Expressly authorised by any Act

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In this article John Cook discusses the impact of the exemptions in the Commerce Act 1975 for trade practices expressly authorised by other legislation, particularly in the light of the recent High Court decisions in the Wool Board *and* Stock Exchange *cases. He concludes that the law is, in a number of respects, in an unsatisfactory state.*

I. INTRODUCTION

The purpose of this article is to consider the interpretation and application of the exemptions contained in sections 22(7)(a) and 27(3)(c) of the Commerce Act 1975 for any trade practice "expressly authorised by any Act"[1], in the light of the recent High Court decisions in the *Wool Board*[2] and *Stock Exchange*[3] cases.

The Commerce Act 1975 (the Act) gives the Examiner jurisdiction to investigate any trade practice[4] which "appears to him to be contrary to the public interest". Unless the trade practice is abandoned, modified, or remedied in conciliation proceedings with the Examiner an inquiry by the Commerce Commission must follow. However, although trade practices at large are liable to investigation under the Act[5] there is little likelihood that resources will be expended on an investigation unless the trade practice at least comes within one of the categories of trade practice described in paragraphs (a) to (e) of section 23(1) of the Act.[6] For these categories the order-making powers of the Commission in section 22 of the Act are available if the practice is found to be contrary to the public interest after investigation and inquiry. For trade practices generally, in theory at least,

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1 This wording is taken from section 22(7)(a). Section 27(3)(c) reads "expressly authorised by any other Act", i.e. excluding the Commerce Act 1975.

2 *ABC Containerline NV* v. *New Zealand Wool Board* [1980] 1 N.Z.L.R. 372. On appeal to Court of Appeal.

3 *Stock Exchange Association of New Zealand* v. *Commerce Commission* [1980] 1 N.Z.L.R. 663.

4 As defined in section 2 of the Act.

5 Section 38(1)(a).

6 An exception was the investigation and inquiry into credit-card services. This resulted in a recommendation by the Commerce Commission in terms of section 23(1)(n) upon which no further steps were taken.

price control powers exist,[7] together with the power to recommend the inclusion of a practice within section 23(1).[8]

The exemption in section 22(7)(a) takes effect at this first regime of control within sections 22 and 23. Section 22(7)(a) prohibits the making of an order by the Commission against any trade practice which is "expressly authorised by any Act". If, however, a trade practice falls within paragraphs (b), (d) or (e) of section 23(1), by virtue of section 27(1) no participant may lawfully carry on the practice without having the prior approval of the Commission under section 29 and fulfilling any conditions subject to which such approval is granted. This is the second, and stricter, regime of control for trade practices in the Act. The effect of the exemption in section 27(3)(c) is to derogate from the general prohibition in section 27(1) provided that the trade practice concerned is "expressly authorised by any other Act". Section 27(3)(c) was added by section 15(1) of the Commerce Amendment Act 1976. Until that amendment the position had been that a trade practice falling within paragraphs (b), (d) or (e) of section 23(1), while immune from an order of the Commission pursuant to section 22 (by virtue of section 22(7)(a)), was subject to the general prohibition in section 27(1).

Until recently these exemptions had not been considered judicially since the judgment of Haslam J. in *H.M.V.* v. *Simmons*.[9] In that case record manufacturers sought unsuccessfully to justify the practice of collective resale price maintenance on the sale of records by reference to the statutory right to acquire, in effect, a compulsory copyright licence on payment of a royalty sum per record manufactured. The amount of the royalty was calculated in accordance with the Copyright Regulations 1913. Haslam J. concluded that the Copyright Act 1913 did not "expressly authorise" an agreement or arrangement between wholesalers of gramophone records to fix resale prices. At one point in his judgment[10] the judge appeared to equate "expressly authorised" with "authorised by necessary implication". However this comment was obiter, and probably made merely to strengthen the conclusion, expressed in the penultimate paragraph of his judgment, that the exemption was inapplicable: so far from there being no express authorisation in the 1913 Act for the practice of resale price maintenance there was not even authorisation by necessary implication.

II. ABC CONTAINERLINE NV v. NEW ZEALAND WOOL BOARD

In the *Wool Board*[11] case the facts were as follows. In June 1979 the Wool Board, successor to the Wool Marketing Corporation under the Wool Industry Act 1977, negotiated a contract for the carriage of wool to Europe with the New Zealand European Shipping Association (NZESA). This agreement replaced an earlier agreement made by the Corporation in 1975 under the Wool Marketing Corporation Act 1972. In Decision 20, given on 29 November 1977, the Commerce Commission had accepted a joint submission by counsel for the Examiner and the

7 Section 25.
8 Section 23(1)(n). Supra n. 6.
9 [1960] N.Z.L.R. 25.
10 Page 30, lines 6-10.
11 Supra n. 2.

Wool Marketing Corporation that the earlier agreement was authorised by the 1972 Act and declined to exercise jurisdiction under section 29 of the 1975 Act in respect of it. In return for a rebate of 10% off current freight rates for all exports the Wool Board purported to agree to ship wool and skins to European destinations exclusively with members of the NZESA. A competitor of the NZESA, ABC Container Line NV., offered the Wool Board its services for the carriage of wool and skins to Europe and North America. The Board declined the offer and informed ABC that it had concluded a new three-year agreement with the NZESA. ABC applied for judicial review of the Board's refusal and decision to ship exclusively through NZESA members. The Board's refusal effectively cut ABC out of the wool trade to Europe since the Board purported to exercise a power under the 1977 Act to require all wool exporters to use only NZESA vessels.

On its application to the High Court for judicial review of the Board's decision ABC raised a number of issues: most important for our purposes were ABC's contentions that the Board was acting (i) ultra vires its statutory powers, and (ii) unlawfully in entering into a freight rate contract with the NZESA without obtaining the prior approval of the Commerce Commission as required under section 29 of the Commerce Act 1975.

Agreements of the same kind were made with the NZESA by the Board's predecessors, the Wool Marketing Corporation, and, earlier, the New Zealand Wool Commission. The agreement was not itself a contract of shipment but was an "umbrella" agreement by which the NZESA bound itself to offer for the agreed period particular terms to any wool exporter in return for the Board's promise that wool would be shipped exclusively with the NZESA members. The central issue was whether the Board could lawfully deliver on its half of the bargain, namely, that the NZESA would be exclusive shippers of New Zealand wool to Europe. Section 19 of the Wool Industry Act 1977 reads:

> (1) Subject to this Act, every contract for the carriage of any wool by sea or air for export from New Zealand shall be made either —
> (a) By the Board, acting in its own right or as the agent of the owners of that wool or of other persons having the authority to export that wool; or
> (b) By a person other than the Board, in conformity with conditions (if any) prescribed or approved by the Board.
> (2) Every such contract made otherwise than in conformity with this section shall be void.

The question of whether the Board acted lawfully in entering into the exclusive agreement with the NZESA involved, in particular, the interpretation of section 19(1)(b). Could this paragraph be interpreted as giving the Board power to impose the condition that contracts for the carriage of wool should be made only with a particular shipper, or shippers? The Chief Justice concluded:[12]

> It is true that there is no express power to restrict shipment through named companies but I am satisfied that in the sections to which I have referred there is ample power to do so if such is necessary in order to enable the Board to carry out its functions.

12 Page 382, lines 1-4.

The Chief Justice seems to have adopted a benevolent interpretation of the Act's provisions, relying, as he did, on their collective effect. None, on its wording and taken seriatim, seems effective to empower the Board to limit shipment to named companies. It is implicit that the Chief Justice did not regard section 19(1)(b) alone as empowering the Board to impose a condition the effect of which would have been to prohibit the making of any contract with carriers not specified by the Board. The word "conditions" in section 19(1)(b) may thus be limited to the nature and content of contracts of carriage rather than the identity of the shipper or, conceivably, the destination of the wool shipped. On the other hand the Chief Justice accepted that section 18(1)(c) empowered the Board to enter into a freight rate agreement with the NZESA on the condition that wool would be shipped exclusively with NZESA members. The Board's power to make agreements is expressed in general terms in that section. However one must be careful not to let the tail wag the dog. The width of section 18(1)(c), which appears to give the Board a free hand as to the terms and conditions it offers or accepts for freight rate agreements, is no ground for concluding that any terms whatsoever agreed by the Board would be intra vires. Section 18(1)(c) must be read in the general context of the Act, and the object, functions, and powers of the Board. The Chief Justice found it necessary to take refuge in the "catch-all" provisions of the 1977 Act, notably sections 17(1)(d) (functions), 18(3) (powers to attain general object) and 21(1)(c) (general power to make arrangements and give directions), and fashion out of those provisions a power to prohibit wool exporters from shipping except with members of the NZESA so as to enable the Board to satisfy its contractual undertaking to the NZESA. The effect of this interpretation is to amplify specific powers in the Act, i.e. section 18(1)(c), section 19(1)(b) and section 21(1)(a), none of which appear to be drafted so as to allow the Board lawfully to carry out the agreement. There is no express power to agree to ship exclusively with one shipper. If there had been it would have been permissible to rely on section 18(3) to give the Board incidental powers to give directions to wool exporters to comply with the agreement. To favour this kind of statutory interpretation can only encourage New Zealand governments to take refuge in general empowering and objects clauses — an encouragement they hardly need. In this case it may be surmised that ministers, and their officials, were aware of the need to direct exporters to contract with particular shippers but shrank from giving the Board power to do so in express terms in the Wool Industry Act.

Clearly an interpretation of the Board's powers is a prerequisite to answering the question whether any trade practice perpetrated by the Board is "expressly authorised by any Act". ABC had to allege that a trade practice falling within section 27(1) existed and was not exempted, in order to succeed on the submission that the agreement made with the NZESA was unlawful. This issue is narrower than those raised on the general question whether the Board was acting ultra vires since it concerns only the agreement actually made with the NZESA and the statutory authority for it. However, interesting theoretical issues also arise as to the potential application of the exemption in section 22(7)(a). Section 23(1) of the Commerce Act renders certain agreements liable to investigation and possible prohibition. The agreement on freight rates and conditions made between the

Board and the NZESA, on behalf of its members, may fall within a number of paragraphs in section 23(1). For example, it constitutes "an agreement . . . between a combination of persons engaging in . . . the performance of services to perform services . . . at prices or on terms agreed upon between the parties . . ." (paragraph (d)). The members of the NZESA, inter se and with the Board, agreed to a freight rate (price) in return for exclusivity. The freight rate agreement would govern actual shipments of wool made by the Board or any other exporter in the future. Second, the agreement may constitute "an agreement . . . between sellers or between sellers and buyers to grant rebates and discounts to buyers of goods calculated with reference to the quantity or value of the total purchases by those buyers from those sellers" (paragraph (g)). It must be remembered that the word "services" may, by virtue of section 123 of the 1975 Act, be substituted for the word "goods". Assuming that "buyers" may include a single buyer (the Board) and that "quantity" may include the totality of any goods or services to be acquired the agreement may be regarded as one whereby the members of the NZESA (suppliers of shipping services) agree to a rebate of 10% on freight rates calculated on the basis that the Board, and other exporters, would acquire all their shipping services from those members. Third, section 23(1)(a) may cover a typical exclusivity arrangement of this kind. The Board and the members of the NZESA agreed to engage in conduct, the purpose or effect of which prevented the supply of shipping services by other carriers, notably ABC, to wool exporters. ABC, however, were only interested in establishing an agreement within paragraph (d) of section 23(1) for the lawful operation of which the Commission's approval was a prerequisite under section 29 of the Act.

Returning to the actual issue raised on the facts the Chief Justice concluded shortly[13] that the freight rate agreement was expressly authorised by section 18(1)(c) of the Wool Industry Act. Section 18(1)(c) empowers the Board to ". . . enter into agreements and arrangements, whether with persons or organisations within or outside New Zealand, in respect of freight rates and other terms and conditions for the transport of wool from New Zealand." The paragraph makes express mention of freight rates. The conclusion would have been more difficult to sustain had the challenged or infringing aspects of the agreement been its exclusivity element. The Chief Justice might well have taken the view that there was no express authority rendering that aspect of the agreement immune.[14] The issue may be illustrated by an analogy. Suppose that legislation authorised X "to manufacture jam". This confers on X an express authority to make jam. The general includes the specific. By necessary implication X is authorised to make strawberry jam. But has X an express authority to make strawberry jam? To take a different illustration, suppose my daughter asks me, "Daddy, can I go to town and spend my birthday money on a dress?" I reply, "It's your birthday money, you're free to spend it as you wish." My daughter then goes to town and returns with a puppy. Have I expressly authorised her to purchase a puppy with her birthday money? Clearly not. These illustrations show how narrow the exemp-

13 Page 385, lines 24-27.

14 See his conclusion as to the interpretation of section 19(1)(b) of the Wool Industry Act 1977, supra n. 12.

tions in sections 22(7)(a) and 27(3)(c) are if full weight is given to the words "expressly authorised".

Since it is unlikely that all of the activities of statutory authorities such as the Wool Board are in fact expressly authorised there is great risk that some of them will not benefit from the Commerce Act exemptions, even leaving aside doubtful cases where the doubt is caused by uncertainty as to whether the exemptions apply or not. It is interesting to note that the Restrictive Trade Practices Act 1976 (UK), the successor to the 1956 Act which was a strong influence on New Zealand trade practices legislation, uses an exemption for agreements "expressly authorised by an enactment"[15] only as a long stop and contains specific dispensations, for example, for agricultural, forestry and fishery associations.[16]

III. STOCK EXCHANGE ASSOCIATION OF NEW ZEALAND v. COMMERCE COMMISSION

The interpretation of section 22(7)(a) of the 1975 Act was raised in another recent decision.[17] The Stock Exchange Association ("SEANZ") was empowered to make rules for the conduct of the business of every registered stock exchange and the conduct of its members by section 11 of the Sharebrokers Act 1908. The power is subject to the proviso in section 11 requiring the rules to be approved by the Governor-General in Council and to be gazetted before they may come into force. SEANZ passed a rule of conduct, the purpose of which was to prohibit branch offices — rule 41(3) provided:

> No member or approved partner or partnership to which a member belongs: (a) shall have more than one place of sharebroking business; (b) shall have a place of sharebroking business outside the territory of the exchange concerned.

The Examiner of Commercial Practices had investigated the operation of this rule and reported his opinion to the Commerce Commission (pursuant to sections 38 and 40). The Examiner alleged that rule 41(3) fell within section 23(1)(j) of the 1975 Act. Paragraph (j) reads:

> Any agreement or arrangement between persons whether as producers, wholesalers, retailers, buyers, or others to limit or restrict the output or supply of any goods, or withhold or destroy supplies of goods, or allocate territories or markets for the disposal of goods.

The Examiner's conclusion was based on the fact that an agreement to abide by the rules of conduct could be taken to exist among SEANZ members since it was a condition of membership that the rules of conduct made pursuant to section 11 were complied with by members. Alternatively it could perhaps be argued that SEANZ was a trade association making a recommendation to its members such that section 23(10) of the 1975 Act would apply to deem an agreement to exist among members to comply with the recommendation. Rule 41(3) limited the supply of broking services by members to a single business situated within the territory of the existing stock exchanges. This kind of rule is not an uncommon one among professions. For example, London barristers are required

15 Paragraph 1(1) of Schedule 3.
16 E.g. s. 33.
17 Supra n. 3.

to practice in chambers within the four Inns of Court, while in New Zealand, under the Pharmacy Act 1970, retail pharmacies are required to be under the independent ownership of an individual pharmacist. Travel agents also, I believe, are not permitted to canvas door to door or operate from premises which are not given over exclusively to the supply of travel agency services. Although one can recognise possible public benefits resulting from these kinds of rules they also have significant anti-efficiency and anti-competitive effects.

White J., giving judgment for SEANZ, held that in the phrase "expressly authorised by any Act" in section 22(7)(a) the word "Act", by virtue of section 4 of the Acts Interpretation Act 1924, encompassed rules and regulations. Thus section 22(7)(a), for the purposes of the application by SEANZ, was to be read as if it said "expressly authorised by any Act, rule or regulation".[18] Since rule 41(3) was the clear origin of the agreement not to operate from branch offices the trade practice was, it seems clear, "expressly authorised" by that rule. The judge rejected submissions on behalf of the Examiner that section 4 of the Acts Interpretation Act did not apply. These were not, in any event, strong. For example, it was submitted that because section 27(7)(a) used the words "*by* any Act" and not "*under* any Act" the authorisation had to be explicitly contained in the statute itself. However the word "by" is neutral. If "under" had been used there would have been no need to rely on section 4 of the 1924 Act. "Act" must be presumed to include rules and regulations, and the exemption read as "expressly authorised by any Act, rule or regulation".

In the course of his judgment the judge made a number of interesting comments on the interpretation of the exemption. For example, he noted that "in my opinion, it is essential to keep in mind that the words of section 22(7) are 'a trade practice expressly authorised by any Act', not 'a trade practice expressly stated by any Act'."[19] The judge, by this remark, must have meant that the exemptions in section 22 and 27 do not require that the trade practice be described in the empowering provision in the same terminology adopted in the paragraphs of section 23(1). This is consistent with the wide definition of "trade practice" in section 2. It is merely necessary to show, in order to gain the exemption, that the conduct (constituting the trade practice under the Commerce Act) is expressly authorised by any Act. However one must be careful not to read any more into the judge's comment since he was clearly not directing his mind to the use of the word "expressly" and that word must still be given force. The conduct which constitutes the trade practice must still be expressly empowered (authorised) by any Act.

The judge also appeared to suggest — with respect, surely wrongly — that the interpretation of the exemption can, chameleon-like, change colour with the context. He said:[20]

> Bearing in mind the date of the Sharebrokers Act and the method of making rules under it by submitting them for approval by the Governor-General in Council, I do

18 Cf. paragraph 1(1), Schedule 3, Restrictive Trade Practices Act 1976, which reads "This Act does not apply to an agreement which is expressly authorised by an enactment, or by any scheme, order or other instrument made under an enactment".

19 Supra n. 3 at 668, lines 28-31.

20 Page 668, lines 22-26.

> not accept that 'expressly authorised' in section 22(7)(a) of the Commerce Act means that the particular trade practice must be specifically stated in the appropriate statute.

If, however, one concludes that the word "Act" includes "rules and regulations" that conclusion must hold good whether or not the rules pass through any approval or vetting process, whether by the Governor-General or a minister. The exemption would equally well have availed SEANZ if SEANZ alone had first and last say over the rules it promulgated provided that they were lawfully made. The judge, however, also said:[21]

> Furthermore, it is only necessary to state the position to underline that this requirement of the Sharebrokers Act places it in a very different category from other statutes providing for a variety of persons to approve rules.

It is also doubtful whether the date of the relevant empowering legislation can be relevant. The word "Act" cannot have a different meaning in relation to statutes passed after the 1975 Act from its meaning in statutes passed before. Indeed the judge dismissed the converse of this argument put forward on behalf of the Examiner.[22]

In reaching his decision White J. took comfort from the fact that the Sharebrokers Act 1908 permitted a scheme of self regulation for the industry, the objects of which were to promote the interests of members and the interests of the public transacting sharebroking business with members. He said, zeugmatically, that ". . . it is clear that the intention of the legislature is to establish a machinery for regulating sharebrokers in the sharebroking industry and in the public interest."[23] However the public interest test in the Commerce Act is, of course, more expansive and is designed specifically to resolve any possible conflict between the participants in an industry or profession and the general public. In the long title to the Sharebrokers Act Parliament was perhaps doing no more than intoning the usual incantation that the legislation — like all legislation — was passed ultimately in the public interest!

It is submitted that whatever criticisms one may make of the judge's obiter dicta it is difficult to refute his central conclusion that rule 41(3) expressly authorised the practice of not supplying sharebroking services from branch offices. The only string to the Examiner's bow was the argument that section 4 of the Acts Interpretation Act 1924 applies only "if not inconsistent with the context": the onus of establishing that this proviso applied was on the Examiner. Sections 22(7)(a) and 27(3)(c) are both derogations from the regime of control over restrictive trade practices imposed by Part II of the 1975 Act and one might expect, and argue for, their narrow construction. Moreover there might be some slight support for the argument that the word "Act" was not intended to include "rules and regulations" since specific exemptions are given by section 27(3)(a) for trade practices affecting fees for profession services of kinds specified in the Second Schedule to the Act. This schedule specifically refers to fees fixed or approved by the Governor-General or any minister under the provisions of any Act. The recommendation and fixing of professional fees by certain of the specified professions may now benefit from exemptions both under paragraph (a) and para-

21 Page 667, lines 17-20.
22 Page 667, lines 43-48.
23 Page 667, lines 40-42.

graph (c) of section 27. However, the overlap between the two paragraphs is far from total, and the same contextual argument would not assist in the interpretation of section 22(7)(a).

White J. found for SEANZ and concluded that the Commerce Commission had no jurisdiction to inquire into the trade practices. However section 22(7) states that the effect of falling within the exemptions in paragraphs (a) to (c) is to deny the Commission authority to make an order. The section does not prevent the Commission from holding an inquiry, or writing a report. Nor does it prevent the use of the price control powers now contained in section 25 of the Act. This last point was noted by Haslam J. in *HMV* v. *Simmons*[24] in relation to the precursor of section 25 in the 1958 Act.[25] A report by the Commission would not necessarily be otiose merely because no order-making powers can flow from it. It may assess anew an exempted practice in the light of the public interest as set out in the Commerce Act, rather than in the perhaps distorted light of the public interest as contemplated by the statute creating, perhaps fortuitously, the exemption. The Commission is the proper and only forum to make such reassessments and its jurisdiction should not be stultified by an interpretation of section 22(7) which is not justified on a proper construction of its wording.

IV. CONCLUSION

Other issues not explored in these two cases remain for consideration. The interface between intellectual property rights and competition law in New Zealand is not expressly dealt with in any legislation. Profound difficulties will arise if reliance is placed on sections 22(7)(a) and 27(3)(c) of the 1975 Act to regulate that interface, particularly in deciding what conduct in the exercise of intellectual property rights is expressly authorised by the statutes in that field. Moreover one can easily imagine situations arising where only one party to the trade practice benefits from a statutory express authorisation to carry on that practice. This problem did not arise in the *Wool Board* case since the Board's immunity benefitted the NZESA since section 18(1)(c) of the Wool Industry Act 1977 specifically refers to the entry "into agreements and arrangements, whether with persons or organisations . . ." Since the paragraphs of section 23(1) are predominantly couched in terms of "agreements" the question will depend on what practice, and whose, is expressly authorised by any other Act, and how strictly the words "expressly authorised" are interpreted. Obviously a person enjoying express statutory authority to enter into an agreement must do so with one or more other parties — by necessary implication.

Many statutory bodies in the regulated New Zealand economy may be unable to trace all of the business practices which they desire to pursue to an express statutory power. In the *Wool Board* case itself the Board may perhaps be regarded as getting the benefit of the doubt.

In conclusion, the exemptions in sections 22 and 27 are difficult to interpret and difficult to apply in practice. They will produce haphazard consequences not

24 Supra n. 9.
25 Section 22, Trade Practices Act 1958.

always consistent with present views on the public interest. Various solutions may be proposed. There is a need for a dispensing power in the Act. If such a power existed politicians would be forced to grasp the nettle and could not shelter hopefully behind the existing exemptions. The power could be exercised to create exemptions as and when necessary, and of a temporary or permanent nature, or limited to a particular purpose. The Commission could act in an advisory capacity to consider proposals to use the dispensing power.

In practice the present government has arrogated to itself a dispensing power by using section 2A(1)(e) of the Act. This provision, inserted by the 1976 Amendment Act, ostensibly permits the government to communicate its economic policies to the Commerce Commission, but has so far been used to promote the exploitation of liquified petroleum gas and the rationalisation of the New Zealand tyre industry. To use section 2A(1)(e) in this way distorts the balancing process necessarily involved in any Commerce Commission decision. In such circumstances it is disingenuous to subject the joint venture, or merger, or trade practice, as the case may be, to an inquiry process which has been tampered with by a section 2A(1)(e) direction. It should be accepted that the executive may need to promote an industrial venture, or an industry rationalisation plan — perhaps developed in response to an Industry Development Commission report — and utilise a dispensing power for that purpose. Against this it may be argued that ministerial involvement in the monopoly and merger controls in the 1975 Act (as originally drafted) was an unhappy experience. A dispensing power, however, need not predicate such day to day involvement by ministers.

If such a power is not acceptable there needs to be a firm procedure for consulting the Examiner, and/or the Commission, in relation to any legislation which might create further exemptions within sections 22(7)(a) or 27(3)(c). There is recent evidence of such input by the Examiner in section 11(2) of the Phosphate Commission of New Zealand Act 1981 which reads:

> Nothing in this section or in section 10 of this Act shall be construed as affecting or limiting any provision of the Commerce Act 1975, or the exercise of any power under that Act.

If that provision is intended to prevent any power in the 1981 Act creating an exemption within sections 22(7)(a) or 27(3)(c) the writer's view is that it misses the mark since if a power in the 1981 Act, on a proper construction, expressly authorises conduct capable of constituting a trade practice under the 1975 Act the exemptions will operate and, far from limiting the operation of the Commerce Act, its exempting provisions will have been activated. Perhaps the subsection would operate to prevent exemptions arising by necessary implication. Input from the Examiner would not, of course, assist in relation to authorisations already in existence under legislation already in force.

The whole question of exemptions from the Commerce Act is a vexed and difficult one. In the next round of tinkering with the Commerce Act — the now preferred alternative to any real reform — it is unlikely any answers will be provided.[26]

26 The Commerce Amendment Bill 1983 effects no relevant changes.