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Abstract
It is the purpose of this article to discuss the Trade Practices Commission's 'study' powers, and their limitations, in the specific context of the newspaper distribution industry and the real estate industry and not in the more general context of the Commission's mooted study into 'the professions' or in the context of even more abstract matters.

The issue to be examined is whether the Commission's 'studies' into practices in the newsagents and the real estate industry involves 'research in relation to matters affecting consumers'.

Keywords
Trade Practices Act, consumer interests, Trade Practices Commission

THE TRADE PRACTICES COMMISSION'S POWER TO 'STUDY' BUSINESS PRACTICES: CAN THE COMMISSION ROVE AT WILL?

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Introductory Observations

A largely dormant power in the *Trade Practices Act* has, under the Baxt Chairmanship of the Trade Practices Commission, been awakened. This largely dormant power is section 28(1) of the *Trade Practices Act* which permits the Trade Practices Commission, in addition to any other functions conferred upon it by the Act, to conduct research in relation to matters affecting the interests of consumers[1]:

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* **This Paper is written as at 31 January 1990. The writer acts for both the Australian Newsagents Federation and the Real Estate Institute of Australia. Much of the material in this Paper has become available because of the writer's involvement with these industries in relation to the 'Studies' being made by the Trade Practices Commission. Both the Federation and the Institute have consented to this Paper being written and the disclosure on such non-public material as is cited in it. However, the views expressed are those of the writer and are not necessarily those of either the Federation or the Institute.**

1 Section 28(1) of the *Trade Practices Act* reads:

(1) In addition to any other functions conferred on the Commission by this Act, the Commission has the following functions:

(a) make available to persons engaged in trade or commerce and other interested persons general information for their guidance with respect to the carrying out of the functions, or the exercise of the powers, of the Commission under (the) Act;

(b) examine critically, and report to the Minister on, the laws in force in Australia relating to the protection of consumers in respect of matters referred to the Commission by the Minister, being matters with respect to which Parliament has power to make laws;

(c) conduct research in relation to matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws;

(d) make available to the public general information in relation to matters affecting the interests of consumers, being matters with respect to which Parliament has power to make laws; and

(e) make known for the guidance of consumers the rights and obligations of persons under provisions of laws in force in Australia that are designed to protect the interests of consumers.

For present purposes, the relevant subsection is s 28(1)(c) as it is this subsection upon which the Commission justifies its 'study' of newsagents, real estate agents and the professions [see n 18]. No other subsection of s 28 seems to confer a wider power in relation to the Commission's study than s 28(1)(c) [See n 8].

Until recent times, the section 28 powers of the Trade Practices Commission have been exercised in a reasonably non-controversial way. The Commission has issued guidelines as to its own functions and powers—presumably under section 28(1)(a). It has issued a number of publications as to the rights of consumers—presumably under section 28(1)(e). It has made reports to the Minister when asked to do so—presumably under section 28(1)(b)[2]. Recently, however, the Commission has instigated, or plans to instigate, 'studies' into the distribution of newspapers, the real estate industry and 'the professions'. Probably further 'studies' are to follow in the future so it is of present fundamental importance to access the legal power of the Commission to conduct them.

The above Commission studies are not Ministerially directed. They are Commission initiated. Ministerially directed studies, even if not within section 28 power, are unlikely to be challenged because the Minister can easily have such a study conducted by his own department or by outside consultants without the constraints of section 28 being relevant. There is a history of appointing outside specialist committees to investigate the *Trade Practices Act* when significant Part IV aspects have been involved.[3] Commission initiated studies, however, are a different matter. The power of the Commission to conduct such studies stems only from section 28. In particular, the Commission relies upon section 28(1)(c)—the power 'to conduct research in relation to matters affecting the interests of consumers . . .' as the basis upon which it has power to conduct its 'studies'.

2 The text of s 28(1) is set out in n 1. If the writer's analysis in this article is correct, it may well be that some of the Reports of the Commission exceed the bounds of s 28(1)(b). As will be apparent, the writer argues that the Commission has power under s 28 only in respect of matters falling under Part V of the *Trade Practices Act*. Thus, for example, the writer would conclude that the Commission's Report on *Price Discrimination in the Petroleum Retailing Industry* (October 1979—May 1980) was outside the statutory grant of power to the Commission (as it concerned only matters within Part IV of the Act) even though referred to the Commission by the then responsible Minister. The question of the Commission's power to conduct its petrol price discrimination enquiry appears not to have been considered at the time. The position in relation to Ministerially initiated enquiries under s 28 does not have the same applicable policy principles as enquiries initiated by the Commission itself. Clearly (as is set out later in this article) the Minister has wide powers to initiate enquiries. If the Trade Practices Commission does not conduct these enquiries, the Minister can obviously have such enquiries made by his department or by a contracted outside entity. This position does not apply in relation to Commission initiated enquiries where s 28 is the sole statutory source of enquiry power. If the Commission has no s 28 enquiry power, presumably the Commission's activities can be injuncted. In the case of a ministerially initiated enquiry, however, even a successful injunction action arguing the Commission had no power may be a somewhat hollow victory. All that such a successful injunction case would achieve would be that the Minister would divert the mechanism of his enquiry into other instrumentalities, which instrumentalities could conduct the enquiry unmolested by the restraints of s 28 of the *Trade Practices Act*. See also the following text of this paper under the heading: 'THE POWER OF THE EXECUTIVE ARM OF GOVERNMENT TO ENQUIRE INTO SOCIAL, ECONOMIC AND BUSINESS MATTERS'.

3 See generally n 2. The text of s 28(1) is set out at n 1 Outside committees appointed to investigate the ramifications of the *Trade Practices Act* where Part IV matters have been involved include the highly important studies by *The Swanson Committee* (1976) and *The Blunt Committee* (1979).

All the studies announced to date involve restrictive trade practices under Part IV of the *Trade Practices Act*. The 'Consumer Protection' provisions of the *Trade Practices Act* are contained in Part V of the Act. The Trade Practices Commission takes the view, however, that section 28(1) is to be widely construed to include restrictive trade practices matters in Part IV of the Act within the term 'matters affecting the interests of consumers'. It believes that the phrase 'matters affecting the interests of consumers' is not limited to Part V consumer protection matters. As Professor Baxt, Chairman of the Commission, put it in a speech in November 1989 in relation to the Commission's proposed 'Study of the Professions', he having noted that the relevant provisions of section 28 are limited to matters affecting the interests of consumers:

> It is important to note that the Courts have consistently read s 52 of the Act very broadly and extended it beyond ... a narrow rendition. Most recently the High Court in the Queensland Wire case has used the word 'consumers' in a wide sense in giving the misuse of market power provision (s 46) much more to do than had previously been thought to be the case. We argue that the scope of the study will be of benefit to all of us as consumers in the broader sense.[4].

It is the purpose of this article to discuss the Commissions 'study' powers, and their limitations, in the specific context of the newspaper distribution industry and the real estate industry and not in the more general context of the Commission's mooted study into 'the professions' or in the context of even more abstract matters. This is done for four reasons, these being:

(i) Each industry has a long history of authorisation grants by the Trade Practices Commission[5]. Authorisations can be

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4 *'The TPC and 'Self Regulation' by the Professions'*—The John V. Ratcliffe address delivered 28 November 1989. See also the views expressed by Professor Baxt in n 18.

5 As regards Authorisations granted by the Trade Practices Commission and relating to Newsagency Distribution Arrangements see *John Fairfax & Ors—Application for Authorisation of Newspaper & Magazine Distribution in N.S.W & ACT* (1980) ATPR (Com) 16416; *The Herald and Weekly Times* (1982 7 ATPR (Com) 50-035; *The Mercury Newsagency System* (1984) ATPR (Com) 50-072; *The Examiner Newspaper* (1985) ATPR (Com) 50-099; *The Queensland Newsagency System* (1985) ATPR 50-097; *The Western Australian Newspaper Limited* (1986) ATPR (Com) 50-108; *Advertiser Newspapers Limited* (1988) ATPR (Com) 50-071; (1988) ATPR (Com) 50-083. [In some cases, the above references are to Draft Decisions, the Final Decision not being reported when it is in accordance with the draft]. For a general discussion of the decisions see W.J.Pengilley: *'Jumping through the Commission Hoops again. Should the Newsagents Leap? If so, how high?'* [A speech given to the Australian Newsagents Federation Annual National Conference in Melbourne on 29 May 1989—Republished by the Australian Newsagents' Federation].
As regards Authorisation decisions relating to the real estate industry, see *David Syme on behalf of Australian Newspapers Council* (and three other decisions re Commission rates (1976) ATPR (Com) 16510-16511; *Real Estate Institute of N.S.W* 1980 ATPR (Com) 52,040; 1980 ATPR (Com) 52,210; *Estate Agents Co-Operative* 1980 ATPR (Com) 50,092; *Estate Agents Co-Operative [Multilist]* 1980 ATPR (Com) 55,002; *Estate Agents Co-Operative* (1981) ATPR (Com) 50-018; *Real Estate Institute of Australia* (1981) ATPR (Com) 50-013; *Real Estate Institute and Stock Institute of Victoria* (1984) ATPR (Com) 50-082; *Real Estate Institute of Australia* (1984) ATPR (Com) 50-066; *Real Estate Institute of Queensland* (1983) ATPR (Com) 50-057; *Real Estate Institute of the ACT* (1985) ATPR (Com) 50-087; (1986) ATPR (Com) 50-120; *Real Estate Institute of Tasmania* (1987) ATPR (Com) 50-062; *The Real Estate Institute of South Australia* (1988) ATPR (Com) 50-075; *Real Estate Institute of the Northern Territory* (1989) ATPR (Com) 50-086.

granted on an evaluation by the Commission that a restrictive practice delivers public benefit. The Commission's 'study' power in light of this history, raises policy issues not present in the case of more generalised enquiries.

(ii) Such an examination can concentrate upon specifics. The newspapers distribution 'study' is, at the time of writing, well under way.[6] More general studies (e.g. into the professions) appear presently to be but a gleam (albeit a strong one) in the Commission's eyes.

(iii) Most of the argument and counter argument put to date in relation to the Commission's 'study' powers has been in the context of the newspapers and real estate industries. There thus appears to be merit in restricting the discussion to these specific industries.

(iv) The writer has had much more involvement with the newspaper distribution and real estate industries in the context of the Commission's 'study' powers than he has had with the mooted more general inquiry into the 'professions'.[7]

The issue to be examined in this article is whether the Commission's 'studies' into practices in the newsagents and the real estate industry involves 'research in relation to matters affecting consumers'. The answer to this question necessarily leads to the conclusion that the Commission is, or is not, empowered to conduct its 'studies' under section 28(1)(c). It appears that section 28(1)(c) is the subsection of section 28(1) giving the widest 'study' power to the Commission. If the 'study' is not empowered under section 28(1)(c), it seems difficult to see how it can be empowered under any other subsection of section 28[8].

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6 The Commission's current timetable is to issue a Position Paper relation to the Newspaper Distribution Industry early in 1990.

7 The writer acts for both the Australian Newsagents Federation and the Real Estate Institute of Australia. As such, he has been involved in negotiations with the Trade Practices Commission in relation to the Commission's 'Studies' on behalf of each body. Much of the research for this Article has been made less burdensome because of this involvement. The writer is aware of the various arguments and counter-arguments put in these two industries. He cannot claim to be aware of the arguments put in more general areas—for example, in relation to the Commission's proposed 'Study' of the professions. No doubt there is, however, a considerable similarity between arguments put in more general areas and those put in the specific case of newsagents and real estate agents.

8 The text of s 28(1) is set out in n 1. The Commission's 'Studies' would appear not to be empowered under s 28(1)(a) because this section relates to 'general information' for 'guidance' with respect to the 'functions' or 'powers' of the Commission. Section 28(1)(b) does not empower the 'Study' because there has been no reference by the Minister to the Commission. Section 28(1)(d) empowers making available only 'general information'. Even if this subsection can be used to justify the 'Study', the same fundamental point is raised in this subsection as is raised in s 28(1)(c) i.e. the research must involve 'matters affecting the interests of consumers'. Section 28(1)(e) would appear not to justify the study because this section covers only 'guidance'. Again, even if this subsection can justify the study, the same fundamental point is raised in it. As in s 28(1)(c) i.e. the research must involve laws that are designed 'to protect the interests of consumers'. The Commission's powers appear to be at their widest under s 28(1)(c) because the nature of the research which the Commission may conduct is not limited save that it must be 'in relation to matters affecting the interests of consumers'. Note also the views of the Chairman of the Trade Practices Commission as expressed to the Real Estate Institute of Australia (n 18 below).

How did the Newsagents and Real Estate 'Studies' come to be?

As stated, both the Newsagents and Real Estate Industry have had their various restrictive practices examined, largely on a State by State basis, throughout Australia. These examinations have been made in the context of Authorization applications and have lasted about a decade in the case of each industry. All the current restrictive practices engaged in by either industry, with one exception, are currently authorized by the Trade Practices Commission as delivering public benefit.[9]

(i) Newsagents

The restrictive practices of newsagents have involved various forms of local territorial monopoly grants to newsagents on the condition that such newsagents engage in home delivery at a price per newspaper not exceeding the maximum price set by the publisher of the newspaper in question. The arrangements, largely for historical reasons, differ State by State and it is not here useful to go into these variations in detail. In each State, there are 'peripheral' restraints of various kinds. In Victoria, for example, newsagencies have to be sold according to an agreed price formula. In New South Wales, home delivery is conducted by retail newsagencies whereas in South Australia it is the general custom for the home delivery territorial monopoly to be held by a person other than a retail newsagent. In all States, with the exception of Tasmania, the arrangement is one to which the major publishers are parties. In Tasmania, the monopoly is one granted by each publisher without agreement between them. There is no restraint on publishers supplying other outlets not identifiable as a newsagency e.g. supermarkets.

Fundamentally, the public benefit found in all cases was that a territorial monopoly was justified because it enabled cheap home delivery of newspapers. This 'trade off' was first justified in New South Wales and then in all other States.[10] In short, the grounds for justification were:

(i) the arrangements provided a wide range of newspapers and magazines at low cost through a prompt and efficient home delivery service;

(ii) the exclusive territorial arrangements were important in the maintaining of widespread home delivery;

(iii) the provisions for fixing of maximum delivery fees were important to continued home delivery because these prevented home delivery obligations being avoided by an excessive delivery charge being imposed and ensured that low cost home delivery was available to all;

(iv) the restriction that there be only one specialist accredited newsagent in each territory provided a secure financial base, in return for which the newsagent ensured provision

9 See references to decisions at n 5 above. The exception is in relation to real estate practices in Western Australia. Application for Authorization of such practices was withdrawn.

10 See Newsagency Determinations cited at n 5.

to all within his territory of a prompt low cost home delivery service; and

(v) the specialist newsagency system provided by the arrangement was more likely to ensure convenient availability to the public of a wider range of publications than would otherwise be the case—particularly in outlying areas or other low population areas.

The Commission granted unconditional Authorization to the newsagency practices in New South Wales (1980); Victoria (1982); Tasmania (1984 and 1985); Queensland (1985) and Western Australia (1986).[11] It did this on the basis that the public benefit involved exceed any anti-competitive detriment notwithstanding its view that the anti-competitive detriment was 'substantial'. It also reached the above conclusion even though 'there (was) difficulty in balancing (the) qualitative nature (of the public benefit) against the detriment which is of a more usual economic nature'.[12]

In South Australia (1988) [13], which was the last application considered by the Commission everything in other States having been determined, the Commission changed its prior line. It granted Authorization for a period of five years and not unconditionally as previously. In addition, the Commission said as follows:

> As to the national picture, the Commission intends to conduct a study into the various newsagency distribution systems in Australia commencing in early 1989. This study, triggered by significant changes in the markets, will focus on the operation of these systems, past and present, particularly in terms of public benefits attainable in markets which continue to experience significant changes. This study is to be carried out under the provisions of s 28 of the Act.

It is to be noted that the Commission does not allege that its powers stem other than from section 28 of the Act. At no time, has the Commission argued any other provision of the *Trade Practices Act* as empowering its study.[14]

(ii) Real Estate Agents

The history of the Real Estate Industry has been akin to that of the Newsagents. A wide spectrum of arrangements has been looked at

11 See Newsagency Determinations cited at n 5.

12 See *John Fairfax & Ors—Application for Authorization of Newspaper and Magazine Distribution in NSW and the ACT* (1980) ATPR (Com) 16416.

13 *Advertiser Newspaper Limited* (1988) ATPR (Com) 50-083.

14 Another possible head of power might be s 91(4) of the *Trade Practices Act* which gives the Commission power to revoke a prior Authorization if, amongst other things, there has been 'a material change of circumstances'. The Commission has never alleged any such material change. Indeed, it has been at great pains to point out that its study has nothing to do with s 91(4). Thus the Commission has stated that its study 'is not an exercise under the Authorization process' and that it 'cannot have any legal effect on Authorizations currently in force' [see Commission Document entitled '*Trade Practices Study of Distribution of Newspapers and Magazines*' accompanying Commission Press Release of 10 April 1989]. A premise to the operation of s 91(4) is that such section directly affects prior Authorizations. In no correspondence to date has the Commission sought to justify its study other than under s 28(1) of the *Trade Practices Act*. As regards the statutory justification for the Commission's real estate enquiry, s 28(1) is also relied upon. (See n 17 and related text and n 18 hereunder.)

including codes of conduct, conjunctional agency arrangements, 'multi-list' arrangements and pricing practices.

It is not here relevant to detail these. What is relevant is to note that all currently operating restrictive practices in the Real Estate Industry, with one exception, have received Commission Authorization as delivering public benefit which exceeds anti-competitive detriment.[15]

The various Authorization applications in the Real Estate Industry were decided by the Trade Practices Commission in relation to activities in New South Wales (1980 and 1981), Victoria (1984), Queensland (1983 and 1984), The Australian Capital Territory (1985), Tasmania (1987) and South Australia (1988). All of the above applications resulted in unconditional Authorizations of the practices involved.[16]

The Northern Territory real estate arrangements, like the South Australian newsagency arrangements, were the last to be considered (in 1989) by the Commission, all all other applications to the Commission having been determined. As in the case of the South Australian newsagents, the Commission changed its line. It did not, as it had previously done, authorize the arrangements unconditionally. Authorization was only for a three year period. Further, the Commission stated in its decision:

> There are compelling reasons for the Commission now considering the real estate industry generally in some depth . . . (the Commission then set out two reasons—deregulation and the fact that commission charges, being a percentage of sale price, have become more significant in 'the current climate of rapidly rising real estate prices'. The Commission then continued) . . . These (and other) factors have influenced the Commission's decision to review the Institute's authorization in three years in the context of a more general study which it is undertaking . . . It should be emphasised that the Commission is not undertaking this study with any preconceived views whatsoever. It has some opinions arising out of its own experience thus far but because of the changing nature of the industry and attitudes, all matters will be in the melting pot. There will be full opportunity for views to be put and for discussions to be held with those in the industry, Government and other interested parties. This study is to be carried out under s 28 of the Act.[17]

15 The Commission Real Estate decisions cited at n 5. The exception relates to real estate practices in Western Australia—as to which see n 9.

16 *See Real Estate Decisions* at n 5.

17 *Real Estate Institute of the Northern Territory* (1989) ATPR Com ¶50-086, Paras 10.2; 10.3; 10.13.

As in the case of the newsagents, the Commission has not sought to justify its study on any basis other than section 28.[18]

The Power of the Executive Arm of Government to Enquire into Social, Economic and Business Matters

It is not the purpose of this article to elaborate in detail upon the power of the executive arm of Government to make enquiries concerning matters of public interest. Suffice it to note that this power has traditionally been widely interpreted. In *Clough* v *Leahy*[19] the High Court of Australia was confronted with the question of whether it was lawful for the executive of the Government of New South Wales to appoint a Royal Commission to make 'a diligent and full inquiry into the formation, constitution and working of' a certain industrial union. The High Court held that Royal Commissions are lawful and the courts have no authority to restrain such commissions provided they do not invade private rights or interfere with the course of justice. The High Court overruled the Supreme Court of New South Wales [20] which had held that the dispute had already been adjudicated upon three times, that the Arbitration Court had power to do justice between the parties and thus there was no public interest in the establishment of a Royal Commission.

Chief Justice Griffith (with whom Justices Barton and O'Connor agreed) said in his judgment that:

> If I make impertinent enquiries into my neighbours' private affairs, I may bring down upon myself the censure of right-thinking people. If the Crown makes an inquiry into the affairs of private persons, the advisers of the Crown may incur the censure of public opinion. They may also incur the censure of Parliament. Any and every person is equally free to form an opinion as to the propriety of the inquiry, but it would be a strange thing if Courts of Justice were to assert the right to inquire into the propriety of executive action—whether it was a thing which, according to the rules of action commonly received in the civilization in which we live, ought to be done. That is a question which a Court of Justice has no right to inquire into. It is for a Court of Justice to enquire whether the law has been transgressed.[21]

The learned Chief Justice then asked the question: 'What is there unlawful in the issuing of the Commission of Inquiry?' It was not

18 As regards the powers under s 91(4) see n 14 above. In the case of the Real Estate Industry, the Commission has clearly left its options open and has found no 'material change of circumstances' [see n 17 and related text]. The point is more directly stated in a letter from the Chairman of the Trade Practices Commission, Professor Bob Baxt, to the President of the Real Estate Institute of Australia Limited dated 12 May 1989. In this letter, the Chairman puts the Commission's position in the following terms:

> The Commission relies upon its powers under s 28 of the *Trade Practices Act* to carry out its study. It believes in particular that s 28(1)(c) gives it a broad function in matters 'affecting the interests of consumers'. In the Commission's view, this provision ought not to be read narrowly to limit it only to matters within Part V of the *Trade Practices Act* or to matters that necessarily disadvantage consumers.

19 (1905) 2 CLR 139.

20 (1904) 4 SR (NSW) 401.

21 n [19] at p 157.

submitted in argument that there was anything unlawful in commissioning the inquiry itself. Thus, the inquiry was not illegal and could not be prevented. The Learned Chief Justice concluded that:

> It would be an unfortunate thing if a Court of Justice should undertake to review the propriety of the action of either the Executive or the legislature. In the case of the legislature, our duty is to ascertain what it has done and give effect to it; and with respect to the Executive, the only duty of the Court is to see that its acts are not unlawful and, if they are, to restrain or punish its agents.[22]

The wide powers of executive inquiry were confirmed by Mr Justice O'Connor in *Huddart Parker & Co. Pty Ltd* v *Moorehead*[23]. There his Honour held that:

> The power of inquiry for the purpose of administration and, under Parliamentary Government, for the purpose of informing the legislature, is an essential part of the equipment of all executive authority. In every grant of power by the Constitution to the Parliament of the Commonwealth there is necessarily included the right of enacting such provisions as may be necessary to render the power effective.[24]

Given the above, clearly either the legislature or the executive would have the power to inquire departmentally, to appoint a Royal Commission to inquire or enact specific legislation to inquire into the activities of either newsagents or real estate agents. If the Minister were to refer a matter to the Trade Practices Commission for inquiry and the commission was not empowered by section 28(1)(b) to inquire into the matter, any injunctive relief claiming the Commission was without power would be something of a hollow victory in light of the alternative inquiry mechanisms available to the Minister[25].

Any leap which says that an executive inquiry is justifiable and that, therefore, a self-initiated inquiry by the Trade Practices Commission must, for the same reason, be justifiable involves, however, significant illogicalities. These illogicalities are:

(a) *That the Trade Practices Commission is akin to the executive or legislature in law.* This is clearly not so. The Trade Practices Commission is set up under statute and has only such powers as are granted by statute. The Trade Practices Commission is a body corporate and has certain functions pursuant to the *Trade Practices Act* of adjudication and prosecution. Its inquiry or study functions are specifically provided in section 28 of the Act. Section 28 must be regarded as drawing the outer boundaries within which the Commission may act in

22 n [19] at p 163.

23 (1909) 8 CLR 330.

24 n [23] at p 377.

25 It can be argued that the Commission's power to undertake an inquiry pursuant to Ministerial reference under s 28(1)(b) is limited in that this section requires the subject matter to relate to 'the protection of consumers'. See also n 2 above.

relation to inquiries and 'studies'. Neither the executive nor the legislature have such detailed statutory restraints.[26]

(b) *That the Trade Practices Commission is subject to the same sanctions as the executive or legislature.* This is clearly not the case. Within the confines of its statutory powers, the *Trade Practices Act* consciously adopts a policy of insulating the Commission from many of the pressures which may be applied to politicians. Commissioners have specific tenure. They are not subject to election or re-election. Except in certain specific areas, the Commission is not subject to ministerial direction. Indeed, the independence of the members of the commission when the *Trade Practices Act* came into force in 1974 (at the same time as the enactment of section 28), was secured by a provision that:

> . . . a member of the Commission has, in the performance of his duties as a member, the same protection and immunity as a Justice of the High Court.[27]

(c) *That the Trade Practices Commission is an alter ego of the executive or legislature.* From what is said in (b) above, it can hardly be argued that the Commission can be seen as some *alter ego* of the executive or the legislature. The Commission has power to act of its own motion and cannot, except as is specifically provided in certain areas, be ministerially directed. It was anticipated, at the time of enactment of the legislation, that any power of ministerial direction would itself be used only sparingly.[28]If there were any analogy with Ministerial responsibility, it would surely

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26 It has been put to the writer that the Commission has study powers in excess of those stated in s 28 of the Act because s 28, in its introductory words, states that the powers conferred by the section are 'In addition to any other functions conferred on the Commission by (the) Act'. However, the view put cannot be correct. One looks in vain in the *Trade Practices Act* for any other powers of inquiry or 'study'. The introductory words to s 28 must be read as meaning 'in addition to any enforcement or adjudicative powers conferred on the Commission by (the) Act'. Such generality of wording cannot give a *carte blanche* power to the Commission, being, as it is, a creation of statute.

27 *Trade Practices Act* 1974 s 158(1). This section was repealed in 1977.

28 Section 29 gives the Minister power to direct the Commission as to its functions. Presumably s 29 could be utilised to prevent the Commission undertaking its studies. However, this is not to say that the Commission is the *alter ego* of the executive. Just because the executive has power to prevent something, it does not follow that what the Commission is doing, of its own initiative, can be said to be in accordance with the wishes of the executive. Further, whilst the executive may not be particularly happy that the Commission is doing certain things, it may be reluctant to interfere because this could be seen as compromising the 'independence' of the Commission. Because of this, the Commission can well, on occasions, act in a manner which is not in accordance with executive wishes and will not be constrained in so acting. It was anticipated, at the time of enactment of the legislation, that any s 29 'Directions Power' would be sparingly exercised. In his Second Reading Speech on this subject, the then Attorney-General, Senator Murphy stated that: 'The Attorney-General is to have a limited power to give directions to the Commission. Comments that have been made on this provision have tended to overlook the *very limited nature* of this power . . . the scope of the Commission's functions and the discretion vested in it are such that a *reserve* power of this kind is desirable' [*Second Reading Speech to Trade Practices Bill 1974 (Hansard—Senate 30 July 1974—Present writer's emphasis)*].

be a pre-requisite to such responsibility that the Minister direct the Commission to instigate any relevant inquiry. There is provision for this in section 28(1)(b) [but this subsection provides that the Minister may require only a report and that such report can be only in relation to laws in effect in Australia 'relating to the protection of consumers']. In any event the Minister has not requested any report in relation to the real estate or newsagency industries, nor any report in relation to the activities of the professions. There can be no argument that the commission is an executive *alter ego* in relation to these matters.

(d) *That the use which can be made of any Commission 'study' is the same as that which can be made of a ministerially initiated study.* This is not so. A ministerially initiated study will usually be for purposes of ascertaining facts to enact new laws or carry out some executive responsibility such as the allocation of funds to certain ends. In the case of the enactment of new laws, there must be publicity and parliamentary debate.

The Trade Practices Commission is in quite a different position to the legislature or the executive. It can use any study for the purpose of finding 'a material change of circumstances' to revoke a prior Authorization.[29] In this regard, it is specifically provided by the *Trade Practices Act* that the Minister has no powers of direction to the Commission.[30] The Commission is totally independent in all respects. There can be no argument that the Commission is akin to the executive in this area.

In short, for the above reasons, and possibly others as well, it cannot be argued that the Commission has powers of inquiry akin to executive powers. The Commission's 'study' powers have to be found within section 28 of the Act.

29 *Trade Practices Act* s 91(4). In the case of Newsagents and Real Estate Agents, the Commission states that it has not determined that there have been any material changes of circumstances—see discussion at n 14 and n 18. However, there is no reason why the study could not be used for this purpose and most in the various industries seem to believe that this is the 'hidden agenda' behind the Studies. Especially is this so in the Newsagency Industry. [See WJ Pengilley: *'Jumping through the Commission Hoops again. Should the Newsagents leap? If so, how high?'* A speech given to the Australian Newsagents' Federation Annual National Conference in Melbourne on 29 May 1989—Republished by the Australian Newsagents' Federation.]

30 Under s 29 of the *Trade Practices Act* the Minister can give certain directions to the Commission. However, he is precluded from directing the Commission in relation to its powers under Part VII of the Act in relation to individual cases. Part VII deals, amongst other things, with the grant of, and revocation of, Authorizations exempting restrictive practices from the Act on public benefit grounds. Section 91(4) which permits the Commission to revoke an existing grant of Authorization on the basis that there has been 'a material change of circumstances' is within Part VII of the Act.

The Interpretation of Section 28—The Argument that the Section Permits a 'Study' of Part IV Practices

As far as the writer can gather them, the following arguments are put to conclude that the Trade Practices Commission has the power under section 28 itself to initiate and conduct inquiries in relation to restrictive trade practices [Part IV] matters:

1. That the Commission's powers are merely extensions of the powers of the executive or the legislature to conduct enquiries or undertake 'studies'.
2. That the section 28 power is given 'in addition to other functions' conferred upon the Commission and this indicates a wide power.
3. That the Courts have consistently read section 52 of the *Trade Practices Act*[31] widely and, therefore, that section 28 should be similarly so read.
4. That the High Court has, in its analysis in the *Queensland Wire Industries v BHP case*[32], indicated that Part IV matters are matters affecting the interests of consumers.
5. That the phrase 'matters affecting the interests of consumers' is broad in scope and this means that the power of enquiry under section 28 should be widely interpreted to include Part IV matters.

It is intended to discuss each of these arguments in turn.

1. **The Commission's powers are an extension of the powers of the Executive legislature to conduct enquiries.**

   This argument has been dealt with in the immediately preceding section of this article. The short answer to the argument is that there are highly significant differences between the functions and powers of the Trade Practices Commission and the functions and powers of the executive and/or legislature.

2. **The section 28 power is given 'in addition to other functions' conferred upon the Commission and this indicates a wide power.**

   This argument cannot be persuasive. All that the words 'in addition to other functions' can mean are, in accordance with the actuality of the words used, that the Commission's study or enquiry function is in addition to, and thus not limited by, whatever other powers are granted to the Commission. Neither are the Commission's section 28 powers limited by any constraints in other Commission powers (for example in relation to procedures). If one could find another specific power to conduct studies or enquiries, then clearly section 28 would not limit the Commission under such other power. The Commission could act alternatively to its section 28 powers, or

31 Section 52 of the *Trade Practices Act* is a general prohibition on engaging in trade or commerce 'in conduct that is misleading or deceptive or is likely to mislead or deceive'.

32 *Queensland Wire Industries* v *BHP* (1989) ATPR 40-925.

cumulatively with them, to conduct a study. In fact, there are no provisions other than section 28 which empower the Commission to conduct its 'study'.[33]

3. **That the Courts have consistently read section 52 of the Trade Practices Act widely and, therefore section 28 should be similarly so read.**

This argument is put by Commission Chairman, Professor Bob Baxt[34]. It is a view which has superficial semantic appeal but one which the writer finds unpersuasive. So far as presently relevant, the wide interpretation of section 52 has been to apply it to all persons, not only consumers. This is because the *Trade Practices Act* prohibits in section 52, without limitation as to the person affected, conduct in trade or commerce, which is 'misleading or deceptive or is likely to mislead or deceive'. The courts have refused to read this section down as being applicable only to 'consumers' because there is nothing in the section that so states.

The writer does not comprehend how this analogy can be applied to section 28. Section 28 clearly does have words of limitation. The interpretation to be given to section 28 would appear to require that effect be given to such limiting words, even conceding (as is undoubtedly the case) that a wide interpretation has been given to section 52.

If there were words of limitation in section 52, it would appear to the writer that the courts would give effect to these words. If, therefore, the section were limited to some generic class such as, 'consumers' or 'the public', it would seem undoubted that the courts would not permit section 52 to stray so widely into purely *inter partes* transactions. Undoubtedly the lack of limiting words has resulted in section 52 having an immense effect in 'non-public' and not necessarily 'consumer' fields such as *inter partes* transactions impacting in the areas of contract, tort, defamation, deceit, company law and workers' compensation law[35]. If section 52 of the Australian *Trade Practices Act* had, however, been drafted in the same limited manner as its Canadian counterpart (ironically also contained in section 52), then, no doubt, effect would have been given to such

33 This argument is also canvassed at n 26.

34 Most recently in the *John V Ratcliffe Address* delivered 28 November 1989—see n 4 above and related text.

35 For some articles showing the length to which the law has gone in these fields because its operation is not limited in any way see WJ Pengilley '*Section 52 of the Trade Practices Act: A Plaintiff's New Exocet?*': (1987) 15 Australian Business Law Review 247; PH Clark '*The Hegemony of Misleading or Deceptive Conduct in Contract, Tort and Restitution*' (1989) 5 Aust. Bar Rev 109; The Hon. Mr Justice RS French '*A Lawyers' Guide to Misleading or Deceptive Conduct*' (1989) 63 ALJ 250; The Hon. Mr Justice RS French '*The Law of Torts and Part V of the Trade Practices Act*' [in Finn (Ed)—Essays on Torts (1989)]; The Hon. Mr Justice LJ Priestly: '*Contract—The Burgeoning Maelstrom*' (1988) 4 Aust Bar Rev 202 and (1988) 1 Journal of Contract Law 15.

limitation. Section 52 of the Canadian *Competition Act* is not breached unless there is:

> a representation *to the public* that is false or misleading in a material respect[36].

A wide interpretation of section 52 in Australia has no relevance to the interpretatory principles applicable to section 28. All a wide section 52 interpretation shows is the obvious. This is that if there are no words of limitation in a statute, there is no reason to limit its application. Section 28, however, does have limitations (for present purposes that the 'interests of consumers' must be involved). It is a question of statutory construction as to what the words of limitation mean. Section 28 is not an 'open season section' purely because section 52 may be thought to be so. To assert this is to misconstrue or overlook the fundamental difference in the structure of the two sections.

4. **That the High Court has, in its analysis in *Queensland Wire Industries v BHP*[37] indicated that Part IV matters are matters affecting the interests of consumers.**

Queensland Wire Industries v BHP was a case involving section 46 of the *Trade Practices Act*. This section relates to misuse of market power and is contained within Part IV of the Act. BHP was found by the High Court to have misused its market power by refusing to supply Queensland Wire Industries with Y-bar feedstock, a product which BHP produced and which feedstock Queensland Wire Industries needed to manufacturer Y-bar fencing posts itself in order to compete with the BHP Group at the retail level.

In their joint judgment Chief Justice Mason and Mr Justice Wilson commented that:

> The object of s 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end[38].

None of the other Justices of the High Court [Justices Deane, Dawson and Toohey] made any similar pronouncements.

There is little doubt that the Trade Practices Commission has eagerly seized upon these words. Commission Chairman, Professor Baxt, for example argues that the High Court in *Queensland Wire* gives the Commission power to conduct its studies into the Part IV activities of newsagents, real estate and the professions because 'the scope of the study will be of benefit to all of us as consumers in the broader sense'[39].

Professor Baxt, apparently believes that the words of Chief Justice Mason and Justice Wilson necessarily mean that Part IV matters are 'matters affecting the interests of consumers'. His logic appears to be

36 Writer's emphasis. The citation in the text is to s 52(1)(a) of the Canadian *Competition Act*. Other sections of the Act retain the requirement, not in the Australian legislation, that there be a 'public' element in the conduct involved.

37 n 32.

38 n 32 at p 50,010

39 n 4 and related text. See also the views expressed in n 18.

that, in the words of Mason CJ and Wilson J, Part IV has as its object the protection of the interests of consumers and Part IV 'is predicated on the assumption that competition is a means to that end'.

There are a number of comments which should be made on the comments on Mason CJ and Wilson J in *Queensland Wire* and the relevancy of such comments to the present debate:

(a) *The observations of Mason CJ cannot be true for all of Part IV.*

There are sections within Part IV which clearly are not primarily aimed at protecting the interests of consumers. Section 49 of the Act covering price discrimination, for example, is, fairly clearly, not aimed at the promotion of competition at all[40]. Its paramount purpose is that of protecting small business[41]. Small business interests are not the same as consumer interests and frequently are in marked contrast to them. The host of Trade Practices Commission decisions refusing authorisation to price fixing and price 'recommendation' arrangements promoting the viability of small business entities but considered to be to the detriment of consumers is eloquent testimony to this. Hence, whatever their validity elsewhere, the comments of Mason CJ and Wilson J cannot be true in relation to Part IV as a whole. Section 49 is one section in Part IV which palpably is not directed at protecting the interests of consumers.

(b) *The observations of Mason CJ and Wilson J are not true in relation to section 46.*

Section 46, amongst other things, prohibits a misuse of market power for the purpose of substantially damaging a competitor. Conduct engaged in for this purpose, even by a party with a substantial degree of market power, may well be to the benefit of consumers. Section 46 largely, and perhaps totally, is aimed at protecting smaller market players not at protecting consumers or consumer interests. If there was doubt about

40 It is not possible to detail here the lengthy and controversial history of price discrimination law. The Australian law is based on the United States *Robinson-Patman Act* and has a similar purpose. In speaking on the *Robinson-Patman Act*, noted American economist, F.M Scherer, said that 'There is virtual unanimity among students of the Act that, in clear contrast to other antitrust laws, its motivation was a desire to limit competition not enhance it'. FM Scherer '*Industrial Market Structure and Economic Performance*' (Rand, McNally—Chicago 1970) p 496.

41 The *Swanson Committee Report* of 1976 recommended that s 49 be repealed. In the Committee's view, the section produced price inflexibility to the detriment of the economy as a whole. This recommendation was not accepted when substantial amendments to the Act were made in 1977. The Minister then in charge of the Bill stated that: 'the Government has decided that s 49 should be retained—in the interests of assisting *the competitiveness of small business*' [*Hansard (Senate)* 31 May 1977 p 1708 (Present writer's emphasis)]. These points are also noted in judgment of Sheppard J in *O'Brien Glass v Cool & Sons* [(1983) ATPR 40-376]. Of course, the competitiveness of small business is not necessarily the same thing as, and often will be directly opposed to, the interests of consumers.

this, the 1986 amendments to the legislation make the point quite clear[42].

Section 46 is thus, like section 49, aimed at concepts of 'fairness' in the market place. It is not primarily aimed at the protection of consumer interests though it can perhaps be argued that the 'fairness' prescribed by the section should, indirectly, generally result in the promotion of such interests. This result does not, however, necessarily have to be the case. In specific cases, the result may be quite the opposite. Those who argue against the retention of section 49 argue cogently, in the writer's belief, that consumer interest is not only not promoted by, but suffers detrimentally from the presence of section 49 in the Act. The argument in section 46 terms is not as strong as that in the case of section 49. This does not, however, detract from the point that section 46 is primarily aimed at the protection of small business entities not at the protection of consumer interests.

(c) *There are a number of objectives of competition law which are independent of consumer interests and may well be contrary to such interests.*

Even in the area of horizontal agreements between competitors, the crucible of competition law, there are a variety of purposes served by the law other than that of protecting consumer interests. In the United States, for example, the protection of independence of business decision making is seen as being as important as any other competition objective. The right to make independent decisions is seen as being an economic civil right as important as civil rights in other areas[43]. Sometimes the two have been dramatically equated, as in *Topco*[44], where the antitrust laws were hailed as 'The Magna Carta of free enterprise'.

On the above, and akin logic, arrangements between competitors as to maximum, as well as minimum, resale prices are illegal as being a restriction on an individual's discretion to deal as he will. This result follows regardless of whether or not the consumer interest is protected by the

42 Speaking on the 1986 amendments to s 46 in his *Second Reading Speech*, the Attorney-General stated: '. . . an effective provision controlling misuse of market power is most important to ensure that small business are given a measure of protection from the predatory actions of powerful competitors. Unfortunately, s 46 as previously drafted has proved of quite limited effectiveness in achieving that result . . .' [*Hansard (H of R) 19 March 1986*].

43 *Appalachian Coal* v *US* 288 US 344 (1933); *US* v *Socony Vacuum Oil* 310 US 150 (1940); *US* v *Topco* 405 US 596 (1972); *Keifer Stewart Co* v *Seagram & Sons* 340 US 211 (1951); *Klors Inc* v *Broadway Hale Stores Inc* 359 US 207 (1959).

44 *US* v *Topco* 405 US 596 (1972).

arrangement[45]. Similarly, arrangements have been illegalised, not primarily for their effect on consumer interests but because it is a matter for government, being an elected body, to restrain trade where this is desirable in the public interest and it is not for private non-elected parties to assume this power in the private interest[46].

There is nothing which indicates that the power of freedom to deal and the concept of 'civil rights' is of any lesser order than any other objective of competition law. The situation is that there are a number of different, and probably equally weighted objectives of competition law and each must be recognised. Sometimes these objectives will be in conflict. Sometimes the protection of consumer interests will not be the law's primary rationale.

Conclusions as to Queensland Wire v BHP

Only in the broadest sense, even in the case of horizontal anticompetitive arrangements, can it be said that the protection of consumers is seen as the prime purpose of competition law. At best, the legislature has set certain rules of market conduct. These rules have, generally speaking, related to how competitors must act towards other competitors.

There has perhaps, been some general, but largely unspoken assumption, that the rules as to how competitors will act towards each other will give rise to better business efficiency and that, presumably, the consumer will benefit from this. Only in this very indirect manner can the words of Mason CJ and Wilson J be understood.

The facts are, however, that the legislature has adopted principles which may well cut across consumer interests pressing for recognition. The price discrimination provisions of section 49 must be seen in this light. Protection of the interests of small business is the only rationale for section 49. Given this, it is certainly not possible to read the words of Mason CJ and Wilson J as extending to the whole of Part IV. From

45 For example, the US Supreme Court held in *Kiefer Stewart Co* v *Joseph Seagram and Sons* [340 US 211 (1951)] that:

'The Court of Appeals erred in holding that an agreement among competitors to set maximum resale prices of their products does not violate the *Sherman Act*. For those agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.'

This holding dramatically reverses the 'consumer interest' view of the Seventh Circuit Court of Appeals [182 F.2d.228; 1950-51 Trade Cases 62,627]. The Seventh Circuit Court of Appeals judgment said:

'Bona fide competition results in benefit to the consumer in the form of lower prices. Higher prices are a detriment to the consumer and no aid to the competitive system . . .'

46 So restrictive agreements between competitors may be condemned because the parties constitute:

'In reality an extra-governmental agency which prescribes rules for the regulation and restraint of commerce and provide extra-judicial tribunals for determination and punishment of violations and thus trenches upon the power of the national legislature'. [*Fashion Originations Guild of America* v *Federal Trade Commission* 312 US 457 (1941)].

what is said above, it is doubtful, except in the most broadly stated sense referred to, that their Honour's words truly represent the rationale even of section 46.

It should finally be noted in relation to the observations of Mason CJ and Wilson J that:

— the comments were clearly *obiter dicta* and not necessary to a determination of the case;

— the case could just as easily be determined, and in fact was basically determined, not on any principle of protecting consumer interests but upon the principle of protecting a small competitor, Queensland Wire, and imposing an obligation of 'fair dealing' upon BHP;

— Justices Deane, Dawson and Toohey made no similar remarks in relation to Part IV of the *Trade Practices Act* being for the purpose of protecting the interests of consumers;

— the authority of the comments themselves is weakened somewhat by the fact that shortly after the *Queensland Wire* decision, Mr Justice Wilson left the High Court bench. Of the present High Court Justices, the comments are thus those only of the Chief Justice.

5. **That the phrase 'matters affecting the interests of consumers' is broad in scope and this means that the power of enquiry under section 28 should be widely interpreted to include Part IV matters.**

The first question to be asked as to the meaning of the phrase 'matters affecting the interests of consumers' should not, it is submitted, be directed at what is meant semantically by the words 'matters' or 'affecting'. The first enquiry should be directed at whether the phrase as a whole is limiting or de-limiting. If the phrase is de-limiting, then it must be read in the sense that all matters within the *Trade Practices Act* are matters affecting the interests of consumers. In this event, the Commission would have a total power of enquiry into all matters covered by the Act[47].

If the words are limiting, then the phrase 'matters affecting the interests of consumers' must be read to mean that some matters contained in the *Trade Practices Act* are not matters affecting the interests of consumers.

The Trade Practices Commission view is that the words 'matters affecting the interests of consumers' are delimiting in that all matters under the Act ultimately affect the interests of consumers. However, this is surely a strange reading of these words. If it were the correct interpretation, one is compelled to ask why the legislature has used the words in section 28 which it has.

Why did the legislature, for example, not give the Commission power to conduct research in relation to matters 'affecting the

47 Even on this assumption, the phrase would presumably limit the Commission to the extent that it could not enquire into matters outside the Act even though these may affect the interests of consumers. Matters such as import policy, taxation, government grants and the like would presumably be outside the Commission's study powers even on a delimiting interpretation.

operation of the Act' or matters 'affecting the interests of persons in relation to matters covered by the Act'. Given the general tendency of the parliamentary draftsperson to draft in wide terms, one can understand the phrase 'matters affecting the interests of consumers' only in the context that it is meant to be a limiting phrase.

If the Commission's view is correct, it is difficult to see where the Commission's power or authority to conduct studies would cease. Any boundary would necessarily be almost totally at the discretion of the Commission.

The limiting words in the section necessarily mean, it is suggested, that the ambit of the Commission's study power must be confined within some ascertainable parameter. This parameter should not be one which the Commission can define for itself as it suits it. The issue is then where the boundaries of limitation are to be drawn. It is submitted that, in setting the parameters for such boundaries, the following principles should be considered by the courts:

— The boundary should not be so vague that it cannot be found;

— Alternatively, the boundary should not be one which can be found only with extreme difficulty, possibly after a judicial pre-enquiry as to the effect of a particular practice on the interests of consumers; and

— The boundary should not be one which as a practical matter does not exist, thus allowing the Commission to roam at will treating words of limitation as words of delimitation.

The Argument that Section 28 Permits a Study only of Part V Practices

In the immediately preceding part of this article, the argument that the Commission has all encompassing powers of enquiry was examined in detail. It was suggested in that part that the arguments put for an expansive interpretation of section 28 are not sound. It was also suggested that the observations of two judges out of five in *Queensland Wire* do not support the expanded enquiry power which the Commission ascribes to them or in the alternative, that such comments do not carry the authority which the Commission asserts. It was further suggested in that part, that the words 'affecting the interests of consumers' must have a limiting effect.

It is now appropriate to ascertain what constitutes the relevant limitation on the Commission's enquiry powers.

1. **The segmentation of Part IV and V of the Trade Practices Act.**

   It is relevant firstly to examine the inter-action of Part IV of the *Trade Practices Act* (covering competition issues) and Part V of the Act (covering consumer protection issues). Clearly enough this segmentation is intended to accommodate more than drafting

convenience. Parts IV and V serve quite discreet and independent objectives or purposes.

The distinctions or contrasts between Part IV and Part V of the *Trade Practices Act* are as follows:

(a) The nature of the proceedings and penalties is different. A breach of Part IV is civil in nature even when proceedings are taken by the Trade Practices Commission. In the case of Part V (except for section 52) criminal proceedings may lie for breach. Different penalties apply in the case of Part IV from those which apply in the case of a breach of Part V.

(b) The two parts function quite separately. There have, for example, been on many occasions separate federal ministers administering the Act's Part IV restrictive trade practices provisions and the Act's Part V consumer protection provisions. The point is illustrated by the position at the time this article is written. Part IV is administered by the Attorney-General, The Hon. Lionel Bowen. Part V is administered by the Minister for Consumer Affairs, Senator Bolkus.

(c) Part IV matters are given separate treatment under cross vesting legislation. Part IV matters remain largely under the jurisdiction of the Federal Court of Australia. Part V matters have been freely 'cross vested' as regards the jurisdiction of State Courts. It was envisaged as long ago as 1974 that a different judicial treatment would be required in relation to Part V matters from that applicable to Part IV matters[48].

(d) Part V specifically preserves the operation of the State consumer protection laws[49]. Part IV contains no specific preservation except to the extent that States may, by legislation or regulation, specifically exempt conduct from the application of Part IV[50].

(e) Consistent with what is said in (d) above, the various States have enacted *Fair Trading Acts* at the State level. These Acts duplicate Part V of the *Trade Practices Act* at the State level. State legislation does not, however, address the practices or conduct proscribed by Part IV. In New Zealand where both Part IV and Part V of the *Trade Practices Act* have been substantially adopted, such adoption has been by way of two separate Acts—the *Commerce Act* which covers Part IV matters and the *Fair Trading Act* which covers Part V matters.

(f) The only entirely common factor of a functional kind between Part IV and Part V of the *Trade Practices Act* is the administration of each by the Trade Practices Commission.

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48 Senator LK Murphy: *Second Reading Speech to the Trade Practices Bill 1974* [*Hansard (Senate)* 30 July 1974]

> Pending the establishment of the proposed Superior Court of Australia, the only Court with jurisdiction under the legislation will be the Australian Industrial Court . . . In due course, it will be desirable to confer jurisdiction on . . . lower Courts to deal with consumer protection matters.

49 *Trade Practices Act* s 75.

50 *Trade Practices Act* s 51(1).

Even here, however, there has not been total commonality. There was an earlier governmental intention to create an Australian Consumer Protection Authority. Because of pending legislation to establish this authority, the government of the day transferred all of the Trade Practices Commission's consumer protection staff to the Department of Science and Consumer Affairs pursuant to an Administrative Arrangement Order of 31 October 1975. Such staff were returned to the Trade Practices Commission in February 1976 after a change of government. These administrative arrangements show that, not only is the *Trade Practices Act* capable of being politically bifurcated (see (b) above) but also that it is capable of being administratively handled in the same manner.

(g) The Commission has power to authorise certain practices otherwise prohibited under Part IV if there is a public benefit in such practices. No such power exists in respect of practices prohibited under Part V.

These functional differences back up the demarcation difference between Part IV and Part V in that the former primarily is concerned with competition in a market and the relationship between competitors whilst the latter is primarily concerned with conduct which inherently results in adverse consequences to consumers. There is nothing in any Part V contravention which necessarily produces adverse effects on competition. Part IV to the extent to which it produces consumer benefit, does so only quite indirectly.

All of this difference of both function and principle leads to the conclusion that a sensible demarcation line as to what is meant by 'matters affecting the interests of consumers' is that such matters are confined to Part V issues. Such an interpretation is consistent with the principles of establishing the relevant boundaries of Commission power as set out in the immediate preceding part of this article i.e. such an interpretation would give rise to:

— certainty;

— no requirement that a case by case enquiry be engaged in as to the effect of any particular practice on the interests of consumers; and

— a requirement that the words of limitation in the Act be given effect to rather than ignored.

The above are sufficient reasons for believing that the Commission's powers are limited to Part V matters. There is, however, a further compelling reason. This is that the Parliamentary Explanatory Memorandum states that this is the intended legislative purpose.

2. **The legislative purpose as stated in the Parliamentary Explanatory Memorandum.**

Extrinsic material is not to be substituted for the text of a statute itself when such text is clear[51]. However, section 15AB of the *Acts Interpretation Act* permits recourse to extrinsic material, including

51 *Re Bolton ex p Bean* (1987) 61 ALJR 190-191.

the meaning of a provision when, amongst other circumstances, 'the provision is ambiguous or obscure'. From what has been already said in this article, it is obvious enough that the meaning of the phrase 'matters affecting the interests of consumers' is far from 'clear'. Also in general parlance, the word 'affect' is one of wide import involving a number of quite different connotations. In the statutory context, it seems to have the notion of 'influencing substantially' in contrast to 'incidentally'[52]. The question of 'substantiality' or 'incidental effect' is clearly at the crux of the interpretation of the Commission's section 28 powers. One must reach the conclusion that there is sufficient tendency to obscurity in the words 'affecting the interests of consumers' in section 28 to justify resort to the Parliamentary Explanatory Memorandum.

It is believed that resort to the 1974 Parliamentary Explanatory Memorandum makes the intended legislative restriction of the Commission's enquiry powers under section 28 clear beyond doubt. The Commission's power is, it is suggested, clearly intended to be limited to matters arising under Part V. This is for the following reasons:

(a) The 1974 Memorandum divides the Bill into two quite distinctive parts headed respectively 'The Provisions with respect to Restrictive Trade Practices' and 'The Consumer Protection Provisions'.

(b) The Explanatory Memorandum sets out two objects of the Bill which is 'to replace the *Restrictive Trade Practices Act* 1971-73 and also to make provision for the protection of consumers from unfair trade practices'.

(c) The Memorandum [paragraphs 57 and 58 referring to clause 28] sets out, most importantly of all for present purposes, the following:

> 57. The Bill prohibits a number of commercial practices that are unfair to consumers . . .
>
> 58. Most of the consumer protection provisions are contained in Part V—some relevant provisions are to be found in . . . Clause 28—providing for the Commission to have functions in relation to law reform, research and dissemination of information:

It must surely follow that the words 'Some relevant provisions' in Paragraph 58 of the Explanatory Memorandum mean, in the context in which they appear, 'Some relevant provisions in relation to consumer protection'.

[Clause 28 of the Bill, of course, became section 28 of the Act].

(d) In addition to (c) above the Commission's powers under Clause 28 of the Bill [subsequently section 28 of the Act]:

— are not referred to at pages 4-5 of the Explanatory Memorandum where the Commission's general powers are discussed

52 See examples in *Stroud's Judicial Dictionary* (5th Ed) Vol 1 pp 74-75.

- are not referred to at all in pages 5-13 of the Explanatory Memorandum where the restrictive trade practices of the Act are discussed
- are not discussed at all in pages 19-20 where the Commission's miscellaneous powers are discussed
- are referred to *solely* under the heading 'CONSUMER PROTECTION'.

3. **Conclusions based on the Functional Diversity of Parts IV and V of the Trade Practices Act and the Parliamentary Explanatory Memorandum**

Given the above, it does not seem sensible to regard section 28 as conferring on the Commission power to make enquiries into matters which, at best, can bear only indirectly on the interests of consumers. This is all the more a logical approach when it is recognised that Part V is a discreet functional part of the Act which purports to deal explicitly with the protection of the interests of consumers. Finally to hold otherwise than as suggested means that any demarcation lines to give effect to the words of limitation in section 28 must necessarily be highly uncertain. This uncertainty could lead to the necessity for a case by case enquiry prior to the Commission embarking on its 'studies' to establish the effect of any particular practice and whether the practice of the subject of the 'Study' does, in fact 'affect the interests of consumers'. Alternatively, the Commission can *de facto* set its own limitations on its 'Study' powers—something which permits the Commission *de facto* to ignore the limiting words of section 28. The fact that a demarcation line of certainty is available is reason for drawing it rather than facing the possibility that all Commission Studies are destined to take place in some kind of contested no man's land which the Commission may or may not hold after a judicial skirmish.

Conclusions

It is the writer's view that parliament has not given the Trade Practices Commission a power under section 28 of the *Trade Practices Act* to initiate enquiries into Part IV practices. The words of section 28 specifically require such enquiries to be in relation 'to matters affecting the interests of consumers'. The writer believes that these words of limitation mean that the Commission can enquire only into Part V matters. To hold, as the Commission contends, that the words have no limiting effect is to read section 28 as if the words 'matters affecting the interests of consumers' were not in the section at all. If the legislature intended as the Commission asserts, it could have achieved an open ended enquiry power by deleting the limiting words entirely. It is near impossible to understand, if an open ended enquiry power was intended, why the words of limitation were not omitted.

There are numerous differences between Part IV and Part V of the *Trade Practices Act* which have been set out in the article. These differences of themselves indicate that parliament could well have thought it appropriate for the Commission to have a power of enquiry under

Part V and not under Part IV. There is another important reason, however, and this has not yet been mentioned. The Trade Practices Commission has no power to 'authorize' any practices under Part V of the Act and thus give them immunity from the Act. Under Part IV, the Commission can authorize certain conduct if the conduct delivers public benefit. The Commission has power to revoke such authorization only on the statutory grounds set out in section 91(4) of the Act, the prime such ground being that there has been a 'material change of circumstances'. Authorizations are intended, it is suggested, to be grants which are not lightly to be put aside or re-argued. In the case of both the newsagency and real estate industries, the Commission is evaluating already authorised arrangements in circumstances where it has not suggested that there is any material change of circumstances. As stated, each industry has had immense involvement with the Commission for a decade or so[53]. For the Commission now to be re-evaluating these industries in respect of already authorised arrangements under the guise of 'Studies' allegedly empowered by section 28 appears to involve the Commission in 'second guessing' what it has already decided and in respect of which it does not assert that there has been any 'material change of circumstances'. It may well be that the legislature thought that this was not proper and, for this reason also, was not prepared to allow the Commission to roam at will through industry restrictive practices. The same considerations do not, of course, apply to Part V matters.

Whatever may be the technical arguments on the question of the Commission's 'Study' powers under section 28, the writer cannot help but return to one fundamental pragmatic question. If one were a legislator in 1974 and wanted the Trade Practices Commission to have a wide ranging power of enquiry in respect of matters within both Part IV and Part V of the Act, why would one unnecessarily create ambiguity or doubt by limiting the Commission's powers to 'matters affecting the interests of consumers'? There is only one logical answer to this question. Assuredly such 1974 legislator did not want to create ambiguity or doubt. He or she intended to confine the Commission's 'Study' and 'Enquiry' role under section 28 to Part V matters. That this is so is conclusively supported by an examination of the 1974 Parliamentary Explanatory Memorandum.

In the writer's opinion, it is an unfortunate extension of the originally granted power under section 28 that the Trade Practices Commission presently believes that it can constitute itself as a roving commission of enquiry to roam at will through industry practices. Especially is this so when, as in the case of newsagents and the real estate industry, such practices have already been exhaustively examined by the Trade Practices Commission and, as a result of such examination, have been authorized by it as delivering public benefit. At present, the Commission clearly believes it is unconstrained as to what it can do and that the words 'matters affecting the interests of consumers' are *de facto* without meaning.

53 See *Newsagents Decisions* and *Real Estate Industry Decisions* cited at n 5 above.