# *Casenotes*

*Trade Practices Commission v Garden City Cabs Co-Operative Ltd,* Federal Court: Cooper J, 15 March 1995 (1995) ATPR ¶41-410

Some interesting trade practices issues arise from the *Toowoomba Cab Case.*[1] As a result of this case we are forced to consider whether, even now, the *Trade Practices Act* 1974 (C'th) has "got it right" on some of its basics or, if it has, whether the judiciary really understands "what it's all about". The case is an interlocutory decision of a single Justice. Its importance, however, far exceeds its lowly status in the hierarchy of judicial decision making.

## What Happened

The cabbies in Toowoomba, as in most places, operate a co-operative two way radio network. As in most places, radio business is very valuable to cab owners. In fact, 60%-70% of the income of a taxi cab in Toowoomba was earned through radio bookings.

As in most places, there was a "going rate" paid to employed cab drivers. The "going rate" in Toowoomba was 50% of the fares received during the period in which an employee drives.

The owners of cabs in Toowoomba, as elsewhere, often employ drivers to drive their cabs because, at times, the owner does not want to do so or because the owner wishes to have the cab on the road for an extended period but cannot her/himself drive it for more than a certain number of hours.

[1] *Trade Practices Commission v Garden City Cabs Co-Operative Ltd,* Federal Court: Cooper J: 15 March 1995 (1995) ATPR ¶41-410; *Australian Trade Practices Reporter,* vol 3, North Ryde: CCH Australia, 1995 at 40,546–40,533 (*'Toowoomba Cab Case'*)

The Toowoomba Cab Co-operative passed a rule called the "Five Day Rule". It replaced a previous "Three Day Rule". In short, this rule provided that:

- When a change of driver occurred, the new driver was to be the only driver of the vehicle when it was available for hiring during the following five days.

- Breach of the rule was to result in a loss of radio rights. The period of such suspension was to be at the discretion of the Directors of the Co-Operative.

The five day rule thus operated to require that when a change of driver occurred, the new driver would be the only driver of the vehicle during the next five days. The owner of the vehicle could not drive his or her taxi during the five days in which the casual driver was employed. Taxi owners who drove their own taxi cabs, and did not employ a casual driver, were permitted to drive for whatever period or periods they wished. A taxi owner was not obliged to operate his or her vehicle in segments of not less than five days.

There was a standing exception from the rule for a wheelchair accessible taxi owned by the Co-Operative but leased to, and operated by, a Mr Sheridan. This cab could be operated on a "five day/two day rotation" period.

Exceptions were granted from the five day rule usually on grounds of illness, bereavement or other personal reason.

The five day rule had two major consequences. Firstly, it prevented taxis on any day being operated in double or treble shifts. Secondly, it ensured that casual drivers were not employed for periods of less than five days.

The Trade Practices Commission ("TPC") alleged that the five day rule was in breach of the *Trade Practices Act*. The Co-Operative thought otherwise. The TPC had been in correspondence with the Co-Operative for some time on the issue and, ultimately, the Co-Operative called a general meeting at which a motion was put that the five day rule be withdrawn. This, it was said, would remove the threat of TPC action.

The Toowoomba cabbies, however, stood by their five day rule and defeated the withdrawal motion by 38 to 35 votes.

The TPC, no doubt suitably incensed at this rebuff, instituted proceedings seeking pecuniary penalty and injunctive relief against implementation of the five day rule.

The Commission alleged that there was an anti-competitive arrangement under s 45(2)(a)(ii) of the *Trade Practices Act* and that an exclusionary provision had been entered into (*Trade Practices Act* s 45(2)(a)(i) and s 4D).

The TPC, at first instance, asked for an interlocutory injunction. This application came before Justice Cooper, his Honour handing down his

decision on the TPC's interlocutory injunction application on 15 March 1995. It is this decision which is discussed in this commentary.

His Honour threw out the TPC's application. He found that the Toowoomba cabbies were justified in retaining the five day rule and that, on this point, there was no serious issue to be tried. Hence the TPC did not obtain an interlocutory injunction. The decision is, however, far more important than most interlocutory applications. If his Honour's reasoning on the law is correct, the cabbies of Toowoomba have stopped the TPC dead in its tracks with no hope of winning at trial.

## An Outline of the Statutory Regulation of Tax Cabs as These Relate to Toowoomba

Taxi services in Queensland are controlled by the *State Transport Act* 1960 (Qld) and the *State Transport Regulations* 1987 (Qld).

This legislation divides Queensland into taxi districts. The legislation provides for the following classes of persons who can operate taxis, these being:

1. Those holding a licence to hire which attaches to a specific taxi cab. In this commentary, we will refer to people holding this licence as a "cab owners".

2. Those holding a licence to drive a taxi cab. This licence does not attach to a specific taxi cab and is given after a driver passes the relevant regulatory requirements to qualify as a driver. In this commentary, we will refer to people holding this licence as "cab drivers".

Cab drivers are normally employees of cab owners. However, they do not have to be. A cab driver can hire a taxi cab from a cab owner for a period of time and pay the cab owner a lease fee. This fee is independent of, and unrelated to, the return from the cab. The cab driver in these circumstances is an independent operator and not an employee of a cab owner. In this commentary we will refer to an independent operator cab driver who leases a cab as an "independent cab driver" and to a cab owner who drives his or her own cab as a "cab owner/driver".

The number of taxi cabs within the Toowoomba taxi district was limited pursuant to the *State Transport Regulations*. All cabs owned in the district were owned by the cab owners. All cabs were operated by cab owner/drivers, driven by a driver as an employee of a cab owner or leased by a cab owner to an independent cab driver.

## Was the Taxi Cab Co-operative a Trading Corporation?

As will appear later, the TPC took action against the Co-Operative. It had to do this as the cab owners and independent drivers were all individuals. They were totally acting intra-state. Therefore, the Commonwealth's power over corporations, which was the constitutional basis for the *Trade Practices Act's* application in the present case, did not extend to them. However, this constitutional requirement was satisfied if the Co-Operative was a trading corporation. The TPC took action against it and alleged that it was.

Though there was substantial argument as to whether the Co-Operative was a trading corporation, Justice Cooper was prepared to assume that there was a serious question to be tried on this point.

## The Decision on the Trade Practices Act Issues

### Was there Anti-Competitive Conduct in breach of s 45(2)(a)(ii) of the Trade Practices Act?

A requirement of a breach of s 45(2)(a)(ii) is that the relevant arrangements have the purpose, effect or likely effect of substantially lessening competition.

As presently relevant, "competition" for purposes of the section means:

> "... competition in any market in which a corporation that is a party to the... arrangement... supplies or acquires ... goods or services."[2]

The Co-Operative was the cab owner in respect of the special disability cab leased to, and operated by, Mr Sheridan. On this basis, the TPC alleged that the Co-Operative competed in the market for the carriage of passengers by licensed taxi cabs in the Toowoomba Taxi District against its members, other persons licensed to drive taxi cabs, and members of Yellow Cabs, the other taxi company in Toowoomba. The allegation was that, as the cab owner of the special disability taxi cab operated in Toowoomba, the Co-Operative was a competitor in the market described.

His Honour concluded, after reviewing the statutory licensing provisions outlined above, that it was the cab owners who employed cab drivers, the cab owner/drivers and the independent cab drivers who competed in the market delineated by the Toowoomba taxi district. Cab owners did not compete in the market when they leased their cabs to independent cab drivers as the return to the cab owner in this event was by way of a fixed rental for the lease of equipment and was unrelated to

[2] s 45(3) *Trade Practices Act* 1974 (C'th)

market activity. Neither were cab drivers who were employees of cab owners in the relevant market. Cab owners who employed cab drivers themselves competed in the market using the labour of the casual driver.

As the Co-Operative's licence to hire in respect of the special vehicle for the carriage of passengers with disabilities was leased to Mr Sheridan by the Co-Operative, the Co-Operative received income unrelated to the earnings of the vehicle as a taxi cab. The Co-Operative performed the role of equipment and licence supplier to Mr Sheridan. Mr Sheridan as lessee of the licence to hire was the person who competed in the market, not the Co-Operative.

The persons who competed in the market were thus non-employees who received income based upon the hiring of cabs. In the case of a leased cab, this was the lessee not the owner. The Co-Operative was, therefore, not a competitor in the market purely because it was the cab owner in respect of the cab leased by it to Mr Sheridan as an independent driver. His Honour concluded, as far as is presently relevant, that:

> Because the respondent [i.e. the Co-Operative] is not a competitor in the market pleaded by the TPC and cannot be said to have aided, abetted, counselled or procured any person in a contravention of s.45(2)(a)(ii) ..., there is no serious question to be tried that the respondent has contravened [this section].[3]

**Was there an "Exclusionary Provision" in breach of s 45(2)(a)(i) and s 4D?**

The term "exclusionary provision" is used in the *Trade Practices Act* to describe what is more commonly known as a collective boycott. As relevant for present purposes, an exclusionary provision is within s 4D of the *Trade Practices Act* if:

- there is an arrangement between persons, any two of whom are competitive with each other; and

- the arrangement has the purpose of preventing, restricting or limiting the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons.

Section 4D further provides that persons shall be deemed to be competitive for purposes of that section if, and only if, at least one person is in competition with another in relation to the supply or acquisition of goods or services to which the arrangement relates.

[3] *Toowoomba Cab Case*, above n 1 at 40,551 (CCH)

The Trade Practices Commission alleged that the arrangement to which the Co-Operative was a party was one:

1. where two or more members of the Co-Operative were competitors who held a licence to hire, and themselves operated, taxi cabs in the Toowoomba Taxi District;

2. where the five day rule, as administered by the Co-Operative, had the purpose of preventing, restricting or limiting

   (i) the acquisition of driving services from a particular class of casual drivers, namely those who refused or were unable to work for a period of five days

   (ii) the supply of taxi services to members of the public in the Toowoomba Taxi District as a class who may from time to time wish to hire a taxi.

In relation to the TPC's allegation that there was an illegal exclusionary provision arrangement, his Honour held:

(i) the provision of work under a contract of service is not a "service" within s 4D or s 45 of the *Trade Practices Act*.[4] Thus "driving services" were not within the *Trade Practices Act* and the cause of action could not be sustained.

(ii) The relevant "purpose" required by s 4D was a subjective purpose[5] and the purpose of the five day rule was not to restrict cab services but to prevent their over supply. His Honour held that in this regard that:

> "the subjective purpose was not to do anything in relation to the way taxi services were provided in the Toowoomba Taxi District by members of the respondent. The five day rule was agreed in circumstances where there was, on the evidence and apparently agreed by all sides, an over-supply of capacity to serve the market for taxi services by approximately ten taxi cabs. The subjective purpose of prohibiting double and multiple shifts was to avoid additional capacity, if any, being introduced into the market by such practices. The level of taxi services available to taxi users remained unaltered by the introduction of the five day rule. It is important to note that the five day rule was not introduced in isolation. It was part of a course of conduct to manage capacity to ensure that there existed in the market a

[4] His Honour referred to the definition of "services" in s 4(1) and cited *Adamson & Ors v New South Wales Rugby League Ltd & Ors* (1991) ATPR ¶41-084 (and on appeal (1991) ATPR ¶41-141) in support of this conclusion.

[5] For this proposition, his Honour cited *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1991) ATPR ¶41-069.

> twenty-four hour, seven day service. The respondent, as a condition of its approval by the Department of Transport, was required to maintain, if necessary, a roster of vehicles to ensure that such a taxi service was available (Policy Statement No. PC:06). The demand in Toowoomba was so poor on Sunday, Monday and Tuesday nights that a roster was necessary. Otherwise no adequate taxi service was available. The five day rule was essentially to avoid additional capacity by the use of double or multiple shifts being introduced for the period Wednesday to Saturday inclusive."[6]

In relation to that part of the cause of action set out in 2(i) above, his Honour held that there was no evidence that the cab owners competed with each other to employ casual drivers. His Honour concluded this because the "going rate" was 50% of driver takings. Thus there was no price competition for casual driver services. Further, there was no evidence that drivers were prepared to work for less than this. Thus, even if labour was within the definition of services for *Trade Practices Act* purposes, there was no evidence that there was a competitive market for such labour in Toowoomba.

In relation to that part of the cause of action set out in 2(ii) above, his Honour held that there was no limitation of services to any particular persons or class of persons. The potential users of taxi services in Toowoomba were all persons relevant in the Toowoomba Taxi District who may wish to use a taxi cab from time to time. If the five day rule operated in respect of users of taxi cabs in Toowoomba, it did so without discriminating between persons or any class of persons. There was no feature which distinguished or differentiated between taxi cab users. Thus the cause of action set out in 2(ii) above could not be sustained. His Honour must clearly be correct in this conclusion.

For the above reasons, his Honour held that the TPC had not established that there was a serious question to be tried in relation to its allegation that the Co-Operative had entered into an arrangement which constituted an illegal exclusionary provision.

## The balance of convenience

It is, of course, basic law that even if a case for an interlocutory injunction is made out, such an injunction still may not be granted if it is contrary to the balance of convenience to do so. His Honour found, in addition to his above findings on the law, that there was no case for an interlocutory injunction because of "balance of convenience" factors.

Consideration of "balance of convenience" issues was not part of the *ratio* of his Honour's judgment. Nonetheless, his Honour thought that he

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[6] *Toowoomba Cab Case*, above n 1 at 40,552 (CCH)

"should record briefly that [he] consider[ed] the balance of convenience to be against making the orders sought".[7]

His Honour found that there was over supply in the Toowoomba Taxi Market and that "[t]he convenience of consumers is not an important feature for the determination of the state of competition in a market".[8] Thus delays in obtaining taxis at a night club, for example, were not, in his Honour's view, indicative of the competitive state of the taxi market. If such delays were unacceptable then his Honour thought that:

> "... the State Transport Department would, one assumes, require the respondent to roster on sufficient taxis to provide an adequate service and there is no suggestion on the material that this has ever been contemplated."[9]

The overwhelming reason, however, for his Honour finding against the issue of an interlocutory injunction on "balance of convenience" grounds was expressed in the following words:

> "The one group which stands to suffer by the removal of the five day rule, whether on an interlocutory basis or permanently, is the employed casual taxi drivers. They will lose an arrangement which effectively delivers guaranteed minimum hours and the potential to earn a reasonable wage and be faced with the possibility of only being offered work at the margins in the off-peak periods for indefinite periods of time. The impact of the abolition of what amount to minimum conditions of employment in the absence of any demonstrable public interest or benefit to be gained in the market for taxi services in the Toowoomba Taxi District would itself be sufficient, in my view, to swing the balance of convenience against making the orders sought."[10]

## Observations on the Case

Clearly enough, the TPC lost on all points.

On the face of it, the TPC's loss is a strange result. If, for example, the cabbies had agreed only to work certain hours or to restrict the number of cabs available at any particular time, one might well conclude that this had the appropriate adverse anti-competitive effect and would involve illegality. Yet, by utilising the "five day rule" through the Co-Operative, an arrangement with the same result escaped condemnation.

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7 *Toowoomba Cab Case*, above n 1 at 40,552 (CCH)

8 *Toowoomba Cab Case*, above n 1 at 40,552–40,553 (CCH). For this proposition his Honour cited *Outboard Marine Australia Pty Ltd v Hecar Investments No 6 Pty Ltd* (1982) ATPR ¶40-327 at 43,990; *Trade Practices Commission v Australia Meat Holdings Ltd* (1988) ¶ATPR 40-876 (Wilcox J); and *TPC v TNT Management Pty Ltd & Ors* (1985) ATPR ¶40–446 (as cited in the CCH report. The citation in the original judgment is ¶40–512).

9 *Toowoomba Cab Case*, above n 1 at 40,553 (CCH)

10 *Toowoomba Cab Case*, above n 1 at 40,553 (CCH)

**If the TPC were to plead the case differently in the future, would it win?**

It must be noted that, at the time of the case, there were substantial constitutional problems involved in pleading the case otherwise than the TPC did. The *Trade Practices Act* then did not reach individuals trading totally within a State. Had none of the cabbies been trading corporations (which appears to have been the case), then the TPC had little option but to plead the case as it did and allege that the Co-Operative was in sin. This commentary is directed at how the case might be pleaded in the future when the constitutional limitations on the *Trade Practices Act* operating against individuals trading wholly within a State are removed. The *Competition Policy Reform Act*, 1995 to achieve this purpose has been enacted. It is anticipated that it will operate to extend the constitutional reach of the *Trade Practices Act* with effect from July 1996 (as regards injunction and damages remedies) and July 1997 (as regards penalties).

**The pleading of the relevant "arrangement"**

Assuming that the judgment accurately reflects the pleadings, it seems that the pleadings involved a fatal flaw. Clearly enough, the Co-Operative was not in competition with its members. There can be no argument with his Honour's finding on this point.

On removal of constitutional limitations to the *Trade Practices Act*, the real question will be able to be pleaded. This question is whether cab owners and independent cab drivers were themselves in competition and whether the Co-Operative was a structure through which these competitors achieved a restrictive objective.

Because of the way in which the case had to be pleaded for constitutional reasons, the alternative scenario was not alleged or analysed in the case.

There is, however, good precedent for finding that structures can involve arrangements between those who are members of such structures. In Australia, the most well known case in point probably is *Hughes v WACA*.[11] In this case, the Western Australian Cricket Association ("WACA") was held to be a vehicle through which member clubs acted in order to exclude Kim Hughes from cricket competition, he having played cricket in South Africa contrary to Australian sporting policy at the time. Though, on a factual evaluation, the conduct in the case was found not to be anti-competitive,[12] the issue of present relevance is whether members of an organisation enter into an arrangement between

[11] *Hughes v Western Australian Cricket Association Inc* (1986) ATPR ¶40-736.

[12] Though an illegal exclusionary provision was found and thus Kim Hughes was, for this reason, the victor in the case.

themselves when agreeing to abide by decisions of an organisation to which they belong. In this regard, Justice Toohey concluded:

> "There was an expectation in the minds of all present that the WACA and the Associated Clubs would abide by the decisions reached... there was an assumption of obligation on the part of the clubs and a recognition by all delegates that the amendments, with which they would abide while they remained part of the rules, had important consequences for the playing of cricket in Western Australia. That, in my view, was sufficient to constitute an understanding reached by those present at the meeting..."[13]

In short, an arrangement between parties may be effected by means of a corporate or co-operative entity. If one belongs to such an entity, then its rules and decision making processes constitute an arrangement entered into between individual members of the entity. At the very least, the fact that the five day rule was not revoked by the meeting of Toowoomba cabbies called to consider it must, one would think, have constituted an arrangement to abide by the rule in the absence of specific notification to the contrary by a particular cabbie.[14]

Had the case been able to have been pleaded as an arrangement between cabbies using the Co-Operative as the method of its enforcement, perhaps the major threshold problem in the case would have been substantially overcome. There would have been a relevant "contract, arrangement or understanding". The court would then have been required to make a factual competition evaluation. This would be a matter for evaluation at trial. The TPC's case could not have been dismissed at the threshold, as it was, by a finding that the Co-Operative was not in competition with its members. Instead an arrangement between cabbies would have been the starting point of the analysis and the anti-competitive effect of this then analysed. The writer's view is that the TPC would not have found it too hard to demonstrate that the arrangement was, in fact, substantially anti-competitive.

### The exclusionary provision pleading[15]

The exclusionary provision case fell down, in part, because it was not demonstrated by the TPC that there was an arrangement between mem-

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[13] Above n 11, at 48,042

[14] Had this notice been given and steps taken by the Co-operative to enforce denial of radio rights to the specific cabbie, one would think that all the requirements of an exclusionary provision (and, in particular the requirement that a "specific person" be targeted) would be satisfied. But more of this later.

[15] The discussion here is not about any substantive issues relating to exclusionary provisions but only about whether the pleadings may have been able to be changed to overcome one major finding adverse to the TPC i.e. that there was no "specified person" or "specified class of persons" which could be identified.

bers involving any limitation of services to be provided or acquired from a person or a particular class of persons. The TPC argued that one such class was "those drivers who refuse or are unable to work for a period of five days". His Honour found that there was no such class. Perhaps if the pleading had been that there was not an actual, but an attempted, exclusionary provision, then the TPC may have been on better ground. Clearly, as soon as a driver filling the above description appeared, there would be a "specified person". Clearly, the Co-Operative and its members had done everything except actually enforce its rules against a driver of the above kind. Indeed, the likelihood is that, because of the *in terrorem* effect of the rules, no such driver would appear.

There was thus no actual specified person or class of persons. But, one would think, there was a very strong case that the arrangements were an attempt to exclude any such person or persons should they appear or should they wish to conduct business in breach of the five day rule. There was nothing else which could possibly be done to exclude such persons other than actually to enforce the rule against them.

If this does not constitute an "attempt" to exclude, it is difficult to see what does. In principle, one would think that the Court should assist specific potential targets if it finds potential illegality, rather than require an actual victimisation before it will move. The five day rule, in fact, may be so effective that it will achieve its purpose without any specific party actually seeking to breach it. It would be a strange result if the Court permitted this state of affairs.

Perhaps, therefore, the TPC would have been better placed if it had pleaded an attempted exclusionary provision rather than asserting an actual exclusionary provision. No doubt, however, the TPC would still have faced a difficult argument on the exclusionary provision issue in light of other findings in the case, to which we will turn later. Again, of course, the constitutional issue must have been an important relevant consideration in the TPC's decision as to how it would plead its case.

### Could the case have been pleaded under s 46?[16]

One would think that the case could well also have been pleaded under s 46 of the *Trade Practices Act* relating to misuse of market power. At least the threshold provisions of this section (a substantial degree of market power held by the Co-Operative and a demonstration of deterring or preventing competitive conduct in a market) would appear to have been met. If the Co-Operative was characterised, as it was in the case, as an entity acting alone and not a vehicle for an arrangement between members, then it would appear to the writer that s 46 is a highly relevant

[16] The comments here are not directed at the substance of s 46 but only as to whether, on its face, the section might be applicable.

applicable section. Only this section covers unilateral conduct. As the TPC pleaded the Co-Operative's conduct as essentially unilateral, it is hard to see why it did not plead s 46.

Constitutional problems made it difficult for the TPC to plead the case other than as it did on the anti-competitive and exclusionary provisions issues. These constitutional difficulties did not apply in relation to s 46. The Co-Operative would appear to be a trading or financial corporation for the purposes of the *Trade Practices Act*.[17] For purposes of the interlocutory proceedings, the Court held there was a serious question to be tried on this constitutional point.

**Conclusions regarding possible alternative pleading of the case**

Different pleadings may, in future, overcome some of the threshold adverse findings against the TPC. In particular, a pleading that the conduct was anti-competitive between cab owners and independent cab drivers would be an important alternative approach which the TPC may, in future, be able to utilise to its advantage. A s 46 pleading would also appear on its face, to be sustainable.

However, even with the above suggested pleading variations, the question still remains as to whether the court would have looked favourably on the TPC's case. It is to this issue that we now turn.

**Was his Honour correct in his decision on the case as pleaded?**

The following comments can be made on his Honour's decision:

(i) Clearly it is cab owner/drivers, cab owners employing cab drivers and independent cab drivers who compete in the market. In the case of a leased cab, it is the independent cab driver who, as lessee, competes in the market and not the cab owner. Clearly therefore, the Co-Operative was not a competitor in the market, it having leased its one cab to Mr Sheridan as lessee. As stated earlier, this problem for the TPC may have been overcome had it been able to plead that the Co-Operative was a vehicle for an arrangement between cabbies. But it could not do this for constitutional reasons. Members were individuals acting solely intra-state. The TPC had to find a corporation in breach in order to have federal constitutional reach under the "corporations power".

[17] See *Re: Ku-Ring-Gai Co-Operative Building Society (No 12) Ltd* (1978) ATPR ¶40-094 per Brennan and Deane JJ (both then of the Federal Court but now of the High Court). In that case, a Co-Operative Building Society was held to be carrying on business and to be a trading or financial corporation notwithstanding that its activities were for member benefit.

(ii) What of the view that the provision of work under a contract of service is not a service within s 4D or s 45 of the *Trade Practices Act*? His Honour must be right on this on the present state of authority.[18] The view taken to date is that the exemption in the *Trade Practices Act* for a contract of service exempts both contracts for the actual performance of work and all antecedent steps in the formation of such contracts so long as the contracts themselves ultimately provide for the performance of work. However, the writer agrees with Wilcox J in the *NSW Rugby League Case*[19] on this point. In that case, his Honour said:

> It is difficult to see what policy purpose is achieved by leaving inviolate arrangements under which potential employers agree not to compete amongst themselves... It is certainly not in the interest of employees. They find themselves, uniquely so far as the Act is concerned, having to suffer any collusion amongst those with whom they would negotiate... It seems to me that the present position is anomalous.

Whilst, on present authority, Justice Cooper in *Toowoomba Cabs* must be correct in the conclusion he reaches, the comments of Wilcox J above, and the present case itself, illustrate the need for judicial or legislative review of the contract of service exemption when more than an employer/employee relationship is involved. There seems to be no case, at least outside the industrial arena or in the case of collective bargaining arrangements, for *Trade Practices Act* exemption of arrangements between competitors as to the terms upon which they will each grant employment;[20]

(iii) His Honour's view that there was no competition between licence holders to employ casual drivers is disturbing. He concludes this because there was a "going rate" of 50% of the take and because there was no evidence that anyone was prepared to drive for less than this.

This view fails to recognise the nature of competition and that competition can be real even if there is a "going rate". Thus:

- There is no reason why an offer not in accordance with the going rate may not be attractive. This may be lower, but it may be higher. Licence holders may well pay drivers more to work specific hours, overtime or on specific projects. A "going rate" does not have to

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[18] *Adamson v West Perth Football Club Inc & Ors* (1979) ATPR ¶40-134 and see the Full Federal Court decision in *Adamson & Ors v NSW Rugby League & Ors* (1991) ATPR ¶41-141

[19] *Adamson & Ors v NSW Rugby League & Ors*, above, n 18, at 53,022.

[20] His Honour found that the arrangement benefited casual drivers. This conclusion was surely only conjecture. There is a very good argument to the contrary which is discussed later.

be set in concrete forever. Refusing to recognise that the "going rate" may be subject to change in specific cases is itself simply entrenching the "going rate".

- Cab owners clearly are rivals in acquiring the services of drivers. Rivalry is an aspect of competition. It may not be intense rivalry at the moment. Intensity, however, will surely vary in accordance with demand and supply. The present "going rate" does not have to reflect any immutable position.

- No doubt there are good drivers and bad drivers. It would be surprising if licence holders did not compete for good drivers. There appears no reason why, on occasions, drivers would not give good drivers some additional incentives notwithstanding the "going rate".

The "status quo" view of competition which his Honour adopts is a matter of concern. In competition assessments the court evaluates both actual and potential competition. His Honour has looked only at the present position, encased it in concrete and concluded that there is no competition because nothing will change. Such a view has little in common with the object of furthering competition pursuant to the *Trade Practices Act*.

(iv) His Honour's conclusion as to the relevant "purpose" of the Co-Operative's Rule is, in the writer's view, contrary to authority.

His Honour was prepared to hold that purposes is a "subjective purpose". This is far from free of doubt.[21] Far more important, however, is the test which his Honour applied. His Honour looked at the *ultimate* object of the Co-Operative rather than its *immediate* purpose. On this basis, he held that there was no "purpose" to restrict drivers because the object of the Co-Operative's action was to avoid over capacity. But the immediate purpose of the conduct was restrictively to effect a change in the way in which taxi services were provided by Toowoomba cabbies. Clearly it is the immediate, and not the ultimate purpose which is the relevant "purpose" for evaluating the legality of exclusionary provisions.[22]

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[21] His Honour cited the *Pont Data*, above, at n 6, for this proposition. However, in *General Newspapers v Telstra Corp* (1993) ATPR ¶41-275 Davies and Einfeld JJ concluded that "the ultimate test is an objective test".

[22] See *Hughes v WACA*, above, at n 12. The test to be applied is that of the "direct" or "immediate" purpose not that of the long term objective of conduct. See *Wribass v Swallow & Ors* (1979) ATPR ¶40-101; *Barneys Blu-Crete Pty Ltd v Australian Workers' Union & Ors* (1979) ATPR ¶40-139; *Tillmanns Butcheries Pty Ltd v The Australasian Meat Industry Employees' Union & Ors* (1979) ATPR ¶40-138; *Transport Workers' Union of Australia (New South Wales Branch) & Ors v Leon Laidely Pty Ltd* (1980) ATPR ¶40-149; *Mudginberri*

(v) His Honour found over-capacity in the industry. For this reason it seems that he was prepared to look at any driver restrictions as not being anti-competitive. Individual market participants "competing out" rivals by providing additional services or by providing specifically needed services at particular times or locations is a method of resolving over-capacity just as much as rationing, yet his Honour does not appear to have considered this as having any relevance.

Rate reductions, either general or selective, may be another method. Individuals may be able to obtain greater efficiency, and therefore be able to lower rates, if they can have their cabs operating 24 hours a day.

The five day rule ensured that none of the above could happen. It is quite possible, as his Honour found, that "[t]he level of taxi services available to taxi users remained unaltered by the introduction of the five day rule".[23] But there is no reason at all why this position should be immutable.

(vi) His Honour's attitude to the competition issue is perhaps most clearly demonstrated in the major comments he made on the "balance of convenience" issue. His Honour thought that the arrangement was beneficial in that it secured minimum hours and reasonable wages for casual drivers and it guarded against casuals being employed only at certain times; yet, in competition terms, there is nothing wrong with this. His Honour's views were apparently only subjective. One can equally see detriments to many. So, for example, students wishing to drive for two days per week are totally excluded from the market.

It is, one would think, not for the court or parties themselves to determine conduct in a market or arbitrarily to decide who should or should not benefit from market forces. This is something competition itself should decide. If we sanction judicial views as to what competition should be, or permit parties by collusion to determine market behaviour, then competition principles are fundamentally undermined.

If there is any public benefit in the restrictions involved in the five day rule, this is for the TPC to determine on an authorisation

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*Station Pty Ltd v Australasian Meat Industry Employees' Union* (1985) ATPR ¶40-598. In *Mudginberri*, Morling J, after reviewing prior authority, held somewhat summarily that the union's claim that its purpose was related to employment conditions had to be rejected because:

> "it is the immediate, and not the ultimate, purpose of conduct which is relevant for the purposes of [former] s 45D(1)" (at 46,838)

It was this very interpretation which led to a specific provision in the *Industrial Relations Act* (Cth) that the "purpose" of conduct is its "ultimate purpose". No such provision is applicable to s 4D.

[23] *Toowoomba Cab Case*, above n 1 at 40,552 (CCH)

application properly made. It is not appropriate for the judiciary to bless arrangements on the basis of subjective public benefit conclusions expressed in the course of court proceedings for penalty or injunction.

(vii) Finally, comment must be made on the proposition that "the convenience of customers is not an important feature for the determination of the state of competition in a market".[24] The proposition is accurately cited by his Honour from the *Outboard Marine* case, though the writer has been unable to find equivalent express citations from the other cases to which his Honour refers. But the factual situation, at least in *Outboard Marine*,[25] is totally different to that in the *Toowoomba Cab* case. The proposition cited from *Outboard Marine* can have no application to the *Toowoomba Cab* case and certainly can have no overall general application.

## Overall Evaluation

Had the case been pleaded differently, the TPC may have been successful. The TPC was, however, inhibited by constitutional constraints from pleading the case in a manner which would appear to have been capable of bringing it the verdict it desired.

Given the change in the constitutional reach of the *Trade Practices Act*, the Toowoomba cabbies' victory may well be short lived. When Commonwealth constitutional power applies to individuals acting intra-state one may well see the TPC take up the cudgels again.

Having said that, the case still demonstrates some underlying problems for competition law.

If the "contract of service" exemption permits collusion as to all aspects incidental to contracts of employment, then an already found weakness in competition law will remain. This is a basic point. The law should not permit parties to collude as to the basis on which they will employ people except perhaps in the case of collective bargaining arrangements or in the case of arrangements specifically sanctioned by industrial rela-

[24] See cases cited by his Honour for this proposition above, at n 8, and related text.

[25] The Toowoomba Cab Co-Operative obviously had significant market power in an industry which had legislative restrictions on entry. In *Outboard Marine*, above, at n 8, the proposition cited by his Honour was put as a response to the proposition that inconvenience by being unable to shop at one outlet was the equivalent of anti-competitiveness. Only one outlet was involved in *Outboard Marine* whereas a considerable part of the market was involved in *Toowoomba Cabs*. The Court in *Outboard Marine* said that the whole market had to be looked at and a conclusion drawn on the basis of competitive effects in the whole market and not on the basis of inconvenience in a single outlet. Quite consistently with *Outboard Marine*, a restriction causing general inconvenience can be anti-competitive.

tions legislation. In the *Toowoomba Cabs* case, the five day rule was successful in utilising "the employee exemption". Based on the logic of this case, parties could agree as to rates, hours of operation or terms of dealing utilising the "contract for service" exemption in circumstances where a direct arrangement between competitors would be blatantly anti-competitive and illegal. It is time for judicial or legislative re-evaluation of the "contract for service" exemption. As Justice Wilcox has noted, it is difficult to see the policy purpose in an exemption whereby employer parties can collude as to terms and conditions. In such cases, employees are required to suffer from sanctioned collusion. The position is quite anomalous.[26]

The case shows up matters of deeper concern. Those who believe that the judiciary is not receptive to principles of economics and the application of those principles of competition law will regard themselves as vindicated in their view by this case. It is unfortunate to find a judicial decision which sees a "going rate" as seemingly immutable and, therefore, to be accepted. It is similarly unfortunate to have a judge express the view that over capacity in an industry is sufficient justification for private licensing arrangements to inhibit services, the possibility that more efficient operators may be able to "compete out" the less efficient apparently not being contemplated.

Unfortunately also, we have seen in this case a number of judicial value judgements which have impinged upon the basic concepts of what competition is about. His Honour sees the preservation of driver conditions as important. My own more daily contact is with students wanting to make some money to get themselves through University. My own reaction is that it is quite unconscionable that a collusively agreed system should preclude them from driving two days a week. I claim no moral superiority for my views over those of his Honour. I suggest the true position is that neither of us should throw in our moral views as to who should benefit from collusion. We should illegalise the collusion, let the competitive process work and see who, in fact, does benefit.

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[26] See comments of Wilcox J above, at n 19, and related text.