Collusive pricing under the Commerce Act 1975

A. H. K. Kee*

Agreements between competitors setting the prices and terms for the sale of goods and services are regarded as collusive pricing. Under the Commerce Act 1975, collusive pricing is prohibited unless approved by the Commerce Commission. The public interest is the primary test used in the approval of arrangements. In this article, the writer examines the approval process and shows that approval is seldom granted. He makes recommendations however which would tighten the controls even further and extend them to professional services.

I. INTRODUCTION

Collusive pricing involves the practice of two or more competitors collectively agreeing to the prices and terms at which they will buy or sell goods and services.[1] For the purposes of this article, however, only selling agreements will be considered.[2] For the agreement to have any impact, the competitors collectively must command a significant share of the particular market. Leaving aside monopolistic and oligopolistic markets, most competitors individually do not possess a significant share of the market. As such, trade associations often represent the protagonist of collusive pricing agreements (CPAs). Such pricing agreements confer the power

* This article was completed as part of the LL.B. (Honours) programme at V.U.W.

1 This will include agreements between manufacturers or wholesalers to impose fixed prices at which retailers may sell their goods (resale price maintenance) but collusive pricing in the context of this article will be taken to mean exclusively horizontal agreements between suppliers of goods and services. For other discussions of this topic, see L. F. Hampton "Collective Pricing Agreements and the Commerce Act 1975" (1981) 1 Canta L.R. 198, and J. G. Collinge *The Law Relating to Restrictive Trade Practices and Monopolies, Mergers and Takeovers in New Zealand* (2 ed., Butterworths, Wellington, 1982).

2 Collusive pricing agreements (CPAs) can be divided into two classes. The first category relates to CPAs coming within s. 27(1) of the Act. These relate mainly to CPAs on selling prices or terms. They cannot be carried out unless approved by the Commerce Commission. The other category covers CPAs on selling prices or terms not within the former category, CPAs on buying prices or terms, and other CPAs (e.g. aggregated rebates, restriction on resources, production and supply, etc.). These CPAs are just examinable trade practices. They are not unlawful and may be carried on unless the Commission orders otherwise. No application or notification of any of these CPAs is required. This paper will concentrate solely on the former category.

to influence prices, usually upwards. Consumer demands for better prices and terms are resisted. Firms will not operate according to forces of demand and supply, resulting in a poor allocation of resources. In sum, it destroys the virtues of competition.[3] The recognition of this inherent anti-competitiveness of CPAs has resulted in the adoption of an illegal per se approach towards them in the United States and Australia.[4] There is a prohibition in both those countries on all forms of collusive pricing, with very few exceptions. In contrast, our system adopts a pragmatic case by case method of evaluating such agreements against a public interest test. This article will examine, primarily from a policy point of view, the legislative and administrative procedures relating to collusive pricing control under the Commerce Act 1975.

II. HISTORY OF CONTROL

Modern legislative control of collusive pricing started with the Trade Practices Act 1958. Earlier trade practices legislation dealing with some collusive pricing[5] was rendered ineffective by the decision of the Privy Council in *Crown Milling Co* v. *R.*[6] CPAs were not prohibited under the Trade Practices Act, but registration of such agreements was required.[7] The Commissioner of Trade Practices and Prices[8] might then conduct investigations into the practice.[9] Upon a report by the Commissioner[10] the Trade Practices and Prices Commission[11] had a discretion whether or not to conduct an inquiry into the matter.[12] The Commission might then make appropriate restraining orders[13] if the practice was contrary to the public interest.[14] By far, the most substantial change in control of collusive pricing

3 It is not possible within the constraints of this article to undertake any detailed evaluation of the effects of competition in the peculiar New Zealand market structure. This article will generally assume the benefits of competition in our markets.

4 For an excellent exposition of United States law in this area, see Areeda and Turner *Antitrust Law: An Analysis of Antitrust Principles and their Applications* (Little Brown, Boston, 1978). See also Kintner *Federal Antitrust Law* (Anderson Publishing Co., Cincinnati, 1980). For the Australian law, see Donald and Heydon *Trade Practices Law* (Law Book Co. Ltd, Sydney, 1978). See also Taperell, Vermeesch and Harland *Trade Practices and Consumer Protection* (3 ed., Butterworths, Sydney, 1983). United Kingdom law in this area is generally quite similar to New Zealand's, though there are major differences. For United Kingdom law, see V. Korah *Competition Law of Britain and the Common Market* (3 rev. ed., Nijhoff, The Hague, 1982).

5 E.g. Board of Trade Act 1919 allows the establishment of fixed or maximum or minimum prices or rates for any classes of goods or services.

6 [1927] A.C. 394.

7 Section 12.

8 Departmental officer appointed under s. 10 of the Trade Practices Act 1958. The name was changed to "Examiner of Trade Practices and Prices" by the Trade Practices Amendment Act 1961, s. 2.

9 Section 16.

10 Section 17.

11 An administrative tribunal set up under s. 3 of the Trade Practices Act 1958.

12 Section 18.

13 Orders may be made only in relation to practices specified in s. 19, which include collusive pricing agreements. Under s. 21 orders may also be subject to conditions.

14 The public interest test contained in s. 20 specifies "five effects" very similar to the "eight effects" in s. 21 of the Commerce Act 1975.

came in the 1971 amendment to the Trade Practices Act.[15] Under that amendment, all parties to a collusive pricing agreement in force on 1 April 1972 were required to seek the approval of the Commission to the agreement and further, all agreements entered into after that date had to have the prior approval of the Commission before they could lawfully operate. In 1975, the new Labour Government enacted the Commerce Act. It repealed the Trade Practices Act but the collusive pricing provisions were carried forward into the new Act and remain substantially in the same form.

Under the Commerce Act 1975, collusive pricing is prohibited unless approved[16] by the Commerce Commission.[17] The Commission must grant its approval if the effect of the practice is not contrary to the public interest in accordance with section 21 of the Act.[18] The prohibition covers agreements or arrangements coming substantially within section 23(1)(b), (d) or (e).[19] There are, however, a number of exemptions to the prohibition.[20] The most important and significant exemption is that relating to the provision of professional services.[21] Solicitors, engineers, and real estate agents for example, have perfectly lawful CPAs. It is difficult to see any fundamental difference between restrictive practices engaged in by the business community and restrictive "ethical" codes followed by the professions.[22] There is nothing unique in the provision of professional services and the exemption ought to be seriously examined.[23]

15 Trade Practices Act 1958, s. 23BB, as inserted by the Trade Practices Amendment Act 1971, s. 12.

16 Section 27(1).

17 The tribunal replacing the Trade Practices and Prices Commission, set up under s. 3 of the Commerce Act 1975.

18 Section 29(4).

19 Section 23(1) provides:
(b) Any agreement or arrangement between wholesalers to sell goods . . . at prices or on terms agreed upon between those wholesalers: . . .
(d) Any agreement or arrangement between wholesalers or retailers or contractors or any combination of persons engaged in the selling of goods or the performance of services, to sell goods, or perform services, . . . at prices or on terms agreed upon between the parties to any such agreement or arrangement:
(e) Any agreement or arrangement between wholesalers to sell goods on the condition that prices charged or conditions of sale by retailers shall be the prices or conditions of sale stipulated by those wholesalers.
Note: Para. (b) appears to be redundant as the practice it deals with is equally covered by para. (d). See Hampton, supra n. 1, 208.

20 Section 27(3) provides the following exemptions:
(a) Professional fees and charges of the type listed in the Second Schedule.
(b) Trade association price lists indicating an individual wholesaler's IRPM (individual resale price maintenance) prices.
(c) Trade practices expressly authorised by other enactments.

21 There is no list of professional services covered provided in the Commerce Act 1975. Arguably, the list contained in the Price Surveillance Regulations 1979/82 can be regarded as those covered under the Commerce Act.

22 Professional services are not exempted from collusive pricing provisions in either the United States or Australia. See Pengilley "The Trade Practices Act and the Professions" (1981) 7 Management Forum 27.

23 This is in fact one of the recommendations put forward by the *Report of the Working Party to the Minister of Trade and Industry on the Commerce Act 1975* (March 1976). Page 13 of the Report states:

III. ELEMENTS OF A COLLUSIVE PRICING AGREEMENT

What exactly constitutes a collusive pricing agreement or arrangement for the purposes of section 23(1)(b), (d) or (e)? The meaning of "agreement" or "arrangement"[24] would undoubtedly include a contract or a legally enforceable agreement, but it would also include something less than that. If there is communication between the partics, and some mutual intention of obligation to follow a common course of action, then an agreement would be held to exist. Thus in *Master Grocers* Dalglish J. said:[25]

> The expression [agreement or arrangement] in my view would include anything in the nature of an understanding between two or more persons to follow a common course of action. It is not necessary that there should be any legally enforceable obligation or any element of compulsion to observe that common course of action arising from the possible imposition of a penalty or sanction or from the fear of possible consequences.

The learned judge went on to say that parallel pricing on its own is not sufficient to establish an agreement or arrangement.[26] This must be so as the necessary communication and mutual intention would not be present. Similarly, geographical zone pricing by itself would not indicate an agreement as the competitor with a location advantage will set the price for that location such that a pattern of pricing will develop. However if all the members of a trade association adopt a uniform zone pricing system throughout large areas despite large differences in costs, collusion can be inferred from the circumstances.

Price leadership (where the prices of a dominant trader are followed by smaller competitors of their own accord in order to survive) would also not on its own connote an agreement because the necessary communication and mutual intention would not be present. The obligation to follow is not accepted by the smaller competitors but as a matter of commercial common sense, they have to. The prohibition extends to any agreement coming "substantially" within section 23(1)(b), (d) or (e), but it is not exactly clear what "substantially" requires.[27]

The justification for exemption of the fees and charges excluded from the provisions relating to Collective Pricing Agreements as presently provided in the 2nd Schedule should be reviewed by the Commission.

24 See Hampton, supra n. 1, 210-212, or Collinge, supra n. 1, 191.

25 *Re N.Z. Master Grocers' Federation's Agreement* [1961] N.Z.L.R. 177, 181.

26 Idem.

27 In *Master Grocers,* the overall adherence in the four districts of the Association was approximately 84% of the lines stocked. Dalglish J. held that an agreement to sell 84% of grocery lines at list prices and freedom to sell 16% of the lines stocked at prices other than list prices cannot be said to be substantially an agreement to sell only at list price. However, the learned judge went on to consider the matter district by district. In the Auckland and Christchurch districts, the agreement related to 86.87% and 92.91% adherence respectively. In Wellington and Dunedin districts, the agreement related to 74.13% and 82.53% adherence respectively. The learned judge held that in the former two districts the agreement is substantially an agreement to sell only at list prices. Therefore, it would seem that an adherence of 85% or more would result in a finding that the agreement was one coming substantially within the specified paragraphs. It is difficult to see any basis for holding 85% as the cut-off point. Later cases came to be decided on a case by case basis without any specific reference for any numerical cut-off point. (The use of the word "only" exacerbated the problem with "substantially".)

Information arrangements may take full market information available to competitors, making parallel pricing likely, but unless they involve an agreement or recommendation as to prices, they will not fall within the prohibition. It is clearly legitimate for businessmen to seek to be well informed about market conditions and it is hardly incompatible with healthy competition. Nevertheless, information arrangements have often been used as a cloak for collusive pricing. By virtue of section 23(3), the prohibition extends to recommendations made by a trade association to its members relating directly or indirectly (through terms of sale) to prices, margins or pricing formulas, notwithstanding any statement that compliance is up to the members' own choice. Since such recommendations constrain bargaining on price, it was clear that they interfered with the free operation of the competitive market. What exactly then constitutes a recommendation? In *Contractors' Federation,*[28] the Federation removed all specific references to "recommended rates" from the Blue Book containing parameters for rate calculation purposes, and had also made it clear that contractors may charge any rate they think fit and that any rates shown in the book may not always be appropriate in a particular case. The Commission, however, held that it was an indirect recommendation relating to prices to be charged and to the pricing formula to be used as provided in section 23(3).

IV. THE APPROVAL PROCESS

Applications for approval of CPAs must be made to the Commerce Commission,[29] which then refers them to the Examiner of Commercial Practices for investigation and report.[30] Under the Commerce Amendment Act 1983 (hereinafter referred to as the Amendment Act), in force from 1 April 1984, the functions of the Examiner in relation to trade practices are more clearly defined.[31] His role is essentially that of an investigator and reporter for the Commission. If, after investigation, the Examiner is convinced that the practice is contrary to the public interest, he is obliged to notify the applicants and endeavour to reach an agreement on a recommendation to be put to the Commission.[32] In any event, whether an agreement is reached or not, he must present a report to the Commission stating (amongst other things) the grounds on which the practice is contrary to the public interest and his recommendation as to the order or such action that the Commission should make or take. The Commission is required to hold an inquiry on all applications contested between the Examiner and the applicants.[33] Under the Amendment Act the Commission is no longer obliged to hold such an inquiry[34] but may hold such inquiries and conduct such investigations as it thinks fit.[35] Where an agreement between the Examiner and the applicants is

28 *Re An Application by N.Z. Contractors' Federation (Inc.)* Decision No. 56, 27 October 1981 (Unreported).
29 Section 29(1).
30 Section 29(2).
31 Section 38 as inserted by s. 17 of the Commerce Amendment Act 1983.
32 Section 39.
33 Section 41(1).
34 Section 11(2) as inserted by s. 8 of the Amendment Act.
35 Section 11(1) as inserted by s. 8 of the Amendment Act.

reached, or where the Examiner is in doubt as to the public interest or comes to the conclusion that the practice is not contrary to the public interest, the Commission may dispense with an inquiry.[36] The Commission has never held an inquiry where the Examiner after conciliation has recommended approval of the CPA. This is understandable given the practical difficulties the Commission would face if it should choose to hold an inquiry. Though in theory the Commission could instruct its own counsel, any such proceedings before the Commission would not be completely adversarial and it would be difficult for the Commission to decide. Therefore, the Examiner's opinion on what constitutes the public interest is as important as that of the Commission. A right of appeal against a decision of the Commission lies to the Administrative Division of the High Court.[37] The decision of the court of any appeal is final and conclusive.[38]

There were 376 applications (as at 31 January 1984) registered for approval since 1972 under section 18A of the Trade Practices Act 1958.[39] These applications were carried forward into the Commerce Act and deemed made under that Act.[40] Where the application for approval was made before 1 January 1973, the practice is allowed to continue, subject to any imposed conditions, pending the determination of the Commission.[41] Of the 376, 261 were not approved, or were withdrawn or lapsed, 39 were approved, and 76 were still to be determined.[42] Except for several applications before the Commission, the rest of those yet to be determined are still with the Examiner awaiting investigation and report, some of which date back to 1972. There were 28 applications registered for approval since 1 November 1975 (as at 31 January 1984) under section 29 of the Commerce Act.[43] Of these, 11 were not approved, or were withdrawn or lapsed, 5 were approved and 12 are yet to be determined.[44] The established trend is for applications to be not approved, withdrawn or lapsed rather than approved, particularly those under section 29 of the Commerce Act. This trend is similar to that under the previous Trade Practices Act regime. It is unlikely that this trend will change in the future.

Unlike applications made under section 18A of the Trade Practices Act, applications under section 29 of the Commerce Act do not have transitional approval.[45] Given that most CPAs are likely to be contrary to the public interest, applicants under section 29 faced the difficult task of demonstrating public benefits

36 Section 41(1).
37 Section 42.
38 Section 45(4).
39 CPA Register held by the Commission. The Register is available for public inspection.
40 Section 29(3).
41 Section 30.
42 Supra n. 39.
43 Idem.
44 Idem.
45 Teleflower Inc. was found by the Examiner to be operating a CPA without approval in the process of investigating Interflora Pacific Unit Ltd CPA application. The Examiner however chose not to prosecute Teleflower. An application was subsequently made and approved. See *Re Application by Teleflower Inc.* Decision No. 76, 14 December 1983 (Unreported).

of a practice that does not yet exist. Though the Examiner will also face a similar difficulty with regard to detriments, he is more likely to be able to point to precedents having detriments. For that reason, it is unlikely that there will be many approvals under section 29 of the Commerce Act.

The current approval process is both tedious and painstakingly slow. The delay is primarily the result of collusive pricing applications being accorded a low priority in the allocation of resources to investigations of trade practices and related matters under the Commerce Act.[46] In terms of allocation of priorities, practices involving offences against Part II (Trade Practices), or relevant to the administration of Part II of the Act have highest priority. Within this group, prohibited practices[47] have first priority, followed by practices prohibited unless approved by the Commission,[48] i.e. including CPAs. Due to limited resources, investigations into complaints alleging contraventions of the Act will not be undertaken unless there is substantive preliminary evidence of a possible offence against a specific provision of the Act.[49] Applications for approval of CPAs are accorded second priority. Within this group, priority will be given to applications under section 29 of the Commerce Act (over that under section 18A of the Trade Practices Act). As to individual applications, the significance of any economic impact is an important consideration. The allocation of priorities appears to be a realistic approach to promote the effective and efficient use of available resources. But it must be questioned why prohibited practices are given the highest priority when there are very few prosecutions involving offences each year. One would have thought that greater emphasis ought to be given to collusive pricing practices as they are far more widespread and pervasive, and of significant impact on the market.

The low priority accorded to CPA applications can principally be attributed to a few factors. The most significant factor is, the severely limited resources of the Examiner. The Examiner, himself an officer of the Department of Trade and Industry,[50] possesses no staff of his own as such, but relies on staff under the Commerce Division of the Department. Commerce Division personnel, who are organised into industry groupings, besides being responsible for the administration of the Commerce Act, are also responsible for the administration of a host of other price control and surveillance regulations.[51] Resources are spread thinly over a wide area and to add to that, it is the Secretary of the Department that determines the allocation of resources. Thus, for instance, when the Price Freeze Regulations 1982/142 were enacted last year, first priority was given to the administration of the regulations, with the result that trade practices investigations

46 Departmental guidelines distributed to Commerce Division personnel. Made available by courtesy of Mr J. R. A. Stevenson, Director of Business Practices, Commerce Division, Department of Trade and Industry.

47 Sections 48-54.

48 Sections 27 and 28.

49 Supra n. 46.

50 Section 18(1)(a).

51 E.g. Price Surveillance Regulations 1979/82 and Price Freeze Regulations 1982/142.

receive minimum attention.[52] The Economic Stabilisation (Prices) Regulations 1983/296, in force from March 1984, most probably demand similar attention. There are currently only eight full-time staff handling trade practices investigations in Wellington.[53] Each CPA application requires the gathering and evaluation of stacks of documents and materials. The Commission in contrast, has eight members performing a much simpler task. The new discretion given to the Commission under the Amendment Act as to whether to hold an inquiry even where there is a dispute between the applicants and the Examiner might indirectly help to clear up the current backlog. Often the holding of an inquiry has meant the preparation of reports to a very high legal standard by the Examiner, which as indicated earlier is beyond his available resources. If the Commission should decide not to hold an inquiry, the present inhibiting factor in presenting a report for the Commission could well be removed. Finally, if the approval process is to be speeded up, the provision of staff directly accountable to the Examiner ought to be given serious consideration.

Over the years, the government emphasis has been on price control rather than the development of competition.[54] The argument often put forward to justify the neglect of collusive pricing is that, since most of the goods under collusive pricing control are also under price control, CPAs have no impact whatsoever (i.e. no possibility of abuse). That justification is true to a certain extent only. Price control maintains prices and prevents unjustified increases, but at the same time it operates against competitive pressures bringing prices down. Price control could also unwittingly foster or even create CPAs. The whole question comes down to whether government policy should be directed towards price control or the development of competition.

The transitional provision in section 30(1) makes matters worse. It allows CPAs registered before 1973 to continue to operate while awaiting determination. As such, parties to the agreement have absolutely no incentive to cooperate voluntarily and conciliate with the Examiner.[55] This makes investigations by the Examiner more difficult.

There is simply no presumption that CPAs are contrary to the public interest under New Zealand's scheme of control. Enormous resources would have to be committed in trying to establish detrimental effects of a practice, which may or may not result in a Commission order. A change of presumption would help

52 Interview with Mr Stevenson, supra n. 46.

53 Idem.

54 E.g. Board of Trade (Price Investigation) Regulations 1939/62; the Price Stabilisation Emergency Regulations 1939/122; Control of Prices Emergency Regulations 1939/275; Control of Prices Act 1947; Part IV of the Commerce Act 1975. Some would argue there was a decisive shift away from price control with the election of the National Government in 1975. It is true that many commodities have been removed from the Positive List of Controlled Goods and Services, but the recent enactment of the Price Freeze Regulations 1982/142 and the Economic Stabilisation (Prices) Regulations 1983/296 could hardly indicate a shift in that direction.

55 Under s. 126 it is however an offence to refuse to produce documents/books, or furnishing false information etc. to the Examiner.

in alleviating the current delay. Lastly, the recent decision of the High Court in *HANZ Appeal*[56] and the Commission in *Contractors' Federation*[57] complicates the matter further by requiring the Examiner to comply with a higher standard of proof, which is grossly incompatible with the making of economic decisions. This point will be developed further, later in the paper.

V. PUBLIC INTEREST TEST

The public interest test contained in section 21 of the Commerce Act represents the core of the whole approval system. After establishing the existence of a CPA, the Examiner must prove on the balance of probabilities that the practice has one or more of the "eight effects" listed in section 21. Section 21(1) provides:

> For the purposes of this Act, a trade practice shall be deemed to be contrary to the public interest only if, in the opinion of the Commission, the effect of the practice is or would be —
>
> (a) To increase the costs relating to the production, manufacture, transport, storage, or distribution of goods, or to maintain such costs at a higher level than would have obtained but for the trade practice; or
> (b) To increase the prices at which goods are sold or to maintain such prices at a higher level than would have obtained but for the trade practice; or
> (c) To hinder or prevent a reduction in the costs relating to the production, manufacture, transport, storage, or distribution of goods, or in the prices at which goods are sold; or
> (d) To increase the profits derived from the production, manufacture, distribution, transport, storage, or sale of goods, or to maintain such profits at a higher level than would have obtained but for the trade practice; or
> (e) To prevent competition in the production, manufacture, supply, transportation, storage, sale, or purchase of any goods; or
> (f) To reduce or limit competition in the production, manufacture, supply, transportation, storage, sale, or purchase of any goods; or
> (g) To limit or prevent the supply of goods to consumers; or
> (h) To reduce or limit the variety of goods available to consumers or to alter, restrict, or limit to the disadvantage of consumers, the terms or conditions under which goods are offered to consumers.

Only the first six effects are most relevant to collusive pricing investigations.

From the very beginning, under the Trade Practices Act 1958,[58] it was clear that it is the "effects" of the practice that are important, and not the motives of the parties to the agreement.[59] So, even if the purpose of the parties entering into the agreement is to fix prices but conditions of the market were such that their objective is not capable of achievement or realisation, the agreement would

56 Re *HANZ* Appeal (Unreported, Wellington Registry, M326/78, 4 March 1980). An addendum to the judgment was issued on 2 April 1981.
57 Supra n. 28.
58 Under the Trade Practices Act 1958, the public interest test is contained in s. 20, which lists "five effects" the first four of which contained the word "unreasonably". Under the Commerce Act, the "not unreasonable" test is incorporated together with the public interest balancing test in s. 21(2).
59 E.g. *In re Wellington Fencing Materials Association's Agreement* Decision No. 3 of the TPPC, 7 September 1959 (Unreported), the Commission held that the public interest in collusive pricing does not depend on the purpose of the prices fixed.

not be contrary to the public interest.[60] The words "is or would be" in the opening part of section 21 had been held in *Registered Hairdressers*[61] to entitle the Commission to have regard to both the present and likely future effects of the agreement.

The provision that is most often invoked by the Examiner to support his case is paragraph (f). This is not surprising given the clear anti-competition effect of collusive pricing. On the other hand, paragraph (e) is seldom invoked as it had been interpreted in decisions under the Trade Practices Act as requiring an absolute or total elimination of competition. Since competition is composed of other components (e.g. cost, service, etc.) besides price competition, it is very difficult to envisage a situation where collusive pricing would result in a total elimination of competition. Therefore it is not surprising that there has never been a finding by the Commission of a CPA preventing competition. In *Stock and Station Agents (No. 1)*,[62] it was held that only one component of competition need be reduced or limited, to bring it within paragraph (f). In most cases it would be price competition. Thus, in *Stock and Station Agents (No. 1)* and *HANZ*,[63] price competition was held to have been reduced or limited by the CPA. The earlier cases under the Trade Practices Act (e.g. *Fencing Materials*,[64] *Registered Hairdressers*[65] and *Master Grocers*[66]) placed considerable emphasis on price competition. In both *Registered Hairdressers* and *Master Grocers*, it was held that the reduction in price competition had a further flow-on effect of lessening competition in other fields.[67] Under the Commerce Commission, the importance of price competition was similarly emphasised.[68] In *Stock and*

60 In *In re the Passenger Agency Agreement of the Australian and New Zealand Passenger Conference* Decision No. 14 of the TPPC, 1 February 1963 (Unreported) and *In re Kempthorne Prosser's New Zealand Drug Co. and Sharland & Co.* Decision No. 15 of the TPPC, 6 March 1963 (Unreported), the Commission was clearly over-concerned with the motives of the parties getting into the agreement. Both the decisions of the Commission were reversed on appeal to the Appeal Authority. Dalglish J., in both appeals, emphasised the importance of the "actual effect" of the practice.

61 *Re The New Zealand Council of Registered Hairdressers Inc.* [1961] N.Z.L.R. 161.

62 *Re An Application by New Zealand Stock and Station Agents Association (No. 1)* (1978) 1 N.Z.A.R. 532.

63 *Re An Application by the Hotel Association of N.Z.* Decision No. 28, 28 June 1978 (Unreported).

64 Supra n. 59.

65 Supra n. 61.

66 [1961] N.Z.L.R. 177.

67 Thus, for instance, in *Registered Hairdressers* Dalglish J. said at p. 173:

> There are various fields in which competition may exist in hairdressing. There may be competition in cleanliness and hygiene, efficiency, style, incidental services and price. . . . But, where an arrangement exists whereby the same price is charged for hairdressing whatever the state of hygiene and cleanliness, whatever the efficiency of the hairdresser and whatever amenities are provided for the customer, hairdressers may well be discouraged from improving their premises, their efficiency and the amenities which they provide. If so, competition in fields of other than price will be lessened as a result of the reduction of competition in the field of price.

68 E.g. In *Stock and Station Agents (No. 1)* supra n. 62 and *HANZ* supra n. 63.

Station Agents (No. 1), the Commission held that section 21(4)(a)[69] implicitly states that, for there to be effective competition, there must be price competition. Inevitably, to determine the effects on competition would involve an analysis of the market impact of the CPA. This would involve, as held in *Fencing Materials*, considering the proportion of the traders adhering to the agreement and their share of the particular market.

Most of the decisions of the Commission where effects on costs, prices or profits are established involve the second limb of paragraph (b) and the second limb of paragraph (c) of section 21(1).[70] Both paragraphs seem to cover the same effect, and indeed that is the Commission's view.[71]

It has been suggested by Hampton[72] that paragraph (c) does not contain the qualification "at a higher level than would have obtained but for the trade practice", but the distinction had never been drawn by the Commerce Commission. The double coverage for practical purposes benefits the Examiner because showing more effects being breached should weigh in favour of the Examiner's case.

In *Registered Hairdressers* and *Master Grocers*, the Appeal Authority was willing to infer increased prices as a consequence necessarily following from reduced competition. That however is not the case with increased costs. In *HANZ*, the Commerce Commission refused to hold that reduced competition necessarily results in increased costs. The Commission required that independent proof be put forward. The nature of costs is such that it involves many factors besides price, and complex accounting evidence is beyond the expertise and resources available to the Examiner. As a result, the provision relating to costs is seldom invoked. Similarly with profits. In *Stock and Station Agents (No. 1)* the Commission refused to hold that profits were necessarily increased as a result of prices being maintained.

The effect must also be direct. It cannot be extended to cover consequential increases. It must relate to the goods and services that are the subject of the CPA, and not to any other goods or services at large. In *Woolbrokers*,[73] where the collusive pricing agreement relates to the issue of a minimum scale of fees and charges for woolbroking services, counsel for the Examiner contended that the practice under inquiry was capable of being caught within section 21(1)(a) as having "by inference, detrimental effects on the costs of wool production."

69 Section 21(4)(a) states that the Commission shall be guided by the need to secure effective competition in industry and commerce in New Zealand, when considering whether any effect in paras. (e) or (f) is not unreasonable.

70 E.g. In *Stock and Station Agents (No. 1)* supra n. 62 and *HANZ* supra n. 63.

71 This is evident in *Stock and Station Agents (No. 1)* where at p. 540 the Commission said:

> It may be possible, semantically, to draw a distinction between the phrases "to maintain the prices" and "to hinder or prevent a reduction in the prices" but the Commission considers that for all practical purposes in the circumstances of this case they can be taken to mean the same thing.

72 Hampton, supra n. 1, 224.

73 *Re An Application by N.Z. Woolbrokers' Association* Decision No. 30, 2 August 1978 (Unreported).

The Commission rejected the argument, holding that the costs referred to in section 21(1)(a) are not intended to be related to a prior or subsequent remote activity.

When the Examiner has established one or more of the detrimental effects listed in section 21(1), the agreement will be presumed to be contrary to the public interest. The applicants may rebute that presumption by justifying their practice in terms of section 21(2). Section 21(2) provides:

> Notwithstanding that the Commission is of the opinion that the effect of any trade practice is or would be any of those described in subsection (1) of this section, that practice shall not be deemed contrary to the public interest if the parties to the practice satisfy the Commission that, in the particular case,—
>
> (a) The practice has or would have effects of demonstrable benefit to the public sufficient to outweigh any of the effects described in subsection (1) of this section, which, in the opinion of the Commission the practice has or would have; or
>
> (b) Even though the Commission is of the opinion that the effect of the practice is or would be one or more of those described in . . . subsection (1) of this section, that effect or effects is or are not unreasonable.

Some of the benefits that have been held to outweigh detrimental effects from a collusive pricing practice include savings in administrative costs of calculating prices (*Master Grocers, HANZ Appeal*), public facilities for accommodation and meals (*HANZ Appeal*), and savings in overseas funds (*Electric Lamps*).[74] Genuine costing assistance, in the form of a pricing formula to small businessmen, is also considered a benefit (*Wellington Master Plumbers*,[75] *Wanganui Master Plumbers*,[76] *Funeral Directors*[77]). Benefits unlike detrimental effects have been held not to be limited to the direct consequence of the collusive pricing practice. Thus, in *Stock and Station Agents (No. 1)*, the Commission said:[78]

> In this case the public interest can be taken as embracing the interests of the farming community, who are direct consumers of the services, the national interest in maintaining efficiency and productivity in relation to industries which provide considerable employment opportunities and earnings of overseas exchange, and the individual interests of many New Zealand citizens whose livelihood depends on the totality of the industry involved.

On the basis of such vague benefits, the Commission went on to hold that the total abandonment of the CPA "would be to worsen present levels of the promotion of consumer interests, effective and efficient development and improvements in productivity".

If any collusive pricing practice is to be approved under section 21(2) it is more likely to be under the "not unreasonable test" rather than the "public

74 *In re the Distribution of Electric Lamps* Decision No. 10 of the TPPC, 22 August 1961 (Unreported).

75 *Re An Application by Wellington Master Plumbers and Gasfitters and Drainlayers Association* Decision No. 58, 18 November 1981 (Unreported).

76 *Re An Application by Wanganui Master Plumbers, Gasfitters and Drainlayers Association* Decision No. 59, 18 November 1981 (Unreported).

77 *Re An Application by Funeral Directors' Association of N.Z.* Decision No. 64, 16 February 1982 (Unreported).

78 (1978) 1 N.Z.A.R. 532, 548.

interest balancing test". The former test is an easier test to satisfy than the latter, in view of section 21(4). Thus, for instance, the joint marketing of drycleaning services (*NZ Drycleaners*[79]), an agency arrangement between trading banks (*NZ Bankers' Association*[80]) and an agreement relating to the transmission of orders for flowers, floral arrangements and other similar items between member florists (*Teleflower*[81]) were approved on the ground that the agreements were not unreasonable. Applying the public interest balancing test, it would be extremely difficult to find any public benefit arising out of those practices. Any benefits would essentially be private in nature.

VI. DEVELOPING TRENDS IN COLLUSIVE PRICING CONTROL

There have been nineteen approvals of CPAs under the Commerce Commission.[82] The Commission has held only five inquiries to date.[83] They, however, relate only to four practices.[84] Of those four, the Examiner recommended approval of two,[85] with modifications, but as not all of those interested agreed with the recommendations, a Comimssion inquiry was held.[86] The other two did not have the Examiner's sanction for approval — *HANZ*[87] and *Contractors' Federation.*[88] Approval was granted in *Contractors' Federation* but not *HANZ*. However, on an appeal to the High Court, the Commission's decision was reversed.

Of the nineteen approvals, only five were not subject to any conditions.[89] The rest of the approvals were subject to varying conditions.

A typical set of conditions often imposed is as follows:[90]

(i) That, where the *maximum amounts* allowed to be charged under any scale of fees and charges issued in terms of this approval are subject to any control under any statute or regulations, the said scale of fees and charges and any alteration to the scale of fees and charges, must comply with any relevant provisions of such control legislation;

(ii) That, where the *maximum amounts* allowed to be charged under any scale of fees and charges issued in terms of this approval are not subject to control under any statute or regulations, other than this condition, the said fees and charges and any alteration to the scale of fees and charges must be submitted *for approval by the Commerce Commission*;

(iii) That any scale of fees and charges issued in terms of the approval be clearly headed to show that the prescribed fees and charges are the maximum which may be charged;

79 *Re An Application by N.Z. Drycleaners Ltd, Matwen Enterprises Ltd and G. Kline Ltd* Decision No. 66, 31 March 1982 (Unreported).
80 *Re An Application by N.Z. Bankers' Association* Decision No. 63, 16 February 1982 (Unreported).
81 *Re An Application by Teleflower Inc.* Decision No. 76, 14 December 1983 (Unreported).
82 See Appendix.
83 Decision Nos. 27, 28, 30, 51 and 56.
84 Decision 51 dealt with the breach of a conditional approval granted under Decision 27 (*Stock and Station Agents*).
85 *Stock and Station Agents,* Decisions 27, 51; *Woolbrokers,* Decision 30.
86 Supra n. 56.
87 Supra n. 63.
88 Supra n. 28.
89 See Appendix.
90 Imposed on Decision 30 (*Woolbrokers*).

(iv) That the Association inform its members that they are *free to charge lower fees* without the risk of incurring sanctions of any kind, such information to be attached to or contained in any scale of fees and charges issued to members in terms of the approval.

(v) That the Association, at the first opportunity, alter its rules to comply with the terms of this decision and, in the meantime, forthwith inform its members that the rules are current scale of fees and charges or to be read as being subject to this decision.

(Emphasis added.)

The above conditions were recommended by the Examiner (and accepted by the Commission) to modify a CPA that was found to be contrary to the public interest into one that would no longer have that effect.[91]

How effective are those conditions in ameliorating the effects that are contrary to the public interest? The "maximum price allowed" would in most situations become the going market price.[92] Even though it is also a condition that members may charge less, they are unlikely to do so unless there is severe competition between them. Furthermore, the setting of those conditions would inevitably require policing which would put further strain on already limited resources.

In fact, in *Stock and Station Agents (No. 2)*,[93] the Association breached the conditions imposed but the breach was not discovered by the Examiner but by Federated Farmers, the interest group. The Commission revoked its previous approval and substituted a more restricted approval. In this case, there was a strong watchdog interest group but there are many situations where there are no such groups and possible breaches could go unnoticed, though involving an offence under the Act.

What is of more concern is the imposition of the condition that prior approval of the Commission be obtained before any alterations can be made. This would necessarily involve the Commission in a price control function, not unlike that in Part IV of the Commerce Act. This preference for control through regulation

91 This approach ought to be contrasted with that taken by the Australian Trade Practices Commission. In its Information Circular No. 3, the Commission took the view that the great majority of recommended price agreements inhibit or diminish competition. This was so notwithstanding that:
(1) the price agreement consisted of "recommended" or "guideline" prices only;
(2) there was no obligation or undertaking to comply with the recommendations made;
(3) there was no attempt to police or follow-up the recommendations made;
(4) the prices were recommended by an association and individual members had no direct hand in the calculation of the recommended prices;
(5) the prices were recommended by the association on the basis of costing or other calculations by a party outside the association (for example an accountant or the secretary of the association).

92 This was the view adopted by Federated Farmers in *Stock and Station Agents (No. 1)*. They lodged a complaint alleging that there were still CPAs precluding the negotiating of fees and charges below scale. The Commission, pursuant to s. 29(8), revoked the previous approval and substituted a more restricted approval. See Decision No. 51.

93 *Re An Application by N.Z. Stock and Station Agents (No. 2)* Decision No. 51, 7 May 1981 (Unreported).

can impede the development of competition.[94] The Commerce Commission's "regulatory approach" contrasts sharply with its predecessor's "competition approach". Under the Trade Practices and Prices Commission, no modifications were ever recommended for a practice held contrary to the public interest.

The Commission is also required to recommend that any goods or services that are the subject of the inquiry be subject to price control under section 82, if it comes to the opinion that that would be in the public interest.[95] The Commission, however, has not made any such recommendation in relation to a collusive pricing application. Price control should only be used as a last resort where conditions of competition do not exist or where there is a likelihood of abuse.

The Examiner, on his part, has also often demanded assurances or undertakings from the parties to the agreement before he recommended approval. Such assurances or undertakings are usually designed to limit the scope of the agreement. Thus, in *Liquigas*[96] there were a few undertakings by the parties, one of which was not to engage in any territorial agreements.[97] Such assurances or undertakings are not legally enforceable as such, but, if they are breached, it would form the basis for the Examiner to seek a revocation or an amendment of the approval under section 29(8).

There has been only one appeal, relating to collusive pricing, to the Administrative Division of the High Court, i.e. *HANZ* Appeal.[98] As a result of the Chief Justice's decision, it now appears that the Examiner has to comply with a higher requirement of proof in establishing the paragraphs (a) to (d) effects. The Chief Justice rejected the Commission's finding that the CPA had the effects described in the second limb of section 21(b) and (c), on the ground that there was "no real direct evidence" to support the Commission's conclusions. The Commission in that case had evidence before it showing that the association members command 35% of the market share for off-premises consumption (the subject of the CPA). There was 95% adherence by members of listed prices for normal bottle store sales and virtually 100% adherence of bulk and wholesale sales.

There was also evidence showing that two non-member hotels in different centres charged prices approximately 3.5% to 10% lower than the association's hotels in the same centres. Also prices charged by members in Auckland, Wellington and Christchurch were between 10.7% and 12.3% higher than prices in Dunedin where price lists were not issued. Based on such statistics, it is difficult to reach a decision other than that the CPA had the effects claimed by the Examiner and accepted by the Commission.

94 It is often argued that the Commerce Act 1975 aligns the trade practices provisions with the price control provisions through s. 21(3)(b). That provision requires the Commission in its determination whether prices under a CPA are "unreasonable" to consider what the price would be if subject to price control under s. 82 of the Act. But this does not in any way indicate any preference for price control.

95 Section 25.

96 *Re An Application by Liquigas* Decision No. 49, 17 December 1980 (Unreported).

97 Examiner's Report to the Commission.

98 Supra n. 56.

The decision is anomalous in a few respects. Prevention of competition (total elimination of competition) was not an effect advanced but the Chief Justice considered it as well. Thus, after stating several relevant matters, he said:[99]

> In the result, for those reasons alone, the impact of reduced competition in the sales of liquor by the Hotel Association members as may ensue from adherence to price guides *cannot have any great significance in the prevention of competition* in the industry as a whole. (Emphasis added.)

The Chief Justice further said:[100]

> There was virtually no evidence before the Commission of the impact of the absence of the price guides could make on competition within the industry and it *would be quite wrong to assume that if price guides were abolished* any increased measure of competition would result in that it would *necessarily be of benefit to the public.* (Emphasis added.)

Two criticisms can be made of that statement. First, the requirement for evidence is not feasible. The Examiner would have to gather evidence on a market which does not exist as such. Surely, the present effects would be a good indication of the likely future effects. Under the Trade Practices Act, Dalglish J. of the Appeal Authority had even held that a practice could be contrary to the public interest solely on its likely future effects.[101] Secondly, the court clearly failed to recognise the inherent anti-competitiveness of collusive pricing and the benefits of competition. The maintenance of reasonable prices was held to be a benefit, when numerous decisions of both the Appeal Authority under the Trade Practices Act[102] and the Commission under the Commerce Act[103] had consistently held that whether a practice is contrary to the public interest or not does not depend on the reasonableness of the price. The Chief Justice, in rejecting the judgment of the Commission on the significance of the market shares, clearly substituted his own opinion for that of the Commission. Although legally there is nothing to prevent him from doing so, the question arises whether it is appropriate for him to do so especially when the Commerce Commission is a specially constituted body composing of persons with special knowledge on economic matters. In the writer's opinion that is a role that the court should avoid taking. Hampton accurately sums up the aftermath of the *HANZ Appeal,* when he said:[104]

> What is of more concern, however, is the possible impact of the *HANZ Appeal* decision on the future course of competition policy. The Chief Justice's emphasis on the need for direct proof to show a detrimental effect on prices, his uncritical acceptance of alleged public benefits and his failure to analyse in any detail the anti-competitive effects of the price guides make the decision a most unsatisfactory one. If followed, the *HANZ* decision could sound the death-knell for any form of effective control over restrictive trade practices in N.Z.

99 Ibid. p. 7 of the addendum to the judgment.
100 Idem.
101 E.g. in *Registered Hairdressers.*
102 E.g. in *Fencing Materials, Registered Hairdressers,* and *Re Associated Booksellers of N.Z.'s Agreement* [1962] N.Z.L.R. 1057.
103 E.g. in *Stock and Station Agents (No. 1).*
104 Hampton, supra n. 1, 251-252.

The authoritative value of the *HANZ Appeal* decision was put to the test in *Contractors' Federation*[105] before the Commission. It was the first time that the evidence of the Examiner was totally rejected. The Commission held that the effects were not established due to the lack of independent evidence. Although the statistics indicating the level of adherence were largely outdated and not comprehensive, one thing was clear, that the difference between the Blue Book rates and the going market rate was astronomical. The Examiner pushed very hard the fact that the sole purpose of the Blue Book was to fix prices. The Commission rejected that, as the Act is not concerned with the purpose of the parties.

Prima facie, that seems logical since the primary concern is whether harm is caused or not. But for two cogent reasons, that approach is fundamentally defective. First, it assumes that market conditions do not change. Business trends can operate in a cyclical fashion with ups and downs. An agreement approved during "hard times" for the reason that it would have no impact, could become an effective price fixing mechanism during "good times". The Commission should not look at the effects or possible effects at any fixed point of time but rather over a long-term basis. The Appeal Authority in *Registered Hairdressers* clearly recognised this factor. Dalglish J. in that case said:[106]

> Another way in which reduction in competition as to prices may operate against the public interest is that when changing circumstances of a general nature would, in conditions of free and open competition, lead to a reduction in prices, no such reduction may take place. Furthermore, when there is an operative agreement or arrangement as to prices to be charged, the possibility exists of those prices being increased from time to time with less justification, or to a greater extent, than would occur in conditions of free and open competition.

Thus, even though the Act does not allow the purpose of the agreement to be taken into account, there is no reason why the likely future effects cannot be considered. Secondly, in accordance with sound commercial sense, businessmen would not enter into an agreement of that nature had they not thought it would have a chance of fixing prices. Undoubtedly, this would be looking at the "purpose" but why should not the "purpose" be taken into account? At the very least it is an attempt to fix prices. A change in the legislation would certainly reinforce present collusive pricing control.

VII. CONCLUSIONS

On the whole, it would be unfair to describe the present collusive pricing control regime as totally defective and unworkable. The Commission and the Examiner, realising the inherent anti-competitiveness of such agreements, have taken a hard-line attitude towards collusive pricing. It would obviously be wise to discourage CPA applications, given that they are seldom approved anyway, and thus free much needed resources. For that reason, serious consideration ought to be given to making CPAs illegal per se. Under the Amendment Act, the Commission is required to disseminate information, in the form of guidance to

105 Supra n. 28.
106 [1961] N.Z.L.R. 161, 173.

persons involved in trade and promoting public understanding of the law relating to competition and consumer protection.[107] It is hoped that the Commission utilising this new power will conduct seminars and issue information circulars to indicate to the public the stance it would take with regard to CPAs and other trade practices. This would help to discourage CPA applications.

The present use of the pragmatic case by case method of control of collusive pricing (and other restrictive trade practices) should be replaced by the use of an absolute prohibition against practices having the purpose or effect of lessening competition and not just concentrate on the effects on prices only. Suitable authorisation on public benefit grounds could be provided. Any effective collusive pricing provisions should apply uniformly, extending to professional services. The maintenance of professional standards and the quality of professional service does not depend on the existence of restrictive ethical codes. Private remedies by way of injunction proceedings could be introduced to lessen the burden on the Examiner. Finally, any collusive pricing control regime should refrain from continuing to adopt "a regulatory approach" to control. This inevitably conflicts with the development of effective competition in New Zealand.

APPENDIX

AN ANALYSIS OF THE APPROVALS GRANTED BY THE COMMERCE COMMISSION

Decision No.	Applicant	Conditions Imposed Relating to Pricing	Comment
10	N.Z. Automotive & Cycle Wholesalers' Assn. Inc.	1 Subject to any price control requirements if applicable	Decision No. 71 revoked approval and substituted in its place a reciprocal trading agreement.
13	N.Z. Assn. of Shipping Agts.	1 Subject to price control requirements if applicable 2 Prior approval required for alterations 3 "Maximum only" 4 Free to charge less	Decision No. 72 changed the "maximum only" to "recommended rates" and also deleted the prior approval condition.
22	Gilbarco Ind. N.Z. Ltd.		
*27	N.Z. Stock & Station Agts.	1 Subject to price control requirements if applicable 2 Prior approval required for alterations 3 "Maximum only" 4 Free to charge less	Decision No. 51* revoked Decision No. 27 and substituted a more restricted approval.

107 Section 11(1A) as inserted by s. 7 of the Amendment Act.

Decision No.	Applicant	Conditions Imposed Relating to Pricing	Comment
*30	N.Z. Woolbrokers	1 Subject to price control requirements if applicable 2 Prior approval required for alterations 3 "Maximum only" 4 Free to charge less	
32	Interflora Pacific Unit Ltd.		Some conditions were imposed but none of them relate directly to pricing.
48	Auckland Joinery Manufacturers' Assn.	1 Prior approval required for alterations	CPA relates to pricing formula.
49	Liquigas	1 Prior approval required for alterations	Directive from Minister on s. 2A.
*56	N.Z. Contractors' Fedn.		Only condition was that Book is to be worded as a "guide" only.
58	Wellington Master Plumbers	1 Prior approval required for alterations	CPA relates to "recommended" pricing formula.
59	Wanganui Master Plumbers	1 Prior approval required for alterations	CPA relates to "recommended" pricing formula.
62	National Insurance Co. of N.Z. and CML Fire & General Insurance		Only condition was that there be a written notice of any amendment or termination of the CPA.
63	N.Z. Bankers' Assn.		
64	Funeral Directors' Assn.	1 Prior approval required for alterations	CPA relates to "recommended" pricing formula.
66	N.Z. Drycleaners, Matwen Enterprises Ltd. and G. Kline Ltd.		
68	N.Z. Bankers' Assn.		
70	N.Z. Bankers' Assn.		Only condition was that there be a written notice of any alteration within 14 days.
75	N.Z. Bankers' Assn.		Only condition was that there be a written notice of any alteration within 14 days.
76	Teleflower Inc.		Only condition was that there be notification of any changes within 14 days.

* Where an inquiry was held.

Note: An inquiry was held in Decision No. 28 (*HANZ*). The Commission declined approval but the decision was reversed on appeal to the High Court.

(1984) 14 V.U.W.L.R.