LX KE KEE, H.K. Collusive pricing - under the Commerce Act 1975

Hun Kiet Kee

COLLUSIVE PRICING UNDER THE COMMERCE ACT 1975

Submitted for the LL.B. (Honours)
Degree at the Victoria University
of Wellington

1st September 1983.

Contents

COLLUSIVE PRICING UNDER THE COMMERCE ACT 1975 *

Introduction

Collusive pricing involves the practice of two or more competitors going into agreement regarding the prices and terms at which they will buy or sell goods and services.[1] For the purposes of this paper however, only selling agreements will be considered.[2] For the agreement to have any impact however, requires the competitors to command a significant share of the particular market. Leaving aside, monopolistic and oligopolistic markets, most competitors individually do not possess a significant share of the market. As such, trade associations often represent the protagonist of collusive pricing agreements (CPAs). Such pricing agreements confer the power to influence prices, usually upwards. Consumer demands for better prices and terms are resisted. Firms will not operate according to forces of demand and supply, resulting in a poor allocation of resources. In sum, it destroys the virtues of competition.[3] The recognition of this inherent anti-competitiveness of CPAs has resulted in the adoption of an illegal per se approach towards them, in the United States and Australia.[4] There is an absolute prohibition in both those countries, on all forms of collusive pricing, with very few exceptions. In contrast, our system adopts a pragmatic case by case method of evaluating such agreements against a public interest test. This paper will examine the legislative provisions and administrative procedures relating to collusive pricing control under the Commerce Act 1975, with a view of identifying any possible defects in our approach and methods to increase the efficiency of collusive pricing control in New Zealand.

History of Control

Modern legislative control of collusive pricing started with the Trade Practices Act 1958. Earlier trade practices legislation dealing with some collusive pricing[5] was rendered ineffective by the decision of the Privy Council in Crown

Milling Co v. R.[6] CPAs were not prohibited under the Trade Practices Act, but registration of such agreements were required.[7] The Commissioner of Trade Practices and Prices[8] might then conduct investigations into the practice[9]. Upon a report by the Commissioner,[10] the Trade Practices and Prices Commission[11] might then make appropriate restraining orders[12] if the practice is contrary to the public interest.[13] By far, the most substantial change in control of collusive pricing came in the 1971 amendment to the Trade Practices Act.[14] Under that amendment, all parties to a collusive pricing agreement in force on the 1st April 1972 were required to seek the approval of the Commission to the agreement and further, all agreements entered into after that date had to have the prior approval of the Commission before they can operate. In 1975, the new Labour Government enacted the Commerce Act. It repealed the Trade Practices Act but the collusive pricing provisions were carried forward into the new Act and remain substantially the same.

Under the Commerce Act, collusive pricing is prohibited unless approved[15] by the Commerce Commission.[16] The Commission must grant its approval if the effect of the practice is not contrary to the public interest in accordance with S.21 of the Act.[17] The prohibition covers agreements or arrangements coming substantially within S.23(1)(b), (d) or (e).[18] There are however, a number of exemptions to the prohibition.[19] The most important and significant exemption is that relating to the provision of professional services.[20] It is difficult to see any fundamental difference between restrictive practices engaged in by the business community and restrictive ethical codes followed by the professions.[21] There is nothing unique in the provision of professional services and the exemption ought to be seriously examined.[22]

Elements of a Collusive Pricing Agreement

What exactly constitutes a collusive pricing agreement or arrangement for the purposes of S.23(1)(b), (d) or (e)? The meaning of "agreement" or "arrangement"[23] would undoubtedly

include a contract or a legally enforceable agreement, but it would also include something less than that. If there is communication between the parties, and some mutual intention to follow a common course of action, then an agreement would be held to exist. Thus in Master Grocers Dalglish J said:[24]

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

The learned judge went on to say that parallel pricing on its own is not sufficient to establish an agreement or arrangement.[25] This must be so as the necessary communication and mutual intention would not be present. Similarly, geographical zone pricing by itself would not indicate an agreement as the competitor with a location advantage will set the price for that location such that a pattern of pricing will develop. However if all the members of a trade association adopt a uniform zone pricing system throughout large areas despite large differences in costs, collusion can be inferred from the circumstances.

Price leadership (where the prices of a dominant trader are followed by smaller competitors on their own accord in order to survive) on its own, would also not connote an agreement because the necessary communication and mutual intention would not be present. The prohibition extends to any agreement coming "substantially" within S.23(1)(b), (d) or (e), but it is not exactly clear what "substantially" requires.[26]

Information arrangements may make full market information available to competitors, making parallel pricing likely, but unless they involve an agreement or recommendation as to prices, they will not fall within the prohibition. It is

clearly legitimate for businessmen to seek to be well informed about market conditions and it is hardly incompatible with healthy competition. Nevertheless, information arrangements have often been used as a cloak for collusive pricing. By virtue of S.23(3), the prohibition extends to recommendations made by a trade association to its members relating directly or indirectly (through terms of sale) to prices, margins or pricing formulas, notwithstanding any statement that compliance is up to the members' own choice. Since such recommendations constrain bargaining on price, it was clear that they interfered with the free operation of the competitive market. What exactly then, constitutes a recommendation? In Contractors' Federation,[27] the Federation removed all specific references to "recommended rates" from the Blue Book containing parameters for rate calculation purposes, and had also made it clear that contractors may charge any rate they think fit and that any rates shown in the book may not always be appropriate in a particular case. The Commission however, held that it was an indirect recommendation relating to prices to be charged and to the pricing formula to be used as provided in S.23(3).

The Approval Process

Applications for approval of CPAs must be made to the Commerce Commission,[28] which then refers them to the Examiner of Commercial Practicesfor investigation and report.[29] If, after investigation, the Examiner is convinced that the practice is contrary to the public interest, he is obliged to notify the applicants and endeavour to reach an agreement on a recommendation to be put to the Commission.[30] In any event, he must present a report to the Commission stating (amongst other things) the grounds on which the practice is contrary to the public interest and his recommendation as to the order or such action that the Commission should make or take. The Commission is required to hold an inquiry on all applications contested between the Examiner and the applicants.[31] Where an agreement between the Examiner and the applicants is reached, or where he is in doubt as to the public interest, or where he comes to the conclusion that the practice is not

contrary to the public interest, the Commission may dispense with an inquiry.[32] The Commission had never held an inquiry, where the Examiner had recommended approval of the CPA after conciliation. This is understandable given the practical difficulties the Commission would face if it should choose to hold an inquiry. Any such proceedings before the Commission would not be completely adversarial and it would be difficult for the Commission to decide. Therefore, the Examiner's opinion on just what constitutes the public interest is as important as that of the Commission. A right of appeal against a decision of the Commission lie to the Administrative Division of the High Court.[33] The decision of the Court on any appeal is final and conclusive.[34]

There were 376 applications (as at 31st March 1983) registered for approval since 1972, under S.18A of the Trade Practices Act 1958.[35] These applications were carried forward into the Commerce Act and deemed made under that Act.[36] Where the application for approval was made before 1st January 1973, the practice is allowed to continue, subject to any imposed conditions, pending the determination of the Commission.[37] Of the 376, 253 were not approved, or were withdrawn or lapsed, 38 were approved, and 85 are yet to be determined.[38] Except for several applications before the Commission, the rest of those yet to be determined are still with the Examiner awaiting investigation and report, some of which dates back to 1972. There were 28 applications registered for approval since 1st November 1975 (as at 31st March 1983) under S.29 of the Commerce Act.[39] Of these, 8 were not approved, or were withdrawn, or lapsed, 4 were approved and 16 are yet to be determined.[40] The established trend, is for applications to be not approved, withdrawn or lapsed rather than approved, particularly those under S.29 of the Commerce Act. It is unlikely that this trend will change in the future.

Unlike applications made under S.18A of the Trade Practices Act, applications under S.29 of the Commerce Act are not allowed to operate until approval is granted. Given that most CPAs are likely to be

contrary to the public interest, applicants under S.29 faced the difficult task of demonstrating public benefits of a practice that does not yet exist.[41] For that reason, it is unlikely that there will be many approvals under S.29 of the Commerce Act.

The current approval process is both tedious and painstakingly slow. The delay is primarily the result of collusive pricing applications being accorded a low priority in the allocation of resources to investigations of trade practices and related matters under the Commerce Act.[42] In terms of allocation of priorities, practices involving offences against Part II (Trade Practices), or relevant to the administration of Part II of the Act have highest priority. Within this group, prohibited practices (§.48-54),[43] have first priority, followed by practices prohibited unless approved by the Commission (§27, 28)[44] i.e. including CPAs. Due to limited resources, investigations into complaints alleging contraventions of the Act will not be undertaken unless there is substantive preliminary evidence of a possible offence against a specific provision of the Act.[45] Applications for approval of CPAs are accorded second priority. Within this group, priority will be given to applications under S.29 of the Commerce Act (over that under S.18A of the Trade Practices Act). As to individual applications, the significance of any economic impact is an important consideration. The allocation of priorities appears to be a realistic approach to promote the effective and efficient use of available resources. But it must be questioned why prohibited practices are given the highest priority when there are very few prosecutions involving offences each year. One would have thought that greater emphasis ought to be given to collusive pricing practices as they are for more widespread and pervasive, and of significant impact on the market.

The low priority accorded to CPA applications can

principally be attributed to a few factors. The most significant factor is, the severely limited resources of the Examiner. The Examiner, himself an officer of the Department of Trade and Industry,[46] possesses no staff of his own as such, but relies on staff under the Commerce Division of the Department. Commerce Division personnel, which are organised into industry groupings, besides being responsible for the administration of the Commerce Act, are also responsible for the administration of a host of other price control and surveilance regulations.[47] Resources are spread thinly over a wide area and to add to that, it is the Secretary of the Department that determines the allocation of resources. Thus, for instance, when the Price Freeze Regulations 1982/142 was enacted last year, first priority was given to the administration of the regulations, with the result that trade practices investigations receive minimum attention.[48] There is currently, only 8 full time staff handling trade practices investigations in Wellington.[49] Each CPA application requires the gathering and evaluation of stacks of documents and materials. The Commission in contrast, has 8 members performing a much simpler task. If the approval process is to be speeded up, the provision of staff directly accountable to the Examiner ought to be given serious consideration.

Over the years, the government emphasis had been on price control rather than the development of competition.[50] The argument often put forward to justify the neglect of collusive pricing is that, since most of the goods under collusive pricing control are also under price control, CPAs have no impact whatsoever (i.e. no possibility of abuse). That justification is true to a certain extent only. Price control maintains prices and prevents unjustified increases, but at the same time it operates against competitive pressures bringing prices down. Price control could also unwittingly, foster or even create CPAs. The whole question comes down to whether government policy should be directed towards price control or the development of competition.

The transitional provision in S.30(1) makes matters worse. It allows CPAs registered before 1973 to continue to operate while awaiting determination. As such, parties to the agreement have absolutely no incentive to cooperate voluntarily and conciliate with the Examiner.[51] This makes investigations by the Examiner more difficult.

There is simply no presumption that CPAs are contrary to the public interest under our scheme of control. Enormous resources would have to be committed in trying to establish detrimental affects of a practice, which may or may not result in a Commission order. A change of presumption would help in alleviating the current delay. Lastly, the recent decision of the High Court in HANZ Appeal,[52] and the Commission in Contractors Federation, complicates the matter further by requiring the Examiner to comply with a higher standard of proof, which is grossly incompatible with the making of economic decisions. This point will be developed further, later in the paper.

Public Interest Test

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

> For the purposes of this Act, a trade practice shall be deemed to be contrary to the public interest only if, in the opinion of the Commission, the effect of the practice is or would be -
>
> (a) To increase the costs relating to the production, manufacture, transport, storage, or distribution of goods, or to maintain such costs at a higher level than would have obtained but for the trade practice; or
>
> (b) To increase the prices at which goods are sold or to maintain such prices at a higher level than would have obtained but for the trade practice; or

(c) To hinder or prevent a reduction in the costs relating to the production, manufacture, transport, storage, or distribution of goods, or in the prices at which goods are sold; or

(d) To increase the profits derived from the production, manufacture, distribution, transport, storage, or sale of goods, or to maintain such profits at a higher level than would have obtained but for the trade practice; or

(e) To prevent competition in the production, manufacture, supply, transportation, storage, sale, or purchase of any goods; or

(f) To reduce or limit competition in the production, manufacture, supply, transportation, storage, sale, or purchase of any goods; or

(g) To limit or prevent the supply of goods to consumers; or

(h) To reduce or limit the variety of goods available to consumers or to alter, restrict, or limit to the disadvantage of consumers, the terms or conditions under which goods are offered to consumers.

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

From the very beginning, under the Trade Practices Act 1958,[53] it was clear that it is the "effects" of the practice that are important, and not the motives of the parties to the agreement.[54] So, even if the purpose of the parties entering into the agreement is to fix prices, but conditions of the market were such that their objective is not capable of achievement or realization, the agreement would not be contrary to the public interest.[55] The words "is or would be" in the opening part of S.21 had been held in Registered Hairdressers[56] to entitle the Commission to have regard to both the present and likely future effects of the agreement.

The provision that is most often invoked by the Examiner to support his case is para.(f) [reduction or limitation of competition]. This is not surprising given the clear anti-competitive effect of collusive pricing. On the other hand,

para.(e) [prevention of competition] is seldom invoked as it had been interpreted in decisions under the Trade Practices Act as requiring an absolute or total elimination of competition. Since competition is composed of other components (e.g. cost, service, etc.) besides price competition, it is very difficult to envisage a situation where collusive pricing would result in a total elimination of competition. Therefore it is not surprising that there has never been a finding by the Commission of a CPA preventing competition. In Stock & Station Agents (No.1),[57] it was held that only one component of competition need to be reduced or limited, to bring it within para.(f). In most cases it would be price competition. Thus, in Stock & Station Agents (No.1) and HANZ,[58] price competition was held to have been reduced or limited by the CPA. The earlier cases under the Trade Practices Act (e.g. Fencing Materials, Registered Hairdressers and Master Grocers) placed considerable emphasis on price competition. In both Registered Hairdressers and Master Grocers, it was held that the reduction in price competition had a further flow-on effect of lessenning competition in other fields.[59] Under the Commerce Commission, the importance of price competition was similarly emphasised.[60] In Stock & Station Agents (No.1), the Commission held that S.21(4)(a)[61] implicitly states that for there to be effective competition, there must be price competition. Inevitably, to determine the effects on competition would involve an analysis of the market impact of the CPA. This would involve, as held in Fencing Materials, considering the proportion of the traders adhering to the agreement and their share of the particular market.

Most of the decisions of the Commission where effects on costs, prices or profits are established involves the second limb of para.(b) [maintaining prices] and the second limb of para.(c) [hindering or preventing a reduction in prices].[62] Both paragraphs seem to cover the same effect, and indeed that is the Commission's view.[63]

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

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

The effects must also be direct. It cannot be extended to cover consequential increases. It must relate to the goods and services that is the subject of the CPA, and not to any other goods or services at large. In Woolbrokers,[64] where the collusive pricing agreement relates to the issue of a minimum scale of fees and charges for woolbroking services, counsel for the Examiner contended that the practice under inquiry was capable of being caught within S.21(1)(a) as having "by inference, detrimental effects on the costs of wool production." The Commission rejected the argument, holding that the costs referred to in S.21(1)(a) is not intended to be related to a prior or subsequent remote activity.

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

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

Some of the benefits that had been held to outweigh detrimental effects from a collusive pricing practice, includes savings in administrative costs of calculating prices (Master Grocers, HANZ Appeal), public facilities for accommodation and meals (HANZ Appeal), and savings in overseas funds (Electric Lamps).[65] Genuine costing assistance, in the form of pricing formula to small businessmen is also considered a benefit (Wellington Master Plumbers,[66] Wanganui Master Plumbers,[67] Funeral Directors [68]). Benefits unlike detrimental effects have been held, not to be limited to the direct consequence of the collusive pricing practice. Thus, in Stock & Station Agents (No.1), the Commission said :[69]

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

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

If any collusive pricing practice is to be approved under S.21(2), it is more likely to be under the "not unreasonable test" rather than the "public interest balancing test". The former test appears to be an easier test to satisfy than the latter. Thus, for instance, the joint marketing of drycleaning services (NZ Dryclearners[70]) and an agency arrangement between trading banks (NZ Bankers Association[71]) were approved on the ground that the agreements were not unreasonable. Applying the public interest balancing test, it would be extremely difficult to find any public benefit arising out of the practice. Any benefits would essentially be private in nature.

Developing Trends in Collusive Pricing Control

There were 17 approvals of CPAs under the Commerce Commission.[72] The Commission held only 5 inquiries to date.[73] They however, relate only to 4 practices.[74] Of those 4, the Examiner recommended approval of 2,[75] with modifications, but as not all those interested agreed with the recommendations, a Commission inquiry was held. The other two did not have the Examiner's sanction for approval - HANZ and Contractors' Federation. Approval was granted in Contractors' Federation but not HANZ. However, on an appeal to the High Court, the Commission's decision was reversed.[76]

Of the 17 approvals, only 5 were not subject to any conditions.[77] The rest of the approvals were subject to varying conditions.[78]

A typical set of conditions often imposed is as follows:[79]

(i) That, where the maximum amounts allowed to be charged under any scale of fees and charges issued in terms

of this approval are subject to any control under any statute or regulations, the said scale of fees and charges and any alteration to the scale of fees and charges, must comply with any relevant provisions of such control legislation;

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

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

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

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

(my emphasis)

The above conditions were recommended by the Examiner (and accepted by the Commission) to modify a CPA that was found to be contrary to the public interest, into one that would no longer have that effect.[80]

The question that must be asked is, how effective are those conditions in ameliorating the effects that are contrary to the public interest. The "maximum price allowed" would be in most situations become the going market price.[81] Even though, it is also a condition that members may charge less, they are unlikely to do so unless there is severe competition between them. Furthermore, the setting of those conditions would inevitably require policing which would put further strain on already limited resources.

In fact, in Stock & Station Agents (No.2),[82] the Association breached the conditions imposed but the breach was not discovered by the Examiner but by Federated Farmers, the interest group. The Commission revoked its previous approval and substituted a more restricted approval. In this case, there is a strong watchdog interest group but there are many situations where there are no such groups and possible breaches could go unnoticed but would involve an offence under the Act.

What is of more concern is the imposition of the condition that prior approval of the Commission be obtained before any alterations can be made. This would necessarily involve the Commission in a price control function, not unlike that in Part IV of the Commerce Act. This preference for control through regulation can impede the development of competition.[83] The Commerce Commission's "regulatory approach" contrasts sharply with its predecessor's "competition approach". Under the Trade Practices and Prices Commission, no modifications were ever recommended for a practice held contrary to the public interest.

The Commission is also required to recommend that any goods or services that is the subject of the inquiry be subject to price control under S.82, if it comes to the opinion that that would be in the public interest.[84] The Commission however, has not made any such recommendation in relation to a collusive pricing application. Price control should only be used as a last resort where conditions of competition do not exist or, where there is a likelihood of abuse.

The Examiner on his part, had also often demanded assurances or undertakings from the parties to the agreement before he would recommend approval. Such assurances or undertakings are usually designed to limit the scope of the agreement. Thus, in Liquigas[85] there were a few undertakings by the parties, one of which was not to engage in

any territorial agreements.[86] Such assurances or undertakings are not legally enforceable as such, but if they are breached, it would form the basis for the Examiner to seek a revokation or an amendment of the approval under S.29(8).

There had been only one appeal, relating to collusive pricing, to the Administrative Division of the High Court i.e. HANZ Appeal. As a result of the Chief Justice's decision, it now appears that the Examiner has to comply with a higher requirement of proof in establishing the para.(a) to (d) effects. The Chief Justice rejected the Commission's finding that the CPA had the effects described in the 2nd limb of S.21(b) [maintaining prices] and (c) [hindering or preventing a reduction in prices], on the ground that there was "no real direct evidence" to support the Commission's conclusions. The Commission in that case had evidence before it showing that the association members command 35% of the market share for off-premises consumption (the subject of the CPA). There was 95% adherence by members of listed prices for normal bottle store sales and virtually 100% adherence of bulk and wholesale sales.

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

The decision is anomalous in a few respects. Prevention of competition (total elimination of competition) was not an

effect advanced but the Chief Justice considered it as well. Thus, after stating several relevant matters, he said:[87]

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

The Chief Justice further said:[88]

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

Two criticisms can be made of that statement. Firstly, the requirement for evidence is not feasible. The Examiner would have to gather evidence on a market which does not exist as such. Surely, the present effects would be a good indication of the likely future effects. Under the Trade Practices Act, the Appeal Authority had even held that a practice could be contrary to the public interest solely on its likely future effects.[89] Secondly, the Court clearly failed to recognise the inherent anti-competitiveness of collusive pricing and the benefits of competition. The maintenance of reasonable prices was held to be a benefit, when numerous decisions of both, tne Appeal Authority under the Trade Practices Act[90] and the Commission under the Commerce Act,[91] had consistently held that whether a practice is contrary to the public interest or not does not depend on the reasonableness of the price. The Chief Justice in rejecting the judgment of the Commission on the significance of the market shares, clearly substituted its own opinion for that of the Commission. Although, legally there is nothing to prevent him from doing so, the question arises whether it is appropriate for him to do so especially when the Commerce Commission is a

specially constituted body composing of persons with special knowledge on economic matters. In my opinion that is a role that the Court should avoid taking. Hampton accurately sums up the aftermath of the HANZ Appeal, when he said:[92]

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

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

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

Dalglish J, in that case said:[93]

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

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

Conclusions

On the whole, it would be unfair to describe the present collusive pricing control regime as totally defective and unworkable. The Commission, realising the inherent anti-competitiveness of such agreements, had taken a hard-line attitude towards collusive pricing. It would obviously be wise to discourage CPA applications, given that they are seldom approved anyway, and thus free much needed resources. For that reason, serious consideration ought to be given to making CPAs illegal per se. The present use of the pragmatic case by case method of control of collusive pricing (and other restrictive trade practices) should be replaced by the use of an absolute prohibition against

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

Footnotes

* This subject was extensively covered in an article by Hampton, L.F., "Collective Pricing Agreements and the Commerce Act 1975," Canterbury Law Review, 1 (1981) 198 (hereinafter referred to as Hampton).

See also Collinge, J.G., "The Law Relating to Restrictive Trade Practices and Monopolies, Mergers and Take Overs in New Zealand (2nd Edn)" 1982 (hereinafter referred to as Collinge).

1. This will include agreements between manufacturers or wholesalers to impose fixed prices at which retailers may sell their goods (resale price maintenance), but due to the constraints of this paper I will not deal with them.

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

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

4. For an excellent exposition of United States law in this area, see Areedaand Turner, "Antitrust Law: An Analysis of Antitrust Principles and their Applications", (1978). See also Kintner, E.W., "Federal Antitrust Law", (1980).

For the Australian law, see Donald and Heydon, "Trade Practices Law", (1978). See also Taperell, Vermeesch and Harland, "Trade Practices and Consumer Protection", (1978).

United Kingdom law in this area is generally quite similar to ours, though there are major differences.

For the United Kingdom law, see Korah, V. "Competition Law of Britain and the Common Market", (1982).

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

6. [1927] AC 394.

7. Section 12.

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

9. Section 16.

10. Section 17.

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

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

13. The public interest test contained in S.20 specify "five effects" very similar to the "eight effects" in S.21 of the Commerce Act 1975.

14. Trade Practices Act 1958, S.23BB, as inserted by the Trade Practices Amendment Act 1971, S.12.

15. Section 27(1).

16. The tribunal replacing the Trade Practices and Prices Commission. Set up under S.3 of the Commerce Act 1975.

17. Section 29(4).

18. Section 23(1) provides:

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

19. Section 27(3) provides the following exemptions:

(1) Professional fees and charges of the type listed in the Second Schedule [S.27(3)(a)].

(2) Trade association price lists indicating an individual wholesalers IRPM (individual resale price maintenance) prices. [S.27(3)(b)].

(3) Trade practices expressly authorised by other enactments. [S.27(3)(c)].

20. There is no list of professional services covered provided in the Commerce Act 1975. The following list is obtained from the Price Surveillance Regulations 1979/82. For practical purposes, these services can be deemed as those covered under the Commerce Act.

Professional Services

1. Services (whether as accountants, auditors, consultants, advocates, investigators, or advisers) performed by chartered accountants or chartered accountants in public practice within the meaning of the New Zealand Society of Accountants Act 1958.

2. Services of actuaries in their capacity as such.

3. Services of architects registered under the Architects Act 1963 in their capacity as such.

4. Services performed by chiropodists registered under the Medical and Dental Auxiliaries Act 1966 in their capacity as such.

5. Chiropractic services, being services performed by chiropractors registered under the Chiropractors Act 1960 in their capacity as such.

6. Dental services, being services performed by registered dentists within the meaning of the Dental Act 1963 in their capacity as such.

7. Services performed by dietitians registered under the Dietitians Act 1950 in their capacity as such.

8. Services of insurance brokers in their capacity as such.

9. Legal services, being services performed by practitioners within the meaning of the Law Practitioners Act 1955 in their capacity as such.

10. Medical services, being the provision of medical or surgical advice or attendance and the performance of surgical operations, performed by registered medical practitioners within the meaning of the Medical Practitioners Act 1968.

11. Services performed by medical technologists registered under the Medical and Dental Auxiliaries Act 1966 in their capacity as such.

12. Nursing services, being services performed by nurses registered under the Nurses Act 1971 in their capacity as such.

13. Services performed by occupational therapists registered under the Occupational Therapy Act 1949 in their capacity as such.

14. Services of optometrists or dispensing opticians registered under the Optometrists and Dispensing Opticians Act 1976 in their capacity as such and of optical dispensers in their capacity as such.

15. Services of professional engineers or technologists, being persons practising as consultants in the field of -

(a) Civil engineering:
(b) Mechanical, aeronautical, marine, electrical, or electronic engineering:
(c) Mining, quarrying, soil analysis, or other forms of mineralogy or geology:
(d) Agronomy, forestry, livestock rearing, or ecology:
(e) Metallurgy, chemistry, biochemistry, or physics:
(f) Any other form of engineering or technology of a kind similar to those referred to in the preceding paragraphs of this clause.

16. Services of patent attorneys in their capacity as such.

17. Services of physiotherapists registered under the Physiotherapy Act 1949 in their capacity as such.

18. Services performed by radiographers in their capacity as such.

19. Services performed by real estate agents within the meaning of the Real Estate Agents Act 1976 in their capacity as such.

20. Services of sharebrokers licensed under the Sharebrokers Act 1908 in their capacity as such.

21. Services of ship brokers in their capacity as such.

22. Services of surveyors of land (including surveyors registered under the Surveyors Act 1966), quantity surveyors, surveyors of buildings or other structures, and surveyors of ships, in their capacity as such.

23. Services performed by valuers of land or of chattels in their capacity as such.

24. Veterinary services performed by veterinary surgeons registered under the Veterinary Surgeons Act 1956 in their capacity as such.

21. Professional services are not exempted from collusive pricing provisions both in the United States and Australia. See, Pengilley, W., "The Trade Practices Act and the Professions", 7 Management Forum (March 1981) 27.

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

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

23. See Hampton pp. 210-212, or Collinge p.191.

24. Re NZ Master Grocers' Federation's Agreement [1961] NZLR 177, 181.

25. Ibid.

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

27. Re An Application by NZ Contractors' Federation (Inc.), Decision No. 56, 27th October 1981 (unreported).

28. Section 29(1).

29. Section 29(2).

30. Section 39.

31. Section 41(1).

32. Section 41(1).

33. Section 42.

34. Section 45(4).

35. Commerce Commission Report for the Year ended 31st March 1983.

36. Section 29(3).

37. Section 30.

38. Supra n.35.

39. Supra n.35.

40. Supra n.24., n.35.

41. The Examiner will also have the similar difficulty of proving the detriments.

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

43.
S.48 - Collective tendering
S.48A - Pyramid selling schemes
S.48B - Misrepresentations regarding home-operated businesses
S.49 - Collective bidding at auction
S.49A - Supply of trading stamps
S.50 - Refusal to sell goods or services unless other goods or services are also purchased
S.51 - Hoarding, etc.
S.52 - Black marketing
S.53 - Mandatory trade-ins prohibited
S.54 - Profiteering in goods or services

44.
S.27 - Collective pricing agreements
S.28 - Individual resale price maintenance.

45. Supra n.42.

46. Section 18(1)(a).

47. e.g. Price Surveillance Regulations 1979/82
Price Freeze Regulations 1982/142.

48. Interview with Mr Stevenson. Supra n.42.

49. Ibid.

50. e.g. Board of Trade (Price Investigation) Regulations 1939/62; The Price Stabilisation Emergency Regulations 1939/122; Control of Prices Emergency Regulations 1939/275; Control of Prices Act 1947; Part IV of the

Commerce Act 1975.

Some would argue there had been a decisive shift away from price control with the election of the National Government in 1975. It is true that many commodities had been removed from the Positive List of Controlled Goods and Services, but the recent enactment of the Prize Freeze Regulations 1982/142 could hardly indicate a shift in that direction.

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

52. Re HANZ Appeal. Unreported judgment (High Court, Wellington M326/78, 4th March 1980).

An addendum to the judgment was issued on 2nd April 1981.

53. Under the Trade Practices Act 1958, the public interest test is contained in S.20, which lists "five effects", the first four of which contained the word "unreasonably". Under the Commerce Act, the "not unreasonable" test is incorporated together with the public interest balancing test into sub-section (2) of S.21.

54. e.g. In re Wellington Fencing Materials Association's Agreement, Decision No.3 of the TPPC, 7th September 1959 (unreported), the Commission held that the public interest in collusive pricing does not depend on the purpose of the prices fixed.

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

56. Re NZ Council of Registered Hairdressers' Agreement [1961] 161.

57. Re An Application by NZ Stock & Station Agents Association (No.1) (1979) 1 NZAR 532.

58. Re An Application by the Hotel Association of NZ Decision No.28, 28th June 1978 (unreported).

59. Thus, for instance, in Registered Hairdressers' Dalglish J. said at p.173:

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

60. E.g., In Stock & Station Agents (No.1) and HANZ.

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

62. E.g., In Stock & Station Agents (No.1) and HANZ.

63. This is evident in Stock & Station Agents (No.1) where at para.41 the Commission said :

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

64. Re An Application by NZ Woolbrokers' Association, Decision No.30, 2nd August 1978 (unreported).

65. In re the Distribution of Electric Lamps, Decision No.10 of the TPPC, 22nd August 1961 (unreported).

66. Re An Application by Wellington Master Plumbers & Gasfitters & Drainlayers Association, Decision No.58, 18th November 1981 (unreported).

67. Re An Application by Wanganui Master Plumbers Gasfitters & Drainlayers Association, Decision No. 59, 18th November 1981 (unreported).

68. Re An Application by Funeral Directors' Association of NZ, Decision No. 64, 16th February 1982 (unreported).

69. para 76.

70. Re An Application by NZ Drycleaners Ltd, Matwen Enterprises Ltd and G. Kline Ltd., Decision No. 66 31st March 1982 (unreported).

71. Re An Application by NZ Bankers' Association, Decision No. 63, 16th February 1982 (unreported).

72. See Appendix

73. Decision Nos. 27, 28, 30, 51 and 56.

74. Decision 51 dealt with the breach of a conditional approval granted under Decision 27 (Stock & Station Agents).

75. Stock & Station Agents - Decision 27, 51.
Woolbrokers - Decision 30.

76. Supra n.52.

77. See Appendix.

78. Ibid.

79. Imposed on Decision 30 (Woolbrokers).

80. This approach ought to be contrasted with that taken by the Australian Trade Practices Commission. In its Information Circular No. 3, the Commission took the view that the great majority of recommended price agreements inhibit or diminish competition. This was so notwithstanding that:

(1) the price agreement consisted of "recommended" or "guideline" prices only;

(2) there was no obligation or undertaking to comply with the recommendations made;

(3) there was no attempt to police or follow-up the recommendations made;

(4) the prices were recommended by an association and individual mambers had no direct hand in the calculation of the recommended prices;

(5) the prices were recommended by the association on the basis of costing or other calculations by a party outside the association (for example an accountant or the secretary of the association).

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

82. Re An Application by NZ Stock & Station Agents (No.2), Decision No. 51, 7th May 1981 (unreported).

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

84. Section 25.

85. Re An Application by Liquigas, Decision No. 49, 17th December 1980 (unreported).

86. Examiner's Report to the Commission.

87. Supra n.52, at p.7 of the addendum to the judgment.

88. Ibid.

89. E.g., In Registered Hairdressers.

90. E.g., In Fencing Materials, Registered Hairdressers, and Re Associated Booksellers of NZ's Agreement [1962] NZLR 1057.

91. E.g., In Stock & Station Agents (No.1).

92. pp 251-252.

93. [1961] 161, 173.

Acknowledgement

The author would like to thank Mr J.R.A. Stevenson, Director of Business Practices, Commerce Division, Department of Trade & Industry, for his kind cooperation.

Appendix

An Analysis of the Approvals Granted by the Commerce Commission

Decision No.	Applicant	Conditions Imposed Relating to Pricing	Comment
10	NZ Automotive & Cycle Wholesalers' Assn. Inc.	1) Subject to any price control requirements if applicable	Decision No. 71 revoked approval and substituted in its place a reciprocal trading agreement.
13	NZ Assn of Shipping Agts.	1) Subject to price control requirements if applicable 2) Prior approval required for alterations 3) "Maximum only" 4) Free to charge less	Decision No. 72 changed the "maximum only" to "recommended rates" and also delete the prior approval condition.
22	Gilbarco Ind. NZ Ltd.		
*27	NZ Stock & Station Agts	1) Subject to price control requirements if applicable 2) Prior approval required for alterations 3) "Maximum only" 4) Free to charge less	Decision No.51* revoked Decision No. 27 and substituted a more restricted approval.
*30	NZ Woolbrokers	1) Subject to price control requirements if applicable 2) Prior approval required for alterations 3) "Maximum only" 4) Free to charge less	
32	Interflora Pacific Unit Ltd.		Some conditions were imposed but none of them relate directly to pricing
48	Auckland Joinery Manufacturers Assn	1) Prior approval required for alterations	CPA relates to pricing formula
49	Liquigas	1) Prior approval required for alterations	Directive from Minister on S.2A.

KEE, H.K. Collusive pricing under the Commerce Act 1975

Decision No.	Applicant	Conditions Imposed Relating	Comment
*56	NZ Contractors' Fedn.		Only condition was that Book is to be worded as a "guide" only
58	Wellington Master Plumbers	1) Prior approval required for alterations	CPA relates to "recommended" pricing formula.
59	Wanganui Master Plumbers	1) Prior approval required for alterations	CPA relates to "recommended" pricing formula.
62	National Insurance Co. of NZ and CML Fire & General Insurance		Only condition was that there be a written notice of any amendment or termination of the CPA.
63	NZ Bankers Assn.		
64	Funeral Directors Assn.	1) Prior approval required for alterations.	CPA relates to "recommended" pricing formula.
66	NZ Drycleaners, Matwen Enterprises Ltd and G. Kline Ltd.		
68	NZ Bankers Assn.		
70	NZ Bankers Assn.		Only condition was that there be a written notice of any alteration within 14 days.

* Where an inquiry was held.

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

LX KE KEE, H.K. Collusive pricing under the Commerce Act 1975