The judicial disposition of cases: dealing with complex and specialised factual material

The following address was delivered by the Hon Justice James Allsop at the 7th Annual University of South Australia Trade Practices Workshop on 17 October 2009 on the topic of how courts deal, in the exercise of judicial power, with factual material of a specialised or expert nature.

A topic in respect of which I have had an interest for some time, and continue to have an interest is how the courts deal, in the exercise of judicial power, with factual material of a specialised or expert nature. It is a topic central to the administration of civil justice in this country, not just competition cases. I will, however, focus my remarks upon that latter topic.

The nature of judicial and non-judicial power

One needs to begin by recognising the basic constitutional architecture in Australia in which judges, here federal judges, work. The importance of this is in considering procedural reform is often lost on commentators. The Federal Court is not the Competition Tribunal. The fundamental differences in their institutional and governmental character must be appreciated before one discusses procedural change.

Chapter III of the Australian Constitution provides for a basal distinction between judicial and non-judicial power. This is both elementary and elemental.

Only judges and courts can exercise federal judicial power. Those judges and courts may belong to the Commonwealth polity, state polities or territory polities. The Australian Constitution, unlike the United States Constitution, provides for Commonwealth judicial power being exercised (at the choice or will of the Commonwealth Parliament) by state courts. From the earliest days of federation this has been done.[1] One consequence of the use of this mechanism is that the Commonwealth Parliament must take the state courts as it finds them. Another consequence of this is that acting or part-time judges sitting as Supreme Court judges can hear cases in federal jurisdiction.[2]

On the other hand, federal judges under s 72 of the Constitution, cannot be part-time or acting.[3] Thus, in a Commonwealth or federal court, judicial power must be exercised by a judge. There is now an exception to this by the recognition that registrars may do so, but only in circumstances of the effective supervision by review by a judge.[4]

For present and practical purposes, this means that in the federal judiciary only judges can decide competition cases, to the extent that they are required by law, or chosen by parliament, to be heard in the exercise of judicial power.

The fact is, of course, the very same question can often be decided judicially (by a court) or non-judicially (by a tribunal). For example, many questions under the *Trade Practices Act 1974* (Cth) may be dealt with by the Competition Tribunal: for example, s 50.[5] In other fields, such as taxation and intellectual property, virtually the same question can be committed for apparent resolution to a court or to an administrative decision-maker.

What is this 'judicial power' then? Is it a trick? If the tribunal can deal with the same issues, what is the difference and what is happening?

Commonwealth judicial power (in the present context, exercised by the Federal Court) derives from Ch III of the Constitution. Commonwealth executive power (in the present context, exercised by the Competition Tribunal) derives from Ch II of the Constitution.

Executive power and judicial power, as species of power, can both affect the individual or the group. It is important to understand the nature of each, because non-judicial power (other than such power ancillary or incidental to the exercise of judicial power) cannot be conferred on a federal court or a state court exercising federal jurisdiction; and judicial power cannot be conferred on a body which is not a court (federal or state) within the meaning of s 71 of the Constitution.

Section 61 (in Ch II of the Constitution) provides as follows:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Executive power can simply be seen as power, other than legislative and judicial power, conferred by law.[6] This tripartite division of governmental authority (legislative, executive and judicial) is one upon which, in important respects, the Australian Constitution and system of government is founded.[7]

Executive power derives from the Constitution, from statute, and from the prerogative of the Crown. The executive power relevant for present purposes is the power exercised by officers of the Commonwealth who are authorised by Commonwealth legislation, in this context, the Trade Practices Act, to make decisions under that Act in the tribunal.

Judicial power is a concept not easily defined. Indeed, cases of the highest authority warn against attempts at exhaustive definition.[8] No single simple encapsulation is possible. Central to the notion, however, is the adjudication and conclusive settlement of controversies or disputes between parties as to their rights and duties under law.[9]

The notion of 'controversy' is central.[10] Courts do not advise Parliament or the executive. They resolve argued controversies. Yet, this is not the determinant of judicial power. Administrators

sometimes deal with controversies, as is well illustrated by the kinds of application decided by the tribunal.

The notion of rights is central. This means existing rights.[11] Again, this is not the determinant of judicial power. Administrators sometimes deal with people's rights.

The notion of 'binding and authoritative' refers to conclusiveness, even if subject to appeal. It means not open to collateral review.[12] This is closer to a determining factor. Administrators generally do not decide matters in a way that is not open to collateral attack, especially if a method of compulsory enforcement is given to the decision.

The paradigms of power belonging to the three arms of government are easy to recognise. Take these hypothetical examples:

1. Parliament's exercise of power to enact legislation – for instance creating a right with certain characteristics.
2. The executive's power granted by statute that if in all the circumstances, in the national interest and in accordance with prevailing government policy, it is satisfied that the statutory privilege be granted for three years. The executive makes that decision and grants that right.
3. The courts' power to declare that as a matter of statutory construction non-citizens cannot seek the statutory privilege in question or that the right purported to be granted by the executive is in fact outside the terms of the statute and so is unauthorised.
4. Only courts, with or without juries, can adjudicate criminal guilt or innocence.
5. The executive, not the courts, can dispense the prerogative of mercy.

These are fairly clear examples. Often the characterisation of the power is not so straightforward. Section 61 of the Constitution, in describing the executive function, refers to the execution and maintenance of the Constitution and of the laws of the Commonwealth. In carrying out that function the executive (officers of the public service) must, every day, make decisions about legal rights. If a customs official decides to levy duty at X per cent on your imported goods, he or she is not usurping the courts' exercise of judicial power of the Commonwealth. Yet he or she has, as between you and the Crown, decided that the law is such as to lead to the conclusion that you must pay duty of $Y. There may be an 'appeal' to a reviewing officer who may have the function of examining or even remaking the decision. There may be an 'appeal' to the Administrative Appeals Tribunal. In all this, there may be an element of a controversy; there may be an element of someone making a decision about rights, about the meaning of a statute and about the consequences of such. There will, however, be no conclusiveness. In part, this is by reason of who is deciding it – by definition it cannot be conclusive, meaning that the decision is always open to collateral challenge because the customs officer is not a judge. One may detect a degree of circularity in all this. There is an element of the asserted or agreed characterisation of the type of power being exercised affecting the content of the power being exercised. So, if we are all agreed that the decision is being made by a clerk behind the counter at Customs, we know that he or she cannot make a decision settling a controversy about present rights according to law in a way that is immune from challenge.

Another way of looking at the issue is to say the customs officer has not decided any rights, he or she has merely purported to apply or execute the law which either does or does not provide for that result.

Sometimes, administrators can be seen to be creating, or doing acts as part of the creation of, rights or liabilities. This can be seen to be distinct from adjudicating on present rights conclusively. Sometimes, one will be able to see the hallmark of the conduct of the administrator as not so much deciding something on the basis of rights, but on the basis of policy of such a broad social or political (in the broad sense) character that a decision so based could not be other than administrative or the act of the executive government.

Yet sometimes the courts also exercise wide discretions; sometimes they make orders which, at least in point of practical substance and sometimes in point of law, create new rights and liabilities; and sometimes they take policy into account.

Sometimes, the answer as to whether something is an exercise of judicial or non-judicial power is not provided merely by a priori reasoning. Notions of history, tradition, method, technique and procedure are important. For instance, advisory opinions are generally considered outside judicial power but courts have historically permitted trustees, liquidators and court appointed receivers to approach them for advice and directions. Also, the declaration is a remedy of wide scope. In public interest cases where locus standi is broadly viewed, the notion of settlement of a controversy can be flexible.

For present purposes, it is a helpful taxonomy to divide functions into three categories: those that can only be conferred on courts; those that can only be conferred on administrators; and those that can be given to either.[13] It is the third category with which we are primarily concerned. The framework of analysis in dealing with this third category was laid down in High Court and Privy Council cases in different generations that concerned tax 'appeals' and intellectual property 'appeals'. In a series of cases the High Court recognised that there were some powers not distinctively judicial or administrative which could be assigned to either arm of government subject to certain requirements. An examination of the main tax and intellectual property cases suffices to explain the approach.

This overlap in the third category appears in many contexts: tax,

intellectual property and competition amongst them.

Essential to the distinction is the choice of which power is to be exercised. It is not just a matter of labelling, or of incantation of a legal spell. It is related to how the power, which is of a kind which can be exercised by one or other (or both) arms of government, is exercised, in order to understand what power is being exercised.[14] In *R v Spicer; Ex parte Australian Builders' Labourers' Federation,*[15] Kitto J, at 305, explained the importance of the character of the repository of the power in a way that bears repeating:

> The reason for concluding in some such cases that the judicial character of the repository imparts a judicial character to the power is simply that the former provides a ground for an inference, which in those cases there is nothing or not enough in other considerations to preclude, that the power is intended and required to be exercised in accordance with the methods and with a strict adherence to the standards which characterise judicial activities.
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> The circumstances in which the power is to be exercisable may be prescribed in terms lending themselves more to administrative than to judicial application. The context in which the provision creating the power is found may tend against a conclusion that a strictly judicial approach is intended. And there may be other considerations of a similar tendency.

Having decided, however, that a controversy is to be decided by judicial power, one must conform to the methods of exercise of that power.

The constrictions of judicial power

Principally for the present debate that means that the court cannot be constituted by part-time or acting judges chosen for their specialised knowledge in economics or other subject matter. The Federal Court cannot therefore be adorned in a competition case by having Professor Maureen Brunt or Professor David Round sitting as a judge, as can take place in a New Zealand Court. That is a fundamental difference between the tribunal and the court. Of course, judges sit on the tribunal, but they are *not* exercising judicial power in that role. They function as part of the executive in that role.

A Federal Court judge, alone, must decide the controversy if it has been committed to the court for resolution.

This may, perhaps, be seen to pose two difficulties for the Federal Court. The two difficulties are related and derive from the fact that many important, indeed central, factual questions are referable to, or answerable by reference to, concepts from one or more separate sciences – the social science of economics, the sciences of mathematics and statistics and theories of human behaviour. The concepts of markets, market power, competition, lessening of competition, substantial lessening of competition, market concentration, import competition, substitutability, vertical integration, cost, profit, etc. are all in this category.

The nature of these issues calls unquestionably for expert consideration and evidence.

The two related difficulties are (a) the need to receive, understand, digest and synthesise often complex expert evidence; and (b) the question of the degree of specialisation that judges who do these kinds of cases should exhibit.

To a significant degree the second issue has reached a measure of resolution in the court. Panels exist in the court for judges to hear these cases. Though, that said, the development of expertise in these cases requires time and experience. Not all judges start from any base of formal training in economics, let alone statistics or mathematics. There is, however, nothing like the degree of expertise as exists in some other jurisdictions.

It would not be appropriate for me, as a judge from another court, to say any more about this, beyond saying that the balance of this discussion will assume a body of judges who have variable but more than passing familiarity with economics and related disciplines from the developing to the highly developed.

The first difficulty is the reception and utilisation of often complex evidence. The judge in the exercise of judicial power must decide on the basis of evidence placed before the court and any legitimate judicial notice. That means he or she must understand and deploy the evidence put before him or her.

We are all familiar with the range of evidence being spoken of: the social science of economics, mathematics, statistics, psychology, human behaviour, game theories and other. What are the satisfactory mechanisms of assisting judges understand, synthesise and deploy such material?

The judicial process has developed a number of mechanisms of bringing expert assistance to the court.

Expert evidence

At one end of the spectrum, there is the traditional presentation of privately chosen and retained expert evidence given in the case of each party. Each side's lawyers cross-examine, and the judge is left to assess, weigh and choose from amongst the competing opinions.

This process epitomises the resolution of disputes by the adversarial system. It can lead to a degree of tension in its undertaking. Sometimes that tension derives from a failure by lawyers to understand what the experts in these cases are setting out to achieve. I discussed this in the *Liquorland* case [2006] FCA 826 at [836]-[842]. What I there said was not novel. Other judges of the Federal Court have said similar things. Some commentators ignore the recognition that the Federal Court has given to the character of the expert evidence before it in competition cases. Let me set out

what I said in *Liquorland* at [838]-[840] and [842]:

> '[838] In cases such as this dealing with a social science, the views of Professor Brunt expressed, if I may respectfully say so, with her customary clarity in chapter 8 of the helpful compendium of her work *Economic Essays on Australian and New Zealand Competition Law*, 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:
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> > *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.'
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> [839] The 'economic' questions here involved the assessment of the purposes of humans working in a commercial environment and the appropriate economic framework in which to discuss them.
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> [840] With the taxonomy of expert evidence of fact, assumptions, reasoning process and opinions as an accepted (indeed necessary) framework, one then comes to the role of the economist in a case such as this. Because it is a social science, and because it is a way of approaching matters and a way of thinking about matters, there is a role, for the economist to assist the court by expressing, in his or her own words, what the human underlying facts reveal to him or her as an economist and what it reflects to him or her about underlying economic theory and its application
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> ...
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> [842] The recognition of the place of 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 in this field for 'putting an argument' as opposed to 'giving an opinion'.

Concurrent evidence

A modern variation to the calling of separate expert evidence, pioneered by the tribunal in the 1970s and 1980s by Professor Brunt and justices Woodward and Lockhart and which has been taken up energetically by the Federal Court and the New South Wales Supreme Court is the 'hot tub' (a ghastly sobriquet). It is the use of privately retained expert evidence, controlled to a greater degree by the court through conclaves, joint reports and concurrent evidence. Space and time do not permit a detailed discussion. It is now widely used in Australia. It is no longer novel. Recently, in a medical negligence case, a judge in the Supreme Court of New South Wales took evidence concurrently from 11 specialist medical practitioners concerning the brain damage of a plaintiff.

There is often a complaint by lawyers that they feel a loss of control over 'their' experts. They do lose a significant measure of control. That is the idea. There is intended to be a reduction in the emphasis on cross-examination, and an increase in emphasis upon professional dialogue.

There can be problems; but the technique has great potential. I do not intend to discuss it in detail here, beyond making one point that is often lost sight of. For the process to be effective, the judge has to be well prepared and very familiar with the technical issues in order to absorb and participate in the professional exchange. The hot tub is not necessarily the best way of filling an intelligent vessel with expert knowledge.

The single expert

One technique used in some courts is the ordering of one single expert. This requires statutory authority because it deprives the parties of calling evidence. Its utilisation in competition cases would be problematic. The difficulties of deriving assistance from only one witness in any discipline is immediately appreciated if one recognises what Professor Brunt said in *Economic Essays on Australian and New Zealand Competition Law* at 358 set out above in *Liquorland* and if one recognises the argumentative and contestable character of much of the relevant evidence of a social science nature. Unless the relevant field is relatively stable in principle and technique (such as valuation of land) the choice of the single expert may go a long way to determine the answer to the question under consideration.

In these circumstances, a single expert is not likely to be illuminating of the relevant full range of possible views.

The court expert

Next, there is the court expert. In addition to the expert witnesses called by the parties, the court can direct the calling of an expert. Under the Federal Court Rules Order 34 rule 2, if a question for an expert witness arises in a proceeding the court may appoint an expert as a court expert to inquire into and report upon any question and upon any facts relevant to the inquiry. The court may direct the court expert to make a further supplemental report or inquiry and report and may give such instruction as the court thinks fit relating to any inquiry or report of the court expert. These instructions may include provision for experiment or test. Under Order 34 rule 3, the court expert is required to send his or her report to the court and the report shall, unless the Court otherwise orders, be admissible in evidence on the question on which it is made, but shall not be binding on any party except

to the extent to which that party agrees to be bound by. Under Order 34 rule 4, upon application to the court, the court may permit cross-examination of the expert either before the court or before an examiner. Under Order 34 rule 5, the remuneration of the expert is to be paid jointly and severally by the parties, unless the court otherwise orders. Under Order 34 rule 6, where a court expert has made a report any party may adduce evidence of one or other expert on the same question, but only if he or she has at a reasonable time before the commencement of the trial given to any other interested party notice of an intention to do so.

I have not seen the court expert provision used. Inherently, it may contain a degree of inflexibility. It may duplicate costs. Further, it takes the expert assistance given no further than the receipt and employment of further evidence. It may, however, solve a problem of intransigent or intractably positioned experts.

The expert assistant

More flexible assistance may be derived from the use of the expert assistant pursuant to the Federal Court Rules Order 34B. Under Order 34B rule 2 the court or a judge may at any stage of the proceeding and with the consent of the parties appoint an expert as an expert assistant to assist the court on any issue of fact or opinion identified by the court or judge (other than issue involving a question of law).

The primary restriction on this mechanism is the requirement for the consent of the parties. If that is forthcoming, there is a helpful degree of flexibility built into the use of such an expert assistant. If it is not, the mechanism is unavailable.

Order 34B rule 2 prohibits a person who has given evidence or whom a party intends to call to give evidence from being appointed as an expert assistant. The expert assistant must give the court a written report on issues identified by the court or judge. Order 34B rule 3 requires that the expert assistant state in the report each issue identified and give a copy of the report to each party. The court must give each party a reasonable opportunity to comment on the report and may allow a party to adduce further evidence in relation to an issue identified in the expert assistant report. The party, however, is not permitted to examine or cross-examine the expert assistant. A party must not communicate directly or indirectly with the expert assistant about an issue to be reported on without the leave of a judge. The expert assistant is not to give evidence in the proceeding. See generally Order 34B Rule 3. Order 34B rule 4 provides for an order for the remuneration of the expert assistant.

This order brings in a degree of flexibility, although once again, the report is in terms of written material which is given to the judge. It is implicit within the order that the judge may rely upon this material.

I have never seen the order used.

The influence of case management and of the fact of penalty hearings

Before turning to some more controversial and different mechanisms, it is worth saying at this point that there is an extra dimension to the use of the above mechanisms by the current active case management which modern judges employ. Where full case management powers are available, and used properly, experts can be brought together early, primers developed, issues defined and refined and reports prepared with a knowledge of the boundaries of the dispute. The court can control the deployment of the expert evidence under such case management powers.

One significant qualification to this must be made in that many competition cases are penal in their character and there is a difficulty forcing admissions of fact and evidence from parties who may not have to give evidence at all and may not be prepared to assist with the sensible deployment of evidence when they are facing multi-million dollar penalties.

The three further mechanisms that I wish to discuss are referees, assessors and the use of more than one judge.

Referees

The Australian Government has proposed to amend the *Federal Court of Australia Act 1976* (Cth) to specifically provide for rules in relation to referees.[16]

The Supreme Court of New South Wales has been using referees for many years in commercial disputes, in particular building, technology and construction disputes. I will first explain what a referee is. I will then describe how the Supreme Court of New South Wales has utilised the facility. I will then discuss how referees, when introduced in the Federal Court, may assist in the disposition and resolution of competition claims.

What is a referee?

In *Buckley v Bennell Design & Constructions Pty Ltd*[17] Stephen J and Jacobs J explained the history and nature of references and referees. The court was dealing with a provision of the *Arbitration Act 1902* (NSW), s 15 which provided that the court might at any time order the proceedings or any question or issue of fact arising therein to be tried before an arbitrator agreed on by the parties or before a referee appointed by the court. The power could be used compulsorily in both respects – arbitration or reference.

A question arose as to the principles by reference to which an award by an arbitrator made after an order under s 15 had been made could be set aside. The Court of Appeal in New South Wales said that the principles were the same as applied in the case of an arbitration pursuant to a submission. This was overruled in the High Court. Although the case concerned an arbitral award, the discussion also concerned references.

Stephen J described the hearing before the arbitrator or referee as a

'trial'. It was a form of special trial. He said that in such a reference the court's procedures of adjudication are not abandoned in a favour of extra-curial settlement of the dispute; rather, the court directs that for better resolution of the particular proceedings initiated before it, resort should be had to this special mode of trial which the legislation made available. Stephen J then discussed the origin and development of this mode of trial and how distinct it was from conventional arbitration.

Time and space do not permit a discussion of this history, but the above pages of the reasons of Stephen and Jacobs JJ make valuable reading for the recognition that the reference is not the abandonment of the method of resolution by the judicial arm, rather it is the use by the judicial arm of a special method of trial for the particular dispute.

In New South Wales, the rules made under the authority of relevant legislation enable a degree of flexibility to be employed by the referee in how the inquiry is undertaken. Under Part 20 of the Uniform Civil Procedure Rules provision is made for the referring out of proceedings or parts of proceedings to a referee for a report: see Uniform Civil Procedures Rules, Rule 20.14. Any person may be appointed a referee whether legally qualified or not: Rule 20.15. The choice of person depends upon the nature of the dispute. Two or more referees can be appointed: Rule 20.16. An inquiry and report can be directed: Rule 20.17. Provision is made for the remuneration of the referee: Rule 20.18. The court may give directions for the provision of services of officers of the court or courtrooms or other facilities for the purpose of any reference: Rule 20.19. The court may give directions with respect to the conduct of proceedings under the reference and the manner in which the referee may conduct himself. Included in this is the question whether the referee will be bound by the rules of evidence and how he or she may inform him or herself in relation to any matter: Rule 20.20. The court may at any time and from time to time on application of the referee or a party give directions in respect of any matter arising under the reference. The court may of its own motion or on application vary or set aside any part of any order for referral: Rule 20.22. The referee must submit a written report: Rule 20.23. The court may on a matter of fact or law or both do any of the following in relation to the report: adopt, vary or reject the report in whole or in part, require an explanation by way of report from the referee, remit for further consideration by the referee the whole or any part of the matter referred for a further report or decide any matter on the evidence taken before the referee with or without additional evidence and make such order as it thinks fit: Rule 20.24.

The court has on a number of occasions identified the considerations which will be taken into account in the review of the report. In *Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd*[18] Chief Justice Spigelman and I discussed these authorities.[19]

The general principles are that questions of law will be reviewed by the court as on a rehearing. As to questions of fact the court generally needs to be persuaded of the clarity and seriousness of any error before even considering entertaining a rehearing on the facts. The degree of scrutiny will depend upon the individual case.[20]

The court is exercising a form of discretion when it adopts or varies the report. It is to be recalled that a (special) trial has been held, not the mere production of evidence.

The success of this procedure in the Supreme Court of New South Wales can be measured by the huge extent of the building, technology and construction list. Any perusal of the newspapers, generally on a Friday, will indicate a huge number of matters in the list. However, there has not been a judge hear the factual basis of a building case in the Supreme Court for some years. The court effectively acts as a clearing house for such disputes with careful supervision of directions and references to a wide variety of referees. An enormous body of work is dealt with to the general satisfaction of the commercial community, which brings disputes from all over Australia to be dealt with in this fashion.

Turning to the use of referees in competition matters, when the power is given to the Federal Court, it is necessary to consider a matter that has concerned people in the past as to the constitutional validity of the use of references when the matter is one of federal jurisdiction. My predecessor, Keith Mason, when he was president of the Court of Appeal, dealt with this matter in some detail in *Multicon Engineering Pty Ltd v Federal Airports Corporation*.[21] His views had the concurrence of Gleeson CJ and Priestley JA.

The argument was that the judge hearing the application to adopt the referee's report was obliged to conduct a hearing de novo having received a report from a referee in a matter in federal jurisdiction. Whilst the decision is in relation to state courts exercising federal jurisdiction, properly understood, it assists in any argument that might be made in the Federal Court. As I have previously said, in the Federal Court registrars can exercise judicial power. In *Harris v Caladine*[22] the High Court indicated that as long as there was a requirement of appropriate control and supervision, the exercise of federal jurisdiction and powers by a registrar could be permitted. As Mason P said[23] in *Multicon,* nothing in *Harris v Caladine* indicates that a full de novo hearing is required for validity. Once one understands that the reference is a special form of trial having a history of some centuries the legitimacy of the procedure in federal jurisdiction can be seen as based on facts other than the delegation of hearing.

The control and supervision discussed in *Bellevarde* is such that it remains flexible and responsive to the needs of particular circumstances. *Multicon* is authority for the proposition that the use of references with appropriate court supervision in accordance with established principle does not violate the requirements of Chapter III in the exercise of federal jurisdiction.

What then can referees be used for? In the building, technology and construction list they are used for the resolution of whole disputes. I would not suggest that is appropriate in the context which we are discussing – competition cases. But there is no reason why a judge could not appropriately fashion orders during the case management of the case for a report to be brought forward on particular issues that have been identified through case management procedures for resolution. These issues might be interlocutory or they may be part of the final trial. Issues of discovery, issues of appropriate scope of evidence, issues of market, issues of competition and product substitutability may well be able to be sent off to referees for a report or for reports which can then form part of the fabric of the trial process.

Likewise questions of damages, often complex and time consuming could be dealt with by the process of reference.

The use of such procedures could, in many cases, be distinctly advantageous. To the extent that a judge wished to have an issue or issues masticated or partly-digested by a specialist before considering the matter the special trial could take place. Whilst one way of using references is to have a bias in favour of adoption, another way might be to use the process as an initial digestion process giving wider or more flexible rights to the parties to contest aspects, thereby shortening judicial consideration, but enabling the parties to engage the judge with the report at a more detailed level than might otherwise be the case in other contexts.

I should say that there may be seen to be disadvantages in this process. In my personal experience, the hard work in understanding the market evidence provides one with a base of deep knowledge when one comes to understand the actions of the individual parties in the living market. Having deeply engaged in the factual understanding of a particular market, the actions of the impugned participants often become pellucid with that deep knowledge. If an expert or commercial person has prepared a report on the market, that deep imbibing of the underlying facts may be lacking in the judge and that may bring about a disadvantage in the ability to perceive the reasons for action and thus to assess the purpose involved in any particular body of circumstances.

Nevertheless, I think Federal Court judges armed, as in all likelihood they will be in due course, with powers to refer out to referees have a highly advantageous tool to enable them more efficiently to deal with complex factual and technical issues.

Assessors

In the *Patents Act 1990* (Cth), s 217 the following appears:

> A prescribed court may, if it thinks fit call in the aid of an assessor to assist it in the hearing and trial or determination of any proceedings under this act.'

No rules or further explanation are given by the Patents Act or the Patent Regulations. In *Genetic Institute Inc v Kirin-Amgen Inc (No 2)*[24] Heerey J in a patent case dealing with biotechnology made an order under the Patents Act, s 217 for an assessor. The making of the order was contested. It was argued that Order 34 of the Federal Court Rules (the court expert) somehow overrode or modified the effect of a law of the parliament (the Patents Act, s 217). This submission, unsurprisingly, was rejected. Heerey J referred to the New Zealand decision in 1980 of *Beecham Group Ltd v Bristol-Myers Co*[25] in which Barker J made an order under the relevant provision in the New Zealand Act providing for the appointment of:

> … an independent scientific advisor to assist the court or to enquire and report on any questions of fact or opinion not involving questions of law or constructions.

Heerey J found that the use of an assessor as an assistant for him was conformable with the exercise of federal judicial power. One aspect of the matter which was complained of was that the consultation would take place privately between the judge and the assessor. This was inimical, it was said, to the exercise of judicial power. Heerey J rejected this. In doing so he called in aid what Mason J said in *Re L: Ex parte L.*[26] There Mason J discussed the proscription of persons communicating with the judge about his or her decision. His Honour said:

> This proscription does not, of course, debar a judge hearing a case from consulting with other judges of his court who have no interest in the matter or with court personnel whose function is to aid him in carrying out his judicial responsibilities …

Heerey J said that an assessor appointed under s 217 was to be included in the category of court personnel referred to by Mason J. Heerey J went on to say:[27]

> How the assessor appointed under s 217 performs his or her role in the actual conduct of this case will of course be governed by law, including the rules of natural justice. It is not appropriate at this early stage to lay down any detailed prescription. Suffice to say that the practical experience of Beecham shows how an appointment can work well and be of great assistance to a trial judge, without infringing natural justice.

There was an application for leave to appeal to the full court. The Court (Black CJ, Merkel and Goldberg JJ)[28] refused leave. The court said:[29]

> … the questions of the role of the assessor, and of the potential impact of that role on the parties' rights of natural justice and his Honour's obligations to perform his judicial functions fairly and independently, were considered and addressed by his Honour before the commencement of the trial. Against this background we are not persuaded that any aspect of his Honour's conduct with respect to the assessor provides a basis for leave to appeal.

To understand what an assessor is and how in competition cases

this facility (of course with any necessary statutory authority) could be of help, it is of utility to examine the historically most used type of assessors – in shipping and Admiralty cases.

The assessor in maritime cases

The function of assessors in Admiralty is explained in Roscoe's *Admiralty Practice 5th Ed* at 330-331, *McGuffie British Shipping Laws* Vol 1 *Admiralty Practice* at [1212] ff and [1331] and Australian Law Reform Commission Report 33 on Civil Admiralty Jursidiction [288]-[291].

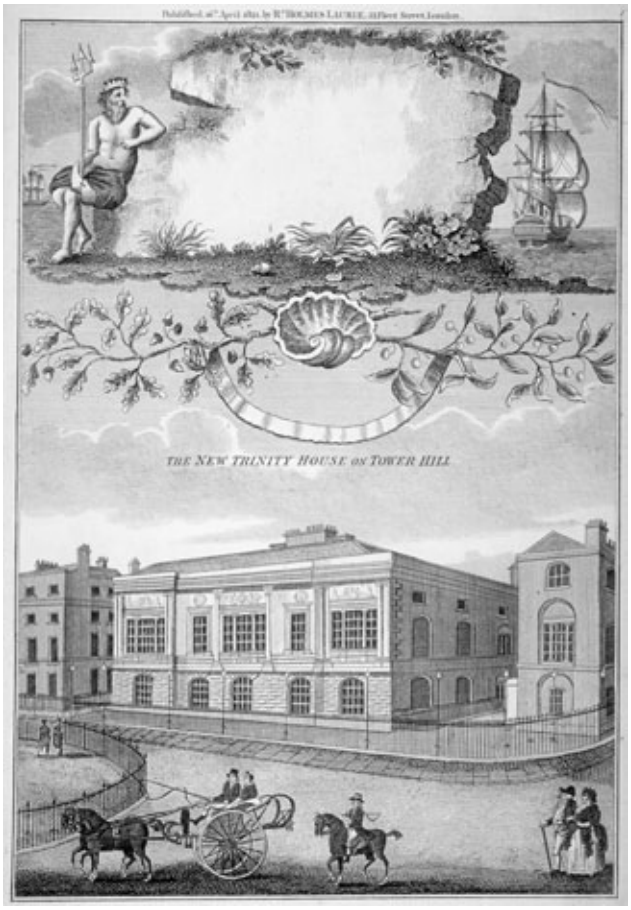
Assessors in maritime cases were brought in when questions of seamanship were in issue – especially in collision and salvage cases. The assessors in England were the Elder Brethren of the Corporation of Trinity House. This was and is an old body whose first official record was a charter from Henry VIII on 20 May 1514 to regulate pilotage. In 1604, James I conferred rights of compulsory pilotage and rights to license pilots in the Thames. The corporation remains a maritime specialist organisation able to provide skilled assistance to the courts and the commercial community generally.

The function of assessors was to advise the court upon matters of nautical skill. The responsibility for the decision and the weight to be attached to the advice of the assessor remained with the judge. In *The Nautilus* [1927] AC 145 the House of Lords made clear that the judge must not surrender to the assessor the judicial function of determining the issue before him, however technical it may be.

There are number of expressions in the English cases that assessors provided a form of evidence of an expert character. In *Richardson v Redpath, Brown & Co* [1944] AC 62 at 70-71 this view was heavily criticised by Viscount Simon. I will come back to Viscount Simon's views shortly. The view that the assessor's advice was evidence sits uneasily with the reality of his or her contribution. They could assist an appellate court (the Court of Appeal or the House of Lords) in understanding the evidence led below. Further, there was no right of cross examination, indeed assessors were not sworn as witnesses. Nevertheless, when assessors assisted the court, without the leave of the court, the parties were not permitted to call their own expert evidence.

Assessors were used in other countries in Admiralty claims. In the United States their use was, however, discontinued in the nineteenth century. New Zealand and Australia no longer make use of them. This is in part because of the dearth of collision and salvage cases, at least in Australia. Canada, however, has always made more use of assessors than its Commonwealth cousins. Its Admiralty rules provide for them, encouraging both the use of assessors and expert evidence in the same case.

You have not all gathered here this weekend in Adelaide to hear me speak on maritime law and procedure. However the tool of the assessor, if carefully and thoughtfully used, could be of great utility to the modern judge hearing a case about any expert



Trinity House, Trinity Square, City of London, 1821. Photolibrary.com

discipline, in particular in my view, competition cases. One of the most helpful discussions of the place of the assessor can be found in a Canadian case: *The Ship 'Diamond Sun' v The Ship 'Erawan'*[30]. There, Collier J surveyed the variety of procedural approaches to the use of assessors. In that survey, Collier J cited Viscount Simon in *Richardson v Redpath, Brown & Co* to which I have already made mention. *Richardson* was not a shipping case. It was a workers' compensation case in which the practice that had grown up in England (and seemed to be a very sensible practice) of using medical assessors to assist judges in dealing with workers' compensation claims was discussed. It is worth setting out some of the views of Viscount Simon. As one reads the words of Viscount Simon one can immediately see their relevance, and the utility of the assessor to fields such as competition cases. Viscount Simon said the following:[31]

> … to treat a medical assessor, or indeed any assessor, as though he were an unsworn witness in the special confidence of the judge, whose testimony cannot be challenged by cross examination and perhaps cannot even be fully appreciated by the parties until judgment is given, is to misunderstand what the true functions of

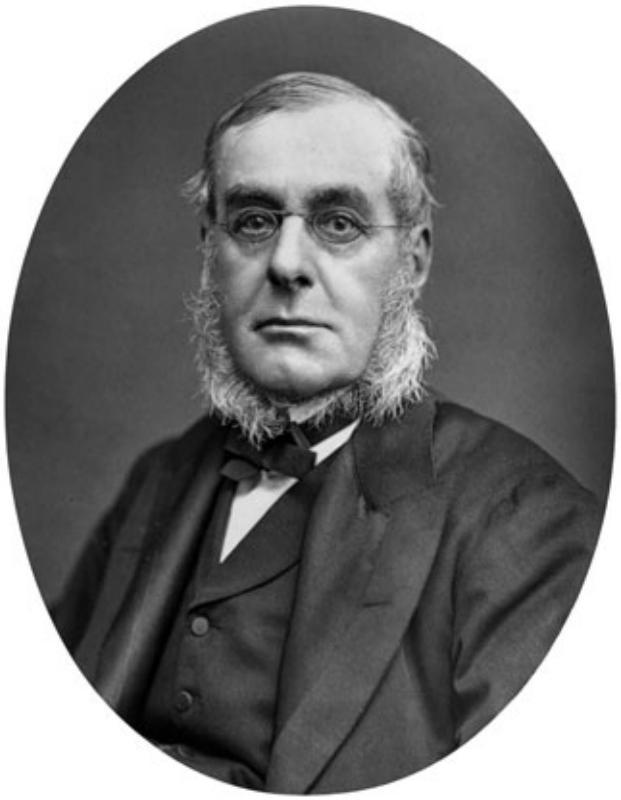
> an assessor are. He is an expert available for the judge to consult if the judge requires assistance in understanding the effect and meaning of technical evidence. He may, in proper cases, suggest to the judge questions which the judge himself might put to an expert witness with a view to testing the witness's view or to making plain his meaning. The judge may consult him in case of need as to the proper technical inferences to be drawn from proved facts or, or as to the extent of the difference between apparently contradictory conclusions in the expert field. … It would seem desirable in cases where the assessor's advice, within its proper limits, is likely to affect the judge's conclusion, for the latter to inform the parties before him what is the advice which he has received. …'

This is a very helpful and clear expression of the consultative non-evidential task of the assessor.

The modern English practice can be seen in cases such as *The 'Bowspring'*.[32] There the Court of Appeal of England and Wales examined the question of the use of assessors against the common law principles of natural justice and article 6 (1) of the European Convention on Human Rights. The principle of fairness, it was said, required that any consultation between the assessors and the court should take place openly as part of the assembling of the evidence.

I am not sure that is not putting the matter too highly. It goes without saying that statutory authority would be required, but as long as it is clear that the task of consultation and its extent is to be disclosed, it is difficult to see why the judge should not have the availability of the assessor out of court as well as in court. The scope and difficulty of the evidence in many cases, including competition cases, is such that a single judge is often left with a vast task which can take months to unravel. The availability of a consultative agency such as an assessor would be of considerable assistance. It is not as if judges do not talk to others.

Let me give you an example. My late colleague, Justice Peter Hely, heard a particularly difficult collision case involving the ramming of a coal berth at Port Kembla by a 140,000 tonne bulk carrier. The case involved a matrix of conflicting human evidence of crew, pilot and bystanders as well as a significant body of technical evidence around the subjects of close ship handling, pilotage practice, the handling of tugs and the forces of tide and wind on a large object such as a bulk carrier in a confined water space. His Honour did his customary magnificent job at first instance in marshalling the facts. I sat on the appeal. After we finished the appeal (upholding all his findings of fact) I asked him whether he would have preferred to have the assistance of an assessor. He was unequivocal in his expression of view that this would have been of great assistance. The fact was that night after night, week after week this diligent, hugely competent man struggled with his 28 year old associate to understand the detail and complexity of the lay and expert evidence. His judgment was a masterpiece of careful organisation and thoroughness. Many judges would not have been able to do



Admiral Sir Richard Collinson, KCB, FRGS, Deputy-Master of Trinity House, 1877. Artist: Lock & Whitfield. Photolibrary.com

what he did. It would have been of great assistance to him had he had a generalist maritime assistant familiar with charts, familiar to a degree with ship handling, familiar to a degree with bulk carriers and tugs to help him marshal and interpret the evidence before him. In some of my competition cases I had the benefit of associates with sophisticated economic training. In others, I did not.

There is, of course, an overlap between evidence and interpretation of evidence. But the world is not perfect. Judges are not super human. A degree of assistance in the interpretation of expert evidence would often be of significant assistance to the judge making it likely that time taken to resolve cases would be shorter and the physical energy demanded of judges to command the facts would be relieved.

If one contemplates the size of many competition cases, the sometimes platoon-like manning of each side with expert witnesses, solicitors, junior counsel, senior counsel and the recognition that one judge will decide the case at first instance leads one to conclude that it is often quite unfair to expect a judge to be able to deal with these without some degree of assistance.

One of the loneliest feelings in the world is finishing a long case

having had the assistance of the teams and platoons from both sides for weeks, or months and then hearing the court door close behind you realising that the thousands of pages of transcript and of exhibits are now yours, and yours alone, to understand, to distill and to deploy in a synthesised way to reach an answer. Your only friend may be the associate or tipstaff who has been with you during the case. There is no one to talk to. The task and its difficulty should not be underestimated.

More than one judge

I will raise briefly one other issue which I have spoken of in various contexts before. Some cases (perhaps only the exceptional) are so large and so complex that it is simply unfair to burden one person alone with the responsibility of writing. I am firmly of the view that in some cases a second judge could usefully be allocated to the hearing of the matter. This person could play a number of functions. First, both judges could be responsible for distilling and assessing the evidence. Of course, one must have dispositive capacity in one judge because there may be disagreement. However, the presence in a working capacity of a colleague could be extremely valuable. Also, people die. There is often not much choice when this occurs. Long cases can cost many millions of dollars. The second judge can step in.

I have not had much success in persuading anyone that long difficult trials could legitimately attract this additional judicial function. It would cost money within the judicial budget. It could be used flexibly, perhaps merely having the second judge as a sounding board on a formal basis and able to step in if the primary judge becomes ill or otherwise infirmed.

I raise it because one day a long case will have a significant effect on the health of a judge. In administration speak, it can be seen as an OH & S 'issue'. The difficulty and weight of many of these cases is not appreciated by the general community, is not appreciated by the commercial community, is not appreciated by counsel and solicitors. It should be. Using, in the very exceptional case, more than one judge may be one mechanism of ensuring that not only the possibility of which I just spoke never occurs, but also that more expeditious resolution of very long cases can occur.

Conclusion

These are some ideas for discussion and consideration by superior courts generally. They are, I think, worth considering. They may help to alleviate the hand-wringing that tends to occur about expert evidence.

1. *Judiciary Act 1903* (Cth), s 39 (2).
2. *Forge v ASIC* (2006) 228 CLR 45.
3. *WWF v TW Alexander Ltd* (1918) 25 CLR 434.
4. *Harris v Caladine* (1991) HCA 172 CLR 84.
5. See *AGL v ACCC* [2003] FCA 1525; 137 FCR 317.
6. See Renfree *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984). As to the lack of an accepted definition, see *Davis v The Commonwealth* (1988) 166 CLR 79, 92-3 and 107 and M Sunkin and S Payne *The Nature of the Crown: A Legal and Political Analysis* (Oxford 1999) pp. 78-87.
7. *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Limited* (1970) 123 CLR 361, 389-97 per Windeyer J.
8. See *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 391 per Windeyer J.
9. Griffiths CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*: '[T]hat the words 'judicial power' as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.
10. *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.
11. *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.
12. *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530.
13. See *British Imperial Oil v Federal Commissioner of Taxation* (1926) 38 CLR 153 (the Second BIO case) at pp 175-76.
14. *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 189; *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617, 628; and *Re Ranger Uranium Mines* (1987) 163 CLR 656, 665.
15. (1957) 100 CLR 277.
16. *Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008.*
17. (1978) 140 CLR 1 at 15-22 and 28-38, respectively.
18. [2008] NSWCA 228.
19. See generally *Chocolate Factory Apartments Pty Ltd v Westpoint Finance Pty Ltd* [2005] NSWSC 784 at [7]. *Super Pty Ltd v S J P Formwork (Aust) Pty Ltd* (1992) NSWLR 549 at 562-565 (Gleeson CJ with whom Mahoney JA and Clarke JA agreed); *Chloride Batteries Australia Ltd v Glendale Chemical Products Pty Ltd* (1988) 17 NSWLR 60; *White Constructions (NT) Pty Ltd v Commonwealth of Australia* (1990) 7 BCL 193; and *Foxman Holdings Pty Ltd v NMBE Pty Ltd* (1994) 38 NSWLR 615.
20. See *Nicholls v Stamer* [1980] VR 479.
21. (1997) 47 NSWLR 631 at 639-642.
22. (1991) 172 CLR 84.
23. Ibid., at 640-641.
24. (1997) 78 FCR 368.
25. [1980] 1 NZLR 185.
26. (1986) 161 CLR 342 at 351.
27. Ibid., at 372.
28. (1999) 92 FCR 106.
29. Ibid., at 118.
30. (1975) 55 DLR (3d) 138.
31. [1944] AC at 70-71.
32. [2005] 1 Lloyds Rep 1 at [57] - [65].