COMPETITION LAW AND VOLUNTARY CODES OF SELF REGULATION: AN INDIVIDUAL ASSESSMENT OF WHAT HAS HAPPENED TO DATE

WARREN PENGILLEY*

I. BASIC OBJECTIVES

A. THE IRISH MOTORIST

There is the story of the Irish motorist who, on stopping to ask a policeman the way to Dublin, received the reply, "If I were wanting to go to Dublin, I sure wouldn't be starting from here!"

---

* D.Sc., M.Com [Newcastle]; J.D. [Vanderbilt]; B.A., LL.B. [Sydney]; FCPA; Managing Partner of the Trade Practices and Technology Division in the Sydney Office of Sly and Weigall, Solicitors; formerly Commissioner, Australian Trade Practices Commission.

This paper was originally presented at the 1989 Trade Practices Workshop held at Jupiters Casino Broadbeach, Queensland on 21-23 July 1989 and subsquently presented at a Continuing Legal Education Seminar conducted by the Faculty of Law, the University of Sydney on 20 September 1989. This paper is written as at 1 June 1989.

A previous version of this paper was forwarded for comment to twenty eight persons or organisations - eight leading trade associations, six academics and six lawyers with an interest in the field, two consumer associations, three Officials of the Trade Practices Commission and three State Government Officials with an interest in Self Regulation.

The purpose in doing this was to attempt to obtain an input of diverse views. Except where the persons involved are on public record as holding certain views, it is thought inappropriate to quote them by name. For similar reasons, it is not intended to disclose the indentity of

An Assessment of self regulation and competition law in Australia involves much the same sort of logic. What we have ended up with is the result of a number of different decisions taken for quite diverse reasons by various separate parties, each of which decisions has had an impact, sometimes unimagined or unintended, in the self-regulatory field. If we wanted a logical policy, we certainly would not have started from where we did.

The matters contributing to the Australian end result are as diverse as the Trade Practices Commission's 1985 decision to conduct its *Survey of Consumer Opinion in Australia* and its subsequent 1987 Report; the Governmental decision in 1977 to enact s.4D of the *Trade Practices Act* covering exclusionary provisions; and the quite discernible differences in the interpretation of competition and public benefit principles by the Trade Practices Commission and its appellate body, the Trade Practices Tribunal (which bodies have power to authorise arrangements, and thus exempt them from the provisions of the Act, on "public benefit" grounds), between the 1970s and the present.

B. THE STATES AND SELF-REGULATION

Initially, it was intended in the Paper to cover self-regulation at the State level, as well as under the *Trade Practices Act.* No-one can deny the huge impact of the State input into the self-regulatory picture. Three States (New South Wales, South Australian and Western Australia) have provisions of various intensities in their *Fair Trading Acts* which provide for the *mandating* of voluntary codes - a conflict of terminologies perhaps but that which has been used to sell the concept politically. Nothing of this nature has yet been done at the Federal level though, as we shall see later, the Trade Practices Commission has, non-publicly at this stage, strongly pressed that there should be Federal legislation to this effect.

---

those to whom the paper was forwarded. Some persons specifically requested not to be identified and this wish has to be respected. If some are not to be identified, it appears to the writer that none should be. It is hoped that the reader will accept the wrtier's assurance that the persons involved represent a wide range of opinion. The views received have, in fact, made any evaluation of the whole self-regulatory issue more difficult. Because they are diverse, they are often diametrically opposed. However, the opinions received have been most valuable in the compilation of this paper. The writer expresses his thanks to those who have assisted him. Probably the one thing all such persons will be pleased to observe is that the present paper bears little resemblance to the prior one. Whether they think that the present ppaer is an improvement on the prior one is, no doubt, something about which the writer will hear in due course.

After some agonising, it was decided to delete coverage of State self-regulatory activity except *en passant* so to speak. Such a coverage would unduly lengthen the paper, add prolixity and lessen the thrust of the prime intended coverage - i.e. self-regulation and competition law, competition law in the form of the *Trade Practices Act* being Federal legislation of which there is no State equivalent. It must be stressed, however, that no coverage of self-regulation in an over-all sense can be complete without a consideration of State actions in the field.

C. MATTERS COVERED IN THIS PAPER

For the above reasons, this paper starts from a number of diverse points involving Federal competition law, policy and enforcement and discusses each. Hopefully, these diverse discussions can then be drawn together into a more general assessment of what has happened to date in relation to self-regulation.

The diverse matters referred to and discussed in this paper are:

(i) The law pre July 1977 and the competition principles which followed from interpretation of it to that date. Fundamentally, this is a discussion of interpretation by the Trade Practices Commission as there was then, and still is, very little Australian judicial interpretation on the subject of trade association regulatory activity.

(ii) The effect of the Governmental decision in 1977 to insert s.4D into the *Trade Practices Act.*

(iii) The difficulties inherent in authorization of self-regulatory activities. Is it possible for the problems of trade associations to be overcome by the authorization?

(iv) Changing principles relating to public benefit and competition. In particular, a study of the Media Council cases is an instructive study in this area.

(v) Procedural difficulties now facing parties seeking authorization.

(vi) The involvement of the Trade Practices Commission and its activities in relation to voluntary self-regulation.

(vii) The present performance of trade associations in their self-regulatory role. In this discussion, it is also appropriate to ask questions as to the present perception of the market players regarding to the role of competition law, the Trade Practices Commission and self-regulation.

It is submitted that a study of the above matters gives rise to the conclusion that some quite significant aspects of present law and/or policy require change. In the ultimate, it may be that little can be achieved by legislation because of the necessary freedom which has to be allowed to adjudicators and administrators. Perhaps, however, adjudicators and administrators may believe that the views

here expressed merit consideration when they adjudicate upon, or embark upon, matters affecting future policy.

II. ALL ASSESSMENTS ARE SUBJECTIVE

> The truth is impossible to comprehend even when one is willing to tell it. For the truth resides in memory and memory is clouded with repression and a desire to embellish. The recollections of any individual are conditioned by the general truths by which he or she has tried to live. To recall an event is to interpret it, so the truth is altered by the very act of remembering. Therefore, the truth, like God, does not exist - only the search for it.
> Frank Hardy *Who Shot Kirkland - A Novel about the Nature of Truth* [Sydney, 1981]

In our quest for "objectivity" in research, we often do not realise, or will not admit, that most conclusions of research, other than in the purely objective sciences (and perhaps often enough even in them) are fundamentally subjective. In areas which are shadowy and largely undocumented, it is even more important to recognise this. In recognition of this fact, this paper has been entitled "An *individual* assessment of what has happened to date". It is only a grudging acceptance of academic pretention that compels the writer to put this paper in the third rather than the first person. The first person would, in a paper such as this, be far more appropriate. If "I think" or "I feel", it is surely nonsense to pretend that this is done by some impartial objective process. Why one's thoughts, and more particularly one's feelings, cannot be expressed in the first person is quite beyond this writer's comprehension. Unfortunately that class of persons called editors, who control the publication of articles, mandate expression in the third person - presumably because they believe such expression gives rise to objectivity of conclusion. This writer makes no such claim for this paper.

In short, the writer has to recognise his subjective experiences and background and does so. He urges only that his critics do the same. Only by this recognition can discussion be both fruitful and non-antagonistic.

A. FACTORS OF SUBJECTIVITY

Just as it is important to recognise that assessments are frequently fundamentally subjective, it is important to recognise why such subjectivity occurs. The obvious initial reasons are the different backgrounds of persons and their different heritages. However, there are factors additional to this which can be identified. These are:

(i) There is a significant amount of input in the field which is quite undocumented and quite unquantifiable. A critic can, therefore, "write off" views which particular persons express on the basis that such views are "unfounded". By the term "unfounded", the critic generally means

"undocumented". Such a short dismissal of seriously and genuinely held views often enough:

- implies that the views are not seriously and genuinely held or are held from some biased or improper motive;
- implies that no view is valid which cannot be "founded" (if "founded" is the logical opposite of "unfounded") yet many views are quite responsible and valid even though based upon nothing more than experience over time and in respect of which no supporting documentation exists at all;
- suggests that the businessperson (if a "business" opinion is being attacked) has time to, or has the capacity or inclination to, write detailed treatises on subjects which often interest him or her more in their application than in their theoretical justification; and/or
- suggests that the critic's comments must be accepted as valid because the view attacked is not substantiated. The critic in alleging that a view is "unfounded" is engaging is sophistry. The critic invites acceptance of his or her criticism whilst at the same time having to present no material himself or herself in answer to the arguments criticised.

All of these methods of approach to non-documented, and thus "unfounded" assertions often appear in self-regulatory discussions. Frequently enough they create more heat then light. Not infrequently, they resemble the well known instructions by a solicitor to his or her counsel: "Have no case; abuse the opposition!"

(ii) There is more to subjectivity of views than differing backgrounds. Much of one's viewpoint is based in the particular vantage (or disadvantage) point from which one views competition law and policy. This may well be regarded as a particular application of the view that "where you stand depends upon where you sit".

A short example of this point will suffice. As appears later in this paper, the writer's views are that the 1977 drafting of s.4D of the *Trade Practices Act*[1] makes the Australian collective boycott provisions very

---

1 "Exclusionary provision" is defined in ss4D(1) and 42(2)of the *Trade Practices Act*. An exclusionary provision is illegalised *per se* by ss45(1)(a), 45(2)(a)(i) and 45(2)(b)(i) of the Act. For purposes of the present discussion, the relevant provision of the *Trade Practices Act* is the definition contained in s4D(1) which reads as follows:

"4D.(1) A provision of a contract, arrangement or undrstanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposed of this Act if -

(a) the contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arried at, between persons any 2 or more of whom are competitive with each other; and

tough indeed - far more so than in the United States. This, in the writer's view, is for no apparent socially or economically beneficial reason. As appears from the *Kim Hughes Decision*,[2] collective action in Australia may be condemned *per se* (i.e. without further enquiry as to consequences) even though it is not anti-competitive - a situation which cannot occur in the United States[3] and which, in this writer's view, is quite unjustifiable.

The writer, and a number of trade associations he has advised, have experienced considerable problems with s.4D in relation to the

---

(b) the provision has the purpose of preventing, restricting or limiting -

(i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or

(ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes or persons in particular circumstances or on particular conditions,

by all or any of the parties to the contract, arrangement or understanding or of the proposed parties to the proposed contract, arrangement or understanding or, if a party or proposed party is a body corporate, by a body corporate that is related to the body corporate."

2 *Hughes v Western Australian Cricket Association* (1986) ATPR 40-736. It is strange that the *Kim Hughes Decision* appears to have been largely unnoticed in political terms. Pursuant to the decision, Hughes, a former Australian Test Cricket Captain, was permitted to return to local cricket after having been denied this right by the Western Australian Cricket Association because he had played cricket in South Africa. This was the only remedy Hughes sought. The decision said nothing about international representative cricket. Perhaps only a mandated return by the Federal Court of Kim Hughes as Australian Captain and some sort of an international cricket boycott of Australia because its Captain had played in South Africa is enough to motivate politicians to change the law. The writer later argues that all dictates of common sense compel one to the conclusion that the Australian law of collective boycotts is quite wrong in principle.

3 The United States Courts:

"will not indulge in (the *per se*) conclusive presumption lightly. 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 of trade with no purpose except stifling of competition. (These are) demanding standards ... *per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anti-competitive ... (and) is without any redeeming virtue" [*Smith v Pro-Football* 1978 - 2 Trade Cases 62,338 (D.C. Ct. of Appeal)].

See also *National Society of Professional Engineers v U.S.* 434 US 679,692 (1978); *Continental TV v GTE Sylvania* 433 US 36, 50 (1977), *Broadcast Music Inc v Columbia Broadcasting System* 1979 - 1 Trade Cases 62,558, (U.S. Sup Ct).

disciplining of errant members in circumstances which would not be anti-competitive in the United States. The writer, based on this experience, believes, for reasons later stated in detail, that s.4D of the *Trade Practices Act* is in very great need of re-drafting, and, for the same reasons as the writer advocates, a re-drafting of the equivalent section in the New Zealand *Commerce Act* is currently under consideration.[4] An Official of the Trade Practices Commission, to whom the writer showed a prior draft of this paper stated, however:

> I look in vain for any scintilla of evidence to support your concerns. Not a single example, not even a hypothetical one, is given to establish that there is the least problem deriving from the circumstances which you describe.

The reason why the Trade Practices Commission Official takes the view he or she does is based, perhaps, on that Official's background (as discussed in (i) above) and perhaps in his or her experience in competition law. Regardless of that Official's background, he or she is unlikely ever, on the Trade Practices Commission, to experience the type of problems which the writer later attempts to articulate.

This is because the last person to whom one would go for advice on how to commit a *per se* breach of the *Trade Practices Act*, or practice some subtlety which may be marginal conduct, would be the Trade Practices Commission. The writer can hardly publicly lay on the line the problems of particular trade associations he has advised or the advice he has given them. Yet, apparently for this reasons, the writer's concerns are set aside by the Commission Official referred to as quite illusory. This can be done only because the Commission Official and the writer see quite different sides of the same law in their day to day involvement with it. It is a pity, however, that, because examples of the problem cannot be publicly given, one's comments cannot be accorded some credibility as representing a concern. It is perhaps also a pity that Government takes its advice largely from its administrative and enforcement authorities who, as the example given demonstrates, see but a limited aspect of competition law in the market place and sometimes have a capacity too readily to write of the experience of others.

(iii) In receiving comments on a prior draft of this Paper, the writer has been particularly impressed with the fervour with which those viewing competition and self-regulation from particular viewpoints have argued from the particular to the general. For example those "consumer advocates" who attack the Media Codes speak in impassioned terms of the inadequacies of the decision in the *Winfield Case* involving cigarette

---

4 *"Review of the Commerce Act - Discussion Paper"*. Paper prepared by the New Zealand Department of Trade and Industry (August 1988) at 29.

advertising.[5] It is, of course, not hard to argue that a whole media self-regulatory system is unjustifiable if all one has to do is to demonstrate that a particular procedure adopted or a particular decision reached is tragically wrong - as the writer believes the *Winfield Case* to have been.

Yet whilst many call for the dismantling of self-regulation systems or more control over them (depending upon the particular viewpoint of the person involved), it is strange that we do not see the same problems inherent in more traditional adjudicative bodies such as the courts. Most of us feel that the High Court of Australia is, on occasions, quite unusually stupid in relation to some of the conclusions it reaches. Yet hardly any, if any, of us campaign to rid the country of that court. The same certainly cannot be said of self-regulatory adjudication.

In similar vein, if one believes the High Court is always right, the lower courts must be quite inadequate in many respects. If the disposition of the High Court Appeals is any indication of competence, lower courts get it right only about fifty per cent of the time.[6] Yet, again, we do not hear cries for the abolition of lower courts of the land.

One's views on self-regulation are perhaps somewhat premised on one's views of decision-making generally and, perhaps even more so, on one's views on governmentally backed decision making as opposed to a private instrumentality doing the same thing - perhaps with all the same inadequacies. Some inherently believe that the Government is better in this area than private enterprise; others clearly do not. The nature of any individual self-regulatory evaluation may well be an extension of what are, in reality, fundamentally political or social attitudes to the solution of societal problems. Such evaluation may, in fact, have but passing relevance to the actual performance of various entities.

It is, in the writer's view highly doubtful if the same standards are applied to Government regulators as to private regulators. One of the reasons the Trade Practices Tribunal did not authorise the Media Codes in *Media Council (No.2)*[7] was that the rules involved suffered from "uncertainty, ambiguity (and) inconsistency". One does not question the necessity for clear rules but is forced to wonder how much

---

5 For general criticism of the operation of the Media Codes see S. Barnes and M. Blakeney "*Advertising Regulation*" (1982) at 467 et seq.

6 The 1988 *High Court Annual Report* gives the following disposition of Appeals to that Court:

Allowed	13
Dismissed	10
Decision Reserved	14
Total Appeals	37

7 *Re Media Council of Australia (No.2)* (1987) ATPR 40-774.

Government legislation would pass this public benefit criterion.[8] The Commonwealth's statutory draftperson is on official record defending his draftmanship on the ground that criticism of it is unfounded when based "(on the mistaken belief that statutes) ought to be expressed in simple language capable of being understood by the average citizen".[9] The Ministerial "unintended consequences" statement has been elevated to an art form in Australian politics and this is due entirely to hastily, or badly thought out positions or to incompetent drafting. One is inclined to believe that not too much of our legislation would pass the public benefit scrutiny of the Trade Practices Tribunal in its *Media Council (No.2) Case*. Governmental activities thus survive - often without criticism at all - in circumstances which may spell doom for many non-Governmental arrangements of an akin kind.

Purely to balance the position as regards media self-regulatory adjudication, Appendix 1 sets out details of such adjudication as gleaned from the only over-all study made, to the writer's knowledge, of decisions of the Advertising Standards Council. It is suggested that a study of this material may well be more fruitful than emotive conclusions from one, or a few, cases where probably wrong principles and procedures were applied. Appendix 1, to this writer, indicates an over-all serious approach to decision making. The reader can make his or her own evaluation of the Advertising Standards Council's adjudicative record by reference to Appendix 1 and perhaps by further study of the material there cited.

(iv) A further factor guiding one's approach to self-regulation may well be one's opinion as to the degree of perfection which can reasonably be expected regarding the solving of society's problems. As is apparent later in this Paper, the writer's basic opinion is that a search for perfection is quite illusory. Even if achievable, its cost to society would be quite disproportionate to the benefit obtained. Indeed, in the writer's view, one of the reasons for the quite over regulated state of Australian commerce is a no doubt well meaning desire to obtain, by regulation, an unattainable state of perfection.

Many a critic of the writer's prior draft paper was of the view that we have dramatically to improve the present state of consumer knowledge and remedies and saw no reason why we could not do so. The writer is of the view that the present position is, in fact, a quite reasonable one in many respects and the dramatic improvement demanded by many is

---

8 See, for example, the searching analysis and criticism of statutory drafting techniques in the Report of the Law Reform Commission of Victoria - in particular "*Legislation, Legal Rights and Plain English: Discussion Paper No.1*" (August 1986).

9 *1984-5 Annual Report of the Office of Parliamentary Counsel* (attached to the Annual Report of the Attorney-General's Department) p.259.

probably illusory in any overall sense and, at the very least, achievable only at disproportionate societal cost. The writer has, however, no doubt that the critics of this view adhere to their position. The difference in the two views is not one of objectives. It is one of belief as to what are reasonable expectations. No doubt one's views of reasonable expectations are also based on background and experience, as much as upon other factors.

(v) It should finally be noted that, as in many debates, it is not, in many aspects, the *actuality* which matters at all. It is the *perception* of parties which is of importance. In battle, if the enemy think you have a brigade of troops in a certain position, then, for virtually all tactical purposes, you have them there. So it is with the Trade Practices Commission and its actions. The Trade Practices Commission sometimes makes statements and then retreats from them or makes statements which can be variously interpreted. This gives rise to certain perceptions as to the Commission's intentions. These perceptions are hard, if not impossible, to dispel. The old joke of a person saying "I am from the Government and I am here to help you" is of particular relevance in relation to how certain trade associations see the Commission's actions in the self-regulatory area. Thus it is not surprising that one trade association executive commented to the writer that the Commission was not genuine when it asserted to trade associations that it was really trying to help, not hinder, and that, in the ultimate, it could force no-one to do anything. He said:

> "I think that one of the real difficulties facing the Commission is its endeavours to have industry accept that its philosophy is one of simple public relations. To be seen to be supporting the Australian Consumers' Association philosophies (either overtly or covertly) and have the public discussion fronted by a former Australian Consumers' Association spokesman creates hurdles of credibility amongst the business community."

A number of other trade association executives at seminars conducted by the Trade Practices Commission have expressed varying degrees of scepticism about what the Commission is doing. Views expressed have been that the Commission's involvement in self-regulation is an attempt at governmental regulation by a new path. Several saw it as a project involving a furthering of the ambitions of the organised consumer movement and its wishes to become involved in industry affairs and decision making. One industry spokesman called on the Commission to "come clean" on its hidden agenda. The Commission may well disclaim the criticism. The point is that it is really not what the Commission says it is doing that matters to such critics. It is their perception of what the Commission is doing which is important. Much as we seek illusory objectivity, we are all, in the ultimate, influenced primarily by what we think others are doing not by what they say they are doing. Thus as

> Frank Hardy says in "*Who Shot Kirkland*" [See quotation at commencement of Part II of this Paper], "... truth ... does not exist - only the search for it."

B. CONCLUSIONS AS TO SUBJECTIVITY

Incensed as many may be at the unsympathetic or quite cynical approach which others take to their own particular philosophies, they should realise that such unsympathetic approaches do exist and are very deeply felt. Indeed, in reviewing various responses to the writer's draft paper circulated to various parties for comment, the major conclusion which the writer reached was that nearly all parties on each side of the debating fence regarded any form of compromise on many crucial issues as a type of moral cowardice. It should not, therefore, be imagined that the self-regulatory debate will give rise to any form of consensus - purely because the philosophical starting points of the contestants are so far removed, one from the other. From a policy viewpoint what is immediately obvious to this writer is that Government would be very foolish indeed to regard the only font of knowledge as being within the Trade Practices Commission or as being within the various studies it has conducted. The Commission's viewpoint is only that - a viewpoint.

A good deal has been said about subjectivity of assessment in the self-regulatory area because it is important that the ground rules pursuant to which discussion in this field takes place be fully examined. It is a fundamental error to regard any opinion expressed as being objective truth. We should initially all concede this so that the realities of the debate are recognised. It is also important to recognise that one can quite reasonably make the most trenchant criticisms of opinions without necessarily attracting the appellation "anti-business" or "anti-consumer". It is of great importance to recognise the fundamental point that branding a critic in such terms says nothing by way of response to the arguments he or she puts.

Having established the ground rules, the writer now wishes to expand upon some of his subjective assessments of what is happening in the field of self-regulation.

III. THE LAW PRE-JULY 1977 AND THE COMPETITION PRINCIPLES WHICH FOLLOWED FROM INTERPRETATION OF IT TO THAT DATE

Prior to 1977, all horizontal arrangements were subject to a competition test. Based on United States reasoning, it was assumed by many, but was not part of the black letter law, that price fixing and collective boycotts were illegal *per se*. Legislative provisions to this effect did not, however, come into force until 1 July 1977.

In addition, the Trade Practices Commission had, pre-July 1977, a power to clear arrangements which might otherwise breach s.45 of the *Trade Practices Act* if the Commission believed that such arrangements did not have a significant effect on competition. A pre-July 1977 clearance had the effect of granting immunity from the *Trade Practices Act* for the arrangement involved. If such arrangement was cleared, no Commission or third party action lay in respect of it. No appeal lay to the Trade Practices Tribunal in respect of a Commission clearance decision. The only factor involved in such decision was anti-competitive effect. The public benefit, or lack of it, in the arrangements was not a relevant consideration.

The Commission's powers of clearance were repealed with effect from 1 July 1977.

In contrast to the very few Court and Trade Practices Tribunal decisions in relation to s.45 prior to July 1977, there were 5,858 Commission clearance decisions from October 1974 to 30 June 1977.[10] Numbers alone do not tell the full story as many decisions were "in principle" or "in block"[11] decisions. However, even discounting the numbers for these decisions, the Commission's competition adjudication role was, by any standard of evaluation, significant in setting the *de facto* competition law in the early life of the *Trade Practices Act.* For all relevant purposes, it was the Commission's decisions on competition which constituted the law at the time - in particular in relation to trade associations and their activities.

The United States law on trade association activity is clear enough. It states that there are no objections to trade association activities which have "meritorious" objectives. A party may be disciplined for breach of a code or other trade association activity without there being any anti-competitive breach

---

10 The figures for s.45 clearance decisions are:

SECTION 45 - CLEARANCE DECISIONS

	1974-5	1975-6	1976-7
Granted on merits	98	751	1713
Denied on Merits	2400 *	185	308
Other (Denied because withdrawn for procedural reasons)	-	58	345
Annual Total	2498	994	2366
Cumulative Total	2498	3492	5858

* Many decisions made in block e.g. in one case over 1500 decisions were made in respect of identical agreements from one applicant.

Source: Trade Practices Commission: *Third Annual Report - Year Ended 30 June 1977* Table 2. p.71.

11 See note 10 *supra.*

of the law so long as a party is given a hearing according to the principles of natural justice at which he or she can present his or her case.[12]

Given this, the Trade Practices Commission, in akin manner to that determined in relation to United States Codes, stated pre-July 1977 that self-regulatory codes with the above characteristics had no anti-competitive effects and could be engaged in without breach of the *Trade Practices Act*.[13]

Pre-July 1977, the public benefit produced by trade association codes was largely irrelevant to their legality. Under the pre-July 1977 clearance

---

12 For commentary in greater detail see W.J. Pengilley *Industry Self Regulation - Background Particulars* [a Paper prepared as a background paper for the Trade Practices Commission (February 1979) and reproduced in Pengilley and Ransom: *Federal Deceptive Practices and Misleading Advertising Law: Judgments, Materials and Policy* (Legal Books Sydney 1987) pp947-974]; see also W.J. Pengilley: *Trade Associations, Fairness and Competition* (Law Book Co Sydney) 1981 pp36-56; pp122-130. See also *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 60,898 (contrast *Iowa v Cedar Rapids Real Estate Board* 1979 Trade Cases 63,012); *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]; *Eliasons Corp. v National Sanitation Foundation* 1980-1 Trade Cases 63,168; and *Consolidated Metal Products Inc v American Petroleum Institute* 1988-1 Trade Cases 68,051. 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 71,706 (a case involving the necessity to choose because only a certain number of golfers could participate in tounaments) and *Bridge Corporation of America v The Amercian Contract Bridge League* 1970 Trade Cases 73,256 where it was held that there were no illegalities in the denial 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 anti-competitive 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 tounament 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.

13 See, for example, *Australian Associated Brewers* (1976) ATPR (Com) p.15,560; *Media Council of Australia - Voluntary Code for Advertising of Cigarettes* (1977-8) ATPR (Com) p.16,925; *Media Council of Australia - Voluntary Code of Advertising of Goods for Therapeutic Use* (1977-8) ATPR (Com) p.16,924; *Media Council of Australia - Voluntary Code of Advertising of Alcoholic Beverages* (1977-8) ATPR (Com) p.16.925. See also note 15 below.

procedures, such codes were frequently cleared on competition grounds thus requiring no public benefit analysis at all. This was so for example, where:

> ... the code (did) not purport to deal with price, amount of advertising or types of product advertised but merely the method of advertising, this method itself being laid down apparently without restriction of competition between the parties being a prime consideration.[14]

Also of importance, in light of the enactment, with effect from July 1977, of the ban on exlusionary provisions contained in s.4D of the Act (a matter subsequently covered in this paper) is the fact that, so long as "due process" was observed and trade association disciplinary action was not engaged in for improper reason, the Commission did not regard an act of expulsion from a trade association as itself constituting a breach of the law. It was the use of trade association powers of expulsion in an arbitrary and capricious manner which was the chief concern of the Commission.[15]

IV. THE EFFECT OF THE GOVERNMENTAL DECISION IN 1977 TO INSERT S.4D INTO THE TRADE PRACTICES ACT

The relevant text of s.4D of the *Trade Practices Act* is set out in Footnote 1 to this Paper.

It is important to analyse s.4D in detail as a matter both of law and policy because of the dramatic impact it has on the legality of trade association actions under the *Trade Practices Act.*

A. THE PERCEIVED VIEW UNTIL RELATIVELY RECENTLY OF TRADE ASSOCIATIONS AND THE TRADE PRACTICES ACT

Until reasonably recently, the perceived view of lawyers, trade association executives and the Trade Practices Commission appeared to be that codes which were not anti-competitive could generally be carried on even if not Authorised. Also parties in breach of such Codes could be disciplined so long as proper procedures were followed. This is the law of the United States. It was the law

---

14 See, for example *Australian Associated Brewers* note 13 *supra.*

15 See *Trade Practices Commission Information Circular No.9* (26 May 1975); *Wine and Brandy Producers Association of South Australia* (1975) APTR (Com) p.8,651; *Wholesale Wine and Spirits Merchants Association of NSW* (1975) ATPR (Com) p.8,646; *Australian Pharmaceutical Manufacturers' Association* (1976) ATPR (Com) p.15,536; *Australian Veterinary Association* (1975) ATPR (Com) p.15,586; *Customs Agents Association of NSW* (1976) ATPR (Com) p.15,588; *Hornsby Travel Centre on behalf of Australian Federation of Travel Agents* (1976) ATPR (Com) p.15,553 (and prior cases in relation to Travel Agents there cited); *Droughtmasters Stud Breeders Society* (1977) ATPR (Com) p.15,628; see also *Australian Funeral Directors Association (Queensland Branch)* (1979) ATPR (Com) p.15,558.

as interpreted by the Trade Practices Commission under its pre-July 1977 clearance powers.

B. NO PUBLIC BENEFIT IN TRADE ASSOCIATIONS AS SUCH

In a determination in 1979, the Trade Practices Commission stated to industry that

> ...the mere setting up of a trade association is (not) 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 authorisation and, in the Commission's view, do not need to do so...* [Emphasis added][16]

C. THE POST 1986 INTERPRETATION OF S.4D AS A RESULT OF THE KIM HUGHES CASE

The above 1979 Commission determination was probably a fair representation of the law as it was perceived in 1979. In 1977, s.4D of the Act and amendments to s.45 illegalised "exclusionary provisions" but this law was, in 1979, still untested. Whilst the interpretation of the "purpose" test in s.45D of the *Trade Practices Act* was developing in this period and the cases in this area had clear "flow over" effects into the interpretation of the exclusionary provision definition in s.4D, the full impact of the 1977 exclusionary provisions amendments did not become apparent until 1986 when the Federal Court handed down its decision in *Hughes v Western Australian Cricket Association.*[17] This decision makes it clear that any trade association seeking to enforce its provisions by, say, expelling a member for breach of its code has severe difficulties *not* in terms of the competitive impact of the expulsion conduct but because, in the absence of Authorization of the Code, the expulsion conduct may constitute an exclusionary provision and thus be a *per se breach of the Trade Practices Act.* Circumstances can also be easily constructed where the refusal to admit a qualified party to membership of a trade association because of non-compliance with, say, the association's code of ethics may similarly be a *per se* breach of the Act.

D. THE CONTRAST BETWEEN AUSTRALIAN AND UNITED STATES LAW OF COLLECTIVE BOYCOTTS

There is no policy logic in the Australian position as stated above. However, the interpretation given s.4D of the *Trade Practices Act* in *Hughes* (supra) leads inescapably to the position stated - a position which is possible only because the Australian Parliamentary draftsperson has both failed to encapsulate in the legislation the intent of the *Swanson Committee's Report of 1976* and has also

---

16 *Australian Funeral Directors Association (Queensland Branch)* (1979) ATPR (Com) p.15,558.

17 (1986) ATPR 40-736. See note 2 *supra.*

managed to mistranslate downunder the provisions of the United States *Sherman Act* upon which the Swanson Committee's recommendations were based.[18]

In the United States, of course, it is a fundamental principle of antitrust law that collective boycotts are *per se* banned. The question of real relevance for present purposes is "What is a collective boycott?" In summary,[19] the United States cases have determined that there are two requirements in order for a collective boycott to exist, these being:

(i) The concerted action must be by a group of competitors to protect themselves from competition at that level. In other words, *competitors* must be acting against actual or potential *competitors*; and

(ii) The conduct must have the overall purpose of lessening competition between competitors, actual or potential. In assessing this aspect, the courts will assess at first instance (or "facially" as the Americans call it) the general object of the arrangements and whether or not they are primarily motivated by anti-competitive considerations, the arrangements are not *per se* illegal.

If the arrangements do not fall within the above confines, then they are not banned *per se* in the United States but must be assessed pursuant to rule of reason, or competition, analysis. The purpose of so confining the scope of group boycotts is to limit the *per se* ban to conduct which is "plainly anti-competitive" [20] and which "lacks any redeeming virtue"[21]. The United States Courts have been cautious in the application of *per se* bans and limit such bans to cases where:

---

18 This paper permits only a generalised treatment of the "mistranslation" problem. For more detailed treatment, see W.J. Pengilley *"The Exclusionary Provisions of the New Zealand Commerce Act in light of United States Decisions and Australian Experience"* [*The Canterbury Law Review* Vol 3 No.3 (1988) pp.357-409(b)]; and W.J. Pengilley *"Trade Association and Collective Boycotts in Australia and New Zealand - A Mistranslation of the Sherman Act Downunder"* [*The Antitrust Bulletin* Vol 33 No.4 (Winter 1987) pp.1019-1049].

19 For further elaboration, see articles cited in note 18 above and cases cited in notes 20 to 24 hereunder.

20 *National Society of Professional Engineers v U.S.* 435 US 679,692 (1978); *Continental TV v GTE Sylvania* 433 US 36, 50 (1977); *Broadcast Music Inc. v Columbia Broadcasting System* 1979 - 1 Trade Cases 62,558 (U.S. Sup Ct); *Smith v Pro Football* 1978 - 2 Trade Cases 62338 (D.C. Ct of Appeals); *Pretz v Holstein Friesian Association of America* 1989 - 1 Trade Cases 68581 [D.C. Kansas]; *Martin v American Kennel Club* 1989-1 Trade Cases 68564 [D.C. N.D. III].

21 *Northern Pacific RR Co v U.S.* 356 US 1, 5 (1958); *Columbia Broadcasting System supra* note 20; *Smith V Pro Football supra* note 20; *Pretz supra* note 20, *Martin v American Kennel Club supra* note 20.

> ... the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output[22]

or where it is

> a naked restraint of trade with no purpose except stifling of competition.[23]

In summary, the United States position can be expressed in terms that the courts:

> will not indulge in (the *per se*) conclusive presumption lightly. 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 of trade with no purpose except stifling of competition. (These are) demanding standards ... *per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anti-competitive ... (and) is without any redeeming virtue.[24]

The difference between this position and that in Australia is immediately obvious once the definition of "exclusionary provision" contained in s.4D of the *Trade Practices Act*[25] is examined.

These differences are:

(i) In Australia, illegality follows regardless of the target of the conduct i.e. it is not required that there be a boycott by competitors *of competitors*. Kim Hughes was a cricketer. He was not a competitor of the Western Australia Cricket Association. Nonetheless when the Association tried to ban Hughes from playing cricket because he had toured South Africa, it infringed the exclusionary provision definition contained in s.4D and thus *per se* breached the Act.[26] This conclusion is in marked contrast to similar United States decisions[27]; and

(ii) Perhaps more importantly:

---

22 *U.S. v U.S. Gypsum Co.* 1978 - 1 Trade Cases 62103 (US Sup Ct); *Columbia Broadcasting System supra* note 20; *Northwest Wholesale Stationers v Pacific Stationery* 1985 - 1 Trade Cases 66,640 (U.S. Sup Ct); *Smith v Pro Football supra* note 20; *Pretz supra* note 20; *Martin v American Kennel Club supra* note 20.

23 *White Motor Co v U.S.* 372 US 253,263 (1963); *Columbia Broadcasting System supra* note 20; *Smith v Pro Football supra* note 20; *Pretz supra* note 20; *Martin v American Kennel Club supra* note 20.

24 *Smith v Pro Football supra* note 20.

25 The provisions of s.4D(1) are set out in note 1 *supra*.

26 See note 2 *supra*.

27 In contrast to the decision in *Hughes v Western Australian Cricket Association* (*supra* note 2), United States Courts have held, for example, that a collective refusal or professional football clubs to employ a player who wagers on games is not *per se* illegal because the clubs are not in competition with the excluded player: see Commentary in Sullivan: *Handbook of the Law of Antitrust* cited in *Smith v Pro Football supra* note 20.

(a) In Australia the relevant conduct has to have the purpose of preventing, restricting or limiting *supply or acquisition* of goods or services *not* the purpose of preventing restricting or limiting *competition between parties*, as in the United States; and

(b) in interpreting the "purpose" of the relevant conduct in Australia, it is not the long term or *ultimate* purpose of the conduct which is relevant[28] but the *immediate* purpose. It is thus not open to parties in Australia to say that their purpose in engaging in the relevant restricting conduct is *ultimately* to preserve, say, a trade association's code of ethics. This ultimate purpose is simply irrelevant to the question of whether or not there is a breach of s.4D. The immediate purpose is to bring direct pressure to bear and this is what matters.

Thus, the very strict policy constraints adopted by United States courts have been cast aside by the Australian Parliamentary draftsperson. This is borne out by the decision in *Hughes v The Western Australian Cricket Association*[29] where the conclusion was reached that the conduct involved was not anti-competitive but breached the Act as an exclusionary provision - a conclusion unimaginable in the United States because of the strict limitations there as to the reach of the *per se* ban.

E. BOYCOTT LAW: SWANSON GOT IT RIGHT; THE PARLIAMENTARY DRAFTSPERSON GOT IT WRONG

The 1976 *Swanson Committee* in its Review of the *Trade Practices Act* undoubtedly got the U.S. position right when it said that there should be a *per se* ban on collective activity by competitors which

> ...has a substantial adverse effect on competition between the parties to the agreement or any of them or competition between those parties or any of them and other persons.[30]

---

28 *Utah Development Corporation Ltd v Seamen's Union* (1977) ATPR 40-049; *Industrial Enterprise Pty Ltd v Federated Storemen & Packers Union of Australia* (1979) ATPR 40-100; *Wribrass v Swallow & Ors* (1979) ATPR 40-101. The authorities up to December 1979 are reviewed in *Barneys Blu-Crete Pty Ltd v Australian Workers Union & Ors* (1979) ATPR 40-139. Consideration is given to the term by *Lockhart J.* in *Leon Laidely Pty Ltd v TWU & Ors* (1980) ATPR 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 40-138 and in *TWU (N.S.W.) & Ors v Leon Laidely Pty Ltd* (1980) ATPR 49-149. The latest decision on the point as at the date of writing is *Mudginberri Station v Australian Meat Industry Employees Union* (1985) ATPR 40-598.

29 See note 2 *supra*.

30 *Report of the Trade Practices Review Committee* (T.B. Swanson Chairman) 20 August 1976 par. 4.116.

The Parliamentary draftsperson, however, mistranslated both the *Swanson Committee's* wording and the *Sherman Act* logic on which its Report was based. Even though the legislation is said to follow the *Swanson Committee's Report* recommendations, s.4D is a very different animal to that which the *Swanson Committee* thought should be born in Australia and to that which lives in the United States.

F. HOW DOES THE AUSTRALIAN EXCLUSIONARY PROVISION LAW AFFECT TRADE ASSOCIATIONS?

What follows from the above analysis for an Australian trade association wishing to, say, expel a member for breach of a self-regulatory code is as follows:

(a) If the expulsion of the member involves the prevention, restriction or limitation of, say, services to the member, then there is a breach of the *Trade Practices Act* because activity involving an exclusionary provision has been engaged in. Commonly trade associations supply technical and other services, or perhaps even goods, to members and if an expulsion results in the cut off of supply of these goods or services, the Act is *per se* breached. It can with persuasion be argued that the mere right to use of the trade association's logo is the supply of "services" in view of the fact that s.4(1) of the Act defines "services" as including "any ... benefits, privileges or facilities that are... provided, granted or conferred in trade or commerce".

(b) A *per se* breach occurs by expulsion in the circumstances mentioned in (a) above even though such expulsion may, in the view of the Association, be necessary to preserve and implement its self-regulatory code.

(c) A *per se* breach occurs by expulsion in the circumstances mentioned in (a) above notwithstanding the fact that:

  (i) The code itself may not be anti-competitive; and
  (ii) All procedures of due process, fair hearing and the like have been extended to the member prior to the decision being made to expel him or her.

(d) Similar arguments can be constructed to those above which could involve *per se* breaches in refusals to admit members to associations. However, problems relating to refusals to admit to membership will, in practice, probably arise less frequently than those involving expulsions.

G. PRESENT AUSTRALIAN EXCLUSIONARY PROVISION LAW IS IN MARKED CONTRAST TO THE PRE-1977 AUSTRALIAN POSITION AND THE PRESENT UNITED STATES POSITION

It thus follows that there is a very dramatic change in the Australian position now to that operating in Australia pre-July 1977 and that presently operating in

the United States. Trade Associations may, of course, administer codes which are not anti-competitive but they now do so in Australia without teeth if the codes are not authorised by the Trade Practices Commission on public benefit grounds. For, without authorization, any expulsion proceedings, and possibly many refusals of admission as well, run a very high risk of *per se* breach of the legislation.[31]

It is possible, of course, in many cases, for a trade association to expel a member but still provide the relevant trade association service to such person. However, trade associations naturally resent having to do this and, being co-operative organisations, think it quite improper and illogical that they should have to share the fruits of their toil with a person who is not prepared to subscribe to their ethical code of conduct. Further, as stated, the wide definition of "services" in s.4(1) of the Act may mean that the mere denial of use of the Association's logo may involve a *per se* breach of s.4D. In these circumstances, trade association officials, quite rightly in the writer's view, regard the present law as being commercially totally unrealistic.

H. WHY SHOULD TRADE ASSOCIATION EXECUTIVES EXPOSE THEMSELVES TO THE RISKS WHICH AUSTRALIAN LAW BRINGS?

With the animosity which often surrounds expulsion proceedings, writs are often readily issued. Trade association executives, who frequently act in an honorary capacity, would be quite unwise to expose themselves to risks of litigation which could all too easily be the product of their conduct. They are not unreasonable in wanting protection from legal risk in carrying on what may be their quite proper duties in the administration of a trade association and such self-regulatory voluntary codes which such association may have.

I. THERE IS NO LOGIC IN THE AUSTRALIAN POSITION

There is certainly no logic in the Australian position. However, all attempts to prevent the enactment of s.4D in 1977 and all attempts to have the

---

31 The Commission has stated: "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" [*Australian Funeral Directors Association (Queensland Branch)* (1979) ATPR (Com) p.15,558]. The Commission also noted in this decision that the mere existence of a trade association did not put it as risk of contravening the *Trade Practices Act* and that "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." As is stated in the text, any trade association engaging in disciplinary activity may now need Authorization to be outside the Act. The comments in *Australian Funeral Directors* must be understood in the context that they were made but a short time after the exclusionary provisions sections were inserted into the *Trade Practices Act* and prior to their testing. The Commission's comments cannot presently be regarded as good advice in view of the decision in 1986 in *Hughes v Western Australia Cricket Association* (*supra* note 2).

government amend the section in 1986, (when substantial amendments were made to the Act and, indeed, s.4D itself was varied), fell on deaf ears. By its intransigence, the government has confirmed that which many of us instinctively fell i.e. that in politics there is no such thing as the automatic rejection of that which makes no sense. This comment applies to governments of both political persuasions. The Liberal-National Party Coalition government enacted s.4D in 1977. The Labor Party not only refused to amend the relevant aspects in 1986 but actually extended its operation in that year to make the section even more restrictive of arrangements with no anti-competitive detriment.[32]

In the hope that some day in the future, the Government will recognise the points put by the writer, a suggested draft of a suitable amended s.4D is attached to this paper as Appendix II.

J. IS THERE ANY EVIDENCE OF PROBLEMS BEING CAUSED BY S.4D?

It will be recalled (see Part II.2 of this Paper) that an Official of the Trade Practices Commission commented that the writer's conclusions as to the problems inherent in the drafting of s.4D of the Act were not supported by a "scintilla of evidence ... Not a single example, not even a hypothetical one, is given to establish that there is the least problem" with the section. The *Kim Hughes Case*[33], in this writer's opinion, clearly establishes that conduct which is not anti-competitive can be a *per se* breach of the Act. This, of itself, is an adequate example of the problems inherent in s.4D. *Per se* breaches should be reserved only for conduct which is inherently anti-competitive, yet clearly s.4D does not fulfil this criterion. Whilst the writer, for obvious professional reasons, is unable specifically to state chapter and verse of problems encountered by him in practice, he believes that the preceding discussion at least shows examples of quite serious hypothetical problems which the Trade Practices Commission Official involved has simply chosen to ignore.

---

32 In 1986, the provisions of s.4D about which complaint is made in the text were not amended. The section was, however, extended so as not only to apply where "a person" is the object of limitation etc. of supply or acquisition but also to apply where "a class of persons" is the object of such limitation. It is thought by the writer that the pre-1986 drafting requiring "particular persons" to be the object of the exclusionary provision is superior. [For further elaboration see Articles cited at note 18 *supra*.] The strict law in Australia probably now is that if a group of hoteliers agree not to supply liquor to a class of persons (drunks), they breach *per se* s.4D of the *Trade Practices Act*. This extreme example shows how illogical s.4D is. On its present wording, it does not, in the writer's view, properly serve either appropriate community or competition objectives. In the suggested re-draft of s.4D set out in Appendix II, the problem of "particular persons or classes of persons" is addressed in suggested Subsection (2).

33 See note 2 *supra*.

The Trade Practices Commission, looking at competition policy overall, apparently sees no problems with the present s.4D. It can, of course, run its own prosecutorial "rule of reason" if it is inclined so to do and not bring cases which, though breaching s.4D, have no anti-competitive effect. Private litigants are, however, concerned not with macro-economic policy but with winning a case. They will thus latch on to any possible winning point. Further, the community has no indication at present of what the Commission's attitude is to s.4D and has, in any event, no legal way of ensuring that the Commission adheres to any attitude it publicly states.

The short point is that merely because the Trade Practices Commission sees no fault with the section is no reason to leave it unamended.

V. THE DIFFICULTIES INHERENT IN AUTHORIZATION OF SELF REGULATORY ACTIVITIES: IS IT POSSIBLE FOR THE PROBLEMS OF TRADE ASSOCIATIONS TO BE OVERCOME BY AUTHORIZATION?

A. WHY HAVE THERE NOT BEEN A SWAG OF AUTHORIZATION APPLICATIONS?: HOW TRADE ASSOCIATIONS HAVE COPED WITH DISCIPLINARY PROCEEDINGS TO DATE

From what has been said, it is clear that only an authorization of the rules and procedures of a trade association can fully protect the association in the event that it expels a member for, say, a breach of its ethical code [For the purposes of the present discussion, we will assume that any code referred to is one which would pass competition scrutiny under American anti-trust law standards].

The immediate question arises as to why more authorization applications have not been made. Partly the answer lies in difficulties, actual or perceived, in the authorization process. Partly the answer lies in various compromises which have been reached between parties so as to avoid confrontation. In these comments, the writer should not be regarded as being opposed to compromise. However, the writer is opposed to a law which, in some cases, mandates certain results when there is no inherent social or economic worth in the results so mandated.

Problems of principle inherent in the authorization process are discussed at length later in this paper. To a significant degree, the more pragmatic problems involve money. Trade Associations fail to see why they should spend what to them can be, actually or potentially, substantial sums in a non-productive pursuit i.e. hiring lawyers and satisfying the demands of regulators. In particular, the prospect of an Appeal to the Trade Practices Tribunal from a favourable Commission Determination is a matter of very real concern. In the Tribunal, there is not the informal and relatively inexpensive procedure which exists before the Commission. The Tribunal involves a full blown public hearing complete with counsel and all the incidental legal expenses inherent in

this. In a number of cases, to the writer's knowledge, disputes have occurred when trade associations have sought to enforce Codes of Conduct and the question has been raised as to whether authorization should then be sought. At that point of time, however, the right to seek authorization is of no practical benefit because of the time periods involved in the process and because of expense and other problems (discussed later) inherent in a possible Tribunal Appeal. In the writer's view, a major problem with the authorization process as seen by trade associations, is that a dissident can seek review of a favourable Trade Practices Commission Authorization Determination yet such dissident bears no onus of proof obligations[34] and is subject to no potential costs discipline in the event that his or her appeal is not upheld[35].

The perceived weaknesses in the authorization system thus force various compromises. These come in a variety of forms. Each form of compromise is one which can be forced by a dissident who is properly advised as to the law. This result follows only because the law, in most circumstances, makes it illegal to expel the association member unless there is authorization for the association's constitution and rules in place prior to the relevant disciplinary proceedings being taken. Compromises, to the writer's knowledge, have been generally along the following lines:

- the party involved has been expelled from an association but permitted to continue to receive various association services.
- disciplinary proceedings have been discontinued because of legal risks involved. [The result of this is, of course, that the association has not been able to enforce its code of conduct]; or
- disciplinary proceedings have been confirmed, the party has been expelled after a full hearing of the matter and the risk has been taken that threatened legal proceedings will not be instituted [The result of this is, of course, that the association enforces its code of conduct but only at considerable legal risk].

Any of the above compromises hinders proper enforcement of codes of conduct. In some cases, s.4D has meant that codes of conduct have remained unenforced.

The writer has no doubt that the Trade Practices Commission believes that the fact that it has not received a swag of authorization applications is evidence that s.4D is causing none of the problems which the writer states. It is suggested, however, that costs and procedures may well be the reason for the dearth of applications. Further the philosophy that "we can cross that bridge when we come to it" appeals to us all far more than the prospect of putting significant sums of money up front now. Finally, changes in the interpretation

---

34 See the Determination of the Trade Practices Tribunal in *MGICA and AMIC Ltd* (1984) ATPR 40-494 at p.45,695 and *Media Council (No.2)* (1987) ATPR 40-774 at p.48,419.

35 The Tribunal has no power to order costs to be awarded against an unsuccessful party in Tribunal proceedings.

of "public benefit" and in the interpretation of the authorization test (discussed later) mean that many associations believe, in any event, that they are unlikely to obtain authorization and there is little point in applying for it. They are thus compelled consistently to risk illegality on any enforcement procedures they take to enforce their codes.

It is not difficult for legal practitioners to draft codes of conduct which have obvious societally worthy objectives, which are not anti-competitive and which provide for procedural "due process" in disciplinary hearings. If these codes and procedures are followed, the risk of anti-competitive conduct is minimised and, in most cases, non-existent. It is a very difficult situation for a legal adviser to draft such a code and supporting procedures and then have to advise a client association that the association may still be acting illegally if, without authorization, it enforces the code. The association executive is even more bewildered when one can give an unequivocal undertaking that the code and procedures as drafted would be legal under United States anti-trust law yet they may be illegal under Australian competition law because of s.4D of the Act. The usual response is the incredulous enquiry by the association executive "But aren't the Yanks meant to have the toughest competition laws in the world?" The reply is "Yes, but ...".

B. AUTHORIZATION IS MORE IMPORTANT NOW THAN IT WAS PRE-JULY 1977: BUT IT IS A LOT HARDER TO OBTAIN

Because of the clearance procedures available pre-July 1977, the then absence of s.4D and the then interpretation of competition principles, as they applied to trade associations, along Untied States lines [see Part III], the role, pre-July 1977, of authorization as a protector of trade association activity was not pivotal. It currently is. Trade associations, however, now face a far more difficult task in obtaining authorization than they did previously. The concepts of "competition" and "public benefit" are now being interpreted in a way unimagined in the 1970's. Further, there are now a number of Tribunal "procedural" rulings which disadvantage the trade association which seeks authorization. The degree of certainty with which an association can regard a Commission Authorization as concluding its involvement with the Trade Practices Commission is also now thrown into real doubt in view of apparent recent Commission policy of undertaking "Studies" of industries whose practices it has previously authorized. The Trade Practices Tribunal's findings as to the desirability of "outside participation" in trade associations, embraced by the Trade Practices Commission, is a further hurdle for associations to overcome in the authorization steeple. It is to a discussion of these aspects we now turn.

C. THE 1970'S INTERPRETATION OF THE "PUBLIC BENEFIT" TEST

In the 1970's the Commission found public benefit in a number of codes before it. The test applied then by the Commission is, however, different from that currently applied.

Firstly, in the 1970's the Commission found in many codes that the anti-competitive detriment resulting from them was small or, in a number of cases, non-existent. In weighing up the equation, therefore, only a small amount of public benefit was necessary in order to tip the scales. Anti-competitive effect, as we have seen [Part III], was largely interpreted along the lines of United States principles.

Secondly, on the public benefit side, the Commission was prepared to authorize codes which delivered a small public benefit if the anti-competitive effect was, as the Commission often found it to be, small or non-existent. Significantly perhaps, the Commission did not view its task as being to withhold authorization because alternative codes could be implemented which may have brought about a more desirable social result.[36] This was a matter for parties to negotiate. Codes could be authorized, notwithstanding their inadequacies, if the public benefit delivered exceeded anti-competitive detriment. As stated, the Commission often found this detriment to be small or non-existent.

The *Trade Practices Act* authorization test is the same now, as a matter of black letter law, as it was in July 1977. The interpretation of that test is, however, much different.

The writer believes, as a value judgment, that the Commission initially interpreted the section in accordance with the legislative intent and, of recent times, there has been a good deal of straying from the initially intended interpretational path. No doubt, this is a matter upon which the reader will formulate his or her own conclusions as this paper continues.

---

36 In *Cigarettes* (*supra* note 13) the Commission required deletion of those provisions of the Code preventing comparison of tar levels because such deletion would put competitive pressure on manufacturers. So varied, the Codes were not anti-competitive and "the Commission finds some public benefit in them". In *Cigarettes*, the Commission was at pains to point out that it thought the Code was far from ideal. However, it was better than nothing and thus delivered public benefits. Similarly in *Therapeutic Goods* (*supra* note 13) the Commission found that public benefit was delivered though this "by no means (is) to suggest that the debate on advertising of these preparations should not proceed or that the code does not need further development". In *Alcoholic Beverages* (*supra* note 13) the Commission found public benefits though it stated that it "is not saying that the standards of liquor advertising are now satisfactory or that liquor advertising itself is in the public interest".

D. FOR SOME TRADE ASSOCIATIONS, AUTHORIZATION WILL BE IMPOSSIBLE TO OBTAIN: THESE ASSOCIATIONS WILL FOREVER BE AT RISK UNDER S.4D IN ENFORCING CODES OF CONDUCT

One fundamental aspect of authorization cannot be overlooked. The whole premise of authorization is based in proof of a public benefit. In its 1979 *Queensland Funeral Directors' Association Determination*,[37] the Commission stated what this writer would believe clearly to be correct when it said "... the mere setting up of a trade association is (not) enough to constitute a benefit to the public ...". Neither, of course, is it a public benefit merely to act in a manner which is not anti-competitive. To so act is the duty of citizens under competition law.

Such a position was quite sensible in pre-July 1977 days when one could only be in breach of the *Trade Practices Act* if acting anti-competitively. One either complied with competition requirements or sought to demonstrate public benefit outweighing any anti-competitive detriments caused by such non-compliance. However, with the advent post-July 1977, of s.4D of the *Trade Practices Act*, many trade associations are in a sort of legislative no man's land from which there is no apparent escape in that:

- they are not anti-competitive;
- they may be *per se* illegal under s.4D if they take disciplinary proceedings to expel a member. Only authorization can give immunity in this respect, there being no pre-July 1977 clearance procedure still available by which they can obtain immunity from the *Trade Practices Act*; but
- authorization requires proof of public benefit. It is thus not available to a number of associations because "the mere setting up of a trade association is (not) enough to constitute a benefit to the public".[38]

The only possible way of overcoming the problem stated appears to be an application for authorization of a particular expulsion when this expulsion is contemplated. Such a path has problems of timing and costs - in particular if an appeal is made to the Trade Practices Tribunal. On present indications, a Tribunal decision could be two years after the event. There are also general policy objections to associations being forced to this position. An authorization application in respect of individual expulsions necessarily involves decisions on particular cases. For the law to force decision-making in particular cases by a Governmental body, the Trade Practices Commission or the Trade Practices Tribunal, rather than by an industry self-regulatory body is hardly wise policy. In effect, such a policy makes all specific administrative decisions a governmental concern rather than a private one.

Such a position may be quite properly described as government regulation of business, or perhaps more appropriately, since self-regulatory codes are now

---

37 See note 16 *supra*.

38 See note 16 *supra*.

seen as the alternative in many areas to prior legislative regulation, as government *re*-regulation of business. Presumably no-one wants such a competition policy. There is no ascertainable logical reason for it.

Subject to the possibility of authorization being sought for specific expulsions or other disciplinary action, there appears to be no way for many associations to escape the impasse set out above if wanting to discipline members by expulsion. The association can totally purify itself in competition terms but unlike the soul of the penitent designated to purgatory, there can be no final achievable absolution or peace.

E. CHANGED PUBLIC BENEFIT INTERPRETATION

Rather than philosophise generally about changed public benefit interpretation in relation to trade association voluntary codes, it is perhaps more useful to follow the process through in the context of the various Media Code Determinations of the Commission and the Tribunal. Undoubtedly, the latest Tribunal Determinations on the Media Codes have broken new ground in relation to the concept of "public benefit" in the context of a trade association's voluntary code.

Further, these Determinations have introduced into the concept of public benefit, the ingredient of "outside involvement". This aspect is of great importance as it has been so readily taken up by the Trade Practices Commission and others in further work relating to self-regulation.

The Media Code decisions are of such importance that their detailed history and development is set out at length in Part VI of this Paper. The short conclusion which this writer draws from the material in Part VI is that authorization of trade association codes, whilst now of fundamental importance in light of the provisions of s.4D, is very difficult indeed to obtain. In light of this, a number of trade associations may well conclude that the exacting standards imposed by the Trade Practices Tribunal as regards voluntary codes mean that it is not worthwhile even considering an application for authorization of codes administered by them.

VI. THE MEDIA CODES: A CASE STUDY IN CHANGES IN INTERPRETATION 1976 to 1987 IN THE AUTHORIZATION PRINCIPLES APPLICABLE TO VOLUNTARY CODES

A. PUBLIC BENEFIT IN SELF REGULATORY CODES - WHAT THE TRADE PRACTICES COMMISSION AND THE TRADE PRACTICES TRIBUNAL THOUGHT IN 1976 AND 1978 RESPECTIVELY

On 24 May 1976, the Trade Practices Commission, after public hearing, granted conditional authorization to the principal arrangements governing the

administration of the Media Council Accreditation system.[39] Various specific advertising codes[40] were similarly authorized. The Commission, in a paragraph which concisely encapsulates the benefits of industry Codes and Standards, stated in its decision as follows:

> The Commission has no doubt of the importance of the Codes and Standards. Their acceptance and their development by industry influence legislation, and in turn are influenced by legislation. Much of the work of the Commission as a consumer protection authority has been directed to compliance with the law by advertisers, agents and media in respects that might have been thought to be covered already by the Codes. Witnesses volunteered that the Trade Practices Act had had a salutary effect, and that there was now greater attention to standards. This probably means that the Codes and Standards have a more important, not less important, role now because of legislation, both Commonwealth and State, and because of its administration. Although there are substantial areas of overlap, as detailed by Canberra Consumers Inc. and by Mr Sherman, the Commission sees industry and legislative controls as complementary and mutually reinforcing and thinks that industry regulation in the standards area must be welcomed - provided it does not become subject to abuse, of which there was no suggestion here. There are areas where legislation does not reach in specific terms, for example, the specific provisions about broadcasting are not reflected in legislation about newspapers. Moreover, there can be flexibility and speed within an industry system. There can also be the same emphasis on prevention rather than cure that the Commission itself has tried to encourage by its own Guidelines on Advertising as well as on other matters. The industry provisions for clearance beforehand of certain broadcasting and television material and of advertising on particular subjects, notably those affecting health, are matters of real value to the public and, be it remembered, to the industry itself in terms of its self-respect and public standing. The law speaks on some, but not all of these matters. The law has little to say, directly, in matters of what amounts to good taste in advertising in a general moral or ethical sense.[41]

---

39 *Herald and Weekly Times Ltd, 2KY Broadcasters Pty Ltd and Southern Development Corporation Ltd Rules and Agreements* (1976) ATPR (Com) p.16547. The condition was that Rule 19 (stating that only accredited agents could receive advertising commission from media) be deleted and Rule 23 (to the effect that agents must not share commission with other than the accredited agents, make free copy or rebate commissions) be deleted or amended.

The Trade Practices Commission held four public hearings between 1975 and 1977. The Commission's power to hold public hearings was abolished in 1977.

40 The authorized advertising codes were:

- A Guide to Advertising Proprietary Medicines and Therapeutic Appliances and a Code for Advertising Similar Preparations.
- A guide for hair piece/treatment advertising.
- A Domestic Insecticide Advertising Code.
- Standards of Broadcasting Practice; and
- Television Advertising Board Regulations and approval of Commercials etc.

41 See note 39 *supra* at p.16,568.

This view was upheld by the Trade Practices Tribunal which granted authorization to the arrangements *de facto* unconditionally.[42] The Tribunal specifically accepted as public benefits the fact that the coverage of the Codes was in addition to practices covered by legislation, the immediacy of the Codes' effectiveness, the protection given by the Codes in various areas where experience has shown the need for special safeguards (eg. slimming treatments) and that the Codes were conducive to the achievement of uniform standards of advertising throughout Australia. It is of interest to note that neither the Commission nor the Tribunal saw "public" or "outside" involvement in the setting of appropriate standards or in the administration of such standards as being of critical importance to their decisions and nothing rested upon the presence or absence of such involvement.

B. WHAT HAPPENED WHEN THE CODES WERE IMPROVED? ROUND ONE: THE TRADE PRACTICES COMMISSION IN 1986

Where the Media Council encountered problems was when it tried to improve its Codes and sought authorization of such improved Codes. In making its review, the Council took into account some 250 submissions from industry, the public, government and special interest groups.

1. How the Commission saw its role

The Commission stated in its decision on the improved Codes[43] that it was not in the same position as the United Kingdom Director of Fair Trading. The Director in the United Kingdom negotiates codes with industry and gives them official approval. The Trade Practices Commission's role, however, is to decide whether it should grant Authorization, and thus an "exemption" from the restrictive trade practices provisions of the *Trade Practices Act.* The question which the Commission has to determine is whether there is sufficient public benefit in the Codes to justify the test for exemption. The Commission cannot substitute new arrangements in place of those for which authorization is sought. It must adjudicate on the Codes submitted to it.

---

42 *Herald and Weekly Times on behalf of the Media Council of Australia* (1978) ATPR 40-058. The only reservations which the Tribunal had were in relation to an Appeal against a refusal of accreditation and amendments to the rules to prevent what the Tribunal regarded as possible breaches of legislation prohibiting secret commissions. Rules relating to commission sharing also were to be deleted. The Tribunal also placed "a rider" requesting the Commission to examine from time to time the workings of the system for the purpose of considering whether, by reasons of altered circumstances, it was appropriate that the authorization granted should be varied or revoked. [Note: this examination was never conducted by the Commission. The system was next examined when the Media Council changed its rules and sought authorization for such changed rules.]

43 *Media Council of Australia (No.2)* (1986) ATPR (Com) 50-107.

2. Composition and Role of the Advertising Standards Council

There were a number of codes involved in the Determination, such Codes being administered by various Councils. Central to the Determination, however, was the composition of the Advertising Standards Council.

The Advertising Standards Council had the central funciton of receiving complaints about advertisements and then determining whether such advertisements were in breach of the Advertising Codes. By its rulings, it interpreted the various Codes in practice so that its rulings served as references and precedents for specific clearing committees and bodies and for members of the advertising industry generally. Commentary on some of its rulings as at 1985 is set out in Appendix I to this paper.

At the time of decision, the Advertising Standards Council was constituted as follows:

- a Chairman being a person otherwise unconnected with advertising
- two Deputy Chairmen nominated by the Chairman
- five members of the public from more than one State, who were otherwise unconnected directly with advertising, and were appointed on the nomination of the Chairman
- three members nominated by the Media Council of Australia, one each representing print, television and radio
- one member nominated by the Advertising Federaiton of Australia (representing advertising agents)
- one member nominated by the Australian Association of National Advertisers
- two additional members of whom:

  one member shall be selected on the basis of a background in commercial interests and one other shall be selected on the basis of present or past experience in a Government or Statutory Authority with relevance to advertising and/or consumer protection.

The Hon. Sidney Einfield, a former N.S.W. Minister for Consumer Affairs, was appointed to one of these positions and, at the time of the Commission hearing, the other position was unfilled. At the time of the Commission hearing, Mr Justice Toose, already a public member of the Advertising Council, had assumed the office of Deputy Chairman and was to take office as Chairman succeeding Sir Richard Kirby in this position.

3. Opposition to Authorization of the Various Codes and Commission holdings on such submissions

There were numerous submissions opposing authorization of the Codes. It is not here possible to summarize these. However, a number of submissions, it is fair to say, were directed at the object of totally banning certain advertising (eg. cigarette advertising) even though such advertising was legal. The Australian Consumers Association wanted consumer representation on the Media Council Boards which formulated, revised and enforced the Codes. It wanted formal

meetings between the Council and public interest groups. It thought that the Code and its administration were industry biased. To this, the Advertising Standards Council's reply, as reported in the Commission's determination, was that the Council:

> rejects claims that it is industry biased. There has not been a single instance in which a matter has been decided, with a division of views between the industry members and the non-industry members. Members do not represent outside interests and are not responsible to any outside group. Delay has occurred in filling one of the positions set aside for a consumer representative but the Chairman of the ASC said that this has been due partly to the difficulty of finding a suitable appointee and partly to the current Chairman's impending retirement and the need for incoming Chairman to be involved in the process.[44]

On public benefit, the Australian Consumers Association stated that the existence of some if not all of the Codes was contrary to the public benefit because if the Codes did not exist there would be effective legislation which would be enforced. Thus the Media Council Codes inhibited the development of alternative and more adequate legislation. The Commission, however, retained its prior view that codes and legislation are not mutually exclusive and never likely to be. It was a fact, said the Commission, that industry self-regulation did have a significant place and this could not be underplayed or overlooked. It was simply unrealistic, at least in the short term, to suggest that self-regulation would be replaced by governmental regulation. Apart from the very real political, practical and administrative ends which would have to be overcome to achieve this result, there was very real doubt as to whether government administrators would be accepted in the role of pre-vetting advertisements. In this regard, any effective system had to have the confidence of industry. The efficiency and effectiveness of a vetting system would probably be adversely affected if it were left to government administration. Further, there was nothing in any event in self-regulatory codes which necessarily prevents the development of legislation where the need for this is perceived.

The Commission saw its role in Authorization decisions as being

> ... in line with the requirements of its own Act (to look) at what has been done not what might possibly or alternatively be done by someone else. Furthermore, it has no power of its own to insist that the industry make further regulations via the codes.[45]

What the Commission concluded on this issue makes eminent sense. Nontheless, the pressures of consumer groups for legislation as epitomised by the Australian Consumers Association does show the real ability which such bodies have to cause codes to change. If codes do not change, then the industry fear of legislation as the alternative to industry administered codes is quite likely to be converted into reality. The changes in the Media Codes between

---

44 See note 43 *supra* at p.55,330.

45 See note 43 *supra* at p.55,333.

1976 and 1986 were largely due to pressures such as that of the Australian Consumers Association.

Another point strongly put in objection to the improved codes was that they served only industry interests. On this issue, the Commission said:

> ...there is an important question of whether the self-regulation system, which uses as its base the MCA codes, serves only the industry's interest. To achieve authorization the MCA must have the Commission accept not principally that the advertising industry is better off by the operation of the codes but that the public at large is better served. That is all the more important since advertising has such an important influence on public behaviour. The setting for such considerations is not one where individual companies are left to their own devices to regulate themselves by reference to the law. The setting is one of organised regulation via the MCA and it constituents based both on the law and the MCA codes. The Commission therefore as part of the authorization process looks to see whether this "self-regulation" system, centred as it is on the codes, complemented by public administration, is geared to serving the public. It is important in this to ask, as it has been in other cases, whether the codes are, in effect, "open to the public", e.g. whether "outsiders" have been invited and able to influence their formulation and operation; whether the codes serve community standards and the like; and how well the codes operate for the public at large. ... Clearly MCA provided an opportunity for outsiders to make suggestions for improvement of the codes; in the end it reserved final decision for itself. The subsequent submissions to the Commission in relation to the authorization application equally clearly indicate that almost all "outside" groups are still dissatisfied with the results. Some particular points of dissatisfaction are noted later. However, looked at more broadly it must be anticipated that there will come a point where industry self-regulation might go no further to meet the position of "outside" groups. The Commission does not find that unacceptable upon the assumption that responsibility is exercised in determining the limits beyond which self-regulation should not reasonably extend ...[46]

A very real, and perhaps the cardinal, point of dispute before the commission was the extent to which "the public" or "outsiders" were to be involved in the actual drafting and administration of the various codes. The Australian Consumers' Association said that "outsiders" should be involved and that they should be people nominated by consumers, government and other bodies. The Commission believed, however, that it was not unreasonable to limit the extent to which "outsiders" might participate. It noted that non-industry persons constituted a majority in the Advertising Standards Council. The industry had also indicated that it was willing to consult and listen in relation to administration of the codes.

The contents of the codes were also attacked in that they were said to be vague and not to reflect community standards. The Commission however, stated on this point that:

> If one looks carefully and objectively at the codes, the Commission does not think it can reasonably be said that the important issues serving community standards

---

46 See note 43 *supra* at pp.55,333-55,334.

are not addressed. Any fair and objective reading would indicate they do address such issues.[47]

The Commission then went on to illustrate in specific detail on each point raised in objection to the codes how the codes dealt with the matter to which objection was taken.

The Commission concluded that its duty was to determine whether the public benefit in the codes outweighed the public detriment. Obviously enough, said the Commission, "authorization of the codes would not imply they are the best system available".[48] In certain areas perhaps there may be a "better" system but this "cannot detract from the public benefit of the system under consideration". The Commission did not think it appropriate to impose conditions on the authorization for the Commission "cannot impose a condition simply to secure different codes".

C. WHAT HAPPENED WHEN THE CODES WERE IMPROVED? ROUND TWO: THE TRADE PRACTICES TRIBUNAL IN 1987

None of the above logic was good enough for the Australian Consumers' Association. It sought review of the Commission's decision by the Trade Practices Tribunal. The Tribunal's basic decision was handed down on 31 March 1987.[49] The Tribunal refused Authorization though it did allow a reasonable time for the Media Council to come up with appropriate amendments which might satisfy the Tribunal's requirements. A final determination granting authorization was made on 2 December 1988.

1. Basis of Tribunal evaluation

The Tribunal's 1987 analysis commenced with two fundamental assumptions. Firstly, its 1978 determination granting Authorization[50] was one which was "not subject to any real contest between the parties or any detailed scrutiny by the Tribunal". The Tribunal stated in 1978 that it would "pay regard" to the Commission's findings as to public benefit where there was not special reason to do otherwise. Secondly, the 1978 Tribunal determination was essentially examining the Accreditation System and Rules with a view to their prospective operation. The Tribunal did not then have the benefit of experience of the operation of the Codes and Standards in practice. In 1987, it did have this benefit. The Tribunal observed that this was the first time it had examined extensively and comprehensively codes which had been already authorized.

Each Code had to be examined in its own right and as part of the set of related Codes. Also each Code had to be looked at in relation to the rules of administration of the Code. Further as each Code was part of a larger scheme,

---

47 See note 43 *supra* at p.55,336.

48 See note 43 *supra* at p.55,337.

49 *Re Media Council of Australia (No.2)* (1987) ATPR 40-774.

50 See note 42 *supra*.

the operation of the scheme as a whole as well as each constituent element required consideration. The Tribunal was not confined to some narrow or rigid examination of the documents constituting the Codes. It had to examine the practical operation or working out of the subject matter of the application for Authorization.

In succinct terms, the Tribunal saw its role as being one of total review of the Codes, and their administration, based on practical considerations. The case constituted a rehearing in the fullest sense.

2. Tribunal's view of the codes and competition

The Tribunal first analysed the competitive impact of the Codes at length. It concluded that the Codes were anti-competitive. However, the Tribunal's analysis might well be considered to be somewhat suspect when the Tribunal adopted as it

> general concept of anti-competitive conduct any system ... which gives its participants power to achieve market conduct and performance different from that which a competitive market would enforce, or which results in the achievement of such different market conduct and performance.[51]

Taken literally, this would mean that any code of ethics would be anti-competitive if it achieved the result of, say, having different advertising standards from those which would have existed absent the Code. Yet the United States experience teaches that the successful application of self-regulatory codes aimed at changing market behaviour in relation to standards is not, for this reason alone, to be condemned as anti-competitive.[52] Codes can be very successful in achieving their objectives, thus ensuring different advertising applies to that which would apply absent the relevant code, yet still permit all the essential elements of competition (price, quantum of advertising, type of media utilised and, within broad bounds, the type of advertising itself) untouched. The "real competition" which we all extol remains unimpaired by the Code.

3. The Tribunal and "Outside" involvement

Of greatest interest, however, is the Tribunal's view of "outside" involvement in self-regulatory codes. The Tribunal expressed concern that, in the Code formulation committees and the pre-advertising clearance committees there was "almost complete lack of representation of the general consuming public or of persons standing quite apart from the system". The Tribunal asked itself:

---

51 See note 49 *supra* at p.48,436.

52 See note 12 *supra* and related text. Even if not anti-competitive, a collective refusal to run an advertisement could, post July 1977, constitute an exclusionary provision (and thus be *per se* banned) under the Australian law mistranslated from that in the United States [see Text Part IV].

> Why should committees or bodies of men and women constituting the Advertising Standards Committee or other bodies of the Media Council system tell us what it is right for us to read, see and hear?

This consideration, stated the Tribunal was "at the heart of the subject matters of this proceeding".[53]

At the crux of the Tribunal's answer to the question was that the Codes could be justified but:

> ... there is a need for wider public input (both as to participation and consultation) into the work of the Codes' formulation and complaint and appeal bodies and the Media Council itself. The representation of the media is disproportionate to other vital interests including advertisers, advertising agents and the public. There is a need for greater involvement ... of advertisers and advertising agencies. There is a real need for input from bodies concerned with consumer affairs and the welfare of children and adolescents and a need for an input from health authorities over the whole range of Codes ...
>
> ... The membership (of the Media Council's various Committees and Councils) should reflect the diversity of Australian society in matters such as age, sex, background, ethnic origins, colour and regionalism ...
>
> ... There are, at present, industry and public members of the Advertising Standards Council. The public members are in the majority ...
>
> ... Without, in any way, seeking to detract from the quality, ability or integrity of the members of the Advertising Standards Council, the manner in which public members are selected (that is, by the Chairman)... will not be productive of public confidence... public confidence in the system must exist.[54]

The Tribunal found, therefore, for the above and for other reasons, that the Codes did not have public benefit which outweighed anti-competitive detriment. However, it adjourned the case to enable the Media Council to restructure its Councils and Committees. Revamped codes emanating from the restructured system may, the Tribunal thought, be "capable of satisfying (the statutory) tests if (the Media Council) house is put in order".[55]

D. WHAT HAPPENED WHEN THE CODES WERE IMPROVED? ROUND THREE: THE TRADE PRACTICES TRIBUNAL IN 1988

On 2 December 1988, the Tribunal gave its final determination on the Media Council Codes.[56] This was done after the Tribunal had reconvened on 3 November 1987 to hear representations as to a proposed restructuring of the arrangements. The Tribunal adhered to its 1987 reasoning and specifically stated that such reasoning should be regarded as being expressly incorporated in its final determination. The Media Council established Code Councils to revise the various Codes. This review was effected by a total of some 16 meetings of the Code Councils since 3 November 1987. The revamped Code Councils had

---

53 See note 49 *supra* at p.48,452.

54 See note 49 *supra* at pp.48,453-48,454.

55 See note 49 *supra* at p.48,455.

56 *Re Media Council of Australia (No.3)* (1989) ATPR 40-933 at pp.50,130-50,131.

wider membership representation than previous committees of the Media Council. Further, the public members of the Advertising Council itself are now to be appointed on the following criteria:

- Not less than 7 nor more than 9 members of the Council are to be members of the public otherwise unconnected with the advertising industry. These members are to be appointed by the Chairman. In making such appointments, the Chairman is required to maintain a soundly balanced membership which possesses the capacity to work efficiently and effectively. In maintaining this balance, the Chairman is required to take into account the diversity of Australian society in matters of age, sex background, ethnic origins, colour, regionalism and any other considerations deemed by the Chairman to be relevant and appropriate.
- of the public members
  - at least one member is to be selected on the basis of a background in consumer affairs;
  - at least one member is to have experience in public health;
  - at least one member is to have experience in the welfare of young children and adolescents.
- before making appointments, the Chairman is required to consult with relevant Ministers of the Crown, Federal and State, and with any other public interest authority or person the Chairman considers appropriate.

Appointments to the Advertising Standards Council are not to extend beyond six year unless the Chairman is satisfied that it would be in the best interests of the Advertising Standards Council for the appointment to be further extended bearing in mind the need to maintain balance etc. on the Council and ensuring that members have an awareness of changing community attitudes.

A register of codes and decisions on them has been set up and is to be publicly available. Various reports and other documents are also to be publicly available.

E. WHAT HAPPENED WHEN THE CODES WERE IMPROVED? THE REACTIONS OF PARTIES TO THE TRIBUNAL'S 1988 DETERMINATION

The drawn out proceedings in the Tribunal, not surprisingly, pleased no-one. Phillipa Smith, Australian Consumers Association Policy Manager, described the result as "disappointing". ACA stated that is was now going to communicate with advertising agencies instead of peak bodies as peak bodies:

> have taken an intransigent line of totally rejecting everything we say.[57]

---

57 "Consumer Association to Infuence Agencies" *Australian Financial Review* 6 December 1988.

The Federal Director of the Advertising Federation of Australia, Mr Bruce Cormack, welcomed the decision but said that the Trade Practices Tribunal's alterations to Codes and Committee membership would have come through "natural evolution" anyway. "It could well have been", he said, "that the objections raised by the ACA simply put the timetable back by several years and cost a great deal of money".[58]

F. THE COMMISSION'S "MONITORING" ROLE UNDER THE AUTHORIZED CODES

The Tribunal in *Media Council (No. 3)* expressly stated that the Commission had "power to monitor the Codes in practice and, if necessary, bring the Codes before it in future for review." Thus even though the Media Codes have now been authorized, the Commission still has a "monitoring" role in their operation. The Commission also believes that part of its task is to see that the codes are reviewed regularly - a function supported by the Tribunal's determination.[59] [For reasons more fully discussed later (Part VII), this writer believes that the Tribunal's determination means that the wisest thing the Media Council can do is to sit on its presently authorized codes and review nothing]. Commission Staff believe that non-Trade Practices Act complaints should be monitored and taken up on a regular basis with the Advertising Standards Council. The Tribunal lays upon the Commission the duty to be "vigilant" in the monitoring of the Codes.[60]

This writer believes that the Codes, when authorized, require no more Trade Practices Commission monitoring on a regular basis. The constitution of the Media Council and its Committees, and the checks and balance inherent in the system, ensure that the system will function adequately without the Commission having any on-going "monitoring function". The Codes are self-regulatory. They are not "Commission monitored" codes. The writer believes that this point should be made clear - if necessary by Ministerial Direction or other administrative means. The retention of such a Commission power is consistent only with the concept of government regulation and quite inconsistent with the concept of self regulation and quite inconsistent with the concept of self regulation.

---

58 See note 57 *supra.*

59 See note 77 *infra.* The Tribunal's view that the Commission has a continuing monitoring role and can recall the Codes before it for re-examination is set out in *Media Council (No.3)* (1989) 40-933 at p.50,127, p.50,129. The Tribunal says the Commission must be "vigilant" in its monitoring of the Codes - see *Media Council (No.3)* at p.50,129. According to the Tribunal, the Codes call for "continual monitoring and revision" [*Media Council (No.3)* at p.50,129].

60 See note *59 supra.*

Since the March 1987 decision of the Trade Practices Tribunal, an increasing agitation for "outside" involvement in self-regulatory codes has become apparent. Parties advocating "outside" involvement were given encouragement by the Trade Practices Tribunal in its 1987 decision. The Trade Practices Commission took this decision as stating the relevant principles of Authorization. It grafted these principles on to its *Survey of Consumer Opinion in Australia* of January 1987 and what it thought it found as a result of that Survey. More impetus in the field was given by the Commission's document of *Self Regulation in Australian Industry and the Professions in Australia* of February 1988. Seminars were conducted by the Trade Practices Commission initially entitled *Workshops on Industry Codes of Practice*[61] and subsequently entitled *Public Participation in Industry Codes of Practice.*[62]

G. CONCLUSIONS: 1988 COMPARED WITH 1976

There is no doubt that the *Media Council Determinations* are leading determinations in the self-regulation area and that they establish principles which will be of importance for some time to come.

In summary, the difference between 1976 and 1987 interpretation of the public benefit test is as follows:

(i) In terms of competition, the Tribunal has taken a much harder line than either it or the Commission did in 1978 and 1976 respectively. Thus backing up codes with sanctions may now be legally more difficult than in the 1970's as, amongst other things, it may well be that the Federal Court of Australia will adopt the reasoning of the Trade Practices Tribunal - as it has in a number of other cases involving competition assessments.

(ii) It follows from the above, that in order to obtain an authorization for arrangements, the public benefit which has now to be shown in order to outweigh anti-competitive detriment is correspondingly larger than previously, the anti-competitive detriment now being regarded as larger than previously.

(iii) The principle seemed to be clearly established as at 1978 that Codes with significant inadequacies could, nonetheless, receive authorization notwithstanding these imperfections. Further, the Commission was of the view that it could not negotiate codes with parties but had to make decisions on material put to it.[63] The fact that there may be better

---

61 For example, Seminar conducted by the Trade Practices Commission entitled "*Workshop on Industry Codes of Practices*" in Sydney 30 August 1988.

62 For example, Seminar conducted by the Trade Practices Commission entitled ""*Public Participation in Industry Codes of Practice*" in Sydney 25 November 1988.

63 This view was re-iterated by the Commission up to *Media Council (No.2)* in 1986 [*supra* note 43].

systems around did not detract from the public benefit available from the system put up for evaluation.

De facto the Tribunal has largely apparently abandoned these principles although it, in fact, re-asserts them in *Media Council (No.3).* The Tribunal as the writer interprets its 1987 and 1988 decisions, is heavily involved in "negotiations" as to be best code available. In its 1988 *Media Council (No. 3)* decision, the Tribunal imposed some eleven condicitons on the authorization, a number of which are not explicable in terms of the Tribunal being involved only in adjudication in the traditionally understood meaning of that term. For example, the Tribunal in its 1988 Determination mandated that persons be members of Code Councils for a minimum of three years whereas the Media Council thought twelve months was more appropriate. The Tribunal also "re-wrote" substantial aspects of the substance of the Codes imposing such re-written provisions as conditions of authorization. This is the Tribunal directly substituting its own view, in one area, of a "better" code rather than adjudicating upon that submitted by the parties.

(iv) Above all, Codes in the 1970's were not condemned for their non-involvement of "outsiders". This point did not feature at all in either the Commissions's 1976 or the Tribunal's 1978 Media Determinations. The Tribunal's 1987 and 1988 Determinations can fairly be interpreted as directions to industry as to the type of personnel which are to constitute its Committees. The Tribunal has not accepted that which is axiomatic to the writer. That is, in the words of the Commission's 1986 Determination:

> it must be anticipated that there will come a point where industry self-regulation might go no further to meet the position "outside" groups[64]

The Tribunal accepts no limitations along the above lines. It is, indeed, prepared to go to great lengths to specify those parties which should constitute the personnel of self-regulatory committees.[65]

Obtaining an authorization of a voluntary code without having the requisite mixture of "outsiders" involved in it is now going to be difficult, some believe impossible, in view of the heavy emphasis put on this aspect by the Tribunal in its Media Council Determinations.

---

64 See note 43 *supra* at p.55,334.

65 See note 54 *supra* and text related thereto.

VII. PROCEDURAL DIFFICULTIES NOW FACING PARTIES SEEKING AUTHORIZATION

As if the changed interpretations set out in this Paper to date do not impose significant enough problems for applicants seeking authorization of voluntary codes, there are veritable barrages of procedural problems now apparent but which were impediments to authorization to a far lesser extent in the 1970s. It is appropriate to note these in this paper.

Procedural problems now apparent relate both to:

- problems encountered in *obtaining* an authorization, and
- problems encountered in *retaining* an authorization.

A. PROCEDURAL PROBLEMS ENCOUNTERED IN OBTAINING AN AUTHORIZATION

Procedural problems now apparent in obtaining an authorization are:

(i) That a favourable decision by the Trade Practices Commission establishes nothing in the event of an Appeal being lodged with the Trade Practices Tribunal. There is no presumption that any findings of the Trade Practices Commission are even, *prima facie* correct.[66] It should be noted that this is a different position to that applying in, say, the Tribunal's 1978 *Media Code Determination* in which the Tribunal said that it would "pay regard" to the Commission's findings as to public benefit when there was no special reason to do otherwise.

(ii) As a result of the above, a party dissatisfied with a Commission determination can now lodge an Appeal to the Trade Practices Tribunal bearing no onus as to proof and incurring no liability as to costs.[67] It is the successful party before the Commission which, once again, bears the complete onus of proof of public benefit and incurs all the costs incidental to this. This places a dissatisfied party in a very powerful position. The writer is aware of cases in which this position has, in his view, been advantageously used by dissatisfied parties to negotiate arrangements which they would not have been able to negotiate had they been required to bear at least some of the onus of proof in the Tribunal of a traditional appellant in a court of law.

(iii) The position of a dissatisfied party is even stronger in the event of an Appeal being lodged and the successful party before the Commission not having adequate funds to pursue the appeal. In such a case, the appellant wins by default, even though unsuccessful before the Commission and presenting no case before the Tribunal. This is

---

66 See note 34 *supra*. See also *Media Council of Australia (No.3)* (1989) ATPR 40-933 at pp.50,123-50,124.

67 See note 35 *supra*.

because the Tribunal has no material before it upon which it can conclude that the necessary elements of public benefit have been established.[68]

(iv) Should the case be one in relation to a practice which has received authorization previously to a subsequent application, one might think it sensible that prior proven public benefits, and the principles adopted in finding them, might have some status in subsequent proceedings. However, this is not the case. The whole public benefit case must be re-proven *de novo*. This means that it cannot be argued in a subsequent authorization application, as might be thought to be a more logical approach, that an arrangement was previously authorized and that a subsequent amendment gives greater public benefit than the already accepted benefit. The whole basis of prior public benefit can be reargued, and has to be reproven, on a subsequent authorization application even if, for example, only minor amendments are made to an already authorized arrangement and the reason for the subsequent authorization application is only to obtain authorization for the later minor amendments.

(v) In view of (iv) above, many associations believe that it is simply non-viable to "improve" already existing arrangements. Any "improvement" involves the full trappings of a totally new case. This, of course, can involve considerable expense. Such a position also makes the bargaining power of any dissident very strong. Such dissident can not only oppose all issues in the Trade Practices Commission but, aided by the points set out in (i), (ii) and (iii) above, can make very unsettling noises about appeals to the Trade Practices Tribunal.

B. PROCEDURAL PROBLEMS ENCOUNTERED IN RETAINING AN AUTHORIZATION

Authorizations, once obtained, cannot be regarded as inviolate by any manner or means. Some procedural problems now apparent in retaining an authorization, once obtained, are:

(i) That an authorization can be rescinded if "it appears to the Commission ... that there has been a material change of circumstances since the authorization was granted."[69]

The term "material change of circumstances" is yet to be interpreted judicially. In this writer's view, the words can be argued as meaning a material change of circumstances which results in the prior found public

68 See note 34 *supra*.

69 *Trade Practices Act* s.91(4).

benefit being reduced or which results in any prior found anti-competitive detriment being increased.

The Tribunal in it 1987 *Media Council (No. 2) Determination* found, however, that prior authorization for codes of conduct could be revoked because a material change of circumstances occurred when the Tribunal made a subsequent determination on different principles in relation to such codes. So, if an application for authorization for amended rules fails to obtain authorization, prior authorized rules are on the line as well. The Tribunal thought that:

> Any other conclusion would result in a nonsense, set at nought the powers of this Tribunal as the statutory body charged with the duty of reviewing authorizations granted by the Commission and be disruptive to the efficient working of the Act.[70]

Whatever the opinion of the Tribunal may be as to its statutory role, its views clearly enough make a losing decision far more costly. Not only the applicable authorization application is lost but also a previously granted authorization on the same subject matter may also be lost. Given this, trade associations cannot help but be reluctant to change, update or improve their codes. This (if one may use the Tribunal's words) "result(s) in a nonsense" if the Tribunal also wants to ask trade associations:

> ... to respond flexibly to the changing needs of Australian society and to the deficiencies in the Codes revealed in practices ...

and to have associations administer:

> living codes, whose interpretation, application and amendment should be undertaken in accordance with the principles we (i.e. the Tribunal) have set down (i.e. those of flexible response to changing needs and revealed deficiences).[71]

The Tribunal's words are no doubt well meant. However, its views as to what constitutes a material change of circumstances double the risk in making a second authorization application for codes responding "flexibly, to changing needs". All the incentives are to sit on what one has - the very antithesis to responding "flexibly to changing needs", as the Tribunal would wish.

(ii) At the moment there is great uncertainty as to how far the above view expressed by the Tribunal, in fact, reach. For example, in *John Dee (Export) Pty Limited*,[72] the Tribunal overruled a Commission Determination in relation to certain stock agents' credit procedures in

---

70 See note 49 *supra* at p.48,418.

71 See note 56 *supra*.

72 *John Dee (Export) Pty Ltd* (1989) ATPR 40-938.

Queensland. Substantially similar practices had been previously authorized by the Commission in New South Wales and Victoria. Does the Tribunal's view of "material change of circumstances" extend to overturning the previously authorized New South Wales and Victorian arrangements?

(iii) Even more difficult to assess is whether the Trade Practices Commission will utilise the principle set out in (i) above to reassess previous authorizations granted *by it* in light of subsequent determinations made *by it*.

(iv) There seems, to this writer, to be a discernable trend in Commission grants of authorizations to authorize for a limited period only. Clearly enough, the Commission has power to make limited period grant of authorization pursuant to s.91(1) of the Trade Practices Act. It is perhaps prophetic that all newagency and real estate arrangements in Australia have been authorized unconditionally except the last ones in each industry - newsagents in South Australia in November 1988[73] and real estate agents in the Northern Territory in February 1989.[74] Each last case was authorized only for a limited period. This seems to signal a new approach. It is an approach which is potentially of great, but largely as yet unrecognised, importance in the Commission's regulation of industry generally. For, by granting limited period authorizations, the Commission can keep an association under surveillance and can change its opinions in relation to it from time to time. If the Commission changes its opinion or changes the principles upon which it determines authorizations, such changes can translate into a denial of authorization at a later date. The limited time authorization means that the Commission never releases an association from the power it has to reassess its codes, along perhaps different lines, in the future. An authorized code may face a Commission requirement some years later as to different or additional "outside" representation for example. If it does not comply, then authorization is withdrawn. The initial authorization has no long-standing value.

(v) An unconditional authorization does not mean the end of Commission involvement. The Commission, apparently without any limitation on its powers, retains a "monitoring" function. In the writer's view, this is more consistent with the concept of continual Governmental supervision than with the concept of self regulation.

(vi) Finally, even an unconditional authorization might be considered to be in doubt if the Commission is minded to look at the industry again. In *Newsagents* and *Real Estate Agents*, the Commission authorized all

---

73 *Advertiser Newspapers Limited* (1988) ATPR (Com) 50-083.

74 *Real Estate Institute of the Northern Territory* (1989) ATPR 50-086.

arrangements after about a decade of involvement with each industry. In its last decision in relation to each, the Commission greeted the industries with the news that it was going to conduct a "Study" of their practices. Members of each industry regard such a "Study" as primarily aimed at finding a "material change of circumstances" in order to revoke authorizations previously granted. This attitude persists no matter how great the protestations of the Commission that it lacks any such motive. The short point here made is that even unconditionally granted authorizations may be in jeopardy should the Commission choose to consider itself as a type of Standing Royal Commission of Enquiry to conduct what it pleases to call "Studies" into industries subject to already granted authorizations.

C. CONCLUSIONS AS TO PROCEDURAL PROBLEMS

At a time when authorizations are even more important than previously (they being the only sure way now to be safe under s.4D), not only has the Tribunal in substantive determination terms made authorizations very difficult to obtain but also a series of procedural hurdles at both Commission and Tribunal levels have been thrown across the path of prospective applicants.

Given all of this, a trade association executive may well feel very cautious indeed about approaching the Commission for an authorization. If one looks at the experience of the Media Council, one can feel considerable sympathy with any person suggesting that the Council would have been far better off sticking with its 1978 Code than attempting to update and amend it. By improving the Codes (and there does not appear to be much doubt that the Codes were improved) the Council was involved in extensive costs, in the proof of a totally new public benefit case twice and in placing its already granted authorization in jeopardy should its subsequent application have been unsuccessful.

It is time for the Commission, the Tribunal or, ultimately, the legislature to identify where all the carrots and sticks are contained in the authorization process. There appears to be no doubt that changes are necessary in order to place these incentives and disincentives where logically they do the most good. It is submitted that they are not in the right positions at the present time.

VIII. THE INVOLVEMENT OF THE TRADE PRACTICES COMMISSION AND ITS ACTIVITIES IN RELATION TO VOLUNTARY SELF REGULATION

A. THE COMMISSION'S INVOLVEMENT IS MORE THAN A REFLECTION OF THE MEDIA COUNCIL AUTHORIZATION TEST

The Commission's involvement in self-regulation is far more than a mere reflection of the Tribunal's 1987 and 1988 Media Code Determinations and

educating the community as to what these mean. The Commission's role can be seen only as one of expanding the frontiers of self-regulatory codes. In Part IX two case studies are given which illustrate this point. Also in Part IX the Commission's desire to have codes legally mandated is discussed.

B. THE COMMISSION NOW SETS THE NATIONAL STANDARDS FOR CODES - AND ITS INVOLVEMENT WITH CODES WILL INCREASE

Administrative arrangements have been reached, and were approved at a July 1988 meeting of the Standing Committee of Consumer Affairs Ministers (SCOCAM), that the Commission act as co-ordinatior of the various Australian regulatory authorities on the question of voluntary codes. The official position in relation to such codes is that:

- there should be a co-operative approach to "fostering" codes.[75]
- there should be a "pro-active and co-operative approach in identifying industry problems amenable to solution by self-regulation".[76]

Commissioner Asher put the position in November 1988 that:

> The endorsement by the last meeting of State and Commonwealth Consumer Affairs Ministers of the Commission's Guidelines for Co-Regulation means that they are virtually a national standard for Codes.[77]

This means that Self Regulatory Codes are high on the Commission's priorities. Fourteen of its approximately 160 personnel (about 9% of the Commission's staff) are currently engaged full time on Code-related matters. Whatever the wisdom of this priority of staff allocation (and this writer seriously doubts the wisdom of such allocation), the number of staff engaged on Codes indicates that the Commission is positively committed to involvement in this area in the future. In its literature, the Commission has also written profusely about self-regulation and what it intends to do in the future in this field.[78]

---

75 *Trade Practices Commission Bulletin* No.43 (July-August 1988) p.20. The Bulletin refers to prior Bulletin No.40 for details of the approved arrangements between the Commission and Consumer Affairs Agencies. This reference appears to be in error. Presumably the reference should be to Bulletin No.41 (March-April 1988).

76 *Trade Practices Commission Bulletin* No.41 (March-April 1988) pp.29-30.

77 In the original of this Paper presented at the Trade Practices workshop, a documented Trade Practices source reference was given for the text material. At the request of Professor Baxt, Chairman of the Commission, this documented Commission source reference has not been included in the representation of this paper.

78 The Commission is profusive on the subject. For example "The Commission's study of industry self regulation has reinforced its belief in the potential of codes of practice to contribute to improved market behaviour, consumer protection and the public benefit generally ... the Commission sees considerable scope for it to foster the development of industry and professional codes of practice ... in May 1988 work will begin on a review of

C. THE CURRENT APPROACH OF THE TRADE PRACTICES COMMISSION TO VOLUNTARY CODES: IS IT CRUSADING IN THE AUSTRALIAN CONSUMERS ASSOCIATION CAUSE?

The Commission's view is that it:

> is not in a position to insist on the adoption of a code or of a particular form of code - nor would it wish to be.[79]

Trade Practices Commission Chairman, Professor Bob Baxt has firmly asserted at Seminars conducted by the Trade Practices Commission[80] that the Commission is spreading its views only as part of its educational function as to what will be required in codes in the future.

This may be how the Commission sees it but as stated in Part II.A(v) of this Paper, it is not by its words that the Commission will be judged - at least by business- but by the business perception of what its words really mean.

The Australian Consumers' Association policy on "outside involvement" in self-regulatory codes is set out as a matter of record, insofar as this writer can ascertain such policy, at Appendix III of this Paper. The Commission has accepted much of this policy. Although it is understood that the Commission does not believe "outside participation" in Codes to be mandatory, the writer knows of no Commission document which so states. Indeed, all Commission documents heavily stress the virtues of such involvement. For example the Commission accepts that there should be "outside" involvement in self-

---

the scope for replacement of existing legislation with beneficial self regulation arrangements" [Trade Practices Commission: *Objectives, Priorities and Work Program for 1988-9* (May 1988) pp.11-12]. See also Trade Practices Commission - *Annual Report 1987-88* Chapter 3; Trade Practices Commission: *Self Regulation in Australian Industry and the Professions* (Publicity leaflet released June 1988). These conclusions were reached after a study of self regulation resulting in a Three Volume Report [*Trade Practices Commission: Self Regulation in Australian Industry and the Professions - Report by the Trade Practices Commission* (3 Volumes - February 1988)]. The Trade Practices Commission is also committed by its fair trading and consumer protection priorities to "actions which enforce acceptable self-regulation schemes" [see Commissions's *Objectives etc Statement* (May 1988 above at p.7]. The Commission also suggests that such self-regulatory codes as exist are not widely known and need further publicity. It bases this conclusion on its *Survey of Consumer Opinion in Australia* [see Trade Practices Commission: *Background Papers to Workships on Industry Codes of Practices* 30 Aug. 1988]. The Commission believes that "a significant minority of consumers do not exercise their basic rights when they encounter problems with the purchase of goods or services" [see *TPC 1987-8 Annual Report* p.38].

79 *Trade Practices Commission 1988-89 Objectives, Priorities and Work Programme* (December 1988) p.6.

80 For example, Seminar conducted by the Trade Practices Commission entitled "*Workshop on Industry Code of Practices*" in Sydney 30 August 1988 and Seminar conducted by the Commission called "*Public Participation in Industry Codes of Practice*" held in Sydney 25 November 1988.

regulatory codes and that the expenses of such consumers should be borne on a "no strings" basis by industry without being passed on.[81] In the case of the Breast Milk Substitute Code [see Part IX.B] the Australian Consumers Association and the Australian Federation of Consumer Organisations apparently enjoyed a favoured position in relation to consumer documentation and the possibility of commenting on Commission staff views. To this must be added the comments earlier cited [Part II.A(v)] by one trade association official that:

> (For the Commission) to be seen to be as supporting the Australian Consumers' Association philosophies (either overtly or covertly) and have the public discussions fronted by a former Australian Consumers' Association spokesman creates hurdles of credibility amongst the business community.

Given these factors, it is not surprising, regardless of how the Commission sees itself, that much Australian business sees the Commission not only as crusading in the field of self-regulation but as crusading in the Australian Consumers' Association cause.

D. THE MATERIAL UPON WHICH THE COMMISSION REACHES ITS CONCLUSIONS AS TO OUTSIDE INVOLVEMENT IN SELF-REGULATION

The Commission's research which leads it to its involvement in self-regulation consist of two basic documents, these being:

(i) The Commission's *Survey of Consumer Opinion in Australia* initiated in 1985 and the Report of which is dated January 1987;[82] and

(ii) The Commission's Three Volume Report entitled *Self Regulation in Australian Industry and the Professions* dated February 1988.

---

81 *"Public Participation in Industry Codes of Practice"*: Trade Practices Commission Discussion Paper (October 1988).

82 In commenting on these documents in this article, the material in the Commission's published documents has been used. The Commission has stated that access to more detailed information from the Commission's Survey data base is available. However, it is not thought appropriate to request any further detailed access for two reasons. Firstly, the Commission justifies its conclusions from the documents it has published and thus any commentary on these conclusions should be able to be based on these documents. Secondly, it is doubtful whether any further breakdown of figures would assist. Most of the comments made in this article are made on the methodology used, conclusions drawn and the method of expressing these conclusions. None of this requires a further detailed breakdown of figures and any such request, even if acceded to, would not, in the writer's view be justified in terms of delay, cost and manpower involved. The attitude is taken in this article, which is not an unreasonable one in the writer's view, that the issue should be able to be debated from Official Publications.

The Commission's main conclusions from these documents, for present purposes, are that:

- where codes are appropriate, experience shows that the major features revolve around questions of public accountability such as coverage of dispute resolution, external participation and public reporting.[83]
- consistently, small minority groups took no action at all in respect of their problems because they did not know where to go.[84]
- very few persons approached a trade or professional association about their consumer problems. Of those who did, about one half were dissatisfied. This, thought the Commission, showed that there was a very low consumer awareness of self-regulatory organisations as avenues for redress.[85]

Based essentially on these premises, the Commission concludes that involving itself more in the activities of self-regulatory schemes, and promoting and publicising such schemes, should be one of its priorities. A major emphasis of this involvement has been that of "outside" involvement in self-regulatory schemes.

The Commission's raison d'etre for its involvement is, of course, only as valid as the premises upon which it is based. These fundamental premises merit some further comment.

E. DOES EXPERIENCE IN AUSTRALIA AND OVERSEAS HIGHLIGHT THAT THE MAJOR ISSUES OF SELF-REGULATION REVOLVE AROUND QUESTIONS OF PUBLIC ACCOUNTABILITY SUCH AS EXTERNAL PARTICIPATION AND PUBLIC REPORTING?

The Commission's precise conclusion from its *Survey of Self Regulation* is that:

> Where codes are appropriate, experience in Australia and overseas has highlighted features which will be necessary or desirable (in codes) ... these issues revolve largely around questions of public accountability e.g. coverage of the industry, administrative arrangements, dispute resolution, external participation and public reporting.[86]

There is, in this generalised statement little more than an "appeal to authority" which in the writer's view, does not stand up to detailed scrutiny. There is no great Australian experience which shows that code effectiveness is

---

83 *Fair Trading - The Trade Practices Commission in the Marketplace*, Trade Practices Commission (December 1988).

84 See *Trade Practices Commission Background Paper to Workshop on Industry Codes of Practice* held in Sydney on 30 August 1988; see also *Commission's Consumer Opinion Survey* (*supra* note 78) p.3.

85 *Trade Practices Commission: Self Regulation in Australian Industry and the Professions* (3 Vols - Feb 1988) Vol I Ch.5.

86 See note 83 *supra*.

related to outside involvement in codes, or, if there is, the Commission has not documented such experience - unless the Tribunal's *Media Council Determinations* of 1987 and 1988 constitute such documentation. Whatever overseas experience there is has not been brought to light unless Chapter 2 of the Commission's *Main Report on Regulation* constitutes such a study. However, Chapter 2 of that Report covers only seven and a half pages. External participation in self-regulatory codes is nowhere referred to in that coverage. The writer when reviewing this Report in 1988 commented that:

> (The chapter on self-regulation in other countries) is of interest but is a little misleadingly entitled. The United Kingdom is covered in reasonable detail but the United States is covered only very superficially and, whilst France and Canada get a mention, not a great deal is said about them. No other countries are covered.[87]

Even the conclusions which the Commission draws (or, it is submitted, more accurately does *not* draw) from its report are coupled with the statement that:

> Cultural, political and economic differences will render some overseas approaches to self-regulation inappropriate to the Australian environment.[88]

Which overseas schemes are "appropriate" or "inappropriate" to Australia is left unstated.

The writer believes that if the above is the best the Commission can do in order to support the statements it makes, then the Commission has demonstrated nothing at all in relation either to Australian or overseas experience upon which it can base any general policy proposition. This does not mean that the conclusion may not be valid. It does mean that the Commission would not graduate if its Report constituted its research thesis.

In making the above observations, the writer does not wish to be seen as denigrating other aspects of the Commission's study. The most useful part of it is probably that it actually locates the various self-regulatory associations - something not previously done in Australia.

F. CONSISTENTLY, SMALL MINORITY GROUPS TOOK NO ACTION AT ALL IN RESPECT OF THEIR PROBLEMS BECAUSE THEY DID NOT KNOW WHERE TO GO - A REASON FOR ACTION?

The Commission draws the above conclusion from its *Survey of Consumer Opinion.*[89] In assessing the validity of the conclusion, one has to understand both the methodology by which this survey was conducted and the semantic terms in which the Commission expresses its results.

---

87 W.J. Pengilley "Final Report on Self Regulation in Australian Industry" Australian and New Zealand Trade Practices, *Advertising and Marketing Law Bulletin* Vol 4. No 5 (July-Aug. 1988) p.78.

88 Trade Practices Commission: *Self Regulation in Australian Industry and the Professions* (1988) Vol 1 p.15.

89 Trade Practices Commission: *Survey of Consumer Opinion in Australia* (January 1987).

The Commission's Survey was preceded by a letter advising those to be surveyed that a survey was to take place. The Survey was to cover "the needs and opinions" of all types of consumers in Australia. Presumably the recipient of this letter would, on receipt of it, begin to think about some of her or his consumer problems.

When the actual survey was conducted, the first question asked was:

> Firstly, thinking back over the past few years ... and the various products that you've purchased ... or attempted to purchase ... and also the various types of services that you may have used ... from your point of view, what would you say is the most serious problem, if any, you have encountered in that time?

The results of the general consumer responses to this questions are tabulated in Appendix IV. What this writer finds quite astounding is that 81% of respondents either had no problems at all or replied that they had only general problems. This is notwithstanding:

(i) the fact that advance notice of the survey was given thus presumably triggering the mind of the prospective interviewee to his or her consumer problems;

(ii) the nature of the question asked. This question would, one would think, almost assuredly elicit a "problem" from most citizens (but in fact did not do so) and would certainly elicit a "problem" from nearly all of the writer's acquaintances because:

- It is open ended in time. It asks the respondent to think back over "the past few years".
- It covers not only purchases but items which the respondent has "attempted to purchase". Nearly all of us, one would think, believe that the price of at least some items which we wish to buy is too high and, not surprisingly, this was the major complaint with "attempted" purchases. It is not a problem which gives rise to any readily ascertainable consumer protection remedy. It is a problem classifiable only as a fundamental economic problem of consumer choice. We often what what we cannot afford.
- It asks the respondent a question which, by its form, appears to solicit a complaint ["What is the most serious problem, if any, you have encountered in that time?"] rather than puts the matter neutrally ["Have you encountered any problems in that time?"].

The reader will evaluate for herself or himself the extent to which this initial question may skew the Commission's survey results. The present writer believes that the initial question does skew the survey results to industry disadvantage by (a) giving rise to answers imprecise as to time ("the past few years") and (b) suggesting possible complaints which the respondent would not herself or himself, under a more precisely and neutrally drafted question, regard question, regard as a complaint. Given the nature of the question, it is surprising to this writer that 100% of respondents did not have a complaint.

The fact that 81% of parties complained not at all or only generally [the most general complaint being that prices were too high in relation to "attempted purchases"] is, to this writer, an extraordinary vote of consumer confidence in the suppliers of goods and services in Australia. All further statistics in the Survey relevant to the present discussion are various subdivisions of the 19% of respondents who thought they had an actual consumer problem over "the past few years".

The *actuality* of consumer complaints "over the past few years" (in the sense of whether such complaints are justified complaints) would be lower than the Commission's statistics indicate. What constituted a "problem" was a matter for the totally subjective evaluation of the interviewed respondent. No attempt was made, nor could it be made to assess the rights or wrongs of the merits of a complainant's case. The number of justifiable complaints must, therefore, be lower than the number of perceived complaints. Given this, the high rate of resolution of consumer problems (see Appendix IV and discussion below) is very impressive indeed. [The Commission, of course, clearly states in its Report the nature of the questions asked but the point should be re-iterated here in the event that the reader of this Paper has not read the original Commission Report.]

The Commission's statistical results have been re-cast in Appendix IV so that all percentages are those of the total group surveyed. The Commission in the narration in its Report has chosen to calculate statistical results as a percentage of smaller sub-groups rather than as a percentage of all persons surveyed. The percentage statistics of those who took no action at all because they did not know where to go are obviously much less when such persons are calculated as a percentage of all parties surveyed. In fact two tenths of one per cent of those surveyed constitute, in the Commission's word, members of "small minority groups who took no action in respect of their problems because they did not know where to go".

Even in the much vilified motor vehicle industry, the Commission's conclusion that "Close to one in ten ... did not know whom to approach and hence took no action" can be, and has been, read out of context. This percentage is also of a smaller sub-group and is not a percentage of the total of those surveyed. The Commission's Survey figures in relation to motor vehicle transactions have been re-cast and are set out in Appendix V. Of those surveyed who, in fact, had motor vehicle problems, only four tenths of one per cent failed to take action for the reason that they did not know who to approach. The semantics used by the Commission to report its findings magnify the nature of the problem. A generalised reading of the Report may lead the reader to believe that the ten percent figure is of far greater importance than statistically it is.[90]

---

90 The semantic expression of the Results of the Commission's Survey is of vital importance as we all tend to think in words and rough impressionistic statistics. Two alternative methods

The whole issue then becomes a matter of subjective evaluation as to whether there is any demonstrated consumer problem at all shown by these statistics. Views on this will vary depending upon one's subjective approach to the problem involved [Part II]. To the writer, if only two tenths of one per cent of persons surveyed overall, or only four tenths of one per cent of persons involved in motor vehicle transactions, were unable to solve their problems because they did not know where to go, then this a manageable result for any society except that seeking to obtain knowledge perfection. This is a subjective value judgement and others may well disagree with it. By any standards, however, it is, in this writer's view, difficult to regard the problems of what the Commission characterises as "small minority groups" as being ones of such a magnitude that they demand the implementation of major Commission policy initiatives.

---

of expressing the conclusions as to those having motor vehicle problems but not knowing where to go are as follows:

Commision's expression the results of its survey	**Alternative expression of the results of Commission Survey**
Around one third (36%) of motor vehicle purchasers or lessees who experienced problems did not take any action with over one half (21%) not wanting to take action and the remainder (15%) stating that they would like to do so. Among the latter, the vast majority maintained that the problem was either ultimately not serious enough (43%) or that it was not worth trying (48%). However, close to one in ten (9%) did not know whom to approach and hence took no action.	Of parties engaged in motor vehicle transactions, 9.7% experienced problems but took no action in relation to them. 5.7% of those engaged in transactions did not want to take any action. 3.6% of those engaged in transactions thought that the problem was not serious enough to merit action or not worth trying. Less than one half of one per cent of those engaged in motor vehicle transactions failed to take action for the reason that they did not know who to approach.

Each method of expression of the Survey results is statistically accurate. It is submitted that the Commission's expression of its Survey results leads to the impressions that "about ten per cent of people didn't know what to do" whereas the alternative expression shows a very low proportion of people in this category. The alternative expression of the Survey Results is based on the re-worked tabulation in Appendix V.

G. VERY FEW PERSONS APPROACHED A TRADE ASSOCIATION ABOUT THEIR CONSUMER PROBLEMS. OF THOSE WHO DID, ABOUT ONE HALF WERE DISSATISFIED. DOES THIS SHOW A VERY LOW CONSUMER AWARENESS OF SELF-REGULATORY ORGANISATIONS AS AVENUES FOR REDRESS?

Again, it is important for the Commission's conclusions to be seen in context. It is also important to look again at the methodology involved in the survey pursuant to which the Commission reaches the above conclusion.

The Commission asked those surveyed the following question:

> Thinking of the professional, trade and industry associations, and these (... examples on showcard ...) are just a few of them, at any time during the past few years, have you approached any association of this type about a consumer problem?[91]

To this question, 3% of the total of the persons surveyed (8,601 persons) answered "Yes" in relation to approaches made to Trade Associations.

There are a number of immediate comments which can be made about the usefulness of this question and the responses to it.

(a) The question is somewhat meaningless as an indicator of knowledge of trade associations or their services. One cannot conclude, for example, that one's knowledge of the Trade Practices Commission can be measured by the number of times one has approached it for advice. There simply is no logical correlation between the question (number of times a body has been approached) and one conclusion apparently drawn by the Commission in its Report (a conclusion as to the awareness of the existence of a body or the services it performs). When another question is to actual awareness of trade associations as a source of potential complaint resolution was asked, the questions were quite erroneously compiled and put. [See (c) below.]

(b) There are comparative statistics elsewhere in the Commission's Report which show that trade associations in some industries have played a very important role as a recipient of consumer complaints. In real estate transactions, 16% of those complainants seeking redress approached industry bodies (Master Builders, Real Estate Institute and so on) with their problems and only a statistically unquantifiable number approached Consumer Affairs. About the same number of complainants approached industry bodies in relation to repairs and servicing as approached Consumer Affairs. Appendix V shows that motoring associations were approached about one third as frequently as Consumer Affairs Bureaux. Such activity of trade associations must be regarded as creditable in light of the governmental money, the staff and the publicity invested in Consumer Affairs Bureaux and also bearing in mind that Consumer Affairs Bureaux are, in the Commission's words, "the only

---

91 See note 89 *supra*, p.81.

consumer advice/protection agency recalled unaided by the majority of the Community."[92]

(c) Statistics of those who *actually approached* trade associations (3% of parties surveyed) can be compared with statistics in another section of the Commission's Survey in relation to entities which *might be approached* with problems *if such problems should occur.* This comparison shows a creditable record of trade associations in complaint resolution.

Three per cent of persons surveyed *actually approached* trade associations. Some comparative statistics of entities which surveyed parties *might* have approached *if having a complaint* are [93] as follows:

.	Solicitor in private practice	16%
.	Legal Aid Office	4%
.	Australian Consumers' Association	3%
.	Trade Practices Commission	3%
.	Consumer Claims Tribunal	2%

Not surprisingly Consumer Affairs Bureaux easily topped the list for organisations to which a person might turn if having a problem. Equally not surprisingly, trade associations did not rate very highly in that section of the Commission's Survey which *might be* utilised if a person had a problem. This result occurred because 17 organisations were mentioned in the Survey Questionnaire as entities *which might* be approached if a problem were to occur. Trade associations were not included in this list. Not surprisingly very few respondents of their own volition went outside those entities listed in the Commission's Questionnaire.

In the above circumstances, from the two questions asked (one involving actual contact; the other involving hypothetical contact), it is difficult to reach the same conclusion as those reached by the Commission. The Commission concludes (at p.81 of its Report), from the questions asked, that there is "a quite low incidence of actual contact" with trade professional and industry associations and that this "may well be related to the low awareness (of them)". The writer believes neither of these conclusions follows from the Commission's Survey.

(d) It is appropriate also to mention, though not to delve into the problem in detail, that other areas of Commission's Survey could well give the reader an unfair view of the trade associations. For example, surveys were made as to the reasons for non-satisfaction in respect of complaints made to trade associations. Two major reasons were:

---

92 See note 89 *supra*, p.74.

93 See note 89 *supra*, p.73.

- *Non results*
  No advice available, complaint not accepted or not resolved (to respondent's satisfaction).
- *Rudeness/incompetence*
  Contact badly handled; arrogant staff; "high handed" attitude; "buck passing"; unable/unwilling to help; failed to call back as promised; time delays; bureaucracy.

Similar questions were simply unasked as to the service received by respondents who complained to say, Consumer Affairs Bureaux, the Trade Practices Commission, the Ombudsman, Members of Parliament, Government departments, or the Australian Consumers' Association. It would be of interest to know how these organisations and persons performed in the eyes of complainants to them. Unfortunately, this will never be revealed. Presumably, however, trade associations do not have a monopoly on arrogant staff "high handed" attitudes, buck passing, failing to return phone calls and, in particular, bureaucratic procedures.

H. CONCLUSIONS AS TO THE RESEARCH UPON WHICH THE COMMISSION BASES ITS PRO-ACTIVE INVOLVEMENT WITH TRADE ASSOCIATIONS AND SELF-REGULATION

The research upon which the Commission has made its decisions to date is very superficial. It is submitted that the Commission has no mandate for a new policy direction based on such research - let alone a mandate for a high profile and pro-active policy. This is not to say that the Commission should not involve itself in education in the area of self-regulation. In doing this, however, it should not base its approach on the Surveys it has conducted or the conclusions of them. Any education in which the Commission engages should candidly disclose that associations can be conducted in a manner which is not anti-competitive and, if an association is appropriately structured, questions of authorization and, thus of "outside" involvement, are simply not relevant. It should be explained that authorization, and thus "outside" involvement, is relevant only in the case of anti-competitive conduct or otherwise if disciplinary proceedings are involved.

What seems to be issuing from the Commission at the moment, however, is a series of statements which are largely philosophical in nature; do not explain the law on which they are based; and draw upon what, in this writer's opinion, is inadequate research stated as objective fact. As a result, the material issued is often quite confusing and perhaps misleading to the trade association executive. This is compounded because such person tends to regard the Commission's statements as *the* law when, at the moment, they are not only not the law but, in the writer's view, misstate it.

The above general conclusion was borne out by the comments of a number of trade association executive who commented on the draft of this Paper. Typical was the comment of one such executive (with which comment the writer

agrees) who stated, after reading the Commission's material and attending its seminars, that:

> the material provided by the Commission ... did not examine the issues in depth and I was somewhat puzzled ... There was a general appeal to the intrinsic merits of self-regulation and the claims for public participation; to a large extent, it seemed to require an act of faith to support them.

IX. THE COMMISSION'S INVOLVEMENT IN SELF REGULATORY CODES: TWO CASE STUDIES

It is not possible to comment in detail on all, or even a majority of, the various codes in which the Commission has become involved. Two such Codes, however, provide appropriate case studies. They are both contemporary with the writing of this Paper.

The first code is that suggested for the Petroleum Industry. The interesting aspect of the petroleum code case study is the role which the Commission feels it is appropriate for it to adopt and the extent to which if feels ancillary restraints are justifiable in order for a Code to function.

The second code is in relation to breast milk substitute products. The writer's conclusion in relation to this code is that, whatever the need for such a code may be in, say, Africa, there is very little demonstrated need for it in Australia. In any event, a 1983 Code in Australia seems to be working adequately. The Commission now seeks to expand the scope of that code and implement an expanded code as a Self Regulatory Voluntary Code.

A. THE TRADE PRACTICES COMMISSION'S INVOLVEMENT IN THE VOLUNTARY CODES FOR THE PETROLEUM INDUSTRY

The Trade Practices Commission made a Study of the Petroleum Industry and issued its Report on this in October 1988. In December 1988, a Commission Media Release was made entitled *TPC Confirms De-Regulatory Approach to Petrol Industry*. The Commission subsequently prepared a draft guideline which was sent to major industry participants for comment in April 1989.[94] At the time of writing, so far as the writer is aware, the Guideline has not been finalised. However, there is enough material available to assess what the Commission is thinking and the direction in which it is aiming.

The Commission in its study isolated certain problems in the petroleum industry. These problems were largely caused by overcapacity in the industry. Thus there was a struggle for market share with the tendency for prices to be

---

94 The Commission's Report is entitled "*The Trade Practices Commission Study of the Petroleum Industry*" (October 1988). The Report is sub-titled as being a "Discussion paper on market practices and Government regulation in the industry; time for review?". The Commission's Press Release entitled "*The TPC Confirms deregulatory approach to Petrol Industry*" was issued on 21 December 1988.

cut. The problem is complicated at the retail end because of the different categories of retail outlet being:

- oil company owned and operated;
- oil company owned and lessee operated;
- independently owned and operated with a supply agreement with a major oil company; and
- independently owned and operated.

All sites offer different services, some specialising, for example, in the sale of fuel only whilst others specialising, for example, in the sale of fuel only whilst others specialise in mechanical repairs. Some outlets run petrol sales more as a sideline, perhaps to supermarket activities on the site, than anything else.

Price support by way of rebate to retail outlets is given by all oil companies during price fluctuations to enable retailers to be competitive in their market areas.

Complaints about the petrol industry are well known. Primarily they come from the re-seller end which feels its margins are squeezed by competition and dislikes the constant gyration of price hikes and reductions caused by the competitive process. Petrol suppliers are, of course, happy to join in these complaints if they see their self interest as being served by doing so. Fundamentally the complaints are about the excesses of competition. Consumers and politicians also complain, from time to time. Some of them see gyrating prices not as being a benefit of competition but as an untidy result of it which offends their desire for market constancy.

A new system of pricing was, therefore, suggested to the Commission. This is the "rack pricing" concept. Different forms of this were proposed but the essence of all proposed arrangements was that each supplier would establish its own rack price ex-refinery which would be the price at which a reseller buyer within a free delivery area could purchase a full tank wagon load at the refinery gate.

The rack price was seen as having the possibility of eliminating differential prices to different customers and eliminating the need for temporary support schemes. An essential aspect of rack pricing is that all prices in each company's rack are visible.

Those who opposed the system of rack pricing did so on a variety of grounds. For present purposes, the major grounds of opposition, in this writer's view, were:

- the Trade Practices Commission was being asked to legitimise a process by which a cartel of oil producers will have far greater control over prices in the market place;
- there are already provisions in the law covering price discrimination;
- the controls are being supported for the reason that they do, and they are designed to, reduce domestic competition;

- that any price control system must make provision for different classes of customers having regard to ownership and capital investment, volumes, range of product sold, marketing strategies, transportation, costs and demand for product. A common price would thus be simple but unfair. A multiple price system would be complex and over-regulated;
- the rack pricing system is compared with that operating in various States of the United States. However, in this regard, there are a number of points which can be made, these being:
  - it is not true that the United States system has stopped retail price wars and wholesale price differences
  - the United States market bears no resemblance to that of Australia. Size and number of marketers, if nothing else, show the immense differences between the two. In the United States, a buyer can negotiate with a large number of local independent and oil company refiners and with a large number of independent importers. There is thus real wholesale competition in the United States which would not, and could not, exist in Australia.

The Commission was not unaware of these concerns. In its October 1988 Report (p.18), it stated that:

> As the Commission presently sees it, the only parties with assured measurable long term benefits (in adopting rack pricing) will be the oil companies and ... these benefits have the potential to grow in the future when refinery excess capacity is reduced or non-existent.

The Commission also expressed concern that visible minimum prices posted by oil companies in a monopolistic market may produce an effect similar to a minimum price agreement and, as with many other oligopolistic industries in Australia, a price leader will set the rack price with other companies following. Both of these problems may not be caught by the *Trade Practices Act*, "yet their effect on competition is as profound as an agreement to fix prices".

At the retail level, price competition would be restricted to dealer margins only. The Commission noted in this regard that:

> This combined with the probable restrictions on wholesale competition ... will entail a substantial reduction in competition at the retail level in metropolitan areas with only a possibility of small reductions in price in the country.

There is no doubt that enormous political pressure, in particular at the State level in Victoria, has been put on oil companies and, no doubt on the Trade Practices Commission as well, to effect some sort of change in the petroleum industry. This political pressure is largely unarticulated both as to substance and means. Politicians want to stop prices fluctuating and want to see resellers treated "fairly". They want the problem to go away - particularly if they are not called upon to make any decisions in relation to it.

The real question, of course, is why politicians should not be responsible for whatever solution is proposed. Should the Commission, acting with only doubtful legal powers, be involved in a solution to problems which are primarily Parliamentary in nature? Is it appropriate that oil companies should be placed in a dubious legal situation by accepting a Commission orchestrated non-legal solution? Should the Commission permit politicians to buck pass problems to it in a field which really has nothing to do with Codes of Ethics or self-regulation at all? - unless we accept that the Commission has a role in suggesting that companies make certain pricing arrangements on the basis that such arrangements are "Self Regulatory Codes".

The Commission apparently sees none of these problems which are so manifest to the writer. Neither does it question that it is the proper authority to orchestrate change. The Commission thought (p.40 of its October 1988 Report) that an industry agreement to implement rack pricing would need a "legislative base and thus the industry would be faced with further regulation". Nonetheless the Commission rejected maintenance of the *status quo* on the grounds that the industry was desirous of change and "consumers will be protected from structured change oversighted by the Commission".

On 21 December 1988, the Commission's Press Release confirmed its "deregulatory approach to (the) petrol industry". The Commission stated that it would consult with industry on the preparation of price discrimination guidelines - a draft Code of Conduct which the Commission hopes will, in time, replace the *Petroleum Retail Marketing Franchise Act.* The Commission did not accept the concept of rack pricing but stated that:

> ... The following approach would be consistent with the proposed Commission's guidelines:
>
> (i) A visible Dealer Tank Wagon price - this would be wholesale price of fuel for a full tanker load with cash payment and would be the price paid by most lessees and small to medium branded independents ...
>
> (ii) A separate price (again a visible posted price) for distributions of relevant oil companies which may take into account the distributor's contributions in the distribution and marketing of fuel ...
>
> (iii) An unbranded price for independents (whether this price is above or below the price in (ii) will depend on individual companies).

The possibility of negotiations outside the visible posted prices was recognised by the Commission. One might, however, think that, in essence, the conduct set out in the Commission's proposed (December 1988) Code of Conduct merely substitutes three posted prices for the prior condemned one rack price. This may result in some diminution of the anti-competitive effect which so concerned the Commission in rack pricing. It is, however, nothing more than a question of degree. The fundamental concept of the method of pricing remains intact. One would feel that the Commission's concerns as to anti-competitive results should be very real indeed. At least to this writer, it seems strange for the Commission to be encouraging visible pricing, with its

likely anti-competitive consequences, under the concept of a "Code of Conduct".

In its draft Code distributed in April 1989 the Commission stated its views as to *Trade Practices Act* illegality of certain pricing arrangements and then said that "a supplier could structure its pricing to take into account what has been said ... as follows: ..." The Commission then re-iterates what, fundamentally, it set out in its December 1988 Press Release in relation to visible pricing.

Leaving aside questions as to whether the Commission is right in what it says in its draft Guideline on the legality of price support systems and differential pricing (and the writer believes much of the Commission's commentary on these issues is simply incorrect in law)[95] what is fundamentally happening is that the Commission:

- believes that it has a charter to correct market problems in the petroleum industry whereas one looks in vain in the *Trade Practices Act* for any such policy role;
- is orchestrating a visible price marketing scheme despite the anti-competitive consequences which flow from this, (of which the Commission is aware and has commented in the context of rack pricing) and;
- apparently does not even contemplate Authorization of the Code. Its Guideline does not mention this issue. [Possibly this is because the arrangements cannot be authorised - see hereunder.]
- is placing parties, should they accede to the Commission's suggestion as to the visible price method of marketing, in a position which may well,

---

95 There are a number of areas in which the Commission's draft Guideline is, in the writer's opinion, wrong and a number of other areas in which it is misleading.

Perhaps the most basic point is in Paragraph 4 of the Guideline. There it is said that the test of "meeting competition" (a valid ground for discriminatory pricing which may be otherwise illegal):

> ... has often been used in a questionable way by the supplier relying on retail price competition rather than wholesale competition for justification.

The point, of course, is that a supplier can ascertain the competitive position only from the state of retail competition unless he calls his competitor and asks the competitor's supply price. If he does this, however, the chances are strong that an illegal price fixing arrangement may be implied. In any event, all that a supplier has to possess is a "good faith" belief in the validity of the relevant facts. In the United States, it has been held that it is not necessary to verify supply prices in order to have a good faith belief and, indeed, to do so may "have the effect of eliminating the very price concessions which provide the main element of competition in oligopolistic industries and the primary occasion for resort to the meeting competition defence" [*U.S. v U.S. Gypsum Co.* 348 US 422 (1978)]. Of course, one of the effects of marketing by a method of visible posted prices is to make competitive prices known. This enshrines in a marketing system the very anti-competitive effects which result from an enquiry of a competitor and which are analysed in *U.S. Gypsum* (*supra*).

as a matter of law, be in breach of s.45 of the *Trade Practices Act*. This is because the suggested arrangements may be either anti-competitive under general competition principles or illegal as price fixing arrangements. If the arrangement are illegal because they constitute price fixing, they cannot be authorized by the Commission as they involve the supply of goods. The oil companies involved are thus in a doubtful legal position.

The Commission's credibility as enforcer of the Act's competition law provisions must be severely undermined by what it is attempting to do in the petroleum industry. In the ultimate, it can be argued, with considerable plausibility, that the Commission is simply acting illegally. If this is too strong a conclusion, it can be said, without doubt, that the Commission is acting contrary to the spirit of the competition provisions of the *Trade Practices Act*.[96]

B. THE TRADE PRACTICE'S COMMISSION'S INVOLVEMENT IN VOLUNTARY CODES RELATING TO BREAST MILK SUBSTITUTE PRODUCTS

The World Health Organisation *International Code of Marketing of Breast Milk Substitutes* was adopted in Australia, with local adaptations, by a *Voluntary Code of Practice for the Marketing of Infant Products* entered into in June 1983. This Code was accepted by Bristol-Myers Company Pty Ltd, Abbott Australasia Pty Ltd, Nestle Australia Ltd, Sharpe Laboratories Pty Ltd and Wyeth Laboratories Pty Ltd.

The Code has in it:

- a clause prohibiting advertising or other forms of promotion to the public of products within the scope of the Code [Clause G.1].
- prohibitions on provision to the general public of samples of the products covered by the Code [Clause 6.2].
- a prohibition on distribution to pregnant women or mothers of infants and young children of any gifts or articles or utensils which may promote the use of breastmilk substitutes or bottlefeeding [Clause 6.3].

The Minister for Health has been advised on several occasions by the Trade Practices Commission that attempts to place bans on advertising would contravene the anti-competitive provisions of the Act and authorization for such activities was not possible. The Code is not, in fact, authorized.

The real interest in the Breast Milk Substitute Code saga is how the 1983 Codes is being developed and expanded by the Commission. This study is of interest both in relation to the genesis of the development and expansion of the Code and the ways in which such development and expansion have progressed.

---

96 The Commission was apparently asked at one stage to Chair the Petroleum Industry Code Committee. Wisely, in the writer's view, it is not involved in the Committee in this capacity.

1. Is there any need for the Code?

It can be said that the Minister for Consumer Affairs, in response to perceived market and consumer problems, requested the Commission to prepare an appropriate code. Another scenario put to the writer is that the Commission has "drummed up" the Code in order to demonstrate its pro-active role. The need for the Code was then "sold" to the Minister. The writer has no interest in speculating as to these alternatives. Suffice it to say that there appears to this writer to be no demonstrated need at all for an expanded code. The following points are relevant:

(a) The committee instituted to monitor the 1983 Code first met in July 1985. It was subsequently disbanded by the Minister. It appears as if the reason for the non-continuance of regular meetings of the Committee was that it had nothing to do.

(b) The Department of Community Services and Health has expressed the following views as to the need for a Voluntary Code on Breast Milk Substitutes,[97]

- Australia is a signatory to the World Health Organisation Code on Breast Milk Substitutes. The Department of Health supports a continuance of breast feeding. It sees the Department's role as an educative one which put forward the advantages of breast feeding by giving out as much information as possible.
- the Department does not see any health risk in any present breast milk substitute formula in Australia. The Department believes its position is right in trying an educative approach. In any event, formulae are controlled by State legislation.
- Australia has a low infant mortalityand breast milk substitutes are not given a high priority by the Department. Australia still has a very high incidence of breast feeding and in the past the industry has regulated itself fairly well.
- There have been complaints made by the Nursing Mothers' Association about the Woden Valley Hospital in the A.C.T. The Department had not received any other complaints. In fact, there have been complaints totally opposite to those made against Woden Valley Hospital where women have complained that when they could not breast feed, or did not want to do so, they have received no help at all in deciding what may have been the best breast milk substitute to use. The Department's view is that it would like to get out as much information about breast feeding as possible and have

97 See note 77 *supra.*

breast milk substitutes available in hospitals as cheaply as possible.

(c) A spokesperson representing the signatories to the 1983 Code,[98] stated that the industry had not been approached in the past two years with any complaints about the Code. The industry was happy with the present code and was happy to put in place a complaints handling scheme if this was desired. The concern of the industry at what the Commission was suggesting was that ethically the industry was not prepared to risk breaching the *Trade Practices Act.* The industry was concerned that its activities could be seen as collusion.

(d) The only external pressure for a Code which this writer could find was from the Australian Consumers' Association, the Australian Federation of Consumer Organisations and the Nursing Mothers' Association in the A.C.T. One stated reason for an extended Code to be adopted in Australia was that New Zealand had adopted the World Health Organization Code in full and so should Australia. [It should, however, be noted that this adoption was prior to the enactment of the *Commerce Act* in New Zealand and the Code may, in New Zealand, now be doubtfully legal. The relevant competition issues (which are the same in New Zealand as in Australia) are discussed hereunder.]

(e) Not surprisingly, the Australian Consumers' Association complained that the existing 1983 Code did not "apply the principle of public participation".[99] It is of interest to note that the Australian Consumers' Association believes that "public participation" is to be regarded as a "principle" of self-regulatory Codes. However, of itself the non-compliance of the 1983 Code in this regard hardly merits a totally new Code - especially in view of the prior history of non-complaint.

In short, on the question of need, the writer's conclusion, on the material he has examined, shows no demonstrable need at all for a Self Regulatory code or for any extension of the prior Code. The material also shows the problems of anti-competitive arrangements being entered into - a concern of the industry and a problem articulated also by the Commission on a number of occasions.

---

98 See note 77 *supra.*

99 Letter from Young Sook Kwok of Australian Consumers' Association to Allan Asher, Commissioner, Trade Practices Commission, of 22 February 1989.

2. The Mechanics by which the Commission is Implementing the Breast Milk Substitute Code

The procedures by which the Breast Milk Substitute Code has been advanced shows a number of points which may cause concern to many. The main general points for comment appear to be:

(a) Commissioner Allan Asher believes that:

> ... Where a Minister seeks to solve a market problem through a code of conduct, it remains part of the Commission's role to minimise any anti-competitive or market distorting features of such a Code. However ... (the Commission) should have an additional responsibility; that being to assist Ministers in finding the best way of achieving the goal they have set for the code.

Commissioner Asher believes:

> That the TPC should adopt a positive 'we'll help you achieve your policy goal' rather than a 'we'll tell you what you can't do' approach to codes.[100]

Is this approach appropriate?

(b) Commission Staff Papers were, in fact, sent to The Australian Consumers' Association and the Australian Federation of Consumer Organisations for comment. This puts these organisations in a very much preferred position. Internal Commission Staff Papers are not, to this writer's knowledge, sent outside the Commission. Thus the two consumer organisations have achieved a highly preferred status - possibly a status achieved by nobody else since 1975. The Commission Staff Papers were not sent to any other outside organisation for comment.

(c) The Voluntary Code, if eventually implemented, will presumably require authorization by the Commission. This is, of course, a public formal process with all submissions on public record. It is apparent, however, that a lot of the relevant material will not be on public record because it consists of a number of discussions preceding the commencement of the authorization process. In the present case, the authorization process (if authorization is, in fact, applied for) raises a number of problems of principle in that:

- the Commission has held numerous meetings of parties aimed at achieving agreement between them as to the terms of a Code. If there is such agreement under the orchestration of Commission meetings, it is difficult to believe that the Commission would decline to authorize that which it has sought so eagerly to bring into effect. For example, at one meeting with industry, it is

---

100 Memo of Commissioner Allan Asher entitled "Codes of Conduct and Government Policy", 22 November 1988.

known that Commissioner Allan Asher gave an undertaking that his organisation would provide full support to the industry group in establishing a self-regulatory body.[101] Is it proper that the Commission should sit in an adjudicative capacity on arrangements it has been involved in orchestrating?

- The Commission has already articulated to industry that one of the grounds relevant to an assessment of public benefit is:

  > Adherence to the World Health Organisation Code and promotion of the policy of the Government concerning adherence to that Code[102]

  If this is accepted as a head of public benefit, the Code must score heavily in any authorization. This writer, however, feels some disquiet at the thought that promoting Government policy is axiomatically a public benefit. This must be especially doubtful in cases such as the present one where there has been no firm articulation of Government policy which policy is at best, set out in a couple of pieces of correspondence.

- Various statements have been made to industry which industry might well interpret as a Commission view that the Code would be authorized. For example, Commissioner Asher stated at one meeting with an Official of the Department of Health and a representative of manufacturers that the Commission had had substantial experience in the assessment of codes and that the Code proposed seemed to be an ideal candidate for the Commission's authorization procedures.[103]

  The above does not accord with the previously expressed understanding of the Minister for Community Services and Health[104] that authorization of the Code was not possible. Is it appropriate for the Commission to express support for an authorization application in such terms prior to an authorization application being made?

The above comments on the Commission's role in orchestrating the Code of Conduct relating to Breast Milk Substitutes do show significant deficiencies, in the writer's view, in the way the matter has been handled. They further make one concerned as to what being "pro-active" in relation to code promotion actually means.

---

101 See note 77 *supra.*

102 See Background Material distributed with Agenda for a Meeting to discuss Code of Conduct on the Marketing of Breast Milk Substitutes - 30 May 1989.

103 Memorandum of Allan Asher 22 November 1988 - re Code of Conduct: Marketing of Breast Milk Substitutes - Meeting of 10 November 1988.

104 See note 77 *supra.*

The writer cannot say that a Voluntary Code for Breast Milk Substitutes is incapable of authorization. However, what is of concern is:

- *The question of the evaluation of the need for the Code.* Apparently, the fundamental question of the need for the code has effectively been already determined. If the Commission thought there was no need for the Code, it would, presumably, not have spent such an immense amount of time organizing industry to agree to it. The fundamental question of the need for the Code would appear beyond debate in Authorization proceedings.
- *The question of whether the Commission is seen as an independent adjudicator.* All documentation which this writer has examined states that the Minister requested the Code in question though some have put it to the writer that the Commission effectively "sold" the Minister on the idea of "requesting" the Commission to organise a Code. Assuming, however, that the Minister genuinely requested the Code, one nonetheless wonders whether the Commission is seen to be adequately independent when Allan Asher, one of its two full time Commissioners, is recorded as explaining the genesis of the Code and the Commission's role in relation to it in the following words:

  > ... the Federal Minister for Health had received complaints, he contacted Minister Bolkus, and Bolkus contacted the TPC and said 'fix it' ... the TPC has a role in showing how the policy ends of others can be achieved, and should be speaking in an encouraging way about the authorization process ... as a new principle ... the TPC should be taking a lead in suggesting ways to fix problems ...[105]

- *The question of favourable treatment of Consumer Groups.* Commission Staff Papers were forwarded to the Australian Federation of Consumers Organisations and the Australian Consumers' Association. This step is unusual enough. What, however, is perhaps more disturbing in some ways is that these two organisations were the only outside organisations given internal Commission staff documents for purposes of commentary.
- *The question of whether the public record in any authorization proceedings will show where the true decisions were made.* It is highly doubtful if any authorization record will show any of the pre-authorization material. A party wishing to oppose an authorization will be at a severe disadvantage in not having available on the record a substantial amount of fundamental information.
- *The question of whether the public benefit issues have been effectively pre-judged.*

---

105 See note 77 *supra.*

> *The question of the downgrading of anti-competitive factors in the Code.* The writer does no know how anti-competitive the restrictions in the Code may be. He does not presume to conclude that the code is incapable of authorization. However, it is of concern that quite basic anti-competitive restraints seem to date to have been largely ignored in the desire to "fix" "the problem". A solution to "the problem" seems so far to have been discussed without any real examination of the anti-competitive effects of the restraints in the arrangements.

Once again, however, the fundamental question remains as to whether the Commission's involvement means that the Code is incapable of Authorization and will, if agreed to by industry, be operated illegally. To a significant extent this depends upon how far the Commission goes - something which at this stage the writer does not know. It is known, however, that the Commission's policy view is that the World Health Organisation Code is "The Model". Clause 5.3 of the World Health Organisation Code prohibits any promotional device to induce sales directly to the consumer at the retail level "such as special displays, discount coupons, premiums, special sales, loss leaders and tie in sales". Further, Clause 6.6 of the World Health Organisation Code prohibits, amongst other things, "low price sales to institutions or organisations".

The World Health Organisation Code requires implementation by Governments "as appropriate to their social and legislative framework" and, presumably because both price fixing and re-sale price maintenance are illegal in Australia, the 1983 Australian Voluntary Code dropped the implementation of most aspects of Clauses 5.3 and 6.6 of the World Health Organisation Code. As this writer has been informed, the Commission seeks to implement the World Health Organisation Code more fully.

If the Commission does seek implementation of the totality of the World Health Organisation Code, it is difficult to see other than that the Commission is seeking to implement a price fixing arrangement for goods which, of course, is both illegal *per se* and incapable of authorization. Further, it is very difficult indeed to see how the full provisions of the World Health Organisation Code can be implemented without some form of resale price maintenance being involved. This practice too is, of course, both illegal *per se* and incapable of authorization. The Code requires that manufacturers and distributors be responsible for monitoring market practices and "for taking steps to ensure that their conduct at every level conforms with them" [Par 11.3]. Hence, the Code requires an express commitment to enforcement of the various restraints referred to.

In short, there are, in relation to the Breast Milk Substitute Code currently being strongly orchestrated by the Commission the same concerns as those expressed in relation to the petrol industry code - that is, whether the Commission will be involved in arrangements which might credibly be argued as being illegal or at the very least as being contrary to the spirit of the competition provisions of the *Trade Practices Act.* A final decision on this

issue will depend upon how much of the World Health Organisation Code is eventually to be implemented. If it is to be fully implemented, there are real dangers of illegalities occurring. If illegalities are to be avoided, it is difficult to see why the present Code needs any change.[106]

X. SHOULD THE COMMISSION'S DESIRE FOR LEGALLY MANDATED CODES BE AGREED TO?

As previously stated, the Commission is currently giving high priority to self-regulatory codes. It is employing about 9% of its staff on Code-related matters. The Commission currently lacks one power which it would dearly love to

---

106 Author's update note re Draft Petroleum Pricing Guideline and the Proposed Breast milk Substitute Code -

Since the original presentation of this paper, there has been subsequent action taken in respect of the Commission's draft Petroleum Guideline and the proposed Breast Milk Substitute Voluntary Code, both of which are referred to in Part IX of the Paper.

1. Draft Petroleum Pricing Guideline
   In relation to the Draft Petroleum Pricing Guideline, the Commission deferred action pending an Enquiry by the Prices Surveillance Authority *(Media Release MR15/89: 27 June, 1989)*. In its submission to the Prices Surveillance Enquiry into the Petrol Industry, the Commission stated that it had "some concern that the purpose of its draft Guideline has been misunderstood". The Prices Surveillance Authority noted in its Report *(Enquiry into Petroleum Product Prices*: 20 December 1989 Paragraph 5.7) that some companies had interpreted the Commission's Guideline as binding and using it as a justification for removing discounts. On 26 April, 1990 *(Media Release 9/90)* the Commission announced that it would not formally issue a Guideline in relation to petrol pricing.
2. Breast Milk Substitute Code
   The Commission has concluded that self-regulation in the manner proposed was not possible because some sectors of industry were not prepared to participate, some aspects of the Code could not be authorised and, in any event, there may not be adequate public benefits to outweigh the anti-competitive implications of the Code [*Trade Practices Bulletin No 51* (Nov - Dec 1989) p.33].
3. Author's Comments
   For the reasons set out in detail in Part IX of the Paper, the author believes that the Commission should never have become involved in either its Petrol Pricing Guideline or in the Breast Milk Substitute Code in the manner in which it did. However, having said that, the Commission's decision not to proceed further with either activity is a sound one. The author's reasons for these conclusions are set out in Part IX of the Paper.

acquire. This is mandating by law that parties shall observe voluntary codes. There are provisions in the *Fair Trading Acts* of New South Wales, South Australia and Western Australia to this effect. There is similar provision in the United Kingdom. Why, asks the Commission, is there no such provision in the Australian *Trade Practices Act*? The Commission is, in fact, presently engaged in strong representations that Voluntary Codes be able to be mandated by law at the Federal level.

It is submitted that the discussion in Part IX of this Paper demonstrates, at the present time, that there should not be a mandating of voluntary self-regulatory codes at the Federal level.

Once major concern which this writer feels is whether, by mandating Codes at the Federal level, competition principles will gradually be eroded pursuant to such Codes. If Parliament has seen fit to legislate in strong terms on price fixing and anti-competitive arrangements, it seems anomalous that such legislation may well suffer gradual erosion by orchestrated codes of conduct. In particular, the Commission's involvement in the petroleum industry code raises, in this writer's view, most serious anti-competitive considerations, none of which appear to be of great concern to the Commission. There must be a fear that this attitude could, and perhaps would, spread quite widely if the Commission or the Minister were able legally to exempt Codes from the *Trade Practices Act.*

The writer's second major concern with mandatory codes involves the extent to which such codes will expand, not decrease, the scope of regulation. In some areas, this writer believes that such expansion can amount only to a form of censorship. Government committees of various kinds seem to be spawning subjects for voluntary codes. A government committee has recently recommended a code of conduct for the sale of war toys. This is something which this writer believes the Government should stay out of - especially when the wide ranging nature of the bans suggested is appreciated. A code of conduct for the depiction of women in advertising is another such code. As the writer understands it, this code may well have the effect of prohibiting a woman advertising a washing machine. In this writer's view, such codes are serving no societal need at all. They are pandering to particular self interest groups with extreme views on specific issues. To permit codes such as these to be made mandatory is an intrusion, for no overall societal benefit, into very fundamental questions of economic and social liberty. If a product is dangerous, the Minister can ban it under the *Trade Practices Act.* This is as far as legal power should run in this field. If the question is one of advertising, then the Codes of the Media Council more than adequately deal with any present problems, such as they are. [See, for example, Appendix I re decisions of the Advertising Standards Council regarding the depiction of women in advertising, which decisions, to this writer, appear most appropriate and reasonable.]

We should not believe that the future holds anything but a potential substantial expansion of codes into as yet undreamt of fields. It is sufficient to

not a comment of Commissioner Allan Asher in relation to Codes that "several others are under way"[107] in order to feel some trepidation as to where it may all end up.

XI. THE TRADE ASSOCIATION RESPONSE

A. A SUMMARY OF VIEWS ADVANCED

In view of the various Consumer Surveys which have been conducted, it might not be unreasonable for a survey to be conducted of trade association executives as to their attitudes to the running of self-regulatory organisations and the problems being encountered by them. The Commission may a well say that it speaks to trade association executives all the time and that a survey of their views is not warranted. Presumably it could have said the same thing about consumers - but it did not. It is extraordinary that so much is being said about trade associations when no-one has bothered to find out and report on what trade association administrators think about it all. The present position is that, because there is ignorance of the views of association executives, the Commission is launching the ship of self-regulation on a sea of darkness without real knowledge as to whether calm or tempest awaits its voyage. Even if the Commission knows what it is doing, the perception of many trade association administrators is that it does not. This is because the Commission has made no study of what association administrators think of it all. Yet, notwithstanding this, it is moving into fields of crucial concern to association administrators.

Undoubtedly the following fundamental propositions guide industry trade association conduct:

(i) Trade association self-regulatory codes are an alternative to legislation.

(ii) Society cannot expect miracles from self-regulation when the substantive law is weak. Traders will be part of a self-regulatory code when it offers an alternative to legislation and/or litigation. In many ways the best thing Government can do for self-regulation is to provide for effective general laws. No trader will submit her/himself to stringent standards if she or he has little liability at general law. Until very recently Division 1 of Part V of the *Trade Practices Act* has been unenforceable in local State courts. Now it is so enforceable. An increase in the quality of self-regulation must be expected to result.

(iii) By definition, self-regulatory codes cannot function without active industry involvement. If industry believes that Government wants to take over the field or that Governmental requirements as to composition of their adjudicative committees means a dilution of the efficiency or

---

107 See note 100 *supra.*

effectiveness of the association, then the reaction of industry may well be to vacate the field and "leave it to the Government". In this regard industry does not distinguish between Government regulation by a Minister of the Crown, by the Trade Practices Commission or by the Trade Practices Tribunal - all constitute "Government" regulation. The Trade Practices Commission approach seems to be that everything at present good in regulatory codes will be retained but there will be further improvements in the codes because of outside involvement. This conclusion may well not be a valid one.

It is appropriate that the views of trade association executives be recorded so that the scales are balanced. The particular concern of association executives, as this writer interprets a number of views put, is with "outside" involvement. This should not, however, be regarded as a universal concern. Some industries welcome outside involvement because it brings balance. Some industries regard outside involvement as important to self-regulatory credibility. Some believe it essential to stalling specific Governmental legislation. All industries with which the writer has been involved welcome constructive outside comments on their self-regulatory codes. It is, however, the mandating of outside involvement which is of concern. Many see outside involvement, and the possible mandating of who are to be the "outsiders", as now being a requirement of self-regulatory codes or something which the Commission is attempting to mandate. Any form of compulsion as to outside involvements is resented.

Those involved in self-regulatory codes give the following reasons for resisting mandatory "outside" involvement:[108]

- Many codes deal with matters which are only the concern of industry and public participation is not required.
- Industry has, in its own self interest, to look after consumers. It knows its consumers far better than outsiders who really represent only another vested interest. The most dramatic example given was the public representatives on the Cigarette Advertising Code Council, all of whom were philosophically opposed to cigarette advertising, even where this was legal, and voted as a block against all cigarette advertising regardless of content.
- The purpose of codes is to get problems solved quickly and without fuss. Stronger consumer protection laws are a greater incentive to do this than has previously existed. If complaints are not properly dealt with, then the complainant will take his or her problem to the Trade Practices Commission or some other equivalent body. So there is immense self interest in industry having codes which work. There is no

108 These views are a synthesis of views expressed privately to the writer and views at two Seminars conducted by the Commission on this subject (see note 80 *supra*).

benefit to industry in encouraging more complaints to regulatory authorities. Likewise, there is immense self interest in ensuring that codes work so that legislative regulation does not occur. "Outside" representation does nothing to aid the process of speedy resolution of problems. Indeed, another vested interest may slow this resolution and, if the codes are perceived as not working efficiently, may hasten the process of legislative regulation. This is a particular fear with "outside" representation because a number of "outside" representatives appear philosophically to be more committed to legislative intervention that to making a success out of voluntary codes. The consumer representations in *Media Council (No.2)* give strong credibility to this concern. There consumer groups argued that self-regulation was contrary to the public benefit because it impeded legislative measures being enacted [see Part VI.B].

- Looking at the situation in another way, the consumer will not utilise the system unless she or he knows it will work. If it is essential to credibility that there be outside representation, then it is in industry interest to provide this. People know about the law and what it is about. Codes are an alternative procedure for consumer redress. They must perform or will be ignored.
- There is much philosophical misconception about self-regulatory codes. The best way to keep up the good name of a trade or profession is not to protect the wrong doer but to do something about him in order to protect the name of the trade or profession itself. Voluntary codes, it is said, now adopt this basic philosophy.
- It is important that codes "belong to industry" and be seen to belong to industry. If a code loses industry support, then it cannot function or be credible at all. The involvement of "outsiders" is likely to result in a fall off of industry support and the donation of time and effort necessary to make sure that self-regulatory codes work. Nonetheless, where a code has to demonstrate credibility and this is important to its self interest, it would be a foolish industry self-regulation arrangement which was entered into without some process of wider consultation.

Amongst other points made by industry representatives are the following:

- Peer judgment is probably the best judgment. Often only a person's peers understand all the relevant issues.
- There are competitive advantages in having higher standards because you will get greater business if people believe you are not a rogue.
- Codes may sometimes fail but there are continued pressures to perform. Sometimes, however, the perceived "failure" of codes is not a failure at all. It is just that industry and the public have a high expectation of

codes to alleviate problems. If the codes do not live up to this expectation, then there are complaints. However, the community as a whole often tolerates government incompetency or incapacity to act. To bring regulatory government into the code area may well result in the codes performing no better, and perhaps worse, but being more tolerated because they are "sanctioned by government".

- The whole cost of consumer representation, education and reporting appears to be currently contemplated as falling on industry. This, say many industry spokespersons, is wrong in principle. Some state that "if government wants "outsiders" in, then government should fund what it compels". Not surprisingly, this governmental funding is not expected to be forthcoming.
- The overwhelming conclusion from the Trade Practices Commission's *Survey of Consumer Opinion* is that consumer complaint rates are exceedingly low. Such complaint rates provide no basis upon which voluntary codes should be subject to legislation or regulation in some other form, such as mandatory "outside" participation. The Commission's Survey confirmed, not disproved, that current industry self-regulation was effective and cost efficient and covered areas where it would be difficult, if not impossible, for government to act. Given this, there is no case for trying to tinker with an already existing effectively working system.
- Codes have their differences and it is not appropriate to evaluate them on some basis of "general principle". This is not a weakness in codes but it is their vitality. To attempt to force codes into a narrow mould, which seems to be the present trend, will inevitably fail. This failure will inevitably occur if codes are legislatively controlled. Control of codes by the Trade Practices Commission and the Trade Practices Tribunal amounts to the same thing as legislative control in the view of many industry participants. Ultimately, the obligations of industry members under the general law are the relevant sanctions. All codes have to work against the background that the law itself will provide a less palatable sanction to industry than will self-regulatory codes. This is the incentive to make self-regulatory codes operate effectively.

B. MANDATORY MEMBERSHIP OF ASSOCIATIONS AND COMPLIANCE WITH THEIR CODES: A SENSIBLE SOLUTION?

Some industry spokespersons fear legislative involvement for a reason different to any of the above. They fear a gloss on the mandating of codes by legislation. This gloss is the mandating of trade association membership by legislation, and hence subjecting all traders to the discipline of an association and its code of Ethics. Associations which operate a Code making their members more ethical than non-members in the eyes of the public obviously are

concerned that this distinction may be obliterated at law. If membership of a trade association is mandated by law for all in the industry, the advantages of membership and of being subject to the association's code are lost. So also is the incentive for industry members to be active in the administration of the code. Might not mandatory codes, therefore, result in the existing benefits of such codes being lost? In these circumstances unless the Government sets up a regulatory code to replace the existing code, there may well be no code at all which survives. This is not a recipe for "fostering" self-regulatory codes but a recipe for their demise.

To the writer's knowledge, one of the major trade organisations fearing mandatory membership of trade associations is the Motor Traders Association of New South Wales. No doubt there are many others. However, it is instructive to look at motor traders as a case study in relation to the effect on some types of code of legally mandating code compliance by all in an industry.

The Motor Traders Association of New South Wales has a complaints system highly praised by many consumer associations, though scorned by some. Its members pay significant membership fees. The advantage of membership to a motor trader is that membership of the association and the display of its logo gives consumers confidence in the member's ethics and thus attracts business to the member. Membership is not easy to obtain. For example, about one half of second-hand car dealers applying for membership are rejected in any one year. The association fears legislation which would force all motor traders to be association members. Some consumer organisations and some statutory authorities see the mandating of membership of an association such as the Motor Traders Association of New South Wales as a solution to many significant consumer problems. They wish for legislation which would mandate such membership.

The writer's fears and those expressed by trade association executives in relation to mandatory association membership were largely scorned by what might be termed "consumer advocates" (both private and governmental) when such persons expressed their views on a prior draft of this Paper. In light of this, the writer sought some opinion from a jurisdiction where there was such mandatory membership. The writer visited New Zealand and interviewed the relevant Officials at the Department of Trade and Industry in Wellington.

In New Zealand, it is currently a legislative requirement under the *Motor Vehicle Dealers Act* 1975 that all persons who purchase, sell, exchange or lease for gain more than six motor vehicles per annum be members of the Motor Vehicle Dealers Institute. The legislation was recently reviewed by the New Zealand Department of Trade and Industry in light of its actual operation and in light of the advent in New Zealand of the *Fair Trading Act.* In New Zealand, the Department of Trade and Industry has an on-going brief to review all occupational licensing as part of the de-regulatory approach of the New Zealand Government. The *Motor Vehicle Dealers Act* review was part of the larger on-going review process.

It is not possible here to set out the totality of the New Zealand Departmental Review. It is contained in a *Report to the Deputy Prime Minister of New Zealand on Reform of Motor Vehicle Dealer Licensing dated 21 February 1989.* The relevant essential paragraph of this Report for present purposes [Par 34] reads as follows:

> A statutory recognition and compulsory membership of the Motor Vehicle Dealers Institute discourages the establishment of "brand names" as a signal of quality. A voluntary association would have both the incentive and the ability to police quality standards amongst its members providing a service to consumers. The Ministry therefore supports the abolition of statutory recognition and compulsory membership of the Institute.

No doubt, there are some trade and professional organisations where compulsory membership may be merited. In particular, there is, no doubt, a genuine basis for this in the case of some of the learned professions. In cases other than those of the learned professionals, there are, however, different considerations. In this arena, the argument for mandatory trade association membership probably is put at its highest in relation to motor vehicle dealers. In view of the disquiet felt by trade association executives involved in the industry and in light of the New Zealand experience, there would appear to be no case for mandatory trade association membership as a solution to perceived consumer problems. If there is no basis for such legislation in the case of motor dealers, it is difficult to see such a case in other industries - with the exception perhaps of some of the learned professions.

XII. CONCLUSIONS AND SUGGESTED CHANGES OF LAW AND POLICY

To write a paper on self-regulation and competition law is no simple task. Neither is it free of controversy. Such a paper involves not only considerations of law but considerations of areas of administration. Often much is undocumented in the area. As stated in Part II of this Paper, much evaluation is subjective. In many areas, there is probably no agreement between parties on basic issues, nor is it likely that there will be.

The most useful conclusion which can be made to this paper is to set out in point form those areas of law or policy which would appear to merit amendment as a result of preceding discussion. In most cases, the recommendations are set out in "broad brush" terms. Except in the case of the recommendation relating to the amendment of s.4D, detailed drafting and detailed elaboration of the recommendations has not been undertaken.

The suggested areas are:

(i) Section 4D of the Act should be amended as set out in Appendix II. This amendment would overcome the necessity for trade associations to seek authorization in a number of cases in order to be legally secure in what they do. This is not an amendment which would necessarily find

favour with the Trade Practices Commission, however, as the amendment would remove a very strong element of power which the Commission has in relation to compelling "outside" involvement in regulatory codes. Without the necessity to seek authorization, questions of "outside" involvement in trade associations may well become academic in the case of most self-regulatory codes. The Commission probably would also argue that there is nothing wrong with s.4D because the Commission has encountered no "complaints" and sees no problems in its operation. It is submitted that this is not the real yardstick by which to judge the section [see discussion in Part II.A(ii) and Part IV].

The suggested amendments, in addition to making eminent sense, would also accord with contemplated New Zealand amendments to s.29 of the *Commerce Act*. These New Zealand amendments are foreshadowed in a Department of Trade and Industry Paper of August 1988.

(ii) If s.4D in unable to be amended as suggested, a form of clearance akin to that operating pre-July 1977 should be introduced for codes, and perhaps in other areas as well. This would grant immunity to actions which are not anti-competitive. The writer regards this as a poor alternative to the substantive amendment to the provisions of s.4D but a necessary one if that section is not amended.

(iii) There should be a re-establishment (presumably possible only by a changed Commission or Tribunal attitude) of the clear proposition that, in order for self-regulatory codes to be authorized, they do not have to be the best codes available and that codes may be authorized despite their inadequacies if they deliver public benefit exceeding anti-competitive detriment. The Tribunal may believe that this is the state of its present holdings. The *Media Council Determinations* of 1987 and 1988 indicate the contrary to this writer.

(iv) Attention should be paid to procedural difficulties in the Tribunal in relation to authorization. The Tribunal could re-evaluate this matter of its own motion but, should it not do so, declaratory legislation would not be unreasonable. The difficulties referred to are:

- that the Tribunal should pay regard to Commission findings such that matters found by the Commission should have at least some *prima facie* status in the Tribunal;
- that an appellant should be required to challenge those Commission findings with which it disagrees rather than the applicant for authorization having to re-prove the whole of its case before the Tribunal;
- that limited power should be introduced to award costs if an appeal is thought to be frivolous, vexatious or instituted primarily to obtain

a delay in the implementation of arrangements. Akin provisions should apply if a party delays proceedings in the Tribunal;

- that, *prima facie*, public benefit previously established should be accepted without further proof in subsequent applications involving similar practices;
- that no subsequent authorization should be able to affect the status of a previously granted authorization except if a subsequent determination granting authorization cannot stand consistently with a previous grant. In this case the previous determination should be void to the extent of the inconsistency. The purpose of this recommended amendment is to prevent the situation of the Tribunal, when declining to grant authorization to a second application, finding that is subsequent reasoning constitutes "changed circumstances" in order that the first authorization should also be revoked. It does not appear reasonable to the writer that the cost of losing a subsequent authorization application should be that, for that reason alone, an already existing authorization can also be revoked. Such a position discourages flexible amendments to rules. This is because many may feel that it is better to sit on what they have rather than risk losing all in the event of a second application for amended rules being unsuccessful.

(v) The Commission's power to grant authorization for a limited period should be expressed to be exercisable only in exceptional cases, which cases, hopefully, might be able to be spelt out at least in broad detail.

(vi) The Commission should be instructed, pursuant to s.29 if necessary, to expend no more resources on "fostering" self-regulatory codes.

(vii) The Commission should be directed, pursuant to s.29 if necessary, to discontinue its Studies of the newsagents and real estate industries and not to commence studies in similar circumstances in the future.[109]

(viii) That when a code is authorized, it should be permitted to function as a self-regulatory code and the Commission should not have any on-going involvement with it in a monitoring role. The law should ensure this result. A Code, when authorized, is a self-regulatory code not a Commission-monitored code. An on-going Commission monitoring function is consistent only with Government regulation and supervision. It is not consistent with the concept of self-regulation.

(ix) The Commission's current non-public but strong representations for the statutory mandating of voluntary self-regulatory codes should be denied. This writer does not believe that the concept of mandatory-voluntary

---

109 The writer discloses that he has been retained by each industry to advise them in relation to the Commission's "Studies". The conclusion in the text is, however, one which the writer is sure he would reach regardless of his client involvement in the industries.

> codes is sound in principle. In those few cases where there may be a case for legal regulation, the task can be achieved by specific legislation and the greater public scrutiny this brings. Regardless of the theoretical position, however, the writer does not believe that the Trade Practices Commission's involvement in the self-regulatory field to date gives rise to any degree of confidence that legislative mandating of voluntary codes will deliver any significant societal benefit.
>
> Any gloss on mandatory-voluntary Codes in the form of mandatory trade association membership for traders in certain industries should also not be acceded to [see Discussion Part XI.B].

The above would, in the writer's view, result in a superior situation to that currently existing. Insofar as the Commission is concerned, it would also result in considerable cost savings. So long as approximately 9% of Commission staff are engaged in code related work (and the Commission's involvement in this area looks like increasing, not decreasing) this writer believes that the Commission should put its own house in order by a reallocation of priorities in order to make its requests for additional funds more credible. So long as the Commission has 9% of its staff employed in Code related activity (and presumably virtually no-one so employed say 5 years ago), this writer is somewhat unimpressed with the claim that "Put bluntly, in terms of resources, the Commission is hurting".[110] This comment does not mean that the writer believes anything but that the Commission must be adequately funded. It means that the Commission could well be called upon to justify some of its projects. In terms of Voluntary Codes, this writer believes that there has been a considerable investment in terms of time, staff and resources for very little justifiable benefit.

What is certain in Australia is that the whole concept of self-regulatory codes as the Bible, Koran and "Confucius Says" of consumer remedies is flawed. If codes evolve, then there is much to be said for them. To have the Trade Practices Commission fostering codes and subjecting industry to a new form of regulation in doing so is, however, to be discouraged. Above all, s.4D of the *Trade Practices Act* which is, in the ultimate, the section underpining a substantial part of the Commission's activities should be significantly amended. If this is not done, then the absurd position will continue under Australian competition law that conduct which is not anti-competitive and has no anti-social effects at all is, nonetheless, banned *per se*.

---

110 The Commission's resource allocation declined by 6.6% between 1980-81 and 1987-88. The Commission has, particularly of late, been given additional tasks. On the other hand, most of its prior heavy Authorization obligations have been completed. The Commission has said that "Put bluntly, in terms of resources, the Commission is hurting" [see *1987-8 Annual Report of the Trade Practices Commission* p.54].

APPENDIX I

SELECTION OF ADVERTISING RULINGS MADE BY THE ADVERTISING STANDARDS COUNCIL[1]

Advertising Permitted [Complaint Dismissed]	**Advertising Not Permitted [Complaint Upheld]**

Complaints in Respect of Alcohol Related Advertisements

1. Alleged that advertisement was offensive in that the poscript portrayed a beer drinking, loud mouthed 'ocker' and denigrated marriage. *Held* that the advertisement was directed to an adult audience and was of a humorous nature. [Ref 1974]	1. Advertisements directed at young people. [Ref 1932]
2. Alleged that advertisement breached code in that it implied success or social distinction was due to drinking. Complaint	2. Advertisement blatantly encouraged over indulgence [Ref 1896]
	3. Advertisment in poor taste. [Ref 1972]

1 Source: Appendix I is a tabulation of the material in an article by Julie Shouldice: *Advertising Standards Council - 1984 Review* [Advertising and Marketing Law Bulletin Vol 1 No 5 (May 1985) pp 65-69]. In 1984 the Council adjudicated on some 350 complaints. See also various articles by J. Shouldice: under the title *Advertising Standards Council* in Advertising and Marketing Law Bulletin Vol 1 no 6 (August 1985) pp 90-92; Vol 2 No 1 (November 1985) pp 7-9; Vol 2 No 2 (January 1986) pp 24-26; Vol 2 No 3 (March 1986) pp 44-46; Vol 2 No 4 (May 1986) pp 62-65. To the writer's knowledge there has been no analysis of the decisions of the Advertising Standards Council other than the above analyses carried out by Miss Shouldice.

dismissed because the advertisement only suggested that a knowledge of wines (as opposed to drinking wine) may be a desirable social asset in a career. [Ref 2148]

Complaints in Respect of Tobacco Advertisements

1. A print advertisement where the complaint alleged, among other things, that the advertisement was a clear invitation to all who wished to own a sleek expensive car to smoke. The complaint was found to have no basis. [Ref 1959]

2. An advertisement in respect of which the complainant alleged that the depiction of young people created an appeal to people under 18 and also that the advertisement suggested that smoking was related to sexual and romantic success. Council believed that the man and woman depicted did not have a major appeal to adolescents under 18 years of age and it was unreasonable to assume that the intimacy between the two is a result of smoking. [Ref 1958]

3. An advertisement where the complainant alleged that the contents of the advertisement

1. Various advertisements which related to the omission or or illegibility of the health warning on packets of cigarettes portrayed in the advertisements. This requirement was strictly enforced by the Council which refused to sanction various advertisements even though -
   (a) The advertisement was was primarily of liquor but happened incidentally to feature a packet of cigarettes. [Ref 1836]
   (b) The advertisement of the health label involved considerable technical difficulty and cost. [Ref 1836]
   (c) The differing colours used in the advertisement when finally reproduced in print form could not come out with clarity. Council stated that it was not concerned with technical difficlties of reproduction and advertisers were warned that they should not use a medium which was in doubt in this

equated smoking with "feeling good". Council was of the view that the complainant had misrepresented the meaning of the phrase "the taste you'll feel good about" in that, read in the context of the advertisement and in conjunction with the health warning, the statement referred to taste and not to well being. [Ref 1847, 2149]

regard. [Ref 1821, 1823, 1897]

(d) the advertisement was in a trade magazine and not one distributed generally to the public. [Ref 1912]

Advertisements Subject to Complaint on the Grounds of Decency

1. A billboard advertising jeans which showed the tight shot of a male crotch area. [Ref 1803, 1812]

2. Classified advertisements seeking women for an escort agency. [Ref 1838]

3. An advertisement for rubbish disposal which jokingly referred to mothers-in-law in the text. [Ref 1940]

4. A commercial for disposal bags which depicted a cat being lifted by a handle. [Ref 2012]

5. A commercial for sports bras where the complainant alleged that three active girls were not wearing bras. [Ref 2075]

6. A radio commercial for men's underwear where the complainant took offence at the statement "they will even help you to score with the women". [Ref 2025]

1. A theatre advertisement depicting 'Our Lady' holding holding a hand grenade [Ref 1801, 1829]

2. A printed advertisement for kit homes which included the statement 'stick it up your landlord'. [Ref 1824]

3. A commercial ridiculing people with speech defects. [Ref 1837]

7. A commercial for chips featuring dancing girls where the complainant alleged that the presentation was offensive and suggestive. [Ref 2074]

8. A television commercial for dairy foods where the complainant found the commercial to be frightening and disrespectful of the dead. [Ref 2069]

   [In dismissing these complaints, Council was of the view that some of them were meant to be of a humorous nature and generally did not agree with the interpretations placed on them by the respective complainants.]

Advertisements Subject to Complaint on the Grounds of Discrimination

1. Advertisements said to be sexist. *Held* that whilst Council supported the objectives of Anti-discrimination and Equal Opportunity legislation, it found that some of the complainants and comments received under the umbrella of this legislation were bordering on the frivolous. [Ref 1984]

2. Advertisement's for women's underwear alleged to denigrate women [Ref 2004], or to be offensive and degrading to the female sex. [Ref 1904, 2100, 2153]

3. Advertisement for electrical goods for Mothers Day alleged to be sexist and reinforcing a mythical image. [Ref 2077]

1. An advertisement relating to office machines in which women were stereotyped as brainless, decorative sex objects and belittled them and underrated the seriousness of tenosynovitis. [Ref 1846, 1850, 1905, 1910, 1920, 1945 1946]

2. Direct mail advertisement for motor parts depicting bare breasted women. [Ref 1872, 1873, 1875, 1880, 1882, 1906]

3. An advertising brochure for a spa bath featuring a woman naked from the waist where the complainant alleged that the use of the

4. Building Society commercial alleged to show women in poor light and being rather stupid. [Ref 1909]

5. Advertisement for office systems where the use of the word 'man' was alleged to be sexist. [Ref 1898]

6. A commercial for chain saws where the complainant alleged that the advertisement depicted the woman as humourless and unappreciative and the man as assertive. [Ref 1876]

7. An advertisement for an overseas cruise which featured a woman in bikini which the complainant alleged was sexist and exploited women's bodies. [Ref 1839]

8. An advertisement for a life company which the complainant alleged failed to reflect the social reality that women are not dependent on their husbands. [Ref 1849]

9. The NSW Anti-Litter Campaign advertisement which was alleged to be discriminatory against people of European descent.

woman's body was. unnecessary. [Ref 1865]

4. An advertisement for sewing classes where the complainant objected to the link made between an idiot and a nurse and alleged that the tone of the advertisement was degrogatory to women. [Ref 1954-1957]

5. An advertisement for overseas brides where complainants alleged that the advertisement exploited the women as 'mere housewives' and that women should not be sold 'like a piece of meat'. [Ref 1968]

APPENDIX II

A SUGGESTED RE-DRAFT OF SECTION 4D OF THE TRADE PRACTICES ACT

Note: The purpose of this redraft is to:

(i) ensure that exclusionary provisions operate only in respect of particular persons;

(ii) ensure that parties against whom exclusionary conduct is directed are competitive with those engaging in the exclusionary conduct;

(iii) ensure that the relevant purpose test is related to a restricting of competition between the boycotting parties or those parties and their competitors; and

(iv) give some guidance to the courts as to the standards to be adopted in assessing who are "particular persons". [See comment at fn 32.]

Section 4D

"1. An exclusionary provision in a contract, arrangement or understanding is a provision which:

(a) is made or arrived at between persons any two or more of whom are competitive with each other; and

(b) which prevents, restricts or limits

(i) the supply of goods or services to; or

(ii) the acquisition of goods or services from those particular persons referred to in subsection (2) or those particular persons in particular circumstances or on particular conditions; and

(c) has the purpose of lessening competition between the parties to such contract, arrangement or understanding or any of them or between those parties or any of them and the particular persons referred to in subsection (2) or any of them.

2. "particular persons" shall mean a person or persons:

(a) who is or are competitive with anyone or more of the parties to the contract, arrangement or understanding referred to in sub-section (1); and

(b) (i) who, given all the relevant circumstances, is or are reasonably able to be identified by any of the parties to the contract arrangement or understanding referred to in sub-section (1) as a person or persons to whom any prevention, restriction or limitation referred to in that sub-section is to be applied; or

(ii) in respect of whom any prevention, restriction or limitation pursuant to the provisions of sub-section (1) is in fact applied.

3. A person shall be deemed competitive with another if such person is actually or potentially competitive with such other person in relation to the goods or services to which the contract, arrangement or understanding referred to in sub-section (1) relates or would be likely to be so but for such a contract, arrangement or understanding."

Comments on the above

(a) Questions of "related companies" have not been covered by the drafting. A brief subsection could be added to cover this. Alternatively on a re-draft of legislation, it may be more appropriate to have a general definition section covering the point.

(b) Subsection (1)(a), (b) and (3) cover approximately what is currently in s.4D. [Subsections 1(c) and (2) are additional to the present coverage.] They comprise some 105 words and the present writer believes (subject to Note 1 above) that nothing of importance has been left out. The verbiage has been reduced by about two thirds and the draft eliminates superfluous use of words and what the writer regards as the splitting of inconsequential hairs. However, in drafting, one is unfortunately, somewhat locked into the present drafting style of the Parliamentary draftsperson. If drafting the Act *de novo* a different drafting style would be used.

(c) The re-draft does not cover questions of illegalities of entering into or enforcing exclusionary provisions. These provisions are in sections far removed from s.4D [see ss.45(1)(a); 45(1)(a)(i); 45(2)(b)(i)]. By way of comment, it can be noted that the New Zealand draftsperson has, in s.29 of the *Commerce Act*, incorporated both the definition of the conduct and its legality into one section. In doing so, she/he has used fewer words to cover both aspects than the Australian draftsperson has used in defining only the conduct involved.

APPENDIX III

VIEWS PUT BY AUSTRALIAN CONSUMER ASSOCIATION ["ACA"] REPRESENTATIVE, PHILLIPA SMITH, AS REPRESENTING ACA POLICY ON CONSUMER INVOLVEMENT IN SELF REGULATION CODES - SEMINAR CONDUCTED BY THE TRADE PRACTICES COMMISSION IN SYDNEY: 30 AUGUST 1988

The following points are relevant to consumer involvement in self-regulatory codes, the type of consumers who should be involved and how they should be involved.

- Consumer representatives should "link" across consumer groups.
- Consumer representatives should be assisted by appropriated research facilities and a budget.
- It is not good enough for an individual from the public to be appointed as a consumer representative. The appointee should have been active in an appropriate consumer group.
- Consumer representatives should not be chosen by independent referees but should represent groups actively involved in consumer affairs. If consumer representatives are to be chosen by independent referees, so should industry representatives. The consumer movement resents the fact that consumer representatives might be subject to some types of screening evaluation whereas industry representatives are not subject to such a process.
- Consumer representatives must be paid for their time otherwise they have to take time off work which they cannot afford.
- Consumer representatives need adequate training. This is a problem because such training needs a significant commitment of resources.
- Consumers need to know their rights. Industry, therefore, has an obligation to advertise its system widely.
- Consumer groups should have the right actively to monitor complaints.
- Reporting of self-regulatory code activities should be public and on-going.
- Consumer involvement in self-regulatory code setting and administration should not be regarded as a cost cutting exercise by industry and industry should allocate appropriate resources to pay for appropriate consumer representation.
- Any costs involved in consumer representations should be borne by industry and not "passed on".

APPENDIX IV

CONSUMER REPORTING OR PROBLEMS AND ACTION TAKEN PURSUANT THERETO

[Source: TPC Report on Consumer Opinion in Australia (1987) - Figures Re-Cast]

[A re-casting of Table 3-2.1 and pages 26-29 of the Survey of the Trade Practices Commission on Consumer Opinion in Australia (Jan 1987)]

[Figures rounded to one decimal place]

			% of Persons Surveyed	
Percentage of Consumers with Complaints Unresolved to Consumer's Satisfaction	#	People unable to report any problem		69.0
	*#	People reporting a general problem		12.00
				81.00
	**#	People reporting a specific problem - 19% of Survey		
		Action taken on problems		
		(a) No action taken		
		(i) Problem not serious enough	7.0	
		(ii) Not worth trying	1.9	
		(iii) Did not know who to approach	0.2	
			9.1	9.1
		(b) Action taken		
		(i) Approached offending party		
		- matter fully or partly resolved	4.9	
		- still negotiating	1.0	
2.3		+ - matter not resolved to satisfaction	2.3	
			8.2	8.2
		(ii) Approached Consumer Affairs Bureaux after matter not resolved by approach to parties		
		- matter fully or		

			partly resolved	1.0	
		-	still negotiating	0.2	
0.5		+ -	matter not resolved to satisfaction	0.5	
				1.7	1.7
2.8%					100.0%

\# The question asked to elicit a response from the interviewee was:

"Firstly, thinking back over the past few years, and the various products that you've purchased or attempted to purchase, and also the various types of services that you may have used, what would you say is the most serious problem, if any, that you've encountered in that time?"

* A general problem is one where a respondent outlined a general problem not related to a specific incident.

** A specific problem is one where a respondent outlined a problem related to a specific incident.

\+ Matter with consumer complaint not resolved to consumer's satisfaction.

APPENDIX V

MOTOR VEHICLE TRANSACTIONS ACTUAL TRANSACTIONS*

[Source: TPC Report on Consumer Opinion in Australia (1987) - Figures Re-cast]

Problems Encountered

[A re-casting of Table 3-4.1 and pages 38-39 of Survey of the Trade Practices Commission on Consumer Opinion in Australian (Jan 1987)]*

				% of Parties Survyed in Relation to Motor Vechicle Transactions
Percentage of Consumers with Complaints Unresolved to Consumer's Satisfaction	No problems			73.0
	Problems - (27% of Survey)			
	Action taken on problems			
	(a)	No action taken		
		(i) Not wanting to take action	5.7	
		(ii) Would like to have taken action but		
		- problem ultimately not serious enough	1.7	
		- not worth trying	1.9	
		- did not know who to approach	0.4	
			9.7	9.7
	(b)	Action taken		
		(i) Approached offending party		
		- problem at least partiallysolved	10.2	
3.6	**	- problem not resolved to		

			satisfaction	3.6	
			- still negotiating	1.8	
		(ii)	Approached Consumer Affairs		
			- problem at least partially solved	0.6	
0.4	**		- problem not resolved to satisfaction	0.4	
			- still negotiating	0.1	
		(iii)	Approached Motoring Association		
			- problem at least partially solved	0.2	
0.1	**		- problem not resolved to satisfaction	0.1	
			- still negotiating	***	
		(iv)	Took private legal advice		
			- problem at least partially solved	0.2	
0.1	**		- problem not resolved to satisfaction	0.1	
			- still negotiating	***	
				17.3	17.3
4.2%					100.0%

* Percentage calculated on actual transactions. Only close to 1% of people reported an attempted transaction as the basis of their problem and such a low incidence is not thought relevant to calculations. In any event, the Commission's verbal dissections do not permit dissections of attempted transactions.

** Matter with consumer complaint not resolved to consumer's satisfaction.

*** Percentage too small to calculate to one decimal point.