THE GREAT SOAP OPERA

By A. J. Duggan*

[The criticism is occasionally voiced that advertising in certain industries is excessive. In Australia, the most frequent target for criticisms of this sort has been the soaps and detergents industry whose advertising practices have, over the past four years, been subjected to no fewer than four official inquiries. In this article, Mr Duggan explains what critics have in mind when they talk of 'excessive' advertising. He discusses the four Australian inquiries and their outcomes. Finally, on the basis that a problem does exist, he assesses the range of solutions that have from time to time been proposed. The conclusion is that in this area of regulatory endeavour agreement is much more evident on the diagnosis than it is on the cure.]

(1) INTRODUCTION

Since the passing of the Trade Practices Act in 1974,[1] the regulation of advertising in Australia has assumed an unprecedently high profile. However, the two provisions of the Act most directly concerned with advertising (sections 52 and 53) are restricted to the relatively narrow goal of ensuring truth in advertising. Both provisions go no further than prohibiting statements which are false, misleading or deceptive. There is no additional — positive — burden imposed on advertisers that their claims be informative. Nor is there any provision in the Act which seeks to limit the level of advertising engaged in by particular manufacturers or industries.

Although the characteristic uninformativeness and the perceived excesses of modern advertising are both recurring subjects of consumer complaint, there are in general good reasons for legislative reluctance to intervene in these areas. In the first place, attempts to increase the informational content in advertising require *a priori* determination both of how much and what kinds of information consumers require. Judgments of this order tend to be elusive. For one thing, informational requirements vary from product to product. Additional information is obviously more important when buying a car or a colour television set than it is when purchasing toothpicks. For another, there is an apparent conceptual impasse in distinguishing 'information' from 'persuasion'; even the most insidiously persuasive advertising at least conveys the information that the product exists, while basically informative advertising is persuasive in the sense that the information is offered as an inducement to purchase.[2] The real

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1 Trade Practices Act 1974 (Cth), (as amended).

2 For a fuller treatment of these matters, see Duggan, A. J., 'Fairness in Advertising: In Pursuit of the Hidden Persuaders' (1977) 11 *M.U.L.R.* 50, 50-64.

choice is probably less between information and persuasion than it is between relevant and irrelevant information. Yet to make a regulatory agency an arbiter of relevance smacks of paternalism.

Similar considerations underlie legislative reluctance to regulate the amount of advertising within industries. Some repetition must be tolerated if the advertiser's message is to reach the target audience, to induce purchases and to maintain consumer awareness of the product. The problem is that no reliable methods exist for measuring the amount of advertising necessary to achieve these goals.[3] Even if the matter is looked at solely from the consumer's perspective, it may not be preferable for such decisions to be made by a bureaucrat rather than a businessman.

However, there has over the years been an undercurrent of debate which suggests that these considerations may not in all circumstances justify the adoption of a *laissez-faire* attitude toward advertising. These views have recently boiled to the surface in Australia in the form of a spate of inquiries conducted between 1974 and 1977 into the soaps and detergents industry, whose products are among the most heavily advertised in the Australian market. The catalyst was an inquiry conducted by the Joint Parliamentary Committee on Prices, a body set up by the Labor Government in 1973 as part of its anti-inflation package, which found that intensive advertising contributed to the high level of concentration in the soaps and detergents industry, resulted in the charging of excessive prices and facilitated the earning of extraordinarily high profits by each of the major participants in the industry.[4] The findings of the Joint Committee closely followed those of a similar investigation of the United Kingdom industry conducted by the British Monopolies Commission in 1966.[5] The Joint Committee's report was followed by an investigation by the Trade Practices Commission into certain advertising themes in the soaps and detergents industry which might conceivably have been false or misleading within the terms of Division 1 of Part V of the Trade Practices Act, by a report issued by the Industries Assistance Commission in 1976 recommending the abolition of tariff protection for the industry,[6] and finally by a Prices Justification Tribunal inquiry into an application by Colgate-Palmolive Pty Ltd for a price increase based solely on increased media charges for advertising.[7]

The singular feature of this frenetic bout of regulatory activity is that it appears to have had no discernible impact either on prevailing advertising

[3] Australia, *Report of the Industries Assistance Commission on Soaps and Detergents* (1976) 42. (Hereinafter referred to as '*IAC Report*'.)

[4] Australia, *Report of the Joint Parliamentary Committee on Prices on the Prices of Household Soaps and Detergents* (1974). (Hereinafter referred to as '*Joint Committee Report*'.)

[5] United Kingdom, *Report of the Monopolies Commission on the Supply of Household Detergents* (1966). (Hereinafter referred to as '*BMC Detergents Report*'.)

[6] *IAC Report, supra* n. 3.

[7] Australia, *Report of the Prices Justification Tribunal on Proposed Price Increases by Colgate-Palmolive Pty Ltd* (Matter No. N77/1133, 23 August 1977). (Hereinafter referred to as '*PJT Report*'.)

practices in the soaps and detergents industry or on policy directions for advertising regulation in general. None of the broader recommendations made by the Joint Committee or by the Industries Assistance Commission has been implemented; no prosecutions resulted from the Trade Practices Commission's inquiry, despite data from the Government Analyst which suggested at least a *prima facie* case under the Act against some of the claims made in soap and detergent advertising; and, in an anti-climactic end to a stormy hearing which *almost* became a full-scale inquiry into the social utility of modern advertising, Colgate was granted (in part) its price increase by the Prices Justification Tribunal.

It is proposed in what follows to examine the nature of the ills which the various Australian inquiries diagnosed as afflicting the soaps and detergents industry, to discuss the outcomes of the respective inquiries and — given their failure to produce results — to determine whether *any* solution exists to the problems they canvass.

Although the focus will be predominantly on the soaps and detergents industry, the considerations to be raised are of far more general significance since they apply with varying degrees of force to other consumer goods industries (for instance breakfast cereals and cosmetics) where concentration is high and advertising intensive. The soaps and detergents inquiries accordingly offer interesting insights into the nature and function of advertising themes which have transformed brand names into household words for the television watcher and newspaper reader; they underscore the difficulties — practical and philosophical — which confront attempts at regulatory intervention; they also (incidentally) pinpoint weaknesses inherent in the structure of some of the statutory bodies in Australia whose decision-making functions impinge on sensitive areas of the economy.

(2) ADVERTISING AND MARKET POWER

(a) *Introduction*

There has in recent years been growing concern with the observed correlation between intensive advertising and market concentration. It is now widely accepted among economists that high advertising expenditures can contribute, if not to the creation, at least to the maintenance[8] of oligopoly within an industry by acting first as a barrier to entry and secondly as a surrogate for price competition between existing firms.[9] The

[8] Wilton-Siegel, H., 'Advertising, Competition and the Economy: A Survey' in Department of Consumer and Corporate Affairs (Canada), *A Study on Misleading and Unfair Trade Practices* (1976), ii, 154. For an account of the view that advertising is a cause of concentration, see Corden, W. M., *A Tax on Advertising?* (1961) 15-6.

[9] *E.g.*, Bain, J. S., *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries* (1956); Corden, *op. cit.*; Mueller, E. E., 'Sources of Monopoly Power: A Phenomenon Called Product Differentiation' (1969) 2 *Antitrust Law and Economics Review* 59, 73-4. Important empirical support for these views is furnished by Comanor, W. S. and Wilson, T., *Advertising and Market*

end results are a decline in the overall level of efficiency, some reduction in incentives to search for and implement technical improvements, higher costs (fuelled by the large outlays on advertising), prices well in excess of competitive levels and higher than average profits.[10] It is these concerns which lie at the heart of the various reports on the soaps and detergents industry.

(b) *The interdependence of oligopoly price movements*

A distinguishing feature of many consumer goods industries is that they are dominated by between two to four large firms which enjoy combined market shares in excess of 80 *per cent*. These firms are effectively insulated from external competition by high barriers to entry and characteristically indulge, either explicitly or tacitly, in collusive behaviour so as to limit competition within the market.[11]

The clearest manifestation of collusion in concentrated industries is pricing interdependence. In some respects the term 'collusion' (at least in its pejorative sense) may not be quite fair, since pricing interdependence between oligopolists might be regarded as simply a rational response to the conditions in which they operate. For an oligopolist to lower his prices is irrational since (all other things being equal) the reduction will automatically be matched by his competitors with detrimental results to them all, for each will retain his market share but with reduced profits. On the

Power (1974). Although the views are not universally shared (see, *e.g.*, Coase, R. H., 'Advertising and Free Speech' (1977) 6 *Journal of Legal Studies* 1, 11; Benham, L., 'The Effect of Advertising on the Price of Eyeglasses' (1972) 15 *Journal of Law and Economics* 337; Telser, L. G., 'Advertising and Competition' (1964) 72 *Journal of Political Economy* 537), they do seem to enjoy majority support (see Wilton-Siegel, *op. cit.* 153).

10 United Kingdom, *Report of the Monopolies Commission on Parallel Pricing* (1973) paras. 104-5. (Hereinafter referred to as '*BMC Parallel Pricing Report*'.) See also Bain, *op. cit.* 37-41, 176; Comanor and Wilson, *op. cit.* 240.

11 The seminal work on the relation between advertising and concentration is Joe S. Bain's *Barriers to New Competition*. He found that high levels of concentration were particularly prevalent in consumer (as opposed to producer) goods industries, that this was attributable in part to high entry barriers which in their turn were due in the main to large outlays on advertising. Many of Bain's findings were corroborated by Comanor and Wilson's empirical study, *Advertising and Market Power*, in 1974. The reasons underlying these developments in consumer goods industries have been identified as two-fold: first, the much more frequent use made of advertising (particularly in the broadcast media) by producers of consumer goods and secondly, the private buyer's relative ignorance of the products he purchases, which forces him to rely almost exclusively on advertising as a source of information. These factors create the conditions in which product differentiation and brand loyalty can operate to divert the consumer's attention from price and quality differentials between competing brands (*ibid.* 24-5). This theme will be developed further in the text which follows. Of course, as some economists have noted, advertising is not the sole source of consumer information. An important alternative source is the consumer's previous experience with the advertised product; if this is unsatisfactory, he is unlikely to purchase the product again, no matter how persuasive the advertising (see, *e.g.*, Coase, *op. cit.* 9). This point does not meet the major concern in the present article which is with consumer choice between competing brands which are advertised differently and sold at different prices, but whose composition and performance capabilities do not vary significantly.

other hand, a decision by one firm to increase prices will normally not be taken unless it is likely that the other firms will follow suit, since a unilateral price increase would result in a loss of sales. Accordingly, increases usually occur uniformly and across the board in response to initiatives taken by the price leader. The results are suppression of effective price competition and a tendency to both higher prices and profits than would be obtained under competitive conditions.[12]

However, pricing interdependence can be maintained only so long as there is a sufficient deterrent to the entry of new firms into the market. In the absence of barriers to entry, excessive oligopoly prices would attract new firms whose entry would drive the market down to a competitive level.[13]

(c) *Advertising as a barrier to entry*

Entry barriers have been defined as constituting 'the advantages of established sellers in an industry over potential entrant sellers, these advantages being reflected in the extent to which established sellers can persistently raise their prices above a competitive level without attracting new firms to enter the industry'.[14] Entry barriers can take a number of forms: for example, the control by existing firms of superior production processes through patents, the access of existing firms to superior raw materials (either through ownership or exclusive dealing arrangements), the achievement by existing firms of economies of scale in production and distribution which result in lower unit costs and heavy expenditure by existing firms on advertising.[15] Of these, the last has been identified as the most significant in consumer goods industries.[16]

Advertising can act in a number of ways as a barrier to entry, but it is as a source of product differentiation that its role is most important.[17] Intensive advertising can instil into consumers brand loyalty — a form of goodwill — for existing products. Within limits, this loyalty will hold even in the face of cheaper prices for competing items of comparable quality.[18] Accordingly, a new entrant seeking to penetrate the market must either offer his product at a price sufficiently below those of his competitors to counteract entrenched loyalties (frequently an economically prohibitive

[12] *BMC Parallel Pricing Report* paras. 100-1; Scala, J. R., 'Advertising and Shared Monopoly in Consumer Goods Industries' (1973) 9 *Columbia Journal of Law and Social Problems* 241, 247-50; Comanor and Wilson, *op. cit.* 246.

[13] *BMC Parallel Pricing Report* paras. 98, 101; Scala, *op. cit.* 249; Comanor and Wilson, *loc. cit.*

[14] Bain, *op. cit.* 3.

[15] *Ibid.* 15-6.

[16] *Ibid.* 124-43; Comanor and Wilson, *op. cit.* 41-63.

[17] Bain, *loc. cit.*

[18] In fact, the measure of product differentiation in a market is the extent to which a firm can raise its prices over those of its competitors without losing market share to them. For example, if a firm manufacturing an identical product to those of its competitors can raise its prices 25% above its competitors' it enjoys a 25% product differentiation factor: Mueller, *op. cit.* 72.

course) or mount an advertising campaign sufficient to break down existing loyalties. The problem with the latter course is that it is easier to induce repeat purchases through advertising than it is to cause consumers to switch brands.[19] Therefore, in many cases a new entrant's advertising will need to be more intensive than that of his established rivals. The higher the projected outlay on advertising, the more effective is the entry barrier likely to be.[20]

There are other variables which compound the problems caused by advertising for the new entrant. There is some evidence that economies of scale exist in advertising itself, in the sense that, up to a point, the more frequently a seller advertises his product, the more effective (by force of repetition) will each advertising message be. Should a new entrant decide to limit his expenditure on advertising, each of his advertising messages will be relatively less effective than the individual messages of his more vociferous competitors.[21] On the other hand, should the entrant decide to launch a frontal assault on the market through a full-scale advertising campaign, it will usually remain open to established firms to defend themselves either by increasing in aggregate the level of their own promotional expenditure or by initiating a short-term price war (a choice likely to be affected by the degree of product differentiation prevalent in the industry).[22]

In all of these ways advertising can be used effectively to insulate an industry from the threat of external competition and thus to facilitate pricing interdependence within the industry.

(d) *Advertising as a form of competition*

However, parallel pricing is not the only form of interdependence to be observed in concentrated consumer goods industries, nor is the suppression of competition through advertising limited to its role as a barrier to entry. Advertising can also have anti-competitive effects *within* industries such as these.

According to classical theory, a consumer's choice between competing brands of the same product will be determined by price and quality differences which exist between them. A notable feature of many consumer goods industries, however, is the existence of significant consumer loyalty for a brand which is not appreciably different from its competitors and which may even be sold at a substantially higher price. Again, the source of this phenomenon lies in product differentiation achieved through advertising.

In industries for whose product overall demand is inelastic — that is, where consumers purchase the product solely in accordance with their

[19] Comanor and Wilson, *op. cit.* 46.
[20] *Ibid.*
[21] *Ibid.* 49-53.
[22] *Ibid.* 42; Scala, *op. cit.* 250-1; Wilton-Siegel, *op. cit.* 157-8.

requirements and will not increase their consumption if prices are lowered — it is comparatively difficult for a firm to increase its sales revenue. Given the degree of interdependence prevalent in the industries under consideration, expansion through aggressive competition at the expense of rivals is unlikely. A second alternative would be for the firm to raise the retail price of its product. However, so long as brands in a market are perceived as homogeneous, variations between them in price and quality will continue to dictate consumer choice. In such circumstances, a unilateral price increase by a single firm could lead to a drop in sales. Advertising can to some extent be employed to counter this tendency. By suggesting the existence of 'illusory' distinctions between competing brands, it can create a sort of spurious heterogeneity. The more successful an advertiser is in persuading consumers that his product is different from those of his competitors, the greater will be the reduction in cross-elasticities between them and (consequently) the lower consumer responsiveness to price variations. In short, effective product differentiation stimulated by advertising can fragment a market and so facilitate the charging of higher than competitive prices.[23]

A by-product of this process is the proliferation of brands which is characteristic of markets for mass-produced, non-durable consumer goods. The segmentation of markets by product differentiation provides an inducement for each major firm to launch separate brands of its product, each designed to compete in one of the market segments thus created. The various brands, which in most cases consist only of minor variations on what is basically the same product, are each advertised as possessing attributes which distinguish them from one another and are sold at different prices. So it is that a cigarette manufacturer will market one brand of his product on an appeal to rugged masculinity, another around the theme of freshness and another directed to those seeking sophistication in smoking. Comparable techniques are to be observed in the marketing of a wide range of consumer items from toothpastes and toilet preparations to detergents and breakfast foods.

In some respects like advertising itself, brand proliferation is a tactic to increase revenue which is employed by firms participating in industries

[23] Mueller, *loc. cit.*; Comanor and Wilson, *op. cit.* 43-4. This explains the underlying cause of brand loyalty. It does not explain why consumers react the way they do to advertising of this kind. One hypothesis is that very little information is available to consumers about the products they buy; accordingly, advertising assumes importance as a source of information, not least because it can be digested with little effort on the part of the consumer. Advertising may provide very little *factual* information about a product, but it does at least make the product 'well-known'; in the absence of other relevant data, the difference between a 'well-known' (heavily advertised) and an 'unknown' (sparingly advertised) product is as good an inspiration for consumer choice as anything else. Thus what is important for the consumer is not so much the content of the advertising as the simple fact that the brand *is* advertised. It has even been suggested that consumers may regard heavy advertising as an implied warranty of product quality and will suffer price premiums on heavily advertised lines as a kind of exchange: *ibid.* 23-5.

whose structure precludes the adoption of more overtly aggressive initiatives and for whose product overall demand is inelastic. The effective differentiation by advertising of two brands of a manufacturer's product can lead to their 'positioning' in different segments of the market, to a consumer conviction that they perform different functions and thus to multiple purchases of what is essentially the same product.[24]

Once in motion, brand proliferation generates further advantages for the firm which ensure perpetuation of the practice. The more brands of his product a manufacturer has on the market, the more retail shelf-space his range will occupy and the greater the likelihood of his product being seen and purchased by consumers over those of his competitors.[25] Thus the launching by one firm of a new brand provides real incentives for its competitors, intent on preserving their position in the market, to do the same. In this way, brand proliferation can become a form of competition between firms in a market. This is important because, by definition, the trend in any oligopoly away from competition is an incomplete one. Vestigial rivalry *may* manifest itself in the traditional forms of price competition and product improvement, but such processes are risky and are in any event not wholly compatible with the pricing interdependence characteristic of concentrated industries. Competition through promotion — that is, through brand proliferation and advertising initiatives — offers producers a much more attractive alternative.[26] Where promotional rivalry is adopted, the price and quality margins between competing brands will remain relatively constant, fluctuations occurring only in the intensity and ingenuity of the advertising campaigns launched by the various manufacturers. This form of competition is upward-spiralling in the sense that a successful marketing initiative by one firm begets redoubled efforts in that direction on the part of its rivals. The end result is a stand-off: the product stays the same, respective market shares remain unaltered so long as each promotional challenge is met, but the price of the product to the consumer floats upward.[27]

[24] For example: suppose a company normally sells one million units of its product at a retail price of $1.00. The company is aware that a rise in the unit retail price to $1.10 would result in a reduction in sales from one million to 800,000 and thus to a drop in revenue from one million dollars to $880,000. If, however, the company were to split its one million units into two separate brands: 800,000 units of brand X, heavily promoted as a premium product and selling (as a consequence) at $1.10 and 200,000 units of brand Y, advertised as possessing different attributes from X and selling at a unit retail price of 90 cents, its total revenue would be increased from one million dollars to $1,060,000: see *The Australian Financial Review* 8 September 1977, 30.

[25] Correspondingly, the more brands of a product marketed by the industry as a whole, the smaller the shelf space that will be available to new entrants. Brand proliferation has a parallel function with advertising in the erection of entry barriers.

[26] Comanor and Wilson, *op. cit.* 145; Wilton-Siegel, *op. cit.* 156.

[27] *Ibid.* 157. Galbraith, J. K., in *Economics and the Public Purpose*, Pelican, (1975) 155-6, describes the process well: 'For firms that have the scale and resources to participate fully in persuasion . . . the aggressive and defensive operations of the participating firms come eventually into a rough equilibrium. The company that is gaining rests

(e) *The effects on the consumer*

In the circumstances and for the reasons outlined above, intensive advertising is an important weapon employed in the defence of market shares held by large firms in concentrated industries. It limits external competition by acting as a barrier to entry. It restricts internal competition by contributing to product differentiation which in its turn, reduces price elasticities between otherwise competing brands. To the extent that the battle for market shares must still be fought, advertising offers in place of price competition a more attractive form of rivalry for the major firms. In performing these functions, advertising sows the seeds of brand proliferation which having flowered, has a depressive impact on effective competition similar to that of advertising itself. It remains to consider how these conditions affect the consumer, as end user both of the advertising and the product in question.

The effects would seem to be three-fold. First, to the extent that advertising is responsible for the suppression of competition and the consequent maintenance of high levels of concentration, it contributes to increased prices and the higher (arguably excessive) profits reaped by the industry as a result.

Secondly, to the extent that advertising functions as a surrogate for price competition, it entails a form of rivalry which can add substantially to the manufacturer's costs. The expenses attendant upon meeting the advertising challenges of rival firms are passed on to consumers in the form of price increases, but the consumer gets nothing in return. From the consumer's point of view, there is an element of wastage when inter-firm rivalry finds its expression in advertising.

Thirdly, advertising when employed under these conditions tends frequently to be of the 'non-informational' variety, comprising meaningless appeals and empty claims of product superiority. Product performance data, information about the product's composition and price details are in many cases notably absent. Since even uninformative advertising is probably of *some* benefit to consumers,[28] it might be argued that lack of information in itself does not provide an acceptable basis for regulating

with its existing system of persuasion; the company that is doing less well seeks more effective means of persuasion as to existing products or searches for products or designs that lend themselves more effectively to persuasion. Sooner or later it succeeds and this returns the play to its previously more successful rivals.'

[28] There is some evidence to suggest that consumers use advertising as a basis for decision-making irrespective of its content (see n. 23 *supra*). Quite frequently, the costs of searching for and absorbing product information will outweigh any small saving which is likely to result. That circumstance may induce the consumer, in seeking an alternative basis for his choice, to rely simply on the distinction between advertised and unadvertised products. In that sense, the mere existence of advertising provides an aid to the consumer; as a consequence, even wholly uninformative advertising might be regarded less as a form of exploitation than as a means of filling the void created by consumer ignorance. In other words, the demand for advertising may *not* be a demand for information as much as for an information substitute: Comanor and Wilson, *op. cit.* 24-5; Wilton-Siegel, *op. cit.* 147-50.

advertising. However, in view of the fact that the type of advertising under consideration is usually directed to artificially differentiating competing brands (with a view to limiting competition), it is almost inevitable that a proportion of the claims made will be not simply uninformative but actively misleading. Moreover, there is an additional element of deception in advertising which is employed in connection with brand proliferation, since in those circumstances, the explicit aim is to induce in consumers the mistaken belief that significant differences exist between various brands of what is basically the same product of a single firm. The result is a distortion of the consumer decision-making process, additional purchases and wasted expenditure.[29]

(3) THE SOAPS AND DETERGENTS INDUSTRY

(a) *Structure*

The soaps and detergents industry in Australia (as elsewhere) provides a graphic illustration of the points raised above. It is one of that category of industries mass-producing consumer non-durables in which the effects of advertising are most pronounced.

There are twenty firms in the industry but of these two — Colgate-Palmolive and Unilever — are clearly predominant. In combination they account for something in excess of 80 *per cent* of the market for personal washing soaps and 90 *per cent* of the market for laundry detergents. Their share of the market for dishwashing detergents is slightly less than 45 *per cent*, but their average combined share of the markets for all soap and detergent products is in excess of 80 *per cent*.[30] Competition from imported soaps and detergents is negligible, imports accounting for less than one *per cent* of the total domestic supply.[31] It is clear therefore that the industry possesses the structural basis for the range of problems already outlined.

(b) *Firm behaviour*

(i) *Pricing*. Evidence presented to the Joint Committee on Prices indicates that since the various firms have similar manufacturing facilities and cost structures, price increases occur at about the same time. The Committee further found that price changes by the major manufacturers were almost identical in their terms. Moreover, although each manufacturer intermittently granted promotional discounts to encourage

[29] Mueller, *op. cit.* 90-1.

[30] *Joint Committee on Prices Report* paras. 27-9. In the soap market, the 4 largest firms account for 92% for toilet soap, 98% for bar soap, 95% for soap powders and granules and 98% for soap flakes and chips; in the market for washing preparations, the 4 largest firms account for 97% for synthetic detergent based flakes, chips, powder and granule preparations; 75% for synthetic detergents for personal toilet use; and 93% for household dishwashing detergents: *IAC Report* 17, 31-2.

[31] *Joint Committee Report*, para. 30.

retailers to purchase additional stocks of a particular brand, these discounts were usually identical for the competing brands.[32]

The Committee cited the findings of the British Monopolies Commission that the principal conditions which contributed to parallel pricing were the concentration of a major share of the industry in the hands of a few sellers, the absence of marked differences in the individual sellers' products, stable demand that is not responsive to changes in price, absence of frequent periods of excessive production capacity, similarity of sellers' costs and regular and specific reviews of prices. It noted that all these factors were present in the soaps and detergents industry and that, in combination with the lack of import competition, they resulted in the absence of effective competition in all segments of the industry with the exception of dishwashing detergents.[33]

(ii) *Barriers to entry.* The combined advertising expenditure of Colgate-Palmolive and Unilever for 1971-1972 was well in excess of five million dollars, most of which was devoted to the advertising of toilet soaps and laundry detergents.[34] Evidence submitted to the Prices Justification Tribunal revealed a substantial increase in advertising expenditure by both firms between 1972 and 1976, although the Tribunal did indicate that Colgate-Palmolive's expenditure had been comparatively restrained since 1974.[35] Advertising expenditure for the two firms accounts for between 10 and 15 *per cent* of sales revenue[36] and from 6 to 13 *per cent* of the retail price of the various products.[37] In the amount expended on advertising over the whole range of its products in 1976, the soaps and detergents industry ranked fifth behind four very broadly constituted groups: foodstuffs, cars and trucks, banks/insurance/finance and travel.[38] On the other hand, the ratio of advertising expenditure to sales for soaps and detergents is significantly higher than for any other product group.[39]

It was concluded by the Joint Committee, the Industries Assistance Commission and (implicitly) the Prices Justification Tribunal that these high expenditures on advertising constituted a substantial barrier to entry, thereby effectively insulating the established firms from external competition.[40]

(iii) *Brand rivalry.* The Joint Committee indicated that the absence of price competition in the industry resulted in an intensification of brand competition as the principal method of expanding and defending market shares.[41] Visible symptoms of this situation are the multiplicity of brands

[32] *Ibid.* paras. 70-1.
[33] *Ibid.* paras. 73, 130.
[34] *Ibid.* para. 99.
[35] *PJT Report* 19-20.
[36] *IAC Report* 42.
[37] *Joint Committee Report* para. 99.
[38] *PJT Report* 17.
[39] *Ibid.*
[40] *Joint Committee Report* paras. 121-2; *IAC Report,* 21-3, 37, 43; *PJT Report* 24.
[41] Paras. 81, 84.

marketed by the major producers, the basic similarities which exist between competing brands and the nature of the claims employed in advertising to differentiate one brand from another.

Table 1, which lists the range of brands produced by the major manufacturers in the principal sub-categories of the industry, indicates the extent of brand proliferation.

TABLE 1[42]

Laundry detergents

Unilever	*Colgate*	*Preservene*	*M.L. Dale*
Omo	Fab	Advance	Castle
Rinso	Ajax	Early Morn	White Joy
Torrent	Punch	Sno	
Surf	Cold Power	Preservene	
Drive	Spree		
Omomatic	Ajax Deter. bar		
Lux			
Velvet			
Persil			
Sunlight			

Toilet soaps

Unilever	*Colgate*	*Preservene*
Lux	Breeze	Christys
Lifebuoy	Cashmere-Bouquet	7777
Revel	Fresh	Camay
Sunlight	Palmolive	
Rexona	Protex	
Pears	Tact	
Solvol		
Solyptol		

Dishwashing detergents

Unilever	*Colgate*	*Scotts*
Sunlight	Palmolive	Scotts
Kit	Add	Dux
Lux	Ajax	Kwit
Velvet	Swerl	Supa-Valu
Sun		

Table 2 gives some indication of the similarities existing between major brands of laundry detergents. Analyses of brands in other product sub-categories of the industry are not available, but it is reasonable to assume that the position with respect to laundry detergents is broadly representative.[43]

[42] Data taken from *Joint Committee Report* Appendix V.

[43] Comparative testing of the popular lines of dishwashing detergent was undertaken by *The Canberra Consumer* in September 1973. This revealed very little difference in the results produced by the various brands: *ibid.* para. 83.

TABLE 2[44]

Name of manufacturer	*Brand Name*	*Comments on formulation*
Unilever	Surf	Contains reduced percentage of soil suspending agent but an increased percentage of dispersing agent. Contains a brightener but no blue. Possibly slightly less effective than other detergent powders.
	Rinso, Omo	Generally identical formulation of main components, slight variations in percentages and composition of blues and brighteners.
	Drive	Slight variation in main components (compared to Rinso and Omo). Main difference is inclusion of an oxygen bleach (18%) which should provide improved cleaning performance. Similar qualities of brighteners and blues to Rinso and Omo.
Colgate-Palmolive	Cold Power White Cold Power Blue	Identical except that Cold Power Blue has a blueing agent whereas Cold Power White does not. Both contain 3% of a chemical which it is claimed makes these powders effective in 'cold' water.
	Fab	Apart from the 3% of the 'cold water' chemical, the formulation of Fab is virtually identical to Cold Power.
	Ajax	Very similar formulation to Fab except that Ajax contains 7.5% of an oxygen bleach which should provide improved cleaning performance.

On the basis of these testing results, the Government Analyst advised the Trade Practices Commission that:

> having regard to the known formulation of individual brands of laundry detergents, there is generally little, if anything, to distinguish them in terms of results that might be expected to be achieved in an average washing load.[45]

The inter-brand similarities revealed by Table 2 are to be contrasted with the claims of uniqueness made for each brand in advertising. The discrepancy gives some indication of the degree of product differentiation in the industry. Table 3 illustrates the point and also describes how advertising of this sort can mislead consumers.

[44] Compiled from analyses undertaken by the Government Analyst for the Trade Practices Commission and reproduced in *The Australian Financial Review* 8 September 1977, 2.

[45] Trade Practices Commission, *Third Annual Report, Year Ended 30 June 1977*, 37.

TABLE 3[46]

Advertising Claim	*Committee Comment*
Drive is the nearest yet to total clean (Unilever)	*Not capable of verification. *Inconsistent with claim that Ajax gives the cleanest whitest wash (Colgate-Palmolive.)
All temperature Punch is the pick of the bunch (Colgate-Palmolive)	*Does not say why the product is superior. *Inconsistent with claim that Spree gives optimum washing results in all temperatures (Colgate-Palmolive).
Rinso gets things whiter (Unilever)	*Does not say what product or situation Rinso is being compared with.
Only Cold Power offers cleanness without damage — hot water damages clothes (Colgate-Palmolive)	*Manufacturer advertises other products for use in hot or cold water.
Fab is lemon charged to whiten . . . naturally (Colgate-Palmolive)	*The impression that Fab contains a significant amount of lemon is incorrect — the lemon in the preparation is present only as a perfume 'in an extremely small proportion' (based on evidence of the Australian Government Analyst). *Neither natural nor synthetic oil has any practical use as a whitening or bleaching agent (evidence of the Australian Government Analyst).

On the deceptive tendencies of advertising of this type, the Joint Committee noted:

> Not only is some of this advertising ambiguous and vague but some of it is indeed inconsistent. The consumer is expected to base his or her judgment on what the media claim and the packet states. Ambiguous and inconsistent advertising and advertising that does not show the differences in brands leaves the consumer the task of wading through a welter of words and phrases of similar meaning such as 'whiter than white', 'cleanest', 'nearest yet to total clean', 'brighter' and 'fresher' in order to make a choice.[47]

On the function of advertising as a form of inter-firm rivalry, the Joint Committee's conclusion was that:

> a portion of the advertising is a self-cancelling exercise in aggression and defence by the two manufacturers for market share. Both Colgate and Unilever stated that advertising was one of the weapons to capture market share. If one company were to reduce its level of advertising it would lose market share if that reduction were unilateral. . . . It is clear that a reduction in the level of advertising in this industry could reduce the price paid by the consumer without affecting the state of competition in the industry or of restricting (*sic*) the manufacturer from informing the consumer of new products.[48]

Similar observations were made by the Industries Assistance Commission.[49]

[46] *Joint Committee Report* para. 95.
[47] *Ibid.* para. 96.
[48] *Ibid.* paras. 103-4.
[49] *IAC Report* 1, 40.

(iv) *Brand proliferation.* The multiplicity of brands marketed by the major firms in the principal product sub-categories of the industry has already been noted. It was remarked earlier that one of the functions of brand proliferation is to segment the market with a view both to reducing cross-elasticities of demand and maximizing sales revenue by inducing multi-brand purchases of what is essentially the same product. These aims are reflected in Table 4 which reveals the function of advertising in 'positioning' each of the major brands in an artificially contrived segment of the market.

TABLE 4[50]

Product position	*Colgate*	*Lever and Kitchen (Unilever)*	*Others*
		Toilet Soaps	
Family skin care	Palmolive	Sunlight	
Deodorant (masculine)	Palmolive Gold	Lifebuoy	
Price economy	Colgate		Wildflower (Preservene)
Feminine Beauty	Cashmere Bouquet	Lux	Pears (Rexona) Camay (Procter and Gamble) Imperial Leather (Cussens)
Freshness	Sea Fresh	Breeze	
		Laundry Detergents	
Medium duty/younger housewives	Fab	Omo	
Heavy duty	Ajax LD	Rinso	
Cold water	Cold Power	—	
Value for money	Spree	Surf	
Pre-soaker	Bio-Ad	Drive	
		Liquid and Powder Cleansers	
Hand Care	Palmolive LD	Lux	
Efficiency	Fab	Sunlight	
Economy	Add	Kit	
Heavy duty	Ajax Liquid	Handy Andy	Flash (Procter and Gamble) Vinyl Magic (S.C. Johnson) Sprint (Reckitt)
Strongest, most effective	Ajax Powder	Vim	Bon Ami (Kiwi)
Creme cleanser	Ajax Creme	Jif	

(c) *Prices and profits*

The Industries Assistance Commission remarked that local production of household soaps and detergents is generally very profitable by Australian standards.[51] The Joint Committee found that the combined profit levels of Colgate-Palmolive and Unilever were significantly higher than the

[50] Colgate-Palmolive Pty Ltd *op. cit.* Exhibit 26.
[51] *IAC Report* 1, 42.

average for the soaps and detergents industry as a whole and above the average for the Australian manufacturing sector as a whole.[52] In relation to Colgate-Palmolive alone, this conclusion was reaffirmed by the Prices Justification Tribunal.[53]

An indication of the size of the margins is given in Table 5 which, for the years 1971-1976, compares both the operating profits as a percentage of funds employed and the net profits as a percentage of shareholders' funds of Australian manufacturing industry, the soaps and detergents industry and Colgate-Palmolive.

TABLE 5[54]

Operating profit/funds employed	1971	1972	1973	1974	1975	1976
Australian manufacturing industry	12.1	11.5	13.0	12.6	12.1	N/A
Soap and detergent industry	25.1	30.1	28.3	31.2	21.2	N/A
Colgate-Palmolive	42.7	41.7	42.2	51.1	51.0	41.8
Net profit (after tax)/shareholders funds	1971	1972	1973	1974	1975	1976
Australian manufacturing industry	9.6	9.0	11.1	9.5	8.6	
Soap and detergent industry	16.7	19.9	21.4	23.3	14.0	
Colgate-Palmolive	26.2	26.8	30.0	40.6	40.9	28.0

While conceding that the higher level of profits in the soaps and detergents industry might in part be a reward for efficiency, the Joint Committee concluded that it was in large measure attributable to the absence of price competition and the high degree of concentration which enabled the companies to set their prices high enough to recoup their substantial advertising expenditures and still to generate large returns.[55] The Industries Assistance Commission summarized its views by reference to the principal conclusion of the British Monopolies Commission's report on the soaps and detergents industry:

> competition in advertising and promotion has tended to displace price competition. The effects of this are not only to increase prices to the extent that the additional expenditure in this field is wasteful but also . . . to keep new entrants out of the market, to weaken other restraints on prices and profits and to create a situation in which even the less successful of the two principal competitors . . . can earn extremely comfortable profits while those of the more successful . . . are outstandingly high.[56]

[52] *Joint Committee Report* para. 119.

[53] *PJT Report* 31.

[54] The table was presented as exhibit 6 by the PJT to the Colgate-Palmolive inquiry. The figures were obtained from: Tariff Board, *Annual Report for the Years 1972-73*, 19; Industries Assistance Commission, *Profitability and Capital Structure of the Australian Manufacturing Sector for 1974-75*, Table 3; Colgate-Palmolive's published annual accounts. For an argument that profits in the soaps and detergents industry are not excessive and that they do not derive from monopolistic conditions, see Polanyi, M., *Detergents: A Question of Monopoly?* (1970) 52-7.

[55] Paras. 120-1, 127-8. See also *IAC Report* 42.

[56] *BMC Detergents Report* para. 116, quoted in *IAC Report* 41. Further support for these conclusions is provided by comparing the prices charged by the major manufacturers with those charged by retailers for their virtually unadvertised housebrands. Evidence given by Coles to the Joint Committee indicated that its soap and detergent housebrands, which were of comparable quality to the heavily advertised brands, retailed for about 20% less: *Joint Committee Report* paras. 88-90.

(4) COUNTERVAILING BENEFITS: THE INDUSTRY CASE

The need for regulation does not inexorably follow from a conclusion that advertising practices of the kind described are anti-competitive, since they may in the final analysis entail larger public benefits than would be expected under competitive conditions. This possibility requires some comment, not least because it constituted a major line of defence for the firms party to the various inquiries under discussion.

The argument traditionally raised in this connection is that substantial advertising is needed to achieve economies of scale and that, once attained, these confer significant benefits on the consumer.[57] The thrust of the argument is as follows:

> The aim of advertisers is persuasion and if they are successful their sales will increase. This in turn will enable them to realize the benefits of the economies of mass-production and so reduce their unit costs. The benefits of these lower costs may more than offset the expense of advertising, and on balance the consumer will eventually gain through lower prices.[58]

It goes without saying that *some* concentration is necessary if economies of scale in production and distribution are to be realized and to the extent that advertising facilitates that goal, the attendant benefits must be conceded. However, if the evidence adduced by Bain and subsequently reaffirmed by Comanor and Wilson is to be believed, it seems that in the case of many consumer goods industries, the degree of concentration is much higher than necessary for the attainment of optimal economies.[59] In those circumstances, the real benefits being sought by advertisers are not lower unit costs, but rather the furtherance of product differentiation, the consequent maintenance of entry barriers and the suppression of intra-industry price competition. These are not conditions which benefit the consumer since the savings which might otherwise have been generated through exploitation of scale economies are progressively eroded by the additional advertising costs normally passed on in the form of increased prices.[60]

Support for this analysis in its application to the soaps and detergents industry is to be found in the profitable co-existence of small firms with the industry giants. Since these small firms produce goods in direct competition with those of the market leaders, they could not be expected to survive if economies of scale were indeed being exploited.[61]

Another, though related, argument frequently advanced in favour of intensive advertising borrows from Schumpeter's thesis that competitive conditions are incompatible with economic progress since they provide

[57] *PJT Report* 5-6; *IAC Report* 40.

[58] Corden, *op. cit.* 15.

[59] See Bain, *op. cit.* 110-3; Comanor and Wilson, *op. cit.* 217-34; Corden, *op. cit.* 17-9; Wilton-Siegel, *op. cit.* 163.

[60] Corden, *op. cit.* 16; Wilton-Siegel, *loc. cit.*

[61] *IAC Report* 40.

neither the incentive nor the reward for innovation.[62] The reasoning runs as follows:

> Advertising is the main way by which a firm can make known that it has a new product; and it is one way of attaining mass-production. For both these reasons it can be said to foster economic progress. For new products will not be produced or even developed if they cannot be sold; and it is mainly large firms operating on a mass-production, mass-distribution basis which can devote large sums to the research which is today the basis of progress.[63]

Reaction to this argument depends very much on the value attached to the innovations achieved under such conditions. The Industries Assistance Commission pointed out that there may well be limits to the benefits which continued research and development can yield in such fields as soap and detergent production.[64] This is partly because the soaps and detergents industry is technologically mature, involved as it is in the production of goods whose mundane functions do not readily allow for startling technical advances. Another factor is that the predominance of the promotional function in industries such as this has caused a shift in research efforts from the development of product characteristics which would improve performance to the creation of features which advertise well. Thus, less importance tends to be attached to the relative performance capabilities of competing brands than to the fact that one product is blue while others are white, or that one is lemon-scented while others are odourless. On this view, innovation is less an end *product* of advertising than it is a *means* of making advertising itself more effective.[65] Admittedly, it may be unfair to dismiss out of hand changes brought about under these conditions, but their true worth can properly be assessed only when compared with what it costs the consumer for the advertising from which they are said to generate.

Other social benefits sometimes, though more faintly, claimed for intensive advertising of the kind in issue are similarly open to question.[66] In so far as the anti-competitive effects of such advertising cannot be justified by appeal to more wide-ranging public interests, the case for regulatory intervention is strong. However, as the fate of the various Australian inquiries indicates, it is one thing to identify the need for regulation and quite another to devise remedial measures which are likely to prove both politically palatable and practically effective.

[62] Schumpeter, J. A., *Capitalism, Socialism and Democracy* (2nd ed. 1947), 105. See also Polanyi, *op. cit.* 25-6, 56. Similar views were put to the IAC (*IAC Report* 43) and to the PJT (*PJT Report* 6).

[63] Corden, *op. cit.* 19.

[64] *IAC Report* 43.

[65] Corden, *op. cit.* 22.

[66] One such argument, relegated here to footnote form simply because of the Pandora's box of tangential issues to which it gives rise, is that advertising performs a vital public function by subsidizing the commercial media. It enables programmes to be broadcast free of charge to the consumer and newspapers to be sold at a fraction of their unit production cost. For a discussion of these points, see Corden, *op. cit.* 22-4.

(5) THE INQUIRIES AND THEIR OUTCOMES

(a) *The Report of the Joint Committee on Prices*

The principal solution advanced by the Joint Committee was borrowed from a recommendation of the British Monopolies Commission in its report on the detergents industry in that country that negotiations be undertaken between the Board of Trade and the two major producers with a view to securing a 40 *per cent* reduction in the selling expenses of their respective products.[67] In the event, that measure was not formally adopted in Britain. Instead, as a result of negotiations with the Board of Trade, the two firms agreed *voluntarily* to make fully available an alternative range of top quality soap powers at a price 20 *per cent* lower than that of existing products; it also agreed to keep prices pegged in respect of those detergents covered by the Commission's report. The Joint Committee recommended that the Attorney-General encourage the two dominant Australian firms voluntarily to agree on limiting advertising expenditure.[68] However, in making this recommendation the Committee glossed over the critical point that the British agreement which it invoked as a precedent broke down within twelve months. As the Industries Assistance Commission was later to note, competition between firms and the resultant mistrust as to each other's intentions makes the breakdown of voluntary agreements between them all but inevitable.[69] The Committee's suggestion has (presumably for this reason) never been acted on.

The Committee further recommended that, given refusal by the major firms voluntarily to limit their advertising expenditures, the Prices Justification Tribunal should examine the question of excessive advertising when the next application for a price increase was made.[70] That occasion did not arise until mid-1977 when Colgate-Palmolive made disinterment of the issue all but inevitable with an application to the Tribunal based solely on increased media charges for advertising. However, as already noted, and for reasons to be canvassed shortly, the issue was defused, the company being granted a partial increase while spared the embarrassment of a full-scale inquiry into its advertising practices.

Other recommendations of the Committee which were later pursued were that the Trade Practices Commission investigate advertising in the industry for possible contraventions of Part V of the Trade Practices Act[71] and that the question of tariff protection for the Australian soaps and detergents industry be referred to the Industries Assistance Commission

[67] *BMC Detergents Report* paras. 125-6.
[68] *Joint Committee Report* paras. 106-8, 139.
[69] *IAC Report* 49.
[70] *Joint Committee Report* paras. 109-10, 140. In fact the PJT *had* in the past noted the issue of excessive advertising in the soaps and detergents industry, but only in passing and without indicating the weight it attached to the matter in ruling on the justifiability of the claimed increase: *Lever & Kitchen Proprietary Limited* [1973-74] Public Inquiry Reports 16.
[71] *Joint Committee Report* paras. 98, 144.

with a view to increasing import competition.[72] Again for reasons to be discussed shortly, neither of these subsequent inquiries resulted in discernible changes in either the structure or the advertising practices of the industry.

A number of ancillary recommendations made by the Committee will be deferred for later discussion. It is sufficient to note here that none has been adopted.

(b) *The Industries Assistance Commission Report*

In its final report released in September 1976, the Industries Assistance Commission reached conclusions similar to those of the Joint Committee concerning the structure of the soaps and detergents industry. In respect of the markets for both toilet soaps and household washing products it found that the profitability of the major producers, the extensive product differentiation achieved through advertising and the consequent lack of price competition made protection from import competition unnecessary; it accordingly recommended the reduction of the existing duties to minimum rates.[73] These recommendations were subsequently adopted. However, the step was simply a reaction to, not a remedy for, the lack of competition in the industry. As the Commission itself noted, advertising levels in the industry were so high that an importer would have to promote his products to an extent which would offset any cost advantages he might otherwise have gained from removal of the tariff: increased import competition remains highly unlikely in the face of the high entry barriers created by the advertising of domestic producers.[74]

In view of the predictable ineffectiveness of its primary recommendation, the Commission advanced a number of ancillary proposals for increasing price competition and reducing the level of advertising. These will be discussed below. None has been adopted.

(c) *The Trade Practices Commission investigation*

In November 1974 the then Commonwealth Attorney-General, acting pursuant to the recommendation of the Joint Committee, directed an examination by the Trade Practices Commission under the consumer protection provisions of the Trade Practices Act of soaps and detergents advertising. The examination was completed early in 1977.

Unlike the other inquiries, the Trade Practices Commission investigation was concerned not with the level of advertising in the industry, but simply with its content. There are three grounds on which the content might be open to criticism. First, as is the case with much media advertising of consumer goods, it is studiously uninformative, eschewing product composition and performance data in favour of meaningless image appeals

[72] *Ibid.* para. 151.
[73] *IAC Report* 21 (toilet soaps), 35 (household washing products).
[74] *Ibid.* 22, 37.

and unsubstantiated claims of superiority. As the Commission noted,[75] lack of information in advertising is not *of itself* a ground for prosecution under either section 52 or section 53 of the Trade Practices Act, since both provisions embody only a negative proscription of misleading or deceptive claims and conduct; they do not impose on advertisers a positive duty to inform. On the other hand, there is a fine line between simply failing to inform and withholding information that reflects materially on the accuracy of the claims that *are* made. In particular — and in accordance with Advertising Guidelines issued by the Commission in June 1975 — claims relating to product performance and superiority which are not capable of substantiation may not simply be uninformative, but actively misleading and hence liable to prosecution.[76] In failing to pursue this point against soaps and detergents advertising, the Commission apparently overlooked the principal objections to the content of the industry's advertising made by the Joint Committee on the basis of evidence furnished by the Government Analyst.[77]

The Commission *did* press objection to some aspects of the advertising and secured their discontinuance without resort to formal proceedings.[78] However, all of these objections related to specific and isolated claims and had little to do with the general advertising themes with which the Joint Committee was concerned.

There is, however, a wider sense in which advertising practices prevalent in the industry might be open to challenge. Quite apart from the accuracy or otherwise of individual claims, the practice of artificial product differentiation, when viewed as a whole, could well constitute misleading conduct within the terms of section 52. By marketing a range of virtually identical products under different brands, each firm induces in consumers the belief that each of its products has unique characteristics and performance benefits not shared by the others. Again, evidence furnished by the Government Analyst both to the Joint Committee and the Trade Practices Commission indicated that in many cases this simply was not so. The Commission declined to pursue this argument to the stage of court proceedings. In so doing, it lost an opportunity to test the legality of a practice which at least on one view goes to the root of the structural ills

[75] Trade Practices Commission, *Third Annual Report, Year Ended 30 June 1977*, 37.

[76] See Trade Practices Commission, *Advertising Guidelines* (Commission Information Circular No. 10, 20 June 1975):

'1.4 As a general rule advertisers should, in order to avoid contraventions of the prohibitions, make their advertisements informative and ensure that claims made are capable of substantiation.'

'5.4 The Commission also considers that, as a general rule, the use of such devices in an advertisement which when read, viewed or heard as a whole are not self-evident exaggerations or expressions of opinion to the persons to whom the advertisement is aimed (for example, 'the most economical') may, of themselves, contravene the section, unless they are capable of substantiation.'

[77] See Table 3, *supra*.

[78] Trade Practices Commission, *Third Annual Report, Year Ended 30 June 1977*, 36-7.

which afflict the soaps and detergents industry and other consumer goods industries similarly constituted.

(d) *The Prices Justification Tribunal hearing*

On 19 April 1977 Colgate-Palmolive notified the Prices Justification Tribunal of a proposed weighted average increase of 2.38 *per cent* in the prices of its detergent powders, detergent liquids, toilet soaps, cleansers and dental creams. The proposed increase was justified solely by reference to increased charges for all media advertising. An aspect of the company's claim which in the event proved material was that the proposed increase covered only the additional cost in 1977 of maintaining the level of advertising achieved in 1976. It did not cover any planned increase in the level of advertising itself. An inquiry pursuant to section 18 of the Prices Justification Act 1973 (Cth) was commenced in July 1977 and the Tribunal's decision was handed down on 23 August 1977.

In view of the grounds on which the company sought to justify its proposed increase it was inevitable that the issue of excessive advertising would be raised before the Tribunal, not simply because the Joint Committee had three years earlier drawn the Tribunal's attention to the question but, more basically, because it is the very essence of prices justification that costs on which a proposed increase is based should themselves be justified; since Colgate-Palmolive's application was confined to advertising costs, the Tribunal was by its own enabling statute required to assess the justifiability of those costs.

The real point of contention arose, however, out of the Tribunal's view that the question as to whether the company's advertising was excessive could not be divorced from the content of the advertising. The Tribunal stated in its report that:

> [i]t seems only common sense that the Tribunal should have a general conspectus of the nature of the material which was the subject of the increased costs. To embark on the consideration of the justification of a price increase based on increased advertising costs, without any knowledge of the general nature of the advertising material concerned, without any knowledge as to whether or not the advertising was in conflict with the standards of other authorities such as the Trade Practices Commission, and so on, would scarcely seem to be a worthwhile exercise.[79]

Accordingly, the Tribunal requested the company to make available to the inquiry a properly representative range of its advertising material. The company refused, claiming that advertising content was a matter entrusted exclusively to the Trade Practices Commission and so lay outside the jurisdiction of the Prices Justification Tribunal. At the same time, it mounted a two-pronged defence of its position. First, it agreed to make the material available upon receipt of a valid notice issued by the Tribunal under section 23 of the Act, simultaneously arguing that since much of the material requested was in audio-visual form, it was not covered by

[79] *Colgate-Palmolive Pty Ltd* (Matter No. N77/1133, 23 August 1977) 15.

section 23 and thus could not be the subject of a valid notice. Secondly, the company embarked on an intensive programme of political lobbying, pressuring the Minister for Business and Consumer Affairs to forestall any further inquiry into either the level or the content of its advertising.

Each of these tacks proved successful. The Tribunal accepted the company's argument that it had no power under the Act formally to demand production of the materials in question. As a result it dropped its request.[80] Furthermore, on 26 July 1977 (in the middle of the inquiry) a letter was sent to the Tribunal by the Minister for Business and Consumer Affairs indicating that the course the inquiry was taking was contrary to government policy and that the Tribunal's proposed examination of the advertising content should be abandoned.[81]

This last development was extraordinary, since it was patently obvious that the Minister's letter could have no formal status: it could not be regarded as a directive, since the Act made no provision for ministerial intervention of that kind; it was not a submission since sections 20 and 21 of the Act clearly envisage that only persons formally joined as parties to an inquiry may make submissions; finally, to the extent that it was simply a statement of government policy, it could not be regarded as relevant, the Prices Justification Tribunal being supposedly an independent statutory body.[82]

The Tribunal rebuked the Minister for his apparently unauthorized intrusion into the inquiry and refused to treat the letter as being 'directly applicable'.[83] In the event, that ruling was hardly significant, since the Tribunal was driven by its inability to demand production of the required materials to forgo further investigation of advertising content. The Tribunal attempted to justify this development by arguing that since the company's claim was based not on a proposed increase of advertising levels but simply on increased advertising costs, the question of content assumed less importance that it otherwise would have.[84] As a statement of policy this reasoning is hardly satisfactory since it implicitly indicates that while the justifiability of cost *increases* is relevant to the exercise of prices surveillance, the justifiability of the cost itself is not. The distinction, tenuous as it is, is perhaps best understood as a rationalization of the position into which the Tribunal was forced by other factors. It does however reflect on the ability of the Tribunal as presently constituted effectively to deal with the advertising problem.

The Tribunal's enforced analysis of the company's advertising levels in isolation from content was predictably cryptic. While noting the unusually high advertising expenditures of the soaps and detergents industry in

[80] *Ibid.* 14.
[81] *Ibid.* 9-10.
[82] *Ibid.* 11.
[83] *Ibid.* 14-16.
[84] *Ibid.* 16.

general and of Colgate-Palmolive in particular, it indicated that the company's advertising had been comparatively restrained since 1974, the level having in fact declined between 1973 and 1976. In the event, an increase of 1.66 *per cent* was granted to the company, without any indication being given of the extent to which the Tribunal regarded the company's advertising as excessive or of the relevance placed on the question of excessiveness in arriving at the final figure.

It is clear from the Colgate-Palmolive inquiry that the operation of the Prices Justification Tribunal is unlikely to have any significant effect on the reduction of advertising levels, much less on industry structures. There are several reasons for this. In the first place although the Tribunal does have power under section 16 of the Act to conduct inquiries into prices charged across entire industries, the vast majority of its inquiries are instituted in response to applications lodged under section 18 by individual firms for price increases. However, since the problems to which excessive advertising can give rise are industry-wide, to limit the advertising expenditure of a single firm is both piecemeal and potentially unfair. The Tribunal itself acknowledged this limitation when, in *Lever & Kitchen Proprietary Limited*, it stated:

> One of the difficulties encountered in a consideration of this subject is that no one company can with safety elect to reduce advertising whilst others in the field continue to maintain forceful campaigns. It would appear that unless the industry as such resolved to exercise restraint, a single company may suffer some competitive disadvantage.[85]

The second problem confronting the Tribunal is its apparent inability to compel the production of audio-visual material, a factor which makes examination of advertising content all but impossible and analysis of advertising levels an arid exercise. It is highly unlikely that this gap in the Tribunal's powers will be rectified.

Finally, and perhaps most importantly, the soaps and detergents episode underscores the point (which was perhaps already evident[86]) that the Tribunal is, despite its apparent independence, very much susceptible to pressure from government. In an area as politically volatile as that under discussion, that weakness is probably fatal. Moreover, it is a weakness likely to become entrenched, since the Minister for Business and Consumer Affairs announced on 7 November 1977 his intention to amend the Act so as to enable directions to be given by government to the tribunal in the course of its inquiries.[87]

[85] [1973-74] *Public Inquiry Reports* 14-5. This limitation reared its head in the Colgate-Palmolive inquiry. In justifying the partial increase, the Tribunal relied heavily on the fact that Colgate's own level of advertising was restrained relative to that of its principal competitor. However, it should be clear from the preceding discussion that it is the advertising level in the industry as a whole which is critical.

[86] See Nieuwenhuysen, J. P. and Daly, A. E., *The Australian Prices Justification Tribunal* (1977), chapter 6. On several occasions between 1973 and 1975 the Labor government made its views known on the codes it believed appropriate for the Tribunal to follow.

[87] *The Australian Financial Review* 8 November 1977.

Perhaps the principal lesson to be gleaned from the failure of the four Australian inquiries to produce discernible changes in the advertising patterns of the soaps and detergents industry is that given the prevalence — particularly in consumer goods industries — of the practices under challenge the issue is too politically charged to allow for serious attempts at resolution.[88] However, even beyond that very basic stumbling-block, the point may simply be that no solutions to the problem can be found which are likely in the long-term to be practically effective. Some attention has already been given to the principal recommendations of the Joint Committee. It is now necessary to examine the Committee's ancillary recommendations, together with those of the Industries Assistance Commission and of others involved in the field, in an attempt to discover whether there *is* a path which might usefully be followed.

(6) THE SEARCH FOR SOLUTIONS RESUMED

Overseas and Australian experience indicates that the possible solutions to the advertising/oligopoly problem fall into three broad groupings: structural remedies, measures aimed at reducing the level of advertising and measures designed to increase the information content of advertising.

(a) *Structural solutions*

While it is widely acknowledged that advertising of the kind in issue here is associated with the structural imperfections of oligopolistic industries, there is some disagreement among economists as to just what the nature of that relationship is. Some analysts regard advertising as a cause (or at least a partial cause) of high levels of concentration,[89] while others see intensive advertising and the trend away from price to pro-

[88] Interestingly enough, this point was noted in one of the earliest works on the subject: Bain, *op. cit.* 216. It is borne out by the fate of all attempts to date to regulate the problem. Apart from the Australian inquiries, there is the British Monopolies Commission's report, the outcome of which has already been noted (*supra* p. 485). That inquiry had been preceded by a similar inquiry into the soaps and detergents industry by the National Board for Prices and Incomes in 1965, none of whose recommendations were adopted; it was succeeded in 1973 by a similar investigation into the breakfast cereal industry, which was able to suggest no positive measures at all (United Kingdom, *Report of the Monopolies Commission on the Supply of Ready-Cooked Breakfast Cereal Foods* (1973)). In the United States, the Federal Trade Commission in 1972 instituted proceedings against the four largest manufacturers of ready-cooked breakfast cereals in that country claiming that, on the basis of considerations similar to those discussed elsewhere in this article, the companies had engaged in unfair methods of competition and deceptive acts or practices in commerce (*Kellogg et al.* [1970-73 Transfer Binder] Trade Reg. Rep. s. 19,898 at 21,915 (FTC 1972). Five years later, the initial stage of the main hearing has just been completed: see *The Australian Financial Review* 3 January 1978). Allowing for completion of that hearing, and the inevitable string of appeals, it is reasonable to assume that the final outcome will not be known for at least another three years.

[89] *E.g.*, Kaldor, N., 'The Economic Aspects of Advertising' (1950) 18 *Review of Economic Studies* 1; Corden, *op. cit.* 15-6; Comanor and Wilson, *op. cit.* 44-5. See also *Joint Committee Report; IAC Report.*

motional rivalry as a *result* of pre-existing high levels of concentration.[90] The distinction is important, because if the latter view is correct, measures aimed simply at reducing the level or improving the content of advertising will in effect be attacking the symptom not the root of the disease.[91]

This of course is not to deny altogether the effectiveness of such measures, since even if proof is lacking that advertising causes concentration, there is substantial agreement with the proposition that it at least *sustains* oligopoly by functioning both as a barrier to entry and a surrogate for price competition.[92] It is therefore entirely possible that measures directed to advertising will eventually have an impact on industry structure. On the other hand, there is also the possibility that in the event of an advertising reduction, new — perhaps more objectionable — methods will be found to sustain the oligopoly.

It is the latter consideration which has, at least in the United States, prompted recommendations for structural solutions, most notably in the form of divestiture of the assets of industry giants with a view to the formation of new, smaller companies prepared to compete on an acceptable basis.[93]

Corporate divestiture is a measure to which occasional resort has been had by American courts in the more traditional type of antitrust case.[94] On the other hand, it is still viewed with suspicion partly because it is politically controversial and partly because its effectiveness depends upon finding buyers for the divested firms which will be strong enough and independent enough to compete without reducing the total number of industry members and potential entrants.[95] For both of these reasons, divestiture is not a viable proposition for the Australian scene; accordingly, attention must be confined to regulating advertising itself even if, on one view, such measures constitute only an indirect approach to the problem.

(b) *Reducing the level of advertising*

There is a considerable variety of ways by which advertising levels might be reduced.

[90] *E.g.*, Galbraith, *op. cit.* chapter 14; Wilton-Siegel, *op. cit.* 151-4, 167; Damrosch, L. F., 'Advertising, Product Differentiation and Monopoly Power: A Critical Look at the Proposed Solutions' (1977) 9 *Antitrust Law and Economics Review* 25, 47.

[91] Wilton-Siegel, *loc. cit.*

[92] Bain, *op. cit.*; Comanor and Wilson, *op. cit.*; Wilton-Siegel, *op. cit.*

[93] In *Kellogg et al* [1970-73 Transfer Binder] Trade Reg. Rep. s. 19,898 at 21,915 (FTC 1972) the Federal Trade Commission listed the following forms of relief in its complaint against breakfast cereal industry leaders: (1) divestiture of respondents' assets with a view to the formation of new corporate entities to engage in the manufacture, sale and distribution of ready-to-eat cereals; (2) the implementation of a licensing scheme over existing trade marks to prevent the further proliferation of brands in the market; (3) prohibition of mergers in the industry; (4) prohibition of any practices found to be anti-competitive, including shelf-space services or use of particular methods of selling or advertising; (5) any other measures which may later appear to be necessary to counter and remedy the effects of the respondents' anti-competitive practices.

[94] Scala, *op. cit.* 267.

[95] *Ibid.* 271-3.

The first and most draconic would be to ban advertising altogether in those industries where advertising excesses were most prevalent. This measure was considered and rejected by the Industries Assistance Commission in relation to the soaps and detergents industry on the grounds that it would deny the legitimacy of advertising and promotion as marketing tools, would deprive consumers of an at least potentially useful source of information and would inhibit the entry into the market of new firms who would have no way of making known the availability of their products or of competing with established brands already entrenched through earlier advertising.[96]

A more selective variant of that proposal would be to impose a ceiling on advertising expenditures in troublesome industries, for example, by limiting the amount which may be spent by each firm on advertising to a stipulated percentage of its sales revenue. The theory behind such a measure would be to stop the escalation of advertising expenditures and eliminate some of the self-cancelling wastage, so that firms would compete through advertising only up to a point, returning thereafter to price and quality competition.[97] In some cases, the measure might also have some effect in lowering entry barriers constituted by intensive advertising.

One difficulty with this proposal is that, as in the case of an outright advertising ban, it would, unless applied selectively, inhibit the position of a new entrant who in many cases must advertise more intensively than established firms in order to overcome entrenched consumer preferences.[98] Another is that a ceiling based on an advertising to sales ratio would entrench the dominant position of major established firms which sell more and would thus be entitled to advertise more than their smaller rivals.[99] Finally, it is possible that advertisers would seek to circumvent restrictions of this order by shifting resources from advertising into less efficient or less desirable promotional measures.

A third way of reducing advertising levels would be to impose a tax on advertising expenditures.[1] This might be achieved directly, by taxing a proportion of the firm's advertising expenditure above a certain level, or indirectly by disallowing advertising expenditure either in whole or in part as a deductible expense for income tax purposes. The possibility of a direct

[96] *IAC Report* 48-9.
[97] Damrosch, *op. cit.* 31.
[98] *Ibid.* 37.
[99] Wilton-Siegel, *op. cit.* 166.
[1] This proposal embodies a form of fiscal discrimination against advertising. In this connection it is interesting to note that existing taxation laws appear in a sense to *favour* advertising. At present, advertising is treated as an expense and is accordingly tax deductible in the year in which it is incurred. However, it is equally valid to regard advertising expenditure not as a *current cost but* as a form of capital investment in the intangible asset of goodwill (or brand loyalty). If that is so, then like other investment expenditures, it should come out of profits *after* tax, being written off over later years as and when it becomes a current cost. To the extent that advertising expenditure *is* an investment and is not simply replacing a depreciating asset, it is treated more favourably for taxation purposes than other forms of investment: Corden, *op. cit.* 32-3.

tax on advertising was entertained by the Industries Assistance Commission as a means of reducing advertising in the soaps and detergents industry. The Commission tentatively approved the proposal but in view of its complexity and the wider policy considerations involved, declined to make a firm recommendation on the matter.[2] The Joint Committee mentioned the disallowance of advertising expenditure as a deductible expense for income tax purposes but deferred consideration of the proposal in view of its complexity.[3]

The taxation proposal does have rather more appeal than other measures suggested for reducing advertising levels. However it is, as both the Joint Committee and the Industries Assistance Commission anticipated, by no means free from difficulty. The threshold problem is one of defining advertising for the purposes of the taxing measure. Radio and television commercials and newspaper advertisements would clearly be included, but what of shop window displays, internal store displays, packaging, labelling and promotional gimmicks?[4]

The measure might well prove self-defeating unless it were selectively implemented. This gives rise to further problems of definition. For instance, it would probably be inappropriate to impose the tax on such genuinely informative advertising as classifieds, notices in trade journals or price lists. Yet to account for advertising of this sort would involve drawing a list of exemptions based on some such vague distinction as between 'persuasive' and 'informative' advertising messages.[5]

Furthermore, as with other measures designed to reduce advertising levels, the taxing proposal poses difficulties for the new entrant.[6] This problem might be overcome by building in an exemption for advertising by new firms or in respect of new products, but it would then be necessary to distinguish between products which were genuinely 'new' and those to which only superficial alterations had been made and between firms which were genuinely 'new' and those which were linked by agreement or ownership with firms already established in the market.[7]

Attention would also need to be given to the impact of the measure on smaller firms in an industry. If the tax were imposed directly and non-selectively across an entire industry, weaker firms, faced with reduced profitability might be forced out, thus *increasing* concentration.[8] This contingency suggests the need for a progressive tax whereby (for example) the first $1,000 of a firm's advertising expenditure was taxed at a rate of

[2] *IAC Report* 48; see also Bain, *op. cit.* 217; Corden, *op. cit.* 33; Wilton-Siegel, *op. cit.* 167.

[3] *Joint Committee Report* para. 105; see also Corden, *op. cit.* 34; *BMC Detergents Report* paras. 125-6.

[4] Corden, *op. cit.* 35.

[5] *Ibid.* 36.

[6] *Ibid.*; Damrosch, *op. cit.* 38.

[7] Corden, *op. cit.* 36-7.

[8] *Ibid.* 37.

10 *per cent*, the next at a rate of 20 *per cent*, and so on.[9] Yet problems are likely to arise here in the case of the firm which manufactures a range of products. There are grounds for arguing that a firm which produces, for example, toothpaste and toilet soap should be entitled to separate its expenditure on advertising the different products for tax purposes; however, such a concession would entail metaphysical inquiries as to when products *were* truly different. The answer might be relatively easy in the case of soap and toothpaste. It becomes less so when the distinction between soaps and household detergents — or the difference between Rinso and Omo — is called into question.[10]

Finally, even if all these problems of definition could be overcome, it is by no means certain that the tax would have the desired impact. Theoretically, if it were to succeed in reducing advertising, a resurgence in price competition would follow. On the other hand, it is equally possible that a proportion of the tax would be passed on to consumers in the form of price increases. That new cost could well offset any benefits which the consumer might otherwise have derived. In that event, the ultimate beneficiary of the scheme would not be the consumer, but consolidated revenue.[11]

Taken separately, none of these anticipated difficulties with the taxation proposal is insuperable. In aggregate, however, they may well rule out the idea as a practical proposition. In this connection it is interesting to note that the Government reacted to the Industries Assistance Commission's flirtation with the advertising tax concept by issuing a statement in which it opposed compulsory controls on the level of advertising, particularly in the form of direct progressive taxation.[12]

(c) *Increasing the information in advertising*

On at least one view, the power of advertising to sustain oligopoly derives from its association with product differentiation. Distinctions between brands fostered by advertising which, while artificial are nonetheless effective, serve to entrench existing products in consumer preferences to the detriment of new entrants, to segment the market by disguising the essential homogeneity of competing products and to offer competing firms a form of rivalry which is at once less risky for them than price competition and more expensive for consumers. From this perspective, what is said in advertising (or perhaps more to the point, what is left unsaid) is at least as important as advertising levels. Accordingly, if means could be found of informing consumers of basic similarities between the competing brands of rival firms and between the range of products of the one

[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.* 37-8; Damrosch, *loc. cit.* See also *IAC Report* 48.
[12] Press Release by the Hon. John Howard, M. H. R. (then) Minister for Business and Consumer Affairs, 18 February 1977.

manufacturer, a new prominence would be given to such price and quality differences as exist between them. This in turn would force a reversal to effective competition between existing firms and, by deflating the impact of advertising, would reduce its incidence, thereby facilitating the entry of new firms into the industry. This is the theory espoused by those who see a direct link between consumer ignorance and market concentration. A variety of proposals has been advanced for communicating basic product information to consumers.

(i) *Elimination of misleading advertising.* The obvious first step to be taken in breaking down the barriers of consumer ignorance is to eliminate misleading claims from the advertising of the industry in question. It has already been noted that this was one of the principal recommendations of the Joint Committee in respect of the soaps and detergents industry. It is a measure for which existing advertising laws were explicitly designed.

On the other hand, it is very much a step of secondary significance, since the real problem in issue derives less from the misleading tendency of isolated claims than from advertising which fails to convey basic product information. That shortcoming might be reduced if it were possible to treat uninformative advertising as being in some wider sense misleading, but the terms in which existing laws are framed, at least in Australia, would seem to preclude such an extension. That, at any rate, appears to be the official view of the Trade Practices Commission as evidenced by its investigation of the soaps and detergents industry.

(ii) *Advertising substantiation.* There is however a border-line area where uniformative advertising may shade off into deception. This occurs where claims of product superiority are made which lack any factual foundation. The Trade Practices Commission has indicated that such unsubstantiated claims as 'more economical' or 'performs better' may contravene Division 1 of Part V of the Trade Practices Act.[13]

Although simple prosecution of claims such as these is unlikely to convey to the majority of consumers the intelligence that the benefits claimed for the product are in fact illusory, consumer ignorance might be reduced if data possessed by manufacturers in support of their advertising claims were made available for public inspection.

This is the reasoning which underlies the advertising substantiation programme initiated by the Federal Trade Commission in the United States. Under the programme, the Commission selects target industries in which advertising levels are significant and requires manufacturers to submit such tests, studies or other data concerning advertising claims which they had in their possession at the time when the claims were made and which purport to substantiate those claims. Failure of a manufacturer to supply adequate data exposes him to the charge that his advertising is misleading or unfair. All data provided is placed on the Commission's

[13] *Advertising Guidelines* (Commission Information Circular No. 10, 20 June 1975).

record and made available for public inspection.[14] The Joint Committee recommended the establishment of a somewhat similar programme to help counter the unsubstantiated claims prevalent in the Australian soaps and detergents industry.[15]

The proposal has the advantage of making product data available to those consumers who are prepared to take the trouble to seek it out. However, its impact on overall advertising patterns and industry structures is dependent on a sufficiently large number of consumers falling into that category. Experience in the United States indicates that this is not likely to happen. One reason is that, particularly in the case of low-priced goods (such as soaps and detergents), it is simply not economically worthwhile for the consumer to search out product data. Another is that, as the Federal Trade Commission's substantiation programme revealed, much of the data submitted by manufacturers — even in respect of relatively simple products — is likely to be highly technical in nature and beyond the understanding of the average consumer.[16] That drawback must deter even the most rabid of comparative shoppers. The fatal flaw in the substantiation proposal is that as a tool for engineering structural change, it is dependent on two uncontrollable factors: the willingness of consumers to seek out information and their ability to understand and apply it.[17] The problem, then, is not simply one of making information available, but of making it available in a readily accessible form.

(iii) *Composition standards.* To meet this need in relation to the soaps and detergents industry, the Industries Assistance Commission recommended that manufacturers be required to list on packets the ingredients and their proportions of each of their products. The Commission considered that such a step would put the domestic consumer on a similar footing to that of the industrial user so far as access to that information was concerned and would facilitate comparative shopping.[18]

[14] For a discussion of the FTC's advertising substantiation programme and references thereto, see Duggan, *op. cit.* 71-3.

[15] *Joint Committee Report* para. 142.

[16] See Duggan, *op. cit.* 73n.

[17] Rather more bizarre suggestions for countering the information problem by directly regulating advertising itself include: mandatory comparative advertising, whereby manufacturers in selected industries would be compelled to devote a certain proportion of their advertising budget to discussing the defects in their rivals' products (Schnabel, M., 'Conscious Parallelism and Advertising Themes: The Case for "Comparative" Advertising' (1974-75) 7 *Antitrust Law and Economics Review* 11); official preclearance, whereby all advertising by leading firms in concentrated industries would be scrutinized prior to screening by a government official to test its informational content — advertisements would be banned if they failed to give sufficient information relating to the product's price, quality and performance characteristics (Scanlon, P. D., 'Anti-Competitive Advertising and the FTC: A Ban on Oligopoly-Creating Ads?' (1970) 3 *Antitrust Law and Economics Review* 21); official counter-advertising, whereby air time would be purchased by government to impart to consumers information concerning products which are highly differentiated by commercial advertising (*ibid.*; Damrosch, *op. cit.* 40).

[18] *IAC Report* 44, 48.

The difficulty with this proposal is that, while it meets the problem of accessibility of information, it does little to assist consumer understanding. As the Commission itself noted, few consumers would have the chemical knowledge necessary to appreciate the significance of compositional differences between competing brands.[19]

An alternative proposition would be for the framing of composition standards for particular products. If the composition of competing brands could be standardized in accordance with criteria developed by an independent authority, a clear certification to that effect on all packages might go some way toward dispelling the illusory distinctions created by brand advertising and encourage consumers to search instead for price differences. The development of composition standards for all soap and detergent products was recommended by both the Joint Committee[20] and the Industries Assistance Commission.[21]

The Standards Association of Australia has already developed a standard setting minimum compositional requirements for household laundry detergent powders.[22] Work on compositional standards for other soap and detergent products is still in progress.[23] The drawback with standards framed by the Standards Association is that compliance by manufacturers is not compulsory; moreover, few consumers are aware of their existence. However, it would be a relatively simple step to translate those standards into mandatory requirements by promulgating them as regulations under section 63 of the Trade Practices Act.

The real difficulty with composition standards lies in determining the form they should take. The Standards Association's document sets only minimum levels for each of the principal ingredients. It thus remains open for a manufacturer to use slightly more of one ingredient than his competitors and to rely on the variation as a basis for product differentiation. Few consumers would be in a position to assess the accuracy of such claims.

The alternative is to define a standard which sets a specific composition level to which all products must conform. This model comes closest to the role apparently envisaged for composition standards by the Industries Assistance Commission. It is open to criticism on the ground that it freezes products into a particular composition and precludes innovations which might either improve performance or reduce production costs.[24]

A final point is that, as the Industries Assistance Commission intimated, there is a danger in the evolution of standards that they may come to

[19] *Ibid.* 44.

[20] *Joint Committee Report* paras. 86-7.

[21] *IAC Report* 45-7.

[22] Standards Association of Australia, *Household Synthetic Laundry Detergent Powder (Composition Basis)* (AS 1658 —1974).

[23] Letter to the writer from Mr Robin Davey, First Assistant Commissioner, Trade Practices Commission, 23 November 1977.

[24] *IAC Report* 46. This objection may not be insuperable: *ibid.*

represent little more than a consensus of the manufacturers involved and thus serve to formalize the existing practices of an industry. Given the highly technical nature of the data involved, the presence of consumer representatives on standard-setting bodies does not necessarily obviate the problem.[25]

(iv) *Performance testing.* Another way of informing consumers, in the face of advertising themes to the contrary, of the substantial similarities between competing brands of a product would be to test each brand for its performance capabilities and publicize the results. Performance testing is likely to provide for consumers a more meaningful basis for comparison than compositional data because the results can be communicated in a non-technical fashion and in a readily understandable form. Performance testing, at least theoretically, can tell consumers at a glance either that one brand is superior to another despite apparent similarities or that all brands are basically the same despite minor compositional variations or distinctions drawn by advertising.

There are two ways in which performance testing can be carried out and the results communicated. The first involves laboratory testing by an independent body of all competing brands in a single product range and the publication of results in a medium accessible to consumers. The work of the Australian Consumers Association through its magazine 'Choice' is a prime example of this kind of activity. The Joint Committee recommended the establishment of a government-sponsored programme of this kind to counter the informational deficiencies in the soaps and detergents market.[26] However, although such measures can provide an undoubtedly valuable service for those consumers who are prepared to consult the assembled data, as a means of inducing structural change in concentrated industries they are deficient because the information they provide, though readily understandable, is still too inaccessible. A very small percentage of consumers subscribe to 'Choice'-type magazines; moreover, where the product in question is an inexpensive, frequently purchased household item, the projected saving of only a few cents makes consultation of independent product information sources simply not worthwhile. It seems clear that if the assembly of product data is to have any significant impact it must, at least in the case of inexpensive items, be provided at point of sale so that the consumer's search costs are reduced to a minimum.

[25] *Ibid.* 47. See also Australia, *Report of the Interim Commission on Consumer Standards* (1974), 12 where the standard-setting processes of the Standards Association of Australia are described: 'S.A.A. standards are prepared by a process of consensus, by expert sub-committees, and inevitably the level at which standards are set depends on the balance of power between interests represented on the committees. User representation is usually weak. . . . In general, S.A.A. has been unable to form balanced committees to deal with quality matters and since it has no power to make its standards mandatory, there would have been, in the past, no point in developing consumer standards set at a higher level of performance than industry was willing to adopt voluntarily. S.A.A. has therefore tended to concentrate on the immediately useful fields of statutory and industrial standards.'

[26] *Joint Committee Report* para. 148.

The second method of performance rating involves the construction by a standard-setting authority of a ranking code, based on laboratory testing, for all brands in a particular product range. Each brand could be assigned a score on a scale of, say, 0 to 100 which would reflect its performance capabilities relative to those of its competitors.[27] If manufacturers were required to disclose on packaging the ranking allocated to each of their brands, consumers should at a glance be able to draw quality comparisons between them. Both the Joint Committee[28] and the Industries Assistance Commission[29] urged the development of performance standards for soap and detergent products. The Trade Practices Commission, in its report on packaging and labelling, recommended performance testing in respect of all identical goods marketed under different brand names at different prices.[30] The process could be formalized by promulgation under section 63 of the Trade Practices Act of performance standards for the range of products in question.[31]

There may, however, be difficulties encountered in formulating performance standards. For one thing, as soap and detergent manufacturers emphasized to the Industries Assistance Commission, it is not possible, when ranking products under laboratory conditions, to take account of variables likely to affect performance in the domestic situation. Examples in the case of laundry detergents are variations in water hardness, in the type of appliance used and in the soiling sought to be removed.[32]

On the other hand, that limitation is hardly decisive. Where competing brands are basically similar in composition, variations in the conditions of use are unlikely to affect the measure of their capabilities relative to one another which is provided by performance rating. In that event, performance testing would give the lie to brand differences claimed in advertising.

The position is slightly more complicated where there *are* differences between brands which, for example, make one laundry powder more effective in hard water, or another more effective when used with a particular washing appliance. A uniform ranking scale evolved under

[27] See Smith, S. A., 'Brand Advertising and Performance Labelling: A Modest Proposal' (1974-75) 7 *Antitrust Law and Economics Review* 29, 41-4.

[28] *Joint Committee Report* para. 147.

[29] *IAC Report* 45. It should be noted that the formulation of price/quality criteria may not of itself remove all obstacles to informed consumer choice. Another problem characteristic of many supermarket items (of which soap and detergent products are typical) is the enormous range of packet sizes permitted by existing regulations. Since the prices for the various packets are not set in exact correlation with their size, it is difficult for a consumer to determine whether, on a price/quantity basis, better value is offered by one size of packet than another. To overcome this problem the IAC recommended a reduction in the number of permissible sizes for soap and detergent packets (*ibid.* 47). A similar recommendation has been made in respect of all supermarket items where this is a problem: Trade Practices Commission, *Report to the Minister for Business and Consumer Affairs on Packaging and Labelling Laws in Australia* (1977), chapter 4. Another solution lies in the introduction of unit pricing (*ibid.*).

[30] *Ibid.* 204, 217.

[31] *Ibid.*

[32] *IAC Report* 45.

laboratory conditions would not give consumers information in this sort of detail.[33] However, it may well be that, upon the introduction of performance testing, that kind of information would come to be provided by advertising itself. In that event, performance testing would assist in reducing the prevalence of artificial differentiation in advertising over constructive claims and immediately useful information.

The Standards Association of Australia was at one time engaged in the formulation of performance standards for soap and detergent products, but the project has since been delayed indefinitely by a lack of funds.[34] It is interesting to note in connection with observations made above that, prior to suspension of the project, industry members volunteered to conduct at their expense a consumer survey to determine what kinds of performance information consumers wanted. That proposal also broke down because of disagreement as to the terms of the questions to be asked.[35]

(7) CONCLUSION

The parade of doubts marshalled above concerning the proposed solutions to the advertising/oligopoly problem might perhaps be regarded as nit-picking — or as reflecting a preconception that the problem ought not to be resolved. In some respects, the problems *have* been overemphasized, but *not* to achieve a rationalized foreclosure of debate on the question. Rather, the aim was to underscore the theme recurrent in this area: that while it is easy enough to diagnose the illness, agreement on a cure is far more elusive. That point was recognized by Bain twenty years ago when he identified the root causes of the problem as the widespread propensity of profit-seeking enterprises to attempt to enhance profits through product differentiation and the innate susceptibility of consumers to the blandishments of advertising.[36] The first point explains why the search for solutions is politically unattractive and the second why efforts to increase informed consumer choice are notoriously unpredictable.

That the campaign in Australia against the soaps and detergents industry foundered on these twin reefs is revealed most graphically by the events surrounding the Prices Justification Tribunal hearing and to a lesser extent by the resounding silence which has greeted the proposals for reform advanced by the other bodies. In the end, the advertising practices in issue became 'a prize political football, created much ill-feeling, many words, and almost no action . . .'.[37] There is little reason to suppose that the

[33] Damrosch, *op. cit.* 43.
[34] *IAC Report* 45.
[35] Letter to the writer from Mr Robin Davey, First Assistant Commissioner, Trade Practices Commission, 23 November 1977.
[36] Bain, *op. cit.* 216.
[37] *The Australia Financial Review* 8 September 1977, 30.

outcome would have been different had some industry other than soaps and detergents been chosen as a target.

On the other hand, the anti-climactic finale to the great soap opera is not in itself an argument for abandoning the search for viable reforms. It is worth emphasizing that the reaction against at least some of the proposals advanced to date is either speculative or based on practical objections which might be overcome by judicious tinkering. Of the suggestions canvassed, performance rating perhaps holds most promise for at least reducing the distortions attributable to intensive advertising. It is — from all points of view — an inoffensive proposal, since rather than imposing direct restrictions on advertising itself, it is concerned only to reduce the popular ignorance on which product differentiation and brand proliferation thrive. Subject to satisfactory development of the performance standards themselves, it is a disarmingly simple concept which, unlike other proposals advanced, would be inexpensive to maintain and supervise. The history to date of performance testing in Australia indicates that there *may* be problems in evolving suitable criteria for performance ranking, but it is difficult to accept — particularly in relation to relatively simple products like soaps and detergents — that they are insurmountable. The costs involved in their resolution would, even in a period of economic slump, be justified by reference to the wastage generated by the marketing methods in question. Of course it is possible — consistently with Bain's prediction — that consumers would still evince a preference for advertising blandishments over the data thus provided, but that contingency is surely better tested by trial of the measure in action than by theorizing. And if the prediction *were* fulfilled, the scheme would at least have furnished a measure for the much-vaunted irrationality of the buying public:

> A vote to knowingly pay $1.25 for a product that can be bought under another name for $1.00 is a vote for Caligula's horse as Emperor of Rome, the stuff madness is made of. Or that fables are made of on Madison Avenue.[38]

[38] Smith, *op. cit.* 46.