"RESTRICTIVE TRADE PRACTICES AND MONOPOLIES"

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RESTRICTIVE TRADE PRACTICES AND MONOPOLIES

This paper attempts to deal with the growth of legislation in New Zealand dealing with Restrictive Trade Practices and Monopoly. Obviously for the most part the paper deals with some aspects of the Trade Practices Act 1958 and its subsequent amendments.

Restrictive Trade Practices

Restrictive Trade practices are those which in some way intefere with "the individual liberty of action in trading" (Lord Herschell L.C. in Nordenfelt v. Maxim Nordenfelt 1894 A.C. 535 at 549). It could be said that English law upholds this freedom, but it might also be said that the freedon to trade is often confused with freedom to contract which has different conceptual results. Freedom to trade is understood to mean that all persons are free to trade in any commodity or service without any restraint of any kind or form. It carries as the economic connotation the freedom from monopolistic practices. Freedom to contract means that all persons are "free" to enter any kind of bargain they wish whether such bargain frustrates their freedom to trade or not. This paper concerns the freedom from monopolistic practices.

Monopoly

Monopoly is defined as the control by one person of the trade in

some commodity or service. Oligopoly is the situation where few people control the trade. Trade practices of the kind discussed hereafter deal more often with the oligopoly situation.

It is beyond the competence of this paper to deal at length with monopoly and advantages or disadvantages of it. Nevertheless it must be said that there is considerable disagreement amongst economists as to the true effects of monopoly.

White it is true that in law at least, which almost pre-supposes a then universal acceptance of the principle, monopoly was recognised as contrary to the public interest as early as 1602 (Darcy v. Allein (1602) 11 Co Rep 846). It was then said that monopoly ~~provided~~ promoted inefficiency and enabled the holder of the monopoly to charge prices which were unjustifably high.

However the theory of monopoly which seems now to influence public opinion, however little the public understands it, stems from economic theories justifying private enterprise. Early economic models proceeded on the premise that man was motivated solely by economic considerations. Thus man shought to maximize his "profits" and minimize his "costs", whether he be a consumer or a producer. Thus a man produced goods because the production of those goods earned him what he though to be an appropriate profit. Similarly a mother bought a quantity of

the product because the price was right. If price, supply or demand deviated, more prople bought the product or less people bought the product and either more people produced or less people produced (or the same number produced more or less and the same number of people bought more or less). At some point in this static model demand and supply curvies in relation to price coincided and at that point, there was a proper~~ty~~ "economic" exploitation of resources and a proper "economic" exploitation of the market.

Monopoly because it places in the hands of one person the ability to control both the supply of the product and the price of the product enables so it was said the producer to exploit the exonomic resources uneconomically and the market uneconomically. Thus said the economist because man is motivated by profit alone he will produce only so much of the product or charge just such a price as will produce the best possible price and profit.

It was of course recognised that by using such a static model that the relationship between demand and price varied according to the goods to be sold. Thus in the case of bread which is a "necessary" item for living, the demand would not be expected to vary greatly while price rose. On the other hand the demand for television sets could be expected to vary dramatically with variations in price. The measure of demand

charges for each item is called the elasticity of demand. It was recognised that goods with inelastic demand could benefit the monopoly holder more than goods for which the demand was highly elastic. Put simply the monopoly holder in necessary goods has a greater potential for making larger profits than the holder of a monopoly in luxury goods.

From this basis then much of public distaste for monopoly is founded. The strongest feeling is of course that the consumer who ever he might be will be exploited. Monopolies potentially for wasting scarce economic resources it is submitted must also be recognised.

The brief discussion above scarcely does justice to the "conventional" theories concerning monopoly. Nevertheless criticism can and should be levelled at the model argument.

First the model is static and it seems difficult if not impossible to formulate any conclusions from the fact that society is dynamic. The fact furthermore that both the consumer and producer are human tends to militate against a too ready acceptance of the model.

Second to rely upon the "profit" motive in human beings as a basic premise besides being uncharitable seems far too simple. To take but one example, namely the multi owned large corporation. The profit motivation premise relys on the argument that each

person seeks to maximize his or her personal profit. In the case of large corporations the only persons who should be motivated by profit in the strict sense are the owners. In other words the carrot and the donkey ~~equivalent~~ argument should apply to them. However in most such cases ownership is fragmented and the owners jointly appoint managers. The managers' performance cannot be said to be motivated by profit because very often a rise in profit on the part of the corporation in no way affects the personal profit made by the manager. He is of course likely to face dismissal if no profit or a loss is made, but provided the profit satisfies the owners he may have a sinecure (albeit a prickly one). It has been said that respectability both in profit and in societies terms motivate people in their economic actions as much as "profit". It is submitted that at least in the case of large corporations this may be the case.

Third many other factors are recognised as justifying monopoly in the particular situation. Thus it can be argued that to provide efficient and proper transport systems a monopoly must be granted. The railway system in New Zealand may be an example. The carriage of goods by sea to the writer's mind illustrates far more dramatically both the dangers in monopoly and the dangers in condemning it out of hand. Thus in almost every liner trade in the world the carriers have combined to form classical cartels: the liner conferences. The

conferences (being a combination of all the shipowners in a trade, of which the New Zealand European Conference is an example) sets the rates of freight, the regularity with which ships call, the amount of the total freight each company will take, the penalties or bonuses payable if a line either takes more of its share or takes less than its share. In most conferences too a weather eye is kept on all competitors in the conference to ensure that inefficiency does not benefit a carrier and so on. In the case of New Zealand dependent as it is upon its overseas trade for its economic well being, most nationals would argue that a stranglehold on the welfare of the country is held by the lines. They can refuse to carry cargo, which means that they can supposedly charge what freight rates they want, without any concern for the shipper of the goods or the consignee. Probably this "oligopoly" is more abused than any other alleged monopoly in or about New Zealand.

The shipowners argue, with it is submitted no ~~title~~ little force gone, that competition is ever present in the form of "tramp" shipping and they point to the dramatic flutuation upwards of that class of shipping when the closure of the Suez Canal caused a general shortgage of ~~their~~ ships throughout the world. Moreover they say that on the New Zealand trade two matters ~~one~~ are of prime importance: first New Zealand trade is seasonal and second sufficient and regular ships are necessary to carry the cargo. Unregulated arrival

of ships to carry cargo could mean both that too many ships arrive or that too few arrive.

Second in terms of quantity (and that is almost the sole basis for cargo charges) shipped there is a large inbalance of trade in favour of the outward trade ~~that~~ and much of New Zealand's outward cargo being foodstuffs means that cargo space cannot be used on inward voyages. Be that as it may it could be said that the shipping companies secure in their knowledge of a market for their service are not greatly motivated to improve the efficiency of the service and there may be some justification for this latter remark.

There are other examples of monopoly or near monopoly in New Zealand. Thus the system of import control was designed to protect the New Zealand manufacturer from the competition of overseas traders. It was argued that many industries need time to develop efficiency ~~efficiently and~~ The dispute now with the gradual replacement of import control by tariffs is how long does an industry need to be protected. For that matter tariffs also create near monopoly. It is argued that the size of New Zealand scarcely justifies more than one major frozen food producer for it is arguable that much duplication of the use of scarce resources is involved and that costs and hence prices could be held more easily if ~~that~~ a monopoly situation develops.

The important points that to the writer's mind emerge from any consideration of monopoly are however that monopoly gives the potential to exploit the consumer and may mean that scarce economic resources are used wastefully. Because however we live in a society composed of people (a tantalising glimpse of the obvious) and because the multitude of the different requirements of those people, whether monopoly is in fact pernicious is a matter for real and substantial scrutiny and not more surmise.

It is the writer's belief that although the present legislation does provide for just such a scrutiny, the motives of the legislature were far more simplistically based.

It was already been observed that the potential of monopoly was realized by the law at an early date. In the late nineteenth century however the courts recognising the economic precepts upon which they were brought up emasculated the power of the law to regulate the growth of monopoly. It was John Maynard Keynes (later Lord Keynes) perhaps one of the greatest economists, who said of politicians that they recognised and held as viable economic theories the theories of some now defunct economist of their youth. Of judges perhaps one can say both that the recognition of new economic theories is belated and that there is a marked reluctance to even accept any theory. (See especially the Privy Council Judgment in Crown Milling and Ors v. R. /1927/ A.C. 394).

Be that as it may two concepts of law have battled at common law for dominance: freedom to contract and freedom to trade (in the economic sense). It must be conceded that freedom to contract has at common law prevailed.

Thus the remarks of Lord Parker of Waddington when delivering the Privy Council's Judgment in Attorney General for Australia v. Adelaide Steamship Company Limited /1913/ A.C. 781 illustrate both the difficulty faced by the courts and the reluctance of the courts to abandon the "freedom to contract" concept. At pages 796 and 797 Lord Parker says inter alia:-

> "The chief evil thought to be entailed by monopoly whether in its strict or popular sense, was the rise in prices which such monopoly might entail. The idea that the public are injuriously affected by high prices has played so inconsiderable part in our legal history .....
>
> The right of the individual to carry on his trade or business in the manner he considers best in his own interests involves the right of combining with others in a common course of action, provided such common course of action is undertaken with a single view to the interests of the combining parties and not with a view to

injuring others."

The case which concerned the monopoly obtained of the entire production of Australian coal by the various shipping companies in Australia was perhaps understandably (in view of the above remarks) decided in favour of the shipping companies.

This acceptance of the theory of freedom to contract was based at least in part upon the generally held belief that all parties to a contract were possessed of an equal bargaining power, which in turn seems to flow from the belief that a man could if he wanted better himself. In our more egalitarian ~~eglatarian~~ times the limitations of such a doctrine may seem quite apparent but it shaped the common law into its present form.

Two cases may be cited as the leading authorities in the two branches of common law which deal principally with monopoly or the combination of traders to for oligopoly.

The cases are Nordenfelt v. Maxim Nordenfelt /1894/ A.C. 535 and Mogul Steamship v. MacGregor Gow & Ors /1892/ A.C. 25. From both cases substantially similar results flow but the situations with which they deal substantially differ. Nordenfelt (supra) concerns a dispute between two persons who were parties to a covenant in restraint of trade. The Mogul Steamship case (supra) deals with contracts entered into my others in restraint of trade which have injured the third person.

Disputes between the parties to covenants in restraint of trade

The facts in Nordenfelt concern the attempt by the inventor of a rapid firing gun to recommence the business of manufacturing arms and the subsequent attempt to prevent him from so doing by the company to whom he had previously sold his business. Nordenfelt had indeed invented some worthwhile (?) rapid firing gun. He and others formed a company to exploit the potential and he assigned his patent to the company for a considerable sum. In consideration therefore he undertook not to enter into competition with the company any where in the world for another twenty five years. For various reasons Nordenfelt left the company. Some years later he endeavoured to recommence such business. The House of Lords granted an injunction to the company restraining Nordenfelt from starting the business. The remarks of Lord MacLaghten at 565 have been cited with approval many times and may be fairly said to be a true statement of the present law. Thus:

> "The true view at the present time I think, is thus: the public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule.

> But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is sufficient justification, and indeed it is the only justification, if the restriction is reasonable - reasonable, that is, in reference to the interests of the parties concerned and reasonable in the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time in no way injurious to the public."

It is not the intention of the writer to fully canvas all the authorities in this area, but it will be of some importance to see just what the common law protected and what remedies it offered to the injured parties or restrained parties.

One would first of all surmise from the above remarks that the law was not generally in favour of contracts restraining a person's freedom to trade. At least until recently no such recognition was accorded the principles by the courts. Thus although the Adelaide Steamship Company case (supra) concerned a prosecution under an Australian Act prohibiting monopoly "which was to the detriment of the public" the Privy Council insisted that monopoly and thus a general restraint of trade was not illegal per se and that cogent and strong proof would be required of the detriment

to the public before so finding it. Thus although price rises of in excess of thirty percent followed almost immediately the creation of the monopoly the court found no detriment to the public and hence the monopoly was legal and could be continued.

More recently however the courts seem more prepared to accept the principle that free and competitive trading is desirable. Thus in Pharmaceutical Society of Great Britain v. Dixon /1968/ 2 All E.R. 686 the House of Lords considered the opposition by Boots the Chemists to a series of rules drafted and accepted by the Society which would inter alia have restricted the trading operations that could be carried out by pharmacists. The House of Lords held that the rules were ultra viries the Society, but also void for being in restraint of trade. Thus Lord Wilberforce said at 707:-

> "I would hold the simple ground, which is the relevant ground in this connection, that there is nothing here to displace the normal proposition that the public has in the absence of countervailing considerations an interest in men being able to trade freely in the goods which they judge the public wants and that these restraints clearly, severely, and arbitrarily restrict this freedom."

The second point made by Lord MacNaghten is that contracts in restraint of trade are void, but they may be justified. This

effect may be one of the great non effects of the common law for as was said by Lord Reid in Esso Petroleum v. Harper's Garage (Stourport) Limited /1967/ 1 All E.R. 699 /1968/ A.C. 269 at page 707:-

> "One must bear in mind that an agreement in restraint of trade is generally lawful if the parties agree to abide by it: it is only unenforceable if the parties choose not to abide by it."

The comment that the covenant is void and hence unenforceable points to the only remedy one has against otherwise legal restraints of trade, namely to have the restraint deemed unenforceable. This also illustrates the fact that a third party can have no means of attacking such a clause and obtaining redress for any loss or damage suffered as a result. Further the rendering of such a covenant void is no great solace to a person who has laboured under the misapprehension as to his rights.

The third point implied by Lord MacNaghten is that covenants solely in restraint of trade may be void. Thus in Vancouver Malt and Sake Brewing Company Limited v. Vancouver Breweries /1934/ A.C. 181.
The Privy Council held that the agreement between the parties was "nothing more or less than a contract whereby in consideration of a sum of money the appelants undertake for a

period of fifteen years not to engage in the business of brewing beer and confine themselves solely to the business of brewing sake" (Lord MacMillan at 185). The Privy Council went on to say that they would not enforce a mere purchase of protection "against mere competition" (page 191) and that also the covenant was not reasonable in the interests of the parties. This case is important because it shows a clear determination by the Privy Council to hold that such covenants are void. It could be said that in the decisions prior to this case and in particular in Nordenfelt (supra) and although the judges said that such covenants were void but could be justified, the effect of their decisions was that the agreements were valid but might be invalidated if they were unreasonable.

It appears to the writer that since the Vancouver case with one or two exceptions, the courts have tended to view covenants in restraint of trade with suspicion. (See Texaco v. Mulberry Filling Station /1972/ 1 All E.R. 513, Esso Petroleum v. Harper's Garage (Stourport) Limited /1967/ 1 All E.R. 699 and Petrofina (Great Britain) Limited v. Martin /1966/ 1 All E.R. 126 which are all cases concerning solus agreements entered into between petrol oil companies and retailers of petroleum products.)

In Lord McNaghten's opinion (being the opinion now followed by the courts) there are two grounds for the justification of

of clauses in restraint of trade. Of these two grounds one almost seems relevant, namely the public interest ground because the public has absolutely no means at common law of obtaining redress and the parties may continue acting as far as the common law is concerned in a way detrimental to the public interest for so long as they wish. The two grounds of course are reasonableness - in the interests of the parties and in the interests of the public.

Reasonableness between the Parties

Early cases seem to confine the matters to be considered by the courts to the period for which the restraint is to operate and the area over which the restraint is to operate. Thus in employment contracts such a restraint was confined usually to finding unenforceable covenants which operated universally and for ever.

More recently in such cases as Robinson v. Golden Chips /1971/ N.Z.L.R. 257 the relative bargaining strengths of the parties have been taken into consideration.

In the "solus agreements" cases (i.e. Petrofina, Esso, Texaco (supra)) the courts have examined rigorously the contracts entered into between the garages and the oil companies supplying them. Although such examinations included considerations of time and space inevitably the courts did seem prepared to

to delve into the whole of the arrangements. Indeed the courts were also prepared to accept that if the oil companies were prepared to finance people into such garages in consideration for a requirement that their products only be sold by the garage that such an agreement might be quite enforceable, being in the interests of the parties.

Public Policy

The writer has already expressed his views on this subject. Lord Reid's comments as cited above from Esso Petroleum (supra) demonstrates amply that the public policy is almost irrelevant in this area of common law. To strike down a bargain as contrary to the public interest solely because one party refuses to follow the bargain seems to be futile because the public interest is only served if the parties disagree. If they continue, the courts have no power to interfere in the contract and the public interest can be damaged as much or the parties want.

There are three cases which demonstrate something of the futility of the law in this area.

The first case concerns an agreement to pay a pension to a man upon the condition that he did enter into competition with the payor's of the pension, his former employers.

In Wyatt v. Kreglinger and Fernau /1933/ 1 K.B. 793 the court

of Appeal held that the whole contract was unenforceable because the covenant in restraint of trade was against the public interest. They held that it was desirable that the man could be able to enter into the wool trade if he so desired. With respect the court may have been influenced by its own doubt as to whether a contract had been properly made, but really it is difficult to see what difference a clerk would make to the competition in the trade (for that is what Wyatt had been). When compared with Nordenfelt's case moreover the public interest in the matter would seem to have been negligible.

Of considerably greater importance is the case of McEllistrim v. Ballymace Illigott Co-op Agricultural & Dairy Society Limited /1919/ A.C. 548.

This case concerned a co-operative which had an extremely large number of peasant farmer members running creamery and dairy factories in a very large area in Ireland. The Co-operative wished to build a new creamery. It had obtained finance by having some members only of the society guarantee the advances to the society. It then sought to change its rules so as to ensure that every single member of the society was forced to trade with the society and could not trade elsewhere without penalty. A member sought to prove the rules ultra viries as being a restraint of trade that was void. The court followed the dicta of Lord McNaghten and said the true view was that

covenants in restraint of trade were void unless reasonable as between the parties and reasonable in the public interest. It was held that the rules were not reasonable in the public interest and were hence a void restraint of trade and hence ultra viries. having regard to ~~The court held that~~ the length of time for which the restraint could operate and particularly having regard to the society's power to prevent the farmer from selling his shares. It was apparently conceded in evidence put forward by the society that they would have to have the restraint of trade ~~to do so to~~ ensure that sufficient capital was available to build the creamery and that If free competition was ~~engendered~~ allowed the price of milk to the society would rise.

Common Law on Restraints of Trade

Although the above is at best a very brief summary of the law, it is sufficient to establish that the common law is very nearly helpless in dealing with the public interest implications in covenants in restraint of trade. Only if the parties find the provisions onerous can the courts consider the implications.

Second although some early lawyers seem to have meddled their way into this branch of law the inter parties aspects of covenants in restraint of trade are now being given rigorous treatment by the courts. Thus one cannot imagine the courts saying as the Privy Council said in the Adelaide Steamship

Company case :-

> "Their Lordships are not aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public".
> (/1913/ A.C. 781 - 795)

Interference in Lawful Trades

Again it is proposed to briefly canvas the law in this area before turning to the legislative measures adopted in New Zealand over the years to deal with restrictive trade practices.

It was earlier said that there are two lines of authority, which are important to this paper. A leading authority in the second line is of course Mogul Steamship Company Limited v. McGregor Gow & Co. /1892/ A.C. 25.

This case concerned the very vigorous attempts to squeeze one shipping company out of the lucrative "tea" trade with China. It perhaps is relevant to note that the tactics used in this case do not differ greatly from the tactics allegedly used by the conferences when those cartels initially commenced. Indeed this would be an example of an early conference. The lines in the "conference" obviously sought to regulate the carriage of tea from China (whose tea season lasted no more than six weeks). They accordingly offered exporters a five per cent

rebate on freight provided they dealt with the "conference" only. They also provided that if possible "conference" ships should be at ports at which it was likely opposition ships would call. Generally the "gunships" sent to prevent the opposition were successful and the conference also pushed freights down to for the Plaintiffs in any event unremunerative rates. The conference also succeeded in having the agents of the Plaintiffs refuse to act for the Plaintiffs.

The House of Lords first found that there was no malicious attempt to ~~argue~~ harm the Plaintiffs, they found an attempt by the Defendants to charge such rates of freight as would eventually discourage the Plaintiffs from commencing in the trade and thus obtain for themselves the total trade. In fact this latter motivation prompted the House to find that the trade practice was lawful.

It was argued that practice was unlawful as being in restraint of trade. It was conceded by the House of Lords that contracts in restraint of trade might not be enforced as being contrary to public policy. Indeed the House of Lords said (Lord Watson at 42):-

> "That an agreement by traders to combine for a lawful purpose, and for a specified time, is not binding on the parties to it if he chooses to withdraw

> and consequently cannot be enforced in ~~Britain~~
> In my opinion it is not authority for the proposition that an outsider can plead the illegality of such a contract, ~~which~~ whilst the parties are willing to act, and continue to act on it."

The major point of the case however is that unless the object of the contract was unlawful or unlawful means were used to interfere in trade no right existed for a third party to attack a contract in restraint of trade.

The facts of the case incidentally reveal that at least in the short term the tea merchants were able to get what were obviously much lower freight rates than those free competition would ever have produced. However as Lord Halsbury remarked at 86 the motive for so giving lower freights was to eventually enable the Defendants to obtain better profits. It is fair to say that perhaps such profits would be produced by the cartel being able to set whatever freight it wanted. In other words the short benefit the traders obtained would shortly dissapate.

One other point that arises out of this case which although not strictly relevant to this paper is the assention by Lord Bramwell at page 46 that as a rule the consumer bears the cost of importing goods, (i.e. the freight can be passed on to the consumer). Although this can be true much depends on the elasticity of the demand for the goods. Thus for most of

New Zealand primary produce the cost of freight will be borne by the producer for the demand for such goods is very elastic.

Although superficially at least the case of Allen v. Flood /1898/ A.C. 1 concerns the right of trade unions to enforce closed shops, the principle is the same for surely a trade union is an agreement in restraint of trade. In this case ironworkers refused to work on ships unless certain shipwrights were discharged. The employers dismissed the shipwrights fearing the collapse of their business. Apparently the ironworkers were motivated because the shipwrights had performed iron work on another ship, thus depriving the ironworkers of that work. The majority held that the shipwrights had no cause of action against the ironworkers although some strong dissent was registered.

This case like the one before it is also interesting because it demonstrates the same principles which will enable a third party to recover from such concerted action as occurred in this case. Thus Lord Watson at page 96

> "There are in my opinion, two grounds only upon which a person who procures the art of another can be made legally responsible for its consequence. In the first place, he will incurr liability if he knowingly and for his own ends induce that other person to commit an actionable wrong. In the second

> place, where the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may be to the detriment of the third party, and in that case according to the law laid down by the majority in Lumley v. Gye 2 E & B 216, the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against the third party."

The case of Quinn v. Leathem /1901/ A.C. 495 concerns a situation where indeed illegal means were used to procure the breach of a contract. Essentially here it appeared that a trade union in ~~the~~ its attempts to get a meat processor (a flesher) employ only union labour (and therefore dismiss some workers) called the employees of retailing butchers out if that butcher took meat from the Plaintiff flesher. The case was distinguished from Allen v. Flood (supra) upon the grounds that that case concerned the principle that acts not otherwise illegal cannot be the foundation for an action even if done with malicious intent. This case however concerned a conspiracy to ~~argue~~ harm the Plaintiff and an intention to violate the contractual relations between two other persons.

In the case of The Crofter Hand Woven ~~Hams~~ Harris Tweed v. Veitch & Ors

/1942/ A.C. 435 the House of Lords reviewed the effects of the previous three decisions when considering what was also a trade union endeavouring to unionize certain ~~Hams~~ Harris Tweed factories in the islands off the coast of Scotland. There were two rival factories/combinations of Crofter who produced ~~Hams~~ Harris Tweed. One group was within the union and the other was not. The one that was not used a considerable amount of mainland labour. The union officials "induced" members of the union serving on the ships to refuse to handle the non union produced yarn and cloth. In long judgments the House of Lords held that there had been no actionable wrongs committed by the union officials.

It was assumed that for the purposes of the decision that the union had combined in obtaining the embargo with the competing Hams Tweed manfacturers but nonetheless it was held the purpose of the combination of the union and the mill owners was to further their own legitimate interests and as the means employed were neither criminal or tortious no cause of action lay against them and the embargo would not be lifted by order of the court.

It is submitted that the distinction between conspiracy to further one's interests and conspiracy to injure another's interests can be a very fine one. Thus in this case, but even more clearly in the Mogul Steamship case (supra) the furthering of one's own interests necessarily meant that another must be driven out of the same business. To argue in terms of motives is to the writer's

mind completely avoiding the above issue for surely if one is motivated to improve one's business and it is known that the only way to do it is to deprive another of its business then surely it sophistry to argue that one had no intention of injuring the other person.

It is necessary to mention briefly that it would appear that if a person adopts a trade practice, which is prohibited by law, and hence illegal, a person injured by such action may have a good cause of action against the parties to the trade practice. Certainly in the case of the Commercial Trusts Act 1910 which made certain trade practices criminal/quasi criminal a good cause of action was held to exist against the parties to a practice prescribed by that Act in Fairbairn Wright v. Levin & Co. (1915) 32 N.Z.L.R. 1.

Common Law: Conclusions

The common law has by a series of precedents built up over the years prevented itself from taking any part in the prevention of trade practices which are detrimental to the public interest. It has proved to be quite useless to the persons injured by combinations of traders, which combination in itself might be unenforceable by law.

It is submitted that perhaps in one sense this has been desirable.

The law has seen earlier examples of quasi economic theories incorporated into the common law with results which to a much changed society have been deemed unjust (eg the common employment rules). It is perhaps much better that in economic matters that persons theoritically answerable to the public should determine how the law should govern such matters. The law, dependent, as it is, on the expensive and time consuming appeal system to change itself is no vehicle in this area for the putting into effect of changes in commercial conscience and social beliefs. Moreover it could well be many years before the law was ever changed.

On the other side of the coin politicians are not always noted for their sensitivity to public opinion is perhaps overstated. Nevertheless it was from the politicians that the changes have come in our law concerning trade practices.

From the legislature there has come the measures discussed hereafter to cope with restraints of trade which are or might be harmful to third parties and the public.

Prevention of Monopoly Act 1908

This Act was a consolidation of a number of earlier Acts, which had been enacted to cover specific situations which had previously arisen.

The Act now provides that the Governor General may by order in Council ~~give~~ lift the customs duty on agricultural implements, flour, wheat and potatoes if he considered that a cartel or monopoly was dealing with any of the commodities and thereby give a bonus to local manufacturers.

The first of the two Acts was the Agricultural Implement (which was consolidated) Manufacture, Importation and Sale Act 1905. It was enacted because local manufacturers of agricultural implements were fearful of "dumping" on the market by foreign operators. Thus the Board set up under the Act could consider either if the importing manufacturers were ~~naturally~~ unfairly reducing the price of the goods or carrying on unfair competition. A bonus of up to thirty three percent could be granted to the local manufacturers if the practices were proved.

The other Act was the Flour & Other Products Monopoly Prevention Act 1907. This concerned unreasonably high prices in the commodities of flour, sugar and potatoes. If monopoly was causing this all customs duty would be lifted on the importation of the commodity. Essentially this meant free access to the market for all producers from overseas and the local industry could be hurt. It is fair to comment that both of the Acts, although designed for specific situations, were extremely vague in their terms. It would also appear that neither part of the Act has been used to any great extent.

Trade Unions Act 1908

This Act is considered only because one of the few early trade practices decisions was decided on a point raised by this Act. The Act provided that trade unions included combinations of employers or of persons engaged in a trade. The Act also provided that a trade union could not be registered under the Companies Act of the time. Moreover agreements between union members could not be enforced in the courts. In Goldfinch v. Rangatiki Sawmillers Co-op Association Limited (1913) 33 N.Z.L.R. 666 all of these points were considered. A combination of all sawmillers in the Rangatiki area had agreed on a quota system of production, with payments to members who did not meet quotas and contributions by members who exceeded the quota system. The Association had sought and had been granted registration as a company. A member sought to enforce the agreements reached between the members. It was held that the Association was a trade union within the meaning of the Trade Union Act, that its registration as a company was a nullity and that hence the arrangements between the members had no contractual force and were unenforceable.

Commercial Trusts Act 1910

The preamble to this Act provided that it was for "the repression of monopolies in trade and commerce". The Act initially applied to a restricted number of basic foodstuffs

(flour and sugar) and contain fuels including coal and petrol. The list of foodstuffs while still restricted was extended in 1915.

Apparently the Act was enacted because the Government of the time was apprehensive of the trading methods of certain foreign meat companies and some oil companies.

The Act introduced criminal sanctions to curtail monopolistic practices.

"Commercial Trusts" were defined in include combinations of persons who had as their object either "controlling, determining or influencing supply, demand or price of any goods in New Zealand or any part thereof ..... creating or maintaining in New Zealand or any part thereof a monopoly in the supply or demand of any goods." Section 3 of the Act created a series of offences relating to the giving of illegal concessions in consideration of exclusive dealings. The offences included:-

(a) dealing exclusively with any person in relation to particular goods or in general;

(b) to not dealing with a specified person or class of person in relation to particular goods or in general;

(c) giving of an illegal concession for a refusal to deal with specified persons or class of persons in

relation to particular goods or in general;

(d) restrictions in dealing with particular persons;

(e) concessions given for becoming a member of a commercial trust;

(f) for concessions given to a person for acting in accordance with the directions of the commercial trust.

Section 4 created a series of offences relating to the illegal refusal by persons, particularly commercial trusts, to deal with other persons.

Section 5 made it an offence for a person to conspire to monopolise wholly or partly the demand or supply in New Zealand of any goods or control the demand or supply or price of goods but a person would be guilty of the offence only if the monopoly or control was contrary to the public interest.

Section 6 provided that it was an offence if a person charged an unreasonably high price at the direction of any commercial trust.

Section 7 provided that all members of the commercial trust would be guilty of an offence if the commercial trust sold goods at an unreasonably high price.

Section 8 provided a definition of unreasonably high prices by providing that persons were to get "fair and reasonable" rates of commercial profit.

The first prosecution under the Act and virtually the only successful prosecution under the Act was of the Colonial Sugar Company and the companies distributing sugar in New Zealand.

The distribution of sugar in New Zealand was achieved by the Colonial Sugar Company virtually importing all sugar to the country and redistributing it to wholesalers. Fairbairn Wright was the only competitor of the Colonial Sugar Company for they imported some sugar as well.

The Colonial Sugar Company operated a system whereby bulk purchasers received rebates calculated on the quantity of sugar taken. Thus the larger the quantity taken the larger the amount of the rebate. Fairbairn Wright were one of the largest, if not the largest purchasers of sugar from the sugar company.

Fairbairn Wright besides being in competition with the sugar company, passed virtually the whole of its rebate onto its customers. The other merchants besides taking a smaller rebate did not pass on the whole of their rebate. Quite obviously Fairbairn Wright stood to gain a large share of the market, and may have been able to eventually compete successfully with the Colonial Sugar Company as an importer of sugar.

The merchants had associations in the regional areas. They therefore met and with the backing of the Colonial Sugar Company

set about changing the system of distribution to cut Fairbairn Wright out of the market. Essentially in each region one wholesaler took the whole of the sugar required for the region and distributed the sugar to each of the members of the Association. The quantity of sugar so taken therefore greatly exceeded the amount that Fairbairn Wright was then taking. They would therefore qualify for the same rebate as Fairbairn Wright. Accordingly the merchants prevailed on the sugar company to alter the system of charging rebates. The sugar company therefore decided that the quantity taken by Fairbairn Wright would qualify for a smaller rebate than before, and set the quantity which qualified the wholesaler for a considerably larger rebate and so high that Fairbairn Wright could never qualify for the rebate and only the combination of merchants could so qualify. The actual figures are immaterial but an example of the technique used will demonstrate the effect.

Thus say the old scale provided that the taking of 12,000 tons of sugar qualified the wholesaler for a rebate of four and one half percent, which was the maximum rebate. The merchants, excepting Fairbairn Wright had agreed to keep one percent themselves, but Fairbairn Wright passed the whole four and one half percent on to its retailers. The retailers could thus buy sugar cheaper from Fairbairn Wright. The new scheme provided that say ~~under~~ over 25,000 tons qualified for five and one half percent. Fairbairn

Wright could never get over 25,000 tons and its rebate had been decreased. The merchants could take 25,000 tons or more and could still take their one percent and still sell cheaper than Fairbairn Wright. The retailers would obviously move their business. (The figures are not the actual figures)

Fairbairn Wright started to lose its customers and so it initiated a prosecution of the companies participating and the sugar company.

The prosecution was brought against the sugar company for giving a concession to other companies to encourage them to join a commercial trust. (Section 3 (d) Commercial Trusts Act 1910). The prosecution of the sugar company was successful, it being said that the merchants association was a commercial trust and the rebate given a concession to get the members to participate in the scheme.

The decision is also important because the member companies of the Association and in particular Levin & Company Limited which was the company in the Wellington area buying on behalf of all members were also prosecuted. In fact it was argued that the actions of Levin and Company did not fall within any of the prohibited acts contemplated by the Act. However the court held that Levin and Company had aided and abetted the sugar company and convicted the company.

The whole case is reported in R. v. Merchants Association (1912) 32 N.Z.L.R. 1233. The case had some later repercussions for Fairbairn Wright took civil action against all the companies involved for the loss of profits (etc.) as a result of the trade practice. It said that unlawful means had been used to achieve an interference in its trade. The action was probably settled for the only reported decision was whether or not Fairbairn Wright had a good cause of action against Levin and Company in tort. It was held that at common law there was a good cause of action but that no cause of action arose but of the Commercial Trusts Act 1910 (Fairbairn Wright & Co. v. Levin & Co. & Or /1915/ 32 N.Z.L.R. 1.

It is rather interesting that Counsel for Levin & Company was Mr Myers, later Sir Michael Myers C.J., for he was involved in the next case, which case completely emasculated the Act. With respect it seems that Sir Michael Myers fully understood the implications and when called upon by the Flour Merchants was able to advise them precisely how to escape the full rigours of the Act.

Until the early 1920's the price of flour was subject to price control. This control it appeared dampened the effects of the fluctuating market for flour.

In 1922 when Government lifted the controls and permitted the

the wheat to be sold without a guaranteed price, the productions of wheat skyrocketed and a surplus over New Zealand's requirements (about 6.5 million bushells) of four million bushells of wheat was produced. Within a short time price cutting on a massive scale commenced and many millers found themselves in difficult financial positions. Accordingly a meeting was called of all millers and at Mr Myers recommendation a company was formed called Distributors Limited. The company was owned by the millers, more or less and was to be appointed agent for the millers in selling all the flour production of the mills. The company was to purchase flour at set prices from the mills and according to a predecided quota. The quota could be exceeded in production but such excess flour could be shipped outside New Zealand or dealt with in a manner which did not prejudice the other persons employing the distribution company.

On the face of it a classical monopoly situation had been created for the sole persons from whom wheat flour could be obtained from was the distribution company. Accordingly it would appear inefficient producers could hide behind that company and very possibly efficient companies could arrange higher profits.

Sim J. heard the action at first instance and, which was an action by the Crown to recover the penalties imposed by the Commercial Trusts Act 1910. He held first with respect to Section 3 of the Act that there had been no exclusive dealing

in goods because a contract agreement for employment of an agent was not a dealing in goods.

He then said that monopoly was not necessarily bad nor unlawful unless contrary to the public interest (Adelaide Steamship Company case /1913/ A.C. 781). Moreover in this case it would only be bad if the price was unreasonably high (Section 8 Commercial Trusts Act 1910) and found that no unjustifably high prices had followed.

With respect to Section 5 His Honour felt that a wide consideration ought to be given to the whole scheme and that monopoly may not be found to be bad. The King v. Crown Milling & Ors /1925/ 258.

In the Court of Appeal (reported at /1925/ N.Z.L.R. 752) a majority held that the control by the trade caused or could cause prices to rise above the level they would reach on the open market and that hence "the control was of such a nature to be contrary to the public benefit" (Section 5 Commercial Trusts Act 1910).

The majority felt that there had been a number of matters established, including a restriction of the saleable output of the mills, a fixed price irrespective of quality and that this price was fixed by the Commercial Trust. The majority then

said that it would require most cogent evidence to find that in fact the monopoly so established was not contrary to the public interest.

However in one fell swoop the Privy Council completely emasculated the whole intent and purpose of the Act. In its decision (reported as Crown Milling v. The King /1927/ A.C. 394) the Privy Council said in respect of the agency argument that because the distribution company had been made the agent for the millers it could not give the millers a concession in exchange for exclusive dealing. Accordingly Section 3 Commercial Trusts Act 1910 had no application to this type of situation.

With respect to the Crown's argument and the Court of Appeal judgment the Privy Council merely said that monopoly was not necessarily rendered illegal by the statute. They then said that public interest was a matter of fact and not of law, (i.e. they were not prepared to hold that a complete disappearance of competition was not in the public interest). The Privy Council said that as a matter of fact no evidence had been heard which established the practice was contrary to the public interest.

The emasculation of the act was thus complete. To ensure that a number of companies could combine concerning such arrangements as price, they together appointed an agent and sold only to the agent at prices they determined.

With respect to the monopoly situation, the Privy Council virtually rendered it impossible to prosecute under the Act for the public interest is notoriously difficult to establish and the Crown would be faced with a mammoth task in putting together such a case.

Of course much of the Act's ineffectiveness must be laid at the foot of the legislature because it would seem clear that such vague terms as "public interest" do not make good statutes. Perhaps the only method to achieve good and enforceable laws in this area is to deem certain matters as against the public interest.

Although the Act was virtually finished one aggrieved fruit retailer in Christchurch endeavoured to use the Act against Fruit Distributors Limited in the early 1950's. Essentially in 1936 the Government prohibited importation of fruit into New Zealand except through a Government Department, which Department in turn supplied the wholesalers on a quota system. After the entry of Japan into the war in 1942 supplies of bananas became very short and each retailer received much reduced quotas. The quotas always came from the same wholesalers, and were fixed by the Government.

In 1950 the Government granted a monopoly to Fruit Distributors Limited (a company formed for the purpose) for the importation

of all fruit. In 1951 bananas were again in short supply and moreover Fruit Distributors Limited obviously felt that some retailers were obtaining more than their fair share of the total fruit and that some areas were not receiving any fruit and that the whole system was being abused by those who were obtaining more fruit. Essentially to remedy the situation the company decided that retailers would get such quota of bananas as would be determined by the amount of fresh fruit they had obtained from their usual wholesaler for the period November and December 1951. Capes the Plaintiff in this action had for some reason bought from other wholesalers than his usual wholesaler in this period and accordingly his quota was much reduced. The Plaintiff argued that Fruit Distributors Limited had procured the distributors (wholesalers) to commit a breach of Section 4 (a) of the Commercial Trusts Act 1910 and that in accordance with the principle laid down in Fairbairn Wright v. Levin & Company (1914) 34 N.Z.L.R. 1 this was actionable and that damages should be awarded against Fruit Distributors Limited.

Section 4 (a) provides basically that an offence has been committed if a person refuses to supply goods to another because the latter person has refused to deal with or has not dealt with some person (I.e. the first person mentioned or some third person).

Mr Justice Hutchison (whose decision is reported as Capes & Ors

v. Fruit Distributors Limited /1954/ N.Z.L.R. 553) held essentially that the reason the Plaintiffs had not been so supplied was simply that it was essential some equitable basis be established for the distribution of fresh fruit. He found that Capes had not been refused supply because of his failure to deal with Fruit Distributors Limited's agents and that hence Capes could not establish a breach of Section 4 (a) by Fruit Distributors Limited or the procuring of such a breach.

The Commercial Trusts Act 1910 could have been important but the ease with which the Privy Council destroyed the effectiveness of the Act and the absence of clear definition of public interest rendered the Act almost a nullity. The Fruit Distributors Limited case it is submitted is of no great relevance here because on the face of the evidence His Honour's decision could scarcely have been anything else.

The Act is now quite easy to avoid and one wonders why it remains on the statute books and has not been replaced.

Board of Trade Act 1919

This Act provided first for the creation of two offences. It also gave power to the Minister to pass regulations to combat monopoly in "the industry".

Section 32 (3) of the Act created an offence of "hoarding for the purpose of causing the price of goods to "increase".

Section 32 (1) provided that it was an offence to sell goods for unreasonable profit. In one case reported under Section 32 (1) a prosecution was brought against the distributors of Big Ben alarm clocks. (Christie v. Hastie Bull and Pickering /1921/ N.Z.L.R. 39). Apparently the American manufacturers were able to force considerable price increases in the f.o.b. cost of the alarm clocks. As soon as these price increases became known the distributors directed that the price of all Big Ben alarm clocks still stocked would be increased. Essentially the distributors were charging replacement costs against the price of then unsold alarm clocks. The distributors obviously could realise substantial profits. It was held by the Court that the prices were not unreasonable for otherwise untold confusion would result on the market place. This section was later tightened.

It is not proposed to deal with the Minister's power to pass regulations under the Act except to note that the courts held early attempts by the Minister to pass such regulations in respect of particular industries to be invalid and ultra viries the Minister (see e.g. Peerless Bakery v. Clinkard (No 3) /1953/ N.Z.L.R. 796. The sections were repealed by the Industries and Commerce Act 1956 and the Minister given wider powers.

Control of Prices Act 1947

Two further offences were added to those offences which had been

created by the Board of Trade Act 1919. The Sections creating offences under that Act relating to trade practices were repealed and replaced in the Act.

The offences now include hoarding for the purpose of increasing prices (Section 25), profiteering (Section 23) blackmarketing (Section 24) and full line forcing (Section 31).

Both of the new offences need some little explanation. Blackmarketing occurs when a seller sells to another knowing that the buyer does not require the goods for the legitimate purposes of his business and knowing the transaction (or others like it) will cause the ultimate price to the consumer to increase above a fair and reasonable price (whether the price is lawful or not).

Full line forcing means essentially that a seller will not sell to the buyer unless the buyer takes the whole of the seller's line.

With respect to profiteering and the replacement cost argument noted in Christie v. Hastie Bull & Pickering (supra) the Control of Prices Act 1947 provides that in determining whether a price is unreasonably high no account will be taken of the replacement cost (Section 23).

The Position by 1958

Before the Trade Practices Act 1958 was enacted the major control of restrictive trade practices had been through the creation of various statutory offences. It might be convenient at this stage to list those offences. They are:

(1) illegal concession in consideration of exclusive dealing in commodities;

(2) illegal refusing to deal with a person;

(3) conspiracy to create a monopoly;

(4) blackmarketing;

(5) hoarding;

(6) profiteering;

(7) full line forcing;

(8) sales by commercial trusts at unduly profitable prices.

In addition it would appear that two common law offences seemed to have escaped the codification of criminal law in New Zealand in the late nineteenth century. The offences were marketing of goods by treat and the spreading of false rumours with the intent to enhance or decry the price of goods. In 1844 an English Statute preserved these offences (which were common law offences) whilst repealing others. The English Act was adopted by New Zealand by the English Acts Act 1854. This Statute was consolidated by the English Laws Act 1908. It

would appear therefore that Section 9 of the Crimes Act 1961 does not apply. It is also perhaps worth noting that Section 310 of the Crimes Act 1961 by creating an offence to conspire to commit an offence under any other Act may be applicable to prohibited trade practices the commission of which is an offence.

Essentially then until 1958 the control of monopolistic practices was restricted to the criminal prosecution under fairly limited Sections.

Legislative Developments other than the Trade Practices Act 1958 and its Amendments

The Illegal Contracts Act 1970 and in particular Section 8 amends the effect of the common law upon covenants in restraint of trade. Previously as has been observed the court could either find the clause reasonable and hence enforceable or find it unenforceable.

Now the court has three courses of action open for it may either delete the covenant and enforce the so amended contract, or substitute a more reasonable covenant and give effect to the so modified contract or if the modification or deletion of the covenant would so alter the contract bargain as to be unreasonable decline to enforce the contract.

While one can see that some otherwise void restraints of trade

could be properly reduced in their scope and hence would be properly enforceable (e.g. Petroleum Resale Solus Agreements in Petrofina, Esso Petroleum (supra),) the vagueness of the term "reasonable" would suggest that there is a potentially haphazard application for the section.

Trade Practices Act 1958

In September 1971 the Government amended the Trade Practices Act 1958 quite significantly. Because no cases have yet to go to the Commission under the amended Act, it is proposed to deal with the amendments separately.

The Trade Practices Act 1958 was introduced by the Labour Government of the day. It appears from the Hansard record of the Debates concerning the Bill, that both parties were in favour of introducing legislation to curb restrictive trade practices. Certainly several draft bills had been before the previous National Government but none had gotten past Cabinet. Both parties then in speaking to the debate were agreed as to the necessity for the bill to be enacted. What they differed on of course was the methods by which the practices should be curbed.

With respect although it appears that evidence had been mounting of the increase of restrictive trade practices, one of the major

forces in having the bill enacted was the fact that other Commonwealth countries had enacted similar bills. One further thing is clear the Minister Mr Holloway in introducing the bill was concerned that the bill protected the ordinary consumer. It is ~~really~~ arguable if the bill has ever achieved this.

The preamble to the Act reads "An Act to make provision with respect to the prevention of trade practices deemed contrary to the public interest." This preamble does reflect in some part the nature of the Act for the Act does deem certain matters contrary to the public interest and thus this Act really is the first attempt to control trade practices with any teeth.

This Act applies to trade practices in respect of both goods and services (Section 2 (c) and Section 39 Trade Practices Act 1958).

An ad hoc tribunal the Trade Practices Commission was created with as its functions:-

(a) To make enquiry as to whether trade practices were in the public interest or not;

(b) The power to order the discontinuance, modification, or prohibition of any trade practice which it found were contrary to the public interest;

(c) The power to take any other steps to control practices which are or might be contrary to the public interest; and

(d) The power to recommend price control and the power to exercise the powers of the Price Tribunal.

The Commission as it was originally constituted was the same body as the Price Tribunal which unhappy situation is now remedied.

It has been observed that the National Party were not great supporters of the original Bill and therefore it is not surprising that in 1961 when returned to power, the Government immediately repealed the original provisions providing for the registration of all agreements relating to trade practices. The original Act was intended no doubt to facilitate the discovery of trade practices, for it is conceded even now that many if not all trade practices are made at social functions or while playing golf and so on. Such agreements are ~~however~~ moreover seldom put in writing and the fact of the agreements are usually difficult if not impossible to prove. Nevertheless a number of agreements were registered and this no doubt assisted the Examiner to get to agreements.

While it is not proposed to discuss at length the procedure under the Act, a brief discussion of the procedure is necessary.

The Examiner of Trade Practices, an officer in the Department of Industries and Commerce, acts like a policeman of trade practices. His function was to investigate trade practices and to if necessary prosecute such practices as he found to be in his opinion contrary to the public interest.

The Examiner may examine practices on his own notion or upon receiving a complaint (Section 16). Although a number of complaints have been received over the years it appears that in the majority of cases the Examiner either finds the complaint unjustified or is already investigating the practice (New Zealand Banker's Association (unreported 1971)).

The Examiner had wide powers to investigate trade practices including the power to require the production of documents and the power to require answers to allegations from persons involved in alleged trade practices.

In 1965 Section 16 A of the Act was added, which provided that where the Examiner was of the opinion that a trade practice was contrary to the public interest he should give notice to the parties of the finding and the reasons for it. The parties are required to answer the allegations and state if they will continue the practice notwithstanding the Examiner's view, or abandon the practice or alter the practice. If the Examiner considers that the parties may by agreement reach compromise he

is empowered to attempt a conciliation.

Section 17 of the Act provides that the Examiner if he thinks an order ought to be made by the Trade Practices Commission should make a report to the Commission requesting an enquiry. It is important to note that the Examiner had to be satisfied that both a trade practice existed and that practice was contrary to the public interest before he could obtain an enquiry.

Section 18 of the Act provided the limits of the jurisdiction for the Commission's enquiry. It first had to be satisfied that practice alleged by the Examiner existed or that a practice substantially similar to that practice alleged. Then it had to be satisfied that the practice fell into one of the categories listed in Section 19 (2) of the Act and then to determine whether the trade practice was contrary to public interest in accordance with Section 20 of the Act. Section 18 gives wide powers to the Commission to accept evidence which would not otherwise be admissible and so forth.

There was provision under the Act as originally enacted for an Appeal Authority (Part V of the Act). The Appeal Authority could hear the whole matter completely afresh.

Until 1965 the two most important Sections in the Act were

Sections 19 and 20.

The Trade Practices Commission, could not make any order unless the matters convassed in Section 19 (2) were established and it was satisfied of the public interest matters laid down in Section 20.

Section 19 (2) Trade Practices Act 1958

Although the Tribunal has jurisdiction to make certain orders with respect to Trade Practices it cannot make any order unless it first establishes that the trade practice falls within one of the numerous categories listed in Section 19 (2). It is perhaps pertinent to note that in most of the cases which got before the Commission the existence of a trade practice has not usually been contested by the parties to it. It is endeavoured below to break up the various categories into the several relevant classes.

I. Restricted Dealings

Section 19 (2) concerns the agreement or arrangement reached by wholesalers (or retailers) to restrict the class or number of buyers to whom they sell or from whom in the case of retailers, they buy.

In re Masterton Bread Bakers (1963) concerned the situation where bakers had agreed that they would deal only with the retailers

who were at that time their customary clients and that none of the bakers would serve any of their competitor's customers. The report of the Commission deals mainly with the public interest aspect of the limiting of competition between the bakers which might have led to a lowering of standards. The Commission held the agreement not to deal with the competitor's customers was to be discontinued.

II. Restrictions in terms of Agreements

(a) Section 19 (2) (b) concerns an agreement or arrangement between wholesalers to sell at prices or on terms agreed between them or a combination of wholesalers and retailers as to the price and terms of the supply of goods or the provision of services.

The decisions in The Fencing Materials (1959) (unreported) (Fencing Materials /1960/ N.Z.L.R. 1121 and Fencing Materials (1960 unreported) all concern the same facts namely the agreement between certain only of the wholesalers and the retailers who were members of the Wellington Fencing Materials Association which once price control was lifted from wire netting published a price list concerning the prices of wire netting which both retailers and wholesalers were intended to comply with. The Commission found a practice within the meaning of Section 19 (2) (b).

It was conceded by Counsel for the conference in Passenger Conference (1963 unreported and on appeal in 1963 also unreported) that the practice there was a Section 19 (2) (b) practice.

That case concerned the Passenger Conferences attempts to ensure that agents accredited to the Conference did not deal with a competitor Chandris Lines. The Agreement between the agents provided that if the agency sought to act for any other Line the Conference could completely review the appointment. The Conference also provided for the setting of all fares on the ships of its members, but It was essentially the agreement to bind the agents so that brought the agreement within Section 19 (2) (b).

(b) Section 19 (2) (c) concerns an arrangement or agreement between selling parties (whether goods or services were sold) to sell only at the prices and on the terms agreed. The New Zealand Banker's Association case (1970) (unreported) dealt with the decision by the five trading banks in New Zealand to fix in collusion the charges payable for the operation of current accounts. It was accepted by the banks that the practice was one falling under Section 19 (2) (c).

The Commission has also considered situations where the price for goods has been fixed by agreement.

In re Wellington Aerated Waters (1959) unreported. In that case the soft drink manufacturers combined as to the price to be charged for all of their wares.

In the cases of In re Registered Hairdressers (1959) unreported and on appeal /1961/ N.Z.L.R. 161, In re Master Grocers (1960 unreported and on appeal /1961/ N.Z.L.R. 177) the Commission considered the situation where price lists had been prepared and submitted to all members, which all were expected to follow although not bound to do so. In both cases Section 19 (2) (c) applied.

In re Distribution of Electric Lamps (1961 unreported) concerned the agreement between distributors of New Zealand made light globes (all those being produced being the same) as to the selling price and also the price terms upon which the retailers obtained the globes.

In re Masterton Bread Bakers (1963) (unreported) concerned inter alia the agreement by bread bakers not to undercut each other. It was found there by the Commission that the margin allowed by price control virtually meant that real trade practice could exist becauseof the already low profit allowed in respect of bread.

(c) Section 19 (2) (d) - agreement or arrangement by wholesalers to sell to retailers provided the retailers agreed to sell at the wholesalers stipulated price or on the wholesalers conditions of sale.

Under this paragraph of the Act the Commission considered the case of In re The Marketing of Television Receivers & Home Appliances (1966) (unreported). Basically agreements had been reached between the manufacturers of home appliances and the retailers of such. The agreements provided inter alia that profit margins (mark up) was to be preserved, that the manufacturers would sell only through recognised/afiliated retailers. Interestingly enough although the Commission stated it had no difficulty in finding a trade practice in accordance with Section 19 (2) (d) (inter alia) the agreement here was reached at the insistence of retailers.

(d) Section 19 (2) (e) - Agreements or arrangements between wholesalers and retailers that the specified price will be charged by the retailers and/or the conditions of sale stipulated by the wholesaler will be applied.

The last mentioned case (i.e. Home Appliances) concerned just such a situation.

III. Granting of Rebates

Section 19 (2) (f) provides for agreements or arrangements between sellers or between sellers and buyers to grant rebates or discounts with reference to the quantity or value bought by the buyer.

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