COMPETITION AS THE REGULATOR

By
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This article examines the role and policy of the Trade Practices Act 1974 (Cth) in dealing with competition and the market place. The author argues that the thrust of the Act is not in fact regulatory but deregulatory. The Act is there to see that competitive forces are allowed free play and are not hindered by restrictive practices, collusive agreements between competitors and other such obstacles. Both the restrictive trade practices provisions and the consumer protection provisions of the Act merely provide a framework within which competition is to operate. The author argues that it is competition, rather than the Trade Practices Act, which regulates the market place. The author also submits that self-regulation deserves encouragement as it serves competition, is flexible to industry and consumer demands, increases efficiency and limits the need for official involvement and public expense.

I. INTRODUCTION

Freedom from government regulation of industry is often seen as necessary in the interests of enterprise and competition. The whole point of this view must be that competition is seen as doing the regulating that governments would otherwise do. If competition is to perform that function, then it needs to be effective competition. The effectiveness of competition in an industry depends on at least the following factors: the industry structure, the nature of its product and substitutability from elsewhere, barriers to entry, opportunities for innovation, aggressiveness of the customers and the attitudes of the companies themselves. If the companies themselves restrict competition, then the industry is regulated not by government regulation but by private regulation. This is where the Trade Practices Act 1974 (Cth) comes in.

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Of course, competition can never be the only regulator. Both government and private regulation may also be desirable, even necessary, but they need not interfere with competition at all. Indeed, there has to be a foundation or framework provided for competition to work effectively. For example, the general laws about formation of companies, the enforcement of contracts, industrial safety and public health, would generally not be in question in this context. Industry self-regulation, for example, as to standards of goods, standards of advertising, and common forms of contract, can also assist, or at least not hinder, the competitive process.

The Trade Practices Act 1974 (Cth) is essentially about competition. The very reason for its existence was to make competition as far as possible the regulator in place of less desirable regulation that had grown up within industry and that was hindering competition. The self-regulation of the pre-Trade Practices Act days included all forms of restrictive practices: for example, agreements between competitors preventing them from competing in price; collective action foreclosing sources of supply to competitors or new entrants; and resale price maintenance imposed by suppliers so that retailers could not compete by reducing prices of the goods in question. All this was self-regulation, however, self-regulation does not need to be as bad as that. There is plenty of self-regulation that is good, and that deserves encouragement. The basic test is whether it serves competition, or at least is not inconsistent with it. Then it can be very useful regulation in complementing the consumer protection law and being acceptable to business and to consumers alike, thus limiting the need for official involvement and public expense.

In competitive enterprise it is axiomatic that competition is the main regulator. The market will test the efficiency of the companies and individuals and will control their prices and exercise eventual supervision, of the "carrot and stick" variety, over their competitive decisions, whether as to investment, innovation, production, distribution or otherwise. Insofar as Trade Practices' law encourages this result, its own thrust is not at all regulatory but indeed is deregulatory. However, the competition has to proceed subject to the consumer protection provisions of the law which stipulate basic standards of commercial probity for the benefit of consumers and ethical traders alike.

For the purpose of placing the Trade Practices Act 1974 (Cth) in context in relation to business regulation, I propose to go very broadly through the main things done by the competition provisions of the Trade Practices Act 1974 (Cth) to see who is regulating who, or who is being stopped from regulating who. Then I propose to examine in the same very broad way the consumer protection provisions of the Act in order to see their consequences for consumers and for business, and indeed for competition itself as the main regulator. Lastly, I intend to expand on industry self-regulation in the large areas where it has a unique role and opportunity and can effectively complement the law, raise industry standards and support competition.

II. COMPETITION PROVISIONS OF THE TRADE PRACTICES ACT

If competition proceeded unhindered in industry and commerce, there would be no need for a Trade Practices Act. In fact, there was a need simply because competition was gravely hindered by the type of regulation that industry itself was involved in. The continuing need is to prevent those days from returning. Let me go

back to my first report to the Parliament in August 1968. My Office had just analysed the new Register of Trade Agreements. The report said:

> 3.30. All the restrictions on competition mentioned in section 35 of the Act are to be found exemplified in the Register, but far the most common is restriction on price competition. It is also very common to limit or control the channels of distribution, and often the two restrictions run together . . . [There are] . . . agreements on discounts and margins, and the persons in an established marketing structure entitled to receive them . . .; persons outside the structure cannot get the particular goods at . . . [competitive] prices.
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> 3.31. Resale price maintenance operates very widely both on producer goods and consumer goods . . . It is often coupled with exclusive dealing.
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> 3.32. Businesses from very large down to very small . . . [have] . . . agreements at their respective levels or between levels . . . [V]ery large companies sometimes . . . agree on common prices for some of their goods. Companies that are substantially without competitors at their own level have price agreements with their distributors that may fix resale prices as well. These distributors are usually part of an established structure and are often in horizontal agreement with each other that they too will sell at set prices.
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> 3.33. Horizontal agreements between manufacturers are more numerous than those between wholesalers or between retailers, . . . Agreements between manufacturers often affect all succeeding level. Some agreements between wholesalers reach back and affect the manufacturing level. At the retail level most effect seems to come from distribution agreements, particularly in regard to exclusive dealing and retail price maintenance on manufacturers' brand lines . . .
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> 3.35. Many trade associations effectively cover, through their membership, the whole of the relevant level of an industry. They usually have power to control admission to membership and therefore admission to the trade. Membership of an association often carries with it the right to preferred terms agreed with other associations and carries the obligation to give preferred terms only in accordance with the association's own agreements or directions.[1]

That was the situation in 1968. This pattern of industry regulation controlling and limiting competition changed slowly under the influence of the first Trade Practices Act, which commenced in September 1967, and more rapidly under the influence of the current Trade Practices Act which was introduced in 1974 by the Labor Government and revised, and in some respects strengthened, by the present Government in 1977.

The clear intention of the law is to let competition regulate the market. To do that, competition has to be effective, and so it needs not to be stifled or inhibited by restrictions that prevent it doing its job. The law cannot, of course, itself produce competition because that ultimately depends on competitors in industry and in commerce, and on the enterprise and initiatives they show. The fact that many do show such enterprise and initiatives is partly a reflection of the changing times in which we live: technology develops rapidly, countries become increasingly interdependent, the economy becomes more complex and the structure of industry itself changes, new products and new processes are developed, and financing becomes more sophisticated. We are part of the high-investment, mass-production

1 Commissioner of Trade Practices, *First Annual Report* (1967-68) 11-12.

society at the same time as we have an important small business sector and see a strong need for individuality in business.

In this dynamic situation, competition is an essential force in seeking and maintaining profitability and in responding to pressures from others in the same or in interdependent industries. The community gains from the competition in terms of more and better goods and services, lower costs and prices, and better use of resources. The role of competition law is to encourage that competition: to increase opportunity for it by removing fetters placed upon it that used to dampen or prevent competitive initiatives or responses and that retarded the processes of change. If efficiency in industry and commerce is to be further developed we need the keen cutting edge of competition freely available to be used by entrepreneurs and competitors willing to do so. What this means is that competition law is a catalyst in a dynamic situation. Its role is to allow competitive forces free play. Competition so encouraged is likely not only to improve efficiency in domestic production and services but also in the infrastructure serving exports or distributing imports.

I propose now to go through the main things done by the competition provisions of the Act to see how they operate. So far from regulating industry and commerce, the Act provides mechanisms to ensure that market forces have the opportunity to do the regulating. I shall consider the following areas of restrictive trade practices: agreements between competitors and resale price maintenance; recommended prices — suppliers' and trade associations'; exclusive dealing; price discrimination; monopolization; and, mergers.

1. Agreements Between Competitors and Resale Price Maintenance

This is the traditional hard-core of anti-competitive activity. The Act is firm, and the administration has to be also, if competition is to regulate the market instead of the restriction of competition doing so.

Price agreements between competitors are outlawed; the Act takes these, by definition, to be substantially anti-competitive. Similarly outlawed, and on the same statutory presumption of necessary anti-competitive effect, are agreements between competitors excluding or boycotting suppliers or customers. Any other agreements between competitors that can be shown on the facts to be substantially anti-competitive are similarly outlawed, examples of which are market-sharing agreements.

The effect of these provisions in freeing up the market has been dramatic. There are probably few boycott agreements or market-sharing agreements between competitors today, although they used to be common enough before the Act. Nevertheless the Commission still comes across examples. Any price agreements that exist between competitors today have to be underground. Companies that can profit from competition in their own markets, or in the markets of their suppliers or customers, demand to have it. Through this process, competition itself becomes the force, with the Trade Practices Commission serving, where necessary, as a catalyst. The Commission can only hear about anti-competitive agreements from people within the industry who desire competition, or from the industry's suppliers or customers. In moving against such agreements the Commission is not itself regulating market conduct. It tells no one what prices to charge, or who to deal with.

Its task is to help competition regulate those decisions. It has done that, for example, in petrol retailing, beer retailing, vegetable wholesaling and livestock selling. The Commission is very active right now in a number of other areas where a conclusion has not yet been reached. The message is clear that the freedom to engage in price competition is and must be defended because restriction of that freedom would leave competition stunted at the roots.

The statutory prohibition of resale price maintenance, which is the fixing by a supplier of the prices that wholesalers or retailers must charge, continues the theme of the Act that it is competition that should regulate the market. Resale price maintenance operates like a price agreement between the distributors or retailers affected because it prevents price competition between them. With resale price maintenance outlawed, outlets have the opportunity to price-compete. Not only does that bring immediate benefit to consumers and other purchasers, but it also puts pressure on distribution systems and on selling generally to streamline and to reduce cost so as to remain profitable. In that way there is better use of resources through the "carrot and stick" of competition. Well known examples of price competition, since the outlawing of resale price maintenance, have been in the retailing of consumer durables, petrol and bread. The Federal Court has in a series of cases taken strong action to deter resale price maintenance, and the point should now be plain to all that resellers must not have their resale prices dictated to them.

It is, of course, of little use to prohibit a supplier from engaging in resale price maintenance, and thereby supplanting competition, if his employees then combine to do the same thing. That was the genesis of section 45D. It prohibits "secondary boycotts" where, for example, a discounting retailer finds his supplies cut, not by his supplier but by his supplier's employees. In cases of this nature, the existence of the section has probably had some effect in reducing interference by trade unions in the competitive process, and the Commission has an arrangement with the A.C.T.U. and the National Employers Federation whereby they use their good offices to see whether such anti-competitive boycotts can be lifted. However, the section goes beyond such cases and has been used in private actions where the damage to competition has been less obvious and the real complaint, on the one side, has been damage to an individual business, and on the other, an apprehended threat to working conditions or to employment. Ultimate decisions have tended to be made in an industrial forum, either as a matter of negotiation or with the assistance of the Conciliation and Arbitration Commission. The fate of section 45D now depends on a constitutional challenge awaiting hearing in the High Court.[2]

2. *Recommended Prices — Suppliers' and Trade Associations'*

Here again is evident the statutory policy that businesses should be free to set their prices on a competitive basis rather than be regulated by their suppliers or their trade associations. It is quite legal for a supplier to recommend resale prices to his outlets but there must be no pressure, or else it would amount to resale price maintenance and be illegal. The actual decision as to resale price must be for each outlet individually in response to competition. The position is really much the same when

2 *Actors and Announcers Equity Association of Australia* v. *Fontana Films Pty Ltd* 1982 A.T.P.R. 40-285, judgment handed down on May 11, 1982.

businesses receive recommended prices from their own trade association or any other informal grouping.

When there are few businesses in the association or group, the recommended prices are in effect prices that the parties have agreed to recommend to themselves, and therefore the likelihood of adherence to the prices, and thus of displacement of competition, is high. The Act treats such "recommended price agreements" as being on a par with ordinary price agreements and makes them illegal. However, where there are many parties to a price recommendation scheme, most of them are likely to be small businesses who are more dependent on price recommendations than larger businesses. The Act has drawn an arbitrary line at associations of not less than 50 parties in an attempt to reach the small business area. Where there are more than 50 parties, recommended price lists are not prohibited if they do not substantially lessen competition or if they secure authorization from the Commission.

The Commission has, on a number of occasions, granted authorization on public benefit grounds for recommended prices of small business trade associations and has explained its approach in a published statement of principles.[3] The Commission looks first to see whether the anti-competitive effect is minimal; if it is, then there may be sufficient public benefit, for example, in helping small businessmen to justify authorization. Consistently with the general stance that competition must be the main regulator, authorization is not granted where the group or association has substantial economic power in a collective sense, as for example, the petrol station retailers. In those circumstances, recommended prices tend to become actual prices and the consumer has nowhere else to go.

In *Re Association of Consulting Engineers, Australia*[4] the Trade Practices Tribunal was not prepared to authorize fixed fee scales put out by the association, nor its overriding ban on fee competition. The Tribunal stated that:

> The Australian community believes that the consequences of competition, including competition on the basis of price, are largely beneficial. That is the philosophy behind the Trade Practices Act itself...In *Standard Oil Co.* v. *Federal Trade Commission* 340 US 231 at 248, the Supreme Court of the United States said "The heart of our national economic policy long has been faith in the value of competition". That statement is no less true for Australia than it is for the United States.[5]

The Tribunal was, however, prepared to authorize a recommended scale, provided the ban on fee competition was given up and provided it was made very clear indeed that the scale was only a reference sale and that individual engineers and their clients could negotiate on any basis, with or without reference to the scale. There was unanimity on both sides of the industry that there would be value in having a reference scale. The Tribunal knew there was a degree of fee competition even with the fixed scale. That being so, it felt that fee competition would not be inhibited by a reference scale which was heavily qualified. Many of the clients were large companies or public authorities with qualified engineers on their own staff and well able to negotiate. The Tribunal's reliance on market solutions was shown by its

3 *Fourth Annual Report* (1977-78) para. 2.18 ff; *Fifth Annual Report* (1978-79) para. 3.10.ff.
4 (1981) A.T.P.R. 40-202.
5 *Id.*, 42, 796.

ready acceptance of the importance of the other elements of competition, together with price, and its willingness to leave them to be balanced by the market.

3. Exclusive Dealing

The treatment of exclusive dealing is an interesting illustration of the general approach of the Trade Practices Act 1974 (Cth) that competition is to be accepted as the main regulator in industry and commerce. There is some exclusive dealing that is anti-competitive, but a great deal is not. It is only towards the first type that the Act is aimed, the second being left to the market to evaluate as part of the competitive process itself. The device that enables anti-competitive exclusive dealings to be separated from other types of exclusive dealings, is the notification procedure. A party engaging in exclusive dealing receives, on giving short particulars to the Commission, full statutory protection for the continuation of the exclusive dealing, unless and until it is challenged by the Commission on the grounds that it is anti-competitive and not justified by any public benefit. As there is so much exclusive dealing that is not anti-competitive, such challenges are relatively few.

Nevertheless, there is a hard core of exclusive dealing that does put effective controls on the competitive opportunities of others, raises entry barriers and makes change difficult. The extreme instances are where there are few alternative suppliers, where outlets are limited in number, for example, because of the need to have a licence under State law or because of town planning or capital requirements, and where the supplier is the dealer's landlord as well. This was broadly the position with tied petrol stations and tied hotels. The Commission denied authorization in those cases, and its decision concerning tied hotels was upheld by the Trade Practices Tribunal. Both industries underwent some change after the decisions, with opportunities for competition at the retail level increasing and at least the possibility created of going elsewhere for supplies. Yet it remains a fact that a supplier who is also a landlord is in a strong position even without an exclusive dealing agreement. It is, however, salutary to remember that it is not so long ago that such landlords could rely as well on the full severity of their exclusive dealing agreements and could even insist on resale price maintenance.

4. Price Discrimination

When we come to discuss discrimination by a supplier in the prices it charges to different outlets, we are moving into one of the most sensitive areas of trade practices law. That is not because section 49 takes any different standard from the rest of the Act. It takes the same standard, which is that competition is the test; the only price discrimination that is prohibited is price discrimination that substantially lessens competition in a market. So it is not a section that can be used as a protection against competition itself. There must be damage to competition before it can be invoked, not just damage to or elimination of one or more competitors, because the latter is constantly occurring as part of the competitive process. One can conclude that the reliance on competition is intended to give dominance to the interests of consumers and the community at large, those interests being generally better served

by the efficiency and lower cost that competition compels. A good deal of the Commission's work on price discrimination has been published. Specifically, that is in respect of petrol, glass, and food, especially bread.[6] The Commission has not found a case, other than possibly glass, where it felt justified in bringing proceedings. In that case the supplier modified its discount schedules and considerably narrowed the discrimination.

As price discrimination tends to occur in markets where competition is keen, cases of demonstrated illegal price discrimination are likely to be rare. The main value of section 49 is thus in whatever deterrent effect it has to remove the worst excesses. I believe that major suppliers do have regard to the section and that discounts are more closely related to quantities than they used to be. The worst type of case is now less likely. That is, where sellers who are themselves efficient have their opportunity to compete effectively in the market put at risk both by the severity of the discrimination against them and by the lack of alternative suppliers who might treat them better.

The Trade Practices Consultative Committee, in its December 1979 report, recommended repeal of section 49, and a simultaneous amendment of the monopolization section to attempt to deal with the problem there.[7] Small business interests have, on the other hand, pressed for the strengthening of section 49 so that price discrimination by suppliers will be reduced, even if anti-competitive effect in the market cannot be shown. This recently became the law in respect of petrol station lessees, by virtue of special legislation.[8] This is direct regulation of business in a way that the Trade Practices Act 1974 (Cth) is not.

5. Monopolization

The monopolization provision, section 46, is directed, in conditions of monopoly or near-monopoly, towards keeping competition alive or encouraging the possibility of it. The section does not seek to do this by any direct regulation of monopoly or near-monopoly companies. What it does is to prohibit the abuse of monopoly or near-monopoly power to crush or prevent competition. That is a very difficult concept. There must be a predatory purpose shown and it has to be proved in Court subject to all the strictness of the rules of evidence. The Commission has tried unsuccessfully to do that.[9]

The Commission's experience is that the restraint the section puts on large companies in their dealings with smaller companies is really quite limited; the section protects small business only in extreme circumstances. No monopolization section could be other than a compromise, because there are two conflicting objectives both

6 *Fifth Annual Report* (1978-79) Ch.5; Ch.7 of the Trade Practice Commission's submission to the Trade Practices Consultative Committee, *Small Business and the Trade Practices Act* Vol. 2, (December 1979); *Report on Price Discrimination in the Petroleum Retailing Industry* (October 1979 — May 1980); *Report on Discriminatory Pricing Affecting Small Mixed Businesses in Victoria* (April 1981).

7 Trade Practices Consultative Committee, *Small Business and the Trade Practices Act* Vol. 1, (December 1979), paras. 10.112-10.113.

8 Petroleum Retail Marketing Franchise Act 1980 (Cth).

9 See *T.P.C.* v. *C.S.B.P. and Farmers Ltd* (1980) A.T.P.R. 40-151.

concerned with competition. The first is to encourage new entrants and to foster what competition is possible even in markets already dominated by monopoly or near-monopoly companies. The desire to do that is reinforced by the fear that, when the competitive process can no longer work effectively, the unrestrained use of economic power will result in total monopoly that may be quite unnecessary for efficiency reasons. The second objective is to leave large companies as free as small ones to conduct their own business activities and policies. The desire to do that is reinforced by the fear that if they are fettered in these respects, efficiencies that are special to large companies will be denied to them with the result that the consumer and workforce will suffer and international competitiveness will drop, and there may be fragmentation of industry.

As with the price discrimination section, the main values of the monopolization section is in whatever deterrent effect it has to prevent the worst excesses. The Commission takes up complaints with large companies from time to time, and they do have to consider their position under the section. I believe the section has some effect, although no monopolization section can compensate for the great imbalances of economic power that are a fact of life. In any event the section does not take a regulatory approach. There is no detailed prescription of what companies must or must not do. They take their own decisions on ordinary commercial considerations, such as efficiency and any cometitive pressures that may be present. The restraint put on them is that they must not set out deliberately to abuse their monopoly or near-monopoly power with the intention of destroying or preventing competition.

6. Mergers

This is the last area touched by the competition provisions of the Act. As everybody knows, there is a great deal of merger and takeover activity going on, and the Act has nothing to say to most of it. Indeed, the intention of the 1977 amendments was to encourage merger activity, and to remove the regulatory effect the 1974 merger provisions were thought to be having. Mergers and takeovers can now proceed whether or not they lessen competition, provided only that they do not go so far as to involve the acquisition or extension of control or dominance of substantial markets. There is no need to approach the Trade Practices Commission, although companies sometimes do inquire whether the Commission would be likely to move against a particular merger or takeover.

The merger cases where the Commission can move are few. The Federal Court's approach in the *Ansett-Avis* case[10] suggests that if there is one strong company left outside the merged entity, then the merger is beyond attack. Thus the competition restraint on mergers taking place is a limited restraint, because the competition to be preserved is limited competition. It is the competition of as few as two companies, provided the acquisition does not take one of them beyond the threshold of dominance.

10 *T.P.C.* v. *Ansett Transport Industries (Operations) Pty Ltd* (1978) 20 A.L.R. 31.

III. CONSUMER PROTECTION PROVISIONS OF THE TRADE PRACTICES ACT

It is generally agreed some regulation of industry, both government and private regulation, may be desirable, even necessary. It need not interfere with competition at all. Indeed there has to be a foundation or framework for industry and for competition to work effectively. That foundation or framework comes partly from the general laws about such matters as formation of companies, enforcement of contracts, and public health. It also comes partly from industry self-regulation that, without interfering with competition, deals with such matters as standards of goods, standards of advertising, and common forms of contract. I will be saying more about self-regulation later. At present I am concerned with the consumer protection provisions of the law. They are part of the framework in which competition has to proceed, for they stipulate basic standards of commercial probity for the benefit of consumers and ethical traders alike. We need to consider not only the direct consequences of the consumer protection law for the consumer and for business, but also the consequences for competition itself, because it should never be forgotten that competition is itself a prime, perhaps the prime, consumer protection.

I will take first what the Act calls "unfair practices", which it prohibits, then "safety and information standards" that suppliers must comply with, and finally, "conditions and warranties" which the Act implies into consumer transactions and which consumers can, if necessary, enforce against manuacturers and suppliers.

1. Unfair Practices

The prohibited "unfair practices" fall into two groups. First, there is misleading or deceptive conduct in the course of advertising or marketing. Secondly, there is a miscellany of nasty practices that would probably attract universal condemnation and that are likewise prohibited. Of this second group it is probably sufficient to instance pyramid selling and also charging for unsolicited goods or services. The latter becomes a lucrative trick in the hands of confidence men who would not at all be influenced by industry self-regulation; they have succeeded in taking down many businessmen by claiming, and receiving, payment for entries in business directories where the entries were not authorised and the directories had no real circulation. The more important area for general discussion at present concerns misleading or deceptive conduct in advertising or marketing, and I propose to pass to that.

When the law tells advertisers that they must not engage in misleading or deceptive conduct, in false advertising, in misrepresenting goods or services or land or franchise opportunities, it is clearly a regulatory law like the laws about public health and industrial safety and so on. To ensure reasonable acceptance of the law requires administration that gets the result while keeping the cost tolerable. On this, let me quote Mr Bruce McDonald speaking as the then President of the Advertising Federation of Australia:

> We now have a proper and sensible Trade Practices Act included in the laws of our land. And my experience says that this Act is properly and sensibly administered with due and fair regard to consumers, to advertisers, and to agencies.[11]

11 *Advertising News*, 3 February 1978, 21.

With the encouragement of that quote, let me make the perhaps surprising point that large and reputable companies have been found in serious default, as well as "the fringe operators" we might prefer to believe are the only likely offenders. Why is that?

There are two particular reasons. First, there is the constant pressure to make sales. Secondly, that pressure is often felt more at operating levels below the most senior management level. The law takes the approach that senior management must accept the positive obligation to ensure compliance with the law at all levels. In broad terms, there is an absolute liability for misleading or deceptive conduct, whether moral turpitude is involved or not. Usually it is not. Recognising that responsibility can be escaped only on very tight grounds, such as reasonable mistake, companies have learned to supervise and scrutinise more closely than they used to do, and the result is a general lifting of standards of advertising.

The consequences for consumers is that they are better able to make their purchasing choices and to activate and take advantage of competition that stays closer to the fundamentals of price and quality. And very simply, every consumer who is not misled is that much better off. The first consequence for business is that all the advertisers who want to keep to high ethical standards can do so in the knowledge that their competitors will have to do the same. This point is demonstrated by the complaints that come to the Commission from companies about their competitors' advertising, although that is something they can, and sometimes do, proceed against directly. Competition thus gets another dimension, to the advantage of the more competitive companies that are prepared to put the facts on the line. For example, the advertising industry no longer bars comparative advertising, comparing one's product directly with a competitor's. It is aggressive, and it has to be truthful.

There is of course a cost to management, and ultimately to the consumer, in ensuring that advertising is not misleading or deceptive; much of the cost many companies would choose to bear, law or no law, as part of keeping customer goodwill. The cost should reduce as companies become more accustomed to the systems of internal supervision and review that they develop. At the same time administration of the law should ease the burden by having reasonable regard to the practical problems that companies face in seeking compliance with the law. This means that there has to be ample room for consultation directed towards improvement, with court action reserved for the cases that need to be public examples. The Commission has engaged fairly extensively in consultation on a company and on an industry basis and has also published guidelines drawing on its experience of the practical operation of the law.

Against this general backdrop of the law and its administration, industry self-regulation can, and does, proceed very usefully. Much of the incentive for effective self-regulation comes from the very presence of the law; general deterrence comes from public enforcement of the law in proper cases. Nevertheless, the more effective that self-regulation is in achieving the objectives of the law for the benefit of the community at large, the less need there is for direct enforcement of the law itself.

2. Safety and Information Standards

This is direct regulation, but it is directed to, and remains under the control of, the government of the day, and in practice it proceeds in consultation with the State governments. Consultation with industry is an obvious necessity also, except where urgency makes that impossible. Moreover, some of the standards give compulsory force to Standards Association of Australia (S.A.A.) standards, to the making of which industry has a considerable input.

Goods which the Minister formally declares to be unsafe are banned from sale. This is an emergency power and is exercised swiftly and the bans have a limited life. More permanent are regulations, made after the process of consultation, banning particular goods from sale unless they meet stipulated safety standards. Information standards, similarly backed by regulations, require that particular goods cannot be sold unless they carry stipulated information that help consumers when deciding whether to buy and when later caring for the goods. The best-known example s "care labelling" of clothing.

The various standards in force on June 30 1980 were listed in Schedule VII of the Commission's last annual report.[12] There were then 6 banning orders for unsafe goods. An example is in respect of children's toys coated with toxic materials. There were 6 safety standards that particular goods had to meet before they could be sold. An example is in respect of flammability of children's nightwear. The benefits of well-directed compulsory standards are obvious. There are costs too, which consumers ultimately bear, and there can be an adverse effect on competition. Not everyone may be geared to meet the standard; smaller businesses could suffer and cheaper goods, particularly imports, could be excluded. Balancing the benefit and the detriment is the purpose of the consultations between Commonwealth and States and between government and industry. The ultimate responsibility for having compulsory standards under the Trade Practices Act 1974 (Cth) is with the Commonwealth Government. Where there are compulsory standards, it is the Commission's task to secure compliance by consultation, guidance, and, if it becomes necessary, direct enforcement.

3. Conditions and Warranties

This too is regulation, but it is not regulation that the Commission comes into. It is between suppliers and consumers and between manufacturers and consumers, the matter being one of private law rights that consumers themselves can enforce if necessary. The Commission has tried to assist all sides, for example, by publishing explanatory material[13] and by conducting seminars. It has also, with the co-operation of those concerned, examined large numbers of warranty documents in several industries in order to make constructive suggestions as to compliance with the law.

12 Trade Practices Commission, *Annual Report* (1979-1980).
13 Information Circular No. 26, 5 January 1979, to be found in (1979) 2 A.T.P.R. 55-026.

Basically the law in this area is an extension of the old Sale of Goods Acts. One funamental difference is that it is not now possible to contract out of the statutory warranties, for example, as to merchantable quality or fitness for purpose. The other fundamental difference is that the statutory warranties are now implied as against the manufacturer, as well as against the actual seller who makes the sale to the consumer. In one sense this is merely making legally enforceable the market place responsibility that many reputable manufacturers have always accepted for their consumer products. However, manufacturers are now also taken to warrant that there will be reasonable repair facilities and spare parts available for their products unless they make the contrary known before purchase. Further, manufacturers are taken to warrant the correctness of the express claims they make for their goods in advertising, packaging and marketing. The direct consequence of the law in this area is to improve the position of consumers relative to suppliers and manufacturers. Experience over time may well show a pro-competitive effect; at least one can dismiss the possibility of any effect to the contrary.

IV. INDUSTRY SELF-REGULATION

In the earlier parts of this paper I have tried to show, first, how the law secures primacy for competition so that it is not to be displaced by industry self-regulation restricting competition; and, secondly, how the law regulates in favour of consumer protection at the same time as it supports competition. The need for competition and for consumer protection sets the framework within which any self-regulation by industry now has to develop. I want to show the wide scope that this leaves for industry self-regulation that is desirable and should be encouraged. The desirable self-regulation is that which brings its flexibility to bear to increase efficiency, support competition, serve the consumer and limit the need for official involvement and public expense.

Some general observations are in order first. Self-regulation is usually quicker and more specific than legislation and is closer to the scene of the action. It should be more readily adaptable to meet changing needs that are rapidly perceived by those in the industry or doing business with them. Thus properly directed, self-regulation can deliver quicker benefit to consumers. At the same time it can serve the longer-term interest of the industry itself by enhancing its own standing and acceptability and by increasing its efficiency and competitiveness. The positive image of self-regulation is improved where customer or consumer groups are drawn into the consultation process so that not only is the result better-tailored but there is less risk of resentment. After all, *self*-regulation by an industry usually affects people outside the industry. They may have legitimate points to make and could regard the self-regulation as an interference with their own rights. Be that as it may, self-regulation can help to compensate for market imperfections, particularly in respect of buyers having insufficient knowledge to make adequately informed decisions. Industry standards can reduce the risk of bad choices and can help to focus competition on price, quality and service.

Perhaps I can give you some of the general flavour of the Commission's approach to self-regulation if I quote from its decision in 1976, when it accepted the public benefit in the Media Council's codes and standards on advertising and had this to say:

> . . . the Commission sees industry and legislative controls as complementary and mutually reinforcing and thinks that industry regulation in the standards area must be welcomed — provided it does not become subject to abuse, of which there was no suggestion here. There are areas where legislation does not reach in specific terms, for example the specific provisions about broadcasting are not reflected in legislation about newspapers. Moreover, there can be flexibility and speed within an industry system. There can also be the same emphasis on prevention rather than cure that the Commission itself has tried to encourage by its own Guidelines on Advertising as well as on other matters. The industry provisions for clearance beforehand of certain broadcasting and television material and of advertising on particular subjects, notably those affecting health, are matters of real value to the public and, be it remembered, to the industry itself in terms of its self-respect and public standing. The law speaks on some, but not all of these matters. The law has little to say, directly, in matters of what amounts to good taste in advertising in a general moral or ethical sense.[14]

Let me now attempt to categorise the self-regulation that is not at risk from the Trade Practices Act 1974 (Cth) and indeed may be positively encouraged by it.

1. Improving the Operation of the Market

Self-regulation is common in matters like the organisation of auction sale systems and stock exchanges, the collection of industry statistics and their dissemination, and the provision of standard forms of contract, for example, for building and construction work. A common feature here is that the self-regulation is not impeding competition; indeed it is assisting it because everybody is bidding or quoting on the same basis. Many procedural uncertainties are thus eliminated, and the competition can proceed on the fundamental issues of the value of what is being offered and the price that is going to be paid for it. The point to note is that this type of self-regulation occurs in the most highly competitive markets we have. It follows that competition and self-regulation can co-exist and complement each other very effectively. Indeed competition in such markets, where the transactions are many and the action is swift, would be hobbled if there were not rules well understood by the participants. If the rules did not come from self-regulation, they would have to come from legislation. In some cases there is in fact special legislation, State or Federal, that provides part of the regulatory frame or supervises the self-regulation. The prime example is the legislation dealing with the securities industry.

So far as self-regulation is concerned, the Trade Practices Act 1974 (Cth) has no role to play unless the self-regulation gets into the area of inhibiting some of the elements of competition. Industry arrangements for collecting statistics and for disseminating the aggregations provide valuable aids to efficiency and are not anti-competitive. On the other hand, common charges for stock brokers prevent

14 *Re Herald and Weekly Times Ltd; Re 2KY Broadcasters Pty Ltd; Re Southern Television Corporation Ltd* [1976] T.P.R.S. 108.98.

price competition between them and would require justification on public benefit grounds. Another example that raised competition issues was the type of common form contract that used to stipulate a detailed rise and fall formula for application in all cases, whether or not the negotiating parties would otherwise bargain for a different formula.

To indicate that there is a point where self-regulation aimed at improving the operation of the market can move into actual restriction of competition should not take attention away from the size of the area where self-regulation is perfectly legitimate. In the Commission's experience, where self-regulation of this sort does include some restrictions on competition, parties are often prepared to change the arrangements to remove the restrictions. This has happened particularly with common forms of contract, which are so useful to industries and to their customers, provided they do not pre-empt negotiation on the substance of the bargain; negotiation that customers want to have.

This brings me to the point of public benefit, and my remarks are not limited to any particular type of self-regulation but apply to self-regulation generally. If the self-regulation does not contain restrictions on competition, then it is perfectly legal and does not need to show public benefit. That is the position commonly reached now in self-regulation directed towards improving the operation of competitive markets. However, in any case where restrictions on competition remain, it is still possible to claim over-riding public benefit and to seek authorization from the Commission. If public benefit can be shown, it is necesssary to show further that the public benefit flows from the restrictions in question. So, although it could be well accepted that there is public benefit in a system of self-regulation that helps a market to work efficiently, any restrictions that had an anti-competitive significance would have to be shown to be an essential part of the whole package before they could be authorized along with the rest of the system.

Subject to what I have been saying, likely headings under which public benefit might be claimed would be contributions to increased efficiency in the industry, including that of smaller businesses in the industry, and the protection of smaller businesses and consumers who deal with the industry. An important public benefit attaching to some type of self-regulation is better information to businessmen and to the public generally. For example, there may be industry standards stipulating that size, dimensions, and performance characteristics of goods are to be shown, and the public may have the assurance of certification as with the S.A.A. mark.

2. *Codes of Ethics*

This is a prime area for self-regulation. There are several pressures at work. First, there is the desire of businessmen to respond to their own ethical aspirations; allied to that is the rising expectation of the community in these days of greater awareness of the role of business in society. Secondly, there is the positive need to cherish goodwill; few companies can afford to take a short-term outlook on that. Lastly, there is the prospect that legislation will fill a void if self-regulation neglects it. The broad general rules in the Trade Practices Act 1974 (Cth), and the enforcement of those rules where necessary, encourage competition and at the same time directly

protect consumers from misleading or deceptive conduct. So the law itself prescribes ethical standards, and it is against the background of the law and the knowledge of its effectiveness that self-regulation develops by working out the detail, by adjusting to new needs, by avoiding legalism, and by keeping continuously in touch with the scene of the action, with the people in the industry, and hopefully with those who do business with it as well.

I quoted earlier from the *Media Council* decision. That is an important case, because it demonstrated the effectiveness of industry regulation. The media has control over advertising, and its own bad debts in respect of advertising, by collectively accrediting advertising agents with whom it is prepared to deal on a commission basis. The agents must reach certain standards, and must comply with a number of media codes operating in specific areas of advertising; through accreditation the media has great leverage to ensure that they do. The severity of the system is tempered by the fact that there is an appeal body with a distinguished retired judge as chairman. The Commission, although it authorized accreditation and the codes, would not have authorized the collective denial of payment of commission to unaccredited advertising agents. The Trade Practices Tribunal, on appeal from the Commission, also authorized this. So here is a demonstration that industry regulation certainly can have "teeth".

There are numerous examples of self-regulation for ethical purposes. Every profession does it, including the legal profession. So do many service industries. It is less common in manufacturing industry, where the emphasis seems to pass more to the standard of the goods supplied, and in that area manufacturers frequently play a constructive role in the Standards Association of Australia, which is a non-statutory body whose work is directed primarily towards voluntary regulation. Coming back to self-regulation by way of ethical codes, a recent decision was the *Consulting Engineers* case.[15] The code of ethics of the consulting engineers aimed at very high professional and ethical standards. The ethical rules were accepted without question by the Commission and by the Tribunal on appeal, and the only issues were on those parts of the code banning fee competition, requiring the use of a mandatory scale of fees, and inhibiting advertising, particularly advertising that referred to fees. The consulting engineers failed on those issues, there being anti-competitive effect and no over-riding public benefit.

A case with some parallels decided by the Commission concerned travel agents,[16] whose federation, the Australian Federation of Travel Agents (A.F.T.A.), moved against a member for discounting fares. A.F.T.A. gave up that sort of action and amended its rules so that such matters fell to be challenged only under the Air Navigation Regulations. In all the respects where the rules did not interfere with competition and were directed to ethical standards, they were accepted. Yet another example of self-regulation concerned the life insurance industry.[17] In a determination just issued, the Commission has authorized for 2½ years on a trial basis an

15 Note 4 *supra*.

16 *Application of Hornsby Travel Centre Pty Ltd for Australian Federation of Travel Agents* (1975) 1 T.P.C.D. [228].

17 *Colonial Mutual Life Assurance Society Ltd on behalf of Life Insurance Federation of Australia* (1980) A.T.P.R. (Com.) 50-005.

agreement by the industry federation, Life Insurance Federation of Australia (L.I.F.A.), directed against "twisting" policies from one life office to another, with the intermediary benefiting through commission but not the insured, because of the second burden of what the industry calls "front-end loading" on policies. The agreement includes penalty provisions.

The above illustrations show that industry self-regulation is largely free in the matter of ethical standards. There must not be interference with competition, and in a number of cases rules having that effect have been removed. There remains the possibility of restrictions on competition being authorized if over-riding public benefit can be found, but the possibility seems a slim one, having regard to the recent Tribunal decision in the *Consulting Engineers* case. It seems now that the starting point must be "no restriction of competition". Subject to that, industries can set their own ethical standards for relationships between themselves and with their customers and the community. They can enhance fairness and honesty in advertising if they wish, and in professional environments they can require that advertising be truthful, factual, dignified and free from ostentation.

The extent to which the law allows self-regulation to operate can be seen when we consider ethical rules that affect not only the participants but others as well. The Media Council controls operate on accredited advertising agents who are not formally parties to the agreement, although the compensating advantages to them of having accreditation are such that they regard themselves in practical terms as being within the compact. The L.I.F.A. controls operate on insurance agents and brokers, and they too were not parties to the agreement, but many of them see some identification with its long term objectives. An even clearer case of reaching out to control others is seen in the Media Council controls over mail order advertising. There the media stipulates not just for honesty in advertising, but for certain minimum terms that the advertisers must be prepared to offer to consumers who respond to the advertisements. The justification lies in the attempt to protect the consumer from shady operators who take the consumer's money, without having a place where goods can be inspected beforehand, a place where the advertiser can be found afterwards, or any satisfactory arrangements as to return of goods.

Finally, a very important point about self-regulation in terms of codes of ethics is that a lot of it quite legitimately proceeds without reference to the Trade Practices Commission. There is no general requirement to submit codes of ethics to the Commission. People do so if they want some reassurance or help. If, as ought to be the common position, there is no interference with price competition or other competition between the parties and no intrusion into the bargains they strike with their suppliers or customers, then there is no cause for worry. If there is some anti-competitive provision, it is pointed out and can be removed. The principles are clear enough, and many groups are prepared to make their own decisions. It is only where groups wish to adhere to restrictions on competition, that they have any need to approach the Commission and seek authorization on grounds of over-riding public benefit. As I have indicated though, that is not easy to show, and the better course is to leave codes of ethics to deal with ethical matters and to let competition have its normal effect.

3. Standards

We probably do not realise how many standards we have as a result of industry self-regulation, and how much we rely on them. Usually they are not in the least anti-competitive. Often they have a positive thrust to press competition into matters of quality and price instead of into fragmenting production with resulting inefficiencies. Furthermore, they bring greater certainty to the consumer or industrial user, and they make it easier for one industry or sector to serve another industry or sector. Take the conventions as to screw sizes and the sizes and dimensions of all sorts of components and materials in the building trade. Understandings not quite so all-pervading have grown up elsewhere. For example, the concrete pipe industry developed a standard range of sizes, and the fibreboard carton industry developed regular sizes for "standard" boxes for very common usage, as opposed to custom-designed boxes for special needs. There are voluntary standards also as to safety and as to quality. Industry groups signify their approval of goods by marking them with distinctive stamps of the relevant trade association. The gas industry is an example of this.

Of course, it is possible to design product standards with the intention of barring new entrants who work to different standards, and that would be objectionable because of its anti-competitive effect. Standards could be a potent weapon against imports and against outsiders to the particular trade association. However, exclusionary arrangements through standards become the subject of complaints, and it is more a problem with compulsory standards prescribed by law, than with voluntary standards that do not have to be complied with. If a trade association certificate as to quality enjoys prestige and thus affects sales, it should normally be available to non-members on a proper fee basis if they meet the quality standards. Just as standards should not be aimed against new entrants, they should also not be directed to preserving a status quo against innovation; a status quo that would normally be overtaken through the forces of competition. Attempts to bar innovation would be likely to be drawn to attention at an early stage, and at some stage to be swept aside altogether.

The anti-competitive possibilities I have just mentioned should not be exaggerated. Where they exist, they can be dealt with. The general thrust of voluntary standards is not anti-competitive, and usually they are valuable to the industry and to those with whom it deals. I have already mentioned a notable set of standards administered by the media, that is, press, radio and television, in respect of advertising of a whole range of products, including pharmaceuticals, liquor and cigarettes. In respect of radio and television, there is an industry system of clearing items in advance. However, the best-known voluntary standards are those of the Standards Association of Australia, whose certification, the S.A.A. "kitemark", is highly respected throughout industry and the community generally. The S.A.A. has a very large number of committees, each working in its own sector and representative of the manufacturers and others concerned with the products of that sector. Often consumers and Government Departments are among the representatives. S.A.A. standards are specifically recognized by the Trade Practices Act 1974 (Cth).

V. CONCLUSION

Competition is an important regulator. The Trade Practices Act 1974 (Cth) is there to see that competitive forces are allowed free play. In this respect the Act is not regulatory, but deregulatory, because it encourages competition to stand in place of government regulation and industry restrictions and to compel adjustment in response to changes in technology and industry structure. The role of the Act in so encouraging competition is continuous, because the reverse pressures, to limit competition, are themselves continuous. The consumer protection provisions, although regulatory in the sense of prescribing standards of conduct, run parallel to the competition provisions and do not dilute their thrust. It should never be forgotten that competition is itself a prime, perhaps the prime, consumer protection. Self-regulation has to accept that it must not displace competition. Subject to that, it can keep consumers better informed, raise standards in industry, assist competitive markets to work better, and reduce the need for government regulation. It is probably not realized how much self-regulation there is, and the extent to which the law leaves room for it.