of South Australia Trade Practices Workshop,* 16 October 2007.

- *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 judgement should make economic sense. It is more likely to do so when economists' views have been cogently expressed."*[97]

On the other hand the practice is not a complete solution as recent events have shown:

- It has not stopped economists acting as advocates e.g. *Qantas*;

- Can lead to an articulate and forceful economist running the show, and skewing the analysis; and

- It may allow the judicial body to substitute its own economic evidence and analysis for the parties as appears to have happened in the ACT.[98]

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[97] Brunt, *Essays*, p. 47.

[98] Simon Uthmeyer and Nadia Cooke have argued:

> *"… under the presidency of Finkelstein J, the Tribunal might be said to be moving toward according primacy to its own economic analysis, which may or may not be informed by the economic 'argument' advanced by experts engaged by parties to the proceedings. In a recent decision in respect of exemptions from regulation in the telecommunications sphere, the Tribunal (over which Finkelstein J was presiding) decided the issues in contention by reference to economic material outside that material advanced in expert economic reports before it, and in doing so, gave rise to potential practical implications for economic experts and their instructing solicitors. In particular, should this approach be adopted by the Tribunal going forward, it would be desirable to predict the economic views of the Tribunal and address these, as well as addressing the economic opinions expressed by experts engaged by the other parties to proceedings.* (para 1.3)

In relation to the ATC decision in *Chime Communications:*

> '*Put simply, the Tribunal in Application by Chime did not decide the issues before it on the basis of economic evidence advanced by the parties. Rather, the Tribunal gave primacy to its own expertise and performed the role of expert itself, considering the economic material before it as 'argument' or 'submission' rather than 'evidence'*. (para 4.59)
>
> '*The readiness of the Tribunal, in this new era, 'to form and act on its own original opinion' arguably renders the role of the expert economic evidence before the Tribunal in future to that of argument or submission. Expert evidence may, in future, be little more than a vehicle for the making of economic argument to complement the legal argument made by counsel.*' (para 4.61)

Simon Uthmeyer and Nadia Cooke, "Economic Experts: How Necessary Are They?" paper to 2009 ACCC Regulatory Conference, Gold Coast, July 2009.

The E&W Bar Council has recently raised a number of concerns about the Jackson Report's proposal[99] to introduce hot tubs in some commercial litigation[100]:

> *"134. We have considerable doubts about the perceived benefits of using expert "hot tubbing." There are three particular dangers which such an approach carries with it:*
>
> *a. lack of preparation by the judge. If hot tubbing is to be effective, it is imperative that the judge be completely familiar with the expert evidence before the experts are called and be capable of directing the presentation of the expert evidence. It is for this reason that hot tubbing can work in some arbitrations, particularly those where there is technical expertise in the tribunal;*
>
> *b. favouring the expert advocate. A particular risk with requiring expert evidence to be presented in a hot tub session, is that the dominant character between two experts will gain the upper hand. Often, the best experts are not the best advocates. However, a procedure which pits experts against each other can have the effect of disadvantaging the less polished performer;*
>
> *c. scrutiny of judicial intervention on appeal. We can foresee that in particular cases judicial supervision of and intervention in the presentation of expert evidence might raise the risk of appeals on procedural grounds."*

Proposal 8: Allowing Economists' Submissions

Allow economists' expert to make submissions as to the application of economics to the law and the implications of the economic assessment to the legal position.

Confining economists to opinion evidence narrowly construed does not seem to me to be either manageable or of assistance to the court. It seems to me fairly impossible for an economist to contribute usefully to trade practices litigation without offering an interpretation and statement of the relevant law. Even if this is couched in terms of the assumptions as to the law and decisional practice of competition regulators and cases on which his analysis is based.

Take a specific example. A number of competition agency guidelines on market definition state that markets are to be based on the product at the centre of the dispute or on the alleged competition infringement(s). It is also an accepted tenet that market definition can alter depending on the nature of the competition dispute. In short the

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[99] *Civil Litigation Costs Review - Preliminary Report by Lord Justice Jackson*, 8 May 2009.

[100] *Review of Civil Litigation Costs - The Bar Council's response,* 31 July 2009.

same product may give rise to different market definitions given the nature of the dispute. This is law and economics, not economics alone.

As discipline law and economics have some common elements and many differences. This is not the place to lament the differences, and the problems that this creates for economic law. Suffice it to quote Federal Court judge Mansfield J as to why economists often irritate lawyers and judges:

> *"Law and economics are both disciplines belonging to the social sciences. As such, they employ similar modes of thought. Both rely on deductive reasoning – the application of theoretical principles to a set of facts - to adjudicate on matters of human behaviour. Perhaps this similarity explains, at least in part, the difficulty with which the law accepts economic evidence - lawyers and judges can feel their role to be usurped by economists since they present information by way of discursive theoretical constructs rather than via testimony of discrete, identifiable facts.'*[101]

I have presented my observations of the practice in E&W courts where *de facto* economists' submissions on law and policy have been tolerated. I propose that economists can make economic submissions. I understand that this is currently possible under Federal Court Order 10 Rule 1 (which was introduced to overcome the restrictive effect of *Arnotts*).[102]

This issue was addressed by Middleton J at the CRMA's Annual Trade Practice Conference in 2007. Then he suggested that '*It may be that greater use should be made of this rule in the appropriate case, particularly where the economic material is largely explanatory'.*[103]I

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[101] Mansfield J, 'Opportunities and Challenges: Evidence in cases under the Trade Practices Act 1974', Competition Law Conference 2008, Shangri-La Hotel, Sydney, 24 May 2008, p. 10. Economists and lawyers obviously think in different ways (Cento Veljanovski, *The Economics of Law*, Institute of Economic Affairs, 2nd edn, 2006; Michael Hutchings, 'The Competition between Law and Economics, *European Competition Law Review,* Vol. 2004, pp. 531) but this should not obscure one from the fact that economic adjudication has an 'economic' character see Cento Veljanovski, 'The Common Law and Wealth' in S. Copp, ed., *The Legal Foundations of the Market,* Institute of Economic Affairs, 2009 Available at SSRN: http://ssrn.com/abstract=1081549; Cento Veljanovski, 'Economic Theorising About Tort', *Current Legal Problems* [1985], pp. 117-140.

[102] Greenwood J in *BHP Billiton Iron Ore v The National Competition Council* (2007) ATPR 42-190, noted that where the court does not have the power to admit an economic expert's statements as evidence, the statements can be admitted as 'submission' referring to Federal Court Rules, Order 10, Rule 1(2)(j):

> *'in proceedings in which a party seeks to rely on the opinion of a person involving a subject in which the person has specialist qualifications, direct that all or part of such opinion be received by way of submission in such manner and form as the Court may think fit, whether or not the opinion would be admissible as evidence').*

[103] Middleton J., 'Expert Economic Evidence', *5th Annual University of South Australia Trade Practices Workshop,* 16 October 2007, at p, 1.

French J has written of the rule:

> *'A well constructed economic argument can be as beneficial to the court as a well constructed legal submission. If economists have an ability to put argument directly to the court as part of the trial process rather than filtering it second-hand through counsel, their role in the adjudication process is enhanced rather than downgraded. As Professor Brunt has observed of the rule:*
>
> > It could also enable the economist-expert to assist the court in whatever capacity might prove useful to resolution of the issues. The rule would appear to give scope for a written submission at any stage in the proceedings, including the pre-trial stage and thus to widen the opportunity for economists to contribute to clarification of the issues and the assessment of the relevance of evidence.'
>
> *Notwithstanding the flexibility offered by the rule it is of course important to maintain the distinction between argument and evidence. Where argument depends for its validity upon the finding of primary facts it will play no part in the course of consideration if those primary facts cannot be found on the evidence.*[104]

Proposal 9: Soften Line between Adviser and Expert

The distinction between adviser and expert is a source of tension, and confusion.

It has led in Australia to the use of so-called 'dirty economists'. The dirty economist is an adviser to one of the litigants and assists in developing the case theory and in framing instructions for the independent expert witness.

This is not a practice I am aware of in the UK. In the E&W there are clear concerns about using an adviser to a company as an expert, as this would lead to his or her independence being challenged, and the risk of disclosure of documents.

The Federal Court has recently attempted to dissuade litigants from using 'dirty economists'. The *Explanatory Memorandum* to CM7 advises:

> '*Nothing in the guidelines is intended to require the retention of more than one expert on the same subject matter – one to assist and one to give evidence. In most cases this would be wasteful. It is not required by the Guidelines. Expert*

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[104] French J, 'Role of the Court in Competition Law', 6 February 2005.

assistance may be required in the early identification of the real issues in dispute.' [105]

The *Explanatory Memorandum* to CM7 also advises that:

> *"An expert is not disqualified from giving evidence by reason only of a pre-existing relationship with the party that proffers the expert as a witness, but the nature of the pre-existing relationship should be disclosed."*

Proposal 10: Judge's Guidelines

Competition law is increasingly interdisciplinary. The position has been reached in the two jurisdictions where there is a relative specialised set of solicitors, and Counsel well versed in both the law and economic issues, and specialist administrative and judicial tribunals which are perfectly able to assess the economic arguments, and indeed have contributed to them.

The odd man out, so to speak, is the generalist judge. The game has lifted for economists, lawyers and industry, and there is no reason to suppose it should not be lifted for judges. I doubt that economics poses any greater problem for a judge than accounting or civil engineering, especially when the law that he must apply is so intertwined with economics. Generalist judges should have a basic familiarity with economics.

Whether more economics education of judges would assist is a moot question. Research by Baye and Wright [106] sheds some light on this issue, albeit for the US judiciary which is fairly different in character. Using a sample of 714 US decisions - 73 decisions on substantive antitrust issued by administrative law judges, and 641 by Article III federal district court judges from 1996-2006 they found that:

- Decisions of judges with basic economics training[107] are appealed in simple cases at significantly lower rates than their untrained counterparts, but that does not appear to have an impact on appeals in economically complex cases.

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[105] *Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia,* http://www.fedcourt.gov.au/how/prac_direction.html

[106] Michael R. Baye and Joshua D. Wright, 'Is Antitrust too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals', George Mason Law & Economics Research Paper No. 09-07, 2009 Available at SSRN: <ssrn.com/abstract=1319888>

[107] The George Mason University Law and Economics Center (LEC), the most successful of these programs. The LEC began training judges in 1976 and has trained hundreds of federal

- Economic complexity significantly increased the likelihood that a court's decision is appealed. This effect is statistically and practically significant, with the appeal rate of economically complex decisions 11-17 per cent greater than for "simple" cases.

- Repeated exposure to complex antitrust issues by judges does not appear to have an impact to the appeal rate

The recent OECD Policy Roundtable suggested that judges be given a list of questions with which to determine the credibility of the witness.[108] Frederic Jenny, an economist and judge of the French competition court, has produced such a list for his fellow judges.

judges currently on the bench. At its height in 1990 the LEC Economic Institute for federal judges had trained 40 percent of the federal judiciary, including two Supreme Court Justices and 67 members of the federal courts of appeals. Henry G. Manne, 'How Law and Economics was Marketed in A Hostile World: A very personal history' in Francesco Parisi and Charles K. Rowley, eds., *The Origins of Law and Economics: Essays by the Founding Fathers,* Edward Elgar, 2005.

[108] OECD Policy Roundtable, *Presenting Complex Economic Theories to Judges*, Paris, 2008 (OECD 2008). Also *Judicial Enforcement of Competition Law - Policy Roundtables 1996*, OECD, 1997 http://www.oecd.org/dataoecd/34/41/1919985.pdf

ABOUT THE SPEAKER

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Dr Veljanovski is Managing Partner of Case Associates, Associate Research Fellow in the Institute of Advanced Legal Studies, University of London, IEA Fellow in Law & Economics, Adjunct Senior Research Fellow, Centre for Regulation and Market Analysis (CRMA), University of South Australia, Assoc. Member of the Chartered Institute of Arbitrators, and Member of the Economic Advisors' Panel, Infocomm Development Authority of Singapore (IDA). He is a well-known economist with over thirty years' experience as an adviser to companies on competition, regulatory and communications economics. He has been a director of several management and economics consulting firms, on the Board of listed public companies, a director of an economics research institute, and held a range of academic appointments in economics and law faculties in the UK, Australia and North America.

Dr Veljanovski has been selected as one of the '*most highly regarded'* competition economists globally and one of the top five in Europe by the 2006 Global Competition Review survey. He regularly acts as an Expert Witness in competition law, commercial and damage litigation, and on the communications and media sectors. Dr Veljanovski has recently acted as expert witness in the English High Court, Irish High Court, Federal Court of Australia, Dutch District Court, Finnish Higher Administrative Court, the UK Competition Appeal Tribunal, and the International Court of Arbitration. He has appeared as an expert in several high profile cases related to private damage claims for breach of antitrust laws such as *Crehan*, *Hendry*, and in the UK against members of the 'international vitamins' cartel', and as an expert on communications (fixed, mobile, computers) and media (cable, TV, newspapers, music etc.) sectors. Has has also advised on cases in the transport, water, credit/store cards, property, postal, paint, sport, Internet, tax and movies sectors/industries.

Dr Veljanovski has had a distinguished academic career. He was educated in Australia and the United Kingdom, holding several degrees in law and economics (B Ec. (Hons), MEc, DPhil.). After a short period at the Australian Federal Department of the Treasury he held a research fellowship at the Centre for Socio-Legal Studies at Oxford University. He was then appointed the first economist to a Law School in the UK at University College London where he developed law and economics courses, and taught law (tort, contract, financial regulation). He has also held academic posts at Monash University (Australia), York University (UK), and Visiting Professorships at the Universities of Toronto, New York, and Miami, and research posts with the Australian Law Reform Commission, Centre for Economic Policy Research (UK), Centre for Policy Studies (Australia) and Institute of

Economic Affairs (UK). As Research & Editorial Director of the Institute of Economic Affairs (IEA), an influential economics think tank, he was at the forefront of research and public debate on economic and industrial policies in the UK and Europe. He has written over 100 books and articles on industrial economics, economic reform, law and economics, and regulation including *The Economics of Law* (IEA, 2nd edn., 2006) and *Economic Principles of Law* (Cambridge UP, 2007). He is on the editorial board of the *UK Competition Law Reports* and the *Journal of Network Industries*, and is a member of the International Bar Association.

LITIGATION

Todd Pohokura Limited v. Shell Exploration NZ and OVM NZ, High Court, New Zealand, current

Commission for Communications Regulation v. eircom Ltd, High Court, Ireland, current

Connect Limited v. HM Revenue & Customs Commissioners, First Tier (Tax) Tribunal, current.

Grampian Country Foods v. Sanofi-Aventis, Competition Appeal Tribunal, current.

Dome Telecom v. eircom, High Court, Ireland (2009), settled.

Moy Park v. Hoffman la Roche, Aventis, High Court, England & Wales (2009), settled.

*PCCW v. Telecommunications Authority***,** Telecommunications (Competition Provisions) Appeal Board, Appeal 24, Hong Kong, 2009.

Seven Network v. News, Federal Court (Appeal) Australia (2008), judgment pending.

Millar & Bryce Limited v. City of Edinburgh Council, Court of Sessions, Scotland (2008) (1st competition case brought in Scottish courts), settled.

Megtian v. HM Revenue & Customs Commissioners (VADT 20894) (2008) LTL 21/1/2009.

Toshiba v. European Commission, European Court of First Instance (2007) (appeal against cartel fine).

Devenish Nutrition v. Sanofi-Aventis, High Court [2007] EWHC 2394 (Ch).

Firm 2 v. Rugby Football Union, High Court, England & Wales (2006).

Firm 1 v. International Rugby Board, High Court, England & Wales (2006).

Ineos Vinyls v. Huntsman Petrochemicals [2006] EWHC 1241 (Ch).

Barclays Bank v. Havenbedrijf Rotterdam (Hbr), EW High Court, (2005/6) (unlawful State aid loan guarantee)

AMP v. Royal Mail, High Court, England & Wales (2005/6).

At The Races v. Race Course Association, EW High Court (2005).

Partridge Publications v Ventures Media, EW High Court (2005).

BCL Old v. Aventis, Hoffman-La Roche, Case No. 1028/5/7/04, Competition Appeal Tribunal (2004) (1st damages case before CAT).

Deans Foods v. Roche Products, Hoffman-La Roche & Aventis, Case No. 1029/5/7/04, Competition Appeal Tribunal (2004).

Seven Network v News [2007] FCA 1062, Federal Court Australia ('mega-litigation' in Australia).

KPN Telecom v. NL Tree & Easynet Group, Den Haag District Court, Netherlands (2004/6).

MacDonald Dettwiler v. Local Government Information House, EW High Court (2003).

MasterCard International v Reserve Bank of Australia [2003] FCA 977 (JR on interchange fees regulation)

Crehan v. Inntrepreneur/Courage [2003] EWHC 1510 (Ch).

Sonera v. Finnish Competition Authority, Supreme Administrative Court, Finland (2003).

Hendry v. World Professional Billiards & Snooker Association, [2002] UKCLR 5. (1st High Court damage claim under Arts 81 & 82EC)

Optus v. Telstra, Federal Court, Australia (2001) [$1 billion damage claim].

R v. Secretary of States for Trade & Industry ex p BT3G and One2One [2001] EuLR 822.

Competition Authority v. Telecom Eireann, High Court, Ireland (1998).

ACCC v. Foxtel, Federal Court, Australia, (aborted 1998).

Clear Communications Ltd v. Telecom Corp. of New Zealand Ltd (1992) 5 TCLR 166.

BBC v. British Satellite Broadcasting (BSB), EW High Court (1989).

Case 86/82 *Hasselbad v European Commission* [1984] ECR 883