

An Analysis of the Australian Trade Practices Act

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and

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In 1906, in the early years of federation, the Australian Parliament passed the Australian Industries Preservation Act. The Act was the expression of the widely held opinion among politicians of the time that infant Australian industries were in danger of falling into the hands of foreign corporations, particularly those of United States origin. The Act of 1906 was modelled on the United States Sherman Act of 1890. For example, adapting section 1 of the Sherman Act, section 4 created the offence of restraining interstate or external trade and section 7, the broad equivalent of section 2 of the Sherman Act, created the offence of monopolizing or attempting to monopolize interstate or external trade. Other sections, inserted by an amending Act in 1909, deal with specific forms of business behaviour; for example, section 7A makes it an offence to refuse to sell to any person because he is not a member of a commercial trust. As in the case of the Sherman Act a person injured by reason of a contravention of the Australian Industries Preservation Act may bring a civil action for treble damages.

The Act soon encountered legal difficulties. First, there was the case of *Huddart Parker & Co. Pty. Ltd. v. Moorehead*¹ concerning sections 5 and 8 of the Act. These two sections were complementary to sections 4 and 7 already described. They made it an offence for a foreign company or an Australian "trading or financial" company to be a party to a restraint of trade or the monopolization of trade respectively, irrespective of whether the trade was foreign, interstate or intrastate. Whereas sections 4 and 7 were based on the federal interstate and overseas trade and commerce power, sections 5 and 8 relied

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¹ (1909) 8 C.L.R. 330.

on the federal corporations power for validity.² The High Court held in *Moorehead's* case, however, that the corporation power did not allow the Commonwealth to regulate the activities of corporations with the exercise of their lawful powers and therefore that sections 5 and 8 were *ultra vires*.³ The effect of the *Moorehead's* case was to constrain the operation of the Preservation Act substantially to restrictive acts undertaken in relation to trade or commerce with other countries or among the States.

A second rebuff occurred in the *Adelaide Steamship Company* case.⁴ In 1911, the Commonwealth instituted proceedings in which the principal issue was whether an agreement between colliery proprietors and shipowners contravened either section 4 or section 7 of the Australian Industries Preservation Act. As they then read, sections 4 and 7, unlike the corresponding provisions in the Sherman Act, required the prosecution to establish an intent to restrain trade and an intent to monopolize trade respectively. Further, in each case the prosecution had to show that the disputed behaviour was "to the detriment of the public." The case eventually went to the Privy Council. In 1913, the Privy Council advised that the defendants did not have the requisite intent and, moreover, that the Commonwealth had failed to establish that the restrictive activities, which took the form of collective price fixing and exclusive dealing, were to the detriment of the public.^{4a} With the disposal of the *Adelaide Steamship*

² Under section 51 (xx.) of the Australian Constitution, the Australian Parliament may *inter alia* make laws with respect to "Foreign corporations and trading or financial corporations formed within the Commonwealth". The Australian Industries Preservation Act ss. 5, 8 purported to extend the operation of the Act to such corporations on the assumption that the corporations' power did not restrict legislation to matters inseparably connected with the corporate existence of corporations, but extended to the control of their business methods.

³ The Court's fear was that if the corporations power allowed the federal parliament to regulate completely the business activities of foreign corporations and Australian trading and financial corporations, it would obliterate the distinction between interstate trade and intrastate trade so obviously drawn in section 51(i) of the Constitution.

⁴ (1913) 18 C.L.R. 30.

^{4a} The Privy Council's willingness to condone such obvious restrictive arrangements is reflected in the following extract from Lord Parker's opinion (1913) 18 C.L.R. (at p. 39).

"It was also strongly urged that in the term 'detriment to the public' the public means the consuming public, and that the legislature was not contemplating the interest of any persons engaged in the production or distribution of articles of consumption. Their Lordship do not take this view, but the matter is really of little importance, for in considering the interests of consumers it is impossible to disregard the interests of those who are engaged

Company proceedings in favour of the defendants a long administrative silence ensued and the Preservation Act ceased to influence the manner in which trade and commerce were conducted in Australia.

About fifty years later, in 1960, the Australian Federal Government announced its intention to consider the introduction of legislation to strengthen and protect free enterprise against the development of injurious monopolies and practices in commerce and industry. There was immediate speculation in some quarters as to whether the Commonwealth would seek to revive and revise the Australian Industries Preservation Act and use it as its weapon of antitrust policy. However, after examining the antitrust legislation of Canada and the United States, the government evolved a scheme which owes a good deal to the Restrictive Trade Practices Act, 1956 of the United Kingdom and very little to North American legislation.^{4b}

The Trade Practices Act received the Royal assent on 18 December 1965. The Act follows the United Kingdom legislation in that most practices are not proscribed outright but are made liable to examination by the Trade Practices Tribunal (which will sit in divisions consisting of a presidential legal member and two laymen) on the application of an independent official called the Commissioner of Trade Practices. If the Tribunal finds the practices to be "contrary to the public interest" it can render them illegal and the decision may be enforced by the Commonwealth Industrial Court. The Act provides also for a scheme of registration of most agreements containing restrictions. The agreements required to be registered are primarily

in such production and distribution. It can never be in the interests of the consumers that any article of consumption should cease to be produced and distributed, as it certainly would be unless those engaged in its production or distribution obtained a fair remuneration for the capital employed and the labour expended."

In *Reg. v. Morrey* [1957] 6 D.L.R. (2d) 114, the majority of the British Columbia Court of Appeal relied on Lord Parker's observations in finding that the evidence before it did not support a finding of public detriment in charges against a group of gasoline station operators of violating section 32 of the Combines Investigation Act.

^{4b} The Australian Industries Preservation Act was amended in 1910 in such a way as to overcome most of the difficulties presented by the Adelaide Steamship Company case. For example, section 4 was amended so that it became an offence to combine "in restraint of or with intent to" restrain trade or commerce. Further, it was rendered unnecessary for the prosecution to establish public detriment as flowing from a restraint. The section was re-drafted to provide that a party alleged to have contravened the section could plead as a defence that the restraint was not to the detriment of the public and was not reasonable. Section 7, dealing with monopolization, was also amended to ease the task of the prosecution.

collective or horizontal agreements concerning dealings in goods. A second Act passed in 1966 made some minor amendments to the Act of 1965 and, more importantly, added the shipping foreshadowed by the government in 1965 but not included in the original Act because they were not ready then.

The Trade Practices Act 1965-1966, as it should be cited, has not yet been proclaimed to come fully into operation but this may happen later in 1967. The Commonwealth has already appointed presidential members of the Tribunal and a Commissioner of Trade Practices.^{4c}

Shortly before the passing of the Trade Practices Act the Australian Industries Preservation Act received some prominence. In 1961 an attempt to found an actionable conspiracy on section 4 (restraint of trade) failed in the Supreme Court of Victoria.^{4d} Shortly afterwards some traders in motor car tires sought treble damages against several tire manufacturers for refusing to supply tires at normal trade prices. The resellers had not observed resale price fixing arrangements allegedly entered into between the tire manufacturers. The reply of the rubber companies was to challenge the validity of section 4 as being beyond the trade and commerce power. In 1964, however, in *Redfern v. Dunlop Rubber (Australia) Limited*,^{4e} the High Court held the section to be valid.^{4f} In 1965 the federal Attorney General prosecuted three companies in the Australian Capital Territory for refusing to supply goods to a grocery store unless the store paid a surcharge of 25% on the list prices of the goods it bought. Two defendants were found guilty of the offence of refusing to supply goods except on disadvantageous terms contrary to section 7B of the Act.^{4g}

The Australian Industries Preservation Act will cease to be law as the substantive provisions of the Trade Practices Act come into

^{4c} Mr. Justice Eggleston of the Commonwealth Industrial Court has been appointed president of the Tribunal. The appointment of three deputy presidents followed, namely Kerr J. of the Supreme Court of the Australian Capital Territory and Nimmo and Sweeney J.J. of the Commonwealth Conciliation and Arbitration Commission. The Attorney General appointed Mr. Bannerman, of the Attorney General's Department, as Commissioner of Trade Practices. Mr. Bannerman, a lawyer, was unknown in Australian business circles and, as far as is known, played no part in the drafting of the legislation.

^{4d} *Bourke Appliances Pty. Ltd. v. Wonder* [1965] V.R. 511.

^{4e} (1964) 110 C.L.R. 194.

^{4f} It is understood that the action was settled out of Court.

^{4g} *Attorney General of the Commonwealth v. Cramp & Sons Pty. Ltd.* and *Attorney General for the Commonwealth v. John Cawsey & Co.* (reports not yet available).

operation and its repeal will no doubt be of some relief to business circles. Except for collusive tendering and collusive bidding pursuant to standing registered agreements, the Trade Practices Act does not impose criminal penalties in respect of restraints of trade. Furthermore the treble damages suit for injury caused by a contravention of the Australian Industries Preservation Act will disappear from Australian Law. Only a single damages suit is possible under the new legislation and then only for injury caused following a violation of an order of the Tribunal.

Whilst it is plain that the Commonwealth Government could have moved effectively into the area of regulation of restrictive practices by strengthening the Australian Industries Preservation Act instead of repealing it in favour of a British type scheme, it must be acknowledged that in the fifty years in which the Preservation Act lay dormant all kinds of restraints of trade came to be practiced in Australian commerce and industry. In this period, when there was no fear of prosecution,^{4h} trade associations multiplied and as of 1965 there were probably some 600 in existence, the majority of which maintained agreements restricting competition. Most agreements provide for resale price maintenance, exclusive dealing, or allocation of markets. Activities which result in corporations being heavily fined and executives going to jail in the United States as amounting to serious *per se* breaches of the Sherman Act have been carried on in Australia for years by groups of companies or through the machinery of trade associations. Although businessmen normally use their best endeavours to conceal price fixing agreements and the like from public scrutiny, concealment has not occurred out of fear of legal consequences. The position in Australia, therefore, is not unlike that attained in 1956 in the United Kingdom. This is to say that the economic environment in which the Trade Practices Act will operate is quite different from that which exists in Canada and the United States where for many years commerce and industry have been conducted in the shadow of laws such as the Combines Investigation Act and the Sherman Act.

This article will proceed to examine the Trade Practices Act in its application to examinable agreements and practices and collusive tendering and bidding. It will not deal with the shipping provisions

^{4h} Several of the States have legislation regulating restrictive practices but none of the State Acts has had a significant impact on Australian commercial arrangements. See Richardson, J. E., "Legal aspects of the control of monopolies mergers and restrictive trade practices in Australia", (1962) 35 A.L.J. 423-426 and Richardson, J.E., *Introduction to the Australian Trade Practices Act*, (Hicks Smith, Sydney), Chapter 4.

introduced by the amending Act of 1966. The shipping provisions are *sui generis* and generally speaking operate independently of the remainder of the Act. They provide an interesting study in the regulation of restrictive agreements relating to overseas cargo shipping, but will have to be dealt with on some other occasion.⁴¹

We propose to analyze the new legislation under the following headings:

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⁴¹ For an account of the shipping provisions see Richardson, J. E., *Introduction to the Trade Practices Act*, Part VI.

PART I: THE EXAMINABLE AGREEMENTS AND PRACTICES**A. Examinable Agreements***1. Kinds of Agreements covered*

Section 35 provides that an agreement is examinable if the parties include two or more persons carrying on businesses that are competitive with each other in the supply of goods or services and at least one of the parties accepts a restriction of one or more of five specified kinds, namely restrictions in respect of:

- a) the terms or conditions, whether as to prices or as to any other matter, upon or subject to which dealings may be engaged in;
- b) the concessions or benefits, including allowances, discounts, rebates or credit, that may be given or allowed in connexion with, or by reason of, dealings;
- c) the quantities, qualities, kinds or extent of goods or services that may be produced, acquired, held in stock or supplied, or the resources or methods that may be used, or the resources that may be acquired or maintained for use;
- d) the places in, to or from which goods or services may be supplied; or
- e) the persons or classes of persons who may be dealt with, or the circumstances in which, or the conditions subject to which, persons may be dealt with.

Summarized the five categories of restriction concern:

- i) Agreements between competitors fixing prices and other conditions of their dealing with their customer; e.g. agreements between paint manufacturers fixing their sale prices and rebates to different classes of purchasers (e.g. the general public, painters);
- ii) Agreements between competitors concerning the quality of their goods, e.g. where manufacturers of electrical goods agree on a maximum life-expectancy of their product;
- iii) Agreements between competitors for quotas on production or quotas on sales;
- iv) Market-sharing agreements, e.g. agreements between competitors that each shall sell only in a certain area or only certain kinds of goods; e.g. if breweries in Melbourne agree with Sydney breweries to sell only in N.S.W.;
- v) Agreements by competitors not to deal with certain persons or classes of persons, e.g. boycott agreements.

2. What is an "agreement" ?

Section 92 of the Act provides that "agreements" include arrangements or understandings, whether formal or informal, whether express or implied, whether made inside or outside Australia, and whether enforceable or not by legal proceedings.

a) "Arrangements"

Some guidance may be obtained from judicial decisions concerning s. 260 of the *Income Tax and Social Services Contribution Assessment Act 1936-1965* which uses the expression "contract, agreement or arrangement". In *Newton v. Federal Commissioner for Taxation*⁵ the Privy Council said:

Their Lordships are of opinion that the word 'arrangement' is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons — a plan arranged between them which may not be enforceable at law. — The whole set of words denotes concerted action to an end — the end of avoiding tax.

The word "arrangement" in the United Kingdom *Restrictive Trade Practices Act, 1956*, has been considered by the Chancery Division and the Court of Appeal in *re British Basic Slag Ltd.'s Application: British Basic Slag Ltd. v. Registrar of Restrictive Trading Agreements*.⁶ The Registrar alleged that there was a restrictive arrangement between several steel companies. In 1917 a group of steel companies had incorporated British Basic Slag Limited (referred to hereafter as "Basic Slag"). In 1953 the companies who were before the Restrictive Practices Court in 1962 were all shareholders in Basic Slag and each had a nominee director on its board. Each of the companies had made an agreement with Basic Slag to sell to that company all the fertilizer which that company could sell, and Basic Slag had agreed, on its part, to "allocate and apportion in an equitable and reasonable manner between the vendor and other vendors who have entered into similar agreements all deliveries of the fertilizers". The steel companies contended that there was no arrangement *between them*, but only a set of bipartite agreements between each of them individually and Basic Slag.

The Court of Appeal unanimously held that there was an "arrangement" between the steel companies since it was unrealistic to deny that the steel companies had communicated and consulted with each other through their nominee directors on the board of Basic

⁵ [1958] A.C. 450 at 465-466.

⁶ [1962] L.R. 3 R.P. 178, [1962] 3 All E.R. 247 (Cross J.); [1963] L.R. 4 R.P. 116, [1963] 2 All E.R. 807 (Court of Appeal).

Slag, and the Court held that each company had thereby represented to the others that it would sign a contract with Basic Slag if the others did the same.

In *re Galvanized Tank Manufacturers' Agreement*⁷ the Registrar argued that the consistent practice of the members of the Association in giving to each other (through the Association's secretaries) advance information about their proposed price changes was an "arrangement", but the Court did not make a decision on the point; it did, however, stress that persons who "exchanged information as to their intentions on matters such as prices or who partake in discussions, formal or informal, with their competitors on such matters" run a real risk that their conduct will be held to have amounted to an "arrangement".

b) "*Understandings*"

In addition to "arrangements" the Act also applied to "understandings" between competitors. As far as we are aware this word has not been defined by a Court, but the Oxford English Dictionary defines it as "an agreement of an informal, but more or less explicit nature". We think that there is no "understanding" unless there are mutual communications between the alleged parties such as to arouse in each recipient an expectation that the person from whom the communication comes will act in a certain way. If the wide interpretation of "arrangement" by the Court of Appeal in *Basic Slag* is accepted in Australia, then the word "understanding" covers nothing that is not already covered by the word "arrangement".

c) *The exchange of information about prices and other statistics*

Suppose there is no evidence of any express agreement to exchange information on prices being charged or which competitors propose to charge, but only evidence that competitors have exchanged this information. Is there an "arrangement" or "understanding"? In our view there is. We think that when several firms are in fact exchanging information, each firm participates on the implied understanding that the others will continue to send similar information in exchange and there is, therefore, an informal implied arrangement or understanding to exchange information.⁸

⁷[1965] L.R. 5 R.P. 315, [1965] 2 All E.R. 1003.

⁸ Whether such 'agreements' are examinable depends on the further and distinct question: Do they involve restrictions of the kinds specified in s. 35(1.)? See *infra* for some arguments that some are examinable.

d) *Mere conscious price parallelism*

Where the only evidence is that several competitors are in fact charging identical prices and there is no provision of information by one or more of the firms to the others, there is no arrangement or understanding. Mere conscious parallelism or price leadership is therefore not examinable.

3. *What are "competitive" businesses ?*

Only agreements where the parties include at least two persons (including corporations) carrying on "competitive" businesses are examinable. Hence where, for example, a single manufacturer and a single retailer of his product agree that the latter shall observe resale price maintenance conditions their agreement is not examinable.⁹

Businesses not actually in competition with each other are deemed "competitive" if they *would be* competitive in the absence of an agreement between their proprietors of a kind to which s. 35 applies. Thus the Act applies to an agreement under which one manufacturer agrees with another to cease, or not to set up in, production of goods which would compete with the other manufacturer's product. However, suppose that two Victorian companies manufacturing office cabinets each enter into an exclusive-dealing arrangement with a New South Wales wholesaler. Suppose the two Victorian companies then enter into an agreement fixing the prices at which each sells to his New South Wales wholesaler. Whilst the two New South Wales distributors might compete with each other, the two Victorian companies are not "competitive": although they would be competitive *but for the exclusive-dealing agreements*, these agreements are not examinable under s. 35. Hence the price-fixing agreement would not be examinable because of the lack of the competitive element.

Businesses can be "competitive" even though they deal in goods or services that ordinarily have different descriptions. For example, manufacturers of bottles could compete with manufacturers of waxed cartons for liquids.

4. *Parties to agreements*

a) *Trade associations*

Section 92 of the Act contains special provisions relating to trade associations. Thus:

⁹ Unless it comes within the monopolization provisions, especially s. 37(1.) (c), or unless the manufacturer, for example, has a retailing business that competes with the retailer.

- i) The *constitution* of a trade association is deemed to be an agreement to which members of the trade association are parties.
- ii) Where a *direction*¹⁰ is given by a trade association to members, it is conclusively presumed that the direction was authorized by the constitution of the association and that those members subject to the direction were required to comply with it.
- iii) An agreement made by a trade association is deemed to be one to which all members of the trade association are parties and by which those members agree to do all those things the trade association is to require or recommend them to do.

One important effect of this third provision is that, unlike the United Kingdom Act¹¹ it makes examinable any bilateral agreement between a trade association and a member.¹²

b) *Subsidiaries*

If a holding company¹³ is a party to an agreement concerning the activities of its subsidiaries, the latter are also deemed to be parties.¹⁴ The result is that where, for example, a restrictive agreement is made between A and B who are not competitors, and the agreement provides for things to be done by A's subsidiary C who is a competitor of B, the agreement is examinable.¹⁵

c) *Persons outside Australia*

The Act expressly applies to agreements made outside Australia¹⁶ but the references to "persons carrying on businesses" should in our view be read as "persons carrying on businesses *in Australia*."¹⁷ However, the effect of s. 91(7) must be considered: a restrictive agreement between an Australian company and an overseas company that does not itself carry on business in Australia is examinable

¹⁰ Compare 'specific recommendation' in the United Kingdom *Restrictive Trade Practices Act, 1956*, s. 6(7).

¹¹ White Paper on *Monopolies, Mergers and Restrictive Practices*, March 1964, Cmnd. 2299, paras. 35-6.

¹² Apart from s. 92(2.) (e), such agreements would not be examinable since only one party would be carrying on business.

¹³ The term 'holding company' has the same meaning as in the *Companies Ordinance 1962* of the Australian Capital Territory.

¹⁴ S. 91(7.).

¹⁵ By virtue of s. 91(7.) there are two parties carrying on competitive businesses and hence it falls within s. 35(1.).

¹⁶ S. 91(3.).

¹⁷ If a foreign principal has an agent in Australia, but the agent is bound to refer any transactions to the principal, judicial decisions seem to have established that the principal does not 'carry on business' here.

if the latter has a subsidiary carrying on business here and any of its activities are the subject of the agreement.

d) *Restrictive Export Franchises*

A bilateral agreement between an Australian company and an overseas company providing that the former shall restrict its exports in any way, is not examinable where the parties are "related" companies,¹⁸ nor where the restrictions are related to goods which are the subject of certain industrial property rights in the parent company,¹⁹ nor where only one of the parties is carrying on business in Australia.²⁰

5. *Kinds of restrictions that make agreements examinable*

We have already²¹ summarized the kinds of restrictions that make agreements examinable. We do not propose to discuss these in detail, but will deal here only with two kinds that will certainly give rise to problems:

- i) information agreements, and
- ii) certain kinds of arrangements for quotas on production or sales.

a) *Information agreements*

Above we have dealt with the question whether an exchange of information constitutes an "agreement". Given that there is an "agreement", the next question is whether it contains any restrictions of a kind that makes it an examinable agreement.

i) *Agreements providing for advance notice of price changes*

Agreements by competitors to give *advance* notice to each other about proposed price changes are examinable. These agreements include agreements to charge according to their current price lists since these are in effect agreements not to change prices without giving prior notice to each other; there is, therefore, a restriction in respect of the prices to be charged.²²

ii) *Other agreements to circulate information*

If these agreements are not examinable, they will be as widely used in Australia as they are in the United Kingdom to avoid exam-

¹⁸ S. 35(3).

¹⁹ S.38(f), see p. 12 below.

²⁰ S. 35(1).

²¹ See pp. 3-4 above.

²² *Re Tyre Manufacturers' Agreement* [1966] 2 All E.R. 849. The same conclusion applies to advance notice of changes in other terms and conditions, proposed production targets, etc.

ination.²³ In our view, agreements to circulate information about changes in prices that have *already* been made are not examinable since they contain no "restrictions" in respect of prices.

b) *Levies on production or sales*

In *Linoleum Manufacturers' Association v. Registrar of Restrictive Trading Practices*²⁴ Ungoed-Thomas J. in the Chancery Division of the English High Court considered an arrangement designed to achieve production quotas in a way that the parties hoped would avoid provisions of the United Kingdom Act similar to s. 91(9) of the *Trade Practices Act* which provides:

(9.) Without prejudice to the last preceding sub-section and obligation on the part of a party to an agreement to make payments calculated by reference to —

(a) the quantity of any goods produced or supplied by him or the extent of any services supplied by him; or

(b) the quantity of any materials acquired by him for the purpose or, or used by him in, the production of any goods or the supply of any services,

being payments calculated, or calculated at an increased rate, in respect of goods, services or materials in excess or a quantity or extent specified in, or ascertained in accordance with, the agreement, shall be deemed to be a restriction in respect of the quantities of those goods that he may produce or supply, or the extent of those services that he may supply, as the case may be.

The parties agreed to a levy based not on the quantities produced *in excess* of any specified amount but on their *total* production. They were not required to make actual payments until the total sum so calculated was divided in agreed proportions; the members were then required to pay such sums as were found due upon the final balance. Ungoed-Thomas J. had little difficulty in holding that this scheme was registrable under the Act. However, he emphasized the fact that the parties did not have to make any actual payments until the final balance was struck, and that in effect the payments they actually made were calculated in respect of the quantities they produced *in excess* of the quota. The decision cannot be taken as authority for the view that the United Kingdom Act or the *Trade Practices Act* apply to an arrangement under which the parties *actually pay* levies on their total production, and at a later date receive rebates calculated by reference to quantities in excess of a

²³ *Third Report of the Registrar of Restrictive Trading Agreements* (1964); Cmnd. 2246; White Paper on *Monopolies, Mergers and Restrictive Practices*, March, 1964, Cmnd. 2269, paras. 30-34.

²⁴ (1963) L.R. 4 R.P. 156, (1963) 3 All E.R. 211.

given amount.²⁵ However, a strong argument can be made for the view that such a scheme is examinable. The larger the quantity produced by each producer, the larger is his levy. Under any scheme that is in substance a production-quota scheme, the producers who exceed the quota will receive back less than they have paid. They could be said to have "made payments" to the extent of their levies less the refunds that they later receive. These net payments are clearly "calculated by reference to the quantities . . . produced", and also "calculated . . . in respect of goods . . . in excess of a quantity specified in, or in accordance with, the agreement"; hence such an arrangement is examinable.

6. *Exempted agreements*

There are many categories of agreements exempted from liability to examination:

- (i) Agreements solely between related corporations.²⁶
- (ii) Agreements made by any 'organization or body that performs functions in relation to the marketing of primary products', if that organization is specified in regulations under the Act providing for such exemption.²⁷
- (iii) Agreements specifically authorized or approved by Commonwealth or legislation or by an Ordinance of a Territory.^{27a}
- (iv) Any agreement insofar as it contains provisions relating to the remuneration, conditions of employment, hours of work or working conditions of employees.²⁸
- (v) Provisions requiring persons to comply with or apply standards prepared or approved by the Standards Association of Australia, or by any prescribed association or body;
- (vi) Provisions that are solely for the protection of the *purchaser* in respect of the goodwill of a business he has bought;
- (vii) Conditions in a licence or assignment of a patent, registered design or copyright in so far as they relate exclusively to the subject of the patent, design or copyright.^{28a}

²⁵ *Korah*, (1964) *Journal of Business Law* 1, Stevens and Yamey, *The Restrictive Trade Practices and Resale Price Maintenance* (Sweet and Maxwell, 1964), 17-18.

²⁶ S. 35(3.).

²⁷ S. 106(2.).

^{27a} The exemptions in (b) and (c) above could take out of the Act restrictive agreements by marketing boards and other Commonwealth and State instrumentalities.

²⁸ But not *numbers* of employees. Cf. the *Restrictive Trade Practices Act, 1956* (U.K.), s. 7(4).

^{28a} The Act therefore exempts, for example, restrictive conditions relating to resale prices or to areas in which the goods may be marketed by the licensee or assignee. Conditions in ordinary trade mark licences are exempted to the extent

- (viii) Agreements relating to the carriage of goods by sea between Australia and other places.²⁹

7. *Registration of agreements*

a) *Agreements that must be registered*

The Act provides that all examinable agreements must be registered, but then goes on to provide an exemption in the case of all agreements in which the restrictions relate exclusively to the supply or acquisition of *services*, unless those services include services by way of:

- a) the production, 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.

b) *The Register of Trade Agreements*

The Commissioner of Trade Practice is required to keep a Register to be known as the Register of Trade Agreements.^{29a} The Commonwealth intends to set up Branch Registers. The Register will not be open to public inspection.

Particulars of agreements required to be registered will have to be furnished within thirty days from the date when the agreements become registrable.^{29b} The national advantage of registration is that the parties provide the evidence on which proceedings may be based instead of the Commissioner having to make a search for evidence.

The registration requirements of Part V of the Act may be complied with by any party to the agreement. If the requirements relating to registration are not complied with every person who is party to the agreement when it became subject to registration is guilty of an offence, the penalty for which is a fine not exceeding \$2,000.^{29c} There are several defences available — for example, that the

that they relate to the kinds, qualities or standards of the marked goods. Conditions in agreements authorizing the use of a certification trade mark are exempted if they accord with rules approved by the Register of Trade Marks under the *Trade Marks Act 1955-1958*.

²⁹ These will be subject to the special shipping provisions contained in Part XA of the Trade Practices Act 1965-1966 when it comes into operation.

^{29a} S. 40.

^{29b} S. 42.

^{29c} S. 43.

party concerned may have reasonably relied on another party or on his trade association to ensure that the required particulars were duly furnished, or that the party did not advert to the need to register.³⁰

B. Examinable practices

1. *The four examinable practices*

Only four restrictive *practices* (as distinct from agreements) are made examinable by the Tribunal upon the application of the Commissioner:

- (a) inducing price discrimination;
- (b) forcing another person's product;
- (c) collectively inducing refusals to deal;
- (d) monopolization.

(a) *Inducing price discrimination*

This is where a buyer induces or attempts to induce a supplier of goods "by any express or implied threat or promise" to accept terms of trade, including prices, more favourable to the buyer than those on which the supplier is willing to supply goods of similar kind and quantity to other business competitors generally, if the effect is likely to substantially lessen the ability of a competitor to compete with the favoured buyer.

Proof that this practice is being engaged in will be difficult, let alone proof that, if it is being engaged in, it is contrary to the public interest. There must, for example, be proof of an "express or implied threat or promise". It is not sufficient to prove simply that the buyer, by reason of his economic strength, is in a position to negotiate advantageous terms of trade. Further, the mere inducement of favourable terms does not make the practice examinable. The favourable terms must be likely to substantially lessen the ability of "competitors generally" to compete with the favoured buyer.

Moreover, if attempts were made to use this provision against, for example, large chain stores who, by threatening to set up in business as competing manufacturers, extract better terms from suppliers than the suppliers allow to the stores' smaller rivals, it would probably be found that the better terms are given, at least in form, as "quantity discounts". Provided the supplier is willing to grant the same quantity discounts if the smaller rivals order the

³⁰ S. 43(4.).

same quantities,³¹ the practice of inducing the better terms is quite outside the scope of this provision.³²

(b) *Forcing another person's product*

This is where a supplier makes it a condition of the supply of goods or services that the customer shall acquire all or part of his goods or services "of another class" from a particular third person. An example is where a reseller of petrol is required, as a condition of supply by an oil company, to sell associated products such as tyres and batteries made by other manufacturers.

(c) *Inducing refusals to deal*

The third practice is where a trade association, a person acting for a trade association, or any person acting in pursuance of an agreement with another person carrying on business, induces (or attempts to induce) a firm to refuse to deal with a third person, or to refuse to deal with that third person except on disadvantageous terms. The practice is engaged in, for example, where a group of garment manufacturers threatens to discontinue buying flannel from a flannel manufacturer if he continues to supply someone who is not a member of the group or who is selling below the prices required by the group.

(d) *Monopolization*

The fourth practice is "engaging in monopolization." Section 37(1.) provides:-

37.—(1.) For the purposes of this Act, a person engages in monopolization if, being in a dominant position in the trade in goods of a particular description, or in the supply of services of a particular description, in Australia or in a part of Australia, he takes advantage of the position so as to —

- (a) Induce or attempt to induce a person carrying on a business to refuse to deal with a third person, or to refuse to deal with a third person except on terms disadvantageous to the third person;
- (b) engage in price-cutting with the object of substantially damaging the business of a competitor or preventing a possible competitor from entering into competition with him; or
- (c) impose prices or other terms or conditions of dealing that he would be unable to impose but for his dominant position.

³¹ This is unlikely unless the small retailers combine into large buying groups.

³² Cf. s. 2(f) of the *Clayton Act* (U.S.A.) and s. 33^b of the *Combines Investigation Act* 1952-1966.

(i) *When is a person in a "dominant position" ?*

The Tribunal is not to find that a person is in a "dominant position" in the trade in goods of a particular description, or in the supply of goods of a particular description, in Australia or a part of Australia, unless the Tribunal is "satisfied that that person is the supplier of not less than one-third, by quantity or value, of the goods (including imported goods) or services of that description that are supplied in Australia or that part of Australia".³³

a. *What are "goods of a particular description" ?*

Section 37(3) provides:

(3.) The Tribunal shall not regard a description of goods or services as being a particular description of goods or services for the purposes of this section if the Tribunal considers that it would be unreasonable to do so having regard to the fact that other goods or services are competitive with goods or services that are included in the description, and to the extent to which those other goods or services are so competitive.

No doubt the criteria to be used in deciding this question will be similar to those employed by the United Kingdom Restrictive Practices Court in deciding whether a particular description of goods is a "commercially sensible" category for the purposes of assessing market shares.³⁴ Thus in one case, *Romeo*, a particular magazine for youthful readers was not taken as the relevant class of goods; instead the relevant goods were all magazines falling within the wide description "magazines for youthful readers."

Cases under the *Clayton Act* of the United States involve similar questions in the use of the confession "line of commerce in any part of the country". In *United States v. Continental Co.*,³⁵ the United States sought an order requiring the nation's second largest producer of metal containers to divest itself of the assets of the nation's third largest producer of glass containers. The Supreme Court expressed the view that a relevant "line of commerce" was the whole trade in glass and metal containers, that the merger had a substantial anti-

³³ S.3 of the *Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948* (U.K.) is similar, except that it uses the expression 'in the United Kingdom or any substantial part thereof'.

³⁴ Section 21(1.) (d) of the *Restrictive Trade Practices Act, 1956* (U.K.) refers to "the trade or business of acquiring — goods" and in *re Wire Rope Manufacturers' Association's Agreement* [1965] L.R. 5 R.P. 146; [1965] 1 All E.R. 382, and *Newsagents', Booksellers' and Stationers' Agreement* [1964] L.R. 5 R.P. 236; [1965] 2 All E.R. 417, the Court said that for this purpose only a 'commercially sensible category of goods should be considered.'

³⁵ 378 U.S. 441 (1964).

competitive impact on this line of commerce, and that it was, therefore, illegal.³⁶

The practical lesson to be derived from such cases is that a firm with a large share of the trade in goods of some narrow description e.g. bottles might have only a small share in the trade of goods of some wider description e.g. containers for liquids, and so would escape the monopolization provisions if it persuaded the Tribunal to adopt the wider description of the relevant goods for the purposes of the Act.

b. *What is "a part of Australia" ?*

Section 37(2) provides:

(2.) The Tribunal shall not regard as a part of Australia for the purposes of this section an area that does not include the whole of a State or Territory unless it is satisfied that it is appropriate to do so having regard to the substantial size of the area and its significance as a market area.

In cases under the *Clayton Act* similar questions have arisen. Thus in *U.S. v. The Philadelphia National Bank*,³⁷ a four-county area in metropolitan Philadelphia was taken as the relevant "part of the country", but this was in a context which concerned many banking transactions by customers who were "neither very large nor very small." On the other hand, in a very different context, notably the supply of huge quantities of coal by a firm to an electricity generating station in Florida, not even the States of Florida and Georgia combined were regarded as a "part of the country." Instead, the calculations were based on a much larger area in south-eastern U.S.A. served by the competing coal suppliers.³⁸

Clearly, in the case of many goods a firm is more likely to escape the monopolization provisions if it persuades the Tribunal to accept only large areas as "parts of Australia."

(ii) *Monopolization by combinations*

The monopolization provisions apply, not only to single persons and companies, but also to "combinations." Hence these provisions can be invoked in respect of many agreements that are also examinable under the agreements provisions. An important aspect of this overlapping is that although certain agreements involving industrial

³⁶ See also *United States v. Dupont*, 351 U.S. 377 (1955) where cellophane was held to be only part of a wider market for flexible packaging materials.

³⁷ 374 U.S. 321 (1963).

³⁸ *Tampa Electric Co. v. Nashville Coal Co.* 365 U.S. 320 (1961).

property are exempted from the agreements provisions, they can nevertheless be examined under the monopolization provisions.³⁹

A "combination" includes:

(a) Two or more "related" corporations.⁴⁰ Each related corporation is included in any other combination in which any of them is included.

(b) Two or more persons who "so conduct their affairs as in any way to restrict or prevent competition between them in connexion with the supply of goods or services of any description."⁴¹

It is arguable that oligopolists engaging, without any agreement between them, in parallel pricing and other parallel marketing policies are a "combination" under this provision, since individually they "so conduct their affairs as... to restrict... competition." On this interpretation no communication between them need be shown to establish a "combination."

However, even if a group of oligopolists is a "combination" under these provisions, the combination engages in monopolization only if a member, acting as a member of the combination, engages in monopolization.⁴² It is possible that a person acts "as a member" of a combination only if he has some "understanding" with the other members. For example, where each member of a combination cuts its prices, or induces a person not to deal with another, or charges high prices, but none individually has a one-third share of the relevant trade, they might be within the scope of the monopolization provisions only if there is some understanding between them. It is not easy to see any other meaning in "acting as a member."⁴³

(iii) *The kinds of conduct that constitute monopolization*

A person in a dominant position brings himself within the scope of the monopolization provisions only if he "takes advantage of that position" so as to:

³⁹ Section 39(4.) (5.) and (6.). In the United Kingdom where certain agreements involving industrial property are exempted from examination by the Restrictive Practices Court under the *Restrictive Trade Practices Act, 1956*, they are nevertheless examinable by the Monopolies Commission under the *Monopolies and Mergers Acts, 1948 and 1965*.

⁴⁰ Section 37(4.) (d).

⁴¹ Section 37(4.) (c).

⁴² Section 37(4.) (a).

⁴³ It is ultimately for the High Court to decide whether an individual oligopolist is acting 'as a member' of a 'combination' of oligopolists.

a. induce or attempt to induce a businessman to refuse to deal with a third person, or to deal with him only on disadvantageous terms;

b. engage in price-cutting with the object of substantially damaging a competitor's business or preventing a potential competitor from competing with him; or

c. impose prices or other terms of dealing which he would be unable to impose but for his dominant position.

It is difficult to construe the words "takes advantage of that position." A person in a dominant position is, for example, likely to be more successful in engaging in price-fixing and price-cutting than someone who is not, simply because he is in a dominant position. It seems, therefore, that the expression contemplates that something more must be proved than that certain consequences have ensued because a person is in a dominant position, but is uncertain as to what is required.

a. Inducing refusals to deal

The conduct made examinable by paragraph (a) of s. 37(1) is the same as that described in the third examinable practices (inducing refusal to deal) described in section 36(1.) (c), the difference being that in monopolization the practice needs only to be engaged in by one person, i.e. the person in the dominant position.

b. Predatory price-cutting

The practice in paragraph (b) of s.37(1.) is often called predatory price-cutting. As defined in this paragraph, the practice only includes price-cutting with the "object" of causing injury to a competitor, as distinct from merely improving the price-cutter's own competitive position. Such an "object" may be difficult to prove.⁴⁴

c. Imposing monopolistic prices, terms and conditions

Paragraph (c) of s.37(1.) relating to prices and other terms and conditions will almost certainly pose some nice problems of proof for the Commissioner. The difference between prices imposed by reason of domination and prices charged having regard to other factors, such as the normal interaction of supply and demand, may be very fine.

⁴⁴ Note the narrow view taken by the courts in such cases as *Crofter Harris Tweed Co. v. Veitch* (1942) A.C. 435; *Bourke Appliances Pty. Ltd. v. Wonder* (1965) V.R. 511.

Imposing resale price maintenance or exclusive-dealing conditions could theoretically be examinable under this heading.

2. *Exempted practices*

The many categories of practices that are exempted from liability to examination are similar to the categories of exempted agreements outlined above. One important point deserves mention: practices involving restrictions by means of conditions in licences or assignments of industrial property rights are not exempted from examination in so far as they constitute monopolization.⁴⁵

3. *Practices not covered by the Act*

Well-known practices not within the ambit of the Act, unless they amount to monopolization, include the following:-

(a) *Full-line forcing*

This is a fairly common practice. A supplier may make it a condition of the supply of specified goods that the buyer shall also purchase goods of other descriptions from him, e.g. a customer wishing to buy drain cocks will be supplied only if he buys other plumbing equipment. Such a practice is covered under section 3 of the *Clayton Act*.

(b) *Exclusive-dealing arrangements*

The general philosophy of the Act is to leave the individual businessman free to negotiate his own terms of trade provided that the area of negotiation is not disturbed by improper behaviour such as a threat. Thus, exclusive dealing arrangements (including sole agencies) entered into between persons at different levels of business, e.g. a manufacturer and a distributor, are not covered. For the most part such practices also fall outside the ambit of the *Restrictive Trade Practices Act, 1956 of the United Kingdom*.⁴⁶ The practices are covered in the United States under section 3 of the *Clayton Act* and section 1 of the *Sherman Act*.

(c) *Vertical resale price maintenance*

This is a major omission. The practice of a manufacturer or supplier making it a condition of supply of goods to a reseller that

⁴⁵ See p. 17 above.

⁴⁶ Section 8(3.).

the goods are sold at fixed or minimum prices is very common in Australia. The practice is now extensively controlled in the United Kingdom under the *Resale Prices Act, 1964*. In the United States such agreements constitute *per se* offences under the Sherman Act, but only where there is not an applicable State Fair Trade law authorizing them. Canadian law goes even farther, section 34 of the Combines Act specifically making it an indictable offense to engage in resale price maintenance.

Part II: Proceedings against examinable agreements and practices

1. *Investigations and consultations by the Commissioner of Practices.*⁴⁷

The Commissioner is the only person who can institute proceedings before the Tribunal.⁴⁸

(a) *Investigations*

His investigations of registered agreements will usually be limited to matters relevant to the public interest. On unregistered agreements, whether or not they ought to be registered, and practices his investigations will concern both the existence of the alleged agreements and practices, as well as the public interest aspects. For the purposes of his investigations, he has certain powers under the Act to require persons to furnish information and produce documents.⁴⁹

Where an offence against the Act⁵⁰ is suspected or alleged, the Commissioner can invoke the aid of the Attorney General.⁵¹

(b) *Consultations*

Before the Commissioner institutes proceedings he is obliged by section 48 to consult with the parties with a view to avoiding the need for proceedings before the Tribunal. The idea is that by consultation he can ascertain whether the agreement or practice can be terminated, or so varied that, in his opinion, proceedings would be rendered unnecessary.

⁴⁷ The Commissioner is to be appointed by the Governor-General for a maximum term of seven years. He is eligible for reappointment, ss. 23, 24.

⁴⁸ The Attorney General may direct the Commissioner to investigate agreements and practices, but not to institute proceedings.

⁴⁹ ss. 103-4.

⁵⁰ e.g. failure to register agreements concerning goods.

⁵¹ Note especially the powers under the *Crimes Act 1901-1960*, ss. 5-10.

(c) *Certificates of clearance under section 59*

If the consultations result in agreement the Commissioner may apply to a presidential member of the Tribunal for leave to file a certificate under s. 59 that the agreement or practice as varied is not contrary to the public interest. While such a certificate remains unrevoked no further proceedings may be instituted, and it is not revocable unless the Tribunal gives leave upon being satisfied that there has been a sufficient change in circumstances since the certificate was filed. The circumstances include decisions of the Tribunal in analogous cases since the date of filing.

Where the Commissioner has commenced consultations but has neither instituted proceedings nor filed a certificate under s. 59, the Tribunal, if satisfied that a "reasonable period for consultations has elapsed", may (on a party's application) direct the Commissioner to take one or other of those actions 'as expeditiously as practicable.'⁵² If the Commissioner decides to file a certificate under s. 59, he cannot thereafter institute proceedings unless he revokes the certificate and this can only be done with the leave of the Tribunal as stated in the preceding paragraph.⁵³

2. *Institution of proceedings before the Tribunal*

The Commissioner (and no one else) may institute proceedings⁵⁴ in respect of any existing agreement or practice that in his opinion is "contrary to the public interest."

He may also institute proceedings in respect of past examinable agreements and practices if he obtains the leave of a presidential member of the Tribunal, to be granted only if the member is satisfied that the agreement or practice (or a similar one) is likely to be revived.⁵⁵ These provisions are, of course, necessary to counter the tactics of suspending agreements and practices until the Commissioner's attention is diverted elsewhere, and reviving them until he renews investigations.⁵⁶

⁵² s. 61(2.) (b), (3.) and (4.).

⁵³ Other circumstances in which 'negative clearances' for minimum periods may be obtained are outlined *supra*.

⁵⁴ Unless, of course, a certificate under s. 59 is on the Register.

⁵⁵ ss. 47(1.) (a), (2.), 55(2.) (3.), 56(1.) (2.).

⁵⁶ The power of the United Kingdom Registrar to take proceedings in respect of past agreements was doubtful until the House of Lords' decision in *Associated Newspapers Ltd. v. Registrar of Restrictive Trading Agreements* [1963] L.R. 4 R.P. 361, [1964] 1 All E.R. 55.

Furthermore, the Commissioner may (without leave) take proceedings in respect of proposed practices.⁵⁷

3. *Interim orders*

After the institution of proceedings the Commissioner, and it seems any party or person given leave by the Tribunal to intervene,⁵⁸ may seek interim orders (similar to interlocutory injunctions) which the Tribunal may make if satisfied (a) that they are necessary to prevent "grave hardship to any person or irremediable injury to the public interest" and (b) that it is reasonable to make the orders having regard to previous decisions of the Tribunal in similar cases.⁵⁹

4. *The hearing before the Tribunal*

(a) *Procedure*

The Tribunal is to sit in Divisions each consisting of a lawyer (as presidential member) and two laymen, appointed having regard to their "knowledge of, or experience in, industry, commerce or public administration."⁶⁰ With the parties agreement, cases can be heard by a presidential member sitting alone.⁶¹

Proceedings are to be conducted with "as little formality and technicality — as the requirements of the Act and a proper consideration of the matters before the Tribunal permit," and the Tribunal is not bound by the rules of evidence.⁶² Hearings are generally to be in public, but the Tribunal has a virtually complete discretion to sit in private for the whole or part of a case,⁶³ e.g. where evidence on some secret manufacturing process, or confidential financial information, is being given.

Further, the regulations may provide for material facts and contentions to be brought before the Tribunal by means of preliminary statements of facts and contentions.⁶⁴ Evidence may be given before a single presidential member.⁶⁵

⁵⁷ ss. 47(2.), 56(1.) (a). Pursuant to a direction by the Tribunal under s. 61, he may also take proceedings in respect of proposed agreements: s. 61(1.) and (6.).

⁵⁸ s. 77(3.).

⁵⁹ s. 54.

⁶⁰ s. 10.

⁶¹ s. 17.

⁶² s. 70.

⁶³ s. 73.

⁶⁴ This procedure is much used in the United Kingdom; in particular, proofs are exchanged before the hearing to eliminate examination-in-chief: *Practice Note (Proofs of Evidence and Cross-Examinations)* [1960] L.R. 2 R.P. 132.

⁶⁵ s. 75.

Questions of law are to be decided according to the opinion of the presidential member⁶⁶ and with his concurrence such questions may be referred (either at the Tribunal's own initiative or on the application of a party) to the Industrial Court, and the proceedings must then be continued in accordance with the Industrial Court's decision.⁶⁷ For the purpose of references to the Industrial Court, "questions of law" do not include a question "whether there is sufficient evidence to justify a finding of fact by the Tribunal."

(b) *Proving the existence of agreements and practices*

The first task for the Commissioner in proceedings before the Tribunal is to establish that the alleged agreement or practice exists.⁶⁸

The Register provides evidence⁶⁹ of the existence of the registered agreements and that the registered particulars are correct both as to parties and terms. However, it is not conclusive evidence; moreover, the Commissioner must still show that the agreement, though registered, is examinable.⁷⁰

The existence of unregistered examinable agreements and of examinable practices will be proved by evidence gathered by the Commissioner from his own investigations and from complaints by persons damaged by the restrictions. Evidence may also include material gathered by the Attorney General in the course of investigating any alleged offences against the Act.

The Tribunal must make a finding concerning the existence of the alleged agreements and practices and their parties and terms, though it seems that it does not have to give its reasons for their determinations;⁷¹ the scope for challenging findings by means of proceedings by prerogative writs in the High Court can thus be minimized. If the Tribunal finds that an examinable agreement or practice exists, it must go on to determine whether it is 'contrary to the public interest.'

⁶⁶ s. 21.

⁶⁷ s. 66.

⁶⁸ Or that it has existed, or is proposed, as the case may be.

⁶⁹ s. 45.

⁷⁰ The Register may well contain many agreements that have been registered because the parties are in doubt on this question. They can still argue that, though registered, their agreements are not examinable.

⁷¹ Cf. s. 49 (2.).

(c) *"The public interest"*

Section 50 provides the considerations which the Tribunal must take into account in determining whether a restriction or practice is contrary to the public interest.

The section reads:

50.(1.) In considering whether any restriction, or any practice other than a practice of monopolization, is contrary to the public interest, the Tribunal shall take as the basis of its consideration the principle that the preservation and encouragement of competition are desirable in the public interest, but shall weigh against the detriment constituted by any proved restriction of, or tendency to restrict, competition any effect of the restriction or practice as regards any of the matters referred to in the next succeeding subsection if that effect tends to establish that, on balance, the restriction or the practice is not contrary to the public interest.

(2.) The matters that are to be taken into account in accordance with the last preceding subsection are

- (a) the needs and interests of consumer, employees, producers, distributors, importers, exporters, proprietors and investors;
- (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.

(3) In considering the public interest in relation to a practice of monopolization, the Tribunal shall weigh against any detriment (including detriment constituted by any proved restriction of, or tendency to restrict, competition) that has resulted, or can be expected to result, from the practice any effect of the practice as regards any of the matters referred to in paragraphs (a) to (f) of the last preceding subsection if that effect tends to establish that, on balance, the practice is not contrary to the public interest.

(i) *The public interest in agreements and practices other than monopolization*

If the only evidence before the Tribunal is a restriction of competition,⁷² the Tribunal must hold the agreement or practice to be "contrary to the public interest".⁷³ The Commissioner does not, in our

⁷² A restriction of competition is involved by definition in all examinable agreements and practices other than monopolization.

⁷³ s. 50: "the Tribunal shall weigh against the detriment constituted by any proved restriction of, or tendency to restrict, competition..."

view, have to demonstrate the effects of the restriction, or show that in the whole economic situation there is an overall restriction of competition.⁷⁴

If the respondents defend the proceedings, the Commissioner would have to show the consequences of restrictions since these consequences are relevant to the weight of the detriment to the public interest.

Assuming the Commissioner to have put his case, the parties in defence may refer to any one or more of the matters specified in paragraphs (a) to (f) of subsection (2), and this they may do only if the effects tend to establish that the restriction, on balance, is not contrary to the public interest. The six matters (a) to (f), though extremely vague, will probably come to be known as "gateways" as in the United Kingdom.

The Australian "gateways" are in very general terms, and in practice will probably not greatly inhibit the parties in constructing a defence. Take gateway (a) for example: this is almost equivalent to saying that the parties, in seeking to offset a detriment flowing from a restriction of trade, may plead the interests of almost every group in the community.

In England the only comparable clause is the defence under gateway (b) of section 21(1.), namely that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed by them as such. Thus the English Act is concerned with the interests of the public as consumers and not with the interests of other groups such as distributors and investors.

The "gateways" leave the Tribunal almost unfettered in developing any policy in relation to the Australian economy. For example, gate-

⁷⁴ An agreement restricting competition between the parties could, for example, strengthen them in their competition with some large rival outside their group to such an extent that the agreement promotes overall competition, e.g. *re Standard Metal Window Group's Agreement* [1962] L.R. 3 R.P. 198, [1962] 3 All E.R. 216. For example, assume that there are three dominant firms manufacturing industrial cameras, the principal markets for which are in Victoria and New South Wales. Suppose that one firm is much more powerful than the other two and the other two firms, one being in New South Wales and the other in Victoria, enter into a market-sharing agreement under which the Victorian firm supplies only the Victorian market and the New South Wales market. The agreement restricts competition between the two firms, but its long term effect may be to enable the two firms to compete more successfully against the powerful third firm. Such effects would, in our view, be matters for respondents to raise as matters within s. 50(2.).

way (b) refers to the needs and interests of small businesses. The Tribunal could take the view that ultimately competition is best promoted by having as many persons and firms in competition with each other as possible. On this view a collective agreement between manufacturers restricting distributorships, though it could be shown by the parties to lower costs of distribution in terms of gateway (e) and to lower prices for consumers, could still be held contrary to the public interest because it had the effect of impairing the commercial interests of, say, small distributors.

Take another example, this time concerning gateway (f). The most common form of collective agreement is a price-fixing agreement. In the United Kingdom few such agreements have survived. In the United States they are illegal *per se*. The Tribunal could take the view that they can rarely be justified. On the other hand, the parties to a price-fixing agreement could argue under various gateways, including gateway (f), that the agreement, though it leads to higher prices on the Australian markets, nevertheless can be justified in the interests of the parties to the agreement on the grounds that it increases their trade in overseas markets at competitive world prices which could, of course, be lower than the cost of production.

The truth is that Parliament has entrusted matters of important economic and social policy to the Tribunal subject only to the qualification that the guiding principle is to be the preservation and encouragement of competition.⁷⁵ From proceedings before it in which the Registrar proves a restriction of competition and the parties will seek to show by way of defence that the restriction can be justified under section 50, the Tribunal may have to predict the state of affairs which would arise from holding an agreement or practice to be contrary to the public interest. The Tribunal will also have to have some conception of what should be the ultimate competitive structure of the Australian economy.

(ii) *The public interest in monopolization cases*

Since many cases of monopolization do not involve any conduct that restricts competition, but rather taking advantage of the absence of competition, the criteria of the public interest for these cases cannot contain a starting-point that the preservation and encourage-

⁷⁵ Just as employees' wages and salaries are entrusted to the Conciliation and Arbitration Commission, employers' practices will now be subjected to supervision by another administrative tribunal formally independent of the Government.

ment of competition are in the public interest. Section 50(3.) therefore provides an adaptation of the main criteria.

(iii) *Determination as to the public interest*

The Tribunal must make a "determination" whether the examinable agreement or practice before it is contrary to the public interest, and must give its reasons.⁷⁶

Any determination against an agreement, whether the agreement is itself examinable or whether it is an agreement providing for an examinable practice, makes the agreement unenforceable. But a determination by itself, without any order or undertaking, does not affect the legality or enforceability of any earlier or later transactions in pursuance of an agreement or practice found contrary to the public interest. For example, if the Tribunal determines that a price-fixing agreement is contrary to the public interest, that agreement becomes unenforceable but continued sales by each member at prices in accordance with the unenforceable price-fixing arrangement are not themselves affected. These transactions become unlawful only if they are in breach of an order or undertaking.

5. *Orders and undertakings*

a) *Legal effect of orders and undertakings*

If the Tribunal determines that an agreement or practice is contrary to the public interest, it may make an order restraining the parties from giving effect to the agreement or from engaging in the practice. Whether or not it has made a determination as to the public interest, the Tribunal may accept undertakings from the parties. Breach of either an order or an undertaking constitutes contempt of the Tribunal and is punishable in the Industrial Court as if it were contempt of that Court.⁷⁷ Such contempt is deemed to be an offence against a law of the Commonwealth for the purposes of such Acts as the *Crimes Act 1903-1960*.⁷⁸ Persons who are damaged financially by any breach of an order may sue for single damages under Part X.⁷⁹

⁷⁶ s. 49(2). An error of law on the record would make the proceedings liable to challenge in the High Court: see s. 102(2).

⁷⁷ s. 67. See *Conciliation and Arbitration Act 1904-1964*, s. 111(1). *Judiciary Act 1903-1966*, s. 24.

⁷⁸ See especially ss. 5-10.

⁷⁹ Sections 88-90. Cf. treble damages under s. 11 of the *Australian Industries Preservation Act 1906-1950*. Section 88 which provides for the action for single

Transactions entered into by a person in breach of an order made against him by the Tribunal or in breach of an undertaking given by him to the Tribunal are illegal.⁸⁰

b) *Orders against agreements "to the like effect" and practices of a "like kind"*

Orders may be made, not only in respect of the particular agreement or practice examined by the Tribunal, but also in respect of any agreements "to the like effect" and practices "of a like kind".⁸¹ In order to minimize the extent to which the Tribunal's orders may be challenged in the courts,⁸² s. 52(6) provides that the Tribunal, in addition to making orders referring "in general terms to restrictions to the like effect or practices of a like kind", may specify in the order a class or description of agreements or practices that *in its opinion* are agreements "to the like effect" and practices "of a like kind". By s. 52(7) such orders are given "the force of the law".

The special provision in s. 52(3) in relation to trade associations, especially the power to prohibit recommendations by the association, could be very important.

6. *Review and further consideration of decisions by the Tribunal.*

There are three main procedures for reviewing decisions of the Tribunal and for getting orders revoked or varied:

- a) Review by the Review Division on the grounds specified in s. 63(1);
- b) Further consideration by the Tribunal under s. 58 after a change in the relevant circumstances;
- c) Challenge in the High Court.

a) *Review by the Review Division*

After the Tribunal has made a determination, with or without any consequential order, a party may apply to a Review Division⁸³

damages refers to damages resulting from a contravention of an "order of the tribunal" and does not appear to cover the case of damage resulting from a contravention of a determination of the tribunal.

⁸⁰ The rights of persons not bound by orders or undertakings are not affected: s. 69.

⁸¹ s. 52.

⁸² Cf. the somewhat narrow scope accorded by the Court of Appeal in the United Kingdom to the Restrictive Practices Court under s. 20(3.) of the Act: *re Black Bolt and Nut Association's Agreement (No. 2)* [1961] L.R. 3 R.P. 43; [1962] 1 All E.R. 139.

⁸³ Consisting of three presidential members, but not including the presidential member who sat at first instance: s. 62.

for an order directing an ordinary Division of the Tribunal⁸⁴ to reconsider the determination. The grounds on which such application may be made are that:

- i) the determination was based on reasons inconsistent with the reasons for another decision by the Tribunal;
- ii) the determination is of such importance that it should be reconsidered in the public interest; or
- iii) a material error of law was made by the Tribunal.

The Review Division cannot receive fresh evidence.⁸⁵ It cannot itself confirm, vary or revoke a determination or order by the Tribunal; the only order it may make (in its discretion) is to direct the Tribunal to reconsider its determination.

The Tribunal, after reconsidering the matter, may confirm the original determination, or vary or reverse it.⁸⁶ Although it could prove to be a waste of time, therefore, for a party to seek an order of the Review Division, it is to be hoped that in practice Tribunals will give close attention to the views of a Review Division. The Review Division could play an important role in developing consistency of approach in the event of the Tribunal sitting in several Divisions. A similar objective is to be found in the amendment of the Canadian Combines Investigation Act in 1960 vesting jurisdiction in the Exchequer Court of Canada as an alternative forum to the Criminal Courts.

If the Tribunal varies or revokes its former determination, any orders made thereon are automatically revoked,⁸⁷ but the Tribunal may make new orders based upon a new or varied determination that a restriction or practice is contrary to the public interest.⁸⁸

b) *Further consideration after a change of circumstances*

Section 58 provides for further consideration by the Tribunal of determinations and orders if a presidential member grants leave, upon being satisfied that there has been such a change of circumstances as to justify reconsideration. The circumstances include later decisions of the Tribunal in analogous cases. Application may be made by the Commissioner or any person affected by the previous determination or order.

⁸⁴ Consisting of the same or different members as sat originally: s. 65(5).

⁸⁵ s. 64.

⁸⁶ s. 65.

⁸⁷ s. 65(3.).

⁸⁸ s. 65(4.).

The Tribunal may, after such reconsideration, confirm its earlier determination and merely rescind or vary any order. Alternatively, it may rescind the determination and order, and substitute new ones.

c) *Challenge in the High Court*

Although questions of law may be referred to the Industrial Court during proceedings before the Tribunal⁸⁹ once a determination or order has been made, it cannot be challenged in any court, including the Industrial Court, except in the High Court in its jurisdiction to issue a writ of prohibition, *mandamus* or *certiorari*,⁹⁰ or an injunction.

7. *Negative Clearances*

a) The Commissioner may, on his own initiative and without any consultations under s. 48, file a certificate under s. 59 stating that an agreement or practice is not, in his opinion, contrary to the public interest. While such a certificate remains on the Register he cannot take proceedings against the agreement or practice and such a certificate can only be revoked with the leave of the Tribunal, to be granted only if the Tribunal is satisfied that there has been a sufficient change in the circumstances⁹¹ to make revocation "reasonable".

b) Where the Commissioner does not file a certificate on his own initiative, parties may in certain cases take steps to have a certificate filed. We have already mentioned^{91a} that if the Commissioner has begun consultations under s. 48 but has not instituted proceedings, a party can get the Tribunal, after a reasonable period has elapsed, to order him to make inquiries under s. 61. The Commissioner must then either take proceedings or file a certificate under s. 59 which will give the parties immunity from proceedings until it is revoked as mentioned in paragraph (a) above.

c) Again, even where the Commissioner has not begun any consultations, a party can in certain circumstances get an order from the Tribunal directing him to make inquiries under s. 61, and the Commissioner must then either file a certificate or institute proceedings. The specified circumstances are where the Tribunal is satisfied that there is "a proposal for a new venture, or for a substantial extension of an existing venture", and a person having sufficient means of

⁸⁹ See p. 24 above.

⁹⁰ The jurisdiction of the High Court in *certiorari* could have been validly removed. Cf. *Constitution*, s. 75(v).

⁹¹ Including decisions of the Tribunal in analogous cases.

^{91a} See *supra*.

knowledge makes a statutory declaration to the effect that (i) a restriction or practice is necessary to the success of the proposed venture or extension, and (ii) it is unlikely to be carried out unless there is an assurance of the legality of the restriction or practice. Whether a certificate is filed or proceedings are taken resulting in a determination that the agreement or practice is not contrary to the public interest, the parties obtain immunity from proceedings or further proceedings, for at least five years. The Commissioner in his certificate, or the Tribunal in its determination, may specify a longer period of immunity.

Part III: Proscribed practices — Collusive tendering and collusive bidding

The two practices are made offences under s. 85 and s. 86 respectively. Penalties for an offence are:

Corporations: Maximum fine of \$10,000

Other cases: Maximum fine of \$ 4,000 or maximum imprisonment of six months.

The Commonwealth Industrial Court is vested with jurisdiction⁹² which may be exercised by a single judge. A prosecution cannot be instituted except with the consent in writing of the Attorney General.

1. *Collusive tendering*

The offence is the action of a person making or participating in the making of a tender, or abstaining from making a tender, in pursuance of a "collusive tendering" agreement.⁹³

A "collusive tendering agreement" is defined in section 85(1) as follows:

85.(1) In this section:

'collusive tendering agreement' means —

- (a) An agreement by two or more persons for the submission of identical tenders or a joint tender for the supply or acquisition of goods or services, or
- (b) any other agreement that has the purpose or effect of preventing or restricting competition among all or any of the parties in respect of tendering for the supply or acquisition of goods or services,

whether the agreement was made before, or is made after, the commencement of this Part and whether or not the agreement relates expressly or exclusively to tendering.

⁹² s. 101.

⁹³ s. 85(2).

It is a defence under s. 85(4) if the defendant satisfies the Court that the agreement concerned was not made for the purposes of a particular invitation to tender and that particulars of the agreement were registered with the Commissioner and that it had not been found by the Tribunal to be contrary to the public interest.

Section 85 has no application to collusive tendering for the supply of goods or services outside Australia.

2. *Collusive bidding*

The offence under s. 86 is that of a person bidding or participating in making a bid or abstaining from bidding at an auction in accordance with a collusive bidding agreement.

Collusive bidding agreement is defined along the same lines as a collusive tendering agreement, that is, an agreement for the submission among parties bidding at an auction.

Subsection (4) also provides the same kind of defence as is available in collusive tendering under s. 85(4).

Part IV: Constitutional scope of the act

The Commonwealth Parliament does not have sufficient powers under the Constitution to control restrictive practices throughout the whole of Australian commerce and industry.

The Parliament has, however, made use of all its available powers to give the widest possible ambit to the Act. In some respects it appears to have gone beyond its powers, and the Act will to that extent have to be read down.⁹⁴

The major powers on which the Act is based are the powers under s. 51 of the Constitution to legislate with respect to:

- (i) Trade and commerce with other countries, and among the States;
- (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth,

and also the power under s. 122 to make laws for the government of Commonwealth Territories.

Other powers relied upon are the incidental power under s. 51 (xxxix) and all other powers which would support the application of the Act to transactions with the Commonwealth, its authorities and instrumentalities.

⁹⁴ *Trade Practices Act 1965-1966*, s. 7(4)(6); *Acts Interpretation Act 1901-1964*, s. 15A.

1. *The use of the trade and commerce power*

The introductory words and paras. (a) and (b) of s. 7(1) provide:

7(1.) The restriction referred to in section 35 of this Act, and the practices referred to in section 36 and Part IX, of this Act, include restrictions and practices that are (whether exclusively or not) applicable to, or engaged in in relation to, or that tend to prevent or hinder, transactions, acts or operations —

- (a) in the course of trade or commerce with other countries or among the States;
- (b) in or for the production, supply or acquisition of goods or services for, or goods or services required for, the purposes of any such trade or commerce.

a) *Paragraph (a) of s. 7(1)*

There is no doubt that the Act validly operates on restrictions and practices that are "applicable to", or engaged in "*in relation to*"⁹⁵ transactions, acts or operations *in the course of* interstate or overseas trade and commerce.⁹⁶

The purported application of the Act to restrictions and practices that "*tend to prevent or hinder*" such transactions etc. raises some difficult questions. It could validly apply to restrictions and practices which *directly* "tend to prevent or hinder" interstate transactions. Suppose, for example, that a group of fish retailers in Queensland agree to boycott a fish wholesaler in Queensland who imports fish from New South Wales. Their boycott could be said to directly prevent or hinder his interstate importation.⁹⁷ On the other hand, while an agreement to purchase fish only at prices agreed by the retailer group would certainly have economic effects on the importer (e.g. he might be less able to afford the prices required by the N.S.W. exporters), the impact of such an agreement on interstate trade might be too indirect to be within the scope of the Act. Take also a group of Victorian manufacturers whose goods compete in Victoria with the goods of a New South Wales manufacturer. Suppose the Victorian group agrees to lower its prices temporarily to drive out

⁹⁵ On the interpretation of 'in relation to' in such a context see especially *Redfern v. Dunlop Rubber (Australia) Ltd.* (1963-1964) 110 C.L.R. 194, and *Bourke Appliances v. Wonder* [1965] V.R. 511, a decision, however, that takes too narrow a view, at least in relation to boycotts of goods of interstate manufacturers.

⁹⁶ *Huddart and Parker Ltd. v. Moorehead* (1909) 8 C.L.R. 330; *Redfern v. Dunlop Rubber (Australia) Ltd.* (*supra*).

⁹⁷ The example is modelled on the governmental restriction in *Fish Board v. Paradiso* (1956) 95 C.L.R. 443.

the New South Wales goods. That agreement will certainly "tend to prevent or hinder" the interstate trade between New South Wales and Victoria. However, the effect on interstate trade would probably be too indirect to be validly controlled by the Act.⁹⁸

At the other end of interstate trade, take an agreement by hop growers to boycott a brewery that sells its beer interstate. The boycott might prevent or hinder interstate trade in a sufficiently direct way to be within the scope of the Act, but would an agreement by the growers fixing the price at which they will sell hops? It could raise the brewery's costs sufficiently to require it to raise prices and thus lose some interstate sales, but this might be too indirect an effect on interstate trade to be validly controlled.

b) *Paragraph (b) of s. 7(1)*

The validity of the whole of para. (b) of s. 7(1) is even more doubtful. Probably the Act validly applies, for example, to restrictions and practices "*applicable to*", or engaged in "*in relation to*", transactions, acts and operations in the production of goods that are *definitely* destined for interstate or overseas trade.⁹⁹ The same is probably true where the production is of goods that are *reasonably likely* to be sold interstate by the producer himself.¹⁰⁰ For example, a production-quota agreement by fruit canneries in one State which definitely produce for sale interstate is validly covered by the Act.

Moving away from such situations, we can envisage such circumstances as the following where the Act purports to apply¹⁰¹ by reason of paragraph (b) of s. 7(1), but where it cannot *validly* do so. Take, for example, a production-quota agreement by fruit canneries that do not themselves sell interstate, but who produce for sale, *inter alia*, to wholesalers who definitely re-sell interstate. Here the canneries' agreement is "applicable to... acts... in the production of... goods required for the purposes of interstate trade",¹⁰² yet it could well be outside the valid scope of the Act.

⁹⁸ *Wragg v. N.S.W.* (1953) 88 C.L.R. 353 provides some authority for this view.

⁹⁹ *O'Sullivan v. Noarlunga Meat Ltd.* (1954) 92 C.L.R. 565.

¹⁰⁰ On the interpretation of '... required... for the purposes of interstate trade', see *Wilcox Mofflin v. N.S.W.* (1952) 85 C.L.R. 488, 540-1; *Swift v. Boyd Parkinson* (1962) 108 C.L.R. 189.

¹⁰¹ i.e. as a matter of construction, putting aside s. 15A of the *Acts Interpretation Act 1901-1964*.

¹⁰² The paragraph is not limited to goods required by the producer for *his* interstate trade.

Agreements and practices that merely "tend to prevent or hinder" production etc. for interstate and overseas trade raise still more difficult problems. An agreement by fruit-growers to boycott a certain cannery that definitely sells its produce interstate would "tend to prevent or hinder" the cannery's production of goods for interstate trade.¹⁰³ It could probably be dealt with validly under the Act. But an agreement fixing prices for sales of fruit to the cannery might not have a sufficiently direct effect on the cannery's interstate trade. *A fortiori* if the cannery is producing for intrastate sale to someone in the same State who re-sells interstate, the growers' agreement is probably not validly controllable under the Act.

The examples just given involve restrictions concerning production, but paragraph (b) of s. 7(1) purports to apply the Act, *inter alia*, to restrictions "applicable to . . . transactions . . . in the supply of goods . . . for the purposes of" interstate trade, including supply by persons who have not produced the goods. Take, for example, a company A which, engaging in monopolization, induces a company B to refuse to make *intrastate* sales¹⁰⁴ to a company C of goods which C is definitely to re-sell interstate or which he is reasonably likely to re-sell interstate. It is probable that this practice is not validly covered by the Act, *A fortiori*, if A engages in monopolization by charging excessive prices on intrastate sales to B for definite re-sale by B interstate,¹⁰⁵ the practice is outside the valid scope of the Act.

2. *The use of the territories power and powers concerning the Commonwealth and its instrumentalities.*

Section 7(1) also extends the operation of the Act to restrictions and practices "applicable to, or engaged in relation to, or that tend to prevent or hinder, transactions, acts or operations:

- c) in or for the production, supply, acquisition or disposal of . . . goods or other property, or services, by or to the Commonwealth or any authority or instrumentality of the Commonwealth;
- d) in a Territory, in respect of property in a Territory or in the course of any trade or commerce of a Territory; or
- e) in or for the production, supply or acquisition of goods or services for, or goods or services required for, the purposes of any trade or commerce of a Territory".

¹⁰³ It would also fall under para. (ga) of s. 7(1).

¹⁰⁴ s. 37(1) (a).

¹⁰⁵ This would be a "practice . . . engaged in relation to . . . the supply of goods . . . for, or . . . required for, the purposes of . . ." interstate trade.

The Commonwealth is entitled to protect the production or supply of goods or services which it or its instrumentalities may require.¹⁰⁶

The Commonwealth also has full power to make laws under section 122 for the government of the Territories and such laws may operate as laws within a State.¹⁰⁷

The extent to which the Commonwealth Tribunal can require the examination of restrictions that only "tend to prevent or hinder" acts concerning the production, etc., of goods required for purposes of territorial trade or for the Commonwealth or for one of its authorities will involve questions of the kind already discussed in relation to the use of the trade and commerce power. Apart from these questions, it seems that the Act validly applies in relation to the subject matters referred to above.

3. *The corporations power*¹⁰⁸

Section 7, in subsection (2) and (3), purports to apply the Act to all cases in which a "foreign corporation, or a trading or financial corporation formed within the limits of the Commonwealth" is involved. This is an attempt to extend the operation of the Act by means of the corporation power.

Most retail trade and distribution is in the hands of "trading" companies. It is possible that manufacturing companies are also "trading" companies. If the extension is valid the result will be to give the Act an area of operation well in excess of that possible under the trade and commerce power.

The provisions cannot be upheld without overruling *Huddart Parker v. Moorehead*.¹⁰⁹

4. *Section 92*^{109a}

The Act will have a substantial direct operation on interstate trade, but it is submitted that where it so operates the operation may be characterized as being regulatory and not restrictive or

¹⁰⁶ *Constitution*, ss. 51 (xxxix), s. 52 etc. *Kidman v. The Commonwealth* (1925) 37 C.L.R. 233.

¹⁰⁷ *Lamshed v. Lake* (1957) 99 C.L.R. 132.

¹⁰⁸ *Constitution*, s. 51 (xx).

¹⁰⁹ (1909) 8 C.L.R. 330.

^{109a} Section 92 of the Constitution states that "trade, commerce and intercourse among the States... shall be absolutely free". The section applies to the legislative and administrative acts of the Commonwealth and States alike.

burdensome according to the Privy Council test in the *Banking Case*.¹¹⁰

As a regulatory measure the Act will not infringe section 92.

The Privy Council has said that the *Australian Industries Preservation Act* did not infringe section 92.¹¹¹ However, the challenge to that Act in *Redfern v. Dunlop Rubber (Australia) Ltd.*,¹¹² was not based on section 92, and the matter still awaits direct decision.

So far as the Act applies to conduct in connexion with acts anterior to interstate trade, for example, a restrictive agreement concerned with the production of goods some of which will go into interstate trade, section 92 has no application.¹¹³

5. *Complementary State legislation*

Section 8 provides for the passing of complementary laws by the States. Sections 106 and 107 of the federal Constitution preserve to the States the bulk of their legislative power under their own Constitutions. Subject to the displacement of a State law by a valid Commonwealth law,^{113a} the State Constitutions vest general law making powers in their respective Parliaments and this includes the power to legislate on the subject of intrastate trade and commerce an area over which the Commonwealth Parliament does not have direct legislative power.

Section 8 assumes the Act of a participating State would confer powers and duties on the Trade Practices Tribunal, confer jurisdiction on the Commonwealth Industrial Court and provide for the use of the federal Register and other Commonwealth facilities. Thus the Tribunal, the Commissioner and the Court may exercise both State and federal powers.

Although cases have come before the High Court involving organizations exercising both State and federal powers¹¹⁴ and there are examples of federal statutory authorities exercising State powers, (e.g. the Australian Wheat Board) it has been assumed rather than

¹¹⁰ (1949) 79 C.L.R. 49. According to the Privy Council test section 92 is violated when a legislative or executive act operates to restrict or burden interstate trade, commerce or intercourse directly, as distinct from creating some indirect or consequential impediment which could fairly be regarded as remote.

¹¹¹ *James v. The Commonwealth* (1936) 55 C.L.R. 1, at pp. 54-55.

¹¹² (1963-1964) 110 C.L.R. 194.

¹¹³ *Grannall v. Marrickville Margarine Pty. Ltd.* (1955) 93 C.L.R. 36. *Beal v. Marrickville Margarine Pty. Ltd.* (1966) 39 A.L.J.R. 473.

^{113a} Constitution, s. 109.

¹¹⁴ e.g. *Wilcox Mofflin Ltd. v. New South Wales* (1952) 85 C.L.R. 488.

held that a Commonwealth authority can exercise powers conferred by a State law.

Insofar as the Tribunal should judge a restrictive practice to be contrary to the public interest by virtue of the powers conferred on it under a State law, can the Commonwealth Industrial Court, a federal Court, exercise jurisdiction (e.g. in contempt proceedings) conferred on it by State law if a party should disregard an order of the Tribunal? No case holds that "State jurisdiction" cannot be conferred on a federal court, but the matter is not free from doubt. In the *Boilermakers' Case*,¹¹⁵ Dixon C.J. McTiernan, Fullagar and Kitto, JJ. jointly observed:

... the autochthonous expedient of conferring federal jurisdiction on State courts required a specific legislative power and that is conferred by s. 77 (iii) ...

If this is so, then it must be asked where in Chapter III of the Constitution is the authority to vest a federal court with "State jurisdiction."

At present the major States, New South Wales and Victoria have not indicated willingness to pass complementary laws, in fact, the Victorian government has stated that it won't. Only Tasmania has affirmatively said that it will and it is the smallest State in the Commonwealth and far less developed industrially than the mainland States. Without the support of Victoria and New South Wales legislation, the federal scheme will have a far less extensive operation unless, of course, the High Court should decide that the Commonwealth can regulate the activities of foreign companies and Australian trading and financial companies under the corporations power. If the Court should decide that the Commonwealth cannot, the Trade Practices Act, without supporting complementary legislation in New South Wales and Victoria, will not apply to extensive areas of commerce and industry.

¹¹⁵ (1956) 94 C.L.R. 254, 268.