FAIR TRADING

By J. LIVERMORE*

The Australian economy is singularly abundant in restrictive practices and monopolies,[1] a state of affairs, which until now, has not been subjected to strong anti-trust laws drawn up by the Federal legislature. Even when the 1965 Trade Practices Act became effective in 1967 it continued thereafter to bear the brunt of constitutional attacks[2] and was weakened in its application by a permissive policy approach which has resulted in the failure of the legislation to make the economic system more competitive.[3] In a recent article the Act was particularly criticized on the following grounds: 'It is vague in its philosophy of competition, ambiguous in its test of the public interest, ineffectual in its case-by-case and consultative procedures, lacking in guidelines for business, and deficient in coverage and remedies'.[4]

In considering the recent developments in trade practices law, the problems of the vagueness of the term 'public interest' and of the balancing process of benefit and detriment undertaken by the Tribunal are central to the operation of both past and present legislation. Later, as a parallel analysis, the likely effectiveness of the consumer protection provisions of Part V of the *Trade Practices Act* 1974 will be evaluated. One writer on restrictive trade practices legislation has come to the conclusion that in both Australia and New Zealand the evaluation of the public interest calls for a balancing exercise at the discretion of the Tribunal.[5] In his comments on the New Zealand Trade Practices Commission Dalglish J. stated its approach to have been one of: 'Setting up in one column the debits, and of listing in the other column the items of public interest or which ameliorate the harm done by the debits, and of finding where the balance lies'. This simple statement gives no indication of the complexity of the balancing exercise itself. Under s.50(1) of the *Trade Practices Act* 1971 the Tribunal is given a general guidance

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1 *Australian Trade Practices*, (1970), Nieuwenhuysen, (ed.) at p. 48.

2 *Strickland* v. *Rocla Pipes Pty. Ltd.* [1971] A.L.J.R. 485 (H.C.) *R.* v. *Tasmanian Breweries Ltd.*, [1970] 44 A.L.J.R. 126.

3 Lindgren, Mason, Gordon (ed.) *'The Corporation and Australian Society'* (1974), Walker at p. 212.

4 Baxt and Brunt at (1974) 2 *A.B.L.R.* 1 at p. 3.

5 J. G. Collinge, *'The Public Interest Criterion and Trade Practices Legislation'* (1968) 42 *A.L.J.* 139.

to, 'Take as the basis of its consideration the principle that the preservation and encouragement of competition are desirable in the public interest.' The tribunal, by reason of s.50(2) of the Act, has to consider specifically in relation to the practice or practices:

(a) the needs and interests of consumers, employees, producers, distributors, importers, exporters, proprietors and inventors;

(b) the needs and interests of small businesses;

(c) the promotion of new enterprises;

(d) the need to achieve the full and efficient use and distribution of labour, capital, materials, industrial capacity, industrial know-how and other resources;

(e) the need to achieve the production, provision, treatment and distribution by efficient and economical means, of goods and services of such quality, quantity and price as will best meet the requirements of domestic and overseas markets; and

(f) the ability of Australian producers and exporters to compete in overseas markets.

Determination of whether an agreement or practice is against the public interest (apart from monopolization, which is treated differently by s.50(3) of the Act) involves:

(1) A decision by the Tribunal as to whether the agreement or practice either tends to restrict competition or has been proved to do so; if the answer is 'no' in either context the agreement or practice will not be against the public interest;

(2) There is a presumption that any restriction on competition in the agreement or practice amounts to a detriment.

(3) Only those matters listed in s.50(2) (supra) can be used to justify the agreement or practice and used by the Tribunal to weigh against the detriment(s) found. Importantly, if the practice has a beneficial effect in respect of the points itemised in s.50(2) then the Tribunal must evaluate this and see if it tends to be in the public interest. If the effect is both beneficial and detrimental, again the Tribunal must make a 'balance'.

(4) In the final analysis the Tribunal has to balance the beneficial effects of the agreement or practice against detrimental effects of restriction of competition and decide if it is against the public interest. In considering the stress to be placed on detriment the Tribunal seems unrestricted by the Act evaluating the effects relating to the specific items in s.50(2). In the view of one authority the Tribunal is entitled to take into account any beneficial or detrimental consequences of restriction on competition in order to weigh one against the other.[6]

6 Masterman and Solomon, '*Australian Trade Practices Law*' (1967) at p. 214.

The Tribunal is thus given the task of compromising the competing interests of different groups and policies and itself deciding the priority and weight to be given to each; in other words it not only applies policy, it creates it. In contrast, the Restrictive Trade Practices Court in England has tended to determine a clash of interests in the light of their effect on competition as opposed to the balancing process adopted under the Australian legislation. Competition in the Australian context is a presumption capable of rebuttal and no priority is given to the interests of consumers in the Acts as opposed to English trade practice law where the onus is on the parties to the agreement to satisfy the court that the restrictions are not against the public interest unless these can be brought within the nine 'gateways' provided by the legislation.[7]

Against the view that the Tribunal should attach greater weight to the benefits of competition. J. G. Collinge, in particular, has pleaded some of the following considerations:—

(a) concentration and co-operation may be necessary for industrial development;

(b) a case-by-case approach may be needed in Australia and New Zealand 'due to lack of information concerning performance of free competition and agreements and practices sought to be prescribed' — This method also enables Tribunal decisions to be modified if economic conditions materially change to affect their decision;

(c) to make practices illegal *per se* would be risky in relatively small economies and to do so would be 'politically difficult to justify' especially in the case of horizontal agreements where these have often been found to be in the public interest.[8]

To take each of these points in turn:

(a) is an argument which implies that, in certain cases, competition may be found to be destructive of beneficial marketing arrangements, therefore competition should not be overstressed. Collinge's view is that if the legislation in question had been applied 'ruthlessly' it would have been impossible for businessmen[9] to plan their activities to comply with the legislation. This is a very special form of pleading which, it is submitted, Walker aptly and concisely answers. It is this line of academic reasoning that has seemed to justify the soft approach that commerce has found far from 'ruthless'.

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7 *Restrictive Trade Practices Act* 1956 s. 21 (1) as amended by the *Restrictive Trade Practices Act* 1968 s. 10.

8 J. G. Collinge, *'The Public Interest Criterion and Trade Practices Legislation'*, (1970) 44 *A.L.J.* 156.

9 (1968) 42 A.L.J. 139 at p. 162.

(b) This point is singled out for particular criticism by Walker, when commenting on the Australian (and, by implication, New Zealand) *laissez-faire* approach to competition policy

> It stems from a tendency to see competition policy as requiring a choice between what are imagined to be the British and American techniques for maintaining competition. The British approach, which consists essentially of examining one agreement at a time with no penalty for agreements immunity while they wait up to a decade for a hearing, is described as 'flexible' or 'pragmatic'. The American approach is viewed as 'doctrinaire' and undiscriminating because in that country, in Sir James Vernon's words, 'Any action restrictive of competition is an offence carrying heavy penalty'. This monstrous inaccuracy is still widely retailed by economists, lawyers and journalists.

Walker outlines that the main means of enforcement in the U.S. are by civil proceedings leading to injunctions or cease and desist orders. Such was the force of such beliefs that

> Nevertheless the misconception and the fallacious conclusions drawn from it became embedded in the Australian conventional wisdom by the time the Barwick proposals came up for discussion. The reasoning went as follows: in the giant U.S. economy competition is maintained by means of 'doctrinaire' prohibitions; in the smaller British economy, a 'pragmatic' system of case-by-case investigation is used. Since the Australian economy is smaller again than the British, and since 'pragmatic' is a nicer sounding word than 'doctrinaire', any legislative measures savouring of prohibition should be rejected.[10]

(c) Presumably here the case against making practices illegal *per se* (as resale price maintenance is under existing legislation) is that this would damage economies the size of New Zealand and Australia. There is no economic evidence adduced that such *is* the case or likely to occur. Certainly in no common law country are *all* restrictive trade practices made illegal *per se* and it would be hardly practical in legal, economic or political terms to so declare them. If the intention of the argument is to claim that no agreement or practice should ever be illegal *per se* this would appear, with respect, to have little substance. There is no evidence, for example, that the banning of resale price maintenance in Australia has weakened the economy. Collinge's final plea, it is submitted, is met by Walker's telling point that then existing legislation (i.e. pre 1974) made it all too easy to obtain immunity from sanctions.[11]

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10 *The Corporation and Australian Society* at p. 201.

11 In fact in Brunt and Baxt's article already referred to n. (4) they favoured amendment of the Trade Practices Bill (as it was then) to include price fixing, collective boycotts, tying clauses and destructive price cutting as *per se* illegal. Loc. cit. pp. 68-70.

Turning to the *Trade Practices Act* 1974 which came into force on 1st October this year, there is clear evidence of a shift in policy. The key part of the Act for the matter under review is the public interest test enshrined in s.90(5). In passing, it is worth noting that the American influence is strong,[12] that an influential administrative agency is created, the Trade Practices Commission, with powers approaching those of the U.S. Federal Trade Commission. Resale price maintenance and exclusive dealing of statutory monopolists are declared illegal *per se* and price fixing and conspiracy are probably also within this category; other practices might also be brought in by court interpretation.[13] In the Act the public interest criterion is applied to all authorizations[14] except mergers subject to government intervention. The Commission shall not make a determination granting an authorization unless it is satisfied that

(a) the contract, combination, act or course of conduct to which the application relates results, or is likely to result in a specific and substantial benefit to the public, being a benefit not otherwise available; or

(b) the contract, combination, act or course of conduct to which the application relates has such a slight effect on competition (other than competition in respect of markets outside Australia) that the contract, combination, act or course of conduct may be disregarded, and that, in all the circumstances, the existence of matters referred to in paragraph (a) or (b), whichever is the case, justifies the granting of the authorization.[15]

It is clear from the wording of the section that the onus is, 'firmly on the applicant to satisfy the Commission that the granting of an authorization is justified'.[16] Similarly the delimitation in (b) sets a practical end-point from which the onus can be applied. The test in (a) which attempts to sum up 'public interest' poses special problems. It is not clear what is to be justified and authorised:

(a) If it is a practice the Commission considers to be probably contrary to ss. 45, 47 or 50 (restraint of trade, exclusive dealing, merger) then there must be a presumption on the part of the Commission that the conduct is unlawful.

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12 Key clauses 45-47, 49-50 derive their language from the *Sherman Act* 1890 as 1 & 2 and the *Clayton Act* 1914, ss. 2-3 & 7.

13 See n. (12).

14 The power of the Commission to grant authorizations is dealt with in s. 88 of the Act. The Commission may grant an authorization on an application by, or on behalf of, a corporation to make a contract or arrangement, or enter into an understanding that would be or might be in restraint of trade or commerce, or continue to be a party to such contracts, arrangements or understandings. The authorization does not prevent such dealings from being enforced or given effect.

15 Cl. 90 (5) and Cl. 92 (2).

16 Senator Murphy, *Weekly Debates* supra n. 5 at 1014.

(b) On the other hand if a practice *might* fall into the three categories above (without the Commission being required to give a view either way) or

(c) *would* do so in the Commission's opinion — then the familiar balancing of benefit and detriment would be required.

It may be that exclusive dealing and mergers would be dealt with under (b) as the relevant ss. 88(1) and (5) state that it is the *practice* that is authorized.

As far as restraint of trade is concerned the legislation gives no power to the Commission or Tribunal to excuse contracts and combinations in restraint of trade which fall outside the definition. For the Court to take the ban on the items at face value would be unlikely, more in accord with logic would be a development by the Court of a 'reasonable' concept of undue restraint to establish liability. If (c) were followed it would give what has been termed a 'sharper test' than the balancing process.

The problem still remains of the ambiguity of public interest. The public is simply mentioned with further elucidation. Are we to be thrown back to the old unsatisfactory test under s. 50 of the existing Act and be faced again with weighing varied and conflicting interests?[17]

Also

> ... if the benefits to the parties using the practice are on a similar footing to the detriments that flow to the public at large, we have the difficulty that the benefits to the parties may well be "specific and substantial", easily identifiable, whereas the benefits to the consuming public are often, in the nature of the case, thinly and widely spread.[18]

The essential elements of any statutory test governing public interest exceptions to competitive conduct in the view of Professors' Baxt and Brunt are as follows:[19]

(1) The first element of the test must be a clearly stated presumption that competition is in the public interest.

(2) (a) There must be a requirement that the practice for which authorization is requested results, or is likely to result, in a specific and substantial benefit being a benefit that would not otherwise be available.

(b) The Commission/Tribunal must be instructed on criteria to be used in identifying and evaluating the benefits to the 'public' that may arise from anti-competitive conduct

(a) and (b) would be satisfied by the Greenwood proposals for amendment of the 1971 Act, by adding that:

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17 See p. 2 *et seq.*
18 *Loc. cit.* at p. 54.
19 *Loc. cit.* at pp. 57-8.

(a) it results, or is likely to result, in a specific and substantial benefit to the public as purchasers, consumers or users of goods or services, being a benefit that would not otherwise be available;

(b) it is reasonably necessary for the prevention of danger to the health of human beings or animals;

(c) without it the parties to the agreement, or the persons engaging in the practice, would be unable to compete effectively with other persons.

in place of:—

results, or is likely to result, in a specific and substantial benefit to the public, being a benefit that would not otherwise be available.

(3) There should be a provision for excuse of practices of 'slight' anti-competitive effect. Given the overall structure of this legislation the existing 90(5) (b) is preferable to the somewhat comparable sub-section in the Greenwood Bill.

(4) There should be a tailpiece, enjoining the Commission/Tribunal to weigh any benefits established under (2) against any detriments arising including detriments from the anti-competitive effect.

Another crucial aspect of the Act is the use of the term 'competition' without further definition.

There are three leading ideas of 'competition' in the anti-trust field;

(a) a positive concept of market control

(b) a normative concept of useful/workable competition

(c) a concept of soft competition (popularist).

If legislation is to be effective, these types of competition need to be distinguished and even if the general purpose of the Act is to establish useful/workable competition each key section requires a suitable standard of competition to be applied to it.

For example, in the field of horizontal agreements, e.g. *Frozen Vegetables Case*,[20] it has been suggested that the most suitable concept of competition to apply would be market control. Additionally the establishment of *per se* and presumptive illegality categories would make matters clearer.

As it is the overlapping of, and possible conflict between, the courts and the Commission/Tribunal — the very structure of the Act's dual enforcement system — appears to be based on the false premise that it is possible to separate issues of competition and public interest.[21]

20 Restrictive Trade Practices Tribunal. Files 1, 2 and 3 of 1970.

21 Baxt and Brunt. *Loc. cit.* at p. 37.

In a discussion on fair trading it is important to deal with one other important facet not yet touched, namely, consumer protection. Since the Moloney Committee on Consumer Protection issued its final report in 1962 the British Parliament has weighted the scale more in the consumer's favour than before with a series of enactments reaching their peak in 1973 with the *Fair Trading Act*. By contrast, it has largely been left to the States in Australia to legislate in this field with little attempt by the Federal Parliament to intervene in favour of consumer interests across the nation. Although the reasons for this lack of initiative on the part of Canberra are largely constitutional, Part V of the Act under study represents a significant breakthrough using the corporations' power established by the *Concrete Pipes* case.[22] The Act states that: 'A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive' which is illustrated in s. 53:

> A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services in connection with the promotion by any means of the supply or use of goods and services
>
> (a) falsely represent that goods are of a particular standard, quality or grade, or that goods are of a particular style or model;
>
> (b) falsely represent that goods are new;
>
> (c) represent that goods or services have a sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
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> (d) represent that the corporation has a sponsorship, approval or affiliation it does not have;
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> (e) make false or misleading statements concerning the existence of effect of any warranty or guarantee.

Similarly, corporations are not allowed by reason of s.54 of the Act, to offer gifts and prizes to promote sales of goods or services without intending to honour such offers.

Advertising goods or services at a special price for a period by a corporation not intending to abide by such representation is also banned. Referral selling is covered too and s.57 of the Act provides that a corporation may not induce a consumer to acquire goods or services by representing that after the contract the consumer will get a rebate, commission or other benefit in return for furnishing the corporation with names of prospective customers, or otherwise assisting the corporation to supply goods or services to other customers.

Payment, or other consideration, for goods and services cannot be accepted by a corporation if at the time it has no intention of supplying these or intends to supply those that are materially different from ones

22 See n. 1.

paid for (s. 58). In addition, a misleading statement about the risk, profitability or other material aspect of any business activity which they have represented as being capable of largely being carried on as a home business is made an offence by s. 59 of the Act. A corporation's 'undue harassment... physical force... coercion' by an agent or employee are banned in connection with supply or payment of goods and services by s. 60.

Pyramid selling is also dealt with in the Act. A corporation contravenes s. 61 if as a promoter of, or participant in, a pyramid trading scheme it induces a person who participates, or is invited to participate, to make a payment on the prospect of receiving payments or other benefits for the introduction of others to the scheme. Pyramid selling rightly attracted the attention of the U.K. Parliament in the *Fair Trading Act*[23] which, *unlike* this part of the Australian *Trade Practices Act*, provides remedies for the participant. It is suggested that either the Act be amended or uniform State legislation be passed to include the following:

(a) A maximum limit should be set for stock (£25 is specified in the *Fair Trading Act*) and payments for training and other services should be completely banned.

(b) Any participant supplied with goods should be able to require the promoter of the scheme to buy them back at 90% of the price paid if the participant wishes to leave the scheme, provided the goods to be returned are in a satisfactory condition.

(c) Recruiting advertising and other documents *must* give basic information about the schemes and claims that any particular income can be earned should be completely banned.

(d) Anyone joining the scheme should have a seven day 'cooling-off' period, during which he can withdraw from the scheme without loss.

(e) All participants should be given written contracts setting out these rights.

At a meeting in June between the Attorney-General, consumer protection council representatives and trade practices commissioners, it was decided to leave the individual states to deal with pyramid selling by detailed State legislation, where this was not already in existence. No State law on pyramid sales (which usually deals additionally with referral selling and 'other undesirable trading practices') at present operating in Australia contains the reforms the writer feels are necessary. In view of impending Tasmanian legislation, these should be incorporated in any forthcoming Bill.

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23 ss. 118, 119.

It would be particularly fitting that as it was an Australian firm, *Golden Wonder Products*, which earned notoriety in the U.K. for its dubious selling methods, that remedies should be provided for those falling foul of similar unethical marketing methods. However, these proposed amendments are not intended to impede genuine direct selling working on conventional techniques.

The Act lays down that where goods for which a safety standard has been prescribed are intended to be used, or likely to be used, by a consumer then the goods *must* comply with that standard. This may include regulations covering:—

(a) performance, composition, contents, design, construction, finish or packaging of the goods, and

(b) the form and content of markings, warnings or instructions to accompany the goods, which are necessary to prevent or reduce injury to persons using the goods. Provision is similarly made for products where a product information standard has been laid down. In both cases, if a person suffers loss or damage due to the failure of the corporation to comply with either standard the loss or damage will be reckoned to have arisen from the supplying of the goods. In other words, the corporation will be legally liable to the consumer.

As in the U.K. legislation, directory payments and liability for unsolicited goods are included in the Act in language somewhat similar to the *Unsolicited Goods and Services Act* 1971 (U.K.) and in essence states that a corporation cannot claim payment for unsolicited goods unless it has reasonable cause to believe that there is a right to payment, although this will not be the case where the person ordinarily uses such goods in his profession, business, trade or occupation. Directory entries are judged on the same basis by s. 64 of the Act. Unless the sender of unsolicited goods claims them one month after the day of *receipt* (whichever ends first) the goods in question become the rightful property of the participant.

Finally, this part of the Act makes an attack on exemption clauses both in relation to the supply of goods and services by a corporation to consumers. This two-fold proposed reform puts the Act into the forefront of consumer protection law.

Essentially, s. 68 of the Act restores those safeguards for a purchaser (which the Sale of Goods Acts allow to be removed) by making any attempt to exclude the implied conditions in consumer sale of goods contracts invalid.

This means that it will no longer be possible for corporations to exclude implied conditions under the guise of warranty — a practice dealt with in United Kingdom legislation.[24] Therefore, all goods sold to consumers, under the Act if it became law, would be sold with the following conditions implied:

(a) that the seller had title to sell the goods and that the buyer would enjoy 'quiet possession' free of any encumbrance,

(b) that in a sale by description the goods correspond with that description,

(c) that goods sold to a consumer in the course of business are of merchantable quality unless specific defects are drawn to the buyer's attention or he examines the goods and he could have seen the defects for himself,

(d) that in a sale by sample:

(i) the bulk corresponds to the sample in quality,

(ii) the consumer has a reasonable opportunity of comparing bulk with sample,

(iii) that the goods are free from defects rendering them unmerchantable that would not be apparent on a reasonable examination of the sample.

In respect of services there is an implied warranty that the services supplied to a consumer will be rendered with due care and skill and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied. If the consumer, either in so many words or by implication, indicates to the supplier a particular purpose for which the services are required or what he wants them to achieve, there is an implied warranty that the services and materials supplied will be reasonably fit for that purpose or might be reasonably expected to achieve that result. There is a proviso that this will not apply where the circumstances show that the consumer did not rely on the skill and judgment of the corporation *or* it would be unreasonable in the circumstances for him to do so. For the purposes of s. 74, 'services' are restricted by definition to:

(a) the construction, maintenance, repair, treatment, processing, cleaning or alteration of goods or of fixtures on land;

(b) the alteration of the physical state of land;

(c) the distribution of goods; or

(d) the transportation of goods.

24 *Supply of Goods (Implied Terms) Act* 1973 s. 4 remodelling s. 55 of the *Sale of Goods Act* 1893.

Clearly, this excludes professional services and the term 'services' itself is narrowly construed. Although this part of the Act deals with an area untouched by corresponding U.K. legislation one could argue that it might be preferable to apply s. 74 to all services and, if required, exempt particular categories.[25]

The Act provides for enforcement and remedies in relation to Part V; a person (not a body corporate) who is found guilty is liable to a maximum fine of $10,000 or imprisonment of up to six months and in the case of a body corporate — a maximum fine of $50,000 may apply (s. 79 (2)).[26] In addition the Court may grant an injunction on the application of the Attorney-General, the Commission, or any other person to restrain a person from engaging in conduct which constitutes or would constitute

(a) a contravention of a provision of Part V (or IV);

(b) attempting to contravene such a provision;

(c) aiding, abetting counselling or procuring a person to contravene such a provision;

(d) inducing, or attempting to induce, a person whether by threats, promises or otherwise, to contravene such a provision;

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

(f) conspiring with others to contravene such a provision.

An important innovation in trade practices legislation, as is the whole of Part V, is the power given to the Court to make such orders as it thinks fit to redress injury to persons caused by conduct engaged in by the defendant which is dealt with in Parts IV and V.[27] This power is additional to the imposition of penalties under s. 77 or s. 79, or the granting an injunction, provided for by s. 80 or recovery of damages as provided for by s. 82. Defences are covered in s. 85. Basically, in a prosecution under Part V it will be a defence if a defendant establishes:

(a) that the contravention in respect of which the proceeding was instituted was due to a mistake, to reliance on information supplied by another person, to the act or default of another person, to an accident or to some other cause beyond his control; and

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25 See Schedules 4 & 5 of the *Fair Trading Act* 1973.

26 Apart from s. 52 which refers to misleading and deceptive conduct.

27 It was only in 1973 that power was given to the criminal courts in England and Wales to order persons convicted under the Trade Descriptions Act 1968 to pay compensation for injuries, loss or damage. If the consumer makes a successful *civil* claim based on the facts of a prosecution under the 1968 Act any money received from a compensation order just described must be taken into account when assessing damages; double compensation is not permitted.

(b) that he took reasonable precautions and exercised due diligence to avoid the contravention.[28]

Enforcement of Part V is the task of the Consumer Protection Commissioner and one special problem area that arises here is the relationship between the Federal government and the States. The Act is based on the Federal government's 'corporation' powers and that in itself limits the legislation to bodies corporate; the sole trader and partnership are outside its terms. What will be the role, in relation to the Act of the Consumer Protection Councils in each State? Will the best agency at State level to enforce Part V be the Trade Practices Commission (Consumer Division)? Can we cast the Consumer Protection Commissioner in the equivalent Australian role of the Director General of Fair Trading under the U.K. *Fair Trading Act* 1973?

The merits of using the Consumer Protection Councils of each State in liaison with the Commission appear to be the following:

(a) over a period of time, Consumer Protection Councils have built up a detailed knowledge of consumer problems,

(b) although States' legislation has been generally ineffective in producing viable protection for the aggrieved consumer (with the significant exceptions of South Australia and the small claims tribunals of Queensland, Victoria and New South Wales) and despite the fact that Councils' roles have been advisory there is no reason why their powers should not be extended to enforcement, either jointly with the Commission or even in cases where the Commission fails to take action under Part V. Certainly if the States are to be given a necessary gap-filling role (in respect of State legislation to deal with non-corporate bodies breaching Parts IV or V or in relation to pyramid selling), then the case seems particularly strong for Consumer Protection Councils in the States to be given teeth with which to bite.

The *Trade Practices Act* 1974 is an important reform which is long overdue. However, the balancing process of detriment and benefit evolved by the Tribunal, and likely to continue under the Commission, requires guidelines to identify and evaluate the benefits to the public arising from anti-competitive conduct. The failure of the Act to provide categories of *per se* illegality, presumptive illegality and so forth for specific categories of practices and agreements means that the business community is without recognisable rules to guide its conduct. Additionally, the legislation does not define competition in terms most relevant

28 For an English judicial interpretation of similar worded legislation as (a) i.e. Trade Descriptions Act 1968 s. 24 (1) see *Tesco Supermarkets Ltd.* v. *Nattrass* [1971] 2 All E.R. 127.

to the type of practice or agreement under review — e.g. market control in relation to horizontal price agreements. The implementation of the consumer protection provisions of the Act poses constitutional and administrative problems between the States and the Federal government which may prove difficult to resolve and for this reason the effectiveness of this part of the legislation may be hampered.

The criticisms above, it should be stressed, are not intended to detract from the positive contribution that the Act is likely to make to the development of workable legislation and the Attorney General's statement 'the purpose of these provisions is to prohibit anti-competitive behaviour in business'[29] sets the basic aim clearly enough. In order to achieve this it may prove necessary to look again at parts of the legislation and in particular, with reference to the Australian consumer review both means and methods of enforcement.

29 A paper presented at a Seminar sponsored by the Australian Association of National Advertisers held in Sydney 23rd August, 1974.