COLLECTIVE PRICING AGREEMENTS AND THE COMMERCE ACT 1975

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All references to the Commerce Act 1975 are to the Act as reprinted on 1 March 1981 unless otherwise indicated.

INTRODUCTION

When there is increasing emphasis in economic and political discussion about the need for New Zealand to develop a more competition-oriented economy, it seems appropriate to examine the New Zealand legislation and experience relating to collective price agreements, i.e. those entered into by competitors regarding the prices and terms under which they will sell goods and services.[1]

Traditionally, trade associations have been the vehicle in New Zealand through which members of an industry have implemented price agreements. As in other countries, trade associations in New Zealand are numerous; virtually every industry has one and, within one industry, there are often separate associations at the various levels of distribution. In the absence of stringent antitrust laws, trade associations have had no reason to conceal the existence of price agreements and trade association price lists have long been a feature of the commercial scene.

Trade association activity in pricing matters was greatly stimulated by the imposition of blanket price controls shortly before the outbreak of World War II — the controls remained of considerable importance right through the 1940's and 1950's. For reasons of administrative convenience, it suited the authorities to encourage applications for price orders or approvals to be lodged on a group basis.[2] Trade associations were the obvious bodies to lodge group applications and one effect of the price control legislation was the spawning of a large number of new trade associations formed for the principal purpose of negotiating pricing matters with Government. Dissemination of pricing information to members became a normal part of trade

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[1] The topic of collective pricing agreements under the Commerce Act 1975 has not been the subject of much comment to date. Brief accounts are to be found in Bornholdt, Farmer and Ricketts, *The Commerce Act 1975—Collected Papers on Restrictive Trade Practices, Monopolies, Mergers and Takeovers* (1978), Legal Research Foundation Occasional Paper No. 12, and J. A. B. O'Keefe, *The Commerce Act 1975* (2nd ed. 1978). For useful accounts of the legislation and experience under the Trade Practices Act 1958, see J. G. Collinge, *The Law Relating to the Control of Competition, Restrictive Trade Practices and Monopolies in New Zealand* (1969); C. D. Edwards, *Trade Regulations Overseas* (1966) ch. on N.Z.; Hunter, "Restrictions of Competition in New Zealand" (1963) 39 Economic Record 131; J. L. Robson (ed.), *New Zealand: The Development of its Laws and Constitution* (2nd ed. 1967) ch. 8; and G. S. Orr, *Trade Practices—Legislation and Practice in New Zealand* (1967, unpublished address).

[2] Some of these price orders and special approvals still continue. The Commerce Act 1975, s.93(2)(c) allows for group price increase applications where the prices of the goods or services in question are already fixed or approved on a group basis by an existing price order or special approval.

association activity during the era of price control and, consequently, it was not surprising that, when goods were progressively removed from price control during the 1950's, trade associations continued to advise members on prices, except that the prices or margins were now fixed by the trade associations themselves. In some cases, these prices or margins were presented to members as recommendations. In others, they were simply agreed prices to which members were expected to adhere. Having been conditioned to the notion of fixed prices for so long, traders saw nothing wrong in continuing a practice which they perceived as differing little from that previously imposed on them by Government.

In addition to trade association price agreements and recommendations, there are numerous other varieties of collusive pricing arrangements in industry. Some are casual and short-lived, e.g. the spontaneous meetings called to terminate price wars.[3] Others endure for decades, held together by an elaborate organisational web and binding written contracts.[4] The cartel type of agreement can be applied very effectively in highly concentrated industries. The fewer the number of sellers, the better the chances of establishing uniform prices and of resisting demands from buyers for better terms. Irrespective of the number of firms involved and the degree of formality under which arrangements are entered into, collusive pricing activity needs to be carefully scrutinised to determine whether it is subject to legislative restraint.

In examining the New Zealand law in this area, I propose to discuss the development of trade practices legislation and, in particular, the statutory provisions and administrative procedures relating to collective pricing. After this study of the legislative framework, the article analyses the public interest test which is pivotal to the total scheme of legislative control. The final part of the article is concerned with some conclusions and policy recommendations.

THE DEVELOPMENT OF TRADE PRACTICES LEGISLATION IN NEW ZEALAND

New Zealand's modern involvement with comprehensive trade practices legislation dates from the enactment of the Trade Practices Act 1958. Earlier legislation dealing with trade practices and combinations, modelled in part on the Sherman Act 1890, had been rendered ineffective by the decision of the Privy Council in *Crown Milling Co.* v *R.*[5] Thereafter, the legislature's policy on trade regulation took the form of anti-profiteering and price control legislation with an extension into the field of industrial licensing during the depression and war years. With the progressive removal of items from official price control during the 1950's, policy-makers became more receptive to the idea of controlling trade practices, seeing in such a policy a means whereby private efforts to maintain prices at a high level

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[3] See e.g. *Re the Marketing of Television Receivers and Home Appliances.* Decision No. 23 of the Trade Practices and Prices Commission (TPPC), 3 February 1966 (unreported) and *Re Frozen Vegetables* (1971) 18 F.L.R. 196.

[4] The International Air Transport Association (IATA) agreements fixing passenger fares on almost all international routes provide an example of such contracts.

[5] [1925] N.Z.L.R. 258 (S.C.), 753 (C.A.), [1927] A.C. 394 (P.C.).

could be curbed. While the concept of trade practices legislation accorded with the free enterprise ideology of the National Party Government (1949-1957), opposition to such legislation from trade associations, and other business interests, led the Government to adopt a cautious attitude to legislative proposals proffered by civil servants. The Labour Party was more enthusiastic about trade practices legislation and, after its election to Government in November 1957, brought down the Trade Practices Bill 1958.[6]

When introducing the Bill, the Minister of Industries and Commerce, the Hon. P. N. Holloway, gave as the reason for the proposed measure "the tendency that has developed for trade groups or associations, individual manufacturers or distributors of goods to fix prices to the consumer".[7] Complaints from persons who had been denied supply of goods or who had been excluded from trade associations were also mentioned as reasons why the legislation was thought necessary. Support for the Bill came from consumer, union and farming groups, but the business community launched a strong attack on the legislation, questioning both its necessity and its provisions. After some modifications, following representations by interested parties, the Bill became law on 3 October 1958.

Overseas experience was looked to when drawing up the new legislation, particularly the United Kingdom Monopolies and Restrictive Practices Commission's *Report on Collective Discrimination*,[8] the United Kingdom Restrictive Trade Practices Act 1956 and the Swedish trade practices legislation — the latter being described by the Minister of Industries and Commerce as compatible with New Zealand's economic status.[9]

The New Zealand legislation was based on the principle that any particular trade practice should not be outlawed until shown to be contrary to the public interest. It thus differed from the United Kingdom legislation which treated restrictive practices as prima facie contrary to the public interest but capable of justification.[10] Amendments to the 1958 Act made in 1961, 1965 and 1971, however, resulted in a more stringent form of control being exercised over certain categories of trade practices. In 1965 collective tendering and collective bidding at auctions became prohibited practices, i.e. illegal *per se*.[11] The 1965 Amendment also singled out collec-

[6] For accounts of the history of trade regulation in New Zealand see, especially, Edwards op.cit. and Robson op.cit.

[7] N.Z.P.D. (1958), vol. 318, p.2127.

[8] *Collective Discrimination: A Report on Exclusive Dealing, Collective Boycotts, Aggregated Rebates and Other Discriminatory Trade Practices* (1955: Cmd. 9504).

[9] The Swedish legislation was not named by the Minister but the legislation then in force in Sweden was the Act to Counteract Restraint of Competition in Business in Certain Instances (25 September 1953). An English translation of the Swedish Act (amended 1956 and 1966) appears in the O.E.C.D. *Guide to Legislation on Restrictive Business Practices*, vol. III.

[10] For an excellent account of the United Kingdom legislation and experience, see R. B. Stevens and B. S. Yamey, *The Restrictive Practices Court* (1965).

[11] The prohibitions were contained in the Trade Practices Act 1958, ss. 23A and 23B, as inserted by the Trade Practices Amendment Act 1965, s. 7. A similar treatment of collective tendering and collusive bidding at auctions prevails under the Commerce Act 1975, ss. 48 and 49. Although these practices involve collective price-fixing, they will not be discussed in this paper because of their illegal *per se* categorisation.

tive resale price maintenance for special treatment by imposing on the parties to the agreement the onus of proving that the practice was not contrary to the public interest within the meaning of section 20(1) of the Act[12] — in the case of all other examinable practices listed in section 19, the onus was on the Examiner of Trade Practices to prove that the practice had, or would have, one or more of the detrimental effects listed in section 20(1). The most far-reaching change in the treatment of trade practices occurred as a result of the 1971 Amendment which required parties to a collective pricing agreement or arrangement in force on 1 April 1972 to seek the approval of the Trade Practices Commission to the agreement. All agreements or arrangements entered into after 1 April 1972 had to have the Commission's prior approval before they could operate.[13] The purpose of this amendment was to screen out those collective pricing practices shown to be inimical to the public interest unless they could be suitably modified.[14]

With the advent of inflationary conditions in the early 1970's there was a return towards utilising price control as a regulatory mechanism. A combination of factors led to a comprehensive review of existing trade regulation legislation: the plethora of price control regulations evoked criticism from the business community; consumer and union groups voiced dissatisfaction with the operation and procedures of the Price Tribunal; and the new Labour Government elected in November 1972 announced its intention to introduce legislation regulating monopolies and mergers in the public interest and to repeal the News Media Ownership Act 1965 which the new Government believed restricted competition in the newspaper industry. The review activity culminated in the enactment of the Commerce Act 1975 which repealed 21 statutes in the trade regulation field dating from 1905 to 1974.

The Commerce Act is built substantially on the 1958 Act in terms of object, principles and structure, incorporating within its ambit the basic provisions of the Control of Prices Act 1947 and including additional matters of substance relating to monopolies, mergers and takeovers. Two existing administrative tribunals, the Trade Practices and Prices Commission and the Price Tribunal, were amalgamated into a new body, the Commerce Commission, which became the main decision-making authority under the Act. An important amendment to the Commerce Act was enacted in 1976 which implemented many of the recommendations of the report of the Tarrant Committee set up by the National Government to review the Act.[15] This amendment recast the monopoly and merger provisions and removed from the decision-making arena a large element of political control. Two further amendments were made in 1979, the first[16] relating to the price

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[12] Trade Practices Act 1958, s. 20(2), as inserted by the Trade Practices Amendment Act 1965, s. 6.

[13] Trade Practices Act 1958, s. 23BB, as inserted by the Trade Practices Amendment Act 1971, s. 12.

[14] J. W. H. Clark, "Restrictive Trade Practices" (1972) Canterbury Chamber of Commerce Economic Bulletin No. 557 at p.5.

[15] *Report of the Working Party to the Minister of Trade and Industry on the Commerce Act 1975* (March 1976).

[16] Commerce Amendment Act 1979.

control provisions contained in Part IV of the Act, and the second[17] embodying reforms to the substantive and procedural provisions of Parts II and III of the Act which deal respectively with trade practices and monopolies and mergers.

The Collective Pricing Provisions

A. *Collective Pricing Agreements Prohibited unless Approved or Exempted*

1. *The prohibition in section 27(1)*

Section 27(1) of the Commerce Act provides that no person shall be a party to or carry on a trade practice that comes substantially within any of the categories specified in paragraphs (b), (d) or (e) of section 23(1) of the Act unless the approval of the Commerce Commission has been obtained under section 29 and any conditions imposed by the Commission are being observed. By virtue of section 27(2), every person who acts in contravention of the above prohibition commits an offence and is liable to the penalties laid down in section 58 (2) of the Act.

2. *Exceptions to the prohibition*[17a]

There are, however, a number of important exceptions to the prohibition, viz.:

(a) *Professional fees and charges of the type listed in the Second Schedule*

Section 27(3)(a) excludes from liability a trade practice affecting fees for personal professional services of a type or class specified in the Second Schedule to the Act or in regulations made in the same behalf. The Second Schedule list is as follows:

1. Any scale of fees or charges where under the provisions of any Act that scale has been fixed or approved by the Governor-General or the Governor-General in Council or any Minister of the Crown.
2. Any scale of fees or charges for personal professional services where that scale has been fixed by any body established by name by any Act.
3. Any scale of fees or charges for personal professional services where that scale has been fixed by any body the membership of which is restricted to members of a specified profession who —
   (a) Are registered under the provisions of any Act; and
   (b) Except in the case of persons who hold a degree, diploma or certificate granted by an examining body outside New Zealand, are not entitled to be so registered unless they hold a degree, diploma or certificate granted by a university in New Zealand.
4. Fees or charges for personal professional services performed by Patent Attorneys.
5. Fees or charges for professional engineering services performed by members of the New Zealand Institution of Engineers.

As originally enacted, the 1958 Act made no distinction between restrictive practices engaged in by the commercial community and those

[17] Commerce Amendment Act (No. 2) 1979. A further amendment was made by the Commerce Amendment Act 1980 relating to the Commission's powers to restrain proposed transactions or sales of assets in contravention of the Act.

[17a] See also the First Schedule to the Commerce Act 1975 for Acts not affected.

engaged in by the professions; provided such practices came within the scope of the Act they were subject to scrutiny under the examinable provisions of the Act. This position was changed by the 1971 Amendment which excluded professional fees of the type mentioned above from the new provisions relating to collective pricing agreements. The exclusion is continued under the Commerce Act except that the section setting out the list inserted by the 1971 Amendment contained a proviso to the effect that "nothing in this section shall be construed as limiting any other provision of this Act in relation to any such scale".[18] The omission of the proviso has not in my view altered in any way the status of professional pricing practices under the Act, i.e. if they come within the scope of section 23 they are examinable.[19] It is unfortunate, however, that the proviso was omitted as it may have served the useful purpose of countering any impression that professional fees were totally outside the scope of the Act.

As a result of judicial decisions[20] and the recommendations of investigating bodies,[21] minimum professional fee schedules have been banned or subjected to regulation in a number of overseas countries in recent years.[22] Although the persons listed in the Second Schedule are unlikely to welcome any change from the status quo, it is my prediction that increasing criticism by politicians, consumer organisations and members of the public is likely to lead to some curtailment of the present freedom enjoyed by New Zealand professional bodies in the area of collective fee-setting.[23]

(b) *Trade association price lists indicating an individual wholesalers irpm prices*

Section 27(3)(b) excludes from the scope of the prohibition the issue by a trade association to its members of a price list showing prices fixed,

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[18] Trade Practices Act 1958, s. 23BB(3) (proviso), as inserted by the Trade Practices Amendment Act 1971, s. 12.

[19] However, if the practice is expressly authorised by any Act no order may be made in respect of the practices: Commerce Act 1975, s. 22(7)(a). The scope of this exception is discussed infra. Agreements by members of a professional body to refrain from tendering competitively may also violate s. 48.

[20] See e.g. *Goldfarb* v *Virginia State Bar* (1975) 421 U.S. 773 and *United States* v *National Society of Professional Engineers* (1978) 435 U.S. 679. The Australian Trade Practices Commission (T.P.C.) recently denied authorisation to an application by the *Association of Consulting Engineers, Australia*, involving, inter alia, minimum fee scales: (1979) 5 TPCD [654]. The Trade Practices Tribunal on 27 February 1981 confirmed the T.P.C.'s determination: (1981) ATPR 40-202.

[21] See e.g. the following *The Report of the Professional Organizations Committee* (Ontario, 1980); Office des Professions du Québec, *Professional Fees in Private Practice: The Question of Regulation* (Québec, 1977); the U.K. Monopolies and Mergers Commission, *A Report on the Supply of Architects' Services with Reference to Scale Fees* (8 November 1977 H.C.P. 4) and *A Report on the Supply of Surveyors' Services with Reference to Scale Fees* (8 November 1977 H.C.P. 5).

[22] For the current situation in Canada, the United States and Australia see, respectively: R. J. Roberts, *Anticombines and Antitrust* (1980), ch. 18; Herudon, "Competition Policy and the Professions" (1979) 48 Antitrust L.J. 1533; and Pengilley, "The Trade Practices Act and the Professions", 7 Management Forum (March 1981) 27.

[23] See generally Slayton and Trebilcock (eds.), *The Professions and Public Policy* (1978).

nominated or recommended by a wholesaler pursuant to an individual resale price maintenance (irpm) agreement or arrangement of a type governed by section 28(1) and (2) of the Act if such agreement has been approved by the Commerce Commission or conforms with section 28(4) (dealing with irpm arrangements involving suggested prices only). A further requirement is that the resellers collectively must take no part in fixing or enforcing the resale prices.

To date no irpm agreement involving fixed prices has been approved by the Commerce Commission and it is unlikely that many applications for approval of such agreements will succeed.[24] This means that the exception under discussion is likely to involve "soft" irpm arrangements, i.e. those involving suggested prices only of which there are a great number in existence.[25] The question of whether suppliers should be free to suggest retail prices has generated considerable debate overseas with critics of the practice pointing out the danger of suggested retail prices being used as a cloak for rpm either of the individual or collective type.[26] In view of the possibility of "soft" irpm arrangements leading to rigidity in retail pricing in some sectors, it would seem dangerous to allow trade associations to disseminate retail prices suggested by individual suppliers. Such a practice would compound the problem, if, in fact, a policy of de facto rpm was being pursued.

(c) *Trade practices expressly authorised by other enactments*

Trade practices that are expressly authorised by any other Act are excluded from the prohibition by section 27(3)(c). While a similar provision has always existed in those parts of the 1958 and 1975 Acts dealing with examinable trade practices, it was not until the 1976 Amendment that the exception was added to section 27.

That the exception has potential as an escape route has been demonstrated by two recent cases. In the first of these, *ABC Containerline N.V.* v *New Zealand Wool Board*,[27] Davison C. J. came to the conclusion that a freight rate agreement was outside the scope of section 27(1) as it was expressly authorised by the Wool Industry Act 1977; earlier the Commerce Commission had declined jurisdiction in respect of two collective pricing applications[28] relating to the freight rate agreement on the ground that the agreement was sanctioned under the Wool Marketing Corporation Act 1972, the fore-runner of the Wool Industry Act 1977. A more detailed discussion of the statutory exception took place in *Stock Exchange Association of New Zealand* v *Commerce Commission*.[29]

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[24] This view is based on the Commerce Commission's collective pricing decisions, discussed infra, which in general show a hostility towards mandatory price-fixing and a favourable attitude to maximum recommended prices. See also Decision No. 57, 18 November 1981 (unreported).

[25] As at 31 March 1982, 513 arrangements of the type described in s. 28(4) of the Commerce Act 1975 had been notified to the Commerce Commission.

[26] See e.g. Anderson, "The Antitrust Consequences of Manufacturer-Suggested Retail Prices—The Case for Presumptive Illegality" (1979) 54 Wash.L.R. 763, and Pickering, "Recommended Prices, the Consumer's Economic Interest and Public Policy in Britain" (1978) 2 Journal of Consumer Policy 97.

[27] [1980] 1 N.Z.L.R. 372.

[28] Decision No. 20, 29 November 1977 (unreported).

[29] [1980] 1 N.Z.L.R. 663.

Mr Justice White, in examining the wording of section 22(7)(a) (the examinable equivalent of section 27(3)(d)) rejected the argument that "expressly authorised" means that the particular trade practice must be specifically stated in the appropriate statute. His Honour held that section 22(7)(a) was broad enough to include the rule-making powers conferred under section 11 of the Sharebrokers Act 1908 under which the rule complained of (prohibiting sharebrokers from having branch offices) had been duly made and approved by the Governor-General in Council. The rule was thus "expressly authorised" by section 11 of the Sharebrokers Act and thus fell within the scope of section 22(7)(a). The fact that the practice was created under a rule-making power and not under an Act did not alter the situation; as the relevant rules were regulations within the meaning of the Acts Interpretation Act 1924[30] they fell within the meaning of "Act" in section 22(7)(a) of the Commerce Act.

In the *ABC Containerline* case counsel for the plaintiff drew a distinction between what is authorised and what is implied, citing in support statements made by the Court of Appeal in *Harding* v *Coburn.*[31] A similar argument was advanced in *Stock Exchange Ass.*, with counsel for the respondents submitting that the term "express" is an antonym of "implied" and that nothing less than words of "necessary implication" in the statute could be sufficient. In making the concession concerning "words of necessary implication" counsel may have been attempting to accommodate the statement made by Haslam J. in *His Master's Voice (N.Z.) Ltd.* v *Simmons*[32] that the trade practice must be authorised "either expressly in words or by necessary implication". It is submitted, however, that the test laid down by Haslam J. is wider than that advanced by counsel. In *His Master's Voice* his Honour, while accepting that the method of computation of royalties laid down in section 25(3) of the Copyright Act presupposed a pre-estimate of the ordinary retail selling price, rejected the contention that the provisions of the copyright legislation implied approval of group collaboration to ensure uniform wholesale and retail prices. The approach adopted by the learned judge suggests that a broad-ranging inquiry into the nature and purpose of the legislation may be in order before one can resolve the question of whether a trade practice is authorised by necessary implication.

That the approach adopted by Haslam J. in *His Master's Voice* has a great deal of merit is readily seen when we examine the patent-antitrust interface, i.e. the relationship between the trade practices legislation and industrial and intellectual property law. As the monopoly rights granted under the industrial and intellectual property statutes can have anti-competitive effects there is a potential conflict between the Commerce Act and the other laws.[33] This is particularly the case in the area of price-

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[30] Acts Interpretation Act 1924, s. 4.

[31] [1976] 2 N.Z.L.R. 577 at 584.

[32] [1960] N.Z.L.R. 25

[33] For Australian comment on the patent-antitrust interface, see: Goldsworthy, "The Application of the Trade Practices Act 1974 (as amended) to Restrictions in Patent, Know-How and Trade Mark Licensing Arrangements" (1976-77) 3 Mon. L.R. 289; Gummow, "Abuse of Monopoly: Industrial Property and Trade Practices Control" (1976) Sydney Law Rev. 339; Lahore, "Industrial Property and the Trade Practices Act" *Monash Trade Practices Lectures* (1977); and Pengilley, "Patents and Trade Practices—Competition Policies in Conflict" (1977) 5 Aust.Bus.L.Rev. 172.

fixing[34] The conflict can only be resolved by making the fair assumption that Parliament intended the exclusive rights and privileges that are within the scope of the patent etc. monopoly to be enjoyed nothwithstanding the trade practices legislation, but that any activity or situation extending beyond the limits of the patent is subject to the provisions of the Commerce Act which protects the public interest in competition.[35] Clearly any agreement or arrangement aimed at or resulting in industry-wide pricing cannot be exempt from the trade practices legislation for in no case do any of the industrial and intellectual property statutes authorise such activity.

It is still an open question whether a patentee who is engaged in manufacturing and marketing the patented product may fix the prices at which his manufacturing licensee or licensees may sell. While the decision of the United States Supreme Court in the 1926 *General Electric* case[36] is usually cited in support of the legality of such a practice, the prevailing opinion in the United States has been that price-fixing clauses in patent licences fall outside the proper scope of the pecuniary reward contemplated by the patent laws.[37]. Even if it is lawful for a single patent owner to impose a price on his licensee, if a number of such individual licences are granted, each containing restrictions as to the price of goods produced under the licence, this may be evidence in certain circumstances of a horizontal agreement between licensees to fix prices.[38] Such an agreement is likely to fall within the prohibition of section 27(1). Likewise, agreements by which two or more owners of patents collectively seek to determine the retail selling prices of their respective products would be caught,[39] although it

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[34] In addition to the literature cited in n.33, see: Furth, "Price-Restrictive Patent Licenses Under the Sherman Act" (1958) 71 Harv.L.Rev. 815; Gibbons, "Price Fixing in Patent Licenses and the Antitrust Laws" (1965) 51 Va.L.Rev. 273; and Turner, "The Patent System and Competitive Policy" (1969) 44 N.Y.U.L.Rev. 450.

[35] The scope-of-the-patent/monopoly extension doctrine is the accepted approach under many national laws but the doctrine has been the subject of criticism by scholars, particularly in the E.E.C. context, where it has been rejected in favour of a broader approach that places greater emphasis on the competition rules. See generally Buxhaum, "Restrictions Inherent in the Patent Monopoly—A Comparative Critique" (1965) 113 U.Pa.L.Rev. 633 and Ullrich, "Intellectual Property in the E.E.C." in *Competition Law in Western Europe and the U.S.A.* (Gylstra and Murphy, eds.) vol. A, para. 61.

[36] *United States* v *General Electric Co.* (1926) 272 U.S. 476.

[37] Pengilley op.cit. ante n. 33 at 182. However, in recent speeches U.S. Antitrust Division officials have indicated that enforcement policy regarding restrictive patent licensing is being reappraised in a direction away from rules of *per se* illegality. For a recent policy statement, see "Current Antitrust Division Views on Patent Licensing Practices", remarks of Abbot B. Lipsky, Jr., Deputy Assistant Attorney General, Antitrust Division, prepared for delivery November 5, 1981, before the American Bar Association Antitrust Section in Washington, D.C. Mr Lipsky's remarks are published in 5 CCH Trade Regulation Reporter at 50,434.

[38] Cf. *United States* v *New Wrinkle Co.* (1952) 342 U.S. 271; *United States* v *Line Material Co.* (1948) 333 U.S. 287; Wilberforce, Campbell and Elles, *Restrictive Trade Practices and Monopolies* (2nd ed. 1966) para. 652.

[39] This would follow from the ruling in *His Master's Voice (N.Z.) Ltd.* v *Simmonds* (supra).

would appear to be lawful for a single patentee to control the prices at which his goods are to sell at retail.[40]

The manner in which the patent-antitrust interface is governed in New Zealand is unsatisfactory, depending as it does on whether a particular practice is "expressly authorised" by the appropriate intellectual property statute. What is needed is a clearly defined provision indicating what is permitted in the way of restrictions in patent licences etc. and what is prohibited.[41] A strong case can be advanced for prohibiting price-fixing clauses in patent licences which have the effect of enhancing or maintaining prices.[42]

B. *The Categories of Collective Pricing Agreements and Arrangements*

As we have seen, section 27(1) of the Commerce Act applies to those collective pricing practices which come substantially within any of the categories specified in paragraphs (b), (d) or (e) of section 23(1) of the Act. In this part of the paper I examine the scope of these paragraphs, their constituent elements and the inclusion of trade association activity within their general ambit.

1. *Paragraphs (b), (d) and (e) of section 23(1)*

The categories of collective pricing agreements and arrangements referred to in these paragraphs are as follows:

> (b) Any agreement or arrangement between wholesalers to sell goods at prices or on terms agreed upon between those wholesalers.
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> (d) Any agreement or arrangement between wholesalers or retailers or contractors or any combination of persons engaged in the selling of goods or the performance of services, to sell goods, or perform services, at prices or on terms agreed upon between the parties to any such agreement or arrangement.

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[40] This stems from the rule that when the patentee makes or authorises a sale of patented goods, restrictions on their sale or use can be imposed as part of the patent right; these bind not only another contracting party but all recipients of the goods with notice of the restrictions: *National Phonograph Co. of Australia Ltd.* v *Menck* [1911] A.C. 336. The rule in *Menck's* case has been displaced by the resale price legislation in Canada, the United Kingdom and Australia but would appear to survive in New Zealand by virtue of s. 28(5) of the Commerce Act 1975 which exempts from the scope of s. 28 any trade practice expressly authorised by any other Act. While the practice in *Menck's* case is not specifically authorised by the patent legislation, the case is based on the assumption that the practice comes within the scope of the patent monopoly and, therefore, in terms of s. 28(5) the practice would probably be held to be authorised by necessary implication. A contrary view has been advanced by Dr David Vaver who, relying on the interpretation of the predecessor to S. 28(5) in *His Master's Voice (N.Z.) Ltd.* v *Simmonds* (supra), has suggested that "the proprietor of a patent, design, trade mark or copyright would probably not, merely by dint of his possession of that monopoly, be immune from complying with the provisions of the Commerce Act in respect of any r.p.m. provisions he chose to insert in his licences": *Pinner's World Unfair Competition Law* (2nd ed. 1978), vol. III, Topic 56, New Zealand, 4-5.

[41] A useful model is provided by s. 20 of the German Act Against Restraints of Competition 1957 (as amended); discussed by Beier, "Patent Licence Agreements Under German and European Antitrust Law" (1972) 3 I.I.C. 1.

[42] Some "Chicago School" scholars, however, have defended price-fixing in patent licences: see especially Ward S. Bowman, *Patent and Antitrust Law* (1973) and Priest, "Cartels and Patent License Arrangements" (1978) 20 Journal of Law and Economics 309.

(e) Any agreement or arrangement between wholesalers to sell goods on the condition that prices charged or conditions of sale by retailers shall be the prices or conditions of sale stipulated by those wholesalers.

Paragraph (b) of section 23(1) appears to be superfluous, for the type of practice it deals with is covered by the broadly cast paragraph (d). The latter paragraph, by referring to "any combination of persons", would extend to cover agreements where the parties are engaged at different levels of distribution.[43] Paragraph (e) deals with collective resale price maintenance and encompasses the situation where the wholesalers collectively agree on the stipulated retail prices or conditions of sale and, it is submitted, would also extend to an agreement by wholesalers to impose retail prices or conditions of sale on retailers even though those prices or conditions were individually fixed by each wholesaler.[44] The three categories of collective price agreements only relate to selling and not to buying. Agreements or arrangements to buy or to offer to buy goods at prices or terms agreed upon by wholesalers, retailers or contractors are covered by section 23(1)(c) but do not fall within the scope of sections 27 and 29 of the Commerce Act and thus are not treated as prohibited practices subject to approval.

As price-fixing agreements can take a great variety of forms, the legislature has been careful not to limit the application of section 27 to practices that fall within a strict literal interpretation of paragraphs (b), (d) and (e) of section 23 (1). Section 27(1) makes it clear that a collective pricing agreement or arrangement not falling squarely within one of the above categories may still be caught if it "comes substantially within any [one or more] of . . . [these] categories". While the use of the word "substantially" widens the jurisdiction of the Commission and the courts to deal with pricing practices,[45] until recently its broadening effect was offset to some extent by the inclusion of the word "only" in paragraphs (b) to (d) of section 23(1). A leading trade association price agreement case decided under the 1958 Act illustrates the key importance of these two words. In *Master Grocers*,[46] counsel representing the association contended that the inclusion of the word "only" meant that *all* sales had to be at list prices and none at any other. Judge Dalglish, sitting as the Trade Practices Appeal Authority, however, said that the question is not whether "the agreement or arrangement . . . is . . . to sell *only* at list prices; but is it *substantially* an agreement or arrangement to sell only at list prices?"[47] The learned judge took the view that an agreement or arrangement to adhere fairly closely to list prices was not "substantially an agreement or arrangement to sell only at list prices unless fairly close adherence indicates that

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[43] By virtue of its broadly cast nature, s. 23(1)(d) is usually invoked by the Examiner in preference to the other paragraphs. While s. 23(1)(d) is the only paragraph to refer to services, s. 123 of the Commerce Act 1975 provides that all the provisions of the Act, as far as they are applicable and with the necessary modifications, shall apply to services as well as goods.

[44] Collinge op.cit. 161.

[45] Compare the views of O'Keefe op.cit. 47-48 with those of G. Q. Walker, *Australian Monopoly Law* (1967) 89-95 on the substance versus form question.

[46] *Re New Zealand Master Grocers' Federation's Agreement* [1961] N.Z.L.R. 177.

[47] Ibid. at 187.

the practice is departed from in only a small proportion of cases".[48] To widen jurisdiction under the Act the word "only" was deleted from paragraphs (b) to (d) of section 23(1) by the Commerce Amendment Act (No. 2) 1979.[49] The effect of the deletion will enable the decision-makers to give more attention to the substance of a pricing practice rather than deciding jurisdictional issues on the basis of a quantitative conformity test.

It should not be overlooked that the effect of the word "substantially", relating as it does to the basic or fundamental substance or aspects of a thing, could also enable the Commission and the courts to refuse to categorise an activity as a collective pricing practice on the ground that it only has a minimal association with price-fixing.[50] It is interesting to consider this point in relation to the no-discrimination clauses in agreements between credit card issuers and merchants. These clauses demand that the merchant, as a condition of the privilege of handling credit purchases, must charge the same prices to credit card purchasers as to cash purchasers. Apart from this restriction, however, the merchant has complete freedom over his own pricing decisions. The suggestion has been made that such clauses amount to illegal price-fixing.[51] But does such a practice, in substance, amount to price-fixing? In the United States it has been held that "an essential element [of price-fixing] is the competitor's surrender, express or implied, of some measure of pricing discretion".[52] It is at least arguable that the amount of pricing discretion surrendered by the merchant is so minimal as to take the practice outside the recognised categories of price-fixing.[53]

2. *Elements of collective pricing agreements and arrangements*

(a) *Meaning of "prices" and "terms"*

A strict interpretation of the phrase "at prices . . . agreed upon" might well require the parties to have reached agreement on actual prices, margins included in the prices or the pricing formula used in the calculation of prices.[54] In other words, agreements which do not name any agreed prices, margins or formulae but merely influence the mechanism of price formulation would appear to be outside the scope of the statutory definitions.

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[48] Idem.

[49] Commerce Amendment Act (No. 2) 1979, s. 15(2), amending s. 23(1)(b)-(d) of the principal Act.

[50] Cf. *Broadcast Music Inc.* v *Columbia Broadcasting System* (1979) 441 U.S. 1.

[51] See Annand, "Price Fixing and Tying Arrangements between Credit Card Issuers and Retailers" (1971) 28 Wash. & Lee L.Rev. 371.

[52] *Checker Motors Corp.* v *Chrysler Corp.* (S.D.N.Y. 1968) 283 F.Supp. 876, 882 (cash rebate offered to purchasers by manufacturer held not within scope of the Sherman Act 1890, s. 1). See also *Blue Cross and Blue Shield of Michigan* v *Michigan Assn. of Psychotherapy* (Mich. 1980) CCH 1980-2 Trade Cases 63,351.

[53] This is not to say, however, that the practice should not be regulated in the public interest. See Rouen, "The Fair Credit Billing Act and Two-Tier Pricing" (1977) 14 Harv.J.Legis. 499 and Monopolies and Mergers Commission's *Report on the Supply of Credit Card Franchise Services in the United Kingdom* (1980: Cmnd 88034).

[54] That paragraphs (b), (d) and (e) of s. 23(1) encompass margins included in the prices and the pricing formula used in the calculation of prices is made clear by *Fencing Materials* [1960] N.Z.L.R. 1121 and also by the explicit wording of s. 23(3)(a).

Thus, an agreement as to an element of the price (e.g. the cost of a raw material) is arguably not subject to the legislation unless it can be established that, in substance, the agreement amounts to price-fixing because of the relative unimportance or stability of the other elements.[55] Under the American antitrust legislation it matters not that the group does not name any figure or range of prices or percentage mark-ups, provided that the combination has the effect of "raising, depressing, fixing, pegging or stabilising the price of a commodity".[56]

Formal cartel agreements often regulate a wide variety of terms of dealing, for a bare price clause is seldom enough to regulate an entire trade.[57] In the context of the collective pricing provisions of the Act, however, it would appear that it is only those terms of sale which relate to or affect prices that are subject to regulation: *noscitur a sociis.* That this is the situation relating to trade association recommendations concerning terms of sale is made clear by section 23(3)(a)(ii) which mentions discount, credit,[57a] delivery, and product and service guarantee terms as illustrations of terms of sale which may directly[58] affect prices, margins included in the prices, or the pricing formula used in the calculation of prices. As section 23(3) is the most recent and most explicit of the definitional pricing provisions and was undoubtedly inserted to broaden the scope of control over collective pricing practices, it is likely that the wording used in the subsection will be resorted to for the purposes of interpreting "terms" as that word is used in paragraphs (b), (d) and (e) of section 23(1).

(b) *The meaning of "agreement" and "arrangement"*

For collective action on pricing to fall within the scope of paragraphs (b), (d) or (e) of section 23(1) it must constitute an "agreement or arrangement".

The Oxford Dictionary defines agreement as (inter alia) "a coming into accord; a mutual understanding". It has also been said to be a "conjunction of two or more minds in anything done or to be done".[59] In the context of the collective pricing provisions, agreements are either to do something, or refrain from doing something — for example, to put prices up, or not to reduce them. This means that before a collective pricing agreement can be said to exist the parties must have reached a common view, and expressed a willingness or intention to adopt a common course of pricing conduct. The assent need not necessarily be express but may be implied

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[55] Collinge, *The Law of Marketing in Australia and New Zealand* (1971) 161.

[56] Walker op.cit. 115, citing *United States* v *Socony-Vacuum Oil Co.* (1940) 310 U.S. 150, 223.

[57] Walker op.cit. 117.

[57a] Recently the U.S. Supreme Court ruled that an agreement among liquor wholesalers to eliminate short-term trade credit to retailers constituted a horizontal agreement to fix prices: *Catalano, Inc.* v *Target Sales, Inc.* 100 S.Ct. 1925, (1980) 64 L.Ed. 2d 580.

[58] The wording used in the forerunner of s. 23(3)(a)(ii) viz. the Trade Practices Act 1958, s. 18A(2)(a), as inserted by the Trade Practices Amendment Act 1971, s. 6, was slightly different, i.e. "Any recommendation relating to prices, or to terms relating to or affecting prices by any means whatsoever. . . ."

[59] *Reniger* v *Fogossa* Plowd. 16a.

from conformity to the common conduct.[60] It is irrelevant whether the parties intend their actions to be legally enforceable or not — "gentlemen's agreements" are included in the scope of the statutory provisions.[60a]

Unlike "agreement", the term "arrangement" almost defies definition. Indeed, the judges have expressly foresworn any attempt to define it.[61] Nevertheless, the concept has been the subject of analysis by United Kingdom and Australian courts[62] and, as a result, it is possible to identify the essential elements of an "arrangement" or "understanding", which latter term is often used interchangeably with "arrangement". The word arrangement is not a term of art. Accordingly, it is to be construed in its ordinary or popular sense. It embraces the situation where each of two parties intentionally arouses in the other an expectation that he will act in a particular way. Usually the arrangement will arise as a result of some communication between the parties.[63] The obligations created by the arrangement may be purely moral obligations or obligations binding in honour. The element of mutuality required under the wording of the United Kingdom Act is not a pre-requisite under either the Australian or New Zealand legislation so it is possible to envisage an agreement or arrangement between two persons restricted to the conduct which one of them will pursue without there being any corresponding obligation on the other.[64] Normally, however, businessmen will not enter an agreement or arrangement unless there is some *quid pro quo*, or some sort of commitment, on each side.

An agreement or arrangement within the meaning of the Act may be formal or informal, express or implied. In cases where direct evidence of an express agreement, written or oral, is not available, circumstantial evidence may be used to imply an agreement.[65] Evidence of parallel

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[60] For further discussion of the concept of an agreement, see J. P. Cunningham, *The Fair Trading Act 1973* (1974) 198-202.

[60a] Commerce Act 1975, S. 23(11).

[61] Cunningham op.cit. at 215 has argued that the failure to define "arrangement" in clear terms has resulted in considerable uncertainty and the imposition of an unfair burden on the business community. Other writers, e.g. V. Korah, *Competition Law of Britain and the Common Market* (1975) 95, have commented that the flexibility of the concept is one good reason for employing it and that the approach that the courts have adopted prevents businessmen devising ways of restricting competition between themselves without falling within the terms of a well-known definition.

[62] The two leading United Kingdom cases are *Re British Basic Slag Ltd.'s Application* (1962) L.R. 3 R.P. 178 (Ch.D); (1963) L.R. 4 R.P. 116 (C.A.) and *Re Mileage Conference Group of the Tyre Manufacturers' Conference Ltd.'s Agreement* (1966) L.R. 6 R.P. 49. Australian cases include: *Top Performance Motors Pty. Ltd.* v *Ira Berk (Q'land) Pty. Ltd.* (1975) 5 A.L.R. 465; *T.P.C.* v *Nicholas Enterprises Pty. Ltd.* (1979-80) 28 A.L.R. 201; *Morphett Arms Hotel Pty. Ltd.* v *T.P.C.* (1979-80) 30 A.L.R. 88 and *T.P.C. v Email Ltd.* (1980) 31 A.L.R. 53. For a discussion of the early New Zealand case-law on "agreement or arrangement", see Collinge op.cit. ante n.1 at 146-155.

[63] The "communication" involved may be express or through the conduct of the parties. See, e.g., *Basic Slag* (1962) L.R. 3 R.P. 178, 196 (Cross J.); (1963) L.R. 4 R.P. 116, 146-147, 149, 155 (C.A.); *Mileage Conference* (1966) L.R. 6 R.P. 49, 101, and *Fencing Materials* [1960] N.Z.L.R. 1121, 1130.

[64] *Morphett Arms Hotel Pty. Ltd.* v *T.P.C.* (supra) and *T.P.C.* v *Email Ltd.* (supra).

[65] For a discussion of the question of proof see, inter alia, Roberts op.cit. 145-171 and Wilberforce, Campbell and Elles op.cit. paras. 607-623.

behaviour by itself is normally not sufficient to establish an agreement.[66] In each case the weight (if any) to be given to the evidence of uniformity will depend on the surrounding market and commercial circumstances.[67] Judging by recent Canadian cases[68] involving so-called "conscious parallelism", the courts are becoming increasingly prepared to pierce the "veil of credibility" that shrouds parallel behaviour of rival firms. It must be borne in mind, however, that section 27(1) only prohibits pricing practices that arise from collusive behaviour; non-collusive parallel behaviour arising from oligopolistic market structures is not unlawful under section 27(1) but may be the subject of investigation under the monopoly and oligopoly provisions of the Act.[69] Likewise, non-collusive price leadership would normally fall outside the scope of the collective pricing provisions, provided competitors are under no obligation to follow the leader and provided the leader is also free from any obligation to adhere to his announced price rise.[70]

3. *Trade association activity*

To understand the full scope of the collective pricing provisions it is necessary to know how the trade practices legislation deals with trade association activity.

Borrowing from the United Kingdom Restrictive Trade Practices Act 1956, certain deeming provisions relating to trade association activity were included in the Trade Practices Act 1958. An agreement made by a trade association was deemed to be made by all persons who were members of the association or were represented thereon as if each such person were a party to the agreement.[71] Also, where specific recommendations were made by a trade association to its members or to any class of members, as to action to be taken by them in relation to any matter affecting their trading conditions, then all such members were to be taken as having agreed to comply with those recommendations notwithstanding anything to the contrary in the constitution or rules of the association.[72]

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[66] See, e.g., *Theatre Enterprises Inc.* v *Paramount Film Distributing* (1954) 346 U.S. 537; *R* v *Canada Cement La Farge Ltd.* (1973) 12 C.P.R. (2d) 12 and *T.P.C.* v *Email Ltd.* (supra).

[67] See the discussion by Schreiber in *The Trade Practices Act 1965-1966*, Lecture VII, Committee for Post Graduate Studies in the Department of Law, Sydney (1968).

[68] See especially *R* v *Armco Canada Ltd.* (1974) 17 C.P.R. (2d) 211 and *R* v *Canadian General Electric Co. Ltd.* (1976) 29 C.P.R. (2d) 1.

[69] For an excellent review of parallel pricing, see Monopolies and Mergers Commission's *Report on Parallel Pricing* (Cmnd. 5330, 1973).

[70] For a recent Australian case on price leadership, see *T.P.C.* v *Email Ltd.* (supra).

[71] This provision has been carried forward into the Commerce Act 1975 as s. 23(8).

[72] This provision has been carried forward into the Commerce Act 1975 as s. 23(10). However, under s. 23(10A), inserted by the Commerce Amendment Act 1976, s.13(3), any member of a trade association who expressly notifies the association in writing that he dissociates himself entirely from any agreement made by that association or, that he will not take action or will refrain from action of a kind referred to in any express or implied recommendation made by that association, shall not, in the absence of proof to the contrary, be deemed to be a party to that agreement or a member of the association who has agreed to comply with the recommendation.

These statutory provisions did not form part of section 19 of the 1958 Act, which was the section defining agreements or arrangements in respect of which orders could be made by the Commission. Instead, the deeming provisions were incorporated in Part II of the Act which dealt with the registration of trade practices. The omission of the deeming provisions from section 19 was used by defence counsel, in some of the early cases, to support the view that a trade association price recommendation was not an agreement or arrangement within the meaning of section 19(2) of the Act.

This attempt to circumvent the legislation failed because of the broad interpretation given to the concept of "an agreement or arrangement". It quickly emerged that trade association activity could readily fall within the scope of section 19(2). In *Fencing Materials*, the first decision of the Trade Practices Appeal Authority, Judge Dalglish commented:[73]

> It may be suggested, perhaps, that the word 'arrangement' is intended merely to include an understanding between two or more persons intended to be observed by the parties thereto but not intended to create obligations enforceable by legal proceedings. In my view the term 'arrangement' is intended to include much more than this. In the context in which the word 'arrangement' appears in paragraphs (b) and (c) of section 19(2) of our Act I consider that it includes something more than an understanding arrived at between two or more persons, binding those persons as between themselves to a common course of action. It would include also an understanding arrived at between individual traders and a third party, for example a trade association, under which traders are bound to follow a common course of action although no rights by one trader against another may arise from the arrangement and although the obligation to follow the common course of action may not be legally enforceable. The word 'arrangement' also contemplates something which is 'arranged' by an organisation and which the members of the organisation are bound to observe.

In 1961, Part II of the 1958 Act requiring registration of agreements was repealed. However, the trade association deeming provisions continued to exist but, as a result of the 1961 Amendment, they now became part of section 19.

A new deeming provision relating to trade association price recommendations was inserted in the legislation in 1971.[74] Unlike the existing deeming provisions, section 18A(2) was specifically concerned with recommendations affecting prices and was designed to bring these recommendations within the statutory definitions of collective pricing agreements and arrangements. Section 18A(2) of the 1958 Act was carried forward in a more expanded version into the Commerce Act 1975 as section 23(3) which reads:

> For the purposes of paragraph (b), paragraph (d), and paragraph (e) of subsection (1) of this section and of sections 27 and 29 of this Act —
>
> (a) Any recommendation, made directly or indirectly by a trade association to its members or to any class of its members,—
>
> (i) Which relates to the prices charged or to be charged by such members or any such class of members or to the margins included in the price or to the pricing formula used in the calculation of such prices; or

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[73] [1960] N.Z.L.R. 1121, 1134-1135.

[74] Trade Practices Act 1958, s. 18A(2), as inserted by the Trade Practices Amendment Act 1971, s. 6.

(ii) Which relates to the terms of sale (including discount, credit, delivery, and product and service guarantee terms) of such members or any such class of members and which directly affect prices, margins included in the prices, or the pricing formula used in the calculation of prices, —

shall be deemed to be a trade practice coming within paragraph (b) or, as the case may require, paragraph (d) or paragraph (e) of subsection (1) of this section notwithstanding any statement in the recommendation or elsewhere to the effect that the recommendation may or may not be complied with as the members or class of members think fit; and

(b) Any recommendation made by any person for the purpose of or having the effect of, in any way, whether directly or indirectly, enabling any trade association to defeat or evade the provisions of this Act shall be deemed to have been made by that trade association.

The subsection has been cast in wide terms but it would not necessarily embrace all types of trade association activity aimed at influencing pricing decisions.

"Exhortations" by trade associations would probably not be caught provided they only involved the suggestion of a general line to be taken without specific details being communicated on prices, margins in the prices, or the pricing formula used in the calculation of prices, or as to the terms of sale which might affect such pricing matters.[75]

Documents circulated by a trade association for the "guidance" of members, or by way of "education", are arguably outside the scope of section 23(3), provided the association is careful not to make any recommendations as to the action to be taken by members affecting prices etc.[76] However, overseas cases show that courts are forever ready to infer "recommendations" when these can fairly be read from the actual evidence.[77] The recent decision of the Commerce Commission in *Contractors' Federation*[77a] suggests that a similar approach will be adopted in New Zealand. One of the issues in that case was whether the publication of the New Zealand Contractors' Federation's Blue Book, containing parameters designed to be used for rate calculation purposes, involved the making of any "recommendation". Counsel for the Federation contended, inter alia, that the publication was merely a guide for the assistance of members and as such did not constitute a recommendation. The Commission rejected this argument, pointing out that the Blue Book[77b]

> . . . is intended by the Federation to be of use and guidance to members and that there is an implied recommendation that members refer to it when calculating their hire rates even although the published rates are not necessarily recommended for any specific job.

Having found that the issue of the Blue Book came within the scope of section 23(3) as an indirect recommendation relating to prices to be charged and to the pricing formula to be used, the Commission ruled that the prac-

[75] Pengilley, "Restrictive Trading Agreements—The Legal Concept of Agreements and Suggested Guidelines for Business Action" (1973) The Australian Accountant 396 at 402.

[76] Wilberforce, Campbell and Elles op.cit. para. 623(c).

[77] Idem. at paras. 614-620.

[77a] *Re Applications by New Zealand Contractors' Federation Inc.* Decision No. 56, 27 October 1981 (unreported).

[77b] Ibid. at para. 35.

tice was a collective pricing agreement. The finding that the publication of the Blue Book involved the making of an indirect recommendation is not surprising given that earlier editions had printed in large letters on the cover the words "RECOMMENDED MINIMUM HIRE CHARGES AND CONDITIONS OF HIRE THROUGHOUT NEW ZEALAND". In later editions this wording was changed to "NEW ZEALAND PLANT HIRE RATES AS A GUIDE TO THE PUBLIC AND INDUSTRY" — the Blue Book, however, now contained a statement by the Federation's accountants giving support to the parameters used and making reference to the "recommended plant hire rates". The word "recommended" was omitted from the 1980 Blue Book but otherwise the statement remained unaltered. While on the factual evidence the Commission was undoubtedly correct in implying a recommendation, it would still seem tenable to argue that the mere publication of an educational document by a trade association, e.g. a genuine cost accounting guide, does not, ipso facto, involve the making of a recommendation.

However, such a view is apparently not shared by the Examiner's Office which has ruled that the circulation of a blank pricing formula by a trade association to its members involves the making of a recommendation relating to a pricing formula.[78] This ruling is premised on the assumption that the very act of a trade association drawing members' attention to a particular method of calculation is an implied approval or endorsement of such method of calculation and hence constitutes a recommendation for the purposes of section 23(3). It is thought that this may be attributing too wide a meaning to the concept of an indirect or an implied recommendation in the particular context in which these terms are used in sections 23(3) and 23(8). Likewise, the manner in which the Examiner's Office has interpreted the term "pricing formula", i.e. attributing to it the same meaning it had under the Stabilisation of Prices Regulations, is open to the same charge of unduly broad interpretation. The question of whether the circulation of a blank pricing formula constitutes a collecting price agreement has not yet been the subject of argument before the Commerce Commission; to date applications involving such formulae (some of which have been drafted with the assistance of the Pricing Division of the Department of Trade and Industry) have received the approval of both the Examiner and the Commission, subject to the condition that any proposed amendment or modification of the practice or the formula be submitted to the Commission for prior approval.[78a]

To avoid the censure of trade practices control, trade associations overseas have often replaced a price agreement with an information exchange.[79]

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[78] See the correspondence on the public file on deposit at the Commerce Commission's Office involving the application by the Auckland Joinery Manufacturers' Association. The Commission, dispensing with an inquiry under s. 41, approved the application in Decision No. 48. 6 October 1980 (unreported).

[78a] In addition to Decision No. 48, see also Decision Nos. 58 and 59, 18 November 1981 (unreported) and Decision No. 64, 16 February 1982 (unreported).

[79] For a study of information agreements, see D. O'Brien and D. Swann, *Information Agreements, Competition and Efficiency* (1969). The Australian Trade Practices Commission in Information Circular No. 14 has described the types of market information agreements which it believes do not have a detrimental effect on competition.

A genuine price information exchange not involving any agreement or recommendation as to prices would fall outside the scope of the subsection. But, because information exchanges are often used as a cloak for collusion on price matters, they are likely to receive careful scrutiny from the authorities.[80] There is, however, no obligation on a trade association to notify that it is operating a price exchange. This is a weakness in the legislation which should be rectified.[81]

Paragraph (b) of section 23(3) treats a recommendation made by any person for the purpose *or* effect of enabling a trade association to defeat or evade the provisions of the Act as having been made by that trade association. It is not clear from the wording of the paragraph whether the person making the recommendation must act in concert with the trade association. If the recommendation is made with the *purpose* of enabling a trade association to defeat or evade the provisions of the Act then concerted action is almost certain to exist. Proving the required purpose, however, may be a difficult task in practice, and for this reason the draftsman no doubt included the "effect" test as an alternative. In contrast to "purpose" which relates to subjective motives, the word "effect" is apt to describe results of an action which may, or may not, have been in the mind of the person concerned.[82] Thus, a recommendation independently made by a person would appear to come within the purview of the paragraph irrespective of the motives of the person making it, provided it has the effect of enabling a trade association to avoid the consequences of the Act. Such an interpretation would bring independently published price guides within the ambit of the legislation if they were used in any way by a trade association to influence its members' pricing decisions, e.g. a trade association might encourage its members to subscribe to an independently published price guide which applied margins or a pricing formula approved of by the association.[83] From a policy point of view, such an interpretation may be desirable if control over recommended prices is going to be effective.[84] Such a policy, however, may seriously interfere with the freedom of an independent person to publish an industry price guide and the courts would probably require a clear legislative intent before they would be prepared to give effect to a policy of this kind.

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[80] The Canadian experience is salutory, as to which, see Nozick, "Open Pricing Agreements and the Dissemination of Data Under the Combines Investigation Act" (1979) 17 Alberta L.Rev. 210.

[81] The potential abuse of information agreements was recognised in the United Kingdom by the enactment of the Restrictive Trade Practices Act 1968, s. 5 (now the Restrictive Trade Practices Act 1976, s. 7). An order has been made under this provision bringing within the scope of the RTPA information agreements relating to prices, terms and conditions: Restrictive Trade Practices (Information Agreements) Order, 1969, SI 1969 No. 1842.

[82] For a discussion of "purpose" and "effect", see Taperell, Vermeesch and Harland, *Trade Practices and Consumer Protection* (2nd ed. 1978) paras. 532-537.

[83] For an Australian case involving an independenttly published price guide, see *Thompson Australian Holdings Pty. Ltd.* v *T.P.C.* (1981) ATPR 40-234 (decision of the High Court of Australia).

[84] See the comments in *Recommended Retail Prices,* Report No. 25 of the U.K. Price Commission (1977), para. 2.4.

As an activity coming within the scope of paragraph (b) is unlikely to be the subject of an application for approval, the interpretation of the paragraph is likely to arise in proceedings alleging a breach of section 27(1). Offences under section 27(1) are quasi-criminal in nature and this may lead the courts to give a restrictive interpretation to paragraph (b) by requiring that the state of mind of the person making the recommendation is a relevant consideration in determining whether the paragraph has application. The circumstances under which the recommendation was made and its utilisation by the trade association could provide evidence from which inferences might be drawn as to the state of the mind of the parties involved.

Applications for Approval

As stated earlier, the treatment of collective pricing as a prohibited practice, unless approved, dates from the enactment of the Trade Practices Amendment Act 1971, which required parties to lodge an application for approval of the practice if they wished to continue it. Provided the application was lodged before 1 April 1972, the parties could continue with the practice without change in its nature, pending the determination of the application or of any appeal. Where approval to a collective pricing practice was given by the Trade Practices Commission under the 1958 Act, that approval is deemed to continue in force under the Commerce Act.[85] Parties whose applications were lodged prior to 1 January 1973 but which were not determined as at 1 April 1977 are permitted to continue the practice pending determination of the application, subject to compliance with certain requirements which the Commerce Commission may impose in respect of the notification, implementation or extent of any increase in the prices, margins or mark-up of the goods or services or of any variation in the selling terms.[86] Because only a very few applications were determined under the 1958 Act, the great majority of applications are subject to the transitional provisions. As at 31 March 1982, of the 376 collective pricing applications made in 1972 or prior to 1 November 1975 (when the Commerce Act came into force), 35 have been approved, 246 fell within the "not approved, withdrawn or lapsed" category, and 95 were yet to be determined. Of the 25 applications made since 1 November 1975 for approval under section 29 of the Commerce Act, 4 have been approved while 5 came within the "not approved, withdrawn or lapsed category leaving 6 yet to be determined.[87]

Once an application for approval of a collective pricing practice is lodged with the Commerce Commission, a copy of the application is forwarded to the Examiner of Commercial Practices for investigation and report.[88] The Examiner is an officer of the Department of Trade and Industry but most of his functions are vested directly in him under the Commerce Act.

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[85] Commerce Act 1975, s. 29(10).

[86] Ibid. s. 30. The 1 April 1972 date, whereby applications for approval were required to be lodged with the Trade Practices and Prices Commission if the parties wished to be able to continue the practice pending determination of the application, was extended to 1 January 1973 by the Commerce Amendment Act 1976, s. 17.

[87] Report of the Commerce Commission for the year ended 31 March 1982.

[88] Commerce Act 1975, s. 29(2).

His role is largely one of detecting, investigating and making recommendations preliminary to the exercise of the functions of the Commerce Commission.[88a]

If, after investigation, the Examiner forms the opinion that the practice is, or may be, contrary to the public interest, he is obliged to furnish to the applicant a statement in writing:

(a) informing the applicant of the Examiner's opinion;

(b) stating on which of the grounds set out in section 21 of the Act the Examiner bases his opinion; and

(c) requiring the applicant to reply in writing within 21 days:

  (i) whether or not he accepts the Examiner's opinion;

  (ii) whether or not he is prepared to withdraw the application and, if the case so requires, to abandon forthwith the practice;

  (iii) whether or not he is prepared to alter the practice or proposed practice in question so that it conforms with the public interest.[89]

If a reply is forthcoming and the Examiner considers the applicant might agree to abandon the practice or modify it so that it conforms with the public interest, there is an obligation on the Examiner to invite the applicant to confer with him for the purpose of reaching agreement on the nature of the recommendation to be made to the Commission.[90] A period of 14 days from the date of the invitation to confer is allowed for the purpose of reaching agreement but this period may be extended in special circumstances at the discretion of the Examiner.[91]

Irrespective of the response from the applicant, the Examiner must report his own opinion to the Commission, stating the grounds on which it is based, and the result of any action taken under the conciliation provisions.[92] On receiving the Examiner's report, the Commission is required to hold an inquiry into the matter, although it may dispense with such inquiry if the Examiner has recommended that the application be approved, or dealt with in accordance with any agreement reached during conciliation and satisfies the Commsision that all persons who would be bound by any order made pursuant to the recommendation have concurred with the recommendation made.[93]

Where the Commission proposes to hold an inquiry it is obliged to provide a copy of the Examiner's report to the applicant, and to any other person who in the opinion of the Commission is affected by the report, allowing such persons time to respond to the report.[94]

[88a] As to the preliminary function of the Examiner in trade practice inquiries, see *F. Flipp Ltd.* v *Soutar Super Meats Ltd.* Unreported judgment (High Court, Wellington A 233/81, 10 February 1982, Quilliam J.)

[89] Commerce Act 1975, s. 39(2).

[90] Ibid. s. 39(4).

[91] Ibid. s. 39(5).

[92] Ibid. s. 40(2)(d).

[93] Ibid. ss. 41(1), 40(4) and 40(4A).

[94] Ibid. s. 40(5).

Section 9 of the Commerce Act provides that hearings are to be held in public except where the Commission is satisfied that it is desirable to move into private hearing by reason of the confidential nature of any evidence or matter.[94a] A minimum of 14 clear days' notice of the hearing is given publicly by advertisement in leading newspapers and by written notice to the Examiner and the applicant. All notices published by the Commission also call for applications for party status from persons other than the Examiner and the applicant.[95] Under section 14(1) of the Act, the Commission may grant party status to either (a) a person who justly ought to be heard; or (b) a person whose appearance or representation will assist the Commission in its consideration of the subject-matter of the proceedings. Consumer groups, trade associations and other persons have been granted party status in a number of public inquiries involving collective pricing practices, but normally such persons are admitted under section 14(1)(b), rather than section 14(1)(a).[96] Parties admitted under section 14(1)(a) have the statutory right to adduce evidence and cross-examine witnesses, whereas parties admitted under section 14(1)(b), while they have the right to make submissions, may adduce evidence and cross-examine witnesses only with the leave of the Commission.[97] Hearings before the Commission are quasi-judicial in nature with the Examiner and the applicant normally being represented by counsel.

The Commission's task is to determine whether the application should be granted and, if so, with or without conditions. In considering whether to grant its approval, the Commission must have regard to whether the effect of the trade practice is not, and is not likely to be, contrary to the public interest within the meaning of section 21 of the Act.[98] An approval may be subject to such conditions as the Commission thinks fit and, in the granting of any approval, the Commission may make such provisions not inconsistent with the Act as it thinks necessary or desirable for the administration of the approval or to ensure compliance with the terms thereof.[99] It is also open to the Commission, where it is of the opinion that it would be in the public interest, to recommend to the Minister that any goods or services to which the inquiry relates should be brought under

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[94a] For an informative article on confidentiality issues, see Stevens "Confidentiality Orders Under the Commerce Act 1975" [1981] NZLJ 479 and 544. Related to the question of confidentiality is the access of third parties to information, as to which, see *New Zealand Association of Bakers Inc.* v *Secretary of Trade and Industry* (1978) 1 NZAR 483 and the innovative Canadian case of *Re Canadian Radio-Television Commission and London Cable T.V. Ltd.* (1976) 67 D.L.R. (3d) 267 (Fed.C.A.).

[95] Previously the applicant had to apply for party status but as a result of the Commerce Act 1975, s. 14(1A), inserted by the Commerce Amendment Act (No. 2) 1979, s. 7, the applicant is now entitled to appear and be represented without application in that behalf as a person who justly ought to be heard.

[96] For the Commission's views on s. 14(1), see especially *Re Applications by Hotel Association of New Zealand and Combined State Services Organisations* (1977) 1 NZAR 236 and Decision No. 36 (unreported).

[97] Commerce Act 1975, ss. 15(1) and (2).

[98] Ibid. s. 29(4)

[99] Ibid. s. 29(5)

price control or price restraint in terms of sections 82 and 83 of the Act.[100]

Pricing practices which have previously been approved either under the 1958 Act or under section 29 of the Commerce Act are open to re-examination either by the Commission on its own motion, or on the application of the Examiner or of the parties to the practice. On re-examination, the Commission is empowered to (a) revoke the approval; (b) alter or revoke any conditions subject to which the approval was granted; or (c) impose new or additional conditions.[101]

Appeals against decisions of the Commission lie to the Administrative Division of the High Court which since 1971 has taken over the role of the Trade Practices Appeal Authority.[102] As well as the Examiner and the applicant, any third party admitted under section 14(1)(a), or under section 14(1)(b) and who was granted leave to adduce evidence and cross-examine witnesses, may invoke the appeal provisions.[103] In its determination of any appeal, the Court may confirm, modify, or reverse the order or decision appealed against, or any part of that order or decision.[104] The decision of the Court on any appeal is final and conclusive.[105] Instead of determining an appeal, the Court may direct the Commission to reconsider, either generally or in respect of any specified matters, the whole or any part of the matter to which the appeal relates.[106] Unless the Court orders otherwise, the decision or order to which the appeal relates remains in full force pending the determination of the appeal.[107]

The Public Interest Test

A. *Section 21(1) — General Comments*

The public interest test, contained in section 21 of the Commerce Act, is pivotal to the total scheme of legislative control over collective pricing practices. Section 21(1) reads:

> For the purposes of this Act, a trade practice shall be deemed contrary to the public interest only if, in the opinion of the Commission, the effect of the practice is or would be —
>
> (a) To increase the costs relating to the production, manufacture, transport, storage, or distribution of goods, or to maintain such costs at a higher level than would have obtained but for the trade practice; or
>
> (b) To increase the prices at which goods are sold or to maintain such prices at a higher level than would have obtained but for the trade practice; or

[100] Ibid. s. 25. Quaere: Does s. 25 limit the Commerce Commission's price control function under Part II of the Commerce Act 1975 to the recommendatory role described in that section or is the Commission's power under s. 29(5) to grant an approval "subject to such conditions as the Commission thinks fit" broad enough to enable the Commission to impose a system of continuing price control on parties to a collective pricing practice? See further the comment post at n.189a.

[101] Ibid. s. 29(8).

[102] Ibid. s. 42.

[103] Ibid. s. 44.

[104] Ibid. s. 45(3).

[105] Ibid. s. 45(4).

[106] Ibid. s. 46.

[107] Ibid. s. 47.

(c) To hinder or prevent a reduction in the costs relating to the production, manufacture, transport, storage, or distribution of goods, or in the prices at which goods are sold; or

(d) To increase the profits derived from the production, manufacture, distribution, transport, storage, or sale of goods, or to maintain such profits at a higher level than would have obtained but for the trade practice; or

(e) To prevent competition in the production, manufacture, supply, transportation, storage, sale, or purchase of any goods; or

(f) To reduce or limit competition in the production, manufacture, supply, transportation, storage, sale, or purchase of any goods; or

(g) To limit or prevent the supply of goods to consumers; or

(h) To reduce or limit the variety of goods available to consumers or to alter, restrict, or limit, to the disadvantage of consumers, the terms or conditions under which goods are offered to consumers.

The corresponding provision in the 1958 Act was section 20 which was framed in similar terms but listed only five "effects", the first four of which contained the word "unreasonably". As this provision constituted the whole of the public interest section, it was initially thought that the only effects relevant to a consideration of the public interest test were those referred to in paragraphs (a) to (e) of section 20. In the *Associated Booksellers*[108] appeal decision, however, Dalglish J. ruled that *all* effects flowing from the practice were relevant to a consideration of the public interest under section 20; previously in *Master Grocers* he had mentioned countervailing benefits and detriments but had considered them in relation to the Commission's order-making discretion under section 19. His Honour justified his view in *Associated Booksellers* by analysing the meaning of the word "only" in section 20:[109]

> If the word 'only' did not appear in the opening part of s.20, then it would be mandatory for the Commission to 'deem' or hold a practice to be contrary to the public interest if in the opinion of the Commission the effect of the practice is or would be to do one or more of the things referred to in paras (a) to (e) of the section. The word 'only' to my mind connotes that the Commission has a discretion. It might perhaps be argued that the word 'only' was intended to limit the power of the Commission to hold a practice contrary to the public interest, and that the use of the word 'shall' made it mandatory for the Commission to find a practice to be contrary to public interest in every case mentioned. If that had been the intention of the Legislature then one would have expected the Legislature to say that a trade practice shall be deemed to be contrary to the public interest 'if, but only if', in the opinion of the Commission, the effect of the practice is or would be to do one or more of the things referred to in paras (a) to (e).

While the wording of the opening part of section 21 of the Commerce Act is unchanged from that of section 20 of the 1958 Act, the inclusion of a new subsection (2) to the public interest section, incorporating as it does a broad public interest balancing test and a "not unreasonable" test, would appear to mean that the Commission's broader overall discretion must now be exercised under subsection (2), rather than under subsection (1). Once one or more of the subsection (1) effects have been established, the trade

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[108] *Re The Associated Booksellers of New Zealand* [1962] N.Z.L.R. 1057.

[109] Ibid. at 1064-1065.

practice is deemed contrary to the public interest, subject to the right of the parties to the practice to rebut this finding under subsection (2).

The question of the standard of proof required to establish the existence of one or more of the effects enumerated in the subsection, and who bears the onus of proof, was answered by Davison C.J. in *Hotel Association of New Zealand (HANZ)*:[110]

> The requirement of S.21(1) that the Commission be of the opinion that the trade practice have one or more of the effects set out in the section means that facts must be placed before the Commission which satisfy it affirmatively that the trade practice is contrary to the public interest. The standard of proof required is the civil standard and the onus rests on those who claim that the trade practice is contrary to the public interest to establish that fact. The section requires that the trade practice be deemed contrary to the public interest 'only if' the effect would be as stated in the section.

The above statement is very much in accord with Dalglish J.'s comments in *Fencing Materials*,[111] which case was cited by the Chief Justice in support. In that case, Dalglish J. also said that it is enough if the Commission is of the opinion that the practices comes "fairly" within one of the paragraphs of section 20, even if within only one.

This latter point leads us into a discussion of the significance of the alternative phrasing of the paragraphs in the subsection. It is sufficient for a practice to be deemed contrary to the public interest once one of the paragraphs of the subsection have been satisfied.[112] However, it may well be in the Examiner's interest to prove as many detrimental effects as possible under subsection (1) in order to increase the weighting of the detrimental effects under subsection (2). This was recognised by the Commerce Commission in *HANZ*:[113]

> At this point the Division notes that as the paragraphs (a) to (h) of section 21(1) are phrased in the alternative, its findings under 21(1)(f) are sufficient in the scheme of the Act for it to move to section 21(2) without further discussion. However, it is clear to the Division that when it moves to section 21(2)(a) and considers whether effects under 21(1) can be counterbalanced in terms of this subsection and whether, in terms of section 21(2)(b), effects under section 21(1) are 'not unreasonable'; the extent to which section 21(1) is infringed may, in some circumstances, be important both in the number of paragraphs infringed and in the degree of their infringement.

Unlike comparable legislation in force in many overseas jurisdictions, the New Zealand Act does not incorporate a *purpose or effect* test. Section 21 is concerned with the effects caused by the practice as distinct from the

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[110] Unreported judgment (High Court, Wellington, M 326/78, 4 March 1980, Davison C.J.) at 8.

[111] [1960] N.Z.L.R. 1121 at 1128.

[112] This follows from the fact that the paragraphs are expressed in the alternative. Some confusion, however, resulted when the Chief Justice ruled in *HANZ* that the practice was not contrary to the public interest, omitting to discuss the relevance of the Commission's unchallenged finding that the practice had the effect described in s. 21(1)(f). The matter was clarified when the Chief Justice issued an addendum to his decision (unreported, High Court, Wellington, M 326/78, 2 April 1981, Davison C.J.).

[113] Decision No. 28 of the Commerce Commission, 28 June 1978 (unreported), para 59.

motives and intentions of the parties to it. The distinction between the two is illustrated by *Passenger Conference*[114] where an agreement was prohibited by the Trade Practices and Prices Commission because that body considered the motives and collusive conduct of the Conference to be unconscionable. On appeal, Dalglish J. reversed because "even though the dominant motive of the common form of passenger booking agency agreement may have been to hamper entry into the field and the growth of the business of the non-conference lines, the clause had very limited *effect* in that direction". However, had the agreement "been as *effective* as the Conference lines had hoped it would be", the learned judge believed that the Commission could "quite properly have held that there was a trade practice which unreasonably reduced competition within the meaning of section 20(d)".

The words "is or would be" in section 21(1) indicate, as Dalglish J. pointed out in *Registered Hairdressers*, that the Commission "is entitled to have regard to the present effect of the agreement or arrangement and its likely effect in the future".[115] In the case of a collective pricing agreement not yet in operation, the Commission can only decide the application on the basis of the agreement's likely future effect. Under the 1958 Act, Dalglish J. in *Kempthorne Prosser*[116] set aside an order of the Commission on the ground that a possible future effect which the Commission had taken into account was too speculative and unsupported by any evidence. This case demonstrates that in making forecasts the Commission should set aside future possibilities which it feels are too speculative and remote, and concentrate upon those which are reasonably foreseeable or immediate.

In summary, the pattern of inquiry under section 21(1) is that the Examiner, after establishing the existence of a collective pricing agreement, must prove on the balance of probabilities that the practice has one or more of the eight effects enumerated in section 21(1). A similar onus will be placed on intervenors opposed to the practice who have been granted party status under section 14. Discharging the onus will often be no easy task, for it involves an element of prophecy in that the consequences of the practice must be assessed, not only from the viewpoint of it being maintained, but also from the viewpoint of it being terminated. This difficulty will be aggravated if the collective pricing practice is not yet in operation. Once the Commission is satisfied that the effect of the practice is or would be as stated in the section, the practice is deemed contrary to the public interest. The burden of proof now shifts to the participants to justify the practice in terms of section 21(2).

B. *The Detrimental Effects of Section 21(1)*

Having outlined the pattern of inquiry under section 21(1) it is necessary to examine the effects listed in the subsection. I will confine my analysis to the first six effects, as these are the most relevant to collective pricing inquiries.

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[114] *Re the Passenger Agency Agreement of the Australian and New Zealand Passenger Conference*. Decision No. 14 of the TPPC, 1 February 1963 (unreported); decision of the TPAA, 20 August 1963 (unreported), noted [1963] N.Z.L.J. 513.

[115] [1961] N.Z.L.R. 161 at 174.

[116] [1964] N.Z.L.R. 49.

1. *The effect on costs, prices and profits — the (a) to (d) effects*[117]

The first four paragraphs of section 21(1) are collectively concerned with the effect of the trade practice in increasing or maintaining the costs, prices or profits of goods and services. These effects are closely interrelated with the question of competition, and recognise the potential for a restriction in competition to be manifest in poor cost control, the power to raise prices or in the ability to earn more than a competitive level of profit.

In a number of inquiries the Commerce Commission has ruled that the prescribed effect on costs, prices and profits cannot be extended beyond the particular practice to encompass consequential increases in the costs, prices and profits of related goods and services at large.[118] Thus, in examining industry-wide adherence to recommended woolbroking charges, the effect of increased broking charges on the cost of wool production was deemed an effect too remote from the practice to be relevant in determining its public interest consequences. The prescribed effects on costs, prices and profits then must be a direct rather than an indirect result of the practice.

Unlike section 20 of the 1958 Act, the public interest test contained in the Commerce Act provides for the possibility of a practice having the effect of maintaining prices etc., or hindering or preventing a reduction therein. As pointed out by the Commerce Commission in *Stock and Station Agents*,[119] each of paragraphs (a) to (d) in section 21 is characterised by two limbs corresponding to particular classes of effects. A detrimental effect may be established under one or both of the limbs. The first limb of paragraphs (a), (b) and (d) refers, respectively, to an increase in costs, prices and profits, and the second limb to the maintenance of costs, prices and profits at a ". . . higher level than would have obtained but for the trade practice". Paragraph (c) pertains to hindering or preventing a reduction in the costs of providing goods, or in the prices at which goods are sold. While recognising that "to increase" prices is clearly different from "to maintain" prices, the Commission considered that for all practical purposes the phrases ". . . to maintain prices at a higher level than would have obtained but for the trade practice" (paragraph (b)) and "to hinder or prevent a reduction . . . in the prices at which goods are sold" (paragraph (c)) could be taken to mean the same thing and thereupon deemed proof of one limb to be proof of another.

It is submitted, however, that a distinct difference in meaning exists between the two limbs. The two limbs have different economic referents and thus different requirements as to proof. Under paragraph (b), prices not only have to be maintained but must be maintained at a level higher than in the absence of the practice. No such qualification exists in respect of paragraph (c). Further, the essence of a maintained price is its inflexibility or lack of responsiveness to changing market conditions. Prices are maintained when they are set and remain unchanged at a given level despite changes in

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[117] I am grateful to Miss C. E. Cliffe, B.A., B.Com., A.C.A. for assistance in the writing of this section of the paper.

[118] *Re An Application by New Zealand Woolbrokers' Association.* Decision No. 30, 2 August 1978 (unreported) and *Inquiry into Bank Cards,* report dated 14 February 1980.

[119] *Re An Application by New Zealand Stock and Station Agents Association* (1979) 1 NZAR 532.

supply costs and demand which would under more competitive conditions lead to a change. Taking these two factors together it is evident that paragraph (b) refers to the existence of price inflexibility having the effect of keeping prices at a level higher than would exist in the absence of the practice. To hinder or prevent a reduction in price does not necessarily import the same meaning. A price reduction which is not prevented, in an absolute sense, but which is merely hindered is one which is impeded or made more difficult to attain. This is not the same as price maintenance, where prices are inflexible in both an upwards and downwards direction. Further, since the legislature made provision for the maintenance of price in paragraph (b), it is unlikely that it was the intention of that body to provide for exactly the same effect again in the following paragraph.

In many cases it may be possible to prove that a pricing practice maintains price or hinders a reduction therein without the necessity of complex accounting and economic proof of the type that may be required to prove that a practice increases costs, prices or profits. At least this was the experience prior to the appeal decision in the *HANZ* case. Even though section 20 of the 1958 Act did not contain any reference to a trade practice having the effect of hindering a reduction in the price of goods, the Appeal Authority was prepared on occasion to infer such a detriment from the factual evidence. In *Fencing Materials* Judge Dalglish held that the Commission was entitled to draw inferences from established facts according to the balance of probabilities and proceeded to find that the recommended price agreement would be likely to hinder future price reductions when economic conditions changed, even though the present effect of the agreement was not to increase prices. Similarly, in *Master Grocers* a detailed investigation of prices to demonstrate that the effect was actually realised in practice was not required. Dalglish J. stated that:[120]

> The public is entitled to whatever benefits would flow from reductions in price brought about by competition. No estimate can be made as to the extent to which prices might be reduced, but it is clear from the evidence that cases of price reduction have from time to time occurred.

The Commerce Commission has demonstrated a similar willingness to draw inferences from proved facts as far as the maintaining and hindering effects are concerned. In both *Stock and Station Agents* and *HANZ* the Commission found that the effects described in the second limb of section 21(1)(b) and (c) had been established to its satisfaction; in the former case the Commission based its findings on the testimony of farmers that they had been unable to negotiate a lower rate for high volume business or limited service, while in *HANZ* the Commission reached its conclusions after "having considered all the submissions and evidence made to it explicitly under sections 21(1)(b) and (c) and implications which may properly be drawn from the evidence of HANZ witnesses. . . ."[121]

In the absence of substantive evidence, however, the Commerce Commission has been reluctant to infer any of the (a) to (d) effects solely from the conduct of the parties to the pricing practice. Thus, in *Woolbrokers*[122]

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[120] [1961] N.Z.L.R. 177 at 191.

[121] Decision No. 28, para. 74.

[122] Decision No. 30.

the Commission rejected the Examiner's argument that the universal adherence to the fixed charges and the provision for disciplinary action to be taken against woolbrokers who charged less was sufficient to infer that the practice tended to hinder the reduction of costs and to maintain prices, costs and profits at a higher level than would have otherwise prevailed.

The Commission has also rejected argument based on the proposition that certain of the effects described in section 21(1) can be inferred from the proven existence of one or more of the other effects. In *HANZ*[123] the Commission expressed the view that it is only possible to infer one effect under a paragraph in section 21(1) from another if the latter were a sufficient condition in logic for the existence of the former. Thus, in the absence of other evidence, increases in costs, prices or profits cannot be inferred from a proved restriction in competition, the rationale of the Commission being that these are effects which may, but need not necessarily, result from the reduction in competition. On these grounds inferential evidence is, by itself, considered insufficient to satisfy the civil onus of proof.

The case-law under the 1958 Act and the early collective pricing decisions of the Commerce Commission indicate that it is legitimate for the Commission to act on probable and inferential as well as direct and positive proof. However, as a result of the Chief Justice's decision in the *HANZ* case, the scope for establishing any of the (a) to (d) effects on the basis of inferences from the factual evidence may be very limited. The Chief Justice rejected the Commission's finding that the collective pricing practice had the effects described in the second limbs of section 21(1)(b) and (c) on the ground that there was no "real direct evidence" to support the Commission's conclusions. What in the Chief Justice's view would constitute real direct evidence for the purposes of the subsection is not explained. However, his assessment of the evidence indicates that it is necessary to demonstrate that the prescribed effects are actually realised in practice. Thus, in order to prove that prices are maintained at a higher level than would have obtained but for the practice requires one to demonstrate that the effects would have been different in the absence of the practice. This, in effect, requires one to establish what the price would have been in a market situation which does not exist.

These standards of proof led the Chief Justice to reject the price evidence presented by the Examiner. This evidence showed uniform adherence to price lists, policing of deviations, mark-up pricing practices based on traditional percentages rather than a realistic assessment of costs and the existence of a 35 percent market share in a licensed industry. This evidence was deemed by the Chief Justice to be insufficient to warrant a conclusion that it was more probable than not that the collective pricing agreement influenced prices.

In addition to the evidence on the structure of the market and firm practices, direct evidence from a market survey showed that:

(i) Two non-member hotels in different centres charged prices approximately 3½ per cent to 10 percent lower than trade association hotels in the same centres.

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[123] Decision No. 28, para. 77.

(ii) Prices charged by trade association member hotels in three cities were between 10.7 percent and 12.3 percent higher than prices in the city of Dunedin where price lists were not issued.

The Chief Justice rejected the evidence in (i) on the grounds that a $3\frac{1}{2}$ percent difference was not significant and a 10 percent difference was considered not able to provide justification for a finding that, in the absence of price guides, prices and costs would be reduced. The evidence in (ii) was rejected on grounds that the lower Dunedin price could be explained by factors other than the absence of price lists, viz. an excess number of hotels resulting in a more competitive market.

The rejection of this evidence as being insufficient to establish the section 21(1)(b) and (c) effects is somewhat surprising, particularly when these findings are considered in relation to the state of the market and the practices of the Hotel Association. The dismissal of a 10 percent difference in price when charged by hotels operating in identical market conditions with the exception of adherence to the price list contrasts markedly with the standards of empirical proof accepted by the United Kingdom Restrictive Trade Practices Court and the United States courts in treble damage antitrust suits.[124] Likewise, the rejection of the comparable market method in (ii) on grounds that factors other than price lists may have led to lower prices does not negate the possibility of the absence of price lists contributing to this difference.

The Chief Justice appears to have reached his conclusion by considering one item of evidence in isolation from another. The fact that firm performance is the outcome of a complex interaction between market conditions, structure and conduct means that, in interpreting the significance of performance data, regard must be had to these parameters and their interrelationships.[125] When the totality of the evidence is considered it would seem that the Chief Justice had more than sufficient evidence upon which to draw a conclusion that it was more probable than not that the effect of the price lists was to maintain prices or hinder or prevent a reduction therein. The *HANZ* appeal decision illustrates the difficulties inherent in a system in which essentially economic decisions are subject to judicial review. The standards applied by the courts may well differ from those accepted by economists and antitrust agencies.

2. *The "not unreasonable" test as applied to the (a) to (d) effects*

Section 21(2)(b) permits a trade practice to proceed if the detriment is "not unreasonable". No benefit need be shown. The section therefore serves to limit the discretion of the Commission in finding a practice contrary to the public interest. The detrimental effect must not only exist, but must exist to an unreasonable extent.

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[124] For a discussion of United Kingdom experience, see Stevens and Yamey op.cit. The leading United States text on antitrust damage suits is E. Timberlake, *Federal Treble Damage Antitrust Actions* (1965).

[125] The inter-relationship between market structure, conduct and performance is discussed in texts on industrial organisation economics, e.g. F. M. Scherer, *Industrial Market Structure and Economic Performance* (2nd ed. 1980).

To assist in evaluating the reasonableness of any increase in, or maintenance of, costs, prices and profits the Commission *may* under section 21(3) have regard to the pricing criteria laid down in section 98 of the Commerce Act. These criteria specify the considerations to be observed in justifying the prices of goods subject to strict price control. They encompass on a macroeconomic level considerations such as full employment, price level stability and the efficiency and optimum development of industry. On a microeconomic level they involve considerations of firm productivity and efficiency, costs, profitability (as measured by an accounting rate of return), subsidies, conditions of competition and risk, the method of financing employed and Government policy directives. In special circumstances, the replacement cost of assets may be taken into account.

The criteria are wide in scope and in instances conflicting—for example, the desirability of both full employment and price level stability. They also import considerations not conventionally part of a strict competition policy. Nevertheless, the pricing criteria enable a reasonable price to be defined in economic terms and provide the potential for identifying those prices which deviate substantially from a competitive level.

Issues most likely to be raised by the defending parties will probably centre on the nexus between price stability, investment, profitability and employment, and in any accounting rate of return investment on the need to take into account replacement cost data to assist in maintaining productive capacity.[126] The Examiner, on the other hand, is likely to concentrate on issues of loss of efficiency, rising cost levels, and reduced risk resulting from the restriction in competition and the adequacy of the profit rate in the light of the reduction in risk.

In practice, the criteria are likely to be applied by the Commission in a manner similar to their application in price control proceedings. These proceedings have essentially amounted to a cost justification process plus an allowance for an adequate profit rate based on an historic cost accounting rate of return.[127] A reasonable price is therefore likely to be equated to a cost justified price.

As we have seen, the Examiner is likely to face some difficulty in establishing the (a) to (d) effects. If none of the (a) to (d) effects are established, this does not mean that there is no scope for introducing the reasonableness of prices argument into the public interest test. The parties still have the option of invoking reasonable prices as a public benefit under the balancing provisions of section 21(2)(a). Discussion of the validity of reasonable prices as a public benefit will be deferred to that part of the paper dealing with public benefit arguments.

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[126] For a discussion of accounting issues in the context of trade practice inquiries, see Henderson, "Accounting and the Trade Practices Tribunal" in Tilley and Jubb (eds.), *Capital, Income and Decision Making: Introductory Reading in Accounting* (1977) 263. See also Decision Nos. 44A and 60.

[127] See e.g. *Golden Bay Cement Co. Ltd.* v *Secretary of Trade and Industry* (1976) 1 NZAR 15, (1977) 1 NZAR 464, (1979) 1 NZAR 562; *The New Zealand Association of Bakers (Inc.)* v *Secretary of Trade and Industry* (1978) 1 NZAR 468; *Akrad Radio Corporation Ltd. and Pye Ltd.* v *Secretary of Trade and Industry* (1977) 1 NZAR 301, (1979) 1 NZAR 550; and unreported Decisions Nos. 54A, 60 and 61.

3. *The effect on competition — the (e) and (f) effects*

(a) *Introduction*

Under the 1958 Act, paragraph (d) of section 20 was used to encompass both the "prevention" of competition and the "unreasonable reduction or limitation" of competition. In section 21(1) of the Commerce Act the "prevention" of competition has been separated out to form a new paragraph (e) and the word "unreasonable" has been deleted from the "reduction or limitation" effect which now forms paragraph (f).

An analysis of the cases decided under both Acts shows that the effect of the practice on competition is always at the heart of any inquiry. The Examiner invariably invokes paragraph (f) to establish that a practice is contrary to the public interest within the meannig of section 21(1) and will often bypass the other effects enumerated in the subsection altogether. This is not surprising, given the clear anti-competitive effect of most restrictive trade practices, particularly those of a horizontal nature. Further, as we have seen, the other effects, particularly the (a) to (d) effects, may involve complex accounting and economic proof of a kind beyond the resources of the Examiner's Office.

(b) *Meaning of "prevent", "reduce" and "limit"*

It is the *reduction or limitation* of competition that is invariably stressed, rather than the *prevention* of competition. The accepted interpretation of "prevent" in the context of section 20(d) of the 1958 Act was that it meant the total elimination of competition. Such an interpretation could be justified on the ground that the wording of paragraph (d) made it clear that "unreasonable" only applied to "reduce or limit", thereby emphasising that "prevent" had an absolute connotation. Once the quantitative meaning of "unreasonable" had received judicial affirmation, this interpretation of "prevent" became most convincing.

This interpretation of "prevent" has been accepted by the Commerce Commission, as can be seen from the following comment of the Commission in *HANZ*:[128]

> . . . [I]t is also clear that the term 'prevent competition' is an absolute term, and that to establish such an effect would require evidence that no parties to the practice compete in price, service or any other way. No such evidence was produced by CSSO. Indeed, from the sum of submissions and evidence before the Commission such an effect could not have been established in this case. The submission is rejected.

Such an interpretation would have the effect of rendering paragraph (e) of little, if any, practical application, for it is difficult to conceive of a situation where a practice eliminates all forms of both actual and potential competition from a given market. Without departing from the absolute connotation of "prevent", it would appear reasonable to argue that, if price competition is totally eliminated by a practice, the effect described in paragraph (e) is established in an important component of competition,

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[128] Decision No. 28, para. 60. In a recent refusal to supply case, however, the Commission found that the s. 21(1)(e) effect had been established: see Decision No. 53, para. 253.

viz. price competition. There is even a case, based on dictionary meanings of "prevent", for arguing that "preventing competition" encompasses "hindering or impeding" activity involving something less than a complete elimination of competition. This latter argument derives some support from the fact that, as a result of the 1976 Amendment,[129] the "not unreasonable" test now applies to paragraph (e).

However, the precise definition of "prevent" may not be of any great practical importance given the use of the words "reduce or limit" in paragraph (f). "Reduce" means to make or become smaller in size, number, extent, degree, intensity etc., while "limit" means to restrict or confine. Had "reduce" been the sole test in paragraph (f), one could have argued that in order to plug any possible loopholes "prevent" needed to be given a broad interpretation so as to encompass the effect of "hindering or impeding competition". The inclusion of the word "limit" would seem to make such interpretation unnecessary, as the end result of successful "hindering or impeding" activity is likely to involve a limitation of competition of some kind.

(c) *Dimensions of "competition"*

In the context of paragraphs (e) and (f), "competition" is interpreted as being multifaceted. This interpretation gives some scope to parties to collective pricing agreements to argue that, while their industry may not be characterised by price competition, there is vigorous rivalry in other dimensions of business conduct, e.g. service. Given the obvious importance which the legislature has attached to the control of collective pricing practices, it is not surprising that this argument has received little support from the decision-makers. Even though the 1958 Act lacked an explicit pro-competition objective, Judge Dalglish, in *Fencing Materials*, had no difficulty in inferring such an objective from the scheme and intention of the legislation:[130]

> When consideration is given to the general scheme of the Act, to the list of trade practices set out in section 19(2) (which are subject to registration and in respect of which the Commission may make an order directing their discontinuance), and to the provisions of section 20, it is clear that one of the main objects of the Act is to secure and maintain free and open competition. In my view paragraph (d) of section 20 is directed to all fields of competition. An agreement or arrangement between traders as to prices which shall be charged or as to margins by which the cost of goods should be increased on their resale definitely restricts competition in the field of prices. Competition in other fields such as services may still continue and that competition may be keen. Nevertheless, any agreement which restricts competition in the field of prices deprives the public of the benefits which they might derive from a lowering of prices when conditions would tend to make prices more competitive.

The positive benefits of price competition were also stressed by Judge Dalglish in *Registered Hairdressers* and *Master Grocers*.

There were, however, two collective pricing cases under the 1958 Act which de-emphasised price competition: the decision of the Appeal Authority in *Associated Booksellers*, which involved collective resale price

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[129] Commerce Amendment Act 1976, ss. 12(1) and 12(2).

[130] [1960] N.Z.L.R. 1121 at 1132.

maintenance of books, and the decision of the Trade Practices and Prices Commission in *Bankers' Association*[131] involving an agreement by the trading banks to impose a uniform scale of charges for current account cheques. In neither case was the agreement held to be contrary to the public interest even though price competition was seriously impaired. The decision in *Associated Booksellers* was based on the premise that price competition would lead to a reduction of stock-holding bookshops; an increase in price, and a smaller range of the more esoteric books; and the elimination of services to the public as booksellers concentrated their efforts on fast-moving popular titles. In *Bankers' Association*, the Commission concluded "that in the case of current account charges price competition viewed as part of total competition has not such major relative significance as it has in the case of many other trades or industry".[132]

The Commerce Commission in all of its public inquiries involving collective pricing agreements has emphasised the importance of price competition as a component of competition. A general statement of principle was laid down in *Stock and Station Agents*:[133]

> In the Commission's view the wording of section 21(1)(f) is quite clear but requires comment. The term 'competition' is used. While this term is a broader term than 'price competition', price competition is clearly a component, and usually a very important one, of competition. It appears to the Commission that, in forming an opinion for the purpose of applying this subsection, it is obliged to consider all aspects of competition in the broadest sense of the term. In a given case there may, for example, be extensive competition in areas other than price but little or none with regard to price. Similarly, there may be unrestricted price competition but little or no competition in other relevant areas. The parties to an arrangement may well argue that lack in one area is balanced by competition in another or others, the total effect being in the public interest in that it results in stable and continuing service brought about by 'orderly marketing' or the like. That may be so, but if the effect is to reduce or limit competition then it falls within 21(1)(f). In other words, if an agreement or arrangement reduces or eliminates competition in respect of one or more components but not all, that clearly reduces or limits competition in its broadest sense.

The above statement was endorsed in both *Woolbrokers* and *HANZ*.

(d) *The relevant market*

Whenever there is the requirement that illegality of a practice be determined by reference to the *effects upon competition*, the relevant market must be specified for until the market in which goods or services are competing has been identified it may be difficult to say whether, as a result of the practice, there is any appreciable restriction on competition. This principle is fundamental to any system of antitrust control embodying a test of competitive effect but, as Professor Joliet has pointed out,[134] decision-makers, unfamiliar with antitrust concepts, often interpret a competitive effect test without regard to market consequences. Instead, the emphasis is placed on the restrictive effects of the practice on competition

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[131] *Re The New Zealand Bankers' Association*. Decision of the TPPC, 29 May 1970 (unreported).

[132] Ibid. at p.35.

[133] (1979) 1 NZAR 532 at 541 para. 49.

[134] R. Joliet, *The Rule of Reason in Antitrust Law* (1967).

between the parties thereto. However, as experience builds up, a more economically sophisticated approach is usually adopted. A study of the New Zealand case-law reveals these tendencies.

An early misunderstanding concerning the area of competitive effect occurred in *Fencing Materials (No. 1)*, a case involving the issue by the Wellington Fencing Materials Association of recommended price margins to its members following the removal from price control of wire-netting. Instead of analysing the market impact of the arrangement, the Trade Practices and Prices Commission confined its inquiry to the effect that the arrangement had on competition among the members of the Association. Since prior competition had been "virtually eliminated" among the members, the Trade Practices and Prices Commission concluded:[135]

> Thus, in terms of the Act competition was unreasonably limited or reduced. It is said that other merchants with wire-netting to sell are not members and are free to sell at any prices they will. In the opinion of the Commission this fact has no bearing on the legality of the agreement or arrangement which is the subject of the present inquiry.

However, on appeal, Judge Dalglish stressed the necessity of considering the market impact of the practice:[136]

> The Commission . . . has to consider whether competition is prevented or unreasonably reduced or limited. In the present case it is clear that there are traders in wire-netting who are not members of the Association. Therefore it cannot be said that the agreement or arrangement 'prevents' competition. But the Commission does not appear to have considered the extent to which competition is in fact reduced or limited by the agreement or arrangement which it has found to exist or to have considered whether that reduction or limitation of competition is 'unreasonable'. In my view the Commission must give consideration to this aspect of the matter and not conclude that merely because some traders have agreed upon a common basis of pricing that competition is thereby unreasonably reduced or limited. This involves, it seems to me, a consideration in the present case of what proportion of the total number of traders in the commodity are affected by the agreement or arrangement and perhaps also what proportion of the total trade in the commodity is handled by the traders so affected.

The learned judge also considered that the market impact of the practice at the wholesale level should be considered separately from that at the retail level. On having the case referred back for reconsideration, the Trade Practices and Prices Commission found that members of the association controlled 50 percent of the wholesale market and 25 percent of the retail market. It also found that the margins applied by the parties to the arrangement were generally followed by all traders in wire-netting although it did not consider it necessary to consider the proportion of the total traders actually belonging to the association. Finding that the influence exterted on the market by the trade practice was very significant, the Commission confirmed its earlier decision.[137]

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[135] Decision No. 3 of the TPPC, 7 September 1959 (unreported), para. 30.

[136] [1960] N.Z.L.R. 1121 at 1133-1134.

[137] *Fencing Materials (No. 2).* Decision No. 8 of the TPPC, 25 November 1960 (unreported).

Under the Commerce Act the question of whether a reduction or limitation in competition is not unreasonable becomes a matter of possible justification under section 21(2)(b). The removal of "unreasonable" from the section 21(1) effects led the Commerce Commission in *Stock and Station Agents* to express the view that the paragraphs of section 21(1) do not import any question of degree. While it is true that the Commission in its inquiry under section 21(1)(f) does not have to decide whether the degree of reduction or limitation in competition has reached the point where it may be considered "unreasonable", it does have to be satisfied that a reduction or limitation on competition has in fact occurred, or would occur, if the practice commences operation. In order to satisfy the *de minimis* test which is applicable to virtually all legal rules, such reduction or limitation of competition would have to be more than insignificant, and, further, as we have seen from *Fencing Materials*, would have to be assessed within the context of the relevant market. It is for these reasons that I believe that a limited market analysis is called for under section 21(1)(f).

However, rather than conducting any sort of market analysis under section 21(1)(f), both the Examiner and the Commission have tended to emphasise the importance of price competition as a facet of competition and the fact that the collective pricing practice under investigation is intended to secure a degree of uniformity in prices to be charged by the parties to the arrangement. Believing that paragraph (f) imports no question of degree, the authorities readily conclude that the requisite effect under section 21(1)(f) is established, i.e. an approach very much like that adopted by the Trade Practices and Prices Commission in *Fencing Materials (No. 1)* is followed. The authorities would no doubt justify their action by pointing out that section 21(4) makes it clear that a market analysis is to be carried out under section 21(2)(b), rather than under section 21(1)(f). While subsection (4) clearly intends full investigation as to the unreasonableness or otherwise of a reduction or limitation of competition to be conducted under section 21(2)(b), this is not to say that a limited market analysis is not called for under section 21()1)(f). Indeed, as I have stated above, an analysis of the market impact of the practice is a pre-condition to a finding under section 21(1)(f). Further, as proof is required (a) of the existence of the effects referred to in section 21(1), and (b) that they result from the practice, it is doubtful if proof of the mere existence of a collective pricing agreement is sufficient to affirmatively establish that the agreement has the effect described in section 21(1)(f).

A statement of general application made by the Commerce Commission in *Woolbrokers* concerning the scope of the section 21(1), effects could, if literally applied to paragraphs (e) and (f), seriously undermine the market effect test. Having reached the view that each paragraph of section 21 is intended to be specific to the operations contained within the practice and not to a related activity outside or remote from the practice, the Commission referred to the use in sections 21(3)(b) and 21(4)(b) of the words "the goods", and concluded:[138]

> These provisions are quite specific to 'the goods', or in this case 'the services', of an individual party, and the parties collectively to the practice, as to the prices

[138] Decision No. 39, para. 78.

> which would pertain to them and to the demand 'for the goods (or services) in question'. *It is therefore not possible in applying these criteria to extend consideration of the effects of section 21(1) beyond the confines of the practice itself.* [Emphasis added.]

If these views are interpreted to mean that the relevant market for the purpose of assessing anti-competitive effect must be limited to goods identical to those which are the subject-matter of the practice, then clearly there is no scope for taking account of goods considered by consumers to be close substitutes. Such an interpretation cannot be supported for it ignores basic economic principles of market delineation and would result in market definitions not according with commercial reality.

Subsequent to *Woolbrokers*, the Commission held its first merger inquiry at which the principles of market definition were canvassed at some length by the parties. In its supplementary decision in the *Nathan/McKenzie* merger,[139] the Commission reiterated the views it had earlier expressed in *Woolbrokers* concerning the scope of the section 21(1) effects, but made it clear that, unlike the other paragraphs of section 21(1), the Commission could go beyond the confines of the practice when considering the effects of the practice under paragraphs (e) and (f). Principles of market definition were laid down which fully accord with a market effect test:[140]

> The selection of the goods to be included in the assessment of competition will naturally include the same goods, identified by brand names or otherwise, but alternative products also need to be identified. These alternatives need to be comparable and reasonable alternatives, not just similar goods, and require to be judged in terms of price, quality, suitability and design. The prime test here would be that these goods be recognized as such by . . . purchasers, consumers or other users. The acceptability of such goods as alternatives could be further indicated by the attitudes other producers and sellers adopt as shown, for example, in their advertising, pricing policies and distribution patterns. Access to such goods will also bear on whether or not they should be classified as competitive.
>
> The determination of competitors calls for identification of these suppliers offering comparable and reasonably similar access to the same or competitive goods for the same customers. This will largely be determined by the activity level they occupy in industry or commerce, for example, as manufacturer, wholesaler or retailer. Having regard to comparable and reasonable access to competitive goods for these same customers will, in many cases, also require consideration as to locality in which they are found. In stating this requirement the Commission accepts that there may be circumstances, such as national distribution from a single central location, in which this might not be applicable or of little importance.

So far we have been discussing the relevant product market but, as noted in the above comments of the Commerce Commission, geographic considerations are also of importance. Many price agreements are national in operation, but they are also frequently encountered on a regional basis, and sometimes even on a city basis. Even though there may be similar regional agreements throughout New Zealand, the authorities may consider the anti-competitive effect of the agreement in each region separately. Moreover, non-adherence to agreed or recommended prices in one region may not necessarily be accepted as evidence that the overall effect of the

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[139] Decision No. 42A reported at (1981) 2 NZAR 335.

[140] Ibid. at 358 paras. 115 and 116.

restriction is reasonable. To take account of these factors, the Commission may confine the application of an order to a particular geographical area.[141]

4. *The "not unreasonable" test as applied to the (e) and (f) effects*

(a) *The evolution of the tests under the 1958 Act*

Under the 1958 Act, the tests for determining whether a reduction or limitation of competition was unreasonable or not evolved over a period of several years, with decisions of the Appeal Authority being looked to for guidance. Unfortunately, a considerable degree of confusion was engendered along the way, caused principally by a failure on the part of the authorities to understand the complexities of a competitive rule of reason test and a tendency to confuse such a test with the public interest test proper.

The analysis of the case-law begins with Dalglish J.'s judgment in *Fencing Materials*. It will be remembered that the learned judge in that case stated "that one of the objects of the Act is to secure free and open competition". He then went on to say:[142]

> It seems to be quite proper, and in accordance with the Act, for the Commission to approach the consideration of any particular case on the basis that any trade practice which prevents or unreasonably reduces or limits competition in the . . . sale . . . of goods is contrary to the public interest and should be made the subject of an order under section 19(1) *unless some good reason is shown why such order should not be made.* [Emphasis added.]

As noted when discussing the relevant market concept, Judge Dalglish thought that the question of whether a practice unreasonably reduces or limits competition involved a consideration[143]

> . . . of what proportion of the total number of traders in the commodity are affected by the agreement or arrangement and perhaps also what proportion of the total trade in the commodity is handled by the traders so affected.

This test stresses the importance of a quantitative assessment of the effects of a restriction on competition. However, the learned judge did add:[144]

> *There may be other factors also which the Commission on further consideration might feel it should take into account.* [Emphasis added.]

Although these statements of Judge Dalglish left it open for other factors to be taken into account, the Trade Practices and Prices Commission in the subsequent cases of *Registered Hairdressers* and *Master Grocers* did not take any innovative line but instead followed the *Fencing Materials* approach by stressing the importance of price competition to consumers and the reduction in such competition brought about by a high degree of adherence to recommended prices. The approach of Judge Dalglish, sitting as the Appeal Authority, was similar, although his Honour did

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[141] See e.g. the order made in *Master Grocers* [1961] N.Z.L.R. 177.

[142] [1960] N.Z.L.R. 1121 at 1132.

[143] Ibid. at 1134.

[144] Idem.

analyse the nature of competition in the industries involved in more detail than the Commission in arriving at the conclusion that the varying circumstances of traders did not justify the charging of uniform charges. Further, in *Master Grocers*, his Honour stated that in the exercise of its discretion under section 19, "The Commission is entitled to consider whether *the advantages* to the grocery trade of the retention of price guides outweigh the detriment to the public . . ."[145]

The need to balance benefits and detriments was overlooked by the Commission in *Associated Booksellers*, whose approach to the case was summarised by Judge Dalglish on appeal as follows:[146]

> It is clear that the Commission took the view that in the bookselling trade competition as to prices was virtually eliminated as to a very high percentage of books sold and that it automatically follows that there is an *unreasonable* reduction of competition in the sale of books, and that such reduction is contrary to public interest within the meaning of s.20 of the Trade Practices Act 1958. The Commission made it clear that it did not consider that it was required to balance any advantages which the public derived from the trade practice as against the detriment flowing from the practice. . . . In other words, the Commission, in deciding that there was an 'unreasonable' reduction or limitation of competition which was contrary to public interest, applied a quantitative test and disregarded all aspects of competition in bookselling other than that of price.

Such a view was rejected by Dalglish J. as being far too narrow. After conceding that he himself had stressed the quantitative test in *Fencing Materials*, his Honour commented that he had left the way open for other factors to be taken into account and, indeed, had taken certain other factors into account in deciding the earlier appeal cases. Furthermore, the present case involved matters which had not been examined in the earlier cases. Having given this background, his Honour proceeded to formulate a broad view of the unreasonable test:[147]

> I am satisfied that in determining the question whether a restriction or limitation on competition which results from a trade practice is reasonable or unreasonable the Commission must look at the matter broadly and take all relevant factors into account. Here the restrictions on competition almost all relate to prices and the question is whether those restrictions as to prices are unreasonable restrictions on competition in the sale of books. All facets of competition in the sale of books such as, for example, services, breadth of selection and display of stocks are relevant for consideration. Furthermore, as this question of reasonableness or otherwise arises for consideration in relation to public interest, it is most material to have regard to the way in which the restrictions in question do or might operate to the detriment or to the benefit of the public. As a corollary from this it is material to consider the benefit or detriment which the public would or might derive or suffer if the trade practice did not operate. The way in which the trade practice has operated in the past and the way in which it would be likely to operate in the foreseeable future is most relevant.

The above statement in my view is misleading in that it confuses the "unreasonable test" contained in section 20(d) with the public interest test proper. While a rule of reason approach is inherent in section 20(d), that

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[145] [1961] N.Z.L.R. 177 at 191. [Emphasis added.]

[146] [1962] N.Z.L.R. 1057 at 1062.

[147] Ibid at 1064.

provision must be seen as embodying a *competitive* rule of reason test in contrast to a *public interest* test.[148] The latter test, as Dalglish J. acknowledged in *Associated Booksellers*, was inherent in the Commission's overall discretion under section 20 but only became operable after one or more of the effects listed in section 20 had been established. It does not follow from the existence of the dual tests that factors relevant to one test are necessarily relevant to the other.[149] If public interest factors are taken into account under section 20(d), a public interest balancing exercise is required. This would have the effect of rendering the independent public interest inquiry, involving as it does a balancing exercise superfluous. Also, many public benefit arguments have no bearing on the question whether a practice is anti-competitive or not. Their possible relevance as countervailing benefits must therefore be examined under the public interest test proper, rather than under section 20(d). Judge Dalglish appears to have recognised these conceptual distinctions when commenting:[150]

> So far I have been discussing the factors to be taken into account on a consideration of the question whether the effect of a trade practice is to 'unreasonably' reduce or limit competition in the sale of goods within the meaning of para (d) of section 20. It was submitted that, even if the only test which should be applied on the consideration of that question is the quantitative test as applied by the Commission in the present case, all the other relevant factors just discussed would have to be taken into account on the consideration under section 20 of the general question whether or not the trade practice should be held to be contrary to the public interest. With that submission I agree.

If the New Zealand legislation had not given scope for a general consideration of public benefits and detriments there may have been a case for applying a broad rule of reason interpretation to section 20(d) somewhat along the lines adopted by the United States Supreme Court in the *Appalachian Coals* case.[151] However, as Judge Dalglish himself had recognised in earlier cases, the 1958 Act did not prevent the canvassing of public benefit arguments. There was, therefore, no need to artificially expand section 20(d) into a public interest test.

For a while, the *Associated Booksellers* appeal formula obscured the pro-competition objective of the legislation, although that case, and subsequent decisions, did have the effect of raising important questions concerning the interpretation of the legislation. Thus, while the application of the *Associated Booksellers* formula by Judge Dalglish led to a reversal of the Commission's orders in *Passenger Conference* and *Kempthorne Prosser*, these two cases helped to clarify the nature of the test embodied in section 20(d). In *Passenger Conference*, the appeal judgment revealed the need for a full market analysis in determining whether a practice unreasonably

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[148] For discussion of the differences between a "competitive rule of reason test" and a "public interest test", see Brunt, Lecture No. 11 *Monash Trade Practices Lectures* (1975) 7-9 and Heydon, "The Trade Practices Act 1974 section 45: agreements in restraint of trade" (1975) 3 Aust.Bus.L.Rev. 262.

[149] A similar blurring of the two tests is evident in the *HANZ* appeal judgment.

[150] [1962] N.Z.L.R. 1057 at 1065.

[151] *Appalachian Coals Inc.* v *United States* (1933) 288 U.S. 344. For a discussion of this case in the context of the rule of reason test, see Heydon op.cit. ante n.148.

reduced or limited competition. That case, together with the appeal decision in *Kempthorne Prosser*, also showed that an "unreasonable reduction or limitation of competition" could not be equated with "unfair competition". Free competition was the subject of section 20, not fair competition.

There was a return to the emphasis on free and open competition with the decision of the new Appeal Authority, Mr F. F. Reid, S.M., in *Hormone Weedkillers*.[152] While the Appeal Authority expressed agreement in principle with the *Associated Booksellers* appeal formula, Mr Reid went on to make the important qualification that that decision should not be read in isolation but along with earlier decisions. Mr Reid then proceeded to hold that if a restriction on competition unreasonably reduces or limits competition then prima facie such an agreement is contrary to the public interest. The following comment was made on the question of onus:[153]

> Once the agreement is established the onus shifts to the appellants to prove that it is in the public interest that the agreement should be maintained, or in other words the benefits flowing to the public from the agreement outweigh the detriment flowing from it.

Finding that the alleged public benefits were of little substances, or would exist even in the absence of the practice, Mr Reid concluded:[154]

> . . . having regard to the fact that the promotion of competition among manufacturers and producers is one of the main objectives to be aimed at when dealing with restrictive practices in relation to the marketing of goods, I am of the opinion that free competition in the fixing of discounts is desirable in the public interest.

The decision of the Appeal Authority in *Hormone Weedkillers* re-established the importance of free and open competition as a central objective of the Act and demonstrated that such an objective was of relevance both when determining whether a practice unreasonably reduced competition and also when evaluating the merits of countervailing benefits alleged by the parties to outweigh the detrimental effects of the practice.

(b) *The statutory embodiment of the tests under the 1975 Act*

To a large extent, the matters considered relevant under the 1958 Act in determining whether a practice had the effect of "unreasonably" reducing or limiting competition have been incorporated in section 21(4) of the Commerce Act which reads:

> S.21(4) In considering, under subsection (2)(b) of this section, whether any effect mentioned in paragraph (e) or paragraph (f) of subsection (1) of this section is not unreasonable, the Commission shall —
>
> (a) Be guided by the need to secure effective competition in industry and commerce in New Zealand; and
>
> (b) Have regard, where in the opinion of the Commission it is practicable to do so to the total demand or total potential demand for the goods in question,

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[152] *Re the Marketing of Hormone Weedkiller Preparations.* Decision of the TPAA, 2 October 1965 (unreported); summarised in Collinge op.cit .ante n.1 at 432.

[153] Collinge op.cit. ante n.1 at 432.

[154] Idem. at 435.

and then have regard to the portion of the total demand or total potential demand over which a reduction in competition is likely to result from the trade practice; and

(c) Have regard to any other matter it thinks relevant.

The fact that the above matters have now been incorporated into the public interest section of the Commerce Act dispels any doubts as to their legitimacy as appropriate criteria. However, as under the 1958 Act, it is likely that the varying circumstances of each case will mean that different matters will be emphasised at different times and that the criteria contained in the three paragraphs of subsection (4) will not necessarily be given the same weighting in every case.

(i) *Section 21(4)(a)*

The present wording of paragraph (a) of subsection (4) was substituted for the original paragraph (a) by section 12(3) of the Companies Amendment Act 1976. The original version read:

(a) Be guided by the principle that free and unrestricted competition is prima facie desirable.

The legislature in adopting this wording was obviously approving of the statutory objectives as inferred from the 1958 Act by the Appeal Authority in such cases as *Fencing Materials* and *Hormone Weedkillers*. While the adoption of the principle in *Fencing Materials* led Dalglish J. to stress the quantitative test, it must be remembered that the principle is based on the public interest in free competition. There may be circumstances where a strictly quantitative measurement test is not sufficient to determine whether the facts as found further or hinder the values which the Act is seeking to realise. In such cases qualitative factors may have to be taken into account.

The change in the wording of paragraph (a), brought about by the Commerce Amendment Act 1976, may have appeased the fears of some business interests uncertain of what "free and unrestricted competition" really meant, but, in practical terms, the change is not likely to make much difference, at least as far as collective pricing inquiries are concerned. Effective competition requires "that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers".[155] This view is reflected in the Commerce Commission's comments in *Stock and Station Agents*:[156]

While acknowledging that there is active competition between individual stock and station companies in matters other than prices the Commission cannot find that that competition is enough to be regarded as 'effective' competition. The Commission does not overlook the elements of price competition claimed in respect of co-operative company rebates and of the 'free-lance' commission agent but does not consider those elements sufficient, either in form or in quantum, to constitute a satisfactory degree of price competition. The Commission finds that competition between the companies cannot be 'effective' so long as freedom to compete in price is proscribed by collusive agreement among them to adhere to uniform prices.

[155] *Re Queensland Co-operative Milling Association* (1976) 8 ALR 481 at 514.
[156] (1979) 1 NZAR 532 at 544, para. 59.

(ii) *Section 21(4)(b)*

The quantitative test set out in paragraph (b) is obviously of importance in determining the competitive effect of a collective pricing practice. However, before such effect can be fully assessed the relevant market must be delineated. So far, market definition has not been an issue in any collective pricing practice which has been the subject of a public inquiry before the Commerce Commission.[157] This is not surprising given that the products or services covered by a collective pricing agreement usually constitute a separate product or service market. There is, however, the odd case where product substitutability from other industries or within the same industry may result in an anti-competitive effect being held to be less than significant, e.g. the United Kingdom *Standard Metal Window* case[158] and the Australian *Interflora* case.[159] In the same way as minimal product substitution from outside the industry is basic to the operation of a collective price agreement, so also is industry involvement by a substantial number of the competitors in the particular industry. Numbers alone, however, are not enough; the quantitative test is also concerned with what proportion of trade in the total market is affected by the agreement. These two points arose for consideration in *HANZ*:[160]

> In terms of section 21(2)(b) it was also submitted by HANZ that competition with other outlets is something which is relevant to the Division's deliberations. It appears to the Division that this does have relevance both through section 21(4)(a) and 21(4)(b). The evidence of Mr Taylor at the first hearing was that HANZ members supply approximately 35% of the total market for off-premises sales. *This is a significant part of the total market.* However, the Division notes that under section 21(4)(b) it has to have regard 'to the portion of the total demand or total potential demand over which a reduction in competition is likely to result from the trade practice'. In this case it is clear that a simple numerical comparison cannot be made since this portion varies with other factors such as geographical location of hotels and taverns and time of day. These are factors which the Division has considered necessary to take into account in its deliberations under this section. [Emphasis added.]

If the parties to the practice enjoy a significant market share in the geographic market in which they operate, this enhances the likelihood of the effect of the practice on competition being declared unreasonable. A 35 percent share of the market was considered significant by the Commission in *HANZ*, although, as seen from the above extract, the Commission in that case also took into account the fact that in some geographic areas hoteliers faced little, if any, competition from competing outlets, e.g. wine retail stores and wholesale wine and spirit merchants, and where such outlets did exist, there were times of the day when hoteliers had a monopoly.

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[157] The matter of market definition was raised by the applicant in correspondence with the Examiner in *Re Interflora Pacific Unit Ltd.* but as agreement was reached during conciliation a public inquiry was dispensed with: see Decision No. 33, 14 September 1978 (unreported) and Examiner's reports and correspondence on public file. The views of the Examiner on market definition are in marked contrast to those expressed by Commissioner Pengilley in *Interflora Australian Unit Ltd.* (1976) 3 TPCD [421].

[158] *Re Standard Metal Window Groups Agreement* (1962) L.R. 3 R.P. 198.

[159] (1976) 3 TPCD [421].

[160] Decision No. 28 at para. 94.

It is submitted, with respect, that these factors together with the legal requirement that a customer must purchase minimum quantities from a wholesaler justified the Commission's approach in treating the 35 percent figure with caution. This view, however, was not shared by the Chief Justice who took the figure at face value and downplayed the factors mentioned above.[161] This led him to the conclusion that the reduction or limitation in competition in the circumstances of the case was minimal.

The *HANZ* case illustrates the difficulty of trying to state in quantitative terms the stage at which a reduction or limitation of competition becomes "unreasonable". The phrase "virtually eliminated" was used in *Associated Booksellers*, and this term has also been invoked by the Canadian judiciary in determining whether a lessening of competition was "undue" in terms of section 32(1)(c) of the Canadian Combines Investigation Act, a provision which incorporates a test very similar to the one under discussion. The Commerce Commission has used the term "significant",[162] suggesting that something much less than total market control may still be held to have an unreasonably restrictive effect on competition. This is likely to be the case when the agreement leads to the creation of a common industry price. This situation was discussed by the Trade Practices and Prices Commission in *Fencing Materials (No. 2)*. As already mentioned, association members in that case were found to control 50 percent of the wholesale trade and 25 percent of the retail trade. When discussing these percentage figures the Commission stated:[163]

> The Commission considers that the amount of market controlled by the Association is such as to have the effect of unreasonably reducing or limiting competition. The Commission does not reach this opinion by merely looking at the percentage figures. Even if the wholesale fraction was only 40% and the retail fraction 20%, the Commission would hold the same view in the particular circumstances under which this product is sold. In other cases it may very well be that the Commission might feel that a higher percentage must exist so as to justify the opinion that the public interest is injured . . . The real question it seems to the Commission is what *influence* is exerted on the market by the trade practice of the members. We do not doubt that it is very considerable . . . no attempt was made to suggest otherwise than that the margins adopted by members were not undercut by non-members and the Commission is left believing that the example and practice of the members is generally followed by all traders in this commodity.

Given the current economic recession, we are likely to see recommended prices being deviated from by some traders. Provided recommended prices are used as a benchmark by a substantial number of traders, they are still likely to have significant anti-competitive effect, e.g. there may be a common understanding among traders that quoted prices should be no more than 10 percent below trade association list prices. Such an understanding may result in some price variation but it will be of a restricted kind. No doubt in such circumstances the parties will argue that market conditions dictate the prices at which they sell and that such conditions foster uniformity in pricing. This argument may have some validity, but the

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[161] Addendum to *HANZ* appeal judgment at 10.

[162] Decision No. 28 at para. 94.

[163] Decision No. 8 of the TPPC, 25 November 1960 (unreported). The quotation is from a summary of the decision in Collinge op.cit ante n.1 at 367.

continued existence of the agreement, and certainly any policing of it, will tend to suggest the contrary.

There may of course be ineffective price agreements which are unable to influence the behaviour of the members of an industry. Factors such as depressed economic conditions, changing technology, widespread cheating, lack of leadership etc. may lead to persistent price-cutting and the eventual abandonment of the agreement. However, it is unlikely that such agreements would be defended.

(iii) *Section 21(4)(c)*

Paragraph (c) allows the Commission to "have regard to any other matter it thinks relevant". It is submitted that this paragraph does not give the Commission *carte blanche*. The Commission's discretion should be exercised within the framework of the competitive rule of reason test and the general objects of the legislation as expressed in section 2A. The Commission is entitled to engage in a balancing exercise under section 21(4) but that exercise should be confined to factors affecting competition, either beneficially or detrimentally. Mention has already been made of the confusion brought about by the appeal judgment in *Associated Booksellers*. Similar problems could also ensue from the Chief Justice's ruling in *HANZ* that the reduction or limitation of competition involved in that case was "not unreasonable". In addition to his comment on the low share of the market affected by the price guides, his Honour referred to his findings under section 21(1)(b) and (c), pointing out that the evidence had failed to show that it had been established that any marked difference in prices would result if the price guides were discontinued.[164] However, while evidence of likely reductions in prices following the termination of a practice is a relevant factor under section 21(4), the absence of such evidence should not be pre-determinative of the issue of whether a reduction or limitation of competition is "not unreasonable". To allow this to happen would emasculate the competitive rule of reason test and result in the reasonable prices argument dominating a collective prices inquiry.

Of decisive importance among the factors considered relevant under the rule of reason test are the nature of the restraint and the quantity of the competition affected by it.[165] The inherently anti-competitive nature of most collective pricing practices is a factor which the Commission can legitimately take into account under both section 21(4)(a) and (c). As we have seen, the quantitative elimination of competition has always been regarded as of prime importance under the New Zealand legislation and now finds statutory expression in section 21(4)(b).

Besides these matters, other factors which the Commission could usefully have regard to include, inter alia,[166] the market power enjoyed by the collectivity of firms; industry concentration; barriers to entry; product differentiation; countervailing power; customers' access to alternative sources of supply and any possible pro-competitive benefits of the practice

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[164] Addendum to *HANZ* appeal judgment at 10.

[165] Roberts op.cit. 136.

[166] See also the list of criteria suggested by W. Pengilley, *Collusion, Trade Practices and Risk Taking* (1978) 17.

and whether these outweigh the practice's anti-competitive effects. Clearly, the behaviour or conduct of the paticipants may also be taken into account. Of particular importance is the question of whether the pricing agreement is policed or not.[167]

The above discussion of relevant factors is by no means exhaustive. In the final analysis it will be the predilections of the decision-makers that will decide whether or not the effect of a pricing practice is held "not unreasonable" for, to use the terminology of Professor Julius Stone, the legal standard embodied in the rule of reason is predicated on a "fact-value complex".[168] By recognising that value choices are imported and required by the rule of reason, Professor Stone believes we can gain greater understanding of the often confusing and divergent judicial decisions involving the application of the rule. This point should not be lost sight of when analysing the New Zealand case-law.

C. *The Public Interest Balancing Test*

Assuming the Examiner has been successful in establishing one or more of the detrimental effects listed in section 21(1), the onus shifts to the parties to the agreement to justify their practice in terms of section 21(2). That subsection provides

> Notwithstanding that the Commission is of the opinion that the effect of any trade practice is or would be any of those described in subsection (1) of this section, that practice shall not be deemed contrary to the public interest if the parties to the practice satisfy the Commission that, in the particular case, —
>
> (a) The practice has or would have effects of demonstrable benefit to the public sufficient to outweigh any of the effects described in subsection (1) of this section, which, in the opinion of the Commission, the practice has or would have; or
>
> (b) Even though the Commission is of the opinion that the effect of the practice is or would be one or more of those described in . . . subsection (1) of this section, that effect or effects is or are not unreasonable.

Section 21(2) has two limbs: the public interest balancing test contained in 21(2)(a) and the "not unreasonable" test contained in 21(2)(b). As the "not unreasonable" test has already been discussed in connection with the 21(1) effects it will not be commented on any further. However, it is important to bear in mind that a decision in favour of the parties under either limb is sufficient to prevent the trade practices being deemed contrary to the public interest.

1. *Burden of proof*

Section 21(2)(a) formalises the public interest test which was inferred under the 1958 Act, particularly following the appeal decision in *Associated Booksellers.* Under that Act, if the parties were successful in demonstrating that some public benefit flowed from the agreement the evidential

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[167] See e.g. the comments of the Commerce Commission in *HANZ,* Decision No. 28 at para. 78.

[168] See Julius Stone, "Some Reflections on the Seminar" in Hambly and Goldring (eds.), *Australian Lawyers and Social Change* (1976) 383.

burden reverted to the Examiner to show the nature and extent of the detriment. As the overall onus of proof was on the Examiner, he had the legal burden of demonstrating that the detriments outweighed any benefits proved by the parties. Section 21(2) of the Commerce Act, however, reverses this situation; the onus is now on the parties to the practice to satisfy the Commission that the benefits from the practice outweigh the established subsection (1) effects, or, alternatively, that those effects are "not unreasonable". In practical terms, however, the change is not as significant as at first appears for the Examiner still has the evidential burden of establishing the weight of the proven S.21(1) effects and their detrimental consequences. To succeed, the Examiner has to establish that the detriment constituted by the S.21(1) effects outweighs the public benefit established by the parties to the practice. Onus will be determinant of the issue only where the benefits and detriments appear to be evenly balanced.

2. *No limitation as to type of benefit*

The New Zealand public interest test is framed broadly and no limitations have been imposed as to the type of public benefit that may be considered. The only requirement to be satisfied is that the effect must be of *demonstrable* benefit to the public. This requirement will be satisfied if it is possible for the parties to define or quantify the benefit; public benefits, however, do not always lend themselves to such treatment and, when this is the case, a qualitative assessment will have to be made. Some supporting evidence, however, will usually be insisted on as mere assertion is not enough. No reference is made to the magnitude of the public benefit; thus it is possible to envisage a situation where the cumulative effect of a number of public benefits, all relatively minor in themselves, is sufficient to outweigh the anti-competitive and other detriments, particularly if the latter are relatively mild.

The words "would have" allow the Commission to have regard to future effects, a factor which, as previously discussed, carries with it problems of proof.

A causal link must exist between the practice and the alleged benefit. Extending this criterion, the fact that it may be possible to secure the benefit by means other than a restrictive trade practice would weaken the claim, although this factor need not necessarily rule out consideration of the benefit altogether.

3. *Meaning of "public benefit"*

The concept of a "benefit to the public" has been interpreted broadly under New Zealand legislation. In *Associated Booksellers* a decrease in the availability of educational and technical books was said by Dalglish J. to be "contrary to the public interest in the widest sense". On the other hand, from Dalglish J.'s comments in *Kempthorne Prosser*, it may be concluded that the "public" need not be confined to the public in general but may also mean the public in one or more specific categories.

The Commerce Commission has also shown a tendency to interpret "public" broadly. In *Stock and Station Agents* the Commission said:[169]

[169] (1979) 1 NZAR 532 at 548, para. 76.

> In this case the public interest can be taken as embracing the interests of the farming community who are the direct consumers of the services, the national interest in maintaining efficiency and productivity in relation to industries which provide considerable employment opportunities and earnings of overseas exchange, and the individual interest of many New Zealand citizens whose livelihood depends on the totality of the industry involved.

However, benefits from price agreements have been accepted which only or chiefly accrue to the parties to the agreement. In *Master Grocers* the recommended price lists were said to assist the grocers themselves as they provided a "ready reference point" but this factor was not sufficient to outweigh the impairment to price competition. The Commerce Commission in *Stock and Station Agents* accepted the claim that the price agreement facilitated the operation of joint saleyards and joint stock sales, although the validity of this claim is open to question as it is likely that such co-operation would occur in the absence of the agreement.[170] In *HANZ* the Chief Justice saw considerable benefit in the price guides to hoteliers "by avoiding the need for [them] to spend time and effort in frequently checking and adjusting prices of liquor as it is supplied from the merchants."[171]

4. *The section 2A objects*

The difficulty with a public interest test cast in wide terms is that the Commission is called upon to be the arbiter of the public interest. Realising the problems which are inherent in this aproach, the Tarrant Review Committee recommended that some guidance in the form of statutory objectives should be included in the legislation. This recommendation was given effect to by the Commerce Amendment Act 1976 which inserted section 2A into the scheme of the Commerce Act. Section 2A(1) provides:

> (1) In the performance or exercise of their functions, powers, and duties under this Act, the Commission, Examiner, and the Secretary shall be guided by the following objects:
>
> (a) The promotion of the interests of consumers.
>
> (b) The promotion of the effective and efficient development of industry and commerce.
>
> (c) The need to secure effective competition in industry and commerce in New Zealand.
>
> (d) The need to encourage improvements in productivity and efficiency in industry and commerce in New Zealand.
>
> (e) The economic policies of the Government as transmitted in writing from time to time to the Commission by the Minister and as published by him in the *Gazette*.[172]

The above objects are not precise, nor exhaustive, and nor are they necessarily consistent; yet in spite of the wide casting they do give emphasis

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[170] Cf. *Application of Roberts Stewart and Co. Ltd.; A. G. Webster and Woolgrowers Ltd. and Websters F. and G. Pty. Ltd.* (1975) 1 TPCD [271].

[171] Addendum to *HANZ* appeal judgment at 8.

[172] The Government has so far utilised s. 21A(1)(e) on three occasions: viz., connection with policies regarding "high priority activities"; exchange gains and losses in the calculation of prices; and the production, distribution and price of liquefied petroleum gas. The last-mentioned activity was the subject of a recent collective pricing decision by the Commission: see *Re An Application by Liquigas*, Decision No. 49, 17 December 1980 (unreported).

to matters of fundamental importance to a sound trade practices policy, viz. the promotion of consumer interests, the encouragement of competition, and the need for greater efficiency in industry. Populist goals, e.g. the encouragement of small businesses, are not explicitly mentioned, although the clauses are probably broad enough to encompass such goals.[173] While the section 2A objects have been referred to by parties to proceedings and by the Commission itself in its decisions, the objects have been used to demonstrate the underlying policy of the Act, rather than being treated as specific criteria.

5. *The balancing process*

The balancing process involves the Commission determining whether the public benefits flowing from the practice are sufficient to outweigh the subsection (1) effects which the Commission has found the practice to exhibit. Under section 21(2)(a) such effects are treated as detriments and there would appear to be no need for further proof of their existence. From a practical point of view, however, the Examiner is unlikely to be content merely in relying on the fact that one or more of the subsection (1) effect exists; in order to attempt to tip the scales in his favour he is likely the stress the quantitative magnitude of the effects and will argue that inherent in the proven subsection (1) effects are specific adverse consequences detrimental to the interests of consumers. The specific detriments involved in each case will generally be a matter of inference from proved facts; in the final analysis, the readiness of the Commission to draw such inferences will probably be dependent to a large extent on how it views the role of competition in the particular industry involved.

The legislation is silent as to how the balancing exercise is to be conducted; neither is there much in the case-law which is of assistance. The formula which is usually cited is that laid down by Dalglish J. in *Associated Booksellers*:[174]

> Thus, in my view, whether a trade practice is looked at on the basis of an inquiry whether it 'unreasonably' reduces or limits competition within the meaning of para (d), or on the basis of a determination whether it is contrary to the public interest under the whole of the provisions of S.20, the matter must be looked at broadly and all relevant factors must be taken into account. There must be a balancing of the various factors from the point of view of the public interest before a determination can be made that a trade practice is contrary to the public interest.
>
> In the present case the Commission clearly has misdirected itself. It has not taken all the relevant factors into account and weighed them up from the point of view of the public interest.

This formula was invoked by the Chief Justice in *HANZ* who similarly believed that the Commission had not properly applied itself to the correct procedure inherent in the balancing exercise:[175]

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[173] For an excellent discussion of the objectives of antitrust law, see P. Areeda and D. Turner, *Antitrust Law* (1978) vol. 1, ch. 1B. The authors advocate that populist goals should be given little or no independent weight in formulating antitrust rules and presumptions.

[174] [1962] N.Z.L.R. 1057 at 1065.

[175] *HANZ* appeal judgment at 17.

> What must be done is that the Commission must consider whether the practice of publishing price lists has effects of demonstrable benefit to the public sufficient to outweigh the effects of the trade practice.
>
> This involves a weighing-up of benefits, on the one hand, and detriments on the other. This has not been done by the Commission. It has not even set out clearly what matters are claimed to be benefits and what are claimed to be detriments on the other so that a weighing up exercise can be done.
>
> It should not be a difficult matter to at least identify the factors. Once this has been done then the weight given to the various factors is essentially a matter for the Commission in accordance with the evidence and the inference the Commission may properly draw from that evidence.

Apart from the truism that all relevant points must be taken into account, neither of the above judicial statements is particularly instructive as to the problem of how the Commission should assess the relative importance of the needs of different categories of persons and how the merits or demerits of the various categories of interest are to be determined.[176] This is an area where the section 2A objects may prove of key importance as will also the qualifications, experience and value judgments of the members of the Commission.

6. *Types of benefit that have been advanced*

Dr Pengilley has suggested[177] on the basis of arguments submitted in New Zealand, Australian and United Kingdom cases that arguments in justification of horizontal agreements in restraint of trade come within one or more of the following grounds:

(a) The agreement prevents "chaotic" competition.
(b) The agreement promotes safety and quality of product.
(c) The agreement allows marketing in uneconomic areas.
(d) The agreement prevents loss of outlets.
(e) The agreement promotes research and development.
(f) The agreement promotes "service" to the consumer.
(g) The agreement promotes exports.
(h) The industry in its agreements charges but "reasonable" prices.

It is not my intention to examine each of the alleged grounds of justification as this has been done by other writers.[178] However, the "reasonable" prices argument does deserve special comment in the light of recent New Zealand developments.

Trade association price agreements have traditionally been justified on the basis that the prices fixed or recommended are "reasonable" prices. Although the "reasonable" prices argument has been rejected outright in a

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[176] For a suggestion as to how the various categories of interest should be weighed, see Collinge op.cit. ante n.1 at 226.

[177] Pengilley, "Comments on Arguments in Justification of Agreements in Restraint of Trade—the United Kingdom, Australian and New Zealand Experience" (1974) 14 Antitrust Bull. 257.

[178] See Collinge op.cit. ante n.1 at 217-227; Korah op.cit. ch. 6; Masterman and Solomon, *Australian Trade Practices Law* (1967) ch. 6; Walker op.cit. ch. 7; Wilberforce, Campbell and Elles op.cit. ch. 8, and Pengilley op.cit. ante n.177.

number of overseas jurisdictions,[179] and in the great majority of cases where it has been raised in other jurisdictions,[180] the argument is still likely to be canvassed in New Zealand in one or more forms.

If it has been established under section 21(1) that the practice has the effect of increasing or maintaining costs, prices or profits of goods or services, the trade association prices are almost certain to be higher than the prices that could be expected in a competitive market. Even though this may be the case, it is still open to the parties to justify their agreement under section 21(2)(b) on the ground that the prices etc. are "not unreasonable". As it is likely that anti-competitive detriment will also have been established, success in proving that the costs, prices or profits are "not unreasonable" will not be sufficient in itself for a favourable verdict. However, the parties will at least have reduced the weighting of the detrimental effects of the practice.

In the absence of any adverse effects under section 21(1)(a) to (d), the parties to the agreement may claim that prices are lower under the agreement than they would be under free competition. If the parties are able to prove such a claim, resulting benefit to the consumer may tend to establish that, on balance, the agreement is not contrary to the public interest. Such a finding was made by the United Kingdom Restrictive Trade Practices Court in *Cement Makers*[181] and this case is likely to be of precedential value in New Zealand. However, in practice, it is unlikely that parties to an agreement will be prepared to sell at prices lower than those which would prevail under free competition.

The most common form that the "reasonable" price argument is likely to assume is that the recommended prices are maximum prices and hold down or stabilise prices. This argument tended to assume importance while the Stabilization of Prices Regulations 1974 were in force but the removal of these regulations as from 1 April 1979 has meant that most traders no longer have to observe maximum mark-ups or margins. As yet, it is too early to predict whether the Commerce Commission will depart from its practice of approving, in certain circumstances, collective pricing applications that provide for the circulation of maximum recommended prices. The first indication that the Commerce Commission was prepared to accept maximum recommended prices was given in *Shipping Agents*[182] where the Commission decided not to hold a public inquiry because of the agreement

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[179] The land-mark U.S. case rejecting the reasonable prices argument is *United States* v *Trenton Potteries* (1927) 273 U.S. 392. The argument has also been rejected in Canada: see Gosse, *The Law of Competition in Canada* (1962) 155-167.

[180] For a discussion of the United Kingdom cases, see Masterman and Solomon op.cit. 231-236. The pre-1974 Australian cases are discussed in Donald and Heydon, *Trade Practices Law* (1978), vol. 1, 152-54.

[181] *Re Cement Makers Federation Agreement* (1961), L.R. 2 R.P. 241.

[182] *Re An Application by New Zealand Association of Shipping Agents Inc.* Decision No. 13, 9 August 1977 (unreported). The Commerce Commission has approved increases in the NZASA scale of fees and charges on three subsequent occasions subject to compliance by NZASA with conditions (iii) and (iv) of Decision No. 13: see Decision Nos. 46, 50 and 67 (unreported).

The rules of the New Zealand (Except Northern) Journalists Union (N.Z.J.U.) provide as follows:

> 7. CODE OF ETHICS: All members shall recognise the following code of ethics in the course of their employment:
>
> (a) To report and interpret the news honestly.
>
> (b) To promote, through their conduct, full public confidence in the integrity and dignity of their calling.
>
> (c) To observe professional secrecy in matters revealed in confidence to the furthest limits of law or conscience.
>
> (d) To use only honest methods to obtain news, pictures or documents.
>
> (e) Never to accept any form of bribe, either to publish or suppress.
>
> (f) To reveal their identity as members of the Press when not to do so would be contrary to ethical standards.
>
> (g) Not to suppress essential fact and not to distort the truth by omission or wrongful emphasis.
>
> (h) To observe at all times the fraternity of their profession and never take unfair advantage of a fellow member of the Union or any other member of a journalists union or other organisation of journalists in New Zealand.
>
> (i) To accept no compulsion to intrude on private grief.

The Northern Journalists Union also subscribes to this code. Together, the N.Z.J.U. and the N.J.U. cover all working journalists in newspapers and private radio stations; some senior staff are also members. Broadcasting Corporation journalists have their own voluntary association, the Association of Broadcasting Journalists. The A.B.J. has no written code of ethics, but a combination of an unwritten code and house rules yields a result similar in terms to the N.Z.J.U. code.

Broadcasters and newspaper journalists are of course obliged to act within the limits of the general law, but the professional allegiance to this code of ethics is so strong that journalists may in some cases see it as prevailing over the law. For instance, the National Council of the N.Z.J.U. has resolved that in the event of censorship such as that imposed in 1951 under the Public Safety Conservation Act 1932 "the Union will still expect all its members to honour the Code of Ethics and will give unlimited support to any member who is prosecuted for ethical journalism."[13]

2. *Broadcasting Standards and Rules*

At least 30 different statutes, regulations and rules of the general law have particular relevance to the media, including such little-known laws as the Optometrists and Dispensing Opticians Regulations 1977, the Designs Act 1953 and the Commercial Use of Royal Photographs Rules 1962.[14]

In addition to the general law, broadcasters are required by statute to adhere to certain standards and rules which derive from four principal sources. These sources must now be examined.

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[13] National Council Minutes, 26 May 1976.

[14] Neither the Press Council nor the broadcasting complaints procedure is intended to act in substitution for the Courts of Law, and they therefore do not seek to enforce the general law. The relationship between the general law and the complaints procedure is discussed in Part II below.

(i) Section 24(1) of the Broadcasting Act provides that:

1. The Corporation shall be responsible for maintaining, in its programmes and their presentation, standards which will be generally acceptable to the community, and in particular it shall have regard to—
   (a) The provision of a range of programmes which will cater in a balanced way for the varied interests of different sections of the community:
   (b) The need to ensure that a New Zealand identity is developed and maintained in programmes:
   (c) The observance of standards of good taste and decency:
   (d) The accurate and impartial gathering and presentation of news, according to recognised standards of objective journalism:
   (e) The principle that when controversial issues of public importance are discussed, reasonable efforts are made to present significant points of view either in the same programme or in other programmes within the period of current interest:
   (f) The maintenance of law and order:
   (g) The privacy of the individual.

Under section 95 of the Act private broadcasters bear identical responsibilities except that they are not expressly required to have regard to "The provision of a range of programmes which will cater in a balanced way for the varied interests of different sections of the community." However, private broadcasters face a more onerous liability than the Corporation in that they may be subject to a complaint that they have failed to have regard to "The need to ensure that a New Zealand identity is developed and maintained in programmes", whereas there is no provision for complaints against the Corporation under this head.[15] This disparity is surprising in view of the superior ability of the Corporation to ensure the development of a New Zealand identity in programmes, and the reasons for the distinction are not clear.

(ii) The Corporation is required under section 26 of the Act to maintain a standing committee, the Broadcasting Rules Committee, which formulates detailed standards and rules applying to radio and television programmes.[16] The Committee has prepared booklets setting out these standards and rules, and from time to time it issues circulars interpreting or amending sections in these booklets. Representatives of the I.B.A. must be included whenever the Committee considers the radio rules, and ratification by the Corporation (and the I.B.A. in the case of radio rules) is required before rule changes come into effect. The rules are enforced through the complaints procedure and through the power of the Tribunal to direct and discipline warrant holders.

(iii) Statutory regulations which specifically affect programme rules include the Radio Regulations 1970 (especially Regs. 49-52) and the Broadcasting Regulations 1977. Under section 98(h) of the Broadcasting Act the Governor-General may, by Order-in-Council, make regulations prescribing conditions relating to warrants. This power may be used to

[15] Nor may complaints be brought against the Corporation under s. 24(1)(a).

[16] The Broadcasting Regulations 1977 set down the procedure for the operation of this Committee.

thwart decisions of the Broadcasting Rules Committee, although this has been done only once.[17]

(iv) As has been noted, each broadcasting station must hold a warrant or authorisation issued by the Broadcasting Tribunal. Where it appears to the Tribunal that a station has failed to adhere to the programme rules made under section 26, it may make such direction to the station as it thinks fit.[18] Any subsequent failure to comply with the direction is a breach of the conditions of the station's warrant, and the Tribunal may impose a fine of up to $500 on the warrant-holder. The Tribunal may also revoke or suspend the warrant, but this power may not be exercised in respect of warrants held by the Corporation except at the request of the Corporation or with the consent of the Minister.

The disciplinary powers of the Tribunal also apply where there has been a breach of the express or implied conditions of a station's warrant. The Tribunal must hold a public hearing before exercising its disciplinary powers,[19] and there is a right of appeal to the Administrative Division of the High Court.[20]

The Tribunal has not had occasion to exercise its power to revoke or suspend warrants. It has, however, had recourse to a more subtle sanction, namely the power to renew warrants for less than the maximum period of five years. The power was first used in the case of two Auckland stations to reduce the renewal period to three years; the implied threat to the stations' continued existence had a marked effect on the managers and directors of the stations concerned.

Despite its lack of use, the power to revoke or suspend warrants is potentially a very potent weapon, and it is noteworthy that this power is exercisable more readily against private radio stations than against the Corporation. The probable reason for this difference in treatment is that the assets of the Corporation are publicly owned, and the Corporation is accountable to Parliament through the Public Expenditure Committee, the annual estimates debates, the Corporation's annual report to Parliament, and members' questions to the Minister. Furthermore, the Corporation holds statutory powers with which it is expected to perform certain statutory duties. Private radio stations, on the other hand, are said to be accountable only to the shareholders, and they owe no duty to anyone outside the terms of the warrant. Hence, it is argued, they do not require the Minister to intercede between them and the Tribunal. It is submitted, however, that this is insufficient reason for the difference in treatment. If the Tribunal is to be entrusted with the power to revoke or suspend warrants, the public interest requires that this power be exercisable equally in respect of Corporation and private stations. The role of the independent Tribunal should not be undermined by the interposition of the Minister as a protector of the Corporation. If, alternatively, the intention

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[17] A statutory regulation in 1977 to prohibit advertising promoting the consumption of alcohol—see Part II below.

[18] *Broadcasting Act*, s. 83.

[19] Ibid., s. 76(4).

[20] Ibid., s. 84(1).

is to reserve to the Tribunal a discrete power to silence private radio stations, then it is reasonable to ask just why this power is necessary. The evidence presented in part II of this article shows that the Tribunal must have teeth if it is to work effectively, and it is therefore submitted that the power of the Tribunal to revoke or suspend Corporation warrants should be exactly the same as that presently applying to privately-held warrants.

3. *Conclusion*

There is a substantial element of self-regulation in both the printed and the electronic media. The Press Council is an entirely voluntary body; both its jurisdiction and its authority rest upon the consent of the constituents. The standards enforced by the Council emanate almost exclusively from the newspaper industry. The broadcasting complaints procedures are statutory, but the primary responsibility for prescribing and enforcing programme standards is entrusted to the broadcasters themselves. The Broadcasting Rules Committee is composed solely of representatives of the broadcasting industry; this body is responsible for most of the specific rules on programme standards. The Corporation complaints committees and the Committee of Private Broadcasters are structured to represent the interests of broadcasters. As it is put in the preamble to the *Standards and Rules*:

> The quality of broadcasting in New Zealand is very much in the hands of broadcasters themselves: the standards they aim at, and the degree of self-discipline they impose on themselves, will more than anything else dictate the nature of the end product.

The importance of self-regulation in broadcasting must not be understated. Nevertheless, it remains true that the power of broadcasters to set their own standards is exercised only on the suffrance of the Government, and that the final arbiter of compliance with the standards is the independent Tribunal. To this extent, the press enjoys much more freedom to prescribe and police its own standards.

It is readily apparent that the standards and rules applying to broadcasting are more precise, more detailed and more comprehensive than those applying to the press. Broadcasting standards are codified in written form, whereas press standards must be gleaned from Council decisions, the Code of Ethics, and press practice. This conclusion is unsurprising, for it accords with the pattern of greater and closer regulation of the broadcasting media. It now becomes necessary to focus on some specific standards and rules to ascertain whether the differences in rules and procedures are reflected in the decisions made on complaints in each branch of the media.

PART II DECISIONS ON COMPLAINTS

For the purposes of this comparative analysis, it is useful to divide the decisions made by the various adjudicating bodies into two broad categories. Section A deals with the substantive aspects of these decisions in five of the most important areas, and Section B reviews the procedural aspects of the substantive decisions.