IS THERE LAW AFTER ECONOMICS: SOME ISSUES OF INTEGRATION

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I. INTRODUCTION

Part IV of the *Trade Practices Act* 1974(Cth) deals with a range of conduct by corporations which may affect the state of competition in the market. The object of this paper is to discuss some issues relating to the role of economics and economists in competition law and policy.[1] In order to set the parameters for the use of economics in court, it will be necessary to discuss generally the points of contact between law and economics in trade practices legislation. This will be followed by consideration of some possible uses of economics by judges and lawyers, which will be contrasted with the existing legal constraints imposed upon the reception of economic analysis by evidentiary rules.

Underlying the discussion is one central assumption – that competition cases will be adjudicated by a judge or judges sitting in court. Proceedings for a civil penalty or other remedy by the Trade Practices Commission, for civil remedies by a private applicant or for a declaration by any interested party are adjudicated in the Federal Court of Australia.[2] Other matters arising under Part IV,[3] however, may fall to be decided by other non-judicial or quasi-judicial bodies, such as authorization in the public interest by the Trade Practices Commission of conduct which may fall within one of the prohibitions of Part IV, and the review *de novo* of such decisions by the Trade Practices Tribunal.[4] In other jurisdictions, decision-making is remitted to bodies composed in whole or in part by non-lawyers, including economists.[5] For the purposes of this paper, however, these basic questions

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[1] The paper will be limited to Part IV matters. Issues of law and economics in respect to Part V matters relate primarily to the public policy decision to legislate: See A. Duggan, *The Economics of Consumer Protection: A Critique of the Chicagoan Case against Intervention*, Adelaide Research Paper No.2, (Adelaide Law Review, 1983); A. Duggan and L. Darvall, *Consumer Protection: Law and Theory* (1980).

[2] *Trade Practices Act* 1974 (Cth.) ss. 86 (exclusive jurisdiction conferred on Court), 4 ("Court" defined as Federal Court Australia), and 163A(1) (jurisdiction respecting declaration and other orders).

[3] s. 88.

[4] s. 101.

[5] For example, in Great Britain, the Restrictive Practices Court presides with one judicial member and two or more lay members; *Restrictive Practices Act* 1976, s. 7. The Monopolies and Mergers Commission has been composed of a range of non-lawyers chaired by a non-judge lawyer, see D. J. Giljstra, ed., *Competition Law in Western Europe and the U.S.A.*, Vol. 3, tab UK. P. C, P. 4.

of whether lawyers or economists or other persons should be deciding competition cases and the kind of decision-making institutions employed are not directly addressed, and the questions posed by trade practices adjudication will be examined here in the context of traditional judicial institutions and procedures.

II. A LAWYER'S VIEW OF TRADE PRACTICES ECONOMICS

Why should economics be a factor in decision-making under Part IV of the *Trade Practices Act*? The simple, if obvious, answer may be that the Act is attempting to effectuate economic goals and that economics can assist the decision-maker in the pursuit of those and perhaps other goals. The follow-up question to that is, given some role for economics, what kind of role is economic theory to play in determining trade practices cases?

At this stage, one should distinguish between the various potential roles for economics and for economists. One way is to distinguish roles on the basis of the extent of the economist's involvement in the legal decision-making process. At the most basic level, an economist may take a problem posed by a judge or lawyer and utilise his or her expertise to deal with the specific part of a case to which economics may contribute.[6] At a more sophisticated level, if the problem is entirely rooted in economics, the economist may give advice as to the best ways to achieve the specified objectives.[7] Finally, at a completely different level, the economist provides a new analytical structure to a problem traditionally viewed in purely legal terms.[8] The former two roles provide the most potential for a practical role for the economist in trade practices matters; the latter is a shorthand way of describing the growth industry that has come to be known as "the economic analysis of law".[9]

Another way to look at the potential role of economics in competition law is to examine the practical role of the economist in litigated cases. At one level, the economist may work with the facts of the case, developing and evaluating economic evidence for use in court and, as a witness, evaluating that evidence by way of expert testimony.[10] At another, the economist may give advice as to an economic test which ought to be applied by the court

[6] A. Klevorick, "Law and Economic Theory: An Economist's View" (1975) 65 *Am. Eco. Assoc. Ann. Papers 237.*

[7] Ibid. p. 238.

[8] Ibid. p. 239.

[9] See generally, R. Posner, *Economic Analysis of Law* (2nd ed., Boston and Toronto, Little, Brown & Co. 1977); C. J. Veljanovski, *The New Law-and-Economics: A Research Review* (Oxford, Centre for Socio-Legal Studies, 1982).

[10] W. R. Jentes, "Defining the Role of the Economist – A Lawyer's Perspective" (1979) 48 *Antitrust L. J.* 1838, 1840; I. M. Stelzer, "Defining the Role of the Antitrust Economist – An Economist's Perspective" (1979) 48 *Antitrust L. J.* 1844, 1845.

when evaluating the facts.[11] To a degree, these two roles may reflect a difference in the types of economic approach which may be brought to bear on a case.[12] It should be noted, in any event, that this latter potential role for the economist is significantly different from the conventional roles that experts have generally performed in litigation.

Once these potential roles that the economist may play are established, the next step is to decide whether there are any limits to those roles. In every case, the use of economics may be limited by one of two general factors. The first of these limitations is imposed by the substantive goals of the governing legislation. Economic goals may not form the only aim of the statute, and economic means may not be the sole means by which those ends may be achieved. The aims and means of a piece of legislation are rarely singular in nature, so that the economic ingredients present may necessarily have to be balanced and weighed against the non-economic elements. Second, the extent to which the economic theory and practice can be integrated into the legal decision-making will be limited by the non-substantive (or procedural) constraints inherent in the process of legal adjudication.

The basic question with respect to the first limitation is whether legislation in support of competition has as its primary or sole goal the pursuit of the efficient distribution of resources or allocative efficiency.[13] It has been argued that competition legislation may include as goals such diverse aims as income redistribution, promotion of small business, prevention of economic concentration and promotion of the freedom of the entrepreneur.[14] The significance of a diversity in goals is that many of these aims may necessarily conflict with or detract from the pursuit of allocative efficiency, and that a broad approach to the goals of competition legislation may mean a modification or limiting of conventional economic theory in the pursuit of purely economic goals, and corresponding limitations in the role of the economist.[15] Although many, if not all economists and lawyers would argue that the only appropriate goal for competition policy is the promotion of allocative efficiency, no clear consensus has emerged from legislative, judicial, or academic sources. In the United States there is a running

[11] For examples of this type of evidence in use see: *Hecar Investments No. 6 Pty Ltd* v. *Outboard Marine Australia Pty. Ltd.* (1982) 62 F.L.R. 159, 165-166; revd. (1982) 44 A.L.R. 667. *R.* v. *Hoffman La-Roche Ltd.* (1980) 109 D.L.R. (3d) 5, 38, 44.

[12] C. Edwards, "Use and Abuse of Economics in Antitrust Litigation" (1962) 20 *ABA Sec. of Antitrust Law* 38-40.

[13] A clear affirmative answer to this question is contained in P. Areeda and D. Turner *Antitrust Law* (Boston and Toronto, Little, Brown & Co., 1977), vol. 1. A similar answer has been assumed in many of the Australian texts: G. Walker, *Australian Monopoly Law* (Melbourne, Cheshire, 1967) p. 8; G. Q. Taperell, et. al., *Trade Practices and Consumer Protection* (3rd ed., Sydney, Butterworths, 1983), ch. 1.

[14] For a summary, see K. Elzinga, "The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?" (1977) 125 *U.Pa.L.R.* 1191.

[15] Although the limitation may apply to the articulation of goals, an economist may provide usable input as to the costs and benefits of non-economic goals, and the most effective ways of achieving them.

debate in the judicial and academic literature,[16] and some concern for goals other than allocative efficiency has been exhibited in the competition policy of the European Economic Community and Canada.[17]

The potential conflict in goals and its implications for the use of economics in adjudication give rise to the question: how clear are the economic aims of Australian competition legislation? Although detailed consideration of this question is beyond the scope of this paper, it is possible to make some preliminary comments. The history of competition legislation in Australia indicates a very mixed approach to the merits and demerits of competition, generally without particular reference to economic welfare.[18] Both of the predecessors to the 1974 Act lacked a coherent philosophy of competition and incorporated substantial non-economic elements.[19] The 1974 Act

[16] See L. Sullivan, "Book Review" (1975) 75 *Col.L.R.* 1214; L. Sullivan, "Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust", (1977) 125 *U.Pa.L.R.* 1214; L. Sullivan, "Antitrust, Microeconomics and Politics: Reflections on Some Recent Relationships" in Siegfried, ed., *The Economics of Firm Size, Market Structure and Social Performance* (Washington, Bureau of Economics, Federal Trade Commission, 1980) p. 9; E. Fox, "Economic Concentration, Efficiencies and Competition: Social Goals and Political Choices" (1977) 46 *Antitrust L. J.* 882; R. Pitofsky, "The Political Content of Antitrust" (1979) 127 *U.Pa.L.R.* 1051; L. B. Schwartz " 'Justice' and Other Non-Economic Goals of Antitrust" (1979) 127 *U.Pa.L.R.* 1076. For representative replies from advocates of efficiency-based antitrust policy see F. Easterbrook, "Is there a Ratchet in Antitrust Law" (1982) 60 *Tex.L.R.* 705; O. Williamson, "Commentary" in Siegfried, ed., *op. cit.*, p. 78.
This debate stems, in part, from a perceived tendency of the courts to emphasize economic efficiency to the exclusion of other goals. See, for example, *National Society of Professional Engineers* v. *U.S.* 435 U.S. 679 (1978) and *Continental T.V. Inc* v. *GTE Sylvania* 433 U.S. 36 (1977). See discussion in D.I. Baker and W. Blumenthal, "The 1983 Guidelines and Preexisting Law" (1983) 71 *Cal. L.R.* 311, 317-321.

[17] In Canada, there has been little explicit debate, although contrasting approaches to competition policy have highlighted different attitudes to the role of efficiency. Compare: Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa, Minister of Supply and Service, 1969) at 19 with: L. Skeoch and B. McDonald, *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa, Supply and Services Canada, 1976) and W. T. Stanbury, "Dynamic Change and Accountability in a Canadian Market Economy: Summary and Critique" (1977) 15 *O.H.L.J.* 1.
The EEC has explicitly opted to use its competition policy as a means of breaking down national market barriers and to assist economic integration: See *Treaty of Rome*, art. 85; *I.C.L.* v. *E.C. Com.* [1972] C.M.L.R. 557.

[18] It has been argued that the 1906 Act was primarily an expression of protectionist sentiment: See A. Hopkins, *Crime, Law and Business: The Sociological Sources of Australian Monopoly Law* (Canberra, Australian Institute of Criminology, 1978), pp. 18-30; and that it came about as a second-best alternative to direct government control of monopolies: See S. C. Joyner, *The Commonwealth and Monopolies,* Sydney Studies in Politics: 4 (Melbourne Cheshire, 1963); D. J. Stalley, "Federal Control of Monopoly in Australia" (1956-59) 3 *U.Qld.L.J.* 258. The 1965 Act reflects the success of the assault by businessmen on the original 1962 legislative proposals. The decision to legislate has been explained as incorporating values relating to social justice as well as to competition: A. Hopkins, *op. cit.*, pp. 69-71; W. Pengilley, "The Politics of Anti-trust and Big Business in Australia" (1973) 45 *Australian Quarterly*(#2) 45.

[19] The 1906 Act, although said to be broadly modelled on the Sherman Act, incorporated numerous qualifications that limited the scope of the Court construing the legislation, and directed its attention to numerous non-economic factors, see *Industries Preservation Act* 1906 (Cth.) ss. 4(1), 6(1) (defining "unfair competition" in terms of causing low wages, industrial disorganization, or unemployment). The 1965 Act adopted a soft U.K. approach to regulation of competition, excluding from consideration several types of potentially anti-competitive conduct, and subjecting the rest to a broad test of public benefit. *Restrictive Trade Practices Act*, 1965 (Cth.) s. 50 (public interest test).

represented an attempt to promote more vigorous and comprehensive stimulation of competition, but incorporated substantial public policy elements not derived from an efficiency-based approach to legislative goals.[20] The efficiency debate has not squarely hit the Australian courts, although there is some indication it may yet do so.[21]

At its most complete, the influence of economic thought in trade practices could extend from designating the goals of the legislation, to providing definitions of prescribed or regulated activities; from formulating standards to be used in giving substance to the definition, to providing analytical and research techniques in the application of the definition and its standards to a given factual situation. The difficulty is that such economic thought is filtered in its application through the very non-economic institution of the Federal Court.[22] This gives rise to further limitations on the reception of economics in trade practices litigation.[23]

The initial problem is whether the court will be able to discern the desired economic goals in construing and applying the legislation. Restrictions upon the use of secondary sources in determining legislative intent have in the past bound the degree to which a judge may rely upon such materials.[24] Recent federal amendments to expand the range of materials to which a judge may have resort will only resolve a part of the problem,[25] for they assume that the policy basis for legislation may be easily determined in those materials, an assumption of which one must be wary.[26] As we shall see even the

[20] The evidence is both internal and external to the *Trade Practices Act*. In enacting the 1974 Act, it was explicitly recognized that the aims and methodology of welfare economics could not be fully incorporated into the Act: Australia, *Parliamentary Debates*, House of Representatives, 16 July 1974, 227-8. The original Act and its 1977 amendments demonstrate concern with such factors as small business protection: see amended s.45A(3) and (4) (partial exemption for some recommended price agreements and co-operative buying and advertising groups). Recently proposed changes to s.49 are quite explicit in the goal of small business protection: See Attorney General's Department, *The Trade Practices Act: Proposals for Change* (Canberra, Australia Government Publishing Service, 1984) pp. 9-11. Furthermore, the paternalistic approach of Part V may confuse and affect legislative decision-making with respect to Part IV.

[21] Contrast, for example the statement of legislative philosophy in Australia, *Report of the Trade Practices Act Review Committee* (1976) p. 13 (quoting the Tribunal in *Re Queensland Co-operative Milling Association*; *Re Defiance Holdings* (1976) 25 F.L.R. 169) with Australia Trade Practices Consultative Committee, *Small Business and the Trade Practices Act* (1979), v. I, pp. 32-33. To date, no court has taken direct issue with the cornerstone philosophical statement in *Q.C.M.A.* (187): "Competition may be valued for many reasons as serving economic, social and political goals. But in identifying the existence of competition . . . we must focus upon its economic role as a device for controlling the disposition of society's resources".

[22] The role of the Tribunal in decision-making under the Act is not directly considered.

[23] This question is dealt with differently and more comprehensively in M. Brunt, "Lawyers and Competition Policy" in D. Hambly (ed.) *Australian Lawyers and Social Change* (Sydney, Law Book Co., 1976), p. 266.

[24] For a review of the current judicial debate, see *TCN Channel Nine Pty. Ltd.* v. *Australian Mutual Provident Society* (1982) 42 A.L.R. 496.

[25] *Acts Interpretation Act* (Cth.), s.15AB.

[26] In the United States, where the use of legislative history is well-established, there has been debate over the legislative intent behind the anti-trust laws: see H. Thorelli, *The Federal Antitrust Policy* (Baltimore, Johns Hopkins Press 1955), W. Letwin, *Law and Economic Policy in America* (New York, Random House, 1965); R. Bork "Legislative Intent and the Policy of the Sherman Act" (1966) 9 *J. of Law & Econ.* 7.

determination of the basic policy direction does not relieve the court of the troublesome task of developing the expertise to execute those policy goals.

Even assuming that the goals of competition regulation are purely efficiency-oriented, and that the sole aim of the legislation is the implementation of the desired economic policy, this unitary aim will necessarily be distorted by judicial concerns with values such as equity, certainty and justiciability, which are inherent in the process of the adjudicative system. These values arise out of the conflict-based organization of our system of dispute resolution. At its crudest, it may be asserted that even with respect to legislation implementing social and economic policy the court charged with the enforcement of the legislation is concerned less with ascertaining an empirically knowable truth than with the resolution of conflicts of interests and the apportioning of outcomes.[27] In trade practices the conflicts and the basis for their resolution are created by statute, and it is the implementation of this conflict model that gives rise to the justice-based considerations which mould and shape the substantive elements of the process.

Not only does the institutional structure and process of judicial adjudication shape the use of economics, but the peculiar mode of judicial analysis limits its adoption. In posing the question whether judges should adopt holus-bolus the analytical approach of economists it is assumed that there may be a difference between the way judges (and lawyers) decide things and the way economists decide things.[28] As a science, or discipline with scientific pretensions, economics appears to be concerned with the development of theories and models respecting the allocation of resources formulated from deductive reasoning. Legal reasoning, on the other hand, employs deductive reasoning only to a limited degree, and relies much more heavily upon analogy and precedent in developing, on a case-by-case basis, approaches which will permit decision-making and conflict resolution, even where there are either gaps in the relevant economic theory, or where the economic models break down under the pressure of real-world factors.[29] Through the use of these tools legal reasoning has adapted peculiarly to the problem of decision-making in a second-best world.

None of the foregoing is meant to downplay the role of economic theory, goals and structures in judicial decision-making in the trade practices area. However, law is the instrument chosen for the realization of social and economics policies and it should be recognised that, in the end, it will be the legal process that will mould and shape the outcome. The legal decision-

[27] This approach is developed in J. Thibaut and L. Walker, "A Theory of Procedure" (1978) 66 *Cal. L.R.* 541. The truth-justice dichotomy does not originate there, but has its roots in the copious literature comparing adversarial and inquisitorial proceedings. For an opposing view see P. Brett, "The Implications of Science for the Law" (1972) 18 *McGill L. J.* 170.

[28] Some of what follows is paralleled in M. Brunt, "Lawyers and Competition Policy" supra n.18, pp. 287-290. In the end our conclusions differ in that our views of the blending of law and economics are based on slightly different recipes: see infra n.30.

[29] E. Levi, "An introduction to Legal Reasoning" (1948) 15 *U.Chi.L.R.* 501; J. R. Murray, "The Role of Analogy in Legal Reasoning" (1982) 29 *U.C.L.A.L.R.* 833.

maker must be accountable to and subject to criticism by the economist, and his or her decision-making must be substantially educated and animated by economics.[30]

Given this, the central question for application is not one of whether judges should be trained in economics, or whether economists should know more law; the key may be to make the judges and lawyers more aware of the relevance of economics and make the economic substance more digestible by the legal system. The question then becomes one of practical implementation.

III. POTENTIAL ROLES FOR ECONOMISTS

Economics and economists have a role not only in providing the court with content for those concepts in the Act clearly imported in whole or in part from economic theory, but also in assisting in the formulation of standards for provisions in the Act which, at first blush, bear little resemblance to economic concepts. Judicious use of economic analysis may assist courts in providing standard, generally worded provisions. Even if the courts ultimately reject the economic approach to the provision in favour of non-economic approach, such an approach may provide a focal point in the judicial debate so as to provoke a more thoroughly reasoned response to the dilemma of legal standard formulation.

One example will suffice. Section 46 of the *Trade Practices Act 1974* (Cth) prohibits a corporation in a position to substantially control a market from taking advantage of that position for the purpose of damaging competitors, preventing entry or reducing competition. Leaving aside the threshold question of when is a corporation "in a position substantially to control a market" (which has been mooted elsewhere),[31] the central task confronting a court in construing section 46 is whether the corporation, in taking its impugned action, has taken advantage of its market power for the prohibited pupose. What factors will the court look to to determine the purpose of the corporation and whether the power has been used to advantage?

Judges in the British Commonwealth when faced with a section containing

[30] Fried makes the point more artfully in a passage in which his references to philosophers could be easily replaced by references to economists:
"The picture I have, then, is of philosophy proposing an elaborate structure of arguments and considerations which descend from on high but stop some twenty feet above the ground. It is the peculiar task of law to complete this structure of ideals and values, to bring it down to earth; to complete it so that it is seated firmly and concretely and shelters real human beings against the storms of passion and conflict . . . The lofty philosophical edifice does not determine what the last twenty feet are, yet if the legal foundation is to support the whole, then ideals and values must constrain, limit, inform, and inspire the foundation – but no more. The law really is an independent, distinct part of the structure of value." C. Fried, "The Artificial Reason of the Law or: What Lawyers Know?" (1981) 35 *Tex. L.R.* 35, 57.

[31] See G. Q. Taperell, et. al., *Trade Practices and Consumer Protection*, op. cit., pp. 296-308.

the word "intent" or "purpose", particularly in regulatory legislation, generally treat the matter as an inquiry into the subjective intent of the corporation.[32] Unfortunately, as subjective intent is rarely provable by direct evidence, particularly in a corporate context, courts are loath to infer a culpable intent from the corporation's acts or other circumstances, and they have accepted rather curious explanations for circumstantially suspicious conduct. This reluctance is particularly well-illustrated by the case of *T.P.C.* v. *C.S.B.P. Farmers Ltd.*[33] In that case a tracking co-operative had been frustrated in its attempts to become a distributor for the local monopolist importer-wholesaler and to obtain supplies from the local monopolist's supplier. It managed to arrange for supplies from outside the country and planned an advertising campaign to publicize this new source of supply. The day before the advertising was due to start the local monopolist reduced its selling price significantly, to a level just below the projected selling price of the co-operative. The trading co-operative then abandoned its plans to enter the market. The judge declined to infer a conscious predatory intent from the circumstances of the refusal to supply and the reduction in price. Although the specific result may be explained in terms of possible non-joinder or evidentiary problems,[34] the approach taken is fairly typical.[35] In view of a fairly consistent and conservative judicial response to this sort of legislative formulation, one might legitimately criticize the legislature for a purely subjective intent-based standard.[36] Currently proposed amendments to the Act address this problem through the addition of an effects-based standard designed to supplement the existing purpose standard.[37]

Given section 46 as presently phrased, how might a court approach the section on a more balanced basis to permit it to be applied effectively with a degree of consistency and certainty? One piece of existing judicial dogma provides a possible gateway. A characterisitic of several recent cases, which has been applied in some trade practices decisions, has been to define the purpose of an action not in terms of subjective intention but in terms of an

[32] *S.S. Construction Pty. Ltd.* v. *Ventura Motors Pty. Ltd.* [1964] V.R. 229, 241; *Re South African Supply and Cold Storage Co.* [1904] 2 Ch. 283; *Chandler* v. *D.P.P.* [1964] A.C. 763.

[33] (1980) 53 F.L.R. 135.

[34] It is arguable that C.L.F., the supplier, should have been joined as a party. Furthermore, it is unclear precisely what evidence was led by the defendant, C.S.B.P., respecting the circumstances surrounding their price reduction.

[35] The same difficulty has arisen in the interpretation of the purpose requirement in securities offences: see for example *Commissioner for Corporate Affairs* v. *Green* [1978] V.R. 505 (refusal to infer purpose and motive from circumstantial facts).

[36] Although legislative drafting techniques to overcome this problem are beyond the scope of this paper, for an innovative approach to regulatory conduct and the use of intent or purpose, see P. Anisman, *Proposals for a Securities Market Law for Canada* (Ottawa, Consumer and Corporate Affairs, 1979), vol. 2, pp. 227-229.

[37] *Trade Practices Amendment Bill* 1984 (Exposure Draft) (Cth.), cl. 12, explained in *The Trade Practices Act: Proposals for Change*, op. cit., pp.7-9. Downplaying the intent element of predatory pricing has not been supported in other recent Australian policy analysis: see, *Report of Trade Practices Act Review Committee*, (1976) pp. 39-40; Trade Practices Consulative Committee, *Small Business and the Trade Practices Act* (1979) v.l, pp. 66-69.

objective purpose necessarily to be implied from the nature and consequences of the Act.[38] Applied to section 46, this would mean that one would look at the act which is said to constitute "taking advantage" and examine its effects or potential effects to determine whether they included the list of harms set out in paragraphs 46(1) (a), (b) and (c). If the court, as a consequence of its inquiry, find the requiste harm, it should presume intent and hold the infraction proved.

A movement to an objective, effects-based standard, either through judicial interpretation or by legislative amendment, is not without hazards. Uniformed application of such a standard may result in *any* pricing or other competitive activity taken by a large firm which adversely affects the position of competitors being held illegal. Such over-inclusiveness may result in unfairness which acts to the detriment of the competitive process.[39] With either an objective standard or subjective statutory tests, the task for the court is clear – it must move beyond the bare words of the statute in search of substantial criteria which may enable an understanding application of the Act.

The question then becomes one of choosing the standards to be used and, in part, assessing the accuracy and practicability of economic standards. This process is not without some difficulty, as the following discussion will attempt to demonstrate in the context of one type of conduct which may infringe section 46 of the *Trade Practices Act*, that is the use of predatory pricing to damage competitors or prevent competition.[40]

A conventional, if vague, rationale for prohibiting predatory pricing is that society wishes to prevent conduct by a firm which uses its market power to extend or increase its competitive position by damaging its competitors or preventing competition by means that would not be employed in a normally competitive market.[41] Under section 46 of the Act, as under the applicable European Economic Community legislation, it is presumed that the firm already possesses a certain degree of power which would enable it to behave independently in the market to the detriment of competition and competitors.[42]

The adoption of a more conduct-based approach to section 46 provides an entree for the economist, for the court must still generate the objective

[38] See *Slutzkin et al* v. *Commissioners of Taxation* (1977) 140 C.L.R. 314 and *Peate* v. *Federal Commissioner of Taxation* (1964) 111 C.L.R. 443 cited in *Dandy Power Equipment Pty. Ltd.* v. *Mercury Marine Pty. Ltd.* (1982) 44 A.L.R. 173, 207. The courts unfortunately have developed the test so as to require an analysis of whether the intent required under the particular provision is subjective or objective – another opportunity for arbitrary pigeon-holing.

[39] Criticisms of an effects-based test in an amended s.46 have reflected this fear: see, for example Business Council of Australia, *Trade Practices Act Proposals for Change – Part IV: An Analysis of the Green Paper* (May 1984), pp. 33-36. In the United States, the danger of judicial overkill is well illustrated by the trial judgment in *Berkey Photo Inc.* v. *Eastman Kodak Co.* 457 F. Supp. 404 (1978 S.D.N.Y.), overturned on appeal 603 F.2d 263 (1978, 2nd Cir.).

[40] In this discussion, predatory pricing which might fall within section 46 is taken not to include price discrimination dealt with under section 49.

[41] L. Sullivan, *Handbook of the Law of Antitrust* (St. Paul, West Pub. Co., 1977) pp. 108 ff.

[42] *Treaty of Rome*, art. 86.

standards to be used in assessing the conduct. One approach is to use the specific words of the statute to determine whether the conduct impugned is likely to have the effect (and therefore the purpose) of eliminating or damaging existing competitors, or preventing market entry by potential competitor, or preventing competition. What is required by this approach is a fact-based inquiry to determine the actual or potential consequences of the actual or potential conduct. The economist may bring his analytical expertise to bear on the factual circumstances of the industry to assist in the analysis of actual entry and exit in the industry, barriers to entry and changes in the state of competition.[43]

Another approach which the court over time may develop is the use of benchmarks to assess the legality or illegality of certain conduct. One of the problems of dealing with a fact-based approach is that the range for judicial inquiry is potentially very large in determining what constitutes damage, deterrence, prevention and elimination. Rather than entering into a full-blown industry analysis on every occasion, the court may over time develop shorthand tests that reflect some degree of generalization about the nature of the conduct, tests which entail a full or partial presumption of illegality.

An example of this might be use of the "abnormally low price" as one test for determining whether pricing conduct infringes section 46.[44] This test reflects a view that dominant firms may employ their market power to cut prices in the short term to damage or eliminate competitors in the anticipation that in the medium or long term the decreased competition will enable the recoupment of those short term losses and the subsequent extraction of increased monopoly profits.

Assuming in the face of some debate that this is one reasonable criterion for the court to employ in assessing the effect of conduct, the court then must consider how to determine what is an abnormally low price. At this point the economist may point to a number of potential tests that will allow the court to further transform the "abnormally low price" test into applicable standards. At this stage, the court and lawyer should be strongly cautioned **not** to ask the simple question "how does an economist determine when a price is abnormally low (or predatory)?". As the recent debate in the United States has demonstrated,[45] the tests proposed by economists (and lawyers

[43] See generally, G.H. Dession, "The Trial of Economic and Technological Issues of Fact" (1949) 58 *Yale L.J.* 1019, and 1242.

[44] This forms part of the statutory standard employed in Canada: *Combines Investigation Act*, R.S.C. 1970 s.34(1) (c).

[45] In 1975 Messrs. Areeda and Turner initiated this debate by proposing a general rule that prices below reasonably anticipated short-term marginal cost should be deemed unlawful: P. Areeda and D. Turner "Predatory Pricing and Related Practices under Section 2 of the Sherman Act" (1975) 88 *Harv. L. Rev* 697. This was followed by a series of articles by various commentators supporting or criticizing "the Areeda-Turner rule", or proposing an alternate formula. For current summaries of the debate, see J.D. Hurvitz and W.E. Kovacic, "Judicial Analysis of Predation: Emerging Trends" (1982) 35 *Vand. L.R.* 63; J.F. Brodley and G.A. Hay, "Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards" (1981) 66 *Cornell L.R.* 738.

delving into economics) can be numerous and conflicting. When turning to economic theory in this context, one should be aware that the judiciary will not only be adjudicating upon the facts of the case, but upon the relevant economic test to be employed in assessing those facts.

Should the judge be placed in a position of choosing between competing economic theories? Should judges adopt purely economic tests to the exclusion of other benchmarks? The first economic tests for predatory pricing offered to the American courts were formulated with a view to providing judicially administrable tests that were rationally based in economic theory.[46] This made it very attractive for courts to adopt the economic test as the legal standard, but also resulted in two difficulties. The first one was that some courts had difficulty in grasping economic concepts and made clear mistakes in their application. The second amd more important difficulty was that it became apparent that the economic test did not reflect a true consensus of economic opinion, and perhaps was not viewed as critically as it might have been at the outset.[47] As the criticisms and refinements of academic and judicial commentators became known however, courts become more circumspect in their treatment of this test and began to introduce modifications to the original test or to adopt alternative tests put forward by others. At this stage in the United States, there is no test generally accepted by courts and economists for the determination of predatory pricing.[48]

Although the inconclusive debate in the United States has led some to question the effort to provide the court with a test based on economics,[49] the real effects of the predatory pricing debate probably will be increased judicial awareness of the potential application of economic tests and hopefully increased skill in their use. Whatever future developments there are in this regard, concern with choosing one fixed rule should not be the ultimate goal of the court for a number of reasons. As the United States debate has shown and as commentators have argued in other contexts, no one economic test can be even adequately responsive to the range of circumstances and activity.[50] Replacing simple legal tests with simple economic tests may end up merely replacing black letter law with black letter economics. Furthermore, advocating increased use of economic criteria does not entail total aban-

[46] See P. Areeda and D. Turner, *op. cit.*

[47] Economists and lawyers exhibiting differences of opinion include, in addition to Areeda and Turner, Williamson, Baumol, Klevorick and Joskow, and Scherer: see J.F. Brodley and G.A. Hay, op. cit.

[48] Courts in the United States at first came close to adopting completely the Areeda-Turner rule as the test for legality: *Janich Bros. Inc.* v. *American Distilling Co.* 570 F.2d 848 (1979, 9th Cir.); *Hanson* v. *Shell Oil Co.* 541 F.2d 1352 (1976, 9th Cir.). Recently, however, the same courts have back-pedalled to a position where the Areeda-Turner test is one important element to be taken into account in assessing the legality of conduct: see *Transamerica Computer Co.* v. *I.B.M. Corp.* (1982-83) Trade Cases para. 65, 218 (9th. Cir). For a comprehensive discussion of the cases, see J.D. Hurvitz and W.E. Kovacic, op. cit.

[49] J.F. Brodley and G.A. Hay, op. cit., 792-794.

[50] In addition to the articles and cases cited above, see W. Schmalensee, "On the Use of Economic Models in Antitrust: The Realemon Case" (1979) 127 *U.Pa.L.R. 994.*

donment of non-economic criteria in fashioning tests for legality. In the rare cases where explicit evidence of predatory intent is available, it should be clearly considered. Other non-cost behavioural criteria would also be relevant, such as pricing without regard to cost, and other economic or business indicators.[51]

A broad-minded approach to defining predatory pricing would increase the likelihood of a court coming to a balanced "real" decision. The danger with this approach is that the court would be flooded with economic and non-economic argument and find the burden of weighing the multitudinous factors impossible. Moreover, the judicial system must respond to more than an economic constituency in its application of the law and must balance the need for certainty and efficiency in pursuit of economic goals with the need to do justice on a case-by-case fashion, developing legal models incrementally and testing their impact slowly.[52] Whereas economics can provide some of the principles and analytical techniques, it must invariably take a second place to the judgmental tools of analogy and precedent which admit only partially of linear and empirical lines of thought.

The move to a realist view of economics, rather than a substituting of economics as the new formalism in trade practices matters, will clearly impose new burdens upon lawyers and judges. Nevertheless, the public has every right to expect from them the same process of integration and adaptation that it has a right to expect from the legal system as a whole.

There have been too few section 46 cases decided to be able seriously to assess the performance of the Federal Court in interpreting the section, although the few cases may be helpful in illustrating the approaches available. As mentioned, in the *C.S.B.P.* case[53] the judge took an absolute intention-oriented approach to section 46 which did not create optimism for those looking for assistance from the judiciary in enhancing the effectiveness of the Act. In *Victorian Egg Marketing Board* v. *Parkwood Eggs Pty. Ltd*,[54] Bowen C. J. briefly adverted to the marginal or average variable cost criteria in assessing predation, but quite properly stayed away from concentration upon such a test in the circumstances owing to the fact that cost was a meaningless benchmark in that case. Bowen C. J. rather looked to the factual circumstances to infer the prohibited puposes.[55] Brennan J., in a concurring judgement in the same case, found that there was evidence to establish a prima facie case of predation, without stating what in the evidence established it.[56]

[51] L. Sullivan, "Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust" (1977) 127 *U.Pa.L.R.* 1214, 1229-1232. See also the approach taken by Bowen C.J. in the *Victorian Egg Board* case, infra n.55.

[52] "A rule based exclusively on cost forecloses consideration of other important factors, such as intent, market power, market structure, and long-run behaviour in evaluating the predatory impact of a pricing decision": *Transamerica Computer Co.* v. *IBM Corp.*, supra n.43, 71,905.

[53] *T.P.C.* v. *C.S.B.P. & Farmers Ltd.*, supra n.28.

[54] (1978) 33 F.L.R. 294

[55] *Ibid.*, 303-304.

[56] *Ibid.*, 314.

Given these three inconclusive approaches, the field is open to creative lawyers to develop sophisticated approaches to these and other questions arising under the Act.

IV. THE ECONOMIST AND EXPERT EVIDENCE

The assistance which may be afforded by the economist extends through the pretrial analytical and preparatory stages and into the courtroom at trial. At this stage, the lawyer and economist come crashing into the legal constraints imposed upon the presentation of evidence before the trial judge, namely the rules of evidence and the manner by which evidence may be adduced. As will be seen, what the lawyer and economist may wish to communicate in the presentation of their case may differ substantially from what is viewed as permissible by a court.

The admissibility and use of expert evidence must be viewed against a long-held suspicion by courts of experts and their testimony:[57]

> "The testimony of experts is often considered to be of slight value, since they are proverbially, though perhaps unwittingly, biased in favour of the side which calls them, as well as over-ready to regard harmless facts as confirmation of preconceived theories; moreover, support or opposition to a given hypothesis can generally be multiplied at will. Indeed, where the jury accept the mere untested opinion of experts in preference to direct and positive testmony as to facts, a new trial may be granted."

Whereas the bounds of admissibility of expert evidence have been gradually loosened with increased reliance upon expert evidence, there is ready evidence in any number of recent judgements of the caution or hostility with which judges view experts.[58]

A number of grounds have been offered to explain the hesitancy of the courts to accept expert economists evidence, most of which will not withstand close scrutiny. Some of these stem from the general rationale for the exclusion of opinion evidence, that is, that the testimony tends to be superfluous or secondary in nature, and supplants the inferential and judgemental function of the trier of fact.[59] The original reason for allowing expert testimony was that the expert was possessed of a skill of knowledge relevant to the subject matter under inquiry which the jury did not have, and without the application of that skill the jury was incapable of coming to a correct

[57] J.H. Buzzard et. al., *Phipson on Evidence* (13th ed., London, Sweet and Maxwell, 1982) p. 498 (footnotes omitted). The leading Australian case is *Clark* v. *Ryan* (1960) 103 C.L.R. 486, which adopts a restrictive approach to admissibility.

[58] See for example *Parente* v. *Bell* (1967) 41 A.L.J.R. 52, 54 per Windeyer J., rejecting actuarial evidence of future loss on ground that witness not qualified "as an expert in economic prophecy". This decision is generally ignored and actuarial or economic evidence is received in assessing future loss: see H. Luntz, *Assessment of Damages for Personal Injury and Death* (2nd ed, Sydney, Butterworths, 1983) at 278-284.

[59] L. Rosenthal, "The Development of the Use of Expert Testimony" (1935) 2 *Law and Contemp. Prob.* 403; C.T. McCormick, "Some Observations on the Opinion Rule and Expert Testimony" (1945) 23 *Tex. L.R.* 111.

judgment.[60] Subsequent cases have progressively loosened this requirement to the point where it need only be shown either that the jury is "unlikely" to come to a correct judgment, or that the jury would be materially assisted by the expert opinion.[61]

The concern that the function of the jury would be usurped arises out of a fear that the jury members would be so impressed by the expert opinion that they would adopt that opinion without exercising their own independent judgment in the case. Presumably a judge would be strong enough to resist that temptation (and their exhortations clearly indicate such a determination) so that a judge sitting without a jury in a trade practices matter should feel less afraid of entertaining expert evidence. However, as shall be seen in the following sections, old rules die hard and the trade practices lawyer faces numerous potential roadblocks in his efforts to adduce economic evidence.[62]

1. Interpreting the Statute

In broad terms the evidence of the economist may shed some light upon two basic questions: first, what is the economic content, if any, of such concepts used in the Act as "competition", "market", "control", and "dominance"? Second, assuming some economic content to these concepts, how may the facts of the case be interpreted in light of those concepts?

In ascertaining the answer to the first question, the economist is involved in giving a workable meaning to the concepts in the legislation and assisting in the formulation of standards which the court may apply in trying the case. Unfortunately the effort of the economist to assist on the first question may well run into the evidentiary rule that expert opinion is not admissible in matters of statutory construction unless the words used in the statute bear a technical meaning as opposed to their ordinary English meaning.[63] Thus while evidence has been admitted from an expert as to the meaning of "antibiotic substance" in dangerous drugs regulations,[64] it has not been admitted to define "mineral processing", "treatment", and "processing" in a tax statute,[65] on the basis that the former word was a technical term while

[60] *Phipson on Evidence*, op. cit., p. 486 citing *Folkes* v. *Chadd* (1782) 3 Doug. 157.

[61] *Ancher, Mortlock, Murray and Wooley Pty. Ltd. et al* v. *Hooker Homes Pty. Ltd.* [1971] 2 N.S.W.L.R. 278 per Street J. in Eq. (court bound to form and act on own original opinion); *Thurston* v. *Todd* [1966] 1 N.S.W.R. 321 (trial judge not required wholly to accept or reject expert estimates, but entitled to arrive at own view).

[62] Not dealt with in this paper are issues relating to the qualifications of the expert, as the economist has rarely been seen to be other than one. As to qualifications of experts and bounds of expertise, see generally *Phipson on Evidence*, op.cit., *Clark* v. *Ryan*, op.cit., J.A. Gobbo et al, *Cross on Evidence* (2nd Aust. ed, Sydney, Butterworths, 1979) p. 426-427.

[63] *Camden* v. *Internal Revenue Commissioners* [1914] 1 K.B. 641; *Scott* v. *Moses* (1957) 75 W.N. (N.S.W.) 101.

[64] *Borowski* v. *Quayle* [1966] V.R. 382.

[65] *F.C. of T* v. *Hamersley Iron Pty. Ltd.* (1980) 11 A.T.R. 302, 320 per Gobbo J., and cases cited therein.

the latter ones were not. To confuse matters further, some courts have done indirectly what the rule says they cannot do directly by admitting expert evidence with respect to the custom and usage of a non-technical term, thus providing a definitional gloss on its ordinary meaning.[66]

The problem lies in the maintenance of the distinction between "ordinary" and "technical" meanings and the assumption that there is necessarily a conflict between the two. There are many words in "common parlance" (to use judicial parlance) which embody both meanings – the ordinary one being a shorthand lay version of the fuller "technical" meaning. "Antibiotic" is one such term that has passed into common parlance, but which retains a technical meaning which must be resorted to if the word is to be applied with any substantive force.

"Competition" is a word of a similar nature, as is "market". The popular meaning of competition as found in the general dictionaries contains much of the flavour of its economic significance but lacks the purported precision of the economic definition.[67] Choosing the "ordinary" meaning (whatever that is found to be) leaves the court with crude non-specific generalizations out of which it has to forge applicable judicial standards, and without the guidance of any of the underlying principles which might be drawn upon to base an assessment of the goals of the statute and from that, a workable definition. This problem comes to light in *T.P.C.* v. *Ansett Transport Industries (Operations) Pty. Ltd. and others.*[68]; a Federal Court decision in which a party attempted unsuccessfully to introduce evidence to illuminate the meaning of central concepts in the *Trade Practices Act*. Expert economic evidence was tendered as to the meaning of "control" and "dominate" in section 50, but was rejected by Mr. Justice Northrop when he found that the two words were not used in the Act in any technical sense, and that therefore the expert evidence used to provide a "technical" economic meaning was not admissible.[69]

It was unfortunate that the lawyers fell into the trap of trying to characterize the economic evidence under the existing evidentiary categories. A better strategy might have been to present the economic theory concerning control and dominance as one means of fleshing out the ordinary meaning in a market setting and to argue the irrelevance of the technical – ordinary dichotomy. The essential element is to present the "theory" (a word judges hate) as pragmatic principles that could be applied in the particular concrete setting. From these economic principles the judge may then mould his legal standard, possibly abbreviating and simplifying the test for the sake of uniformity and

[66] *Borowski* v. *Quayle*, op. cit.

[67] E.g. one definition of "competition" in the *Oxford English Dictionary:* "Rivalry in the market, striving for custom between those who have the same commodities to dispose of" (Vol. II, p. 720, col. 1). Speaking of an ordinary meaning in the singular is also unrealistic in that many words have multiple "ordinary" meanings.

[68] *T.P.C.* v. *Ansett Transport Industries (Operations) Pty. Ltd. et al* (1978) 32 F.L.R. 305.

[69] *Ibid.*, 322-325. Instead, Northrop J. resorted to the Oxford English Dictionary.

ease of application, or modifying it to take partial cognizance of another goal. While the economist may not be satisfied when the judge does not entirely accept his or her economic analysis, at least he or she will have done a service in making the judge aware of the economic ramifications implicit in the choice of any legal standard in the regulatory legislation.[70]

The exclusion of expert evidence in the *Ansett-Avis* case did not mean the complete exclusion of economic evidence for the purpose of defining statutory concepts, as there have been instances in the small body of trade practices case law where economic evidence in this regard has been received by the Federal Court.[71] Conveniently, the question of the evidentiary rule was avoided, yet another illustration of the rules of evidence working best when they are ignored.

The maintenance of the antiquated evidentiary rule is particularly unfortunate at a time when the legislature is mandating a purposive approach to statutory interpretation[72] and wider use of extrinsic aids.[73] If the court prevents itself from consulting experts directly and openly, it has either the unrealistic alternative of ignoring the expert learning, or the alternatives of receiving economic learning second hand through counsel in argument, or through an untutored reading of economic literature directly.[74] Clearly the former option is more conducive to accurate information.

2. The Ultimate Issue

The second general area of conflict lies in the ability of the economist or other expert witness to testify before the court on certain issues. Many of the prohibitions of Part IV are structured so as to ban certain conduct only if that conduct has the effect or likely effect of substantially lessening competition.[75] The concept of competition is undefined, except with reference to it taking place within a market,[76] a term which is generally defined.[77] As

[70] Ironically, what the court would not receive directly it obtained indirectly. Northrop J. got his primer in economic concepts not from the private experts, but from decisions of the Trade Practices Tribunal which clearly incorporate the expert "evidence" of the tribunal's economist member: See the use of *Re Queensland Co-operative Milling Association Ltd.* (1976) 25 F.L.R. 189 and *Re Howard Smith Industries Pty. Ltd.* (1977) 28 F.L.R. 385; *T.P.C.* v. *Ansett Transport Industries (Operations) Pty. Ltd. et al*, op. cit., 325-326.

[71] *Hecar Investments No. 6 Pty. Ltd.* v. *Outboard Marine Australia Pty. Ltd* (1982) 62 F.L.R. 159. Unfortunately, the dictionary appears to be as frequently used as a source: see *T.P.C.* v. *Ansett Transport Industries (Operations) Pty. Ltd.*, op. cit., *Adamson* v. *West Perth Football Club* (1979) 39 F.L.R. 199; *Top Performance Motors Pty. Ltd.* v. *Ira Berk (Qld.) Pty. Ltd.* (1975) 25 F.L.R. 286; *T.P.C.* v. *Email* (1980) 43 F.L.R. 383. In Canada, judges have expressed little adverse concern with the reception of economic evidence for the purpose of defining relevant concepts, although their skill in its use might be viewed as questionable. See *Re A. G. Can. and Restrictive Trade Practices Commission* (1980) 113 D.L.R. (3d) 295, 304-5 per Cattanach J.; *R.* v. *Hoffman-La Roche Ltd.* (1980) 109 D.L.R. (3d) 5, 38-41 per Linden J.

[72] *Acts Interpretation Act* (Cth) s.15AA.

[73] *Ibid.*, s.15AB.

[74] For an example of this, see *T.P.C. v. Ansett Transport Industries (operating) Pty. Ltd.*, op. cit.

[75] Ss. 45, 45B, 47 and 49.

[76] Sub.ss. 45(3), 45B(4), 47(13), and 49(1).

[77] S. 4E.

has been pointed out, economists may have useful things to contribute to the definition and application of both these concepts. In the trial of a trade practices matter the question to the economist witness might typically be either: "What, in your estimation, is the relevant market in this case?" or: "On the basis of the evidence before the court, could you give us your opinion as to whether competition in the market has been lessened, and if so, to what extent?" In evidentiary terms both questions relate to what is known as the ultimate issue, the very question that lies for determination by the Court.

The rationale for the exclusion of expert evidence on the ultimate issue is an extension of a general fear that expert evidence will usurp the function of the trier of fact.[78] As stated above, this cannot be a real danger in a situation where there is no jury. Furthermore, it is inconsistent to say that while the reason for wanting the testimony is to assist the court in a particular field of expertise, that expertise may not extend to the most important issue before the court, that is, the ultimate issue.[79] The judge in any event must assess the theoretical and empirical underpinnings of the evidence and its probative value, and come to his own conclusion as to the assistance that such evidence ultimately affords. Fortunately, while many courts cling tenaciously to the general principle that as a matter of course evidence on an ultimate issue should not be permitted in "ordinary" cases, the extraordinary cases appear to outnumber the ordinary cases, even where there has been a jury. The courts admit such evidence cautiously, and they hasten to remind themselves of their need to form an independent opinion on the evidence.[80]

None of the reported Part IV cases raise the ultimate issue problem explicity, although the potential for such a problem arising is clear. When faced with the ultimate issue argument the lawyer has two choices. He may either admit that the evidence is on the ultimate issue to be decided and deal with the cases as presented, or he may attempt to argue that the evidence as to the definition of a market or the substantial lessening of competition does not fall within the ultimate issue rule. The argument would revolve around the extraordinary nature of the case and the fact that the opinion would be "necessary" or "of assistance" to the Court in determining the issue. The danger, of course, is that a hostile judge would interpret the rule narrowly and exclude the evidence.[81]

[78] Gobbo, op. cit., pp. 430-431.

[79] The point is less politely made in N. Brooks, "The Law Reform Commission of Canada's Evidence Code" (1978) 16 O.H.L.J. 241, 249, citing J.H. Wigmore, "Looking Behind the Letter of the Law" (1937) 4 *U.Chi.L.Rev* 259, 263-64.

[80] *R.* v. *Tonkin* [1975] Qd. R.1; *Dahl* v. *Grice* [1981] V.R. 513; *Samuels* v. *Flavel* [1970] S.A.S.R. 256. Other decisions have held that the opinion was in fact not strictly speaking to the ultimate issue: e.g., *Habessis* v. *Australian Iron and Steel Ltd.* [1961] N.S.W.R. 1102.

[81] The ultimate issue rule has been abrogated by statute in England: see the *Civil Evidence Act*. Its abrogation has been recommended in Canada: see Law Reform Commission of Canada, *Report on Evidence* (1975) at 40, 98. For a review of current proposals see, Australia, Law Reform Commission, *Opinion Evidence* (1983, Evidence Reference Research Paper No. 13).

3. The Basis of the Evidence

One potential approach to the difficulties of economic evidence in a Part IV matter is to use the economist as essentially a theoretician, testifying as to generally applicable economic principles and giving the court guidance in the selection of economic principles and criteria to be employed in the analysis of the facts. Another approach is to select an economist not on the basis of general theory, but on his or her specific knowledge of the industry in question derived through career work or case-specific study. This economist would seek to shed light on the actual operation of the industry in terms of definition, structure, conduct and performance.[82] The latter approach, however, necessitates using the economist as an active analyst, assimilating information and opinion derived from personal investigation, other individuals, secondary documentary sources and the economic literature. The facts and opinions gathered are then weighed by the economist who applies economic principles to formulate his or her expert opinion.

Unfortunately, the conventional rules of evidence have tended to place arbitrary limits upon the items of information on which the expert may base his or her opinion. The rule has been variously expressed as limiting the expert's expression of opinion to facts admitted in evidence,[83] or facts admissible in evidence.[84] The rationale for this rule is based on a belief that the trier of fact should be able to properly have before it all the actual material which the expert used to enable the court to review and assess the basis of the opinion.

The effect of this rule is to render inadmissible economic opinion which is directed at a real life assessment of the activity or industry questioned. It is inevitable that some material useful or necessary to the economist's formulation of opinion will be inadmissible, with the result that an expert's opinion based solely upon admissible facts (if one can be properly given at all) will be incomplete.

Fortunately, although many courts adhere to this rule, others have realized the negative effects of the rule and pragmatically ignored it, or have attempted to formulate standards which allow for a more broadly based opinion, particularly recognizing the fact that applied economics, like any applied social science, is necessarily based upon secondary analysis of human behaviour.[85] The judicial analysis of Blackburn J. with respect to the

[82] For general discussion as to the potential role of economists, see G.H. Dession "The Trial of Economic and Technological Issues of Fact" (1949) 58 Yale L.J. 1019, 1242.

[83] *Shephard* v. *Pike* (1954) 72 W.N. (N.S.W.) 85; *Leis* v. *Gardner* (1965) Qd. R. 181, 188.

[84] *English Exporters (London) Ltd.* v. *Eldonwall Ltd.* [1973] Ch. 415; *R.* v. *Turner* [1957] Q.B. 834; Sir. R. Cross, *Evidence* (5th ed. London, Butterworths, 1979) p. 384.

[85] In Canada, it has been accepted that hearsay or other inadmissible material may form the basis for an expert's opinion where taking into account such material is used in ordinary professional practice: *Wilbrand* v. *The Queen* [1967] S.C.R. 14. The question of the accuracy of the opinion's basis is a matter for weight, not admissibility: *R.* v. *Knight* (1975) 27 C.C.C. (2d) 343. See, to the same effect, *R.* v. *Lingwoodock* (1962) Q.L.R. 50; *R.* v. *Seifert* (1955) 73 W.N. (N.S.W.) 358. In Great Britain, a different rule is emerging, to the effect that a hearsay basis for an expert opinion is permissible so long as the hearsay does not relate to "the existence . . . of some fact which is basic to the question on which he is asked to express his opinion". *R.* v. *Abadom* [1983] 1 W.L.R. 126.

admissibility of expert evidence of two anthropologists on Aboriginal community life is instructive of one approach.[86]

> "The process of investigation in the field of anthropology manifestly includes communicating with human beings and considering what they say. The anthropologist should be able to give his opinion, based on his investigation by processes normal to his field of study, just as any other expert does. To rule out any conclusion based to any extent upon hearsay – the statements of other persons – would be to make a distinction, for the purposes of the law of evidence, between a field of knowledge not involving the behaviour of human beings (say chemistry) and a field of knowledge directly concerned with the behaviour of human beings, such as anthropology. A chemist can give an account of the behaviour of inanimate substances in reaction, but an anthropologist must limit his evidence to that based upon what he has seen the Aboriginals doing, and not upon what they have said to him."

It has been asserted that one corollary to the traditional rule is that the expert's opinion must not only be restricted to admissible evidence, it must be based upon *all* the evidence admitted on the particluar issue.[87] It is this curious rule which appears to have lead Northop J. to make the following cryptic remarks in the course of his judgement in the *Ansett-Avis* case:[88]

> "[The economic evidence of Professor Hogan and Dr. Norman] consisted of opinions based on factual material presented to the Court but not necessarily all that material, since all the witnesses had not been cross-examined at the time the opinion evidence given. At the time, the question of admissibility was raised but was deferred since the issues had not then been clearly defined and the principles to be appointed had not been determined. The evidence was admitted. The evidence relating to whether the word "dominate" had acquired any special meaning in the literature of economics is admissible and relevant but I exclude from consideration the evidence given by Professor Hogan and Dr. Norman respectively directed to their opinions on the issue of whether Avis dominates the car rental market in Australia."

It is unfathomable why the evidence of an otherwise qualified expert should be declared to be inadmissible on the basis that it may be incomplete. Such defects clearly go to the weight to be given to the opinion tendered and not to its initial admissibility, as the effect of the omission will depend on the materiality of the facts omitted from consideration. Courts in other situations have recognized this; the curious treatment of the economic opinion by Northrop J. may be regarded as unfortunate and wrong.[89]

This is not to say that the court should place great weight upon expert evidence which is clearly incomplete, or based substantially upon dubious secondary information. The basis of the opinion tendered should be offered

[86] *Milirrpum* v. *Nabalco Pty. Ltd.* (1971) 17. F.L.R. 141, 161.
[87] *R.* v. *Dubois* (1890) 17 Q.L.R. 203.
[88] *T.P.C.* v. *Ansett Transport Industries (Operations) Pty. Ltd.*, op. cit., 329.
[89] *Wilson* v. *Bell* (1918) 45 N.B.R. 442.

and the veracity or reliability of the underlying factual and analytical assumptions tested.[90] The lawyer should recognise the danger in the ease with which economics may be used to establish second hand data or incidents as facts, as the court will not look with favour upon efforts to prove second-hand facts through experts. In a recent case Megarry J. stated:[91]

> "I know of no special rule giving expert valuation witnesses the right to give hearsay evidence of facts: . . . I can see no compelling reasons of policy why they should be able to do this."

It is, however, too early to tell whether this will be adopted as a strict rule by all courts, as arguments exist for flexibility in the proof of secondhand facts by experts where those facts are otherwise incapable of direct proof.[92]

In order to use economic evidence to its best advantage the courts will have to recognize the real position of economic evidence and base their judgement not on outdated arbitrary rules, but on a pragmatic test of the relevance and the reliability of the factual data (whatever its source) and the validity of theoretical analysis applied in arriving at the expert opinion.

4. The Presentation of the Evidence

A traditional feature of expert evidence is the use of the hypothetical question in eliciting the opinion of the expert. The lawyer asks the witness to assume the existence of a certain set of facts, which although "hypothetical" bear a striking resemblance to the facts which the party tendering the witness is seeking to prove by other evidence. At the end of the recitation of facts and assumptions, the expert is then asked for his opinion. A rationale for this manner of presenting evidence is that it is appropriate that both the opinion *and* the basis for the opinion be made explicit before the court.[93]

The hypothetical question has, however, progressed from being one possible method of presenting expert testimony, to being the only method by which such evidence may be led. The supplementary rationale for making the hypothetical question compulsory is that the expert is required to give his opinion on hypothetical facts so that he is not seen to be weighing the evidence.[94] This rationale is merely a variation on the "usurping the function of the jury" argument, and carries as little weight. Any expert opinion necessarily involves the expert in weighing facts to arrive at his opinion.

Not only is this supplementary rationale subject to the same criticisms as those offered in dealing with restrictions on ultimate issue tesimony, but it

[90] For emphasis upon the need for expositon of the basis of the opinion, see *Commissioner for Railways* v. *Harradine* [1961] N.S.W.R. 639; *R.* v. *Jenkins ex.p. Morrison* [1979] V.L.R. 227.

[91] *English Exporters (London) Ltd* v. *Eldonwall*, op. cit.

[92] For an important example, see *R.* v. *Seifert*, op. cit. (admission of secondary evidence justifiable where exclusion would lead to injustice).

[93] On hypothetical questions generally see *Wigmore on Evidence*, (Chad. rev., Boston and Toronto, Little, Brown & Co., 1979) vol 2, pp. 792–813.

[94] *Diffin* v. *Dow* (1882) 22 N.B.R. 107; *Wigmore on Evidence*, op. cit., p. 795.

is also plainly an artificial construct behind which the expert weighs the evidence while pretending not to. Furthermore, the desirability of the hypothetical question has been criticized on a number of grounds. Although it has been called "one of the few scientific features of the law of evidence", its operation has been termed "clumsy" and an "intolerable obstruction of the truth".[95] In structural terms, the hypothetical question puts the real job of developing the opinion in the hands of the lawyer "spinning" the hypothetical, and opens up the opinion to precisely the types of advocacy and grandstanding that the court wishes to avoid.[96] The expression of opinion is locked into a formula which may or may not assist the expert in the effective communication of the expert's opinion and the reasons therefor.

Some courts have implicitly recognized the problems created by the hypothetical question and have created an exception to permit the opinion to be expressed in other than hypothetical forms, when it is impractical to do otherwise.[97] It is submitted that the courts should do away with the requirement of the hypothetical question and instead simply require that for the opinion to have any weight, its basis should be made explicit to permit evaluation by the court. Failure to do so would lessen the weight of the evidence by a degree proportional to the incompleteness of the opinion's basis.[98]

CONCLUSION

The themes presented for discussion in this paper arise from one source: the multifarious problems posed by the use of law as an instrument of complex social and economic policies. The challenge facing lawyers and judges is to adapt traditional thought and institutional patterns to the dictates of modernity without losing the essential elements of the legal process that are still prized.

The questions raised; the limitations of economics in a legislative and judicial context, the interpretive role of economists, and the constraints on economic evidence, are only a few of those that must be dealt with by lawyers and economists in implementing an appropriate and effective trade practices regime. Untouched are the practical questions of how masses of technical data can be communicated and assimilated and the intractable difficulties posed for a litigation process that traditionally relies upon oral evidence. Similarly left for another day is the basic juristic question of whether lawyers or economists or both should be deciding trade practices cases. Debate over specifics, both legal and economic, must continue, but widening the debate to include fundamental and practical issues of structure and process will provoke the creative responses necessary for the effective mobilization of the law towards a more modern context.

[95] Rosenthal, op. cit., pp. 414-418.
[96] McCormick, op. cit., 122ff; *Cross on Evidence* op. cit., 446.
[97] *Bleta* v. *R.* [1964] S.C.R. 561.
[98] Judges have clearly demonstrated their awareness of the need to be aware of and assess the basis of expert testimony: see cases cited in n. 82.