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Economic Experts: how necessary are they?

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1 Introduction

1.1 In recognition of the economic underpinnings of regulation, expert economic evidence will continue to play an important role in the range of regulatory processes in Australia. Such processes include first instance decision-making processes before the regulators, merits review proceedings in the Australian Competition Tribunal (**Tribunal**) and judicial review proceedings in the Federal Court of Australia. This paper considers the current use of expert economic evidence in Australian regulatory processes, and explores recent developments in the acceptance and evaluation of economic evidence in the Tribunal and the Court.

1.2 Whereas under Part IV of the *Trade Practices Act 1974* (Cth) (**TPA**) the judiciary is responsible for enforcement of the relevant provisions, and therefore charged with considering the substantive issues raised by the legislation, the matters in the Federal Court that might be characterised as 'regulatory processes' are limited to judicial review of decisions by administrative decision-making bodies (the regulators and the Tribunal). Despite the Court being thus confined to considering 'errors of law' by the relevant decision-maker, expert economic evidence has found its way into Federal Court proceedings, including in respect of the proper construction of economic concepts in the relevant legislation and to impugn a decision by the regulator or Tribunal on the ground of *Wednesbury* unreasonableness. This paper considers a possible shift towards a more expansive approach to the admissibility of expert economic evidence in judicial review proceedings in these circumstances.

1.3 Interestingly, while the role for expert economic evidence is arguably expanding in the judicial review context, 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,[1] 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.

1.4 Regardless of the ultimate role played by it in proceedings, as noted above, expert economic evidence is likely to continue to play an important role in regulatory processes, irrespective of the forum. Accordingly, this paper discusses the 'tools'

[1] *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2.

available to regulators, the Tribunal and the Court for considering competing expert evidence.

1.5 The remainder of this paper is structured as follows. Section 2 describes the processes that might constitute 'Australian regulatory processes', while section 3 examines the role and nature of expert economic evidence in these processes. Section 4 assesses in detail the recent developments in the acceptance and evaluation of economic evidence in the Tribunal and Court. Finally, section 5 discusses the tools available to decision-makers to consider competing expert evidence in regulatory processes.

2 What are 'Australian regulatory processes'?

2.1 'Australian regulatory processes' deal with a range of specific issues but can all be said to relate to the determination of matters regarding access to infrastructure with monopoly characteristics. That is, regulatory processes culminate in decisions as to whether a facility or service will be regulated and decisions in respect of the terms of access (either directly through the setting of access terms for access seekers or indirectly through the determination of access provider revenues).

2.2 Regulatory processes arise under:

- the National Electricity Law (**NEL**) and National Electricity Rules (**NER**);
- the National Gas Law and National Gas Rules;
- Part XIC of the TPA (which establishes a telecommunications specific access regime); and
- Part IIIA of the TPA (which establishes a general access regime)

2.3 While gas and electricity distribution and transmission networks and telecommunications networks are subject to industry specific access regimes, Part IIIA establishes a general access regime. It has been applied to a range of industries, for example, railway networks, sewerage transmission and interconnection services and services provided by airports.

2.4 In terms of forum, regulatory processes can be categorised as follows:

- processes before a regulator;
- merits review proceedings in the Tribunal; and
- judicial review proceedings in the Federal Court.

2.5 Regulatory processes are fluid and can move between forums. A process before the regulator might come to an end, but a merits review proceeding in the Tribunal might take its place. Following a decision by either the regulator or the Tribunal, judicial review proceedings in respect of the decision may be commenced. The use of economic evidence in one process will often have significant implications for other processes, particularly where there is an evidentiary limit enshrined in the legislation,

such as in the telecommunications regime established by Part XIC and in merits review proceedings under the NEL/NER.

2.6 Part IIIA of the TPA, governing access to essential facilities, incorporates a number of 'regulatory processes', the main ones being:

- applications to the National Competition Council (**NCC**) asking it to recommend that a service be declared (s44F of the TPA);
- decisions by the Minister to declare, or not declare, a service (ss44H and 44HA);
- processes relating to the revocation of a declaration (recommendation of the NCC and decision by the Minister) (ss44J and 44JA);
- the provision of access undertakings by access providers to the Australian Competition and Consumer Commission (**ACCC**) (Part IIIA, Division 6);
- arbitration of access disputes by the ACCC (Part IIIA, Division 3); and
- applications to the Tribunal for review of:
    - a decision by the Minister to declare, or not declare, a facility as an essential facility or a decision to revoke a declaration (ss44K and 44L);
    - a decision by the ACCC in respect of an access undertaking (s44ZZBF); and
    - an arbitration decision by the ACCC (s44ZP).

2.7 Similar regulatory processes are provided for in respect of the telecommunications industry in Part XIC of the TPA. The processes established by Part XIC of the TPA can be contrasted with Part IIIA as follows:

- the ACCC considers and makes decisions to declare (and revoke declarations of) telecommunications services (in place of the two step process for declaring essential facilities involving the NCC and the Minister under Part IIIA);
- neither the ACCC's decisions to declare a telecommunications service (or revoke such declarations) nor its arbitration decisions are subject to a review on the merits by the Tribunal; and
- Part XIC provides for the ACCC to make orders exempting access providers from the access obligations resulting from declaration (ss152AS, 152ASA, 152AT and 152ATA), as well as Tribunal review of decisions to make (or not to make) such orders (s152AV).

2.8 A further distinguishing feature between the two Parts, which has implications for the role of economic experts in merits reviews by the Tribunal, is the presence of an evidentiary limit. Part XIC limits the evidentiary material that can be taken into account by the Tribunal upon review of ACCC decisions in respect of orders

exempting access providers from regulation (s152AW(4)) and access undertakings (s152CF(4)) to that material that was provided to or otherwise examined by the ACCC during the original decision-making process. No such limitation exists in respect of merits review of decisions under Part IIIA. An evidentiary limit also exists in merits review of decisions by the Australian Energy Regulator (**AER**) under the NEL/NER (discussed further below). The implications of evidentiary limits for economic expert material used in these processes are discussed further below.

2.9 A number of regulatory processes take place (or will in future take place) before the AER. Most notably, these processes relate to revenue regulation of electricity transmission and distribution networks in the national electricity market, as well as the gas transmission and distribution networks in all jurisdictions except Western Australia. As well as the processes relating to individual businesses, the AER has initiated processes with general application to revenue regulation, for example, development of AER guidelines and the review of the weighted average cost of capital (**WACC**) parameters to be adopted in revenue determination processes.

2.10 Decisions of the AER under the NEL/NER are subject to merits review by the Tribunal provided it can be established that a ground for review exists (see ss71B and 71C of the NEL). If a ground of review is made out, the Tribunal is required to consider any documents 'prepared, and used, by the AER for the purpose of making the reviewable regulatory decision and that the AER is made publicly available' (s71R(2)). As noted above, the Tribunal on review is subject to an evidentiary limit. The Tribunal may allow new information or material to be submitted if it 'would assist the Tribunal on any aspect of the determination to be made' and 'was not unreasonably withheld from the AER when it was making the reviewable regulatory decision' (s71R(3)). Parties other than the AER are prevented, however, from raising 'any matter that was not raised in submissions to the AER before the reviewable regulatory decision was made' (s71O(2)). The Tribunal has interpreted the evidentiary limit in this context as follows:[2]

> 'The overall picture, clearly enough, is that the Tribunal's review is not at large, but is a review of the AER's decision on the factual and legal grounds available, but only on the material provided to or before the AER.'

2.11 Finally, the decisions in regulatory processes made by an administrative decision-making body (ie, the regulators or the Tribunal), are subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**). Applications for review under the ADJR Act must be made on a ground specified in the ADJR Act (see s5). While the grounds on which applications can be based relate to 'errors of law', expert economic evidence can be introduced into judicial review proceedings where the argued grounds are those such as 'there was no evidence or other material to justify the making of the decision' or 'the making of the decision was an improper exercise of the power' (ss5(1)(h) and (e)). The latter ground requires consideration of 'taking an irrelevant consideration into account in the exercise of a power' or 'failing to take a relevant consideration into account in the exercise of a power' (see s5(2)).

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[2] *Re: Application by ElectraNet Pty Limited (No 3)* [2008] ACompT 3 at [69].

3 What is expert economic evidence?

What issues are experts addressing in regulatory processes?

3.1 Experts retained to assist with regulatory proceedings can offer expertise on a range of issues, including explaining economic concepts as they appear in the legislation and applying economic theory to the facts of the case (discussed in more detail below), evaluating particular propositions by reference to economic/econometric models, assessing input parameters into cost estimates and discussing technical matters in respect of the infrastructure or service the subject of the regulatory process.

3.2 In considering the kind of economic evidence adduced in regulatory processes, it is helpful to consider the processes as falling into one of two classes:

- decisions as to whether or not to regulate; and
- decisions as to how to regulate (that is, establishing the terms and conditions of access).

3.3 In deciding whether or not to regulate (eg, under Part IIIA and Part XIC of the TPA), the predominant issues addressed by expert economic evidence are:

- the effect of regulation on competition; and
- the question of whether the relevant infrastructure or service has bottleneck or natural monopoly characteristics.

3.4 Both matters are addressed by traditional industrial organisation economists.

3.5 In deciding how to regulate on the other hand, modelling and technical evidence (requiring expertise beyond that of a traditional industrial organisation economist) appears to be more prevalent. Modelling and technical evidence can be used in this class of regulatory proceedings, for example, to estimate costs, forecast demand, estimate capacity and to calculate WACC parameters. The AER (in regulating access to gas and electricity networks) and the ACCC (in setting access terms in the telecommunications industry) are required to assess considerably more modelling and technical evidence than the decision-makers in regulatory processes to determine whether or not to regulate access to a facility or service.

3.6 In both decisions as to whether or not to regulate and decisions as to how to regulate, evidence of industry experts may also be important. Such evidence is more likely to be adduced in regulatory processes under Parts IIIA and XIC of the TPA, than regulatory processes under the NEL/NER or National Gas Law/National Gas Rules. This is because, in the case of Part IIIA, the industries the subject of regulation can vary widely and thus the decision-makers may not possess the knowledge and expertise necessary to properly consider the matter. In the case of Part XIC, it may be because communications technology advances at a rapid pace and decision-makers require ongoing education as to the relevant infrastructure and services being provided. Decisions under Part IIIA and Part XIC can therefore be contrasted with decisions in respect of electricity and gas networks in that these industries are well known to regulators and do not experience high levels technological change.

3.7 Some of the issues addressed by expert evidence in regulatory processes are similar to the matters raised in the context of Part IV of the TPA, while other issues are quite different. For example, the objective of 'promoting competition' is a criterion for declaration under Part IIIA (s44H(2)(a)) and is relevant to considering whether a particular thing promotes the long-term interests of end-users of carriage services or of services provided by means of carriage services (s152AB(1)), which is the over-arching objective of Part XIC of the TPA (s152AB(2)(c)). The economic considerations relevant to assessing whether a particular thing promotes competition are clearly similar to those relevant to determining whether a matter is likely to have the effect of 'substantially lessening competition' for the purposes of Part IV of the TPA. By contrast, evidence as to the whether or not a particular facility is a 'natural monopoly' and modelling and more technical evidence is less likely to arise in a Part IV context.

Characterising expert economic evidence - 'evidence' or 'argument'?

3.8 As noted above, expert evidence in regulatory processes can assist parties to address a range of issues. For the purposes of considering the characterisation of expert economic evidence, explanatory economic analysis can be distinguished from more technical economic evidence, such as expert evidence in respect of WACC parameters. More discursive economic analysis differs from 'hard sciences', and even disciplines like econometrics and engineering, in that the facts underlying the opinion are more easily observed and proved in 'hard sciences' than those underlying an economic opinion. Economic opinion also involves a greater degree of abstraction. G Blunt, P Shafron and B Keneally described the difference as follows:[3]

> 'Economics is quite different to the physical sciences. The physical sciences apply inductively derived theoretical principles to observed facts in order to reach conclusions about observed elements. Economics involves the application of often highly abstracted, deductively derived to "facts". The abstractions involved in the construction of these models are often subjective and value laden, while the "facts" to which they are applied are often difficult to observe. This difficulty in observation of behaviour is overcome by assumptions as to the likely responses of rational actors. These assumptions are, typically, impossible to verify either because they are "non-falsifiable" or they cannot be tested experimentally. So economics, unlike the physical sciences, is not just a theory which can be applied to facts, but a way of determining just what the facts are.'

3.9 The Court has recognised that expert economic evidence is unlike other forms of expert evidence in that it is inherently argumentative or opinion-based in nature. Against the background of an attack on the credit of an economic expert in *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* (2006) ATPR 42−123, Allsop J said the following of the role of expert economic evidence (at 836 and 842):

> 'In cases such as this dealing with a social science, the views of Professor Brunt … illuminate one aspect of the helpful, indeed essential role for expert evidence in this field. In that chapter, Professor Brunt quoted Keynes at page 358, where that learned economist said:

[3] G Blunt et al, 'From *Arnotts* to *QIW* - A Study of Expert Evidence in Trade Practices Cases' (1994) 1 *Competition & Consumer Law Journal* 181 at 184.

> *The Theory of Economics does not furnish a body of settled conclusions immediately applicable to policy. It is a method rather than a doctrine, an apparatus of the mind, a technique of thinking, which helps its possessor draw correct conclusions.*
>
> …
>
> The recognition of the place of the expert economic assistance in the manner described by Professor Brunt means that often the point of the expert opinion is to give a form or construct to the facts. It may appear to be an argument put by the witness. So it is. The discourse is not connected with the ascertainment of an identifiable truth in which task the Court is to be helped by the views of the expert in a specialised field. It is not, for example, the process of ascertaining the nature of a chemical reaction or the existence of conditions suitable for combustion. The view or argument as to the proper way to analyse facts in the world from the perspective of a social science is essentially argumentative. That does not mean intellectual rigour, honesty and a willingness to engage in discourse are not required. But it does mean that it may be an empty or meaningless statement to say that an expert should be criticised for "putting an argument" as opposed to "giving an opinion".'

3.10 Given this, a question arises as to the nature of the expert economic evidence: is it 'evidence' or is it 'argument'?

3.11 As described further in section 4 below, the distinction between 'evidence' on the one hand and 'argument', or 'submission', on the other arises in the context of considering the admissibility of expert material in Court proceedings. As recognised by Greenwood J in *BHP Billiton Iron Ore v The National Competition Council* (2007) ATPR 42-190, where courts do not have the power to admit an economic expert's statements as evidence, the statements can be admitted as 'submission'. The court's power to do this rests in Order 10, rule 1(2)(j) of the Federal Court Rules, which provides that the Court may:

> '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'.

3.12 While the rules of evidence do not apply to merits review proceedings in the Tribunal, or to regulatory processes before the regulators, the distinction proves useful for considering the treatment of material produced by economic experts, irrespective of the forum.

3.13 Explanatory expert economic evidence might be used in regulatory processes to:

- interpret the legislation, including to explain the meaning of economic terms and concepts used in the legislation (or as discussed further in section 4 below, the administrative decision under review), by reference to economic theory;
- identify the facts relevant to the legal issues under consideration and to use economic theory to establish a framework for assessing those facts;
- assess the correctness of propositions in a proceeding as a matter of economic logic; and

- apply economic theory to the facts in order to reach a view on the ultimate issue for determination.

3.14 The use of expert economic evidence to interpret economic concepts in legislation has largely been accepted as 'evidence'. As a practical matter, economic evidence as to the meaning of economic terms and concepts used in the legislation is reserved for processes in the Tribunal and the Federal Court (the findings of the Federal Court are binding, and the findings of the Tribunal are often highly persuasive in future processes before the regulators, the Tribunal and the Court). Where an evidentiary limit operates on merits review in the Tribunal, however, parties may wish to consider bringing such evidence before the relevant regulator.

3.15 The more sophisticated uses of expert evidence, which raise more difficult questions as to how the material should be characterised, are those set out in the second, third and fourth dot points above.

3.16 So what does it mean if the economic material presented by parties to a regulatory process is treated as 'submission' rather than 'evidence'?

3.17 Justice French said (extra-judicially) of the distinction: [4]

> 'Notwithstanding the flexibility offered by [Order 10, rule (1)(2)(j) of the Federal Court Rules] 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 consideration [sic] if those primary facts cannot be found on the evidence.'

3.18 That is, while economic material admitted as 'evidence' goes to the correctness of the pleaded facts, economic material constituting 'submission' is an interpretation, or explanation of the effect of, facts as established by other means. Whereas competing expert 'evidence' is weighed by the Court (with the Court adopting a position based on the evidence before it), expert material admitted as 'submission' is no more than an argument to be considered and evaluated by the Court in the same way that arguments made by counsel for the parties are evaluated. In commenting on the implications of opinion evidence being admitted as 'submission' pursuant to the Federal Court Rules in Part IV proceedings, G Blunt, P Shafron and B Keneally observed:[5]

> 'One possible consequence of the [admission of expert opinion as submission] is that it may tend to reduce the status of economic evidence in Pt IV cases, a status which we have argued should rather be enhanced. By defining the contribution of economists as "submission" or "argument" rather than "evidence", the court will now have the opportunity to deal with economic input in much the same way as it deals with argument from counsel. In short, economic opinion may lose much of the force it should otherwise be accorded as coming from a trained expert.'

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[4] Justice R S French, 'Workshop on Competition Law for Judges and Lawyers in Papua New Guinea, The Role of the Court in Competition Law' 26 February 2005, p 26, available at www.fedcourt.gov.au.

[5] G Blunt et al, 'From *Arnotts* to *QIW* - A Study of Expert Evidence in Trade Practices Cases' (1994) 1 *Competition & Consumer Law Journal* 181 at 203.

3.19 While the Court has acknowledged the difference between economic evidence which is inherently argumentative and other forms of expert evidence, the difficulties associated with characterising expert economic evidence remain.

4 The use of experts in merits and judicial review - what expert evidence is being admitted by the Australian Competition Tribunal and the Courts, and for what purpose?

Judicial review in the Federal Court

Introduction

4.1 Judicial review of regulatory decisions is increasingly prevalent. This has been accompanied by increased attempts by regulated entities to introduce in judicial review proceedings expert economic evidence that was not before the regulator, ostensibly to evidence that the grounds on which review is sought are made out but often in a thinly veiled attempt to obtain merits review of the regulatory decision under scrutiny. These attempts are being made with increased success, most recently in the decision of Rares J in *Telstra Corporation Ltd v ACCC* (2008) ATPR 42-259.

4.2 This section of the paper explores whether the apparent increase in the admission by the Federal Court of new expert economic evidence (ie, evidence not before the regulator) in the judicial review of regulatory decisions is the product of a change in outlook or approach on the part of the Court or a change in the grounds relied upon by regulated entities applying for review.

Relevance and admissibility of expert evidence

4.3 As the judicial review of the regulatory decisions outlined in the earlier sections of this paper is conducted in the Federal Court (most commonly under the ADJR Act), the expert economic evidence adduced in the proceedings is subject to the rules of expert evidence set out in the *Evidence Act 1995* (Cth) (**Evidence Act**).

4.4 Section 56 of the Evidence Act establishes what has been described by Middleton J of the Federal Court as 'a threshold test of relevance on all expert evidence'.[6] It provides that 'evidence that is relevant in a proceeding is admissible in the proceeding' and '[e]vidence that is not relevant in the proceeding is not admissible'. Evidence that is relevant in a proceeding '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'.[7]

4.5 Section 76 of the Evidence Act provides that evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed. However, s79 establishes a specific exception to the inadmissibility of opinion evidence, providing as follows:

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[6] Justice Middleton, 'Expert Economic Evidence', 16 October 2007, available at www.fedcourt.gov.au.

[7] Evidence Act, s55(1).

> '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'.

4.6 Finally, s135 of the Evidence Act provides that the Court may refuse to admit evidence if its probative value is substantially outweighed by the danger that it might be misleading or confusing, or cause or result in undue waste of time. In addition, s136 provides that the Court may limit the use to be made of evidence if there is a danger that a particular use might be misleading or confusing.

4.7 As most readers would be aware, the Federal Court has issued a practice direction for expert witnesses, 'Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia', the 6th version of which was issued on 5 May 2008 (**Expert Guidelines**). The Expert Guidelines set out the expert's general duty to the court, the means by which the expert may avoid criticisms of partiality and the form in which the expert should present his/her expert evidence. While a failure to comply with the Expert Guidelines does not render expert evidence inadmissible, they are 'intended to facilitate the admission of opinion evidence' and compliance with them is useful in ensuring expert evidence is given proper weight.

Admission of new expert evidence by Federal Court and purpose for which admitted

4.8 Questions regarding the admissibility of new economic evidence adduced in proceedings for judicial review of regulatory decisions are most commonly resolved by reference to the 'threshold test of relevance'.

4.9 Assuming that expert evidence satisfies the 'threshold test of relevance', there are numerous other bases on which the Federal Court may rule that expert evidence is inadmissible. However, in recent proceedings for judicial review of regulatory decisions in which a party has sought to adduce new economic evidence, these questions of admissibility have rarely arisen.

4.10 This is perhaps because in judicial review proceedings, as distinct from Part IV enforcement proceedings, the economist is not called upon to opine quite so directly on the issues for determination by the Court. In the case of judicial review proceedings, the question for the Court will ultimately be whether the regulator's decision was made in accordance with law. By contrast, in Part IV proceedings, the proclivity of economic experts to address the factual disputes and ultimate issues for determination by the Court is something that has been said to account for the Court's reticence to admit economic evidence that articulates an opinion about the factual correctness and logical coherence of assertions as to economic facts and the application of economic theory or principles to the facts for the purpose of making a finding on a legal question at issue in the proceedings.[8]

[8] See, for example, G Blunt et al, 'From *Arnotts* to *QIW* - A Study of Expert Evidence in Trade Practices Cases' (1994) 1 *Competition & Consumer Law Journal* 181.

4.11 The relevance of economic evidence in proceedings for the judicial review of regulatory decisions will necessarily depend on the ground of review and the circumstances of the case.[9]

4.12 Until relatively recently, the 'threshold test of relevance' has operated to confine the use of expert evidence that was not before the regulator in judicial review proceedings to:

- evidence as to the proper construction of words used in the relevant statute, in particular where those words have a specialised or technical economic meaning; and
- establish that the decision under review was unreasonable in the *Wednesbury* sense - that is, the decision under review was so unreasonable that no reasonable decision-maker could have made such a decision[10].

4.13 The use of new expert evidence to establish the proper construction of words in a statute that have a specialised or technical meaning is now well established and uncontroversial.[11] There are numerous cases that support the admissibility of new expert evidence for this purpose in proceedings for the judicial review of regulatory decisions. Most of these cases rely on the seminal High Court decision in *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389. In that case, in considering the relevance of expert evidence as to the trade meaning of a composite phrase appearing in a statute, the Court observed that[12]:

> 'it will ordinarily make sense for a court or tribunal to take notice of the trade meaning of a word or words within that expression, provided such an interpretation does not lead to a result which is absurd … inconvenient, anomalous or illogical, futile or pointless, or artificial. Consideration of the trade meaning of individual words in such cases is more likely than not to lead to the interpretation that the makers of the instrument had in mind'.

4.14 It is also well established that new expert economic evidence as to the merits of the regulator's decision may be admissible in judicial review proceedings, if judicial review is sought on the ground that the regulator's decision was *Wednesbury* unreasonable. In rejecting new expert economic evidence on the merits of the ACCC's decision under review as irrelevant in *Foxtel Management Pty Ltd v ACCC* (2000) 173 ALR

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[9] See, for example, *McCormack and another v Commissioner of Taxation* (2001) 114 FCR 574 at 587, per Sackville J; *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at 566.

[10] See, for example, ss5(1)(e) & 5(2)(g) of the ADJR Act.

[11] See for example *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300; *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446; *Woodside Energy Ltd v Commissioner of Taxation* (2006) 155 FCR 357; *BHP Billiton Iron Ore v National Competition Council* (2007) ATPR 42-141.

[12] *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 401 - 402

362 (***Foxtel v ACCC***) (a finding that was upheld on appeal[13]), Wilcox J acknowledged that such evidence may be relevant to establish that the decision under review was *Wednesbury* unreasonable.

4.15 However, recent decisions regarding admissibility of expert evidence that was not before the regulator in the judicial review of regulatory decisions suggest that the Court is taking a more expansive approach to both:

- the admission of new expert evidence on the meaning of words with an economic or other technical meaning; and
- the admission of new expert evidence on the merits of a regulator's decision where a regulated entity is seeking to impugn the regulator's decision on the basis of *Wednesbury* unreasonableness.

Admission of expert evidence on words with economic or technical meaning

4.16 While it is well accepted that expert evidence may be adduced in judicial review proceedings to evidence the proper construction of statutory words with an economic or other technical meaning, recent decisions suggest that it may also be permissible to adduce such evidence in support of the objectives or economic rationale underpinning statutory provisions, or to evidence the meaning of technical terms used in the decision under review or during the decision-making process. These decisions purport to find support for the admissibility of expert evidence for this purpose on the basis of both the accepted principle that expert evidence can be adduced to evidence the proper construction of statutory words and the accepted principle that expert evidence may be adduced to establish that the regulator's decision was *Wednesbury* unreasonable.

4.17 In *Foxtel v ACCC*,[14] Wilcox J considered the relevance and resultant admissibility of an expert report adduced as evidence in a judicial review under the ADJR Act of the ACCC's decision of September 1999 to declare the subscription television broadcast service under Part XIC of the TPA. The expert report was comprised, in part, of a synopsis of Part XIC of the TPA, with comments upon the objectives of the Part and perceived problems in its application. In concluding that the expert report was irrelevant, and therefore, inadmissible,[15] Wilcox J observed that the expert's views on the objectives of the Part, and the perceived problems in its application, were 'not matters of economic theory or expertise' and were not 'issues in these proceedings'.[16]

4.18 While Wilcox J concluded that expert economic evidence on the objectives of Part XIC and the perceived problems in its application was not admissible, more recent decisions have involved the admission of economic evidence that explains the

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[13] *Telstra Corporation Ltd v Seven Cable Television Pty Ltd* (2000) ATPR 41-785.

[14] Upheld on appeal in *Telstra Corporation Ltd v Seven Cable Television Pty Ltd* (2000) ATPR 41-785 at [120]-[126].

[15] *Foxtel Management Pty Ltd v ACCC* (2000) 173 ALR 362 at [175].

[16] *Foxtel Management Pty Ltd v ACCC* (2000) 173 ALR 362 at [166].

objectives and economic rationale underpinning regulatory regimes. Most recently, in *BHP Billiton Iron Ore v NCC* (2007) ATPR 42-141 (***BHP v NCC***), Middleton J concluded that, in circumstances where no party had asserted that the term in issue ('production process'), had a technical or specialised meaning in economics, it was not open to the court to admit expert economic evidence on the interpretation of the statutory term 'production process' or the application of that term to the circumstances of the case.[17] Nonetheless, his Honour admitted such evidence to inform the Court as to the nature and context of Part IIIA of the TPA. In so doing, Middleton J observed:[18]

> 'I see nothing inappropriate in the court having regard to and admitting into evidence expert evidence to inform itself as to the nature of and the context in which Pt IIIA is to operate, just as it would be appropriate for the court to consider any economic writings on the subject: see [*Boral Besser* Masonry *Ltd v ACCC* (2003) 215 CLR 374] at 454, [247] per McHugh J. By admitting the expert evidence for this purpose, the material is presented in evidentiary form and all the parties know precisely the extent of the material that is before the court and that which is to be considered by the court'.

4.19 There is some precedent for Middleton J's approach. In *Re Dr Ken Michael AM; Ex part Epic Energy (WA) Nominees Pty Ltd* (2002) 25 WAR 511, in the judicial review of a regulatory decision regarding gas access arrangements under the Code for Natural Gas Pipeline Systems 1997, the Western Australian Court of Appeal allowed expert evidence on economic terms for the purpose of both construing economic terms in the Gas Pipelines Access (Western Australia) Act 1998 and the Code for Natural Gas Pipeline Systems, and informing the Court of the nature and objectives of competition policy underpinning the Act and the Code. In so doing, the Court observed:[19]

> '[E]xpert evidence may relevantly and usefully inform the Court as to this specialised usage, of which the Court would otherwise be unaware, so that the Court can determine whether the Act and Code is using particular words or phrases in their ordinary everyday usage, or in the specialised usage among those versed in this field of economics. Further, the expert evidence provides an appreciation of the nature and objectives of competition policy in the field of economics, and, in particular, of the regulation of essential infrastructure, so that the policy and objectives of the Act can be discerned with a greater and more reliable appreciation of the possibilities. In addition, the potential relevance of some concepts and provisions in the Act and Code can be more readily understood'.

4.20 Similarly, in *Visa International Service Association v Reserve Bank of Australia* (2003) (***Visa v RBA***) 131 FCR 300, Tamberlin J allowed expert evidence to be adduced on the meaning of the terms 'competition', 'market' and 'efficiency' in the relevant statutory instrument. In so doing, however, Tamberlin J articulated reasoning that would be equally applicable to expert evidence as to the objectives and economic rationale of the statutory regime and distinguished the findings of Wilcox J in *Foxtel v ACCC* to exclude such evidence on the basis of the circumstances of the case. After

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[17] *BHP Billiton Iron Ore v National Competition Council* (2007) ATPR 42-141 at [169].

[18] *BHP Billiton Iron Ore v National Competition Council* (2007) ATPR 42-141 at [172].

[19] *Re Dr Ken Michael AM; Ex part Epic Energy (WA) Nominees Pty Ltd* per Parker J, with whom Malcolm CJ and Anderson J agreed, at [107].

considering the Full Federal Court's affirmation on appeal of Wilcox J's decision, Tamberlin J observed:[20]

> 'In the present case, there is a claim of Wednesbury perversity and the statutory context is different to that in the Telstra case. In my view these differences are significant. The present case is concerned with economic regulation by the RBA and it would be unrealistic to ignore the guidance afforded by economic experts as to whether the terms have a meaning in the field of economics and as to the way in which the concepts have been applied and operate in practice.
>
> …
>
> In the present matter I am satisfied that the expert evidence was admissible on the basis that it is of assistance in understanding more fully the relevant and practical content of the concepts of "competition", "efficiency" and "market", so far as they are relevant to the present proceedings. In the particular context of a central bank charged with the regulation of the Australian economy where it is necessary to interpret terms which have a particular meaning in the art of economics, it would be inappropriate to shut out consideration of such evidence as being inadmissible, irrelevant or unnecessary'.

4.21 It is true that the decision in *Visa v RBA* can be distinguished from that in *Foxtel v ACCC* on the basis that there was a claim of *Wednesbury* unreasonableness in the former but not the latter. However, the inference that *Foxtel v ACCC* was not concerned with a statutory regime informed by economic objectives is not supportable and suggests that the decision in *Visa v RBA* represents a shift in judicial thinking regarding the admissibility of expert evidence not before the regulator for the purpose of informing the Court of those economic objectives.

4.22 In considering an appeal against *BHP v NCC*, however, the Full Federal Court took a different view of the use of expert economic evidence in a judicial review of regulatory decisions to provide an explanation of the objectives and economic rationale underpinning regulatory regimes. Justice Greenwood, with whom Sundberg J generally agreed, preferred the approach of Wilcox J, observing:[21]

> 'The appellants contend on appeal that the evidence of the economic experts is inadmissible as irrelevant. The evidence was admitted on the basis of the contextual elaboration of the extrinsic material. The evidence is relevant if it is evidence that if accepted could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding (Evidence Act 1995 (Cth), s 55(1)). … In this case, the experts did not seek to offer an economic opinion related to disputed or undisputed facts probative of a matter in issue. They sought to offer an historical or contextual explanation as an elaboration of extrinsic material going to Part IIIA of the Act. It is difficult to see how that evidence is truly admissible except perhaps in that unusual category of 'expert non-opinion evidence' descriptive of a relevant element of the economic discipline concerning the evolution of economic concepts of access to natural monopoly infrastructure, without offering any opinion about facts in issue.'

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[20] *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300 at [661] & [666].

[21] *BHP Billiton Iron Ore v the National Competition Council* (2007) ATPR 42-190 at 48-150 to 48-151.

4.23 Justice Greenwood went on to observe, however, that:[22]

> '[i]n any event, the material is capable of being received by the court and considered by force of Order 10, rule 1(2)(j) of the Federal Court Rules, by way of a submission rather than admissible evidence'.

4.24 The conservatism reflected in the Full Federal Court appeal decision is not reflected in the recent decision of Rares J in *Telstra Corporation v ACCC* (2008) ATPR 42-259. In that case, Telstra sought judicial review of the ACCC's determination of an arbitral dispute in respect of the ULLS between Optus and Telstra under Part XIC of the TPA. Justice Rares admitted expert evidence as to the meaning of technical terms used in the regulatory decision under review and the regulator's decision-making process, concluding that the evidence of technical experts 'was admissible to prove the meaning of technical terms used in the final determination [and related documents] in the context of the telecommunications industry'. The evidence admitted included evidence in relation to 'how concepts such as a soft dial tone, a communications wire and other network paths operated.'[23] While the principles informing Rares J's reasoning are not immediately apparent, a consideration of the authorities cited in support of his Honour's conclusion discloses that the conclusion is premised on both:

- the principle that expert evidence is admissible to evidence the proper construction of words used in the relevant statute;[24] and
- the principle that expert evidence, including as to the meaning of economic or technical terms used other than in the relevant statute, is admissible to impugn a regulator's decision on the ground of *Wednesbury* unreasonableness.[25]

4.25 While the expert evidence before Rares J was technical, rather than economic, Rares J's reasoning would be equally applicable to the use of expert economic evidence in judicial review proceedings to evidence the meaning of economic terms used in the regulatory decision under review and the related decision-making process.

4.26 Optus and the ACCC have appealed the decision of Rares J that the ACCC's decision was invalid and should be quashed. However, the grounds of appeal do not challenge Rares J's conclusions regarding the admissibility of expert technical evidence.

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[22] *BHP Billiton Iron Ore v the National Competition Council* (2007) ATPR 42-190 at 48-151.

[23] *Telstra Corporation v ACCC* (2008) ATPR 42-259 at [51].

[24] Justice Rares cites the seminal decision of *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at [48].

[25] Justice Rares cites *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300 at [50].

Admission of expert evidence on the merits of a regulator's decision to it on the basis of Wednesbury unreasonableness

4.27 In recent judicial review proceedings in the Federal Court (NSD 70 of 2008), the parties submitted to the Court expert economic evidence relating to the WACC parameter adopted by the ACCC in arbitrating a number of telecommunications access disputes (relating to access to Telstra line sharing service (**LSS**)) under Part XIC of the TPA. In alleging *Wednesbury* unreasonableness on the part of the ACCC in rejecting Telstra's arguments that there was 'welfare asymmetry' in relation to underestimating and overestimating the WACC parameter, Telstra has sought to rely on expert economic evidence not before the regulator. In response, the access seeker a party to the proceedings submitted expert economic evidence that was not before the ACCC to support its case that the decision by the ACCC was not *Wednesbury* unreasonable. While judgment in the proceeding is reserved at the time of writing, the case is a further example of the way in which judicial review proceedings can attain the semblance of merits review of the regulatory decision under scrutiny.

4.28 Absent *Wednesbury* unreasonableness as a ground of review, it will be more difficult to introduce expert evidence on the meaning of economic or technical terms other than for the purpose of construing statutory words taking a specialised meaning, and it will be very difficult to introduce expert evidence pertaining to the merits of the decision under review.

4.29 The decision of Wilcox J in *Foxtel v ACCC* provides an example of the latter. Justice Wilcox concluded that the expert's views on 'the steps "an economist" would take in determining whether a declaration under Pt XIC will promote the long-term interests of end-users' were irrelevant to the determination of the judicial review because 'Parliament chose to assign the decision about declaration, not to a hypothetical economist, but to a statutory body invested with a discretionary power'.[26] As a result:[27]

> 'the challenge to the 1999 declaration is made under the Administrative Decisions (Judicial Review) Act. Wednesbury unreasonableness aside, it was for ACCC [sic] to determine the facts pertinent to its exercise of statutory power'.

4.30 However, as disclosed by the more expansive approach in recent years to the admissibility of expert evidence on the meaning of economic or technical terms, the inclusion in the grounds for review by a regulated entity of *Wednesbury* unreasonableness can open the door to the admission of expert evidence not before the regulator for various purposes related to an assessment of the merits of the regulator's decision. This can occur even in the face of Court reluctance to admit such evidence because of the additional time and costs taken up by its consideration.[28] But there are still limits.

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[26] *Foxtel Management Pty Ltd v ACCC* (2000) 173 ALR 362 at [167].

[27] *Foxtel Management Pty Ltd v ACCC* (2000) 173 ALR 362 at [170].

[28] See, for example, *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 per Weinberg J at [457]-[459].

4.31 The 'threshold test of relevance' still operates to confine the expert evidence that may be adduced where *Wednesbury* unreasonableness is included as a ground of review. For example, Weinberg J excluded an expert report in *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 on the basis that it was irrelevant.[29] After observing that the economic theory advanced in that report had 'little, if anything, to do with the reasoning embodied in the [decision under review]', Weinberg J explained the principles underlying exclusion of evidence unrelated to the reasoning adopted in the decision under review as follows:[30]

> 'That does not, of itself, render it admissible. A challenge to a decision based upon Wednesbury unreasonableness, or on a "no evidence" ground, could, in some cases, be rebutted by showing that the decision might have been arrived at, or supported, by some means other than the reasoning actually employed.
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> However, there are sound reasons for limiting the admissibility of evidence of this type. The more far removed the theory proffered to support the decision is from the actual reasoning employed by the decision-maker, the more likely it is that judicial review will degenerate into the kind of interminable excursus into merits review that Aronson comments upon. Of course, much will depend upon how coherent, and comprehensible, the alternate reasoning happens to be, as well as how far removed it is from the actual reasoning that is impugned'.

Merits review by Australian Competition Tribunal

Introduction

4.32 The impact of the Tribunal's use of expert economic evidence on the preparation of expert evidence for regulatory processes cannot be overstated.

4.33 Experience tells us that, where merits review is available to regulated entities as an avenue for review, the use of expert evidence before the Tribunal is far more common. Recourse to judicial review tends to be more common where merits review is unavailable. Further, as discussed below, in merits review proceedings, expert economic evidence does not have to overcome the hurdles of admissibility to be presented to the Tribunal. As a result, the Tribunal's use of that evidence is far more likely to inform decisions regarding the formulation of the role in case theory for, and preparation of, expert evidence, than the use of that evidence by the Federal Court in judicial review proceedings.

4.34 After briefly commenting on the way in which the treatment of expert evidence by the Tribunal in merits review proceedings differs from the treatment by the Federal Court in judicial review proceedings, this section of the paper will consider recent developments in the Tribunal's use of expert evidence. As the Tribunal predominantly conducts merits reviews of regulatory decisions (its role in respect of Part IV matters largely confined, in practice, to the review of the ACCC's authorisation and notification

[29] *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [478].

[30] *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [476]-[477].

determinations[31]), these developments have the greatest potential implications for expert economic evidence prepared for regulatory processes.

Admissibility versus weight

4.35 In the Tribunal, questions of admissibility do not arise. The Tribunal is an administrative decision-maker. It does not exercise judicial power[32] and is not bound by the rules of evidence.[33]

4.36 As a result, issues in respect of expert evidence of the kind discussed above in the context of judicial review proceedings arise in the Tribunal as questions of weight. Such an approach is inevitable where the merits review proceedings are subject to an evidentiary limit that specifies that the Tribunal may have regard only to that material provided to or otherwise before the regulator. Some of this material will fall short of the standard required for admissibility in the Federal Court. While the Tribunal has recognised that it has the discretion to disregard evidentiary material (even where that material properly falls within an evidentiary limit applicable to the review proceedings),[34] there is no precedent for the calling in aid of this discretion as a means of excluding expert evidence.

4.37 Accordingly, given the formulation and preparation of expert evidence for regulatory processes is commonly informed by the availability of merits review in the Tribunal, that evidence is primarily formulated and prepared with a view to maximising its persuasive value rather than its admissibility. However, the distinction is more apparent than real.

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[31] While the Tribunal has the power to consider authorisation applications made directly to it in relation to mergers and acquisitions (see s95AT of the TPA), this power is, to date, untested.

[32] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, in which the High Court considered whether the predecessor to the Australian Competition Tribunal exercised judicial power, which exercise of power would have been invalid because the Tribunal was not a judicial body constituted in accordance with s72 of the *Constitution*. The High Court concluded that the Tribunal's adjudicative function did not involve an exercise of judicial power.

[33] Section 103(1)(c) of the TPA provides that in proceedings before the Tribunal, the Tribunal is not bound by the rules of evidence. The Tribunal has ruled that Division 2 of Part IX of the TPA applies to all review proceedings before the Tribunal, whether or not commenced under Division 1 of Part IX for review of authorisation and notification determinations: *Re Freight Victoria Ltd* (2002) ATPR41-884; *Re Lakes R Us Pty Ltd* (2006) 200 FLR 233. In addition, the Notes at the end of the ss152AW and 153CF (which set out the functions and powers of the Tribunal in Part XIC of TPA) read: 'Division 2 of Part IX applies to proceedings before the Tribunal'.

[34] In *Telstra Corporation Ltd (No 1)* [2006] ACompT 7 (at [30]) Goldberg J stated that just because documents fall within the relevant evidentiary limit 'it does not follow automatically that the Tribunal either will consider, or is bound to consider, and examine those documents.' Goldberg J went on to suggest that it remained open to parties to a proceeding to 'submit that a document should not be examined or looked at by the Tribunal or by other parties, whether on the ground of confidentiality, whether on the ground that the document was supplied in error to the Commission or was supplied in circumstances where there was an acceptance or an undertaking given that a document listed was only supplied for a particular purpose otherwise than for the purpose of the [regulatory decision under review]'.

4.38 In practice, the preparation of expert evidence with a view to maximising the weight it is accorded generally involves largely the same considerations as would apply to the preparation of expert evidence with a view to its admissibility in judicial review proceedings. These considerations include, for example, compliance with the Federal Court's Expert Guidelines, the choice of expert having regard to the possibility that the expert's opinion will support the party's case and the likelihood of examination and cross-examination of the expert, and the formulation of instructions to ensure the expert addresses the issues that are of relevance to the regulatory process.

4.39 By way of a final general observation, it should be recalled that in many instances an evidentiary limit operates to confine the evidentiary material that can permissibly be considered by the Tribunal in merits review of regulatory decisions (eg, decisions by the ACCC under Part XIC of the TPA and revenue determinations by the AER under the NEL/NER). The presence of an evidentiary limit has implications both for the Tribunal's consideration of expert evidence, including in particular the tools available to the Tribunal for considering competing expert evidence (discussed further in section 5 below), and the preparation of expert evidence. An evidentiary limit precludes the examination and cross-examination of the expert. This can inform a party's choice of expert in the preceding regulator decision-making process, with attributes such as technical knowledge and drafting skills becoming more important than witness presentation. It can also reduce the utility for the Tribunal of expert evidence, as shortcomings in an expert's drafting skills and loose language in an expert report may be magnified in the absence of accompanying oral evidence and counsel left to explain (and possibly reinterpret) expert evidence for the Tribunal that they may not themselves properly understand.

The Tribunal in transition and, with it, role of expert economic evidence

4.40 The Tribunal is undergoing a 'sea change'. Justice Goldberg has departed as President and Finkelstein J has been appointed in his place. It is fair to say that Finkelstein J is seeking to reinvigorate the Tribunal. Rejecting a presumption in favour of the 'status quo', Finkelstein J is eager to explore whether the way it has always been done is 'best practice' and to seek out opportunities for improvement.

4.41 The potential significance of this changing of the guard in the Tribunal was heralded at one of the first directions hearings at which Finkelstein J presided. To the surprise of senior counsel and instructing solicitors alike, Finkelstein J suggested that the previous formality and procedure of the Tribunal may be rejected for the purposes of those, and indeed future, proceedings, in favour of a very large round table, around which the Tribunal members, counsel and solicitors could sit to have a 'chin wag' about the issues.

4.42 So, what does this mean for the role of expert economic evidence in Tribunal proceedings for the merits review of regulatory decisions? It would appear quite a bit.

4.43 In one of the first decisions by the Tribunal following proceedings over which Finkelstein J presided,[35] his Honour would appear to have redefined the role of the

[35] *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2.

Tribunal and, by necessary implication, the role of the expert economic evidence before it.

4.44 In prior Tribunal decisions, the approach of the Tribunal to the assessment of, and reliance on, expert evidence was akin to the assessment by the Federal Court of admissible expert evidence. These Tribunal decisions disclose a careful scrutiny of the expert evidence adduced by the parties, and the contentions advanced by the other parties to the proceeding as to the shortcomings of that evidence, with the Tribunal choosing the resultant extent to which it accepted the expert evidence.

4.45 The Tribunal's decision, in *Telstra Corporation Ltd* (2006) ATPR 42−121, to affirm the ACCC's decision to reject the ordinary access undertaking submitted by Telstra for the LSS under Part XIC of the TPA illustrates the approach previously adopted by the Tribunal. In assessing the expert evidence as to whether the levelisation period used by Telstra in determining the LSS price specified in the undertaking satisfied the 'reasonableness' criteria in ss152AH and 152AB of the TPA, the Tribunal:

- scrutinised the expert report provided by Telstra's expert;
- accepted certain of the contentions of the non-Telstra parties; and
- concluded that while the expert report was 'presented … as a judgment that had balanced the relevant matters that need to be considered, [the expert] had only considered a subset of those matters to which the statute demanded attention be paid. In particular, [the expert] did not consider the long-term interests of end-users'.[36]

4.46 Similarly, the subsequent decision *Telstra Corporation Ltd (No 3)* (2007) ATPR 42-160, in which the Tribunal affirmed the ACCC's decision to reject Telstra's ordinary access undertaking for the unconditioned local loop service (**ULLS**), illustrates the Tribunal's historic approach to the use of the expert evidence before it. The Tribunal weighed various expert reports in respect of the reasonableness of the ULLS price specified by the undertaking relied on by the parties for the purposes of the proceeding. The reports related, in particular, to the reasonableness of the cost estimates generated by Telstra's 'PIE II' model and the reasonableness of Telstra's proposed approach to allowing for the asserted asymmetric social costs of underestimating the WACC relative to overestimating it. The Tribunal determined the extent of reliance that should be placed on the reports on the following bases:

- the reports did not, in fact, address that proposition;[37]
- the expert was instructed to proceed on the basis of the proposition in issue;[38] or

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[36] *Telstra Corporation Ltd (No 3)* (2007) ATPR 42-160 at [109]-[117].

[37] For example, the evidence of Dr Mitchell on the appropriateness of the PIE II Model used by Telstra to estimate network costs was found by the Tribunal to provide 'little evidence as to the suitability of the manner in which Telstra rolls forward the use of the PIE II model into periods subsequent to 2004/2005' (see *Telstra Corporation Ltd (No 3)* (2007) ATPR 42-160 at [359]).

- the facts or assumptions on which the expert opinion was based were not established by the party seeking to rely on the proposition.[39]

4.47 In summary, previous Tribunal decisions disclose a weighing of the expert material before it as 'evidence'. The Tribunal did not treat the expert material as 'submission' that could be accepted by the Tribunal or rejected in preference of the Tribunal's own view. For example, in the two decisions outlined above, the Tribunal did not revisit the relevant theory, making its own selection of the theory to be applied, and then apply those principles to the issues for determination to form its own opinion. It did not state its own view on the principles applicable to WACC estimation and apply those to determine whether or not there were asymmetric social consequences associated with WACC estimation. The Tribunal also did not seek to independently scrutinise the cost estimation models advanced by Telstra, with a view to forming its own opinion on the reasonableness of the cost estimates they generated.

4.48 While this paper has focused on previous Tribunal decisions in which the expert material before it was concerned with WACC estimation and network costing models, the approach to expert evidence outlined above would also appear to have been applied in considering expert evidence of a more traditional economic character.[40]

4.49 This historic approach of the Tribunal to the expert material before it can be contrasted with the approach taken in the Tribunal's recent decision in *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 (***Application by Chime***), a review on the merits of the ACCC's decision to grant exemptions sought by Telstra in relation to the local carriage service (**LCS**) and wholesale line rental service (**WLR**), subject to the imposition of certain conditions and limitations. The Tribunal's decision was made on remittal of the decision by the Full Federal Court following judicial

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[38] For example, in exercising caution in relying on Dr Mitchell's evidence on the appropriateness of the cost estimates generated by the PIE II Model, the Tribunal observed that 'Dr Mitchell relied on Telstra for a description of the model and for a number of other aspects of the model' (see *Telstra Corporation Ltd (No 3)* (2007) ATPR 42-160 at [353] & [359]).

[39] For example, in concluding that Dr Mitchell's evidence did not satisfy the Tribunal as to reasonableness of the PIE II Model's roll forward methodology, which involved an assumption of an unchanged total number of copper lines during the periods for which costs were estimated, the Tribunal observed that Dr Mitchell had assumed that 'total copper lines are forecast to decline slightly', whereas the evidence before the Tribunal did not '[support] the view that the aggregate number of SIOs in Australia would be likely to decline during the periods covered by the undertakings' because, in particular, 'Telstra's evidence [was] that the CAN expands each year due to new estates' (see *Telstra Corporation Ltd (No 3)* (2007) ATPR 42-160 at [360] & [365]). Similarly, the Tribunal accepted the evidence of Professor Bowman, Telstra's expert for the purposes of WACC estimation, that the long-term social consequences of underestimating the WACC may be greater than the long-term social consequences of over-estimating in circumstances where this would lead to the cessation of the services or a failure to develop services at a socially desirable rate. However, the Tribunal concluded that Professor Bowman had assumed these circumstances existed in respect of supply of the ULLS and Telstra had failed to provide evidence that demonstrated the correctness of this assumption (see *Telstra Corporation Ltd (No 3)* (2007) ATPR 42-160 at [449] & [460]).

[40] See *Qantas Airways Limited* (2005) ATPR 42−065,

review of the Tribunal's earlier decision in December 2008 to set aside the ACCC's decision and refuse to make the exemptions sought. The earlier decision[41] and the decision on remittal represent the first two decisions by a Tribunal with Finkelstein J presiding.

4.50 As a result of the Full Federal Court remittal of the decision and questions raised during the hearing about the Tribunal's ability to refer to economic literature not within the evidentiary limit applicable to the proceedings, the Tribunal in *Application by Chime* was prompted to revisit the role of the Tribunal. The Tribunal observed, by reference to the provision of the TPA under which it is constituted, that it is a specialist Tribunal, whose members have knowledge of, or experience in, industry, commerce and economics.[42] The Tribunal concluded that this disclosed a Parliamentary intent that the members of the Tribunal would 'bring to bear their particular experience and knowledge when performing their functions'.[43] The Tribunal contrasted its role with that of a judge as follows:[44]

> '[T]he function of a specialist tribunal is different to that of a judge. Judges must decide cases based on the facts that have been tendered in evidence. The judge is an expert in the law and will rely on that expertise in deciding a case. In addition, a judge may use extrinsic material as a source of ideas…
>
> The Tribunal, however, is better placed than a judge. It has no need to go to external material to inform itself of, for example, principles of industrial organisation, although those principles may go to the very heart of an issue before it. The reason the Tribunal has no need to look to extrinsic material is that some of its members were appointed because they possess knowledge of those principles.'

4.51 In short, the role of a judge is to decide cases 'on the facts that have been tendered in evidence' but the role of the Tribunal is 'to make use of its knowledge and experience if its knowledge and experience will assist it in arriving at a decision'.[45]

4.52 It is uncontroversial that the Tribunal is, in the sense articulated, better placed than a judge to determine the issues before it and is to make use of its knowledge and expertise in determining those issues. The previous President of the Tribunal would, no doubt, have agreed and considered that this was what the Tribunal, during his Honour's tenure, did.

4.53 It is the manner in which the Tribunal makes use of its knowledge and expertise in *Application by Chime* that sets the decision apart from its predecessors. The contrasting of the Tribunal's role to that of deciding cases 'on the facts that have been tendered in evidence' is a harbinger of the reasoning to come in the later parts of the decision.

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[41] *Application by Chime Communications Pty Ltd* (2008) 222 FLR 323.

[42] *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 at [5].

[43] *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 at [6].

[44] *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 at [8]-[9].

[45] *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 at [11].

4.54 The Tribunal's consideration of Telstra's applications for exemption in respect of the LCS and WLR commences with its identification of the economic principles and theories applicable to its assessment of the 'promotion of competition' element of the LTIE. The Tribunal first examines the economic principles and theories of market analysis applicable to the determination of the issues before it.[46] The Tribunal undertakes what can be summarised as a 'literature review', charting the development of the principles of market analysis from Scherer and Ross' structure-conduct-performance paradigm, and the critics thereof (noting, by way of example, Carlton and Perloff, and Peltzman), to the conduct and performance approach advocated by Bork to the models of strategic behaviour developed by Salop and Willig. This review of the relevant literature culminates in the Tribunal articulating its own opinion, in reliance on its specialised knowledge and experience, on the principles of market analysis to be applied in the proceedings:[47]

> 'The Tribunal is of the opinion that, despite its critics, the structure-conduct-performance model provides a limited but nevertheless useful foundation for purposes of market analysis, provided its limitations (its static nature, its unidirectional focus, its "group" rather than individual competitor focus, and its failure to consider inter-firm rivalries and strategic behaviour (especially with respect to entry deterrence and barriers to expansion)) are kept in mind.'

4.55 The Tribunal then proceeds to undertake a substantively similar exercise in respect of the models of competition,[48] the details of which need not be recited in full here. Suffice to say that contestability theory comes in for particular attention, with the Tribunal citing Baumol, Panzar, Bailey and Willig as the proponents of the theory and then citing the 'extensive' critical literature.[49] Of the critical literature, the Tribunal focuses on that which places greater emphasis on market structure as the determinant of market power, the difficulties of identifying and measuring the height of barriers to entry and expansion, the lesser impact of potential competition as compared to actual competition on the competitiveness of a market, and the failure of contestability theory to explicitly consider actual market conditions.[50] Again, the Tribunal concludes with an expression of its own view on the models of competition applicable to the issues for determination:[51]

> 'In the Tribunal's view a market is sufficiently competitive if the market experiences at least a reasonable degree of rivalry between firms each of which suffers some constraint in their use of market power from competitors (actual and potential) and from customers. The criteria for such competition are structural (a sufficient number of sellers, few

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[46] In section 2.2 of *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2, at [20]-[29].

[47] *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 at [29].

[48] In section 2.3 of *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2, at [30]-[48].

[49] *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 at [40]-[48].

[50] *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 at [42]-[47].

[51] *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 at [48].

> inhibitions on entry and expansion), conduct-based (eg no collusion between firms, no exclusionary or predatory tactics) and performance-based (eg firms should be efficient, prices should reflect costs and be responsive to changing market forces).'

4.56 Finally, the Tribunal undertakes a substantively similar exercise in respect of the principles and approach to determining competitiveness.[52]

4.57 The Tribunal rejected the expert report relied upon by Telstra primarily because it was formulated on the basis of contestability theory, a theory which, based on its specialist knowledge and expertise, the Tribunal had rejected in forming an independent opinion on the economic principles and theory to apply to the proceedings. The Tribunal relevantly stated:[53]

> 'There are two observations that need to be made at this point concerning Dr Patterson's report. First of all, it is formulated directly on the theory of contestable markets. What is surprising is that Dr Patterson did not take the trouble to discuss the theory and mention, and then attempt to deal with, the theory's many critics. He appears to have implicitly assumed that it is a theory that is accepted as an appropriate tool of analysis that can assist in the evaluation of any regulatory issue. The second observation is that in dealing with Telstra's case, Dr Patterson did not identify all the potential barriers to entry and expansion.'

4.58 The Tribunal did not confine itself to the economic material before it in determining the economic principles and theory to apply. None of the economic literature within the Tribunal's specialist knowledge that was considered and relied upon by it in reaching its own opinion on the economic principles and theory to apply was put before it by a party to the proceedings. In particular, the economic material before the Tribunal did not include any expert opinion, by reference to the critical literature, to the effect that Telstra's expert's reliance on the theory of contestable markets was misplaced. As there was no economic material advanced in the Tribunal advocating the economic principles and theories which the Tribunal determined were applicable, not surprisingly, the Tribunal was also required to apply those principles and theories to the facts of the case, in the absence of any guidance on their application from the expert economic material put before the Tribunal by the parties.

4.59 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'.

4.60 The role that this newly constituted Tribunal would appear to accord expert economic evidence is encapsulated in the approach to expert evidence discussed by Street J in *Anchor, Mortlock, Murray & Woolley Pty Ltd v Hooker Homes Pty Ltd* [1971] 2

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[52] In section 2.4 of *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2, at [49]-[54].

[53] *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 at [115].

NSWLR 278. [54] In discussing the role of the expert evidence of architects in a case relating to copyright infringement, Street J stated the following:[55]

> 'The fact that one particular expert of the highest authority and unimpeachable credit is permitted to swear to an opinion on similarity or dissimilarity does not relieve the court of the responsibility of forming its own opinion on this issue. In this sense the expert evidence in a suit such as the present fulfils a somewhat unusual role. It is almost as if each side calls an expert to argue out with counsel in examination-in-chief and cross-examination the similarity or dissimilarity which that particular expert sees between the plans and houses. *By attending to the progress of this argumentative process … the court is enabled to perceive and more readily to appreciate the points of similarity and dissimilarity. In this way the tendering of expert evidence is of value in exposing the facets of the ultimate question to which the expert opinion evidence is directed. But the important point is that, in distinction for the judicial process in relation to expert evidence such as is encountered in litigation, a court in the present type of litigation is entitled, and, indeed, bound, to form and act on its own original opinion*' [Emphasis added].

4.61 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.

4.62 It will be interesting to see whether the Tribunal is as willing to depart from the expert evidence before it in favour of its own opinion when confronted, not by an assessment of market power and competition effects known to industrial organisation economists, but by material of a yet more specialised and technical nature not within the expertise of Tribunal members (eg, the estimation of WACC parameter values, demand forecasting, depreciation methodologies and network costing models etc).

4.63 None of this is by way of a suggestion that the 'old' approach of the Tribunal to expert material was 'right' and the 'new' approach of the Tribunal is 'wrong'. To the contrary, the Tribunal's approach arguably strikes the correct balance, in circumstances where the Tribunal, itself, is an 'expert' in economics and, as recognised at the outset of this paper, economic evidence is by its nature more akin to 'argument' or 'submission' than an expert opinion as to the existence of facts.

4.64 Nonetheless, the 'new' approach of the Tribunal brings with it uncertainty for the parties before it, particularly as the Tribunal revisits and reshapes, over time and with the development of economic theory, its opinion on the economic principles and theories for application in the matters before it. This, in turn, raises issues of procedural fairness that the Tribunal should seek to manage, if it adopts the 'new' approach in future proceedings.

4.65 This apparent change in the use of expert economic evidence by the Tribunal in merits review proceedings is not simply a matter of semantics. The practical

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[54] Referred to with approval in *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300 at [663].

[55] *Anchor, Mortlock, Murray & Woolley Pty Ltd v Hooker Homes Pty Ltd* [1971] 2 NSWLR 278 per Street J at 286

implications for experts and their instructing solicitors are significant. There are potential implications for a party's choice of expert and how many experts to engage, as well as for the subject matter that an expert should potentially canvass in their report.

4.66 Should this approach be adopted in future Tribunal proceedings, it would no longer suffice to address the expert economic evidence presented by the other parties to the proceeding. It would be desirable to predict the expert economic views of the Tribunal and address these as well, or at least allow for the possibility that the Tribunal will conduct its own review and/or draw on its existing knowledge of alternate economic theories not presented to it by the parties and perform its own application of those theories to the facts as found by the Tribunal. This, in turn, may involve:

- briefing alternate expert economists from differing schools of economic thought (rather than a single expert) to address, on the basis of their own economic views, the issues raised by the proceedings;
- the inclusion by the expert in their expert report of an economic literature review and a discussion of the implications for their expert opinion of economic views that differ from their own that have a degree of academic acceptance.

5 Tools for considering competing expert evidence

5.1 Where expert evidence is submitted by parties to regulatory processes, the decision-maker is often required to evaluate competing arguments advanced by different experts. The nature of expert economic evidence is such that expert economists can advance material with dramatically different consequences for the outcome, and the regulator, Tribunal or Court will need to assess and evaluate the competing economic material.

5.2 In processes before the regulators, expert evidence is subject to comparison by the regulator itself. Regulators are typically well equipped with the relevant expertise to assess the competing expert evidence placed before them (particularly economic evidence). The regulator may be assisted in this regard by the experts engaged by the parties to the process:

- directly critiquing the opinions of the other experts involved; and
- responding to criticisms made of their own reports.

5.3 The regulator may also choose to engage an expert of its own to assist it to assess the competing evidence before it, particularly in those areas where it may not possess the necessary technical expertise (eg, the NCC sought independent technical/engineering advice on railway capacity issues in considering the application for declaration of Mount Newman and Goldsworthy railway services and the AER regularly engages experts to consider cost forecasting by regulated businesses).

5.4 The expert evidence presented to regulators will be particularly important in those cases where, on merits review in the Tribunal, there is an evidentiary limit imposed. In such cases, parties are limited to using counsel to advocate one expert's approach

over the other, based on the material that was before the regulator. The manner in which a report is prepared for the purposes of the process before the regulator will therefore clearly impact on its credence in Tribunal proceedings.

5.5 By contrast, in judicial review proceedings before the Federal Court, and in those merits review proceedings before the Tribunal where no evidentiary limit is applicable, the Court or Tribunal can employ various case management techniques to test competing expert evidence put before it.

5.6 Most well-known among these is the 'hot tub'. The 'hot tub' is a technique for facilitating the consideration of complex economic analysis, particularly those involving economic modelling, by those members of the Tribunal or the Court that have limited knowledge and understanding of economics. It involves a mix of direct exchanges between expert and expert, and between expert and counsel. The success of the 'hot tub' technique is critically dependent on whether it is properly structured and controlled by the judge.

5.7 At its best, the 'hot tub' narrows the issues in dispute, facilitates the Court or Tribunal's consideration of the expert evidence and allows each party to put and test expert evidence. However, 'hut tubs' are not without their limitations, which have been neatly summarised by Henry Ergas as follows:[56]

> 'To begin with, economists are not trained in, or at all familiar with, the forensic analysis involved in cross-examination and rarely approach hot tubs in a structured and systematic way. Additionally, the language in which economists assess each other's work is no less technical than that which underpins the analysis they undertake, and inevitably involves many terms of art, and references to the literature, which non-economists will find difficult to understand, much less assess. Moreover, hot tubs are especially at risk of being dominated by those participants who are most confident or assertive - traits that bear little relation to the merits of the analyses being presented. Finally, time constraints often mean that the discussion remains relatively superficial, further limiting its value'.

5.8 While the use of 'hot tubs' is not without criticism, they are likely to remain a technique frequently employed by both the Tribunal (in the absence of an evidentiary limit) and the Federal Court, as the judiciary is, by all accounts, enamoured with the 'hot tub' technique. Justice Middleton in advocating the use of the 'hot tub' technique (which his Honour made use of in considering the expert economic evidence in *BHP v NCC*), noted that 'hot tubs' can be flexibly employed and are a progressive tool for a new generation of judges and counsel:[57]

> '[I]f the hot tub process is being employed, the process itself can be quite flexible. Much will depend upon the judge, the issues being discussed, the individual characteristics of the experts themselves, and the experience of the lawyers involved. To one Senior Counsel, clearly antagonistic to his own participation in the "hot tub", I suggested that that part of the trial could be left to his younger, more progressive junior

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[56] Henry Ergas, 'Reflections on expert economic evidence' (2007) 45(2) *Law Society Journal (NSW)* 68.

[57] Justice Middleton, 'Expert Economic Evidence', 16 October 2007, at [45], available at www.fedcourt.gov.au.

> counsel, who seemed to be enthused with the idea of jumping into a "hot tub". I assumed junior counsel's concept of hot tubbing was the same as mine. As it turned out, Senior Counsel rose to the occasion and became an enthusiastic participant.'

5.9 Another case management technique to facilitate the consideration of competing expert evidence is the experts' conference. The experts' conference, if successful, confines the issues in dispute. It involves a meeting of the participating experts at the direction of the Tribunal or the Court, for the purpose of defining the areas of agreement and disagreement between the experts and identifying the reasons for any disagreement. Critical to the success of the experts' conference is the independence of the experts. The Expert Guidelines expressly state in this regard (at clause 3.1) that:

> 'If experts retained by the parties meet at the direction of the Court, it would be improper for an expert to be given, or to accept, instructions not to reach agreement.'

5.10 Expert economic evidence is invariably dependent on the facts and assumptions on which it is based and can be highly sensitive to changes in these. This poses a difficulty in Court and Tribunal proceedings in that the facts and assumptions are generally not established until after the giving of expert evidence and expert reports often do not disclose the extent to which the expert opinion expressed therein is robust to a change in facts or assumptions. A technique that has been employed by the Tribunal with relative success to facilitate the consideration of the sensitivity of expert evidence to changed facts and assumptions is the provision of questions to the experts, which are premised on a small number of facts and assumptions (which may have been established or may simply be open to the Tribunal to find), that the experts are asked to address in their oral evidence.

5.11 These various case management techniques were put into practice by the Tribunal in *Qantas Airways Limited* (2005) ATPR 42−065 (**Qantas / Air NZ**), in which six economists were engaged by the parties to the proceeding to provide evidence.[58] The Tribunal directed the experts to meet at a pre-hearing experts conference to discuss the issues raised by the factual evidence, in order to see whether they could reach agreement on relevant issues, and if not, to identify areas of disagreement.[59] While the process was ultimately unsuccessful in Qantas / Air NZ, the Tribunal indicated it would persist with pre-hearing expert conferences, though it suggested the conferences would be chaired and supervised by a Registrar of the Tribunal, in the hope there would be 'greater definition of the relevant issues'.[60]

5.12 The Tribunal then brought the experts together in a 'hot tub' process. To 'focus the attention of the economists on relevant issues', the Tribunal prepared questions for the economists, which were based on assumptions that were either non-controversial

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[58] While Qantas / Air NZ involved a review of an ACCC decision to refuse authorisation, the same techniques can be engaged by the Tribunal in regulatory processes. Justice Middleton for example used the 'hot tub' approach in Middleton J in *BHP Billiton Iron Ore v National Competition Council* (2007) ATPR 42-141.

[59] *Qantas Airways Limited* (2005) ATPR 42−065 at [213].

[60] *Qantas Airways Limited* (2005) ATPR 42−065 at [213].

facts or findings that the Tribunal considered open to them on the basis of the evidence.[61] The 'hot tub' procedure then continued with the following:[62]

> 'the expert witnesses being called before the Tribunal to give evidence at the same time. Each, in turn, makes an opening statement and after that is completed the economists are given the opportunity to question each other and develop a dialogue with one another to encourage consensus on issues that are non-contentious, and to clarify points of difference on those issues upon which expert opinion remains divided. They are then cross-examined by relevant counsel.'

5.13 During the 'hot tub', the presiding member plays an active role as moderator. However, the 'hot tub' also requires discipline on the part of the expert involved. In Qantas / Air NZ, the Tribunal suggested that the Federal Court's Expert Guidelines should apply *mutatis mutandis* to the Tribunal,[63] and while experts are able to advocate an opinion, they should not advocate for a party. The Tribunal in Qantas / Air NZ criticised some of the experts involved for failing to respond to questions whose answers might have been adverse to the case put by the party calling them and for using inflammatory language.[64]

5.14 These techniques can also now be utilised in the Federal Court, following the introduction of Order 34A of the Federal Court Rules, which allows the Court or a judge to direct:

- expert witnesses to confer;
- expert witnesses to produce joint documents;
- expert witnesses to give opinion on the opinions of other expert witnesses; and
- that cross-examinations or re-examinations be conducted.[65]

5.15 Finally, both the Tribunal and the Federal Court can consider engaging experts themselves to assist with the assessment of economic or technical issues raised in proceedings. The Tribunal has in the past, for example, employed a person with

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[61] *Qantas Airways Limited* (2005) ATPR 42−065 at [214].

[62] *Qantas Airways Limited* (2005) ATPR 42−065 at [215].

[63] *Qantas Airways Limited* (2005) ATPR 42−065 at [217].

[64] *Qantas Airways Limited* (2005) ATPR 42−065 at [222]-[223]. The Tribunal considered that the experts in question provided 'non-responsive answers and deviated to discussions of other issues which supported the case of the [other parties]'. The Tribunal also said that one expert's description of claimed cost savings as 'almost entirely bogus', their submissions regarding barriers to entry as a 'desperate attempt to bolster a case which failed comprehensively' and statements that the applicants 'may have attempted to finesse [a particular] issue with the aid of a cunning but long discredited concept of contestability' gave the Tribunal 'no confidence that [it] could rely upon [the expert] for independent expert testimony.'

[65] The technique has in fact been used in the Federal Court, for example, by Heerey J in *Australian Competition and Consumer Commission v Boral Ltd* (1999) 166 ALR 410.

economic expertise and familiarity with the telecommunications industry to assist it to consider a number of telecommunications matters. Such a person might assist Tribunal members to come to a view in respect of the written expert reports presented to the Tribunal by the parties or during 'hot tub' processes. In those cases where a question for an expert witness arises, the Federal Court also has the power to appoint an expert as the court expert to inquire into and report on that question (Order 34, Federal Court Rules).