THE ROLE OF PRIVATE ACTIONS IN AUSTRALIAN RESTRICTIVE PRACTICES ENFORCEMENT

BY MAUREEN BRUNT*

1. *INTRODUCTION*

The first reported decision under Part IV — Restrictive Trade Practices of the Trade Practices Act 1974 (Cth) ('the Act') was a private action, *Top Performance Motors v. Ira Berk* (1975). The first reported High Court decision was a private action, *Quadramain v. Sevastapol* (1976). The most important judgment to date was yet another private action, *Queensland Wire Industries v. B.H.P.* (1989). In this case the Australian High Court handed down a judgment on 'misuse of market power' (s. 46 of the Act), universally hailed as a landmark decision. And over the last decade and a half, there has come a stream of significant decisions on the interpretation of various sections in Part IV of the Act arising from litigation initiated by private parties. To the three cases just cited we can add:

Adamson v. West Perth Football Club, (1979);
Tillmans Butcheries v. A'sian Meat Industry Employees' Union (1979);
Ron Hodgson v. Westco (1980);
Actors and Announcers Equity v. Fontana (1980, 1982);
Cool v. O'Brien, (1981, 1983);
Radio 2UE v. Stereo FM, (1982, 1983);
Outboard Marine v. Hecar (1982);
Dandy Power Equipment v. Mercury Marine (1982);
Williams & Hodgson v. Castlemaine Tooheys (1985, 1986);
Warman v. Envirotech (1986);
Hughes v. Western Australian Cricket Association (1986);
Mark Lyons v. Bursill Sportsgear (1987);
McCarthy v. Australian Rough Riders (1988);
Jewel Food Stores v. Amalgamated Milk Vendors Association (1989, 1990);
Paul Dainty v. National Tennis Centre Trust (1989, 1990);
Pont Data Australia v. ASX Operations (1990).

Even some of the decisions on the grant of interlocutory injunctions, by their nature of limited authority, have generated an interest extending beyond resolution of the immediate dispute, for example:

Victorian Egg Marketing Board v. Parkwood Eggs (1978);
Williams v. Papersave (1987);
Midland Milk v. Victorian Dairy Industry Authority (1988).

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Finally, we should note instances of enforcement action undertaken, in effect, jointly by private parties and the Trade Practices Commission — of private actions running on the 'coat-tails' of successful Commission prosecution, as in the damages suits:

Hubbards v. Simpson (1982);
Parrys Department Store v. Simpson (1983).

Many more actions are instituted by private parties than are instituted by the Trade Practices Commission ('the T.P.C.'). While most of these private actions are settled or discontinued, one has the impression that more significant judgments on the merits stem from private than from public (*i.e.* Commission) actions.

This paper attempts to examine systematically the role of private litigation in enforcing the restrictive practices provisions under Part IV of the Act. We can all agree that private restrictive practices litigation is, in some sense, 'important' in Australia. What is less obvious is how, or whether, this private litigation contributes to the enforcement of what is, after all, public law — a law designed as an instrument of economic policy of the Australian Government.

2. *INCENTIVES TO PRIVATE LITIGATION*

The inspiration for our Act was, at least initially, the American antitrust laws. Like them, the Act is court-centred. Like them, the Act relies upon both public and private enforcement.

Yet there are some significant differences in the incentives to private litigation[1] as between Australia and the United States.[2] The most striking difference is the absence in Australia of the powerful American financial incentives to sue for damages — treble damages, class suits, and contingency fees. There is also the special asymmetrical cost rule for American antitrust litigation which entitles the successful plaintiff, but not the successful defendant, to recovery of costs. The Clayton Act (s. 4) provides: '. . . any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee . . .' The availability of class actions and contingency fees reinforces these rules to promote suits where there are numerous members of an affected class or group. Moreover in the United States, where conspiracy is alleged, defendants are jointly and severally liable for damages, a rule that enables the skilful plaintiff and attorney to negotiate a

[1] For general discussions of the incentives to private litigation see Salop, S. C. and White, L. J., 'Private Antitrust Litigation: An Introduction and Framework' in White, L. J. (ed.), *Private Antitrust Litigation* (1988) 3; Cooter, R. and Ulen, T., *Law and Economics* (1988), Ch. 10; Cooter, R. D. and Rubinfeld, D. L., 'Economic Analysis of Legal Disputes and Their Resolution' (1989) XXVII *Journal of Economic Literature* 1067; Posner, R. A., *Economic Analysis of Law* (3rd ed. 1986), Ch. 21; and Shavell, S., 'Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs' (1982) 11 *Journal of Legal Studies* 55.

[2] Areeda, P. and Kaplow, L., *Antitrust Analysis* (4th ed. 1988) is a convenient and authoritative source.

succession of settlements from defendants fearful of being 'left holding the bag'[3] — and thus to obtain progressive contributions to financing the suit which may thereby assume a self-financing character.

In Australia it is only single damages of the traditional type that are provided for; and, moreover, both counsel and the courts have exhibited some uncertainty in approaching what might be the relevant principles to govern their computation. Section 82(1) of the Act simply states:

> A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

Plaintiffs' and defendants' cost recovery is governed by a somewhat attenuated indemnity rule, whereby the successful litigant can generally enjoy recovery of no more than two-thirds of the client's bill and possibly as little as 40 per cent.[4] The situation, then, is that a prospective applicant for damages must weigh the probability of achieving compensatory damages of uncertain magnitude against costly litigation of uncertain length, the costs certain to be substantial even should the action prove successful.

Nevertheless it should be noted that two of the relatively rare Australian cases that involve the computation of damages are 'follow-on' cases, riding on the coat-tails of a successful T.P.C. resale price maintenance action for penalties. For s. 83 does give some additional incentive to private pursuit of damages in that 'a finding of fact by a court' in other proceedings, whether public or private, is '*prima facie* evidence of that fact'.

It is true that our antitrust standing rules are somewhat more liberal than the American. The United States Supreme Court has ruled that a private plaintiff, whether seeking damages or injunctive relief, must show actual or threatened 'antitrust injury', *i.e.* 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful'.[5]

3 *Ibid.* 86.

4 The figures refer to cost recovery in litigating a restrictive trade practices case in the Federal and High Courts. The generalization is based upon verbal information from partners in some of the leading law firms. There is no published study directly in point.

There is a considerable literature canvassing the effects of the indemnity cost rule by comparison with the standard American cost rule (all parties bear their own costs). In addition to the reference cited in n. 1, see Katz, A., 'Measuring the Demand for Litigation: Is the English Rule Really Cheaper?' (1987) 3 *Journal of Law, Economics, and Organization* 143; Bowles, R., 'Settlement Range and Cost Allocation Rules: A Comment . . .' (1987) 3 *Journal of Law, Economics, and Organization* 177.

It turns out that the full indemnity rule has somewhat complicated effects, making predictions less than straightforward. What can be readily seen is that the indemnity rule accentuates the effects of relative optimism and pessimism in the parties: for an optimistic party, expected costs are diminished; for a pessimistic party, expected costs are amplified. Hence the indemnity rule encourages suit by a relatively optimistic plaintiff; discourages nuisance suits and those with a low probability of success; and encourages expensive and protracted trials. Where a potential plaintiff is 'entitled' to judgment and well-informed of the merits of its case, the rule will tend to promote the initiation and pursuit of litigation, and threatened litigation, for 'justice'. But this very tendency will promote compliance with the law — and an absence of potential defendants!

However, in practice in Australia, it seems that the actual cost rule lies somewhere between the indemnity rule and the standard American cost rule, and allowance must be made for this.

5 *Brunswick v. Pueblo Bowl-O-Mat, Inc.* (1977) 429 U.S. 477, 489. The rule was extended in *Cargill, Inc. v. Monfort of Colorado, Inc.* (1986) 479 U.S. 104 to encompass suits for injunctive relief.

Further, the treble damages remedy is afforded only to those suffering direct injury, such as a 'direct purchaser' subject to over-charging.[6]

By contrast, in Australia there are no restrictions upon standing to bring an action for an injunction, other than in relation to merger (within Australia as distinct from outside). Section 80(1) confers power to seek injunctions in all cases other than domestic mergers upon the Attorney-General, the T.P.C. and 'any other person' — and the courts have held upon more than one occasion that the phrase means just that.[7]

It was the 1977 amendments to the Act that removed the private right of action for merger injunctions. Now, only the Attorney-General or the Commission is entitled to apply for an injunction by virtue of provisions in the Act (although there may be room to found an action upon more subtle legal bases such as the powers of the Federal Court[8] or the right to seek a declaration).[9] Nevertheless, from a formal point of view, it is open to 'any person' to seek divestiture once a merger has been consummated: s. 81.

The requirements for standing in a suit for damages under the Act have not been spelt out, s. 82(1) simply referring to a 'person who suffers loss or damage by conduct . . . in contravention', and the cases to 'some causal connection'[10] between the conduct constituting the contravention and the loss or damage suffered. It may be that our courts will achieve a similar result to the 'antitrust injury' rule via some doctrine of remoteness.[11] But at the present time, with the expected costs and returns of litigation falling as they do, the issue is of little importance.

As we would expect from the preceding discussion, in Australia most private applicants are satisfied if they achieve the award of an injunction. The implication is that in these cases the expected dollar value of injunctive relief (unlike a damages award) will outweigh the high cost of litigation.

Contemplation of this differing pattern of incentives in Australia, as compared with the United States, leads us to expect a somewhat different litigation pattern. As regards the United States, Areeda and Turner generalize in their multi-volume work on the significance of treble damages:

> Such a remedy not only compensates private persons for their injuries, but gives them a powerful financial incentive to enforce the antitrust laws. The result is that public enforcement, which is inevitably selective and least likely to concern itself with local, episodic, or less than flagrant violations, is supplemented by private enforcement, which increases the likelihood that a violator will be found out, greatly enlarges his penalties, and thereby helps discourage illegal conduct.[12]

The pathbreaking and important *Private Antitrust Litigation*, recently published and built on the Georgetown Antitrust Project, states of the United States in its opening paragraphs: 'Private suits have been the predominant form of antitrust

6 *Illinois Brick Co. v. Illinois* (1977) 431 U.S. 720; *Cargill v. Monfort.*
7 See, in particular, *Phelps v. Western Mining Corp.* (1978) A.T.P.R. 40-077.
8 *Brisbane Gas Co. Ltd v. Hartogen Energy Ltd* (1982) A.T.P.R. 40-304.
9 *Cf. TPC v. APM Investments* (1983) A.T.P.R. 40-403.
10 *Hubbards Pty Ltd v. Simpson Ltd* (1982) A.T.P.R. 40-295, 43,674; *Parrys Department Store (W.A.) Pty Ltd v. Simpson Ltd* (1983) A.T.P.R. 40-393, 44,611.
11 *Cf.* Heydon, D., *Trade Practices Law* (looseleaf) II, 9241.
12 Areeda, P. and Turner, D. F., *Antitrust Law* II (1978) 33.

litigation for at least 40 years.'[13] Its sample study of all private antitrust cases filed from 1973 through 1983 in five federal districts found that the primary illegal practice alleged in complaints was 'horizontal price fixing' (16 per cent). When primary and secondary allegations were combined, 'horizontal price-fixing' accounted for 21 per cent of complaints, although 'refusal to deal' overtook it with 25 per cent; 'tying or exclusive dealing' also amounted to 21 per cent.[14] Of the 329 private antitrust cases in which horizontal price-fixing was the primary allegation, 230 or 70 per cent were independently initiated, with 99 or 30 per cent 'follow-ons' to cases initiated by the Department of Justice or Federal Trade Commission.[15] Using a broad definition of settlement (to include dismissals), 88 per cent of cases were settled; even with the narrow definition of settlement (with dismissals counted as judgments for defendants), 71 per cent of cases were settled.[16]

By contrast, we should not expect that in Australia the ratio of private to public suits would be so high (although necessarily this is dependent, too, upon the size of T.P.C. budgets); and we should expect there to be a much lower incidence of private actions concerned with price fixing or cartelization generally. No doubt it is the case, as in the United States, that private parties will become, by contrast with the public enforcer, more involved in the nooks and crannies of violation of the law — localized, episodic, rather individualized forms of conduct.

What of the sheer frequency of private litigation? Would it be right to say that we should expect much less than in the United States, after correcting for size of the jurisdiction, given the differing financial incentives? The truth of the matter seems to be that we are unable to predict the sheer volume of litigation. This is because of what Salop and White label the 'Laffer curve of litigation' (named after the relationship between tax revenues and average tax rates often attributed to Arthur Laffer). The Laffer effect posits that as the rewards to prevailing plaintiffs rises, the number of law suits first rises, reaches a peak, and then declines — since, in the end, the very number of violations will fall.[17] Where the United States and Australia might be located on such a curve it is difficult, if not impossible, to say!

We are on much firmer ground if we attempt to predict the *pattern* of litigation in Australia. The interest of business enterprise is in access to business opportunity (*e.g.* supplies) and in securing a level playing field. We should expect the private plaintiff to be a sharply disadvantaged person, primarily in relation to supplies or price, rather than the recipient of somewhat diffuse harm accruing to a group. The provisions that might be hoped to cater to this concern would be those governing primary boycotts, secondary boycotts, monopolization or misuse of market power, exclusive dealing, and price discrimination. Where suspect conduct impinges on the interests of a group, as with a class boycott, price fixing

[13] Salop and White, *op. cit.* 3.
[14] *Ibid.* 6.
[15] Kauper, T. E. and Snyder, E. A., in White (ed.), *op. cit.* 333.
[16] Salop and White, *op. cit.* 11.
[17] *Ibid.* 19-21. See also Cooter and Ulen, *op. cit.* 481-4.

or some mergers, or as with any conduct disadvantaging consumers, an individual litigant would be insufficiently rewarded for the expense and time consumed in litigation, the risks arising from the cost rules, and the free riding of other members of the group.

The private litigant's motivation is formed not just by a comparison of the injury suffered with the eventual pay-off (damages, injunction, award of costs). There is also the question of the requirements of proof. If a complaint is, on any view, an open and shut *per se* violation of the law, threats are credible and will likely result in early settlement — the conduct to cease and compensation to be made. Our cost rules aid this outcome. If the issue is a little more complicated than this, a problem of characterization in seeking to apply a *per se* rule (as happened, for example, when Castlemaine Tooheys faced the allegation of third-line forcing),[18] the parties may well litigate. Finally, if a matter requires extended rule of reason inquiry with an extensive mounting of evidence whose relevance is not necessarily obvious, problems of proof, and complexity of argument, private litigation is unlikely. However, even here there is no doubt some trade-off between the two considerations of (1) personal injury and hoped-for relief on the one hand and (2) litigation expense and uncertainty on the other. No doubt, also, miscalculations and various psychological and strategic bargaining factors, aided by a deep purse, come into play. But all in all, it is the *per se* violations and the simpler rule of reason cases that will be pursued by the private litigant — conduct that places him or her at a sharp disadvantage through denial of supplies or outlets, or from trade on disadvantageous terms. Here the potential plaintiff's knowledge of the facts, and ability to mount the legal proofs, may well be a decisive consideration.

Such a conclusion receives trenchant support from Commissioner Warren Pengilley (as he then was) in his addendum to the Commission's *Annual Report* for 1980-81:

> Any private litigation will essentially be limited to areas with a complaining and damaged victim party who has direct knowledge of (and can thus give direct evidence of) the circumstances. Almost assuredly a per se offence will be generally involved as private litigants are not interested in arguing complex economic competition evaluations. To date, these areas have constituted the main success of even Commission litigation. Misleading Advertising and Resale Price Maintenance exemplify conduct of the nature referred to. Cases involving no directly damaged victim with direct knowledge of the facts and involving complex economic arguments as to the meaning of 'competition' will not be privately enforced. Price arrangements are classic examples of areas in which lack of Commission enforcement will in all likelihood result in no enforcement at all.[19]

We turn next to an examination of some statistics relating to the pattern of Australian restrictive practices litigation. Happily our expectations regarding this pattern appear to be largely confirmed.

3. *SOME STATISTICS*

We now have a litigation record of 15 years. This section of the paper sets down the statistics of private and public actions that can be drawn fairly

[18] *Williams & Hodgson Transport Pty Ltd v. Castlemaine Tooheys Ltd* (1985) A.T.P.R. 40-609; (1986) A.T.P.R. 40-653; (1986) A.T.P.R. 40-751.

[19] Additional Commentary: Commissioner Warren Pengilley, 137.

readily from published sources. These are the T.P.C., *Annual Reports* (1974-75 to 1988-89); a year by year tabulation, *Private Actions Under The Trade Practices Act* published by the T.P.C. in June 1981 that lists the private actions instituted from 1975 (the beginning) to 1980; and the *Australian Trade Practices Reporter* published by the CCH.

A complete coverage of T.P.C. actions, both initiated and concluded, can be drawn from the Commission's *Annual Reports*, and this has been done. For the private actions we are reliant upon the early T.P.C. monograph and the CCH's *A.T.P.R.* The T.P.C. monograph has the advantage that it lists the actions instituted on a year by year basis, irrespective of whether they are fought to a conclusion in the courts. But it records only the private actions known to the T.P.C., principally those emanating from N.S.W. and Victoria, not the universe of actions recorded by the Court Registrars. Some obvious cases have been missed (*Quadramain*, *Tradestock*, *Ah Toy*), by some clerical oversight, and these have been added in. There are signs of a waning of interest as the tabulation runs into 1980. All things considered, it is best to take the aggregate figures for the years 1975-1980 as indicative of the pattern of private litigation, rather than the absolute numbers of cases instituted. On the other hand, the A.T.P.R. does report on the universe of concluded cases. There are now 11 volumes.[20]

When reading the tables, the distinction between a 'case' and a 'cause of action' needs to be borne in mind. Most of the statistics tabulated refer to a 'cause of action'. A case, such as *Top Performance Motors v. Ira Berk*, may seek to rely upon more than one cause of action, in this instance s. 45 and s. 46. The 'outcomes' recorded refer only to causes of action under Part IV; for example, where a party fails on the basis of the Act but succeeds on some other basis (*e.g.* restraint of trade under the common law) the case is counted as 'dismissed'. Likewise, the successes and failures recorded refer to the particular cause of action rather than the outcome for the case. The concept of a concluded action also requires explanation. Those ending in a declaration or orders by consent, or victory on a preliminary point, have been excluded from the count of concluded actions. Those ending in interim or interlocutory injunctions are included. However all cases have been tracked to their eventual conclusion including any appeals.

Clearly even though an action may not have proceeded to a conclusion (in the sense defined) the applicant may have achieved all or much of his or her purpose. Enforcement action is of course a continuum, running from threats that have no formal association with the court system to the action that is concluded by the award or denial of penalties, injunctions, and damages.

The tables document a number of characteristic features of private litigation in Australia, and a number of significant points of contrast with the T.P.C. pattern.

The first two tables take advantage of the T.P.C.'s record of private cases instituted, as well as concluded, for the period 1975-1980.

[20] This statistical section builds on some early work of my colleague, Paul Kenny, who undertook the analysis of the data contained in the first four volumes of the A.T.P.R. as well as the data in the TPC's early monograph.

Table 1 Restrictive Practices Cases Reported by the T.P.C. 1975-1980

Applicant	*No. Instituted*	*No. Concluded*
T.P.C.	28	21
Private Party	108	26
	No. Instituted Excl. Pure 45D	*No. Concluded Excl. Pure 45D*
T.P.C.	27	20
Private Party	73	15

Source: Compiled from T.P.C., *Annual Reports*; T.P.C., *Private Actions Under the Trade Practices Act* (June 1981).

Table 2 Causes of Action Reported by the T.P.C. 1975-1980

	No. of Cases Relying Upon Designated Cause of Action			
	Instituted		*Concluded*	
Causes of Actions	*T.P.C.*	*Private Party*	*T.P.C.*	*Private Party*
S. 45 Price Fixing	7	2	4	1
S. 45 Other Agreements	4	42	3	7
Ss. 45D,45E Secondary (and related) Boycotts	1	37	1	11
S. 46 Monopolization	2	20	1	4
S. 47 Exclusive Dealing	4	20	2	4
S. 48 R.P.M.	13	5	11	3
S. 49 Price Discrimination	0	11	0	1
S. 50 Merger	1	2	1	0
Other (unclassified or shot-gun)	0	3	0	0
All causes	32	142	23	31

Source: Compiled from T.P.C., *Annual Reports*; T.P.C., *Private Actions Under the Trade Practices Act* (June 1981).

Table 1 shows that for the earlier years private parties instituted many more actions than the T.P.C. It is known that this is still the case. For 1975 through 1980, it is safe to say that well over 100 private actions were formally instituted.

However many of these related to section 45D controlling secondary boycotts. This has always been a popular provision with employers, with interim and interlocutory injunctions often secured. The issues raised are somewhat special[21] and interact (formally, since 1980)[22] with the Conciliation and Arbitration Act,

[21] However, in a case on appeal to the High Court, an applicant has sought to extend the reach of s. 45D to encompass a non-'industrial' collective boycott: *Jewel Food Stores Pty Ltd v. Amalgamated Milk Vendors Association Inc.* (1989) A.T.P.R. 40-931; (1990) A.T.P.R. 40-997.

[22] See s. 80AA inserted in the Act in 1980.

so there is some point in recording figures net of the s. 45D proceedings. The T.P.C. itself has only instituted one action resting in part on s. 45D over its entire period of operation. Nevertheless, as Table 1 shows, the private actions instituted still outweigh the Commission actions by a substantial margin.

Of course the T.P.C. has available to it consultative procedures and administrative warnings not open to a business firm, so it is not surprising that the great majority of T.P.C. actions instituted are brought to a conclusion, while the great majority of private actions are settled or discontinued. Indeed, for a private plaintiff the very institution of proceedings may be enough to demonstrate 'seriousness' and to secure acceptable concessions.

While private litigants displayed considerable initial interest in anti-competitive agreements, monopolization, exclusive dealing and price discrimination (putting secondary boycotts to one side), in fact comparatively few of these actions were concluded.

Of the seven anti-competitive agreements cases shown as concluded under s. 45, four are related to primary boycotts. None of the seven involved an interest extending beyond that of the immediate applicant.

One celebrated s. 45 case, *Tradestock*,[23] initially brought by a small transport broker, was discontinued when the applicant ran out of funds but was taken over by the T.P.C. Interestingly, one of the reasons the action in the end failed was that the alleged primary boycott related to a refusal to deal by freight forwarders with a class of person, *viz.* transport brokers, whereas s. 4D defining an exclusionary provision at that time referred only to the impact upon a particular person or persons as opposed to a particular *class* of persons. The case also relied upon allegations of anti-competitive agreement. One of the reasons for the initial applicant being forced to discontinue was that she or he had assumed a *class* burden, one with very demanding problems of proof besides. In fact the litigation ran from 1976, when initiated by Tradestock, was taken over by the Commission in 1978, and finally concluded in 1985. The Commission lost and was forced to rely upon a special appropriation in excess of $4,500,000 to fund the award of costs against it.

It is notable that over 1975-80, only one private price fixing action was concluded. This was *Radio 2UE v. Stereo FM*.[24] As we would expect this was not a cartelization case but a much simpler problem of characterization, *viz.* whether a combined rate card offered by two Sydney FM stations amounted to price fixing.

We turn now to the tables referring to the full litigation record to date, sourced from the CCH, *i.e.* from 1975 to December 1989: Tables 3, 4 and 5.

Table 3 displays the private litigants' interest in interim injunctions, and some striking differences in the pattern of litigation, classified by sections of the Act, as between private litigants and the T.P.C.:

[23] *TPC v. T.N.T. Management Pty Ltd* (1985) A.T.P.R. 40-512.
[24] *Radio 2UE v. Stereo F.M. Pty Ltd* (1982) A.T.P.R. 40-318; (1983) A.T.P.R. 40-367.

Table 3 Outcomes of Restrictive Practices Litigation 1975-1989

	Private Actions					*T.P.C. Actions*			
Causes of Action	*Interim/Interloc. Injunction Granted*	*Interim/Interloc. Injunction Refused*	*Contra-vention*	*Dismissed*	*Total Private*	*Interim/Interloc. Injunction Refused*	*Contra-vention*	*Dismissed*	*Total T.P.C.*
S. 45 Price Fixing	—	—	—	1	1	—	10	2	12
S. 45 Other Anti-Competitive Agreements	1	4	—	6	11	—	—	2	2
S. 45 Primary Boycotts	3	2	1	1	7	—	—	1	1
Ss. 45D, 45E Secondary Etc. Boycotts	23	4	5	3	35	—	—	—	—
S. 46 Monopoliza-tion/Misuse of Market Power	4	5	2	4	15	—	—	1	1
S. 47 Exclusive Dealing	—	2	2	5	9	—	4	—	4
S. 48 RPM	—	—	3	1	4	—	20	1	21
S. 49 Price Discrimination	—	—	1	1	2	—	—	—	—
S. 50 Merger	—	1	—	—	1	2	1	1	4
All Causes	31	18	14	22	85	2	35	8	45
Causes Excluding Ss. 45D, 45E	8	14	9	19	50	2	35	8	45

The tabulation relates to cases that generated an initial judgment (at least) reported in Vols 1-11 (1974-1989) of the A.T.P.R. Decisions on preliminary points and declarations have not been included. The cases have been tracked to final outcomes from any appeals reported in these volumes. The numbers tabulated refer to causes of action; a case may involve more than one cause of action. The 'outcomes' are those for each cause of action seriously contested, not for the case as a whole.
Source: Compiled from CCH, *Australian Trade Practices Reports*, Vols 1-11.

- Of 85 reported private causes of action, taken at least to the interim or interlocutory injunction stage, no less than 49 did not proceed to a full hearing of the case.
- Of these 49, 27 related to s. 45D (secondary boycotts) or to s. 45E (collective boycott arrangements between union and supplier).
- If we exclude the ss. 45D and 45E cases, there were 49 private causes of action compared to 45 public.

Table 4 Incidence of Final Judgments: Private Causes of Action Compared with Public 1975-1989

	S. 45 Price Fixing	*S. 45 Other Anti-Competitive Agreements*	*S. 45 Primary Boycotts*	*Ss. 45D, 45E Secondary etc. Boycotts*	*S. 46 Monopoli-zation*	*S. 47 Exclusive Dealing*	*S. 48 R.P.M.*	*S. 49 Price Discrimina-tion*	*S. 50 Merger*	*Totals*
					Private Actions					
1975		1			1					2
1976		1								1
1977			1		1					2
1978										0
1979		1		1		1				3
1980		1		1	1		1			4
1981						1		1		2
1982	1	1				2	2			6
1983							1			1
1984										0
1985										0
1986		1	1	2		1				5
1987				1	2	1		1		5
1988				2						2
1989				1	1	1				3
	1	6	2	8	6	7	4	2	0	36
					T.P.C. Actions					
1975							1			1
1976										0
1977										0
1978	1						1		1	3
1979						1	3			4
1980	2	1			1		3			7
1981	1						1			2
1982						1				1
1983	2					1	2			5
1984							3			3
1985	3	1	1				2			7
1986	2						2			4
1987						1	1			2
1988	1						1			2
1989							1		1	2
	12	2	1	0	1	4	21	0	2	43

The tabulation relates to cases that generated a final judgment (*i.e.* excluding interim or interlocutory judgments) reported in Vols 1-11 (1974-89) of the A.T.P.R. Where a decision has given rise to an appeal judgment, the date noted is the date of the final appeal judgment recorded in these volumes.
Source: Compiled from CCH, *Australian Trade Practices Reports*, Vols 1-11.

- After ss. 45D and 45E, the next most numerous private actions related to monopolization or misuse of market power (the label varies according to the vintage of the legislation). Unlike the United States experience, private price fixing actions (whether horizontal or vertical) were of little significance.

Table 5 Types of Reported Restrictive Practices Cases 1975-1989

Type of Case	*Applicant* *Private Party*	*T.P.C.*
Ss. 45D, 45E		
Interim/Interloc. Injunctions	25	—
Final Judgments	8	—
All Ss. 45D and 45E	33	—
All Other Cases		
Interim/Interloc. Injunctions	17	2
Final Judgments	20	41
All Other Cases	37	43
Total — All Reported Cases	70	43

The tabulation relates to *cases* that generated an initial judgment (at least) reported in Vols 1-11 (1974-1989) of the A.T.P.R. Decisions on preliminary points and declarations have not been included. A case may involve more than one cause of action.
Source: Compiled from CCH, *Australian Trade Practices Reports*, Vols 1-11

Indeed, over the whole period only one private price fixing action was concluded, *Radio 2UE* just mentioned, and that lost.

- On the other hand, the T.P.C. has shown a consistent strategy over the years of pursuing price fixing, both horizontal and vertical. Of 45 concluded causes of action, no less than 21 were for resale price maintenance ('R.P.M.'); and 12 were for horizontal price fixing.
- Over the whole of this period, the T.P.C. has contested only four mergers to judgment in the courts (two of them for interim/interlocutory decisions) and has won only one of them. It makes an interesting contrast with the Commission's success in its R.P.M. cases — 20 victories out of 21 concluded actions — and in its price fixing cases — 10 victories out of 12 concluded actions.
- One notes, too, that whereas private parties have pursued an allegation of monopolization (or misuse of market power) on 15 occasions, the T.P.C. has taken an action on monopolization to conclusion on only one occasion (when it lost).
- Indeed, of the 35 occasions on which the T.P.C. mounted a successful cause of action, no less than 20 were for R.P.M.; 10 were for price fixing, four for exclusive dealing and one for merger.

Table 4 shifts the perspective to highlight the year-by-year incidence of final judgments (*i.e.* judgments going beyond interim or interlocutory relief). Where the case was appealed, the year shown is the year the ultimate judgment was handed down. The emphasis in this table is thus upon the cases that generate court rulings of precedent value. The table documents a number of striking features in the enforcement pattern:

- One notes immediately what a small number of private actions have gone to final judgment — only 28 causes of action if we exclude the ss. 45D and 45E cases. This can be compared with 45 causes of action for the T.P.C.
- Yet one would have to say that rather more rulings of precedent value have come from private litigation than from public.[25] It follows that private litigation has generated an altogether disproportionate number of rulings in proportion to causes litigated.

This is partly because the private cases show a considerably more varied spread than do those run by the T.P.C., with its consistent focus over the years upon price fixing and R.P.M. It is also because quite a number of Commission cases have ended with admissions by the respondents, usually before the necessity for the court to make interpretative rulings on Part IV of the Act, though typically with much contest on preliminary points relating to discovery, constitutionality, *etc*.

It is of interest, then, to pursue the actual number of *cases* brought by the Commission and private parties. These are set down in Table 5.

If we exclude the ss. 45D and 45E cases, there were in fact a smaller number of cases brought by private parties from 1975 to 1989 compared with the T.P.C. — 37 as against 43. If from these figures we exclude the cases that ended at the interim or interlocutory injunction stage, there were only 20 private cases compared with the 41 undertaken by the T.P.C.! Yet of these 41, 21 were pure R.P.M. and 12 pure price fixing cases. That is, over the whole period 1974 to 1989, the T.P.C. ran only 8 cases to final judgment (generating, as it happens, 10 causes of action) relating to all the other prohibitions contained in Part IV of the Act. They deserve to be named:

C.S.B.P. (1980): anti-competitive agreement (s. 45) and monopolization (s. 46);
T.N.T. (*Tradestock*, 1985): anti-competitive agreement and primary boycott (s. 45);
Legion Cabs (1978): exclusive dealing (s. 47);
Queensland Aggregates (1982): exclusive dealing (s. 47);
Massey Ferguson (1983): exclusive dealing (s. 47);
British Building Society (1988): exclusive dealing (s. 47);
Ansett Transport Industries (*Ansett-Avis*, 1978): merger (s. 50);
Australia Meat Holdings (1988, 1989): merger (s. 50).

However the cut-off date for this tabulation is the end of 1989 (Vol. 11 of the A.T.P.R.). As 1990 proceeds, there have already been a number of important T.P.C. cases decided, perhaps indicative of a shift in T.P.C. priorities. To the eight just listed we can add:

Carlton and United Breweries (1990): misuse of market power (s. 46);
CSR (1990): misuse of market power (s. 46);
Arnotts (1990, on appeal): merger (s. 50);
Australian Iron and Steel (1990): merger (s. 50).

25 But let the reader decide! Page 582 lists the private actions that have given rise to judgments of precedential value for the interpretation of part IV of the Act. *Cf.* a corresponding list of T.P.C. actions: *Ansett Transport Industries* (the *Ansett-Avis* case, 1978); *Nicholas Enterprises* (*Adelaide Hotels*, 1979); *C.S.B.P. & Farmers* (1980); *Simpson Pope* (1980) with follow-on cases: *Hubbards v. Simpson* (1982) and *Parrys v. Simpson* (1983); *Email* (1980); *Allied Mills* (the *Glucose* case, 1980, 1981); *Orlane* (1983, 1984); *Mobil* (1984); *BP* (1985, 1986); *T.N.T. Management* (*Tradestock*, 1985); *David Jones* (*Sheridan Sheets*, 1986); *Australia Meat Holdings* (1988, 1989); *Arnotts* (1990); *Australian Iron and Steel* (1990).

Table 6 Restrictive Practices Actions Instituted by the T.P.C. Classified by Cause of Action 1974-75 to 1988-89

	No. of Actions Instituted	*No. of Causes of Action Instituted*	*S. 45 Price Fixing*	*S. 45 Other Agreements*	*Ss. 45D, 45E Secondary Etc. Boycotts*	*S. 46 Monopolization/ Misuse of Market Power*	*S. 47 Exclusive Dealing*	*S. 48 R.P.M-*	*S. 49 Price Discrimi-nation*	*S. 50 Merger*
1974-75	3	3	1				1	1		
1975-76	2	2	1					1		
1976-77	3	3	1					2		
1977-78	7	9	1	2		1	2	2		1
1978-79	7	8	2	1		1		4		
1979-80	4	5	1	1	1			2		
1980-81	3	3					2	1		
1981-82	1	1						1		
1982-83	8	10	2	1		1		3		3
1983-84	8	9	3	1			1	3		1
1984-85	5	5	2					2		1
1985-86	4	4	1				1			2
1986-87	2	2	1					1		
1987-88	5	5						2		3
1988-89	5	6	1			1	1	2		1
Totals	67*	75*	17	6	1	4	8	27	0	12

*An action may claim breach of more than one section.
Source: Compiled from T.P.C., *Annual Reports*. In a few instances the figures differ from those reported by the T.P.C. in light of other information.

There may be more!

Tables 6 and 7 summarize the full Commission litigation record to date drawn from its *Annual Reports*, *i.e.* from 1974-75 to 1988-89. The tables are useful in displaying the T.P.C.'s litigation initiatives, and not just the cases that went to judgment. In fact, the record is somewhat more varied than might be gleaned from the law reports. Nevertheless, of 67 cases instituted, 25 have relied in whole or in part upon s. 48, the prohibition of R.P.M. Another 17 have relied (in whole or in part) upon allegations of price fixing. Only one of the R.P.M. cases has been lost (though three were discontinued). The contrast between T.P.C. enforcement strategy and private litigation practice will be explained further in the next section.

4. *THE ROLE OF THE T.P.C.*

The role of the T.P.C. has been formed by philosophy, the constraint imposed by limited and increasingly stretched budgets, and by the demands of the merger movement. There have been discernible shifts over the period we are surveying (1975-1989). The Commission has always been conscious that its litigation

Table 7 Outcomes of RTP Actions Instituted by the T.P.C. 1974-75 to 1988-89

Causes of Action	*Won*	*Lost*	*Settled, Conditions, Undertakings*	*Discon-tinued*	*Not Concluded*	*Totals — Causes of Action Instituted*
S. 45 Price Fixing	12	3	1	—	1	17
S. 45 Other Agreements	1	2	1	2	—	6
Ss. 45D, 45E Secondary etc. Boycotts	1	—	—	—	—	1
S. 46 Monopolization/ Misuse of Market Power	—	1	1	1	1	4
S. 47 Exclusive Dealing	4	—	—	3	1	8
S. 48 R.P.M.	21	1	—	3	2	27
S. 49 Price Discrimination	—	—	—	—	—	0
S. 50 Merger	1	3	4	3	1	12
Totals — Causes of Actions Instituted	40	10	7	12	6	75

Note: These figures refer to causes of action, larger in number than the cases instituted.
Source: Compiled from T.P.C., *Annual Reports*.

strategy should be formulated as complementary to the role played by private enforcement.

It has been the practice of the T.P.C. to bring actions only where there is thought to be a strong impact upon competition. The Commission has consistently emphasized that it is a 'competition authority' and hence will take an interest in secondary boycotts and price discrimination only where there is a sufficient impact on competition and consumer interests. It has concentrated on what it regards as hard-core breach — price fixing agreements and understandings, R.P.M., collective boycotts and some forms of exclusive dealing.

The Commonwealth Government's 'Review of Commonwealth Functions' (R.C.F.), initiated in 1981 with a view to containing government expenditure, prompted the Commission to review its priorities and to conclude:

> Complaints of anticompetitive conduct are assessed, not from the point of view of the effect on the individual complainant but rather the effect on competition in the relevant market. Complaints which clearly do not indicate conduct meeting the test of substantial lessening of market competition are not pursued. Neither are complaints which appear to lack substance or which are

considered to be more suitable for private action. Generally complaints will be considered more suitable for private action if one or more of the following apply:

- the complainant is a firm of considerable size or strength which could bring its own action for injunction and for damages
- private action would be sufficient deterrent to the party complained of and others
- it is the kind of case in respect of which the Commission would be likely to take administrative action rather than court proceedings (a complainant may in those circumstances elect to institute proceedings and seek damages himself).

However, there may be cases suitable for private action, where the Commission would still want to consider taking action itself because of public interest considerations overriding the private interest considerations. For instance, the case may be one of price agreement between competitors that needs to be made an example, or the case may be one that will produce serious consumer detriment if not pursued and there may be no prospect that it will be pursued by private action.[26]

In the following Annual Report, the Commission recognized that it has a special responsibility as regards the more complex price fixing cases:

> There is a significant place for private action in the enforcement of the Act and in the development of case law . . . However, private action is less likely to be used in agreements between competitors (*e.g.* price fixing cases) than, for example, exclusive dealing. In price fixing cases evidence gathering is generally time consuming, expensive and difficult. These factors create problems for the T.P.C. itself but are even greater obstacles to private litigants. For the T.P.C. it means that the choice of price fixing cases is very important since to lose is very expensive in terms of costs, apart from any other considerations.[27]

As Mr Ron Bannerman wrote on his retirement from the Commission in 1984:

> The message from these agreement cases [*Glucose*, *Tradestock*, and *Pioneer Concrete*] is that allegations of hard-core breach by major companies, which the T.P.C. believes it can prove, must be pursued in the courts, even at heavy cost, if the Act is to have credibility.[28]

Yet the cost of these 'cartelization' cases has in fact been so heavy, both in terms of budgetary and organizational resources, that the Commission has been forced to place great reliance upon the demonstration effect of a relatively small number of cases — albeit the second-largest category of case, as Tables 6 and 7 show.

Some will regard it as a curious foible that the Commission has instituted so many R.P.M. cases. For many, especially United States commentators of the Chicago School, it has become part of the received wisdom that R.P.M. is 'efficiency-enhancing'. But for the Commission, especially under Chairman Bannerman, R.P.M. has largely been regarded as part of 'the web of anti-competitive restriction'[29] that characterized the Australian economy prior to 1974 — the interlocking pattern of horizontal and vertical restraints upon pricing and freedom of entry. The Commission's Annual Reports often record the policy approach and the cost-effective pay-off, for instance in 1977-78:

> *Resale price maintenance* has some of the character of price agreements. Although it is in form a requirement by a supplier that limits price competition among his outlets, it can result from pressure by outlets on to the supplier. In any event it attracts the same legislative condemnation as price agreements between competitors. It is not as hard to prove as a price agreement, because it is necessarily more visible and there is usually someone who objects to it being imposed on him. The Commission (and before it the Commissioner under the previous legislation) has a record of vigorous court enforcement of the resale price maintenance law, which dates from 1971. This is an area where backsliding cannot be permitted. Almost invariably the goods concerned are consumer goods, and it is the consumer who pays the extra price.[30]

[26] *Annual Report* (1980-81), 62-63.
[27] *Annual Report* (1981-82), 79.
[28] *Annual Report* (1983-84), 175.
[29] *Ibid.* 157: Chairman Bannerman's words.
[30] *Annual Report* (1977-78), 33.

Or in Chairman Bannerman's words on his retirement:

> The central vice of resale price maintenance is that it operates as if there were an agreement between resellers not to compete on price, notwithstanding the different package of services they may be providing with the goods and notwithstanding the different costs they may be incurring because of volume, location, hours of trading etc. Indeed, the notion of implicit agreement surfaces from time to time, when resellers ask their suppliers to stop other resellers from price-cutting. The fact that this is now illegal has greatly encouraged price competition in many trades, from petrol distribution to whitegoods and domestic appliances. It has been one of the factors working towards structural changes in retailing. Those changes have been notably in the growth of buying groups in response to the continued growth of the chains and in the restructuring of wholesaling and distribution to meet a more competitive environment where the straight out price competition directly benefits the consumer, *e.g.* in liquor retailing. The TPC keeps demonstrating that resale price maintenance is illegal and that it attracts heavy fines from the Federal Court. I believe the message is clearly understood.[31]

Right from the start the Commission emphasized that it must focus upon restrictions that impact upon price. With horizontal 'arrangements and understandings' so difficult, expensive and time-consuming to prove, it has systematically pursued R.P.M., both as a way of attacking horizontal understandings and inhibitions, and as a way of demonstrating the credibility and presence of the T.P.C. as public enforcer.

The enforcement practice of the T.P.C. does exhibit some variation over the years however. It has always had a tight budget and has had constantly to review its priorities in light of shifting demands upon its resources. Only some 30-40 staff have been available for restrictive practices enforcement.

In the beginning it was swamped with clearance and authorization work, with education and the preparation of guidelines. As it eased into court enforcement, it was met with a barrage of constitutional and other challenges to its authority. One observes, next, in Table 6 a middle period in which there were brought on a larger number of cases of some diversity. But then, beginning with the R.C.F. in 1981, there were pressures for economy, and from 1980-81 to 1987-88 a real decline in budgetary resources for salaries and administrative items amounting to 6.6 per cent.[32] There is currently a Commonwealth cap upon the fees that can be paid to counsel to conduct its litigation. The Griffiths Committee has expressed its concern and recommended that greater resources be made available.[33] No doubt, too, the *Tradestock* defeat in 1985 has had an impact upon litigation funding and morale. One notes that only two cases were instituted in the following year.

The Commission has been hard-pressed to cope with the merger boom: in 1986-87 it examined 46 acquisitions or potential acquisitions; in 1987-88 it examined 89 and in 1988-89, some 150.[34] Trans-Tasman merger activity in connection with C.E.R. (Australia New Zealand Closer Economic Relations) has added to the burden.[35] It will be recalled that in 1977 the private right of action for merger injunction was removed. It comes as no surprise that in the 1980s the

31 *Annual Report* (1983-84), 193-4.
32 *Annual Report* (1987-88), 6.
33 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Mergers, Takeovers and Monopolies: Profiting from Competition?* (May 1989) 89-92.
34 *Annual Report* (1986-87), 15; 1987-88, 74; 1988-89, 3.
35 *Annual Report* (1988-89), 3-4.

Commission turned increasingly to administrative enforcement of the Act — enforcement through education, consultation and negotiation. That natural result was reinforced by the personal preferences of Mr Bob McComas, the second Chairman of the T.P.C., appointed in February 1985. As the *Annual Report* for 1986-87 puts it:

> The Commission continued its open-door policy of encouraging consultation between businessmen and the Commission prior to the implementation of their plans. Advantage has been taken of this policy with increasing frequency, and the outcome of the consultative process which has taken place continues to satisfy the Commission that it is a cost-efficient and generally satisfactory course to pursue.
>
> . . .
>
> Almost by definition, the process is more suitable to conduct falling within the restrictive business practices Part IV of the Act than to the consumer protection Part V. In the former part, the legal/economic nature of conduct sought to be regulated is such that (except for the *per se* proscriptions such as price fixing and resale price maintenance) differing views may legitimately be held as to whether conduct is likely to 'substanially lessen contribution', whether it represents a misuse of market power, or whether it may lead to an ability to dominate a market for goods or services.[36]

However, as Frances Hanks has reminded me, where 'differing views may legitimately be held' as to the anti-competitive character of business conduct, an alternative strategy to informal private consultation would be precisely to bring (in her words) 'the sorts of proceedings that would result in judicial rulings on the hard questions raised by the Act'.

Under Mr McComas there was, too, some shift in the Commission's priorities to emphasize the significance of the conduct of powerful firms (buyers as well as sellers), large corporations and/or those possessing substantial market power — not an easy challenge to address through court actions with limited budgets.

The McComas Commission's priorities for Part IV were expressed in the 1985-86 *Annual Report* as follows:

- to pursue vigorously the correction of the *per se* offences (sections 45 and 48 — price fixing, resale price maintenance and collective boycotts), seeking to deal adminstratively with those of a relatively small or localised character but more likely by formal proceedings where larger corporations are involved;
- in relation to section 45D (secondary boycotts) to pursue those cases which have a substantial anticompetitive effect and are not purely of an industrial character;
- in relation to section 46 (misuse of market power) to concentrate on oligopolistic situations, particularly those where it is clear that real harm is being done to the competitive opportunities of those who would otherwise challenge the market position of the powerful corporation concerned;
- to proceed in relation to exclusive dealing conduct (section 47) primarily in relation to large corporations particularly where the practice acts to inhibit or foreclose the opportunities of others to develop existing marketing systems or establish new avenues for distribution;
- in relation to price discrimination (section 49) to focus attention on companies (powerful buyers as well as powerful sellers) which possess a substantial degree of power in the relevant market;
- in relation to mergers (section 50) to deal expeditiously with all cases which come before the Commission whether by formal authorization application or informal consultation according to the following criteria.
- Section 50 will usually *not* apply where there are, after the merger:
  - at least two well matched competitors in the market; or
    if there is only one major local competitor, there remain:
  - a number of other viable local competitors with the opportunity to develop; or
  - effective import competition.
- to apply a significant effort to the compilation of guidance programs and to encourage consultation thereon and participation in their formulation where appropriate.[37]

[36] *Annual Report* (1986-87), 2.
[37] *Annual Report* (1985-86), 15-16.

Most recently the third Chairman of the T.P.C., Professor Bob Baxt, whose term commenced in April 1988, has expressed a preference for procedures generating wider 'public scrutiny', and there are signs that some new policies are being developed. It is possible to take this review of Commission policies only up to the *Objectives, Priorities and Work Program* document of May 1988 and the *Annual Report* of 1988-89. Nevertheless one can point to the following shifts of emphasis:

- a 'greater emphasis to the authorisation process in mergers with the potential for market dominance' to 'ensure that the process for assessing any net public benefits is exposed to public scrutiny and that any divestiture or other undertakings are built into the authorisation decision';[38]
- the pursuit of 'integrated, industry-wide strategies' in response to deregulation and to technological and structural change, as for instance in telecommunications, the petrol industry and the waterfront, an approach that emphasizes preventative consultation and education;[39]
- 'the provision of help and advice to other government agencies formulating and administering policies with an impact on market behaviour, especially in such fundamental areas as price competition and the acquisition or exercise of market power';[40]
- 'selective litigation to demonstrate the requirements and sanctions imposed by the law';[41]
- 'a more cost-effective policy of integrated litigation/information', building preventative education and information upon successful prosecution, rather than merely taking 'individual action against a breach of the Act'.[42]

This latest *Annual Report* reiterates the message of the previous year:

> Enforcement of the Act remains an important discipline on market behaviour but experience has demonstrated that measures to improve the operation of the marketplace and to encourage widespread volunatary compliance are often more appropriate and more cost-effective.[43]

It is plain that merger vetting and the development of the 'new work areas'[44] associated with deregulation and structural change have imposed a severe strain upon the Commission's resources. While the 1988-89 Budget 'voted significant additional resources to the Commission for its legal work',[45] the Commission is still (in accordance with general government policy) 'faced with the fact that it cannot pay legal counsel at the same rate as private litigants'.[46]

It seems, too, that the Commission is increasingly beset by doubts as to the efficacy of the court process in certain categories of case. It has criticized the inadequacy of penalties. It has repeatedly expressed its doubts as to the effectiveness of the conventional court system to handle the rule of reason

38 *Objectives, Priorities and Work Program for 1988-89* (May 1988) 5.
39 *Annual Report* (1988-89), 8-9; and see Ch. 3-4.
40 *Ibid.* 5.
41 *Ibid.* 8.
42 *Ibid.* 59.
43 *Ibid.* and see *Annual Report* (1987-88), 6.
44 *Annual Report* (1988-89), 5.
45 *Ibid.* 6.
46 *Ibid.* and see *Annual Report* (1987-88), 55.

'competition' cases without undue cost, delay and uncertainty. It advised the Griffiths Inquiry in 1988

> . . . of its concern at the role played by courts in the evaluation and adjudication of matters relating in particular to part IV of the legislation, and more specifically to provisions which contain a competition test. The history of trade practices legislation in other countries, as well as in Australia, suggests the courts may not be the most effective forums in which to evaluate marketplace laws such as the Trade Practices Act. The Commission suggested that it may be necessary to establish a different forum if, over a period of time, the courts prove unable to respond effectively to the challenges which have been given to them in dealing with these issues.[47]

The T.P.C. has certainly had some costly experiences with some of its rule of reason cases. *Tradestock* gave rise to five years of interlocutory proceedings and 17 months of hearing. The Commission became enmeshed in the *APM-Fibre Containers*[48] merger litigation, ten months of interlocutory warfare between four companies. It has yet to emerge from its attack on Arnotts' acquisition of the Nabisco biscuit business; the *Arnotts* case[49] is currently on appeal to the Full Court of the Federal Court after a trial lasting some nine months. The impact of such proceedings upon the Commission's scarce resources of money and staff is obvious.

In summary, each Commission has found its resources strained in relation to the broad spectrum of activities the authority has pursued. Each Commission has found highly selective court action inevitable. There is some room for debate as to whether the right overall balance has been struck, in view (as will be discussed in the next Section) of the characteristic strengths of public enforcement and some characteristic weaknesses of private enforcement of restrictive practices laws.

What is striking is the exceptionally limited range of court actions the Commission has instituted. As we have seen in the preceding Section, there has been an extreme concentration upon price fixing, both horizontal and vertical. R.P.M. actions are by far the largest category of case and constitute over one-third of the total causes of action instituted (*cf.* Table 6). It has been a consistent target over the whole 15 years of our survey. Price fixing under s. 45 is then the next most important category, the two together making up almost 60 per cent of all causes of action. If we go to the count of actual *cases* that were fought to a final judgment in the courts (*cf.* Table 5), 21 related to R.P.M. and 12 to price fixing under s. 45. To the end of 1989 there were only eight cases that sought to enforce the remaining prohibitions through to final judgment in the courts: one under s. 45 (primary boycott and anti-competitive agreement); one under s. 45 and s. 46 (anti-competitive agreement and monopolization); four under s. 47 (exclusive dealing); and two under s. 50 (merger).

This emphasis has resulted from a two-pronged litigation strategy: first, the pursuit of price fixing as the central form of hard core breach of the Act; and second, the pursuit of cases for their enforcement impact. As regards the latter,

[47] *Annual Report* (1987-88), 4.

[48] See, as samples: *A.P.M. Investments Pty Ltd v. TPC* (1983) A.T.P.R. 40-404; *TPC v. A.P.M. Investments Pty Ltd* (1984) A.T.P.R. 40-434; *Visy Board Pty Ltd v. TPC* (1984) A.T.P.R. 40-435.

[49] *TPC v. Arnotts Ltd* (1990) A.T.P.R. 41-002 (1990) A.T.P.R. 41-010.

the philosophy is to fight cases 'to win' and to secure as heavy sanctions as the Act will allow. What is sought is a demonstration of an 'Act with teeth', victories that can be widely publicized and that can serve as a springboard for educational and preventative work.

With these objectives, the emphasis is upon enforcement of the *per se* proscriptions of the Act rather than enforcement of the provisions governed by a rule of reason, *i.e.* provisions requiring the application of tests of 'substantial lessening of competition', 'misuse' of market power, the creation or enhancement of market 'dominance'. What this means is that the public enforcer has shown rather limited interest in bringing cases that would clarify and develop the law of prohibited practices, in the sense both of interpretative rules and processes of proof.

We turn now to the systematic economic analysis of the private enforcement of public law.

5. *PRIVATE ENFORCEMENT AND PUBLIC LAW*[50]

Traditional civil litigation is concerned with relations between persons. The evidence is thrown up by a disagreement between the parties, invariably a small number of persons. Private litigation is concerned to settle disputes between private parties about private rights.[51] However in trade practices litigation these private rights have been granted by the Parliament to implement the objectives of public law. From the viewpoint of the plaintiff it is fortuitous that one person's complaint may be vindicated by policy regarding the desirable functioning of markets that make up the total economy. While traditional civil litigation is concerned with relations between persons, private restrictive practices litigation is concerned with the relations between persons and the economy.

From the beginning it has been generally accepted in Australia that the Act overall (encompassing both restrictive practices and consumer protection provisions) aims to promote effective competition within its sphere of operation. The ultimate objective has been taken to be the achievement of economic efficiency and complementary social and political ends (such as the promotion of business opportunity, the promotion of honesty in trading, and consumer sovereignty).

In introducing the 1986 amendments to the Act the Attorney-General stated:

50 The approach in this section has been influenced by Chayes, A., 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harvard Law Review* 1281; Chayes, A., 'Public Law Litigation and the Burger Court' (1982) 96 *Harvard Law Review* 4; Scott, K. E., 'Two Models of the Civil Process' (1975) 27 *Stanford Law Review* 937; Schwartz, W. F. and Tullock, G., 'The Costs of a Legal System' (1975) 4 *Journal of Legal Studies* 75; Posner, R. A., *Economic Analysis of Law* (3rd ed. 1986) Ch. 7, 22; Ackerman, B. A., *Reconstructing American Law* (1984); and Cappelletti, M., 'Vindicating the Public Interest Through the Courts: A Comparativist's Contribution' (1976) 25 *Buffalo Law Review* 643 and variants noted in n. 55.

51 Of course I exaggerate to make a point. There is a public element in nearly all private litigation. It is a question of degree. *Cf.*, too, Ackerman, *op. cit.* 63, who writes of 'the dim boundary that separates private from public law in the activist state'.

It should be noted that the term 'public law' is here used with a somewhat broader connotation than is sometimes the case, to encompass the clarification, working out and implementation of statutory or constitutional policies. The focus is upon public law as regulatory law.

> The Trade Practices Act plays an important role in ensuring that the maximum benefits are obtained through an efficient allocation of our national resources, as well as protecting the interests of the consuming public and reputable businesses. The Government attaches great importance to ensuring that the Act is effectively and appropriately achieving its dual aims of promoting efficiency through competition, and thereby ensuring goods are provided to the consumer at the cheapest price, and providing consumers and business people with an appropriate measure of protection against unscrupulous traders.[52]

The High Court in *Queensland Wire Industries* gave strong confirmation to this public law character of the Act. The Court's comment on objectives was confined to s. 46. Nevertheless that section defining liability for misuse of market power is so central to the design of the Act that it appears the words can be given wider application. Mason C. J. and Wilson J. said:

> . . . the object of sec. 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end.[53]

Deane J. said:

> . . . the essential notions with which sec. 46 is concerned and the objective which the section is designed to achieve are economic and not moral ones. The notions are those of markets, market power, competitors in a market and competition. The objective is the protection and advancement of a competitive environment and competitive conduct . . .[54]

The language is forthright.

Cappelletti has argued[55] that specially designed forms of legal procedure are required if public interest law is to be implemented through the ordinary courts. The traditional private right of action is inadequate.

It is instructive to follow his argument a certain distance. He finds the source of public interest law in what he terms the 'massification' of economic and social relationships, interests, and actions in contemporary society. These become 'collective'. Injuries, and corresponding rights to protection, have become 'diffuse'.

> . . . more and more frequently the complexity of modern societies generates situations in which a single human action can be beneficial or prejudicial to large numbers of people, thus making entirely inadequate the traditional scheme of litigation as merely a two-party affair. For example, false information divulged by large corporations may cause injury to all who buy shares in that corporation; an antitrust violation may damage all who are affected by the unfair competition; the infringement by an employer of a collective labour agreement violates the rights of all his employees; the imposition of an unconstitutional tax or the illegal discontinuance of a social benefit may be detrimental to large communities of citizens; the discharge of waste into a lake or river harms all who want to enjoy its clean waters; defective or unhealthy packaging may cause damage to all consumers of these goods. The possibility of such mass injuries represents a characteristic feature of our epoch.[56]

He concludes that:

> The 'individual standing' solution is manifestly insufficient. If the individual 'personally aggrieved' is allowed to sue merely on his own behalf, the diffuse interest in most cases will not find adequate protection. Typical is the case of the consumer.[57]

52 *Parliamentary Debates*, House of Representatives 19 March 1986, 1626; quoted by the Griffiths Committee, *op. cit.* 9.

53 *Queensland Wire Industries Pty Ltd v. The Broken Hill Proprietory Co. Ltd* (1988) A.T.P.R. 40-925, 50,010.

54 *Ibid.* 50,011.

55 *Op. cit.* 643. The latest presentation of these themes is in Cappelletti, M., *The Judicial Process in Comparative Perspective* (1989) 268. See also the version in Cappelletti, M. and Garth, B., *Access to Justice: Emerging Issues and Perspectives* 3 (1979) 515. All references in this paper are to the 1976 version cited in n. 50.

56 'Vindicating the Public Interest Through the Courts' (1976) 647.

57 *Ibid.* 651.

He discusses in some depth the newer solutions to this problem (in addition to the Attorney-General):

(i) the 'Specialized Governmental Attorney General', essentially specialized government agencies,
(ii) the 'Private Attorney General', exemplified in representative and class actions and in the intervention of private organizations, and
(iii) 'Combined' or 'Multiple' Solutions, as with *parens patriae* suits and follow-on actions.

The analysis offers a stimulating point of departure for the subject-matter of this paper. First, does the Cappelletti characterization accurately capture the public interest character of a restrictive practices law? Second, granted that the traditional private right of action is inadequate or incomplete, what nevertheless might be its contribution, and how can that be enhanced? What is its relationship with the 'Specialized Attorney General', in this instance the T.P.C.? Can the private litigant in Australia play something of the role of the Private Attorney General?

For Cappelletti, it seems, the problem posed by public interest law is essentially the definition and protection of 'group interests'. His focus is upon 'group' harms that, in principle at least, could be remedied by an appropriately designed class action. His examples relevant to the present context would be overcharging by an 'abusive monopolist' or cartel.[58]

> More and more frequently, because of the 'massification' phenomena, human actions and relationships assume a collective, rather than a merely individual, character; they refer to groups, categories, and classes of people, rather than to one or a few individuals alone. Even basic rights and duties are no longer exclusively the individual rights and duties of the 18th-or 19th-century declarations of human rights inspired by natural law concepts, but rather meta-individual, collective, 'social' rights and duties of associations, communities, and classes.[59]

But the public interest in an effective restrictive practices law goes beyond these considerations. What is distinctive about restrictive practices problems is not so much that the economic actors may be large corporations, or that a particular business practice may impinge upon transactions with large numbers of customers and suppliers, but rather that the business practices impact upon the functioning of the economic system, conceived of as a network of interrelated activities and transactions. The stage upon which the conduct takes place is the economy, conceived of (as economists say) as a general equilibrium system. The ultimate decision-making units are firms and consumers, but their transactions take place in markets, and it is the functioning of these markets, each in relation to the functioning of others, that determines the allocation of resources and economic performance. It is a market system.

It follows that the impact of competition laws upon the functioning of the economy and upon consumer welfare is fundamental. Indeed, one can ask whether there is any regulatory law which has a more powerful impact upon the functioning of the total economy.

It also follows that the social utility of any restrictive practices court action,

[58] *Ibid.* 653.
[59] *Ibid.* 646.

whether public or private, should be found in its impact upon the functioning of the economy, and the promotion of competition in its constituent markets. Sometimes a large effect will come from the impact of a judgment upon the functioning of the 'relevant market or markets', part of the subject-matter of the litigation. The markets may be large or strategically placed within the economy. Merger litigation can be especially important here. More often — and this is a fundamental feature — the impact will come from the general deterrence and rule-making that flow from the judgment. Either way, the effects of the judgment will be of a widespread character by reason of the interconnections that exist between elements of the economic system and not just by reason of some group interests immediately involved.

What, then, is the role of the private enforcer? We note immediately that his or her rights are not intrinsic but instrumental. For it must be the public interest in the benefits from competition that creates them and governs their implementation.

The products of the litigation process in general are punishment and deterrence, compensation, conflict resolution, and rule-making and elucidation of the law. In restrictive practices litigation, the private party seeks conflict resolution, specific deterrence (by way of injunction) and compensatory damages. While any damages awarded will be fashioned as compensation for personal loss, the injury results not from a private 'wrong' but from breach of the applicant's legitimate expectations regarding the social and economic order — the business code. In Australia, the important private remedy is not damages but the injunction or other order, in effect the regulation of business conduct by fiat (backed up by proceedings for contempt of court).

The private action thus has some immediate regulatory impact, and reform of respondent's conduct can make some immediate contribution to consumer welfare and business opportunity. But competition law is regulatory law in a more fundamental and on-going way, not so much in the sense of imposing requirements upon the identified person as in the sense of fashioning a system of constraints upon what a person may lawfully do in his or her business dealings. Any successful litigation, whether public or private, has a wider deterrent effect, and may contribute to rule-making and elucidation of the law. There is, in short, in the economist's terminology, a capacity for private litigation to generate a positive externality.[60]

Areeda and Turner have written of the United States:

[60] It is essential for understanding the argument in the next few pages of text to appreciate that the concept of 'externalities' is not, as is sometimes supposed, merely that of an 'advantage' or 'disadvantage'. To supply some definitions: externalities, sometimes referred to as 'spillovers' or 'third party effects', may be positive or negative. A positive externality occurs when one person (engaged in production or consumption) confers a benefit upon another without receiving a reward: the social benefit of an activity is greater than the private return. For instance, the use of soil conservation by one farmer may assist neighbouring properties. A negative externality occurs when one person imposes a cost upon another without making compensation: the social cost from an activity is greater than the private cost. The significance of this is that there is thus a divergence between private and social costs and benefits, with private decisionmakers inappropriately motivated to achieve efficient patterns of production and consumption.

> Notwithstanding the increasing volume of private antitrust suits, government-initiated actions are the key to enforcement of the antitrust laws. They are undertaken in the public interest, addressed to more significant restraints, and backed by substantial resources.[61]

Yet it may well be argued that this is to down-play the role of private enforcement. While, as we have seen, the typical private action is a case in narrow compass, it may yet throw up issues of public importance. This is precisely because of the competition context in which the alleged violation occurs. (There may also arise constitutional, jurisdictional and evidentiary issues.)

So, in *Queensland Wire Industries* a complaint resting upon the fact of denial of supplies of Y-bar by B.H.P. to Q.W.I. eventually gave rise to the elucidation of most fundamental principles relating to what constitutes misuse of market power and how it can be proved. So, in *Radio 2UE* the Full Court of the Federal Court indicated its approach to a characterization of price-fixing. So, in *Outboard Marine v. Hecar*, another case turning on withholding of supplies, the Full Court of the Federal Court enunciated a doctrine of competition as 'referring to a process or state of affairs in the market'[62] and drew a strong distinction between the impact of the alleged exclusive dealing upon 'the competitive position of Hecar as an individual retailer'[63] and the effect upon competition in the market. We note that rule-making and general deterrence are inseparably linked.

The public interest status of private litigation was explicitly recognized by Deane J., when still a judge of the Federal Court, in ruling that the standing afforded to 'any person' to move for an injunction under the Act by s. 80(1)(c) is to be taken literally:

> It is patently desirable that the legislature does not assume that traditional rules of the common law relating to *locus* to institute civil proceedings are universally appropriate to circumstances where laws are increasingly concerned with the attainment and maintenance of what are seen as desirable national economic and commercial objectives and standards and with the protection not only of the life and liberty of the citizen but of the environment in which he lives and of the quality of the life which he may lead. There is little merit in approaching the construction of a statute on the basis that it is to be presumed that the Parliament has in fact ill-advisedly made such an assumption. There is no merit in the erection of a curial ambush of shibboleths in which even a legislative intent evinced by words as clear as those used in s. 80(1)(c) of the Act would lie entrapped.[64]

Private enforcers have their characteristic advantages — their personal motivation, their knowledge of the immediate facts, their varied outlooks — even, it seems in Australia, their access to litigation budgets. Public institutions, such as the T.P.C., may suffer from bureaucratic blindness and some political pressure. In a pluralistic society, such as our own, it is clearly desirable that diversity of viewpoint can be expressed in the litigation process.

This is not, however, to make the private litigant the hero or heroine of our paper. The private suit has clear limitations — and indeed dangers. Strong public enforcement of the law has an essential role to play. It is a theme of this paper that where restrictive practices have an immediate impact that is diffuse, *e.g.*

61 *Op. cit.* 131.
62 (1982) A.T.P.R. 40-327, 43,983.
63 *Ibid.* 43,984 and 43,990.
64 *Phelps v. Western Mining Corp.* (1978) A.T.P.R. 40-077, 17,770.

upon a body of consumers or a class of enterprises, no private litigant will be sufficiently motivated to proceed.

Further, there may be problems of concealment and difficulties of proof; consider, for example, 'arrangements and understandings' between numbers of participants such as under-cover price-fixing. The sheer cost of discovery and legal proof may be enormous — and open only to a sufficiently endowed public enforcer who discerns, moreover, not only the immediate pay-off from a successful case but the deterrent impact upon the economy at large.

Ideally, too, the public enforcer can take the larger view, both of the impact of the conduct upon the functioning of the economy, and of the impact of the case upon the development of the law. The public enforcer should be well versed in the inter-relationships between various facets of the law, and can develop an enforcement strategy and seek to reflect, in case selection, policy values of the society and its legislators. It can retain specialized resources and reap economies of scale. While the Commission may lack inside information, it has important investigatory powers under the Act (s. 155); and generally speaking one would expect discovery of a public enforcer to be less bounded than for a private.

It follows that the social benefit from pursuit of a case can well be greater than the private benefit. There is thus an 'incentive gap'[65] for private plaintiffs, viewed from the stance of the public interest, which will be the greater (to express the point systematically) the more diffuse the impact of the injury on consumers and businesses; the more important the breach for the functioning of the economy as a whole; the greater the costs of discovery and proof; and the more significant the case for the clarification and development of the law and its contribution to a system of deterrence. In Australia the incentive gap is magnified by the uncertainty of the principles governing the computation of damages, by cost rules that fail to indemnify, and by fee rules that require the litigant, rather than the lawyer, to bear the risks.

It is plain that the incentive gap is not a constant but shifts according to developments in the law, changes in the economy, and changes in cost and fee rules. To take a very recent example of this process, *Queensland Wire Industries* has effected such a clarification of the law relating to 'misuse of market power' that many s. 46 matters can now be expected to fall into the simpler rule of reason category, with private parties encouraged to litigate at least to the interlocutory injunction stage.

But effective enforcement requires not only the pursuit of a case in the courts; there is also the requirement of efficacy of remedy.[66] The 'private' remedies granted to private parties must also be assessed by reference to their contribution to the public, regulatory character of the law — in short, to the system of

[65] This is to appropriate Scott's suggestive phrase, *op. cit.* 939, although the considerations here addressed go beyond his discussion which is focused upon problems of multiple injury.

[66] See Areeda, P. and Turner, D. F., *Antitrust Law* II (1978), Ch. 3; Elzinga, K. G. and Breit, W., *The Antitrust Penalties* (1976); Breit, W. and Elzinga, K. G., *Antitrust Penalty Reform* (1986); Posner, R. A., *Antitrust Law* (1976) Ch. 10 and *Economic Analysis of Law* (3rd ed. 1986) Ch. 7, 22; and Schwartz, W. F., *Private Enforcement of the Antitrust Laws* (1981).

deterrence. There is no doubt that a successful prosecution by the T.P.C. carries a special stigma. There is no doubt, too, that the Commission is especially qualified to draw a court's attention to the implications of any far-reaching injunctions or orders for the functioning of the economy (*e.g.* divestiture) and for the development of a system of deterrence. On the other hand, the private party is at no disadvantage when the remedy sought is a relatively confined injunction; indeed it may have an advantage, at times, in its understanding of the business realities that should be addressed.

However the private damages remedy may well be inadequate to achieve the wider public purposes of the law: the damages awarded will be related to the private loss of a single applicant rather than to the profit reaped by the breaching respondent or to the injury imposed upon society as a whole.[67] Nor, since it is single damages that will be awarded, is there any possibility of enhancement of the monetary award to reflect ease of escape (through opportunities for concealment and problems of proof). Hence in this case we can say there will be a deterrence gap (as well as the incentive gap just identified).[68] There is here an important contrast with the fine or pecuniary penalty pursued by the public enforcer, a penalty which can be fashioned, at least in principle, in accordance with the requirements of the deterrence objective.[69]

All this is to say that public enforcement has the characteristic function of pursuing litigation that yields a pure 'public good' (in the economist's technical sense):[70] in this context, litigation that attacks group harms; and/or that seeks to make an important contribution to the functioning of the economy as a whole; and/or that seeks to make a significant contribution to the overall regulatory system by way of deterrence and rule-making.

[67] The argument is expressed in this way (*i.e.* in the alternative) to reflect the two alternative approaches to deterrence currently in vogue. The economics of law literature recognizes two main approaches: 'optimal deterrence' and what I will term 'absolute deterrence'. An objective of optimal deterrence would seek to penalize the party in breach by imposing an expected 'price' upon its conduct that reflects the costs imposed on society as a whole. This is the line of thinking that follows the pathbreaking contribution of Becker, G. S., 'Crime and Punishment: An Economic Approach' (1968) 76 *Journal of Political Economy* 169. See Posner, *Antitrust Law* 221-7 and *Economic Analysis of Law* 205-212. The alternative approach would seek to make the breaching conduct unprofitable, with the objective of achieving complete observance of the law. *Cf.* Cooter, R., 'Prices and Sanctions' (1984) 84 *Columbia Law Review* 1523.

[68] On the system of definitions and perspective adopted in this paper, the 'deterrence gap' and the 'incentive gap' are not (as might initially be supposed) two sides of the one coin, although they are related and overlap. The point is that the social benefit from a law-suit (which is relevant to the incentive gap) may well be greater than the benefits that flow from deterring the respondent's conduct (which is relevant to the deterrence gap), depending upon the externalities that might arise.

[69] Posner would add a further benefit to public enforcement, the possibility (by design and as a policy matter) of systematically varying the size of the monetary penalty and expenditures upon enforcement in relation to each other. The latter affects the probability of 'apprehension and conviction' (what I have referred to as 'ease of escape'), so that one can think of a trade-off between severity of penalty and probability of conviction, and adjust them concurrently in an optimal way. Posner, *Economic Analysis of Law* 559-61. See also Schwartz *op. cit.* 8-15. This possibility has been neglected in the text for the reason that I do not judge it to be very practical in the Australian context.

[70] The 'public good' concept adds both clarity and power to the analysis. A public good (as distinct from a private good) has two related characteristics: 'non-rivalrous consumption' and 'exclusion difficulties'. As to the first, consumption of the good by one person does not leave any less for others; *i.e.* the marginal cost of supplying an additional individual is zero (or, at least, very low). As to the second, it is difficult, if not impossible, to exclude additional persons from enjoying the good once it is produced; *i.e.* there is a 'free-rider' problem that makes private provision of the good

The burden for the public enforcer is lightened to the extent that private litigation contributes to the achievement of some of these ends — *e.g.* in the manner of *Queensland Wire Industries*. But private litigation will do so only as an incidental spillover (or 'externality') to its own, private purposes.

This private motivation would not matter (*cf.* Adam Smith's invisible hand) if private litigation ranged widely over all classes of case — and achieved, besides, a remedy that exhausted the requirements of the public interest. But it will not. Necessarily it will neglect those classes of case for which the potential private reward is significantly less than the potential social benefit: group harms, breaches subject to an extended rule of reason, conduct requiring costly proofs: *i.e.* price fixing, anti-competitive agreements, some collective boycotts, some exclusive dealing, some misuse of market power, and mergers and acquisitions. There is a characteristic bias in private enforcement. Much reliance upon private enforcement would create an enforcement gap.

We note immediately the strengths and weaknesses in the T.P.C.'s actual enforcement strategy and achievements to date. There is strength in the Commission's unwavering focus upon the competitive functioning of the economy as a whole; in its pursuit of horizontal price fixing; and in its awareness of the 'enforcement impact' of successful prosecution. But the systematic analysis of this Section does point up some weaknesses, namely the narrow range of cases brought and the comparative neglect of the rule-making pay-off from a wisely selected range of cases, especially those requiring the fashioning of a rule of reason. The Commission seeks to demonstrate the enforcement capability of the Act, in a word to achieve deterrence. But, for other than the *per se* prohibitions, rule-making and deterrence go hand in hand. If the Commission is unable, for whatever reason, to seek the clarification and development of the law governing the rule of reason, the gap is unlikely to be filled by private parties.

The approach in this article is that of the economist, trained to seek out and to recognize positive and negative externalities — 'spillover effects' — that break the congruence between private and social values. Where there are large positive externalities arising from an activity in relation to private gain, a private party may be insufficiently motivated to pursue the activity. Hence the strong role that exists for the T.P.C. as enforcer of the Act, as has just been argued. Where there are negative externalities arising from an activity, the private party may press on

unprofitable. Popular examples of a public good in the textbooks are the provision of defence for the nation as a whole; or the erection of a lighthouse to guide ships in a much-travelled waterway. In practice, products may exhibit public goods characteristics to a varying extent: the more extreme the public goods character of a product, the greater the need for public provision (or public recompense of the private provider). However activities pursued by private persons for private profit may give rise to externalities (or spillovers) of a positive kind, and so lighten the burden for the public provider.

It is clear that the public enforcer has a special role in pursuing litigation that yields a 'public good' in either of two senses. First, the elimination of a 'group harm', such as price fixing, is analagous to the provision of a lighthouse. Second, just as defence is undertaken for the protection of the realm, so the prosecution of an 'important' breach and prevention of an 'important' merger, or the pursuit of deterrence and rule-making, may be undertaken for its impact upon the functioning of the economy. In both cases, the social benefit from enforcement will exceed the private gain to potential private litigants.

regardless, for he or she acts to pursue and protect his or her own interests.

Turning to the negative externalities that may emerge it is a question, then, whether the private litigant will always act, in Chayes' felicitous phrase, in 'the interests of absentees'.[71] This is a question of fact and circumstance. Again as Chayes says, as regards fact-finding:

> If the party structure is sufficiently representative of the interests at stake, a considerable range of relevant information will be forthcoming.[72]

And it should be added, a similar point can be made about the range of legal issues that counsels' argument will display.

Nevertheless under the adversary system the 'facts' are what are volunteered by the parties under pressure of the contest; the submissions centre upon those principles that seem relevant to winning or resisting the opposition's case; and the tactics consist, in part, in taking full advantage of procedural rules and the formal rules of evidence. While costs and the cost rules (as presently operating) might inhibit blatant time-wasting in court, they do not necessarily rule out the profit to be made from obfuscation and delay (uninformative pleadings, refusal to make admissions, abuse of discovery). It is a question, too, of the size of the stakes at issue and the value of delay. Moreover the court's conduct of proceedings is not invariably well attuned to the requirements of public law.

In principle, a discrepancy between the private costs borne by the parties and the social costs imposed upon the community can arise in a number of ways: first, from the immediate costs of error in the judgment; second, from the formulation of a bad rule which has general applicability and creates perverse incentives for the business community; third, from undue delay in litigating the case of a meritorious applicant or respondent, and in implementing a socially valuable decision; and fourth, from the wasteful use of court resources provided at negligible cost to the private litigants. The waste of court resources is to be thought of not just in terms of dollar costs (the provision of physical resources, the annual vote for salaries and maintenance) but also in terms of litigants excluded from the scarce court facility, or forced to move back further in the queue. To some extent these social costs arise from the adversary system itself. If the objective is too narrowly to win, the public enforcer may not be immune from the pressures of the adversary process.

6. *POLICY ISSUES AND IMPLICATIONS*

The focus of this final section is upon the implications for restrictive practices litigation policy in Australia at this time.

One very general point emerges. In policy discussions of Australian restrictive practices law it is desirable to pay more attention to enforcement and remedies as distinct from the statutory requirements for breach. The Griffiths Committee's careful survey of enforcement policy in relation to ss. 46 and 50 of the Act is a welcome departure from the customary emphasis.

71 'The Role of the Judge in Public Law Litigation' 1294.
72 *Ibid.* 1308.

Both public and private enforcement of the Act are important. They play different and complementary roles. The T.P.C. itself is well aware of this fact. A wider public appreciation of the point should give rise to a substantial increase in Commission resources.

It is not assumed that more enforcement, more litigation, is always desirable. Enforcement of the law consumes real resources. In refusing to pursue particular cases there can be wisdom in restraint.[73] One would not wish to push enforcement activity beyond the level at which the marginal social benefit exceeds marginal social costs, nor to pursue particular cases for which the net social benefit is doubtful. But one would judge that in Australia at this time, on any relevant concept of benefit,[74] we fall short of what is desirable. The Commission has doubted the productivity of some types of public enforcement in the absence of higher penalties and of reforms to practice and procedure in the courts. Granted the problems, it is difficult to resist the conclusion that there is room for more public enforcement and a wider spectrum of cases selected.

Let there be no misunderstanding. It is not suggested that cases should be brought by the T.P.C. merely to test the law. Private parties would have a legitimate grievance if they were to be regarded as guinea-pigs for T.P.C. testing.[75] But some case selection is inevitable. What is urged is that in its selection of cases the Commission pay regard to a number of criteria: competitive impact and significance, feasible remedy, and development of the law and of a system of deterrence.

There is evident widespread community concern regarding the expense and delay associated with the civil justice process, a concern that is evidenced by numerous inquiries and reports.[76] One looks forward, in particular, to the findings of The Cost of Justice Inquiry of the Senate Standing Committee on Legal and Constitutional Affairs currently under way. One would hope that the viewpoint adopted is not restricted to considerations of private access to the law but is enlarged to encompass the contribution that the civil justice system can make to the development and enforcement of public law.

There should be more systematic research upon the public policy implications of various alternative approaches to computing pecuniary penalties and damages. The level of analysis by both practitioners and scholars, in the specifically Australian context, might fairly be described as primitive.

Current debate on the desirability of enlarging the representative action to

[73] *Cf.* Areeda and Turner, *op. cit.* 36-41. And note (37): 'When a substantive rule is deemed truly wise only if applied to "significant" instances, the government plaintiff is more likely than the private plaintiff to withhold suit in lesser instances.'

[74] The reference is to alternative concepts of deterrence (and associated rule-making), whether 'optimal deterrence' or 'absolute deterrence'. See n. 67.

[75] I owe this choice phrase to Ron Bannerman.

[76] The Cost of Justice Inquiry of the Senate Standing Committee on Legal and Constitutional Affairs; Victorian Civil Justice Committee, *Preliminary Study* . . . (1982) and *Reports* (2 vols.) (1984); Cranston, R. and Others, *Delays and Efficiency in Civil Litigation*, A.I.J.A. (1985); Law Reform Commission of Victoria, *Access to the Law: the Cost of Litigation* (1990); and various inquiries of the Victorian Attorney-General *e.g. The Higher Court System in Victoria* (1989) and 'Alternative Dispute Resolution' (Discussion Paper, May 1990).

encompass wider group procedures (class actions) and some form of contingency fee could be informed by some of the considerations discussed in this paper. The Australian Law Reform Commission has indeed recommended that wider group procedures and a very modified form of contingency fee be available under the Trade Practices Act, but the focus of their discussion and attention, so far as trade practices are concerned, has been upon consumer protection.[77]

The recommendation of the Griffiths Committee that 'the private right to injunctive relief in relation to mergers be re-introduced' is supported by the argument of this paper, as is their qualification that 'takeover targets and associated persons should be excluded from this right'.[78] With the current standing rules and the problems associated with divestiture, the T.P.C. has become for most practical purposes the sole enforcer of the merger law.

Paradoxically, perhaps, the very importance of the private action in the restrictive practices field points to the necessity of re-designing some of its features.

Private enforcement of the restrictive practices law is so important that much careful thought should be given to ways in which the traditional adversary process and rules of evidence might be modified to enhance the social utility of the private action. For I judge that the negative externalities that might flow from private litigation in this area come largely from some weaknesses in the legal process itself in handling public law litigation. What is required is a thorough-going and systematic acceptance of the public law status of restrictive practices laws. Moreover, restrictive practices law is public law of a distinctive type: it deals with economic subject-matter.

What is required is that the relevant facts be found; that the relevant arguments be mounted; and that the judgment be informed by an appreciation of the economic content of the issues and of the regulatory impact of the decision, both upon the conduct of the parties to the dispute and upon the on-going structure of incentives and constraints in the wider economy.

This suggests that one should critically re-examine the various procedural steps in the litigation process. It may be, as has already been said, that many trials will adequately protect 'the interests of absentees' but it is suggested that serious consideration be given to the following techniques.

First, restrictive practices litigation lends itself to less reliance upon the traditional adversary process and more upon 'managerial judging', not only in clarifying the issues but also in suggesting gaps in the evidence and argument and, indeed, curtailing super abundance of evidence and argument. If this be considered too extreme a suggestion, let it be re-iterated that it is the public interest in the benefits from competition that creates the private right, and that the court system is a very costly 'free good'. Where the public law aspect of the litigation is paramount, it is an extreme position to say that the traditional

[77] Report No. 46, *Grouped Proceedings in the Federal Court* (1988). See also South Australia, Law Reform Committee, Report No. 36, *Class Actions* (1977); Law Institute of Victoria, *Funding Litigation: The Contingency Fee Option* (1989).

[78] *Op. cit.* 69.

objective of the civil legal process as 'settling disputes' — and on the parties' terms — should be the prevailing value.

Second, the judge's role could be enhanced by a greater utilization of court-appointed experts, or by the use of court assessors and lay members, with training in economics. While these proposals are often canvassed as a means of expanding a judge's technical expertise, their more important role could well be as a method of securing *impartial* economic advice, not only on the case as presented but also on the relevance of fact-finding to the issues.

Third, consideration should be given to the use of counsel assisting the court in a suitable matter, a technique that in my view would hold considerable promise in the restrictive practices field in Australia.

Nevertheless, the settlement of commercial disputes expeditiously and impartially is a value, and one would hesitate to canvass procedural innovations that might unduly protract the trial. Thus, while an administrative body, such as the Prices Surveillance Authority, might routinely receive submissions and evidence from third parties, including public bodies, such an approach might well destroy the private action.

All this is to go over some old ground, albeit from a somewhat different perspective. One novelty only I raise for consideration; this is that the T.P.C. be granted the status of intervener, in an *amicus curiae* role, as of right in any restrictive practices action. That role would restrict it to making submissions on the law and its applicability to the evidence and issues.

It will be remembered that when the *Queensland Wire* case reached the High Court, the T.P.C. sought leave to intervene and handed up notes of the submissions it would wish to make. The Court refused the application for the reasons given by Toohey J.:

> The Commission did not seek to intervene before *Pincus J.* or the Full Court. Section 163A of the Act empowers the Commission to intervene in a proceeding instituted under Pt IV (other than a matter arising under sec. 48) where declaratory relief is sought of the kind mentioned in sec. 163A(1)(a). No such relief is sought by QWI. Counsel for BHP and QWI opposed the intervention of the Commission, largely on the ground that submissions the Commission had indicated it wished to make were based on factual arguments not urged in the courts below by QWI and not reflected in findings of fact made by those courts. In my view leave to intervene should be refused for two reasons. The first lies in the objection advanced by BHP and QWI to which reference has just been made. The second is that submissions by the Commission as to the proper construction and operation of the Act were largely taken up by counsel for QWI and have been dealt with in these reasons. In the circumstances, no particular purpose would be served by acceding to the Commission's application.[79]

The Commission has a special responsibility in discerning the long-range and fundamental implications of court decisions, and of understanding the interactions between them. Interventions in big cases could serve the function of exposing the fundamental issues of public importance. It might be added that for a public body with a very limited budget such an occasional intervention could be a very cost-effective technique in the pursuit of its obligations.

[79] (1988) A.T.P.R. 40-925, 50,025.