HANDLING TRADE PRACTICES CASES

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I. INTRODUCTION

This is a practical paper. It reflects views which I have formed over more than fifteen years on the Bench and earlier years at the Bar about the proper handling of litigation under the *Trade Practices Act* 1974 (Cth) ("the Act"). Litigation under the Act has much in common with litigation generally, but it does have certain features which distinguish it from many other cases.

The Act gives rise to litigation of more than one kind. Part IV gives rise to complex cases which concern restrictive trade practices, such as anti-competitive conduct (ss 45-45E), misuse of market power (s 46), exclusive dealings (s 47), resale price maintenance (s 48), price discrimination (s 49) and anti-competitive mergers and acquisitions (ss 50 and 50A). Central to these cases are issues of competitive conduct in trade or commerce, usually between trade rivals, benefits flowing from competition, and detriments that arise from anti-competitive conduct. Market delineation is important. Expert evidence is required in many cases under Part IV, usually from expert economists. Market surveys are often tendered in Part IV (and Part V) cases, and they give rise to their own special problems, to which I shall refer later. Discovery in Part IV cases is frequently a large and

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expensive undertaking unless properly controlled by the Court and the legal representatives of the parties. The form in which evidence is given (eg affidavits, statements of witnesses, outlines of evidence or oral evidence) plays an important part in preparing cases for hearing and in the conduct of the trial. Evidence given by affidavit or by statements verified in the box tend generally to involve more work and expense before trial, but undoubtedly save time and money at trial. However, certain evidence is still best given mainly, if not entirely, orally, namely, evidence involving disputed questions of fact which arise from conversations and turn upon the credibility of witnesses. Part IV cases are heard almost entirely in the Federal Court as they are "special federal matters" under the cross-vesting legislative scheme.

Cases under Part V of the Act concern consumer protection. The section mainly relied upon in the conduct of litigation is s 52, which prohibits corporations and others from engaging, in trade or commerce, in misleading or deceptive conduct. Section 52 cases are often linked with more traditional alternative causes of action (such as passing off and infringement of trade marks). Cases under the Act which are instituted in the Federal Court may be transferred to State or Territory Supreme Courts under the cross-vesting legislation[1] and to District and Local courts pursuant to s 86A of the Act, provided the specific statutory criteria are established in each case before an order for transfer is made.

Although in practice many cases are commenced under Parts IV and V of the Act by private litigants in pursuit of their own commercial objectives, it must never be forgotten that the essential nature of litigation under the Act is to protect the public interest by ensuring free and effective competition between traders and the absence of misleading and deceptive conduct in trade and commerce.

Courts are empowered to deal with contraventions of the Act by granting injunctions (s 80), making declarations (s 163A), making orders for divestiture of shares or assets (s 81), awarding damages (s 82) and making remedial orders of a far reaching kind (s 87).

Other proceedings brought under the Act may recover pecuniary penalties for contravention of certain of its provisions (s 76). Such proceedings are brought by the guardians of the public interest, namely, the Attorney-General or the Trade Practices Commission ("the TPC"). Penalties for contravention can be very substantial, as high as $10 million in the case of a contravention by a corporation of certain of the provisions of Part IV and $500 000 in the case of contravention by an individual. Certain contraventions of Part V of the Act constitute criminal offences (s 79).[2]

Representative actions (most of which relate to the leasing of shopping centres) are becoming more frequent in litigation under the Act, especially in consumer protection cases under Part V. Amendments made to the *Federal Court of*

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1 The cross-vesting scheme is contained in corresponding Federal and State legislation entitled *Jurisdiction of Courts (Cross-vesting) Act* 1987.

2 See discussion of reform in the Australian Law Reform Commission's Discussion Paper 56, *Compliance with the Trade Practices Act 1974* (1993) ch 6.

Australia Act 1976 (Cth) have been in operation since 4 March 1992, and they confer on the Federal Court power to hear representative proceedings in respect of causes of action arising after 5 March 1992. Section 33C provides that where seven or more persons have claims against the same person in respect of or arising out of the same, similar or related circumstances and those claims give rise to a substantial common issue of law or fact, a proceeding may be commenced by one or more of those persons as representing some or all of them. In deciding whether to commence proceedings of this kind, lawyers must be careful to ensure that these statutory prerequisites apply. This will not always be easy to determine without incurring a fair amount of expenditure and time. Although misleading or deceptive conduct under s 52 affects persons in different ways, there are many cases where there will be similar or related circumstances from which claims arise with substantially common issues of law or fact. For example, in *Poignand v NZI Securities Australia Limited*[3] it was held by the Federal Court that a representative proceeding was appropriate in circumstances where the applicant asserted that he represented the trustees of a trading trust, which had borrowed money for its trading purposes, guarantors of the borrowings and beneficiaries of the trust, who were potentially personally liable for any shortfall of the trust's obligations. Shopping centre cases may give rise to such a proceeding, but whether they do or not depends upon the degree of similarity between representations made by or on behalf of the lessor or its agent to prospective tenants and the circumstances in which they were made.[4]

When discussing trade practices litigation, I shall confine my comments to practices and procedures in the Federal Court, for it is there the most of such cases are brought.

II. DEFINING THE ISSUES

The initiating process in the Federal Court is an application which may or may not be accompanied by a statement of claim. Upon an application, the Registry endorses a return date for a directions hearing. The Court places considerable emphasis, usually by judges, upon the conduct of directions hearings as being the most efficient method of preparing a case for trial. Judges differ, as is to be expected, in their conduct of directions hearings; some are highly interventionist, some are not, most are somewhere in between. Nevertheless, the days are gone where judges sit back and allow the lawyers for the parties to determine the appropriate pre-trial steps.

The lawyers representing parties in the Federal Court, in trade practices litigation, must familiarise themselves as early as possible with the essential issues and basic facts of the case. Obviously, as the case develops they will become more

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3 (1992) 37 FCR 363.

4 JP Hamilton and N Francey, "Practical Aspects of Section 52 Litigation - Shopping Centre Cases as a Paradigm" (1993) 1 *Trade Practices Law Journal* 61; note 2 *supra* at [3.25].

familiar with its details and involved in the preparation of proofs of evidence, affidavits and statements. Judges expect the lawyers, from an early stage in the pre-trial process, to know a lot about the case.

Practitioners must give careful thought to the methods of defining the issues. Pleadings are the traditional method, but as everyone knows, a competent pleader will cast his case in the broadest possible way to allow the client the maximum manoeuvrability during the trial. In my view, those days are past. Pleadings often tell the reader more about what the issues are not, rather than what they are. In the past this was often because the lawyers simply did not know what the true facts were at the time the case was commenced. Again, those days have gone. There are various ways of determining the issues in a case. Sometimes the issues of law or fact will be so clear and simple (perhaps not so simple in their resolution) as to require no documents defining issues except the application itself. Sometimes pleadings are appropriate. A method frequently employed in courts these days, including the Federal Court, is to require the parties to file, usually consecutively, statements of the issues (as the party filing the document perceives them to be), basic or constitutive facts and principal contentions. In this way the real issues tend to come to light more readily than with traditional pleadings, partly because the lawyers are required to focus on those matters at an early stage.

The task of defining issues in cases under the Act, especially Part IV, is often difficult. The parties must assert what they claim to be the relevant market or markets, the conduct that is impugned and the competitive benefits and detriments that are said to arise from that conduct.

III. DISCOVERY

Discovery is essential, in most cases, to the resolution of the dispute between the parties. Knowledge of all the relevant facts is necessary for the proper conduct of litigation and discovery is one of the tools that enables that knowledge to be ascertained. There is a necessary tension between the objective of obtaining the truth through the discovery of relevant documents and "the competitive impulses that are at the centre of the traditional adversary process".[5] The courts have developed rules to ensure that the parties and their lawyers conduct discovery procedures properly, and, in particular, discover documents that are relevant even if harmful to the client's case. Gone are the days when discovery of a document could be resisted on the ground that it tended only to assist the case of the other party and not to impeach it: the old trial by ambush. Breach of these rules can result in severe consequences to lawyers and their parties. In cases under the Act, especially Part IV, discovery can get out of hand and become extremely

5 WD Brazil, "The Adversary Character of Civil Discovery: A Critique and Proposals for Change" (1978) 31 *Vanderbilt Law Rev* 1295 at 1299. See also generally, SD Simpson, DL Bailey and EK Evans, *Discovery and Interrogatories*, Butterworths (1990) and BC Cairns, *The Law of Discovery in Australia*, Law Book Co Ltd (1984) especially ch 1.

burdensome in terms of time and cost, unless properly controlled. It is, however, an essential procedure in many cases, indeed, one of the most vital. Courts have wrestled for many years with ways and means of cutting down the scope of discovery, yet ensuring that vital documents emerge from the process. This is especially important in times where costs of litigation are very high. There is no easy solution. A perusal of international literature establishes this. Brazil, for example, makes the point with reference to the American scene that, for discovery to be effective, it can only be done if there is judicial control over the existence of the process and substantial changes are made in the environment in which it is conducted.[6] I offer a few suggestions.

The lawyers for parties must sit down and think hard about the important issues in the case, the documents that the client has, which bear upon them, and the documents which they know or expect the other parties have, which also bear on those issues. They should prepare, not necessarily lists of documents enumerating them one by one, but ones which identify documents sufficiently to enable them to be examined by the clients and thus opponents of the parties. For example, the traditional discovery affidavit lists documents one by one. This is an extremely laborious and often utterly unproductive process. It is usually sufficient to state in affidavits of documents the classes of discoverable documents which are in the possession of the client and refer to them by category or file description, or with reference to a group of documents, to enable the documents to be identified upon inspection. This tends to shift, to a degree, the burden of discovery to the party seeking it rather than the party giving it, but on the information available to me, it appears that the overall burden and cost of discovery may be substantially reduced. After all, the party seeking discovery of the opponent's documents is usually able to flick through a large number of documents to discern those which may be of use to the case. Otherwise, if the party giving discovery specifies each document in an affidavit, having looked at it beforehand, the cost of discovery will be increased.

Discovery in complex cases is almost invariably not a once and for all process, but an ongoing one. Discovery starts at an early stage of the case, inspection follows, and as further documents come to light, they too are discovered and inspected, and so on until the commencement of the hearing or shortly beforehand.

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6 At pp 1348ff. See generally, for example, JA Samules, "The Economics of Justice" (1991) 1 *Journal of Judicial Administration* 114; JA Davies and SA Sheldon, "Some Proposed Changes in Civil Procedure: Their Practical Benefits and Ethical rationale" (1993) 3 *Journal of Judicial Administration* 111; JA Davies, "The Survival of the Civil Trial System: A Judicial Responsibility" (1989) 5 *Aust Bus LR* 277; MM Blecher and CE Carlo, "Towards More Effective Handling of Complex Antitrust Cases" [1980] *Utah LR* 727; ME Frankel, "The Search for Truth Continued: More Disclosure, Less Privilege" (1982) 54 *Uni Colorado LR* 51; AW Alschuler, "The Search for Truth Continued, the Privilege Retained: A Response to Judge Frankel" (1982) 52 *Uni Colorado LR* 67; BC Cairns, "An Evaluation of the Function and Practice of Discovery" (1987) 61 *ALJ* 79; J White, "Discovery - Justice for Whom?", paper delivered to the 28th Australian Legal Convention, September 1993; JC Reitz, "Why We Probably Cannot Adopt the German Advantge in Civil Procedure" (1990) 75 *Iowa Law Rev* 987; J Marus, "The Interventionist Court and Procedure" (1992) 18 *Monash Uni LR* 1; ED Elliott, "Managerial Judging and the Evolution of Procedure" (1986) 53 *Uni Chicago LR* 306; Report by the Australian Institute of Judicial Administration, *The Use of Discovery and Interrogatories in Civil Litigation*, (1990).

lawyers for parties must increasingly confer during the pre-trial stages with a view to limiting the ambit of discovery and putting in place the most effective discovery procedures. This is becoming increasingly the norm and every encouragement should be given by courts to that end. In my experience, co-operation between lawyers for the parties seems to reduce the time, scope and cost of discovery which ultimately must benefit the clients and ensure the more orderly dispatch of litigation. Courts have devised different procedures to give effect to objectives of this kind. I mention the Federal Court's rules and practices, not because they are necessarily better than other courts, but because they are the ones with which I am most familiar. In the Federal Court, discovery of documents has ceased to be as of right, although the parties seeking discovery may ask the judge in a directions hearing for an appropriate order. Before doing so, however, it is expected that the lawyers will have done the necessary homework of the kind to which I have referred above. Of course, I am talking of complex cases such as those that arise under Part IV of the Act. Discovery in many cases is often a simple task and can be easily disposed of by traditional means.

IV. INTERROGATORIES

The use of interrogatories in complex commercial litigation has been criticised by judges and practitioners. They are often prolix, poorly drafted, expensive, time consuming, rarely tendered at the trial and then, not infrequently, rejected. There are cases where interrogatories are essential, a good example being cases alleging breach of a confidential relationship. However, interrogatories have ceased in many courts to be available as of right and are now permitted only by leave of the court, as is the case in the Federal Court. The practice which the Federal Court recommends (as do other courts) is that a party seeking to interrogate another party must draft the proposed interrogatories, submit the draft to the lawyers on the other side, agree upon as many as they can and, at a directions hearing, ask the judge for appropriate orders. The judge can rule on the question whether any of the interrogatories to which objection is taken are proper interrogatories or not. It is a procedure which generally works well.[7]

V. ADMISSIONS

Notices to admit facts and documents are also useful weapons in the armoury of the court, which parties may invoke, sometimes in conjunction with notices to produce documents. Again, lawyers must determine what facts and documents they wish their opponents to admit without the necessity of special proof. This can

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7 A useful analysis of the circumstances in which interrogatories are permissible is found in the report by R Cranston, P Haynes, J Pullen and IR Scott, *Delays and Efficiency in Civil Rights Litigation*, The Austalian Institute of Judicial Administration Incorporated (rev ed, 1985) pp 82ff.

involve lawyers in fairly laborious listing of the facts or documents they wish to have admitted, but it can result in substantial savings of time and cost at the trial. It is a process to be encouraged, especially as the failure of the party to admit a fact or document that ultimately is not in issue or is proved can, and does, result in visiting the offending party with an order for costs.

VI. AGREED DOCUMENTS

It is essential that lawyers agree about the documents to be admitted by consent at the trial, place them in an agreed bundle and have a separate group of documents, the admissibility of which is in contest. This can be integrated with the processes of discovery, especially if discovery is on an ongoing basis, and loose-leaf files maintained, so that they can be topped up from time to time with further documents in either the agreed or non-agreed category.

VII. FORM OF EVIDENCE

This subject attracts considerable discussion among lawyers. Some judges prefer to have almost all evidence given by affidavit with minimal cross-examination; others would have no affidavits and all the evidence given orally; and some prefer witnesses statements, whilst others like outlines of evidence of witnesses. In earlier times, evidence was given entirely, or almost entirely, by witnesses orally in the witness box. Today, however, civil litigation conducted this way is to my mind inefficient and not necessarily productive of the truth. After all, proofs of witnesses have to be obtained before trial. Affidavits or statements are but a formal and carefully prepared extension of them. Many judges (I am one of them) prefer that, in most cases (there are obviously exceptions), evidence be given primarily by affidavit, subject to cross-examination of the deponents at the trial. Where the issues turn essentially on the question of credibility (for example, who said what during conversations, which are said to constitute the making of representations under s 52 of the Act), outlines of evidence of witnesses on those issues are desirable. However, the evidence in chief (and, of course, cross-examination) should be given orally at the trial. The benefit of an outline of evidence is that it puts the other party on notice of the broad subject matters that will be dealt with by the witness in evidence in chief.

VIII. INTERLOCUTORY INJUNCTIONS

There are cases where interlocutory relief is essential to preserve the interests of a party until the final hearing. It is desirable that parties endeavour to avoid a dispute of this kind and develop, by consent, a regime to adjust their rights and

liabilities until the trial, in particular, if they can obtain an early date for trial. It must be remembered that the threshold test to obtain interlocutory injunctive relief is not very high, namely, whether there is a serious question to be tried,[8] and whether the balance of convenience favours the grant or refusal of interlocutory relief.

IX. MEDIATION AND ARBITRATION

Mediation and arbitration are such large topics that they merit papers in themselves, so I do not propose to analyse them in depth. It is sufficient for me to say that courts, including the Federal Court, encourage parties, at an appropriate stage after the commencement of proceedings, to adopt mediation procedures. In the case of the Federal Court, mediation conferences are conducted by trained mediators who are registrars of the Court. Mediation procedures are set in train by an order of the judge with the consent of the parties.[9] Mediation has a reasonably high rate of success. Practitioners must be involved fully in the conduct of procedures of this kind, thus requiring of their party a knowledge of the issues and facts at a fairly early stage of the case and an awareness of the strengths and weaknesses of the case of each party.

X. TELEPHONE AND VIDEO-LINK

Courts, including the Federal Court, are increasingly using telephones and video-links in proceedings. As the Federal Court is a national court with registries in every capital city of Australia, and as cases frequently have parties, witnesses and lawyers from different States and Territories, the Court resorts to the use of these procedures, in particular, in the conduct of directions hearings. It is not uncommon to have a three, four or five way hook-up by telephone or video-link, with lawyers in different capital cities, to conduct proceedings, sometimes dealing with contentious questions. Evidence is taken by video-link from witnesses in cities other than that in which the hearing is taking place, including cities outside Australia. Saving of costs is obvious and can be considerable, though there is no ultimate substitute for the presence of witnesses in the courtroom. Sometimes contentious evidence has been taken from witnesses by video-link, and judges who have taken the evidence say that the procedure works well.

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8 See for example *Epitoma Pty Ltd v Australasian Meat Industry Employees' Union* (1984) 3 FCR 55 at 58; *Australian Course Grains Pool Pty Ltd v Barley Board of Queensland* (1983) 57 ALJR 425 at 425.

9 Federal Court Rules, O 72, r 1.

XI. OUTLINES OF SUBMISSIONS

In trials of trade practices cases, judges are increasingly requiring that lawyers provide written outlines of submissions before the commencement of address, and the profession is responding very well to this requirement. It not only helps the judge, but also helps the lawyers to express briefly and pithily the essence of their cases in written form, on questions of fact and law.

XII. CROSS-EXAMINATION

Cross-examination has always been central to the conduct of litigation. I am one who thinks that its effect is often overstated, and my view is shared by many other judges. Judges assess questions of truthfulness and reliability of witnesses, not only upon impressions gained as they gave their answers in the witness box, but by considering those answers in the light of the probabilities and contemporaneous documents, if any.

Use of cross-examination as a means of eliciting facts that are not seriously in dispute is to be discouraged; it is still quite prevalent, takes time and is rarely very productive. It requires a judge to continually move the case along. I do not seek to underestimate the importance in appropriate cases of cross-examination. There is always a place for a skilful cross-examiner, especially when the central issues depend on the credibility of witnesses (for example, versions of conversations). Complicated commercial cases generally turn on documents, rather than someone's recollection of past events.

XIII. SURVEYS

In a paper on market research surveys, Mr PGM Pattinson said that to most people the phrase "market research survey" conjures up the image of a bespectacled man lurking with a clipboard beside an impressive pyramidical display of margarine tubs in a supermarket.[10] In this country it is more likely to conjure up the image of a person dressed in T-shirt and jeans, without spectacles, though possibly with tinted contact lenses, not lurking with a clipboard, but approaching the prospective interviewee on a footpath, outside a shop, with a forced smile.

Mr Peter Weiss, in his article on the use of survey evidence, says that the function of surveys is to plumb the minds of the public in order to make up the minds of the judges.[11] There is some truth in that observation.

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10 "Market Research Surveys - Money Well Spent?" [1990] 3 *European Intellectual Property Review* 99.

11 P Weiss, "The Use of Survey Evidence in Trademark Litigation: Science, Art or Confidence Game?" (1990) 80 *Trade Mark Reporter* 71.

The question of survey evidence has been the subject of much controversy.[12] The five main uses of surveys in trade practices cases are to provide evidence:

(a) that a particular opinion is held by the public or a relevant section of the public;
(b) of actual confusion or the likelihood of confusion between the plaintiff's and the defendant's businesses or products in the mind of the customer;
(c) of misrepresentation by the defendant;
(d) of deception by the defendant; and
(e) of the extent and nature of the plaintiff's reputation.

Survey evidence is often linked by many lawyers to the hearsay rule. It is useful to recall the classic statement of the hearsay rule by Lord Radcliffe in the Privy Council, in *Subramaniam v Public Prosecutor*,[13] that hearsay evidence is evidence of an oral or written statement by a person other than the witness who is testifying, which is being adduced to prove the truth of the matter stated. Few rules are more misunderstood than the hearsay rule.

The admissibility of survey evidence has waxed and waned over many years. Australian courts have been cautious about admitting survey evidence: *McWilliam's Wines Pty Ltd v McDonald's System of Australia Pty Ltd* (the *Big Mac* case),[14] and *Mobil Oil Corporation v Registrar of Trade Marks* (the *Mobile Oil* case)[15] are notable examples. In some of the cases, such as *Big Mac* and *Mobil Oil*, the relevant evidence was characterised as hearsay evidence and rejected. In the *Big Mac* case, the material was tendered to prove the facts asserted by the interviewee's answers, but I am not so sure about the *Mobil Oil* case, as we pointed out in *Arnott's Ltd v Trade Practices Commission* (the *Arnott's* case).[16] If the survey is direct evidence of an issue in the case, namely, the state of public deception, it is not hearsay, and this was found to be the case in the *Arnott's* case and *Ritz Hotel Ltd v Charles of the Ritz Ltd* (the *Ritz* case).[17] In both cases, the fact that it was held to be hearsay was the barrier to admissibility. A very useful treatment of the question was given by Mahon J in *Customglass Boats Pty Ltd v Salthouse Brothers Ltd*,[18] where His Honour concluded that evidence of a properly conducted scientific market research survey fell within an acknowledged exception to the hearsay rule, that is, proving the state of mind of those interviewed on a specific question, or that such evidence was not hearsay at all, but rather evidence which went to proof of an external fact, namely, that a certain opinion was held by the public or a class of the public. I favour the latter view. It all depends on what

12 The starting point that I prefer is the article by RC Sorensen and TC Sorensen, "The Admissibility and Use of Opinion Research Evidence" (1953) 28 *New York University Law Review* 1213, in which the admissibility and utility of survey evidence is discussed.

13 [1956] 1 WLR 965.

14 (1979) 28 ALR 236.

15 [1984] VR 25.

16 (1990) 24 FCR 313 at 360.

17 (1988) 15 NSWLR 158; see also *Shoshana Pty Ltd v 10th Cantanae* (1987) 79 ALR 279, per Burchett J and *Sterling Pharmaceuticals v Johnson & Johnson* (1990) 18 IPR 309.

18 [1976] 1 NZLR 36.

you are seeking to prove. If you tender survey evidence to prove that members of the public hold certain beliefs, in my view, it is not hearsay at all. The judge is simply being told what people out in the marketplace think about a particular product or name. But if you are trying to prove that the belief is true and soundly based, for example, that interviewees in fact purchased product X, then it is hearsay.

The two criticisms generally advanced against the reception into evidence of surveys are that it is said, first, to be hearsay and, secondly, unreliable, having regard to the techniques employed in collecting it, though the latter criticism usually goes rather to weight than to admissibility. Survey evidence was rejected by Franki J in the *Big Mac* case,[19] by Bray CJ in *Hovan's Glynde Pty Ltd v Firle Hotel Pty Ltd*[20] and by King J in the *Mobil Oil* case.[21] However, it is well established that evidence of a statement of existing intention is admissible to prove the existence of that intention, for in such case the evidence may not be hearsay but direct evidence of one aspect of conduct, which throws light upon the underlying state of mind.[22] Broadly speaking, evidence of a person's response to a question is admissible to establish a state of mind of that person if that is a matter relevant to be proved.

In s 52 cases, passing off cases and trademark cases, proof of reputation and the likelihood of deception and confusion of the public are critical evidentiary matters. They are questions of fact for the judge to determine on the basis of the evidence and in the context of his own knowledge of people and affairs. As Lord MacNaughton said in *Payton and Co Ltd v Snelling Lampard and Co*:

> The Judge, looking at the exhibits before him and also paying due attention to the evidence adduced, must not surrender his own independent judgement to any witness whatever.[23]

Clearly, actual evidence of confusion and diversion of sales from the plaintiff to the defendant is valuable. But if it is not available, the plaintiff must in some cases bring more general evidence, so that the inference can be drawn that the relevant reputation exists and that the defendant's conduct caused confusion.

Some of the cases draw distinctions between survey evidence, obtained for the purpose of a particular proceeding, and other survey evidence. I, myself, do not see any logical difference between the two kinds of survey evidence.[24]

In *Ratten's Case*,[25] the Judicial Committee said:

> If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. The question of hearsay only arises when the words spoken are relied

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19 Note 14 *supra*.

20 (1983) 4 SASR 503 at 506-12.

21 Note 15 *supra*.

22 See *Concrete Constructions Pty Ltd v Plumbers & Gasfitters' Employees Union of Australia (No 2)* (1987) 15 FCR 64; *Walton v R* (1989) 166 CLR 283; *Pollitt v R* (1992) 174 CLR 558.

23 (1900) 17 RPC 628 at 635.

24 See *Shoshana Pty Ltd v Contanae*, note 17 *supra* and *Sterling Pharmaceuticals v Johnson & Johnson*, note 17 *supra* at 325.

25 [1972] AC 378.

> on as establishing some facts narrated by the words. When a party seeks to adduce evidence of answers given by respondents to a market survey in order to prove what products they customarily purchase or consume that party seeks to rely upon the answers testimonially, that is in the sense of establishing a fact narrated by the words. The evidence is tendered as proof of the facts asserted by the interviewee so the evidence is hearsay.[26]

Some people say that there is not much point in talking about whether it is hearsay or not because of the discretion of the Court, under Order 33 rule 3 of the Federal Court Rules, to waive the rules of evidence and permit the evidence to be adduced.

I say nothing about criminal cases. In a civil case, however, where a market survey may cast light on relevant issues, it is desirable, in principle, to admit into evidence the report of a professionally conducted survey, upon proof that it has been satisfactorily conducted, using relevant and unambiguous questions and without requiring evidence from each of the participants. There are two reasons for this. First, market survey techniques have now been refined to the point where, if undertaken by experienced and professional people, they are capable of providing answers which are highly likely to be accurate, subject only to small sampling errors. After all, polls are frequently used to predict the results of elections within a couple of percentage points. Political parties and commercial organisations constantly use market research to gauge public reactions on a wide range of matters, and there seems little reason to doubt that overall they find the results reliable. The number of witnesses is reduced considerably. It should only be necessary to call a person responsible for designing and administering the survey and an expert witness to verify the design and methodology employed. My second reason goes to both of the alternative methods of proving consumer habits and attitudes, which have unacceptable features. One possibility is to call such of the many respondents to the survey as can be found. This has the advantage of providing a selected group of witnesses but the disadvantage of adding to the cost and length of trials. The second possibility is that a party calls evidence from a lesser number of selected witnesses and has no survey.

In more recent years the view has emerged in cases in Australia that survey evidence could be admitted as falling within the exception to the rule against hearsay.[27] Remember, however, that the evidence may be admissible as an exception to the hearsay rule, by relying upon dispensation under Order 33 rule 3 or by relying upon the fact that it is tendered as proof of the fact that a section of the public holds a particular opinion.

A few examples of recent cases, where one or other of the parties has sought to rely on survey evidence in relation to the issues, is useful:

- whether non-biscuit snacks were substitutes for biscuits;[28]

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26 *Ibid* at 387.

27 See *Ritz Hotel Ltd v Charles of the Ritz Ltd*, note 17 *supra; Sterling Pharmaceuticals v Johnson & Johnson*, note 17 *supra*; and *Arnott's Ltd v Trade Practices Commission*, note 16 *supra*.

28 *Arnott's Ltd v Trade Practices Commission*, note 16 *supra*.

- whether a substantial section of the public was familiar with the word "caplets";[29] and
- whether the packaging of Tyco children's building blocks misled or deceived members of the public by falsely suggesting an association with Lego building blocks;[30]

Admissibility of survey evidence must depend upon proof of correct methodology. The party tendering the survey has the burden of establishing that it was conducted in accordance with accepted principles of survey research, namely, that the proper universe was examined, a representative sample was drawn from that universe and the mode of questioning the interviewees was correct. The persons conducting the survey must be recognised experts, the data gathered accurately reported, and the sample design, questionnaire and interviewing in accordance with generally accepted standards of objective procedure and statistics in the field of survey. The samples, design and interview must be conducted independently of the attorneys, and the interviewers must have no knowledge of the litigation or the purposes for which the survey is to be used. This is the ideal.

Australian law should follow the American lead in acknowledging that market survey evidence may play a useful role in cases. It is merely one element in the overall picture, and its importance varies from case to case.[31]

Surveys are expensive, so it is prudent for parties to raise these matters with their opponents and the court before the survey is carried out. This was the course taken in the case of *Greynell Investments Pty Ltd v Hunter Douglas Ltd.*[32] Ideally, the form of the relevant questions will be agreed by the parties, after expert advice, or settled by the Court.

I offer some advice concerning survey evidence:

1. Limit the use of surveys to cases where it really is needed - an obvious case of misleading conduct or passing off is not worth the cost of survey.
2. Do a pilot or mini-survey before conducting a major survey. If the mini-survey does not work out then don't waste money further.
3. Get the best and most experienced professional to design, conduct and evaluate the survey.
4. Do not hesitate to work closely with the experts to establish methodology; but do not become involved at the execution stage.
5. Retain additional expert witnesses not connected with the persons or organisations conducting the survey to validate its results if necessary. Observe the generally accepted standards as closely as possible.

In the United States, the use of survey evidence in many types of trade mark litigation is becoming not only accepted, but virtually mandatory.

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29 *Sterling Pharmaceuticals v Johnson & Johnson*, note 17 *supra*.

30 *Interlego AG v Tyco Industries Inc* [1989] 1 AC 217.

31 Note 11 *supra*.

32 (1979) 4 TPR 173, or see RV Miller, *Annotated Trade Practices Act*, The Law Book Co Ltd (15th ed, 1994) at [815.165] where the directions are set out.

There is a marked difference between the attitudes of the Courts of the United Kingdom and the United States. In the latter, the failure to adduce this evidence can result in adverse inferences from the Court. In Canada, a similar trend is in progress, and in other countries, mostly in Europe, the trademark lawyer is increasingly resorting to surveys, although some British judges still regard them with scepticism.

Does the cost of market research justify its use in litigation? In the *Arnott's* case,[33] we suggested that the form of the survey and the formulation of the questions be determined at a directions hearing before a survey is carried out. It is for the parties to determine whether they will derive benefit from the survey by conducting a pilot survey.

XIV. EXPERT EVIDENCE, IN PARTICULAR ECONOMISTS

Cases under the Act often require threshold questions of interpretation of the relevant sections. This is a task for the judge, assisted by argument of the lawyers. Questions arise of literal interpretation and, what is sometimes referred to (often inaccurately) as, purposive interpretation. In Part IV of the Act, the words of some sections involve economic concepts, for example, "market power", "substantial degree of power in a market", "substantially lessening competition" and "competition in any market". The object of the Act is to promote effective competition in trade and commerce in Australia. Although there is sometimes a tension between literalism and a construction which furthers the object of the Act as promoting and stimulating competition, recognition of economic concepts was affirmed by the High Court in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Ltd*.[34] In that case, the High Court analysed economic concepts in construing certain statutory expressions. In my view, the courts are showing an increasing acceptance of the necessity to analyse the substance of the purpose of the Act and the economic concepts which it involves, and to interpret the words of the statute in the light of its objects.[35] After all, the nucleus of Part IV consists of concepts of markets, market power, competition and anti-competitive conduct.

A most valuable case for analysing fundamental concepts of markets, market power, competition and anti-competitive conduct is the decision of the Australian Trade Practices Tribunal in *Queensland Co-op Milling Association Ltd*,[36] which has been cited many times with approval in both Australian and New Zealand restrictive trade practices cases.[37]

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33 Note 16 *supra*.

34 (1989) 167 CLR 177.

35 See *Arnott's Ltd v Trade Practices Commission*, note 16 *supra* at 343.

36 (1976) 25 FLR 169.

37 See M Brunt, "Market Definition Issues in Australia and New Zealand Trade Practices Litigation" (1990) 18 *Aust Bus LR* 86.

A party who seeks to call an expert must obtain a report from the expert and serve it on the other parties. Experts' reports must then be exchanged.[38] Lawyers must inform the experts of the issues in the case, both of law and fact, especially those particularly relevant to their expertise. Traditionally, the evidence of experts, including economists, is taken in the same way as it is with other witnesses, in that they are called to give evidence-in-chief and verify their report and are cross-examined and re-examined. They tend to be called towards the end of a party's case.

Economists have a distinct role to play as experts in Part IV cases, a role not confined to explaining economic theory, but one which extends to the application of theory to the facts of the case, provided the underlying factual assumptions are made clear (see the *Arnott's* case at 350-1). There is no objection to an expert economist expressing an opinion as to the proper methods of defining a market and giving a definition relevant to the particular case, but the assumptions which are made by the expert upon which the opinion is founded must be stated. The traditional method employed is for experts to prepare written reports and then compulsorily exchange them before trial. Order 10 of the Federal Court Rules confers powers on the Judges to make orders of this kind. Order 33, rule 3 also provides a mechanism for relaxing the rules of evidence to facilitate proof of matters, which are not bona fide in dispute, or where compliance with the rules of evidence might involve unnecessary or unreasonable expenses or delay.

There is, I think, much to commend the view that evidence of experts in trade practices cases, especially Part IV cases, should be treated by way of submission, rather than opinion evidence. This is now provided for by the Federal Court in Order 10, rule 1(2)(j), namely:

> ...
> (2) ... the Court may - ...
>
> (j) in proceedings in which a party seeks to rely on the opinion of a person involving a subject in which the person has specialist qualifications, direct that all or part of such opinion be received by way of submission in such manner and form as the Court may think fit, whether or not the opinion would be admissible as evidence.

In this way time is saved and the full benefit of the views of the expert is gained by the Court and treated as if it were argument in the case. It has the added advantage that some experts then tend to be distanced from the debate about controversial facts and do not feel obliged (as some do) to necessarily support the case of the party that called them.[39]

It is noteworthy that Order 34 of the Federal Court Rules empowers the Court to appoint a court expert, on the application of a party, to enquire into and report upon any facts and questions which arise from an expert witness.[40]

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38 Note 16 *supra* at 350-1.

39 See J Angland, "Using Expert Witnesses in Antitrust Litigation" (1989) 3(2) *Antitrust* 22.

40 See generally, "Court Experts and Other Remedies" in I Freckelton, *The Trial of the Expert*, (1987); K Yeung, "The Courtroom Economists in Australian Antitrust Litigation: An Underutilised Resource" (1992) *Aust Bus LR* 461; RG Blunt, P Shafron and B Kenneally, "A Study of Expert and Survey Evidence in Trade Practices

XV. CONCLUSION

As mentioned at the beginning of this paper, it is a practical paper intended to assist lawyers in the conduct of litigation under the Act. I have sought to expose some of the pitfalls into which it is easy to fall and, above all, to inculcate an awareness of the necessity in modern litigation to get to the essence of the issues of a case as quickly as possible, discard procedural points that do not lead anywhere and concentrate on the proof of the crucial issues. In this way the interests of clients are properly served, costs and time are saved. Knowledge of a court's practice and procedure, including its rules, is essential to a practising lawyer, not only because it is impossible to conduct a case without such knowledge, but because without it a lawyer cannot ask a court to dispense with the rules of evidence when it is just and appropriate to do so.

Cases", paper presented to Business Law Section Law Council of Australia, July 1993; J Farmer, "Competition Litigation in the High Court", paper presented to the 3rd Annual Workshop of the Competition Law and Policy Institute of New Zealand Inc, August 1992; T Pinos, "Is There Law After Economics: Some Issues of Integration" (1985) 11 *Monash Uni LR* 201.