A Comparative Study of the Regulation of the Practice of Resale Price Maintenance in Australian and EEC Restrictive Trade Practices Laws*

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A comparative study or examination of the laws of two or more countries on some particular subject is generally considered desirable and worthwhile. But that would seem to be even more so in relation to a comparative study or examination of the anti-trust or the restrictive trade practices and monopolies laws of Australia and of the European Economic Community (the EEC). The fact that the Australian Federal Government has seen fit to appoint a Minister of Cabinet rank to be specifically in charge of trade negotiations with the EEC may provide some justification for such comparative study. Added to the latter, the fact that both the Commission of the European Communities (the EC Commission)[1] and the Court of Justice of the European Communities (the EC Court)[2] have, in a number of cases decided by them, ruled that EEC anti-trust law has extra-territorial application on the basis of the so-called "effects doctrine",[3] means that Australian companies or firms which have some business connections or trade dealings within the European Common Market, need to observe the EEC's anti-trust law in the conduct of those businesses or trade transactions. Moreover, as the Committee of Experts of the Organisation of Economic Co-operation and Development (the OECD) which deals with the subject of restrictive business practices has had occasion to observe, anti-trust policies and laws in the various OECD member countries with market economies are gradually assuming an international character, with the result that proposals discussed for legislation, or a case

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1. See e.g., the decision of the EC Commission to the effect that EEC anti-trust rules are capable of being applied in respect of economic measures taken in a non-member country of the EEC at either the governmental or the private level. Note furthermore, that agreements or concerted practices engaged in by foreign companies or firms, *inter se*, are capable of being treated as constituting a violation of EEC anti-trust law. (*Re The Franco–Japanese Ballbearings Agreement* (74/634/EEC): [1975] C.M.L.R. D8; Bulletin of the European Communities (1974, No. 13), pp. 32–33. For other EC Commission decisions on similar lines, see e.g., *Re The French and Taiwanese Mushroom Packers* (75/77/EEC): [1975] C.M.L.R. D83; Bulletin of the European Communities (1975, No. 1), pp. 31–32; *The Community* v. *Hoffman–La Roche* (76/642/EEC): [1976] O.J. L223/27 (16th August, 1976); [1976] C.M.L.R. D25; *Wilkes* v. *Theal N.V. & Watts Ltd.* (77/129/EEC): [1977] O.J. L39/19; [1977] C.M.L.R. D.44.
2. See e.g., (Cases 48–57/69): *I.C.I. Ltd and Others* v. *EC Commission* [1972] C.M.L.R. 557; (Case 6/72): *Europemballage Corporation and Continental Can Co Inc.* v. *EC Commission* [1973] E.C.R. 215; [1973] C.M.L.R. 199; (Case 6–7/73): *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation* v. *EC Commission* [1974] E.C.R. 233; [1974] C.M.L.R. 309.
3. As regards the general question of the extra-territorial application of the anti-trust law of the European Common Market, see e.g., Bentil, *Extra-territorial Effect of EEC Anti-Trust Law*, (1975) The Scots Law Times 149; *Control of the Abuse of Monopoly Power in EEC Business Law*, (1975) 12 C.M.L. Rev. 59.

brought before the courts of one country, may become an event which could rapidly give rise to a parallel action in other countries.[4]

Nevertheless, similarities and differences exist in the anti-trust laws and procedures of various countries, despite the fact that conduct by business or commercial enterprise may be the same in most, if not all. Obviously, a European Economic Community of nine different member-States is very different from an Australia with a single economy to grapple with. Moreover, the drafters of the relevant Australian anti-trust legislation would seem to have drawn almost entirely on the anti-trust law of the United States of America, and not on that of the EEC. Yet, one detects considerable similarities between the Australian and the EEC legal systems in this area. That is not to say that differences between the two systems do not exist. It is therefore the main object of this paper to undertake a comparative study of one particular area of anti-trust regulation, namely, the regulation of the practice of resale price maintenance under the two systems. It will be convenient to begin the present study with a consideration of the general background covering the nature and scope of the practice of resale price maintenance, as well as of an interesting study by the OECD of that practice, with a view to getting the present examination into its proper perspective.

General Background

Since it is important for the present study to know from the beginning what the practice of resale price maintenance entails, it is necessary to examine the nature and scope of that practice. In this respect, economic more than legal factors would be taken into account. After all, underlying all anti-trust laws are various economic considerations which legislators and administrators of anti-trust systems have to keep in mind all the time, to be able to formulate and apply the appropriate rules and procedures in that field.

(i) Nature and Scope of the Practice of Resale Price Maintenance

The practice of resale price maintenance[5] relates to the conduct by which manufacturers or the suppliers of goods acting either individually or collectively, prescribe a price (usually the minimum price) to be charged by wholesalers or retailers when such goods are resold by the latter. Consequently, wholesalers or retailers are not allowed to sell such goods below the fixed minimum price. To ensure that wholesalers and retailers adhere to the fixed or the prescribed minimum price, some action disadvantageous to such wholesalers or retailers may be threatened by manufacturers or suppliers against the former, should they fail to observe that price in the course of reselling the goods supplied to them. Usually, manufacturers or suppliers enter into some form of agreement or arrangement which is meant to be enforced by wholesalers or retailers. The net effect of the latter is that, in the event of a breach of the agreement or the arrangement by a wholesaler or a retailer, some sort of sanction, such as a ban or a boycott against the wholesaler or the retailer, or a withdrawal of or a refusal to supply any more of the goods to the latter, may be applied.

4. That observation was made after the Committee of Experts' 1973–1975 survey of recent business competition policy developments in the member countries of the OECD. (see The OECD Observer, No. 77, September–October, 1975, p. 40).
5. On the economic aspects of the subject, see e.g., B. S. Yamey (ed.), *Resale Price Maintenance*, 1966), Chapter 1; Alex Hunter, *Competition and the Law*, (1966) pp. 191 & 194.

However, apart from vertical resale price maintenance agreements or arrangements, which are concluded between manufacturers or suppliers on the one hand and wholesalers or retailers on the other, there are also horizontal resale price maintenance agreements or arrangements that may be concluded between manufacturers or suppliers *inter se*. But the latter would not seem to occur frequently. Furthermore, although it is usually believed or taken for granted that resale price maintenance agreements are imposed by manufacturers or suppliers on wholesalers or retailers, yet there is some evidence to suggest that, as a form of marketing policy or strategy, such agreements may indeed be forced by wholesalers or retailers on manufacturers or suppliers for the purpose of protecting the business interests of such wholesalers and retailers. Consequently, it has been argued that, in origin and intent, resale price maintenance has the elements of a horizontal restriction in addition to its usual vertical one.[6]

More often than not, the type of goods in respect of which resale price maintenance agreements or arrangements are entered into are those which possess some special feature or characteristic, or those which happen to be branded goods protected by some trade name or trade mark. Goods of that kind may be made the subject-matter of resale price maintenance agreements in spite of the fact that substitutes may happen to be available within the same market. Thus, pharmaceutical goods, patented medicines and toiletry goods, books, motor vehicle accessories, petrol and oils, some durable consumer goods such as electric lamps, refrigerators, vacuum cleaners, washing machines etc., photographic and sports equipment, some building materials, office equipment, dental supplies, beer, wine and soft drinks, cigarettes and tobacco, are mostly made the subject of resale price maintenance agreements or arrangements.

Although the economic arguments for the legal control or regulation of the practice of resale price maintenance are by no means conclusive, there would seem to be no denying the fact that the practice of resale price maintenance does tend to distort or prevent business or commercial competition. Indeed, resale price maintenance policies are usually designed to present price competition among manufacturers and distributors, and are occasionally a vehicle for exclusive dealing. However, resale price maintenance agreements differ from other types of restrictive business or commercial practices. Thus, in particular, resale price maintenance agreements or arrangements may contain elements which may tend to encourage business or commercial competition by means of service or product differentiation, in which case they may usually provide benefits for the public.

Since Australia, as well as all the EEC member-States are members of the OECD, and the latter has had occasion to study the practice of resale price maintenance and how it is dealt with or regulated in the various member countries of the OECD, it would seem useful to examine some of the important features of that study briefly at this stage.

(ii) OECD Study of the Practice of Resale Price Maintenance

Some years ago, the Committee of Experts on Restrictive Business Practices of the OECD undertook to examine, from the standpoint of competition policy, problems which arose in cases where suppliers refused to sell goods or supply services to particular wholesalers or retailers. The examination was prompted by the fact that the practice in question had, by that time, become of increasing

6. See Alex Hunter, *op. cit.*, p. 193.

concern to the anti-trust authorities of several of the member countries of the OECD. It was indeed the fear that such a practice was likely to prevent free access to the market, or restrict the free play of the forces of business or commercial competition, and therefore subsequently bring about an unfavourable effect on the development of modern distribution structures,[7] which influenced various OECD member countries to move the Committee of Experts on Restrictive Business Practices to undertake this investigation. Thus, it was within this general context that the specific question of the practice of resale price maintenance came to be considered by the Committee of Experts of the OECD.

As regards the practice of resale price maintenance in particular, the Committee of Experts took the view that experience had demonstrated that refusal to sell by suppliers of goods to wholesalers or retailers was the most persuasive means employed by suppliers to enforce resale prices. In that respect, the Committee of Experts found that suppliers tended to circumvent legal prohibitions of individual or collective resale price maintenance agreements or arrangements in many of the OECD member countries[8] by withholding supplies from distributors who sought to sell those suppliers' goods at prices lower than the suppliers thought were reasonable. Quite apart from that, the Committee of Experts felt that, even if "prescribed" resale prices were prohibited by law, a supplier might resort to "recommended" resale prices which could then somehow or indirectly ensure the maintenance of resale prices. It was found that a supplier might not only refuse to sell to a distributor in the event of a breach of a resale price maintenance agreement by the latter for the purpose of protecting the supplier's own business or commercial interests, but also in response to an initiative on the part of distributors or retailers in certain situations. In relation to this latter, a supplier would be prevailed upon to keep the circle of distributors or retailers as small as possible, or to exclude particular price-cutting distributors or retailers from the market. Indeed, it was found that cases were becoming increasingly frequent in some of the member countries of the OECD, in which traditional retailers and specialised shops tended to threaten to discontinue the distribution of a supplier's products if the latter delivered identical products to supermarkets, discount houses, chain stores, or other non-traditional retailers. In that event, traditional retailers aimed at hindering the appearance or the development of new forms of distribution. Indeed, since such new forms of distribution tended to be economically more efficient than the traditional forms, especially because of their lower labour costs, price advertising, self-service, and othe rationalisation methods, it was to be expected that the traditional forms of distribution would react in the way indicated.

The survey conducted by the OECD's Committee of Experts on Restrictive Business Practices, concerning the question of refusal to sell by suppliers generally, and that of the practice of resale price maintenance in particular, revealed that the member countries of the OECD tended to take up a variety of legal positions on such matters. Nevertheless, all the then existing legal measures had certain economic aims in common. These were: (a) to achieve a modernisation of the structures of distribution, and (b) to maintain price stability. France and Spain were the only member countries of the OECD

7. See *The Report of the Committee of Experts on Restrictive Business Practices* (The OECD Observer, No. 39, April 1969, pp. 27–30).
8. Such as in Canada, Denmark, France, Ireland, Luxembourg, the Netherlands, Norway, Sweden, the United Kingdom and the U.S.A.

which were found to have adopted a general prohibition declaring all forms of refusal to sell to be illegal. Other OECD member countries would seem to have adopted a less severe legal approach: such countries either sought legally to prohibit specific types of refusal to sell by suppliers, or applied the general provisions of their restrictive business practices laws to different kinds of refusal to sell by suppliers.

As regards the practice of resale price maintenance in particular, the Committee of Experts found that, almost invariably, OECD member countries considered it necessary to take some legal or administrative action in respect of it. Thus, apart from France and Spain, which had introduced a general prohibition in respect of all forms of refusal to sell by suppliers, and thereby automatically rendered the practice of resale price maintenance illegal, there were other member countries of the OECD which had specific laws for dealing with that practice. For example, Japan, Luxembourg, the Netherlands, and the United Kingdom were found to have specific laws on refusal to sell by suppliers and which laws were aimed directly at illegal resale price maintenance agreements or arrangements. In Scandinavia, restrictive business practices laws were generally applied against unlawful resale price maintenance agreements or arrangements, especially since the latter were considered as being against the public interest. In Ireland, it was found that orders tended to be issued under that country's Restrictive Trade Practices Act to control and regulate the practice of resale price maintenance. As regards the United States of America, it is noteworthy that the OECD's Committee of Experts found that, under its anti-trust regulation system, a supplier was, and continued to be, entitled to refuse to sell to a retailer. Consequently, it was found that, in the United States, the practice of resale price maintenance was not legally prohibited. However, in practice, when an activity in pursuance of a resale price maintenance agreement or arrangement happened to include other factors, such as joint price discussions, the United States courts were found to have, in many instances, treated that as amounting to an illegal combination in violation of section 1 of the Sherman Anti-trust Act.

On the rather subtle practice of "loss leader" selling by retailers, which resale price maintenance agreements or arrangements seek to forestall, the OECD's Committee of Experts on Restrictive Business Practices found that it was generally accepted by the anti-trust authorities of the various member countries of the OECD that a supplier was justified in refusing to supply a distributor or a retailer, who chose to resell at uneconomic prices or at a loss the goods of that supplier, for the purpose of attracting customers to that distributor's or retailer's establishment to buy other kinds of goods sold by the latter. Consequently, it was found that the laws of most of the OECD member countries tended to contain specific provisions authorising a supplier to refuse to sell to a distributor or retailer who engaged in "loss leader" selling or trading.

Having considered the foregoing general background to the present study, attention will now be directed to an examination of the institutional and procedural aspects of restrictive trade practices regulation within the legal framework of the Australian and the EEC anti-trust systems.

Institutional and Procedural Comparisons

Under this heading, the various agencies or bodies entrusted with the administration and the regulation of the anti-trust systems of Australia and the EEC, and how they are meant to carry out their duties and functions,

will be considered. It will be convenient to consider the relevant institutional comparisons first before proceeding to examine the various procedural comparisons.

(i) Institutional Comparisons

Under the Trade Practices Act 1974 (Cth.), as amended by the Trade Practices Amendment Act 1977 (Cth.), three main agencies—the Trade Practices Commission, the Trade Practices Tribunal, and the Federal Court of Australia—are entrusted, in various ways, with the administration and the application of this legislation. The Trade Practices Commission appears to exercise purely administrative functions, such as disseminating information, making proposals for the reform of the law, conducting research,[9] and above all, granting, revoking or varying authorisations[10] to a company or firm to enter into an agreement, arrangement or practice which may be in restraint of trade or commerce, or to a company or firm already party to any such agreement, arrangement or practice, to continue to do so. On the other hand, the Trade Practices Tribunal and the Federal Court of Australia are meant to exercise quasi-judicial and judicial functions respectively. The Trade Practices Tribunal is only a review body which is meant to exercise powers of that nature[11] in respect of any determination of the Trade Practices Commission touching any application by a company or firm for the grant of an authorisation or the revocation or variation of an authorisation. The Federal Court of Australia, which would seem to have been brought into the general framework of the restrictive trade practices provisions of the Australian Trade Practices legislation without its having been referred to beforehand in the earlier part of those provisions,[12] is meant to exercise purely judicial functions and powers.

Thus, the Federal Court of Australia exercises an exclusive jurisdiction in respect of its powers under the Trade Practices Act, except for the fact that appeals may lie from its decisions to the High Court of Australia. In that respect, the Federal Court of Australia has power to order a person who acts in violation of, or attempts, aids, abets, counsels or procures another person or conspires with other persons to violate a provision of the restrictive trade practices section of that legislation to pay to the Australian Commonwealth such pecuniary penalty[13] as it considers appropriate.[14] Should such pecuniary payment not be paid, the Court has competence to hear and determine civil proceedings brought before it by the appropriate Government Minister or by the Trade Practices Commission for the recovery, on behalf of the Australian Commonwealth Government, of such pecuniary penalty.[15] Furthermore, the Court has jurisdiction to entertain applications by the appropriate Government Minister, the Trade Practices Commission, or any other person who can show cause, for an injunction to restrain some other person from acting in violation

9. Section 28 of the 1974 Act as amended.
10. *Ibid.*, sections 88–91.
11. *Ibid.*, sections 101–102.
12. Cf. the well-defined and neatly arranged provisions relating to the composition, powers and functions of the Trade Practices Commission and those of the Trade Practices Tribunal. Indeed, it is not at all easy to obtain a coherent picture of the Court's actual position within the general framework of the restrictive trade practices provisions of the legislation.
13. Not exceeding 50,000 dollars in the case of a person not being a body corporate, or 250,000 dollars in the case of a body corporate.
14. Section 76 of the 1974 Act as amended.
15. *Ibid.*, section 77.

or attempting to or being a party to or conspiring with others to violate some provision of the restrictive trade practices part of the legislation.[16] The Court also has power to award damages in favour of a person suffering damage or loss in consequence of the conduct of another person in violation of the relevant provisions of the Trade Practices Act.[17] In addition to that, the Court has power to make other orders, as it considers appropriate, against a person who engages in conduct which is violative of some provision of the restrictive trade practices part of the legislation.[18] Apart from all the foregoing, the Court has power to hear and determine proceedings in respect of contempt of the Trade Practices Tribunal as regards proceedings before the latter.[19]

The Australian anti-trust institutional framework is, in a number of ways, different from that of the EEC, although similarities also exist in respect of the two systems. Leaving aside the Council of the European Communities (the EC Council), which has policy functions as well as legislative powers of enacting regulations touching all aspects of restrictive trade practices and monopolies control in the European Common Market, the EEC's anti-trust system is administered and applied, in the main, by the EC Commission, and to a limited extent, by the EC Court. Unlike the Australian Trade Practices Commission, the EC Commission exercises both administrative and quasi-judicial functions and powers. Although the functions and powers of the EC Commission are broadly envisaged under the EEC Treaty,[20] they are spelt out in more detail by the First Regulation of the EC Council[21] for the implementation of the restrictive trade practices and monopolies provisions of the EEC Treaty.[22] From the point of view of EEC anti-trust administration, the EC Commission has power to grant 'negative clearance' in respect of agreements, decisions, or concerted practices entered into by enterprises which, *prima facie*, are not deemed to constitute an infringement of the EEC anti-trust rules.[23] Added to that, the EC Commission has power to grant exemptions from the anti-trust prohibition of the EEC Treaty, in respect of agreements, decisions, or concerted practices operated by enterprises, but which satisfy certain specified conditions laid down by that Treaty.[24] Apart from those, the EC Commission is meant to act in liaison with the respective anti-trust authorities of the individual member-States of the EEC.[25] In this respect, the EC Commission has power to request the Governments and the competent authorities of the individual member-States of the Community, as well as enterprises, to furnish it with all necessary information.[26]

From the viewpoint of its quasi-judicial powers, the EC Commission has investigatory powers in relation to the operations of enterprises. Consequently, the EC Commission is vested with the discretionary power of imposing fines[27] or periodic penalty payments[28] on enterprises which intentionally or negligently supply it with incorrect or misleading information, or produce books

16. *Ibid.*, section 80.
17. *Ibid.*, section 82.
18. *Ibid.*, section 87.
19. *Ibid.*, section 137.
20. Articles 87–89.
21. EC Council Regulation 17 (J.O. 13/204), which came into operation on March 13, 1962.
22. Namely, Articles 85 and 86.
23. Article 2 of EC Council Regulation 17.
24. Articles 6–8 of EC Council Regulation 17.
25. Article 10 of EC Council Regulation 17.
26. Article 11 of EC Council Regulation 17.
27. Article 15 of EC Council Regulation 17.
28. Article 16 of EC Council Regulation 17.

or other business records in an incomplete form during investigations. However, the exercise of these latter powers by the EC Commission is subject to review by the EC Court.[29]

It can be seen that, apart from the possibility of review by the EC Court of the EC Commission's exercise of its quasi-judicial powers, the EC Commission is virtually the sole agency which administers and applies the anti-trust system of the EEC. That contrasts with the powers of the Australian Trade Practices Commission which leave the latter body with no chance of making its existence strongly felt by Australian enterprises within the area of restrictive trade practices. The fact that, for example, the Australian Trade Practices Commission has to resort to the Federal Court of Australia for the imposition of any pecuniary penalty on offending enterprises, or for an injunction to restrain a person or enterprise from engaging in conduct which may constitute an infringement of the Australian Trade Practices Act, certainly shows how extremely limited the powers of the Commission are. However, sight should not be lost of the fact that there are constitutional restraints imposed by the Australian Federal Constitution in this respect. It is equally noteworthy that the EC Commission combines not only the powers of the Australian Trade Practices Commission and the Trade Practices Tribunal, but also those of the Federal Court of Australia; albeit the appellate jurisdiction of the EC Court could ultimately be invoked to vary or set aside the EC Commission's determination, should the need arise.

As regards the EC Court, it has unlimited power to review the decisions or determinations of the EC Commission which impose fines or periodic penalty payments on enterprises alleged to have acted in violation of the EEC anti-trust rules. The exercise by the EC Court of its review powers in this respect means that it is in a position to pronounce on whether or not an act or omission on the part of an enterprise or enterprises constitutes a violation of the EEC anti-trust provisions. Consequently, the EC Court would seem to have power to review directly, all aspects of decisions and determinations made by the EC Commission in the anti-trust field. This would seem to contrast with the powers of the Federal Court of Australia, which appear to be solely confined to imposing pecuniary penalties on persons acting in infringement of the Australian trade practices legislation, or to granting injunctions to restrain persons from so acting. This follows from the fact that, in respect of the power of granting authorisation which is entrusted to the Australian Trade Practices Commission, only the Australian Trade Practices Tribunal is entrusted with review powers. There is no indication that the Federal Court of Australia has an ultimate power of review in that regard. On the other hand, the power of the Federal Court of Australia to grant injunctions to restrain a breach of the relevant provisions of the Australian trade practices legislation contrasts with the lack of any such power on the part of the EC Court, although that power would seem to be exercisable by the EC Commission under the EEC anti-trust system. Furthermore, the power of the Federal Court of Australia to award damages to a person who suffers damage or loss in consequence of the conduct of another person in violation of the Australian restrictive trade practices provisions, is totally lacking under the anti-trust system of the EEC.

All told therefore, one is bound to wonder why, under the Australian trade practices legislation, the Trade Practices Commission is so limited in its powers, in contrast to its EEC counterpart. Moreover, the position of the Australian Trade Practices Tribunal under its legislation would appear to be somehow

29. Article 17 of EC Council Regulation 17.

an anomalous or an odd one. Indeed, it may be wondered why its powers should not have been entrusted to the Federal Court of Australia. But, of course, unlike the EEC set-up, the Australian system has to come to grips with various consdtitutional constraints. Other than that, one would be inclined to question the wisdom and the desirability of the legal framework of the institutional structure of the Australian anti-trust system.

(ii) Procedural Comparisons

Generally, under the Australian trade practices legislation, the Trade Practices Commission has power to grant authorisations which permit a corporation to enter into a contract, arrangement or understanding which may otherwise have the effect of substantially lessening business or commercial competition.[30] However, such authorisations are not meant to be granted in respect of contracts, arrangements, or understandings which tend to fix or control prices, grant discounts, allowances, or rebates in respect of goods supplied by parties to those contracts, arrangements, or understandings, and others not parties to them.[31] Moreover, the Trade Practices Commission has no power to grant an authorisation to a corporation to make a contract or arrangement, or to arrive at an understanding in a situation where the contract, arrangement or understanding has already been entered into before the Trade Practices Commission makes a determination as regards that application.[32] Even where the Trade Practices Commission considers it should exercise its power to grant an authorisation, it is entitled to do so, only when it is satisfied that the restrictive trade practice meant to be engaged in by the corporation, in whose interest the authorisation is meant to be granted, is likely to have a substantial benefit for the public, especially if that benefit could not otherwise be available.[33]

It is interesting to note that the Trade Practices Amendment Act 1977 (Cth.) has repealed those provisions of the Trade Practices Act 1974 (Cth.) which previously empowered the Trade Practices Commission, on being notified by a corporation of an existing or a proposed restrictive trade practice, to declare to such a corporation, that any restraint of trade or commerce resulting from a notified agreement or practice did not have, nor was likely to have, a significant effect on business or commercial competition. Indeed, the effect of any such declaration by the Trade Practices Commission meant that the apparently restrictive character of the agreement or practice notified to the latter was not to be considered as being in restraint of business or trade, for the purposes of the 1974 legislation.[34] Equally noteworthy, is the fact that, under the amending legislation of 1977, all provisions touching clearances, except for those in relation to exclusive dealing agreements, arrangements or understandings, have been done away with.

As compared with the procedural rules of the Australian anti-trust system which are fully laid down under the Trade Practices Act 1974 as amended (Cth.), the EEC anti-trust procedural rules are not to be found in the EEC Treaty itself. Instead, they are embodied in EC Council Regulation 17 of 1962. Under the provisions of the latter Regulation, the powers of the EC Commission to grant 'negative clearance',[35] grant exemption in respect of

30. Section 88(1) of the 1974 Act as amended.
31. *Ibid.*, section 88(2).
32. *Ibid.*, section 88(12).
33. *Ibid.*, section 90(6)–(9).
34. Section 92 of the 1974 Act, which is now repealed.
35. Article 2.

restrictive trade practices under specified conditions[36] in accordance with the provisions of Article 85(3) of the EEC Treaty, and to impose fines[37] and periodic penalty payments,[38] are spelt out. In the case of the EC Commission's power to grant 'negative clearance', an application is meant to be made by an interested enterprise or an association of enterprises to the EC Commission. Should the EC Commission consider that, on the basis of all the available evidence at its disposal, no action on its part is required in respect of an agreement, decision or a concerted practice engaged in or proposed to be engaged in by that enterprise or enterprises, the EC Commission would then issue a certificate to that effect. This would mean that the conduct or the proposed conduct in question does not, *prima facie*, constitute an infringement of the EEC anti-trust rules. In other words, the enterprise or enterprises concerned become legally entitled to proceed with the relevant business or commercial transaction or venture. Since the idea of clearance would seem to have been, in all essentials, done away with under the Australian trade practices legislation as it now stands, except for that in relation to exclusive dealing agreements, arrangements or understandings, the EEC 'negative clearance' procedure deserves to be carefully borne in mind.

In contrast to the power of the EC Commission to grant 'negative clearance', is that same Commission's power to grant exemption in respect of restrictive trade practices which would normally be treated as being in violation of the relevant anti-trust prohibitory rules of the EEC.[39] However, Article 85(3) of the EEC Treaty lays down specific conditions which have to be satisfied before any such exemption by the EC Commission from the prohibitory rules of the EEC Treaty may be granted. The conditions are: (i) that the restrictive trade practice involved should contribute or be capable of contributing to an improvement in the production or the distribution of goods; (ii) that it should promote or be capable of promoting technical or economic progress, while at the same time, making it possible for consumers to gain some benefit from its operation; and (iii) that it should neither impose on the enterprises involved, unnecessary restrictions, nor make it possible for them to eliminate business or commercial competition touching a substantial part of the products in question. In a way, the authorisation provisions under the Australian trade practices legislation which empower the Trade Practices Commission to grant authorisation in respect of certain kinds of restrictive trade practices, have some affinities with the exemption provisions of the EEC Treaty as outlined above.

In relation to the EC Commission's power to impose a fine or a periodic penalty payment on enterprises found to have acted in breach of the EEC anti-trust rules, the procedure meant to be followed contrasts with the power of the Federal Court of Australia to impose pecuniary penalties and to award damages against individual persons for acting in breach of the restrictive trade practices provisions of the Australian trade practices legislation. However, it needs to be noted that, just as the Australian trade practices legislation

36. Articles 6–8.
37. Article 15.
38. Article 16.
39. For a consideration of the distinction between the discretionary powers of the EC Commission to grant "negative clearance" and exemption respectively, see Bentil, *International Trade Fairs under EEC Competition Law*, (1974) 124 New L.J. 193 at pp. 194–195; *The Prohibition of Resale Price Maintenance under the Commercial Law of the European Economic Community*, (1974) 3 Anglo–American Law Rev. *380 at p. 384; Anti-Trusting Aggregated Rebate Cartels in Australian and EEC Business Law*, (1976) 4 Austr. Bus. Law Rev. *126 at pp. 139–141.*

considers that criminal proceedings do not lie against a person who acts in violation of the restrictive trade practices provisions of that legislation,[40] so under EC Council Council Regulation 17, decisions of the EC Commission touching the imposition of fines are not meant to be "of a criminal law nature."[41]

In the Australian context, the Federal Court of Australia is empowered to impose pecuniary penalties on a person found to have contravened, attempted, aided, abetted, counselled, procured another person or conspired with others to contravene the restrictive trade practices provisions of the Australian trade practices legislation. The Federal Court of Australia is meant to take the following factors into account in making its determination, namely: (i) the nature and extent of the act or omission in question; (ii) the nature and extent of any loss or damage suffered in consequence of the act or omission; (iii) the circumstances within which the act or omission happened to have taken place; and (iv) whether the law-breaker has previously been found by that Court to have engaged in any similar conduct under the relevant provisions of the legislation. In a somewhat similar way, under EC Council Regulation 17, the EC Commission is meant to take into account, when fixing the amount of a fine: (i) the gravity of an infringement; (ii) the duration of that infringement; and (iii) whether the infringement was intentional or negligent. On the other hand, the EEC periodic penalty payments meant to be imposed by the EC Commission on enterprises for infringing the EEC restrictive trade practices rules are specifically geared to ensure that infringements are quickly brought to an end; that the EC Commission's directions already given are complied with; that some requisite information requested by the EC Commission is supplied; or that particular enterprises submit to an investigation ordered by the EC Commission. Although the same would not seem to be spelt out under the Australian trade practices legislation, it is fair to argue that similar ends would be aimed at, where necessary, by the Federal Court of Australia in imposing pecuniary penalties.

Lastly, the availability under the Australian trade practices legislation of a remedy in damages, recoverable by a person aggrieved by the conduct of another person in contravention of the restrictive trade practices provisions of that legislation, (which is totally absent under the EEC anti-trust rules), deserves some attention. For a person to be able to recover damages in an action before the Federal Court of Australia in this context, such a person must have suffered loss or damage in consequence of the conduct of another person and which conduct was in contravention of the restrictive trade practices provisions of the statute. Moreover, damages of this kind may equally be claimed against any other person involved in the statutory contravention. The damages that may be awarded by the Court would seem to be limited to the amount of the loss or damage suffered by a claimant. There is a period of limitation in respect of a legal action of this nature. A claimant or an aggrieved party is meant to commence proceedings at any time within 3 years after the date on which the cause of action accrued.

Having considered some of the institutional and procedural aspects of the Australian and the EEC anti-trust systems, it becomes necessary to examine the important substantive legal provisions and rules of the two systems touching the practice of resale price maintenance, and the way and manner in which

40. Section 78.
41. Article 15(4).

that practice is meant to be controlled or regulated under each of them.[42]

Substantive Legal Provisions and Rules on Resale Price Maintenance Compared

It will be convenient to examine, under the present section, some of the general provisions and rules touching the practice of resale price maintenance as envisaged by the Australian and the EEC anti-trust systems, broadly at first, before proceeding to consider specific aspects of the practice. In that respect, not only will the relevant statutory and Treaty provisions respectively be considered, but also the relevant case-law will be brought to bear to put the entire study into its proper perspective.

(i) Comparisons as Regards General Legal Provisions and Rules

Unlike both the EEC Treaty and Regulation 17 of the EC Council which contain no specific provisions on the practice of resale price maintenance, the Australian trade practices legislation specifically contains provisions in relation to the practice. Thus, apart from a general declaration prohibiting the practice of resale price maintenance by a corporation or some other person under Part IV of the legislation,[43] the whole of Part VIII of the legislation, consisting of five sections,[44] is devoted to the nature and scope of the practice, and how it is meant to be legally controlled. On the other hand, under the EEC anti-trust system, the regulation of the practice of resale price maintenance appears to be covered by that part of the provisions of Article 85(1) of the EEC Treaty which sets out to prohibit direct or indirect price-fixing or any other trading conditions[45] as incompatible with the establishment of the European Common Market, should certain conditions be present. Those conditions are as follows: (i) that there should be present an agreement or concerted practice between enterprises, or a decision by an association of enterprises; (ii) that any of those activities should have the tendency of affecting trade between the member-States of the EEC; and (iii) that any such activity should have, as its objective or effect, the prevention, restriction or distortion of business or commercial competition within the European Common Market.

However, the case-law on the EEC anti-trust system evolved and developed by the EC Commission and the EC Court respectively, has clearly established some important basic rules and principles for the regulation of the practice

42. As regards some of the important literature on the legal regulation of the practice of resale price maintenance under the Australian anti-trust system, see e.g., H. Schreiber, J. L. Taylor and B. Donald, *Resale Price Maintenance: A Guide to the Australian Law*, (1972), pp. 1–4; R. Baxt and M. Brunt, *The Murphy Trade Practices Bill: Admirable Objectives, Inadequate Means*, (1974) 2 Austr. Bus. Law Rev. 3 at p. 17; K. E. Lindgren and L. V. Entrekin, *Resale Price Maintenance in the Light of Marketing Strategy Involving Selective Distribution*, (1973) 1 Austr. Bus. Law Rev. 130 at p. 147.

In relation to the nature and scope, as well as the application of EEC rules on the practice of resale price maintenance, see e.g., Bentil, *The Prohibition of Resale Price Maintenance under the Commercial Law of the European Economic Community*, *op. cit.*; R. Graupner, *The Rules of Competition in the European Economic Community*, (1965) pp. 16 & 30; J. T. Lang, *The Common Market and Common Law*, (1966), pp. 393–394; B. Goldman, *European Commercial Law*, (1973) pp. 190–191; C. Bellamy & C. D. Child, *Common Market Law of Competition*, (1973), pp. 68–69, paras 310–311 & pp. 72–73, paras 319–320; W. Alexander, *The EEC Rules of Competition*, (1973), pp. 65–66; J. P. Cunningham, *The Competition Law of the EEC*, (1973), pp. 56–57, para 3; Barounos, Hall & James, *EEC Anti-Trust Law*, (1975) p. 50.

43. Section 48 of the 1974 Act as amended.

44. *Ibid.*, sections 96–100.

45. Article 85(1)(a).

of resale price maintenance in the EEC. This would seem to suggest that, unlike the position under the relevant Australian statutory provisions, the EC Commission is given more scope within which to develop directly the law and practice relating to the regulation of the practice of resale price maintenance. Under the Australian anti-trust system, the law and practice concerning the practice of resale price maintenance are so well-defined by the trade practices legislation as to leave the Trade Practices Commission and the Federal Court of Australia with very little or no discretion in that direction. But be that as it may, the basic general rules and principles developed for the regulation of the practice of resale price maintenance would appear, *mutatis mutandis*, to be the same under both the Australian and the EEC anti-trust systems.

To advert, first of all, to some of the general features of the law and procedure relating to the practice of resale price maintenance under the Australian anti-trust system, two main factors need to be examined. These are: (i) the kind of acts which are meant to be treated as constituting engaging in the practice of resaale price maintenance; and (ii) sanctions meant to be resorted to by the party imposing the obligation for the observance of the practice of resale price maintenance, for enforcing that observance. As regards the kind of acts which are meant to be treated as constituting the conduct of engaging in the practice of resale price maintenance under the Australian trade practices legislation, the following types of business or commercial behaviour on the part of a corporation or some other person, as a supplier, are considered to be such, namely: where a supplier conveys to a retailer or a wholesaler that goods supplied by the former are not to be sold by the latter at a price below that fixed by that supplier; or where a supplier induces or attempts to induce a retailer or a wholesaler not to sell such goods at a price less than that specified by the supplier.[46] In either situation, it does not matter whether the conduct in question happens to be that of the supplier or that of a person acting on behalf of, or by arrangement with the supplier, since the supplier would be deemed to have brought about that conduct. Moreover, it does not matter that the minimum price below which a retailer or a wholesaler is not allowed to sell the goods provided by a supplier is positively or negatively expressed. Furthermore, a supplier's direction to a retailer or to a wholesaler not to sell below a fixed minimum price may take the form of indicating that the goods supplied should not be advertised[47] for sale at a price below that minimum price, or that they are not to be displayed or offered for sale below that price.

It is quite clear that an agreement as to the practice of resale price

46. It may be noted that, in the recent case of *Trade Practices Commission* v. *Sharp Corporation of Australia Pty Ltd.* (1976) 8 A.L.R. 255, the Trade Practices Commission brought proceedings against the defendant company for breach of section 48 of the Trade Practices Act 1974 (Cth.), in that the latter had, by a letter, requested a company to which it supplied electronic calculators, to note that all future advertisements in respect of those products should show the defendant company's uniform retail price. The Trade Practices Commission treated that conduct of the defendant company as amounting to an attempt by a supplier to induce a second person not to advertise goods supplied to a retailer below a price less than that specified by such a supplier. Consequently, the Commission felt that a violation of the relevant statutory provisions had been brought about by the defendant company. The then Australian Industrial Court sustained the decision of the Trade Practices Commission and considered the imposition of a fine of 5,000 dollars as the appropriate penalty in the circumstances of the case.

47. See e.g., *The Amoco Petrol Case* (CCH–Australia) Ltd., para 990, in relation to a retailer refusing to remove a board on which was advertised the sale of a supplier's petrol at a discount. See also *Trade Practices Commission* v. *Sharp Corporation of Australia Pty Ltd., supra.*

maintenance does not need to be formal or written. An oral stipulation would suffice. Indeed, in the case of *Commissioner of Trade Practices* v. *Matsushita Electric Co. (Australia) Pty Ltd.*,[48] oral stipulations touching minimum selling prices sufficed for the conclusion of a resale price maintenance agreement for the purposes of the relevant provisions of the Trade Practices Act 1971 (Cth.). Consequently, a mere informal understanding may suffice to create a situation in which the practice of resale price maintenance may be observed. However, a mere agreement, arrangement, or understanding would not, *ipso facto*, be enough for the relevant legal prohibition to be applicable. Thus, in addition to an agreement or an understanding, however formal or informal that may be, there must be some kind of sanction, whether direct or indirect, which is supposed to be carried into effect or which is threatened, should a retailer or a wholesaler fail to observe a resale price maintenance agreement or understanding. Indeed, the agreement and the sanction become inseparable and are, almost invariably, accepted by a retailer or by a wholesaler at the same time. This leads to an examination of the sanctions generally imposed by suppliers on retailers or wholesalers should the latter fail or refuse to observe the maintenance of retail prices, as a second feature of the law and practice touching the practice of resale price maintenance as referred to above.

The Australian trade practices legislation makes it quite clear that the various ways in which a supplier indicates that the supply of goods would be withheld, if a minimum price fixed by that supplier below which a retailer or a wholesaler is not meant to sell those goods is not complied with, may provide some insight into the sanction calculated to ensure the observance of resale prices by retailers or wholesalers which the law seeks to prohibit. Thus, when such a supplier refuses to supply goods except on terms which are disadvantageous to the retailer or wholesaler; or, where in supplying those goods to a retailer or a wholesaler, the supplier treats the latter less favourably, whether as regards time, method or place of delivery or otherwise, than that supplier treats other persons to whom the same or similar goods are supplied; then, any such conduct would constitute a sufficient sanction considered unlawful under the Australian trade practices legislation.

Obviously, these instances are not meant to be, by any means, exhaustive. Thus, in the case of *Commissioner of Trade Practices* v. *Hoover (Australia) Pty Ltd.*,[49] decided by the then Australian Industrial Court[50] in accordance with the relevant provisions of the (now) repealed Trade Practices Act 1971 (Cth.), it was held that, not only was the mere threat to withhold supplies the only form of illegal sanction frowned upon the the law, but also that other forms of inducement might be tantamount to illegal sanctions. Equally, in the case of *Commissioner of Trade Practices* v. *Dalgety Australia Ltd.*,[51] decided by the then Australian Industrial Court in accordance with the relevant provisions of the now repealed Trade Practices Act of 1971, it was held that a company whose representatives had misleadingly indicated to retailers that the latter were not to sell that company's evaporative air-conditioners below a certain minimum price, lest they lost certain benefits, amounted to a supplier seeking to impose an unlawful sanction on retailers. Similarly, in the case of *Cattle Tickicide*[52], the then Australian Industrial Court treated as amounting

48. (1972) A.T.P.R. 36-006.
49. (1973) A.T.P.R. 36-008.
50. The predecessor of the Federal Court of Australia.
51. (1973) 22 F.L.R. 62; A.T.P.R. 36-011.
52. CCH(Australia) Ltd, para 970.

to an imposition of an unlawful sanction, the supply by a company of its product to a distributor on terms which were subsequently altered to the latter's disadvantage after that distributor had attempted to cut its prices.[53]

It is quite clear that, under the Australian trade practices legislation, the practice of resale price maintenance is treated as *per se* illegal. Consequently, the power of authorisation generally meant to be exercised by the Trade Practices Commission in respect of the various restrictive trade practices, is not meant to be exercisable as regards resale price maintenance agreements, arrangements, or understandings in relation to business or commercial activities. This would appear to be rather curious, in view of the fact that the anti-trust law of the United States of America, whose provisions provided a basis for the drafting of the Australian trade practices legislation, does not treat the practice of resale price maintenance as illegal *per se*. On the contrary, the anti-trust law of the United States of America appears to allow the practice to be engaged in by business enterprises, as has already been noted in the examination of the OECD study of the practice in the OECD member countries. Why then is the practice of resale price maintenance treated as *per se* illegal under the Australian trade practices legislation? Could it be because of the fact that the structure of Australian business organisation is such that, not only the whole of the Australian economy, but also the general interests of the consumer would seem to be so directly affected by the maintenance of resale prices in such an adverse manner, as to warrant total legal prohibition of the practice? Or could it be because of the fact that the structure of the Australian economy is so dominated by a few large companies or firms, that it is necessary to impose such a strict or absolute prohibition?

Equally, the EEC anti-trust system has evolved and developed rules and principles which indicate that, not only an agreement or concerted practice by enterprises, or a decision by an association of enterprises to engage in the practice of resale price maintenance, but also, any evidence which suggests that some sanction may be applied to ensure compliance with that practice, will be caught by the EEC legal prohibition. Thus, in the case of the *Association Syndicale Belge de la Parfumerie* (*ASPA*),[54] the EC Commission had occasion to point out that, the rules of a trade association which obliged its members collectively to apply maintained retail prices and to enforce compliance on others by means of a collective boycott in the event of a breach, constituted a violation of the EEC restrictive trade practices law. In a similar vein, the EC Commission held in the case of *Deutsche Philips GmbH*,[55] that agreements between enterprises which sought to fix minimum prices and other restrictive trading conditions backed by an export ban, constituted a violation of EEC anti-trust law. Equally, in the case of *Re the Application of Gerofabriek NV*,[56] the EC Commission issued a "cease and desist" order to the applicant manufacturer as regards those parts of the latter's standard-form agreements with wholesalers and retailers which prohibited exports and which sought to impose retail prices. Furthermore, in the case of *Groupement des Fabricants de Papiers Peints de Belgique* v. *EC Commission*,[57] decided recently by the EC Court on an appeal from a decision of the EC Commission,[58] it was pointed out that, not only a system of fixed selling prices imposed on

53. See also the *'Cedel' Health and Beauty Aids* case (CCH Australia) Ltd., para 980.
54. (70/333/EEC): [1970] J.O. L148/9 (8th July, 1970): [1970] C.M.L.R. D25.
55. (73/322EEC): [1973] J.O. L293/40 (20th October, 1973); [1973] C.M.L.R. D241.
56. [77/66/EEC): [1977] O.J. L16/8 (19th January, 1977); [1977] C.M.L.R. D35.
57. (Case 73/74): [1976] C.M.L.R. 589.
58. (74/431/EEC): [1974] O.J. L237/3 (29th August, 1974); [1974] C.M.L.R. D102.

retailers, but also a system whereby retailers were required to display price lists drawn up by their suppliers and were prohibited from making any public announcement of any rebates on such prices (even though they were not prohibited from actually granting such rebates), constituted an infringement of the anti-trust law of the EEC. Moreover, it is of interest to note that, in the latter case, the EC Court observed that, where the EC Commission had evidence that a trading group took action collectively to suspend supplies of goods to a recalcitrant dealer, it was not necessary to prove that the latter in fact placed an order with a member of the group and had it refused, in order to find that there was unlawful conduct under Article 85(1) of the EEC Treaty. It is noteworthy that, in the case of *Re Vereeniging Van Cementhandelaren* (*VCH*),[59] the EC Commission considered that, an obligation on the part of the members of a trade association not to sell their goods at a loss, amounted to the fixing for each sale of a compulsory minimum price. Consequently, since that was coupled with the withdrawal of certain benefits if that obligation was breached by retailer members of the association, the EC Commission held that the provisions of Article 85(1) of the EEC Treaty had been violated.

On the other hand, unlike the position under the Australian trade practices legislation, the practice of resale price maintenance is not illegal *per se* under the anti-trust law of the EEC. Consequently, the exemption provisions of Article 85(3) of the EEC Treaty, or the negative clearance provisions of EC Council Regulation 17, are capable of being applied in appropriate cases to any practice of resale price maintenance which happens to be engaged in by business or commercial enterprises. In either of the two latter situations, the EC Commission would be heavily influenced by economic policy considerations or factors in determining whether or not to grant negative clearance or an exemption in respect of a restrictive trade practice that may have been so engaged in by such enterprises. Thus, for example, in the *VCH* case already referred to, the EC Commission refused to grant negative clearance or an examption in respect of the pricing rules of a Dutch cement trade association which contained provisions demanding an observance of resale price maintenance. That contrasts with the EC Commission's decision in granting negative clearance in respect of the rules of a Dutch association of manufacturers of paints and other related products, which imposed an obligation on its member companies to keep the minimum prices and export sales and deliveries conditions fixed, to ensure that middlemen did not resell those products below the minimum prices fixed by that association: *Vereeniging van Vernis -en Verffabrikanten in Nederland* (*VVVF*).[60]

It is noteworthy that the EC Commission considered in the *VCH* case that the fixing of binding prices and conditions of re-sale for deliveries had the effect of removing, from the members of the association of Dutch cement manufacturers, the possibility of drawing up prices and conditions of sale in accordance with their own individual judgments. Equally, the EC Commission maintained that such an obligation removed the possibility of the members of that organisation being able to attract cement orders from their competitors by granting lower prices and more favourable conditions. On the other hand, in the *VVVF* case, there were several economic factors which would seem to have influenced the EC Commission into granting the negative clearance already alluded to. Those economic factors were: (a) that the fixed minimum

59. (72/22/EEC): [1972] J.O. L13/34 (17th January, 1972); (1973] C.M.L.R. D. 16.
60. (69/202/EEC): [1969] J.O. L168/22 (10th July, 1969); [1970] C.M.L.R. D1.

prices were at a fairly low level, in comparison with the effective prices of similar products then obtaining within the European Common Market as a whole; (b) that there was the possibility of real business or commercial competition in relation to the products in question, as between the member companies of that association and third parties; and (c) that there existed within the European Common Market itself, strong competition among various manufacturers in the paint and allied products sector.

Equally, in the case of *Re Dupont de Nemours (Deutschland) GmbH*,[61] the EC Commission chose to grant negative clearance in respect of a revised version of a standard-form contract and general conditions of sale used by a German manufacturer of photochemical products in the distribution of its products within the European Common Market. In this latter case, the EC Commission considered that, since the facts available to it at the time did not show that the standard form contracts and conditions of sale concerning the fixing of minimum prices and the laying down of uniform conditions for the sale of those products had, as their object or effect, the prevention, restriction or distortion of business or commercial competition within the European Common Market, they did not constitute an infringement of Article 85(1) of the EEC Treaty. Similarly, in the *Re ASPA* case already referred to, the EC Commission granted negative clearance in respect of standard-form contract provisions of a Belgian association of manufacturers of perfumery and toiletry products, which provisions sought to enforce certain retail prices, fixed by that association, against middlemen or retailers failing or refusing to comply with that obligation. The reason the EC Commission granted the negative clearance was that the contractual provisions no longer had the effect of preventing, restricting, or distorting business or commercial competition within the European Common Market.

It could be seen that, while the Australian rules on the control of the practice of resale price maintenance are too rigid in their nature and application, those of the EEC are rather flexible in both their general characteristics and in their application. Perhaps unlike the nature of general economic organisation in Australia, that of the EEC would not seem to be dominated by a few large companies or firms, which may be likely to impose on retailers or wholesalers an obligation to observe particular kinds of resale price maintenance in respect of various products, as well as trying to seek to enforce such an obligation. Moreover, the economic systems of the nine member-States of the EEC appear to have been developed to the extent where they have been diversified and broadened out. Consequently, there would not seem to be much need for the formulation and application of strict rules to govern the practice of resale price maintenance; hence the flexibility that appears to characterise the EEC's approach to the regulation of the practice within the legal framework of the European Common Market.

Having examined the essential general rules and principles governing the control or the regulation of the practice of resale price maintenance, one needs now to consider certain specific aspects of the practice and how these are dealt with under both the Australian and the EEC systems of anti-trust law.

(ii) Comparisons in Relation to Legal Provisions and Rules touching Specific Aspects of the Practice of Resale Price Maintenance

There are two aspects of the practice of resale price maintenance which will be considered here. These relate to: (a) the question of "recommended

61. (73/196/EEC): [1973] J.O. L194/27 (16th July, 1973); [1973] C.M.L.R. D226.

prices", and (b) the question as regards "loss leader" selling by retailers or wholesalers. As far as the question of "recommended prices" is concerned, the Australian trade practices legislation is meant to treat a supplier who engages in that kind of conduct, as not acting to induce or to attempt to induce a retailer or a wholesaler to maintain resale prices, so long as specified conditions are complied with.[62] Those conditions are: (a) that any statement applied to a covering, label, reel or thing in or with which goods are supplied, should be preceded by the words "recommended price"; or alternatively that (b) a supplier's notification in writing to a retailer or a wholesaler of the price recommended as appropriate for the sale of that supplier's goods, must include either expressly or by necessary implication, a statement to the following effect: "The price set out or referred to herein is a recommended price only and there is no obligation to comply with the recommendation."

The important case of *Festival Industries Pty Ltd.* v. *Mikasa (N.S.W.) Pty LTd*,[63] decided first of all by the then Australian Industrial Court and which subsequently went on appeal to the High Court of Australia,[64] is of considerable interest in this regard. In that case, the appellant firm of Mikasa, an importer of high-quality tableware, had, before the coming into force of the now superseded *Trade Practices Act 1965–1971* (Cth.), engaged in a resale price maintenance practice. What it did was to issue a retailers' catalogue and price list indicating the prices at which it desired those retailers to resell the goods or products imported by it. However, in anticipation of the legislation of 1965–1971, the Mikasa firm issued a replacement catalogue in which the retail prices desired by it to be observed by the retailers, were described as "suggested retail prices" and to which latter was added the statement: "This is a recommended price only with which there is no obligation to comply." The prices were subject to alteration by the Mikasa firm without any prior notice to retailers. The respondent in the case was a firm representing a group of retail discount houses. The group had a purchase scheme under which customers were allowed to purchase merchandise at discount prices on certain terms. Moreover, delivery services similar to those offered by large retail stores were also provided. For about three years before the proceedings in the present case were commenced, the respondent had sought unsuccessfully to purchase Mikasa products. Eventually, the respondent commenced the instant proceedings before the then Australian Industrial Court seeking an injunction to restrain the firm of Mikasa from engaging in that particular kind of resale price maintenance practice.

The Full Bench of that Court upheld the application of the respondent firm and granted the injunction sought. In particular, the joint judgment of Spicer C.J. and Smithers J., which sought to distinguish between "specific prices" and "recommended prices", made it quite clear that the Court could not be deceived by an attempt to describe a "specific price" as a "recommended price", in an effort by a supplier to get round the legal prohibition envisaged under the trade practices legislation. Nevertheless, the judgment underlined the fact that genuine "recommended prices" would not be viewed as a practice for maintaining resale prices. Consequently, it became clear that such a practice would not constitute a violation of the relevant anti-trust law. As regards the withholding of supplies by the firm of Mikasa, the joint judgment

62. Section 97 of the 1974 Act as amended.
63. (1971) F.L.R. 260; A.T.P.R. 36-003.
64. *Mikasa (N.S.W.) Ltd* v. *Festival Industries Pty Ltd.* [1972–73] A.L.R. 921; (1973) 47 A.L.J.R. 14.

of Spicer C.J. and Smithers J. maintained that, if it was done to enforce a "recommended price", then it had to be treated as falling foul of the relevant anti-trust law. What would seem to have been even more interesting was the fact that the Court considered that a belief, induced in a retailer or in a distributor, that some pressure or sanction would be exerted if a "recommended price" were not observed by the latter, would suffice to bring the practice in question within the ambit of the statutory prohibition. Equally, the Court would seem to have implied that it was more in relation to the operational, rather than the static, aspects of the practice of resale price maintenance which would be treated as more significant, when a court came to assess whether or not a practice of the kind in question constituted an infringement of Australian anti-trust law.

Upon Mikasa appealing to the High Court of Australia, the High Court decided to dismiss the appeal and uphold the decision of the Australian Industrial Court. In so dismissing the appeal, the High Court of Australia held, *inter alia*, that the then relevant statutory provisions on the practice of resale price maintenance did not require that a supplier's price be specified before the withholding of supplies occurred, or that a supplier's price could not be specified in a recommendation. Consequently, the High Court held that it was sufficient if there was a withholding of supply because of the likelihood that a retailer would not observe the price which it was the strong policy of the supplier to specify.

From the judgment of the then Australian Industrial Court and from that of the High Court of Australia, it may be wondered whether indeed the relevant provisions of the current Australian trade practices legislation add much to the law touching the question of "recommended prices", apart from a mere verbal addition. Surely, the new provisions of the current Australian trade practices legislation do not throw any light on whether the genuineness of a "recommended price" has to be ascertained first, and if so, how that is to be done. Consequently, it would seem to be left entirely to the discretion of the Australian Trade Practices Commission and eventually to that of the Federal Court of Australia to determine whether or not a "recommended price" is a genuine one, although the latter may, to all intents and purposes, satisfy the prescribed statutory requirements. In this respect, the *Mikasa* case would continue to be central to any determination on the matter by these two bodies.

Unlike the position under the Australian trade practices legislation, neither the EEC Treaty nor Regulation 17 of the EC Council directly has any provisions on the question of "recommended prices". Consequently, it has been left to the EC Commission largely, and to the EC Court to some extent, to develop the necessary rules and principles in this area. However, it would not appear that the attitude adopted under EEC anti-trust law differs from that adopted under Australian anti-trust law. Thus, in the *VCH* case alluded to above, the regulations and the conditions of sale of the Dutch cement dealers' association in question, *inter alia*, established a system of "guide and recommended Prices" as regards sales of some cement products which were purchased in large quantities. It has already been noted how the EC Commission refused to grant either negative clearance or exemption in respect of these regulations and conditions of sale. As regards the system of "guide and recommended prices" in particular, the EC Commission maintained that the act of prescribing prices of that kind by a trade association for the goods of its members, and which was directed at, and indeed succeeded in imposing a uniform and co-ordinated conduct upon those members, constituted a limitation on the business or commercial competitive freedom of the latter.

On an appeal by VCH to the EC Court[65] against the decision of the EC Commission, the Court affirmed the latter's decision and held, *inter alia*, that, just as the imposition of fixed prices could be said to fall foul of the relevant EEC anti-trust legal prohibition, so could a system of "guide or recommended prices" operated by a trade association, since the latter tended to affect effective competition in trade by permitting the participants to foresee, with a reasonable degree of certainty, what the prices of their competitors would be like. The EC Court considered that to be all the more so, in a situation where those participants were required to make a profit in all cases, and especially when the system in question was supported by means of a strict discipline through inspection and the imposition of sanctions.

From the relevant anti-trust case-law of the EEC therefore, it is quite clear that, just as under the relevant Australian anti-trust law, certain factors, such as the use of or threat of some sanction by a supplier of goods against a recalcitrant retailer or wholesaler who refuses to maintain a retail price fixed by that supplier, need to be combined with a "guide or recommended price" situation for an infringement of the appropriate anti-trust law to occur. Consequently, the need to distinguish between genuine and non-genuine "guide or recommended" prices becomes necessary. In this respect, the judgment of the then Australian Industrial Court in the *Mikasa* case, and that of the EC Commission and the EC Court respectively in the *VCH* case, would seem to provide the relevant ground rules and principles.

Concerning the question of "loss-leader" trading by retailers or wholesalers in respect of goods provided by particular suppliers, it has already been noted how the OECD's Committee of Experts on Restrictive Business Practices considered that, in the OECD member countries, suppliers would generally appear to have been allowed legally to impose sanctions against retailers or wholesalers in respect of this practice. The latter equally happens to be the position under the Australian trade practices legislation.[66] Thus, where a supplier withholds the supply of goods to a retailer who, within the preceding year, has sold goods obtained from that supplier at less than their cost to third parties, whether such be direct or indirect, such withholding is meant to be treated as not amounting to the supplier engaging in the practice of resale price maintenance. Consequently, a supplier of goods, so behaving, is not considered as acting in breach of the relevant Australian anti-trust law. However, for that legal position to be brought about, it is necessary that the retailer or the wholesaler in question should have sold, within the preceding year, goods obtained from that supplier at less than their cost to third parties, either for the purpose of attracting to that retailer's or the wholesaler's establishment at which the goods were then sold to persons likely to purchase other goods; or alternatively, for the purpose of promoting the business of third parties. On the other hand, the law's acceptance of the imposition of sanctions by a supplier of goods to a retailer, or to a wholesaler against the latter in a "loss-leader" kind of trading, would not be so where either a genuine seasonal or clearance sale of goods that were not acquired for the purpose of being sold at that sale, or a sale of goods that may have taken place with the consent of the supplier, could be found.

The observations of the then Australian Industrial Court, especially those of Spicer, C.J. in the case of *Commissioner of Trade Practices* v. *Dalgety Australia Ltd.*, already referred to above, would seem to be instructive in this

65. (Case 8/72): *Vereeniging van Cementhandelaren* v. *EC Commission* [1973] C.M.L.R. 7.
66. Section 98(2) of the 1974 Act as amended.

context. In that case, Spicer C.J., after finding that there had taken place a practice of resale price maintenance as regards two sets of prices for the resale of the defendant company's air-conditioners, had occasion to dwell on the question of "loss-leader" trading by retailers or by wholesalers. Indeed, Spicer C.J. pointed out that it was not, generally speaking, an offence to sell below cost on the part of a retailer or a wholesaler. However, the learned Chief Justice pointed out that, under certain circumstances, as were prescribed by the relevant section[67] of the then Trade Practices Act 1965–1971 (Cth.), a supplier of goods was permitted to withhold further supplies if that kind of trading by a retailer or by a wholesaler below cost took place. Yet, it may be wondered whether, in a situation where a retailer or a wholesaler, instead of reselling a supplier's goods below the cost price, simply proceeded to give that supplier's goods away, free of charge, with a view to attracting more customers, such would amount to a "loss-leader" type of trading to warrant a withholding of further supplies of goods by that supplier. Although the judgment of Spicer C.J. in the *Dalgety* case would seem to suggest a negative answer to such a question, it is arguable that, for the present, the issue would appear to be an open one.

In contrast to the Australian position where rules are defined under the trade practices legislation in relation to "loss-leader" trading by retailers or by wholesalers, neither the EEC Treaty nor Regulation 17 of the EC Council in any way attempts to define any such rules. Moreover, the case-law on the regulation of the practice of resale price maintenance so far developed by the EC Commission and by the EC Court, would not seem to have said anything about the question of "loss-leader" trading by retailers or by wholesalers. However, it would seem to be logical, from the flexible approach provided for by the anti-trust law of the EEC, as already considered above, that the Australian legal attitude to "loss-leader" trading by retailers or by wholesalers would be the same within the EEC anti-trust system, if that kind of question were to come before the EEC anti-trust authorities. Consequently, it would seem probable that a supplier of goods to a retailer or to a wholesaler would be legally entitled to impose the necessary sanction in respect of "loss-leader" trading by the latter.

An Overview

From the purely economic standpoint, the practice of resale price maintenance whether engaged in individually or collectively by business or commercial enterprises, appears to be, on balance, disadvantageous to the public at large. Yet economists would generally seem to consider any legal attempt to control or regulate the practice as undesirable, if not completely unnecessary. However, most economists would seem to have accepted any such legal control or regulation of the practice as a necessary evil. But be that as it may, modern governments, in their efforts to protect the so-called "public interest", have not rested content with allowing normal economic forces to come into full play to correct harmful economic or business practices. Consequently, legislative measures and administrative procedures for the control or the regulation of the practice of resale price maintenance abound.

Yet, however well-thought out and stringent such legislative measures and administrative procedures may be, efforts are always made by business or commercial enterprises to circumvent them. It has already been noted how

67. Section 68(2).

refusal to sell or the withholding of further supplies of goods, and recourse to a system of "guide or recommended prices" by suppliers of goods have been pressed into service by the latter to get around the various legal and administrative rules. The latter, in turn, would seem to have stretched the ingenuity of anti-trust authorities into designing new means for grappling with such circumvention.[68] It is noteworthy that, in its recent survey concerning current measures for strengthening business or commercial competition in the OECD member countries, the OECD's Committee of Experts on Restrictive Business Practices has pointed out that developments in this sphere since 1973, indicate that provisions prohibiting, *inter alia*, the practice of resale price maintenance, stem from the desire of governments to combat inflation and modernise the distribution system.[69]

On the other hand, one would take issue with the OECD's Committee of Experts on Restrictive Business Practices as regards the latter's contention that, with modern developments of retailing, some retailers may be sufficiently powerful to break the barrier of the practice of resale price maintenance by refusing to buy and stock the goods of a given supplier, unless granted special terms, including freedom from that practice. Indeed, the Committee of Experts considers the latter as introducing the concept of "countervailing power" which may be considered as equally capable of being directly applied also by consumers, often through associations formed primarily for other purposes,[70] so as to obtain favourable terms, such as discounts or rebates for their members.

But it is arguable that "countervailing power" of this nature requires a well-organised and articulate group to be able to bring it about. Since, in relation to individual consumers, an organisation and articulation of this kind is seldom achieved, the practicality of this suggestion of the OECD's Committee of Experts on Restrictive Business Practices would not seem to be highly tenable. Consequently, one would be inclined to appreciate the necessity for legal control or regulation by governments. After all, gone are the days when the doctrine of *laissez faire* was so fashionable. But that is not to say that legislative measures and administrative procedures constitute a panacea for dealing completely with all the ills of the different kinds of restrictive trade practices generally, and the practice of resale price maintenance in particular. Nevertheless, the latter would seem to go a long way in that direction.

Conclusion

From the EEC anti-trust policy point of view, it would not appear that the practice of resale price maintenance poses all that much of a serious problem.[71]

68. It is worthwhile noting that the OECD's Committee of Experts on Restrictive Business Practices, in considering recent measures employed by the OECD member countries or governments to strengthen their respective business or commercial competition policies, put Australia somewhat on a par with the Federal Republic of Germany as regards the effective exercise of control over restrictive business practices. Indeed, the report of the Committee of Experts noted that 1973 German anti-trust amending legislation had firmly sought to control the practice of resale price maintenance, and had particularly sought to regulate "recommended prices" in much the same way as Australian anti-trust law had sought to do. (see The OECD Observer, No. 77, September–October, 1975, p. 38.).
69. The OECD Observer, No. 77 (September–October, 1975), p. 38.
70. E.g., trade unions, professional associations and employers' organisations. This kind of practice was found by the OECD's Committee of Experts on Restrictive Business Practices to have been common in France and in the United Kingdom.
71. See e.g., Bentil, *op. cit.*, (1974) 3 Anglo–American Law Rev. *at p. 399; Barounos, Hall & James, op cit.*, at p. 50.

This is because the practice is either generally forbidden or legally controlled at the national level in the individual member-States of the EEC. Moreover, it is virtually impossible to maintain retail prices in a European Common Market open to imports of the same or similar products. Indeed, it is primarily, albeit indirectly, through its action in relation to impediments to the freedom of movement of goods within the European Common Market, as envisaged under the EEC Treaty,[72] that the EC Commission seeks to ensure that resale price maintenance practices allowed under the national legislation of the individual member-States of the EEC, do not affect adversely trade between those member-States.[73] Hence the flexible approach of the EEC anti-trust system in that direction.

On the other hand, the practice of resale price maintenance appears somehow to pose a serious problem as regards anti-trust policy in Australia, with the result that Australian anti-trust authorities may have to keep close watch over the practice. That may be the reason why the practice is treated under the Australian anti-trust system as illegal *per se*. That in itself makes for a rigid rather than a flexible approach on the part of the Australian anti-trust authorities in their efforts to control the practice. However, it may be wondered whether the general principle envisaged by the Australian trade practices legislation viz. that, where the effect of a restrictive trade practice does not substantially lessen business or commercial competition, the anti-trust authorities would do well to ignore that practice without the taking of any legal action,[74] could not be pressed into service at the appropriate moments. In that respect, a kind of a *de minimis non curat lex* rule may have become fundamental to the application of the provisions of the Australian trade practices legislation by the Australian anti-trust authorities.

72. Title I, Articles 9–37.
73. See e.g., Barounos, Hall & James, *op cit.*, at p. 50.
74. Sections 45(1)(b); 45A(1); & 45B(1) of the 1974 Act as amended.