IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2006-485-2353

UNDER	the Commerce Act 1986
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	CARDS NZ LIMITED AND OTHERS Defendants

CIV-2006-485-2693

AND BETWEEN	DSE (NZ) LIMITED AND OTHERS Plaintiffs
AND	CARDS NZ LIMITED AND OTHERS Defendants

Hearing:	15, 16, 17 June 2009
Appearances:	DJ Goddard QC, H Wilson, J Standage and H Algie for Commerce Commission JL Land and E Harding for Retailers JE Hodder SC and VL Heine for MasterCard International Incorporated JA Farmer QC, AK Rawlings and K Bishop for BNZ Bank D Shavin QC, D Blacktop and J Stevens for ANZ National Bank FJ Cuncannon for Westpac/TNPSL A Peterson and MJ Austin for ASB Bank Limited MN Dunning and TP Mullins for Visa International Services Association M Dean QC and J Anderson for Cards NZ Limited L O'Gorman for Kiwibank and New Zealand Post
Judgment:	29 June 2009 at 3:00 pm

JUDGMENT OF ASHER J AND DR RALPH LATTIMORE (LAY MEMBER)

This judgment was delivered by me on 29 June 2009 at 3:00 pm pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

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Date

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Introduction

[1] The Commerce Commission and a group of large New Zealand retailers have brought proceedings against Cards NZ Limited, Visa International Service Association, MasterCard International Incorporated, and a number of banks. It is alleged that the defendants who operate the Visa and MasterCard credit card systems, have breached ss 27 and 30 of the Commerce Act 1986. The Commerce Commission seeks declarations, injunctive relief and pecuniary penalties and the large New Zealand retailers seek injunctive relief and damages.

[2] The proceedings are set down for a ten-week hearing commencing on Monday 5 October 2009. Some of the banks and MasterCard International Incorporated ("MasterCard"), have applied for orders that some of the proposed evidence of the plaintiffs is inadmissible in whole or in part. The Commerce Commission ("the Commission") and the group of large New Zealand retailers ("the retailers") oppose the applications.

The Commission's case

[3] Visa International Services Association ("Visa") and MasterCard operate what is known as a 'four party' or 'open loop' payment card system. The four parties are:

a) The issuer, a bank which is licensed by the scheme operator to issue cards.

b) The cardholder, who uses the card to buy goods and obtain cash.

c) The merchant, who accepts the card and allows it to be used for the payment of goods or services.

d) The acquirer, a bank, which is also licensed by the scheme operator, which pays the merchant the value of the transaction less a fee called the 'merchant service fee' ("MSF").

[4] The acquiring bank is reimbursed for the payment made to the merchant by the issuing bank. When the issuer remits the purchase amount, a fee known as a 'multi-lateral interchange fee' ("MIF") is deducted. When the acquirer remits the purchase amount to the merchant, the MSF includes an amount which equals the MIF as well as the fee charged by the acquirer for the processing of the transaction. The issuing bank is in due course paid by the cardholder and will also receive card fees and interest.

[5] The Commission and the retailers allege that Visa and MasterCard and their respective issuing and acquiring banks have entered into arrangements, the practical effect of which is that merchants pay an inflated fee for credit card acceptance services, which is spread across all customers including those who do not use credit cards. The particular allegedly anti-competitive arrangements focused on are:

a) 'the MIF rules', which provide for the centralised setting of the MIF, which must be paid by an acquirer to an issuer;

b) 'no surcharge rules', which prohibit surcharging of card transactions by merchants;

c) 'no discrimination rules', which prohibit certain forms of discrimination between card payments and other payments, and between cards from different schemes or users;

d) 'honour all cards rules', which require merchants to honour all cards and prohibit selective acceptance of cards from some issuers or specific types of cards;

e) 'access rules', which restrict those who are permitted to act as an acquirer of Visa or MasterCard transactions.

[6] It is the plaintiffs' case that because of the challenged rules the issuers of credit cards have no incentive to reduce or change various oppressive provisions, and that retailers have little or no bargaining leverage to force a change. It is alleged that entry by other specialist acquirers is also hindered.

[7] The Commission's case is that the rules taken together provide for a fixing, controlling or maintaining of fees in breach of s 30 of the Commerce Act 1986 ("the Commerce Act"), substantially lessen competition in the acquiring market in breach of s 27 of the Commerce Act, and are unenforceable and should be deleted from the relevant contracts. The Commission's case is that if these rules and provisions were not in place, fees charged by competing acquirers would be reduced, and competition would improve. The defendants strongly deny these allegations and positively assert that their actions are not anti-competitive, and indeed support competition, and are accepted around the world. They deny any breach of s 27 or s 30.

[8] The central issue in the case is described by the Commission as follows:

a) How would the market for acquiring services be different if the challenged provisions (or some sub-set of them) were deleted?

b) How would the behaviour of acquirers, issuers, merchants and consumers change?

c) What would the MSFs look like in those circumstances?

[9] To prove its case the Commission and the retailers have served briefs of evidence directed at describing the market in New Zealand as it currently operates within the challenged rules. They have also sought to serve evidence aimed at describing what the market would look like if the challenged provisions were absent.

[10] The applications objecting to the admission of the evidence were filed by a group of four banks, ANZ National Bank Limited ("ANZNB"), ASB Bank Limited ("ASB"), Bank of New Zealand ("BNZ") and Westpac New Zealand Limited ("Westpac"). Mr Farmer QC appeared in support of this application on behalf of the BNZ, and Mr Shavin QC on behalf of the ANZNB. An application was also filed on behalf of MasterCard, and Mr Hodder SC appeared in support of that application. The application was opposed and notices of opposition were filed, with Mr Goddard QC appearing as senior counsel for the Commission and Mr Land as senior counsel for the retailers.

[11] All three defence counsel argued that some of the plaintiffs' evidence breached the Code of Conduct for Expert Witnesses, was hearsay or argumentative, and that some of the evidence presented by experts was outside their field of expertise. They submitted that factual and expert opinion evidence traversing the regulatory experience in Australia, where specific legislation was enacted which imposes controls on fees in combination with statutory prohibitions on some of the credit card scheme rules, and references to regulatory systems that exist elsewhere, breached the rules of evidence in various ways and were irrelevant. They submitted that the prejudicial effect of such evidence outweighed its probative effect.

[12] The submissions presented in support of the application were wide-ranging. They were voluminous and related to many hundreds of pages of evidence. Faced with the objections to the overseas evidence the plaintiffs have reduced the number of jurisdictions referred to in detail from 42 to three, being Australia, the EU and the US. This has not assuaged the defendants' objection.

General principles relating to admissibility

[13] The fundamental principle of admissibility, set out in s 7 of the Evidence Act 2006, is that relevant evidence is admissible, and evidence that is not relevant is not admissible. The further principle set out in s 8, is that evidence will be excluded if its probative value is outweighed by the risk that the evidence will:

a) have an unfairly prejudicial effect on the proceedings; or

b) needlessly prolong the proceedings.

Obviously evidence is not unfairly prejudicial merely because it is adverse to a party's case. A party normally calls evidence to support its case with the express intention that it will prejudice the case of the other party. For evidence to be inadmissible under s 8(1)(a), not only must the prejudice outweigh the probative value of the evidence, but that prejudice must be unfair. Weak evidence of little probative value is more likely to be inadmissible than strong evidence of clear probative value.

[14] Section 25(1) of the Evidence Act 2006 provides that an opinion of an expert is admissible

> … if the fact finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.

Section 25(3) provides that:

> If an opinion by an expert is based on a fact outside the general body of knowledge of that expert, the opinion may be relied on only if that fact is or will be proved or judicially noticed in the proceeding.

There is a Code of Conduct for expert witnesses set out at Schedule 4 of the High Court Rules.

[15] A party seeking to exclude evidence in a civil trial prior to the hearing must be able to satisfy a Court to a reasonable degree of certainty that exclusion is required. McGechan J in *Donovan v Graham* (1991) 4 PRNZ 311 set out the Court's difficulty in dealing with such an application at 313-314:

> In this situation, the Court is faced with something of a dilemma. Pretrial objections as to evidential matters are not particularly common. The more usual situation is one where the Judge picks his way through the total material at ultimate trial stage, discarding the dross. Where, however, pretrial objection is indeed taken the Judge must act in a manner which will best promote the overall interests of justice given the facts of the particular case. The Judge must bear in mind risks involved in premature exclusion of evidence which on the more fully informed basis emerging at trial might be seen as admissible. He must keep in mind the desirability of the case being kept within bounds, and open to efficient disposal. It is important affidavits not be allowed to mushroom, with irrelevance piled upon irrelevance, accusation upon accusation, and with the parties becoming increasingly and unproductively inflamed. Having said that, it also is important the Court not become buried in extensive interlocutory battles over evidential points of relatively trivial importance, without time to decide substantive disputes. There is room for pretrial pragmatism, particularly over lesser matters. Each case must depend very much upon its own facts.

He made the point that if affidavit evidence is allowed in, which ultimately causes time wastage, that aspect can be compensated by costs.

[16] The defendants' objections to the evidence of Australian developments and the plaintiffs' expert evidence were wide-ranging. They objected to the evidence about Australian developments on the basis that it was irrelevant and would unduly

and unnecessarily prolong the trial if it was admitted. They asserted that much of the expert evidence was unsubstantiated and a breach of the Code of Conduct of Expert Witnesses. They submitted that it was unduly argumentative, irrelevant and involved hearsay. They submitted that in relation to some of evidence, even if it was otherwise admissible, it was of so little probative value that it would unnecessarily prolong the hearing. It was asked that three briefs be declared inadmissible entirely and that there be substantial deletions from eight other briefs. Some of those eight briefs were from witnesses of fact giving evidence about the Australian situation.

[17] We will first consider the general objections to the evidence, before turning to the specific briefs.

Objections to the expert evidence

Factual and argumentative evidence

[18] The defendants relied on *Clark v Ryan* [1960] 103 CLR 486 at 498 and *R v Turner* [1975] QB 834 at 841 where the Courts were referred to scientific expert evidence, and the need for it to relate to information outside the ordinary knowledge and experience of a jury. They quoted the judgment of the Full Federal Court of Australia in *Arnotts Limited & Ors v Trade Practices Commission* (1990) 97 ALR 555, at 593, 595 and 597:

> The events of this case underline the importance of the principle that an expert witness must identify the facts assumed in his or her opinion.
>
> … it seems to us that an expert economist may legitimately give an opinion, for example, as to the proper method of defining a market. The economist may go further, rendering that opinion more apposite to the case by proffering a definition relevant to the particular case. … It does not matter whether, as in that case, the issue is one upon which the court has to reach a finding. What does matter … is that the assumptions upon which the opinion is based are identified and articulated.
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> …
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> The use of an expert witness to filter the facts, asking the witness to hear or read all the evidence and then express factual conclusions, is a practice which we have come across only in Pt IV litigation. We do not know its origin; such evidence was rejected in an early Pt IV decision: *Ansett* at 329. Whatever its origin, the practice is illegitimate. It must be stopped. Part IV litigation is usually complex and expensive enough. It does not need this embellishment.

The defendants complain of the plaintiffs' experts unnecessarily synthesising and summarising facts that could be presented by witnesses of fact or submission.

[19] In *Arnotts* the expert had expressed general opinions avowedly drawn from all the transcript and documentary evidence of a trial that had been proceeding for fifty-five days. The trial judge determined that it was impossible in the circumstances to know what facts the expert had in mind in expressing his submissions. It was this practice which earned the strong criticism on appeal of the Full Court of the Federal Court of Australia.

[20] This has not necessarily happened here, at least at this stage. The plaintiffs' experts claim to have done that which only economic or industry experts can do; they have used their knowledge and expertise to put together referenced facts from a large variety of sources to reach their opinions. They have not purported to present an overview of unspecified facts, as was done in *Arnotts*.

[21] The comments in *Arnotts* must be balanced against other pronouncements which set out the particular nature of expert economic evidence in competition law cases. As Professor Brunt pointed out in *Economic Essays on Australian and New Zealand Competition Law*, (2003) at 358, economic reasoning is different from reasoning in other areas, where a certain and verifiable truth is sought. She quotes the pronouncement of J M Keynes:

> 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 to draw correct conclusions.

[22] It was stated by the Chief Justice of the High Court of Australia in his paper "Expert testimony, opinion, argument and the rules of evidence" (2008) 36 ABLR 263 at 267 in relation to the interpretation of the phrase "substantial lessening of competition":

> The statutory standard is functional rather than descriptive of some external reality to be ascertained like the state of the weather. It provides a broadly stated instruction to the Court about the circumstances in which it should intervene against the classes of anti-competitive conduct to which that test is applied. Where economic testimony is used to assist the Court in forming a view about the application of these criteria, it will be inescapably argumentative in character.

[23] The particular position of the economist was explained this way by Allsop J in *ACCC v Liquorland (Australia) Pty Ltd* (2006) ATPR 42-123 at [843]:

> 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 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 viewer 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".

[24] We consider that in a competition law hearing the economic evidence will have an argumentative element that may not be acceptable in other expert testimony. We cannot accept at this pre-trial stage that evidence should be rejected because it sets out large quantities of factual material, and expresses strong views. As Professor Blunt comments, this can be expected of expert economic evidence. On occasions the experts in their briefs may have expressed themselves with undue or careless vigour, and this may well be the subject of cross-examination or submission at trial. On occasions the experts may have listed large quantities of sources without indicating with sufficient clarity what precise part or parts of this material has had a role in the forming of their opinions. However, such faults as can be discerned are not so bad as to warrant the exclusion of evidence at this stage.

[25] The requirement that experts clearly and with precision set out the sources relied on for their opinions is now contained in Schedule 4 of the High Court Rules. It reads in part:

> **Schedule 4 Code of conduct for expert witnesses**
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> Duty to the court
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> 1 An expert witness has an overriding duty to assist the court impartially on relevant matters within the expert's area of expertise.
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> 2 An expert witness is not an advocate for the party who engages the witness.
>
> Evidence of expert witness
>
> 3 In any evidence given by an expert witness, the expert witness must—

(a) acknowledge that the expert witness has read this code of conduct and agrees to comply with it:

(b) state the expert witness' qualifications as an expert:

(c) state the issues the evidence of the expert witness addresses and that the evidence is within the expert's area of expertise:

(d) state the facts and assumptions on which the opinions of the expert witness are based:

(e) state the reasons for the opinions given by the expert witness:

(f) specify any literature or other material used or relied on in support of the opinions expressed by the expert witness:

(g) describe any examinations, tests, or other investigations on which the expert witness has relied and identify, and give details of the qualifications of, any person who carried them out.

4 If an expert witness believes that his or her evidence or any part of it may be incomplete or inaccurate without some qualification, that qualification must be stated in his or her evidence.

5 If an expert witness believes that his or her opinion is not a concluded opinion because of insufficient research or data or for any other reason, this must be stated in his or her evidence.

[26] Four of the experts have exhibited long lists of discovered documents that have been considered. This does not show an attempt to present broad assertions without specific references of the type that was criticised in *Arnotts Ltd*. Rather, the appendices appear to be included to show the extent of the expert's relevant reading. If that is all it is, it is not bad practice.

[27] We do not discern a general failure in any of the expert testimony to support opinion by facts and reasons, although a cursory examination shows occasional lapses, and there are a considerable number in Mr Gove's brief. They will be deleted. Those that are left in other briefs at the time of hearing may be the subject of cross-examination and submission at trial. We do not consider the errors to be so serious or extensive to warrant intervention at this stage.

Hearsay

[28] Section 25(1) of the Evidence Act 2006 provides that an opinion by an expert is admissible if the fact finder is likely to obtain substantial help from the opinion. Section 25(2) provides that an opinion is not inadmissible simply because it is about the ultimate issue or a matter of common knowledge. Section 25(3) provides:

> **25 Admissibility of expert opinion evidence**
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> …
>
> (3) If an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact-finder only if that fact is or will be proved or judicially noticed in the proceeding.

This section makes it clear that facts within the general body of knowledge of an expert can be put forward as the basis for the expert's opinion without being proven in the usual way. Moreover, the facts relied on by experts may often be matters of common knowledge in terms of s 25(2). In addition, s 129(1) provides:

> **129 Admission of reliable published documents**
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> (1) A Judge may, in matters of public history, literature, science, or art, admit as evidence any published documents that the Judge considers to be reliable sources of information on the subjects to which they respectively relate.

[29] Whether the published documents about economic issues are history, science or art or a combination of all three could be debated at length. We did not have the benefit of argument on the issue. However, published reports on economic developments may well involve public history. Economic theory and data may well be "science" in the sense of "an organised body of knowledge on a subject", (The New Zealand Oxford Dictionary (2005)).

[30] These sections reflect the latitude that was accepted in any event, prior to the enactment of the Evidence Act 2006. Experts can helpfully comprehend and synthesise a body of knowledge, and by skilled analysis and reasoning develop an opinion. That opinion is of value to a fact finder who would not have the knowledge and skill to reach such an opinion with confidence, certainly within the constraints of a trial. Moreover, there would be no practical way for all the elements that make up

the expert's knowledge to be proven in a Courtroom context. As was stated by Gowans J in *Borowski v Quail* [1966] VR 382 at 387 (quoted in Freckelton and Selby, *Expert Evidence*, (4ed, 2009) at 128, in relation to the admissibility of commercial and professional lists, registers and reports:

> Their admissibility in some instances is placed upon judicial principle; in others it arises solely from statutory innovation. … The necessity … in all of these cases lies partly in the inaccessibility of the authors, compilers or publishers in other jurisdictions; but chiefly in the great practical inconvenience that would be caused if the law required the summoning of each individual whose personal knowledge has gone to make up the final result.

Gowans J quoted *Wigmore on Evidence* (3ed 1961-1979) at [665(b)]:

> The data of every science are enormous in scope and variety. No one professional man can know from personal observation more than a minute fraction of the data which he must every day treat as working truths. Hence a reliance on the reported data of fellow scientists, learned by perusing their reports in books and journals. The law must and does accept this kind of knowledge from scientific men. On the one hand, a mere layman, who comes to court and alleges a fact which he has learned only by reading a medical or a mathematical book, cannot be heard. But, on the other hand, to reject a professional physician or mathematician because the fact or some facts to which he testifies are known to him only upon the authority of others would be to ignore the accepted methods of professional work and to insist on finical and impossible standards.

[31] Given the defendants' strong general objection to the extensive reliance on factual material in the briefs, it is necessary to examine the hearsay rule in relation to the expert evidence in this case. While the hearsay rule was only mentioned in passing in submissions, it arises when experts refer to factual material not within their personal knowledge, which they put forward not only as a fact in support of their opinion under s 25(3), but as a fact that the Court may accept.

[32] A hearsay statement is defined as follows in s 4 of the Evidence Act 2006:

> **hearsay statement** means a statement that—
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> (a) was made by a person other than a witness; and
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> (b) is offered in evidence at the proceeding to prove the truth of its contents.

Therefore statements in the expert briefs made by other persons, and which are offered by the expert in evidence at the proceeding to prove the truth of their

contents, are hearsay. However, s 18 sets out circumstances in which hearsay is admissible:

> **18 General admissibility of hearsay**
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> (1) A hearsay statement is admissible in any proceeding if—
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> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
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> (b) either—
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> (i) the maker of the statement is unavailable as a witness; or
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> (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.
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> (2) This section is subject to sections 20 and 22.

[33] The expert testimony of the plaintiffs may contain hearsay, if facts are put forward as facts which the Court can accept as true. To give an example, it is stated in paragraph 4.75 of Dr Frankel's brief (which is objected to) that the US Federal Reserve Bank in 1984 found that credit card profits were consistently higher than other banking activities. On the one hand it may be argued that this sort of evidence is not put forward to establish the truth of the reference, but simply as an acknowledged stepping stone in a train of reasoning on the part of the expert. That is expressly permitted by s 25(3). On the other hand, Dr Frankel clearly believes that the information is true and the plaintiffs may be expecting the Court to accept that. If the fact is being put forward as true, rather than to support the opinion, s 25(3) of the Evidence Act 2006 does not apply to it.

[34] To give another example, where the Nilson Report of February 2005 is referred to at paragraph 4.77 of Dr Frankel's brief as setting out the top ten issuers' share of general purchase card charge volume, such a document is hearsay in that it is a statement made by a person other than a witness (Nilson), and may be put forward to prove the truth of the fact contained in that statement, namely the extent to which the general purchase card charge volume grew. If so, it may fall under s 129(1) as a matter of science which could be considered a reliable source of information. Further, it may be after cross-examination and the defendants' evidence is heard that the Court is reasonably sure that the statement is reliable in

terms of s 18(1)(a), and that in terms of s 18(1)(b)(i) and (ii) the maker of the statement is unavailable or it would be unduly expensive or cause undue delay to require the maker of the statement to be available.

[35] If the hearsay point was taken in relation to specific facts put forward by the experts, it may be that s 18 could apply, if s 129 did not. It may be said that the circumstances relating to the statement provide reasonable assurance that the statement is reliable, and the maker of the statement is unavailable as a witness or there would be undue expense or delay in causing the maker of the statement to come to New Zealand. Thus in relation to the statement by the Federal Reserve Bank, which is referenced in Dr Frankel's brief, the Court may be able to be assured that the evidence is reliable and the maker of the statement is unavailable, or undue expense or delay would be incurred in making that person available.

[36] Evidence of overseas studies, such as surveys, may be relevant and helpful to a Court. Given the fact that Visa and MasterCard operate worldwide there may well be reputable material obtained often at great cost, which is relevant and not available within New Zealand. Providing the reliability, integrity and relevance of the material can be properly established, it may be useful. Such evidence was referred to and relied on in the appeal decision of *Air New Zealand Limited v Commerce Commission (No. 6)* HC AK CIV-2003-404-6590 17 September 2004 Rodney Hansen J and Kerrin M Vautier (Lay Member), at 112. It would be premature to reject references to such material at this stage.

[37] As a matter of practice, even in criminal trials, objections to evidence given by qualified experts that is technically hearsay, are seldom made. One of the defendants, Cards NZ Limited, has indeed filed a brief in reply and not raised any evidential issues. Normally when such expert evidence is put forward, which contains facts that are put forward as true, no determination is required as admissibility under s 18, s 25 or s 129 is tacitly accepted. If the challenge was made at the time, it might well be that the evidence was still admitted. Such an approach is consistent with the practicalities of the situation. Experts inevitably may wish to refer to facts in other materials, and often those materials are very extensive indeed.

[38] At this stage we are not prepared to find any of the evidence inadmissible on the grounds of hearsay. If specific objection is taken at trial to any portions of the evidence on the grounds of hearsay then such an application will be considered then.

Opinions of overseas regulatory bodies

[39] Objection is also taken to references in the economic expert briefs to expressions of opinion of overseas regulatory bodies. For example, Dr Frankel quotes the European Commission at para 40.20 of his evidence and its characterisation of an MIF. At paragraph 4.21 Dr Frankel quoted the European Commission Final Report of January 2007, and its statement about identified competition concerns. These statements are not hearsay, except in the sense that they may be put forward to prove as a fact that the regulatory body did in truth have that view. They are put forward to demonstrate the opinion of another expert, in this case an expert body. Experts, in setting out their reasons for their opinions, are entitled to rely on the properly identified opinions and conclusions of other properly qualified experts. That reliance can, of course, be attacked at trial as ill-founded because the opinions relied on were mistaken or in a different context, but that is a matter for the trial. Such references should not be declared inadmissible at this stage.

[40] Mr Hodder submitted that there was a difference between the opinions of other experts, and the opinions of regulatory bodies, as the opinion of an expert could be related to an identifiable work which could be then analysed and, if necessary, criticised, and because the qualifications and expertise of the quoted expert could be properly understood and analysed. However, the same can be done in respect of the opinions of a regulatory body. If there are doubts, whether they are in fact views expressed by that body, the evidence may not be accepted. As to the weight to be attached to the opinions, the expertise of the body can be analysed and the references given for the opinions can be checked. If ultimately the views expressed are irrelevant or arise from a context so different as to be of no help, or to be ill-founded or wrong, that material will be put to one side. The assessment is a matter for trial and not for now. Therefore, we do not accept Mr Hodder's submission that at this hearing such opinions from regulatory bodies should be declared inadmissible.

Reference to history

[41] Mr Hodder criticised references to the history of payment systems and credit cards in some of the briefs. Mr Hodder asked why do we care about such history and what are we meant to do with it?

[42] While distant history beyond the lifetimes of available deponents cannot be proven as a matter of fact, it can properly be recounted by those who are experts in the relevant discipline. Section 129(1) may apply if there are references to published sources. An account of history can be regarded as no more than an expression of opinion, based on various materials. As an expression of opinion it can properly be accepted as evidence.

[43] We reject any suggestion that the history of payment systems is irrelevant to the issues before the Court. While an account of payments systems starting with barter may have no direct relevance, a knowledge of the history of such systems may well help explain why various current day systems have certain features, and the economic drivers behind those features. Current practices can be put in context and better understood. It is our view at this stage that it would be wrong to exclude such evidence.

Conclusion on general criticisms

[44] We consider that by-and-large the extensive criticisms being made of the evidence of the plaintiffs' experts go too far. We are not persuaded that any of the economic experts called by the plaintiffs have consistently transgressed the requirements of the Code of Conduct for Expert Witnesses, set out in Schedule 4 of the High Court Rules. That is not to say that there are not lapses within those briefs, which will warrant submission and consideration at the trial. However, none of the briefs transgress the Code of Conduct to the extent that intervention at this early stage is warranted. Given the hundreds of pages of expert testimony, any sentence by sentence examination of the evidence is quite impossible. The rejection of individual sentences that might have been pin-pointed in submissions is difficult given the Court's incomplete understanding at this stage of all the evidence presented by a particular witness, and the context within which it is presented. For

the Court to reject a brief, or part of a brief, because it was unduly argumentative or because opinions were not sufficiently supported by facts and assumptions and reasons, the faults would have to be serious and obvious. Premature rejection could lead to an unfair trial. We have not been persuaded at this point that such faults exist, save for parts of Mr Gove's brief.

The evidence of developments in countries other than New Zealand

[45] A primary objection of all three counsel for the defendants was that the evidence of overseas developments was irrelevant, and unfairly prejudicial, and would greatly add to the length of trial.

[46] The Commission and the retailers seek to adduce evidence on developments in Australia, the European Union, and the United States. In Australia the Reserve Bank of Australia ("RBA") has prescribed fees and regulated surcharge prohibitions. The plaintiffs seek to look at markets that have similarities to New Zealand where the features of the credit card schemes that it is said are objectionable, are absent, or where they have been removed or modified. They assert that the credit card schemes that operated in Australia and in other countries before intervention were essentially the same as those in New Zealand, and that indeed the Visa and MasterCard rules are essentially the same worldwide, with some limited local variations. It is submitted that it is helpful to look at similar markets in other countries, particularly Australia, where the scheme rules have been changed by regulation. This will shed light on the likely effects of similar changes in New Zealand, and, thus, whether the arrangements are anti-competitive.

[47] The defendants accept the use of counterfactual analysis, but they claim that there has been no case brought by the Commission where a plaintiff has attempted to establish a counterfactual by leading evidence of a foreign market and by claiming that that market is a truly competitive market. Their central contention is that any such reference to an overseas market could not have any probative value without a full examination of the facts of the market and whether it is a competitive market, and without an analysis of how the participants in that market conduct themselves as compared with those in the New Zealand market. It is submitted that such evidence is either irrelevant, or its probative value is outweighed by the risk that it will

prolong the proceeding needlessly and cause undue delay. Reliance is placed on the statement by Miller J in *W v Attorney General* HC WN CIV-1999-485-085 24 April 2007, where it was said that relevance "is not the only touchstone of admissibility": at [39].

[48] It is only possible to assess these submissions on a general basis at this stage. Given the six volumes of evidence already received and the complexity of the issues, any detailed analysis of the probative value or prejudicial effect of such evidence on a paragraph by paragraph or even section by section basis is quite impossible.

[49] It was observed in *Re Qantas Airways Limited* (2004) ATPR 42-065 at [224], while overseas experts might be experienced and highly qualified, this is not substitute for familiarity with or knowledge of the relevant market. It was stated:

> We will not be greatly assisted by an expert who focuses exclusively on markets which are geographically or temporally distinct from the relevant market without any analysis of the specific features and context of the market under consideration.

[50] It was stated in *Re EFTPOS Interchange Fees Agreement* (2004) ATPR 41-999 at [81], that there was not a great deal of value in overseas comparisons, given the mix of historical, geographical, political, cultural and socio-economic factors that must pertain in any country.

[51] However, these criticisms of overseas evidence were made in relation to evidence that was admissible, but of little relevance because it was evidence that the experts sought to relate to local conditions, with which the experts were not sufficiently familiar. Here the overseas evidence, while not related directly to New Zealand, is relied on by the plaintiffs as a useful counterfactual. Certainly in relation to the Australian comparison, the expert economists claim to have expertise in the Australia and New Zealand markets. They may be shown to have insufficient knowledge, but that cannot be determined at this stage.

[52] In fact evidence of overseas developments has been considered in New Zealand Courts in previous Commerce Act cases. In *Air New Zealand Limited v Commerce Commission (No. 6)* at [108], [111]-[118], the Australian domestic

market was considered, as were Australian and American studies. It was stated at [117]:

> Predictions of the likely behaviour of firms in a dynamic market at some point in the future typically involve the application of economic theory, previous experience (in the market *or other markets having shared characteristics*) and known facts about the structure of the market and the behaviour of competitors and potential competitors. Such predictions have often been referred to as "value judgments" …
>
> [emphasis added]

[53] In *Woolworths Limited v Commerce Commission* (2008) 8 NZBLC 102,128 at [232], overseas evidence as to the success of relevant comparable commercial ventures was considered not particularly relevant, but in the Court of Appeal at [205] evidence of overseas experience was considered: *Commerce Commission v Woolworths ltd* (2008) 12 TCLR 194 at [205].

[54] In *Rugby Union Players Association Inc v Commerce Commission (No. 2)* [1997] 3 NZLR 301, the Court considered evidence of overseas sports leagues in assessing the likely effect of player transfer regulations, and rejected an argument that overseas experience should be discarded as not relevant: at 325. The Court referred to expert evidence relating to overseas experience as being "impressive": at 325.

[55] These decisions were distinguished by the defendants on the basis that many decisions were in fact appeals from authorisation decisions of the Commission, where the evidence had been received by the Commerce Commission using its investigative powers, and the admission could not be challenged in the High Court. While this may be so, the fact is that in these decisions the Courts found overseas material to be of positive assistance.

[56] Visa and MasterCard operate in Australia, an environment where the Reserve Bank of Australia ("RBA") has introduced controlled fees and taken other measures in relation to credit card practices. The counterfactual that the Australian experience provides does, on the face of it, have relevance. It may be that an examination of the details of what has happened in Australia shows that the Australian experience is

irrelevant, and it may be that it supports the defendants' and not the plaintiffs' position. However, it cannot at this preliminary stage be dismissed as irrelevant.

[57] An expert called by the defendants, Professor Phillip Williams, has filed an affidavit in support of the application for orders as to admissibility. He has stated that before the Australian reforms can be of any value in analysing the effects on competition in the New Zealand market, the effects of each aspect of the reforms on competition in Australian markets would need to be analysed separately. That may or may not be so, but his view that the changes offer little guidance to New Zealand is clearly a matter of opinion and not accepted by the plaintiffs' experts. It is significant that it is only the effects of the Australian changes that the plaintiffs seek to rely on, not the circumstances that lead to those changes.

[58] The purpose as claimed by the plaintiffs is not to show why there were changes introduced in Australia, but rather to show the effect of them. It seems reasonable to assess the likely effects of change in competitive conditions empirically by using data from different regions as benchmarks. The relevance of overseas data is more relevant in this case than it might be in others because of the worldwide nature of the Visa and MasterCard operations. Although there will be differences in relation to each particular country, the fact that they are international companies with an international modis operandi makes comparability and relevance more likely.

[59] It is relevant that a number of the briefs put forward by the defendants provide information about the conduct of market participants in overseas markets which have features in common with New Zealand markets, in particular, Messrs Laing, Sheedy, Sekulic and Jonas. The fact that they, in common with the plaintiffs' expert witnesses, all look to overseas material, supports it as relevant to the issues before the Court. Naturally such material must be considered against the backdrop of the dissimilarities of the payments system in that foreign jurisdiction to New Zealand, and where a Court could not be confident that relevant differences were identified, the evidence may be of little or no use. This exercise cannot be undertaken at this point.

[60] It may be, as is generally asserted in the defendants' submissions, that the need to provide evidence to explain the Australian experience and to establish its irrelevance or limited relevance, will significantly prolong the hearing. We are not necessarily persuaded that the extra time involved will be great. We are certainly unable to conclude that any prolonging of the hearing for this reason will be needless. The Australian counterfactual may have probative value.

[61] We therefore decline to exclude this evidence at this stage.

Application of s 79 of the Commerce Act

[62] There is an issue as to whether s 79 of the Commerce Act applies. Section 79 provides:

> **79 Evidence not otherwise admissible**
>
> In the exercise of its jurisdiction under this Part of this Act, except in respect of criminal proceedings *and proceedings [for pecuniary penalties]* of this Act, the Court may receive in evidence any statement, document, or information that would not be otherwise admissible that may in its opinion assist it to deal effectively with the matter. [emphasis added]

[63] The Commission and the retailers submit that s 79 can be applied in relation to these evidence issues. Mr Goddard QC submits that the fact that the Commission seeks pecuniary penalties does not mean that the section cannot be used. He refers to the fact that the retailers in their proceedings are not seeking penalties, and suggests that s 79 could be applied to admit evidence for some purposes but not for others, just as evidence is admitted in criminal trials in relation to some defendants but not others. Later in submissions he argued that s 79 could be used as part of the testing process. The Court could consider, first, whether there was a breach without using s 79, and only if the threshold was not crossed without s 79 evidence, would evidence be admitted under s 79. The Banks strongly resisted such an interpretation of s 79.

[64] The Commission seeks pecuniary penalties pursuant to s 81 of the Commerce Act in all of its causes of action. In contrast, the retailers, who would not have been in any event able to seek penalties, claim for an inquiry into damages and exemplary

damages as the monetary relief sought. The retailers, if their proceedings were not joined for hearing purposes, would be able to avail themselves of s 79.

[65] However, the Commission and the retailers have chosen to have these proceedings heard together. An order has been made to this effect at their request. They jointly seek a finding of breach of s 27, and there will be a single judgment. It would be impracticable to somehow compartmentalise the two claims for the purposes of judgment, and indeed that is not suggested. It would equally be quite impracticable to have a two-stage approach, as Mr Goddard suggested, or to consider one body of evidence in relation to penalties, and a different body of evidence in relation to declarations, injunctions and damages. The Court will have to move through all the evidence and submissions to reach its conclusion. Once a conclusion on liability is reached using s 79 evidence, that cannot be undone or put to one side when penalties are considered.

[66] While in criminal trials juries are asked to carry out a compartmentalising exercise, that is in relation to different defendants, where the task of compartmentalising evidence is straightforward. Whereas here a progressive reasoning process traversing large quantities of evidence is required, using evidence for some purposes and not for others would be most burdensome and there would be a real danger of prejudice.

[67] The proceedings collectively are "proceedings for pecuniary penalties", and s 79 does not on its face apply. We take the view that the section must be construed as not applying to proceedings that do not seek pecuniary penalties in themselves, but are to be heard with other proceedings that do. If this were not the case, conclusions could be reached on pecuniary penalties on the basis of evidence admitted under s 79, in breach of the express limitation within that section. The limitation would therefore be defeated by such an interpretation.

[68] The Commission relied on an extract from *Gault on Commercial Law* at CA79.04:

> Even in cases under the enforcement or remedies provisions of the Act it would be beneficial for the Court to have access to as much information as

> possible in order to be able to make useful inferences from market behaviour."

This is undoubtedly correct as a general proposition. However, the learned authors then go on to state:

> Note that proceedings for pecuniary penalties and criminal proceedings are expressly excluded (ie the normal rules of evidence will apply in those situations).

[69] In *Callplus Ltd v Telecom NZ Ltd* (2000) 15 PRNZ 14 at [49], Wild J contemplated that the s 79 discretion might be used in the event of there being a concurrent hearing of cases, one involving penalties and one not. However, that was in the context of him observing that the Court would be "very reluctant" to exercise the discretion in such circumstances.

[70] It is conceivable that particular pieces of evidence might be admitted at trial under s 79, where they had a purpose that clearly had nothing to do with penalties. However, no such submission has been made in relation to the particular evidence in contention in this application. Rather, s 79 has been invoked generally as an answer to any technical non-compliance with the provisions of the Evidence Act 2006. We reject the plaintiffs' submission on this point, and conclude that the normal rules of evidence should be applied to this application.

The criticisms of specific briefs of evidence

[71] It is proposed to shortly summarise the Court's position on the specific briefs of evidence or parts of briefs of evidence that are criticised, bearing in mind the general conclusions set out in paragraphs [16] – [67].

Evidence of Charles John Gove

[72] The banks' application seeks an order that Mr Gove's evidence is inadmissible. Mr Gove is categorised as an industry expert who, although not an economist, has relevant expertise from within the industry to present evidence. In his evidence he backgrounds the basic principles that apply to credit cards, the rationale for the MIF fee and the scheme rules. He then discusses in detail the New Zealand credit card market. He proceeds then to outline reforms in the Australian

payment card market, refers also to payment reforms in other jurisdictions, and concludes by setting out possible merchant actions.

[73] Mr Shavin QC, who made the submissions in relation to Mr Gove's evidence, made the general criticism that Mr Gove was not qualified to give expert evidence. He pointed to the fact that he had no academic qualifications and stated that his experience as outlined in his brief was insufficient. He observed that he was neither an economist, a statistician or an accountant, and categorised him as a "lobbyist" for the retailers.

[74] The criticism of Mr Gove's evidence must be seen against the background that Mr Gove's brief was filed on 14 November 2008, but no concerns were expressed about the plaintiffs' evidence generally until a memorandum was filed on 16 April 2009. The plaintiffs have now filed their experts' briefs, and the defendants have filed their factual briefs. Thus the challenge is late, and it will be difficult for the plaintiffs to file more evidence without disrupting the timetable sequence and possibly imperilling the fixture.

[75] Mr Gove's brief over some three pages sets out details of his experience. It shows that he has worked as a specialist in the payment card field for approximately 22 years, including managing a project for Mobil Oil over five years in Australia and New Zealand whereby the company's card processing was changed from a manual to an electronic system. Since 1992 he has been involved in his own card-marketing consultancy with one other person, and they have offices in Australia and the United Kingdom. The brief indicates very extensive experience in the areas of card strategy, analysis of payment card markets, market research, and the development of card products.

[76] Mr Shavin was critical of the lack of detail in Mr Gove's summary of his experience. It is true that there is a lack of precise detail in the sense of exact dates and work descriptions. However, the level of criticism directed by Mr Shavin is that which normally occurs in cross-examination of an expert and would result in the expert's elucidation of the exact ambit of his experience, (or revelation of the lack of it). Mr Gove's lack of detailed description of his expertise is unfortunate given the challenge now made, but it would be wrong to declare his brief inadmissible because

of a lack of expertise at this point. It will be open to the defendants to challenge his expertise at the hearing, should they choose to do so.

[77] If his experience was as flawed as Mr Shavin submitted it was, we might well have excluded the brief. However, the evidence available does not support Mr Shavin's description of Mr Gove as a "lobbyist". Rather, he appears to be a consultant, and a specialist of choice of large merchants in relation to a wide range of card activities involving, on the face of it, some quite detailed expertise. Mr Gove's lack of academic qualifications would certainly not qualify him to give evidence as an economist, but a lack of formal qualifications does not disqualify an expert if expertise is established by experience, and a demonstrated confidence in his expertise of other reputable persons. There is prima facie evidence of this.

[78] Mr Shavin sought to demonstrate that the brief was so "embedded with error" that it should be rejected. While he made a number of criticisms about specific paragraphs, the errors shown did not establish any consistent and palpable flaw. We are not satisfied, from our perspective at this stage, that the brief is of such obvious poor quality that it should be put to one side.

[79] It also appears that much of Mr Gove's evidence is aimed to provide the Court with uncontentious background information. It is significant that in a brief in reply prepared by the defendant, Cards NZ Limited, (which has not joined in this application), Mr Gove's evidence is considered by a Michael Laing and a response is given, referred to earlier in this judgment. Mr Laing, who is a former director of Visa and chairman of its Board, and who provides global consulting services in developing financial service credit card partnerships and alliances, agrees with large sections in Mr Gove's brief. He broadly disagrees with Mr Gove's interpretation of the overall effect of the RBA's intervention in Australia, and there are additional areas of disagreement regarding the RBA's reforms and related issues. Nevertheless a consideration of Mr Laing's brief indicates that Mr Gove's brief contains relevant material, that at least one former Visa senior director considers worthy of analysis.

[80] We are not satisfied, therefore, that Mr Shavin's general criticisms warrant this brief being put to one side. It cannot be said in terms of s 8 of the Evidence Act

that its probative value is outweighed by its prejudicial effect. The issues addressed are relevant.

[81] Mr Shavin was also critical of the specific references by Mr Gove to overseas reforms, particularly the Australian reform. However, Mr Laing's reply brief itself engages in the implications of the Australian reforms. We have already indicated we do not consider that such evidence should be ruled inadmissible at this stage.

[82] We did accept in the course of submissions a number of Mr Shavin's criticisms of specific paragraphs, where remarks that were made by Mr Gove were not supported by facts or reasons, or may have been outside his area of expertise as an industry expert working primarily in Australia and the United Kingdom. The extent of the valid criticisms were such that we would have intervened and directed that a number of paragraphs and sections of his brief were inadmissible. However, Mr Land has accepted many of Mr Shavin's criticisms. Mr Land and Mr Shavin have agreed (without prejudice to Mr Shavin's broader objections), that Mr Land will present a list of proposed deletions and changes, and Mr Shavin will respond. If there is still disagreement after this exercise they will come back to the Court seeking a direction. We are content to accept this sensible way forward.

Evidence of Michael McCormack

[83] The Bank defendants submit that this brief should be rejected in its entirety. Mr McCormack has an MA in international policy studies from Stanford University. He is a consultant based in Fort Lauderdale, Florida. He has had considerable banking experience specialising in credit cards, while working for the Wells Fargo Bank, and extensive consulting experience in the area of credit cards. His brief is largely an overview of the New Zealand payment card industry.

[84] Mr Shavin criticised Mr McCormack's lack of specialised knowledge of New Zealand. He asserted that much of Mr McCormack's evidence was submission, and much of it no more than a summary of what was found in discovery. While accepting that Mr McCormack's evidence was in a different category to that of Mr Gove, he submitted that it should be declared to be inadmissible because of its general and tendentious nature.

[85] Any criticism of the fact that Mr McCormack has commented on the New Zealand position while being an overseas expert, must be seen in the context of the small pool of experts available in New Zealand. The problem in relation to that small pool must be compounded by the fact that the major New Zealand banks and credit companies are all involved in the litigation, inevitably giving rise to conflict problems for those experts who are in the jurisdiction.

[86] Mr McCormack worked for the Wells Fargo Bank in California from 1992 to 1996 managing Visa and MasterCard networks, and has worked as an expert in the area since. His experience and its relevance to New Zealand must be seen in the context that Visa and MasterCard operate worldwide. He has been retained as a merchant acquiring expert for a plaintiff in a damages lawsuit against Visa and MasterCard in the United States. We are not prepared at this stage of the proceedings to find that he lacks sufficient expertise to give a detailed opinion on the New Zealand situation, although it is a matter that the defendants can pursue, if they wish, at the hearing.

[87] An examination of the brief shows that all references are supported by detailed footnotes. As with Mr Gove's brief, much of the material is likely to be uncontentious, and where it is contentious it does not on any overview fall outside the bounds of expert evidence. Where he purports to set out a brief history of Visa and MasterCard MIF levels, he gives detailed references to his sources. There were some instances, in particular paragraphs 149, 168 and 182, where broad statements were made that were not substantiated. However, such matters can be remedied from the defendants' perspective in cross-examination and submissions. We do not consider the faults to be so severe as to warrant intervention at this stage. While criticisms can be made of Mr McCormack's brief, they are best left to trial and should not be dealt with by orders at this stage excluding evidence.

[88] We, therefore, are not prepared to declare any part of Mr McCormack's evidence inadmissible.

Evidence of Alan Frankel

[89] Dr Frankel is an experienced professional economist with a PhD from the University of Chicago. His expertise is not in any way challenged. However, Mr Hodder, who led the defendants' submissions in relation to Dr Frankel's evidence, criticises his evidence on the basis that it contains fact evidence that should not be adduced by an expert and contains irrelevant material. He is very critical of the reference to overseas experience by Dr Frankel.

[90] Dr Frankel relates the origin of inter-bank payment systems and MIFs, and gives his views on how MIFs work in card payment systems. He discusses legal and regulatory actions concerning MIFs and MSFs in Australia and the US. On the basis of this material he sets out various conclusions. His original brief included references to legal and regulatory actions in many other countries, but in the light of the defendants' objections those references have been deleted.

[91] We do not consider it to be illegitimate for Dr Frankel as an expert economist to have set out a detailed factual background. The ability of experts to give such evidence is considered earlier in this judgment. As an expert economist it can be accepted that he has the knowledge and authority to give such an overview. If there are errors they will be revealed by cross-examination and submission.

[92] Mr Hodder has a general objection to evidence from overseas jurisdictions being utilised by experts to support or demonstrate the points that they wish to make. Providing the material relied on by the expert is identified, there is compliance with the requirement that an expert states the facts and assumptions on which opinions are based. Mr Hodder submitted that Dr Frankel had no expertise that enabled him to set out what has happened in other jurisdictions. However, as already observed, experts reach conclusions based on the transparent use of identified facts. Their references to facts do not necessarily prove those facts, but provide support for the conclusions reached. If the facts that they have assumed to be correct are shown to be wrong, then their opinions are damaged as a consequence.

[93] Dr Frankel gives examples of inter-bank payment systems operating successfully without MIFs and regulatory developments in other jurisdictions. This

is criticised, but the question may be asked, if experts cannot provide this type of evidence (assuming it is relevant), who will? To give examples of overseas systems and developments by calling witnesses directly from those jurisdictions could be prohibitively expensive and waste a lot of time. The advantage of adducing this sort of evidence from experts is discussed at [45] – [61]. It may well be that a Court will feel able to use such background material if it is satisfied after hearing from the witness and cross-examination and opposing witnesses, that the material is accurately summarised.

[94] There was also a criticism of broad statements made by Dr Frankel such as "Competition authorities, central banks and other authorities around the world have been investigating and expressing concerns about interchange fees in card payment systems for may years." However, this criticism, which other defence counsel made of other aspects of the plaintiffs' briefs, overlooks that such statements are by way of summary of material considered in more detail either before or after the conclusory statements. It is perfectly legitimate for an expert to summarise in a general way, provided there is a proper basis for the conclusions reached in earlier detailed material.

Evidence of Dennis Carlton and Gustavo Bamburger

[95] Doctors Carlton and Bamburger filed a joint brief for the Commission. They are both expert economists with doctorates from distinguished United States Universities. They discuss relevant markets and put forward counterfactual scenarios.

[96] A report from the European Commission which recently investigated MasterCard interchange fees on "cross-border" transactions was quoted at paragraph 4.2.4. This is criticised by defence counsel, as are other quotes from MasterCard or Visa documents presented in overseas jurisdictions.

[97] However, we do not consider that such references should be excluded at this stage. It is not argued that these quotes are hearsay. As discussed, they may be put forward to show MasterCard's or Visa's opinion. Even if they are put forward to prove matters of fact, they could be expected to be generally admissible under s 18

as reliable statements, and because there would be undue expense or delay in causing the maker of the statement to appear as a witness. Of course MasterCard or Visa would always have the ability to call the author of any such quote in any event. Given the fact that MasterCard and Visa are worldwide organisations, we cannot say that it is unfairly prejudicial for them to be quoted in respect of statements made in overseas jurisdictions.

[98] Mr Farmer criticised a reference by them to the report of another expert, a Professor Von Weizsääcker, prepared for MasterCard. However, this is not hearsay, and insofar as it is a statement by another expert, it can be checked by the defendants as the Professor has been employed by MasterCard. The opinion quoted may have some probative value. It falls within the category of the body of other expert opinion that an expert is entitled to draw upon in reaching conclusions.

[99] We do not consider any portion of Drs Carlton and Bamburger's evidence should be declared to be inadmissible at this stage.

Evidence of Jerry Hausman

[100] In Professor Hausman's brief there is an extensive use of footnotes and, contrary to the pattern in many other briefs, those footnotes often contain substantive argument or comment. Even though it is not usual for briefs to be read in cases such as this, it is preferable for argument and comment to be contained within the body of the brief, as it enables the listener or reader to follow a sequential and developing line of argument, rather than having that process interrupted by the need to follow up footnotes that may often refer to different matters than those being pursued in the body of the text. Nevertheless, such a criticism does not warrant any of the material being treated as inadmissible at this stage.

[101] Mr Farmer's particular criticisms of Professor Hausman's brief included a quote at footnote 22 on page 9 of the statement by one of the witnesses for the defendants, Mr Sekulic of MasterCard, and a comment by Professor Hausman that he disagreed. Professor Hausman sets out why he disagreed with the statement and it is difficult to see how any exception can be taken to the way Professor Hausman

deals with it. The comment appears to relate to a relevant matter, namely Amex's strategy in relation to MSFs.

[102] It is true that if the comment is not accepted and is considered to be of importance, that there may have to be cross-examination and evidence by the defendants on the issue. However, it cannot be said that, in terms of s 8, this evidence will needlessly prolong the proceeding. Inevitably there is already in this case a vast amount of material before the Court. Judgments have to be made as to what is background or unimportant. It is not possible for the Court at this stage to conclude that this reference, and a number of others referred to in Professor Hausman's brief, should be excluded.

[103] It is also true that Professor Hausman on a number of occasions refers to other remarks by Mr Sekulic, which he then proceeds to disagree with and endeavour to disprove. While it could be said that this is an argumentative technique, it does not on its face obviously go beyond that which is legitimate in the area of expert disagreement.

[104] Mr Farmer submits that much of Professor Hausman's evidence is submission. It is correct that his brief could be seen as a connected argument put forward to the Court for acceptance or rejection. He quotes relevant markets. He analyses the relevant markets, and what he calls "restrictive rules in the acquiring market". He puts forward counterfactuals and does a s 27 and s 30 analysis to reach conclusions supportive of the plaintiffs' position. None of this is obviously beyond the normal bounds of expert evidence.

[105] We have found nothing sufficiently unacceptable in his brief to warrant an inadmissibility order at this stage.

Evidence of Roy Epstein

[106] Dr Epstein has a PhD in economics from Yale University and his expertise is not challenged. However, his brief is criticised. Conclusory statements are objected to, (for instance paragraph 85), but these are the result of detailed analysis elsewhere in the brief and do not breach the requirement that the opinions of expert witnesses

are supported by articulated facts and assumptions. His references to events in the United States and Europe cannot be excluded at this stage. We do not consider ourselves to be in a position to declare any portion of his evidence to be inadmissible.

Evidence of David Spicer, Jason Nesbitt, James Cody, Hans-Josef Stollmann and Dhum Karai

[107] The evidence of these industry witnesses to be called by the plaintiffs was objected to where it related to the Australian experience. For the reasons given we are not prepared to exclude such evidence at this stage.

Conclusion

[108] The defendants' applications have resulted in a considerable body of evidence about overseas jurisdictions other than Australia, the European Union and the US being removed from the plaintiffs' evidence. Further, the application has resulted in it being accepted that parts of Mr Gove's evidence will have to be deleted.

[109] However, broad criticisms by the defendants about the use of historical material, counterfactual foreign material, foreign studies and foreign statements of regulatory opinion are not accepted at this stage. Nor will the evidence be excluded because it is unnecessarily argumentative or relies on hearsay. We are not able to accept the general criticisms of the plaintiffs' evidence but, of course, it will be open to the defendants to object to evidence if they consider it appropriate to do so, at the hearing.

Result

[110] The applications for orders that the proposed evidence of the plaintiffs is inadmissible in whole or in part are dismissed.

[111] In relation to Mr Gove's brief, the defendants may renew their application following the retailers' provision of a statement as to what will be excluded from that brief.

Costs

[112] If any of the parties wish to pursue the question of costs, submissions should be filed within 14 days, with submissions in reply within a further 7 days.

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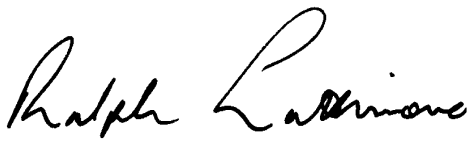
Asher J



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Dr Ralph Lattimore