THE LEGISLATURE AND

THE CONTROL OF COMMERCIAL

PRACTICES AND PRICES

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Adrienne von Tunzelmann
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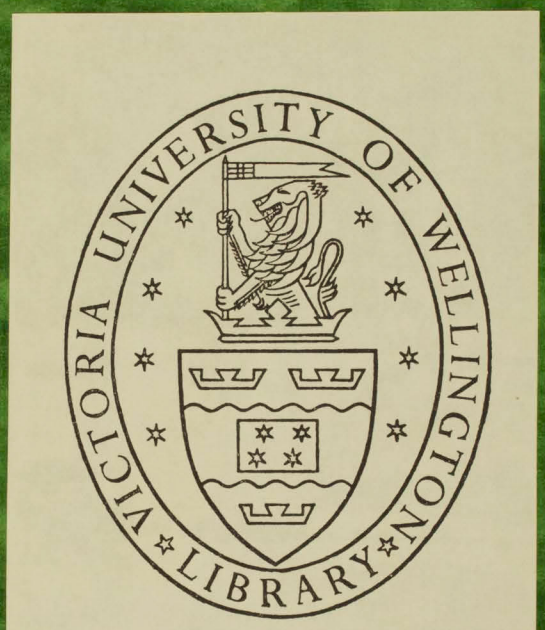

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PART ONE

INTRODUCTION

> "Legislative zeal is one of the outstanding characteristics of the Dominion. From early days the legislature has shown its readiness to deal with economic and social problems, and the field of restrictive practices is no exception to this rule. But even by New Zealand standards an unusually large number of enactments have been introduced for the purpose of controlling restrictive practices, and the wide variety of methods adopted by this legislation is equally exceptional."
>
> Collinge[1]

The history of legislative intervention in the area of commercial practices[2] begins late last century with the setting up by statute of state-owned enterprises to compete with the private sector in the insurance and trustee fields. Since that time there have been no fewer than nine enactments[3] concerned with competition and prices in the market place. These enactments portray the history and development of a legislative framework which is oriented essentially to an

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1. Collinge, J., The Law Relating to the Control of Competition - Restrictive Trade Practices and Monopolies in New Zealand (1969), p. 60.
2. The term 'commercial practices' for convenience is used throughout this paper to refer collectively to restrictive practices and trade combinations. The latter will be used as distinct terms where appropriate.
3. See Appendix A. This number includes only principal Acts and does not take account of legislation passed specifically to meet wartime requirements.

administrative approach having the occasional departure towards the judicative. In the most recent, the Commerce Act 1975, Parliament has sought to combine elements of both approaches by creating an administrative structure subject to a system of judicial control and providing for certain commercial activities to be illegal per se. Central to this Act is the establishment of a tribunal, whereby the Legislature has isolated from itself, and from executive government, the function of supervising and adjudicating on such practices in the commercial sector as, in terms of the legislation, may be restrictive on competition and against the public interest, while yet not choosing to allocate original jurisdiction in this area to the courts.

The Commerce Act and its predecessors reflect Parliament's belief that the free enterprise market is in the public interest, and over the last seventy years Parliament has sought to establish the conditions where competition in all sectors of commerce would be maximised.

Although a range of possible detriments arising from an absence of competition have been recognised in statute, historically the overriding concern of the Legislature has been the maintenance of reasonable prices, intervention being based primarily on the assumption that any inhibition to competition in trade represents a threat to prices and, consequently, to the public at large. The existence of price control as the fundamental administrative issue has lent to the succession of

legislation a continuity at least in substance. Alongside, there emerged in legislation two separately identifiable substantive issues - restrictive trade practices and trade combinations.

The accepted complementarity between, on the one hand, the structural and behavioural characteristics of the market place and, on the other, the level of and trends in prices is now recognised in the Commerce Act which provides for a combination of controls through the functions of one administrative body, the Commerce Commission.

While it is possible to identify in the history of the legislation a consistency of economic thought, it is also true to say that in the development of manner and form there emerged certain elements to which the Legislature periodically returned, re-enacting them either as they first appeared or in a different form. It is not claimed that this tendency represented any purposeful development in the mind of the Legislature, nor would such purpose be looked for given that the legislation concerned spans a period of experiment in New Zealand and overseas in socio-economic intervention by Parliament. But a close examination of the

statutes on commercial practices reveals in the various constitutional and procedural provisions enacted a number of clear precursors to the 'new' legislative era beginning with the Trade Practices Act in 1958. To this extent the pre-1958 developments can be regarded as a base for the later legislation which built on a process described by Collinge[4] in elaborating upon the comment quoted above as one of 'trial and error'.

Since 1958 a distinct trend in procedure has emerged - as the scope of the legislation has expanded so the provisions relating to procedure have become more detailed. It would appear that Parliament has accepted the wider regulation of commerce as the basis for a greater degree of procedural specificity. When the Trade Practices Act placed in the hands of an independent administrative tribunal the wide surveillance of commercial practices a new direction for procedural questions was created - questions which have assumed importance in the general development of administrative law and which it is the intention of this paper to explore, in the historical context.

The central issue is the significance of the method chosen for the determination of issues arising from the legislation. The value of an administrative body capable of establishing principles and guidelines for the conduct of trade can be argued against or seen in conjunction with the alternatives (the

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4. Collinge, op. cit., p. 62.

Minister, a department or the courts). If more than one method subsists, to what extent are different procedures prescribed? Who decides on procedure, in the first instance and as it evolves? Given that the legislation on commercial practices cuts across common law principles, what safeguards are provided to counter the abrogation of existing rights? How is a balance achieved between the public interest and the interests of traders when there is a conflict, and to what extent may the parties concerned make out their case in respect of the public interest?

These, and other relevant, questions impinge largely on where the tribunal is seen to lie in the administrative and judicial processes. The provisions for the early tribunals on prices and commercial practices suggest that the Legislature regarded these bodies as strictly part of the administrative machinery. Such an unequivocal distinction has been rejected as a matter of administrative law[5] and the courts, if only for policy reasons, have found the administrative - judicial dichotomy to be of little relevance. Although still customarily entitled "administrative"[6], tribunals are now endowed with a substantial judicial element which carries a recognition that certain basic procedural principles must be observed.

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5. e.g., Report of the Committee on Administrative Tribunals and Inquiries (1957) Cmnd 218, para. 40.

6. One writer in administrative law has preferred to discard altogether the adjectival use of the word "administrative" in connection with tribunals. Foulkes, D., Introduction to Administrative Law (1972), p. 60.

The recent legislation on commercial practices indeed reflects a greater degree of acceptance of the importance of procedure. But the attendant questions were not answered immediately or simultaneously by the Legislature, for which a number of reasons can be found.

First, it is to be expected that in applying the relatively unexplored area of tribunal administration (predominantly a post-war development) to a wide field of commercial practice Parliament would prefer to retain a high degree of procedural flexibility thereby allowing scope for practical experience to suggest the appropriate areas for statutory detail. Second, over the last two decades the relevant body of administrative law has undergone considerable advance as a result both of an increasing willingness on the part of the courts to extend the ambit of their involvement in administrative matters,[7] and of systematic studies undertaken in the context of the general tendency of legislatures in New Zealand and other countries to allocate to tribunals rather than to the courts jurisdictions newly created by statute. Further, regard must be had to the changing nature of parliamentary procedure, especially in the role of select committees. In the history of the legislation on commercial practices up to 1970 only two of eleven Bills (including amending Bills) were referred to a select committee

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7. Liversidge v Anderson [1942] A.C. 206 cf Anisminic Ltd v Foreign Compensation Commission [1969] 1 All E.R. 208; Reade v Smith [1959] N.Z.L.R. 996; Padfield v Minister of Agriculture [1968] A.C. 997.

for consideration, and in each of these cases for periods of only one month. Since the introduction of the Trade Practices Amendment Bill in 1970, every such Bill has been subject to the comparatively lengthy examination of a select committee and since 1974 to committee hearings in public. Concomitantly the amount of time spent by Parliament on the Bills has increased progressively from one day (Monopoly Prevention Act 1908) to nineteen months (Commerce Act), a trend which can not be explained simply in terms of the greater length of more recent legislation. (Appendix A illustrates these points in detail.)

The relevance of parliamentary scrutiny to the major questions of administrative law is affirmed by Thomas:

> "A developed system of administrative law cannot be solely concerned with the judicial function or restricted to the law relating to the judicial review of administrative action only. The other two branches of government must also be examined; the legislature as the body responsible for the enabling legislation and the Administration as the branch responsible for the implementation of that legislation.
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> . . . [I]t is because the administrative process is so largely based on statute, that the content and form which legislation takes not only determines its structure but also has a vital impact on the operation and fairness of the administrative process itself . . . . Consequently, the degree to which Parliament scrutinizes legislation, particularly the so-called machinery provisions, will have a direct bearing on the powers conferred on the Administration, the manner in which those powers will be exercised and the form and reality of the citizen's right to relief should those powers be abused."[8]

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8. Thomas, E.W., Parliamentary Control of the Administration of Central Government - Fact or Fiction? F.W. Guest Memorial Lecture, 11 September 1975, University of Otago.

The more recent opportunities available for Parliament to study the legislation in detail undoubtedly has ensured that matters considered extend beyond the purely substantive; and greater public involvement increases the likelihood that such questions as safeguards will be encompassed. The latter point is amply illustrated in the case of the Commerce Act, to which reference later will be made.

Before proceeding, it may be emphasised that the succession of legislation on commercial practices and prices should not be seen in isolation from the economic and political background which has influenced the decision to intervene and the shape of the machinery provisions. The objectives and scope of control sought by Parliament from time to time reflect not only a general tendency towards legislative solutions of economic problems in New Zealand, but also a response to the changing face of commerce. In political terms, the introduction of legislation and its amendment can be related to changes of government, although a substantial degree of consent about the objectives sought is revealed in the political history - not, perhaps, surprisingly given that the issues of price and competition find a uniform philosophical acceptance in New Zealand society. Further, the New Zealand legislation has borrowed from similar developments overseas. There are few countries in the western world which have not legislated for the control of commercial

practices, and in this respect, also, legislative developments in New Zealand find a background of influence.

The variety of method, and the extent of its statement in statutory form, invests the history of commercial practices legislation with an unusual interest when taken as a case study in the evolution of administrative law as viewed by the Legislature. The succession of provisions and equally their rejection reveal, in particular, the issues which guided Parliament in its choice of an administrative structure with judicial requirements.

It is the aim of this paper to examine the nature of parliamentary intervention in this area of economic life and to attempt to show, against a background of developing administrative law: why Parliament saw fit to intervene in matters previously encompassed by the common law; what sorts of constitutional and procedural provisions found statutory expression, and the adequacy of these provisions in terms of what is generally now considered necessary or desirable for tribunal systems; and how the dilemmas confronting Parliament in adopting an administrative approach were resolved, especially with respect to the allocation of administrative - judicial tasks set by the legislation and the implications of more detailed statements of "rules" in a situation of expanding surveillance of commerce.

The primary concern will be with constitution and procedure. It is not intended to assess the merits of the legislation, that is, whether it was effective in fulfilling the legislative intent. This would be, essentially, to argue the extent to which the respective long titles were realised. Rather, the discussion will focus on the nature of the framework devised to provide for the objectives sought by Parliament, with reference to the substantive law where this is necessary to provide a context.

The adoption of a legislative solution to an economic problem necessarily raises issues which are many and diverse. Within the ambit of this paper it is not possible to consider every such issue, and especially their individual ramifications. The exploration of the nature of parliamentary intervention in this area will be confined largely to those principles that have become developed and entrenched in modern administrative law, so far as it has evolved, and which are therefore common to a wider field. For reasons suggested in the foregoing it will be useful to consider the history of intervention in two periods - up to 1958, and from 1958 to the present time. In this context some comparison can be made with the Securities Commission as provided in the Securities Advertising Bill currently before Parliament. While there is a degree of overlap between the substantive aspects of the proposed Commission and those pertaining to the tribunals which have been already established to deal with commercial practices, of considerably more interest are the similarities and differences in the constitutions and procedures

of each, and what further contribution to the growing body of administrative law is made by the Legislature in this, historically most recent, move.

PART TWO

LEGISLATIVE INTERVENTION IN COMMERCIAL PRACTICES AND PRICES UP TO 1958

To obtain an intelligible account of the present system of legislative control over competition and prices it is necessary to look back only as far as 1919 when, under the Board of Trade Act, an administrative body was created with investigatory and inquisitorial powers in respect of industrial and commercial behaviour. The preceding legislation is, however, important, not least because it indicates a disposition on the part of Parliament towards providing controls in this area of economics. There is also found in the legislation before 1919 the outcome of Parliament's early attempts to settle the question of who should be the decider in the reconciliation of public and private interests, if not the ordinary courts under the common law. For it was dissatisfaction with the way in which the courts had dealt with restraints in trade that motivated intervention by means of legislation.

The Common Law

In the late nineteenth century the position at common law was that restraints of trade could be enforced only if reasonable in

respect of the parties to the restraint and the public interest, a doctrine which was crystallised in the Nordenfelt case, where Lord Macnaughten said that

> ". . . 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 reference to 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 it is in no way injurious to the public." [9]

This position was reached by a process of slow evolution from the prohibition imposed by the Elizabethan courts on monopolies and contracts in restraint of trade. The seventeenth century saw a move away from complete prohibition. In 1711 Lord Macclesfield, reviewing the whole field, recognised the possibility that contracts in partial restraint of trade might be valid, provided they were supported by adequate consideration.[10] In the nineteenth century the decisions of the courts reflected the classical economic theory of freedom of commerce which postulated the absence of restrictions on contracts and proprietary rights except where essential for the preservation of those rights for others. Adherence to the 'laissez-faire' doctrine

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9. Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd [1894] A.C. 535, 565. Also, Mason v Provident Clothing and Supply Co Ltd. [1913] A.C. 724.

10. Mitchell v Reynolds (1711) 1 P Wms 181.

is illustrated in Printing & Numerical Registering Co v Sampson[11]:

> "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract."

The presumption behind this doctrine is that parties to an agreement are of equal bargaining strength and that what is agreed between them is a free exercise of will.

With the Nordenfelt case such a condoning of contracts became subject to their meeting a test of reasonableness. The Victorian courts said that restrictive covenants were lawful if they satisfied three tests, these being that

(i) the restraint must not be greater than is necessary to protect the interests of the party in whose favour it is granted - there must be an interest meriting protection;

(ii) it must be justifiable as being in the interests of the party restrained; and

(iii) it must not be contrary to the public interest.

Despite the recognition of public interest in restraints of trade, this test of reasonableness was in fact applied to a limited extent.

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11. Printing & Numerical Registering Co v Sampson (1875) L.R. 19 Eq 462 per Jessel MR.

A range of contracts prejudicial to competition continued to be upheld by the courts.[12] Further, the law of torts did not operate to protect traders adversely affected by the restrictive practices of competitors. In cases brought under the economic torts the courts found that tort liability for restrictive practices and trade combinations depended on establishing either that the purpose of the practice or combination was unlawful, or that unlawful means had been employed. In the Mogul Steamship[13] case, brought on the ground of conspiracy to injure through the imposition of a boycott on shippers refusing to enter an exclusive dealing arrangement, the Court of Appeal decided that there was no cause for action because the defendants had done nothing in itself unlawful, nor was their objective - to extend their own trade and increase profits - unlawful:

> ". . . they have done nothing more against the plaintiffs than to pursue to the bitter end a war of competition waged in the interest of their own trade."

In other words, economic self-interest was sufficient justification for the actions of the defendants.

The reluctance of the courts to address themselves directly to

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12. For example, Rowlings v General Trading Co [1921] 1 K.B. 635 (concerning a collusive bidding agreement); Auto-Mart (London) Ltd v Chilton (1927) 43 T.L.R. 463 (a "black-listing" case).

13. Mogul Steamship Co Ltd v McGregor, Gow & Co et al [1892] A.C. 25, 32. Also, Ware & De Freville Ltd v Motor Trade Association [1921] 3 K.B. 40.

the broad question of the public interest, and the consequent absence of any effective overall check on trade restraints, largely prompted legislative intervention. In another respect, also, the common law failed to be an effective protector of the public interest. In so far as both parties to a restrictive practice were prepared to observe its terms, it would not come before the courts. A person who, as a member of the public or otherwise, was not a party could not impeach a contract before the courts, because of the doctrine of privity of contract. The Legislature sought to overcome this failing, as will be seen, by intervening to provide, in most cases, for an official or an official body to act on behalf of the public in questioning any commercial practice.

For these broad reasons Parliament was not content to leave to the common law the reconciliation of private and public interests in matters of competition.

Having the motivation, the Legislature found justification for intervention in terms of economics. With the fading of the 'laissez-faire' era competition became an economic force to be protected and positively encouraged. It was inferential that appropriate steps be taken to deal with influences which might discourage free competition. Such action was seen as especially important in New Zealand where the market was, and is, characterised by a small scale and range of enterprise and production. The Government and Parliament

were of one mind in the view that in the restricted commercial environment, which in itself presented a limitation on competition, it was essential that there should be as full an exercise of competitive rights as possible, unfettered by artificial restrictions. Unlike the courts, Parliament considered that when competition was restricted and prices threatened (whether identifiably or not), a prima facie case for control existed. In this respect the Legislature believed it was following

> ". . . the common consent of civilisation that trade must be controlled. . . .".[14]

Because of the diffidence of the courts towards these issues the controls needed to be legislative ones.

Indirect Intervention

It would not be apparent from a knowledge only of the present legislation on commercial practices that initially Parliament showed a reluctance to permit interference with the freedom of traders. But the first form of intervention was in fact indirect. The early legislation introduced to deal with competition and prices aimed to check private monopolies by providing a competitor in the market, viz, the State. The establishment by Act in 1869 of the Government Life Office was followed by the Public Trust Office Act 1872 and the State Fire Insurance Act 1903. The then current view, that interference with commerce should be minimal and

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14. N.Z.P.D. (1919) Vol. 184, 906. Hon. Sir Francis Bell on the Board of Trade Bill 1919.

beneficial, was revealed in the debate on the 1869 Bill when the Colonial Treasurer said:

> "There was no doubt that the law of supply and demand should not be interfered with, except in extraordinary cases, by the Government, but it had been found in England that, in dealing with many of the practical questions that arose out of the social and political condition of the country, that law could sometimes be beneficially infringed."15

Even this moderate approach met with disagreement among members, and direct government trading was not universally welcomed. The effect of these measures on prices, however, would seem to have amply justified them as a means of regulating prices. For example, the State Fire Office began operating in 1905 with premiums 10 percent below the ruling rates set by the private companies' 'ring'. The latter immediately reduced premiums on houses and chattels by 33 1/3 percent, which was in return met by the State Fire Office. (This outcome is of interest in terms of the potential effectiveness of later legislation which recognised price regulation as an alternative and back-up to free competition.)

Still, the Legislature did not find in indirect intervention a satisfactory means of ensuring that where the freedom of traders or combinations of them conflicted with the public interest, the

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15. N.Z.P.D. (1869) (L.C.), Vol. 7, 673

latter would prevail. In 1908 a direct approach was sought to resolve such conflicts in law.

Direct Legislative Intervention

Direct intervention in any area through legislation places a requirement on Parliament to address itself to specific policy and drafting questions. It must consider

- whether or not offences will be created
- the nature of the structure to be provided, especially how responsibilities will be allocated
- where shall lie the onus of proof
- the ambit of the statutory provisions
- the definition of terms.

Successive enactments dealing with commercial practices and prices from 1908 reveal that these legislative issues were decided in different ways and to varying extents. These are now considered.

Monopoly Prevention Act 1908

As the first significant legislative expression of Parliament's belief in direct intervention in this field, it is not remarkable that this Act, which created economic remedies for monopoly situations, was of limited scope. A consolidation of two earlier enactments, the Act covered, in two Parts, agricultural implements, and flour and other products. Despite

its restricted ambit, however, its provisions exhibited an interesting contrast in approach.

To deal with agricultural implements (their manufacture, importation and sale) a board of inquiry was established with the function of investigating complaints, regarding the prices of and competition from imported implements, from local manufacturers made to the Minister of Customs. The board consisted of a Judge of the Court of Arbitration (the Chairman), the Presidents of the Farmers' Union and the Industrial Association of Canterbury, and two persons appointed by the Governor-General representing the Trades and Labour Councils and the Agricultural and Pastoral associations. The board met only when summoned by the Minister, and reported to him recommending the relief, if any, to be granted. The board's reports were required to be laid before Parliament. In contrast the wholesale prices of flour, wheat and potatoes were to be investigated by the Court of Arbitration acting on the direction of the Governor-General. For this purpose the membership of the Court was supplemented by a representative of the Agricultural and Pastoral societies. If prices were found to be unreasonably high the Court had to recommend the Governor-General exercise his power to declare the importation of the commodity duty free. No attempt was made to define, or lay down guidelines as to, what were 'unfair' competition and 'unreasonably' high prices. As

observed by Collinge, "Not surprisingly, the machinery of the Act does not appear to have been used to any appreciable extent.[16]

The Act was also conspicuous for its removal of the right to private actions being brought in respect of the areas covered - a feature which pertains to all subsequent legislation on restrictive practices, trade combinations and prices.

Commercial Trusts Act 1910

In a marked departure from the approach adopted in the 1908 Act, from the law of New Zealand,[17] and from prevailing economic precepts,[18] the Commercial Trusts Act was passed for the direct repression of monopolies. The Act favoured agreements being checked by law rather than by administrative action, in which respect the Legislature chose generally to follow the American anti-trust laws and, for the provisions of the Act, Australian legislation passed four years previously. Some consideration of how Parliament dealt with this measure is worthwhile because in the long term movement towards administrative controls it represents something of an aberration, and yet the 'illegal per se' path is not wholly discarded in later legislation.

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16. Collinge, op. cit., p. 39.

17. This point was made in the debate on the Bill by Hon. Dr J.G. Findlay: ". . . the law in New Zealand, although it declares an agreement to combine among employers, manufacturers or merchants void, does not make it criminal. . . This Bill marks a divergence from that rule." N.Z.P.D., (1910), Vol.153,p. 293.

18. E.g., in Merchants' Association v R (1913) 32 N.Z.L.R. 537, 550, the opinion was expressed that the offences created by the Act had introduced "an extensive departure from the economic doctrines of more modern times."

Four offences were created by the Act, but only two - exclusive dealing agreements and refusals to deal - were prohibited outright. Monopolies were prohibited "if of such a nature as to be contrary to the public interest" while price fixing by commercial trusts was made illegal where the price so fixed was "unreasonably high"[19]. These tests were to be determined by the courts. Finding difficulty in specifying what constituted the public interest the Legislature agreed to leave this as a matter for the discretion of the courts[20]; and recognising the impossibility of laying down a prescribed rule to determine whether a price was reasonable or not, the term "unreasonably high" (as used undefined in the Monopoly Prevention Act) was defined very generally as one which "produces or is calculated to produce more than a fair and reasonable rate of commercial profit."[21] Penalties for offences consisted of fines, but in addition, under section 13, the Supreme Court could grant an injunction against the continuation or repetition of the offence. Proceedings under the Act could be commenced only by the Attorney-General on behalf of the Crown.

While an extreme measure, the Act can be explained in terms of the economic circumstances of the time. The debate on the Bill in

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19. Sections 5 and 6.

20. In the Merchants' Association case, supra n. 18, the Court of Appeal gave 'public interest' a broad interpretation. Finding a prima facie detriment to the public interest in the price effect of the monopoly concerned, the Court considered as countervailing factors, at pp 1251-1252, the extent to which the monopoly might be necessary to prevent destruction of the industry or to secure efficient distribution of the product.

21. Section 8.

both Houses concentrated in very great detail on the effect on prices of the development of the trust, seen largely as a product of major inventions in steam, communications and transport, and the division and co-operation of labour, which demanded big economic units. Hon. Dr Findlay, Minister in charge of the Bill in the Legislative Council, highlighted the significance for the provisions of the Bill of economic factors when he said that

> "The present Bill, and what it implies, is a symptom . . . of the evolution of our industrial world; and you cannot understand - you cannot justify - this law unless you go behind it and try to get some grasp of the operations which make it a necessity in this country as elsewhere. . . . "[22]

The severity of the Act is the reason for the limit which was placed on its application. A small number of major commodities only were included in the Schedule. The Legislature saw the importance of specifying itself the commodities to be covered by the Act, and also considered that the Schedule should be extended only at the will of Parliament.[23]

Although there was agreement that the machinery provided by the Act was sufficient for the purposes, the debate on the Bill revealed certain reservations held about its likely practical effect. In particular, it was felt that there would be difficulties in enforcing penalties as trusts tended to find ways of eluding such

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22. Supra, n. 17.

23. Only one attempt was made during the debate to extend the Schedule - to beer. This was defeated on a division. N.Z.P.D. (1910), Vol. 153, p. 15.

punitive provisions.[24] Further, it was expected that only in clear-cut cases brought under the Act would a verdict of guilty ensue. Border-line cases would probably not be caught.[25] The main effect of the Act would in practice be indirect:

> "The great bulk of our repressive laws have an indirect effect. The fact that you have an Act of this kind on the statute-book will be of value. . . . It may have a preventive effect, and if it has it will be justifiable."[26]

These expressions of qualification about the practical effect of the Act almost foreshadowed the outcome of the Crown Milling case[27] which demonstrated its major weakness - that the statutory formulae for determining matters of economic import were too wide for the ordinary courts to handle effectively. This well-known case dealt with two main issues, namely, whether a partial monopoly was created, and, if so, whether it was contrary to the public interest. The first was conceded in the New Zealand Supreme Court which found, however, that the partial monopoly was not against the public interest. A majority of the Court of Appeal, taking an approach which viewed, as a matter of law, any monopoly or monopolistic tendency as being pernicious in itself, reversed the latter decision of the Supreme Court which was, however, restored on appeal to the Privy Council.

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24. N.Z.P.D. (1910), Vol. 152, p. 643.

25. Ibid., Vol. 153, p. 297.

26. Ibid., p. 298.

27. R v Crown Milling Co Ltd [1925] N.Z.L.R. 258 (S.C.); 758 (C.A.); [1927] A.C. 394 (P.C.).

The Privy Council decision raised a number of points which, as later discussion in this paper shows, found a subsequent response from the Legislature. These are summarised by Robson thus:

> "The Privy Council considerably restricted the scope of the question by saying: 'It is not for this tribunal, nor any tribunal, to adjudicate as between conflicting theories of political economy.' [17] They thought that the legislature had in view that there might be cases of monopoly or control which would not be contrary to the public interest. That a monopoly was contrary to the public interest had to be established in each particular case of prosecution. The burden of proof was upon the Crown. . . ." [28]

Following its discrediting by the Crown Milling case the Act was not used again despite earlier attempts to strengthen its operation by the setting up of machinery for investigating and reporting to the Minister on alleged infringements of its provisions.[29] For the Legislature, the case was a confirmation of the efficacy of the alternative, administrative, approach, already embarked on in the Board of Trade Act of 1919.

Board of Trade Act 1919

By passing the Board of Trade Act Parliament simultaneously affirmed its belief in legislative intervention in the regulation of industry and trade, and made its first perfectly clear decision to provide for an administrative method of intervention:

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28. Robson, J.L., (ed.), New Zealand: The Development of its Laws and Constitution (1967), 290. Footnote 17 refers to Crown Milling Co Ltd v R [1927] A.C. 394, 402.

29. Cost of Living Act 1915, section 6(a).

> ". . . anything that is required to prevent excessive prices . . . should be provided by a sensible law on the statute-book. Whether it be profiteering, or exploitation, or anything else of the kind, there should be legislation to enable the country to deal with it." [30]

> "It is absolutely essential . . . that there must be an independent body of persons . . . to provide the information . . . to enable the public, whether it be Parliament or the public authority, to prohibit or to satisfy itself that no iniquity exists. Here, then, we have . . . the cardinal and essential condition precedent - namely, a competent tribunal to inquire . . . " [31]

The Act arose out of wartime experience with the administration of regulations, and from its predecessor the Cost of Living Act 1915. The 1915 Act established a Board of Trade with the limited function of investigating and reporting on matters of commerce. Reports were made to the Governor-General. As a means of regulating commerce, especially in respect of prices, this machinery proved to be inadequate, as indicated by the absence by 1919 of any occasion on which the regulation-making provision relating to the powers of Borough Councils was invoked. Under the 1919 Act a further Board, similarly constituted but with stronger powers, was set up, consisting of the Minister of Trade and Industry as the chairman, and four members appointed by the Governor-General.

Both inquisitorial and investigatory functions were conferred

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30. N.Z.P.D. (1919), Vol. 184, 561. Rt. Hon. Sir J.G. Ward.

31. Ibid., 908. Hon. Sir Francis Bell.

on the Board, the former to be conducted judicially. The purposes of judicial inquiries and investigations included, inter alia, the obtaining of information for the prevention or suppression of monopolies, unfair competition and other practices detrimental to the public welfare, and for the proper regulation in the public interest of the prices of goods and services.[32] Essentially, the reason for conferring these two distinct functions on the Board were to enable it,

> (i) to conduct inquiries into specific matters (on its own motion, on reference from the Governor-General, or on a complaint) and adjudicate; and
>
> (ii) to conduct general investigations either if the nature of a matter considered by judicial inquiry appeared to merit a more wide-ranging examination, or if a general investigation was suggested by the nature of a matter raised as being more appropriate than a judicial inquiry.

In respect of its powers, a significant development was the revocation of the 1915 provision that the Commissions of Inquiry Act 1908 should apply to the Board's exercise of its functions. This was found in practice to be unsatisfactory and on the Board's reconstitution it was replaced with specified powers relating to

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32. Sections 13 and 23 respectively.

the conduct of inquiries and investigations. Here, perhaps, can be identified the first occasion on which Parliament could be said to have turned its mind directly on, and resolved, certain matters of procedure. These were:

(a) Meetings should be held in private (section 21). This was seen as a necessary adjunct to the receipt and consideration of evidence concerning private business. The Act provided, however, for the publication by the Board of information which it considered might be in the public interest, subject to the proviso that published evidence not be the basis of an action for defamation, (section 34).

(b) Evidence could be taken on oath, and witnesses summonsed, (section 14). Possible incrimination was not an excuse for declining to give evidence, (section 16). This provision was based on numerous precedents in New Zealand legislation, and was to be found in the Monopoly Prevention and the Commercial Trusts Acts.

(c) Delegation was permitted of all or any of the Board's powers to an individual member or group of members of the Board, (section 18).

(d) The parties to an inquiry included any person whom the Board deemed to have sufficient interest in the result, and parties could appear personally or by representation, (section 19).

Each of these provisions represents an area of procedure to which the Legislature was to return, in most cases in more detail, in later enactments. The Act was silent, however, on the question of appeal and review. Given the discretionary nature of the Board's powers and the fact that the chairman was to be the Minister of Industries and Commerce, it would appear that little existed in the way of safeguards against decisions made, especially since the courts in subsequent cases showed caution in 'trespassing' on spheres of ministerial activity and, in cases concerning the administration, have tended to invoke or at least refer to the existing checks provided by the political system through ministerial responsibility.[33]

A particularly striking feature of the Act was the extremely wide power conferred on the Governor-General for making regulations. While it is true that some specific powers for the Board were laid down in the statute, much detail was left for determination by regulation - the source of strong contention in the debate on the Bill.

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33. For example, Liversidge v Anderson [1942] A.C. 206, 222 per Viscount Maugham, and 279 per Lord Wright; Pagliara v Attorney-General [1974] 1 N.Z.L.R. 86, 95 per Quilliam J.

The regulations were, in fact, used extensively, for the very reason of deficiencies which emerged in the course of the Act's operation. Apart from fixing prices, for which regulations obviously would be a convenient tool, regulations also established further machinery for the supervision and control of trade. The Board of Trade (Onion) Regulations 1938,[34] for example, provided for: the appointment of an Advisory Committee to advise the Minister on variations in minimum onion prices, members to be paid fees; the registration of onion growers and merchants; and offences for the failure to comply with the Regulation. The government's reliance on regulations tended to increase, and the provision was retained on the dissolution of the Board in 1923 and in the Industries and Commerce Act 1956 which repealed the Board of Trade Act.

The Act also created offences, viz, hoarding, if the effect was to raise prices, and the selling of goods at unreasonably high prices. The Legislature did not see fit to extend the definition of 'reasonably' beyond that employed in the Commercial Trusts Act. Prosecutions could be brought only with the consent of the Board.

The Board of Trade was abolished in 1923 by the Board of Trade Amendment Act, and its powers were vested solely in the Minister who could delegate tc any officer of his department any of those powers of judicial inquiry and investigation, as originally conferred

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34. S.R. 1938/25.

on the Board. An Advisory Board was appointed, with provision for assistant members to be co-opted for their expert knowledge. A further Board of Trade was set up under the 1950 Board of Trade Act, with primarily advisory functions, but deriving from the customs rather than the industries and commerce field.

With the apparent convenience and especially the flexibility of the administrative approach, combined with the effective negation by the courts of the 'illegal per se' approach of the Commercial Trusts Act, it was almost inevitable that the Legislature would continue to adopt, and build on, the former. That there was a risk connected with the granting to an outside body of powers to regulate matters of considerable economic importance was recognised by the Legislature. With the establishment of the Board of Trade much was entrusted to the quality and independence of the membership, and to the extent of the powers conferred.[35] Subsequent legislation indicates the ways in which Parliament responded to these concerns.

Prevention of Profiteering Act 1936

In an attempt to remedy statutory deficiencies in the legislation providing for profiteering, the Prevention of Profiteering Act was passed in 1936. The move to more strictly regulate pricing practices was taken in the context of a range of post-depression economic

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35. See N.Z.P.D. (1919), Vol. 184, p. 909.

policies, and simply made it an offence to sell or offer to sell goods or services at a price exceeding by an unreasonable amount a defined "basic price".

In the debate on the Bill the Minister in charge pointed out that its provisions could equally have been created by regulation under the Board of Trade Act, but considering the public interest in pricing matters this course consciously had been rejected in favour of a separate enactment, allowing full public discussion.[36] In fact, the Bill did not depart from the earlier Act (as amended in 1923) in so far as the Minister retained control, proceedings being initiated only at his direction. Where it differed significantly was in the provision for special judicial tribunals to be set up, ad hoc, by the Governor-General to determine cases arising, jurisdiction to be exercised by a Stipendiary Magistrate[37] who was to be guided by more precise criteria in deciding whether profiteering had occurred than had been laid down in previous legislation. The Magistrate was, further, permitted to consider evidence beyond that legally admissible in other proceedings,[38] a provision which, in relation to legislation on commercial practices, had first appeared in the Commercial Trusts Act in connection with proceedings of the Supreme Court in recovering penalties.

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36. N.Z.P.D. (1936), Vol. 246, p. 137.

37. Sections 5(1) and 6(1).

38. Section 10.

The Act was never tested - it was repealed in 1947 without any proceedings having been initiated. The explanation for this was to be found not in the adequacy or otherwise of its provisions, but in the procedure followed by the Minister and his department - not laid down in the Act - in seeking through conciliation a voluntary curtailment of prices by persons investigated after a complaint. Departmental records show that a number of investigations were made under the Act but that in all cases the persons or companies concerned voluntarily reduced prices on an approach from the department, thereby avoiding the need for proceedings to be instituted.[39] In practical terms the success of conciliation was a matter of considerable significance, to be adopted formally in later legislation. This aspect, rather than the Act itself, marks the Prevention of Profiteering Act out in the evolution of an administrative approach to the control of commercial practices and prices.

Industrial Efficiency Act 1936

Also in 1936 the Industrial Efficiency Act was considered and passed by Parliament, concerned less directly than previous legislation with commercial practices and prices and more with the supervision and regulation of industrial development. As suggested by Robson, however, the Legislature would have considered the complementary nature of these substantive aspects:

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39. From evidence presented by G.D. Stringer in a paper prepared for the Diploma of Public Administration, Victoria University of Wellington, 1973, Aspects of Direct Price Control.

> "Questions of monopoly and price control inevitably raise those concerned with industrial efficiency." [40]

Of greatest interest in the present context was the nature of the machinery created for the broad objects of the Act, based on a registration and licensing system administered by a Bureau of Industry. The system was heavily bureaucratic, effectively providing for absolute control by the Minister with some consultation with outside interests through the presence in the Bureau of special members appointed as representatives of producer and employee groups. (Ordinary members were public servants with relevant expertise.) The Bureau was responsible for compiling registers of industries on the direction of the Minister who could then declare any registered industry to be subject to licensing.[41] Licence applications were to be made to the Bureau which granted licences in its discretion, subject to certain guidelines laid down. Here, the standing provision of the Board of Trade Act 1919 was taken a step further with an additional specification regarding the opportunity to present evidence. Section 15(2) read:

> "In considering any application for a license . . . the Bureau shall give to the applicant and to all other persons who in its opinion will, whether directly or indirectly, be materially affected by its decision, a sufficient opportunity to produce evidence or to make representations to the Bureau . . ."

Further, a requirement that reasons be given made its first appearance in the evolution of the legislation here under consideration. On refusal of a licence the Bureau had to notify the applicant, stating

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40. Robson, op. cit., p. 303.

41. Sections 13 and 14.

reasons for the decision.[42]

Another innovation was the provision of an appeal right, for any licence applicant aggrieved by a decision of the Bureau and for any other person by leave of the Minister.[43] The right of appeal was circumscribed, however, by virtue of the Minister functioning as the appeal body. This had the curious effect that the Minister adjudicated upon the decisions of an administrative body on matters which he referred to that body by declaring that the licensing procedure was to be applied. No appeal lay against the Minister's declaration that an industry should be licensed, but such a declaration made it unlawful for an industry to carry on in business without a licence. As the Appeal Authority the Minister was required to take into account not only the general purposes of the Act, but also the "economic necessity of securing efficiency and co-ordination in industry."[44] The appeal cases were, accordingly, a virtual declaration of the government's economic policy, the factors which were taken into account in determining appeals having included the desirability of a balanced economy,[45] the protection of domestic industry,[46] and the ills of destructive competition.[47]

The Act tended, in operation, to contradict its intent by

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42. Section 18.
43. Section 21.
44. Section 21(4).
45. Decision of 3/12/45 of Industrial Appeal Authority in appeals by M. Michelin and Co Ltd and Others. Unreported.
46. Decision of 16/4/45 of Industrial Appeal Authority in appeal by Amalgamated Wireless (Australasia) Ltd. Unreported.
47. Decision of 28/1/46 of Industrial Appeal Authority in appeal by Footgluve Shoe Manufacturing Co Ltd. Unreported.

fostering existing industries irrespective of their efficiency. Its administration, as Robson noted, "did not develop in the fullness envisaged by Parliament",[48] perhaps for the reason of its being held closely in the hands of the Minister. Nevertheless, some precedent in respect of procedural requirements was established.

The Act was repealed by the Industries and Commerce Act 1956 which provided for the continuation of licensing for those industries licensed under the 1936 Act, subject to the Minister being able to release any particular industry from the earlier licensing provisions.[49]

Control of Prices Act 1947

In the disturbed economic conditions of post-war times the Legislature returned again to the direct question of prices in the Control of Prices Act of 1947 which created the most detailed system for price control yet enacted. In respect of concept and detail the Act can be regarded as the forerunner of present legislation in the area with which this paper is concerned, both because of new provisions which became settled procedure, and because of the way in which the Act drew into a format which still subsists elements of earlier legislation. Like the Board of Trade Act, this Act combined administrative controls of a judicial and investigatory nature with offences, but ministerial involvement was lessened and, for the first time, Parliament saw the appropriateness of public hearings. The importance of the measure was such as to

48. Robson, op. cit., 309.
49. Section 19.

ensure that the Bill was referred to a select committee for consideration. In moving its referral, Hon. Mr Nordmeyer described it as

> "a very far reaching measure, and it would be unwise for the House to proceed with it until the public had had an opportunity of considering it and making representations."[50]

A wide range of organisations responded to the opportunity to be heard, as a result of which the Industries and Commerce Committee proposed some important amendments, to which reference is made below.

The main feature of the Act was a Price Tribunal, initially set up under emergency regulations[51] but now removed to the sphere of more permanent administration. No qualifications were specified for members, and despite the argument of an Opposition member, that

> ". . . the tribunal is still a political tribunal. The members are appointed during the pleasure of the Government and can be removed from time to time at the will of the Government."[52] ,

no provision was made for security or continuity of tenure. This was a contradiction of membership provisions of earlier legislation, especially as in the Board of Trade Act where special emphasis was placed on expertise and representative interests, and on a five-year tenure.

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50. N.Z.P.D. (1947) Vol. 278, p. 431. A request from an Opposition member that the Industries and Commerce Committee be open to the news media for the hearing of evidence was unsuccessful.

51. Control of Prices Emergency Regulations 1939, S.R. 1939/275.

52. N.Z.P.D. (1947) Vol. 279, p. 256. Mr Watts.

The functions of the Price Tribunal were, inter alia, to

- make price orders (section 15)
- issue price approvals (section 16)
- investigate complaints received directly or referred by the Minister (section 10)
- institute proceedings for price offences (section 10)
- issue by notice in the Gazette exemptions from price control (included at the instigation of the select committee but transferred to the Minister in 1956) (section 18).

A distinction can be made (and was made by the Minister introducing the Bill) between the judicial and administrative functions of the Tribunal, but it is also the case that the Tribunal had a legislative function in making price orders and issuing price approvals which could have general application throughout the country.

Wider powers for obtaining evidence than were previously seen were granted to the Tribunal, including access to such books and documents as required, the power to require returns of information from producers, manufacturers, distributors and retailers and to inspect stocks and take samples.[53] For the purposes of its investigations the Tribunal could take evidence on oath; and in respect of the giving of incriminating evidence identical provisions to those of the Board of Trade Act were enacted.[54] These were seen as necessary powers to give effect to the intent of the Act, although

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53. Sections 11, 13 and 14.

54. Section 12.

submissions to the select committee objected strongly to the extent of the powers so conferred, and held that that concerning incriminating evidence was repugnant to the common law of the land.

No right of appeal against decisions of the Tribunal was granted, but on matters delegated to the Director of Price Control under section 39 (later the Secretary of Industries and Commerce) the Tribunal took on an appellate function, determining appeals in such manner as it thought fit. The Director's decision remained in force pending the outcome of an appeal.

The provision for delegation (of all or any of the Tribunal's powers) was prompted largely by major difficulties experienced under the preceding price administration system. Much criticism was voiced before the select committee of the long delays that had accompanied price applications, and in practice the department had carried out most of the pricing work with the Tribunal functioning mainly as the appellate body. Enforcement, too, had been a problem. With statutory delegation the department was able to build up the numbers of staff employed in price control, as shown in its annual reports, to 206 in 1948 and 240 in 1949. The scheme was further assisted by the use of district offices to handle applications for price increases. Thus it was expected that such matters as did not require a public hearing and which fell into fairly well-defined categories could be given speedy attention.

The provision for public hearings was clearly the most significant innovation to be found in the Act, representing a complete reversal of earlier legislative provisions, and of the provisions of the 1939 Regulation which required hearings to be in private unless the Tribunal ordered otherwise. Under the latter, the Tribunal had seen fit to open its hearings to the public in only a few cases, reflecting the general view that the operations of the business community should remain private. Mr Watts, a member of the Industries and Commerce Committee, reiterated in the House the objection raised in submissions to the inconvenience that public hearings would cause:

> ". . . a date must be fixed, and witnesses must be called and warned to appear at a certain time resulting in all the paraphernalia and delays associated with public hearings of any dispute, either in our Courts or before a judicial tribunal. The effect of that will be greatly to delay the work of the tribunal. . . ."[55]

The House chose, however, to favour the benefits of public access to proceedings on pricing issues over mere expedience. The Tribunal was given the discretion to sit in private and prohibit publication of proceedings, and on the recommendation of the select committee the bond of secrecy was imposed on members and staff of the Tribunal.[56]

The Act did not follow the Industrial Efficiency Act in requiring that the Tribunal give reasons for its decisions, but the

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55. N.Z.P.D. (1947), op. cit., p. 526.

56. Sections 5(5), 5(6), and 8.

emphasis on public hearings was interpreted by the courts in cases brought against decisions of the Tribunal as requiring the Tribunal in its procedure to act judicially.[57]

As mentioned above, offences were also created under this Act, including the by then standard price offences of black marketing, hoarding, refusals to sell and profiteering. In respect of the latter, once again the Legislature declined to expand on the definition of 'unreasonably' high prices, as being those which produced, or were calculated to produce, more than a fair and reasonable rate of commercial profit. Thus this still was left to the courts to decide, as a matter of fact. The courts were given a further task of factual determination in respect of the offence of exceeding maximum prices that might be charged on goods subject to price approvals. The maximum price was described in the Act as the lowest price charged for other goods of the same kind when sold in substantially the same quantities and on substantially the same terms.[58] The existence of these conditions, under section 22(a), was determinable by the courts. In addition, section 22(b) placed on the defendant the entire burden of proving that his prices were based on variations from conditions applying in the market for the same goods which were substantial. In subsequent legislation on commercial practices the question of where the burden of proof lay in any proceedings became a central issue.

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57. Notably, F.E. Jackson and Co Ltd v Price Tribunal (No. 2) [1950] N.Z.L.R. 433

58. Section 20.

A large number of successful prosecutions were brought under the Act. The department's annual report for 1950 records a total of 3,661 convictions for breaches of price-control measures between early 1940 and 31 March 1950, fines totalling £16,377. 5s.[59]

In 1954 the Tribunal on the Minister's request, held an inquiry into the policy of price de-control. In the course of the inquiry the relationships between the Tribunal, and the department and the Minister, were brought into focus, some interests arguing that the Tribunal should be guided by the course of policy laid down by the Government.[60] In a decision on a price order the Tribunal affirmed the view that it was from the 1947 Act

> "under which duties, functions and powers are conferred on the Tribunal by the legislature that the intentions of the legislature must be gathered. The Tribunal is established to carry out the purposes of the Act under which it is constituted . . . . Policy as to the continuation, extension, or discrimination of price fixation for the purposes of price control is to be spelled out of those factors which have their basis in the Act, not out of electioneering speeches. . . ."[61]

In the same inquiry the Tribunal suggested a revised role for price control in the future, based on its opinion that where free and open competition was operating effectively, it should be unnecessary to

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59. Department of Industries and Commerce, Annual Report for Year ended 31 March 1950, A.J.H.R. (1950) Vol. IV H.44, p. 28.

60. Stringer, op. cit., p. 30.

61. Price Order 3592.

fix prices. The factors cited as possible impediments to competitive conditions were monopolies and restrictive trade practices.[62] To this extent the Tribunal predicted the substantive shape of the legislation which was to be enacted within four years, providing for an orientation towards commercial practices and prices which emphasised the former.

Summary of Developments 1908 to 1958

The foregoing survey of the methods chosen by the Legislature to deal with the questions of market structure and behaviour serves to disclose the thrust of constitutional and procedural developments antecedent to new legislation in 1958 which, though substantially innovative, reflected this background. In exactly fifty years the Legislature had progressed in three clearly identifiable ways:

(i) From an initial reluctance to intervene Parliament, disenchanted with the courts, affirmed its belief in legislative machinery to regulate commercial practices and price levels.

(ii) While specific market situations prompted the earlier legislation Parliament later responded to the perceived need for general controls which anticipated circumstances which might be against the public interest.

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62. Stringer, op. cit., p. 33.

(iii) Prohibitions and criminal sanctions gave way to a recognition that market restrictions and certain pricing practices might not necessarily be detrimental to the public interest, and that, indeed, in the New Zealand context a more permissive approach was appropriate.

This pattern of development was accompanied by the emergence of provisions for constitution and procedure which by no means met the demands of modern administrative law, but at least evinced the acceptance of the Legislature, that administrative controls should carry certain procedural requirements. In this, Parliament was prompted increasingly by the claims of the private sector which insisted that if controls were to be imposed, then some safeguards should be provided.

The reasons for the apparently piecemeal approach on the part of the Legislature to matters of substance and procedure over this period can readily be understood in terms of, respectively, the changing economic conditions and especially the special circumstances of war, and the wider context of the evolution of administrative law.

By 1958 it was no longer necessary to look to the failings in the common law to find the motivation for legislative intervention in the field of commercial practices and prices.

The principle had become firmly entrenched and further intervention had its own momentum. Neither was legislation by then required to assist the Government in its policies for a controlled economy which had been the basis of the earlier tendency of retaining in the hands of the Minister a large degree of control and discretion. For these reasons it was possible for Parliament to turn to the consideration of a more coherent legislative framework for intervention in this area and to direct attention towards questions of manner and form as much as to substance.

Whether such a possibility was realised can be seen in the ensuing legislative history. Before this is considered, some general discussion of tribunals - the factors that govern their choice and the procedures by which desirably they should be governed - will be useful. Against this discussion can be assessed the important tribunals established under, first, the Trade Practices Act of 1958 and, later, the 1975 Commerce Act.

PART THREE

THE USE OF ADMINISTRATIVE TRIBUNALS

Why Tribunals?

In situations where decisions have to be made to settle disputes where the interests of individuals conflict with the pursuit of the wider public interest, and where it is desired that the decision-making process involve the application of certain criteria to particular cases, the New Zealand Legislature has been ready to confer jurisdiction on tribunals for the implementation of its legislative plans. Besides their use in the area of commercial practices, as evidenced in the preceding section of this paper, a comprehensive survey of administrative tribunals in 1965 identified 61 tribunals, including appeal authorities, created by statute.[63]

The administrative tribunal stands between the courts, at one end of the decision scale, and the executive government, through the Minister concerned, at the other. In terms of constitutional arrangements and by reference to competence and responsibility the tribunal as decider presents a number of advantages over both.

As a system for administrative adjudication in comparison with the courts the advantages of the tribunal have been neatly summarised in the 1957 report of a committee set up in the United Kingdom, known

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63. Department of Justice, The Citizen and Power: Administrative Tribunals (1965), Government Printer, Schedule.

as the Franks Committee, to inquire into tribunals and inquiries:

> ". . . there are demonstrable special reasons which make a tribunal more appropriate, namely the need for cheapness, accessibility, freedom from technicality, expedition and expert knowledge of a particular subject." 64

In elaboration of these much quoted criteria it may be said that a primary consideration is that the tribunal is not bound by the rules of evidence that constrain the courts. Not only are tribunals free from the practice of the courts of placing a strict construction on the words of a statute, but they may, through a process of investigation, supplement evidence put forward by the parties with information obtained of their own accord. Neither are tribunals bound by precedent. These are important features given that tribunals have been chosen most often to deal with matters of social and economic concern where, because of changes brought about by government policy or spontaneously through society's development, it is appropriate to consider different factors in different cases or to consider the same factors in different lights and to determine questions in the light of prevailing social and economic conditions; and are significant for tribunals exercising both appellate and first instance jurisdiction. They may also be seen as part of the logic of privative clauses to exclude further review by the ordinary courts.

In respect of accessibility and expedition tribunals are advantaged by their ability to operate less formally than the

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64. Cmnd 218, op. cit., para. 38.

courts. It will often be provided in the constating enactment that a tribunal may regulate its own procedure,[65] although such a provision will need to be seen against any procedural rules laid down in the statute or regulations made thereunder, and, importantly, against the principles firmly established in the common law for the observance of natural justice (discussed below). Further, a tribunal may be enabled to adjust its procedure, where appropriate and where a better result may be achieved, to dispense with formal hearings and the associated procedural requirements. This is well illustrated in the conciliation process provided under the Trade Practices and Commerce Acts.

Whether the advantage of "expert knowledge of a particular subject" pertains to a tribunal will depend on its constitution. As seen in the evolution of an administrative approach to commercial practices and prices, it was not always provided that members should be appointed for the relevance of their knowledge and experience. It may also be noted that the establishment of specialist courts as, for example, the British Restrictive Practices Court, will achieve the same end.

As an alternative to ministerial decision-making the tribunal has the overriding advantage of independence - provided, of course, that its constitution is such as to free it from ministerial direction. There will also sometimes be the less meritorious benefit that the creation of an administrative tribunal may relieve the

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65. Cf Price Tribunal, Control of Prices Act 1947, section 7.

workload of a minister and his department and remove the burden of making difficult decisions. But the allocation of powers between ministers and independent tribunals will depend not so much on the apparent advantages of the latter as on the extent of policy involved in the area of administration. If the policy considerations are major it is accepted in public opinion and conceded by the Legislature that under our political system certain actions and decisions should remain in the hands of the minister; where the policy is small or may be reduced to a set of guiding rules the decision-making properly can be left to a tribunal. This can be appreciated by reference to the circumstances of the controlled economy which existed in New Zealand throughout the period of the two world wars and in each post-war period. As suggested earlier in this paper, the strong policy interest of the government in matters of pricing and competition in the private sector was found to be justification for their being kept under the close ministerial supervision, even when delegated to an administrative body. By 1958 when the Trade Practices Bill was considered only the very broadest policy was at issue - the promotion of free competition in the interests of the economy and the consuming public - and this was given in the terms of the legislation.

From the foregoing it would appear that the administrative tribunal is a particularly appropriate instrument for decision-making in the area of trade and prices. On the one hand, the subject matter is economic in orientation, and the advantages of the tribunal as compared with the courts come into play. On the other, the decisions

required to be made have major implications for the viability of private commerce and for the general well-being of the community and should be taken independently of political pressures. For tribunals exercising either original or appellate jurisdiction there is a further advantage, one simply of practicality. In creating new areas of law Parliament inevitably increases the scope for decision-making. It is difficult to envisage the ordinary courts dealing with the sheer volume of work involved. But while in New Zealand and Australia[66] the tribunal was in fact the method chosen, in the United Kingdom the Legislature preferred to place the supervision of trade practices with the courts, by establishing the Restrictive Practices Court.[67] Following upon an increasing trend towards the creation of administrative tribunals, the British Parliament responded with an "outstanding example" [68] of a return of jurisdiction to the courts. The Restrictive Trade Practices Act declared certain trade agreements to be against the public interest and void, but stated that such agreements would be valid if proved by the parties not to be so, in the light of criteria laid down in the Act. In this respect it was not different from the New Zealand approach which continued to provide for specified prohibitions, but an additional and stringent requirement was that issues for decision be reduced to the judiciable, that is, questions of fact which the Court properly could decide. The Court would of course have the same, or a greater, advantage as an administrative tribunal as regards impartiality, but was expected also to create certainty and predictability by means of a body of solid case law based on the

66. Trade Practices Act 1965-1974 (Commonwealth).
67. Restrictive Trade Practices Act 1956.
68. Stevens, R.B. and Yamey, B.S. The Restrictive Practices Court: A Study of the Judicial Process and Economic Policy (1965), p. 9.

principles laid down by Parliament[69]. The decision to rely on the judges was further based on a belief, strongly expressed in the debates on the Bill, in the effectiveness of the law as a "dynamic force in modern problems"[70], a presumption not echoed in the New Zealand Legislature since the passing of the Commercial Trusts Act in 1910.

In its choice of a court to deal with restrictive practices[71] the British Parliament took the point of the Franks Committee, that

> "as a matter of general principle . . . a decision should be entrusted to a court rather than a tribunal in the absence of special considerations which make a tribunal more suitable." [72]

The "special considerations", quoted above, were found by the New Zealand Legislature to point to the administrative tribunal, in this as in other jurisdictions, rather than to the courts.

Tribunal Procedure

A central concern of the Franks Committee was procedure which, it was thought, should be laid down clearly in statutes which created tribunals. The exhaustive analysis by the Committee of what was desirable procedure for tribunals, given that they were not courts, stimulated interest in tribunal procedure in other countries.

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69. Ibid., p. 14.

70. 199 H.L. Deb. (5th Ser.), col. 350 (1956). Lord Kilmuir.

71. It is of interest to note that monopolies are not referred to the Court. In contrast, they are supervised by the Monopolies Commission, an administrative body set up by the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, with investigatory and advisory functions only.

72. Cmnd 218, op. cit., para. 30.

The Justice Department report[73] in New Zealand was a direct result. It surveyed the conditions and procedures of New Zealand administrative tribunals, and the opportunities for judicial review that were provided, against the recommendations of the Franks Report, and found a wide variation in standards:

> "It must be admitted that the present pattern is not coherent nor simple and there are unsightly knobs and excrescences upon which surgery should be taken."[74]

The Justice Department Report went on to say, however, that all tribunals should not necessarily have the same constitution, procedure or opportunities for judicial review:

> "Each case, we think, must be treated on its merits."[75]

The implication was, that not all the conclusions arrived at by the Franks Committee ought necessarily be applied in New Zealand. Keeping in mind the three requirements considered fundamental by the Franks Committee, namely openness, fairness and impartiality, the Justice Department Report identified a number of characteristics which should be observed by tribunals in the interests of natural justice. Summarised, these were that

- the public be adequately informed of the right to apply to the tribunal
- the parties be informed of the case to be met
- a minimum period of notice prior to a hearing be prescribed

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73. Op. cit.
74. Ibid., p. 4.
75. Ibid., p. 5.

- hearings generally be in public
- parties be allowed legal representation
- the tribunal have power to subpoena witnesses and, on its discretion, to administer oaths
- cross-examination be permitted in oral hearings
- the parties be informed of appeal rights
- reasons for decisions be given
- tribunals be enabled to award costs.

Having thus covered the common law principle of natural justice in respect of a fair hearing the Department proposed that impartiality should be ensured by

- the appointment of at least the chairman by the Governor-General, or the Governor-General in Council after consultation with the Minister of Justice
- the avoidance of representation of special interests in the membership of tribunals
- tenure of a fixed term, with standardised grounds for removal from office.

The Department also felt that it would be desirable for other tribunals to follow the existing practice of some, of publishing their decisions, and that selected decisions of the more important tribunals might be published in the one series.[76]

As to existing appeal provisions the Department's survey revealed wide variations which it classified into five types ranging from the absence of any appeal right on fact or merit (which included the Price Tribunal) to appeal from the decision of a tribunal direct to the

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76. This point has been taken up with the publication of the New Zealand Administrative Reports, beginning in 1976. N.Z.A.R. (1976) Part 1.

Supreme Court. Recognition was given to the possibility that an appeal procedure could counter the advantages of using tribunals as compared with the courts, especially by causing delay. The Franks Committee did not admit of such a possibility, finding that the right of appeal had the three merits of making for correct adjudication, helping to ensure consistency in decisions and giving the appearance of fairness. This Committee argued that generally there should be a right of appeal from a tribunal of first instance, to an appellate tribunal, on questions of fact and law and on the merits of the decision. Points of law should be appealable in the courts.

As bodies exercising judicial functions tribunals had always been subject to review by the courts, by means primarily of the order of certiorari requiring the tribunal to rehear the case, deciding it in accordance with correct legal principles as indicated by the court. This had not always been the case for the exercise of administrative functions, but a decision of the House of Lords in the case of Ridge v Baldwin[77] in 1963 clarified the position with respect to administrative decisions, Lord Reid affirming that the rule of natural justice, that a person was entitled to a hearing, must be applied equally to administrative decisions as to judicial hearings.

The response of the Legislature to the insistence of the courts that administrative decisions could be reviewed was to enact the so-called "privative" clauses which purported to deprive the courts of jurisdiction. Such clauses often are found in New Zealand legislation

77. [1963] 2 All E.R. 66.

contrary to the recommendation of the Franks Committee that they be abolished in order to secure judicial control by means of the remedies of certiorari and mandamus.[78] The courts, however, have construed statutes in such a way as to strike down these clauses. For example, in Anisminic Ltd v Foreign Compensation Commission[79] it was established that if a tribunal misconstrues the provisions empowering it to act, this is an error of law going to its jurisdiction, in which case a privative clause cannot operate to exclude review by the courts.

In the matter of review by the courts it is relevant here to note the much simplified procedure for obtaining review introduced by the Judicature Amendment Act in 1972, designed to replace the complex procedures of the prerogative writs. The new procedure has been freely used, and bears directly on the question of safeguards inherent in the system of decision-making by administrative tribunals.

A question which has dominated the interest in tribunal procedure for a number of years is whether a code should be laid down to specify and standardise procedures. The Franks Committee stopped short of such a proposal, recommending instead some permanent machinery for the general supervision of tribunal organisation and procedure. The Council on Tribunals was enacted in the Tribunals and

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78. The Franks Committee view was endorsed by the Australian Commonwealth Administrative Review Committee (1971), Parl. Paper 144/1971. Recommendation 14.

79. [1969] 1 All E.R. 208.

Inquiries Act of 1958 for this purpose. With similar, but somewhat broader, objectives an Administrative Review Council was recently established in Australia under the Administrative Appeals Tribunal Act 1975. In New Zealand this function is fulfilled to some extent by the Public and Administrative Law Reform Committee. In contrast, America has had an Administrative Procedure Act since 1946 which lays down certain basic rules of procedure to be observed by all administrative agencies; and in Australia draft legislation providing an administrative procedure code is under consideration.[80] A code of procedure for administrative tribunals in New Zealand has been mooted. G.S. Orr argued that

> "the number and importance of our tribunals is such that the enactment of a statute dealing specifically with their procedure and powers in a general way is overdue." [81]

This view was in part based on the tendency in New Zealand legislation for procedure in respect of evidence and cross-examination to be covered generally by reference to the powers of Commissions under the Commissions of Inquiry Act 1908. Orr's opinion was that

> "The Commission of Inquiry Act 1908 was not enacted to regulate the powers of administrative tribunals, then in their infancy, but those of ad hoc inquiries. The incorporation of the provisions of a statute enacted for another purpose is an unsatisfactory method of defining the powers of administrative tribunals." [82]

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80. See First Annual Report of the Administrative Review Council (1977), Parliamentary Paper 306/1977, pp. 11-13, for a discussion of this legislation.

81. Orr, G.S., Report of Administrative Justice in New Zealand (1964), para.197.

82. Ibid.

A more recent study, however, favoured an alternative approach whereby detailed rules for each tribunal would be provided in the constating Act, largely on the grounds that a general code would not create any more certainty in procedure than found in the common law.[83]

From the various reports and cases it is evident that tribunals may no longer be regarded as a 'short-cut' method of decision making. Whatever their advantages, they may not omit procedures for the observance of natural justice, even in the interests of efficiency and speed. Further, the application of natural justice does not depend on the statutory expression of procedural detail, as enunciated by Lord Reid in Wiseman v Borneman:

> "For a long time the Courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary." [84]

The issues raised in this discussion of the administrative tribunal were by no means all apparent to the Legislature in 1958, where the Legislative history is resumed; but given that the use of the tribunal is reaffirmed in the legislation of that year and continued, indeed reinforced, up to the present day, these issues may be kept in mind especially in terms of what improvements and safeguards were sought.

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83. Keith, K.J. A Code of Procedure for Administrative Tribunals (1974), Legal Research Foundation Occasional Pamphlet No. 8, pp. 48, 49.

84. [1969] 3 All E.R. 275, 277.

PART FOUR

LEGISLATIVE INTERVENTION

1958 TO THE PRESENT DAY

The subsisting machinery for intervention in commercial practices and prices, provided by the Commerce Act 1975, has its distinct origins in the Trade Practices Act of 1958. In general, these Acts followed the administrative approach of the Board of Trade Act but with major innovations deriving from the vesting of jurisdiction in a body by and large free of ministerial supervision. By 1958 the Legislature saw the need for a new structure with, as Collinge described it,

> ". . . its own administrative machinery, its own tribunal and appeal system, its own procedure and its own principles." [85]

Strong economic considerations underlay both Acts. The 1958 Act was introduced in the context of the government's greater willingness to rely on market forces to stabilise prices. A more immediate factor was the tendency, which accompanied the progressive disuse of direct administrative controls over prices during the 1940s and 1950s, for the trade associations which had emerged

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85. Collinge, op. cit., p. 8.

primarily for the purpose of negotiating with government officials on price orders and approvals to substitute their own price fixing arrangements. It was the view of both main political parties that if competition was to work effectively to regulate prices some form of supervision should be exercised over restrictive business practices which might interfere with the competitive process. When the Trade Practices Bill was introduced by the then Labour administration, the previous National Government had been working on similar substantive lines, drafting legislation to curb restrictive trade practices. It is also evident that the proposals of the National Government were to include an investigatory commission to deal with the effects of trade restrictions on the public interest.[86] In the words of the Honourable Mr Holloway, Minister in charge of the Bill,

> "The need to do something about restrictive trade practices is not just a whim of this Government. . . . legislation should be introduced to deal with restrictive trade practices that were not in the public interest. Members of Parliament, of both parties, also agree with that." [87]

Thus the need for legislation, shifting the substantive emphasis away from direct control of prices towards the removal of impediments to free trade, was not an issue in the debates. Nor was it a matter of contention that the approach should be by means

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86. See Rt Hon. Sir Keith Holyoake, Deputy Prime Minister, in The Evening Post, 2 October 1957.

87. N.Z.P.D. (1958), Vol. 318, p. 2127.

of administrative tribunal. Rather, as Mr Holloway suggested was properly the case,[88] disagreement focused on the form of administration.

The same economic factors influenced the introduction of the Commerce Bill, with the added impetus of the inflationary conditions of the 1970s which re-emphasised the need for price regulation and which, along with the fact of developments in competition law in other countries, largely explains why a need was seen for complex new legislation after only seven years' experience with the Trade Practices Act. The Commerce Act was in fact the result of a comprehensive review and rationalisation of the existing legislation, dating back as far as the 1908 Monopoly Prevention Act. In particular, the Act consolidated within its ambit the Trade Practices Act and the Control of Prices Act. As well, the Commerce Act extended the area of substantive law making separate provision for the control of monopolies, mergers and takeovers.[89]

Both Acts created machinery whereby certain commercial practices, whether operated by individuals or groups of traders, could be the subject of public scrutiny by an administrative tribunal. The intention was to bring down legislation which would not

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88. Ibid.

89. No role for the Commerce Commission is provided under Part IVA of the Act, Strikes and Lockouts Contrary to the Public Interest, which was inserted by the Commerce Amendment Act 1976. Somewhat incongruous in the general context of the Act, this Part will not be considered in this paper.

prejudge any particular commercial practice, but instead adopted a case by case method of arriving at conclusions as to the effect on the public interest of the practice and at a determination as to whether it should be permitted to continue, with or without modification, before which, by a process of investigation and inquiry each person affected was to have the right to state his case. Some offences were created, rendering illegal without further proof specified practices, reflecting the belief of the Legislature that the law should be quite clear on those practices which were positively harmful to the public interest - and reviving, to some extent, the approach adopted in the Commercial Trusts Act.

Of central interest in the present context is the fact that the Commerce Act is somewhat more precise and detailed in respect of constitution, manner and form than was the Trade Practices Act - even after the latter had progressed through three major amending Acts bearing on these aspects. That the 1958 Act was sparse on detail can be explained in terms of the experimental nature of its approach and the consequent desire of the Legislature to allow for flexibility in the application of its provisions. In Collinge's words,

> "The immediate formulation of a detailed code would have been risky, and the legislature declined to provide a basic procedure in broad general terms." 90

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90. Collinge, op. cit., p. 115.

Despite a lengthy debate on the Bill during its passage in 1958, little attention was given to procedural questions except in the sense that it was recognised that the Act might need amending in the light of experience - as indeed happened. It is relevant to note here that the Bill was not referred for select committee consideration. Neither were subsequent amendments, until 1970 when the Trade Practices Amendment Bill of that year was put before the Commerce and Mining Committee.

The Commerce Bill, by way of contrast, was subject to the prolonged scrutiny of the House.[91] On its introduction in March 1974, the Bill was referred to the Commerce and Mining Committee (where 57 submissions were received and considered in some detail), and reported back to the House over seven months later. At that stage it was realised that the complexity of the Bill and the dissention on many of its provisions demanded further consideration and only one area of the Bill, that relating to pyramid selling which was seen as a matter of urgent need, was passed that session. A new Commerce Bill, revised in the light of the original evidence to the select committee and additional submissions made to the Minister, was introduced in 1975 and passed without referral back to the Committee. This lengthy process, as might be expected, exerted a strong influence on the final shape of the legislation, requiring as it did a much closer attention on the part of the Legislature to matters of substantive, constitutional and procedural detail. Remaining areas of

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91. See Appendix A.

disagreement were reappraised in a subsequent amendment following on the heels of the Act, in 1976.

Each of these Acts is now considered in turn, bearing in mind the emergence of new detail in respect of constitution and procedure over the span of the two decades.

Trade Practices Act 1958

In broad terms, the Trade Practices Act was designed to allow trade practices to be investigated and, if found to fall within a list of practices specified in the Act and to be contrary to the public interest according to prescribed tests, to be subject to an order directing the discontinuance or modification or prohibiting the repetition of that practice. The body established under the Act to be responsible for inquiry and adjudication was the Trade Practices Commission. Parliament thus affirmed the appropriateness of the administrative tribunal for determining matters of economic import[92] - a decision of some significance in view of the decision only two years previously of the British Parliament to assign this task to a special court.

In the form provided for supervision and determination the New Zealand Legislature introduced a notably innovative model of the

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92. The economic cast of the Act was given early recognition in a decision of the Trade Practices Commission: "The Act is economic in concept and its provisions are designed to restore free competition when such competition in any of its aspects has been reduced or restricted." Decision of Trade Practices Commission Re New Zealand Master Grocers' Federation, 18 February 1960.

administrative process, comprising:

(a) An administrator, being the Examiner of Trade Practices who, acting on a complaint or on his own initiative,[93] by investigation was to establish whether a prima facie case existed of a trade practice being carried out contrary to the public interest.

(b) If a prima facie case was in the Examiner's opinion shown, a process of conciliation whereby the trader concerned could confer with the Examiner with a view to reaching an agreement to abandon the practice or modify it to remove the detriment to the public interest. Whether or not conciliation took place, the Examiner then reported the results of his investigation to

(c) A tribunal, being the Trade Practices and Prices Commission which, on receipt of the report and recommendation of the Examiner, conducted an inquiry to establish whether a trade practice existed, whether it was against the public interest and if so what order should be made.[94]

(d) An independent appeal authority, being the Trade Practices Appeal Authority, to whom a person the subject of a decision of the Commission could appeal.[95]

Constitution of Commission

The constitution of the tribunal was, of course, of central importance to this structure, but the Legislature did not consider it necessary to set up an entirely new body, choosing instead to

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93. Under the 1958 Act, section 16(1)(a), the Examiner was also to conduct investigations by reference from the Commission. This source of investigation was deleted by an amendment in 1961.

94. A discretion was granted the Commission to conduct an inquiry where the Examiner reported doubt as to whether a practice investigated was against the public interest, by section 5(1) of the Trade Practices Amendment Act 1971.

95. The appeal provisions were substantially revised in 1971. See subsequent discussion.

reconstitute the Price Tribunal established in 1947 under the Control of Prices Act and thereby amalgamate the two functions of encouraging competition and controlling prices. In defence against criticism of this move the Minister in charge reiterated the essential complementarity between competition and prices:

> ". . . the intention of this Bill is not that there should be an addition to the Price Tribunal but an organisation in substitute for it. The intention is that where a competitive spirit does operate there will be no need for price control."[96]

An informed commentator saw other reasons for Parliament's decision to utilise an existing tribunal:

> "It was, I believe, adopted for two reasons. One, that it was probably cheaper than appointing an entirely new Commission: the other that it might have been thought difficult to recruit other suitable persons for what was likely to be part-time work."[97]

The same commentator on another occasion pointed out that

> "As the same persons comprise the membership of the two bodies and the Commission is empowered to exercise all the powers and functions of the Tribunal, considerable difficulty must be experienced by members in ascertaining whether they are acting as the Commission or as the Tribunal when exercising the powers and functions conferred by the Control of Prices Act 1947! They may alternate as they see fit."[98]

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96. N.Z.P.D. (1958), op. cit., p. 2129.

97. Orr, C.S., Trade Practices - Legislation and Practice in New Zealand (1967). Unpublished paper, quoted by permission of the author.

98. Orr (1964), op. cit., para. 79.

In practice the Commission tended to function as the Price Tribunal in respect of its price control activities, and in this capacity to delegate increasingly pricing matters to the Department of Industries and Commerce. There being no right of appeal under the 1947 Act except from decisions made under delegation to the Price Tribunal, this meant that the independent appeal provided under the Trade Practices Act, against price orders or special price approvals made by the Commission, did not apply despite the equal possibility created by price decisions of either tribunal that business interests might be adversely affected. A minor amendment in 1964 providing that the Chairman of the Commission be appointed by the Governor-General, and a further amendment in 1971 preventing this office and that of President of the Price Tribunal being held by the same person, indicated some appreciation by the Legislature of the anomalies caused by the identity of the two bodies. The problem was also raised in 1965 during the introduction of a private member's Bill[99] by Dr A.M. Finlay who asked the then Government to consider taking steps to separate their functions,[100] but the matter remained to be tackled only in 1975, by the Commerce Bill.

As a further result of the identity of the Trade Practices Commission with the Price Tribunal, the Legislature failed to turn its mind towards the important question of membership qualifications for the new tribunal. As noted in the prior discussion of the 1947

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99. Trade Practices Amendment (No. 2) Bill 1965.

100. N.Z.P.D. (1965) Vol. 345, p. 3277.

Act, no qualifications were laid down for members of the Price Tribunal nor, consequentially, for the Commission although it was expected to perform wide investigatory, inquisitorial and judicial functions and to exercise extensive discretions. Not only did the absence of any specific qualifications run counter both to one of the Franks Committee criteria for establishing tribunals, namely that they afforded opportunity for the application of expert knowledge, and to the recommendation of the First Report of the Public and Administrative Law Reform Committee, that tribunal members should "possess qualifications and experience equipping them for membership of the tribunal concerned, having regard to its status and functions,"[101] but it also ignored the provisions of overseas legislation. The aforementioned Restrictive Practices Court established in Britain in 1956 was presided over by a judge of the High Court and comprised at least one other such judge and lay members qualified by virtue of their knowledge of or experience in industry, commerce or public affairs. The Australian Trade Practices Act of 1965 provided for the appointment of presidential members who were to be barristers or solicitors of the Supreme Court while other members of the tribunal were to have qualifications similar to those of the non-judicial members of the British Court. The New Zealand Parliament did respond to calls for legally qualified tribunal chairmen[102] by enacting in 1971 that the Chairman of the Trade Practices Commission should be a barrister or solicitor with special experience in commercial law, but, again, it was left to

101. First Report of the Public and Administrative Law Reform Committee, Appeals from Administrative Tribunals (1968), para. 42(iii).

102. E.g., ibid., para. 42(ii).

the Commerce Bill to raise generally the matter of appropriate membership.

On the other major aspect of constitution, that of the tribunal's independence, the 1971 Trade Practices Amendment Act provided for the Chairman of the Commission to be appointed by the Governor-General on the advice of the Minister of Industries and Commerce, but no attempt was made to secure tenure, nor to specify standard grounds for removal from office of any member. No prohibition against bias was stated. The Act was free of any direct policy directions, except that it is of interest to note an insertion into the criteria set down in section 20 for the guidance of the Commission as to effects of trade practices that would be contrary to the public interest, a direction that, in determining whether a trade practice prevented or unreasonably limited competition, the Commission "shall be guided by the principle that free and unrestricted competition is desirable."[103]

The Commission had no power to appoint staff, the necessary administrative officers being appointed under the State Services Act 1962.

The Examiner of Trade Practices was, similarly, appointed under the State Services Act and in 1961, recognising what was, anyway, the practice, the legislation provided expressly that the Examiner be an officer of the Department of Industries and Commerce. Given that inquiry by the Commission appeared to depend on the initiative of the

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103. Section 20(d), as inserted by section 10(2) of the Trade Practices Amendment Act 1971.

Examiner,[104] it is of some significance for the Commission's independence that the Examiner was answerable to his Minister. His counterparts in Britain (the Registrar of Restrictive Trade Practices) and Australia (the Commissioner of Trade Practices) were comparatively insulated from political control and might therefore exercise their duties strictly in accordance with the requirements of the Act. It would be reasonable to assume that the New Zealand Examiner would at least not act in contradiction of his department's policy.

What of the procedures required to be followed by the Examiner and the Trade Practices Commission, so constituted, in the exercise of their functions?

Procedure

The possible sources of procedure for tribunals are, of course, the statutory provisions of the constating enactment, rules developed by the tribunal in its discretion whether or not under specific statutory power, and those imposed by the common law principles of natural justice which may be codified in the statute or supplied in the case law.

In the case of the Trade Practices Act as passed in 1958, little procedural detail was enacted, or indeed discussed in the debates. This can perhaps be attributed to the fact that the procedures of the Commission were contemplated as being essentially investigatory

104. Section 8(a), however, suggested that the Commission might not necessarily await a report of the Examiner before conducting an inquiry. The writer has been unable to discover any instances of the Commission initiating its own inquiry.

and inquisitorial rather than adversarial and no need was seen for legislative statement on procedural requirements. Nevertheless, the Commission was bound to act judicially - not in the words of the statute but by virtue of its decision-making powers. The decision of the Legislature that the Commission should (except in special circumstances) meet in public placed on the Commission an even greater obligation of notice, evidence, giving of reasons and standing. Where detail was not laid down in the Act the Trade Practices Appeal Authority was ready to rule on what was desirable procedure for the Commission,[105] and the Legislature responded to an extent by laying down some minimum rules of procedure in the 1961, 1965 and 1971 amending Acts. In its 1971 form, the procedural provisions of the Act may be summarised as follows.

1. Procedure determined by Commission

Within the legislative framework provided by the Act, it was the view of the Legislature that the Commission should be free to regulate its procedure as it thought fit (section 4(5)) subject to such procedure as was laid down in the Act;[106] and subject to such rules as it might make for itself (section 18(7)) and to cover the proceedings of parties. By the latter the Legislature would of course not intend that the Commission should fetter itself with respect to the fundamental principle which lay behind the approach of the Act, that each case should be considered on its own merits.

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105. E.g., Registered Hairdressers [1961] N.Z.L.R. 161, 164-7.

106. Confirmed in Fencing Materials [1960] N.Z.L.R. 1121, 1126 which added that the principles of natural justice must also be observed, i.e., that the Commission must act in good faith, listen impartially to both sides and ensure that the parties are given a fair and reasonable opportunity to be heard.

2. Meetings to be held in public

Although hearings generally were to be held in public (section 5) the Commission was granted the discretion to sit privately; and to limit the publication of any aspect of any inquiry.

3. Hearings

The Act contained no code as such to ensure compliance with the rule of fairness. The opportunity for all the parties to be heard was, however, enhanced by a requirement inserted (only as late as 1965) that where the Commission proposed to hold an inquiry it should

(a) provide to the parties to the practice a copy of the Examiner's report initiating the inquiry, requiring an answer within a specified time (section 17(3));

(b) supply the Examiner with a copy of the parties' answer (section 17(4)).

Thus, upon the Commission embarking on the hearing each side was enabled to know the case against it. (It is relevant to note here that the parties to the trade practice under investigation already would have been informed of the prima facie case made out by the Examiner and would have been afforded the opportunity to rebut the Examiner's opinion regarding the effect of the practice on the public interest, by means of the process of conciliation, introduced in 1965.

The importance of this provision is such as to warrant further discussion, below.) The Act was silent on the questions of notice for Commission hearings (except in respect of hearings for applications by the Examiner under section 18B, for orders requiring the production of information), the giving of reasons for Commission or Appeal Authority decisions, and the exercise of impartiality in the weighing of the evidence. There were no provisions relating to standing, although it could be inferred that those parties entitled to appeal under section 26, being persons directly affected by decisions of the Commission, could also present a case before the Commission.

4. Evidence

The Commission's powers in respect of obtaining evidence under section 18 were wide, but not more so, according to the Minister, than provided in previous legislation relating to commercial practices and prices. It is significant, however, that no provision was included to compel a witness at a hearing to give evidence which nevertheless might incriminate him. The Commission was explicitly freed in 1961 from court rules of evidence and could consider evidence that would not be admissible in a Court of law, the Legislature thereby recognising the elusive nature of economic and social facts that might be encountered in an inquiry. The authority to administer oaths and require the production of books and documents was, however, as for an ordinary court.

The Examiner's powers for obtaining information to assist him in reaching an opinion were spelt out in the 1971 amendment, to include an express power to require relevant books and documents to be produced for his inspection. (The original Act provided simply that the Examiner had the powers of a Committee of Inquiry appointed under the Industries and Commerce Act 1956.) The Department was required to assist the Examiner in respect both of information specifically requested by him, and of information relevant to an investigation which it might have available.

It may be concluded from the constitutional and procedural arrangements in the Act that the Legislature afforded minimal rights to traders who were the subject of investigation to present their case, and fell far short of providing the elements of a fair hearing described in the First Report of the Public and Administrative Law Reform Committee as

> "a process which will enable the facts to be ascertained; the differing points of view or arguments to be effectively present; all the relevant points to be weighed with manifest care; and an impartial and informed decision to be made."[107]

On cases taken to appeal, however, some of the conspicuous omissions of the Legislature were supplied. In Registered Hairdressers',[108] for example, the Appeal Authority said that the Examiner, in his report to

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107. Op. cit., p. 2.

108. Op. cit.

the Commission, should state, by reference to the relevant provision of the Act, the grounds for his opinion that a trade practice was contrary to the public interest, and that if before the hearing and on closer examination of the case additional or other grounds were found these also be advised to the party or parties concerned. The parties must be permitted to know in advance what it was about the trade practice that was claimed to be against the public interest. In the same appeal case Dalglish J. considered the question of whether the Commission would, under section 18, be predisposed to finding a trade practice contrary to the public interest, and concluded that a proper interpretation of the Legislature's intentions here would be that the Commission should begin with an open mind on the case and give full weight to all the evidence and arguments put before it from all sides. In Associated Booksellers'[109] the Appeal Authority found, similarly, that the Commission must look at the matter under consideration broadly, and take all relevant factors into account. In the aforementioned Fencing Materials case the Appeal Authority considered at length the procedure for evidence before the Commission and concluded that it was for the Commission to decide the weight which should be given to facts adduced before it, and to make its decision on a balance of probabilities. The Authority also commented on the

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109. [1962] N.Z.L.R. 1058. Here, however, Dalglish J. went further, indicating that it was material to take into account not only the detriments to the public interest of the trade practice, but also the benefits that might be forgone if the trade practice did not operate, thereby foreshadowing - perhaps prompting - a specific provision in the Commerce Act allowing for a balanced appraisal by the Commission of "pros" and "cons" of trade practices.

position as to the onus of proof regarding the effect on the public interest of a trade practice, and stated the view that it did not lie with the parties to the trade practice to satisfy the Commission that the practice was not contrary to the public interest, that was, that it had none of the effects specified under section 20 of the Act.[110]

The appeal rights under the Act thus assumed a particular importance in determining the procedure to be followed by the Commission, in the absence of specific rules in the statute - and, it may be noted, in the absence of any requirement before 1971 that the tribunal membership contain legal expertise.

Appeal Provisions

The appeal provisions in the Trade Practices Act underwent more substantial change during the Act's existence than did any other of its aspects. The Bill as introduced to the House in 1958 provided no appeal rights whatsoever, the Minister expressing the belief that an appeal authority merely substituted its opinion for that of the first instance authority which would already have dealt thoroughly with the matter before it. In the eight weeks between the Bill's introduction and second reading a change of mind occurred and the Legislature concurred with the insertion of a new Part[111] dealing

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110. Though a matter of substance rather than procedure, this was an important consideration in the light of a provision in the Commerce Act which, in purportedly reversing the onus of proof by placing it on the trader, was the subject of strong contention in the House and among witnesses before the select committee.

111. Part V, sections 24-36.

exclusively with appeal to a special body, the Trade Practices Appeal Authority which was to sit, generally in public, as a judicial authority for the determination of appeals from orders made by the Commission. As the Act did not specify the grounds for appeal, it was to be presumed that the Legislature intended appeal to lie on matters of both fact and law. The Appeal Authority was required to be a barrister or solicitor of not less than seven years' practice, holding office at the pleasure of the Governor-General. The alternative of appeal being to the Supreme Court was rejected for two reasons. First, it was felt that the Court lacked the special knowledge required to deal with policy issues and matters of administrative discretion. The second consideration was one of sheer practicality. It was not expected that the Court would have time to deal with trade practices appeal work.[112]

Persons entitled to appeal were those directly affected by an order of the Commission, but appeal against price decisions was prohibited. An error of law in respect of the latter would have to be corrected on review by the courts.

In respect of evidence the Authority was free to admit such as might in his opinion assist him to deal effectively with the matter before him, whether or not admissible in an ordinary court, an essential provision given that he was, with legal qualifications only, required to determine the appeal as on a rehearing. As well as determining any appeal the Appeal Authority was empowered to refer

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112. N.Z.P.D. (1958), op. cit., c. 2130.

the case back to the Commission for reconsideration, advising the Commission of his reasons for doing so and the Commission was required to take these into account.[113] The Appeal Authority was required to advise only the Commission, and not the parties, of his determination.

A privative clause in a form to be found in other legislation was included, providing in section 36 that:

> "Proceedings before the Appeal Authority shall not be held bad for want of form. No appeal shall lie from any determination of the Appeal Authority and, except on the grounds of lack of jurisdiction, no proceeding or order of the Appeal Authority shall be liable to be challenged, reviewed, quashed, or called in question in any Court."

A similar provision applied to the Commission itself, and generally has been commented upon in an earlier part of this paper. A number of legal commentators have found such clauses, excluding judicial review except on jurisdictional grounds, to be open to serious question.[114] Both the Chairman of the Commission and the Appeal Authority were empowered to state a case for the opinion of the Court of Appeal on any question of law arising from any proceeding.

With the establishment of the Administrative Division of the Supreme Court in 1968 the main reservations of the Legislature regarding appeal rights to the courts were overcome. As stated by

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113. In Registered Hairdressers', op. cit., it was ruled that "reconsideration" did not mean that the Commission had to re-open the inquiry or rehear the parties.

114. E.g., Orr (1964), op. cit., para. 29.

the Honourable Mr Hanan, introducing the Judicature Act Amendment Bill in 1968,

> ". . . . . the Bill will provide the legal framework for administrative appeals to be heard by Supreme Court judges who will be thoroughly conversant with the social and economic background involved. . . . The administrative division will bring greater coherence, consistency, and authority to administrative appeals. The creation of the division will also return the Supreme Court to its rightful place in our constitutional system by ensuring its direct involvement in some of the most important judicial questions to be decided. In the past the Supreme Court has been bypassed. Now it will once again become the centre of our judicial system."[115]

Supported by the Public and Administrative Law Reform Committee and by the business community which, in submissions to the select committee to which the Bill amending the Trade Practices Act appeal provisions was referred, criticised the existing appeal rights, in 1971 Parliament substituted for the special Appeal Authority a right of appeal to the Administrative Division. Few new procedural details accompanied this move. Pricing matters were again excluded from any appeal opportunity, and the parties entitled to appeal remained those directly affected by a decision of the Commission. Under a new section 29, however, the Examiner was permitted to appeal to the Administrative Division by way of case stated for the opinion of the Court on a question of law, where he was dissatisfied with any decision of the Commission as being erroneous in point of law.

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115. N.Z.P.D. (1968), Vol. 356, p. 1067.

In addition, any party to an appeal proceeding before the Administrative Division was enabled to state a case for the opinion of the Court of Appeal on questions of law only, determinations of the Court, which included the power to remit the matter to the Administrative Division with an opinion, being final.

In Appendix B a comparison is made between the appeal and review provisions of the Trade Practices Act and the 1975 Commerce Act.

Conciliation Procedures

The objections of the commercial community to the decision-making framework provided by the Act centred largely on its cumbersome machinery, and especially the formality and expense of proceedings before the Commission. The procedure for conciliation introduced in 1965 proved to be of very great practical importance in this respect. By section 16A of the 1965 amendment the Examiner was required, if he was of the opinion that a trade practice was being carried on contrary to the public interest, to inform the trader of his opinion, stating his grounds, and requesting a reply as to whether the trader accepted his opinion and whether the trader might abandon, voluntarily, the practice. If a reply was received, the Examiner, in his discretion, could invite the trader to confer for the purpose of reaching an agreement to abandon or modify the practice, any agreement reached to be the basis of a recommendation to the Commission. The enactment of this provision

reflected what had in fact been the practice of the Examiner. Indeed, the Minister on introducing the 1958 Bill had anticipated that a process of negotiation would take place at an early stage in any investigation, as had also been the case under the Prevention of Profiteering Act 1936. Unless required by the Commission, a formal hearing could be avoided by successful conciliation, and in fact the benefits of saving time and expense were such that from 1965 the majority of complaints were met by the voluntary withdrawal from, or modification of, the practice under investigation by the Examiner.

The conciliation procedure was regarded by the Department of Industries and Commerce as being

> ". . . of great value in enabling more speedy results and have, it is believed, promoted a better understanding of the purposes of the principal Act."[116]

In practice agreements reached in conciliation on appropriate consent orders were adopted by the Commission without a hearing. Not only were the parties to the practice and the State saved considerable expense, but it was clear, with the use made of informal discussion between the Examiner and the parties, that this was more suited to the nature of commercial practices than were protracted formal hearings of a judicial nature. The jurisdiction of the Commission was

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116. Department of Industries and Commerce, Annual Report for Year Ended 31 March 1968, A.J.H.R. (1968), Vol. IV, H.44, p. 17.

of course not ousted as the Act contemplated that a consent order was still required to be made by the Commission, but conciliation meant, as expressed by Orr,[117] that the trade practice could be discussed

> ". . . in an informal way more compatible with the nature of the issues involved. It short cuts or supplants the more cumbersome procedures before the Commission which over the years have tended to become increasingly formal and closely akin to proceedings in a Court of law."

For the traders concerned, moreover, successful conciliation removed the possibility of unwelcome publicity that might accompany the public hearings of the Commission and Appeal Authority. The trend towards a greater degree of judicialism in the proceedings of the Commission as noted by Orr, and the attendant legal costs to the parties to the practice, further encouraged the use of negotiation to resolve trade arrangements or agreements found by the Examiner to be against the public interest.

Some irony can be seen in the fact that only with the enactment of conciliation procedures, allowing tribunal investigation and inquiry to be avoided, were the advantages of tribunals identified by the Franks Committee - cheapness and expedition - fully realised.

The Trade Practices Act, in summary, can be said to have provided a law sufficiently flexible to allow any person to complain informally

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117. Orr (1967), op. cit.

about a trade practice and have it investigated with a view to eliminating any detriment to the public interest. Regard was had to the interests of the trader by placing the onus of proof on the State, viz, the Examiner.

The nature of the legislative framework was such as to provide that the essence of the investigatory and inquisitional process was the role of the Examiner who, from a workload point of view, was the main element in the three-tiered structure.[118] The burden of proving a case of a practice being carried out against the public interest was considerable, as borne out in Fencing Materials. Certain developments aided the Examiner in obtaining the information required to establish his case. Under the 1971 amendment the Examiner could seek an order from the Commission requiring parties he had reasonable cause to believe were engaged in a section 19(2) practice, possibly having one of the section 20 effects on the public interest, to supply him with particulars of the trade practice.[119] And the conciliation procedure enabled him to seek relevant information in discussion with the parties, which was nearly always voluntarily surrendered.

With the amendments enacted by successive Parliaments the Act after 1971 was considered by many to be "workable". Certainly annual reports of the Department reflected no dissatisfaction with

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118. That this was, and is still, so was confirmed by the writer in discussions with senior personnel of the present Examiner's office.

119. Section 18B, inserted by section 7 of the Trade Practices Amendment Act 1971.

its operation. By the late 1960s, however, the number of cases coming before the Trade Practices Commission had almost come to a halt.[120] This was attributed by Collinge and Hampton to a decline in enforcement activity,[121] but should also of course be related to the practical outcome of conciliation and, perhaps, to the repeal in 1961 of the provision in the 1958 Act for compulsory registration of a wide variety of restrictive agreements or arrangements, which had been a source of investigation by the Examiner.[122]

Despite the three major amendments, the Act was still unspecific on important matters of manner and form. Returning to the observation introducing the present discussion of the Trade Practices Act, it would have been difficult for the Legislature to have achieved anything more detailed, bearing in mind the experimental nature of the machinery established and the subject matter of the legislation.

To some extent the pursuit of more complex legislation in 1975 was the result of a bolder approach on the part of the Legislature

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120. Excepting that approvals for collective pricing agreements sought under section 18A continued to accumulate, creating an increasing backlog, unable to be handled by the small staff engaged on trade practice and pricing work, which was inherited by the Commerce Commission in 1975.

121. Collinge, J. and Hampton, L.F., in an unpublished paper presented to the New Zealand Society of Accountants 1976 Continuing Education Programme, Competition Law and Price Control: Practical Aspects of the Commerce Act 1975.

122. The compulsory registration principle had been borrowed by the New Zealand Legislature from the British Restrictive Practices Act but, not being suitably modified, had proved unsatisfactory. Whether the withdrawal of the registration provision had any effect on the number of cases brought to investigation should be viewed with caution, in light of the fact that it was believed in 1961 that, while 800 agreements had been registered this represented less than half the agreements in practice.

to providing for constitution and procedure, prompted by the view expressed by influential persons and bodies such as the Public and Administrative Law Reform Committee which continued in its reports to develop the issues raised in its First Report on administrative tribunals. It is also the case that the commercial and pricing practices covered by the Trade Practices Act did not extend sufficiently far to meet the objective of free competition. In particular, the 1958 Act dealt inadequately with trade combinations. Section 19 included as a trade practice subject to the Act any complete or partial monopoly of the supply of goods, or any practice tending to bring about a complete or partial monopoly, but it was found difficult to establish these conditions in actual cases. In the Trade Practices (No. 2) Bill 1965 Dr Finlay attempted to strengthen the monopoly provisions by setting a quantitative test for the existence of a monopoly situation. But the inclusion of trade combinations in an Act dealing with defined trade practices was anyway somewhat anomalous, and the provision was not capable of controlling takeovers and mergers in business which, because of their being prime sources of future monopolies, needed to be the subject of scrutiny prior to their implementation. This consideration led Collinge to suggest that registration be reintroduced with special provisions in respect of mergers and takeover bids,[123] and Orr to predict a need for special legislation to regulate complete or partial monopolies arising from company mergers.[124] The trade

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123. Collinge (1969), op. cit., p. 308.

124. Orr (1967) op. cit.

combination was, in the event, the chief source of new substance in the 1975 Commerce Act.

The legislation on trade practices provided under the 1958 Act and subsequent amendments has been described as "complicated and elaborate", providing for the implementation of "broad economic and social policies embodied in the Act."[125] How much more so can this be said of its successor?

The Commerce Act 1975

A complicated and elaborate piece of legislation, the Commerce Act is built substantially on the 1958 Act in terms of object, principles and structure, amalgamating within its ambit the basic provisions of the 1947 Control of Prices Act and including additional matters of substance dealing directly with monopolies, mergers and takeovers. The Act also incorporated an interim Act passed the previous year to control the development of pyramid selling schemes.

Taken generally, the Commerce Act is reflective rather than innovative, representing an accumulation of legislative effort to come to terms with the complexities of modern commercial life. In subject matter there is little that is entirely new in the Act. As has been shown, trade practices, trade combinations and prices had all been the subject of parliamentary attention in the course of the century. But the Act is not merely a consolidation. In bringing together all three areas under the general supervision of one

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125. Public and Administrative Law Reform Committee, First Report, op. cit., paras. 72, 78.

administrative body the Legislature was confronted with problems of jurisdiction, procedure and appeal and review, requiring much more detailed thought which in turn was reflected in provisions much fuller than found in earlier statutes. It needs also to be recalled that developments in administrative law, as briefly surveyed in Part Three of this paper, had in due time come to the attention of legislators not only in published statements and reports, but also in the results of appeal cases under the 1958 Act and through the growing tendency, reinforced by the establishment of the Administrative Division, for the courts to insist more vigorously that inferior tribunals should observe judicial procedures that met the demands of natural justice. Parliament thus was faced on the one hand with determining the roles of a new tribunal and, on the other, with resolving important, and related, questions of constitution and procedure previously expressed but sparsely. It is a notable feature of the Act that the principles recognised in English common law of nemo judex in causa sua and audi alteram partem become matters of substantive justice.

An analysis of the Commerce Act is complicated by the unusually cumbrous process by which a final framework was arrived at. In the following, the discussion will concern primarily the Act as passed in 1975, noting the significance of earlier provisions for manner and form and of amendments made under the 1976 Commerce Amendment Act.

The tribunal established under the Act is the Commerce Commission.

By separating the substance of the Act into three distinct areas the Legislature was able immediately to resolve the problems caused under the 1958 Act by the identity of the Trade Practices Commission and the Price Tribunal. Jurisdiction previously exercised de facto by the Department of Trade and Industry in respect of price control was granted de jure, meeting in part a recommendation of the Public and Administrative Law Reform Committee that the Department not draw its authority in practice from delegated power.[126].

The functions of the Commerce Commission are, in brief, to

(a) inquire into and adjudicate upon examinable trade practices after investigation and report by the Examiner of Commercial Practices - as under the 1958 Act (Commerce Act, Part II, section 41);

(b) inquire into and adjudicate upon or make recommendations to the Minister on monopolies, after investigation and report by the Examiner of Commercial Practices (Part III, sections 64-66);

(c) inquire into mergers and takeovers, investigated by the Examiner but not subject to his clearance, consenting to those found not against the public interest and making orders against those found to be so detrimental (Part III, sections 73, 76 and 78);

(d) sit as a judicial authority for the determination of appeals from decisions of the Secretary for Trade and Industry on matters of price approvals, price fixing and price orders (Part IV, section 99); and

(e) exercise original jurisdiction with respect to the determination of prices when conducting inquiries on the direction of the Minister into any matter relating to prices, reporting to the Minister its findings and recommendations (Part IV, section 104).

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126. First Report, op. cit., para. 83.

It is against these functions that the establishment of the Commerce Commission should be viewed. The imposition of investigatory, inquisitional, judicial and advisory functions clearly demanded a body expertly constituted and strongly independent. To what extent were these exactions met?

Constitution

The Act provides for a membership of 4 or more, no qualification being specified for the chairman. Both points were the subject of much criticism in the House during consideration of the 1974 and 1975 Bills, and by witnesses before the select committee on the Bill. It was felt that the number should be increased to about 7, that the chairman should be a lawyer of standing, and that the membership should include relevant expertise. None of these criticisms were responded to in the Bill as reported back from the select committee, the Minister, somewhat unsatisfactorily, arguing that it would be the intention of the Government to appoint 7 members and that a legally qualified chairman would be sought[127] - borne out in practice.[128] In the 1975 Bill as passed, however, it was decided that rather than detailing the specific qualifications of members a provision should be included to indicate general attributes expected of the Commission as a body,

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127. The Department of Trade and Industry in a paper to the Commerce and Mining Committee proposed an increase in the statutory membership to 7, but supported the Minister in rejecting a legal qualification for the Commission chairman. In the course of the Committee hearings the Minister disclosed that difficulty had been found in finding a suitable lawyer to be chairman of the Trade Practices Commission and some embarrassment could be caused by a requirement that the Commerce Commission be chaired by a lawyer.

128. N.Z.P.D. (1974), Vol. 395, p. 5419.

the Minister to be guided by these when recommending appointments to the Governor-General, these attributes being "knowledge of or experience in trade, industry, economics, accountancy, commercial law, public administration, or consumer affairs."[129] The 1976 amendment added that at least one member should be legally qualified (but not necessarily the chairman) being appointed after consultation with the Minister of Justice.

The appointment of "pressure group" representatives to the Commission was rejected outright, Parliament believing that far from enhancing the impartiality of the Commission as claimed in a number of submissions, this would give rise to conflicts with sectional or partisan ties as well as creating a problem in selecting which groups could be considered for representation. The point was met in part by standing provisions (see below, under procedure) which could allow interested parties to appear before the Commission as witnesses.

No statutory term of office is specified for Commission members, although while no term can exceed five years any member may be re-appointed by the Governor-General, under section 4(1). If it is agreed that the Commission is to be independent having regard to its judicial functions, there are grounds for arguing that the tenure of a member could be made more secure. There is a danger, however remote, that a member who acts in contradiction to government policy or a ministerial direction could be removed at the end of his appointed term, and this possibility was voiced in several

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129. Section 3(6).

submissions including that of the New Zealand Law Society.[130]

More concern was expressed about the provisions in the 1974 Bill for the Commission to sit in divisions at the direction of the Minister. The Law Society held that it was fundamentally wrong that the Minister should so be able to be involved with the administration of the Commission. This view was expressed strongly in the debates by the Rt. Hon. Sir John Marshall who said during the second reading on the 1974 Bill:

> ". . . the Minister still directs. He specifies which division deals with specific matters and may revoke or amend a direction. This function of the commission should be a purely administrative matter for the chairman of the commission. . . . The intervention of the Minister in details of individual cases opens the way to political interference . . . and in effect it is giving one party in court proceedings - the Government - the power to select its own judge and to decide whether one division or another will hear a particular matter."[131]

The opportunity to sit in divisions was an important one, enhancing the advantages which could be gained by bringing to bear on particular cases relevant expertise. In the 1975 Act the Minister's role in this respect was modified to provide that the Chairman constitute divisions but only with the concurrence of the Minister. The 1976 amendment gave complete discretion to the Chairman to set up and appoint members to divisions.[132]

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130. Submission No. 1.

131. N.Z.P.D. (1974), op. cit., pp. 5431, 5432.

132. Section 7.

Bearing in mind submissions made to the Committee in 1974 about the benefit to the Commission's independence of its having an independent servicing staff, provision was made in the Bill as reported back for staff to be seconded to the Commission from the Department, the personnel so allocated to be then directly responsible to the Chairman of the Commission. This matter has been taken somewhat further, by amendments in 1976 allowing the Commission to appoint its own employees (on terms and conditions agreed by the State Services Commission) and to be funded for all expenditure incurred in the course of its operations from a direct parliamentary appropriation.[133] The Commission noted in its Report for 1978,

> "The provisions, as to finance and staffing, operative since 1 April 1977 appear to be unique when compared with those applicable to similar statutory bodies which are funded entirely from parliamentary vote and which possess judicial and/or quasi-judicial functions."[134]

A source of strong reservation about the Commission's independence was the extent of political control to which it might have been subject. The 1974 Bill, and the 1975 Act despite some modifications, granted to the Minister substantial powers echoing the extent of ministerial involvement found in pre-1958 legislation, for example the 1919 Board of Trade Act. Comment has already been made above on the phasing out of the Minister's influence in the membership of the Commission. In clause 11(2)(a) of the as reported

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133. Sections 17A and 19A respectively.

134. Report of the Commerce Commission for Year Ended 31 March 1978. G.34, p. 4.

1974 Bill the Minister could refer matters to the Commission for investigation (struck out in the 1975 Bill); the Bill as introduced in 1974 provided in clause 17(1)(h) that the Minister could create public interest criteria (deleted by the select committee); the Minister could act independently in respect of price control, for example by amending the list of goods and services subject to price control and order the Secretary of Trade and Industry to conduct inquiries thereon (clauses 70(6) and (7) of the 1974 as reported Bill) - these being matters of some political implication. More conspicuous (and controversial) was the extensive role of the Minister in respect of monopolies, mergers and takeovers which remained in the Act as passed in 1975. This was a result mainly of the fact that for monopoly control the Legislature turned to the British legislation for guidance, rather than to the anti-trust approach of the United States. Indeed, the Minister made his role quite explicit:

> "The provisions will enable the Minister to take effective action against monopolies, mergers and takeovers which are shown to have objectionable features in the public interest."[135]

To permit him to so act, the 1975 Act provided that the Minister could

- initiate inquiries to be conducted by the Commission
- determine which parties would have a direct interest in the matter and would therefore be advised of the inquiry

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135. N.Z.P.D. (1974), Vol. 390, p. 1283.

- consult with the parties concerned
- refer the matter to the Examiner for investigation
- receive the report of the Commission on its inquiry following the Examiner's report to it
- determine the matter on consideration of the Commission's findings and publish his decision in the Gazette
- appoint an appeal authority to determine any appeal lodged
- receive the decision of the appeal authority
- decide whether to accept a voluntary remedy if put forward by the parties concerned, or to request that the Governor-General make an order.

In 1976 a newly elected National Government took the opportunity to remove impediments to the independence of the Commerce Commission, taking particular account of the report of a special working party set up to review the 1975 Act.[136] The working party, known as the Tarrant Committee, proposed numerous changes to the Act central to which was the objective of enhancing the status and role of the Commerce Commission, whose powers and obligations it recommended be increased relative to those of the Minister, and whose discretion to act be extended. The most significant outcome of the Committee's report was the enactment of a new Part III[137] substituting the Commerce Commission for the

136. Report of the Working Party to the Minister of Trade and Industry on the Commerce Act 1975, March 1976. Unpublished.

137. Commerce Amendment Act 1976, section 22.

Minister in respect of each stage of investigation and inquiry, with consequential amendments to appeal provisions, discussed below. The general effect of these and other changes in the 1976 Act was to increase the distance of the Commission and the Examiner from political involvement and to grant to it the discretion to make the appropriate policy decisions.

It is of interest to note, however, that the 1976 Act included a new provision suggesting a general policy direction for the Commission - again on the recommendation of the Tarrant Committee which believed that broad principles, in addition to the Long Title, were needed to overlay the particular references to public interest criteria specified in the Act.[138] Thus new section 2A reads:

> "2A. General objects - (1) In the performance or exercise of their functions, powers, and duties under this Act, the Commission, Examiner, and the Secretary shall be guided by the following objects:
>
> (a) The promotion of the interests of consumers:
> (b) The promotion of the effective and efficient development of industry and commerce:
> (c) The need to secure effective competition in industry and commerce in New Zealand:
> (d) The need to encourage improvements in productivity and efficiency in industry and commerce in New Zealand:
> (e) The economic policies of the Government as transmitted in writing from time to time to the Commission by the Minister and as published by him in the Gazette."

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138. In sections 21, 73 and, by inference, 98.

The section is subject to a privative clause excluding review by the courts on any allegation of failure by the Commission to be guided by any of these objects. The objects are of course only directory, although this provision does come nearest to the Commission being required to take account of government policy.

Consideration must also be given to the extent to which impartiality on the part of Commission members is ensured by the Act. Nothing in the Act disqualifies members from hearing and determining any case on the grounds of possible conflict of interest. Neither are members required to disclose financial interests. The latter might have been a desirable provision, in the public interest, given the entirely commercial nature of the substance over which the Commission has jurisdiction, but the Legislature decided against such a statement as was to be found in the Australian Trade Practices Bill 1973 [1974][139] under consideration at the same time as the Commerce Act and to which the attention of the Commerce and Mining Select Committee was drawn. The New Zealand legislation refers only to the opportunity which members may avail themselves of, of not sitting on the Commission where they feel there may be a conflict of

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139. "17. (1) Where any member of the Commission other than the Chairman has or acquires any direct or indirect pecuniary interest in any business carried on in Australia, or in any body corporate carrying on such business, being an interest that could be in conflict with his duties as a member, the member shall, to the best of his knowledge, disclose that interest to the Chairman."

interest;[140] and section 3A(1) of the Act states that, if the chairman deems it not proper or desirable (for unspecified reasons) that he should adjudicate on any particular matter, the Deputy Chairman shall exercise all his powers. Under section 3A(2) the Deputy Chairman may similarly excuse himself.

Wide powers are given to the Examiner whose functions under the Trade Practices Act are extended and to whom under statutory authority the Commission may delegate the right to exercise some of its powers. A number of witnesses before the select committee indicated that they believed the Examiner's powers to be too wide, in response to which clause 36 of the 1974 Bill, providing that the Commission could delegate any of its powers in respect of trade practices to the Examiner, was deleted. The Examiner, however, may still on delegation exercise the same powers as the Commission in respect of inquiry and investigation (obtaining information) under section 12 of the present Act. In fact, the Legislature has made it quite clear that the Examiner has only investigative and inquisitorial powers and may not exercise judicial functions.

In attempting to formulate procedural requirements to meet the wider jurisdiction of the Commerce Commission the Commerce Act is found to deal expressly with matters on which the legislation previous was silent.

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140. Two instances of this having occurred were noted in the Report of the Commerce Commission for Year Ended 31 March 1977 A.J.H.R. (1977), Vol.III, G.34, p. 3.

Procedure

The Commerce Commission, as is now an established precedent, sits in public subject to the same exceptions as provided under the Trade Practices Act.

Generally speaking, the process of investigation and conciliation by the Examiner of Commercial Practices and of inquiry, hearing and determination by the Commerce Commission, for trade practices and combinations is made uniform with that which was established in the 1958 Act. With respect to trade practices, however, a new requirement is placed on the Commission to make a balanced appraisal of both the harmful and the beneficial effects on the public interest of trade practices. Trade practices listed in section 23 are not only not presumed to be against the public interest unless they have one of the effects listed in section 21, but on a consideration of any demonstrable benefit to the public under subsection (2) the Commission must decide whether the net effect is either reasonable or unreasonable. As before, the onus lies on the Examiner to prove that a practice falls within the words of sections 23 and 21(1), but Parliament has placed the burden of proof firmly with the parties to the practice under consideration to

> ". . . . . satisfy the Commission that, in the particular case, -
>
> (a) The practice has or would have effects of demonstrable benefit to the public sufficient to outweigh any of the effects described in subsection (1) of this section which, in the opinion of the Commission, the practice has or would have; or

> (b) Even though the Commission is of the opinion that the effect of the practice is or would be one or more of those described in . . . subsection (1) of this section, that effect or effects is or are not unreasonable."[141]

It is fair to say that, along with appeal matters, the purported effect of this provision on onus of proof became a preoccupation of the House in the debates of 1974 and 1975. On both occasions the Minister adhered to the view that once the Examiner had established the existence of a trade practice having the undesirable consequences of increasing costs, prices or profits or reducing competition, the first burden of establishing that those consequences were not in the circumstances unreasonable should rest with the parties wishing to defend the trade practice. It was stressed that the onus of proof was anyway an entirely mobile concept, as the traders having attempted to show that the unfavourable effects on the public interest previously found by the Examiner could be outweighed by beneficial consequences, the onus would pass back to the Examiner to present evidence before the Commission in refutation of the parties' contention that the results of the trade practice were not unreasonable. The Minister at the same time denied that the provisions offended the

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141. Section 21(2). These balancing factors do not apply to the public interest tests for monopolies. However, section 80 adds to the public interest criteria of section 21(1) which do apply to monopolies, further criteria to which the Commission must have regard - in respect of assisting or hindering certain consumer, industrial, commercial, employment, export and social interests, which suggests that here too a balanced assessment of monopoly effects must be made by the Commission.

established principles of British justice and said that the considerable amount of criticism it had attracted, in submissions and in the House, was "unwarranted".[142] The Chairman of the Commerce and Mining Committee had already pointed out that such provisions for proving the reasonableness of trade practices were

> ". . . in line with the more stringent attitude adopted by overseas legislatures. . . ."[143]

The Legislature might also have had in mind the practical effect on the Examiner's task of proving a case before the Commission by making it easier in some respects.

In respect of all its functions the Commerce Commission could

(a) regulate its own procedure (section 8),

(b) not have its proceedings held bad for want of form (section 16) (notwithstanding which provision a failure to observe natural justice would find certiorari), and

(c) dispense with formal hearings following successful conciliation (conducted under sections 39, 55A, 62, and 74).

The provision of the 1958 Act, that the Trade Practices Commission could make its own rules not inconsistent with the Act, is re-enacted in the 1975 Act, but to a much greater extent procedural requirements are spelt out. Here, the Legislature

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142. N.Z.P.D. (1975), Vol. 401, p. 4744.

143. N.Z.P.D. (1974), Vol. 395, p. 5430. Mr MacDonell.

had in mind and considered what "rules" should be met by legislative statement.

1. Notice

The Commerce Act provides expressly that reasonable notice must be given to traders engaged in a trade practice or monopoly, having been found by the Examiner on preliminary investigation to be contrary to the public interest, of the successive stages of investigation and inquiry to which they will be parties. The specific requirements of length of notice and the form in which notice is given varies as, for example, between monopolies and examinable trade practices. In both cases the parties get an early opportunity to know the initial case against them, by means of the opportunity for conciliation, and are given a statutory period of time in which to reply to the statement of his opinion furnished to them by the Examiner to avail themselves of this opportunity (sections 39 and 62). Inquiries by the Commission into examinable trade practices are notified by means of the Commission sending to the parties a copy of the Examiner's report, a reply to be furnished in a time to be stated by the Commission. In respect of monopolies, mergers and takeovers the notice procedures are more stringent (perhaps because trade practice procedure was adopted from the existing provisions of the 1958 Act). The Commission must publish notice of its intended inquiry

in the Gazette and appropriate newspapers, and give notice in writing to the Examiner and the participants in the trade combination (sections 64(3) and (4) and 74(3) and (4)), and, for monopoly inquiries, to such other persons as it thinks fit (section 64(4)(c)). Price control under the Act is not subject to inquiry and there is therefore no requirement for parties affected by decisions to be granted rights to notice - or hearings - these factors being relevant at the appeal stage.

For examinable trade practices and trade combinations appeals are made by lodging notice in the Gazette, the procedure governed generally by the rules of Court. Appeals against pricing matters to the Commerce Commission are advised in writing to the Commission which must, on fixing a time and place for the hearings give

> ". . . not less than 14 clear days public notice thereof, and shall also give not less than 14 clear days notice in writing to the appellant and to the Secretary."[144]

2. Standing and Representation

Under the Commerce Act the legislation is designed to make the law much more precise on the question of who may be accepted as parties to proceedings, to be represented, to present evidence and cross-examine witnesses. The 1976 amendment, while retaining clarity on this point, considerably simplified the formulae. It provides that

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144. Section 99(5).

in any proceedings before the Commission any person may appear or be represented who applies, and who in the Commission's opinion either justly ought to be heard (with an automatic right to adduce evidence and cross-examine), or could assist the Commission in its consideration of the subject-matter of the proceedings (being able to adduce evidence and cross-examine only with the leave of the Commission). The Examiner, and the Secretary on pricing matters, are entitled to appear without application.[145] Under section 14 of the principal Act the right to appear was spelt out in some detail, to provide that persons in the eight categories listed, and no others, could be parties except for a discretion the Commission had to hear any person with a "special interest" in the matter under inquiry. These provisions were described as having overcome

> "the vexed question of locus standi, ... at least to a large extent, in this Statute by the process of definition."[146]

The standing provisions under neither enactment were to extend to the Commission sitting as an appellate body on price appeals, where the persons entitled to appeal are carefully specified in section 99 but, under the 1976 amendment, allow for the Commission in its discretion to admit consumer groups. The latter point had been an issue in submissions to the Commerce and Mining Committee in 1974 from consumer groups which argued that these organisations should

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145. Section 14(1) and (2).

146. O'Keefe, J.A.B., The Commerce Act 1975 (1976), para. 318.

have a statutory right to appear and be heard, and participate in inquiries held under clause 91 (section 104 of the 1975 Act).

A former chairman of the Commerce Commission having worked with the 1975 standing provisions, described them as

> ". . . a confused and difficult area." ,

and

> ". . . a tangled mass of confusion and contradiction which, in some circumstances, had the practical effect of denying the apparent or assumed spirit and intent of these provisions."[147]

At the time of writing (March 1978) the new standing provisions had not been tested, but he implied that by the new standing provisions of 1976 the Legislature should more readily find its intentions that wide opportunities should be provided for party status realised.

3. Disclosure of Relevant Information

The Act follows the common law principle in respect of disclosure of information independently acquired by an administrative tribunal - that such information must be given to the parties. This principle is met by requiring, under section 40(5), that on proposing

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147. Bornholdt, B., The Commerce Act 1975, in Collected Papers on Restrictive Trade Practice, Monopolies, Mergers and Takeovers (1978), Legal Research Foundation Occasional Pamphlet No. 12, p. 11. Mr Bornholdt's criticisms were demonstrated, for example, in Decision No. 3 of the Commission, Re New Zealand Association of Bakers (Inc.) where the Commission's decision to refuse party status under former section 99(2)(a) to two interest groups was overturned on appeal to the Court in respect of one of the applicants.

to hold an inquiry into a trade practice the Commission forward to the traders concerned a copy of the Examiner's report which initiates the inquiry, and, under section 64(5) that before beginning an inquiry into a monopoly (or oligopoly) the Commission circulate to every party having received notice of the inquiry a copy of the Examiner's reports. The reports of the Examiner, in both cases, must describe the practice he has found to exist, the persons involved, the nature and results of any investigations and discussions he has held, and any other material which, in his opinion, is relevant. The parties thus will know in advance the basis of the Commission's inquiry and may lodge rejoinders, if desired. It is also relevant to note here the practical benefit to the parties and the Examiner of the conciliation process at which stage, as might be expected, the arguments on both sides are canvassed, the trading parties often apparently taking legal advice.[148]

The Commission also has the authority to order the exchange of documents and other information before or during a hearing (under section 15(3)),[149] it being an offence to contravene any such order. The provision has the advantage that, on a fuller understanding of the considerations of the other parties, all parties might be enabled to see a way to a reasonable and pragmatic resolution of their differences.

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148. As stated to the writer in discussions with senior officials of the Examiner's office.

149. Such an order was made, for example, during the Commission's consideration of the application by the Brewers' Association of New Zealand Inc. for an increase in beer prices, in 1976.

4. Evidence

The powers of the Commission (and the Examiner) to take evidence under the 1958 Act were substantially re-enacted in 1975, the Commission having the advantage of freedom to seek information of assistance in its inquiries and being free from Court rules of evidence, but with the same authority as the courts to administer oaths, issue summonses and require the production of books or documents (section 13). Unlike the Trade Practices Act, however, the Commission may compel a witness to give evidence which he would be excused from giving before an ordinary court on the ground that he might tend to incriminate himself (section 17). This provision was modified on the recommendation of the Commerce and Mining Committee after consideration of the 1974 Bill by the inclusion of a clause to protect a witness having tendered incriminating evidence from such evidence being used in any criminal proceedings.[150]

Proceedings before the Commission are to be taken orally but, according to O'Keefe

> "It is understood from inquiries which have been made that the Commission favours following a procedure by which all evidence and submissions in chief will be reduced to writing, 15 copies being handed in well before any hearing, and in time for opposing parties to file written material in reply before the hearing. This procedure . . . should ultimately result in a substantial saving of time in arriving at a formulation of the essential questions on any given matter."[151]

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150. Commerce Bill, as reported from the Commerce and Mining Committee, clause 13A(2). Cf Commerce Act 1975, section 17(2) and (3).

151. Op. cit., para. 318.

This would appear to be a very good example of the Commission using to advantage its power to decide its own procedures. It is a policy which is not in accordance with normal court procedure, but was also found to be useful by the Trade Practices Commission, especially in relation to the advance disclosure of evidence to each party.[152] Oral hearings are still of course necessary to enable the Commission to resolve inconsistencies among the various sources of evidence.

5. Reasons

Despite the attention to detail in respect of other procedural matters, Parliament failed to take the point made in the statements and writings of administrative law experts, that in the interests of fairness the Commission should give reasons for its decisions. As aforementioned, the Examiner must state the grounds for his belief that a practice exists contrary to the public interest, and this is reported to the parties. Under section 22(2), the Commission, before making any order against a practice, shall consider further representations from the parties which might cause it to refrain from confirming the order. But the only specific reference in the Act to the giving of reasons is found in respect of price decisions of the Secretary under section 95 which reads:

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152. In Fencing Materials, op. cit., 1126 Dalglish J. said that "as much evidence as possible should be put in writing . . . and shown to the other side in advance of the final hearing."

> "Reasons for decision of Secretary to be given on request - The Secretary shall give in writing to the applicant, and to any other person whom he regards as having a direct interest in any decision that he has made in relation to the price of goods or services, his reasons for the decision, if the applicant or any such other person so requests."

Clearly, where reasons are given the first instance decision is more likely to be better formulated, and the opportunity to appeal against the decision will be vastly enhanced.

In practice, the Commerce Commission does give reasons for its decisions. In the hearing relating to the Brewers' Association, for example, the report of the Commission records that

> "The Commission allowed the application in full in this case and the reasons for that, together with a dissenting opinion, are set out in the full decision."[153]

Sitting as the appeal authority on Golden Bay Cement the Commission, similarly, set out in detail the grounds on which it reached its decision to dismiss the appeal, subject to variations it made in the special price approvals granted the appellants by the Secretary in the first instance.[154] It is, however, clear that "in the absence of a legislative requirement, administrative tribunals . . . are not so obliged [to give reasons for their decisions.]"[155] Since the giving

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153. Annual Report of Commerce Commission (1977), op. cit., p. 6. Re Brewers' Association of New Zealand Inc., Decisions 7 and 7a, 3 June 1976 and 21 June 1976 respectively.

154. The Golden Bay Cement Company Ltd v Secretary of Trade and Industry, Decision No. 2, of the Commerce Commission, 12 March 1976.

155. Keith (1974), op. cit., p. 17.

of reasons is coming to be seen as a very important aspect of administrative law it is a major omission of the New Zealand Legislature that it did not see fit to make specific provision. Being informal bodies, it is not necessary that reasons given by tribunals be of too exacting a standard, but where appeal rights exist, as under the Commerce Act, they should be required, in sufficient detail to permit a person affected by a decision, to properly represent his case at appeal - or, alternatively, to decide not to proceed to appeal.

Appeal

Rights of appeal in the Commerce Act appear under three heads, for trade practices, trade combinations and price control.

(i) Trade Practices (sections 42-47)

As under the 1958 Trade Practices Act, appeals against decisions of the Commission lie to the Administrative Division of the Supreme Court, on matters of fact or law, although this is not stated. Persons from both party sides are entitled to appeal, whereas under the 1958 Act the Examiner could appeal on points of law only. The Court is to follow the usual procedure laid down by the rules of Court, but under section 45 there is an unusual provision for the Court to hear a case in private if it considers that a public hearing would not be in the interests of the public or other persons concerned. The decision of the Court is to be final and conclusive.

(ii) Trade Combinations (sections 81-81E)

Appeal provisions here are similar to those for trade practices; although the grounds of fact and law are specified.

(iii) Price Control (sections 99-103)

In the price control area the Commission acts as a judicial authority for the determination of appeals from decisions of the Secretary. Given the wide powers of the Secretary this is an important provision, and follows the earlier recommendation of the Public and Administrative Law Reform Committee that,

> "having regard to that [legislative] characteristic and to the part which policy must play in the function [of price-fixing], we do not consider that the Price Tribunal should be merged with the Administrative Division."[156]

The Committee did, however, see it as essential that the Appeal Tribunal on price matters be strongly constituted and be chaired by a legally qualified person. While the Commerce Commission is not required to be so chaired, it is relevant to consider the further remark of the Committee, that few questions of law would arise in this field,[157] and that legal expertise will be found on the Commission if not necessarily in the chair.

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156. First Report, op. cit., para. 82.

157. Ibid., para. 84.

Proceedings before the Commission taken under Part IV on price control are not appealable, (section 105).

Reference was made above to the fact that much of the debate on the Commerce Bill was concerned with the appeal provisions which were, certainly, somewhat more limited in the 1974 Bill than in the 1975 Act as amended. For example, in the former, as reported from the select committee and despite strong contentions on the appeal rights provided,

> ". . . relating to trade practices, no appeal is provided on a question of fact. . . . but the investigation of trade practices involves almost entirely questions of fact and not of law."[158]

Much more anomalous was the original nature of the appeal right against decisions of the Commission on trade combination matters. Section 74 of the principal Act provided that any parties to an inquiry into a monopoly (including the Examiner) could appeal on a point of law by notice to the Minister who then appointed ad hoc a barrister or solicitor of not less than 7 years' practice for the purposes of hearing that particular appeal only, the Appeal Authority to determine its own procedure. No further appeal lay to the Administrative Division. In the Bill as introduced the Appeal Authority could not even determine the matter, but merely could advise the Minister of the outcome of his hearing for the Minister's decision;

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158. N.Z.P.D. (1974), op. cit., p. 5432. Sir John Marshall.

or remit the Commission's report for further consideration or direct the Commission to pass its report to the Minister. As argued by Sir John Marshall, this measure did not

> ". . . provide for an independent or impartial appeal, but merely for an interim review, with the final decision reserved for the Minister."[159]

The Minister's involvement in appeal on trade combination matters was a natural corollary to the then Government's policy regarding the control of monopolies, discussed more generally previously. Sir John's belief, expressed in the context of the above quotation, that in this area appeal should lie to the Administrative Division was implemented upon the transfer of ministerial power to the Commission in 1976.

Being an important matter for the decision of the Legislature, an attempt is made in Appendix B to compare the appeal and review rights provided under the post-1958 legislation.

Regulations

Regulation-making power is granted under section 132, dealing largely with procedures required to be followed by traders in keeping records for and making applications to the Commission, Examiner and Secretary; prescribing procedure and guidelines for

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159. Ibid., p. 5433.

the Commission, Examiner and Secretary;[160] and providing for certain pricing details.

The Fourth and Fifth Schedules to the Act allow for Stabilisation of Prices Regulations made under the Economic Stabilisation Act 1958 to remain in force, leading to the fear being expressed in the House that

> ". . . much of the spirit and much of the effect of the 35 sets of Stabilisation of Prices Regulations, with all their frustrations, disincentives and ineffectiveness, will find its way in permanent form into the regulations to be made under this Bill."[161]

To date, this has not been the case in Commerce Act Regulations, but of course whether or not these effects are avoided would depend to a large extent on the policies and practices adopted by the Secretary who in all these respects is subject to supervision by the Commission.

Offences

Little has been said in the present context about the creation of offences under the Act. Prohibitions of course create a role for the ordinary courts, and those practices actually prohibited are such as were by 1975 well-established and accepted as appropriately being illegal *per se*. Profiteering, however, is treated somewhat

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160. E.g., Statutory Regulations 1977/82, Clause 3, provided that with respect to notices regarding mergers and takeovers, "The Examiner may from time to time prescribe the form of the notice required to be given under section 68(1), and . . . under section 71(1) of the Commerce Act 1975."

161. N.Z.P.D. (1974), op. cit., p. 5426, Hon. Mr Adams-Schneider.

differently. Although profiteering in goods or services is an offence under section 54, it became under the 1976 amendment the subject of a conciliation procedure whereby no prosecution may be commenced without leave of the Chairman of the Commission, on the application of the Examiner who must, before lodging an application, inform the person concerned of the alleged offence and invite him to confer with a view to entering into a written agreement that the offence will be mitigated as far as practicable and repetition of it avoided.[162]

It was felt that outright prohibition was a severe means of dealing with the practice of profiteering, individual instances of which might be unwitting, but if the offence is without mitigating circumstances the Commission Chairman may, after receiving an application from the Examiner, authorise immediate prosecution without the opportunity for negotiation being extended to the parties.[163]

The Commerce Commission, as a body set up to deal with an area of broad economic and social relevance, needed to be vested with two distinct characteristics. First, it had to be given sufficient flexibility to deal with each case on its merits - the essence of the New Zealand Legislature's approach to the control of commercial practices and prices. Second, it needed clear guidelines under which to operate to minimise the need for parties the subject of

162. Section 55A.
163. Section 55B.

investigation to have recourse to the courts. The Legislature has attempted, in the 1975 Act, to meet both aspects, but not without attracting to the legislation considerable criticism. On the one hand, the Commerce Commission has been said to have unenviably unfettered discretion in the exercise of its powers and functions. On the other, criticism has come, primarily from the commercial community, of the unduly time-consuming and expensive procedures which must be observed, pursuant to the Act.

The complexity of the Act has been admitted by a past Chairman of the Commission:

> "Any legislation dealing with the 20th Century market place and sophisticated areas such as prices, trade practices, monopolies/mergers and takeovers must inevitably be complex."[164]

Mr Bornholdt has denied, however, that the Act is unworkable having not experienced this in office, but in finding certain areas in which the Act does create problems with administration and interpretation he has seen the discretion of the Commission as an advantage in their resolution.

As expressed in the 1977 Annual report of the Commission, membership has been a problem with respect both to accomplishing its workload and achieving independence - as foreshadowed during the

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164. Bornholdt, op. cit., p. 7.

consideration of the 1974 and 1975 Bills. The report said

> ". . . that it may conduct its affairs as expeditiously as reasonably possible the Commission considers a membership of eight is required. That should give it the flexibility not only to sit in divisions but also to allow for temporary absence of members through sickness or otherwise, through disqualification by way of conflict of interest circumstances."[165]

Another problem of constitution was the part-time nature of the Chairman's appointment, the position calling in fact for this and possibly two or three more appointments to be full time, a matter given insufficient attention by the Legislature in establishing an administrative body with such demanding functions.

A striking feature of the Commerce Commission's operations is one perhaps not looked for by Parliament when considering the Commerce Bill in comparison with the 1958 Trade Practices Act, namely, an increasing tendency already evident in the Trade Practices Commission towards judicialisation. The Commerce Commission is of course obliged to act judicially but this does not imply, as such, that the trappings of full adversarial trial by the courts be adopted. To an extent, the words of the Statute suggest a modelling of the tribunal along judicial lines.[166] In being bound by the rules of natural justice the Commission has also striven to ensure unbiased

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165. Op. cit., p. 3.

166. That this is also a trend in Britain, whose legislation has provided a model in some respects for the New Zealand legislation on commercial practices, is suggested by Stevens and Yamey, op. cit., p. 9: "Administrative tribunals have been made more judicial in appearance and independent in action."

and fair hearings.[167] As a result, all parties being always in practice represented by legal counsel and adversarial processes being followed, the Commission, according to close observers, operates very formally, and proceedings are very costly for the trading parties concerned.[168]

Formality, cost and publicity have tended, in the short time of the Act's operation, to provide strong deterrents to commercial parties who might be subject to proceedings under the Act. Examinable trade practices are almost always resolved by conciliation. By March of this year no monopoly cases and only one case under the merger and takeover provisions had come to the Commission. Most of the Commission's work has in fact related to pricing matters.

It is arguable whether this outcome indicates deficiencies in the machinery of the tribunal, especially a lack of effective enforcement machinery[169] thus frustrating the intent of the Legislature, or whether, in opposition, the machinery is such as to fulfil the desire of Parliament to have the commercial community regulated as far as possible by administrative controls, the responsibility at the end of an administrative process resting with a tribunal exercising judicial functions. It is perhaps unreasonable to draw too definite a conclusion about the utilisation in practice of the legislative framework provided under the Commerce Act considering that the Examiner and the Commission have an independence relatively new-found, in the 1976 amendments to the Act.

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167. Bornholdt, op. cit., p. 9.

168. Supra, note 148.

169. As suggested by Farmer, J.A., Restrictive Trade Practices in Legal Research Foundation Occasional Pamphlet No. 12, op. cit., p. 48.

It would also appear that the present Government has in mind putting to the House further amendments in the near future, which may bear on aspects of constitution and procedure.

The Commerce Act was considered in detail by the Legislature on three occasions in the same number of years - a history in itself. In addition, the Fifth Schedule to the Act (Enactments Repealed) represents a virtual history of the legislation on commercial practices and prices[170]. As this schedule might suggest, the Commerce Act is not entirely without a cognate relationship with even the earliest legislation passed in New Zealand to deal with this area, and indeed in substance and procedure bears out an identifiable historical continuity. As the result of an accumulation of effort on the part of the Legislature to find an appropriate means of encouraging competition and regulating prices, the Act does, however, have the distinction of providing a coherent administrative approach under the supervision of a single administrative and judicial body.

In the 1975 Act Parliament saw that it was desirable, in terms of administrative convenience and in the interests of sensible tribunal development, to amalgamate two existing administrative tribunals, the Trade Practices Commission and the Price Tribunal. This year, however, a new tribunal is proposed in legislation which

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170. See Appendix C for a schedule of repeals of commercial practices and prices legislation considered in the present paper.

has objects and deals with substance not completely unconnected with that covered by the enactments discussed up to this point, thereby contradicting any tendency which might have been inferred that the Legislature might refrain from creating further bodies to administer new areas of jurisdiction. It remains, now, to consider the Securities Commission which it is intended to establish under the Securities Bill currently before the House.

Securities Bill 1977 [171]

The Securities Bill was, like the Monopoly Prevention Act seventy years before, introduced to deal with a specific market situation, in this case a chain of business collapses in the financial securities field.[172] Its general purpose is to regulate the activity of commercial fund raising and to attempt, as far as possible, to apply uniform standards to fund raising for all organisations seeking finance from the public. It has in common with the Commerce Act two basic substantive objectives. First, like the Commerce Act the Securities Bill is broadly concerned with the stability of the economy, the viability of business, the savings of small and large investors and the protection of the

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171. The Bill was introduced as the Securities Advertising Bill, but on the extension of its content it was found appropriate to adopt the less restricted title. See Supplementary Order Paper No. 9 (1978). The Bill here will be referred to as the Securities Bill, and is the Bill as reported back from the Statutes Revision Committee.

172. The Bill was prompted finally by the financial failure of the Securitibank Group in 1977.

public (consumers and the investing public respectively).[173] Second, both pieces of legislation are concerned with the regulation of the structural and behavioural patterns of entrepreneurs - on the one hand in the goods and services market and on the other in the capital market - when these adversely affect the interests of others.

It is understood that some consideration was given by the Government to including in the functions of the Commerce Commission those intended for the Securities Commission, prior to the introduction of the Supplementary Order Paper proposing the new tribunal,[174] which was referred to the Statutes Revision Committee considering the Bill. It would appear that amalgamation was rejected on the grounds that the two tribunals would deal with quite different subject matters, despite not dissimilar objectives and despite certain evident similarities in approach and procedure.

That a specialist body for the surveillance of the capital market was not included in the original Bill was a result of the limited application initially intended. The provision of a Securities Commission arose almost entirely in response to submissions to the select committee, that a body should be established to oversee and co-ordinate developments in the securities market,[175] and also to avoid the possibility of legislative control

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173. All these objectives were attributed to the Commerce Bill by Sir John Marshall during debate on the 1974 Bill. See N.Z.P.D. (1974), op. cit., p. 5431.

174. Supplementary Order Paper No. 9 (1978), new clauses 6A-6T and 48A.

175. Notable among such submissions was that of Mr R.P. Darvell, a law practitioner specialised in commercial law, who saw a need immediately for a co-ordinated framework covering the whole of the securities area. Submission No. 12.

in individual circumstances of serious financial difficulty being precluded during parliamentary recesses.[176]

The Legislature was quick to take up the idea and consider it further in select committee. A discussion of the form and procedures of the proposed Securities Commission is of interest because it will show how Parliament's propensity for establishing tribunals to be responsible for new jurisdictions created by statute is developed. As will be seen, the Securities Commission borrows from the Commerce Commission in several respects, but has additional, distinguishing, features in constitution and procedure.

Constitution of Securities Commission

It is important first to note that the Securities Commission is to be a body corporate, capable of dealing in property and of suing and being sued, and so on. Its proceedings, however, are to be privileged as follows, in clause 6T(1)(a):

> "No proceedings, civil or criminal, shall lie against the Commission for anything it may do or fail to do in the course of the exercise or intended exercise of its functions, unless it is shown that it acted in bad faith or without reasonable care."

Further, members, employees, special appointees and delegatees of the Commission are expressly prohibited from giving evidence in any court, or indeed in any proceedings of a judicial nature relating to information he has acquired in the course of the

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176. E.g., New Zealand Finance Houses Association (Inc.), Submission No. 13A.

Commission's operations (clause 6T(1)(c)), and any evidence taken before the Commission is to be privileged as for an ordinary court.

These provisions clearly distinguish the Securities Commission from any other tribunal, being seen as necessary adjuncts to the functions of this tribunal most of which are to be effected beyond the public gaze.[177]

The functions of the Commission as originally proposed were somewhat broadly phrased, being under clause 6B

(i) to keep under review the law relating to bodies corporate, securities, and unincorporated issuers of securities, and to recommend to the Minister any changes considered necessary, and

(ii) to perform other functions imposed by the Act or any other enactment, these including the power to consider exemptions of any organisations from the provisions of the Act, to investigate and advise on amendments to the Companies Special Investigations Act 1958, and to act in an appellate capacity in respect of appeals against decisions of the Registrar.[178]

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177. But the Commission is required to report annually to Parliament (clause 6V). See also later reference to appeal procedure.

178. Being the Registrar of Companies established under the Companies Act 1955.

In response to calls in submissions that these functions be further spelt out, the additions were made by the Statutes Revision Committee that the Commission also keep under review practices relating to securities commenting thereon to any appropriate body; and promote public understanding of the law and practice relating to securities. The former went some way to meeting the recommendation of the New Zealand Law Society that the Commission should investigate any new commercial practice relating to securities irrespective of whether that practice was controlled by any existing law.[179] The latter suggested a new path for tribunals in publicising some aspects of their work, already adopted informally, and as yet on a limited basis, by the Examiner of Commercial Practices who has taken steps to disseminate among relevant groups information about the nature and operation of the Commerce Act.[180]

The functions of the Commission are thus to be investigatory, advisory and judicial.

To carry out these functions, the Securities Commission is to consist of five members, appointed by the Governor-General on the recommendation of the Minister, for a term stated in the appointment but not exceeding five years (subject to possible reappointment).

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179. Cf the definition of a 'trade practice' in the Commerce Act which includes 'anything done or intended to be done', thus permitting the Examiner to investigate the circumstances of any intended action which might fall within the Act, as well as trade practices actually in operation.

180. Supra, note 148.

Some submissions proposed that some qualifications for members should be laid down and that there was a need for full time members. Neither point was taken by the Committee, although difficulties with membership of the Commerce Commission had already pointed to the desirability of some full time membership. The chairman of the Securities Commission must be a barrister or solicitor of not less than seven years practice.[181]

Under clause 6D the Governor-General, on the recommendation of the Minister, may appoint alternate members to fill vacancies on the Commission caused for whatever reason. The appointment of an alternate for an ordinary member is made by the Chairman, and for the Chairman by the Minister, from those alternate members already appointed by the Governor-General, thus enabling the Commission to proceed with its business speedily and without delay - as often it must.

A new provision for tribunals appears in clause 6M of the Bill, which permits the Commission to appoint experts "to assist it in connection with the exercise of its functions, to make such inquiries or to conduct such research or to make such reports as may be necessary for the efficient carrying out of any functions of the Commission", remunerating experts so appointed as it thinks fit. In a technically specialised area this is obviously of great

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181. See clause 6C.

potential advantage considerably enhancing the possibility of decisions being based on thorough and objective investigation. Such a provision could well be considered for the Commerce Commission.

The Commission is to have independence in the appointment of its employees (clause 6L).

Procedure

The Securities Commission is to be able to regulate its procedure as it thinks fit (clause 6G(7)). Except in respect of its appellate function (see below), no direct provision is made for the Commission to hold public hearings. The Bill states simply that the Commission may deliberate in private (clause 6K(4)).

The powers for obtaining evidence are the same as those accorded the Commerce Commission, except that clause 6J(4) provides that

> "The Commission may permit a person appearing as a witness . . . to give evidence by tendering and, if the Commission thinks fit, verifying by oath, a written statement."

Persons who may appear and be represented are the same for the inquiry and appellate functions of the Commission. In the original Supplementary Order Paper (clause 6I), standing provisions were identical to those of the Commerce Commission. The Select Committee made these more specific, so that those who could seek leave to apply and be represented were

(i) in respect of considerations by the Commission of

prospectuses (under section 22(1)(b)), the party directly affected,

(ii) in respect of appeals, the person whose appeal is being considered, and

(iii) persons who in the opinion of the Commission ought to be heard, (the word 'justly' is omitted), or who could assist the Commission.[182]

As an appellate body under section 48A of the Bill the Securities Commission is to meet in public, with exceptions and prohibitions on the publication of proceedings and evidence as for the Commerce Commission. Appeal decisions of the Commission are to be final, but appeal on a question of law only to the Administrative Division of the Supreme Court is allowed, by any party to any proceedings before the Commission who is dissatisfied with the Commission's decision as being erroneous in point of law, under clause 6R. In contrast with appeals made from decisions of the Commerce Commission, this clause requires that the appellant must state in writing his appeal case, setting out the facts and the grounds of the determination appealed against, and must specify the question of law on which the appeal is based, the appellant having to circulate his statement to every other party. This provision places a heavy responsibility on the appellant who will, for this purpose, need to know from the Commission the reasons for

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182. See clause 6K(1)(a) - (c).

its determination although the Bill does not state that the Commission shall give reasons to the parties upon reaching a determination.

It is also provided under clause 6Q that the Commission itself may state a case for the opinion of the Administrative Division on any question of law arising, the Supreme Court being granted express statutory power to order the removal of any such case stated into the Court of Appeal.

In considering the appeal provisions of the Bill the Select Committee declined to concede the argument put forward in some important submissions that appeal should lie to the Administrative Division on matters of fact as well as law, given that decisions of the Commission could terminate business operations whose closure would have a very great impact on employment and on commercial endeavour.

The Bill of course has yet to proceed through the Committee of the Whole House and in details where it is seen to fall short it may yet be amended. It may be noted here that the introduction of "bureaucratic control", into a Bill originally characterised by the certainty of a complex system of prohibitions on securities practices, is still contested in the House.[183] The business

183. E.g., Mr Lange in the debate on the reporting back of the Securities Advertising Bill and Supplementary Order Paper No. 9 from the Statutes Revision Committee. (At the time of writing the Hansard references to the debate were not available.)

community, however, favours the shift of emphasis from prosecutions based on breaches of the law provided in the original Bill, to one of constructive investigation by the Commission.[184]

Like the law on business competition, the approach in the Securities Bill has its rationale in the opportunities provided for pragmatic, balanced and informed value judgments on each case raised. It could be argued that the job to be assigned to the Securities Commission could have been done by the Commerce Commission, with appropriate constitutional and procedural amendments, especially in the building up of relevant expertise and the appointment of full time personnel among members.

The intended establishment of a Securities Commission undoubtedly confirms the orientation of the Legislature towards administrative controls. Does it also indicate that in setting up yet another tribunal Parliament recognises that quite different characteristics are required of tribunals with different jurisdictions?

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184. E.g., see The Evening Post, 26 August 1978, p. 20.

PART FIVE

CONCLUSIONS

In over a century of New Zealand parliamentary intervention in commercial practices and prices the administrative machinery which has emerged is as complex as are the market situations with which it deals. The history of legislation designed to supervise and control this area presents an especially interesting case study of, on the one hand, the process by which the Legislature chose to intercede in an area previously free of statutory provisions and, on the other, the desirability of intervention having been affirmed, the pattern of the Legislature's response to

a) the changing nature of the subject matter, and

b) general developments in administrative law.

Both of these latter factors are reflected in the legislation discussed in the foregoing, but are not entirely unrelated. As the ambit of the law has extended to meet developments in trade, so the method of approach has evolved in the long term, towards administrative controls with increasing attention to detail in constitution, manner and form.

From the outset of Parliament's involvement in commerce and prices the main substantive concern was with the public interest which the courts had neglected in the determination of disputes produced by restrictive trade agreements. With the exception of the Commercial Trusts Act 1910 and of certain prohibitions which remain (albeit modified) the public interest in the New Zealand context has been seen to be best served by providing that market practices including pricing arrangements are assessed on a case by case basis rather than in accordance with rigid precedent. To this end Parliament has sought pragmatic solutions to the effect on the public interest of business activities, guided primarily by the special characteristics of the New Zealand economy, particularly the size and distribution of the population, the country's geographical location and the relative strengths of its agricultural and manufacturing sectors. For this reason it is probably not meaningful to compare the New Zealand legislation too closely with that adopted in other countries to deal with trade restrictions and combinations, where the economic considerations differ. From the somewhat dismal experience with the anti-trust approach of 1910 the New Zealand Legislature became persuaded that a more permissive approach was called for in a small economy where trade restrictions and even monopolies and price fixing might sometimes be necessary, or at least desirable, to achieve a viable commercial community working in the public interest.

The flexibility thus sought has been found in the administrative approach whereby decision-making on trade and price matters is allocated to an independent body with statutory provisions, to obtain the result than traders are induced to not act in such ways as are considered by Parliament to be detrimental to the public.

The establishment of administrative tribunals in this area - beginning essentially with the Board of Trade in 1919 - represented a development of some constitutional importance, effecting Parliament's intention to remove the issues from the purely judicial sphere and increasingly, from executive control, to a field of jurisdiction which combined the administrative, the legislative and the quasi-judicial. As such, questions of administrative law have consequently arisen. The courts and increasingly, through representations to Parliament, the public, have demanded that in the process of adjudication tribunals observe the principles of natural justice which applied under the common law. The preceding historical analysis is in part an attempt to demonstrate how far the requirements of natural justice have become embodied in statutory form.

Procedure itself is a matter, according to the Franks Committee, which should be clearly laid down in the relevant statute or statutory instrument. The history of legislation on

commercial practices and prices does show a progressive move in this direction, and it is perhaps less true to say now, as was held by Orr in 1964, that no rational principles underlie administrative tribunals and that their structure and powers depend largely on the particular inclinations of the Minister responsible at the time.[185] The procedural features held in common by the Commerce Commission and the proposed Securities Commission suggest at least a basic standard of legislative expression of matters of procedure.[186] It remains the case, however, that

> "When the Legislature intervenes to establish tribunal procedures the effect is not always to create certainty and remove doubts."[187]

While incorporating in statute certain procedural provisions for administrative tribunals, the Legislature, in deciding to establish separate tribunals in this as in other areas of decision-making,

> ". . . has recognised the great virtues of the flexibility of the principles of natural justice and the undesirability of attempting to lay down absolute generally applicable rules."[188]

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185. Op. cit. (1964), para. 2.

186. The Tarrant Committee, op. cit., comprising members experienced in the practical operation of the Commerce Act, sought to establish that the rights and obligations of those affected by the Act should (a) be clearly established (b) be consistent throughout the Act and (c) recognise the principles of natural justice.

187. Keith, op. cit., p. 8.

188. Ibid., p. 47.

The Commerce Commission (and originally the Trade Practices and Prices Commission) and now the Securities Commission are illustrations of the necessity of taking into account the character of the tribunal concerned, and the reasons for its establishment, in determining what principles should be provided in the relevant enactment. In particular, each has been left with an amplitude of discretion to act according as it has seen fit - a characteristic considered by the House as appropriate to the subject matter over which jurisdiction is given. In the final analysis, for example, it is clearly a matter for the discretion of the Commerce Commission as to which of the several and sometimes conflicting public interest criteria should be weighed more heavily than the other. Presumably, members of the Commission are to reach their conclusions by reference to the assumptions and principles which their training and experience would lead them to apply, in each case investigated. Certainly, the Commerce Commission adjudicates on matters of considerable, possibly critical, importance to the persons immediately concerned and to the general public, matters clearly falling into the area described by the Public and Administrative Law Reform Committee as being capable of being said

> "without exaggeration to affect the lives of more people than most of the issues dealt with at present by the older-established courts."[189]

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189. First Report, op. cit., para. 5.

It is not within the scope of this paper to discuss the future of the administrative approach in the commercial area, but rather to have reviewed the administrative machinery established for its supervision and control. There is now no question that jurisdiction over actions arising from trade practices, trade combinations and pricing matters should have been conferred on a tribunal and the history overall indicates that administrative tribunals are here to stay. The Franks Committee expressed the view that

> "Reflection on the general social and economic changes of recent decades convinces us that tribunals as a system for adjudication have come to stay. The tendency for issues arising from legislative schemes to be referred to special tribunals is likely to grow rather than diminish."[190]

Accepting that administrative tribunals are an essential part of the constitutional machinery of democratic states, the issue is not one of their existence but of controlling the exercise of the powers vested in them and ensuring that they are developed in a rational way. Both are matters for which the Legislature is responsible and which it can, where there may already be shortcomings, readily correct. The discussion over the

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190. Cmnd 218, op. cit., para. 37. That there is an established case for the continued establishment of specialist tribunals was also recognised by the Australian Committee of Review on Administrative Discretions which, reviewing tribunals in the review context recommended the retention of specialist tribunals where appropriate. Op. cit., recommendation 20.

last twenty years of the use of administrative tribunals for decision-making has, in New Zealand as elsewhere, found its way into the legislation. The effect of further developments in the body of administrative law, as it is applied to new and changing circumstances, similarly can be expected, albeit gradually, to be balanced by a response on the part of the Legislature. Even now there is scope, as has been shown in Part IV of this paper, for further improvements to the constitution and procedure of the Commerce Commission if only to bring it into line with the present state of administrative law.

Of the future it may perhaps just be said that the most significant development could be an appraisal by the Legislature of its use of tribunals, considering its heavy reliance on them to perform functions and exercise powers created by new legislative plans. In particular, in the commercial area it would seem desirable that the place of the tribunal in the overall structure of policy and decision-making and in relation to the courts be evaluated. To some extent the mere fact of the frequency of legislation on commercial practices and prices has represented, especially since 1958, a form of review, but this hardly qualifies for the systematic evaluation necessary to ensure rational allocation of jurisdiction or the provision of the most appropriate procedures, rights of recourse and so on. Such a review might well mean a more extensive role for

the Commerce Commission, especially if political expressions of future developments in consumer protection legislation are fulfilled.[191]

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191. See, for example, the views expressed by Hon. Mr Tizard with respect to revamping consumer law covering price control, monopoly control, trade practices and consumer protection, in The Press, 3 April 1978, p. 2.

APPENDIX A

LEGISLATION ON COMMERCIAL PRACTICES AND PRICES

Consideration of Bills by the Legislature

Bill	Date Bill Introduced	Reference to Select Committee		Date of Third Reading
		Period of Consideration	No. of Submissions Received	
Monopoly Prevention 1908 *	5 Oct 1908	-	-	6 Oct 1908
Commercial Trusts 1910 *	7 Sep 1910	8 Sep - 12 Oct	n.a	26 Oct 1910
Board of Trade 1919 *	9 Sep 1919	-	-	19 Sep 1919
Prevention of Profiteering 1936 *	24 Jul 1936	-	-	29 Jul 1936
Industrial Efficiency 1936 *	25 Sep 1936	-	-	20 Oct 1936
Control of Prices 1947 *	18 Sep 1947	9 Oct - 7 Nov	n.a.	19 Nov 1936
Industries and Commerce 1956 *	5 Oct 1956	-	-	24 Oct 1956
Trade Practices 1958 *	7 Aug 1958	-	-	2 Oct 1958
Trade Practices Amendment 1961	14 Nov 1961	-	-	30 Nov 1961
Trade Practices Amendment 1964	23 Oct 1964	-	-	17 Nov 1964
Trade Practices Amendment 1965	6 Oct 1965	-	-	29 Oct 1965
Trade Practices Amendment (No. 2) 1965	6 Oct 1965	-	-	Lapsed
Trade Practices Amendment 1970	4 Sep 1970	4 Sep - 10 Jun 1971	34	15 Sep 1971
Trade Practices (Commerce Commission and Pyramid Selling) 1974	28 Mar 1974	See Commerce Bill 1974		6 Nov 1974
Commerce 1974	28 Mar 1974	28 Mar - 9 Oct#	57	Lapsed
Commerce 1975 *	22 Aug 1975	"	"	8 Oct 1975
Commerce Amendment 1976	20 Oct 1976	20 Oct - 17 Nov#	26	30 Nov 1976
Securities Advertising 1977	14 Dec 1977	14 Dec - 25 Aug 1978 #	72	-

* Enactments referred to on page 1, Part One of this paper.

Open to news media for hearing of evidence.

SUMMARY OF APPEAL, REVIEW AND CASE STATED PROVISIONS

I. Control of Prices Act 1947

A. APPEALS

Authority Appealed Against	Matters on which Appeals Lie	Persons Entitled to Appeal	Appeal Authority	Further Appeal
(a) Secretary of Trade and Industry	Any Act done or decision made under delegated authority by Secretary or departmental officers	Any person directly or indirectly affected	Price Tribunal	None
(b) No appeals from decisions of Price Tribunal acting in original jurisdiction				

B. REVIEWS

Any decision made by Price Tribunal and decisions or actions in course of inquiries subject to review by Supreme Court on grounds of natural justice (no statutory provision required). However, proceedings not to be held bad for want of form.

C. CASE STATED

No provision.

II. Trade Practices Act 1958*

A. APPEALS

Authority Appealed Against	Matters on which Appeals Lie	Persons Entitled to Appeal	Appeal Authority	Further Appeal
Trade Practices and Prices Commission	Any decision relating to orders, approvals (on merits and questions of law)	(a) on merits - parties other than Examiner (b) on law only - Examiner	Administrative Division : Supreme Court	From Court, on law only, to Court of Appeal, for either party

B. REVIEWS

As for 1947 Act.

C. CASE STATED

Chairman of Commission may state case to Administrative Division : Supreme Court, on question of law arising in course of proceedings.

* as amended

A. APPEALS

		Authority Appealed Against	Matters on which Appeals Lie	Persons Entitled to Appeal	Appeal Authority	Further Appeal
Part II (Trade Practices)		Commerce Commission	On questions of law only in decisions made	Parties and Examiner	Administrative Division : Supreme Court	None
Part III (Monopolies Mergers Takeovers) Clauses 63 and 64		Commission in advisory jurisdiction relating to monopoly or merger reference	On questions of law only arising in report of Commission or decisions made in course of inquiries	Parties and Examiner	Barrister and Solicitor of 7 years standing, appointed by Minister	None
Part IV (Control of Prices)	(a)	Secretary of Trade and Industry	Any decision made in respect of price orders and approvals, prohibition of sale notices and new types of goods	Applicant for price increase; other persons in discretion of Secretary or Commission, or by leave of Secretary or Commission	Commerce Commission	None
	(b)	No appeal from decisions of Commerce Commission exercising original jurisdiction				

B. REVIEWS

Part II - Any decision made by Commission and decisions or actions in the course of inquiries sugject to review by the Supreme Court on the grounds of natural justice (no statutory provision required). Proceedings not bad for want of form.

Part III - Commission's jurisdiction advisory, therefore no review on grounds of natural justice. Questions of law however, are fully covered by clauses providing for appeal.

Part IV - (a) Decisions by the Secretary appealable to the Commerce Commission - includes failure to observe obligation to give parties reasonable opportunity to present case and notice of certain intentions.

(b) Decisions made by the Commission in respect of appeals or public inquiries or actions in the course of such proceedings subject to review by the Supreme Court on grounds of natural justice. Proceedings not to be held bad for want of form.

C. CASE STATED

The Chairman of the Commission may state a case for opinion of the Administrative Division : Supreme Court only on any question of law arising in any matter before it.

* as introduced

IV. Commerce Act 1975*

A. APPEALS

	Authority Appealed Against	Matters on which Appeals Lie	Persons Entitled to Appeal	Appeal Authority	Further Appeal
Part II (Trade Practices)	Commerce Commission	Any decision relating to trade practices (not restricted to questions of law)	Parties and Examiner	Administrative Division : Supreme Court	None
Part III (Monopolies, Mergers, Takeovers)	Commerce Commission	Any decision, consent or order relating to this Part, on fact and law	Parties and Examiner	Administrative Division : Supreme Court	None
Part IV (Price Control)	Secretary of Trade and Industry	Any decision of Secretary relating to price fixing, price orders and price approvals	Business persons affected; purchasers and users affected, by leave of Commission; consumer representative, in discretion and by leave of Commission	Commerce Commission	None

B. REVIEW

Parts II, IV - As for 1974 Bill

Part III - Commission exercises original jurisdiction, therefore review on grounds of natural justice by Supreme Court applies. Proceedings not to be held bad for want of form.

C. CASE STATED

Commission may state a case for opinion of Administrative Division : Supreme Court only, on any question of law arising in any matter before it.

* as amended in 1976

V. Securities Bill 1977*

A. APPEALS

Authority Appealed Against	Matters on which Appeals Lie	Persons Entitled to Appeal	Appeal Authority	Further Appeal
Securities Commission	Any determination of Commission, on point of law only	Parties	Administrative Division : Supreme Court	None
Registrar of Companies	Against any act or decision of Registrar made under his powers of inspection	Any person aggrieved by such act or decision	Administrative Division : Supreme Court	None
Registrar of Companies	Any refusal, act or decision of Registrar other than the above	Any person aggrieved by such refusal, act or decision	Securities Commission	None

B. REVIEWS

Review by the Court on grounds of natural justice, as for other tribunals.

C. CASE STATED

The Commission may state a case for the opinion of the Supreme Court, to be heard and determined by the Administrative Division unless ordered by the Court to be removed to the Court of Appeal, on any question of law arising in any matter before it.

* as reported from the Statutes Revision Committee

APPENDIX C

LEGISLATION ON COMMERCIAL PRACTICES AND PRICES

REPEALS

ACT	REPEALED BY
Monopoly Prevention Act 1908	Commerce Act 1975
Commercial Trusts Act 1910	Commerce Act 1975
Cost of Living Act 1915	Commerce Act 1975
Board of Trade Act 1919 and amendments	Industries and Commerce Act 1956
Prevention of Profiteering Act 1936	Control of Prices Act 1947
Industrial Efficiency Act 1936	Industries and Commerce Act 1956
Control of Prices Act 1947 and amendments	Commerce Act 1975
Trade Practices Act 1958 and amendments	Commerce Act 1975
Trade Practices (Commerce Commission and Pyramid Selling) Act 1974	Commerce Act 1975