AUSTRALIAN TRADE PRACTICES LAW AND THE AMERICAN EXPERIENCE

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I INTRODUCTION

The purpose of this article is to examine Australia's solution to the problem of anti-competitive trade practices in the context of Australia's distinctive economic structure and in the light of the American experience of antitrust legislation.

The Trade Practices Act 1965-1967 (Cth) has been subjected to severe and searching criticism by Australian lawyers ever since it was first proposed by the Commonwealth government in December 1962.[1] The Act, while regarding competition (in the sense of a market process)[2] as a desirable feature of Australian economic life, also acknowledges that in some cases restrictions on competition may be justified by certain overriding considerations which are collectively lumped together under the expression 'public interest'. Basically, this is also the approach underlying the United Kingdom legislation and differs radically from the more rigid approach of the United States with its emphasis on *per se* rules and its refusal, by and large, to permit any practices to tamper with the market process, quite irrespective of the extent to which such practices may be 'required by the public interest'.

In assessing the purpose and effect of the Australian legislation it is important to notice that with two exceptions,[3] no class of practices or agreements is directly prohibited or rendered illegal by the Act. Thus agreements (whether registrable or not) and practices, even though examinable, may still be legally observed or carried on by the parties. Before an agreement or practice becomes illegal, the following conditions

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[1] Commonwealth, *Parliamentary Debates,* 6 December 1962, 3102-14. These original proposals consisted merely of a detailed statement of the government's intentions and were to undergo numerous changes in form and substance before being enacted as the Trade Practices Act. The original proposals are analyzed in some detail in the following articles: Stalley, 'The Commonwealth Government's Scheme for the Control of Monopoly and Restrictive Practices—A Commentary' (1963) 37 *Australian Law Journal* 85; Richardson, 'The Law Relating to the Australian Trade Practices Plan' (1963) 37 *Australian Law Journal* 203, 239; Korah, 'The Commonwealth Proposals for Legislation Controlling Monopolies and Restrictive Trade Practices' (1964) 38 *Australian Law Journal* 190.

[2] See *infra* for a discussion on the term 'competition' in the context of the Australian Act.

[3] The two exceptions are collusive tendering and collusive bidding which are prohibited directly by the Act (ss 85 and 86 respectively).

must be satisfied. First, the agreement or practice must be examinable.[4] Secondly, the Commissioner must form the opinion that it is contrary to the public interest.[5] Thirdly, the Commissioner must consult with the relevant parties with a view to securing such undertakings or action as will render the proposed proceedings unnecessary.[6] Then the Commissioner must decide to institute proceedings and the Tribunal must find that the restriction (to be found in the agreement) in question or the practice is contrary to the public interest.[7] The effect of such a determination is that the relevant restriction or any portion of an agreement providing for the relevant practice becomes unenforceable. However, any transactions entered into between the parties pursuant to such restriction or in accordance with such practice are 'not illegal or unenforceable by reason only of the making of that determination'.[8] The Tribunal is then given a wide discretion enabling it to make Orders which will have the effect of prohibiting the parties from enforcing the relevant restriction or from engaging in the relevant practice.[9] Any person who fails to comply with such an order is guilty of a contempt of the Tribunal which is punishable by the Commonwealth Industrial Court as if it were a contempt of court. However, no proceedings are to be instituted in respect of such contempts without the consent in writing of the Attorney-General.[10] The Act also provides for civil proceedings which enable a person suffering damage by reason of acts committed by another in contravention of an Order of the Tribunal to recover the amount of his damage from that other person in a court of law. A finding of fact in relevant contempt proceedings is evidence of that fact for purposes of the civil proceedings.[11]

II RULE OF REASON VERSUS PER SE ILLEGALITY

When the Sherman Anti-Trust Act[12] was passed in 1890, the United States Supreme Court was faced with the task of developing tests which would limit its language for otherwise it could easily be construed to

[4] S. 35 (1) defines examinable agreements and s. 38 sets out a number of matters to which regard is not to be had in determining whether the agreement is examinable. The corresponding provisions of the Act relating to examinable practices are ss 36, 39.

[5] S. 47 (1).

[6] S. 48 (1).

[7] S. 49 (1). See s. 50 which gives content to the term 'public interest'.

[8] S. 51 (3).

[9] S. 52.

[10] Ss 67, 68.

[11] Ss 88, 90.

[12] The text of the first two sections of the Sherman Act reads as follows: S. 1 'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . .' S. 2 'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations shall be deemed guilty of a misdemeanor . . .'

render illegal all contracts entered into in an interstate setting.[13] Thus in 1911, the Supreme Court speaking through Chief Justice White announced that section 1 of the Sherman Act rendered illegal only undue restraints of trade and that the common law 'standard of reason' should be applied in 'determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided'.[14] For various reasons which will be analyzed shortly, this vague standard of reason was thought to be unsatisfactory and the courts soon outlined certain types of agreements which were held to be illegal *per se* under section 1 of the Sherman Act. Thus in *Northern Pacific Railway Company v. U.S.* Justice Black in delivering the opinion of the Court said:[15]

> there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use . . . Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing; *U.S. v. Socony-Vacuum Oil Co.*;[16] division of markets, *U.S. v. Addyston Pipe & Steel Co.*;[17] group boycotts, *Fashion Originators' Guild of America v. Federal Trade Comm.*;[18] and tying arrangements, *International Salt Co. v. U.S.*[19]

As indicated earlier, apart from the prohibited practices of collusive tendering and collusive bidding, the Trade Practices Act does not provide that any agreement or practice is to be held illegal *per se*.

The arguments in favour of the *per se* rule[20] however, are not necessarily compelling when applied to the very different framework of the Australian Act. The central thrust of the American antitrust laws is to render illegal conduct contravening the prohibitions contained in the various statutes. The only guide provided for the American businessman is the body of American antitrust law as interpreted by the courts. If the rules are vague and the standards difficult to apply, the businessman will have no way of knowing whether his proposed conduct comes within the prohibitions of the antitrust legislation. The results are uncertainty, lengthy trials requiring an assessment of economic arguments and data

[13] The first step in this direction was taken by Taft J. in *U.S. v. Addyston Pipe & Steel Co.* (1898) 85 F. 271 where the Court adopted the common law distinction between naked and ancillary restraints in distinguishing between those restraints which were illegal under s. 1 of the Sherman Act and those which were merely ancillary to some lawful contract and thus not necessarily prohibited. Such ancillary restraints will, however, be rendered illegal if accompanied by an 'actual attempt to monopolize', *ibid* 291. See also Bork, 'The Rule of Reason and the Per Se Concept: Price Fixing and Market Division' (1965) 74 *Yale Law Journal* 775, 780.

[14] *Standard Oil Co. of N.J. v. U.S.* (1911) 31 S. Ct. 502, 516. See also *U.S. v. American Tobacco Co.* (1911) 31 S. Ct. 632.

[15] (1958) 78 S. Ct. 514, 518.

[16] 310 U.S. 150.

[17] 6 Cir., 85 F. 271.

[18] 312 U.S. 457.

[19] 332 U.S. 392.

[20] For examples see *Northern Pacific Railway Co. v. U.S.* (1958) 78 S. Ct. 514, 518; *U.S. v. Trenton Potteries Co.* (1927) 47 S. Ct. 377, 379.

which the courts may be ill-equipped to make, and finally, the injustice of a man being punished criminally (or being made civilly liable) for acts which were not clearly illegal when carried out.[21]

In contrast, the emphasis of the Trade Practices Act is not on punishing or attaching civil liability to past conduct but rather on proscribing future activity. The Act in effect creates a licensing system to cope with the problems presented by certain types of agreements and practices which are likely to have anti-competitive effects on the Australian economy. Thus, if a businessman is desirous of entering into a certain type of arrangement he may be called upon by the Commissioner to 'obtain a licence' (so to speak) for the same by proving, to the satisfaction of the Tribunal, that the arrangement is not contrary to the public interest. The standards may well be vague, but the Australian businessman knows that no matter what the ultimate decision of the Tribunal may be, his past activities cannot possibly be held illegal. Criminal and civil liability attaches only in respect of those activities carried out subsequent to and in contravention of an order made by the Tribunal. Even more significant is the fact that the Australian Act specifically lays down procedures whereby those proposing to enter into a particular arrangement or venture, may, under certain circumstances, obtain a ruling in advance from the Tribunal. Such a ruling will usually be made operative for a minimum period of five years during which time the Commissioner cannot apply for leave to rescind the ruling.[22] As a practical matter, a clearance once given is very unlikely to be revoked unless there is a substantial change in either economic conditions or the Tribunal's interpretation of the Act. Even if such a change occurs, often the parties will be able to negotiate a compromise with the Commissioner which will operate as a modification of existing arrangements rather than a complete abandonment thereof.

Thus, when the requirement of justice for the individual businessman is viewed against the framework of the Australian Act, it becomes obvious that the absence of legal certainty in the sense advocated in particular by many of the American judges will not result in unfairness or arbitrary consequences.

It is sometimes suggested that the judges constituting courts of law do not have the necessary training or background to deal with the complex economic issues which a typical 'rule of reason' antitrust case is likely to raise. Even assuming the validity of this argument it is rendered

[21] If the Antitrust Division of the Justice Department indicates that a particular form of activity is not prohibited by antitrust legislation and undertakes not to sue, the government will not be bound by such undertaking should it subsequently decide to institute proceedings.

[22] S. 61. While it is true that the Act does not provide a mechanism for advance clearance of long-term arrangements, this is not a serious objection in light of the fact that the legislation applies only to contract combinations and not to mergers. The disruptions and economic hardships following from divestiture decrees in merger cases will usually not be present when the parties are merely enjoined from putting into effect a particular restriction in an agreement. *Cf. U.S. v. E.I. Du Pont De Nemours & Co.* (1956) 77 S. Ct. 872.

inapplicable in the Australian context in view of the provisions of the Act which constitute the Trade Practices Tribunal as a primarily lay body. The Act provides that the Tribunal will sit in divisions, each of which will be constituted by a Presidential member having legal qualifications[23] and two other members who are to be qualified for appointment by virtue of their 'knowledge or experience in, industry, commerce or public administration'.[24] All issues, except for questions of law, are to be determined by a majority of the Tribunal whose decisions on all factual matters will be final and not subject to review in any court of law. It has been argued that if the issues were formulated in such a way that they could be ruled upon by courts of law, then any decision given will be *res judicata* and 'the case cannot be reopened simply because the economic conditions on which the decision was based have changed, as they inevitably will'.[25] But surely, it should be possible to appoint sufficient persons to serve on the Tribunal and to devise an administrative set up which is efficient enough to cope with these problems.[26] It would, to say the least, be an arbitrary policy which ignores subsequent economic changes when they may well have a profound impact on the economic consequences of the relevant agreement or activity.[27]

American commentators have often referred to the alleged impossibility of making a rational choice between conflicting economic and social interests which the typical rule of reason approach requires.[28] Professor Turner comments as follows:

> One of the virtues of accepting competition as a standard is that it minimizes the courts' burden of choosing between, or balancing, conflicting economic and social interests. In contrast to the British court charged with applying the British Restrictive Practices Act, for example, our courts have not been called upon to determine the validity of a price-fixing agreement by weighing the consumer interest in lower prices against the interest of the stockholders and wage-earners of a distressed industry.[29] The standard of competition has provided an answer.[30]

[23] S. 10 (1).
[24] S. 10 (2).
[25] Geoffrey de Q. Walker 'The Trade Practices Bill: The Need for More *Per Se* Rules' (1965) 39 *Australian Law Journal* 125, 130.
[26] There seems to be no factual evidence which would conclusively show one way or another whether the Commonwealth government has sufficient resources at its disposal to provide the required number of qualified members for the Tribunal and an administrative organisation which would be capable of efficiently policing the law.
[27] The combination of an efficient administrative organization and the effective use of the Commissioner's powers of consultation will no doubt ensure that the decision making process is able to keep pace with changing economic conditions.
[28] For an analysis of the different themes which operate within the 'Rule of Reason' see Bork, 'The Rule of Reason and the Per Se Concept: Price Fixing and Market Division' (1965) 74 *Yale Law Journal* 775.
[29] This is precisely the type of determination which the Tribunal will be called upon to make under the Australian Act.
[30] Turner, 'Conglomerate Mergers and Section 7 of the Clayton Act' (1965) 78 *Harvard Law Review* 1313, 1395. See also Bork and Bowman, 'The Crisis in Antitrust' (1965) 65 *Columbia Law Review* 363, 370. It is difficult to detect any factual basis for the professors' view that only economic criteria will provide standards of sufficient certainty.

However, to ignore conflicting social and economic interests will no doubt simplify the reasoning process but at the same time will produce grossly distorted decisions. Opinions may differ as to what should be the proper scope of the court's enquiry in certain types of cases. Yet, to argue (as Professor Bork does) that an inability to predict how a court will resolve a conflict between two opposing policies should lead us to question whether the system 'deserves the name of law' is to misconceive the essential nature of the judicial process.

In many cases, the policies to which Turner refers will not conflict; often they will both point in the same direction. Furthermore, even when the policies are in conflict, frequently the context will make it clear that one is to be preferred over the other. As for the Australian scheme, it is anticipated that over a period of time the Tribunal and courts will build up a body of case law which will supplement the rather brief statutory definitions and serve as an important aid to lawyers in predicting the outcome of future cases. The provisions in the Act relating to the review of determinations of the Tribunal will no doubt ensure that basic policy decisions are applied systematically and also inject an element of permanence and continuity into the general policy approaches adopted by the various Divisions of the Tribunal.

The argument in favour of the *per se* rule based on the inordinate length of proceedings and resultant complexity which the Australian approach is alleged to give rise to, has already been mentioned. No doubt procedures will have to be devised which will limit the volume of evidence and narrow down the issues involved in any determination by the Tribunal. It is true that the Tribunal will be obliged to apply a broad range of economic and social criteria in determining whether or not a given restriction or practice is contrary to the public interest,[31] but this does not imply that the factual material to be considered by the Tribunal need be unlimited in extent or produce impossibly long and drawn out proceedings.[32] As Professor Bok points out:

> There is undoubtedly a point in human understanding where information can be said to bear upon a situation without being understood well enough to assist in predicting the course of future events.[33]

The Tribunal will have at its disposal several devices which can be utilized to limit effectively the factual material to be placed before it. Allocating the burden of proof, deciding on different presumptions which different sets of circumstances will give rise to, establishing *prima facie*

[31] S. 50 (2). See *infra*.

[32] Regulation 24 of the Trade Practices Regulations (S.R. 1967 No. 98) expressly provides for a preliminary conference to take place before the Tribunal (constituted by a Presidential member), its purpose being 'to facilitate the orderly convenient and expeditious conduct of the proceedings and, as far as possible, to simplify the proceedings' (Reg. 24 (3)). See also Reg. 24 (4) which sets out a number of matters that may be considered at such a conference.

[33] Bok, 'Section 7 of the Clayton Act and the Merging of Law and Economics' (1960) 74 *Harvard Law Review* 226, 349.

rules for the balancing of conflicting criteria in certain common factual settings are only some of the methods available for limiting the factual material to the point where it can be 'understood well enough to assist in predicting the course of future events'.[34]

It is submitted that the Australian approach is preferable to the arbitrary *per se* rule, the proponents of which seek to shelter behind the protective wall of legal certainty while ignoring the equities and economic setting which must be given due weight if a just and rational decision is to be rendered in each particular case.[35]

It is one thing to concede that even the most carefully framed law cannot cover all contingencies. Where unprovided for contingencies arise it may be quite legitimate for the Attorney-General to fill the *casus omissus* in the law through the exercise or non-exercise of his discretion to prosecute. It is quite another matter deliberately to create a rule of law which is arbitrary, which does not provide for certain contingencies likely to have a major impact on the equities in any particular case, and then rely on the Attorney-General's discretion to ensure that no injustices will thereby be perpetrated.[36] Such an approach is not in keeping with our democratic traditions and constitutes an unwarranted investiture of judicial power in the executive branch of the government.

The definition of 'public interest'[37] in the Australian Act does at least indicate the factors and policies which the government considers relevant and which must be balanced against each other by the Tribunal in every case. The Tribunal will not be choosing between conflicting policies but rather will be assessing the relative weight of those policies in specific fact situations. The alternative of leaving these issues to the discretion of the enforcement agency which need give no reasons for its decisions is, as already indicated, unsatisfactory.

The purpose of the preceding analysis was threefold. First, to outline the differences between the American and Australian solutions to the problem of controlling anti-competitive activities in their respective economies. Second, to indicate that the reasons for the adoption of the *per se* rule approach in the U.S. are certainly not compelling in the context of the particular scheme enacted by the Commonwealth Parliament.[38] Finally, to suggest that whatever the particular context, the *per se* rule

[34] *Ibid.* See *infra* for an elaboration of this theme.

[35] The application of a rigid simplified rule to fact situations exhibiting significant variations is hardly conducive to equality or the furtherance of justice.

[36] See for example Walker, 'The Trade Practices Bill: The Need for More Per Se Rules' (1965) 39 *Australian Law Journal* 125, 131.

[37] S. 50.

[38] For an analysis of the disadvantages of the Restrictive Practices Court and its procedures under the Restrictive Trade Practices Act 1956 (Eng.) see Leyland, 'Competition in the Court' (1965) *Oxford Economic Papers* XVII, 461-7 (reprinted in Low (ed.), *The Economics of Antitrust: Competition and Monopoly* (1968) 163). It is interesting to note that most of the disadvantages listed do not apply to the Australian scheme.

approach may well lead to arbitrary and unjust results and is not in keeping with the democratic tradition.

III THE SCOPE OF THE COMMONWEALTH ACT: JURISDICTIONAL LIMITATIONS

The jurisdictional bases of the Tribunal's power to make determinations and orders in respect of agreements are to be found in section 35 of the Trade Practices Act. This provision is couched in extremely wide language and covers horizontal agreements between two or more persons carrying on businesses that are competitive with each other under which certain restrictions are accepted, including *inter alia* restrictions in respect of 'the terms or conditions . . . as to any . . . matter, upon or subject to which dealings may be engaged in'.[39] Without purporting to analyze the precise scope of the above provision, it will suffice for present purposes to point out that the section encompasses all the horizontal agreements which have been held illegal *per se* in the United States plus many more. Horizontal price fixing agreements,[40] group boycotts,[41] agreements between competitors allocating markets[42] are both illegal *per se* in the United States and examinable agreements under the Australian legislation.

In addition, the Trade Practices Act also applies to certain practices defined in section 36. One is the practice, engaged in by a buyer in connection with the acquisition of goods, of attempting to induce his supplier by threat or promise to discriminate in his favour as to prices or terms of dealing 'where the more favourable terms or conditions are, or would be, likely substantially to lessen the ability of any person or persons to compete with the person engaging in the practice'.[43] It is hard to see any reason for this last requirement in view of the fact that the Tribunal cannot determine that a practice is contrary to the public interest unless there is a 'proved restriction of or tendency to restrict, competition'.[44] The second practice consists of forcing another person's product.[45]

[39] S. 35 (1) (a).

[40] *U.S. v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150.

[41] *Fashion Originators Guild v. Federal Trade Commission* (1941) 312 U.S. 457; *Klors Inc. v. Broadway-Hale Stores Inc.* (1959) 359 U.S. 207.

[42] *U.S. v. Sealy Inc.* (1967) 87 S. Ct. 1847.

[43] S. 36 (1) (a). Compare ss 2 (a) and (f) of the Clayton Act (as amended by the Robinson-Patman Act 1936) which prohibited price discrimination. Contrast the Australian legislation which only renders illegal, in certain circumstances, any inducing of such discrimination in favour of the person engaging in the practice. See, however, the definition of monopolization in s. 37 (1) of the Australian Act.

[44] S. 50 (1). It may be that the required effect on the ability of persons to compete does make sense if we are prepared to concede the possibility of a difference between hurting *competitors* and restricting *competition*. See *infra*. Furthermore, there may be some significance in the word *'substantially'* in s. 36 (1) (a) which perhaps implies something more than a mere 'restriction of . . . competition' (s. 50 (1)). It should also be noted that the required detriment to competitors must be found before the Tribunal has jurisdiction to examine the practice and thus could raise questions of law to be decided by the Presidential member of the Tribunal alone or referred for determination by the Commonwealth Industrial Court (s. 66).

[45] S. 36 (1) (b).

This would occur where a supplier refuses to sell to a buyer unless the buyer acquires all or part of his requirements of goods *of another class* from a particular third person. Neither the practice of engaging in reciprocal buying programs[46] nor tying arrangements[47] are covered by the Act unless there is a horizontal agreement between competitors. Apart from the practice of monopolization, which will be dealt with separately, there only remains the practice of inducing refusal to deal. The typical situation would be something like this. A is in competition with B. Both supply goods to C and D. A, in pursuance of an agreement with C, induces D not to deal with B. The section requires that A, in doing the 'inducing', act in pursuance of an agreement with another person. However, that other person need not be a competitor of A and the practice may arise out of either a vertical or a horizontal arrangement.[48]

It is to be emphasized that the Act does not apply to any vertical arrangements apart from the three practices listed.[49] Thus, none of the following are within the purview of the Act: resale price maintenance, vertical arrangements allocating markets and providing for customer restrictions, exclusive dealing agreements, requirements contracts and individual refusals to deal.

To take price fixing as an illustrative anticompetitive practice, the following would be the position under the Australian legislation:

(1) A and B are in competition and C is their supplier. A and B agree to sell one of their products supplied by C at a certain fixed price. This is an examinable agreement within the Act.

(2) C enters into identical agreements with both A and B which have the effect of fixing the price at which both A and B can sell products supplied by C. This is a vertical arrangement, and not being the result of any agreement or understanding between A and B, does not come within the Act.

(3) At A's insistence, C enters into a contract with A whereby the price at which A can sell products supplied by C is fixed at a certain sum. A informs C that he will no longer buy C's goods unless C deals with A's competitors (in this case B) on identical terms. C therefore enters

[46] *E.g.* A agrees to buy product X from B if B agrees to buy product Y from A.

[47] *E.g.* A will supply B with product X only if B also purchases product Y from A. It is not clear why this type of arrangement should not equally constitute an examinable practice under the Act.

[48] Note that s. 35 (1) relating to examinable agreements does not apply to vertical arrangements. Compare s. 37 (a) dealing with the practice of monopolization (see *infra*). Under that provision A, in doing the 'inducing', *need not* act in pursuance of an agreement with another person. Query whether there is any justification for the limitation in s. 36 (1) (c).

[49] The only exception is the practice of monopolization, (*infra*). Of course, vertical arrangements may well be indirectly struck at in the case of fully or partly integrated business concerns such as manufacturers or wholesalers who also have retail outlets.

into an identical agreement with B. This case, as with case (2), involves a vertical arrangement and does not come within the purview of the Act. There is clearly no 'agreement' between A and B nor 'an arrangement or understanding'[50] so as to bring the facts within case (1). Indeed there is no reason why B should even know about the agreement between C and A.

It is understandable why case (1) should come within the purview of the Act; the anti-competitive effects are fairly obvious. One can also make an argument for case (2) being excluded from the reach of the Act: resale price maintenance may be the only way the supplier can protect his products. It gives him a lever which may help to ensure that his goods are properly promoted and that retailers will not ruthlessly cut prices on the supplier's products with a view to attracting customers for the purchase of other suppliers' products.[51] However, case (3) should undoubtedly be encompassed within the act. What the parties have done is to make use of the arrangement existing in case (2) to achieve the result attained in case (1).

The same analysis would apply in relation to practically all types of horizontal agreements covered by the Act which suggests that the Australian legislation is full of loopholes which should be plugged as soon as possible. In the writer's view, the jurisdiction of the Tribunal should not be limited to specified forms of agreements and practices. A mere glance at the provisions of the present Act should be sufficient to give the casual observer at least some conception of the difficulties of interpretation which are raised. Definitions are complex and detailed, yet wide and uncertain in their application. The Act would be considerably simplified if these jurisdictional requirements were deleted and instead the Tribunal invested with jurisdiction to examine *any* agreement or practice to determine, according to certain criteria, whether that agreement amounts to a restriction of competition which is contrary to the public interest. There is, of course, no objection to making provision for certain *specific* exemptions, for example, provisions in agreements approved by state legislation, or for compliance with standards approved by certain designated organizations.[52]

[50] S. 91. Both the American and English courts and legislatures have considerably extended the meaning of the terms 'agreement' and 'conspiracy': *Interstate Circuit Inc. v. U.S.* (1939) 306 U.S. 208; *Esco Corporation v. U.S.* (1965) 340 F. 2d 1000; *British Basic Slag Ltd. v. Registrar of Restrictive Trading Agreements* (1963) L.R. 4 R.P. 116, 155. See Walker, *Australian Monopoly Law: Issues of Law Fact and Policy* (1967) 95-102; Turner, 'The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusal to Deal' (1962) 75 *Harvard Law Review* 655.

[51] In the United States resale price maintenance agreements are illegal *per se*: *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911) 220 U.S. 373. However, note the limited approval accorded to State 'fair trade' laws. See *U.S. v. McKesson & Robbins Inc.* (1956) 351 U.S. 305 for an analysis of the scope of the relevant statutes.

[52] See s. 38.

IV THE PUBLIC INTEREST CRITERIA AND THE PRESUMPTIVELY ILLEGAL PRACTICE AND ARRANGEMENT

Section 50 of the Trade Practices Act lays down the considerations to be taken into account by the Tribunal in determining whether a restriction or practice is contrary to the public interest. The section suggests that the burden is first on the Commissioner to prove at least a tendency to restrict competition. Once this has been proven it would seem that the burden then shifts to the person engaging in the practice or the parties to the agreement to show that, on balance, the same is not contrary to the public interest by reference to the criteria set out in the section.[53]

In analyzing the basic philosophy underlying the Sherman Act, Justice Black once remarked as follows:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions.
>
> *But even were that premise open to question, the policy unequivocally laid down by the Act is competition.*[54]

The premise articulated by Justice Black has at least been questioned, if not rejected, by the framers of the Commonwealth Trade Practices Act. A careful reading of section 50(2) of the Act will reveal that collectively, the criteria set forth closely correspond with Justice Black's conception of the advantages to which free competition will give rise, the premise on which the policy favouring free competition rests. The basic idea underlying section 50 of the Act is that free competition *will not always* yield those results which justify the legislative policy prohibiting restrictions thereon. In Australia, a restriction on competition can be justified if it does not detract from the end results or premise on which the policy in favour of free competition is grounded. Competition is not therefore an end in itself but a means of securing certain benefits which the Attorney-General for the Commonwealth of Australia, in referring to the term 'public interest' outlined as follows:

> The maintenance of free enterprise under which citizens are at liberty to participate in the production and distribution of the nation's wealth, thus ensuring competitive conditions which tend to initiative, resourcefulness, productive efficiency, high output and fair and reasonable prices to the consumer.[55]

[53] Query the result if the factors set out in s. 50 (2) indicate that the relevant agreement or practice is in fact contrary to the public interest despite the fact that the Commissioner has been unable to prove a tendency to restrict competition.

[54] *Northern Pacific Railway Co. v. U.S.* (1958) 78 S. Ct. 514, 517 (italics inserted).

[55] Commonwealth, *Parliamentary Debates*, 6 December 1962, 3103.

The conflict which the Tribunal under section 50 of the Act must resolve by a careful process of balancing, is not 'free competition *versus* the public interest', the public interest being conceived of as something external and unrelated to the notion of free competition. Rather, the opposing considerations can be formulated as:

> The restriction of competition as a market process plus a presumption that certain adverse consequences will necessarily follow from such a restriction *versus* a showing that despite such restriction on competition *in fact*, only some or few or none of the 'presumed' adverse consequences have occurred or are likely to occur *and* that the actual consequences may even produce a beneficial or positive effect.

Once it is recognized that the basic problem is as outlined above the way is open for a rational solution which will take into account both the equities of each individual case and the administrative and practical problems discussed earlier.

The American solution was that certain types of arrangements having a direct effect on competition as a market process were declared illegal irrespective of the actual economic effects which they produced. The rationale for one class of such arrangements was that the 'presumed' adverse consequences nearly always followed *in fact*. The other class of arrangements tainted with *per se* illegality encompassed those practices which involved the oppression or coercion of competitors.[56] There is, of course, considerable overlap between these two categories and different attributes of the same arrangement may fall into either or both classes. Nevertheless, the two different rationales are, and should be, kept distinct.

It is against this background that an attempt will be made to elucidate the meaning of the phrase 'the detriment constituted by any proved restriction of, or tendency to restrict, competition' in the context of section 50(1) of the Act.

One possible interpretation is that the mere existence of an examinable practice or agreement necessarily constitutes a 'proved restriction of . . . competition'. As Justice Brandeis has remarked, 'every agreement concerning trade, every regulation of trade, restrains [competition]. To bind, to restrain, is of their very essence'.[57] This would mean that the Commissioner automatically discharges his burden of proving a restriction of competition the moment he satisfies the Tribunal that the particular practice or agreement comes under its jurisdiction. This interpretation,

[56] A typical case of coercion would be the group boycott held illegal in *Klor's Inc. v. Broadway-Hale Stores Inc.* (1959) 359 U.S. 207. This was a case which involved the coercion of an individual trader. There were practically no effects on the public nor on competition as a market process. Yet the arrangement was held illegal. Although there are some statements in the cases to the effect that the anti-trust laws were designed to protect competition, not competitors, the better view would seem to be that this is not necessarily the case. See *U.S. v. Aluminium Co. of America* (1945) 148 F. 2d 416, 427, *per* Learned Hand J.

[57] *Board of Trade of City of Chicago v. U.S.* (1918) 38 S. Ct. 242, 244.

however, is unsatisfactory for the terms of section 50(1) of the Act clearly contemplate proof of a restriction of competition over and above the mere existence of the agreement or practice in question.

The concept of harm to competitors is not a useful criterion in determining whether a particular arrangement restricts competition, since it is not in itself a necessary element of a restriction of competition. A price fixing arrangement would be an obvious example of an examinable agreement which is likely to have serious effects on competition in a particular market without resulting in any injury to competitors. Indeed, such an agreement would benefit competitors at the expense of consumers. Section 50(2) of the Act in fact contemplates that 'the needs and interests of small businesses' are factors to be taken into account at the second stage of the enquiry, namely, in determining whether, on balance, the arrangement is not contrary to the public interest.[58]

It is submitted that the concept of competition embraced by Section 50(1) of the Act is essentially that of competition viewed as a market process. It is a market condition in which competition is such as to prevent any single firm operating in that market from being able to affect market prices by its output decisions or choose its levels of profit by determining the prices at which it will sell. Generally, therefore, competitors will be forced to sell at the lowest possible profit margin.[59]

Having determined what ought to be the meaning of 'competition' within the context of the Australian legislation it is necessary to consider the type of conduct which will amount to a 'restriction of, or tendency to restrict, competition' under section 50(1) of the Act. In the writer's view the Commissioner should have to prove two effects: the first a quantitative effect and the other a qualitative one.

In order to prove the quantitative effect the Commissioner will have to show that the amount of commerce involved is not trivial. The Act deals with competition as a market process. It is concerned only with public wrongs and injury to the public. If the agreement or practice involves only an insignificant amount of commerce, the fact that a competitor is injured or put out of business will not give rise to a restriction of competition unless it is shown that the conduct in question is part of a general plan which itself will produce the required quantitative effect. Thus in *Klor's Inc. v. Broadway-Hale Stores Inc.*[60] which involved a

[58] Although s. 50 (1) does not expressly say so, it is clearly implied that the various and perhaps conflicting effects as regards the factors set out in s. 50 (2) are to be weighed against each other in the first instance, and it is only the *net* effect which is to be weighed against any proved restriction of competition.

[59] The concept of competition adopted here is not widespread in modern industrialised countries. However, this concept of competition provides a workable measuring stick and differs from the more complex models in that it does not become confused with the various considerations which are relevant to the second stage of the enquiry, namely, whether or not the alleged restriction of competition is contrary to the public interest.

[60] 255 F. 2d 214.

group boycott directed against an individual retailer, the Court of Appeals held that the required element of public injury was absent since 'there was no charge or proof that by any act of defendants the price, quantity, or quality offered to the public was affected, nor that there was any intent or purpose to effect a change in, or an influence on, prices, quantity or quality'.[61]

The qualitative effect which the Commissioner must prove is simply the existence of a long run or ultimate adverse effect on competition as defined above. Any agreements or practices which tend to relieve firms in a particular market from competitive pressures or which provide firms with greater power to exclude competitors and fix prices thus determining their own profit levels are inconsistent with the notion of competition as a market process and will tend to promote the evils of monopoly.[62]

The Commissioner's burden of proving a restriction of, or tendency to restrict, competition can best be illustrated by the following example: A, B, C, D, E and F, being manufacturers of toothbrushes of varying qualities distributed in the same market, agree that in future, for a period of five years, they will not produce any toothbrushes which do not comply with certain standards of quality. This arrangement constitutes an examinable agreement under section 35(1) of the Act.[63] If the Commissioner decides to institute proceedings before the Tribunal, his first task will be to show that the amount of commerce affected by the arrangement is not trivial. He will then have to prove that the agreement operates as a restriction on competition in the sense outlined above.

Counsel for the toothbrush manufacturers in question may well argue as follows: A, B, C, D and E between them control 75 *per cent* of the relevant toothbrush market while F controls 25 *per cent* thereof. A, B, C, D and E are able to compete with F at present in the production of high quality toothbrushes but it will take them about five years to obtain the necessary know-how and machinery to compete with F in the manufacture of all types of toothbrushes. In the absence of such an agreement, F could concentrate its efforts on the manufacture of the cheaper quality toothbrush and as a result put A, B, C, D and E out of business in a relatively short time.[64] F will therefore be left with complete monopoly power over the toothbrush industry. It is obvious, in the

[61] *Ibid.* 230.

[62] 'The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: (1) the power ... to fix the price and thereby injure the public; (2) the power . . . of enabling a limitation on production; and (3) the danger of deterioration in quality of the monopolized article . . .'. (*Per* Chief Justice White in *Standard Oil Company of New Jersey* v. *U.S.* (1911) 31 S. Ct. 502, 512.

[63] See especially s. 35 (1) (a), (c).

[64] 'Ruinous competition' does not necessarily promote competition as a market process; it may well lead to oligopoly or monopoly. Note also that the consideration for F's entering into the agreement may simply be the payment of a sum of money by A, B, C, D, and E, to F.

light of these observations, that the agreement in question will not in the long run operate as a restriction on competition viewed as a market process.

If the Commissioner is unable to detect any flaw in this reasoning then he will have failed to prove the existence of any restriction of, or tendency to restrict, competition. Even if the Commissioner is able to prove the required adverse effects, the parties may yet be able to show that, by reference to the criteria in section 50(2), the restriction contained in the agreement is not contrary to the public interest.[65]

In the light of the American experience consideration might be given to amending the Australian Act so as to declare certain types of arrangements and practices presumptively illegal (as distinct from illegal *per se*). In the case of certain arrangements, the Commissioner will have to show only that the amount of commerce affected was not trivial; he will not have to prove any qualitative adverse effect on competition; this much will be conclusively presumed. The burden then will be placed squarely on the parties to the arrangement or the person engaging in the practice to prove affirmatively that the same is not contrary to the public interest by reference to the criteria set out in the present section 50(2) of the Act. It is submitted that this burden should be a heavy one and will be discharged only if it can be shown that an arrangement results in benefits which are clearly in the public interest. A mere showing of lack of detriment to the public interest will be insufficient.

These presumptively illegal arrangements could well be based on the American experience as outlined above.[66] Horizontal price fixing agreements, group boycotts, tying arrangements and market sharing agreements should no doubt at least initially be included in the list. Naturally, however, these arrangements may operate somewhat differently in the small insulated Australian economy and the American experience should not be the sole and final arbiter of the types of practices to be included in the list as presumptively illegal.[67] Obviously, with the passage of time, it may be felt desirable to add or delete certain arrangements on the basis of the Tribunal's experience. Perhaps, therefore, the Commissioner should

[65] No attempt has been made to analyze the various complex problems involved in the example. The purpose of the exercise was merely to illustrate the types of effects which the Commissioner must prove and to indicate that these effects are quite distinct from the matters enumerated in s. 50 (2). There may be some overlap, but in that case the common factors will be relevant for different purposes depending on the context.

[66] See Bowman and Bork, 'Antitrust for Australia?' (1965) 39 *Australian Law Journal* 152. Compare the specific list of *per se* offences suggested by Professors Kaysen and Turner in Kaysen and Turner, *Antitrust Policy: An Economic and Legal Analysis* (1965 2nd printing) 270-1.

[67] Professor Hunter specifically makes reference to the prevalence of tying arrangements or 'full line forcing' in Australia. He suggests that an 'excellent case can be made for outright prohibition of the tied contract in a competitive economy'. (Hunter, 'Restrictive Practices and Monopolies in Australia' *Economic Record* (March 1961) 25.) Ironically this type of arrangement is not an examinable practice under the Australian Act unless someone is engaged in forcing *another person's* product.

be required, periodically, to submit to Parliament any recommendations he sees fit to make as to the contraction or expansion of the list of presumptively illegal arrangements.

It is suggested that this approach represents a fair compromise between administrative convenience and the requirements of justice. It is the writer's view that the *per se* offences of collusive tendering[68] and collusive bidding should be retained. These practices are tainted by an element of fraud which distinguishes them from the presumptively illegal practices and justifies making them illegal *per se*.[69]

V MONOPOLIES AND MONOPOLIZATION

Both the Australian Act and the American legislation contain provisions dealing with monopolies and monopolization. In the 1920's the Supreme Court of the United States indicated that the offence of monopolization was not proven unless the monopoly in question was formed and continued by means of predatory practices illegal under section 1 of the Sherman Act.[70] The doctrine, however, underwent a distinct change of emphasis in the 1940's. In *U.S. v. Griffith*[71] the Supreme Court held that the use of monopoly power, though lawfully acquired, to obtain a 'competitive advantage' is illegal. Finally, there is the celebrated judgment of Learned Hand J. in the *Alcoa* case[72] where he formulated the rule as follows: the mere possession of monopoly power, even though lawfully obtained and remaining unexercised, is illegal under section 2 of the Sherman Act subject to one possible exception. This exception covers those who 'become monopolists by force of accident';[73] 'monopoly may have been thrust upon [them]'.[74] Furthermore, it is misleading to talk about any requirement of deliberateness in the sense of specific intent for 'no intent is relevant except . . . an intent to bring about the forbidden act . . . — no monopolist monopolizes unconscious of what he is doing'.[75]

[68] Professor Hunter specifically refers to collusive tendering as being much more common in Australia than in the United Kingdom (Hunter, *loc. cit.*).

[69] A probable consequence of the general approach outlined in this paper would be the restriction of registration requirements to presumptively illegal agreements. The whole system of registration of agreements, a problem in itself, is outside the scope of this paper.

[70] *U.S. v. United States Steel Corporation* (1920) 251 U.S. 417. *Cf. U.S. v. Union Pacific P.R. Co.* (1912) 226 U.S. 61; *U.S. v. Reading Co.* (1920) 253 U.S. 26; *U.S. v. Southern Pacific Co.* (1922) 259 U.S. 214. In *Standard Oil Co. of N.J. v. U.S.* (1911) 221 U.S. 1 the defendant company, which had acquired 90 *per cent* of the relevant market by means of predatory practices, was declared by the Court to be an illegal monopoly and was dissolved.

[71] (1948) 334 U.S. 100.

[72] *U.S. v. Aluminium Co. of America* (1945) 148 F. 2d 416.

[73] *Ibid.* 430.

[74] *Ibid.* 429.

[75] *Ibid.* 432. Compare the remarks of Justice Cardozo in *U.S. v. Swift & Co.* (1932) 52 S. Ct. 460, 463: 'Mere size . . . is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly . . . but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past'.

This far reaching doctrine which lays all the emphasis on the mere existence of monopoly power and its potentialities as distinct from its exercise in the form of predatory practices is in sharp contrast to the approach adopted by the Australian legislature and enshrined in section 37(1) of the Act. In the United States the emphasis is on power, not predation. Monopoly power is usually defined as 'the power to control prices or exclude competition'[76] in the relevant market. This power is presumed from control of a certain percentage of the market. In the *Alcoa* case the figure was 90 *per cent* and as Learned Hand J. remarked: 'That percentage is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four per cent would be enough, and certainly thirty-three per cent is not.'[77]

In Australia, however, the emphasis is on predation rather than power. The Tribunal is not invested with the power to dissolve illegal monopolies but must confine itself to ensuring that the proscribed predatory practices are eliminated. Furthermore, to engage in the practice of monopolization under the Australian Act one need not be possessed of monopoly power: it is sufficient if one occupies 'a dominant position' in the relevant market. This requirement can be met if the person or company alleged to be engaged in the practice is the 'supplier of not less than one-third, by quantity or value, of the goods . . . that are supplied' in the relevant market.[78] In the present state of the American authorities, this would fall far short of monopoly power.[79]

In one respect, the Australian legislation is possibly wider in scope than the Sherman Act, which was, and still is, the 'original charter' of American antitrust law. Take the following example: A, B, C and D control respectively 35 *per cent,* 60 *per cent,* three *per cent* and two *per cent* of a relevant market which geographically consists of either the whole of Australia or the United States as the case may be. In town 'X' only A and D compete; until recently each controlled about half of the relevant business in this town (where all D's business was concentrated). A decides it wants to put D out of business and with that in mind drastically cuts its prices. Shortly, D goes out of business.

It is at least arguable that A is in a 'dominant position' within the meaning of the Australian Act and that he has engaged 'in price-cutting with the object of substantially damaging the business of a competitor'.[80] He has therefore engaged in the examinable practice of monopolization.

On the other hand, it is unlikely that A's conduct is illegal under the Sherman Act: section 1 of that Act would be inapplicable since, on

[76] *U.S. v. E. I. DuPont de Nemours & Co.* (1956) 76 S. Ct. 994, 1005.
[77] *U.S. v. Aluminium Co. of America* (1945) 148 F. 2d 416, 424.
[78] S. 37 (4) (b).
[79] The smallest market share which has been held by the Supreme Court to amount to monopoly power was 66 *per cent* in *U.S. v. American Tobacco Co.* (1911) 221 U.S. 106.
[80] S. 37 (1) (b).

the facts given there was no 'contract, combination [or] conspiracy'; A's actions were purely unilateral. Furthermore, it is clear that a 35 *per cent* share of the market is insufficient to constitute a monopoly — even when increased to 37 *per cent*. Thus no relevant market has been 'monopolized' within the meaning of section 2 of the Sherman Act.

Did A's conduct nevertheless amount to an 'attempt to monopolize' within section 2 of the Sherman Act? He attempted only to gain control of 37 *per cent* of the relevant market.[81] This would not constitute monopoly power. Since A has not attempted to obtain monopoly power with reference to the relevant defined geographic market, it is at least arguable that he has not attempted to monopolize 'any part of the trade or commerce' within the meaning of section 2 of the Sherman Act.[82]

Today, however, there is no doubt that A's conduct falls clearly within the ambit of section 3 of the Robinson-Patman Act (1936) which declares it unlawful for any person engaged in commerce *inter alia* 'to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor'.[83]

The story of the practice of 'monopolization' under the Trade Practices Act has only been half told. Once the practice is shown to exist the Tribunal must then find that it is contrary to the public interest before any further action can be taken. This will involve the Tribunal in a consideration of the matters listed in section 50(2) of the Act.

In relation to the practice of monopolization, however, the Tribunal is required to

> weigh against any detriment (including detriment constituted by any proved restriction of, or tendency to restrict, competition) that has resulted, or can be expected to result, from the practice any effect of the practice as regards any of the matters referred to in [section 50(2)] if that effect tends to establish that, on balance, the practice is not contrary to the public interest.[84]

[81] S. 37 (2), (3) of the Australian Act deal respectively with the relevant geographic and product markets. These provisions are not very helpful and in effect all they do is to impress upon the Tribunal that the relevant markets must also be significant. Must a market area be substantial before it can be significant or must it be substantial in addition to being significant? What does 'substantial' mean? Compare the smallness of the geographic area in *Lorain Journal Co. v. U.S.* (1951) 342 U.S. 143.

[82] A possibility not to be overlooked is that the Court may draw the relevant geographic market more narrowly or, alternatively, find relevant local submarkets—such as town X in our example. See *U.S. v. Grinnell Corp.* (1966) 384 U.S. 563 where divestiture under s. 7 of the Clayton Act was ordered on both local and national levels. As a purely practical matter, in order to achieve desirable results, the courts have tended to draw the relevant markets more narrowly when there is evidence of predatory practices.

[83] Note the relevance of s. 5 (a) (6) of the Federal Trade Commission Act which empowers and directs the Commission 'to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce'. The Commission would surely have no difficulty in characterizing A's conduct as an 'unfair method of competition'.

[84] S. 50 (3).

The provisions of the Australian Act just referred to are, to say the least, somewhat obscure. Obviously, the preservation of competition cannot be the basic consideration, for market dominance or monopoly power, especially when combined with predatory practices, represents the very antithesis of free competition. The section also implies that 'the detriment' which results from the practice is not limited to the detriment constituted by a restriction of or tendency to restrict competition. What does this mean? What detriment can the practice of monopolization give rise to except that which flows from the restrictions on competition which the practice emanates from or causes? It is true, as already indicated, that the practices and agreements to be considered by the Tribunal under section 50(1) of the Act can result in detriment without amounting to a restriction of competition. The destruction of a competitor who controlled only an insignificant amount of commerce is a good example of just such a practice. In contrast, the mere existence of firms wielding monopoly power or occupying a dominant position in the relevant market constitutes a restriction on competition viewed as a market process. As Professors Kaysen and Turner observe, the 'core of market power is the possession of a substantial range of price and output choices, not decisively affected by the response of rivals or would-be rivals'.[85]

Neither in the United States nor in Australia has antitrust legislation embarked upon a policy which involves a basic restructuring of the economy at large. In particular the Tribunal under the Australian Act has no power to restructure markets with a view to the creation of a more competitive economy. The Tribunal's powers are confined to the task of ensuring that the market power of individual firms is not increased (and competition thus restricted) by means of certain predatory practices. This, however, as indicated, is not to say that the existence of dominant market power in a single firm does not constitute, in itself, a restriction of competition; it clearly does. Furthermore, the practices which the Act subsumes under the heading of monopolization must be the result of a person taking advantage of his dominant position in the market.[86] The practices in question are therefore only outward manifestations of a pre-existing restriction of competition.

In view of these observations, it is very difficult to perceive what is meant by 'any detriment' as distinct from the 'detriment constituted by any proved restriction of, or tendency to restrict, competition'.[87] Furthermore, why the need for any 'proved restriction of, or tendency to restrict, competition'? In view of the foregoing analysis it is almost impossible to conceive of any situation in which it could be argued that the types of practices set out in section 37 (which defines the meaning of mono-

[85] Kaysen and Turner, *Antitrust Policy: An Economic and Legal Analysis* (1965 2nd printing) 266.
[86] S. 37 (1).
[87] S. 50 (3).

polization), when engaged in by a person or company in a dominant market position, do not constitute a restriction on competition. It is true that such restrictions on competition may not always give rise to the evils which are normally presumed to flow therefrom. At this point, a consideration of the matters relating to the public interest becomes relevant. Nevertheless, the fact remains that the mere proof of the practice as defined is equivalent to proof of a restriction on competition.

In the light of the above observations and with a view to strengthening the effectiveness of the existing law, it is possible that the Act may need to be amended so as not to require proof of a restriction on competition in the case of the practice of monopolization, and so as to place squarely on the shoulders of the alleged monopolizer the burden of proving that his activities can be justified in the public interest.[88]

To take matters a little further, it is hard to see in what circumstances individual (or vertical) boycotts or predatory price fixing, when engaged in by a person occupying a dominant position in the relevant market, can ever be justified as being in the public interest. These activities (consisting of the first two of the three classifications of conduct which constitute the practice of monopolization)[89] all involve deliberate and intentional attempts to put competitors out of business by utilizing coercive and predatory methods. It is submitted that deliberate attempts to destroy competitors by those in a position to do so can *never* be justified in the public interest. These activities could, by an appropriate amendment to the Act, be made illegal *per se* and thus placed in the same category as collusive tendering and collusive bidding.[90]

Even today, the legal profession in the United States is not united in its attitude to the legality of monopoly size alone, regardless of how it was obtained or used. Bearing in mind that in such cases the only practicable relief will be dissolution, Professors Bowman and Bork have argued that

> at least in the absence of actual predation or merger, the fact of size itself raises a very strong presumption that that size is the result of economies of scale. Such economies are often difficult to identify, partly because they may not be due to engineering efficiencies but due to such intangibles as managerial efficiency. One can only say that the fact of

[88] Since the dominant market position occupied by the alleged monopolizer supplies the requisite quantitative effect, the amount of commerce affected by the practice itself cannot alter the fact that there is a restriction of competition: The Commissioner, therefore, will not be obliged to show that the amount of commerce affected was not trivial.

[89] S. 37 (1) (a), (b).

[90] In view of the uncertain application of the term 'dominant position' to any particular set of circumstances, it may be desirable to enable a person to obtain an advance ruling from the Commissioner or Tribunal as to whether he in fact occupies a dominant position in the relevant market. This ruling would normally stand until revoked by the Commissioner or the Tribunal.

growth is strong evidence that such economies exist. What can anti-trust sensibly do in such a case?[91]

Whichever approach may be the more appropriate one in the American context, the views of Professors Bowman and Bork arguably ought to prevail in dealing with the problems of power and predation in the younger and somewhat less developed Australian economy. Even the U.S. Supreme Court has on occasion recognized that a 'considerable size is often essential for efficient operation in research, manufacture and distribution.'[92] Many industries in the smaller Australian economy will be able to support only a few firms (perhaps only one) sufficiently large to adopt the most modern and efficient means of production and to obtain up to date costly machinery and necessary technical equipment. Often, only a monopolist will be in a position to take advantage of all possible economies of scale in the relatively small Australian market. On the other hand, a country like the United States with its much larger market may be able to support many competing and highly efficient enterprises in nearly all industries.[93]

The few commentators who have attempted to analyze the degree of concentration in the Australian economy invariably conclude that insufficient data made their task extremely difficult.[94] Professor Hunter was able to conclude only that 'concentration of industry in Australia has gone further than in most countries; and, perhaps more significant, very much further than in certain countries (such as the United States) which have found it desirable to institute legislative control of big business'.[95] The conclusions of other economists who have analyzed the available data are only a little more specific:

> The degree of concentration which prevails throughout the Australian economy is unusually high . . . In each of the fields of manufacturing, mining, finance and retailing, the greater part of activity takes place in monopolistic or oligopolistic markets. While it is true that there are significant areas of large scale competition in manufacturing, retailing, construction and agriculture, only in agriculture is it pure competition; and even in agriculture there are collective marketing arrangements for commodities constituting over one half of the value of rural output.[96]

Apparently therefore, monopolistic and oligopolistic markets are of much greater importance in Australia than in the United States. It has already been indicated that because of the limited size of the Australian market, a high degree of monopoly may be inevitable if full use is to be

[91] Bowman and Bork, 'Antitrust for Australia?—An Evaluation of the American Experience' (1965) 39 *Australian Law Journal* 152, 159. Compare Brandeis, *The Curse of Bigness* 105, 114-5; *U.S. v. First National Bank* (1964) C.C.H. 71,072.

[92] *U.S. v. E. I. DuPont De Nemours & Co.* (1956) 351 U.S. 377, 386.

[93] This analysis is, of course, subject to qualification especially in relation to those Australian industries which have developed substantial export markets.

[94] Hunter, 'Restrictive Practices and Monopolies in Australia' *Economic Record* (March 1961) 25, reprinted in Arndt and Corden, *The Australian Economy* (1963) 268, 283; Karmel and Brunt, *The Structure of the Australian Economy* (1963) 55.

[95] Hunter, *loc. cit.* 283.

[96] Karmel and Brunt, *op. cit.* 92-3.

made of modern techniques and economies of scale. However, as Professor Karmel and Miss Brunt point out, what 'is not obvious is whether *such* high concentration as exists is necessary'.[97]

Despite the dearth of statistical data, it is not clear that industrial concentration in the Australian economy is too great. According to Hunter, 'if the statutory prohibitions of the Sherman Act operated in Australia, the steel industry, paper, glass, sugar, tobacco, electrical goods and others, would all automatically become subject to a "share of the market" doctrine and possibly be threatened with dissolution and divestiture of assets',[98] a rather frightening prospect.

It is the writer's view that, for the reasons outlined above — some to be found in the differences between the United States and Australian economies[99] and others of a more fundamental nature — the Commonwealth government's approach to the problem of monopolization, emphasizing predation as distinct from unexercised market power, seems to be in principle an appropriate solution for a country such as Australia. It has also been suggested, however, that in this context a rule of reason approach, which does not place the entire burden of proof on the person engaging in the practice, is unjustified. Furthermore, for reasons of overriding public policy, at least certain forms of activity constituting monopolization should be made illegal *per se*.

VI MERGERS AND ANTITRUST LAW

This article, for several reasons, will not deal exhaustively with the problems associated with mergers. In the first place, the reach of the Australian legislation does not extend to merger activity. Mergers are not subject to the jurisdiction of the Trade Practices Tribunal.[1] Secondly, the various approaches to the problems which mergers give rise to are articulated, to some extent, in the earlier discussion dealing with monopolization. Finally, the problems in this area are extremely complex and could not be adequately explored within the confines of this article.

From one point of view, the anti-competitive effects of mergers on the economy are more serious than those occasioned by horizontal price

[97] *Ibid.* 88. Despite the high degree of industrial concentration and the lack of adequate statistics, it is clear according to Karmel and Brunt, 'that the rapid rate of growth of Australian manufacturing since the war has made possible the establishment of a very large number of new firms'. *Ibid.* 97.

[98] Hunter, in Arndt and Corden, *op. cit.* 285.

[99] 'The U.S.A. is probably the only country which possesses both the appropriate social and political attitudes to monopoly and competition and a market sufficiently large to make the techniques of "Shermanism" viable. What is all too frequently regarded as the archetype of anti-monopoly legislative control is in fact unique and not especially suitable for general use.' (Hunter, in Arndt and Corden, *op. cit.* 285.)

[1] Query whether the Australian Act might possibly apply to an agreement between direct competitors to merge.

fixing agreements.[2] Both have the effect of fixing prices but in the case of mergers the effects are permanent and in addition to price competition all other forms of competition are also eliminated, for example, service competition, quality competition. However, in another more fundamental sense, mergers may well be more beneficial to (or less destructive of) competition than the typical horizontal price fixing agreement or exclusive dealing arrangement. A merger will always involve some degree of risk. When one company takes over another it does not merely tie up outlets or fix prices; it is also putting its own capital on the line and subjecting it to risk. This being the case, there is at least a possibility that, in general, mergers will tend to promote efficiency and enable the merged firm to take full advantage of available economies of scale.[3] This would be in sharp contrast to the types of agreements and arrangements listed above which involve no element of risk and generally possess no 'efficiency creating potential'.

It is basically for these reasons that mergers, unlike horizontal price fixing agreements, are not illegal *per se* in the United States. Section 7 of the Clayton Act provides that a merger is prohibited, where 'in any line of commerce in any section of the country', the effect thereof *'may be* substantially to lessen competition, or to tend to create a monopoly'.

In interpreting this section the Supreme Court has been mainly concerned to implement the Congressional purpose of stemming 'the rising tide of economic concentration' in the American economy. Although the tests of legality vary somewhat depending on the type of merger which is under consideration,[4] the existence of any probable trend toward economic concentration in the market concerned will almost always be determinative. The theory is that increasing economic concentration in particular industries will lead to the development of oligopolies. Oligopolies which are formed as the result of merger activity are invariably accompanied by inefficiency and detrimental effects on both existing and potential competition. Short term efficiency is no justification for a merger which accentuates the trend to oligopoly. The premise underlying the theory is that *in the long run* a deconcentrated market will be more conducive to both efficiency and free competition.

It is to be emphasized that section 7 of the Clayton Act does not reach only mergers which take place in an already concentrated market. The Supreme Court has pointed out on more than one occasion that it 'cannot avoid the mandate of Congress that tendencies toward concentration in

[2] Or exclusive dealing arrangements in the case of vertical mergers, *e.g.* a merger between a manufacturing enterprise and a chain of retail outlets all engaged in the same line of commerce.

[3] It is not here suggested that all mergers will produce efficient firms. The writer's purpose is simply to indicate that the efficiency creating potential possessed by the merger may be sufficient to justify according special treatment thereto.

[4] *E.g.* horizontal, vertical or conglomerate.

industry are to be curbed *in their incipiency*'[5] and that 'remaining vigour cannot immunize a merger if the trend in that industry is toward oligopoly'.[6]

In general, therefore, if the firm produced by the merger controls a substantial share of the relevant market and its formation results in a significant increase in economic concentration, then the merger will be held illegal.[7] Furthermore, if either of the merging companies is already one of the leaders in an industry in which there is evidence of a trend toward concentration, then the merger will almost invariably be held illegal even though it may result only in a very slight increase in economic concentration.[8] As the Supreme Court observed in the *Philadelphia National Bank* case, the 'intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behaviour, or probable anticompetitive effects'.[9]

Once the conditions outlined above are found to exist the merger will be held illegal subject to two possible qualifications. A possible defence may be found in the 'failing company doctrine'. If one of the companies has suffered financial reverses and will almost certainly go out of business, then an otherwise illegal merger may be justified depending on the degree of economic concentration, the extent of the competitive advantage which will accrue to the acquiring company and the existence of other companies which would be interested in purchasing the failing concern. This so called 'failing company doctrine'—which has only been applied in one Supreme Court case[10]—could therefore perhaps be appropriately described as a 'mitigating factor'[11] rather than an absolute defence. A second mitigating factor which does not seem to have played a crucial role in any decision of the Supreme Court involves the showing of 'a demonstrated need for combination to enable small companies to enter into a more meaningful competition with those dominating the relevant markets'.[12]

The Supreme Court has not hesitated to strike down mergers even though the merged companies between them only controlled a relatively small percentage of the relevant market and despite the lack of any existing economic concentration in the relevant industry. In one case the merged companies controlled only five *per cent* of the market and the increase in concentration in that market (which was not already concentrated) was only 1.5 *per cent*. The merger was held illegal.[13]

[5] *Brown Shoe v. U.S.* (1962) 370 U.S. 294, 346.

[6] *Ibid.* 333.

[7] See *U.S. v. Philadelphia National Bank* (1963) 374 U.S. 321.

[8] *E.g.* Justice White's concurring opinion in *U.S. v. Von's Grocery Co.* (1966) 384 U.S. 270, 280-1.

[9] (1963) 374 U.S. 321, 363.

[10] *International Shoe Co. v. F.T.C.* (1930) 280 U.S. 291. The doctrine was only an alternative basis for the decision.

[11] *Brown Shoe v. U.S.* (1962) 370 U.S. 294, 346.

[12] *Ibid.*

[13] *Brown Shoe v. U.S.* (1962) 370 U.S. 294. See also *U.S. v. Von's Grocery Co.* (1966) 384 U.S. 270; *U.S. v. Pabst Brewing Co.* (1966) 384 U.S. 546 where the control of 4.5 *per cent* of a relevant market by the merged companies was considered to be sufficient to justify holding the merger illegal.

It is submitted that the American approach to mergers should not, for good reasons, be adopted in Australia. In the first place, the theory that mergers in a concentrated market (or a market evidencing a trend toward economic concentration) in the long run lead to inefficiency simply does not hold true for the smaller and less developed Australian economy. John Bushnell, in his study of Australian company mergers, makes reference to several facts which in the writer's opinion strongly militate against the adoption in Australia of anything resembling the American approach to mergers.[14]

Proportionately, the number of mergers in Australia during the 1950's was far greater than that in the U.S. at any time since the 1920's.[15] Since price fixing and various other types of predatory practices were, until recently, quite legal in Australia, it is apparent that firms did not need to merge in order to derive monopoly profits. A simple agreement amongst competitors fixing prices and involving no element of risk would seem to be the obvious method of eliminating competition.[16] What then are the underlying reasons for merger activity in Australia? One of them is certainly the need to expand in order to increase efficiency and take full advantage of available economies of scale in production and distribution. Management problems, which are somewhat acute in the context of the rapidly developing Australian economy, are an important cause of mergers.[17] Bushnell also mentions the continuous shortages of resources in Australia as a relevant factor.[18]

One consideration which limits oligopolist profits and inefficiency is the 'actual or potential entry of overseas firms into oligopolist Australian markets through locally established factories'.[19] Professor Karmel and Miss Brunt outline the advantages accruing to such a firm as follows:

> It enters as a going concern, with access to overseas innovations and know-how, and with sufficient financial strength to begin on a large-scale, to carry substantial establishment expenses (accounting losses) and, if need be, to buck the existing 'channels of trade'. Generally speaking, the most important of these advantages has been the access to overseas innovations and know-how.[20]

After an exhaustive study of the reasons for mergers in Australia, both in general and in particular industries, Bushnell concludes that as reasons for mergers, 'monopoly advantages have been secondary in post-war

[14] Bushnell, *Australian Company Mergers 1946-1959* (1961). Although this study is somewhat dated, it is nonetheless the only exhaustive analysis of company mergers in Australia which the writer has been able to locate.

[15] According to Bushnell (*op. cit.* 81) there were probably about twice as many mergers *per* one thousand firms in Australia as in the U.S. during the postwar period.

[16] It is true, of course, that price fixers often cheat; consequently a series of mergers may be a more secure method of raising prices above competitive levels.

[17] Bushnell, *op. cit.* 50.

[18] *Ibid.* 83-4.

[19] *Ibid.* 133.

[20] Karmel and Brunt, *The Structure of the Australian Economy* (1963) 97.

Australia to the influence of taxation and ownership patterns on the one hand and the very rapid expansion and development of the economy on the other'.[21] He points out that mergers have often been in the public interest by helping to set up firms of sufficient magnitude to take advantage of the most modern production methods and management techniques. 'Greater concentration does not necessarily mean less competition. An oligopolistic or monopolistic structure is a prerequisite, but not a guarantee, of monopoly profits'.[22]

Quite apart from considerations peculiar to the Australian economy, the so-called 'doctrine of incipiency' derived from section 7 of the Clayton Act and as applied by the U.S. Supreme Court has come under strong attack from certain academics. Professors Bowman and Bork argue

> that a trend toward a more concentrated condition in an industry is *prima facie* desirable . . . Merger law ought not to frustrate the more efficient use of resources by stopping concentration long before it can conceivably have any anti-competitive effect. The concept of incipiency . . . stops mergers whose only real social impact would be the creation of efficiency.[23]

In the light of the preceding discussion, the relevance of the above observations to the Australian context is obvious.[24]

Although for reasons given, the introduction into Australia of laws regulating mergers based on the American model would be undesirable, there is need for some control since some mergers do not promote efficiency, are not in the public interest and severely limit competition. Consideration might be given to the introduction into the Australian Act of provisions requiring all parties concerned to give the Commissioner advance notice of any and all proposed mergers (with some limited exceptions). Certain relevant facts would have to be disclosed by the parties. The Commissioner would then be given a specific (relatively short) time within which to institute proceedings before the Trade Practices Tribunal. If no proceedings were commenced within the allotted time, then the merger could be consummated. It would then no longer be subject to the jurisdiction of the Tribunal unless one of the parties has been guilty of negligent or fraudulent concealment or misrepresentation of material facts. If the Commissioner instituted proceedings within the prescribed period then the burden would be on him to prove any alleged restrictions on competition and also, with regard to any matters which might be raised

[21] Bushnell, *op. cit.* 26. One of the chief effects of merger activity in Australia has been to promote efficiency by enabling firms to attain optimum size.

[22] *Ibid.* 165.

[23] Bowman and Bork, 'Antitrust for Australia?—An Evaluation of the American Experience' (1965) 39 *Australian Law Journal* 152, 156.

[24] Professors Bork and Bowman assert that, at a very early stage, the existence of a trend toward concentration 'indicates that there are emerging efficiencies or economies of scale . . . which make larger size more efficient' (Bork and Bowman, 'The Crisis in Antitrust' (1965) 65 *Columbia Law Review* 363, 368. They do not, however, explain why taxation, ownership patterns, personal ambitions and the elimination of competition play a lesser role than efficiency in interpreting the effects of a trend toward concentration.

by the parties, that it would be contrary to the public interest to permit the merger to be consummated. Should one of the parties to the merger be in a dominant position in the relevant market, or the merger, if consummated, would result in the merged companies occupying a dominant position in the market, then the burden of showing that the merger was justified or required in the public interest would be placed on the parties to the proposed combination.

It is submitted that this approach is administratively feasible, that it would not hamper the future expansion of the Australian economy through merger, and finally, that it would put an end to those mergers which are not justified in the public interest and the principal effect of which is to limit or entirely destroy competition in certain lines of commerce. When the Australian legislative scheme was first proposed it did provide for the registration of certain mergers as restrictive practices. It was intimated by the Attorney-General that only large mergers involving aggregate assets and capital of more than $500,000 would be covered by the Act.[25] However, as Stalley has observed,

> There should be no legislative limit on the size (in terms of aggregate assets) of mergers subject to the law since this overlooks the fact that monopoly can be achieved by the gradual elimination of a number of small firms and that monopoly power and 'bigness' are not synonomous.[26]

VII CONCLUSIONS

The purpose of this article has been to explore some of the basic notions and theories underlying American antitrust law and to determine to what extent it is possible and desirable to apply the same in the context of the Australian economy.[27]

In order to cope with the problem of anti-competitive practices and potentialities within the U.S. economy, Congress adopted the usual methods of dealing with illegal activities: certain conduct is declared to be illegal; criminal penalties are provided for, as well as civil remedies. In general, the courts may decide only real issues and it is impossible to obtain advance rulings on proposed activities. In contrast, the Australian legislature had adopted what can best be described as a regulatory licensing system for controlling restrictive trade practices. Under the Australian Act, activities are illegal only to the extent that the Tribunal so determines and, even then, only prospectively. The law therefore is specific and directed to particular cases. There is no element of uncertainty. For these reasons there is no necessity for the adoption of *per se* rules in Australia

[25] Commonwealth, *Parliamentary Debates,* 6 December 1962, 3102-14.
[26] Stalley, 'The Commonwealth Government's Scheme for the Control of Monopoly and Restrictive Practices—A Commentary' (1963) 37 *Australian Law Journal* 85, 92.
[27] Some of the many topics omitted are: constitutional problems, trade associations, patents, trade marks, extraterritorial application and conflicts problems.

except in very limited circumstances. It has been argued that *per se* rules are, in general, unjustifiable.

On the other hand, despite these basic underlying differences in the structure of antitrust law in the U.S. and Australia, there is much to be learnt from the experience of the former. The history of antitrust litigation in America highlights the inadequacies of the severely limited jurisdiction vested in the Trade Practices Tribunal. The American experience also suggests that in many respects the provisions of the Trade Practices Act dealing with examinable agreements and practices, particularly the practice of monopolization, must be tightened up if the Act is to become an effective instrument of social and economic policy. The present legislation cuts a sharp line of distinction between the *per se* offences and 'the rest', which may be labelled as agreements and practices subject to the 'rule of reason'.[28] The writer has argued for the inclusion of a third category of presumptively illegal arrangements. No doubt the American experience would play a vital role in giving content to the proposed categories.

In the writer's view, the theories underlying the American approach to the twin problems of monopoly and merger are inapplicable in the Australian context. The American experience does, however, show that it is necessary to provide for some control over merger activity and also to reject any 'rule of reason' test when dealing with activities of monopolists which are deliberately designed to coerce competitors.

Finally, it is hopefully expected that the body of learning on antitrust problems accumulated in the decisions of the American courts and in the writings of American legal commentators will not go unheeded when either the Tribunal or the courts in Australia are faced with problems of a similar nature.

[28] The classic statement of the 'rule of reason' is to be found in the opinion of Justice Brandeis in *Board of Trade of City of Chicago v. U.S.* (1918) 38 S. Ct. 242, 244.