SECTION 45 OF THE TRADE PRACTICES ACT— THE LAW AND ADMINISTRATION TO DATE*

BY WARREN PENGILLEY**

One of the most important sections of the Trade Practices Act is section 45, which concerns restraint of trade. Dr Pengilley begins by outlining the provisions of the Trade Practices Act dealing with restraint of trade and the role of the Trade Practices Commission in relation to those provisions and in comparison to the courts. Detailed analysis is then given to numerous decisions, from a number of jurisdictions, relevant to the interpretation of section 45. Extensive examination is also made of a large number of Trade Practices Commission decisions regarding clearance or authorisation of conduct which is, or may be, contrary to section 45. The article concludes by discussing and assessing the implications of the High Court's only decision to date on the interpretation of section 45.

I. LEGISLATIVE STRUCTURE OF THE ACT

The restraint of trade provisions of the Trade Practices Act 1974 (Cth), primarily contained in section 45, are basic to its entire operation. Certainly control of restraint of trade activities is a basic starting point in almost all systems of trade practices control.

The Trade Practices Act 1974 was proclaimed on 1 October 1974[1] although, except as regards price fixing for goods, the operation of its restraint of trade provisions was postponed until 1 February 1975.[2]

The legislative provisions covering restraint of trade may be briefly summarised as follows:[3]

---

* This article sets out the position as at 1 August 1976.

** J.D. (Vanderbilt); M.Com. (Newcastle), B.A., LL.B. (Sydney), A.A.S.A.; Barrister-at-Law (N.S.W.); Solicitor and Barrister (A.C.T.); Member of the Australian Trade Practices Commission.

The views expressed are the personal views of the writer. The writer is indebted to Mr J. D. Pyne and Dr G. de Q. Walker for their reading of the drafts of this article and the helpful comments they have made on such drafts.

[1] S. 2(3) and Australian Government Gazette No. 75B, 13 September 1974, 1.

[2] S. 2(4).

[3] In this article, it is not intended to deal with a number of aspects which may touch on restraint of trade under the Trade Practices Act. Thus, for example, the constitutional reach of the Act is not covered. Neither are the exemption provisions set out in the statute (s. 51). Questions of "severance", though of great practical importance, are similarly not dealt with. Corporate and individual responsibility for breaches of the legislation is a separate topic as are the principles of private action. The inter-action of ss. 45 and 47 is also not dealt with. With the intent of conserving space s. 45(3) is not covered. Though important, the general thrust of section 45(3) is covered by the comments in this article relevant to s. 45(4). The summary given is the legal position as at 1 August 1976. It is a summary only for the purpose of giving the legislative background against which this article has to be viewed. It is not an all encompassing summary.

(1) A contract *in restraint of trade*[4] made before the commencement of the Act is unenforceable.[5]

(2) A "*contract or arrangement*" shall not be made in restraint of trade or commerce nor shall "*an understanding*" in restraint of trade or commerce be entered into.[6]

(3) A party shall not "give effect to a contract, arrangement or understanding to the extent that it is in restraint of trade or commerce. . .". This prohibition applies whether the contract or arrangement was made or the understanding reached before or after the commencement of the Act.[7]

(4) The above prohibitions are not contrary to the Trade Practices Act "unless the restraint has or is likely to have a significant effect on competition between the parties to the contract, arrangement or understanding or on competition between those parties or any of them and other persons".[8]

(5) A breach of the above legislative prohibitions may involve a body corporate in a pecuniary penalty of up to $250,000 and an individual in a pecuniary penalty of up to $50,000.[9] Proceedings for penalty may be brought by the Trade Practices Commission or the Attorney-General[10] in the Australian Industrial Court.[11] Both the Attorney-General and the Trade Practices Commission may also seek injunctive relief in the Australian Industrial Court.[12] An individual may seek injunctive relief in such court[13] and may seek to recover there any damages suffered.[14]

The above provisions show a legislative mechanism which is clearly modelled on the United States principles of anti-trust legislation. However, the U.S. principles were not imported *in toto* into Australia.

---

[4] The italics here and elsewhere are that of the writer.

[5] S. 45(1).

[6] S. 45(2)(a). The section states that "a corporation" shall not be party to the prohibited activities and this terminology is general in the Act. The word "corporation", however, generally covers individuals (s. 6(2)(h)). This raises questions as to the Constitutional reach of the Act into which it is not intended here to delve.

[7] S. 45(2)(b). See also comments *supra*, n. 6.

[8] S. 45(4) but see also 45(3) and n. 3 *supra*.

[9] S. 76.

[10] S. 77.

[11] S. 76; see also s. 169 and definition of "Courts" in s. 4.

[*Editor's note*: Since the creation of the Federal Court of Australia (see Federal Court of Australia Act 1976) and the abolition of the Industrial Court (see Conciliation and Arbitration Amendment Act (No. 3) Act 1976, s. 4) the Federal Court of Australia has jurisdiction over matters arising under the Trade Practices Act. The definition of "Courts" in the Trade Practices Act, s. 4 has been amended accordingly (see Federal Court of Australia (Consequential Provisions) Act 1976, s. 3).]

[12] S. 80.

[13] *Ibid.*

[14] S. 82.

There was fear that the Act would create general uncertainty for business and the legislative view was that business should have the opportunity of having its agreements evaluated elsewhere than in the Industrial Court, because, in the Industrial Court, an adverse adjudication may well carry heavy penalty. Thus the Act incorporated provisions whereby a party may apply to the Trade Practices Commission for clearance of contracts, arrangements or understandings which *may be* in restraint of trade and such a clearance may be granted by the Commission at any time.[15] The Commission, in a clearance application has to determine the competition point and may grant clearance if:

> the Commission considers that any restraint of trade or commerce that *results from* the contract, arrangement or understanding or *would result from* the proposed contract, arrangement or understanding, does not have and is not likely to have, or would not have and would not be likely to have, a significant effect on competition. . .[16]

Clearance may be applied for in respect of actual or potential contracts, arrangements or understandings. If clearance is granted by the Commission, then the relevant contract arrangement or understanding is not in breach of the Trade Practices Act.[17]

A further legislative refinement which distinguishes the Australian legislation from the American is the authorisation procedure in the Australian Act. The legislature accepted the view that restraints of trade may have public benefits. It thus provided that the Trade Practices Commission may authorise, on public benefit grounds, a contract, arrangement or understanding (other than one fixing or controlling the price of goods)[18] which *would or might be* in restraint of trade.[19] The legislature did not lay down in detail any definition of "public benefit" but prescribed that the Commission is not to grant an authorisation

> unless it is satisfied that the contract, arrangement, or understanding . . . to which the application relates results, or is likely to result, in a substantial benefit to the public, being a benefit that would not otherwise be available, and that, in all the circumstances, that result, or that likely result, as the case may be, justifies the granting of the authorisation.[20]

If authorisation is granted by the Commission then the relevant contract, arrangement, or understanding does not breach the Trade

---

[15] S. 92(1).
[16] S. 92(2).
[17] *Ibid.*
[18] S. 88(2).
[19] S. 88(1).
[20] S. 90(5).

Practices Act.[21] A number of provisions of importance to draftsmen of documents (but into which it is not intended here to delve) are set out in the Act, the essence of which is to ensure that contracts, arrangements or understandings are not implemented prior to their receiving authorisation.[22]

The Commission also has power to grant interim authorisation to enable it to determine an application on its merits or for a number of other reasons,[23] or authorisation subject to conditions.[24] The Commission, where it considers it appropriate to do so, may hold a public hearing in relation to an authorisation application.[25] There is a right of appeal to the Trade Practices Tribunal which can be pursued by "A person dissatisfied with a determination by the Commission in relation to an application for, or in relation to the revocation of, an authorisation".[26] There is no appeal provision in the case of a Commission clearance decision.

II. THE INTER-ACTION OF THE "JUDICIAL" ROLE OF THE COMMISSION AND THE JUDICIAL ROLE OF THE COURTS

The Commission clearly is not a court. It has no ability to give binding determinations which affect the rights of parties. Neither has it power to extract a pecuniary penalty from anybody. To do this, the Commission has to bring proceedings as a party before the Australian Industrial Court and it is that judicial body which makes binding findings. It is clear too that it is ultimately the courts which interpret the words of, and the scope of, the Trade Practices Act and it will be ultimately the courts which will determine whether the Act will be given a wide or restricted interpretation.

Nevertheless, the Commission does have an important function which some have described as "quasi-judicial". This is in making administrative determinations as to its views on clearance (competition) issues and authorisation (public benefit) issues in response to applications made to it for exemption from the general provisions of the Act. Any practical appreciation of the effect of the Trade Practices Act cannot be considered complete without reference to Commission decisions and determinations for at least three reasons, these being:

(1) At the date of writing,[27] there have been no court decisions,

---

[21] S. 88(1).
[22] See, *e.g.*, ss. 45(8), 88(4), 88(5).
[23] S. 91(2).
[24] S. 91(3).
[25] S. 90(2).
[26] S. 101.
[27] *I.e.* as at 1 August 1976. By the time this article appears, there may well be significant changes in the position as stated in this article but these cannot be anticipated with any degree of certainty at this stage.

other than the Full High Court decision in *Quadramain*,[28] on the questions raised by the restraint of trade section of the Trade Practices Act (s. 45). *Quadramain* is a decision with certainly marked potential significance, but decided in a context different from that raised generally by the section. This decision[29] is commented upon in detail later. This does not mean to say that cases have not been brought in the courts. They have, but decisions have not yet been given. In contrast, the Commission has issued a great number of clearance and authorisation decisions.[30] To date the Commission decisions are, therefore, the only real guide that business has as to the practical operation of the Act and its Australian interpretation.

(2) Clearly the views of the Commission have high commercial relevance because of the fact that the Commission is the only body which can give an exemption to the basic provisions of the Act (subject to an appeal to the Trade Practices Tribunal in authorisation cases). This exemption is of great importance to business. The Commission decisions show the principles which it considers of relevance in granting or rejecting applications.

(3) The Commission's decisions on clearance applications show the view it is likely to take in instituting proceedings before the Courts and the line of argument it may take in the courts. The Commission in clearance applications essentially has administratively to determine the same questions as those which courts are called upon judicially to determine *i.e.* whether there is a significant effect on competition. In the Commission's determination, the answer to this question determines whether or not a clearance is granted. In the Court's determination, the answer to the question determines whether or not the Act is breached. However, the courts have additional obligations in determining a number of legal issues in which the Commission does not become involved.

All applications for clearance and authorisation are placed on a public register, subject to the Commission granting confidentiality for certain information. The Act envisages a public register and indicates a desire both for open decision making and for open processes leading to decision. The Commission takes the view that the utility of the public register should not be reduced more than necessary. Thus the Commission has rejected a number of claims for confidentiality. But it has granted a number too—primarily where sensitive cost, financial and planning information is involved. In this way, it is hoped that the

[28] *Quadramain Pty Ltd* v. *Sevastapol Investments Pty Ltd* (1976) 50 A.L.J.R. 475.
[29] *Ibid.*
[30] References given in this article are to the Commission Registration Numbers and the date of the Commission's decision.

full issue can be aired whilst, at the same time, the proper limits of disclosure are recognised.

The Commission has adopted an administrative practice of giving detailed reasons for all cases involving rejection of clearance applications as it wishes the community generally to be aware of the thrust of the Act as the Commission sees it. For the same reason, detailed reasons are given for grants of clearance where the case is of importance or raises new principles. It should be noted that this is an administrative burden the Commission regards as proper that it should accept. In clearance cases, there is no requirement in the Act for the Commission to give written reasons for any decision it makes. In authorisation cases the situation is different for, in these cases, the Commission is required to state reasons for its decisions in writing.[31]

As part of its general obligations under section 28 of the Trade Practices Act,[32] the Commission has issued a number of Guideline statements.[33] These are also of relevance in assessing the impact of the legislation for the same reasons as those stated above.

However, the Commission has emphasised frequently that it is not a Court[34] and some significant results follow from this fact. Firstly, it is clear from decisions the Commission has issued that the Commission does not determine whether, in fact, section 45 Trade Practices Act is breached. This follows from the wording of the Act itself, in that a party may apply for clearance in respect of an agreement which "*may be*" in restraint of trade.[35] Equally, clearance may be granted or denied for an agreement which *may not be* in restraint of trade.[36] Similar consequences flow in the authorisation area.

The Commission stated its general position in this regard in its *Shell* determination[37] as follows:

> All the contracts and all the conduct put before the Commission by the applicants in this case for authorisation have obviously

---

[31] S. 90(4).

[32] The Commission, under s. 28(1)(a) of the Trade Practices Act, has an obligation "to make available to persons engaged in trade or commerce and other interested persons general information for their guidance with respect to the carrying out of the functions, or the exercise of the powers, of the Commission . . .".

[33] Eighteen such Guidelines have been issued as at 1 August 1976. Guidelines are directed to a number of matters (*e.g.* advertising guidelines) as well as to restraint of trade. Six Guidelines relate primarily to restraint of trade.

[34] Each Guideline issued by the Commission specifically carries a notation that the Commission cannot bind the courts and neither can it bind the Attorney-General or individual litigants as to cases such persons may come to bring before the courts.

[35] S. 92(1).

[36] Quadramain Application (C18284—11 August 1975).

[37] Shell Authorisation Determination—Public Hearing No. 1 of 1975. Determination 9 December 1975.

> been carefully considered by (the applicants) in relation to the risk that they may be in breach of the Act if not authorised. It is not the Commission's task in these proceedings to judge that risk or to attempt to rule on what the Act comprehends by restraint of trade. . .[38]

Secondly, the Commission has to determine not whether a section 45 breach, in fact, has occurred, but *the results* that follow from the agreement before it.[39] Whilst this often will involve the same question faced by a court in deciding whether there is or is not a breach of the Act, the difference of emphasis in the role of the Commission to that of courts can lead to different conclusions.

Having thus placed the role of the Commission and the Courts in appropriate perspective, the balance of this article is a consideration of

— Overseas and Australian court decisions on the subject of restraint of trade where these are considered relevant to the Australian legislation.
— A review of decisions of the Australian Trade Practices Commission relating to both clearance and authorisation applications and the principles which may be extracted from these.
— A consideration of the Australian High Court decision in *Quadramain*[40] and an analysis of the problems there raised as far as relevant in trade practices terms.

III. OVERSEAS AND AUSTRALIAN DECISIONS RELATING TO RESTRAINT OF TRADE—OTHER THAN THE QUADRAMAIN DECISION

A consideration of section 45 basically falls into three parts. Firstly, there must be a "contract arrangement or understanding".[41] Secondly, this must be "in restraint of" the third factor, which is "trade or commerce".

A. *What is "a contract, arrangement or understanding"?*

The words directly occur in section 260 of the Australian Income Tax Assessment Act 1936 (Cth) and some guidance as to likely interpretation can be gathered from the court cases interpreting that section. In *Newton's* case[42] the Privy Council felt that an "arrangement" was "something less than a binding contract"; "something in the nature of an understanding" and "a plan . . . which may not be

---

[38] Shell Authorisation Determination, *supra*, para. 9.3(b).
[39] Quadramain Application, *supra*, n. 36.
[40] (1976) 50 A.L.J.R. 475.
[41] Note s. 45(1) refers only to a "contract in restraint of trade" omitting the words "arrangement or understanding". However, s. 45(1) applies only to contracts made before the commencement of the Act. S. 45(2) will clearly be the more relevant section in future. It refers to the making of "contracts, arrangements or understandings".
[42] *Newton* v. *Commissioner of Taxation* [1958] A.C. 450.

enforceable at law". The Supreme Court of New Zealand has specifically approved *Newton's* case and its reasoning in the interpretation of the relevant New Zealand Trade Practices Statute.[43] An even more liberal interpretation has recently been given by the Privy Council to the New Zealand equivalent of section 260 of the Income Tax Assessment Act. The Privy Council approved the following words from *Newton's* case:[44]

> In applying the section you must, by the very words of it, look at the arrangement *itself* and see which is *its* effect—[that] which it does—irrespective of the motives of the persons who made it . . .

and further added:

> If an arrangement has a particular purpose, then that will be its intended effect. If it has a particular effect, then that will be its purpose. . .[45]

The interpretation given in a taxation context is an interpretation one might reasonably consider to be consistent with commercial reality. Indeed, it is an interpretation consistent with trade practices interpretation of the same or similar words in statutes of the United States, Great Britain and New Zealand. A trade association "recommended price" arrangement, on such interpretation, would thus come within section 45.[46] Indeed, in the *Wellington Fencing Materials* case[47] the New Zealand Supreme Court said as regards such a trade association recommended price list that if there is a common course of action, it is hair splitting to deny that there is an agreement or arrangement. The evidence there showed that the members of an association entrusted to their executive the formulation of a price fixing plan for a known and stated objective; that the executive devised the plan and notified members of it; that there was a general understanding that the plan would be followed and that, in fact, there was no substantial deviation from the observance of the plan. The recommended price list was thus held to be within the terms of the New Zealand trade practices statute even though there was no power to bind members, no formal undertaking to comply with recommendations, no attempt at enforcement, no enquiry as to the extent of compliance and notwithstanding the fact that prices did, in fact, vary from recommendations.

---

[43] *Re The Wellington Fencing Materials Association* [1960] N.Z.L.R. 1121.

[44] [1958] A.C. 450.

[45] *Ashton* v. *Inland Revenue Commissioner of New Zealand* [1975] 1 W.L.R. 1615, 1621. The case involved the construction to be put on s. 108 of the Land and Income Tax Act 1954 (N.Z.). So far as here relevant, s. 108 of the New Zealand statute may be considered equivalent to s. 260 of the Australian Income Tax Act.

[46] *E.g., U.S.* v. *National Association of Real Estate Boards* (1950) 339 U.S. 485; *U.S.* v. *Nationwide Trailer Rental Systems Inc.* 1955 Trade Cases 68,101; *Plymouth Dealers Assoc. of Northern California* v. *U.S.* 1960 Trade Cases 69,726; *Re The Wellington Fencing Materials Association* [1960] N.Z.L.R. 1121.

[47] [1960] N.Z.L.R. 1121, 1128.

By similar reasoning, so called "information agreements" have been held to infringe the Sherman Act of the United States where anti-competitive results can be seen to follow on a realistic commercial interpretation of the factual market operation of the agreement. Price information dissemination serves a valid information purpose and may, indeed, be even pro-competitive. But it can be the mask for restrictive agreements also. The difference is illustrated by *American Column & Lumber Co.* v. *U.S.*[48] and the succeeding case of *Maple Flooring Manufacturers' Association* v. *U.S.*[49] In the first case, a detailed statistical information agreement was entered into. The Supreme Court of the United States had little difficulty in finding that the agreement infringed American anti-trust laws on the basis that:

> Genuine competitors do not make daily, weekly and monthly reports of the minutest details of their business to their rivals. . . . This is not the conduct of competitors but is so clearly that of men united in an agreement, express or implied, to act together and pursue a common purpose . . . and a direct restraint upon . . . commerce . . . must inevitably [be] inferred from the facts . . . proved.[50]

In *Maple Flooring*,[51] decided but four years later, the U.S. Supreme Court found that a survey which involved a statistical interchange of notional quotes, where the names of no individual companies were mentioned and the information relating to quotes was basically historical, was a valid information exchange not violative of U.S. legislation. The view the court took in each case clearly turned, not upon principles of draftsmanship or minute technical legal considerations, but upon the way the court saw the agreement operating in actuality in market place terms.

Conduct itself, over time, may be sufficient to give rise to an arrangement or understanding violative of section 45. In the *British Basic Slag* case,[52] legal formality was swept aside and the court found on a basis of the factual effect of the agreement or understanding. The court quoted with approval the judgment of Cross J. under appeal, where His Honour had said:

> all that is required to constitute an arrangement not enforceable in law is that the parties to it shall have communicated with one another in some way, and that as a result of the communication each has intentionally aroused in the other an expectation that he will act in a certain way.[53]

---

[48] (1921) 257 U.S. 377.
[49] *Maple Flooring Manufacturers' Association* v. *U.S.* (1925) 268 U.S. 563.
[50] (1921) 257 U.S. 377, 410.
[51] (1925) 268 U.S. 563.
[52] *Re British Basic Slag Agreements* [1963] 1 W.L.R. 727.
[53] *Id.* 747 *per* Diplock L.J.

Similarly, in the *Mileage Conference* case, some three years later, the court stated that

> the law is not so subtle or unrealistic to involve the conclusion that . . . [an arrangement] . . . cannot come into being as a result of information as to another's intentions derived from their actual and continuing conduct towards one another.[54]

Without proceeding further into overseas precedents, which are many, it is clear from the United States, United Kingdom and New Zealand decisions above that the existence of a contract, arrangement or understanding has to be determined by factual intent and effect in the market place, *not* by legal form. On the basis of the above overseas holdings, considerations of enforceability, consideration, seals and writing and all the other shibboleths of common law with which lawyers are long familiar appear to be largely irrelevant in the context of a commercial statute regulating business conduct. The initial question always to be asked is "What is in fact occurring regardless of legal form?" It is this question courts have answered in determining the existence or otherwise of a contract, arrangement or understanding. Furthermore, it is not to be thought that the view expressed above is that only of common law countries. It is a necessary part of the realistic interpretation of a commercial trade statute. This interpretation has been reached irrespective of the jurisprudential inheritance of the particular court deciding the matter. Thus, in one of the latest decisions of the Common Market Court, the *European Sugar Cartel* case,[55] the court was called upon to interpret the words "concerted practices which may affect trade" as contained in section 85 of the Treaty of Rome. One would think this language requires a far higher element of agreement and enforcement than section 45 of the Trade Practices Act or the statutes of the United States, the United Kingdom or New Zealand. Nevertheless the interpretation of the court was in all relevant respects identical to those quoted above for the court said:

> The concept of a "concerted practice" refers to a form of co-ordination between undertakings, which, without having been taken to the stage where an agreement properly so called has been concluded, knowingly substitutes for the risks of competition co-operation in practice between them which leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the importance and number of the undertakings as well as the size and nature of the said market . . . the question of whether there has been a concerted practice can only be properly evaluated if

[54] *Re Mileage Conference Group of the Tyre Manufacturers' Conference Ltd's Agreement* [1966] 1 W.L.R. 1137, 1159.

[55] *Re The European Sugar Cartel: Co-operatieve Vereniging 'Suiker Unie' UA v. E.C. Commission* [1976] 1 C.M.L.R. 295.

> the facts relied on by the Commission are considered not separately but as a whole, after taking into account the characteristics of the market in question.[56]

B. *What is "a restraint"?*

The most commonly quoted common law definition of the term "restraint of trade" appears to be that of Diplock L.J. when he said in the *Petrofina* case:

> A contract in restraint of trade is one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty *in the future* to carry on trade with other persons not parties to the contract in such manner as he chooses.[57]

This might be considered a reasonable definition as presumably restraints when imposed operate, by definition, on future actions. The apparently simple definition appears, however, to have been thrown into confusion by the House of Lords in its *Esso* decision.[58] This decision stated that a restraint of trade must embody a party giving up an *existing* freedom. The conclusion which may be thought to follow from *Esso* is that if, for example, a person is financed into a petrol station with a petrol "tie", or indeed subject to any other applicable restraint, then there is no legal "restraint of trade". Prior to his entering into the service station he had no right to be there or to trade there. If he accepts restraints as a method of entering into business, he is giving up no future freedom which he previously had.

Such an interpretation is, however, at all odds with commercial reality in the context of a trade practices statute. It means that any person having applicable market power may impose virtually any restraint he likes. This state of affairs can do nothing but perpetuate the power situation to the disadvantage of other competitors who may not have the appropriate market power but who do have the competitive product to sell. Such competitors can easily be denied market access if the *Esso* interpretation is considered applicable in a trade practices context. Yet to give fair market access is clearly an objective of the Trade Practices Act. Indeed, in trade practices terms, it would be surprising if such an interpretation survived. In the United States, the realistic situation has been seen. So where land was sold by a railway company subject to a covenant that the railway company was to obtain "preferential routing" of products produced on the land, the United States Supreme Court had little difficulty in holding the covenant violative of U.S. anti-trust laws saying:

> We wholly agree that the undisputed facts established beyond any genuine question that the defendant possessed substantial econ-

---

[56] *Id.* 405.
[57] *Petrofina (Gt. Britain) Ltd* v. *Martin* [1966] Ch. 146, 180. (Italics added.)
[58] *Esso Petroleum Co. Ltd* v. *Harper's Garage (Stourport) Ltd* [1968] A.C. 269.

omic power by virtue of its extensive landholdings which it used as leverage to induce large numbers of purchasers and lessees to give it preference to the exclusion of its competitors in carrying goods or produce from the land transferred to them.[59]

One would hope that an economically realistic interpretation will survive in Australia in the trade practices field. It should be noted that *Esso* involved a common law restraint, not one pursuant to a statute akin to the Trade Practices Act. There may, however, be a tendency to apply it across the whole spectrum, notwithstanding the two basically different settings in which interpretation is called for. Even in a common law context, it is the opinion of the writer that the *Esso* doctrine's illogicality must be apparent and the High Court already, perhaps, shows leanings in this direction. It was not greatly impressed with the *Esso* doctrine in *Buckley* v. *Tutty*[60] when it said that the restraint of trade doctrine applied "to all restraints, howsoever imposed, and whether voluntary or involuntary".[61] Similarly in the *Pamag* case[62] the restraint of trade doctrine was thought to be quite general. Moreover, in subsequent cases in the United Kingdom itself, the *Esso* doctrine does not appear to have been received with enthusiasm and there are cases which seem to apply principles of restraint of trade quite generally.[63] The High Court itself did not apply the *Esso* test in its *Amoco* decision,[64] where Menzies and Walsh JJ. doubted it, Stephen J. supported it and Gibbs J. left the issue open.

United States and other court holdings, some of which are canvassed below, show a number of findings of restraint of trade based upon an assessment of market place effect and independently of whether there is "a restraint" at common law. Perhaps only some of these may infringe section 45 of the Australian Act if *Esso* is followed here.

Some examples of arrangements which the United States and other courts have regarded as violative of anti-trust laws are as follows:

(i) Recommended price agreements.[65]

(ii) Information agreements whereby detailed statistics are regularly given to competitors.[66]

---

[59] *Northern Pacific Railway Co.* v. *U.S.* (1958) 356 U.S. 1, 7.

[60] (1971) 125 C.L.R. 353.

[61] *Id.* 375.

[62] *Queensland Co-operative Milling Association* v. *Pamag Pty Ltd* (1973) 47 A.L.J.R. 342.

[63] *E.g., Pharmaceutical Society of Great Britain* v. *Dickson* [1970] A.C. 403, 431, 440; *Schroeder Music Publishing Co. Ltd* v. *Macauley* [1974] 1 W.L.R. 1308, 1315.

[64] *Amoco Australia Pty Ltd* v. *Rocca Bros Motor Engineering Co. Pty Ltd* (1973) 47 A.L.J.R. 681.

[65] See cases cited *supra*, n. 46.

[66] See *American Column & Lumber Co.* v. *U.S.* (1921) 257 U.S. 377, *cf. Maple Flooring Manufacturers' Association* v. *U.S.* (1925) 268 U.S. 563.

(iii) Codes preventing members from engaging in certain lines of business.[67] It is irrelevant that these codes are aimed at a "benevolent" or "socially useful" purpose.[68] The view has also been accepted in Great Britain that it is irrelevant that such codes are binding "in honour" only.[69]

(iv) Codes requiring business to be done in a certain way.[70]

(v) Agreements which limit production or impose quotas.[71]

(vi) Agreements which arbitrarily exclude qualified competitors as members of a trade association. A recent example was the case of exclusion of a qualified real estate agent from an agents' "multiple listing service".[72]

(vii) An agreement requiring competitors to adhere to "fair codes of competition".[73]

(viii) The enforcement of anti-competitive agreements by forfeiture of pecuniary deposits for non-compliance with group restrictive agreements.[74] Similarly enforcement of anti-competitive agreements by means of penalty and fine is illegal.[75]

(ix) Group boycotts of competitors, suppliers or purchasers.[76] In the *Klors* case, the Supreme Court of the United States said that "group boycotts or concerted refusals to deal with other traders have long been held to be in the forbidden category . . . such arrangements cripple the freedom of traders . . . to sell in accordance with their own judgment".[77] In the United Kingdom, the comment has been made that boycott must be "necessarily condemned" notwithstanding the grounds open in the United Kingdom for justification of agreements in restraint of trade.[78]

(x) The imposition of discriminatorily high fees for admission of a new entrant to a trade association.[79]

---

[67] *U.S.* v. *Baton Rouge Insurance Exchange* 1958 Trade Cases 69,068.

[68] *Fashion Originators Guild* v. *F.T.C.* (1941) 312 U.S. 457. Note that it is possible that such a purpose in Australia may merit authorisation on "public benefit" grounds under s. 90(5) of the Trade Practices Act.

[69] *Pharmaceutical Society of Great Britain* v. *Dickson* [1970] A.C. 403.

[70] *F.T.C.* v. *Pacific States Paper Trade Association* (1927) 273 U.S. 52.

[71] *Klor's Inc.* v. *Broadway-Hale Stores Inc.* (1959) 359 U.S. 207.

[72] *Marin County Board of Realtors Inc.* v. *Palsson* 1975—2 Trade Cases 60,445.

[73] *U.S.* v. *Abrasive Grain Association* 1948-1949 Trade Cases 62,329.

[74] *U.S.* v. *American Lindseed Oil Co.* (1923) 262 U.S. 371.

[75] *U.S.* v. *Coal Dealers' Association of California* (1898) 85 F 252.

[76] *Klors Inc.* v. *Broadway-Hale Stores Inc.* (1959) 359 U.S. 207.

[77] *Id.* 212.

[78] *Daily Mirror Newspapers Ltd* v. *Gardner* [1968] 2 Q.B. 762, approved in *Brekkes* v. *Cattel* [1972] Ch. 105. Such a statement should be borne in mind by parties seeking authorisation pursuant to s. 90(5) of the Trade Practices Act—a subject dealt with later in this article.

[79] *Associated Press* v. *U.S.* (1945) 326 U.S. 1.

(xi) A trade association imposing a maximum resale price on members.[80]

The above are but illustrative examples and are thus selective in nature. On a general basis, the writer has attempted to classify restraint agreements into various categories in a previous article.[81] But the combinations of possible restraints are endless. As Mr Snedden said in 1962, when prior Australian trade practices legislation was being considered by Parliament, restrictive trading agreements show:

> refinements [which] are as exotic as the fire from a cut diamond. Tailored by master craftsmen to suit the needs of themselves, no greater labour has produced greater artistry of result.[82]

The above opinion deserves respect when courts are interpreting section 45 and also in the wider context of the interpretation of trade practices legislation generally.

C. *What is "Trade or Commerce"?*

Even at common law, the word "trade" does not appear to have been confined within any particular or discernible limitations. The courts appear to have followed the view expressed by Atkin L.J. in 1920 that the doctrine of restraint of trade "extends further than trade, it undoubtedly extends to the exercise of a man's profession or calling. . .".[83] Thus the playing of soccer[84] and rugby league[85] is a trade, as is horse training.[86] Boxing and theatrical activities have been held to be trade in the United States,[87] as has news gathering.[88] Similarly in the United Kingdom, it has been stated that there is no exception in favour of a profession from the general rule that the doctrine of restraint of trade applies quite generally.[89] The doctrine thus covers United Kingdom pharmacists.[90] In the United States, the anti-trust laws have been

---

[80] *Keifer—Stewart Co.* v. *Joseph E. Seagram & Sons Inc.* (1951) 340 U.S. 211. Note that this activity is not within the exemption of s. 45(5) Trade Practices Act as it involves concerted action by more than one party.

[81] Pengilley, "Restrictive Trading Agreements" (1973) 47 The Australian Accountant 396.

[82] H.R. Deb. 1962, Vol. 36, 424.

[83] *Hepworth Manufacturing Co. Ltd* v. *Ryott* [1920] 1 Ch. 1, 26. Approved by the Australian High Court in *Buckley* v. *Tutty* (1971) 125 C.L.R. 353.

[84] *Eastham* v. *Newcastle United Football Club Ltd* [1964] Ch. 413.

[85] *Blacker* v. *New Zealand Rugby Football League (Inc.)* [1968] N.Z.L.R. 547; *Buckley* v. *Tutty* (1971) 125 C.L.R. 353.

[86] *Nagle* v. *Feilden* [1966] 2 Q.B. 633.

[87] *U.S.* v. *Schubert* (1955) 348 U.S. 222; *U.S.* v. *International Boxing Club of New York Inc.* (1955) 348 U.S. 236.

[88] *Associated Press* v. *U.S.* (1945) 326 U.S. 1.

[89] *Pharmaceutical Society of Great Britain* v. *Dickson* [1970] A.C. 403.

[90] *Ibid.*

held to cover medical practitioners,[91] real estate agents[92] and lawyers.[93] Indeed the extent to which a "trade" may be covered by the common law doctrine is shown by the fact that, where a person's professional football employment was jeopardised by the rules of an *amateur* body, the Supreme Court of New Zealand had no hesitation in applying such doctrine to prevent enforcement of such rules.[94]

No doubt there will be submissions put to the Australian courts that certain activities are not "trade or commerce". Primarily one might think that these submissions will come from professional or quasi-professional groups. In the writer's view such submissions do not have high prospects of success, although it is difficult to read the court's mind in advance of any actual decision. It is also to be expected that cases of this nature will be slower to surface in Australia than elsewhere. The Act is primarily based on the Australian government's constitutional power over corporations and the constitutional power over interstate commerce. Purely intrastate restraints engaged in by individuals thus may not be speedily seen in the courts and, even if seen, may arise in particular circumstances and not in an overall general context.

IV. COMMISSION DECISIONS—CLEARANCE

As stated earlier, the Commission's role in clearance decisions is to make an administrative finding as to whether the results which follow from the contract, arrangement or understanding before it (which may or may not be in breach of the Act) significantly affect competition. Questions of public benefit are not relevant here but in authorisation determinations—a subject dealt with later. In general terms the Commission does not regard its function as being that of applying overseas legal precedents to Australian conditions. It has, for example, shown a marked difference in interpretation of exclusive dealing (section 47) from that adopted in the United States.[95] It appears undoubted also that a large number of company mergers cleared by the Commission would not receive similar sanction in the United States.[96] Whilst making these statements, however, there is a marked similarity between

---

[91] *U.S.* v. *American Medical Association* (1940) 110 F 2d 703; *American Medical Association* v. *U.S.* (1942) 130 F 2d 233 *cf.* on appeal (1943) 317 U.S. 519; *U.S.* v. *Oregon Medical Society* (1952) 343 U.S. 326, 338-339.

[92] *U.S.* v. *National Association of Real Estate Boards* (1950) 339 U.S. 485, 490.

[93] *Goldfarb* v. *Virginia State Bar* (1975) 421 U.S. 773.

[94] *Blacker* v. *New Zealand Rugby Football League (Inc.)* [1968] N.Z.L.R. 547.

[95] See Pengilley, "Exclusive Dealing under the Trade Practices Act" (1975) 3 Australian Business Law Review 174, 197-202.

[96] It is realised that this is assertion without discussion. The point appears clear to the writer on comparative evaluation but it cannot be elaborated in detail in this article. This view has been confirmed by at least two U.S. authorities (Professors Weston and Mnookin) with whom the writer has discussed the matter in detail.

overseas views on restraint of trade and the holdings of the Commission to date. This is not to be unexpected. Exclusive dealing and company mergers are interpreted against differing economic backgrounds, different industry concentration factors and differently worded statutes. In some countries, notably the United Kingdom, legislation dealing with exclusive dealing does not effectively exist at all even though there is detailed legislation dealing with restraint of trade agreements. Not only this, but anti-competitive repercussions are much more universally and uniformly identifiable in the case of agreements in restraint of trade than in perhaps any other area of trade practices legislation.

The Commission quite early took the view that recommended price agreements would have a significant effect on competition and issued a guideline statement to this effect.[97] Boycotts and blacklists were singled out for mention in the Commission's very first guideline.[98] Likewise, the Commission has taken the view that it is unable to clear trade association "codes of ethics" which provide for expulsion of members for undefined "unethical conduct". Terms such as this may be interpreted as extending to "discounting" and this has, in fact, been found to be the case.[99] The Commission has issued a guideline statement on this subject in which, among other things, it states that it rejects the view that:

> price competition is unethical or by calling such competition "unethical" it can be lawfully restrained. Agreements and understandings to restrict price competition do not stand any better with the Trade Practices Act by calling them "codes of ethics" or including them within "codes of ethics".[1]

In the same Guideline, the Commission stated that even obscure references to price competition in codes of ethics (*e.g.* no member shall perform a task for less than "full fee") are likely to be sufficient to lead to a clearance rejection. Vague provisions for expulsion of members from an association or admission of members to it are also likely to result in a rejection of clearance. Use of any code in an arbitrary or capricious manner is similarly, regardless of the wording of the documentation, sufficient to result in clearance rejection. Actual Commission decisions follow the views expressed in the Guideline statement referred to.[2]

---

[97] Information Circular No. 3—10 December 1974.
[98] Information Circular No. 1—10 December 1974.
[99] Australian Federation of Travel Agents (C7515, 16 July 1975).
[1] Information Circular No. 9—26 May 1975.
[2] *E.g.*, Australian Federation of Travel Agents (C18520, C18437 and C7515—all decisions 15 May 1975); Wholesale Wine and Spirits Merchants Association of N.S.W. (C3093—28 July 1975); Wholesale Wine & Brandy Association of N.S.W. (C3748—28 July 1975); Wine & Brandy Producers Association of South Australia (C515—28 July 1975); Australian Pharmaceutical Manufacturers Association (C21031—23 October 1975); Australian Veterinary Association (C21167—

The Commission has, however, cleared agreements involving certain joint activities engaged in by small business entities to enable them more effectively to compete against larger corporate entities[3] and has issued a guideline as to its position on this matter.[4] Also, the Commission has had regard to the problems of marketing information agreements. It has expressed its views in very similar terms to the United States decisions in *American Column & Lumber*[5] and *Maple Flooring*.[6] These views have been expressed in both decisions[7] and a Guideline Statement.[8]

The Commission has been involved with a number of shopping centre leases and competitive restraints which follow from restrictive clauses in such leases. It has issued a Guideline Statement on this subject.[9] Whilst the Commission is not concerned as to basic rentals payable by lessees, it is concerned at competitive restrictions placed on lessees such as detailed regulation as to how a lessee is to conduct his business;[10] the preventing of a lessee from advertising except in a manner in the unfettered control of the lessor;[11] restrictions preventing the lessee obtaining a liquor licence[12] or allowing a lessor an absolute right of audit and inspection of the lessees books of account.[13] Provisions in Merchants' Association rules have also resulted in denial of clearance where the contributions of small lessees to the merchants' association give discriminatory advantages to a large lessee[14] which competes against them.

The Commission from October 1974 to June 1976 has decided on their merits some 3,492 clearance applications (for details see Tables I and II hereunder). In many cases granting clearance and raising no

---

21 November 1975). In particular, see letter from Australian Federation of Travel Agents dated 9 September 1975 and Commission's reply of 24 October 1975 (on public register No. C7515). Note the A.F.T.A. Code of Ethics subsequently cleared (C23242—2 August 1976). Other Codes of Ethics cleared include codes relating to Beer Advertising (C22033—17 December 1975) and a code relating to Law Society rulings on Business Names (C23119—9 April 1976).

[3] Pharma Buy (C4272—11 July 1975); Magnetic Electrix Application (C939—24 October 1975); Donlan Liquor Market (C763—8 August 1975).

[4] Information Circular No. 15—12 May 1976.

[5] (1921) 257 U.S. 377.

[6] (1925) 268 U.S. 563.

[7] *E.g.*, Tractor & Machinery Association of Australia (C266-71—6 November 1975).

[8] Information Circular No. 14—28 April 1976.

[9] Information Circular No. 7—12 May 1975.

[10] Myers Application (numerous registration numbers—25 June 1976). A number of other decisions express the same view.

[11] Northpoint Shopping Centre (C931—26 September 1975). A number of other decisions express the same view.

[12] *Ibid.*

[13] *Ibid.*

[14] Starbridge No. 1 Pty Ltd (C21332—19 May 1976). Two large lessees occupied 63% of Shopping Centre but paid only 17.9% of contributions.

new point of principle, detailed reasons have not been given. Often reasons have been given by reference to issued Guideline Statements. In some cases, decisions have been made in block. The statistical analysis is not, therefore, of great assistance. Even with these limitations, however, it is clear that it is impossible in an article of this length to go into detail as to the points made in decisions as a whole. From what has been said, however, it is clear that anti-competitive repercussions of restrictive agreements, as seen by the Commission, have had a great deal of similarity to such repercussions as seen by overseas tribunals. For reasons earlier stated, it would be surprising if this were not so.

V. COMMISSION DECISIONS—AUTHORISATION

So far as the writer is aware, there is no overseas statute which contains a "public benefit" test similar to that of section 90(5) of the Trade Practices Act. In the United States there is no such test available, the sole criterion of judgment being that of competitive effect. In New Zealand the test is not as stringent as that of Australia. In the United Kingdom, a number of specific "gateways" of justification exist.

The position is thus that the Trade Practices Commission cannot rely upon overseas' experience or precedents at all and has had to establish its own views.

The Commission has determined in the period October 1974 to June 1976 a total of 2518 Authorisation applications (for details see Tables I and III hereunder). As in clearance cases, however, a number of these have been determined in block and the statistical analysis is not highly relevant.

Some basic points relating to authorisation need to be made. Firstly, authorisation is generally relevant only when clearance is denied. If clearance is granted, immunity from the general provisions of the Act follows and authorisation will be dismissed for the reason that clearance is granted. Secondly, a large number of authorisation applications have been lodged with the Commission which have no chance of fulfilling the requirement of "public benefit" as set out in section 90(5). To take but one example, a number of authorisation applications have been lodged in respect of shopping centre leases. The Commission, on the merits, has not yet authorised any shopping centre lease and appears not likely to do so. The Commission's view is that shopping centre questions are basically questions of competition. Whatever public benefit there may be in such leases (a point the Commission has not had to decide) such benefit is "otherwise available" pursuant to leases which do not significantly affect competition.

A number of authorisation applications were lodged prior to 1 February 1975 (the day section 45 came into force) in order to obtain

interim authorisation. The Commission has no power to grant interim clearance, but it may grant interim authorisation for a number of reasons including the reason that such a grant is necessary to enable the Commission to determine the matter on its merits. Since 1 February 1975, the basic policy has been not to grant interim authorisation. Before 1 February 1975, interim authorisations, except in matters involving boycotts and blacklists in particular,[15] were readily granted. There were a number of reasons for this, the chief being, as stated in the Commission's *First Annual Report*, that:

> If Interim Authorisation was not granted before the end of the four month period [expiring 1 February 1975], the Commission had no power to grant substantive authorisation afterwards even if it could be shown to be justified. To have refused interim authorisation without the opportunity to give due consideration would therefore have been equally to refuse substantive authorisation without due consideration, notwithstanding that the Act requires the Commission to state in writing its reasons for decision on substantive authorisation. The Commission would have been denying to applicants who were at risk of illegality the opportunity the Act intended them to have of showing public benefit that could lead to authorisation making their conduct legal. The truth is that the Act gives the Commission no power to legislate, and wholesale dismissal of cases without consideration or reasons is legislation that the Parliament itself was not prepared to engage in.[16]

The situation with authorisation is thus that a number of interim authorisations have been granted and are still outstanding. However, the Commission has decided on their merits an adequate number of authorisations to give a reasonable guide as to its thoughts.

The first hurdle which has to be jumped in authorisation proceedings is the axiomatic one that a purely *private* benefit is not a *public* benefit. For example, in its *Shell* determination,[17] the Commission found that a substantial amount which Shell stated to be "additional cost" it would incur if the petrol tie were abolished, was, in fact, a profit reduction Shell expected to incur by lowering prices to meet competition or, alternatively, it was a loss of sales to other companies because of competitive pressure. The Commission saw no public benefit in deciding who should have this business. It felt the matter should be determined in the market and not by artificial restraints. A similar conclusion was reached in the *A.P.M.* determination where the view was stated that:

---

[15] Information Circular No. 1—10 December 1974.

[16] *First Annual Report of the Trade Practices Commission—Year Ended 30 June 1975* paras. 1.39 and 1.40.

[17] Shell Authorisation Application (Public Hearing No. 1 of 1975—Determination dated 9 December 1975), para. 47.

> Should A.P.M. under more competitive conditions reduce its rate of growth and its market share relative to Smorgon, then the loss in its efficiency will be offset by the gains to Smorgon with no loss of benefit to the public.[18]

A number of submissions as to public benefit have been put to the Commission. Most of these have been rejected in the context of the particular arrangements. Some examples are:

(i) Promotion of local employment was not a public benefit when there was no evidence that local unemployment existed.[19]

(ii) The requirement that a restrictive agreement was necessary in order that a trucker meet government standards was not a public benefit as every trucker in the industry, as a pre-condition of doing business, had to meet such standards.[20]

(iii) "Stabilisation" of the market as such was not a public benefit.[21] Neither was "stability of costs" as such, "maintenance of capacity" nor alleged benefits of "promoting competition" in the context of a recommended price agreement. In particular this was so as the recommended agreement achieved none of these ends.[22]

(iv) In a shipping agreement there was no public benefit which could be shown to result from a price agreement. The alleged benefits were prevention of "unfair dealing", ensuring a "proper and reasonable sum" is paid by overseas interests to Australian agents, ensuring employment in Australia and "ensuring survival of sufficient agents to keep the industry competitive".[23]

(v) There was no public benefit in the view that "recommended prices" ensure only "maximum prices", it being clear that most association members charged the recommended prices.[24]

(vi) Claims as to promotion of quality and availability of product did not merit authorisation when such results were clearly obtainable by agreements which are not anti-competitive.[25]

(vii) There was no public benefit in members being relieved by a recommended price agreement from the "time consuming

---

[18] Australian Paper Manufacturers Limited (A974-5; A4018-9—28 January 1976).

[19] Nixon Blayney Pty Ltd (A15250-3—15 January 1976).

[20] *Ibid.*

[21] Victorian Building Societies (A4217—23 February 1976); Institute of Launderers and Linen Suppliers (A3554—23 February 1976).

[22] Institute of Launderers and Linen Suppliers (A3554—23 February 1976).

[23] Australian Chamber of Shipping (A3193—21 June 1976). At the date of writing an appeal has been lodged to the Tribunal against the Commission's determination.

[24] South Australian Chamber of Cement Distributors (A6102—11 June 1976); Timber Merchants Association of Victoria (A73—12 June 1975).

[25] Glenila Poultry Services (A5050-1—6 May 1976). The point is quite general and appears in a number of Commission Authorisation determinations.

and sometimes complex task of pricing goods".[26] This was especially so when there was no information put to show the complexity of the pricing calculations and where, indeed, non member retailers actually did do their own cost calculations.

(viii) There was no public benefit in the fact that prices were "recommended only", for "the anti-competitiveness of the practice remains despite the description of 'recommended prices' ".[27] Nor was there public benefit in preventing "non-cost justified" pricing.[27]

(ix) There was no public benefit in the Australian Federation of Travel Agents having power to expel members for vaguely worded "offences" for "the problem inherent in this is that an association executive is in a position to impose sanctions on a member with potentially serious consequences for that member's livelihood".[28] (This particular agreement was subsequently substantially amended and was granted clearance).[29]

(x) There was no public benefit in a recommended price list providing "accurately costed" prices which were said to be better than a situation where members merely "copy" each other. The Commission stated that "it sees no public detriment in one member 'copying' the price of another if that is how that member wishes to price his product provided that the action does not infringe section 45 Trade Practices Act".[30] In the particular application the Commission did not accept in any event that the cost information was "accurately costed".[30]

(xi) The Commission saw no substantial public benefit not otherwise available where authorisation was sought for continuance of a collective boycott of Canberra hospital facilities by medical practitioners. Regardless of what detriments may have resulted from the changed hospital procedures (a point upon which the Commission did not reach a conclusion) the Commission was of the opinion that the viewpoint of the medical practitioners could clearly be pressed without resort to a collective boycott.[31]

From the examples given (which are necessarily selective in nature), it is clear that the Commission is not prepared to allow anti-competitive agreements to escape the general provisions of the Act under guise of often specious public benefit claims.

It appears to be common ground among economists (but a point not to be debated here) that competition policy gives rise to efficiency and

---

[26] Hardware Retailers of Western Australia (A7102—31 March 1976).

[27] *Ibid.* The same principle is stated in a number of cases *e.g.* Timber Merchants Association of Victoria (A73—12 June 1975).

[28] Australian Federation of Travel Agents (A16164—28 April 1976).

[29] Australian Federation of Travel Agents (C23242—2 August 1976).

[30] Timber Merchants Association of Victoria (A73—12 June 1975).

[31] A.C.T. Medical Association (A91—31 January 1975).

restraint of trade to the reverse. The Australian legislature has allowed other than economic considerations (and indeed economic performance and efficiency considerations too) to be considered in a public benefit claim. The point which applicants generally find difficult to prove is that anti-competitive restraints are necessary to achieve these benefits. To date, frequently the benefit is just not made out or there is no causal link between the benefit and the restraint. More frequently, however, such benefit as may be shown is clearly available "otherwise", *i.e.* is clearly available without the restraint. That public benefit will not frequently be proven is the experience of countries other than Australia also.[32]

The Commission has, however, granted authorisation under section 88(1) (relating to agreements which are or may be in restraint of trade under section 45) in some 10 cases up to 30 June 1976. In the *Hydrocarbon Products* determination,[33] authorisation was granted as Australia's self sufficiency in styrene would be aided by the agreement. The agreement enabled new investment to go ahead, and the construction of a large scale modern plant. The parties needed access to each others' technology and the plant would also allow productive use of some materials then presently being wasted. All this was shown not to be available without the agreement. Authorisation was granted for various restrictions, including 15 year tie-ins, notwithstanding the fact that the agreement was, in fact, between two of the largest industrial concerns in Australia (B.H.P. and Monsanto). The Commission was concerned at the possible exclusionary effect the agreement may have had on Dow Chemicals, the chief competition in the field, but the effect here was ameliorated by the fact that Dow was a large concern and overseas was, in fact, a bigger producer of styrene than Monsanto. In the *Philips Industries* determination,[34] authorisation was granted for establishment of a joint venture in Australia with exclusive distribution restrictions and restraints on competition as regards medical electronic and X-ray equipment. The public benefit was "ensuring the availability of choice in the sophisticated equipment involved and its proper maintenance and quick repair". Because it was not possible to assess future market trends, authorisation was limited to a period of 5 years. In the *Biscuits* determination,[35] restraint of trade agreements were authorised as they were a necessary part of the consummation of a merger which the government of the day had specifically authorised.

---

[32] See the writer's article "Comments on Arguments in Justification of Agreements in Restraint of Trade—The United Kingdom, Australian and New Zealand Experience" (1974) 19 The Anti-Trust Bulletin 257.

[33] Hydrocarbon Products Pty Ltd (A14 and A4029—11 March 1975).

[34] Philips Industries Limited (A3502—29 October 1975).

[35] Associated Biscuits International (A510-511—17 February 1975).

In *Media Council*,[36] the Commission accepted quite substantial restraints in the media council accreditation system in order to achieve certain benefits. The benefits as elaborated by the Commission were basically the centralising of collection of information and the importance of advertising codes and standards (which were shown to be properly drawn up and fairly administered). The Commission did, however, deny authorisation to aspects of the agreement barring commission payments to consultants and unaccredited agents—the Media Council's collective exclusivity rule.

The above cases give examples of some of the factors which have led to the grant of an authorisation. Necessarily each case before the Commission is considered on its merits and no general precedent pattern has yet emerged. It may be that it will never do so. The one thing that is plain is that authorisations will not be frequently granted. Yet in a competition statute, exemption from the competitive rules is not a matter to be lightly granted. Amongst other things, there is an impact which an exemption to one party has on another not so exempted. And if there is no substantial public benefit demonstrated or if such substantial public benefit as is demonstrated is available by a less restrictive or non restrictive course of action, it is difficult to see, in policy terms, why the less restrictive or non restrictive course should not be that adopted. Such a view appears difficult to criticise in any overall general sense.

VI. THE STATISTICAL STORY

Statistics as to Commission decision making do not reveal a highly useful picture as to the impact of the Commission's actual activities. For example, many parties have applied for both clearance and authorisation hoping to get one or the other. If clearance is granted, the authorisation application is redundant and is formally dismissed. Some parties make application in respect of each outlet when one application could cover all. One applicant in the petrol industry lodged literally thousands of applications in these circumstances. Some decisions (*e.g.* the *Shell* determination)[37] have "flow on" effects in a number of applications by other companies in the same industry. Others (*e.g.* the *Media Council* determination)[38] are basically confined to the one industry alone. And the Commission itself has seen its task as being that of qualitative impact rather than being too much concerned with mere numbers. However, despite these reservations, many will still

[36] Herald & Weekly Times (Public Hearing No. 2 of 1975—Determination 24 May 1976). At the time of writing, the applicants have lodged an appeal from this decision on the question of the non-authorisation of exclusivity aspects of the agreement.

[37] Shell Authorisation Application (Public Hearing No. 1 of 1975—Determination dated 9 December 1975).

[38] See n. 36 *supra*.

judge the Commission's "judicial" role in terms of statistics. For those of statistical mind, the relevant statistics relating to section 45 adjudications (to 30 June 1976) are set out in Tables I, II and III hereunder:

TABLE I

SECTION 45 APPLICATIONS FINALLY[a] DEALT WITH
(1 OCTOBER 1974 TO 30 JUNE 1976)

	S. 45 Clearance Applications	*S. 45 Authorisation Applications*
Number of applications finally dealt with	3492	2518
Applications finally dealt with as a percentage of total applications lodged	48%	40%

[a] Excluding Interim Authorisations.

Source: *Second Annual Report of the Trade Practices Commission—Year Ended 30 June 1976*, para. 3.2 (2)(a).

TABLE II

SECTION 45—NUMBER OF CLEARANCE APPLICATIONS DECIDED
(CLASSIFIED BY RESULTS)—TO 30 JUNE 1976

Result of Clearance Decision	*Oct. 1974 to June 1975*	*July 1975 to June 1976*	*TOTAL DECIDED*
Granted on the merits	98	751	849
Denied on the merits	2400[a]	185	2585
Other[b]	—	58	58
TOTAL DECIDED	2498	994	3492

[a] Many of these decisions were made in block. In one case over 1500 clearance decisions were made in respect of identical agreements from a single applicant.

[b] 'Other' decisions comprise clearances denied because the application has been withdrawn or for other procedural reason.

Source: *Second Annual Report of the Trade Practices Commission—Year Ended 30 June 1976*, para. 3.72.

TABLE III

SECTION 45—NUMBER OF AUTHORISATION APPLICATIONS DECIDED
(CLASSIFIED BY RESULTS)—TO 30 JUNE 1976

Result of Authorisation Decision	*Oct. 1974 to June 1975*	*July 1975 to June 1976*	*TOTAL*
Granted on the Merits	7	3	10
Denied on the Merits	13	1719[a]	1732
Revoked	—	247	247
Other[b]	17	512	529
TOTAL OF THE ABOVE	37	2481	2518
Total Interim Authorisations Granted	4610	386	4996

[a] See Note [a] to Table II above.

[b] 'Other' decisions comprise authorisations denied because clearance granted, or because application withdrawn or for other procedural reason. Where more than one decision has been made in relation to the same application, only the later one is included, as where grant of interim authorisation is followed by a grant of final authorisation.

Source: *Second Annual Report of the Trade Practices Commission—Year Ended 30 June 1976*, para. 3.72.

VII. *QUADRAMAIN*[39]

This decision of the High Court is the only court decision to date relating to section 45 Trade Practices Act. It is not here intended to review this case in detail. Professor Heydon's article[40] already does this very lucidly.

Quadramain raised the issue of section 45 in the specific circumstances of a *Tulk* v. *Moxhay*[41] covenant running with land. The narrow ratio of *Quadramain* is that section 45 Trade Practices Act is not applicable to a *Tulk* v. *Moxhay* covenant (i) that runs with the land (ii) where the burdened and benefited land are adjoining and (iii) the parties seeking to enforce and escape the covenant terms are not the original parties to the covenant. A decision in these terms may perhaps be regarded by some as unfortunate but it does not represent a major inroad into trade practices law. What the case does create, however, is confusion as to the likely interpretation of the Trade Practices Act in future. Three Justices (McTiernan, Gibbs and Mason JJ.) expressed the view that "restraint of trade" in section 45(1) of the Trade Practices Act had the same meaning as those words at common law.

The point is by no means resolved, but with three of the seven High Court Justices expressing the above view, many assume that ultimately section 45 of the Trade Practices Act will be given a restrictive common law interpretation by the High Court.

Two immediate comments need to be made on the *Quadramain* decision. Firstly, it is not certain by any means that a majority of the High Court will hold that "restraint of trade" in section 45(1) means the same as that term at common law. However, with three out of seven Justices so deciding, the statistical odds favour such an interpretation. And many believe quite generally that historically the interpretation of courts in the Australian judicial hierarchy has led to the invalidating of useful competition statutes. There is certainly historical ground for such belief in decided cases from the Privy Council[42] down

---

[39] (1976) 50 A.L.J.R. 475.

[40] Heydon, "Restraint of Trade in the High Court" (1976) 50 A.L.J. 290.

[41] (1848) 2 Ph. 774; 41 E.R. 1143.

[42] *Attorney-General of the Commonwealth* v. *Adelaide Steamship Co. Ltd* (1914) 18 C.L.R. 30; *Crown Milling Co. Ltd* v. *R.* [1927] A.C. 394 (overruling the interpretation given in New Zealand to the Commercial Trusts Act 1910 by *Merchants Association of New Zealand (Inc.)* v. *R.* (1913) 32 N.Z.L.R. 537 and *Fairbairn, Wright Co.* v. *Levin & Co. Ltd* (1915) 34 N.Z.L.R. 1).

to the State Supreme Court[43] level. Secondly, it must be pointed out that section 45(1) was the only section before the court in *Quadramain*, as the covenant in question was created before the Act. This section will have less relevance as time goes on. It will be section 45(2) which will be of greater future relevance. Section 45(1) speaks only of "contracts in restraint of trade" whereas section 45(2) specifically talks about "contracts, arrangements or understandings" in restraint of trade. It is difficult to see how a common law interpretation can be given to section 45(2) and *Quadramain* is no authority on this point. Nevertheless, many feel that the interpretation of *Quadramain* will carry over into section 45(2) and that the influence of common law notions will lead to the conclusion *either* that courts will be reluctant to find "a restraint" of trade if there is no such "restraint" at common law *or* that the courts will import common law notions of "reasonableness" in evaluating such restraints where found.

Quadramain creates a wide area of confusion in trade practices law. Some of the inconsistencies which may follow if a common law interpretation is followed have been amply demonstrated in Professor Heydon's article.[44] These need not be re-iterated here.

1. *Is the common law test of "restraint" of trade appropriate to section 45?*

In the writer's view a common law interpretation as to what is "a restraint" of trade under the Trade Practices Act is not one which can be logically given. This point has been earlier discussed and cases cited where there is a factual market place restraint but no common law restraint. The classic case would be a recommended price agreement—not a restraint at common law (as no obligation to comply exists) but clearly an agreement with restraining market place repercussions.

2. *Are common law "reasonable" restraints excluded from section 45?*

The argument that contracts in restraint of trade which are "reasonable" at common law fall outside anti-trust legislation was considered quite early by the United States Supreme Court. That court said:

> Contracts in restraint of trade have been known and spoken of for hundreds of years, both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would

[43] *Attorney-General* v. *Brickworks Pty Ltd* (1941) 41 S.R. (N.S.W.) 72.
[44] Heydon, *op. cit.*

> be so described either at common law or elsewhere. *By the simple use of the term "contract in restraint of trade", all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade.*[45]

It is clear that, whatever justification there may have been at common law for restraint of trade, these justifications are only relevant where "a restraint" is first found. Indeed in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co. Ltd*,[46] where is found Lord Macnaghten's classic exposition of the doctrine of common law "reasonableness" of restraint of trade, the point was clearly recognised. Lord Macnaghten said, when propounding the common law doctrine, that "restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case".[47] His Lordship's exposition of the common law doctrine does not imply that a reasonable restraint of trade at common law is not "a restraint". It clearly is a restraint but it is an allowable one at common law. In the United States, the leading English decision in *Mogul Steamship Co. Ltd* v. *McGregor Gow & Co.*[48] has been specifically considered in the context of the Sherman Act. The case, and its holdings as to common law reasonableness, were held simply not to be relevant in the context of the Sherman Act. The U.S. Supreme Court said that the *Mogul* case itself, when considered, "makes for rather than against [this] conclusion".[49] The Trade Practices Act thus does not exempt "reasonable restraints". It embraces all restraints substituting a competition test for the prior reasonableness test.

3. *The Trade Practices Act covers all market restraints*

The above logic leads the writer to the conclusion that section 45 of the Trade Practices Act covers all restraints of trade having a factual market restraining effect and this is so whether or not a common law restraint is found. As to matters of justification of the restraint, the common law test of reasonableness has been replaced by the competition tests of the Act. Any aspects of public benefit are now dealt

---

[45] *U.S.* v. *Trans-Missouri Freight Association* (1897) 166 U.S. 290, 328 (italics added). In *Standard Oil of New Jersey* v. *U.S.* (1911) 221 U.S. 1, the *Trans-Missouri Freight* holding was modified by the "rule of reason" test, in that it was held that only "undue restraints" with a direct effect on trade or commerce were covered by the Sherman Act. Thus a judicial "de minimis" test was built into the legislation. The Australian Act has its own statutory "de minimis" test built in, as s. 45(4) states that the restraint does not breach the legislation unless the restraint "has or is likely to have a significant effect on competition". Similarly s. 45(3) has a "de minimis" test built in as regards those agreements to which the sub section relates.

[46] [1894] A.C. 535.

[47] *Id.* 565.

[48] [1892] A.C. 25.

[49] See *U.S.* v. *Addyston Pipe & Steel Co.* (1898) 85 F 271, 286.

with not by a test of reasonableness to be applied by the courts but by the Trade Practices Commission applying the test of section 90(5) of the Trade Practices Act to applications made to it for authorisation.

4. *Public Policy and a wide Judicial Interpretation of section 45*

The writer sees nothing inconsistent between the above view and concepts of public policy. Public policy is a matter for the legislature and, in the writer's view, has been stated in the Trade Practices Act in competition and public benefit terms. It appears appropriate for the courts to grasp this change of public policy. In restraint of trade cases at common law, courts have consistently stressed that the doctrine must change with economic and social circumstances. It has thus been said that:

> It is no doubt true that the scope of a doctrine which is founded on public policy necessarily alters as economic conditions alter. Public policy is not a constant. More especially is this so where the doctrine represents a compromise between two principles of public policy.[50]

Similarly it has been stated that:

> the law relating to restraint of trade has ever been in movement and movement will continue. Founded as it is on public policy, it will change as views of what is required in the public interest inevitably change.[51]

Interpreting the Trade Practices Act quite generally would appear to be applying judicial policy views such as those expressed above. For example, it is surely inconceivable that the Trade Practices Commission was set up, with its complex clearance and authorisation procedures, purely to adjudicate on "reasonable" restraint of trade covenants at common law. For at common law even the most anti-competitive activities have received judicial sanction. It is thus at common law perfectly permissible to conspire to ruin a person's business if no "ill will" is shown,[52] collusively to bid at auctions[53] or for a trade association to black list or fine a dealer who does not follow trade association prices.[54] And indeed the House of Lords has allowed a conspiracy to fix salt prices "even though unquestionably the object [is] to regulate and keep up prices"[55]—the very antithesis of the whole *raison d'etre*

---

[50] *Vancouver Malt & Sake Brewing Co. Ltd* v. *Vancouver Breweries Ltd* [1934] A.C. 181, 189.

[51] *Blacker* v. *New Zealand Rugby Football League (Inc.)* [1968] N.Z.L.R. 547, 568.

[52] *Mogul Steamship Co. Ltd* v. *McGregor Gow & Co.* [1892] A.C. 25.

[53] *Rawlings* v. *General Trading Co.* [1921] 1 K.B. 635.

[54] *Hardie & Lane Ltd* v. *Chilton* [1928] 2 K.B. 306; *Ware & de Freville Ltd* v. *Motor Trade Association* [1921] 3 K.B. 40; *Sorrell* v. *Smith* [1925] A.C. 700; *Thorne* v. *Motor Trade Association* [1937] A.C. 797.

[55] *North Western Salt Co.* v. *Electrolytic Alkali Co. Ltd* [1914] A.C. 461.

of trade practices legislation. Although *Quadramain* does not go so far as to find that the function of the Commission or the effect of the Act is as limited as has been stated, there is no doubt that many see this as a possibility. The decision does perhaps encourage rather than discourage such a belief.

5. *Quadramain and the future*

It appears that *Quadramain* poses a question of legislative policy. If the matter is left with the courts, the significance of the decision may expand or contract over a course of future decisions that will take time to dispel the present uncertainty. The question for Parliament is whether the effectiveness of a major part of the Act is to be left to the processes of litigation or whether it is to be decided as a matter of legislative policy. If the matter is left to the processes of litigation, the writer would regard *Quadramain* as being one of those decisions which will hopefully be brought within the recent Privy Council statement in the *Ogden Industries* case.[56] There the Privy Council stated:

> [Their Lordships] desire to re-iterate however what has so often been said before that in a common law system of jurisprudence which depends largely upon judicial precedent and the earlier pronouncements of judges, the greatest possible care must be taken to relate the observations of a judge to the precise issues before him and to confine such observations, even though expressed in broad terms, to the general compass of the facts before him, unless he makes it clear that he intended his remarks to have a wider ambit. It is not possible for judges always to express their judgments so as to exclude entirely the risk that in some subsequent case their language may be misapplied and attempt at such perfection of their expression could only lead to the opposite result of uncertainty or even obscurity as regards the case in hand.
>
> These general principles are particularly important when questions of construction of statutes are in issue.
>
> It is quite clear that judicial statements as to the construction and interpretation of an Act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself.[57]

It is difficult to see *Quadramain* in any other context apart from regarding the *Ogden Industries* case as being applicable to it. Especially is this so when some of the possible wider ramifications of *Quadramain*, briefly discussed above, are considered.

---

[56] *Ogden Industries Pty Ltd* v. *Lucas* [1970] A.C. 113.
[57] *Id.* 127.

VIII. CONCLUSION

There has been an impressive flurry of activity caused by the Trade Practices Act in the comparatively brief period since its enactment.

In the words of the Commission:

> The main benefit of the Act is longer term—in promoting a climate for competitiveness and efficiency, in encouraging efficient industry structure, new entry and the development of entrepreneurial talent, and in disciplining decisions as to what to produce, promote and sell and how best and most cheaply to produce, promote and sell it.[58]

There is no doubt that the Act is having this effect. This is not to say that the Act may not be able better to achieve its objectives by appropriate amendment from time to time in the light of experience. Indeed a Review Committee has been set up by the Australian government to look at the functioning of the Act. At the time of writing, its report has not been tabled in Parliament.[59]

But central to the Act's effectiveness is the interpretation given it by Courts of law, for it is there ultimately that the impact of the legislation is determined. There are possibilities at least that, in the courts, the Act may not receive the interpretation which the writer would feel appropriate to a commercial statute regulating the relationships of business.

On the one hand we have what appear to be realistic commercial interpretations by overseas (primarily United States) courts. Commission decisions appear to follow these interpretations. On the other hand, we have the potential leaning of the High Court towards a non commercial and, in the writer's view, a potentially unrealistic interpretation of possibly the most important section of the Trade Practices Act. The exact parameters of this interpretation are at the moment far from clear. What will happen legislatively or judicially post *Quadramain* is a matter which businessmen and Commission administrators will await with some not inconsiderable degree of interest.

---

[58] *Second Annual Report of the Trade Practices Commission—Year ended 30 June 1976*, para. 1.8.

[59] [*Editor's note*: The Review Committee reported on 20 August 1976, see Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs*. The government has announced its intention to make amendments to the Trade Practices Act in 1977.]