

AUSTRALIAN BUSINESS LAW REVIEW

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EDITORIAL 261

ARTICLES

Expert testimony, opinion, argument and the rules of evidence – Robert French

Expert evidence in contemporary litigation often goes beyond inference as to past or future events based on proven facts. Some classes of so-called expert evidence amount to little more than observation. In some cases, particularly economic statutes, expert opinions may be evaluative and offer characterisations of factual circumstances for the purpose of applying statutory terms, particularly economic concepts. Such testimony may be characterised to some degree as argumentative in character. The article discusses the various classes of expert evidence and the application of the “basis rule” in relation to such evidence under s 79 of the *Evidence Act 1995* (Cth). It considers United States and Canadian approaches to expert testimony particularly in relation to economic evidence. It considers also the line between permissible “argument” and impermissible advocacy on the part of experts. 263

All headache pills are not the same! Product differentiation and the result: Unilateral market power – Deirdre L Hay

Product differentiation (including branding) alters the competitive dynamic and can lead to several important anticompetitive consequences which need to be better understood. If products of merging firms are close “in product space” then the merger is more likely to give the new firm unilateral market power, eliminate a close rival and in some cases can reduce customer choice. Differentiation may increase barriers to entry for new entrants or for existing competitors seeking to reposition their products to mitigate price increases. In contrast, if firms are differentiating their products rapidly, perhaps due to technological advances, any market power is likely to be shorter lived and thus, in certain cases, differentiation can show that a market is more not less competitive. Differentiation is also likely to inhibit collusive practices because it is harder to reach agreement when there is a wide range of customer preferences and product characteristics. This article sets out the issues that arise where there is differentiation and analyses decisions of Australian Courts and the Australian Competition Tribunal and determinations of the Australian Competition and Consumer Commission [ACCC]. I conclude that differentiation has not yet been addressed systematically and that competition would benefit from a more systematic analysis of the effects of differentiation. Differentiation should trigger a detailed consideration of all the various consequences differentiation can have including potential unilateral effects. This issue is particularly timely since the ACCC made its ground-breaking and very welcome Competition Assessment in Woolworths/Coles and has recently published Draft Merger Guidelines (2008), containing a new section 4 dealing with unilateral effects. It is hoped that differentiation will be given greater attention, and

that through the relevant Merger Guidelines, an increasing focus on differentiation and its potential effects will filter through into trade practices law generally and raise awareness of the issues. Such changes should protect against some Type I and Type II errors in merger enforcement and make for more consistent court decisions. 281

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