THE TRADE PRACTICES INJUNCTION – AN EMPIRICAL STUDY OF ITS USE BY THE TRADE PRACTICES COMMISSION

JOHN DUNS*

"To me a major disappointment in Commission enforcement has been the inability to move quickly by way of injunctive relief."

Dr. W. Pengilly,
Trade Practices Commission member, 1974-81[1]

INTRODUCTION

Apparently following United States and Canadian models, Australian legislatures have shown an increased willingness to employ the injunction as a sanction in commercial legislation. This has been particularly noticeable since the introduction of the injunction into the *Trade Practices Act* in 1974. Injunctions in almost identical terms to section 80 of the *Trade Practices Act* have been included, for example, in the *Companies (Foreign Takeovers) Act* 1975 (Cth) (s. 35); the *Companies (Vic.) Code 1980 (s. 574); the Securities Industry (Vic.) Code* 1980 (s. 149); and the *Futures Industry (Vic.) Code* (s. 157). Use of the injunction by the legislature is one thing, however its "use" by enforcement agencies and private plaintiffs may be quite another.[2] It is the aim of this article to examine how the injunction and other personal orders available under the *Trade Practices Act* are used by the Trade Practices Commission (the TPC), the body responsible for enforcing the *Trade Practices Act 1974* (Cth) (the Act).

The TPC has a range of sanctions available to it in the event of a breach of the Act. If there is a breach of the restrictive trade practices provisions in Part IV, the TPC can apply to the Federal Court for a pecuniary penalty, an injunction or, in the case of a breach of the merger provisions of section 50, a divestiture order.[3] In the event of a breach of the Part V consumer protection provisions, the TPC has a choice of fine, injunction, and corrective advertising or public disclosure order.[4] Following the 1986 admendments to the Act, the TPC can now also seek a range of orders under sections 87 and

* LLB.(Hons) B.Com.(Melb). Lecturer, Faculty of Business, Warrnambool Institute of Advanced Technology.

[1] *Trade Practices Commission Annual Report 1980–81*, Schedule XI, para. 1.6.

[2] Cf. M. Ball and L. Friedman, "The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View" (1965) 17 *Stanford Law Review* 197, 199.

[3] See sections 79, 80, 81.

[4] See sections 79, 80, 80A.

87A including a "representative action" on behalf of consumers and an interim injunction to "freeze" a defendant's assets prior to a hearing. This range of remedies vests considerable discretion in the TPC and to a significant extent the article is concerned with how this discretion is exercised. It has been pointed out that "almost nothing" is known about how such discretion is exercised in Australian regulatory bureaucracies.[5] The study by Grabosky and Braithwaite of the enforcement strategies of Australian business regulatory agencies is admittedly "sketchy" on the TPC and makes no attempt to provide a detailed analysis of the use of the injunction.[6]

In order to assess the use of the injunction by the TPC, all TPC injunction applications from 1974–75, the first year of the Act, until 1985–86 have been analysed. Applications made under section 80A and 81 have also been included. The total amount of cases examined in which an injunction was sought was 68. Comparisons will be made with other TPC court actions and, where appropriate, with overseas studies. The principal source of information has been the TPC Annual Reports. Information on the injunction was obtained by gathering and analysing all relevant material on injunctions contained in the TPC's Annual Reports. These reports provide details of TPC court actions and often also give some indication, either explicitly or implicitly, of the TPC's attitude and approach to the use of the different sanctions. But the Annual Reports do not provide the complete picture. They do not always give sufficient detail of the cases, nor do they necessarily reflect the practical experience and attitudes of those staff responsible for dealing with and recommending the use of injunctions. To supplement this data, interviews were conducted with staff at the Canberra and Melbourne TPC offices and also at the Commonwealth Solicitor-General's office in Canberra. These staff were generally able to fill in gaps left in the Annual Reports, either from their own knowledge of the cases or from TPC files. They also provided an insight into the TPC's attitude toward the use of the injunction. Finally, court decisions, TPC publications on enforcement policies and priorities[7] and the TPC Staff Manual were also used to fill out the picture.

The article takes up three main areas of enquiry. The first looks at the frequency with which injunctions and other personal orders have been used by the TPC since the commencement of the Act. Comparisons are made with the TPC's use of prosecutions. The TPC's use of and attitudes toward interim injunctions are also examined. Where appropriate, comparisons are made with United States studies. Explanations are sought for yearly variations in the TPC's injunction applications. Secondly, the circumstances under which the TPC chooses to make an injunction application in preference to prosecution are examined. An analysis is made according to the sections under

[5] P. Grabosky, "Corporate Crime in Australia: An Agenda for Research", (1984) 17 *Aust. and NZ Journal of Criminology* 95, 99.

[6] P. Grabosky and J. Braithwaite, *Of Manners Gentle. Enforcement Strategies of Australian Business Regulatory Agencies (1986) 230.*

[7] See *Restatement of Future Directions of TPC Consumer Protection Work*, TPC, May 1986 and "Objectives, Policies and Priorities in Relation to Restrictive Trade Practices": An Address by W. R. McComas, Chairman of the TPC, to the Rotary Club of Sydney on 14 January 1986.

which injunctions have been sought and Part IV applications are compared with Part V applications. Injunction cases are also examined with a view to finding common characteristics of such applications. Finally, the outcomes of TPC injunction cases are considered. These cases are analysed according to their result and are then compared with prosecution cases.

Two matters which are outside the scope of the article should be noted. While relevant to the practical workings of the injunction in this context, they would constitute significant empirical studies in their own right. The first is an assessment of injunction applications by private plaintiffs to restrain breaches of the Act. Section 80 gives standing for applications to be made not only by the TPC but also by "any other person".[8] Information on private actions would be very difficult to obtain. In practice private actions may be less significant than those by the TPC as the TPC can be expected to direct its enforcement activities toward achieving the objectives of the Act whereas at best this will be an indirect benefit in the case of private applications. Nevertheless private applications are an integral part of the Act's enforcement scheme and in fact far outnumber TPC applications. Ideally therefore they would be taken into account. Secondly, the analysis does not examine the effect of injunctions on the defendants subjected to them. In 1978 Hopkins studied the effects of fines on corporate defendants subjected to them.[9] A similar study on injunctions would be valuable. The fact that the TPC has instituted only one contempt action,[10] (which was unsuccessful) may say more about its surveillance procedures than about defendants' compliance with injunctive orders.

FREQUENCY OF USE

1. Injunctions and Prosecutions – a Comparison

Table 1, below, shows the total number of court orders sought by the TPC since the commencement of the Act, according to the year and type of order sought. In the first column the year is shown in which the TPC court action was instituted. To coincide with the TPC Annual Reports, the year ends on 30 June. Interim injunctions are shown separately from final injunctions even if both applications are made in the same action. Hence the total "injunction alone" column is the addition of both the interim and final injunctions. The "prosecution" column refers to both TPC applications for pecuniary penalties under Part IV of the Act and informations laid by TPC staff[11] for fines under Part V.

[8] The only exception to this is where there has been a breach of section 50 (the merger provision) which restricts standing to the TPC and the responsible Minister: section 80(1A).

[9] A. Hopkins, *The Impact of Prosecutions under the TPA* (1978).

[10] *TPC* v. *C. G. Smith Pty. Ltd.* (1977) A.T.P.R., 40-059.

[11] The only exception to this is *Hartnell* v. *Sharp Corporation of Australia Pty. Ltd.* (1975) A.T.P.R., 40-003, in which the informant was an officer of the Attorney-General's Department.

Table 1
Orders Sought By TPC 1974-86

Year Court Action Instituted (to 30 June)	1 Injunction alone Sought	2 Penalty & Injunction Sought	3 Total where Injunction Sought	4 Prosecutions alone	5 Total actions
1974-75	2	2	4	3	7
1975-76	–	1	1	11	12
1976-77	1	3	4	9	13
1977-78	6[a]	4	10	10	20
1978-79	4	5	9	7	16
1979-80	1	1	2	4	11
1980-81	2	2	4	11	15
1981-82	–	1	1	3	4
1982-83	7	4	11	8	19
1983-84	8[b]	4	12	12	24
1984-85	5	1	6	11	17
1985-86	3	1	4	3	7
Totals	39	29	68	100	168[c]

Table Notes

[a] This includes one action where both an injunction and a corrective advertising order under section 80A was sought.

[b] This includes one action where both an injunction and a divestiture order was sought.

[c] This does not include one application which was for a corrective advertising order alone.

Table 1 shows that the injunction has received significant use by the TPC but it also reveals a comparatively greater use of prosecutions. In just over 40 per cent (68 out of 168) of all cases instituted by the TPC, an injunction was sought. Prosecutions, on the other hand, were instituted in 77 per cent (129 out of 168) of cases. Further, to include cases where both pecuniary penalties and injunctions have been sought in fact exaggerates the significance of injunctions. According to TPC staff interviewed, most of these actions are in reality "prosecutions". The injunction applications were generally made simply as a matter of course.[12] If, therefore, such cases are treated as prosecutions, injunction applications fall to 39 out of 168 or 23 per cent, in comparison with 77 per cent for prosecutions. This still leaves the injunction as a significant sanction in the TPC armory but indicates a preference for prosecution.

These figures contrast with those of United States antitrust enforcement studies. U.S. antitrust legislation is roughtly the equivalent of Part IV of the *Trade Practices Act*. Part IV injunction applications, if combined penalty-injunction applications are excluded, constitute approximately 24 per cent of total Part IV actions. Kirkpatrick's analysis[13] of antitrust proceedings

[12] The United States' practice in antitrust enforcement is apparently similar: W. Kirkpatrick, "Antitrust Enforcement in the Seventies" (1981) 30 *Catholic University Law Review* 431, 435.

[13] *Id.* 431-435.

instituted by the Antitrust Division of the U.S. Department of Justice during the 1970s showed that, on average almost two-thirds of all such actions were injunctions or other personal orders. A similar study by Posner for the 1950s and 1960s showed these proportions ranging from 50 per cent to 73 per cent of total actions.[14] Thus in U.S. antitrust enforcement, the injunction is the preferred sanction. Despite many differences between the Australian and U.S. situations, the difference in use of the injunction is striking.

Perhaps the factor contributing most to this difference is the far more extensive use of consent injunctions by the U.S. enforcement agencies. Although the consent decree is not expressly referred to in the U.S. legislation, it has been allowed by the courts without requiring a determination of a breach of the legislation. As Shapiro explains in her study of the U.S. Securities and Exchange Commission, this feature makes the consent injunction attractive to the enforcement agencies. It is "a relatively efficient dispositional alternative for S.E.C. investigators: of the 100 parties named in injunction proceedings, at least 90 are permanently enjoined, at a cost of litigating with only about 12 of them."[15] It is attractive not only to the enforcement agency, which need not prove a breach, but also to the defendant because it avoids a precedent-setting decision which may form the basis of a subsequent private treble damages action under the *Clayton Act*. This dual attractiveness has resulted in a very high number of consent decrees (an average minimum of 80 per cent of all antitrust injunctions) and a high total injunction figure.

In contrast, until 1986, consent injunctions under the *Trade Practices Act* could only be obtained by the TPC following a determination by the court that there had been a breach of the Act. In *TPC* v. *Visy Board Pty. Ltd.*, the TPC was required to discontinue its action following settlement rather than obtain the desired injunction. As explained by Woodward J., "in the event the TPC sought only discontinuance, no doubt because s. 80(1) of the T.P. Act did not permit a consent judgement unless the court could be satisfied that the facts justifying it had been established – and this was not possible without an extensive hearing."[16] As a result, the TPC's use of the consent injunction, as will be seen below, has been comparatively insignificant.

In 1986, and thus not reflected in the Table 1 figures, section 80(1AA) was added. This section allows consent injunctions, along the lines of the U.S. model, "whether or not the court is satisfied that a person has engaged, or

[14] R. Posner, "A Statistical Study of Antitrust Enforcement" (1970) 13 *Journal of Law and Economics* 365, 385–88. Injunction applications made in the same proceedings as criminal prosecutions were treated as criminal proceedings. A study of the U.S. Securities and Exchange Commission enforcement pattern also showed a two to one preference for civil (again typically injunctive) sanctions over criminal; S. Shapiro *Wayward Capitalists: Target of the Securities and Exchange Commission* (1984) 152–159 esp. table 6.2. The Australian experience may be more in line with this however as the National Companies and Securities Commission has shown a clear preference for civil over criminal sanctions, although not specifically for the injunction: P. Grabosky and J. Braithwaite, *Of Manners Gentle. Enforcement Strategies of Australian Business Regulatory Agencies* (1986).

[15] Shapiro, *op. cit.* 156.

[16] (1984) A.T.P.R. 40-435 at p. 45008.

is proposing to engage" in a breach of the Act. Although this amendment may well result in a greater use of the injunction, the increase may not be as dramatic as the U.S. figures might suggest. In contrast with the U.S. legislation the *Trade Practices Act* does not allow a private plaintiff to bring a treble-damages action, only an ordinary damages action. There have been very few private "coat-tails" actions following TPC actions.[17] The incentive for defendants to avoid an injunction is accordingly not as great. Nevertheless the consent injunction will still be attractive to both the defendant and the TPC and an increased usage may be expected.

There is further reason to believe the TPC's use of the injunction may increase following the 1986 amendment to section 79. Until section 79(4) was added, an application for an injunction to restrain a Part V breach could not be combined in the same proceeding as the prosecution for a fine. This was not so for Part IV breaches and of the 54 Part IV actions, 28 sought both a pecuniary penalty and an injunction. In contrast, in the 114 Part V actions, the TPC has, with only one exception,[18] chosen to pursue either a prosecution or an injunction. Section 79(4) now allows an application for an injunction and prosecution to be made in the one action. An increase in injunction applications under Part V can be expected to follow.

2. Interim Applications

Table 2, below, divides TPC "injunction alone" applications into interim and final and shows whether the interim applications were made *ex parte* or *inter partes*. The table indicates the comparatively insignificant use by the TPC of interim injunctions and of *ex parte* interim injunctions in particular.[19] Of the 39 actions where injunctions were sought (68 if combined penalty-injunction applications are included) only 10 applications were made for interim injunctions. Of these 10 only 2 were made *ex parte*. It is also worth noting that the 1986 amendments referred to above are unlikely to lead to an increase in interim injunction applications. If anything, the greater ease and speed with which consent injunctions may be obtained may discourage the TPC from pursuing interim applications. The greater opportunities for Part V injunctions following the introduction of section 79(4) are unlikely to result in increased interim applications if Part IV experience is any guide. Of the 29 combined penalty-injunction applications, not one saw an application by the TPC for an interim injunction. This is in accordance with the consistently expressed views of TPC staff interviewed: that in penalty-injunction applications the injunction plays very much the secondary role, being applied for almost as a matter of course.

[17] See s. 82, TPC Annual Report 1982-83 para. 4.11.1 and TPC Annual Report 1983-84 para. 4.11.2. One example is *Fenech* v. *Sterling* (1983) A.T.P.R. 40-413.

[18] *Dawson v. Australian Consolidated Reserves Pty. Ltd. and Anor (trading as Bridgewater Importers)* (1983) A.T.P.R. 40-374.

[19] This would also appear to be the U.S. position in antitrust enforcement: R. Fellmeth and T. Papegeorge, *A Treatise on State Antitrust Law and Enforcement: With Models and Forms* (1978) 44.

Table 2
Interim & Final Injunctions Sought by the TPC 1974-86

Year Application made (to 30 June)	Interim		Final	Total
	Ex parte	Inter partes		
1974-75		1	1	2
1975-76				0
1976-77		1		1
1977-78			6	6
1978-79		2	2	4
1979-80			1	1
1980-81			2	2
1981-82				0
1982-83	1	1	5	7
1983-84		2	6	8
1984-85	1		4	5
1985-86		1	2	3
Totals	2	8	30	39

The small number of interim injunction applications by the TPC flows largely from a belief that such injunctions are very hard to obtain. TPC staff expressed the view that courts appear more reluctant to grant an interim injunction to the TPC than to a private plaintiff. It was suggested that the courts tended to give greater weight to the readily apparent economic effects such an injunction might have on a defendant's business in comparison with the more tangible public interest the TPC was seeking to protect. To obtain the speedy relief otherwise offered by interim injunctions, the TPC therefore sought the alternatives of either a consent injunction (or court undertaking) or an order for a speedy trial.[20]

In this respect the interim injunction has proved disappointing. There is also the additional difficulty for the TPC that once interim proceedings have been instituted the TPCs broad investigatory powers under section 155 may not be available. An exercise of these powers may constitute a contempt of court in such circumstances.[21] It was considerations such as these which led Dr Pengilly to make the following comments in the 1980–81 Annual Report:

> "To me, a major disappointment in Commission enforcement has been the inability to move quickly by way of injunctive relief to prevent certain conduct developing. The reason for this may be either in the absence of an appropriate number of legal staff or the view taken by the crown law authorities as to the evidence required before the Commission can move

[20] See for example *TPC* v. *APM Investments Pty. Ltd. & ors* (1983) A.T.P.R. 40-381, 40-403, 40-404 (1984) A.T.P.R. 40-434 where the TPC sought and obtained an early hearing for the final injunction application and an appropriate undertaking from the defendant pending the hearing: Annual Report 1983-84 para. 4.10.4.

[21] See generally G. Pagone, "Access to Information: Guerilla Warfare under the Trade Practices Act", (1982) 5 *U.N.S.W. Law Journal* 192.

> in an interim manner, or both. It may also lie in the procedural difficulties discussed in the Commission's report. Once proceedings have been instituted section 155 is unavailable and there is no discovery and interrogatory process available either. There is, therefore, a natural reluctance to institute interim injunction proceedings the effect of which is to deprive the Commission of the only information gathering procedures (section 155) which the Commission has available to it to prove its substantive case."

It is often too late to do anything by way of effective remedy if the Commission is unable to move promptly in court in appropriate cases.[22]

Dr. Pengilly's reference to the advice given to the TPC on the evidence required to obtain an interim injunction is interesting in the light of the outcome of such cases. The outcomes of proceedings are considered below but at this point it can be noted that of the TPCs ten interim injunction applications, all but one resulted in an interim injunction being ordered. Furthermore the first interim application was made in the first year and was granted (although a final injunction was not granted at the hearing as the TPC was unable to prove a breach of the Act).[23] Despite this early success only three interim injunction applications were made over the next seven years. It appears therefore that the TPC has been very conservative in its estimation of the difficulties posed by interim injunctions.

The introduction of section 87A in 1986 may lead to a greater use of interim applications in Part V cases. Section 87A provides for interim orders to be made on the application of the TPC (or the Attorney-General as the Minister responsible) to "freeze" a defendant's assets once proceedings have been instituted. The need for such a provision was first raised by the TPC in 1978.[24] In introducing this section the Government's Explanatory Memorandum pointed to the fact that the lack of such a power had "enabled funds obtained from consumers to be dissipated in the often lengthy period during which investigations are pursued to completion, proceedings are instituted and judgement is given in the case."[25] In 1986–87, and thus not reflected in the Tables, there were at least three interim applications by the TPC for Part V breaches,[26] two of which were made *ex parte*. Two of these three applications were to restrain the defendants from dealing with bank account funds. This compares with a total of four interim applications, none of which were made *ex parte*, for Part V breaches over the previous twelve years and may suggest a greater willingness to make interim applications.

3. Other Personal Orders Sought

Turning to personal orders other than injunctions, it must be said that they are significant only by their almost total absence. Only twice has the TPC sought an order under section 80A requiring the defendant to disclose

[22] TPC Annual Report 1980–81, Schedule XI, para. 1.6.
[23] See *TPC* v. *Vaponordic (Aust.) Pty. Ltd. & anor.* (1975) A.T.P.R. 40-009.
[24] TPC Annual Report 1977–78 para. 4.8–4.10.
[25] *Trade Practices Revision Bill 1986 – Explanatory Memorandum* para. 193.
[26] *TPC* v. *Century 2000*, *TPC* v. *Troyden Publications* and *TPC* v. *Norton Holdings*, all unreported.

information and only once has a section 81 divestiture order been sought. Divestiture is an order "for the purpose of securing the disposal by the corporation of all or any of the shares or assets acquired in contravention of"[27] section 50. Section 50 in general terms, prohibits any acquisition of shares or assets which would allow the acquirer "to control or dominate a market for goods or services". The fact that the TPC has instituted only one divestiture action in the 8 section 50 cases reflects its preference for injunctions in such cases. In defending this preference the TPC has given three reasons:[28]

(i) If a takeover is in the Commission's view illegal, the Commission should not stand by and allow the law to be broken.
(ii) Divestiture may be ineffective. In real commercial terms, the eggs will get scrambled. It may be very difficult to get alternative purchasers long after the event, and the court will be pressed to exercise its discretion in favour of not disturbing the acquisition.
(iii) The constitutionality of divestiture is open to challenge, as demonstrated by the *Petersville* case, although the point did not have to be decided there.

Section 81 was amended in 1986 "to improve the effectiveness of the divestiture remedy and its deterrent effect".[29] In certain circumstances the TPC can now apply to have share transfers in breach of section 50 declared void. Consent orders may also be made.[30] These amendments would appear to make little impact on the TPC's arguments above and so it is doubtful whether they will have any significant effect on the TPC's use of divestiture.

Disclosure or corrective advertising orders under section 80A are available for all Part V breaches. The TPC minimal use of this section does not of course mean that this sanction is of no benefit. Its mere availability may have a deterrent effect. But it can be said that the sanction is of little significance to the TPC in practice. Sub-sections (2) (3) and (4) of section 80A, which imposed a limit of $50,000 on the expenditure the defendant could be ordered to incur, were deleted in the 1986 amendments. According to the Explanatory Memorandum the $50,000 limit was "unrealistic where a nationally operating corporation is involved as almost any order directing it to disclose information or publish corrective advertisements will necessarily involve an amount exceeding $50,000."[31] There is nothing to suggest that it was the monetary limit which inhibited TPC use of section 80A however, and so the amendment may have little impact on its future usage.

This minimal usage of section 80A is also indicative of the generally conservative approach of the TPC in the form of the orders sought. It is rare for an order to be sought in terms other than the traditional restraining order. One exception was *TPC* v. *Lamova Publishing Corporation Pty. Ltd.*[32] in which the defendant sent false invoices to telex directory sub-

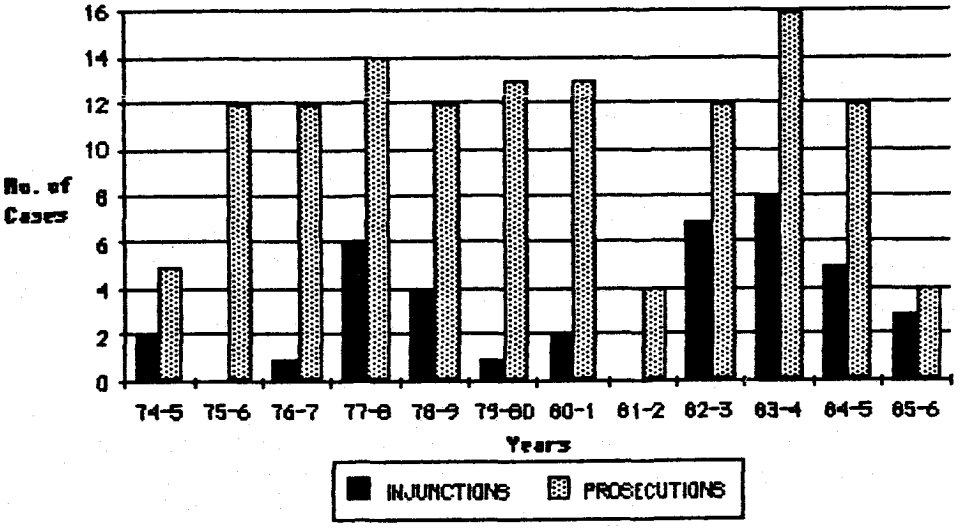
[27] *Trade Practices Act*, section 81(1).
[28] TPC Annual Report 1983–84 para. 4.10.8.
[29] *Explanatory Memorandum supra*, para. 174.
[30] Section 81(3).
[31] At para. 173.
[32] (1979) A.T.P.R. 40-130.

scribers in breach of section 52 of the Act. The defendant was not only restrained from continuing such conduct but was also restrained from using the money received. Following TPC recommendations first made in 1977–78,[33] the Act was amended (in 1986) to allow the TPC to take "representative" actions on behalf of consumers. This, together with section 87(1A) referred to above, gives the TPC considerable flexibility when choosing appropriate sanctions.

4. Annual Variations

Table 1 also gives a year by year analysis of sanctions applied for by the TPC. The annual variations in the use of the injunction[34] in comparison with prosecutions are highlighted in the column chart below. This chart shows, for each year, the number of injunction applications, prosecutions and total cases instituted by the TPC. For the reasons outlined above combined penalty-injunction cases are treated as prosecutions. Although the totals are too low to comment meaningfully on trends over the period or to be used as a basis for predictions,[35] the chart reveals several interesting features.

Figure 1
TPC Injunctions and Prosecutions 1974-1986



[33] TPC Annual Report 1977–78 para. 4.8–4.10.

[34] The 3 applications under ss. 80A and 81 are also included.

[35] The Annual Reports make numerous references to the relatively few court cases instituted by the TPC and attempts are made to defend the TPC's position on this: see, for example, 1976–77 para. 1.19, 1978–79 para. 2.51, 1979–80 para. 2.6.2, 1980–81 para. 2.12.1, 1981–82 para. 2.3, 1983–84 para 2.21.4, 1984–85 para. 3.6.1, 3.6.2. The lack of court enforcement is also the specific subject of complaint by Dr. Venturini. In his "note" in Appendix 5 of the 1975–76 Annual Report, Dr. Venturini complained that "no amount of statistical cosmesis will minimize the fact that no enforcement proceedings have been brought by the Commission under section 49 (on price discrimination) ... and under sections 46 (on monopolization) and 50 (on mergers)".

Three specific features of the chart require comment. The first is the comparatively little use made of the injunction in the first few years (1974 to 1977). The TPC experience in this respect appears to fit into a general pattern of enforcement for new legislation. This general pattern has been explained as follows:

> "For the period immediately after a Statute goes into effect, there is comparatively little litigation. An educational program is far more important, and fledgling staff are inadequate to pursue both activities extensively ... A large proportion of the limited enforcement facilities are directed at blatantly wilful violaters, who must be punished to prevent disregard of the Statute; injunctive actions are instituted primarily to obtain judicial interpretation or in key cases having deterrent effect ... But attempts to 'cut corners' soon become more common than flagrant violations, and injunctions are well suited to check 'widespread violations arising out of ignorance, inertia or expectancy of non-enforcement'."[36]

As the chart shows, injunctions (at least to date) have not outstripped prosecutions. But otherwise the above generalization appears to represent the Australian experience.[37]

The second noteworthy feature of the chart is the dramatic drop in both injunction applications (which fell to zero) and prosecutions in 1981–82, which was followed by a sharp increase in 1982–83. This decreased court activity was the result of the Review of Commonwealth Functions. This Review, the results of which were announced in April 1981, affected all statutory bodies and Government Departments. The TPC suffered staff cuts and was directed to be more selective in its investigations and to limit compliance work "to those matters that raise issues of importance at the national level".[38] More emphasis was given to encouraging private actions and the TPC increased its use of less costly "administrative enforcement".[39] A change in government in March 1983 saw the lifting of these restrictions and the increased court activity in 1982–83 and 1983–84 represents the TPC catch-up response.

The final observation concerns the decline in total cases and in prosecutions in particular, in 1985–86. It is too early to say whether this represents greater compliance with the Act or what "a number of scholars ... have suggested [-] that regulatory initiatives go through a life cycle of initial enthusiasm and toughness which ultimately decays in co-optation."[40] The TPC has in fact been accused of being "captured and weak".[41]

[36] "The Statutory Injunction as an enforcement Weapon of Federal Agencies" 57 *Yale Law Journal* (1948) 1048, Footnote 15.

[37] A backlog of authorization and clearance applications for conduct which otherwise may have been in breach of Part IV, also contributed to the low initial enforcement rate: TPC Annual Reports 1975–76 para. 1.27, 1976–77 paras. 1.11–1.24 and J. Niewenhuysen (ed.) *Australian Trade Practice. Readings* (2nd ed. 1976) p. 149.

[38] TPC Annual Report 1980–81 para. 1.2.2 quoting the Prime Minister's statement.

[39] See TPC Annual Report 1980–81 paras. 1.3.1, 1.5 and 2.2.

[40] J. Braithwaite, "The Limits of Economism in Controlling Harmful Corporate Conduct" (1981–82) 16 *Law and Society Review* 481, 488.

[41] See W. Pengilly, "Competition Policy and the Law Enforcement: Ramblings on Rhetoric and Reality" Vol. 2 No. 1 (1984) *Aust. Journal of Law and Society* 1; G. Venturini, *Malpractice. The Administration of the Murphy Trade Practices Act* (1980) 428. Cf. Grabosky and Braithwaite, *op. cit.* 230.

The chart also shows some similarity between the annual variations in injunctions and prosecutions. The most noticeable difference between the two occurs in the first two years where prosecutions dominate. A possible explanation for this has been considered above. Apart from this, and with some exceptions, injunction and prosecutions cases tend to rise and fall together. This is most noticeable in the last five years. In other words, although the total number of cases instituted by the TPC varied each year, the ratio of injunctions to prosecutions remained relatively constant. This is perhaps surprising. The rate of use of different sanctions which are, ostensibly at least, subject to different policies, might be expected to be independent of each other. Different usage would presumably reflect the variety of cases instituted by the TPC and perhaps changing policies over time. This has in fact been the U.S. experience where studies show considerable variation in the injunction–prosecution ratio.[42]

There would appear to be two possible explanations for this. One is that the injunction–prosecution ratio is more or less controlled by the TPC. The other is that for any given number of court actions, a relatively constant proportion involves circumstances which the TPC considers appropriate for the injunction. In the absence of a study in the TPC's decision-making processes, which is beyond the scope of this study, any conclusions are necessarily tentative. However, discussions with TPC staff suggest the former explanation is more likely. TPC staff often referred to the injunction as an efficient, mild action, useful when the TPC wishes to be seen to be taking action, rather than as a sanction with specific features to fit the circumstances of a particular breach.

5. Conclusion

There are four main conclusions which can be drawn from this data on the use of the injunction. The first is that, although the injunction has had significant use, prosecution is the preferred sanction. This contrasts with the United States' experience. In 1986 reforms allowing greater use of consent injunctions (s. 80(1AA)), combined prosecution and injunction applications for Part V breaches (s. 79(4)), and greater use of interim orders (s. 87A) may well promote greater use of the injunction in the future. Secondly, little use has been made of interim injunctions and *ex parte* interim injunctions in particular. Section 87A may increase this use in the future. Thirdly, the orders sought by the TPC are generally the traditional restraining order and little use has been made of section 80A (public disclosure or corrective advertising) and section 81 (divestiture). Finally, there is some evidence to suggest that the frequency of the injunction's use is related more to the overall use of court actions by the TPC rather than according to the circumstances of a particular breach.

[42] See Kirkpatrick, *op. cit.* 432, Table 1; Posner, *op. cit.* 385, Table 15.

CIRCUMSTANCES IN WHICH INJUNCTIONS ARE USED

1. Part IV and Part V Compared

In this part the circumstances in which the TPC chooses injunctions are examined. Before undertaking an analysis of injunction applications according to sections, their comparative use in Parts IV and V should be noted. The figures in Table 3, below, would appear to suggest a virtually identical use in both Parts. Of the 168 actions instituted 22.0 per cent (12 out of 54) of Part IV cases were injunction (or in one case divestiture) applications in comparison with 23.7 per cent (27 out of 114) for Part V. For reasons stated above, combined penalty-injunction applications are included in the prosecution but not the injunction category. The two Parts are not directly comparable in this manner however. This is because section 52[43] in Part V, which prohibits "conduct that is misleading or deceptive or is likely to mislead or deceive", is not subject to prosecution by the TPC in the event of a breach. Its broad and general nature is considered to be inappropriate for a criminal sanction and accordingly the TPC is limited to an injunction or disclosure application.

Table 3
Orders Sought by the TPC 1974-86: Part IV & V Actions

	Part IV	Part V	Total
Injunction alone	12[a]	27[b]	39
Penalty & Injunction	29	–	29
Total cases where Injunction Sought	41[a]	27[b]	68
Prosecution alone	13	87	100
Total cases	54	114	168[c]

Table Notes
[a] Includes one case where a divestiture order under section 81 was also sought.
[b] Includes one case where a corrective advertising order under section 80A was also sought.
[c] This does not include one application for a corrective advertising order (section 80A) alone.

The inclusion of section 52 injunctions in the Part V figures above does not necessarily reflect a preference by the TPC for injunctions over prosecutions. It is true that section 52 may be (and has been) chosen in preference to other sanctions in order that the TPC may obtain injunctive relief – section 52 is expressed in such general terms that it is often available as an alternative to the other more specific prohibitions of Part V. But, as will be shown below, the reverse is also true. In other words the defendant's conduct may not fall within one of the more specific sections and so the TPC must look to section 52. In such circumstances, therefore, the injunction is

[43] And now also section 52A, introduced in 1986, which prohibits "unconscionable" conduct.

being used, not in preference to prosecution, but because prosecution is not available.

If section 52 injunction cases are put to one side, the percentage of Part V cases in which the injunction is preferred to prosecution is 10 per cent (11 out of 114). Further, of these remaining 11 cases, 7 also include a claim for breach of section 52. Thus if all cases in which a breach of section 52 is claimed are excluded, the TPC has opted for the injunction in preference to prosecution in only 4 out of 115 cases or 3 per cent. On this basis the injunction can be seen as effectively a Part IV and a section 52 sanction. The interim applications confirm this. Five of the nine interim applications were for Part IV breaches and both *ex parte* applications involved Part IV breaches.

Table 4, below, shows an analysis of orders sought by the TPC according to sections claimed to have been breached.

Table 4
Sections Under Which Orders Sought

Section	Injunction Only			Penalty and Injunction	§80A	§81	Prosecution	Total[44]
	Interim		Final					
	Ex parte	Inter parte						
				Part IV				
§45/45A		2	3	12			5	22
§45D		1						1
§46			2					3
§47		1	1	1			3	6
§48		1		17			5	23
§50	2	1	4			1		8
				Part V				
§52		3	20		1			25
§53(a)			7				30	37
§53(aa)							1	1
§53(b)							4	4
§53(c)		1					23	25
§53(d)		1					2	3
§53(e)			1				6	7
§53(f)							3	3
§53(g)			2				4	6
§53A							5	5
§53B			1				1	2
§55			6				5	11
§55A							4	4
§56							3	3
§58							4	4
§59							10	10
§62			1				5	6
§63							1	1
§64							1	1

[44] The total exceeds the total actions shown in Table 1 because a breach of more than one section is commonly claimed in one action.

2. Part IV

The comparative use of sections by the TPC is naturally influenced by its system of investigations and priorities.[45] Looking first at Part IV, it can be seen that enforcement activity as a whole is concentrated primarily on two types of conduct. These are resale price maintenance (section 48) and anti-competitive agreements, notably price-fixing (section 45 and 45 A). Breach of such sections are far more likely to provoke a prosecution than an injunction however.[46] In only one action for breach of section 48, the *Bread Industry Employees* case,[47] did the TPC choose the injunction as the sole sanction and this case was untypical of section 48 actions in that the defendant was a union and a breach of the secondary boycott provisions (section 45D) was also claimed. Price-fixing under sections 45 and 45A were more likely to be the subject of injunction applications – five of the 22 cases were injunction applications.

Most injunction applications were for breaches of section 50 which prohibits mergers or acquisitions which would create or reinforce market dominance. Although prosecution is available for a breach of this section, injunctions (or in one case divestiture) were always preferred. Reinforcing this the only two *ex parte* interim injunction applications were for alleged breaches of section 50. There is no explicit statement in the Annual Reports or other TPC publications rejecting prosecutions in favour of injunctions in section 50 cases, but the preference is not surprising. Such cases would seem to be ideally suited to the injunction. First, the TPC will often have to move quickly if the merger is to be prevented. In three of the seven actions interim injunctions were made against the acquiring company before the completion of the takeover. Secondly, the threat of a monetary penalty imposed after the takeover is of doubtful deterrent value, both because the financial gains from the merger may well outweigh the amount of the penalty and because there may be doubt about whether the merger contravenes the provisions of section 50. This doubt arises because section 50 does not create a per se offence but requires proof that the merger places the defendant "in a position to control or dominate a market". Finally, if injunctive action is to be taken it must be by the TPC (or the Attorney-General) as private plaintiffs have no standing to make injunction applications under Section 50.

The Part IV picture becomes less clear as we move away from section 50. In actions alleging breaches of sections 45, 45A, 45D, 46, 47 and 48, the TPC has opted for either prosecution or injunction at different times. In five such cases the TPC has chosen the injunction alone. An examination of these five cases reveals no clear pattern. However what can be said, is that the injunction appears to have been chosen as much for its "mildness" as for its *preventiveness*. In the *Bread Industry Employees* case[48] the TPC took injunction

[45] See references in note 7 *supra*.

[46] These sections create *per se* offences i.e. the TPC does not have to show the anticompetitive effects of the conduct. See note 41 above.

[47] *TPC* v. *Bread Industry Employees' and Salesmen's Association of N.S.W.* Unreported, Federal Court 1979.

[48] *ibid.*

action against bread contractors who were alleged to have imposed a secondary boycott against discounting of beer in Adelaide. The TPC, in its Annual Report, expressed its reluctance to act in industrial matters unless there was a "clear and significant anticompetitive detriment involved". It considered that the defendants' conduct in that case amounted to resale price maintenance and action was taken under both section 45D (secondary boycotts) and section 48. The proceedings were thus exceptional. Another of the cases, *A.P.A.D.A. and T.W.U.*[49] also involved union conduct and again the injunction may have been preferred as less inflammatory than prosecution. In this case the TPC sought an injunction to restrain members of the Transport Workers Union, the Australian Petroleum Agents and Distributors Association and seven oil companies from putting into effect an alleged agreement controlling the supply of petrol to particular retail sites.

In the third of these cases, *Monier*,[50] the TPC alleged that the defendant engaged in monopolistic conduct in the roof tile industry. Breaches were alleged of sections 45 and 46, but also significantly of section 50. The choice of injunction is thus consistent with other section 50 cases. In the *Banana Federation Growers* case[51] political sensitivity may have influenced the preference of injunction over prosecution. The TPC alleged that the Banana Growers Federation [BGF], in breach of sections 45, 46 and 47, compelled its members to use only BGF-arranged transport to deliver bananas to interstate markets. The case appears to have been an unusually sensitive one and proceedings were stayed and ultimately settled following Ministerial intervention.[52] The last of these cases is the *Anco Meat*[53] case in which the TPC sought an injunction to restrain the implementation of an agreement entered into by meat exporters to charge livestock producers levies they themselves were required to pay under Commonwealth law. The choice of injunction in these circumstances, where the TPC wished to make an industry-wide impact, is consistent with the approach revealed in the Part V cases discussed below.

The final observation on the Part IV injunction cases concerns the use of combined penalty and injunction actions, particularly in section 48 cases. Section 48 creates a per se offence of resale price maintenance and the TPC has, with the one exception referred to above, opted for prosecution or prosecution combined with injunction, rather than injunction alone. Of the 23 occasions section 48 breaches have been alleged, in 17 the TPC has sought both a penalty and a prosecution. TPC staff described the additional injunction claim as almost "automatic".

The TPC's use of the injunction in this manner has sometimes resulted in an injunction being sought, not frivolously, but in circumstances where it cannot play a preventive role. For example, in the *I.C.I., Norris-Wightman*

[49] *TPC* v. *Australian Petroleum Agents and Distributors Association and the Transport Workers Union* Unreported, Federal Court 1984.
[50] *TPC* v. *Monier Ltd., CSR Ltd. and Wunderlich Ltd.*, Unreported, Federal Court.
[51] *TPC* v. *Banana Growers Federation*, Unreported, Federal Court.
[52] See Annual Reports 1977–78 para. 3.38 and 1978–79 para. 4.56 and W. Pengilly, *op. cit.* 6.
[53] Unreported Federal Court 1979.

case,[54] the TPC sought an injunction despite the fact that there was no evidence to suggest a continuing breach. The Court, in refusing the application, referred to the fact that "[t]he contravention ceased when the Commission commenced to investigate the contravention and has not been carried on since then. This is not a case where an injunction should be granted."[55] The *Orlane* case[56] was similar: one contravention only had been established against Orlane. "There is no evidence to suggest that Orlane is engaging in any other conduct in contravention of the provisions of Part IV of the Act. This is not a case where an injunction should be granted."[57]

There have been instances of "one-off" section 48 breaches where the TPC has not sought an injunction as well as a penalty.[58] Nevertheless there is little disincentive for the TPC to "add on" the injunction application and the TPC's rather low "success rate" for such applications, considered in the next part, suggests an overuse of the injunction in this way. The risk is that an overuse may downgrade the effect and impact of the TPC's other injunction applications.

There appear to be two broad conclusions which can be drawn concerning the TPC's use of the injunction for Part IV breaches. The first is that the injunction as a sole sanction appears to be limited to the special circumstances of a breach of section 50 or alternatively, where a "mild" sanction is required. The second is that the injunction commonly plays a secondary role in per se offences, particularly in section 48 cases where it is typically added on to a prosecution almost as a matter of course.

3. Part V

Turning from Part IV to Part V (consumer protection) breaches, an important procedural difference affecting TPC injunction applications comes into play. Until the 1986 amendments to section 79, the Federal Court Rules did not allow an injunction application to be made in the same proceedings as a prosecution. With only one exception,[59] the TPC has elected not to institute separate injunction proceedings where a prosecution has been instituted.

According to the TPC Staff Manual, a recommendation for court action (by a regional director or branch head) should include a recommendation as to the appropriate sanction to be sought. The stated TPC policy is along traditional lines: the choice is between "the need for injunctions to *stop* the particular conduct; or for penalties to deter others from engaging in like conduct . . ."[60] But in practice, and as revealed in Table 4, the injunction alone

[54] (1983) A.T.P.R. 40-364.
[55] At page 44,373.
[56] *TPC* v. *Orlane Australia Pty. Ltd.* (1983) A.T.P.R. 40-348, 40-375; (1984) A.T.P.R. 40-437.
[57] At page 44,448-9.
[58] See for example *TPC* v. *Dunlop Australia Ltd.* (1980) A.T.P.R. 40-167, *TPC* v. *Madad Pty. Ltd.* (1979) A.T.P.R. 40-105 and *TPC* v. *BP Australia Ltd.* (unreported, Aust. Industrial Court, Vic.).
[59] *Dawson* v. *Australian Consolidated Reserves Pty. Ltd. (trading as Bridgewater Importers)* (1983) A.T.P.R. 40-374.
[60] TPC Annual Report 1977-78 para. 4.14, emphasis added.

is rarely considered other than in section 52 situations. Of the 131 claimed breaches of sections 53 to 64, in only 20 (in 12 actions) were injunctions sought. Further in eight of these 12 cases, breaches of section 52 were also claimed and so prosecution was not available.

This view of injunctions being confined in practice to section 52 breaches was confirmed in the 1977–78 Annual Report which distinguished between sections 52 and 53 in the following terms.

> The main thrust of the Commission's consumer protection enforcement work has proceeded under:
>
> *section 52*, the broad prohibition of conduct that is, or is likely to be misleading or deceptive (the remedy being civil injunction and not prosecution); and
>
> *section 53*, the prohibition of false representations and misleading statements of specific kinds (*the remedy being prosecution*)[61]

4. Categories of Cases

An analysis of the Part V TPC injunction applications by cases rather than by sections shows that these applications tend to fall within one or more of the following categories:

(1) where the defendant is a "promoter" of a scheme to deceive consumers. This is seen as a major use of the injunction – to "stop" the scheme. An advantage of the injunction over prosecution in such a case is that the defendant will often consent to an order being made against him. The TPC thus obtains a quick result and has the availability of contempt procedures in the event of a further breach.

And so injunctions have been used against defendants claiming payment for false invoices[62] and against certain land promoters.[63] On the other hand, where the breach is by an otherwise legitimate business, prosecution is preferred. Thus car dealers, a common defendant in a Part V action, were almost invariably prosecuted.[64] Similarly, if the defendant is a large company, prosecution is preferred.[65]

[61] Para. 4.36, emphasis added.

[62] For example *TPC* v. *Lamova Publishing Corporation* (1979) A.T.P.R. 40-130, *TPC* v. *Sparrow*, unreported Federal Court, *TPC* v. *Paramount Productions Pty. Ltd. & Olympic Productions & Publication Pty. Ltd.* Unreported Federal Court.

[63] See *TPC* v. *C. G. Smith Pty. Ltd.* (1978) A.T.P.R. 40-059 and *TPC* v. *Robert Sterling* (1980) A.T.P.R. 40-145 (1981) A.T.P.R. 40-212.

[64] See *Eva* v. *Mazda Motor (Sales) Pty. Ltd.* (1977) A.T.P.R. 40-020, *Eva* v. *Preston Motors Pty. Ltd.* (1977) A.T.P.R. 40-048, *Eva* v. *Southern Motors (Box Hill) Pty. Ltd.* (1977) A.T.P.R. 40-026, *Given* v. *C. V. Holland (Holdings) Pty. Ltd.* (1977) A.T.P.R. 40-029, *Finger* v. *Malua Motors Pty. Ltd.* (1978) A.T.P.R. 40-061, *Thompson* v. *J. T. Fossey Pty. Ltd.* (1978) A.T.P.R. 40-079, *Ducret* v. *Nissan Motor Co. (Australia) Pty. Ltd.* (1979) A.T.P.R. 40-111, *Henderson* v. *Bowden Ford Pty. Ltd.* (1979) A.T.P.R. 40-129, *O'Neill* v. *El Camino Autos Pty. Ltd. & anor* (1980) A.T.P.R. 40-158, *Rearden* v. *Morley Ford Pty. Ltd.* (1980) A.T.P.R. 40-190 (1981) A.T.P.R. 40-205, *Wise* v. *MRG Automotive Services Pty. Ltd.* (1981) A.T.P.R. 40-239, *Wallace* v. *Walplan Pty. Ltd.* unreported Federal Court, *Hollis* v. *P. H. & D. Stephens Investment Pty. Ltd.* unreported Federal Court. Cf. *TPC* v. *Walplan Pty. Ltd. & McKerrow* unreported Federal Court.

[65] So, for example, *Hartnell* v. *Sharp Corporation of Australia Pty. Ltd.* (1975) A.T.P.R. 40-003, *Ransley* v. *Black and Decker (Australasia) Pty. Ltd.* (1977) T.P.R.S. 304.296, *Doolan* v. *Waltons Ltd.* (1981) A.T.P.R. 40-257, *Barton* v. *Westpac Banking Corporation* (1983) A.T.P.R. 40-388, 40-407, cf. *TPC* v. *B.M.W. Australia Ltd.* (1985) A.T.P.R 40-620.

(2) where section 52 is the only section which can be used. That is, where the conduct complained of does not fall within the more specific provision of sections 53 to 64, the injunction is used simply because it is the only sanction available. This was the case, for example, in *Annand and Thompson*[66] where the defendant car dealer had described vehicles as "new" despite the fact that they had been in stock for extended periods. The TPC's legal advice was that, "while the specific prohibition in section 53(b) of false representations that goods are new would not apply ... the generality of section 52 would apply".[67] In the case of *John R. Lewis (International) Pty. Ltd.*[68] the defendant had previously been fined for claiming payment for unauthorized entries in spurious directories. Following the fine the defendant "continued to make similar assertions, ... in a manner ... outside the specific prohibition in section 64 [but] prohibited by the generality of section 52".[69]

(3) where the breach is clearly an ongoing one. For example, an injunction was sought in the *Jeans West* case[70] where the defendant continued to display a "no refund" sign (which the TPC argued was in breach of sections 52 and 53(g)) despite "an extensive educative and guidance program by the Commission during which a number of business firms were informed of their obligations".[71] Promoters in category (1) may also fall in this category.

(4) where the TPC wishes to make in industry-wide impact. For example, in the "orange juice"[72] cases the TPC instituted injunction proceedings following its investigations into the dilution of orange juice by the manufacturers. Similarly injunction proceedings were chosen for the "barramundi" cases[73] where the TPC alleged widespread misrepresentation of other fish as barramundi.

(5) where quick action is required. For reasons already discussed, the TPC has made only two interim injunction applications for Part V breaches.[74]

5. Conclusion

Several conclusions can be drawn on the TPC's use of the injunction for Part V breaches. The first is that the TPC generally prefers prosecutions to injunctions for Part V breaches. Injunctions are little used outside section 52. In some instances the injunction is used simply because no section other than section 52 is available to the TPC and thus prosecution is not available. The second is that almost no use has been made of interim injunctions. The third is that the two most common uses of the injunction were against "promoters" and as a method of making an industry-wide impact.

[66] (1978) A.T.P.R. 40-074.
[67] TPC Annual Report 1977–78 para. 4.40.
[68] Unreported Federal Court. Aug. 1978.
[69] TPC Annual Report 1977–78 para. 4.41.
[70] *TPC* v. *JWA Pty. Ltd. (trading as Jeans West)* Unreported Federal Court.
[71] TPC Annual Report 1984–85 para. 4.8.1.
[72] See *TPC* v. *Fount-Wip Pty. Ltd.*, *TPC* v. *Sport Drinks Aust Pty. Ltd.*, *TPC* v. *Griffiths*, *TPC* v. *Florida Foods Pty. Ltd.*, *TPC* v. *Mr Juicy*, all unreported Federal Court and *TPC* v. *GLO Juice Co. Pty. Ltd.*, (1987) A.T.P.R. 40-788.
[73] *TPC* v. *Smith & Reader Sea Foods Pty. Ltd.*, *TPC* v. *P. Manettas & Co. Pty. Ltd.*
[74] *TPC* v. *C. G. Smith Pty. Ltd. & ors* (1978) A.T.P.R. 40-059, *TPC* v. *Sullivan Sprinklers* Unreported Federal Court.

THE OUTCOMES

The final aspect of the TPC's use of the injunction to be examined is the outcomes of such applications. Table 5 sets out the various outcomes of both TPC injunction applications and combined penalty–injunction applications. It should be noted that although undertakings given by defendants to the court and injunctions are treated as equivalent on the basis that both impose the same obligations on the defendant, in two cases[75] the TPC insisted on an injunction rather than accepting an undertaking. The outcomes of prosecution cases are shown in Table 6.

Table 5
Outcomes of Injunction Applications

	No Hearing		Hearing[b]			
	Settled with No Orders Made	Consent Injun./Under.	No Breach	Breach But No Injun.	Breach Plus Injun./Under.	Total
Injunction alone Sought[a]	7	21	4		6	38
Penalty & Injunction Sought	3	2	4	7	12	28

Table Notes

[a] The two section 80A and the section 81 applications are not included. Only *TPC* v. *Annand & Thompson Pty. Ltd.* (1978) A.T.P.R. 40.074 did not result in a consent order. In this case a disclosure order was made at first instance but was rescinded on appeal.

[b] There were five appeals to the Full Federal Court, four by defendants and one by the TPC. Two concerned injunctions – *TPC* v. *Sterling* (1981) A.T.P.R. 40.212 and *TPC* v. *Pye Industries Pty. Ltd.* (1979) A.T.P.R. 40.124. In the former the defendant's appeal against an injunction was unsuccessful. In the latter, a combined penalty–injunction case, the penalty was affirmed but the injunction rescinded (discussed below).

Table 5 shows that most (21 out of 38 or 55 per cent) injunction applications result in consent injunctions or undertakings. This is not surprising. The cost of litigation, and the fact that the defendant is facing neither a financial penalty nor the stigma of a criminal conviction, provides a significant incentive to settle. This in turn makes the injunction attractive to the TPC as it increases the likelihood of a "successful" result. As explained above, the proportion of consent injunctions may well increase with the introduction of section 80(1AA) allowing consent injunctions without admission of liability.

[75] *TPC* v. *Bryant Pty. Ltd.* (1978) A.T.P.R. 40-075 and *TPC* v. *Bata Shoe Company of Australia* (1980) A.T.P.R. 40-161, 40-162.

Table 6
Prosecution Outcomes

	Discontinued	Hearing[a] No Breach	Breach & Penalty	Total
Part IV	2	2	9	13
Part V	6	10	68	84
Total	8	12	77	97[b]

Table Notes

[a] There was only one appeal, *TPC* v. *Parkfield Operations Pty. Ltd.* (1985) A.T.P.R. 40.639 in which the TPC successfully appealed against a dismissal.

[b] Three cases have not been decided: *Ducret* v. *Chandhary's Oriental Carpet Palace Pty. Ltd.*, *TPC* v. *British Building Society* and *Given* v. *Geculo Pty. Ltd.*

The relatively high figure (seven out of 38) for "settled" applications which did not result in consent orders reflects a variety of situations rather than any clear pattern. For example, the *Banana Growers Federation* case[76] was a result of Ministerial direction, *Bell Resources Holdings Pty. Ltd.*[77] was settled because of the passing of the *Trade Practices (Transfer of Market Dominance) Act* 1986 and in *Lochmere Pty. Ltd.*[78] proceedings were discontinued after the principal defendant was jailed following a police prosecution. The combined penalty-injunction applications more often proceeded to a final hearing. The most interesting figure is the seven cases where the TPC obtained a penalty but was refused an injunction. These cases were "successful" for the TPC in that the penalties obtained were the main objective. So in the early case of *TPC* v. *Sharp Corporation of Australia Pty. Ltd.*[79] the fact that the injunction was refused is not even mentioned in the TPC's first announcement of the result.[80] These results support the earlier suggestion that injunction applications may be too readily added on to Part IV prosecutions. It can also be noted here that in *Pye*[81] although an injunction was granted at first instance it was rescinded on appeal and in the *Stihl Chain Saw* case[82] an injunction was refused against one of the defendants.

The overall "success" rate of injunctions is, perhaps surprisingly, lower than the prosecution success rate. In applications for injunctions only, four cases "failed" in the sense that no breach could be proved. A further seven were settled without the TPC obtaining an injunction or undertaking. In this sense 27 out of 38 cases or 71 per cent were successful. If the outcome of penalty-injunction applications are included, then 41 out of 66 cases or 62

[76] *Supra.*
[77] Unreported Federal Court 1986.
[78] Unreported Federal Court.
[79] (1975) A.T.P.R. 40-010.
[80] TPC Annual Report 1975-76 para. 2.8.
[81] *TPC* v. *Pye Industries Pty. Ltd.* (1978) A.T.P.R. 40-088, 40-089, (1979) A.T.P.R. 40-124.
[82] *TPC* v. *Stihl Chain Saw (Aust.) Pty. Ltd.* (1978) A.T.P.R. 40-091.

per cent "succeeded". This lower percentage reflects the significant number of injunctions which do not succeed when coupled with penalty applications. This figure may have been even lower if not for the practice of defendants[83] offering undertakings to the court as a factor to be taken into account in determining the amount of the penalty. In the case of interim applications, 9 out of 10 were successful in that interim orders were made.[84] Further, five of these resulted in final injunctions and only two ultimately resulted in the TPC failing to prove a breach of the Act. Prosecutions were "successful" in 77 out of 97 or 79 per cent of cases. If penalty-injunction cases are included, the percentage falls slightly to 77 per cent. In Part V prosecutions the TPC was successful in 68 out of 84 cases or 81 per cent. This is higher than both injunction and Part IV prosecution success rates (28 out of 41 or 68 per cent of cases).

ASSESSMENT

In principle, "harm-based" sanctions employed in the *Trade Practices Act*, such as fines, pecuniary penalties and damages, may be ineffective in two situations. The first is where these sanctions prove to be an inadequate deterrent against a particular defendant. This is the rationale for equity's jurisdiction to enjoin legislative breaches in cases where the defendant "flouted" what was demonstrably inadequate penalties in regulatory legislation.[85] There has been no example of the *Trade Practices Act* being flouted in this way, although use of the injunction by the TPC to restrain "promoters" of various schemes which misled or deceived consumers, bears some similarities. In these cases TPC staff indicated that injunctions were considered effective to prevent the schemes where fines may not have been.

A preventive sanction may also be necessary where the harm caused by the breach is too serious to be dealt with after the breach. Braithwaite, in his study of corporate crime in the pharmaceutical industry, refers to this when he says that "injunctions to prevent a dangerous practice are more important than retribution against past sins in terms of the immediate priority of a regulatory agency to save lives and prevent suffering".[86] The injunction at equity is traditionally used to prevent irreparable injury. Again, the study of the TPC's use of the injunction did not reveal a widespread use of the injunction to avoid irreparable injury. The most significant use in this manner was against proposed mergers in breach of section 50 of the Act where it was seen that the injunction was preferred to divestiture. Divestiture, as a post-breach sanction, was considered to be ineffective.

[83] See, for example, *TPC* v. *J. W. Bryant Pty. Ltd.* (1978) A.T.P.R. 40-075, *TPC* v. *Madad Pty. Ltd.* (1979) A.T.P.R. 40-105, *TPC* v. *Bata Shoe Company of Australia* (1980) A.T.P.R. 40-161, 40-162.

[84] The *T.W.U./A.P.A.D.A.*, *supra*, case was the only "failure".

[85] See the discussion in *Gouriet* v. *Union of Post Office Workers* [1977] 3 All E.R. 70; [1978] A.C. 435.

[86] J. Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (1984) 126.

Whether the injunction has in fact deterred those enjoined from breaching the Act is difficult to determine. There has been only one contempt action[87] instituted by the TPC which would seem to suggest that the injunction has proved effective. But this figure may be misleading as TPC staff acknowledged that there were no specific surveillance procedures to detect breaches of injunctions or court undertakings. Nevertheless the fact that breaches of TPC injunctions are virtually unknown may well indicate general compliance with injunctive orders. The potential violator of the injunctive order probably overestimates the odds of detection, "for discovery of his previous dereliction should have enhanced his fear of detection, and conviction for contempt would not only tarnish his reputation but would also expose him to penalties of unpredicatable severity".[88]

The main factor inhibiting the TPC's use of the injunction as a preventive sanction has been its inability or unwillingness to obtain interim injunctions. Speed is the essence of prevention and for this purpose use of the interim injunction is essential. It was seen that once the TPC commenced interim proceedings, use of its investigatory powers under section 155 ran the risk of a contempt of court. It is on the grounds of effectiveness that a member of the TPC called for an amendment to the Act which would allow the TPC discovery and interrogatories: "lack of the ability to obtain discovery ... inhibits the Commission from seeking what might be its most effective remedy – the quick injunction."[89]

It appears that the TPC has seen the injunction as effective as much for its "civil" nature as for its preventiveness. Criminal convictions are notoriously difficult to obtain in regulatory legislation generally. There are various reasons for this. According to Braithwaite, in the case of large corporations "typically, neither the political will nor the prosecutorial resources exist to prove beyond a reasonable doubt that the complex activities of a large company constituted a crime."[90] It has also been suggested that the legal complexity of the cases, the ability of defendants to retain the best legal advice and the procedural protections of the criminal process all contribute to make the criminal sanction ineffective. There is also some evidence that judges and juries are reluctant to convict the white-collar criminal: such defendants are not seen as "criminal" but to "have merely pursued capitalist goals too aggressively".[91]

An injunction, on the other hand, "averts the possibility that an agency's

[87] *TPC* v. *C. G. Smith Pty. Ltd.* (1977) A.T.P.R. 40-059.

[88] "The Statutory Injunction as an Enforcement Weapon of Federal Agencies" (1948) 57 *Yale L.J.* 1023, 1043.

[89] W. Pengilly, "Competition Policy and Law Enforcement: Ramblings on Rhetoric and Reality" (1984) Vol 2 No 1. *Australian Journal of Law and Society* 1, 7.

[90] J. Braithwaite, "The Limits of Economism in Controlling Harmful Corporate Conduct" (1981-82) 16 *Law and Society Review* 481, 482.

[91] R. Zepfel, "Stopping a 'Gruesome Parade of Horribles': Criminal Sanctions to Deter Corporate Misuse of Recombinant DNA Technology" (1986) 59 *Southern California Law Review* 641, 652. See also A. Sutton and R. Wild, "Corporate Crime and Social Structure" in P. Wilson and J. Braithwaite (eds) *Two Faces of Deviance. Crimes of the Powerless and the Powerful* (1978).

case may be impaled on the spikes of criminal procedure".[92] Not only is the burden of proof lighter but there is often less resistance from defendants who do not face a monetary penalty. TPC staff often referred to the injunction as a means of obtaining a "successful" result where a conviction may not have been possible, rather than a sanction to be used only where prevention was required. The examination of the circumstances in which the TPC used the injunction confirmed this. TPC staff were of the view that to obtain compliance with the Act, often it was sufficient simply that court action be taken and the form of that action was relatively unimportant. In an agency with limited resources, the appeal of the injunction as an "efficient" sanction is understandable. Some evidence of the overuse of the injunction was seen in the TPC's combined penalty-injunction applications, although generally the TPC preferred prosecution to injunctions.

Once the injunction leaves its preventive role and becomes a general civil sanction, questions arise as to its effectiveness. There is no empirical evidence on whether injunctions generally deter breaches of the *Trade Practices Act* and such evidence would be very difficult to obtain. "Few problems", points out Jacobs, "combine such a high degree of intuitive significance with so many grave empirical difficulties as the question of whether legal sanctions deter crime."[93] But the very features of the injunction which make it such an "efficient" sanction for the enforcement agency also work against it being a strong deterrent. A civil, non-monetary preventive sanction, although not without some deterrent effect, is a comparatively gentle sanction. It has been described, for example, as "an exceptionally mild weapon with which to threaten a hardened miscreant."[94]

It can also be asked why a civil, injunctive order is used to restrain undesirable business practices and not, for example, criminal laws of conspiracy or aiding and abetting. It was Sutherland who first presented the argument that, in regulatory legislation where both criminal and civil sanctions are available, the injunction is, in effect, a "soft option". "Persons who violate laws regarding restraint of trade, advertising, pure food and drugs, and similar business practices are not arrested by uniformed policemen, are not tried in criminal courts, and are not committed to prison;[75] their illegal behavior receives the attention of administrative commissions and of courts operating under civil or equity jurisdiction."[95]

Sutherland traced the differential treatment of white-collar criminals to the U.S. *Sherman Act* and was critical of the "clever invention" of the injunction in particular. "This law is explicitly a criminal law and a violation of the law is a misdemeanor no matter what procedure is used. The customary policy would have been to rely entirely on criminal prosecution as the method of enforcement. But a clever invention was made in the provision of an injunction to enforce a criminal law ... The defendant did not appear in the criminal court and the fact that he had committed a crime did not appear

[92] (1948) 57 *Yale L.J. op. cit.* 1035.
[93] H. Jacobs, "Deterrent effects of Formal and Informal Sanctions" (1980) 2 *Law and Police Quarterly* 61.61.
[94] (1948) *Yale L.J. op. cit.* 1044.
[95] E. Sutherland, *White Collar Crime. The Uncut Version* (1983) 6.

on the face of the proceedings. The Sherman Antitrust Act, in this respect, became the model in practically all the subsequent procedures authorized to deal with the crimes of corporations."[96] This is an argument which has subsequently been put on a number of occasions by sociologists and criminologists. It was made forcefully by Laura Nader in her criticism of Shapiro's recent study of the enforcement strategies of the U.S. Securities and Exchange Commission: "Shapiro neglects to explain why every violator gets 'one free bite at the apple', that is, gets to commit one violation without being sanctioned; why the defendants participate in writing their own consent decrees; and why they participate in writing their own press releases. In short, why are these crimes different from all other crimes?"[97]

The counter argument is that, in comparison with the general criminal law, the stigma of criminal sanctions is inappropriate for the more morally neutral business offence. This was the justification offered by Senator Murphy, when the Trade Practices Bill was introduced, for employing the injunction in Part IV of the Act. "The important consequence is that such proceedings, involving business dealings to the extent that they do, will not find their way into a criminal court."[98] The difficulties of obtaining criminal convictions, already referred to, also appeared to contribute to the choice.

The history of the *Trade Practices Act* has seen a variety of civil and criminal sanctions employed. Sutton and Wild have suggested that the use of the injunction and other civil sanctions in the *Trade Practices Act* can be related to the attitudes and influences of the different Governments in power. For example, the Liberal Government, which could be seen as representing business interests, rejected criminal sanctions in the 1971 Act. It was reluctant to use sanctions at all, but when it did so, it preferred the civil sanctions of injunction and damages. The Labor Government, "which relies heavily on trade union affiliations", introduced penalties (criminal and civil) into the 1974 Act. The return of the Liberals in 1975 saw amendments to the Act whose "overall effect was substantially to reduce restrictions on business" and the imprisonment sanction was repealed.

The debate over the appropriateness of the injunction is not readily resolved. The TPC's greater use of prosecution than injunction from 1974 to 1986 would suggest that, in the Trade Practices context, the injunction has not been greatly overused. Grabosky and Braithwaite concluded their study of all Australian business regulatory agencies by stating that the TPC is "the most punitive agency in the country".[99] The injunction's broad availability, which has been further increased by the 1986 amendments to the Act, does however, provide a potentiality for misuse of the kind referred to by Sutherland. This availability, together with the inherent difficulties of obtaining criminal sanctions, raise the risk that the injunction will become a "catch-all" sanction to overcome the deficiencies of other sanctions.

[96] *Id.* 53-54.
[97] L. Nader, "Enforcement Strategies and the Catch they Yield at the S.E.C." (1986) 99 *Harvard L.R.* 1362, 1367-68.
[98] Cth Parl. Debates, Senate vol. 57, p. 1018.
[99] P. Grabosky and J. Wilson, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1986) 230.