THE EXCLUSIONARY PROVISIONS OF THE NEW ZEALAND COMMERCE ACT IN LIGHT OF UNITED STATES DECISIONS AND AUSTRALIAN EXPERIENCE

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A paper given at a Trade Practices Workshop held in Auckland in March 1987 under the auspices of The Centre for Commercial Law and Applied Legal Research, Faculty of Law, Monash University.

I. INTRODUCTORY COMMENTS

Sections 29(3) and (4) of the *Commerce Act* (New Zealand) state:

> "29(3) No person shall enter into a contract, or arrangement, or arrive at an understanding that contains an exclusionary provision.
> (4) No person shall give effect to an exclusionary provision of a contract arrangement or understanding."

Section 29(1) defines the term "exclusionary provision" at length. Sections 29(5) and (6) provide that the prohibitions on giving effect to an exclusionary provision apply, and an exclusionary provision is unenforceable, whether the arrangements in relation to such provision were made before or after the commencement of the Act. As is stated in the *Commerce Act* itself, the sections are modelled upon the equivalent provisions of the Australian *Trade Practices Act*.[1]

For introductory discussion purposes, and subject to what is said later in this paper, an "exclusionary provision" may be regarded as a collective boycott — an arrangement between competitors that they will prevent, restrict or limit supplies of goods or services to a particular person or effect similar restrictions in relation to the acquisitions of goods or services from a particular person. The combining group combines to deny to a particular person a trade relationship which he requires to enter, or survive in, a market. In 1986, the Australian legislation was extended to cover not only a particular person boycotted but also particular classes of persons. The *Commerce Act* of New Zealand covers both particular persons and classes of persons.[2]

[1] The Australian sections are somewhat more difficult to locate than the New Zealand provisions, all of which are in one section. The relevant sections of the Australian *Trade Practices Act* are ss.45(2)(a)(i); 45(2)(b)(i) and 4D. The substance of both the Australian and New Zealand provisions is the same. For wording of the section see Part IV below and text relating to n.60.

[2] *Commerce Act* (NZ) s.29(1); *Trade Practices Act* (Aust) s.4D. For wording of the sections see Part IV below and text relating to n.60.

Subject to the potentiality of an Authorization on public benefit grounds[3], exclusionary provisions in both New Zealand and Australia are banned *per se*, that is without a need to demonstrate any adverse effects on competition.

It is the purpose of this paper firstly to discuss the background, social and economic, which has led to the *per se* banning of exclusionary provisions. This is done primarily by a general analysis of the United States experience in the group boycott area. In this analysis, there, is an attempt to seek some basic objectives of competition law and see how the *per se* ban of exclusionary provisions either advances or retards these basic objectives. It is then proposed to look at exclusionary provisions strictly from a viewpoint of statutory interpretation and see what the Australian experience in this regard is likely to bring to New Zealand. After all of this, some conclusions can, hopefully, be drawn as to whether New Zealand was wise to follow verbatim the Australian law or whether New Zealand might well have modified its statute in light of Commonwealth experience.

II. A Search For Objectives In Competition Law

A. *Objectives of the United States Sherman Act*

It is very difficult indeed to ascertain with any degree of precision what the United States *Sherman Act* 1890 was aimed at promoting, although it is easy enough to see what it aimed at preventing.

Senator Sherman warned his colleagues that:

> . . . the popular mind is agitated with problems that may disturb the social order.[4]

He singled out inequities of wealth and the formations of capital so great that they threatened to produce:

> a trust for every production and a master to fix the price for every necessity of life.[5]

Congress, he felt, must heed the appeal of the voters

> . . . or be ready for the socialist, the communist and the nihilist. Society is now disturbed by forces never felt before.[5]

Further, argued Sherman, monopoly smacked of tyranny, "of Kingly prerogative" and a nation that "would not submit to an emperor . . . should not submit to an autocrat of trade".[6]

[3] *Commerce Act* (NZ) ss.58(1)(e); 58(1)(f); 58(2)(b). The ground for an authorization by the Commerce Commission is that the exclusionary provision will, in all the circumstances, result, or be likely to result in such a benefit to the public that it should be permitted [*Commerce Act* (NZ) s.61(7)]. The *Trade Practices Act* (Aust) provides for authorization of an exclusionary provision under s.88(1), the grounds being the same as those in the New Zealand *Commerce Act* as set out above [see *Trade Practices Act* (Aust) s.90(6)]. Authorization is discussed in detail in Part V of this paper.

[4] See Handler, Blake, Pitofsy & Goldschmid: *Trade Regulation — Cases and Materials* [2nd Edition — Foundation Press Inc. New York 1983] p.10.

[5] n.4.

[6] Handler & Ors (n.4) p.74.

Senator Sherman's views were typical of the vast majority of Congress. He believed in a private enterprise founded on the principle of "full and free competition".[7] But, generally speaking, neither he nor other proponents of the 1890 antitrust legislation saw much need to attempt any type of penetrating analysis of the underlying economic theory which supported their views. Economists had virtually nothing to do with the passage of the *Sherman Act*. They played no role in seeking it, drafting it or testifying or working on its behalf. Members of Congress simply proclaimed "the norm of free competition too self evident to be debated, too obvious to be asserted".[8]

Whilst the arguments in favour of antitrust laws were politically pressed with fervour, their economic base was thus largely ignored. To some degree the case for antitrust legislation was simply another manifestation of the American suspicion of concentrated economic power. The beneficiary in all of this in the 1890 Congressional mind, was in all probability the small business proprietor or tradesman whose opportunities were to be safeguarded from the then recently evolving elements of business that seemed gigantic, ruthless and awe inspiring. The *Sherman Act* was not viewed exclusively as an expression of economic policy. It was safeguarding the rights of the "common man" and, in this regard, had a distinctively "social" objective. It was far more important to Congress to get a clear vision of evils to be remedied and the obstacles to free enterprise to be eliminated than it was to display the merits of competition.[9] Further not only the cherished freedom of enterprise but also political democracy itself was thought to be endangered by the workings of mighty business combinations. The famous prescription of the Massachusetts Bill of Rights — "to the end it may be a government of laws and not of men" — is a favourite American one and an essential one for understanding American attitudes to antitrust law.[10]

All of this is important — especially to an understanding of the philosophy behind exclusionary provisions. Economists who often think that courts should decide cases solely by reference to the cause of economic progress, not only run into legal difficulties, but are bound to clash with the proponents of causes such as "small business" who frequently see the preservation of small business as a *per se* benefit to the economy.

The importance of these American political views is that they have been reflected in American judicial determinations and, through such determinations, in decisions, both political and judicial, elsewhere. The American judiciary has been guided not by one value but by several. In many cases, conflicts have not been easily resolved. In a number of cases, quite non-economic virtues have been found by United States judges to be of fundamental importance to American antitrust policy. So United States courts have said that the *Sherman Act* is "a charter of freedom . . . comparable to that found to be desirable

[7] See Schwartz, Flynn & First: "*Free Enterprise and Economic Organisation — Antitrust*" [6th Edition Foundation Press Inc. (New York) 1983] p.33; see also works there cited — Thorelli: "*The Federal Antitrust Policy — Organization of an American Tradition*" [John Hopkins Press (1955)] pp.226-27; 564-68; Letwin "*Law and Economic Policy: The Evolution of the Sherman Antitrust Act*" (1965).

[8] Schwartz & Ors n.7.

[9] See generally Schwartz & Ors (n.7) at p.34 et seq. Handler & Ors (n.4) concludes similarly.

[10] See A.D. Neale: "*The Antitrust Laws of the United States of America*" [Cambridge University Press (1960)] p.423.

in constitutional provisions"[11]. In 1972 in *Topco*, the United States Supreme Court elevated the *Sherman Act* to the status of the "Magna Carta of free enterprise". Such decisions certainly have the true ring of U.S. constitutional rhetoric. They categorise antitrust regulation as the alternative to dictatorship.[12] Given this, it is perhaps easier to see why in *Fashion Originators Guild*[13] a group boycott arrangement was invalidated because, amongst other things, it was

> in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations and thus trenches upon the power of national legislature . . .

Throughout American case law, we frequently find small business initiative being fulsomely praised whilst the sloth of the monopolist is scorned[14]. In

[11] *Appalachian Coals* v. *U.S.* 288 US 344 (1933) per Chief Justice Hughes. To similar effect see *U.S.* v. *Socony Vacuum Oil Co.* 310 U.S. 150 (1940).

[12] See *U.S.* v. *Topco* 403 US 596, 610 (1972). The view that the *Sherman Act* is a charter of economic freedom has always been strong in the United States. Another interesting manifestation of the point is contained in the observations of Judge Ganey, the Trial Judge in the famous Electrical Equipment Conspiracy case where 29 electrical equipment manufacturers and several executives were fined and/or given gaol sentences for a long standing conspiracy to rig bids and fix prices on the sale of heavy electrical equipment [see J. Herling: *The Great Price Conspiracy: The Story of the Antitrust Violations in the Electrical Industry* (1962)]. His Honour said:

> Before imposing sentence, I want to make certain observations . . . what is really at stake here is the survival of the kind of economy under which America has grown to greatness, the free enterprise system. The conduct of the corporate and individual defendants . . . has flagrantly mocked the image of that economic system of free enterprise which we profess to the country and destroyed the model which we offer today as free world alternative to state control and eventual dictatorship.

[Quoted in A. Bernhard "*U.S.* v. *Itself: The Antitrust Convictions in the Electrical Equipment Case* (reprinted in L. Schwartz & J. Flynn "*Antitrust and Regulatory Alternatives* 445 (5th Ed. 1977)].

[13] *Fashion Originators Guild of America Inc.* v. *Federal Trade Commission* 312 US 457 (1941).

[14] *U.S.* v. *Du Pont du Nemours & Co.* (the *"Cellophane Case"*) 351 377 (1956); *U.S.* v. *U.S. Shoe Machinery Corp.* 110 F. Supp. 295 Affd. 347 US 521 (1954) citing Judge Learned Hand in *Alcoa* [148 F.201 416 (1945)] where his Honour praises small business "because of its indirect social or moral effect . . . a system of small producers, each dependent for his success upon his own skill and character (is to be favoured) to one in which the great mass of those engaged must accept the direction of the few". In relation to monopoly power Judge Learned Hand held in *Alcoa* held that:

> possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy, that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well alone.

In *U.S.* v. *U.S. Shoe Machinery* (supra) economic monopoly power was said to be unable to be tolerated because it encourages sloth rather than the active quest for excellence; and because it tends to damage the very fabric of our society and, therefore, monopoly power is "inherently evil". No doubt the ultimate expression of this general theme is that of Mr. Justice Douglas in *U.S.* v. *Falstaff Brewing Corp.* 410 US 528 (1973) [a merger decision] in which his Honour said:

> Control of American business is being transferred from local communities to distant cities where men on the 54th floor with only balance sheets and profit and loss statements before them decide the fate of communities with which they have little or no relationship. As a result of mergers and other acquisitions some States are losing major corporate headquarters

a number of cases, "civil rights" aspects are clearly to the fore, in that traders should have, and do have, under competition law, a "freedom . . . to sell in accordance with their own judgment".[15] This factor plus the inherent fear of concentrated power and the recognised virtues of small business preservation has led American courts to the conclusion that a group boycott by competitors of another competitor in the market:

> . . . is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.[16]

To economists, there may not appear to be much logic to all of this. The courts have applied judgmental factors which are probably, on an objective analysis, quite suspect. There is no persuasive evidence that a middle level corporate executive is socially or politically a less desirable creature than if he ran his own business. However, the facts are that a value judgment to this effect is a fundamental one of United States antitrust jurisprudence and, through such jurisprudence, of the competition laws of many other countries.

Finally we must regard competition law for what it is — a law. As such it is interpreted by lawyers. The lawyer's approach reflects a centuries old tradition of viewing a dispute in the context of doing justice between parties. Lawyers must have individuals in mind in every transaction and the acceptance or rejection of a practice by a judge will often reflect his view of the fairness of the situation. Economists, on the other hand, think from a different tradition. They seek verification of solutions through empirical material and interpretations of it. They strive for an objective, as distinct from a moral, solution to problems. The economist's concern is not whether a party is treated fairly but whether a practice results in a desirable allocation of resources. The diverse approaches of lawyers and economists will not infrequently lead to differing conclusions.

Probably the collective boycott has been condemned *per se* in the United States more because of non-economic factors than because of any rational analysis of the economics of the situation. This is inevitable given the reasoning processes which lawyers and judges adopt to achieve an appropriate "societal" objective. If a group of competitors combine together to deny goods or services to another competitive entity then this, by its very nature, reeks of an abuse of power by those who collectively have acquired it and, through their joint

> and their local communities are becoming satellites of a distant corporate control. A case in point is Goldendale in my State of Washington. It was a thriving community, an ideal place to raise a family, until the company that owned the saw mill was bought out by an out of State giant. In a year or so auditors in far away New York City who never knew the glories of Goldendale decided to close the local mill and truck all the logs to Yakima. Goldendale became greatly crippled. It is against this background that we must assess the acquisition.

For a collection of relevant cases on this and other general aspects of U.S. merger policy see *U.S.* v. *Black & Decker Manufacturing Co.* 1976-2 Trade Cases para.61,033 at p.69572 (US Distr. Ct. Maryland).

[15] *Keifer-Stewart Co.* v. *Seagram & Sons* 340 US 211 (1951); *Klors Inc.* v. *Broadway Hale Stores Inc.* 359 US 207 (1959).

[16] *Klors* v. *Broadway Hale Stores Inc.* (n.15).

conduct, seek to retain it. By the very nature of the arrangement, it is the smaller business competitor which is victimised. In the United States, economic benefits cannot be pleaded in justification of a collective boycott. Whatever the economics of the situation, such a practice inevitably falls for condemnation under the United States antitrust laws because of the "societal" objectives which lawyers and judges have found to be the primary purpose of such laws.[17] Indeed, in an analysis of collective boycotts, one American commentator has concluded that collective boycotts are condemned more because they are "low down social tricks" more than for any other reason.[18]

B. *Objectives in the Australian legislation*

The American distrust of economic power is not echoed to the same degree in other countries and, in particular, neither in Britain nor in countries of British legal heritage such as Australia and New Zealand. Indeed A.D. Neale in his penetrating study of the United States antitrust laws through British eyes concluded:

> . . . the basic concern in the United States is with the sheer possession of economic power; so much so that restrictive agreements . . . are illegal *per se* even though it might be established in particular circumstances that they produce economic advantages. Rightly or wrongly, it seems unlikely that in Britain the cause of dispersing economic decision making would of itself attract decisive public support; it would be widely believed that, if need be, economic power could be 'controlled' or dealt with in some other way, and an anti-monopoly policy would tend to be advocated mainly on other grounds . . .
>
> Whereas American institutions often appear to be designed to hamper the exercise of power [British ones] are designed on the whole to facilitate it, though great importance is attached to protecting minorities against its abuse and elaborate safeguards are adopted to this end.[19]

The Australian attitude on similar matters may be a colonial reflection of the United Kingdom views, stemming from the earliest convict days. As Australian cartoonist, Bruce Petty, with his tongue almost through his cheek, put the matter in the historical introduction to his book on Australia:

> All Englishmen found stealing bread were sent to the colony and had the activity knocked out of them by the New South Wales Corps which set up stills, brothels, graft and restrictive trade practices thus beginning in Australia the renowned 'Australian Way of Life'.[20]

Given the above, it is understandable perhaps that the United State Supreme Court can characterise the *Sherman Act* of that country as the "Magna Carta of free enterprise"[21] whereas the British, Australian and New Zealand judiciary

[17] A plea of economic benefit as a justification for a collective boycott is unsustainable — see *Klors* (n.15).

[18] J.A. Rahl: *"Per se Rules and Boycott: Some Reflections on the Klors Case"* 45 Virginia L R 1165 (1959).

[19] Neale (n.10) p.475.

[20] B. Petty *Australia and How it Works* [Penguin Books 1976].

[21] *Topco* (n.12).

are either quite unable to see, or at least unwilling to express, the link between the events at Runnymede in 1215 and competition law of the late twentieth century. It has been the history of all three countries to pursue restrictive agreements cautiously, not to illegalise them *per se*, and to allow extensive provisions for the demonstration of public benefit in them. The United Kingdom legislation of 1956[22], the New Zealand legislation of 1975[23] and its predecessor legislation[24] and the Australian 1965 legislation[25] all took this approach. No doubt British, Australian and New Zealand societal attitudes to the accumulation of power are also shown in judgments relating to *per se* statutory bans where these existed in the early twentieth century. Thus both the *Australian Industries Preservation Act* 1906 and the New Zealand *Commercial Trusts Act* 1910 had statutory *per se* bans on restrictive agreements in certain circumstances.[26] Each statute was *de facto* set at nought because no public detriment was found to flow from certain agreements challenged by criminal proceedings.[27] The decisions holding to this effect[28] must surely rate as economic collectors' items. In the case of Australia, the agreement before the Privy Council had successfully raised the price of coal some fifty per cent in two years but, said their Lordships, there was no evidence that this was unreasonable, the agreement was not contrary to the public interest and no "sinister intent" to injure the public had been shown. In the New Zealand Case, arguments that the agreement caused deterioration in, and unavailability of, product were ignored. These decisions are in marked contrast to the near contemporary United States rugged banning of restrictive agreements in similar circumstances[29] on the ground, amongst other things, that "agreements which

[22] *Restrictive Trade Practices Act* 1956 (UK). The Act provided for some six "gateways" of justification with a "tailpiece" test that "the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or persons not parties to the agreement . . . resulting or likely to result from the operation of the restriction".

[23] *Commerce Act* (NZ). The legislation did not mention the term "competition" except in its long title and in three sections (ss.21(1)(e); 21(1)(f) and 21(4)(a)]. There were a wide variety of justifications for restrictive agreements and except for collusive tendering and bidding, no agreement was illegal unless so determined by the Commerce Commission after enquiry.

[24] *Trade Practices Act* 1958 (NZ) as amended in 1961, 1964, 1965, 1971 and 1974.

[25] *Trade Practices Act* 1965 (amended for constitutional reasons and re-titled the *Restrictive Trade Practices Act* (1971). This legislation had a vast spectrum of matters which had to be considered in any public interest justification evaluation. No guidance whatsoever was given as to weighting or intensity of any of these factors. Hence there was no real guidance of any sort as to what "the public interest" justification test was all about.

[26] The *Australian Industries Preservation Act* 1906 prohibited *per se* any combination in trade or commerce with intent to restrain trade or commerce to the detriment of the public. The New Zealand *Commercial Trusts Act* 1910 prohibited *per se* any conspiracy to monopolize or control the demand or supply of any goods "if such monopoly or control is of such a nature as to be contrary to the public interest".

[27] In relation to Australia, see *A.G. (Commonwealth)* v. *Adelaide Steamship Co.* (1914) 18 CLR 30; (1911-13) All ER Rep. 1120 (commonly known as the *"Coal Vend Case"*). In relation to New Zealand see *Crown Milling Co.* v. *The King* [1927] AC 394 overruling previous New Zealand decisions to the contrary [see *Merchants Assoc. of Nz (Inc.) & Ors* v. *The King* [1913] 32 NZLR 537; *Fairbairn Wright Co.* v. *Levin & Co.* [1915] 34 NZLR].

[28] *"Coal Vend"* and *Crown Milling Co.* (n.27).

[29] See *U.S.* v. *Trenton Potteries* 273 US 392 (1927) where the United States Supreme Court said:

> The aim of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price

create such potential power may well be held to be in themselves unreasonable or unlawful restraints".[30]

Having said all that, however, it is, nonetheless true that societal objectives akin to those found in America [and discussed in Part II.A above] have had their impact on competition policy in Australia. Whilst Sir Garfield Barwick as Australian Attorney-General based a large part of his 1960's case in favour of competition legislation on economics and economic concepts, nonetheless his appeal to societal and non-economic goals was direct and persuasive. He argued, for example, that competition law addressed the sociological problem which "arises out of the trend for small businesses, with the personal service which they are accustomed to giving, to disappear and be replaced by businesses owned by large-scale organisations".[31] He also spoke of the fact that restrictive trade practices tended to remove or suppress incentive — "the incentive to be more efficient, to be more enterprising, to be more resourceful and to introduce innovation", something which he described as a "socio-economic effect" of restrictive practices.[32] Further, in an appeal which is totally reminiscent of the "civil rights" concept which supports much American antitrust law, Sir Garfield made the following observations on collective boycotts:

> The problems which are created by restrictive trade practices are both sociological and economic in nature. The sociological problems are most apparent from the practices designed to exclude the persons who engage in them from competition of others. In a free-enterprise economy, persons are entitled to expect that they will be afforded a fair opportunity to engage in competition with existing businesses. This is so in any free-enterprise economy, but it is particularly important where the population is increasing at a very high rate — much of it from immigration., Indeed we seek to attract migrants to this as a land of opportunity — of opportunity for free men to become their own masters, if they prefer that to employment

fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable — a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.

For a review and affirmation of the above opinion see *U.S.* v. *Socony Vacuum Oil Co.* 310 US 150 (1940).

[30] *U.S.* v. *Trenton Potteries* (n.29).

[31] The Hon. Sir Garfield Barwick, Attorney-General of Australia — *"Australian Proposals for the Control of Restrictive Trade Practices and Monopolies — Trade Practices in a Developing Economy"*. The G.L.Wood Memorial Lecture delivered at the University of Melbourne 16 August 1963. Reprint by Commonwealth Government Printer p.11. Sir Garfield's quite strong views as to the necessity for effective competition in Australia were, however, somewhat politically sabotaged. For the story of this see W.J. Pengilley: *"The Politics of Antitrust and Big Business in Australia"* The Australian Quarterly Vol. 45 No.1 (June 1973) pp.53-61.

[32] Barwick — *G.L. Wood Memorial Lecture* (n.31) p.10.

by others. Our migrants are entitled to expect that they will not be prevented from setting up businesses in Australia by organizations of existing businesses.

An example of this kind of sociological problem was recently commented upon by Mr. Justice Travers of the South Australian Supreme Court when sentencing a Dutch furniture maker convicted of having unlawfully and maliciously set fire to his furniture factory with intent to injure or defraud. His Honour stated that the prisoner appeared on the facts before the Court to have suffered treatment by a trade association which was harsh and unfair. His Honour went on to say that if a man was producing a good-quality article and his commercial practices were clean, his right to trade should not depend on whether any particular association was prepared to grant him the privilege of membership. Referring to the fact that the rules of the particular trade association there involved made a migrant to Australia ineligible for membership until ten years after naturalization, his Honour said [see *The Adelaide "Advertiser"*, May 30, 1963] 'A migrant to this country is eligible to become Prime Minister the day after he is naturalized, and can get himself elected. It seems very harsh indeed that a migrant should not be eligible for membership of a trade association, whatever the qualities of his work may be, until ten years after naturalization'.[33]

This concern for civil rights in relation to collective boycotts has been continuous. The enactment of the exclusionary provision legislation in Australia in 1977, for example, was justified on the basis that:

> boycotting the commercial activities of particular persons is generally undesirable conduct, and . . . the *Trade Practices Act* should take a firm line on these matters. Accordingly, the Bill prohibits collective primary boycotts where they have the purpose of restricting or limiting the trade of particular persons"[34]

C. *Economics and Collective Boycotts*

As has been noted, economics has, in fact, had very little to do with the condemnation of collective boycotts. Such arrangements have been banned primarily because they are anti-social conduct, a type of business bullying in which a competitive party without economic muscle is victimised. When set against the backdrop of small business virtue, then a *per se* ban on collective boycotts is a totally logical legal solution to the problem faced. As has been seen, the United States bans collective boycotts and does not permit overall desirable economic results to be demonstrated in their defence.[35]

[33] Barwick — *G.L. Wood Memorial Lecture* (n.31).

[34] Hon. John Howard, Minister for Business and Consumer Affairs — Second Reading Speech to Trade Practices Amendment Bill. [*Parliamentary Debates (Hansard) H of R*, 3 May 1977, p.1476]. Note that Mr. Howard refers to "particular persons" being boycotted. This was the form in which the legislation was enacted in Australia in 1977. The Australian Act was amended in 1986 to cover not only "particular persons" but "particular classes of persons". The New Zealand legislation covers both particular persons and particular classes of persons. The reason for the inclusion of particular classes of persons within the collective boycott provision is discussed later in this paper.

[35] *Klors* (n.15).

But it would be strange if there were not also economic and marketing justification for a *per se* ban on collective boycotts. It would be even stranger if the forces of societal values were operating quite contrary to the forces of free enterprise economics and thus a type of socio-economic haemorrhage was constantly occurring because of the *per se* ban on collective boycotts.

It is to a brief overview of the economic considerations applicable to collective boycotts, that we now turn.

The economists' theory of what competition is all about starts with a model of perfect competition. It is a "model" because perfect competition, like perfect government or perfect charity, is conspicuous in the real world by its absence. Perfect competition involves at least the following broad concepts:

— economic rationality. People know the consequences of what they are doing
— people are free to act as their motives prompt them
— perfect mobility in making adjustments i.e. a complete absence of physical obstacles to making, executing and changing plans at will
— perfect knowledge of every potential buyer of the choice available between independent sellers
— every person acting in entire independence of others i.e. a complete absence of collusion or other market restraints.[36]

Perfect competition, in terms of pure economic theory, will give a most efficient economic result because it assumes virtually instantaneous adaptation of supply to demand and hence a perfect supply/demand equilibrium. Hence, in terms of economic theory perfect competition is a highly attractive gaol. It deserves to be aimed at a highly attractive goal. It deserves to be aimed at because of its efficiency results. However, few of the factors pre-requisite to perfect competition exist in any industries in the so called "real world". Hence, we have to settle for a real world second best. This acknowledges imperfections but nonetheless finds virtue if so called "workable competition" can be promoted and if economic policy can be based on this. With a commendable degree of statutory pragmatism, the New Zealand *Commerce Act* recognises this point by defining in s.3 the "competition" which the Act aims to promote as being "workable or effective competition".

At least eighteen authors have proposed criteria for workable competition.[37] Professor Stigler, for example, has suggested that competition in an industry is "workable" when:

— there are a considerable number of firms selling related products in important market areas;
— firms are not in collusion; and
— the long run average cost curve for a new firm is not materially higher than that for an established firm, thus allowing acceptable freedom of market entry.[38]

[36] See F. Knight "*Risk, Uncertainty and Profit*" [Riverside Press 1921] chapters 1 & 6 for one classic exposition of the concept of perfect competition.

[37] S.H. Sosnick *A Critique of the Concept of Workable Competition*" Quarterly Journal of Economics, 1958, p.381. No doubt the number of authors on this topic has increased since the date of this article. The relevant point is made by the article, however, and the present writer has not conducted an update of the economic writings on the point since 1958.

[38] G.J. Stigler: "*Extent and Bases of Monopoly*" American Economic Review, June 1942, pp.2-3.

Professor Edwards in his work *"Maintaining Competition"*[39], however, saw seven criteria as the basis of workable competition. These criteria are akin to those of Stigler referred to above. For present purposes, the important relevant Edwards' criteria are that:

— matters of commercial policy must be decided by each trader without agreement with his rivals.
— new traders must have the opportunity to enter the market without handicap other than that which is automatically created by the fact that others are already well established there.
— access by traders on one side of the market to those on the other side of the market must be unimpaired except by obstacles not deliberately introduced, such as distance or ignorance of available alternatives.

The economic writings on workable competition, of which Stigler and Edwards are but two examples, show that the parameters of policy can be seen somewhat intuitively but are elusive to establish with any great degree of precision. In terms of conduct, however, all economists stress the need for independent policies by those in the market and for an absence of agreement between competitors as to their market behaviour. In terms of structure, all economists stress the need for an absence of artificial inhibitions on market entry and an absence of any artificial restraints on mobility between buyer and seller.[40]

The economists' concepts of workable competition have been implemented by judicial and quasi judicial decisions made in both Australia and New Zealand. In a decision applauded and followed on both sides of the Tasman, the Australian Trade Practices Tribunal in *QCMA*[41] said the following, in the context of a merger evaluation, about the nature of competition:

> Competition expresses itself as rivalrous market behaviour. In the course of these proceedings, two rather different emphases were placed upon the most useful form such rivalry can take. On the one hand it was put to us that price competition is the most valuable and desirable form of competition. On the other hand it was said that if there is rivalry in other dimensions of business conduct — in service, in technology, in quality and consistency of product — an absence of price competition need not be of great concern.

[39] MacMillan, New York, 1949 — See p.901. 40.

[40] See for example Sosnick (n.37); Stigler (n.38); C.D. Edwards *"Maintaining Competition"* (n.39); F. Scherer *"Industrial Market Structure and Economic Performance"* [Rand McNally 1971] p.38; J.M. Clark *"Towards a Concept of Workable Competition"* American Economic Review, June 1940, p.240. For the non economic theoretician an excellent and readable review by an economist of the various commentaries on this subject and a summation of the relevant principles is contained in an article by J.P. Nieuwenhuysen entitled *"The Theory of Competition Policy"*. This article constitutes Chapter 13 of *Australian Trade Practices; Readings — Second Edition* (Croom Helm London 1976).

[41] *Re Queensland Co-operative Milling Association & Defiance Holdings Ltd.* (1876) ATPR para.40-012 [Australian Trade Practices Tribunal]. This decision has been followed in New Zealand both by the Commerce Commission [*Visionhire Holdings Ltd. - Commerce Commission Decision No.79 of 9 May 1984*] and by the courts [*Air New Zealand* v. *The Commerce Commission* (1985) 2 NZLR 338, 345]. The QCMA decision was a public benefit evaluation of a merger in the Australian flour manufacturing market.

> In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.
>
> Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate. The elements of market structure which we would stress as needing to be scanned in any case are these:
>
> (1) the number and size distribution of independent sellers, especially the degree of market concentration.
>
> (2) the heights of barriers to entry, that is the ease with which new firms may enter and secure a viable market;
>
> (3) the extent to which the products of the industry are characterized by extreme product differentiation and sales promotion;
>
> (4) the character of "vertical relationships" with customers and with suppliers and the extent of vertical integration; and
>
> (5) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.
>
> Of all these elements of market structure, no doubt the most important is (2), the condition of entry. For it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of the entry of a new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct.

Because the *QCMA* decision was a merger public benefit evaluation, it stresses "structural" rather than "conduct" matters. But the behavioural message in the decision is easy to identify. Behaviour which heightens entry barriers or restricts the ability of firms to function as independent entities is obviously to be discouraged.

What are the characteristics of a collective boycott? In order to succeed, a collective boycott must be an arrangement entered into between parties who together are in a position to exercise substantial market power. The boycott must be aimed at an entity which is weaker than the combining parties. Collectively to boycott a stronger entity is an exercise in market futility. Sensible business persons are not interested in pursuing futility and do not normally enter into collective boycotts when they cannot win as a result. Because of the need to pursue weaker entities, it is frequently individual firms which are singled out for joint attention. Pressure applied to an individual entity can also effectively discipline a group as a whole, each member of which is aware that he will, if he steps out of line, have the same tactics applied to him.

Collective pressure is generally applied to one of two types of business — the competitive new entrant (whom those already in the market wish to exclude) or the person already in the market who wishes to operate in a more innovative, or at least in a different, manner (frequently the discounter). A group boycott has the effect in such cases of preventing competitive innovation and rivalry and permitting only the practices of the majority to survive.

It can thus be seen that the collective boycott of competitors[42] contains those aspects of economic behaviour which are universally condemned by economists. It inhibits:

— new entry — regarded in *QCMA*[43] as the most important factor in determining market concentration over time
— independent decision marking
— free access of traders, each to the other

and it also has the inherent vice that decision making is reached in concert by a process of collusion.

Given the above, the collective boycott can be rationally condemned on economic grounds as being inherently anticompetitive just as vehemently as it can be condemned on sociological grounds as being a low down social trick.[44] On occasions, it may give economic benefits. But these occasions are so rare that they do not merit departure from the position of a *per se* ban because of the greater certainty of action given by such ban.

III. Collective Boycotts Under United States Law — The Court Rationale For A Per Se Ban On Collective Boycotts

A. *United States case law*

The United States *Sherman Act* is uncomprising in its terms. It declares in Section 1, with a simplicity unusual in statutory drafting, that:

> Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.

Of course, drafting in these terms has its share of risks — risks which neither the Australian nor New Zealand legislature was prepared to take. It relies upon the judiciary to interpret generalistic words on a case by case basis. What, for example, is "restraint of trade"? The statute also is very unforgiving. Does it really mean *every* contract?

Both of these questions are of immense relevance to the history of antitrust law, not only in the United States but throughout the world.

The test of the coverage of the U.S. statute came in the 1911 *Standard Oil Case*[45]. This case gave rise to "the rule of reason" in United States antitrust law. In *American Tobacco*[46], which was argued at the same time and on some of the same days as *Standard Oil*, the holding in *Standard Oil* was explained in these terms:

> In *Standard Oil* it was held, without departing from any previous discussion of the court that as the statute had not defined the words 'restraint of

[42] Discussion to date has generally been in relation to boycotts of particular persons. This is the more classical manifestation of the collective boycott and represented the Australian law prohibition between 1977 and 1986. Current law in both Australia and New Zealand prohibits collective boycotts of both particular persons and particular classes of persons.

[43] *QCMA* (n.41).

[44] Rahl (n.18).

[45] *Standard Oil Co. of New Yersey* v. *U.S.* 221 US 1 (1911).

[46] *U.S.* v. *American Tobacco Co.* 221 US 106 (1911).

> trade' it became necessary to construe those words — a duty which could only be discharged by a resort to reason . . . It was held in the *Standard Oil Case* that . . . the antitrust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts etc. injuriously restrained trade . . . It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal and usual methods, whether by agreement or otherwise to accompany such purpose.[47]

The growth and application of the rule of reason is not the topic of this paper. A wide range of horizontal agreements live or die by whether they are court characterised as *per se* illegal or subject to rule of reason analysis.

The United States Courts condemn certain activities *per se* and have noted certain criteria in relation to such an evaluation:

— in order to be *per se* banned, the practice must have a "pernicious effect on competition and lack any redeeming virtue"[48]
— the *per se* approach "permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive". In such cases "courts can avoid the significant costs in business uncertainly and in litigation inefficiency by imposing the *per se* ban"[49]
— *per se* condemnation is applicable where the practice facially appears to be one that would "always or nearly always tend to restrict competition and decrease output"[50]

However, where there are arrangements which do not fit within the above parameters, the courts almost without exception have held the *per se* rule inapplicable. Invocation of a *per se* rule always risks sweeping reasonable pro-competitive activity within a general condemnation and a court will run this risk only when it can say on the strength of unambiguous experience that the challenged action is a naked restraint with no purpose except that of stifling competition.[51] Once *per se* categorisation is reached, the plaintiff

[47] *American Tobacco* (n.46) at p.179.
[48] *Northern Pacific Railway Co.* v. *U.S.* 356 US 1, 5 (1958).
[49] *Arizona* v. *Maricopa County Medical Society* 457 US 332 (1982); *Northwest Wholesale Stationers Inc.* 1985 — 1 Trade Cases para.66, 640 (U.S. Sup Ct.).
[50] *Broadcast Music Inc.* v. *Columbia Broadcasting System* 441 US 1, 19-20 (1979).
[51] *Smith* v. *Pro Football Inc.* 1978-2 Trade Cases para.62338; 593 F.2d. 1173 (citing prior authority); *Topps Chewing Gum Inc.* v. *Major League Baseball Players Association* 1986-2 Trade Cases para.67214. See also the Court emphasis on the "demanding standards" of the *per se* categorisation [*Continental TV* v. *GTE Sylvania* 433 US 36, 50 (1977) citing 366 US at 5]; and statement that the *per se* categorisation is applicable only for conduct that is *"manisfestly anti competitive"* [*Continental TV* (supra) pp.49-50]. In *Continental TV* (supra) the Supreme Court overruled its prior holding in *U.S.* v. *Arnold Schwinn* 388 US 365 (1967) as to the *per se* illegality of certain vertical restraints. It did this on the basis that the arrangements in question had redeeming virtues and that there existed "substantial scholarly and judicial authority supporting their eoconomic utility".

must win. "The *per se* rule is the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score".[52]

United States courts have held collective boycotts of competitors *per se* illegal along with three other types of practices.[53]

Having said this, however, it is important to define precisely what constitutes a group boycott for United State antitrust purposes. This is not always easy. One learned United States commentator has said that

> there is more confusion about the scope and operation of the *per se* rule against collective boycotts than in reference to any other aspect of the *per se* doctrine"[54]

The ingredients of a collective boycott have been held[55] to be as follows:

(i) It is a concerted attempt by a group of competitors at one level to protect themselves from competition from non group members who seek to compete at that level. So the group boycott categorisation has not been given when the excluded party is not a threat to the combining competitors. A concerted refusal of airline operators not to list a tour operator who is not a competitor of the airlines is not a collective boycott as there is no intention to exclude the operator from the market.[56] A refusal by the Bridge Club of America to certify a particular local tournament was similarly held not to be a group boycott because the refusal was based on the maintenance of tournament standards and conditions and not upon an intent to exclude a competitor.[57]

(ii) Typically the boycotting group combines to deprive would be competitors of a trade relationship which they need in order to enter, or survive in, the level wherein the group operates. The group may accomplish its exclusionary purpose by inducing suppliers not to sell to potential competitors, by inducing customers not to buy from them or by refusing to deal with would be competitors themselves.

(iii) The essential aspect of a group boycott is the effort of competitors "to barricade themselves in from competition at their own level". The position sought to be entrenched must be that of those engaging in the group boycott if *per se* illegality is to flow. This point is illustrated by the *Airlines Case* in (i) above. Another illustration, and in many ways a better one, concerns sporting teams. If a group of professional football teams band together to refuse to hire a player who has gambled on games, this may be a concerted refusal to deal. But such an arrangement is not a group boycott condemned *per se*. It does not constitute concerted action by

[52] *United States* v. *Realty Multi-List Inc.* 1980-81 Trade Cases para. 63624; 629 F 2d 1351.

[53] *Fashion Originators Guild* (n.13); *Klors* (n.15). The other types of arrangements banned *per se* are vertical price fixing [*U.S.* v. *Parke Davis & Co.* 362 US 29 (1962)]; horizontal market division [*Timken Roller Bearing Co.* v. *U.S.* 341 US 593 (1951)]; and tying arrangements [*International Salt Co.* v. *U.S.* 332 US 392 (1947)].

[54] L. Sullivan: "*Handbook of the Law of Antitrust*" 229-30 (1977) cited from *Topps Chewing Gum* (n.51) 178.

[55] *Smith* v. *Pro Football* (n.51). See also the analysis in *Topps Chewing Gum* (n.51).

[56] *E.A. McQuade Tours Inc.* v. *Consolidated Air Tour Manual Comm.* 1972 Trade Cases para.74125; 467 F.2d. 178.

[57] *Bridge Corp. of America* v. *American Contract Bridge League* 1970 Trade Cases para.73, 256; 428 F. 2d. 1365.

firms at one level to exclude competition between them. Its effect is thus assessed by rule of reason analysis not by *per se* condemnation.[58]

(iv) By definition, group boycotts are horizontal arrangements (i.e. between parties at the same level of production or distribution) and are not applicable to vertical arrangements (such as manufacturer and reseller who are at different levels of competition).

B. *Some short observations as to how United States law varies from that of Australia and New Zealand*

It should be noted, *en passant* at this point of time, that the United States collective boycott criteria are quite different from the statutory criteria in Australia and New Zealand in at least the following ways:

— The United States criteria require that the group boycott, in order to be *per se* condemned, must be aimed at inhibiting competition *at the level of those carrying out the boycott.* Section 4D of the Australian *Trade Practices Act* and s.29 of the New Zealand *Commerce Act* have no such requirements. Certainly the parties engaging in the boycott must be "competitive with each other". However, the restriction of goods or services effected by the boycott can be in relation to any party *regardless of whether or not such party is competitive with those involved in the boycott.*

— United States group boycotts are regarded as *per se* banned *because of their pernicious effect on competition.* In Australia and New Zealand there is no such basis of banning. The banning is based on statutory wording *which wording does not anywhere refer to anticompetitive effects.* Thus, whereas the United States Courts can look at, say, the motive for an arrangement (e.g. was the motive to stifle competition or not?) prior to making an evaluation as to whether the practice should be *per se* banned, Australian and New Zealand Courts seem to be unable to engage in this exercise. *The sole question in Australia and New Zealand is whether the relevant conduct preventing, restricting or limiting the supply or acquisition of goods or services has been engaged in.* It would seem, therefore, that, in Australia and New Zealand, a concerted arrangement to maintain the quality of bridge tournaments by refusing to certify a particular local tournament could well be *per se* illegal whatever the motive. Such conduct clearly has the purpose of limiting the acquisition of goods or services by a particular person or class of person and this is all that is required to breach the *Trade Practices Act* or the *Commerce Act.* Yet, as we have seen, no illegality follows in the United States in these circumstances. A prerequisite to *per se* banning in the United States is that there is *anticompetitive* purpose and, in the circumstances of the *Bridge Case*[59], this purpose was not present.

— Of course, authorization is always possible in Australia and New Zealand whereas in the United States it is not. However, the availability of authorization may not be a panacea for the problems faced. Authorization may not be available because no public benefit is demonstrated and this is a pre-requisite of its grant. The Australian or New Zealand businessperson

[58] Sullivan (n.54) pp.231-2 cited in *Smith* v. *Pro Football* (n.51).

[59] *Bridge Corp. of America* (n.57). The interpretation of "purpose" in the Australian context is discussed in detail at Part IV. 4 hereunder.

may well, therefore, find it strange that he is *per se* banned from certain activities which would not be considered anticompetitive in America. [Authorization for collective agreements is discussed in greater detail at Part V below.]

IV. An Analysis Of The Australian And New Zealand Legislation In Relation To Exclusionary Provisions

A. *The Statutory Provisions*

Shorn to its basics, both the Australian and New Zealand legislation[60] illegalise the making of, or giving effect to a provision of

— *a contract, arrangement or understanding*
— entered into etc. between persons *of whom any two or more are in competition with each other*
— which has
the *purpose of preventing, restricting, or limiting* the supply of goods or services to, or the acquisition of goods or services from *any particular person or classes of persons* Each of these concepts merits analysis in detail.

B. *What is "a Contract, Arrangement or Understanding?"*

The concept of "a contract, arrangement or understanding is fundamental to all trade practices law. In all cases of arrangements between competitors, the first question to be asked is whether the appropriate "contract, arrangement or understanding" is present. If it is, the analysis proceeds to determine whether what is found is illegal as a price fixing arrangement[62], or an exclusionary provision[63].

There are two major aspects in relation to "contracts arrangements or understandings" between competitors, these being

1. the nature of the activity; and
2. the evidentiary position at law.

1. *The nature of the activity*

No particular form or formality is necessary for there to be a contract, arrangement or understanding. The term "arrangement" is

> apt to describe something less than a binding contract, something in the

[60] *Commerce Act* (NZ) s.29(1); *Trade Practices Act* (Australia) ss.45(2)(a)(i); 45(2)(b)(i) and 4D. For practical purposes the effect of each statute is the same. The New Zealand statute is drafted far more readably and, from this viewpoint, is superior to its Australian predecessor. There are some drafting variations between the two statutes which do not appear to be of importance. Thus the Australian legislation requires that the parties to the exclusionary provision be "competitive with each other" whilst the New Zealand statute requires that the parties be "in competition with each other".

[61] *Commerce Act* (New Zealand) s.30 [deemed anticompetitive for purposes of s.27 illegality]; *Trade Practices Act* (Australia) s.45 A(1) [deemed anticompetitive for purposes of s.45 illegality].

[62] *Commerce Act* (new Zealand) s.27; *Trade Practices Act* (Australia) ss.45(1)(b); 45(2)(a)(ii); 45(2)(b)(ii).

[63] n.60.

> nature of an understanding between two or more persons . . . a plan arranged between them which may not be enforceable at law[64].

Formalities have generally been swept aside if courts believe that results prohibited by the Act either are intended to result or necessarily flow from the action of the parties. Numerous cases could be cited in this connection but one succinct summary of the position is that put by the Australian Trade Practices Commission in the following words:

> An arrangement or understanding comes into existence as a result of some communication between the parties; the communication can however occur by written or spoken word the one to the other or by one observing and interpreting the other's behaviour. It is sufficient if the result of that communication is an expectation or hope in each party that the other is likely to act or not act in a particular way or for a particular purpose. There is no difference between an arrangement or an understanding in terms of anti-competitive purpose or effect. Any differences are a matter of degree — for instance, an understanding is likely to be more informal, communication more subtle, the means of achieving the anti-competitive purpose or effect more vague or even open to independent unilateral action etc. The Courts have recognised subtlety and disguise as inevitable hallmarks of illegal collusion.[65]

In short, "wink and nod' agreements come within the Act.

In simple terms, courts will tend to find an arrangement or understanding where the conduct is "not the conduct of competitors"[66] and it matters not if the conduct is "wholly nascent or abortive" on the one hand or successful on the other[67]. It is the "nature and tendency of the agreement" which is relevant[68]. In the colourful expression of one US Supreme Court judgment, the court said it should not be:

> Blinded by words and forms to realities which men in general very plainly see and condemn as an old evil in a new dress with a new name.[69]

A collective boycott may be spelt out from quite indirect arrangements. So it may be adequate for an "Official Report" to be sent to members of a trade association with no specific requirement on the member as to non dealing with the party or parties referred to in the report. In the context of lumber dealers wishing to prevent direct wholesaler/consumer trading (thus attempting to preserve the retail margin on timber) the following notice to members was held sufficient to constitute a collective boycott[70]:

[64] *Newton* v. *F.C.of Taxation* (1957) 98 CLR 1 at p.7; *Wellington Fencing Materials Association* [1960] NZLR 1121.

[65] *Trade Practices Commission Submission to N.S.W. Prices Commission Inquiry into prices and distribution of motor vehicle spare parts* — July 1978. For cases to support the general proposition stated see n.71.

[66] *U.S.* v. *American Column and Lumber* 257 US 377 (1921).

[67] *Associated Press* v. *U.S.* 326 1, 13 (1945).

[68] *Perington Wholesale Inc.* v. *Burger King Corp.* 1979 Trade Cases para.62986.

[69] *American Column and Lumber* (n.66) at 410.

[70] *Eastern States Lumber Dealers Association* v. *U.S.* 243 US 600 (1914).

"STATEMENT TO MEMBERS"

You are reminded that it is because you are members of our association and have an interest in common with your fellow members in the information contained in this statement that they communicate it to you . . . The following are reported as having solicited, quoted or as having sold direct to consumers. (Here follows a list of names and addresses of various wholesale dealers). Members upon learning of any instance of persons soliciting, quoting or selling direct to consumers should at once report same and in doing so should, if possible supply the following information. (Here follows the information requested including the name of the wholesale dealer involved and details of the 'reported' transaction).

The United States Supreme Court made the following observations:

True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure to do so, but he is blind indeed who does not see that the purpose in the predetermined and periodical circulation of this report is to put the ban upon wholesale dealers trying by methods obnoxious to retail dealers to supply the trade which they regard as their own.

The purpose of the circulation of the lists, said the court, was to impose upon wholesalers as a condition of trade that they trade in such manner as was acceptable to the retail industry upon pain of being reported as an unfair dealer to a large number of other retailers in the trade. The court affirmed that any retailer could refuse to deal with any wholesaler for reasons sufficient to himself but "an act harmless when done by one may become a public wrong when done by many acting in conspiracy, and may be prohibited or punished, if the result be hurtful to the public or the individual against whom the concerted action is directed".

It is important to say, loud and long, that it is *reality* not cosmetics which will determine whether or not the relevant contract arrangement or understanding is present.[71]

[71] The cases to this effect are legion and will be cited but not canvassed here in detail. For United Kingdom cases see *Re British Basic Slag Ltd. Agreement* [1963] 2 All ER 807, 819; *Re Agreement of Mileage Conference Group of Tyre Manufacturers Ltd.* [1966] 2 All ER 849. For United States cases, see, inter alia, *United States* v. *American Linseed Oil Co* 262 US 371 (1923); *Interstate Circuit Inc.* v. *United States* 306 US 208 (1939); Contrast *Maple Flooring Manufacturers Association* v. *U.S.* 268 US 563 (1925), *Cement Manufacturers Protective Agency* v. *U.S.* 268 US 588 (1925), *American Column and Lumber* (n.66), *Eastern States Lumber* (n.70) and *U.S.* v. *Container Corporation of America* 393 US 333 (1969). For New Zealand cases see *Wellington Fencing Material* (n.64); *New Zealand Council of Registered Hairdressers* [1961] NZLR 161; *Ashton* v. *Commmr of IR (NZ)* [1975] 1 WLR 1615. For Australian cases see *Custom Credit Corp.* v. *Goldsmith* (1976) L.B. Co. Indust. Arb. Serv. 52 (N.S.W. Ind.Comm); *Newton* v. *FTC* (n.64); *Jacques* v. *F C. of Taxation* (1951-3) 87 CLR 548 at 572-3; *Re Hall and Alison Clint Floral Delivery Pty. Ltd.* (1971) AR (NSW) 56 at 64; *TPC* v. *Nicholas Enterprises Pty. Ltd.* Anor 1980 ATPR para.40-126; *Morphett Arms* v. *TPC* (1980) ATPR para.40-157; *TPC* v. *Allied Mills Industries Pty. Ltd.* 1980 ATPR para.40-178, 1981 ATPR para.40-237; *AG* v. *Associated Norther Collieries* (1912) 14 CLR 387, 413 (overruled but on other grounds 15 CLR 65; 18 CLR 30); *TPC* v. *David Jones (Australia) Pty. Ltd. & Ors* (1986) ATPR para.40-671.

2. *The evidentiary position at law*

The law has been consistently ready to draw conclusions that collusion has occurred when certain *prima facie* facts are demonstrated by a prosecuting party. The following is the legal position as stated by the writer in his CCH Commentary on the evidentiary position relating to meetings and the conclusions the court will draw from the existence of such meetings.[72]

(a) Any conduct engaged in on behalf of a body corporate by a director, agent or servant of the body corporate or by any other person at the direction or with the consent or agreement (express or implied) of a director, agent or servant of the body corporate is deemed, for purposes of the Act, to have been engaged in also by the body corporate.[73]
(b) Arrangements or understanding are rarely provable by direct evidence. An inference of conspiracy can be drawn from the acts and conduct of the alleged conspirators.
(c) If there is no direct evidence or no sufficient direct evidence of an express arrangement or understanding, it may be possible to infer the relevant understanding from circumstantial evidence. The fact that parties did, in fact, engage in mooted conduct is significant circumstantial evidence from which the existence of an understanding may be inferred.
(d) If there is parallel conduct, the failure of a defendant to explain the reasons for his conduct encourages a court to feel that it is less unsafe to make a finding that an understanding exists. *Where facts or evidence are peculiarly within the knowledge of a particular party, the court will be prepared to act on slight evidence of their existence. The absence of an explanation by such a party may enable the court to conclude a fact proven on slight evidence of its existence.*
(e) Pre-existing circumstances such as price leadership or interdependence could be such that a proposer of a course of action has grounds for assuming that what he proposes will be followed unless he is notified to the contrary. In these circumstances if there is no action taken to notify dissent from the proposition put, an understanding may be inferred — particularly where the proposition is, in fact, implemented.
(f) Community of purpose may be proven by independent facts, but it need not be. If one defendant is shown to be committing actions separate from those of the first but tending to the same end, then, though primarily each set of facts is attributable to the person whose acts they are, and to him alone, there may be such a concurrence of time, character, direction and result as naturally to lead to the inference that these separate acts were the outcome of pre-concert or some contemporaneous engagement, or that they were themselves the manifestations of mutual consent to carry out a common purpose, thus forming as well as evidencing a combination to effect the one object towards which the separate acts are found to converge.[74]

[72] *Anti-competitive Agreements — Relevant Evidentiary Matters.* Australian Trade Practices Reporter Vol.1 p.4-300 *et seq* (CCH Australia Limited). Detailed citations for the various propositions put are contained in the Reporter. Some of the matters mentioned are more relevant to price collusion than to collective boycotts but they are left in the text to this paper as they are of general relevance.

[73] *Trade Practices Act* (Australia) s.84; *Commerce Act* (New Zealand) s.90.

[74] See in particular on this point *AG* v. *Associated Northern Collieries* (n.71).

(g) Once a combination and its purposes are proved, the acts of any party to it in furtherance of those purposes are attributable to all as being within the scope and in execution of their common agreement. Usually this principle will not be applicable to narrative facts but will relate to directions, instructions or arrangements or to utterances accompanying acts.

(h) Some of the circumstances which may be relevant to the proving of a conspiracy are:
- — a refusal to quote to some customers after the prices to such customers have been increased by other suppliers. This may evidence agreement particularly where the refusal to quote was to an already existing customer;
- — notifications of price increases which are similar in timing and amount;
- — contemporary memoranda which refer to exchanges of information at senior level in relation to price;
- — individual companies being previously unsuccessful in raising prices as compared with a present situation where companies are successful across the board in effecting price increases.[75]

(i) The present state of Australian authority is that no element of mutual obligation has to be demonstrated in order for there to be an understanding.[76]

(j) There is a presumption of continuance. An individual or corporation, once a party to an arrangement, may withdraw or abandon it only by positive renunciation or by engaging in conduct which is clearly inconsistent with the idea of continued participation in the arrangement. *Mere cessation of activity in furtherance of the arrangement is not sufficient to establish a withdrawal from it.*

(k) It is *actuality* which is of relevance and not *form*. Courts will strike down artificiality where this obscures substance.

3. *Conclusions as to the law relating to "contracts, arrangements or understandings"*

There is nothing in the above law which cries out for amendment. It is consistent with overseas law and accords with economic and business realities.

C. *The Contract, Arrangement or Understanding must be between Two or More "Competitors"*

The very essence of the *per se* ban on collective boycotts is that such arrangements are horizontal in nature — that is, between competitors.

Although arrangements involving exclusionary provisions are *per se* in nature and do not require an assessment of anti competitive effect, competition enquiries are thus not totally irrelevant to them. Such inquiries may be necessary to establish whether, in fact, at least two parties to the agreement are in competition with each other. Normally, however, such an enquiry will be a short and fairly pragmatic one. As a matter of reality, business persons enter into collective boycott arrangements only with their competitors. To

[75] See in particular *Sheppard J.* in *TPC* v. *Allied Mills Industries Pty. Ltd. & Ors.* (1981) ATPR para.40-237.

[76] In *Morphett Arms Hotel Pty. Ltd.* v. *TPC* (1980) ATPR para.40-157, this was specifically held by the Full Federal Court of Australia though the judgment was given "forthwith" and without the necessity to "express any final view on this question".

enter into such arrangements with a stranger is commercially irrational. The competition enquiry is not related to competition in the market as a whole but to whether parties are "competitive". Some may regard this enquiry as *per se* answered by the proposition that the parties would not enter into a collective boycott arrangement unless at least two of them were competitive with each other. United States courts have generally adopted this view.

It cannot be overlooked, however, that a plaintiff, in order to establish a case, does have to demonstrate that at least two parties to the arrangement are in competition. Though this is usually not a difficult task, and does not detract from the general *per se* nature of the exclusionary provision ban, it is still possible that a plaintiff can be involved in an enquiry into the economic indicia of competition and market analysis along product, functional and geographic basis in order to establish the competitive relationship between at least two parties. It is not intended here, however, to elaborate further on this analysis.

It needs to be emphasised that an exclusionary provision exists if *any two parties* are competitive with each other. It does not have to be demonstrated that every party is competitive with every other party. Further, if any two parties are competitive, then all participants in the arrangement are parties to it. If, therefore, there is an arrangement between 10 competitive wholesalers to boycott a competitive outlet and one retailer is also a party, the retailer does not escape liability on the basis that he is not competitive with any of the wholesalers. He is a party to an agreement with at least two competitive parties. He is a party to the agreement in exactly the same manner as all others. Even if this were not so, the retailer would be liable for aiding or abetting the other parties in their exclusionary provision arrangements.

It is the parties to the arrangement which must be competitive with each other. The boycotted persons can be anyone, whether or not competitive with the parties to the agreement. As we have seen [Part III] this is a fundamental difference in the New Zealand/Australian position to that applying in the United States.

D. *What is the Law in Relation to "Purpose"?*

1. *Resolution of the Problem of the "Immediate" versus the "Ultimate" Purpose of Conduct*

Both in Australia and New Zealand there are specific statutory provisions concerning the question of "purpose".[77] These provisions state that a certain "purpose" is present if it is one of a number of purposes and provided it is a substantial one. The intent of these provisions is to overcome the argument that a particular purpose was not the dominant or sole one. At general law, one could have escaped liability by using this argument.

The Australian "purpose" provisions have been subjected to considerable judicial attention in connection with the "secondary boycott" provisions contained in s.45D of the *Trade Practices Act*[78]. This section, of which there

[77] *Commerce Act* (New Zealand) s.2(5); *Trade Practices Act* (Australia) s.4F.

[78] *Utah Development Corporation Ltd.* v. *Seamen's Union* 1977) ATPR para.40-049; *Industrial Enterprises Pty. Ltd.* v. *Federated Storemen & Packers Union of Australia* (1979) ATPR para.40-100; *Wribrass* v. *Swallow & Ors* (1979) ATPR para.40-101. The authorities up to December 1979 are reviewed in *Barneys Blu-Crete Pty. Ltd.* v. *Australian Workers Union & Ors* (1979) ATPR para.40-139. Consideration is given to the term by *Lockhart J.* in *Leon*

is no New Zealand equivalent, was inserted into the Australian legislation in 1977 to cover secondary boycotts of businesses by trade unions. It is couched in terms which require a "purpose" of inflicting damage or injury to be proven if various of the permutations and combinations set out in the section are to be infringed. The most obvious defence, and that immediately pleaded by those union members against whom s.45D proceedings were initially instituted, is that the purpose of the secondary boycott is not to damage the party subjected to it but to preserve working conditions and wages. The secondary boycott, in other words, is merely a means of achieving the "true" purpose which relates to industrial matters.

Problems of purpose are always tricky and invariably involve mixed motives. As *Evatt J* said in *McKernan* v. *Fraser*[79], to ask a person whether he engaged in certain conduct to defend his own trade interest or to injure his economic adversary for the time being is equivalent to asking of a soldier who shoots to kill in battle whether he does so for the purpose of injuring his enemy or of defending his country. However, the Federal Court of Australia has taken the view that:

> . . . The long term purpose may well be the implementation of an industrial objective but the immediate purpose is to bring direct pressure to bear on the (party subject to the secondary boycott) by depriving him of the materials needed to conduct his business . . .[80]

Clearly it is not necessary that there be personal *animus* against a party in order that the relevant purpose be established. It is sufficient if a party knows the results of his action will be to disadvantage a party and one of the purposes in the conduct is to bring about such disadvantage.[81] Another characterisation of the 'purpose' test is that of Deane J. in *Tillmans Butcheries*[82]. The test, according to his Honour is one of "the operative subjective purpose of those engaging in the conduct" or "what in truth is the objective in the minds of the relevant persons when they engaged in the conduct". His Honour also counsels that:

> the common distinction between purpose and motive should be observed in construing the effect of s.45D . . . it suffices that the purpose of causing substantial loss or damage to the appellant's business was a purpose, whether dominant or subsidiary, of the respondents in engaging in the relevant conduct.

In *Wribrass* v. *Swallow*[83], Mr. Justice Smithers took the analysis somewhat

Laidely Pty. Ltd. v. *TWU & Ors* (1980) ATPR para.40-147. The Full Federal Court has commented on purpose in *Tillmans Butcheries Pty. Ltd.* v. *The Australasian Meat Industry Employees Union & Ors* (1979) ATPR para.40-138 and in *TWU (N.S.W.) & Ors* v. *Leon Laidely Pty. Ltd.* (1980) ATPR para.40-149.

[79] *McKernan* v. *Fraser* (1931) 46 CLR 343, 403. This case is cited in *Barneys Blu-Crete* (n.78), *Leon Laidely* (n.78) and *Tillmans Butcheries* (n.78) as illustrative of the difficulties involved where mixed motives are involved.

[80] *Barneys Blu-Crete* (n.78).

[81] *Leon Laidely* (n.78). Similar reasoning is given in all the cases cited in no.78 above.

[82] n.78.

[83] n.78.

further. The relevant purpose, said his Honour, is not the same as the ultimate purpose for which participants engage in conduct. The relevant question is not whether persons want *ultimately* to achieve a certain objective but what the purpose is in engaging in *the particular conduct in question.* If this is to disadvantage or injure, then this is the relevant purpose of the conduct regardless of whatever long term goals may be sought. His Honour also took the line that the purpose for which conduct is engaged in is limited to the level which the conduct is capable of achieving. Clearly enough, this will always be the disadvantage of a "victimised" party. The conduct may or may not achieve the long term goals sought by those who engage in it.

The conclusion from all of the above is stated by Mr. Justice Morling in one of the cases constituting the *Mudginberri* saga[84]. In that case, his Honour held that the defence that conduct was engaged in for the ultimate purpose of achieving an industrial result

> . . . is not an answer to the applicant's claim, since it is the immediate, and not the ultimate, purpose of conduct which is relevant for the purposes of s.45D(1).

2. *What do the "Purpose' Holdings Mean in Terms of Exclusionary Provision Law? A Contrast between the New Zealand/Australian Position and that of the United States*

The above holdings in relation to "purpose" in s.45D of the Australian *Trade Practices Act* would appear to be directly applicable to the interpretation of "purpose" where this is used in the definition of "exclusionary provision". Both exclusionary provisions and s.45D deal with boycotts. The only difference between the two is that s.45D deals with *secondary* boycotts, primarily in an industrial relations context, whereas the exclusionary provision sections deal with *primary* boycotts, basically in a commercial and non-industrial relations context. The essential thrust of each however, is the same. Each deals with collective boycotts.

This poses yet another real difference between the Australian/New Zealand position and that of the United States. Such difference can be illustrated by two examples chosen at random. The first of these involves some quite common activities of trade associations and the admission and expulsion of members of such associations. The second involves a hypothetical combined telecasting arrangement which has been held in the United States to be pro competitive but in Australia/New Zealand would seem to fall for *per se* condemnation in light of the interpretation of "purpose" in the exclusionary provision section of the law of each country.

(a) Trade associations — admissions and expulsions

The difference between the two laws (United States as against Australian/

[84] *Mudginberri Station Pty. Ltd.* v. *The Australian Meat Industry Employees Union* (1985) ATPR para.40-598. Mudginberri is a small Northern Territory abattoir which had certain trade union bans imposed on it. The litigation consequences of this constitute a saga in the life of s.45D of the Australian *Trade Practices Act.* There have been 16 Mudginberri cases between July 1984 and June 1986. They are conveniently summarised in the July-August 1986 *Bulletin (no.31) of the Australian Trade Practices Commission.* Basically Mudginbe.ri has won, and the unions lost, on all issues. Damages of $ 1,759,444 have been awarded to Mudginberri but this award is currently subject to appeal.

New Zealand law) is perhaps most dramatically illustrated in the case of trade associations. By definition, such associations are bodies comprising competitors acting in concert. An Association may wish to deny admission to a non-member for a variety of reasons unconnected with competition. The consequence of such a denial, however, may be that the non-member cannot receive certain goods or services either supplied by the association or by outside parties through the association. The position is probably more dramatic, and more likely to arise in practice, when an expulsion from a trade association is involved.

The association may well argue that its purpose in denying admission or admission or in expelling a member is to maintain its standards. The excluded party would, no doubt, argue that this may well be the long term purpose of the association but the immediate purpose, and certainly the immediate effect, of the exclusion is that he is denied certain goods or services because of the concerted action of competitors acting through the medium of their trade association. On the basis of the interpretation of "purpose" discussed in Part IV D 1 above, the excluded party's argument is difficult to fault.

There are any number of United States trade association cases which hold that "due process" in terms of hearing and observance of natural justice principles is required where trade association admission or expulsion is involved. However, if procedural fairness is followed and there is no intention improperly to eliminate or damage a competitor then there is no illegality involved by a refusal to admit a person to membership or by an expulsion from membership.[85] In the case of Australia and New Zealand, illegality flows not because of presumed anticompetitive purpose or effect but because of deemed illegality if the statutory wording is infringed. An infringement occurs when there is a denial of relevant goods or services by an association, even though such denial may be for reasons which many would regard, and United States antitrust law frequently does regard,

[85] See generally *Montague* v. *Lowry* 193 US 38 (1904); *Associated Press* v. *U.S.* 326 US 1(1945); *Marin County Board of Realtors* v. *Palsson* 1966-1 Trade Cases para.60898 (contrast *Iowa* v. *Cedar Rapids Real Estate Board* 1979 Trade Cases para.63012); *Radiant Burners* v. *Peoples Gas Light & Coke Company* 364 US 656 (1961) [where certification of the plaintiff's product was not in accordance with objective criteria but was withheld for "arbitrary" and "capricious" reasons]; *Eliason Corp.* v. *National Sanitation Foundation* 1980-1 Trade Cases para.63168. In general terms see FTC Opinion letters of 1967 (72 FTC 1053) and 1971 (78 FTC 1628) in relation to trade association standards setting. See also *Deesen* v. *The Professional Golfers Association of America* 1966 Trade Cases para.71706 (a case involving the necessity to choose because only a certain number of golfers could participate in tournaments) and *Bridge Corporation of America* v. *The American Contract Bridge League* 1970 Trade Cases para.73256 where it was held that there were no illegalities in the denials of trade association advantages because objective standards were provided and impartially enforced. In the *Bridge Corporation case*, it was said that the denial of facilities was

> not motivated by any anticompetitive motive or purpose to eliminate or damage BCA but to ensure that the manner in which league bridge was scored would not create a situation where the integrity of the master point system, the inspiration of league tournament play, would be questioned.

In relation to expulsions from trade associations and "due process" see *Silver* v. *New York Stock Exchange* 373 US 341 (1963). As regards trade association activities not permitted in the United States and in respect of which members cannot be disciplined see W.J. Pengilley "*Section 45 of the Trade Practices Act — the Law and Administration to date* (1976) Federal Law Review Vol.8, no.1.

as being quite proper. Indeed, the position may be worse still for the Australian/New Zealand trade association in comparison with its United States counterpart. As we have seen[86] the United States collective boycott *per se* ban applies only if a competitor of association members is eliminated or damaged by being excluded from the fruits of association membership. There is no such restriction in the Australian/New Zealand provisions. It may well be, therefore, that a retailer could, if appropriately motivated, use the exclusionary provisions section of Australian or New Zealand law to obtain admission to or benefits from, say, a manufacturers' association.

All of this is somewhat difficult to swallow. New Zealand courts may find their salvation in not following the Australian s.4F decisions on "purpose" as they have been interpreted in the s.45D context. This, however, may prove difficult in light of the avowed intention that the interpretation of competition law in each country should be similar and in light of specific reference in s.2(5) of the New Zealand Act to the fact that it is modelled on s.4F of the Australian legislation. For their part, Australian courts are in a much more difficult bind if it is thought that the above results should not flow. Australian courts, if they intend to overcome the above results, will have to utilise some exceedingly dexterous judicial stratagems. If they do this, however, the quite illogical conclusion must follow that different rules as to "purpose" apply depending upon whether a primary or secondary boycott is involved. The courts must be seen as speaking somewhat with forked tongues if they permit trade associations to deny goods or services to non-members on the basis that the associations seek thereby to maintain quality and standards whilst they hold at the same time that trade unions are not permitted to deny perhaps identical goods or services in order to achieve certain long term industrial goals.

Australian courts may thus feel compelled to adopt the same interpretation of "purpose" for exclusionary provision purposes as has been adopted for s.45D purposes, notwithstanding the unfortunate economic and marketing consequences which may follow from this. New Zealand courts may well feel fortified in this approach, notwithstanding its undesirable economic results, because they may be able to rationalize that it is really a question of authorisation of trade association rules if there is any problem created by this interpretation. This Pontius Pilate approach is, of course, not available to the United States judiciary. Further it is not a real solution in that:

— In many cases, there may simply be no public benefit (a prerequisite to a grant of authorization) in a trade association limiting its goods or services to certain parties. Yet surely parties should be able to co-operate with each other without having to share all the benefits of such co-operation with whoever demands them. Surely also associations are entitled to set appropriate membership standards and to decline to join in business with those whom they regard as unqualified or as of lesser ability. Is it not contrary to the principles of free enterprise that a group of individuals should be forced to give up their rights or disgorge what they have developed, probably at considerable cost to themselves, at least without compensation in some form? It may well be that the exclusionary provisions of the Australian/New Zealand

[86] See Part III above.

legislation do, in the case of some trade association conduct, "work an enormous injustice, and operate to the undue restraint of the liberty of the citizen".[87]

— Being compelled for technical reasons to apply for authorization of otherwise innocuous conduct certainly cannot encourage the avowed aim of the Australian Government in 1977 when it abolished the clearance procedure[88] in order to encourage "self reliance . . . in a private enterprise system".[89]

(b) Combined television arrangements — a hypothetical example of *per se* Australian/New Zealand condemnation of what in the United States is regarded as being pro competitive

Suppose a group of horse racing clubs agrees to allow closed circuit telecasting of races to social clubs, hotels, motels, racetracks and other institutions but a term of the agreement is that local races are not to be telecast in the local area. The reason for this restriction is that the local horse racing clubs wish to retain racetrack crowds. Without such crowds, local race meetings would be less successful and it is not inconceivable that the subject matter of the telecast itself (i.e. races) could cease to exist. [The choice of horse racing clubs for the example is to overcome difficulties in Australia caused by a decision of Mr. Justice *Northrop*[90] which held that football clubs do not compete with each other. If this is so (and his Honour's logic must be suspect[90]) a quite basic aspect of the definition of an exclusionary provision is unable to be satisfied].

All of the above reasons in favour of home town "blackouts" have led to the conclusion in the United States that such jointly agreed TV "blackouts" are not anticompetitive. Indeed the home town blackout restriction "promotes competition more than it restrains it . . ."[91] In

[87] See *U.S.* v. *Trans Missouri Freight Association* 166 US 290 (1897) — judgment of Mr. Justice *White*.

[88] Prior to 1 July 1977 agreements could be cleared by the Trade Practices Commission if they did not significantly affect competition.

[89] *Australian Parliamentary Debates (Hansard) Senate 31 May 1977)* — p.1711 incorporating Second Reading Speech. See also lengthier citation at n.153.

[90] *Adamson* v. *West Football Club (Inc.) & Ors* (1979) ATPR para.40-134. In this case Mr. Justice Northrop held that "competition" when used in a commercial or economic context is not to be confused with competition when used in a sporting sense. Only the former, thought his Honour, was affected by the *Trade Practices Act*. There are difficulties in his Honour's holding. Firstly, it is hard to see why professional football teams are not competitive in a commercial sense. Secondly, the decision is contrary to U.S. authority [*Smith* v. *Pro Football* (n.51)]. In using the example of horse-racing clubs, it would appear as if these problems are not relevant. *Adamson* based its logic on teams of humans. Racing is distinctly a non-team event involving animals. Presumably also horse-racing is seen as a more distinctively commercial activity than football. Further, there would appear to be little doubt that horse-racing clubs do compete with each other, even over quite wide geographic areas, for sponsorships, entries and prize money offered. [NOTE In *Hughes* v. *Western Australian Cricket Association (Inc.) & Ors* (1986) ATPR para.40-736 (which decision was not available to the writer at the time of writing) it was held that cricket clubs were competitive. This decision would appear to the writer to be clearly correct.]

[91] See *U.S.* v. *National Football League* 1953 Trade Cases para.67, 614. The judgment in this case was construed in *U.S.* v. *National Football League* 1961 Trade Cases para.70082 and in *WTWV Inc.* v. *National Football League* 1982 Trade Cases para.64784. Questions of whether one League can tie up all three television networks were considered in *US Football League* v. *National Football League* 1986 Trade Cases para.67074. Horse-racing rather than football has been used to demonstrate the point in Australia for the reasons stated in n.90.

Australia and New Zealand, a *per se* ban on such jointly agreed arrangements may, however, be the result. There is no doubt that the immediate purpose is to deny services to certain identifiable persons or institutions. There appears to be little doubt that the various horse racing clubs are competitive with each other (they compete for sponsorships, entries and prize money offered). Whilst the blackout certainly does not *substantially* lessen competition between the horse racing clubs, this is not the relevant test for infringement of the exclusionary provision legislation.

Per se illegality for an arrangement along the above lines defies economic or any other form of common sense. It is no answer to say that Authorization for such a practice is available, although one would think, in fact, that the chances of such an Authorization, in the circumstances stated, must be high. What has happened is that the Australian legislative draftsperson has done that which the United States courts have declined to do — that is, he has swept up reasonable pro-competitive activity within a general condemnation. Certainly there is no conceivable evidence that an arrangement for joint telecasting with local blackout restraints should be deemed to be a naked restraint of commerce with no purpose except the stifling of competition.[92] Yet both the New Zealand *Commerce Act* and the Australian *Trade Practices Act* so deem.

3. *An Alternative Approach to the Question of Purpose*

The real difficulty with the present "purpose" test is that the relevant purpose is related to the restricting or limiting of supply or acquisition of goods or services. No doubt this was done to avoid competition issues being raised. The more appropriate test, however, is whether the conduct has the purpose of lessening competition. The *per se* nature of the breach could be retained by providing that the competition involved had to be that between parties to the collective action or the necessity to consider competition in the market *at large*. It would also enable application of the direct purpose test — but in a different context. Quite consistently with the present interpretation of purpose a trade association could argue that its direct and immediate purpose was, for example, to maintain standards and not to lessen competition between the collective actors *inter se* or between them and their competitors.

Admittedly there is some risk in this course and some may see the present *per se* test degenerating into a competition evaluation. The writer does not see this. There are different parties to be considered. Also the competition evaluation would not be of competition in the market as a whole but would be limited to competition between specific entities.

Even if the writer is wrong in his assessment of the effects on the *per se* nature of the section, the consequences involved in the proposed redrafting of it are far less harmful than the present *per se* condemnation of many practices which have no antisocial or anticompetitive consequences at all.

Appendix "B" gives the writer's suggested re-draft of s.4D of the Australian *Trade Practices Act* to accomodate the views here expressed. This re-draft can also, without difficulty, be applied to the New Zealand *Commerce Act*.

[92] See n.51 above and related text for United States views as to when conduct should be *per se* illegalised.

E. *Why extend the law to cover "particular classes of persons" as well as "particular persons"?*

As originally enacted in Australia in 1977, an exclusionary provision had to operate against "particular persons". The 1986 amendments changed this requirement and provided that an exclusionary provision was illegal if it operated against "particular persons or *classes of persons*". The 1986 New Zealand law foreshadowed the 1986 Australian amendments.

It is appropriate firstly to look at Australian decisions on the legislation as it was worded in the period 1977-1986.

1. *"Particular persons" — the Australian Law 1977-1986*

In *Bullock*[93] Mr. Justice Gray in an interlocutory injunction application said regarding s.4D of the Australian *Trade Practices Act* that it

> . . . is plainly designed to apply to provisions which exclude particular persons in the sense of persons whose identity is known or can be ascertained. It is not directed towards the exclusion of the entirety of the available body of persons who could conceivably be called upon to supply the relevant services.

Thus, thought his Honour, the provisions did not apply to a trade union whose policy was to require suppliers of carpets to enter into certain contractual arrangements with subcontractors who laid such carpet. Enforcement of this union policy was to be by way of black bans on non-signing suppliers. Although the policy was designed to exclude from the floor-covering laying industry the use of subcontractors except on the basis provided in the agreement, there was not, thought his Honour, an exclusionary provision because the collective boycott was not directed at "particular persons" but "intend(ed) to exclude all carpet layers and not particular persons from operating otherwise than in accordance with its terms".

For this, and other reasons, Mr. Justice Gray declined to grant an interlocutory injunction. The applicant appealed and the appeal was decided by the Full Federal Court on 11 February 1985.[94] Mr. Justice Woodward (with whom Mr. Justice Sweeney agreed) said that:

> It is unnecessary and undesirable that any concluded view on the meaning of these sections should be reached for the purposes of this application. It is sufficient to say that, in my view, it is clearly arguable that 'self employed carpet layers' or at least 'the self employed carpet layers who have in the past been employed by the carpet suppliers who have been forced to sign the FFTSA agreement' are particular persons within the meaning of the Act. It is arguable that particular persons may be identified by general description, or as members of a designated class without being individually named.

Mr. Justice Smithers stated that he agreed with the views of Mr. Justice

[93] *Bullock* v. *The Federated Furnishing Trades Society of Australasia & Ors* (1985) ATPR para.40-505 (*Gray* J.).

[94] *Bullock* v. *The Federated Furnishing Trades Society of Australasia & Ors* (1985) ATPR para.40-577 (Full Court — Smithers, Sweeney and Woodward JJ.).

Woodward but wished to add some comments of his own. For present purposes his Honour's additional comments were:

> . . . if the provision did in fact exclude all carpet layers and that provision was included by the parties for the purpose, *inter alia* of excluding the particular carpet layers referred to . . . then that was one of its purposes . . . the first and principal targets of the agreement were the carpet layers referred to . . .

On 12 February 1985, but one day after the Full Federal Court decision in *Bullock*, Australia's greatest antitrust disaster since the 1914 *Coal Vend* decision[95] struck. This was Mr. Justice Franki's decision in the *Tradestock Case*[96]. The *Tradestock* decision had an impact in Australia far greater than its status as a single judge determination. This is because of the sheer immensity of the costs involved and because of the overall logistics of the case.[97]

It should also be noted that the *Tradestock* decision, though given a day *after* the Full Federal Court decision in *Bullock* (*supra*), had a far greater impact than *Bullock* because the *Bullock* decision did not become available for publication purposes until July 1985 — some five months after the availability of the *Tradestock* decision. This five month period was one of considerable sensitivity in Australia because the amendments to the *Trade Practices Act* were under active debate at the time, the government having announced proposals for change to the legislation in its "*Green Book*"[98] of February 1984 with the then intent of legislating such amendments in the 1984 Budget (August) session of Parliament. [In fact, the amendments were legislated in May 1986 so the intended timetable was somewhat optimistic].

[95] n.27.

[96] *TPC* v. *TNT Management & Ors* (1985) ATPR para.40-512. The case is generally referred to as either as the "*Tradestock Case*" (in honour of the boycotted party left without a remedy by virtue of the judgment in the case) or as the "*Freight Forwarders' Case*" (in honour of the boycotting trade association which succesfully defended the case). The case was instituted by the Trade Practices Commission.

[97] The case occupied some 60 days of interlocutory proceedings and some 20 separate interlocutory judgments. There were five appeals to the Full Federal Court from some of these judgments. Three applications were made for special leave to appeal to the High Court of Australia. Of these, one was refused, one apparently was not proceeded with and the third was unsuccesful. The evidence occupied 173 days and the addresses 32 days. In addition, the parties prepared certain written submission. The submissions for the Commission totalled some 70 pages. Six defendants lodged written submissions totalling some 2,965 pages. In addition, the first defendant (TNT Managmement Pty. Ltd.) sought to tender a further submission of 600 pages which Mr. Justice Franki rejected on the basis that 'the mere obligation to read or to decide whether or not to read such a mass of material in addition to the material already tendered by the first defendant was an unreasonable burden to impose on a judge'. The Trade Practices Commission lost the case. Legal costs are reliably reported as exceeding $ 10 million. In a judgment on 1 March 1985, Mr. Justice Franki ordered the Trade Practices Commission to pay all the costs of one defendant and 85 per cent of the costs of the others [(1985) ATPR para.40-530]. The judgment of Mr. Justice Franki in typed form occupied some 226 pages. [In the Australian Trade Practices Reporter the printed judgment occupies 72 pages]. The evidentiary rulings made by his Honour have also been reported [(1984) ATPR para.40-446; (1984) ATPR para.40-483] and occupy some 60 pages of the Australian Trade Practices Reporter.

[98] "*The Trade Practices Act: Proposals for Change*" — A Policy document issued by the Attorney-General, the Minister for Home Affairs and the Environment and the Minister for Employment and Industrial Relations [AGPS Canberra February 1984]. This document is commonly referred to by the colour of its cover as "*The Green Book*".

Tradestock was a new entrant insurance broker which wished to introduce a commission freight forwarding service. The Tradestock proposal that it operate as a commission agent would mean that freight forwarding companies would pay commission to it for business introduced in much the same way as a life insurance company pays commission to insurance agents who introduce business. It had been long standing policy of the National Freight Forwarders Association, a body comprising nearly all of the major freight forwarding companies in Australia, to resist this new method of doing business. When Tradestock wrote to each freight forwarding company asking each such company whether it would do business with Tradestock on the basis Tradestock proposed, the matter was discussed at a meeting of the National Freight Forwarders Association. The resolutions of various meetings were epitomised by the following resolution dated 4 August 1976:

> *Transport Brokerage Services*
> A letter from Tradestock Pty Limited was tabled and noted. The meeting reaffirmed its opinion that it is in each Company's best interests to deal directly with its own clients.

The Trade Practices Commission's allegations in its case against the various members of the National Freight Forwarders Association were:

> (That the various respondents) . . . made an arrangement and/or entered into an understanding whereby they and each of them . . . would not negotiate with, furnish quotations to, enter into contracts with, or otherwise deal with (Tradestock) . . . or any other agent or broker for or on behalf of persons seeking the services of such defendants or any of them for the carrying or forwarding of freight . . . through (Tradestock) or any other agent or broker.
>
> and
>
> that such defendants and each of them would only negotiate etc. . . . with persons . . . carrying on or forwarding . . . freight direct . . . and would not negotiate with (Tradestock) or any other agent and/or broker.

These allegations were sustained.

The reasonable contract bridge player would regard it as a lay down slam in light of this holding that there was both substantially anticompetitive conduct engaged in by the members of the National Freight Forwarders Association and that such members had given effect to an exclusionary provision. Mr. Justice Franki, however, managed to find no infringement on either basis.

Most of the case concerns pre 1977 conduct (when there was no legislation specifically covering exclusionary provisions) and an evaluation of competition issues. It is not here intended to canvass this aspect of the case.[99] An allegation was also made that post 1 July 1977, the members of the National Freights Forwarders Association had given effect to an exclusionary provision and this is the relevance of the case for present purposes. In this connection, Mr.

[99] For a detailed commentary on the case see W.J. Pengilley: *"How to boycott collectively with judicial approval — The Tradestock Case"* Advertising and Marketing Law Bulletin, Vol.1, no.5 (May 1985) p.70.

Justice Franki was called upon to interpret the term "exclusionary provision" in the *Trade Practices Act*. His Honour held as regards the 'particular persons' issue as follows:

> It is necessary to have regard to the meaning of the words 'particular persons'. The arrangement or understanding proved is not limited to Tradestock but extends to a class of intermediaries although the Statement of Claim excludes all but Tradestock in the allegations of giving effect to. Further, the arrangements or understandings proved did not extend to the question of dealing with any 'particular persons' in the category of those seeking freight forwarding services.
>
> The question arises whether the arrangement or understanding proved is sufficient to satisfy the words 'particular persons' and 'classes of persons'.
>
> I accept the submissions of the defendants in this regard that an arrangement or understanding not to deal with a class or category of persons does not satisfy the requirement of an arrangement or understanding not to deal with 'particular persons'. However, the word 'persons' will also include the singular. That conclusion is sufficient of itself to answer the claim made of giving effect to an exclusionary provision.[100]

The writer regards the *Tradestock Case* as being wrongly decided on virtually every point which the Court had to determine.[101] The 'particular persons' determination is but one of a litany of errors in the decision. His Honour is, in the writer's view, incorrect on any reasonable approach to the 'particular persons' issue which one may care to adopt. Thus:

— if one were looking from a pragmatic viewpoint at the object of the conduct, it was clearly Tradestock. This is so, even though the resolution was expressed in general terms (and would apply to any freight forwarding market entrant), because his Honour in fact held that:

> . . . the only broking services during the period under consideration were those offered by Tradestock. . . . There was no evidence of any other consultant or broker operating at the relevant time nor can any reasonable inference be drawn that one was likely to operate at that time.[102]

As the meetings of the National Freight Forwarders Association were summoned in response to approaches by Tradestock and decisions were taken specifically recording the fact that they were taken as result of a Tradestock approach, it seems not unreasonable to conclude that Tradestock was a 'particular person' which the Association had in mind when taking its decision. In view of all the facts, it is unbelievable, with respect, that his Honour could conclude that the National Freight Forwarders did not

[100] n.96 at pp.46136-37. The New Zealand *Commerce Act* has no exclusive dealing sections akin to s.47 of the Australian *Trade Practices Act*. The plural "persons" includes the singular "person" by virtue of s.23(b) of the Australian *Acts Interpretation Act* 1901 — "In any Act unless the contrary intention appears, words in the singular shall include the plural and words in the plural shall include the singular".

[101] n.99.

[102] *TPC* v. *TNT Management & Ors* (1985) ATPR para.40-512 at p.46128.

have in mind Tradestock as a 'particular person' such as to satisfy the s.4D definitional requirement.

— if the above suggestion (which is based largely on what the writer regards as a "common sense" conclusion) is unacceptable, it would seem clear that Tradestock was a particular person in the restricted sense referred to by Mr. Justice Gray in *Bullock*[103] in that it was a party "whose indemnity can be known or ascertained". Unfortunately, Mr. Justice Franki did not cite the earlier judgment of Mr. Justice Gray in *Bullock*.

— clearly Tradestock was a particular person within the terms of the Full Court decision in *Bullock*[104] bearing in mind that the Full Court had said that "it was arguable that particular persons may be identified by a general description, or as member of a designated class without being individually named" and in view of the even stronger views of Mr. Justice Smithers that "if the provision did in fact exclude . . . then that was one of its purposes".

2. *The 1986 Australian Amendments*

Possibly the answer to the 'particular persons' problem as decided in *Tradestock* was simply to regard his Honour, Mr. Justice *Franki*, as wrong and leave the Act unamended. An alternative may have been to have added a provision akin to s.47(13)(a) of the *Trade Practices Act* [dealing with exclusive dealing, of which there is no New Zealand equivalent provision] stating that the question of particularity could be determined from the actual conduct of persons or other relevant circumstances. An amendment akin to this was made in relation to the misuse of market power provisions of the Australian *Trade Practices Act* by inserting s.46(7) into the Act in 1986. Unfortunately, however, the Australian Government, without, it appears, making any evaluation in marketing terms of the effect of its decision, solved the alleged *Tradestock* particularity problem by making it illegal collectively to restrict or limit dealings with "particular . . . classes of persons" as well as with 'particular persons'. The writer's view, for reasons just discussed, is that this amendment was unnecessary. For reasons subsequently discussed, the writer's view is that the amendment is, in marketing terms, a vast overkill which in a number of cases can only be detrimental to the competitive process. New Zealand in the interests of legal uniformity has accepted the Australian solution and thus it has inherited, or will inherit, what this writer sees as quite formidable problems caused by the amendments.

3. *Per se illegalisation of collective restrictions on dealing with "particular classes of persons" — a discussion of the merits of the 1986 Australian Amendments.*

The prohibition of collective boycotting is either for economic "civil rights" reasons discussed at the beginning of this paper or on the assumption that such practice is *per se* anticompetitive and, therefore, should be legislatively illegal. For at least the latter reason it is illegal in the United States collectively to boycott only competitors. In Australia and New Zealand, it is illegal collectively to boycott any individual or any class of persons, whether

[103] n.93.
[104] n.94.

competitor or not. This is a massive extension of the United States logic in condemning *per se* the collective boycott.

It should be remembered that the *per se* prohibition on giving effect etc. to an exclusionary provision is only one weapon in the arsenal available to preserve competition. There is also the *per se* ban on price fixing[105] and the general prohibition on contracts, arrangements or understandings which substantially lessen competition.[106] In particular, the *per se* prohibitions of s.45A(1) of the Australian *Trade Practices Act* and s.30 of the New Zealand *Commerce Act*, though referred to in shorthand terms as being prohibitions on "price fixing", are, in fact, much more than this. The prohibition is on entering into or enforcing a contract, arrangement or understanding which has the *purpose* of, *has, or is likely to have*, the *effect* of fixing, *controlling* or *maintaining* prices or which is a contract, arrangement or understanding *providing for* such a fixing, controlling or maintaining of such prices *or any discount, allowance, rebate or credit* in relation to goods or services supplied or acquired by parties to the arrangement.[107] Without going into detailed case law, it is appropriate to note that the word "maintaining" is a word of wide import. It has at least the following meanings: "to keep in continuance or existence, to preserve, to keep in operation or force, to keep unimpaired, or to hold against attack".[108] "Control" has similar wide import with at least the following meanings: "to exercise restraint over, to dominate, to command, to hold in check, to curb".[109] For these reasons, courts have given a very wide interpretation of price fixing prohibitions. Thus, prices are "fixed because they are agreed upon"[110] and it is irrelevant whether or not there is any penalty for deviation.[111] It is quite strongly arguable that recommended prices of themselves contravene the price fixing provisions of both the Australian and New Zealand legislation unless exempted by the "50 member trade association exemption".[112] This is because recommended prices are "an agreed starting point"[113], that they constitute arrangements binding "in honour" and because price deviation is "frowned upon" and they are, therefore, effective in maintaining prices.[114] Whatever the view taken on

[105] n.61.

[106] n.62.

[107] Emphasis is in relation to provisions of importance in addition to aspects involving the "fixing" of prices.

[108] These are some of the more relevant meanings given of "maintain" in the Revised Edition of the *Concise Macquarie Dictionary* (Macquarie University, Australia — Doubleday 1982).

[109] These are some of the more relevant meanings of "control" in the *Macquarie Dictionary* (n.108).

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

[111] *U.S.* v. *National Association of Real Estate Board* 339 US at 489 (1950); *Plymouth Dealers Assoc. of Northern California* v. *U.S.* 1960 Trade Cases para.69,726.

[112] Exempting provisions from *per se* treatment apply to recommended prices involving trade associations of 50 or more members [see *Trade Practices Act* (Australia) s.45A(3); *Commerce Act* (New Zealand) s.32]. The interpretation of these provisions is not free from doubt. There has been no court case on the point to date.

[113] *Plymouth Dealers Assoc. of Northern California* v. *U.S.* 1960 Trade Cases para.69726.

[114] See various statements in *Eastern States Lumber Dealers* (n.70 and related text); *U.S.* v. *National Association ofReal Estate Boards* (n.111); *U.S.* v. *American Column & Lumber* (1921) 257 US 377; *Re Mileage Conference* [1966] 2 ALL ER 849; *Re New Zealand Council of Registered Hairdressers* [1961] NZLR 161; *Re New Zealand Master Grocers* [1961] NZLR 177; *Re Wellington Fencing Materials Association* [1960] NZLR 1121.

this point, it is clear that if a non-following of the recomended prices is something which can be "visited with . . . consequences",[115] then there is a *per se* illegal maintaining of prices. Undoubtedly the vast majority of collective boycotts involve the disciplining of *competitors* for *price deviations*.[116] The chief method of attacking such boycotts is by use of legislative provisions prohibiting arrangements between competitors fixing, controlling or maintaining price and not by use of the ban on exclusionary provisions. The exclusionary provisions sections of the Australian and New Zealand legislation may be a useful back-up to the prohibitions on price fixing, but they are not the prime assault weapon in such cases.

Even those cases where an individual has been singled out for boycott treatment because of his price cutting activities (which cases are fequently regarded as illegal on an analysis akin to that involved in the Australian-New Zealand exclusionary pprovision legislation) are most appropriately categorised as cases involving price fixing. The classic case in this area is *Klors* v. *Broadway Hale*.[117] The issue in that case was not that Klors was an individual being boycotted. The real issue was that there was a price arrangement between parties (admittedly aimed at Klors) "depriving manufacturers and distributors of their freedom to sell (to Klors at their

[115] *Barwick* C.J. in *Mikasa (NSW) Pty. Ltd.* v. *Festival Stores* (1972) 127 CLR 617 at 636. This case was decided in the context of a so called "recommended" price in relation to resale price maintenance legislation. However, there appears to be no reason why the principle is not also good in the horizontal agreement field.

[116] See, for example, *A.G.* v. *Dalgety Trading Co.* [1966] Argus LR 194 — boycott of liquor retailer by all wholesalers adding agreed 25% to his price because the retailer purchased wine from a non-member of the wholesaler's association and the non member's prices were less than those fixed by the association. *Redfern* v. *Dunlop Rubber Australia* (1963-64) 110 CLR 194 involved a "combination (of the defendants) among themselves . . . (which) . . . purported to govern the fixation of prices for traders and the terms on which the goods would be retailed." (p.207). For classic trader's boycotts to enforce retail prices in the motor industry, see *Ware & de Freville* v. *Motor Trade Association* [1921] 3 KB 41 — collective refusal to deal by manufacturers and retail dealers' association against retailers who infringed collectively agreed resale prices. Such dealing was regarded as conduct "which may lead to competition between . . . agents" [(pp.62-3) — see also p.71 for comments by Scrutton LJ as to non-objection of the law to conduct which prevents suppliers being ruined)], *Hardie Lane* v. *Chilton* [1928] 2 KB 306 (boycott to prevent alteration of list prices), *Thorne* v. *BMTA* [1937] AC 797 (boycott of discounting retailer). For a modern day equivalent of the United Kingdom cases "disciplining discounters" in the motor industry see the complex arrangements in *U.S.* v. *General Motors Corp.* 1966 Trade Cases para.71,750 (U.S. Sup.Ct.). The arrangements in this case between distributors and suppliers were complex methods of detecting and disciplining discounting dealers. For the latest U.S. authority on the "do's" and "don'ts" in the distributor/supplier agreement area see *Monsanto Co.* v. *Spray Rite Service Corp.* 1984 1 Trade Cases para.65906 (U.S. Sup.Ct.). *American Column & Lumber* (n.66) and *Eastern States Lumber Dealers* (n.70) each involved in various ways ascertaining the identity of discounters and their disciplining or, alternatively, the use of price fixing arrangements to achieve a certain defined goal.

[117] 359 US 207 (1959). The case involved an action by a retailer against another retailer, Broadway-Hale Stores, and various manufacturers and distributors of certain appliances. Broadway-Hale had conspired with certain manufacturers and distributors to supply Klors only at discriminatory prices. The arrangement was condemned on the basis that "It deprives manufacturers and distributors of their freedom to sell to Klors at the same prices and conditions made available to Broadway-Hale . . .". It was not saved by the fact that only one small entity was the victim. It was in essence the horizontal price restraint which was the basis of the condemnation.

own prices)".[117] Similarly in *Fashion Originators Guild*[118] (which many have seen as a case of a collective boycott to prevent "style piracy", and not as one to enforce price fixing arrangements between competitors), the arrangement was basically condemned because it was an illegal price fixing arrangement, the boycott only being the manner of enforcement of that arrangement.

The exclusionary provision legislation will, it appears, be most useful where there are collective restrictions which are either directly contrary to one's view of civil rights or which may have price and competition aspects sounding in, but unable to be directly sheeted home to, price or other anticompetitive restraints. An example is the post War collective boycott of immigrants, an example given by Sir Garfield Barwick as Attorney-General and cited earlier.[119] It can be seen long term that this prevents market entry though this may be hard to prove in law. Another example is that of a stock exchange member, one Mr. Silver, who had the plugs pulled on his telex communications life support system by the New York Stock Exchange without reason.[120] The decision in *Silver* had very little to do with economics, the only acknowledgement to that discipline in the decision being the finding that stock exchange members and Mr. Silver were, in fact, competitive each with the other. The conclusion was that is was unfair for such high handed procedures to be adopted and Mr. Silver was entitled to know about, and protest about, the proposed course of action prior to its implementation. If such arbitrary treatment is to be allowed, it obviously will not be long before price deviants will also be able to be so disciplined. Thus there are long term competition aspects involved in controlling arbitrary treatment. Again, however, as a matter of legal proof, these long term competition aspects may be difficult to establish.

Cases somewhat easier to see in price competition terms but undoubtedly hard to sheet home under legal rules of evidence and proof might be:

— *Canberra Cabs*[121]. Twelve new Taxi plates had been issued in the Australian Capital Territory. The govermental decision made in issuing these plates did not accord with the views of members of the Canberra Taxi Co-Operative, a monopoly cab company in the Territory. The cab

[118] 312 US 457 (1941). It was the price fixing arrangements which were condemned. It was argued by the defendants that their action was justified (in Australian — New Zealand terms "authorizable") in order to prevent "style piracy". This defence was rejected. The condemndation was in respect of a combination whose prime restraints were preventing members from participating in retail advertising, regulating discounts and prohibiting members from selling at retail. The case stands for no more than that combinations cannot plead the reasonableness of their cause when there is a conspiracy to effect an unlawful objective. In Australia or New Zealand, authorization could have been sought for the "public benefits" of the arrangement but this is unavailable in the United States.

[119] n.33 and related text.

[120] *Silver* v. *New York Stock Exchange* 373 US 341.

[121] See Trade Practices Commission: *1982-3 Annual Report* pp.76-7. The case was put more as a monopolisation case but was put in the alternative as an exclusionary provision. The Commission's report gives the outcome of its intervention but, as regards the law, says only that warning was given to "the Co-operative that its conduct could breach ss.45 and 46 of the Act". The price effect is that the Co-operative did not want more cabs in competition with existing members.

company refused to supply radio services to the new licensees. It subsequently relented upon intervention of the Trade Practices Commission.

— *Expulsion from the Nurserymen's Association of Western Australia*[122] of two members who were not prepared to accept trading restrictions imposed on them by the association and who were expelled without any specific charges being made and without the conduct of any hearing at which the parties were present.

Necessarily, examples tend to be selective. Nonetheless there are certain common themes which show themselves in collective boycott cases which merit *per se* condemnation. These are:

— Most commonly the conduct is price related. Collective boycotts are, therefore, most appropriately, and generally most adequately controlled by *per se* restraints on contract, arrangements or understanding fixing, controlling or maintaining prices.
— There are, nonetheless, cases which are not directly price related. There are far fewer of these because traders are more interested in price than anything else. Some cases with "civil rights" overtones, although perhaps not sounding directly in price terms, may ultimately be so directed. This price direction may, however be difficult to prove at law. There is, therefore, a case for legislation covering collective exclusionary conduct in order to protect basic economic civil rights. Given a realistic interpretation of the term "particular persons" then the party subjected to collective action will normally be easily identifiable, simply because collective boycott activity cannot be conducted *in vacuo*.
— In nearly all cases of which this writer is aware, the party against whom collective action has been taken has been a competitor, actual or potential, of the parties involved in such collective action. Sometimes the competitor link is hard to demonstrate (e.g. a collective boycott of immigrants). Nonetheless the case involving a total non-competitor where real social or economic harm is done must be exceedingly rare. For this reason, *per se* condemnation of all such cases cannot be supported.

There does not seem to be any strong case for extending exclusionary provision illegality to cover actions against "classes of persons". This is especially so when there is no limitation to the effect that the class of persons must be a class of persons competitive with those carrying out the boycott.

Whilst there may well be good reasons in civil rights terms and in economic terms for preventing *per se* collective boycotts by competitors of competitors, this logic does not extend to the prevention of collective action by parties in relation to non-competitor entities. There may, for example, be very good reasons why drug companies may wish collectively to limit supplies to certain types of outlets and not deal with others. These reasons may be quite genuinely

[122] See Trade Practices Commission: *1980-81 Annual Report* p.70; *1981-2 Annual Report* p.91. The price effect is that the expelled members traded longer hours and on days when other association members did not wish to trade. There was an attempt to prohibit trading on such days and at such hours via the association. There was also material indicating that the expelled members discounted below the prices suggested by the association.

safety based. If the excluded entities can find words to describe themselves in terms of a particular class, such conduct by the drug companies will be illegal *per se*. Hoteliers may band together to refuse to supply a particular class of persons called "drunks". Again, illegality *per se* follows. A trade association may well wish to confine business to members and not deal with entities at another stage of manufacture or distribution. If such non-members can find words to describe themselves as a class, (such as "non-member electricians" for example) then the restriction of the association's business is illegal *per se*. If, in Australia or New Zealand, banks were to deny credit card facilities to adult entertainment industry outlets, this would appear to be *per se* illegal. Analysis in the United States, however, has led to the conclusion that:

> . . . the relationship between the parties is completely unlike the relationship in those cases where the courts have found actionable refusals to deal. In this case there is no allegation that defendants conspired with competitors of the plaintiffs in order to put plaintiffs at an economic disadvantage. Nor is there any allegation that defendants seek to gain any competitive advantage for themselves or create monopoly power by the alleged concerted refusal to deal.[123]

Of more difficulty in Australia and New Zealand is the problem of trade associations wishing to set standards or certify products. The problem of doing this in the Australian-New Zealand context is that the person who is not certified can claim that he had an exclusionary provision restriction applied to him. Sometimes the complainant will find it hard to describe himself with enough particularity to constitute a particular class of persons. A court may, for example, say that the term "non-members" does not describe a particular class as it refers to most of the world other than the more limited number of association members. But "non-member electricians" would, one would think, be adequate to describe a particular class of persons.

Normally one would think that a trade association would be saved if it did not have any tainted purpose in excluding from membership or in conducting certification programmmes. In Australia, and more likely than not in New Zealand too, this argument will not be sound because, as we have seen, purpose does not mean the long term objective of conduct but means the short-term necessary effect of it.[124]

That trade associations may be in considerable difficulties because, amongst other things, of an over hasty government reaction to the *Tradestock Case* is somewhat sad. In the United States, the law allows considerable flexibility to trade association programmes where these are not vehicles for fixing prices, lessening competition or otherwise boycotting or excluding competitors.[125] There seems no reason why there should be any limitation on conduct other than that having such effects. In Australia and New Zealand it will be a pity if similar versatility cannot apply purely because of inadequacies either in the concept of, or in the drafting of, the exclusionary provisions aspects of competition law.

[123] *Alpha — Sentura Business Services Inc.* v. *Interbank Card Assn* 1979-2 Trade Cases para.62960.
[124] See Part IV.D.
[125] n.85

In short the Australian government did not think it all through too well. Mr. Justice Franki in *Tradestock* succesfully caused a panic, even though his decision is, with respect to his Honour, so clearly incorrect that it probably merited no amendment whatsoever to the legislation.

It is trite law, but needs to be here stated simply because it is so often forgotten, that taking collective conduct out of the *per se* illegal category does not necessarily legalise it. It is just that the conduct is not *per se* condemned. This means that the conduct falls for evaluation on the basis of whether or not it substantially lessens competition. Some of the examples given of conduct which the writer believes should not be *per se* condemned may well fail this evaluation. It is certainly not claimed that all such conduct is necessarily legal. What is claimed is that the examples given are examples of conduct which cannot be assumed to have such a pernicious effect on competition that they merit *per se* condemnation.

V. AUTHORIZATION

In Australia, since the 1986 amendments, it appears that there will be a greater need than previously to obtain authorization of various practices. Both for this reason and in order to indicate to New Zealand readers the possible trends in public benefit authorization assesssments, it is appropriate to comment briefly on the likelihood of Authorization being obtained. Conclusions to date must be based entirely upon Australian experience as there have not yet been enough New Zealand decisions to assess the thoughts of the Commerce Commission on public benefit issues. It would be surprising, however, if Australian experience was not followed fairly closely in New Zealand. This is because nearly every industry likely to seek Authorization in New Zealand will have run a prior Australian gauntlet. No doubt the Australian treatment of such industry will be the first place to which the New Zealand researcher will turn.

The Authorization decisions in Australia seem to break down into the following categories which are of present relevance:

1. Authorization relevant to collective boycotts to enforce price fixing arrangements.
2. Authorizations relevant to exclusions because of rationing necessity.
3. Authorizations directly impacting on usual trade association activities.

We will discuss each of the above subjects in turn. Sample decisions only are taken briefly to illustrate the main relevant issues.

1. *Authorizations relevant to collective boycotts to enforce price fixing arrangements*

The Trade Practices Commission has consistently taken a hard line towards price fixing arrangements. Indeed, one of its first guideline statements advised that in the great majority of even recommended price agreements "it is clear that such agreements interfere with the free operation of the competitive market and inevitably act to inhibit or diminish competition".[126] Based upon overseas

[126] Trade Practices Commission: *Information Circular No.3* (10 December 1974) re Recomended Price Agreements.

decisions and experience[127], this conclusion may well have been a reasonable one. However, it led in 1977 to an Australian legislative exemption of "pure" recommended price arrangements of trade associations with over 50 members from *per se* treatment. This exemption has been followed in New Zealand.[128]

The Australian Trade Practices Commission, however, has seen public benefit in certain price arrangements. Thus, in the case of recommended prices of a trade association serving some 3000 odd retail milk bars and mixed businesses, the Commission saw public benefit in the arrangements in that the association's recommmended price list gave small business some useful assistance in its costing. The Commission issued as statement of general principles as to what it regarded as "small" business in this context. The essential features of this statement are:

— that members of the association must be in competition with larger members outside it. Thus the association prices will have little effect on general price levels because of outside pressures;
— that competition should be such as to depend upon location and convenience as much as, or more than, on price;
— that the association's recommended prices should assist in efficiency (e.g. by saving time in calculations of prices). This saving of time and resulting efficiency will constitute a public benefit. Even if the recommended prices do not assist efficiency, however, the structure referred to above will ensure that there is no great anticompetitive detriment.[129]

Similarly, the Trade Practices Tribunal has recognised that small business road haulage contractors should be permitted to band together to negotiate terms with larger business as this promotes the public benefit of industrial harmony. However, the Tribunal was of the view that, pursuant to such arrangements, there should be no authorization for the making of any contract, arrangement or understanding which would constitute an exclusionary provision contrary to s.4D of the *Trade Practices Act*.[130] This has been an approach which has subsequently been adopted in a number of Commission decisions such that it is now fair to say that the chances of obtaining authorization for a collective boycott to back up a price fixing arrangement are virtually nil.[131] Unfortunately, the reasons for this view have never been stated articulately. The restriction was imposed by the Trade Practices Tribunal

[127] n.111, n.113, n.114 and related text.

[128] n.112.

[129] See *Retail Confectionary and Mixed Business Association (Victoria)* 1977-78 ATPR (Com) 16989 and statement of general principles attached to that decision.

[130] *G. & M. Stephens Cartage Contractors* (1977) ATPR para.40-042. Authorization to enforce an exclusionary provision was not sought and the Tribunal's authorization was conditional upon no s.4D conduct being permitted.

[131] *N.S.W. Road Transport Association* 1979-80 ATPR (Com) 15553; *NRMCA (Qld) Ltd.* (1980) ATPR (Com) 52,137; *NRMCA (SA) Inc.* (1980) ATPR (Com) 52228; *Crushed Stone Association of Australia* (1982) ATPR (Com) para.50-019; *Long Distance Road Transport Assoc. of Aust.* (1982) ATPR (Com) para.50-030; *Quarry Carters Assoc.* (1981) ATPR (Com) para.50-014. See also *Acmil Industries Pty. Ltd. & Transport Workers Union* (1980) ATPR (Com) 52,227; *Victorian Road Transport Association* (1980) ATPR (Com) 52033; *West Australian Road Transport Assn.* (1980) ATPR (Com) 52201; *Australian Road Transport Federation* (1982) ATPR (Com) para.50-031; *Long Distance Road Transport Assoc. of Aust.* (supra) (Trade Union "closed shop" not to be enforced).

in its initial decision[132] because authorization for collectively enforced exclusionary conduct was not sought. It has simply "followed on" into other decisions. The only real observation on the point was made by the Trade Practices Commission in its authorization of small smash repairers collectively to agree rates to be quoted to large motor vehicle insurers.[133] In granting an interim authorization to negotiate rates, the Commission said:

> The Commission wishes to make it clear that the authorization sought, and the interim authorization granted, do not cover refusals by motor body repairers collectively to carry out repairs while the negotiations take place. The action by motor body repairers not to repair vehicles while this dispute on rates exists is creating serious problems for the numerous consumers who cannot have their cars repaired. This is not a strike by employees but amounts to a strike by small businessmen. As such, it may well breach the *Trade Practices Act*.

There is not much economic logic in refusing small businesspersons permission to engage in exclusionary conduct. If one permits them to combine to negotiate with bigger entities, it is quite illogical to forbid the collective conduct which gives strength to their negotiation. The small business entities are negotiating in circumstances where they can surely bark but are quite incapable of biting. The Commission has, perhaps subconsciously, apparently adopted the view that collective exclusionary conduct has social and other ramifications which are so unacceptable that the conduct itself is impermissible.

To balance the equation, it is also true that applicants have, on many occasions, not applied for authorization of collective exclusionary conduct — presumably on the basis that they believe they have no realistic expectation of obtaining such authorization.

2. *Authorization relevant to exclusions because of rationing necessity*

In *Calvary Hospital (ACT) Incorporated*[134] the problem of "rationing" was assessed. Calvary Hospital had limited medical facilities and more applicants for medical positions than could be justified. Calvary set up a system, which objectively assessed the capacity of medical applicants. It was accepted that a body did have to be set up for this purpose and that the proposed procedure was the best which could be implemented in all the circumstances. Authorization was granted. The public benefit was that such a system was necessary to the functioning of the hospital and that the hospital contributed to the health services available to the public.

The *Calvary Hospital Case* did not involve competitors acting in concert. However, trade asociations, which by definition compromise competitors acting in concert will frequently have akin problems to those in the *Calvary Hospital Case*. Often trade association "rationing" problems relate to matters such as the allocation of space at trade fairs or decisions in relation to who can participate in some other trade association function. There is only one way

[132] n.130.

[133] *Motor Traders Association of NSW* (and associated applications) 1983 ATPR (Com) para.50-063. The terms of interim authorization are set out at p.55300. See also *Canberra — Queanbeyan Panel Beaters Group* (1984) ATPR para.50-067.

[134] (1979-80) ATPR (Com) 15581; (1982) ATPR (Com) para.50-032.

such a problem can be dealt with and that is to set up some "fair" standards impartially administered. The very fact that joint exclusionary activity is involved in rationing appears to mean that, in Australia and New Zealand, there is also a *per se* breach of competition law involved unless authorization is obtained.

In the United States, arrangements of a rationing kind, fairly administered, have no anticompetitive consuquences.[135] This is as it should be. It seems quite absurd that the failure to obtain an authorization in such circumstances should involve *per se* illegality. There are no undesirable social or economic consequences which follow from the conduct. If a party alleges that the collective activity is improperly exclusionary of him, then such party should be capable of demonstrating that a substantial lessening of competition flows from the conduct in question.

3. *Authorization directly impacting on usual trade association activities*

By their very nature, trade associations have to set criteria and standards for membership and matters akin. They must constantly assess applicants for membership and be involved in terminating membership for reasons such as unacceptable conduct. Certainly trade association exclusionary activities should not be used as a method of enforcing price fixing arrangements, and this is quite fundamental law.[136] A number of trade association activities, however, which are not anticompetitive, and thus would pass muster in the United States, appear to be illegal *per se* in Australia and New Zealand because of the definition of "exclusionary provision" in the law of each country.

Authorization is not an appropriate safeguard to trade associations that may have to engage in exclusionary activity which, though not anticompetitive, infringes the exclusionary provision definition. Public benefit must firstly be found before authorization can be granted. As has been noted, it is often difficult to weigh the public benefit balance. Two examples in the United States of this problem are those previously given of a collective agreement by credit card organizations not to deal with adult entertainment outlets[137] and a collective agreement by football clubs not to engage players who bet on games.[138] Though there is clear collective exclusionary activity, in the United States there is no *per se* illegality because one group of competitors is not acting collectively against another actual or potential competitor. The law is fairly clear. In Australia or New Zealand, the public benefit whim of the respective authorizing Commissions makes it almost impossible to know how entities may act in such circumstances. Even if authorization is ultimately granted, the delays involved in hearings and possibly also in appeals could well negate the effectiveness of the association's action as this effectiveness may depend upon an immediate response to the problem in hand.

There is also another problem. Trade associations as such generally give rise to no public benefit. On this theme, the Trade Practices Commission said in one decision in February 1979:

[135] See *Deesen* v. *Professional Golfers' Association* (n.85).

[136] See cases cited at no.116. For activities prohibited to trade associations in this field see *Pengilley* (n.85). See also cases cited at n.85 and Federal Trade Commission opinions there referred to.

[137] n.123 and observations in related text.

[138] n.58.

> As a general comment, the Commission does not consider that the mere setting up of a trade association is enough to constitute a benefit to the public. This is by no means to assert that trade associations should not be set up, or that their existence puts them at risk of contravening the *Trade Practices Act* in the absence of authorization. There are hundreds of trade associations in Australia that have never contemplated authorization, and in the Commission's view, do not need to do so . . .[139]

This comment as regards the lack of a need for an Authorization was clearly true pre July 1977. It was truer when made in 1979 than it is now. Now that there have been further decisions on what is meant by "purpose"; now that the legislature has widened the definition of "exclusionary provisions" to include "classes of persons"; and when it is now fully realised that the relevant "class of persons" may be *any* class, competitive or otherwise, with the boycotting parties, trade associations run a considerable risk, without authorization, of *per se* illegality of many of their activities even where these activities are singularly unobjectable. Clearly enough the law needs change to prevent this result. Alternatively, a clearance procedure[140] could be reinstated specifically to enable certainty of trade association activity which itself gives rise to no public benefit. This suggestion has particular merit if the views put in Part IV D3 as to a changed competition purpose test do not find acceptance.

Having said all that, the Trade Practices Commission has, in fact, found public benefit in a number of trade association arrangements. Some such benefits have been the joint accreditation procedures for travel agents[141], facilitating the auction sale of wool[142], facilitating the better registration of cattle breeds to enable detection of abnormalities[143], facilitation of stock exchange activities and share dealing[144], providing the mechanism through which livestock selling on standard terms may be carried out[145], providing arrangements to ensure the financial stability of travel agents[146], ensuring ethical standards of real estate agents[147] and facilitating multiple listing of real estate properties to ensure greater market coverage[148].

The above decisions, and others akin to them, merit reading not only for the public benefit evaluations in them but also to note the objections taken

[139] *Australian Funeral Directors Association (Queensland Branch)* (1979) ATPR (Com) 15558.

[140] n.88.

[141] *International Air Transport Association* (1980) ATPR (Com) 52152; (1981) ATPR (Com) 55,274.

[142] *Brisbane Wool Growers Association* (1980) ATPR (Com) 52216; *Adelaide Woolbrokers Association* (1982) ATPR (Com) 55420; *Melbourne Woolgrowers Association* (1981) ATPR (Com) para.50-006; *Tasmanian Woolbrokers Assoc.* (1981) ATPR (Com) para.50-012; *National Council of Wool Selling Brokers* (1981) ATPR (Com) para.50-007.

[143] *Aust. Poll Hereford Society* (1981) ATPR (Com) para.50-015; *Murray Grey Beef Cattle Society* (1981) ATPR (Com) para.50-017.

[144] *Australian Associated Stock Exchanges* (1982) ATPR (Com) para.50-049; (1984) ATPR (Com) para.50-068; para.50-075; para.50-080; para.50-081.

[145] *Queensland Country Livestock Associations* (1981) ATPR (Com) para.50-008. Note list of activities set out in this decision which the Commission states may be carried on without risk and "Indeed, . . . may foster competition."; *Queensland Livestock Property and Produce Brokers Assoc.* (1981) ATPR (Com) para.50-009.

[146] *Australian Federation of Travel Agents Ltd.* (1982) ATPR (Com) para.50-047.

[147] *Real Estate Institute of Australia (1981) ATPR (Com) para.50-013.*

[148] *Real Estate & Stock Institute of Victoria* (1984) ATPR (Com) para.50-082.

by the Trade Practices Commission to various aspects of association arrangements. The Commission has been asiduous in ensuring, in particular, that the public benefits claimed are not used as a cloak behind which price fixing arrangements are effected. The Commission has also been very careful to ensure that procedural "due process" is written into trade association rules prior to authorising them.[149] In one case the Commission observed that:

> clauses which invest the governing body of a trade association or other similar organization with wide ranging and unfettered discretions without providing some guidelines for their fair and proper exercise have the potential to be used for anticompetitive purposes . . .
>
> Provisions may inhibit competition where they attempt to control advertising within the industry; provide for exclusion from the association without specifying grounds for such exclusion; attempt to oust the jurisdiction of the courts and thereby make the association a law unto itself; or generally seek to, or by their very nature tend to, inhibit firms from engaging in competition for fear that they will in some way be disciplined or ostracised by their peers. Direct restraints on price competition and on 'poaching' sometimes occur.[150]

This view is, of course, totally consistent with the observations in *Silver* v. *The New York Stock Exchange*.[151]

4. *Overall conclusions from authorization decisions*

The conclusion one reaches from the authorization decisions in Australia is that the outside observer would regard the *de facto* competition law in relation to trade associations as very similar in Australia and the United States — or at least as aiming at similar ends. The difference, however, is that the United States laws enable independent decision making and individual risk taking. Although this was an objective in Australia when the clearance procedures[152] were abolished in 1977[153], the introduction of the statutory exclusionary provision in that year, and the massive extension of its coverage by the 1986 amendments, makes individualistic risk taking a difficult proposition and one which can often be only partly succesful. In many cases, it appears as if trade associations will have to apply for Trade Practices Commission authorization to be tolerably protected — even when their activities are not anticompetitive at all. The difficulty, insurmountable in many cases, is that authorization will not always be available to associations because their activities, though not anticompetitive, give rise to no public benefit.

[149] For brief summary of Commission holdings see Pengilley: *"Trade Associations, Fairness and Competition"* [Law Book Co. (1981)] pp.50, 94.

[150] n.139.

[151] n.120.

[152] n.88.

[153] "Experience has shown that the clearance procedure provided by the present law has involved the Trade Practices Commission very closely in the daily operations of Australian business. Whatever justification this may have had in the early days of the legislation has now disappeared. To continue the clearance procedure would perpetuate unnecessary interference by government in the exercise of economic initiative. The Bill thus abolishes the clearance procedure." The government also abolished clearance in order to encourage "self reliance . . . in a private enterprise system". Senator Durack — *Parliamentary Debates (Hansard) Senate 31 May 1977* p.1711. Second Reading Speech to Trade Practices Amendment Bill.

All of this places trade associations in a singularly difficult position in Australia and, one would believe, also in New Zealand. This difficult position is one from which their United States counterpart associations are, quite properly, free.

VI. How Should The 'Exclusionary Provision' Law Be Changed Yet Still Be Effective?

1. *The writer's view as to desirable changes*

The writer believes that the exclusionary provision law is another of those Australian laws which may be categorised as having "unintended consequences"[154] and, for this reason, merits change. The New Zealand law is in the same position.

If it were only the Australian Trade Practices Commission or the New Zealand Commerce Commission which had power to bring cases, one could, no doubt, pursue a type of "rule of reason" approach to infringement litigation. These bodies, presumably, would not be interested in bringing cases where there were no general competition issues involved. However, private litigants have no such wider horizons. If the literal parameters of the exclusionary provision definition are breached, the private litigant is able to sue. Whatever the reason for the exclusion and whatever the status of the party excluded, the present legislation categorises the collective conduct as illegal *per se* and provides a cause of action to the excluded party. Clearly the legislation requires amendment as this is a vast overkill.

No doubt the cause of uniformity between Australian and New Zealand law is a commendable one — particularly in light of provisions in the *Closer Economic Relations Treaty* between the two countries which are aimed at achieving this end. New Zealand, however, has not totally followed Australian competition law in other areas. It has no price discrimination provisions. It has not followed the extensive Australian statutory law on exclusive dealing.

[154] The cynic could well claim that the words "unintended consequences" have been elevated to an art form in recent Australian politics. The legislative drafting technique used in Australia of recent times seems to be one of including every possible transaction within the legislative net and then, when "unintended consequences" appear, to exempt such "unintended consequences" by Ministerial statement, by regulation or by further amending legislation. The *cause celebre* in this context was the governemental amendments in October-November 1986 to the Fringe Benefit Tax ("FBT") legislation. These amendments exempted business from having to pay 46c. in the $ to the government when an employee was sent home by taxi because of late working hours; when an employee was permitted to use an employer's office equipment for a personal purpose; when a person obtained an accomodation "benefit" because s/he "lived in" to look after an elderly person; or when an employee was given a safety award. Notwithstanding the amending legislation, there are still a good number of other matters which are, one would think, subject to FBT but which would, on any rational basis, be regarded as an "unintended consequence" but this paper is not an appropriate one in which to explore this issue. The 1986 amendments to s.4D of the *Trade Practices Act* are, in some ways, another manifestation of this governmental trend. In an article in the *Australian Financial Review* on the first business day of the Act's operation, the writer commented:

> It is not as if the Government has not been advised of the legal ramifications of what it has done. It has, however, chosen to go ahead . . . By its decision in this regard, the Government has only confirmed that in politics there is no such thing as the automatic rejection of that which makes no sense. W.J. Pengilley: *"Knowledge of Act changes is a Must"* — Feature article *Australian Financial Review* 2 June 1986.

It has varied the Australian provisions relating to misuse of market power. New Zealand could easily dissent from the extreme Australian position on exclusionary provisions without sacrifice to the object of basic uniformity of commercial legislation expressed in the *Closer Economic Relations Treaty*. In the writer's view, New Zealand would have been wise not to have followed *in toto* the Australian approach to the exclusionary provision law.

There are a number of policy options for amendment of the exclusionary provision law.

The options, the arguments for and against each, and the writer's conclusions on each are summarized in Appendix "A". This Appendix also serves as a summation of the text of the paper.

In short, the writer believes, for the reasons stated in Appendix "A", that:

(a) There should be an amendment to the definition of exclusionary provision to provide:
   (i) that the boycotted parties have to be parties competitive with those conducting the boycott if illegality *per se* is to flow;
   (ii) that the test of purpose should be whether the purpose is to lessen competition between parties to the agreement or those parties and their competitors; and
   (iii) that the Australian 1986 amendments to provide that a boycott can apply to "classes of persons" as well as "particular persons" should be negated and the pre-1986 Australian position restored.

   The effect of these amendments would be that *per se* condemnation would be applicable only to collective boycotts of particular persons who are competitors of those carrying out the boycott and where the purpose of the conduct is to limit competition between the parties to the agreement or those parties and their competitors. Other practices would fall for assessment as price fixing arrangements (and condemned *per se* if found so to be) or as arrangements affecting competition (and condemned after an enquiry on this issue if they substantially lessen competition).

(b) A provision should be inserted giving guidance to the courts in ascertaining what constitutes "particular persons". This may overcome literal interpretations such as that of Mr. Justice Franki in the *Tradestock Case*.

(c) That clearance should be reinstated for trade association activities if the suggestions in (a) above, and particularly those in (a)(i) and (a)(ii), are not adopted. This would permit the Trade Practices Commission to grant statutory immunity for trade association activities which had no anticompetitive consequences but do not necessarily sound in public benefit terms. The problem at the moment is that some such activities may well be *per se* banned because of the over zealous scribing of the Parliamentary draftsperson's pen and yet incapable of authorization.

(d) That though the interpretation of "purpose" certainly poses problems for trade associations, the statutory language should not be varied to permit trade associations to argue an innocent "ultimate objective". Any problems caused to trade associations in the present interpretation of the word "purpose" can be adequately covered in the manner suggested in (a) and (b) above.

2. *A draft section to implement the writer's view as to desirable changes*

On the basis that one should always try to be constructively useful, Appendix

"B" contains a suggested re-draft of s.4D of the Australian *Trade Practices Act*.

This could easily be adopted for New Zealand purposes by appropriate amendment to s.29(1) of the *Commerce Act*.

The writer would be happy to have any comments on the draft in Appendix "B". No doubt, there will be debate as to its adequacy.

3. *Some observations on drafting style and some comments on the different Australian and New Zealand drafting approaches.*

In drafting the section in Appendix "B", the writer has been unable, as a matter of conscience, to use the Australian Parliamentary draftsperson's statutory drafting style. It is unbelievable that it should take a sentence of 123 words in s.4D(2) to explain when two persons are competitive with each other. It is equally difficult to see why an exclusionary provision should be defined in s.4D(1) in a continuous flow of no less than 183 words. Although neither sub-section quite reaches the 253 words involved in the *Bismac Case*[155], there is a certain sympathy with the observations of Mackinnon L.J. when reading s.4D and, indeed, many of the other sections of the *Trade Practices Act*. His Lordship said in *Bismac*:

> In the course of three days hearing of this case I have, I suppose, heard s.4 of the [Trade Marks] Act of 1938 read, or have read it for myself, dozens if not hundreds of times. Despite this iteration I must confess that, reading it through once again, I have very little notion of what the section is intended to convey, and particularly the sentence of two hundred and fifty-three words, as I make them, which constitutes sub-s.1. I doubt if the entire statute book could be succesfully searched for a sentence of equal length which is of more fuliginous obscurity.[156]

Why drafting in terms of prolixity, repetition and convolution should be the Australian order of the day completely mystifies the present writer.

The concern about the *Trade Practices Act* being comprehensible to business was expressed by the Minister for Business and Consumer Affairs when he charged the Trade Practices Review Committee in 1976 amongst other things, to

> pay *particular attention* to the need to ensure that the *Trade Practices Act* is sufficiently certain in its language to enable persons affected by it to understand its operation and effect so as to be reasonably able to comply with its obligations in the ordinary course of business.[157]

[155] *Bismac Ltd.* v. *Amblins (Chemists) Ltd.* [1940] 1 Ch.667.

[156] n.155 at p.687. For some other humorous utterances of judicial anguish in relation to the incomprehensibility of various statutes see *Davy* v. *Leeds Corporation* [1964] 3 All ER 390,391; *City of Marion* v. *Lady Becker* (1973) 6 SASR 13,29; *Livingston* v. *Commissioner of Stamp Duties* (1960) 107 CLR 411,446. See also Current Topics *"Unintelligible Acts"* (1930) 4 ALJ 105,106; *"Some Reflections on Law and Lawyers"* (1950) 10 Cambridge LJ 361. An excellent paper on this topic citing the above material, and an advance copy of which the writer has read, has been written by David St.L. Kelly, Chairperson of the Victorian Law Reform Commission and is to be published in the Adelaide Law Review under the title: *"Legislative Drafting and Plain English"*.

[157] Reference 2 to the Swanson Committee (n.158). The emphasis of the words "particular attention" is that of the writer.

The Swanson Committee thought the above term of reference so important that it answered the Minister's charge to pay *particular attention* to the comprehensibility of the Act by saying in its Report[158] *not one word* specifically addressed to this subject. In 1977, there followed a series of amendments which more than doubled the volume of the original Act. Presumably this sort of thing must occur in Australia when the Australian Parliamentary Counsel in his Annual Report can proclaim with pride that most of the criticism of his drafting seems to be based on the mistaken belief that all statutes "ought to be able to be expressed in simple language capable of being understood by the average citizen"[159]. However, all is not without hope. The Victorian Law Reform Commission has recently re-drafted s.35 of the *Fair Trading Act* of Victoria [akin to the remedies provision of s.80A of the *Trade Practices Act*] into a single section of 58 words. The original comprises 4 subsections, two subsections and a total, on the writer's count, of around 600 words.[160] The writer subscribes to plain English drafting rather than the Canberra style. Appendix "B" cuts the length of the Section by two thirds, eliminates superfluous use of words and eliminates what this writer believes to be the splitting of inconsequencial hairs. It is this writer's attempt, in relation to a re-draft of s.4D, to answer (admittedly a decade late) the charge put to the Swanson Committee in relation to statutory language.

One must have considerable sympathy with New Zealand in having to follow Australian legislation for the sake of uniformity. Following the Australian legislation means following the Australian drafting style and this is a curse which no person should ever place on his neighbour. The New Zealand draftsperson is, however, to be commended for his adaptation of the Australian legislation. Where it has proven possible to do so, there has been a far superior drafting technique utilised in New Zealand to that in Australia. This writer is particularly pleased to see the reprehensible double negative in the Australian s.45A(5) ["a provision of a contract . . . shall not be taken not to have the purpose . . .] has not been repeated in New Zealand. The New Zealand draftsperson has very sensibly covered the position by providing exceptions in ss.31, 32 and 33 [Nothing in s.30 . . . applies to a provision of a contract . . . to the extent that (it does certain things)"].

From a statutory drafting viewpoint, it would have been a far better situation had Australia inherited its law from New Zealand rather than vice-versa. All of this means that there is much which could have been, and should be, done to take unnecessary obfuscation out of the Australian legislation.

[158] *Trade Practices Review Committee* [T.B.Swanson Chairman]. The Report of the Committee (known in Australia as the "*Swanson Committee Report*") was handed to the Minister on 20 August 1976.

[159] 1984-5 *Annual Report of the Office of Parliamentary Counsel* (attached to Annual Report of the Attorney-General's Department) p.259.

[160] Law Reform Commission of Victoria — *"Legislation, Legal Rights & Plain English"*, Discussion Paper no.1 (August 1986) pp.3-5.

APPENDIX "A"

POSSIBLE OPTIONS IN RELATION TO AMENDING THE EXCLUSIONARY PROVISION DEFINITION

[References to Parts are to the Parts of the Paper where the relevant question is discussed]

POSSIBLE AMENDMENT	ARGUMENTS IN FAVOUR	ARGUMENTS AGAINST	THE WRITER'S CONCLUSIONS AS TO DESIRABILITY
1. Change "purpose" to enable ultimate "object" to be pleaded. [Part IV.D]	1. Would allow trade associations to enforce standards etc. without breaching Act *per se*.	1 (a) Contrary to s45D interpretation — consistency desirable. (b) Would lead to Section *de facto* being unenforceable. (c) Problem can be handled in other ways.	Not favoured for reasons stated in Arguments Against column — in particular, the problem can be handled in other ways.
2. Delete 1986 amendments extending the section to cover a boycott of a "class of persons". [Part IV.E]	2 (a) Amendment not needed (b) "Class of persons" too wide especially when class does not have to be a class competitive with boycotters. (c) Persons subject to boycott normally always ascertainable. (d) Improperly characterises a wide variety of conduct *per se* illegal when it	2 (a) 1986 amendment needed because of *Tradestock* decision. (b) Present law prevents collective activity on wide front. No reason why boycotts should be only by competitors of competitors. (c) Need *per se* treatment as competition test difficult to apply in practice.	Favoured [Primarily because many activities banned *per se* under this definition have not been demonstrated as having a pernicous effect on competition. Indeed some have been found to have no anticompetitive effect. The problem is not solved by authorization as no public benefit is provable in some association activities].

POSSIBLE AMENDMENT	ARGUMENTS IN FAVOUR	ARGUMENTS AGAINST	THE WRITER'S CONCLUSIONS AS TO DESIRABILITY
	should be subject to a competition test. (e) Prevents many quite usual and non-detrimental trade association activities.	(d) Any difficulties can be overcome by authorization.	
3. Require that person(s) *at* whom boycott action is directed be a competitor (or competitors) of the parties effecting the boycott. [Parts III.A.B.; IV.C]	3 (a) Consistent with U.S. law after much experience of case by case evaluations. (b) Only this sort of conduct should be *per se* banned. Conduct other than this is appropriate for competition assessment. (c) This conduct is the main cause of concern in boycott activity.	3 (a) Unduly hampers the effect of the *per se* provision which should be applicable to all collective boycotts. (b) Would involve unnecessary competition arguments.	Favoured [For same reason as in 2 above. Unnecessary competition evaluations should not result because of the amendment. The Court is asked to find only if the boycotted parties are "in competition" with those boycotting. An enquiry to ascertain whether the boycotting parties are "in competition" is already required.
4. Require that the *purpose* of the conduct must be to limit competition between parties to the arrangement or those parties and their competitors [i.e. change the present test requiring a purpose of limiting or restricting supply or acquisition to a test	4 (a) Would permit an assessment of competition between specified parties. This would not require an overall test of competition in the market as a whole. It would not, therefore, pose the difficulties which may be present in wider	4 (a) Would reinstate competition test. This would lead to difficulties. (b) Would ruin *per se* nature of section.	Favoured The adverse consequences to the *per se* nature of the section (should they eventuate which is by no means certain) are, in all the circumstances, not as undesirable as the present consequences of banning *per se* a number of arrangements with no antisocial or anticompetitive

POSSIBLE AMENDMENT	ARGUMENTS IN FAVOUR	ARGUMENTS AGAINST	THE WRITER'S CONCLUSIONS AS TO DESIRABILITY
requiring a purpose of lessening competition between specified parties. This test would not require an evaluation of competition in the market as a whole] [Part IV.D especially; part IV.D.3]	evaluations. (b) Would allow quite proper trade association activities. (c) Would not require any change to the interpretation of "purpose". (d) Would not change the essential *per se* nature of the test. (e) Would mean that a clearance procedure would not have to be reintroduced.		consequences. Also the amendment would mean that a clearance procedure would not have to be reintroduced.
5. Insert a provision giving guidance to the courts as to how it should interpret the term "particular persons". [Part IV.E especially at IV.E.2]	5 (a) Would prevent narrow literal interpretations such as those in *Tradestock*. (b) Would permit realistic interpretation in all the circumstances.	5. There are no real arguments to the contrary except that some may argue in favour of a literal interpretation. Others may think that vagary would follow by insertion of such a clause.	Favoured [Note, however, that the question is basically only relevant if it is agreed that "classes of persons" should be deleted from the definition — see 2 above.]
6. Reintroduce clearance for the rules etc. of trade associations (i.e. Trade Practices Commission could	6 (a) Would permit trade associations some certainty. This is important because there	6 (a) Inhibits independent decision making. (b) Leads to government interference in business	Favoured but only if the suggested amendment in 3 above and the amended purpose test [see 4 above] are not adopted. [There are factors

POSSIBLE AMENDMENT	ARGUMENTS IN FAVOUR	ARGUMENTS AGAINST	THE WRITER'S CONCLUSIONS AS TO DESIRABILITY
grant statutory immunity to a trade association if its rules etc. did not substantially lessen competition). [Part V]	are a considerable number of members and each association official may be liable in the event of an association breach. Trade associations are different for this reason and introducing limited clearance would not lead to a general introduction of clearance. (b) Would permit a trade association to obtain protection in cases where it presently appears to breach the exclusionary provision definition but there is no anticompetitive effect. (c) In a number of cases, trade association cannot obtain authorization as there is no public benefit. Nonetheless even though there is no anticompetitive effect of their conduct,	decisions. (c) If clearance made available to trade associations, it would have to be available for all practices. (d) Unnecessary. (e) In particular unnecessary if the suggested amendment in 3 above and the amended purpose test [see 4 above] are adopted.	which make trade associations sufficiently different to reintroduce clearance in their case. The generally large membership; the *per se* ban on exclusionary activities; the fact that the law appears to ban *per se* some quite reasonable association activities; and the fact that some associations appear unable to qualify for authorisation are all reasons favouring a limited re-introduction of clearance. The work load should be well within the Commission's capacity and there would be some desirable overseeing of arbitrary association rules. The amendments in 3 and 4 above, if adopted would, however, answer nearly all of the arguments in favour].

POSSIBLE AMENDMENT	ARGUMENTS IN FAVOUR	ARGUMENTS AGAINST	THE WRITER'S CONCLUSIONS AS TO DESIRABILITY
	they appear to breach the exclusionary provision definition. (d) Standards setting etc. necessarily involves some exclusionary dealing. It is desirable that such conduct be able to be engaged in without fear of the law. (e) It would enable the Commission to keep a check on trade associations by ensuring that arbitrary rules are not permitted.		