

THE ADMISSIBILITY OF EXPERT OPINION ECONOMIC EVIDENCE IN JUDICIAL REVIEW

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This paper deals with the growing prevalence of economic evidence in judicial review proceedings in Australian courts. It examines the limitations imposed upon the admissibility of such evidence through the rules of evidence, at common law and the uniform Evidence Act, and the nature of judicial review actions. In considering two recent Federal Court cases where economic evidence was an integral component of the judicial review action, this paper suggests that despite the intricate rules now imposed upon the admissibility of expert opinion evidence, the main obstacle to the admissibility of expert economic evidence in judicial review actions is the incompatibility of determinative economic perspectives and the need for the court to refrain from merits review. Thus it would seem that the introduction of technical economic evidence in a judicial review proceeding runs a dual risk of being inadmissible for either not furnishing with sufficient clarity the foundations of the expert opinion proffered, or if the expert opinion is perceived as being too conclusive in its assertions it may also be inadmissible as going to the merits of the original decision the legality of which is the sole concern of the court reviewing the decision. Should the correct balance be found, expert economic opinion evidence is admissible in judicial review actions.

I INTRODUCTION

In his 1985 account of judicial review Christopher Enright contended that there are two decision making mechanisms in the modern state, the law and the market.¹ When modern laws reflect, and in some cases rely on, the market mechanism, the clear dichotomy offered by Enright blurs. Competition policy and laws regulating monopolistic power are the clearest example of this union between law and the

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¹ Christopher Enright, *Judicial Review of Administrative Actions* (1985) 3.

market. As a consequence of this increased interdependency between law and the market, situations arise where executive functionaries are required to consider economic conditions in making administrative decisions. Given that in Australia the legality of executive decisions can be challenged through judicial review, the situation has now arisen where economic evidence is a key component of successfully mounting such a challenge.

What this paper explores is the admissibility of expert economic evidence in judicial review cases. The conclusion this paper reaches is that to be admitted in a judicial review proceeding, economic evidence must overcome the requirements imposed by the *Uniform Evidence Act*, but at the same time not exceed the limitations imposed by the nature of a judicial review action. Admissibility depends upon finding the middle path.

Part II of this paper discusses what is meant by the term 'economic evidence'. Part III proceeds to outline the fundamental 'opinion rule' under the *Uniform Evidence Act* with which expert economic evidence must comply. Particular focus is given in Part III to the decision of Heydon J in *Makita*² and how this foundational position has been refined in subsequent cases. Part IV examines two recent cases of judicial review where economic evidence played an important part and the admissibility of such evidence received comprehensive treatment.

II ECONOMIC EVIDENCE AT TRIAL

The initial question 'what is economic evidence?' is in itself not as simple to answer as one might hope. Despite the growing use of 'quantitative' economic evidence based on data collation and regression through the use of econometric techniques³, the vast majority of economic evidence presented at trial in Australia can perhaps best be termed 'explanatory'. That is, it is the use of expert economic testimony to explain and interpret particular economic concepts relevant to legal proceedings.

Recently, Allsop J of the Federal Court of Australia, in addressing the nature of economics and its utility at trial found it helpful to quote John Maynard Keynes. 'The theory of economics' Keynes argued '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.'⁴

² *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 ('*Makita*').

³ See generally Charles Sweeny and Deirdre Hay, 'Quantitative Economic Evidence in Australian and New Zealand Courtrooms' (2003) 10 *Competition and Consumer Law Journal* 284.

⁴ *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* [2005] FCA 630 (18 May 2005) [21].

Understanding economics as ‘an apparatus of the mind’ places the economist closer in practice to a lawyer than to an expert on, say, late Victorian architecture. Economists do not bring a settled knowledge of a particular topic to bear; rather they provide a perspective and a method for understanding issues. As Robertson has argued, economists present economic paradigms such as ‘market’ or ‘monopoly’ (as opposed to legal paradigms such as ‘tort’ and ‘contract’) and then filter facts through these models to identify the *relevant* facts. It is further suggested, that in accomplishing this task economists challenge simplistic or intuitive judgments that might otherwise incorrectly be reached.⁵

Economic evidence has grown in importance and indeed complexity within the sphere of litigation arising mainly from government competition policy (in particular the *Trade Practices Act* 1974). Central concepts such as ‘efficiency’, ‘competition’ and ‘monopolistic power’, which had long been familiar to the field of economics, have become integral to enforcing competition policy in Australia. After approximately the first decade of having the *Trade Practices Act* on the books, the uncomfortable lack of compatibility between economic evidence and the prevailing evidentiary system started to sharpen in focus. On completion of a comprehensive study on the use of economic evidence in antitrust litigation in Australia, Professor Maureen Brunt observed

Taking perhaps a pessimistic interpretation, the common law rules relating to hearsay and expert opinion evidence might almost have been designed to frustrate the reception of economic evidence, especially the testimony of economists. Fortunately, perhaps, there is some uncertainty as to the scope and meaning of two of the rules governing opinion evidence, the ‘basis rule’ (the inadmissibility of opinion evidence based on material not already admitted) and the ‘ultimate issue rule’ (the inadmissibility of evidence as to the ultimate issue). But the present stance of the Court as regards the reception of expert economic testimony might best be described as uneasy with, one might surmise, even the most generously inclined judge somewhat inhibited in the assistance he might feel able to secure from professional economic advice.⁶

Two decades after Brunt found ironic solace in the underdevelopment of the opinion rule, modern practitioners and commentators have grown to see the clarification of that particular aspect of evidence law as vital to understanding the admissibility of expert economic evidence at trial. On the whole, however, the courts have been increasingly willing to entertain economic evidence in a number of divergent contexts.⁷

⁵ Donald Robertson, ‘Expert Economic Evidence: Challenging the Paradigm’ (2003) 11 *Trade Practices Law Journal* 70, 73-4.

⁶ Maureen Brunt, ‘The Use of Economic Evidence in Antitrust Litigation: Australia’ (1986) *Australian Business Law Review* 261, 304.

⁷ See, for example, *Airservices Australia v Canadian Airlines International Ltd* [1999] HCA 62 (taxation and constitutional law); *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 207 (Negligence – determining a duty of care).

As economic evidence has become more common, the rules of evidence addressing the admissibility of expert opinion evidence have also become much more refined. Through the amendments to the uniform Evidence Law and the interpretation the new legislation has received in the courts, a fundamental threshold has been established which economic evidence, and in fact all opinion evidence, must meet before being admitted. It is to that basic threshold that this paper now turns.

III THE 'OPINION RULE' AND EXPERT EVIDENCE POST *MAKITA*

By 1985, the ALRC observed that it was generally accepted that a rule which excludes opinion evidence exists, but that due to the lax approach of the courts in upholding this rule, it cannot be asserted that the rule operates in any meaningful way.⁸ This lack of judicial vigilance is not to be seen as mere indifference, oversight or the shirking of responsibility by the bench, rather, it is in the definition of what is to constitute an 'opinion' as opposed to a 'fact' that judges found it difficult to articulate a consistent approach. Without delving too deeply in to the realm of philosophy, in a sense all representations of facts by witnesses are 'opinions',⁹ creating an unsatisfactory distinction between factual and opinion evidence serving only to further confuse the matter. Upon the broadest reading of the rule, an opinion was generally understood as the drawing of an 'inference from observed ... data'.¹⁰

An exception to the traditional opinion rule is the admissibility of expert evidence. There were, however, certain limitations imposed on the admissibility of expert testimony based loosely upon whether the expert opinion was:

- based upon a factual basis (the 'basis rule');
- went to the ultimate issue to be decided by the tribunal of fact (either judge or a jury) (the 'ultimate issue rule');
- not merely a recantation of something which is common knowledge and capable of judicial understanding on the basis of common sense (the 'common knowledge rule');
- based upon knowledge which forms part of a recognisable field of expertise (the 'field of expertise rule');
- expounded by a person possessing sufficient knowledge in the recognised field allowing them to be held out as an expert (the 'expertise rule').¹¹

It was upon this conceptual foundation of a general prohibitive rule as regards opinion evidence, limited by certain exceptions and in turn these exceptions tempered by particular rules that the present evidence law regime is founded.

⁸ Australian Law Reform Commission, *Evidence*, Report 26 (Interim) (1985) 347.

⁹ James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) 524.

¹⁰ Australian Law Reform Commission, *Evidence*, Report 26 (Interim) (1985) 348.

¹¹ Australian Law Reform Commission, *Uniform Evidence Law*, Report 102 (2005) 9.26.

The opinion rule is reflected in s 76¹² of the *Uniform Evidence Law* with the expert evidence exception encapsulated by s 79.¹³ The limitations on the admissibility of expert evidence were significantly altered by the introduction of the uniform evidence regime. Section 80 abolished the ‘ultimate issue rule’ and the ‘common knowledge rule’, although as will be explored below in the context of judicial review the ‘ultimate issue rule’ is, in a sense, necessarily resurrected. Moreover, as s 76 reads that to be admissible, the testimony of an expert must be founded upon a ‘specialised knowledge based on the person’s training, study or experience’ the ‘field of expertise rule’ and the ‘expertise rule’ are likewise incorporated in the words of the legislation.¹⁴

What remained unconsidered, or at least explicitly unaddressed, by the legislation was the ‘basis rule’ as it affected the admissibility of expert evidence. In 2001 Heydon J, then serving on the bench of the Supreme Court of New South Wales, addressed this issue in the case of *Makita*.¹⁵ The exposition, provided in *obiter*, raised some concerns amongst observers in that it appeared to create an overly restrictive approach as regards the admissibility of expert evidence. Upon further treatment, not least in the body of cases faced with the basis-rule issue since *Makita* was handed down, it would appear that the approach of Heydon J is not only sound, but places the ‘basis rule’ in the contemporary context of the overall uniform Evidence framework.

It is important to understanding the reasoning underpinning *Makita*, as it has formed the basis of the main objections raised to the admissibility of economic evidence in judicial review actions in two recent and important Federal Court cases.

The relevant issue in *Makita* was the admissibility of a particular report completed by an expert on surface friction in a negligence claim pertaining to a ‘slip and fall’ incident.¹⁶ The ‘basis rule’ was examined by the court as to its existence at common law, and also under the uniform evidence regime. Justice Heydon provided the most comprehensive treatment of the ‘basis rule’ of the three judges who presided over the case. The position articulated by Heydon J was that in submitting an opinion to the court, an expert must show that the basis of that opinion was based ‘wholly or substantially’ on a field of ‘specialised knowledge’.¹⁷ Furthermore, experts must

¹² (1) Evidence if an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

¹³ If a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

¹⁴ See Australian Law Reform Commission, *Uniform Evidence Law*, Report 102 (2005) 9.31-9.32.

¹⁵ Since being decided, *Makita* has been applied across Australian State and Federal jurisdictions more than 30 times.

¹⁶ See *Makita*, above n 2, [25]-[28] for a complete assessment of the facts per Heydon J.

¹⁷ *Makita*, above n 2, [85].

distinguish whether the foundations of their opinion were based on ‘observed’ or ‘assumed’ facts.¹⁸ In summation Heydon J stated

the expert’s evidence must explain how the field of ‘specialised knowledge’ in which the witness is expert by reason of ‘training, study or experience’, and on which the opinion is ‘wholly or substantially based’, applies to the facts assumed or observed so as to produce the opinion propounded.¹⁹

In Report number 102, released by the ALRC late in 2005, it was noted that the position espoused by Heydon J in *Makita* had created ‘substantial uncertainty about the existence of the basis rule under the *Uniform Evidence Acts*.²⁰ What perhaps caused the confusion amongst observers and practitioners was the view expressed by Heydon J that the *admissibility* of expert opinion evidence hinged on the identification of the basis of an opinion by the expert. The ALRC responded to this critical issue by stating clearly that, in the opinion of the commission, no ‘basis rule’ exists at common law or under the *Uniform Evidence Acts*, and that the approach of Heydon J in *Makita* is one primarily concerned with the weight (as opposed to questions solely pertaining to admissibility) to be attributed to expert opinion evidence, the foundations of which remain unclear or unspecified.²¹

The approach adopted by Heydon J, whilst seemingly strict, has actually been interpreted quite liberally in subsequent cases dealing with the admissibility of expert opinion evidence. In the case of *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd*²² the joint judgment of Weinberg and Dowsett JJ’s interpreted Heydon J’s approach in *Makita* as relating primarily to considerations of weight rather than the absolute admissibility of expert opinion evidence.²³

The idea that there is some kind of nexus between weight and admissibility seems to be at the core of the emerging conception on expert opinion evidence in Australia. This view is the view supported and propagated by the ALRC, and it rests on the interaction of s 55 (relevance) and s 79 (expert opinion rule) of the *Uniform Evidence Acts*. The reasoning underpinning this view is that for adduced evidence to be admissible, it must first be ‘relevant’. Relevant evidence is ‘evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings’.²⁴ Evidence that carries little or no weight could thus not ‘rationally affect’ the outcome of a case making it inadmissible because it is not relevant.²⁵

¹⁸ *Makita*, above n 2, [85].

¹⁹ *Makita*, above n 2, [85].

²⁰ Australian Law Reform Commission, *Uniform Evidence Law*, Report 102 (2005) 9.52.

²¹ Australian Law Reform Commission, *Uniform Evidence Law*, Report 102 (2005) 9.54.

²² *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157 (4 June 2002) (‘*Red Bull*’).

²³ *Makita* [86], [87].

²⁴ *Uniform Evidence Acts* (1995) s 55 (1).

²⁵ *Uniform Evidence Acts* (1995) s 56. As Heydon J noted in *Makita* at [66], the interplay between weight and relevance can be seen as far back as *Ramsey v Watson* (1961) 108 CLR

Despite the admirable efforts of the ALRC to reflect a neat self enclosed evidentiary facade wherein no semblance of a ‘basis rule’ is to be seen, *Makita* has insured that it remains ‘axiomatic that the opinion of an expert must be based on disclosed facts which enable the soundness of the conclusion to be tested’.²⁶

Another issue to have arisen as an extension of the need for experts to disclose the factual basis of their opinions is the nature or the facts to be disclosed. On a number of recent occasions, the most prominent of which can be seen in the case of *ASIC v Rich*, the court was faced with an important question on this point. That question was whether the disclosure required of experts had to be one where a ‘true factual basis’ is furnished by the expert as opposed to merely an ‘asserted (or assumed) factual basis’.

In the course of the substantial litigation arising from the case of *ASIC v Rich*,²⁷ Austin J at first instance ruled that evidence provided by an accounting expert was inadmissible because some of the information the accountant ‘more likely than not’²⁸ took into account in reaching his opinion was not identified in a submitted report and thus inadmissible based on the failure to comply with the requirements of *Makita* in not providing the *true* factual basis of his assertion.²⁹ On appeal, Spigelman CJ (with whom Giles and Ipp JJ agreed) rejected Austin J’s approach and held that that it was for a trial judge to determine whether opinion evidence is correct and capable of aiding the resolution of a material fact in issue, and questions relating to the factual foundations of the opinion are influential on the weight to be given to the opinion and is ‘irrelevant to the admissibility of the opinion’.³⁰ As Einstein J noted of this case in remarks made extra judicially³¹

The Court of Appeal held that Austin J had erred by holding that it was insufficient (in admissibility terms) for an expert to identify the facts and reasoning process which the expert *asserted* to be an adequate basis for his or her opinion.

The burden of the Court of Appeal decision is that it is not necessary for the expert to reveal *the actual historical basis* on which his or her opinion was in fact formed.

As slight as this distinction may seem to the passing observer, the conceptual ramifications of this approach belie its modest framing. Indeed, the approach

642. See also *Red Bull* at [14] per Branson J. Cf The Honourable Justice Clifford Einstein ‘Recent Developments in Opinion Evidence – Exposing the Factual Basis for an Expert’s Opinion’ (2006) 7 *The Judicial Review* 432, 441. Justice Einstein saw the conceptual relationship as merely ‘adding to the landscape’ of the existing body of evidence law.

²⁶ *Quenchy Crusta Sales Pty Ltd v Logi-Tech Pty Ltd & Anor No SCCIV-00-252* [2002] SASC 374, [41].

²⁷ *Australian Securities and Investment Commission v Rich* (2005) NSWCCA 152.

²⁸ *Makita*, above n 2, [75] quoting Austin J at first instance at [175].

²⁹ *Makita*, above n 2, [75].

³⁰ *Makita*, above n 2, [136].

³¹ Einstein, above n 25, 438.

adopted in *ASIC v Rich* shifts the trajectory in this particular area of Australian law decidedly away from the course being followed in America.

The position in the United States is that in making a ruling on the admissibility of expert opinion evidence, it is for a judge alone to determine the factual soundness of an opinion forwarded by an expert, that is, judges play the role of the proverbial 'gatekeeper'.³² In comparison to the perhaps more subtle Australian approach, the approach followed in the US, as a result of *Daubert*, forces Judges to understand technicalities and make clear decisions on the admissibility of expert evidence during trial as opposed to being able to weigh the relative importance of that evidence in formulating the final decision.

As it stands, the opinion of an expert is admissible under s 79 as long as the expert makes clear the 'facts and reasoning process that the expert *asserts* justify the opinion expressed'.³³ By contrast to the American position wherein Judges must for themselves decipher scientific and expert evidence in a vast array of fields to determine the correctness of the factual basis of the expert opinion (and thus admissibility); in Australia, it would appear, the onus is on the expert and the side utilizing the expert to insure that the conclusions proffered can be followed by the court such that the evidence adduced is influential (that is, carries weight). Admissibility is not an issue as long as there is an asserted foundation provided in support of the opinion, and it is ultimately the clarity and quality of this supporting justification that will be determinative of the weight the evidence is to carry.

If you were to ask a priest, an engineer and an economist how to get out of a deep hole, the responses you would get respectively are: pray for a ladder, build a ladder and assume a ladder. Jokes aside, the discipline of economics is built on assumptions controlling various variables in the real world. Whereas a physical science may have verifiable data supporting the conclusion of an expert, economists often must rely on various assumptions in formulating models from within which conclusions are reached and then tested against the real world. It is for this very reason that the approach taken to the opinion rule is especially significant to expert economic evidence.

³² See *Federal Rules of Evidence* 28a USC § 702 and *Daubert v Merrell Dow Pharmaceuticals* 509 US579 (US Supreme Court, 1993) ('*Daubert*'). *Daubert* established the standard which applies to the admissibility of expert opinion evidence in the United States. That standard was based on the Federal Rules of Evidence rather than the 'Frye' test established earlier by the case of *Frye v United States* (DC Cir 1923) 293 F 1013. The main characteristic of the 'Frye' test was that it adopted an approach whereby expert evidence would be admissible if it conformed to the state of knowledge "generally accepted" by the majority of experts in the field. Whilst *Daubert* did not completely eliminate this factor in determining admissibility, this factor alone is no longer the sole criterion. The *Daubert* decision, it was hoped, would end the 'battle of the experts' in judicial proceedings by imbuing the presiding judge with the significant responsibility of adjudging the reliability of evidence in such matters.

³³ Einstein, above n 25, 448.

The conclusions offered by economic experts are usually clear enough for digestion by the court on their own. However, according to s 79 it must further be shown that the opinion forwarded is based on the specialised knowledge of the expert. Given that economics is a discipline of rational reasoning heavily reliant on foundational assumptions, the cases have shown that, in the context of judicial review at least, litigants have sought to exclude economic evidence on the grounds that the underlying assumptions were not made clear.

This confrontational approach, challenging the conclusions of an opinion offered by an expert, has proven to be an expensive and time consuming exercise. It is now understood that as long as some basis for an opinion is offered, that evidence is admissible with the reliability of the actual opinion (including its supporting foundations) a matter influencing the weight to be attributed to that evidence not its admissibility.

IV JUDICIAL REVIEW AND ECONOMIC CONSIDERATIONS

A *Judicial Review*

The practice of judicial review has grown in concert with the expansion of government activity within the social and economic spheres of western liberal democracies.

In Australia, the basis upon which executive actions can be reviewed by the courts originally arose from basic common law principles.³⁴ These common law principles were consequently enacted in the late 1970s and a new and clearer foundation was laid upon which aggrieved parties could seek judicial review of executive actions at the federal level of Australian government. The common law grounds upon which judicial review could be sought were namely a denial of natural justice, a decision being *ultra vires*, being made in jurisdictional error, error of law on the face of the record and a failure to perform a duty.³⁵ These grounds were subsequently adopted as the statutory grounds upon which judicial review applications could be made, and indeed remain the main source of authority for aggrieved persons affected by executive decisions.³⁶

The statute which ‘in parts replaces and in parts adopts’³⁷ the common law framework for judicial review is the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* (*ADJR Act*). Apart from limited situations where judicial review of executive decisions is sought on constitutional grounds, be means of the writs

³⁴ See generally E I Sykes, D J Lanham and R R S Tracy, *General Principles of Administrative Law* (2nd ed, 1984) 21-67; S D Hotop, *Principle of Australian Administrative Law* (1985) 168-261 for a comprehensive treatments of judicial review at common law in Australia.

³⁵ Enright, above n 1, 443-4.

³⁶ See *Administrative Decisions (Judicial Review) Act 1977 (Cth)* ss 5-7.

³⁷ Enright, above n 1, iii.

available in s 75(v), the *ADJR Act* is the primary means through which affected persons can initiate judicial review actions in relation to federal executive decisions.

B The Cases

The main cases wherein economic evidence has been of pivotal importance in judicial review proceedings are *Visa International Services Association v Reserve Bank of Australia*³⁸ (*Visa*) and *Australian Retailers Association v Reserve Bank of Australia*³⁹ (*ARA*). For convenience, these cases will be referred to as ‘the designation cases’ in that the facts of each case arose out of the designation by the Reserve Bank of Australia (RBA) of a payment system as capable of being regulated through the imposition of standards by the RBA.⁴⁰

As summarised by Weinberg J in *ARA*⁴¹

Under the *Payment Systems (Regulation) Act* 1998 (Cth), the RBA has the power to ‘designate’ a payment system if it considers it would be in the ‘public interest’ to do so. Once a payment system has been ‘designated’, the RBA has the power to, amongst other things, make standards that must be complied with by participants in the payment system. In determining what is in the ‘public interest’, the RBA is required, under the Act, to have regard to payment systems being, in its opinion, ‘efficient’ and ‘competitive’.

The definition of a ‘payment system’ is provided by s 7 of the *Payment System (Regulation) Act* 1998 as a ‘funds transfer system that facilitates the circulation of money, and includes any instruments and procedures that relate to the system’.

The facts in the *Visa* case were that on 12 April 2001, the RBA, through a decision taken by its Payment Standards Board (PSB), had designated the credit card operations of *Visa* as a payment system capable of regulation. The RBA had only designated the payment system, but, as of the date of review, had yet to implement regulations. The type of regulation contemplated by the RBA was related to the ‘surcharge’ and ‘interchange’ standards to be imposed upon *Visa*.⁴² In challenging the designation, *Visa* argued on several grounds that the decision taken by the RBA was unenforceable. Among the arguments raised, *Visa* contended that the operations conducted through its credit card scheme were not a payment system as defined in the *PS(R) Act*. Even if the credit card scheme were a payment system as per the statutory definition, *Visa* further suggested, the RBA did not take relevant

³⁸ [2003] FCA 977.

³⁹ [2005] FCA 1707.

⁴⁰ Designation is provided for by the *Payment System (Regulation) Act* 1998 (Cth) s 11(1).

⁴¹ *ARA*, above n 39, [3].

⁴² Interchange fees are fees paid by a financial institution (who pays a merchant for a credit card purchase) to issuers of credit cards as a means of balancing processing costs. Some credit card companies such as *Visa* and *MasterCard* also have rules stipulating that ‘no surcharge’ can be levied by merchants for the use of the credit facility. The RBA made regulations abolishing the ‘no surcharge rule’ and this was another basis for challenge in *Visa*.

issues it was bound to consider into consideration and was ‘grossly unreasonable’ in reaching its designation decision and ‘breached principles of proportionality’.⁴³

At various stages in the proceedings of the *Visa* case, Tamberlin J made it abundantly clear what the purpose and function of judicial review was, and the need to refrain from sliding into merits based review.⁴⁴ It was thus within this overarching judicial purpose articulated that the use of technical economic evidence was accepted by the court. The majority of the economic evidence adduced by both sides went to establishing (and disconfirming) the claim that the decision making process employed by the RBA did not conform to legal requirements in not considering central concepts of ‘competition’ and ‘efficiency’.

To succeed in their action, Visa would have to establish that given the meaning of the terms ‘efficiency’ and ‘competition’ no reasonable decision maker would have reached the decision ultimately affirmed by the RBA. Visa thus sought to lead with submissions based on expert economic opinion as to the definition of ‘efficiency’ and ‘competition’. Justice Tamberlin made several rulings early in the proceedings allowing the submissions to be made in that they aided in informing the court of the technical ‘trade’ usage of the terms in question.⁴⁵ Counsel for the RBA raised four objections to the submission of the expert reports, the first of which was based on Heydon J’s position in *Makita*. The remaining objections centred on the nature of the expert opinions proffered and the suggestion that the conclusions submitted in their reports went to the merits of the decision rather than the way in which the decision of the RBA was reached. Some of the evidence which was not admitted was in fact rejected ‘on a number of grounds, including considerations that the evidence did not disclose assumptions’.⁴⁶ Over all, the approach adopted by Tamberlin J was to ‘err on the side of admitting evidence which was on or close to the borderline, on the basis that such evidence, if admitted, could be evaluated as to substance and weight in final submissions’.⁴⁷ The approach adopted by Tamberlin J is consistent with the prevailing attitude reflected in *AISC v Rich* that as long as an opinion offered by an expert is transparent, it is admissible leaving other consideration such as the validity, veracity or otherwise to be considered at the final judgment stage in attributing weight.

The main issue influencing the weight attributable to the expert economic evidence adduced in *Visa* was the very nature of a judicial review proceeding (in being concerned with legality as opposed to merits) and the conclusive opinions offered in the expert reports which seemed to go very much to the merits of the RBA’s decision rather than its process. Despite the ‘ultimate issue rule’ being abolished through s 80 of the *Uniform Evidence Law*, in judicial review proceedings it is

⁴³ *Visa*, above n 38, [42].

⁴⁴ See eg, *Visa*, above n 38, [7]-[12].

⁴⁵ *Visa*, above n 38, [649]-[650]; Justice Tamberlin also relied upon *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, [401]-[402].

⁴⁶ *Visa*, above n 38, [668].

⁴⁷ *Visa*, above n 38, [669].

important to bear in mind the ultimate issue to be determined. The ultimate issue in judicial review is not the same ultimate issue concerning the original executive decision maker, rather, the ultimate issue is whether the original decision maker made a valid decision according to law.

The decision in *Visa* made it apparent that *Makita* was not as overly restrictive in the context of the admissibility of economic evidence in judicial review as might have been expected. The decisive aspect of the evidence adduced in *Visa* which rendered the evidence of limited weight, if not no weight at all, was that the expert opinions submitted drew conclusions on the merits of the administrative decision rather than its reasonableness. Rather than proving that the RBA had reached a decision in ignorance of some obvious minimal formal economic objective conceptualisation broadly agreed upon in the discipline, the very contestability of the economic issues at trial by the opposing experts revealed a significant fact upon which Tamberlin J based his judgment. Justice Tamberlin was thus⁴⁸

satisfied that there is no accepted principle among economists or a majority of economists which compels the conclusion that certain types of empirical evidence can or must be collected before the RBA can form the opinions required under the legislation.

What the case of *Visa* seemed to indicate was that instead of the basis of an opinion being the important element governing admissibility in judicial review proceedings, the direction towards which the opinion was utilised would be of greater significance. It should be noted that in 2003 *Makita* had yet to be given the comprehensive judicial treatment which it has since enjoyed. Thus when a similar issue recently arose before the Federal court, a clearer articulation of just how *Makita* was to operate in this context was perhaps always to be expected.

In the second designation case decided in late 2005, the facts were very similar to those in *Visa*. On 9 September 2004 the RBA designated 'EFTPOS' (Electronic Fund Transfers at Point of Sale) as a payment system subject to regulation through the *PSR Act*. The Australian Retailers Association and six independent retail merchants sought to challenge the decision to designate EFTPOS on the basis that, as with *Visa*, the RBA had failed to take proper consideration of the terms 'efficiency' and 'competition' in making the decision to designate. The initial avenue pursued by the applicants was to challenge the RBA's decision at the Australian Competition Tribunal (ACT). Not being satisfied with the ACT's decision, the Australian Retailers Association applied to the Federal court for judicial review. The applicants contended that should the RBA seek to eliminate or reduce interchange fees the loss in revenue to 'acquirers'⁴⁹ would ultimately be made up through a 'flow-on' effect to be born by merchants or higher prices for consumers. The failure to consider such a scenario, it was suggested, meant that the

⁴⁸ *Visa*, above n 38, [745].

⁴⁹ See *ARA*, above n 39, [44]. Justice Weinberg defines 'acquirers' as 'financial institutions such as banks that 'acquire' merchants' claims against issuers'.

RBA had not properly considered the effect on ‘efficiency’ and ‘competition’ as required by statute.

The *ARA* case involved significantly more economic evidence than *Visa* (close to 7 000 pages were submitted). Each opposing side provided its own economic experts which were in turn supported by detailed and technical analytical economic reports demonstrating the basis of each expert’s opinion. The purpose of adducing the economic evidence was to prove that the decision taken by the RBA was (un)reasonable, in the *Wednesbury* sense.

In ruling on the objections raised by each party on the admissibility of the opposing side’s economic evidence, Weinberg J began by clearly articulating the state of the law on the admissibility of expert opinion evidence under the uniform Evidence Act.⁵⁰ Starting from the foundational *Makita* position, Weinberg J noted that it is now well recognised that expert opinion evidence must display a distinction between the opinion forwarded and the facts underlying that opinion.⁵¹ Justice Weinberg then went on to confirm that the cases of *Red Bull* and more recently *ASIC v Rich* are to be interpreted as rendering expert evidence admissible even if the underlying assumptions are unproven or assumed. This ultimately renders the clarity and quality of the underlying assumptions or facts influential on the weight to be attributed to the evidence, not necessarily determinative of admissibility.⁵²

In implementing this approach, Weinberg J addressed the objections of each party by ruling that, in all but one instance, the concerns raised went to the weight of the evidence. With respect to the exception, evidence tendered by a Pr Farrell on behalf of the RBA, his Honour found the reasons for the opinion provided were so technical and incomprehensible that the evidence was inadmissible.⁵³ The underlying reasoning being that in not being able to understand the basis for the opinion, the evidence was of no weight and could not rationally affect the ultimate decision thus rendering it irrelevant and inadmissible.

The present rules relating to the admissibility of expert opinion evidence form only one of the dimensions limiting the scope and utility of expert economic evidence at judicial review. The other limit imposed upon evidence tendered of this nature is the requirement that the evidence go towards addressing the ultimate issue in the judicial review proceeding, that is, was the administrative decision reached in a legal manner? Should economic evidence go too far in attempting to demonstrate that a seemingly obvious economic perspective was omitted from consideration by

⁵⁰ *ARA*, above n 39, [447]-[452].

⁵¹ *ARA*, above n 39, [448]. Justice Weinberg understood the decision of Gleeson CJ in *H G v Queen* (1999) 197 CLR 414, [39] as authority for this position.

⁵² This position is supported by Branson J in *Red Bull* and Weinberg J in *ARA*. The nexus between the disclosure of the clear underlying assumptions, ‘weight’ and ‘relevance’ is also to be remembered. See *ARA* at [484]-[485]. Justice Weinberg rejected the evidence tendered by an expert on the basis that the underlying assumptions were too mathematically technical to understand.

⁵³ *ARA*, above n 39, [484].

the original decision maker, that expert economic evidence may tend to far towards the merits of the decision (that is, what the decision maker *should* have decided) and consequently be considered inadmissible. In both the designation cases the economic evidence was of limited use to the trial judge in that it went too far towards challenging the merits of the original decision. Economic experts cannot assert what they believe the outcome of the decision maker's discretion should be; only what issues that decision maker should have take into consideration. Experts must be informed of the limits imposed upon their function in judicial review proceedings.

V CONCLUSION

The admissibility of expert economic evidence in judicial review proceedings under the *Uniform Evidence Act* has proven to be a delicate operation. Economic evidence must find the middle ground between satisfying the requirements imposed upon the admissibility of expert opinion evidence and at the same time not challenging the merits of the original decision. From examining the designation cases it would appear that overcoming the first hurdle as regards admissibility is not the main challenge to the successful employment of economic evidence in judicial review. By providing a clear report outlining the basis of the opinion offered by an expert, that opinion is admissible as evidence with other considerations going to the weight given to the opinion.

What has emerged from the designation cases as the main issue affecting the weight attributed to expert economic evidence is the nature of the actual evidence and whether it goes to the merits of the original decision or merely brings its legality into question.⁵⁴

Economics is a discipline that lends itself to conjecture and disagreement within its own academy. This realisation needs to be acknowledged by those practitioners seeking to employ economic evidence in a judicial review proceeding. In circumstances where there is a clear economic principle put before the court by an expert in support of a claim that it was unreasonably omitted from consideration by the original decision maker, it would be quite expected for opposing counsel, in

⁵⁴ See *Telstra Corp v 7 Cable Television* (2000) FCA 1160. In the *Telstra* case, which was a *Trade Practices Act* case, and which occurred before the designation cases, the issue of economic evidence in judicial review proceedings was encountered; See [122]-[137]. The rejection of the expert economic evidence in that case on the grounds that it would go to the merits of the original decision foreshadowed just how this area of evidence law was to emerge to its present state. More recently, Justice French handed down his decision in the case of *Woodside Energy Ltd (ABN 63 005 482 986) v Commissioner of Taxation for the Commonwealth of Australia* [2006] FCA 1303 on the 4th of October 2006. In this case, his honour approved of the approach adopted in *Visa* by Justice Tamberlin. The facts in *Woodside* also involved the admissibility of expert economic evidence. It was affirmed that despite the risk of appearances that undue reliance on expert testimony may undermine the judicial function, the economic testimonies in question were admissible as relevant evidence aiding the court in understanding the meaning of certain words and the operational impact of legislation.

rebuttal, to put forward an expert of their own challenging the grounds of the economic claim itself creating the appearance of disagreement amongst experts. In being an issue open to contention, the court could be persuaded that the economic principle being presented by an expert is not an obvious economic axiom the ignorance of which might render an administrative decision unreasonable.

The efforts to transcend such uncertainty may also be as dangerous as the uncertainty itself. As competing experts present their respective versions of economic truth, opinions may be offered to the court with such a hardened degree of certainty as to exceed the limits of what is acceptable in judicial review actions given the limits imposed upon merits review.

Thus what the court needs to be wary of is the muddying of the proverbial waters whereby confusion and the façade of debate is itself a victory. Controversy, no matter how baseless, can create the impression that economic issues are parallel choices of policy rather than obvious matters which a decision maker may be duty bound to consider. The consequences of this is that economic evidence may be admissible on *Makita* grounds but be afforded no weight on the basis that the opinion goes to the merits of a decision rather than its legality. The line to be walked is perilous, requiring acute judicial vigilance and contextual understanding.

Ultimately it will fall to the trial judge to understand the nature of the competing economic arguments and thus determine whether the economic evidence adduced is first admissible, and secondly of any weight given the nature of the evidence and the strict constitutional limitations inherent to judicial review.