Shock, Horror: Economists Impertinent, Prevent Clear Thought , “The Vibe” Preferred

Henry Ergas Blog | *31 March 2012*| 2 Comments

Yesterday’s High Court decision in Betfair Pty Ltd v Racing New South Wales [2012] HCA 12 (30 March 2012) makes good reading. The matter is an important one: whether a State law, that (it was claimed by Betfair) imposes a greater burden on a particular out-of-state trader than on a trader based within the state, contravenes section 92 of Constitution, which says that “trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free”.

The decision stresses that what is required, to make out a breach, is “an essentially objective inquiry” that assesses whether the “practical effect” of the impugned statute “is to discriminate against interstate trade and thereby protect intrastate trade of the same kind”.

Now, one might think that was, at least in part, a matter of economics. Not so! In concurring that Betfair had not made out its claim, Heydon J. offers this assessment (at paragraphs 65-66):

“Proceedings in the Federal Court of Australia frequently involve inquiries into the question whether there is a substantial effect on competition in a market. Those proceedings have developed certain unattractive drawbacks. They are ponderous. They are slow. In them the parties tender, often successfully, copious quantities of inadmissible or marginally admissible “expert” evidence, selected with extreme discrimination, assembled at enormous expense and given with considerable impertinence in more than one sense of that word (..).

The trial judge in this case did have before him expert trade evidence. It can often be of value. It was of value here. But his Honour said:"One interesting omission in this case was any expert witness skilled in economics."[66] The tone was regretful. The omission, however, may actually have been a blessing. It may have assisted clarity of thought.”

Well said, but how will the trial judge know whether the statute indeed has the impugned protectionist effect? Could it be on the basis of “the vibe” of the thing, opening up opportunities for an entirely new source of expert evidence, vibrators (or would they be vibrationists)?

No, the learned judge tells us, the question is one of fact and hence should be determined as such; but so is whether the earth turns around the sun or vice versa, whether ‘black holes’ exist, or whether DNA evidence is always accurate. Merely saying that a statement is a statement of fact hardly means its truth-value is ascertainable without reference to methods, concepts and theories. And the obvious point that some of those methods, concepts and theories were reflected in “legislative innovations .. three quarters of a century after 1900”, hardly means they are to be ignored, any more than any other developments in thought and understanding.

Which is not to say Justice Heydon's complaints about the use and (more often than not) abuse of economics in the courts are unwarranted – far from it: see http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1430208. But it would have been better for the High Court to give guidance as to how economic evidence could be more wisely used, rather merely 'have a go': or is that too impertinent?