ASSESSING THE FUTURE: THE CHALLENGE OF RUNNING COMPETITION CASES

THE 17TH ANNUAL COMPETITION LAW AND ECONOMICS WORKSHOP

Competition law: The penicillin of public policy?

19 October 2019

The Honourable Justice John E Middleton

Ladies and Gentlemen,

When first presented by the organisers of this Conference with possible topics to address today, I was offered a number of suggestions – including the topic "Assessing the Future: a Challenge of Competition Cases". I accepted this suggestion, but as your programme attests (and the astute observer will now notice) I changed that to "Assessing the Future: The Challenge of Competition Cases". Even this change gave rise to some ambiguity in exactly what I was going to talk upon, so as is a presenter's prerogative, I am going to change the topic again to "Assessing the Future: The Challenge of Running Competition Cases". This gives me a wider canvass to explore beyond discussing the future focussed counter factual enquiry employed in some competition cases. It will allow me to also assess the future challenge in running competition cases.

Competition law now touches all manner of economic activities – the natural monopolies, the activities the preserve of the State, professions, sport and the media, both on the national and international stage. Lawyers and economists frequently work as a team, as complex cases require both legal and economic input.

Before I go any further, I should make it clear, that nothing I say today should be interpreted as indicating my views on matters I have before me for determination, or those that may come before me in the future.

I am reminded of the Monty Python movie "The Life of Brian". You will recall the scene "The shoe is a sign", where Brian is running away from his followers and one of his shoes falls off and is picked up by one of his potential disciples, who calls out: "A sign, hold up the shoe". As you will recall, not all the followers interpreted "the sign" in the same way and the followers

divided up into different groups according to their interpretation of what Brian meant by leaving the shoe. And obviously it was not meant to be a sign by Brian in any event. I assure you that I, like Brian, have no intention of leaving any such signs, or either of my shoes, behind.

Let me start with some perceptions of competition law and the potential litigation horizon.

"Competition law is an ass" – so wrote Matthew Stevens in the Australian Financial Review on 25 September 2019.

Mr Stevens was referring to the Port of Newcastle contest and Glencore, and the recent "no-decision" by the Federal Treasurer on the National Competition Council's recommendation that the Port of Newcastle (as Mr Stevens puts it) be "relieved of its oversight by the ACCC". Effectively the declaration of the shipping channel service at the Port of Newcastle under Part IIIA of the *Competition and Consumer Act (2010)* (Cth) was allowed to lapse.

Mr Stevens went on to reflect on a couple of points:

> *how can it possibly take so long to settle issues that seem so fundamental to the competition law?*
>
> *how is it that two arms of competition regulation (the ACCC and the ACT) are so convinced that the Port of Newcastle has failed the test of the law while the other (the NCC) is not?*
>
> *Is Part IIIA of the Consumer and Competition Act 2010 really that obtuse and subjective?*

The history to this litigious saga is briefly as follows.

In 2014, the Port's new owners decided to lift shipping channel fees arguing that the cost of access had not moved for a generation. The coal companies responded by saying the increase fees came with no obvious improvement in the service provided to the customers who had historically funded work done to sustain and increase the capacity of the Port's shipping channel.

In 2015, Glencore sought a declaration of the service. The National Competition Council decided that the circumstances did not require a declaration. In 2016, the Australian Competition Tribunal disagreed, made the declaration sought, and the ACCC was then to regulate access and charges in a decision that was subsequently endorsed by the High Court in March 2018.

Then, after 2017 amendments to Part IIIA, the Port of Newcastle reconvened the National Competition Council process, requesting it repeat its 2015 determination and free the Port from declaration. That is where we are now, with the National Competition Council recommending to the Treasurer that the declaration be revoked and by operation of law, the Treasurer is taken to have adopted that recommendation.

John Durie in the Australian said that the National Competition Council decision is almost certain to be taken to the Federal Court for the second time by Glencore and big coal exporters from Newcastle like Yancoal.

In addition to this 'potential' litigation, there are the determinations to be made in the applications by Port of Newcastle Operations Pty Ltd and by Glencore Coal Assets Australia Pty Ltd before the Australian Competition Tribunal (soon to be delivered) and the decision in Vodafone Hutchison Australia Pty Limited v Australian Competition and Consumer Commission in the Federal Court of Australia to be delivered in December 2019 or, more likely, February 2020.

Then there is the appeal from Beach J in *Australian Competition and Consumer Commission v Pacific National Pty Limited (No 2)* [2019] FCA 669 and an expected increase in the number of regulatory actions and class actions, including criminal proceedings in the cartel space. Add to that the involvement of the ACCC in looking into the mortgage market in the banking sector and investigating the high cost of low speed NBN plans, and associated litigation to be brought by ASIC arising out of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Those of you here today involved in litigation will probably know better than I that the immediate future will bring a large increase in competition law disputes that must necessarily be heard by the Australian Competition Tribunal or the Federal Court of Australia.

Amongst all of this is the increased emergence of technologies, which has a number of consequences, including generating different kinds of market power. Competition policy will need to be made suitably applicable to the use of informational power in markets. This will undoubtedly raise issues for judicial determination.

The result will be significant growth in litigation, in the competition and regulatory area, all of which must be managed effectively by the ultimate decision-makers.

If I may reflect from my own point of view, gone are the days of trial judges (admittedly in the 1840's at the Old Bailey), where they would not give the defendant a chance to say a word, direct the jury that they should have 'no doubt' in the guilt of the defendant, and call "seven years' transportation, next case". According to a judge, recalling one case, the whole trial (including judgment) took two minutes and fifty-three seconds: see the recount in "Great Legal Disasters" by Stephen Tumim (at pages 71-72).

As part of the judicial function, and as required by statute in the case of the Australian Competition Tribunal, all decisions must today be supported by logical and coherent reasons.

The reality is that in most cases the main controversy relates to the facts, not the law. And this is no different in competition cases.

Then it is to be recalled judges, in one way or another, make decisions that involve public policy and may give rise to continuing controversy after a particular proceeding has completely disposed of the dispute between the parties. Judges are frequently required to consider what is in the public interest, to assess social norms, and consider the consequences of their decisions beyond their effects on the parties to a proceeding before them.

A trial judge has a very important responsibility to carefully analyse the evidence presented and make clear findings of fact - not the least because it is still difficult to overturn findings of fact of a trial judge on appeal. The importance of the trial judge finally determining a proceeding and doing so according to law cannot be overstated - the appeal process is a safeguard, but a successful appeal can never entirely undo a wrongful decision of a trial judge.

Fact finding is often the most time-consuming exercise of the trial judge. In an environment where there is conflict, with differing versions of fact being urged upon them, sometimes difficult evaluations of reliability and credibility, and all the constraints of the adversarial system and rules of evidence and practice. This is before we even enter the uncertain world of a future focussed counter factual.

On the function of a judge's decision making, there is a stimulating article by Justice Stephen Gageler entitled "*Alternative Facts in the Courts*" (2019) 93 Australian Law Journal 585.

The requisite standard of proof in a civil proceeding is expressed commonly as proof "on the balance of probabilities". As Justice Gageler reminds us, expression of the standard of proof in a civil proceeding as satisfaction on the balance of probabilities is an acknowledgment that the judgment to be made by the tribunal of fact is inevitably to be made under conditions of

uncertainty. However, whatever its underlying probability, a disputed fact once found is a fact which is taken to exist for the purpose of resolving the legal rights or liabilities that are in dispute.

After referring to what Justice Dixon said in *Briginshaw v Briginshaw* (1938) 60 CLR 336, Justice Gageler wrote:

> *The main thing Justice Dixon was saying, consistently with mainstream judicial and academic opinion in the United States, is that satisfaction on the balance of probabilities involves the formation under conditions of acknowledged uncertainty of a subjective belief. The requisite belief is an "actual persuasion" that the fact in issue actually exists – that a past event the occurrence of which is uncertain and is disputed did indeed occur. What he was emphasising is that belief, as Bentham put it, "is susceptible of different degrees of strength, or intensity". The belief involved in having a state of satisfaction "beyond reasonable doubt", the universally accepted expression of the requisite standard of proof for a fact asserted by the prosecution in a criminal proceeding, is similar to the belief involved in having a state of satisfaction "on the balance of probabilities" in that it is subjective belief and different only in that it is belief that must be held with a greater degree of intensity.*

Then there is the added complexity given to the tribunal of fact where credibility of a witness is involved. We now accept that in assessing credibility, the key consideration is what people say, not the manner in which they say it. Intuitively many of us associate lying with people who are not assertive, or refuse to look you directly in the eye. We tend to believe people who recall matters with confidence, conviction and assuredness. There is no real basis for this tendency and there is no established legal methodology for assessing the credibility or reliability of witness testimony. Different judges will take various different approaches to this task of assessing credibility.

Then we add the extra layer of uncertainty in determining the future. Looking at section 50(1) of the *Competition and Consumer Act*, it provides, relevantly, that a corporation must not acquire shares in the capital of a body corporate if the acquisition "would have the effect, or be likely to have the effect, of substantially lessening competition in any market".

By its terms, section 50 requires a forward-looking analysis.

There is some debate in the authorities about the meaning of the word "likely" in the phrase "likely to have the effect" as it is found in section 50. There is authority that the word "likely" in this phrase requires a "real chance" of the effect occurring. In *Australian Gas Light*

Company v Australian Competition and Consumer Commission (No 3) (2003) 137 FCR 317, French J concluded (at [348]):

> *The meaning of "likely" reflecting a "real chance or possibility" does not encompass a mere possibility. The word can offer no quantitative guidance but requires a qualitative judgment about the effects of an acquisition or proposed acquisition. The judgment it requires must not set the bar so high as effectively to expose acquiring corporations to a finding of contravention simply on the basis of possibilities, however plausible they may seem, generated by economic theory alone. On the other hand it must not set the bar so low as effectively to allow all acquisitions to proceed save those with the most obvious, direct and dramatic effects upon competition. By the language it adopts and the function thereby cast upon the Court and the regulator in their consideration of acquisitions s 50 gives effect to a kind of competition risk management policy. The application of that policy, reflected in judgments about the application of the section, must operate in the real world. The assessment of the risk or real chance of a substantial lessening of competition cannot rest upon speculation or theory. To borrow the words of the Tribunal in the Howard Smith case, the Court is concerned with "commercial likelihoods relevant to the proposed merger". The word "likely" has to be applied at a level which is commercially relevant or meaningful as must be the assessment of the substantial lessening of competition under consideration…*

In *ACCC v Pacific National (No 2),* Beach J synthesised a series of points on section 50 as follows (at [1274] to [1279]:

> *[1274] First, the phrase "likely to have the effect" of a substantial lessening of competition requires only a real chance. There is no compelling reason why a test that is appropriate to determine the likely effect on competition in the context of s 45 should not also apply to s 50.*
>
> *[1275] Second, the standard of a real chance implicit in the concept of likely is to be understood at a level which is commercially relevant and meaningful. I am concerned with real commercial likelihoods, not with mere possibilities, however plausible they might be.*
>
> *[1276] Third, and importantly, the subject of the likelihood or real chance is singular in the sense that s 50 refers to the likely effect of substantially lessening competition and thus ultimately poses one question involving one evaluative judgment. In the present case, the application of s 50 turns on my satisfaction in relation to this single evaluative judgment, even though the exercise of determining whether the competitive effects of a transaction amount to a substantial lessening of competition involves multiple constituent inquiries, namely, identifying the futures with and without the transaction, identifying the effect on competition of each, and then making the relevant comparison leading to answering the one question that I have identified.*
>
> *[1277] In this regard, it is a distraction to ask what standards of proof apply at each of the atomised constituent steps involved in assessing competitive effects. I am inclined to follow Yates J's approach in Metcash. Yates J identified the*

> *potential problem with atomising s 50 in the following terms: "a counterfactual is no more than an element of [the] calculus … [I]t has no separate existence or purpose … other than as an aid to detect the existence and extent of change in the process of competition" (at [228]). That led his Honour to doubt the adoption of different legal standards for individual elements of the test because to do so could obliterate the statutory standard, which posed one question involving one evaluative judgment with that one evaluative judgment to be assessed on the basis of a real chance.*
>
> *[1278] Now in this context, the ACCC is going too far in saying that it can necessarily establish a contravention of s 50 by proof of a real chance of the existence of a counterfactual and a real chance of a substantial lessening of competition in the sense that one real chance is compounded with another. Indeed, to apply s 50 on the basis of a real chance of a substantial lessening of competition built upon a real chance in the counterfactual may, depending upon how one does it, be erroneous. In doing so I would not have directed myself to the single statutory question and may have inappropriately reduced the probability inherent in the real chance to be assessed for the ultimate question.*
>
> *[1279] Now I accept that the ACCC does not necessarily need to prove its counterfactual on the balance of probabilities. But the magnitude of any real chance that it demonstrates in respect of the alleged future states will practically and ultimately affect the magnitude of the real chance that it is able to demonstrate in respect of the alleged effects on competition and whether that rises to the requisite level of a likely effect of substantially lessening competition. Considering both the counterfactual and the alleged competitive effects together, the evaluation required compositely is whether a real commercial likelihood of a substantial lessening of competition has been shown.*

This approach involves an 'evaluative judgment'.

This is not a new concept. The making of evaluative judgments arises in many contexts. For example, take the issue of "public interest" in declaring a service under Part IIIA.

In *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [42] the High Court held that:

> *… It is well established that, when used in a statute, the expression "public interest" imports a discretionary value judgment to be made by reference to undefined factual matters. As Dixon J pointed out in* Water Conservation and Irrigation Commission (NSW) v Browning *(1947) 74 CLR 492 at 505, when a discretionary power of this kind is given, the power is "neither arbitrary nor completely unlimited" but is "unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view". It follows that the range of matters to which the NCC and, more particularly, the Minister may have regard when considering whether to be satisfied that access (or increased access) would not*

> *be contrary to the public interest is very wide indeed. And conferring the power to decide on the Minister (as distinct from giving to the NCC a power to recommend) is consistent with legislative recognition of the great breadth of matters that can be encompassed by an inquiry into what is or is not in the public interest and with legislative recognition that the inquiries are best suited to resolution by the holder of a political office.*
>
> [Omitting citations]

There is another context where the judge must make hypothetical estimates of a future matter, which informs a general approach to be taken. In looking at a claim for damages, the High Court in *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 drew a distinction between proof of historical facts and proof of future (or past) possibilities and hypothetical situations and went on to say at page 643:

> *If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. … But unless the chance is so low as to be regarded as speculative – say less than 1 per cent – or so high as to be practically certain – say over 99 per cent – the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 percent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability.*

This passage was quoted with approval by the High Court in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 350, where the plurality held that logic and "the nature of things" made it appropriate to adopt this approach in respect of a future or hypothetical commercial opportunity.

Then an evaluative approach arises in considering what is "unconscionable" in a given statutory context. Whilst different in nature and content to the exercise to be undertaken in applying section 50(1), the evaluating of impugned conduct involves applying the statutory normative standard to given found facts.

Here, evaluating the impugned conduct must not involve any "personal intuitive assertion": *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, [296]. In the same case, I explained that people need certainty in order to arrange their commercial affairs in advance: *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, [402].

The evaluation of impugned conduct does not involve "a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules": *Paciocco v Australia*

and New Zealand Banking Group Ltd (2015) 236 FCR 199, [304] (Allsop CJ). Instead, the evaluation requires an assessment of the impugned conduct in all the circumstances against a statutory normative standard to determine whether it should be characterised as unconscionable.

I interpolate that with legislation that is 'uncertain' of application, or in the case of 'ambiguity' in legislation, the role of a judge is to resolve disputes between the parties. According to some theorists, to resolve a dispute in these circumstances is to make 'retrospective law', it may be fairer to resolve it by deciding the application or meaning of the statute in favour of a particular contention, and say this will only have effect for situations that arise in the future.

How then is the Court to undertake the evaluative exercise in the context of future focussed counter factuals? In addition to the task already described, there are so many elements of uncertainty in the evaluation exercise: the very nature of the task of looking into the future; the changing process of competition itself in a particular market; and predicting the behaviour of people in business.

Whilst the intellectual task cannot be delegated or avoided, there are tools to aid the decision-maker along the way.

Before I go to some of these, I should confess I am a little worried about the skills needed to be an effective decision-maker.

In the criminal context, Rhondda Waterworth, '*Measuring Legal Actor Contributions in Court: Judges' Roles, Therapeutic Alliance and Therapeutic Change*', (2019) 28 Journal of Judicial Administration 207, at pages 211-212 gave a list of effective non-verbal behaviour for solution-focused judges as follows:

- *active listening - that is, allowing space for defendants to speak and refraining from interruption while they are speaking, asking clarifying questions to ensure the communication by the defendant is clear and well developed, and including relevant details so as to make sense to the listener;*
- *empathic or relational listening;*
- *reciprocity and dynamism;*
- *turn-taking;*
- *connection;*
- *co-creation of a narrative explanation of events and understanding of proceedings;*
- *connection between what each person says in turn;*
- *space and support for participants to say what they need to say;*

- *non-stereotyping;*
- *mutual influencing;*
- *non-coercive communication;*
- *cognitive complexity - that is, an understanding of ideas, events and reasons in a way that integrates multiple elements and a nuanced understanding of the interaction of these;*
- *multiple lenses for problem formulation;*
- *appropriate self-monitoring and self-awareness on the part of the judge (but not to the point of distraction);*
- *strategies to create effective dialogue via eliciting, challenging, clarifying and asking open questions (generally, "what' questions are more effective and less confronting);*
- *body language that shows the judge is listening, including open body language and body gestures that indicate listening (such as head tilting, evaluative poses);*
- *effective non-verbal prompts to encourage contributions from the defendant;*
- *suggested format - ask open questions about wellbeing, then life events, then issue with non-compliance;*
- *understanding of the impact of the context on anxiety, and the subsequent impact of this on communication;*
- *strategies to encourage participants to make sense of the proceedings - for example, focusing on one issue after another systematically;*
- *effective non-verbal prompts;*
- *care taken to limit negative statements about the defendant in open court so as to avoid creating "defensiveness" or a shame reaction that gets in the way of constructive change;*
- *care taken in discussions with other staff to limit legal jargon during discussions in front of the defendant; and*
- *care to recognise achievements and not inadvertently discount these.*

With these attributes, the task of the Court is to manage the interlocutory steps and the trial, and to deliver a reasoned determination according to law.

In *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2019] FCA 1284, Allsop CJ recently case managed a proceeding for relief which included penalties for conduct exhibiting statutory unconscionability and for providing financial services otherwise than efficiently, honestly and fairly.

The Chief Justice made these observations in relation to the case management of the case and the trial:

> *… the plaintiff should set out a well-drafted narrative of the facts and circumstances and of the wrong or grievance that constitutes the real substance of the complaint. The statement, concisely but fully expressed, should contain all the facts to be proved at the appropriate level of generality or specificity, without prolixity, as to make meaningful the grievance. This may make relevant and reasonable a distinction between stated or narrated fact and evidence, but*

that will be a matter of degree and context, not a matter of definition based on categories or taxonomies such as material fact, particular, or evidence, decided a priori.

In a coherent way, anchored in the facts, the plaintiff should explain why the facts stated lead to the conclusion contended for. This may require a degree of reasoned or argued articulation. This process may throw up facts, circumstances or context of which the plaintiff is unaware which may then require the need for some interrogation by written or oral questioning to understand the full factual context.

Once that statement is complete, the defendant should engage with the narrative in an appropriate fashion, identifying what is in contention or what should be added to contextualise its conduct and to explain in a reasoned articulation why its conduct did not meet the statutory standard. The statement and the answer are to be viewed as the combined narrative which encompasses the case, not in a rigid or over-technical way but in a way that, through its narrative, coherently expresses the respective cases as to the conduct that is said to contravene or not contravene the abovementioned provisions.

… the Court expects the cooperation between the parties and the development of this narrative in a cost-effective manner. To the extent that further interrogation may be required, such can be achieved in a cost-effective manner and a number of tools are available: simple requests for information, confined but precisely targeted interrogatories, preferably small in number, in tranches if necessary, or, if cooperation did fail, oral examination of senior officers with personal knowledge of events in the form of oral discovery with any necessary certificates under s 128 of the Evidence Act 1995 *(Cth) to the individuals concerned, if that were to be necessary. The utilisation of answers to such oral interrogation would be at all times within the control of the Court. However, as I have said, from what has fallen from the parties today and from what I have read in the material sent up, I do not anticipate these steps being necessary.*

… Modern litigation of this kind must be wrenched from the mindset of staged trench warfare, statement and affidavit drafting and document production that makes access to the legal system, even for large and well-resourced litigants, overly costly and slow.

In addition concurrent evidence techniques, more use may need to be made of referees.

Section 54A of the *Federal Court of Australia Act 1976* (Cth), inserted in 2009 by the *Federal Justice System Amendment (Efficiency Measures) Act 2009* (Cth) contains a power to appoint a referee. It states:

Referral of questions to a referee

(1) Subject to the Rules of Court, the Court may by order refer:

(a) a proceeding in the Court; or

(b) one or more questions arising in a proceeding in the Court;

> *to a referee for inquiry and report in accordance with the Rules of Court.*
>
> *(2) A referral under subsection (1) may be made at any stage of a proceeding.*
>
> *(3) If a report of a referee under subsection (1) is provided to the Court, the Court may deal with the report as it thinks fit, including by doing the following:*
>
> *(a) adopting the report in whole or in part;*
>
> *(b) varying the report;*
>
> *(c) rejecting the report;*
>
> *(d) making such orders as the Court thinks fit in respect of any proceeding or question referred to the referee.*

In *Kadam v MiiResorts Group 1 Pty Ltd (No 4)* [2017] FCA 1139 at [35]-[62], Lee J helpfully set out the background to the use of referees as a method of ensuring that discrete issues in litigation are determined with maximum efficiency. In *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527, Murphy J adopted the comments of Lee J, and in a different discourse of jurisprudence referred to the use of a panel of candidates for selection as referees.

Then there is the potential use of assessors to assist a judge in understanding scientific, technical or economic matters. Viscount Simon LC in *Richardson v Redpath, Brown & Co Ltd* [1944] AC 62 said of the role of assessors:

> *But to treat a medical assessor, or indeed any assessor, as though he were an unsworn witness in the special confidence of the judge, whose testimony cannot be challenged by cross-examination and perhaps cannot even be fully appreciated by the parties until judgment is given, is to misunderstand what the true functions of an assessor are. He is an expert available for the judge to consult if the judge requires assistance in understanding the effect and meaning of technical evidence. He may, in proper cases, suggest to the judge questions which the judge himself might put to an expert witness with a view to testing the witness's view or to making plain his meaning. The judge may consult him in case of need as to the proper technical inferences to be drawn from proved facts, or as to the extent of the difference between apparently contradictory conclusions in the expert field.*

In the case of *Matthews v SPI Electricity Pty Ltd (ACN 064 651 118) & Ors* [2013] VSC 630, J Forrest J set out a process for the use of assessors at [27]:

> *The primary role of the assessors is to assist the court in understanding the evidence of the experts. Applying the CPA, combined with the principles of natural justice and the guidance from the cases I have referred to, I set out below the scope of the role of the assessors in this case:*

(a) The assessors' role is to assist the judge. The decision is that of the judge alone.

(b) The assessors will sit with me during the concurrent evidence sessions. If they wish, they may question the experts (or counsel) in this context. Such questioning however will be limited to clarification of the evidence; that is, where they consider the evidence to be ambiguous, unclear or incomplete.

(c) I may consult with the assessors while sitting if I find a point of evidence unclear and seek their immediate input as to an appropriate or useful inquiry to make.

(d) I will consult with the assessors whilst in chambers on matters raised by the experts in their oral evidence and in their individual and joint reports. This may include advice as to any questions the assessors think I should ask counsel or the experts in order to determine the questions at hand.

(e) I will seek the guidance of the assessors on technical matters upon which I lack the requisite knowledge to understand without qualified assistance. This may include "lessons" on matters fundamental to, for example in this case, fracture mechanics or vibration.

(f) If the assessors raise a theory or opinion that has not previously been identified by the parties, I will discuss this with counsel.

(g) The assessors may from time to time provide me with advice on matters over which there is dispute between the experts. Such advice is not binding and the determination of a particular issue rests with the judge.

(h) I anticipate that I will consult with the experts immediately after the conclusion of the concurrent evidence session and, from time to time, while drafting the judgment. This is likely to include seeking confirmation from them that I have properly understood the meaning of the expert evidence of conclaves 1, 3 and 4. I repeat, however, that their role is confined to providing advice and ensuring that I have comprehended the evidence given. I also repeat that the decision on these issues is mine and mine alone

More recently, in *Carlewie Pty Ltd v Roads and Maritime Services* [2018] NSWCA 181, Basten JA made the following observations as to the use of assessors:

28. The modern case law now contains a number of considered explanations by experienced trial judges as to how they have used scientific advisors in the course of proceedings. Three elements may be noted. First, generally assessors have been encouraged to articulate reactions to particular submissions or evidence in open court, so as to allow such views to be exposed and considered. Secondly, to the extent that alternative views were expressed to the judge in chambers, these too were conveyed to the parties for their comments. Thirdly, in each case the judge appears to have been at pains not merely to reiterate that the

> *issues for determination rested with the judge alone, but also to explain that the expert assessors, who appear to have been appointed on an ad hoc basis in each case, understood their limited role. By these means, the distinction between assistance and adjudication was maintained and, further, a reasonable degree of transparency was achieved for the purposes of what was otherwise an adversarial hearing. Although the statutory schemes for the appointment of Commissioners in the Land and Environment Court differ from the provisions in various Supreme Court Acts or rules, and in s 217 of the* Patents Act 1990 *(Cth), that approach could be adopted in the Land and Environment Court.*
>
> *29. As already explained, the issues upon which a Commissioner may provide assistance and advice are not expressly constrained by the terms of the* Land and Environment Court Act *and, at least in the present case, there is no reason to imply a constraint. Nevertheless, the functional distinction between advice and assistance on the one hand, and adjudication on the other, is expressly stated and must be adhered to. Thus, there is no doubt that if the judge deferred to the opinion of the Commissioner without being persuaded that it was correct, the exercise of the jurisdiction would have miscarried. On the other hand, if the judge has formed an independent opinion with respect to each material issue, there can be no complaint that those opinions were shared by the Commissioner.*

Let me say this by way of conclusion. There is no doubt that litigation in the competition and regularity area will be on the increase: in both number and complexity. The judge's role will necessarily become more difficult and much more reliance will be placed upon the profession to fulfil their duties to the court. For my part, I will attempt to comply with Ms Waterworth's list of "effective non-verbal behaviour for solution – focused judges", especially active listing, relational listening and non-coercive communication.