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**EXPERT ECONOMIC EVIDENCE
COMMENTARY**

1. The Honourable Justice Middleton's paper provides a valuable insight into the role of economic concepts and principles in forensic controversies and how the Court might be informed about them by expert economic evidence.

2. As Justice Middleton's paper indicates, a consideration of economic concepts is highly relevant to the interpretation and application of a statute such as the *Trade Practices Act* whose purpose and objects are informed by economic concepts. The *Trade Practices Act*, of course, has as a primary object the promotion of competition (s.2). Provisions such as Part IIIA and Part IV are presumably therefore directed towards the creation and maintenance of an open, competitive, free market economy. Hence, as Justice Middleton observes, courts should receive expert economic evidence both to assist in the understanding of the economic objectives of the *Trade Practices Act* and also to assist in the understanding and interpretation of specific terms having a specialised usage and meaning.

3. In some cases of course, as the paper recognises, the expert economic evidence will involve the application of concepts or principles to solve specific factual controversies generated by the particular case.

4. The paper elucidates three important distinctions or categories within the field of expert economic evidence. There is the purely theoretical or conceptual, there is opinion in the form of a conclusion or inference drawn from disclosed facts, and there is opinion or analysis of facts which is essentially evaluative or judgemental in character (eg, whether products are substitutes on the demand or the supply side, the geographic limits of a market and so on).
5. Each category presents its own challenges for the witness and the Court as the paper demonstrates.
6. Purely theoretical or conceptual evidence smacks of argument or submission and generally lacks a specific and detailed factual foundation. Justice Middleton notes that because of a Full Federal Court decision which suggested that such evidence offended the common law basis rule of evidence, and was therefore inadmissible, the Federal Court introduced a special rule to permit it. It may be that the Full Federal Court took too strict an approach to the basis rule in the *Arnotts* case. In any event, s.79 of the Commonwealth *Evidence Act* probably has the effect of relaxing the basis rule in respect of an opinion of a purely theoretical or conceptual nature.
7. Furthermore, the logic of the requirement that experts clearly disclose the facts or assumptions upon which their opinion is based, a requirement which is reflected in the Federal Court's "*Guidelines for Expert Witnesses*" and the supporting Explanatory

Memorandum, does not have the same force in respect of evidence of this kind. It is to be anticipated the Federal Court would allow those guidelines a different application in a case where the expert economist is not giving evidence of an opinion based upon proved or assumed facts but rather an explanation of principles relevant to the case without seeking to apply them to the factual controversy.

8. Expert evidence of this kind has some analogy in the field of intellectual property proceedings. In copyright, design or patent cases, an expert will often provide evidence (relating to similarity, novelty or inventiveness, for instance) which elucidates the question for the Court on which it must then form its own original opinion.
9. In other words, at this level the evidence can serve an educative function so as to provide the Court with an intellectual framework within which to decide the ultimate question. It is important to observe here that s.80 of the Commonwealth *Evidence Act* has relaxed the common law inhibition on an opinion which asserts the answer to the ultimate issue for decision.
10. Expert witnesses might wonder why the Court simply does not inform itself of elements of economic theory through published writings. The Court has some, albeit very limited power, to inform itself through independent inquiries in matters about which there can be no real dispute. However, economics is likely to be contentious. Generally, the Court should not inform itself without giving the parties the

opportunity to express their views on the works consulted. The purpose of the Court being informed by expert evidence is that the interests of justice are properly served. The precise nature and ambit of the material the Court is to take into account is clearly defined. The authority of the material can be tested before the Court and accepted or rejected. All parties to the proceedings have the opportunity to introduce and test the material.

11. It is when the expert economist's evidence moves from the purely theoretical to conclusions or inferences from foundational facts that the expert must give particular attention to the form of a forensic report which contains their opinion. It is in this context that it is particularly important that the expert make clear what is fact or assumption, and what is opinion, and how the expert has reasoned from one to the other. The requirement is not merely pedantic or formalistic. It serves important purposes. It enables, first of all, the Court to see clearly whether the opinion expressed falls within the witness's area of expertise. Secondly, it enables the Court to follow the logic or method by which the opinion is derived in order to see whether it is sound and justified. An expert who fails to comply runs the risk that their evidence will be treated as irrelevant and inadmissible. However, in my experience courts tend to approach compliance in a purposive and principled, rather than legalistic, way and a reasonable degree of latitude is allowed provided the objects I have mentioned are met.
12. Justice Middleton has also identified another category of case in which the

economist's evidence is "*argumentative*" in character. Justice Middleton notes the observations of Justices French and Allsop that in certain realms of discourse, the discipline of economics analyses and explains the world from the perspective of a social science (rather than a "*hard*" science). I take the description "*argumentative*" in this context to refer to the fact that the economist's conclusion (for instance, on the existence or non-existence of a market) is frequently judgemental on a matter about which reasonable minds may differ, and to the fact that it is often a conclusion on the ultimate issue for the Court to decide (for instance, a substantial lessening of competition). I suppose that we should not be surprised that the evidence of an expert economist should appear "*argumentative*". After all, there is anecdotal evidence that it is possible to lay all the economists in the world together end to end and still not reach a conclusion.

13. I commend Justice Middleton's paper to the conference.

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