AN INQUIRY INTO BANK CARDS

REPORT OF THE COMMERCE COMMISSION

14 February 1980

IN THE MATTER of the Commerce Act 1975
(the Act)

and

IN THE MATTER of a Report from the Examiner of Commercial Practices (The Examiner) pursuant to section 40 of the Act and dated 6 December 1978

and

IN THE MATTER of an Inquiry into Bank Cards pursuant to section 41(2)(c) of the Act to consider the making of a recommendation pursuant to section 23(1)(n) of the Act.

BEFORE A DIVISION OF THE COMMERCE COMMISSION (The Commission)

Mr K. B. O'Brien	Chairman
Mr H. C. Sadgrove	Deputy Chairman
Miss C. E. Dewe	Member
Mr G. McK. Fraser	Member
Mr J. R. Tipping	Member

Hearing at Wellington on 12, 13, 14, 15, 18, 19, 20, 21, 22, 26 June 1979.

Counsel and Agents as set out in the Schedule attached to this Report and labelled Appendix "A".

1. On the 15 December 1978 the Commission gave public notice that it had received a report furnished by the Examiner of Commercial Practices pursuant to section 40 of the Act which contained a recommendation that:

> "The Commission recommend for the purposes of subsection 23(1)(n) of the Commerce Act, the making of an Order-in-Council which will have the effect of specifying Visa Card, Bankcard and other schemes of comparable purpose or effect as trade practices against which the Commission may make orders."

Notice was also given (inter alia) asking, pursuant to section 14 of the Act, all persons, who wished to take part in the public hearing into this matter to be held pursuant to section 41 of the Act, and who might be authorised so to do by the Commission, to so notify the Commission's Executive Officer.

2. A preliminary hearing by the Commission commenced on Tuesday 13 February 1979 one purpose of which was to consider applications for party status pursuant to section 14(1) of the Act.

3. Following this hearing the Commission promulgated Decision number 36 to which was attached a schedule setting out the names of those applicants whom the Commission agreed to admit as parties to the principal hearing. Appendix "A" attached sets out the names of the parties to the inquiry and the names of counsel or agent who represented them at the substantive hearing.

4. By letter dated 21 March 1979, New Zealand Retailers' Federation (Inc.) confirmed that it was also appearing for:

The New Zealand Retail Motor Trade Association
New Zealand Meat Retailers' Federation
Motel Association of New Zealand
New Zealand Chemists Guild

and for the following affiliated organisations:

New Zealand Cycle Traders' Federation
New Zealand Sports Dealers' Federation
New Zealand Retail Hardware Federation (Inc.)
Booksellers' Association of New Zealand Inc.
New Zealand Radio, T.V. and Electrical Retailers' Association
New Zealand Specialist Mower Service Dealers' Association

Society of New Zealand Professional Florists Inc.
National Association of Retail Grocers and
Supermarkets of New Zealand
Music Trades Association

5. Following an application pursuant to section 14(4) the Commission, on 27 March 1979, after consulting all parties concerned, consented to the joining of the following parties in terms of section 14(4) and granted leave accordingly to the New Zealand Retailers' Federation (Inc.) to appear and be heard in the proceedings as representing them:

New Zealand Hardware Federation
National Association of Retail Grocers
and Supermarkets of New Zealand
New Zealand Dairy and Confectionery
and Mixed Business Association (Inc.)

6. On 28 March 1979 the Commission gave public notice that it had set 12 June 1979 as the date on which the substantive hearing into matters raised by the Examiner of Commercial Practices in his "Visa" report dated 6 December 1978 would commence.

7. This Report relates to the substantive hearing on a proposed new category of examinable trade practice. The specific purpose of the hearing was to enable the Commission to determine whether it should make a recommendation to the Minister of Trade and Industry that the trade practice concerned should be added to those examinable trade practices categorised in section 23 of the Commerce Act.

8. Some 1200 pages of evidence were formally tabled at the inquiry and the transcript from the substantive hearing occupies some 600 pages. Consequently, to provide an adequate summary of all the submissions and evidence before the Commission would be a lengthy exercise. However, the Commission will outline the basic stances of the parties and the way they endeavoured to substantiate their positions. Whilst doing so, the Commission would stress that in coming to its decision it has taken into account all the submissions and evidence before it. The public submissions and evidence and the hearing transcript can be inspected at the Commission's offices from where copies may be purchased.

9. On 6 December 1978, the Examiner of Commercial Practices made a report to the Commission in accordance with section 40(1)(d) on the trade practice the subject of this inquiry.

10. The Examiner's report stemmed from formal complaints he had received from the National Association of Retail Grocers and the Consumers' Institute. It also stemmed to some extent from an investigation on the Examiner's own motion (in terms of section 38(1)(a) of the Act) on a trade practice which appeared to be contrary to the public interest.

11. The grounds which prompted the Examiner to make his investigation and report thereon were stated by him to be that the Visa Card then currently being introduced by the Bank of New Zealand (BNZ) was a first step in a major development in banking practice which would affect the operations of retailers and other businesses selling goods and services, the prices at which such goods and services are sold, and the traditional freedom of the public to choose how they pay for goods and services. The Examiner's investigations showed that the National Bank of New Zealand Limited (NBNZ) intended to introduce a Visa Card system and that the three Australian based banks, namely the Australia and New Zealand Banking Group Limited (ANZ), the Bank of New South Wales (Wales) and the Commercial Bank of Australia Limited (CBA) had decided that, at some appropriate time in the near future, they would each introduce a credit card system based on the Bankcard currently operating in Australia.

12. The Examiner's report stated that to date it appeared the BNZ Visa Card had received only a limited degree of acceptance and unless it made substantial progress it would probably have little effect contrary to the public interest and would require no more consideration than has been given to the operation of the American Express Card (AMEX) and Diners Club Card (Diners). However, the Examiner stated there were other factors which led him to consider that an examination of the scheme was justified. These were:-

Firstly, that the other four trading banks intended to introduce debit or credit card systems, possibly within the next twelve months.

Secondly, that there was a "domino effect" which, assisted by the powerful influence of the banks to persuade more merchants to enter the scheme, would almost certainly ensure a wide acceptance of both Visa and Bankcard schemes.

Finally, that there was the near certainty that the New Zealand public, without any opportunity of expressing their views, would be saddled with systems of payments which would probably have the effect of increasing the price of goods and services whether or not they partake in the operation.

13. The Examiner's investigations and report covered not only Visa but also other credit card systems operating in New Zealand or likely to be introduced.

14. This inquiry by the Commission, however, encompasses only those cards introduced or about to be introduced by the five trading banks mentioned in paragraph 11 hereof. The confining of the substantive hearing to the bank cards practice only was the result of the dismissal from further proceedings of South Pacific Credit Card Ltd (Amex) and Diners Club N.Z. Ltd (Diners) following applications made by them at the hearing on 13 February 1979. The Commission's Decision No. 37 refers.

15. The modus operandi under which the system of bank cards operate is common to all five banks and is probably widely known but in the general interest is set out in some detail in Appendix "B" to this Report.

16. Provided they comply with all current Government Regulations relating to the banking system, bank credit or debit cards, as such, are not illegal in New Zealand. Some complainants suggested to the Examiner that the method by which the BNZ distributed their Visa Cards initially may have been in breach of the provisions of the Unsolicited Goods and Services Act 1975 but, as the administration of that Act is the responsibility of the Justice Department, this aspect was not pursued by either the Examiner or this Commission.

17. After investigating the complaints from the National Association of Retail Grocers of New Zealand and the New Zealand Retailers' Federation which related principally to the additional costs which their members could incur if they were forced under the "domino theory" to accept bank cards, the Examiner stated:-

> "In my opinion the Visa Card system and the other card systems which the four other trading banks are intending to introduce into New Zealand constitute trade practices which in the language of the Commerce Act, are deemed contrary to the public interest in that the effect of the practices would be "To increase the costs relating to the distribution of goods and services" (section 21(1)(a)). Moreover, with the eventual removal of price control over many goods and services (which at that time was a reasonable expectation in view of the policy statements of the Government) the practices would have the effect of increasing the prices at which goods and services are sold within the meaning of section 21(1)(b)."

The Stabilisation of Prices Regulations 1974 were in fact repealed on 6 April 1979.

The Examiner went on to say that because Visa (BNZ) had been in operation for a very short time the effects cited above were currently of minor significance only. His opinion was based, however, on the effects that he considered were likely to develop in future as the schemes became established and more widely accepted.

18. The Examiner in his report stated that his investigations had failed to reveal that this trade practice had or would have effects of demonstrable benefit to the public which would outweigh any of the effects described in paragraph 17, in addition to which he reported that he could not agree that the effects of the practice were not unreasonable, in terms of section 21(2).

19. The Examiner gave consideration as to whether the practice came within the ambit of section 23(1)(k) being "a payment to any person by sellers or resellers by way of a commission or fee which in the circumstances is excessive" but the legal advice he received indicated that this subsection was not appropriate. The Examiner stated that although the Commission might consider the practice does come within the ambit of section 23(1)(k) he preferred to recommend that action should be taken in terms of section 23(1)(n).

20. The Examiner's recommendation contained in his report of 6 December 1978 to the Commission reads:-

> "In that I have formed the opinion that the Visa and Bankcard schemes which have either been introduced or will probably be introduced into New Zealand, are likely to have effects which are deemed to be contrary to the public interest in terms of subsection 21(1)(a) and (b) of the Commerce Act and in view of my opinion that these practices do not avoid being deemed contrary to the public interest in terms of section 21(2) I recommend that:
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> > The Commission recommend for the purpose of subsection 23(1)(n) of the Commerce Act, the making of an Order in Council which will have the effect of specifying Visa Card, Bankcard and other schemes of comparable purpose or effect as trade practices against which the Commission may make orders."

21. In his evidence at the substantive hearing, which commenced on 12 June 1979, the Examiner reiterated the opinion

expressed in his report of December and stated that although BNZ had since made improvements to its Visa scheme, he was still of the opinion that, if the schemes gain wide acceptance, retail prices would be inflated by the merchants' commission charges, now that most goods and services had been freed from price control. The effect was likely to be that those who do not accept either Visa or Bankcard would still be required to pay increased prices if the schemes were widely adopted by retailers. He also stated his preliminary investigations indicated that the three Australian based banks (ANZ, CBA and Wales) might be introducing identical schemes with identical scales of charges. If this were so, stated the Examiner, the action of the three banks would, in his opinion, constitute a collective pricing agreement as described in subsection 23(1)(d) of the Act, in which event, before the scheme could be put into operation, the practice would need to be notified to and be approved by the Commerce Commission in terms of sections 27 and 29 of the Act.

22. It was the Examiner's view that the inclusion of a trade practice among the categories of examinable practices in section 23(1) of the Act did nothing more than establish that that practice is accountable to the public interest criteria mentioned in section 21 of the Act. It did not have to be demonstrated that the practice could be contrary to the public interest, or to have that likelihood, for it to be included in section 23(1). The Examiner submitted, in considering whether or not this trade practice should be made examinable, that the Commission need only consider whether having regard to the general purposes of the Commerce Act, "it is reasonable to hold that the practice is accountable to the public interest."

23. The factors which the Examiner considered clearly established that it was reasonable that this practice be made examinable were:-

(a) that the operation of third party payment settlement mechanisms beyond present levels, in place of or in addition to historic systems, would have a significant impact on present commercial, economic and social patterns;

(b) that in particular the operation of third party payment settlement mechanisms by the trading banks was, in the words of the Commission itself:-

> "a notable and important development in banking practice in New Zealand which, if overseas experience affords any guidance,

is likely to become widely accepted in this country" (paragraph 13 of Decision No. 37);

(c) that organisations representative of merchants and consumers, the users of third party payment settlement mechanisms, were concerned that the increased activity of these schemes may prejudicially affect them;

(d) that in overseas jurisdictions, where these schemes have operated for some time, and from whence has come the impetus for expansion into New Zealand, (in particular the United States, the United Kingdom and Australia) the parallel trade practice authorities had deemed it appropriate that the ramifications of these schemes should be, and indeed currently were, the subject of inquiry;

(e) that in so far as it was relevant to have regard to the likely public interest effects of these schemes, within the meaning of section 21, that such schemes were likely:-

(i) to increase the costs relating to the distribution of goods and services at large, within the meaning of section 21(1)(a); and

(ii) to increase the prices at which goods and services at large were sold, within the meaning of section 21(1)(b);

without there being any redeeming feature to offset those effects within the meaning of section 21(2).

25. The Examiner stressed that the Commission was not acting judicially in this matter for the Commission's determination at this inquiry may not result in a trade practice order or approval nor directly create any other effect which would impact on individual rights. Under the provisions of section 41(2)(c) the Commission at this inquiry has only to decide, if it forms the opinion the practice does not come substantially within any of the categories set out in section 23(1) of the Act, whether or not in those circumstances it should make a recommendation for the purposes of section 23(1)(n).

26. The Examiner pointed out that it was not an offence to operate an examinable trade practice nor was the prior approval of the Commission necessary, but the categories of trade practices in this class were singled out as practices against which the Commission may make orders.

There was then a presumption that as a class those practices at least have the capacity to be harmful to the public interest within the meaning of section 21(1) of the Act.

27. The Examiner also submitted that subsection (2)(c) of section 41 of the Act, unlike other subsections, did not spell out how the Commission should go about its task of determining whether it ought to make a recommendation. Nor did it spell out what factors should be taken into account but the Commission was bound to take into account the public interest and the intent of the Act, described by the long title, which, inter alia, was to prevent mischiefs that may result from trade practices. It would be pointless to recommend the designation of a category of examinable trade practice if that practice lacked the capacity to demonstrate some mischief and for that reason the Commission must have regard to section 21 to ascertain whether this category of trade practice was capable of measure in that way.

28. The Examiner submitted that, in his opinion, the Commission's only concern at this inquiry should not be with the merits or demerits of a particular trade practice but whether or not in the public interest it should make a recommendation that this class of trade practice be categorised and made examinable under section 23(1).

29. In his closing submissions counsel for the Examiner advanced the argument that on receipt of the Examiner's report the Commission - except where it decides to dispense with an inquiry - shall conduct an inquiry into the matter. Subsection (2)(c) of section 41 requires the Commission to determine:

> "Where the Examiner has furnished a report under section 40(1)(d) of this Act or where the Commission is of the opinion that the practice does not come substantially within any of the categories set out in section 23(1) of this Act, whether or not it should make a recommendation for the purposes of section 23(1)(n) of this Act,"

and that in his view, no limitation was placed upon the Commission in section 41 as to the evidence and/or facts to be considered in arriving at its decision.

30. In closing the Examiner reiterated his opening submission that, having regard to the general purposes of the Act, the Commission should now consider whether for the future it was reasonable to hold this trade practice accountable to the public interest for, in his opinion, there were compelling reasons for setting this legislative step in motion. In the event of the bank credit card schemes

eventually achieving a substantial degree of acceptance in New Zealand he foresaw that this would have an adverse effect on costs and prices. For these reasons he recapitulated the recommendation set out in paragraph 1 of this Report.

31. In accordance with the provisions of subsection (5) of section 40 of the Act, the Commission, on receipt of the Examiner's report, sent a copy of the same to every person, or organisation, named in that document and requested that an answer be provided to the Commission by 4 p.m. Wednesday 24 January 1979.

32. At the conclusion of the party status hearing on 13 February 1979, all parties to the inquiry were informed that the substantive hearing would commence on 12 June 1979 and that opening submissions from all parties should be filed with the Commission by Friday 27 April 1979. This date was met by all parties except the Consumer Council, which requested an extension of time to enable the Council itself to approve, at its meeting, the contents of the submissions prepared by its Director. This time extension application was granted and the Consumer Council's opening submissions were received on 4 May 1979.

33. Following the circulation of these opening submissions to all parties, supplementary submissions were scheduled to be received by Friday 1 June 1979, and these were also circulated to all parties. The Commission wishes to place on record its appreciation of the manner in which these scheduled dates were adhered to by the parties involved as it allowed everyone concerned to be fully informed and briefed prior to the commencement of the hearing.

34. At the conclusion of the substantive hearing on Tuesday 26 June all counsel concurred in the proposal that final submissions were to be filed with the Commission by Friday 10 August and that if, for any reason, after receipt of those, the Commission decided it would need to reconvene the hearing or to see individual counsel it would notify the parties. The Commission, after deliberation, considered that neither course was necessary.

35. Evidence was given at this inquiry by the Examiner and sixteen witnesses who appeared on behalf of various parties. A list of all of these witnesses, together with the names of the parties on whose behalf they appeared, is appended to this Report and labelled Appendix "C".

36. Before summarising as briefly as possible the submissions of all parties to the hearing it is perhaps appropriate

firstly to refer to the submissions of counsel for the banks on the question of statutory criteria and the Commission's jurisdiction.

37. Counsel for the BNZ and the National Bank gave notice in writing of applications to the Commission on various matters pertaining to the limits of the inquiry and, at the commencement of the hearing on Tuesday 12 June, these counsel were invited to present their applications before the main inquiry proceeded further.

38. The application dated 1 June 1979 by counsel for the BNZ sought the Commission to rule at the outset that certain matters introduced in submissions from various parties to the inquiry were irrelevant and the Commission had no jurisdiction to consider these. In brief, counsel submitted that at this inquiry, the Commission had no jurisdiction to consider:-

1.1 Any matters alleged to be contrary to the public interest which the Commission could not properly consider when inquiring into an examinable trade practice and that within the category of those proper for consideration this should be restricted to those where it is alleged there is a real likelihood of such consequences in the foreseeable future as distinct from a vague or remote future possibility or potentiality. Counsel conceded, however, that there must be an ingredient of potentiality when the Commission is viewing the public interest issue under section 41(2)(c). For the Commission to make an Order under section 22(1) it is circumscribed by the criteria on public interest set out in section 21(1) and that for this inquiry it would be wrong for the Commission to consider any other adverse factor of public interest which did not fall within the section 21(1) criteria.

1.2 The possible terms of an Order under section 22, as to do so would predicate that the trade practice is examinable. That was a different issue from an inquiry into determining whether a trade practice should be made examinable.

1.3 Making a recommendation that could affect other institutions who were not parties to the inquiry, as the Commission's Decision No. 37 limited this inquiry into types of bank cards only.

1.4 Requiring the Examiner to make a thorough examination into the present and future effects of bank cards.

1.5 The following matters as they were irrelevant to this inquiry which was to determine whether the Commission should make a recommendation for the purpose of section 23(1)(n):-

(a) Whether credit cards may increase the profits of the banks, as it would be straining the language of section 21(1)(d) to construe "profits from the ... sale of goods" to embrace profits from the provision of credit to enable the purchase of goods;

(b) Whether alternative systems of money transmission or credit should have been offered to the public prior to introducing credit cards;

(c) Whether EFT is a desirable future development or not and what controls, if any, it should be subject to;

(d) Whether the introduction of bank cards constitutes a "change in circumstances" in relation to banks' charges for operating current accounts, as they are a new and different service from current accounts;

(e) Whether the charges to retailers or card holders for bank cards should be fixed by the Commerce Commission instead of the Reserve Bank, as they were all charges within the definition of "specified financial services" under the Financial Services Regulations 1979. The Commission is the appeal authority under those Regulations and it would be inappropriate for the Commission to canvass at this inquiry whether the law should be changed relating to the approval of those prices, neither is it part of the Commission's function to consider whether this law should be changed;

(f) Whether price control of interest rates on credit cards and controls on the method of calculating interest should be vested in the Commission, for the reasons given in (e) above;

(g) Whether "in house" credit operated by a bank on behalf of a retailer and any charges made therefor should be controlled, for the same reasons as (e) above;

(h) Whether the Commission should undertake a revision of the charges for trading bank current accounts, for the reasons stated in (e) above;

(i) Whether the Visa NZ decides to issue travellers cheques;

(j) Whether trading banks should consult with consumer and retail interests before introducing any significant new developments in banking;

(k) Whether banks should be prohibited from requiring retailers not to discriminate against card holders as to price, as this would be inviting the Commission to make recommendations that the law should be changed in some way, and if the law needs revision then these matters should be addressed to the appropriate authorities and not the Commerce Commission;

(l) Whether banks should be required to refund bank card commissions where no redress is given by retailers in respect of faulty goods, for the reasons given in (k);

(m) Whether a code should be drawn up governing such matters as error resolution and disclosure, for reasons as cited in (k);

(n) Whether the issue of privacy should be considered in relation to records of credit cards maintained by banks which would involve reviewing the law relating to banking secrecy.

39. In addition counsel for the BNZ commented on certain legal aspects which had been raised in various submissions and these related to:-

2.1 The assumption by the Consumer Council that section 22 of the Commerce Act 1975 was the only instrument for imposing conditions on credit cards, but as the Council's suggestions for regulation of credit cards applied equally to other forms of credit, then the Law Reform Council was a more appropriate body to whom to make such recommendations.

2.2 The Consumer Council submitted an interpretation of section 2A of the Act which was, in counsel's view, untenable in that it suggested that paragraphs (a) and (b) of subsection (1) of

section 2A "must be taken together". Counsel for the BNZ argued that the five objects set out in subsection (1) of that section should be read in their entirety and that each object must be considered in its own right and to the extent that they are considered together they are all to be considered and not any particular two of them.

2.3 The submission by the CSU that the Commission should ask itself the questions as to whether it should assume the right to outlaw, restrict or attach conditions to various forms of payment settlement mechanisms, and what kind of payment settlement mechanisms should be subject to this form of restriction, was much too wide a statement and ignored the relevance of the Act and particularly sections 21 and 40 of the Act. The Commission cannot simply put aside questions of public interest and approach the issue by applying a vague sort of test which the CSU proposed.

2.4 The CSU also submitted another sweeping test when it suggested that it was sufficient for the Commission to be of the opinion that the community ought to have at its disposal machinery for the investigation of and taking action against a trade practice of this general form. Counsel for BNZ contended that this submission by the CSU was not appropriate, for the implications of making a trade practice examinable are considerable, particularly when a form of consumer credit competes in the market place with similar forms of consumer credit which are not examinable.

2.5 The CSU also submitted that "if it is likely that a practice may have any of the effects listed in section 21(1) of the Act it is advisable to include the practice in the list in section 23". While counsel accepted that the likelihood of effects listed in section 21(1) of the Act were undoubtedly important and that the Commission must of necessity have regard to them, they should not be treated as conclusive and the Commission is entitled to weigh the positive advantages of a trade practice and section 21(2) requires the Commission to carry out a counter balancing exercise.

2.6 The Consumer Council had stated in its submissions that it was now law in the U.S.A. that banks were "prohibited from forcing retailers not to give

discount for cash" and that the BNZ would call a witness from the U.S.A. to adduce evidence as to the United States law and its effects in practice, and that as far as New Zealand was concerned the "no discrimination" clause was directed not at discounts for cash but to prohibit surcharges to card holders.

3. Other legal aspects were raised in submissions and these were, counsel contended, outside the Commission's jurisdiction to consider and comment would be reserved on these until such time as the Commission ruled on the applications numbered 1.1 to 1.5 above.

4. The parties who supported the Examiner's view of bank cards had made invalid assumptions on legal aspects and many of these were completely unproven.

40. By letter dated 11 June 1979, counsel for the National Bank also sought a preliminary ruling on two matters which arose out of the opening submissions of counsel for the Examiner and these were:-

1. That the submission by the Examiner that the definition of the trade practice should be extended to include all third party payment mechanisms was too wide an expansion of the scope of this inquiry. It was obvious that "third party payment mechanisms" was a broader category than debit or credit cards issued by banks and other organisations and it was quite clear that the trade practice under consideration by the Commission could not be expanded to include matters which may even extend to the entire cheque payment system operated by banks and even post office money telegrams. No one knew what the words "third party payment mechanisms" meant and it was ludicrous that on the eve of the inquiry the banks should be asked to front a new and expanded practice.

2. That the Commission is not required to consider whether or not bank cards are, or are likely to be, contrary to the public interest. The counsel for the Examiner had made the point that the issue for the Commission is simply whether having regard to the general purpose of the Act, it is reasonable to hold the practice accountable to the public interest. That submission by the Examiner went a great deal further than an examination of the effect or effects on the public interest being likely, possible or probable.

It was suggesting that the effect on the public interest was not at issue but rather that there should be some general consideration as to whether or not it was reasonable to hold the trade practice accountable to the public interest. It was essential, counsel argued, that all parties knew what were the general criteria that the Commission had regard to in deciding whether it should make a recommendation. The Commission could not approach its task on a broad brush basis, it must be confined to a consideration of the trade practice as defined in the Examiner's report, and he adopted the submissions of counsel for the BNZ set out in item 1.1 in paragraph 38 above.

41. Another legal argument was propounded by counsel for the National Bank to the effect that a decision of the Commission to make a recommendation pursuant to section 23(1)(n) of the Act to add an additional class of examinable trade practice, must be considered in the light of those practices which are already listed in section 23(1). Any new category under section 23(1)(n) must have similar characteristics with those already there. The common thread or characteristic which the practices listed in the section exhibit was that they were all prima facie objectionable as they all had a distorting effect on costs, prices or competition, but their prime mischief was not their price feature. It was the agreement not at arm's length which was the vice or mischief, because the parties had banded together to take a course of action which produced the harmful effects. They were arrangements or understandings between persons to follow a common course of action in their trade relationships. The vice was the banding together. Subsection (k) of section 23(1) was, counsel argued, the key, for although it was concerned with "any payment to any person ... by way of royalty, licence, fee, retainer or otherwise which in the circumstances is excessive", it was the making of the payment which was the examinable practice and not the price. Counsel suggested that this was because the two parties had agreed upon the excessive fee for some ulterior purpose. There was further support for this argument, counsel said, in the nature of the Orders the Commission may make under section 22 of the Act. Those Orders were directed towards the prohibition or discontinuance of a particular activity, as the activity was an abuse of a free market system. It was inconsistent with the Commission's powers to operate a system of control of the prices charged in those practices, which may well be the effect of the Commission's Order, but the powers were designed to curtail the non-price element.

42. In his opening submission counsel for the Examiner presented certain arguments which also affected the scope

of the inquiry and which dovetailed into the preliminary arguments presented by counsel for BNZ and National Bank. These submissions related to the Commission's Decision No. 37 issued following the 13 February 1979 hearing, and were as follows:-

(a) That Decision No. 37 granted, inter alia, applications by certain parties to be dismissed from the inquiry.

(b) That the only effect, in law, of the applications so granted was that the applicants were no longer parties to this inquiry.

(c) That, in law, the absence of those parties from the inquiry did not mean that the trade practices carried on by these parties were therefore excluded from inclusion in the class of trade practice which was the subject of the inquiry and which may be designated an examinable practice pursuant to section 23(1)(n).

(d) That in any event it could not be a proper and valid effect of Decision No. 37 to limit the scope of the inquiry, or to interpret the Examiner's intention in the use of the description "comparable purpose and effect" without all parties having been fully heard on the matter.

43. All parties were given opportunity to state their arguments either in support of, or in opposition to, the points made by counsel for BNZ, National Bank and the Examiner. Having heard all these arguments the Commission adjourned the hearing until 10 a.m. the following day in order to deliberate on the matters raised.

44. The Commission would like to place on record that, prior to coming to its decision on the applications of counsel, it considered carefully all arguments presented, both for and against, but does not intend to list these. All those arguments can be read on pages 4-40 of the transcript of the hearing.

45. At the resumption of the hearing on 13 June the Commission gave its ruling, copies of which were circulated to all parties present, and which is now placed on public record.

46. "The Commission has carefully considered all the submissions made to it yesterday in relation to the applications for rulings initiated by Mr Clayton (counsel for BNZ) and Mr Webb (counsel for National Bank). It will rule immediately on some of the matters raised and

will reserve its decision on others for a subsequent ruling or rulings either during the course of this hearing or on its completion.

46.1 In general the Commission derives its jurisdiction from the Commerce Act 1975. It also derives jurisdiction from other Acts and Regulations which are not in issue in the present case, in which it is common ground that the immediate foundation of jurisdiction results from a report from the Examiner of Commercial Practices properly made pursuant to section 40 of the Commerce Act the subject matter of which is now being inquired into by the Commission pursuant to section 41. In the report the Examiner recommends that the Commission in its turn make a recommendation by proceeding in terms of section 23(1)(n). The Commission can not be at present concerned with what might or might not happen in later proceedings if the practice under consideration is made examinable and subsequently examined.

46.2 It will therefore proceed to deal with jurisdiction and relevance on each point raised in relation to this present hearing only. The convenient way to do that appears to be in the sequence raised by initiating counsel.

46.3 Mr Clayton's supplementary submissions dated 1 June 1979:-

Paragraph 1.1 - The Commission has sympathy with the main thrust of this submission but is not prepared to rule today in detail on the intricate points which may be raised later in the hearing.

As a general but not binding guide the Commission expresses the opinion that the issue to be resolved in these present proceedings is:

> Whether or not the action or actions taken by the New Zealand trading banks in relation to the adoption or possible adoption of their respective credit card schemes should lead the Commission to the conclusion that those schemes should be classed in a category and that category made an examinable trade practice because they may now or in the future lead to effects contrary to or likely to be contrary to the public interest in that such effects may be harmful to consumers and or traders.

Paragraph 1.2 - The Commission upholds Mr Clayton's submission subject to the proviso that matters may be raised which could be held relevant to both the present inquiry and eventually to the nature of what Order (if any) might eventually be made under section 22.

Paragraph 1.3 - This raises the issue of the wording of the recommendation contained in the submission lodged by Mr Harris on behalf of the CSU. The Commission upholds Mr Clayton's submission and further considers that, to assist Mr Harris, it should rule now that, in its present form, the wording of the CSU proposal goes well beyond the scope of this inquiry and is therefore not acceptable to the Commission as a formula capable of adoption.

Paragraph 1.4 - The Commission upholds Mr Clayton's submission. It does not have the power to so require the Examiner. It is for him to conduct his inquiries in the way laid down in the Act.

Paragraph 1.5 - (Subsections dealt with in sequence)

(a) This appears to conflict with Mr Clayton's own original submission 2.2 on pages A2 and A3. The Commission rules against Mr Clayton but wishes to make it clear that it does not wish to hear lengthy speculative expositions on possible profits which might be gained from schemes which are hardly yet off the ground.

(b) The Commission upholds Mr Clayton.

(c) The Commission reserves its decision until later after it has heard submissions and evidence on EFT.

(d) The Commission upholds Mr Clayton's submission because, if the 1970 Trade Practices Commission decision is relevant, then the matter should have come to the Commission in that context specifically. In the present case the Reserve Bank possesses quite a number of control mechanisms and has approved the BNZ proposals with respect to both price control and exchange control.

(e) and (f) The Commission upholds Mr Clayton's submission on these two points in relation to the present inquiry because the Reserve

Bank is at present the pricing authority designated by Regulation. This issue is however reserved in relation to any subsequent and separate proceedings in the light of the circumstances found then to be prevailing.

(g) This issue appears to have two limbs. In relation to charges the Commission upholds Mr Clayton's submission on the same basis as in (e) and (f). It reserves its decision on the issue of operation.

(h) Mr Clayton's submission is upheld.

(i) In so far as it understands this point the Commission upholds Mr Clayton's submission, but would grant leave for consideration later if the issue appears to be relevant.

(j) Mr Clayton's submission is upheld on the ground that the issue is not relevant to the present inquiry.

(k) The Commission reserves its decision on this issue.

(l) and (m) Mr Clayton's submission is upheld in the context of and in relation to the present inquiry.

(n) The Commission reserves its decision on this issue.

The Commission notes parts 2, 3, and 4 of Mr Clayton's submission and assumes he will address it on these matters later.

46.4 Mr Webb's submissions notified in his letter of 11 June.

The first matter - The Commission upholds Mr Webb's submission on the grounds that such an extension of the definition could take this inquiry well beyond its proper scope.

The second matter - This relates to paragraph 2 of Mr Hill's (counsel for the Examiner) submission. It appears that that paragraph can be interpreted in two ways. In so far as Mr Webb's interpretation is concerned, his submission would have to be upheld. However, the Commission interprets it as meaning that in the present proceedings the Commission is not concerned with whether any of the named or other particular card schemes should be deemed contrary

to the public interest. That would be a matter for subsequent proceedings, if any. The Commission agrees with that, but does not agree, nor understand Mr Hill to mean, that the issue of the public interest is not required to be considered on the present issue, namely, whether card schemes as a category have the potential to be contrary to the public interest.

As a consequence the Commission does not consider it necessary to rule on Mr Webb's closely argued submission on the common thread he claimed to be a link between all the other paragraphs of section 23. It does however accept his argument that section 21 is not the start point in relation to a recommendation made in relation to the invoking of section 23(1)(n).

46.5 The Commission considers it should also rule immediately in relation to paragraphs (c) and (d) on page 5 of Mr Hill's submission of 1 June and the application of its own Decision No. 37. It has considered the letters from counsel acting on behalf of Diners Club (NZ) Limited and South Pacific Credit Cards Ltd.

The Commission rejects paragraph (d) on the grounds that all parties had the opportunity to be fully heard on the matter in the proceedings in February last which resulted in Decision No. 37.

The Commission rejects paragraph (c) on the grounds that:-

(1) Having issued Decision No. 37, the Commission could not proceed to widen the class of trade practice without hearing from the two parties therein named and/or giving proper notice to any other parties who might be affected by such widening; and

(2) To proceed in the manner indicated would be a breach of the rules of natural justice, namely the "audi alteram partem" rule."

47. For convenience, at this point in this Report, the Commission incorporates its rulings on the points reserved during the hearing.

48. Having now heard and considered the submissions and evidence presented at the hearing, the Commission considers that the opinion it expressed as a general guide in reply to Mr Clayton's submission contained in paragraph 1.1 satisfies the point raised by him. It therefore does not consider it needs to issue what would possibly be a quite

lengthy ruling on where a dividing line might be drawn between "real likelihood" and "vague or remote future possibility", particularly as, in the present case and quite possibly in future similar cases, such a distinction would need to be drawn in relation to "potential as distinct from actual consequences". The Commission's evaluation of the substantive issues in the present case will emerge later in the Report.

49. In paragraph 1.5(c), Mr Clayton submitted, as part of a long list, that "Whether EFT is a desirable future development or not and what controls, if any, it should be subject to" was irrelevant to a determination to make a section 23(1)(n) recommendation in this case. The Commission upholds Mr Clayton's submission, because nothing submitted later in the hearing persuaded it that the EFT issue was relevant in the present proceedings.

50. In paragraph 1.5(g) of the same list Mr Clayton raised the issue which the Commission divided into two limbs. It ruled on one of them and reserved its decision on the issue of "operation" by a bank of in-house credit on behalf of a retailer. While reference was made during the hearing to such activities in other countries, no evidence was introduced to indicate that any such proposal was being considered by any New Zealand bank or retailer. For the purposes of the present inquiry, the Commission now upholds Mr Clayton's submission, but reserves the issue if it is raised in any subsequent and separate proceedings.

51. The next item in Mr Clayton's list was contained in paragraph 1.5(k), namely, "Whether banks should be prohibited from requiring retailers not to discriminate against card holders as to price". The first part of this goes to the issue of "prohibition" and the Commission upholds Mr Clayton, because that would properly be a matter for consideration in any subsequent and separate proceedings in the light of submissions and evidence tendered about it. However, whether the Commission lacks jurisdiction to consider this as one of a set of future possibilites in forming its mind on whether to determine to make a recommendation appears, as a matter of law, to be a second and different issue. In so far as the Commission has a discretion or discretions vested in it, it cannot divest itself of the duty to exercise any or all of them in appropriate cases and circumstances. Therefore, the Commission rejects Mr Clayton's submission in so far as it relates to the second issue. However, the Commission now notes, as will appear later in this Report, that the second issue was not a matter it found itself called upon to address in forming its opinion in the present proceedings, so that the question of the exercise of the discretion did not arise.

52. The final reserved item from Mr Clayton's list was contained in paragraph 1.5(n), namely "Whether the issue of privacy should be considered in relation to records of credit cards maintained by banks which would involve reviewing the law relating to banking secrecy". This item appears to raise as one issue a number of separate issues. It is quite clear that, in general terms, the Commission has no power to review the law relating to banking secrecy. However, in so far as the Commission may be required to take such law into account in relation to credit cards, or any other matter in relation to which the banks are subject to the provisions of the Commerce Act, the Commission would have to hear submissions and evidence properly placed before it. Furthermore, it is conceivable that, as a result of separate and subsequent proceedings, submissions might be made to it requesting that conditions or provisions about secrecy be attached to any Order or Orders made pursuant to section 22 of the Act. If such submissions were made, the Commission would have to consider them before deciding whether to adopt them or not and would clearly, in the event of the absence of any other over-riding law on the subject, have the jurisdiction to impose conditions or provisions. For the sake of the record only, the Commission also notes at this point that the issue of secrecy can arise in relation to applications made to it pursuant to sections 8, 9 or 15(3) of the Act. For the purposes of the present inquiry, the Commission considers that the issue or issues raised are irrelevant and therefore upholds Mr Clayton in that context. However, the issue must clearly be reserved in relation to any separate and subsequent proceedings.

53. In the ruling or rulings cited in paragraph 46 above, the Commission stated, inter alia, that it did not consider it necessary to rule on one of Mr Webb's submissions. It has now had the opportunity of reviewing all the material before it. As the issues involved here may arise in other cases, and as this is the first inquiry arising from the application of section 23(1)(n) of the Act, the Commission considers it would be helpful to interested parties to set down Mr Webb's submission and to record the views it has formed.

54. After stating (a) in the event that the trade practice were made examinable, "the Examiner would envisage that the Commission should at a second stage inquiry make orders under section 22 of the Act which would directly control the prices charged for bank card services"; (b) that the Consumer Council had recommended strict price control of all charges for cheques, bank cards, extended credit incurred by the use of bank cards and by "own brand" retail cards; (c) that Retailers' Federation similarly looked ahead to a second stage

inquiry and envisaged the making of orders against or controlling the charges of bank cards; Mr Webb went on to submit:-

"2.4 We believe that the Examiner and those supporting him have misconceived the functions of the Commission under Part II of the Commerce Act. It is our general submission that the role of the Commission in the control of those trade practices listed in section 23 of the Act does not include the operation of a continuing system of price control.

2.5 We refer first of all to the nature of the trade practices listed in section 23. They are all practices which by their very nature are likely to have distorting effects on costs, prices, or competition. They are prima facie objectionable.

2.6 But on closer analysis, we suggest it will be found that it is not the price charged by those engaged in the practice which is the vice. There is in each case a dominant over-riding non-price feature. Thus we find that categories (a) to (h), (j) and (m) are aimed at understandings between persons that they will follow a common course of action in their trading relationships. Categories (i), (ka) and (l) are concerned with restrictive trade practices. Even category (k) is not, in our submission, directed to the price feature as such. This final comment requires some amplication.

2.7 Category (k) is concerned with "any payment to any person by sellers, or resellers, by way of royalty, licence, fee, retainer, or otherwise which in the circumstances is excessive." It is significant that it is the making of the payment which is the examinable practice. If the issue were simply one of price, then one would expect the practice to be the selling of the goods or services at an excessive price, rather than the payment for them. We suggest that category (k) relates simply to those cases in which two parties who are not at arm's length agree upon an excessive fee for some ulterior purpose. An example would be transfer pricing from an overseas parent company to a New Zealand subsidiary."

55. In his final submission Mr Webb recapitulated that submission in the following terms:-

> "This subject was explored at greater length in Part I of the National Bank Supplementary Submission. I will content myself at this time by repeating the observation that the classes of trade practice listed in section 23 all have this in common - that they are practices which by their very nature are abuses of a free market system. They are either practices whereby there is collusion between traders or suppliers to affect the market, or an unjustifiable action or refusal in relation to the supply of goods or services. It is my submission that any recommendation to be made by the Commission for the purposes of section 23(1)(n) should be only in respect of a trade practice such as I have described."

56. The Commission notes, in passing, that no other counsel adopted Mr Webb's submission. The first part of Mr Webb's submission is that there is a common thread or characteristic to the categories of trade practices referred to in section 23(1). He refers to it in the first place as "a dominant over-riding non-price feature" or, in his final submission, "by their very nature (they) are abuses of a free market system". The Commission is divided on the question of whether there is such a common thread in the categories of practices listed in section 23(1). The majority considers there is not, whether in terms of the language used by Mr Webb or otherwise. The minority considers there is.

57. However, the Commission cannot agree with the second part of the submission, viz., that any recommendation to be made for the purposes of section 23(1)(n) should be only in respect of a practice having the characteristics of the examinable practices listed in section 23.

58. The alternative to Mr Webb's point of view is to be found in a consideration of what Parliament intended and, indeed, what it intended in the like provision in the Trade Practices Act 1958. Did it intend the effect which Mr Webb contended for or did it intend to provide for the addition of a category or categories not then foreseen and not necessarily having commonalty with paragraphs (a) to (m) but having in them the potentiality for mischief? If the latter interpretation is correct, then it would appear that the purpose in mind was to enable action of a legislative type to be taken without the need to amend the Act each time but also ensuring that, that action having been taken, a full further inquiry pursuant to section 41 could be undertaken.

59. After careful consideration, the Commission has unanimously concluded that the paragraph must be construed as containing the second intention, not the one for which Mr Webb contended. The Commission wishes it to be noted that nothing it has stated in this paragraph goes to the question of what the mischief or potential mischief is or where it must be found to be. That becomes a matter of application.

60. Mr Webb also stated "that the role of the Commission in the control of those trade practices listed in section 23 of the Act does not include the operation of a continuing system of price control". The Commission does not wish to explore that issue in depth in this Report, but does wish to record that it does not for the present accept all the implications of Mr Webb's submission. That would more properly be done when considering conditions to be imposed pursuant to section 22(1)(b) or provisions pursuant to section 22(4). In the different context of section 29 proceedings, this matter, in terms of section 29(5), has been discussed in Decisions Nos. 27 and 30 and is adverted to in Decision No. 13. It should be noted, of course, that in those Decisions the Commission was not dealing with Part IV "price control" in the sense used in section 82 of the Act.

61. Parties to the inquiry who supported the Examiner's opinion of the bank card practice, were Retfed, Consumer Council and the CSU (who also represented the Shop Employees at the substantive hearing). The essence of their arguments is first summarised, and then considered in greater detail.

62. The attitude of all parties opposing bank cards was that they had no wish to see the cards proscribed and their opposition was directed to the likelihood of mischiefs arising as the circulation and acceptance of the cards became more widespread. For that reason it was desirable for the cards to become examinable for the protection of the public.

The prime mischiefs that were seen by the parties supporting the Examiner were, the likely effect on costs, prices and retailer's profits; that overseas experience with similar systems had warranted legislative controls being introduced and that currently inquiries into bank card operations were being conducted in the U.K. and Australia; that the social implications of the cards leading to overspending by card holders were evident overseas; that the practice brought an intrusion of a third party into contractual obligations; that as the system was being operated by the banks there was a suggestion that "leverage" could be applied to bank customers to accept the cards; and that from statements made by bank officials there was an intention by the banks to move customers away from cheques and cash to a more profitable payments system and the introduction of cards was the first step in this process.

63. Other peripheral issues raised were the possible effect on competition; the disadvantaging of consumers by altering the terms and conditions under which goods are offered; and Electronic Funds Transfer Systems (EFT). The CSU also discussed the effect on the contractual obligations of the parties due to the terms and conditions governing the use of the cards.

64. Effect on Costs, Prices and Profits:

In its opening submissions Retfed stated "... that in the initial stages of the debate with the trading banks, ... the opposition to bankcards was based almost entirely on the increased costs to be borne by the merchants." These increased costs were seen as automatically occurring because of the merchant service charge proposed to be levied by the banks on retail outlets using the bankcard facility in their stores. (Details of the operation of the scale of charges are shown in Appendix "B" of this Report); and that the commission payable to the banks introduced an entirely new element into the merchant's cost structure. Other arguments on this issue of costs related to the "selling" to the public of an extended credit system which had not been sought by either the retailers or consumers. It was a means of phasing out the use of cheques and retailers were being encouraged to believe that the transfer to card payment systems would eliminate the risks of accepting valueless cheques. Retfed could not accept this as the banks' promotion and issuance of cards were to customers who were good credit risks and cheques would still be proffered by people who were not eligible for cards if the banks' criteria of offering cards to selected customers only was adhered to. For every payment made with a bank credit card which had previously been made by cheque, the retailer would be faced with paying a percentage commission on the value of the sale, as compared with the current charge of .03c per cheque, and on a transaction of $500 the merchant service charge could be as high as $15.

Retfed recognised, however, that the current processing charge of .03c per cheque was not the true cost of this service and that on this basis it was an uneconomic one for the banks.

Bank cards were a more expensive mode of payment to the retailer than cash, cheques or inhouse credit, and they would not correspondingly reduce clerical or administrative costs in stores. To the extent that cards replace cash there would be a direct increase in costs to the retailer and such costs would be spread over the entire retail stock offered for sale.

65. The arguments relating to increasing prices were based on the assumption that the profit margins in the New Zealand retail sector were marginal and a large percentage of retailers would be unable to absorb these added costs, and thus were likely to pass them on to consumers in the form of higher prices. The motel operators were cited as a specific example of this having already occurred. By the introduction of an extra "middleman" into the chain of distribution of goods the additional commission paid to that extra party must inflate the retail price. The argument used by the banks to sell the system to retailers that the cards increased turnover and that the extra profit so generated more than offset the commission paid was fallacious. This would only be so in the initial instance for the first firms that adopted the scheme but they would lose this advantage as other competitors joined in and many retailers would be forced to offer the service to customers merely to remain competitive. All of this could ultimately lead to reduced profitability by merchants handling the cards and, to offset this, retail margins could be increased accordingly. The effect of this could be that consumers who were not card holders could be forced to pay higher prices for goods simply because a proportion of the public were using the cards.

66. Overseas Experience:

Considerable emphasis was placed by all parties advocating that the cards be made an examinable practice, on what had been experienced in various overseas countries in relation to the operation of bank cards.

In the United Kingdom the Monopolies Commission was conducting an inquiry into the cards which had been going on for two years and it was due to report in June 1979. In Australia the Trade Practice Commission was currently inquiring into a collective pricing agreement being operated there by the banks issuing "Bankcard", whilst in the U.S.A. there had been various Senate and/or Congressional committees which had studied the bank card operations. In all of these countries, as well as Canada, there was consumer protection legislation dealing specifically with credit and debit cards. As New Zealand had no such similar protective legislation, it was submitted that, because other jurisdictions considered there was a need for protective codes of operations, there was also a need for some machinery to give control over the cards in New Zealand.

67. Social Implications:

The leading protagonist in this argument was the Consumer Council which devoted a considerable section of its submission to what it labelled "credit carditis". This was the social effect of having numerous credit cards available in a community whereby a consumer found it all too simple to purchase goods or services by utilising a plastic card to charge to an account and not to pay either by cash or cheque at the time of purchase. A consequence of this easy credit availability can be over commitment of income resulting in hardship and, in some cases, bankruptcy. It could also lead to distortions of money flow within the economy. However, the paramount concern of the parties was the ease with which the acceptance of this facility could lead to what it termed the "cashless society" and the acceleration of the advent of EFT. This "inexorable trend" (to use the phrase of the CSU) has been evident in some other countries, and would inevitably occur in New Zealand.

Bank cards had been introduced in the U.S.A. where, because of the multiplicity of banks (approximately 16,000) and other financial institutions (approximately 50,000) there had been a need for a quick and reliable payments system. No such necessity existed in New Zealand when cheques were cleared within 3-4 days by means of a centralised clearing system which was run by the five trading banks operating here. The banks had stopped their promotion of cheques and were now promoting bank cards which may later be used for EFT purposes.

68. Third Party Intrusion:

A further implication of the introduction of bank credit cards was the intrusion into a contract of sale between an ordinary buyer and seller, of a third party, in this instance, the bank, as the provider of credit for the transaction. This, it was submitted, obscured the legal position governing the rights and obligations between the parties. This aspect of the cards had warranted legislative control investigation in both the United Kingdom and the U.S.A. for there were potential problems of sufficient weight to concern both the retailer and the consumer.

The rights of the purchaser to cash refunds, or other remedies available under the Sale of Goods Act 1908, could be affected.

69. "Leverage" by Banks:

The retail industry, it was submitted, is heavily dependent on the trading banks to finance their commercial

operations. The banks, by the introduction of these cards, would now be participants in every retail sale effected by means of the cards and as a result would be in receipt of revenue from each such sale. This could lead to coercion or "leverage" being applied by the banks to encourage retailers to join the schemes. The five trading banks can exert significant influence on a small market place such as New Zealand and if the banks and the large retail establishments combined, then such a combination could have far reaching effects on trade. The linkage of banks with the retail trade could reduce competition by making consumers pay higher prices for either goods and services, or credit. An individual retailer was fully entitled to evaluate bank cards for himself and make his own decision as to whether he wished to become a participating merchant, but he may be influenced in his decision by other factors, such as the sales approach of the bank officer promoting the cards, his relationship with his bank, the state of his bank account, and other indebtedness, or even if neighbouring competitors have joined, or are said to have joined. The banks had indicated that they plan to operate their bank card schemes as profitable free standing adjuncts to their existing services and it was essential for their profitability that there was a maximum growth and use. Establishment costs of the system were expected to be high and in the initial stages losses occur. However, from overseas experience it appeared that the break even point was reached within 3 years and from that stage onwards substantial profits could be achieved. Because merchants are "beholden" to the banks, "leverage" could be used to induce merchants to join the scheme.

70. More Profitable Payments System:

The opposing parties saw the banks' introduction of the cards as a means of phasing out the use of cash and numerous cheques, both of which were uneconomical for the banks to handle, and would allow them to recover a higher proportion of expenditure. It was acknowledged that existing cheque fee charges only recovered a very small percentage of total bank expenses, and the new schemes would be, for the banks, a far more profitable payments system. Ninety percent of all retail sales were by either cash, cheque or charge account, and any reduction in this volume by substitution of the cash or cheque transaction by a bank card transaction, would have cost saving benefits to the banks and generate greater income for them. This income would flow not only from the merchant commissions, but also from the interest rate charged to the card holder granted

extended credit on his purchases. This, it was contended, could amount to 18% per annum, when the disclosed monthly interest rate of 1½% was converted to an annual basis. This annual rate compared most unfavourably with the normal overdraft and personal loan rates of borrowing of around 12% per annum. This was an unwarranted price increase and a distinct disadvantage to the consumer. The concern expressed was that banks' customers may be diverted from the cheaper sources of credit, such as overdrafts and personal loans, to the dearer one, namely the bankcard extended credit scheme. Tied to this was the increased charge for an encashment facility which was part of the bank card scheme. The banks intended charging $1 for each transaction of this nature, whereas the cost of a cheque form was only .03c. Ultimately the cards will be used primarily for EFT processing, but in the meantime the community would have to bear the additional costs of this system.

71. Possible Effect on Competition:

The Consumer Council contended that another important impact the cards would have would be their effect on competition in terms of section 21(1)(e) of the Act. The main thrust of this argument was that because of the additional costs to be borne by the retailers by way of commissions paid to the banks, there would be defensive reactions by the retailers to protect their profits if they did not pass the commissions on in the form of higher prices. Those defences could be the abandonment of "discounted" lines and "specials" and a refusal to cut prices as a normal competitive action. The recent decision by the Government to relax price control on Category B items and its policy to restrain consumer demand could be jeopardised if bank cards were to gain growth and acceptance and stimulate consumer spending, and such a consequence could seriously hinder a greater reliance on competition as a regulator of prices.

72. Alteration to Conditions of Sale:

The CSU particularly, was concerned that bank cards would alter the terms and conditions under which the goods were offered to consumers in terms of section 21(1)(h) of the Act. Although this would not alter the rights of a purchaser to seek redress in the case of defective goods being supplied, it would, it was submitted, alter the effective power of a purchaser to enforce those rights. The purchaser can usually withhold payment for any unsatisfactory goods or services supplied but with the advent of bank cards, where the

credit is provided by the bank, the purchaser may have to obtain satisfaction by more expensive and elusive legal means. If retailers withdrew in-house credit services and directed customers to a bank card scheme this would be a direct alteration of the terms and conditions under which goods were offered and would be contrary to the public interest.

73. Electronic Funds Transfer (EFT):

The opposing parties all expressed deep concern at what they considered to be the true implication of the introduction of bank cards, in that they were the first step in the implementation of an EFT system and the "cashless society". There were real dangers in such a system being established without protective legislation such as enacted in the U.S.A. New Zealand already had a large proportion of payments made by electronic transfer (approx. 12½%) and the prediction was that this could be as high as 75% in ten years time. Eventually EFT systems could be provided by terminals in shops, offices and public places to provide 24 hour payment systems with no direct contact with a bank. The system would be processed through Databank debiting and crediting accounts, by instructions given by customers who activate transactions by means of a plastic card. By the early 1980's there could be a proliferation of point of sale terminals in retail outlets hooked into the banking system and all geared to a plastic card. The dangers that were seen in such a system developing based on the bank card schemes were the risks of unauthorised transfers occurring, possible intrusion into the private financial affairs of bank customers by outsiders, need for terms and conditions of transfers to be defined, documentation requirements, civil and criminal liabilities to be defined and all disclosures to be in readily understandable language. The virtue of EFT for the banks was that it disposed of a tremendous volume of paper in the form of cheques and thus saved costs. A quotation was supplied purporting to come from the Vice Chairman of the EFT Commission of the USA (a Senate Committee which recommended legislation to govern EFT in that country) who said "... in testimony before the Commission, the dominant fear of the consumer was the fear of coercion. The consumer is afraid EFT will be jammed down his throat whether he wants it or not. The Commission believed this coercion was fundamentally wrong and that the consumer's freedom of choice among competing payment services must be guarantted legislatively." Should EFT be introduced into New Zealand it was essential that there should be both control over its operations and a different basis for the calculation of the merchant service charges.

74. Contractual Obligations:

The CSU considered the key aspect of the potential mischief likely to arise from the issuance of bank cards was the conditions of use under which the card holders and merchant agreements operate. The terms of these contracts are variable at the banks' discretion and there is no recourse of appeal to any authority if changes to the terms of the contract are disadvantageous to acceptors. This was contrary to the normal law of contract whereby no alteration to a contract may be made unless agreed to by the parties to that contract.

75. The banks' defence and arguments presented in support of the bank card practice was both detailed and voluminous. The written submissions from these parties alone occupied over 660 pages of typed and printed material. The banks also presented witnesses from New Zealand and overseas, all of whom made themselves available for cross-examination. Those witnesses who came from USA, United Kingdom and Australia all possessed intimate knowledge of the bank card systems operating in those countries and the Commission was greatly assisted by their appearance at the hearing. It would like to record its appreciation of the time all witnesses gave to the hearing and the courteous and helpful manner in which they responded to questions.

76. As in the case of the arguments presented by the parties supporting the Examiner's view, the banks' other arguments in defence and support of the cards will be first summarised and then developed under each heading.

77. These arguments were that bank cards would not increase costs or prices; that it was the responsibility of the critics of the bank cards scheme to prove that the cards would have the effects so mentioned; that there were demonstrable benefits to the public; that any effects were not unreasonable; that there would be no "domino" effect; that no "leverage" would be exerted; that there were sufficient existing legislative controls over the banking system in New Zealand to provide for the public protection; that overseas experience gave proof of the popular demand that existed for the cards; and that the cards would not reduce or limit competition.

78. The Commission will now proceed to enlarge upon the general arguments submitted by the banks as a defence and in support of bank cards.

79. No Increase in Costs or Prices:

In the opening submissions presented in reply to the Examiner's report the banks contended that bank card

schemes would provide a credit facility to retailers which could be used to replace "in-house" credit and consequently provide substantial cost savings to retailers. This stance was later modified, and the banks acknowledged that stores with existing "in-house" credit services would continue to operate these contemporaneously with bank card schemes. It was contended, however, that, despite these alternative credit facilities being retained, the merchants competed by price and customers were not affected by the additional credit system being in existence. Consumers were, in fact, offered a greater choice of forms of credit, and at the same time the merchant gained an additional competitive tool. Bank cards may also generate a growth factor to free capital which may normally be utilised in expanding a store's credit sector. All "in-house" credit systems were costly to operate and it was the banks' submissions that bank cards provided a substantially cheaper form of credit to the retailer. Savings would evince themselves by reductions in bad debts, security risks of handling cash, accounting staff and machines etc. Even though a retailer continued to operate his own credit service in conjunction with bank cards, the additional business (revenue and profit) created by the bank card scheme more than offset the extra costs of operating the service, though there was no definitive proof that credit cards did increase turnover. A survey carried out in New Zealand by J.V.T. Baker Ltd., of Wellington, into the costs of retail credit was offered in evidence, as was also a survey conducted in the United Kingdom by the Inter-Bank Research Organisation into Retail Prices (referred to as IBRO). The Baker survey was prepared for this inquiry and the IBRO one was compiled specifically for the United Kingdom Monopolies Commission inquiry and presented to the Commerce Commission in support of the banks' argument that on overseas experience credit cards had little or no effect on price levels and if there was an effect, then this was swamped in the many other elements of retailing. Mr R. N. Taylor of Wellington also provided evidence at the inquiry of his calculations into the costs of "in-house" credit and the impact that bank cards would have on retailing costs and the Consumers' Price Index. In any event, the percentage of retail transactions by the use of cards would be so small that they would have minimal effect on costs and prices to the consumer.

80. Responsibility of Proof:

It was the banks' contention that the Examiner had made an unwarranted assumption that bank cards would increase

costs and prices and that it was his responsibility and that of other critics of bank cards to prove that those effects were factual. The onus to disprove the allegations did not rest with the banks. It was submitted that unless the Commission could conclude that, potentially at least, bank cards could have the effects mentioned it could not recommend that they be made an examinable trade practice in terms of section 23(1)(n). Also it would be illogical and unjust if bank cards were made an examinable trade practice whilst other credit cards, such as American Express and Diners Club, or for that matter, all forms of credit, were excluded from such a recommendation. Overseas legislation drew no distinction between credit or debit cards and even embraced "in-house" credit cards. The BNZ also submitted that the Commerce Commission was not an appropriate vehicle to achieve the protection desirable for all parties to credit contracts generally. In the light of a 1977 recommendation by the Contracts and Commercial Law Reform Committee that power to examine credit contracts should be given to the Courts.

81. Demonstrable Benefits:

The banks also argued that even if the introduction of bank cards had any effects on costs and prices, which they strongly disputed, those effects would be outweighed by demonstrable benefits to the public in terms of section 21(2)(a). These demonstrable benefits were, the banks submitted, the availability of an efficient, convenient and safe means of payment, and the development of banking facilities arising from technological advances. Members of the public would be eligible to receive credit facilities by becoming card holders, and this will enable them to have greater flexibility and control over disposable income. The cards would provide the holders with a means of identification and a reduction of the risks involved through carrying cash. They would be acceptable throughout New Zealand and also abroad, and available for the purchase of a wide range of goods and services. In addition, there were benefits to merchants enabling them to offer the facility to their customers in that, the banks submitted, they could increase turnover and allow smaller traders to compete more effectively with larger stores and that the immediate payment arrangement improved a merchant's cash flow position. The schemes brought with them the elimination or reduction of costs of credit and security risks and allowed for greater efficiency of business operation.

82. Effects Not Unreasonable:

The banks also argued that even if the Commission

came to the opinion that bank cards would have the effects of increasing costs and prices, which they do not accept, those effects would not be unreasonable pursuant to section 21(2)(b) of the Act. In this regard, it was argued that the Commission is empowered under section 21(3) of the Act to have regard to various considerations under section 98 in forming its opinion especially those provisions under subsections (e), (f), (g) and (i) of section 98(1). The banks contended that if those relevant subsections were taken into account then the Commission, in the light of the evidence presented, could not come to the opinion that a recommendation to make bank cards an examinable practice was justified. It would perhaps be useful if, at this point, those subsections were quoted. That part of section 98(1) reads:-

> "In any proceedings under ... this Act, the ... Commission ... shall have due regard to:
>
> (e) The extent to which the manufacturer or distributor of goods or the supplier of the services is able to demonstrate improvements in productivity or efficiency with regard to his operations:
>
> (f) The conditions of competition and the commercial risk under which the goods or services are produced, manufactured, supplied, or distributed:
>
> (g) The method of financing the manufacture, supply, or distribution of the goods or services:
>
> (i) Any other matter the Secretary or the Commission thinks relevant."

83. No "Domino" Effect:

The banks argued that, contrary to the Examiner's claim that the powerful influence of the banks to persuade merchants to accept bank cards will almost certainly ensure a wide acceptance of the schemes, the success of the schemes overseas had been due to the enthusiastic acceptance of these by merchants as they obtain a competitive edge over other merchants who do not accept cards. Some retailers do join out of fear of being placed at a disadvantage but this is due to a lack of competitive zeal on the part of that retailer. No evidence had been produced by opposing parties to

support this claim by the Examiner and the allegations assumed that retailers were gullible and not able to judge for themselves what was advantageous to their own business. The banks did not want reluctant merchants as these would be damaging to the success of the schemes and also the bank/customer relationships. In the United Kingdom the Monopolies Commission received responses from 1300 merchants on this issue and those replies disclosed only a handful of merchants who felt some degree of compulsion to take the scheme. The present proportion of transactions overseas made by credit cards was negligible and there is no possibility of increasing this to saturation point. If saturation point was reached then virtually all consumers would be card holders and plastic cards would have replaced money as a means of exchange. A merchant is under no compulsion to remain as a participant in a bank card scheme and if he monitors the impact of the cards on his trading results he can withdraw from the scheme if he is not satisfied as to its benefits. It had seemed initially as though the "domino" effect had sinister overtones but this was nothing more than a catchword descriptive of the competitive market place response.

84. No "Leverage":

The banks' response to the suggestions that they would subject retailers to a form of pressure to take bank cards was that such actions would be considered totally unacceptable. Also such an action by a bank would be illegal under section 50 of the Act. The retailers' unjustified fears spring from a lack of understanding of the operations of bank cards and the effects the cards will have on their businesses. The retailers brought no evidence to the inquiry to support this allegation which impugned the professional integrity of the banks and their staff, and would be contrary to the banks' ethics. The more general issue was, in the words of one witness, whether the banks might at some point exploit their power and impose unreasonably high rates of charge on merchants. Such action would be suicidal for bank cards as it would make them unattractive to merchants and intensify entry by other card companies and by retailers themselves offering their own schemes to customers.

85. Existing Legislative Controls:

The need to make bank cards an examinable trade practice under section 23(1) of the Commerce Act was, in the banks' view, unnecessary as there were already sufficient legislative regulatory controls over all aspects of banking. The trading banks have traditionally been

subject to continuing scrutiny and control by governments in New Zealand and the primary responsibility was now vested in the Reserve Bank by virtue of the Reserve Bank Act 1964. Controls under that Act extend to all banking transactions, currency control, rates of interest, overseas exchange and powers to require returns of assets and liabilities, maintain reserve assets and to direct banks to implement government economic policy. In addition the Financial Services Regulations 1979 gave the Reserve Bank the powers of surveillance over the prices charged by the banks for banking services. The banks argued that consequently the operation of bank cards fell naturally within the ambit of these controls and the Reserve Bank was therefore adequately empowered to monitor the cards' operations. The policy of the Reserve Bank was to encourage the banks to provide as efficient a service to the community as possible and to offer competing services to the public. If bank cards were singled out for direct controls, this would discriminate against the banks in favour of the non-bank card issuing companies and would also negate the role of the market place as the regulator of charges. There were many forms of consumer credit and the bank card scheme was only one of these. The interest rate to be charged for use of the credit facility to card holders of 1½% per month did not necessarily convert to 18% per annum. The annual rate paid would depend upon the term over which the card holder chose to repay the amounts due and the full 18% would only apply to "hard core" borrowing. Overdraft interest rates currently range between 13¼% to 15 3/4% per annum. For many years interest rates were low due to direct controls but it was now recognised that direct controls over lending rates distort the financial market and produce detrimental effects in other sectors of the economy. The service was a voluntary one and no bank customer need ever obtain and use the card unless he wished to do so. The banks had accepted their responsibility to adjust levels of personal lending to implement official monetary policy as usual. The Reserve Bank had raised no objections to the bank card schemes nor to their level of charges.

86. Popular Demand:

Critics of the cards had stated that the system was being imposed on a largely unwilling market place, but this was a completely unproven assumption. Surveys carried out in New Zealand by the BNZ and independent research indicated that the need was there and that the consumer was already receptive to the use and

benefits of plastic cards. With the increased tourist traffic of recent years New Zealanders had become aware of the operations of bank cards in other parts of the world and there have been an increasing number of inquiries to the banks here for similar systems to be available to New Zealand citizens. It was in response to these approaches by customers that the banks had introduced the schemes into New Zealand. Overseas experience provided evidence of the advantages the cards offer. In Australia "Bankcard" was launched on 9 October 1974 by nine banks simultaneously. At that date there were 20,520 merchants who had agreed to participate. By the end of December 1978 that number had risen to 85,075 and there were 2,325,714 card holders (23.7% of the total Australian population over the age of 18 years) and fourteen participating banks. In the year ended 31 October 1978 the total number of transactions through the "Bankcard" scheme in Australia was 49,307,418 for a value in excess of $A1,373m and the total indebtedness of card holders to the banks under the scheme was in excess of $A610m. In the United Kingdom "Barclaycard" was launched on 29 June 1966 with targeted merchant outlets of 30,000 and 1 million card holders. These targets were almost achieved by that date. As at 31 December 1978 the number of merchant outlets totalled 113,000 with 4,600,000 card holders. The total number of transactions processed for the year to 31 December 1978 was 54 million and the total indebtedness of card holders under that scheme was Stg£307m (no comparable details were available to the Commission of the "Access" card operations, which is the "Barclaycard" competitor bank card in the United Kingdom). The growth in the use of the cards was attributed to consumer preference as they provided a convenient, simple alternative payment mechanism to cash and cheques.

87. No Reduction or Limiting of Competition:

The arguments that bank cards would reduce or limit price competition in terms of section 21(1)(f) of the Act were not proved. Instead, the banks contended, they would give a competitive advantage to merchants and retailers who did not previously provide credit to their customers and would now be able to offer this service. The commission paid by these firms to the banks for bank card facilities would be at a lesser cost than would be the case if the retailer ran his own credit system. The commissions paid would increase the ability of retailers to lower their

prices. The cards were simply another payment mechanism, no different in principle from other mechanisms used by retailers to promote business but possessing the important additional feature of providing flexible consumer finance. As the cards had the propensity to increase turnover, they not only could have the effect of reducing costs but also increasing profits. The merchant agreement with the operating bank will require that the merchant agrees to supply card holders with goods or services at prices no greater than the normal retail price for those items. The lowered costs brought about by replacing existing credit systems with a bank card system would encourage lower prices generally by "specials" or discount lines. As the banks will be actively competing amongst themselves, and also against other credit card operators, the benefits of this competition would flow on to the retailer and consumer alike. There had been considerable criticism of a lack of competition in the market place in New Zealand, and in the area of consumer credit cards the only competition that existed was between "in-house" credit and "travel and entertainment" cards. If bank cards were precluded from operating there would be a reduction in a developing competition to the detriment of the consumer.

88. Counsel for the banks also raised a legal argument affecting the Commission's jurisdiction to make a recommendation to the Minister pursuant to section 23(1)(n). The argument was first put forward by the Australian based banks and later adopted by the BNZ and the National Bank. Its substance was that the Commission in its deliberations as to whether bank cards should be made an examinable practice could not go beyond the public interest effects referred to by the Examiner in his report. The Examiner had come to his opinion that the card systems that the BNZ had introduced, and the other four trading banks were intending to introduce, were likely to have effects contrary to the public interest in that they could increase the costs and prices of goods and services within the meaning of section 21(1)(a) and (b) of the Act. The Commission, it was submitted, could not of itself widen the scope of the inquiry and take into consideration any consequences described in subsections (c) to (h) of section 21(1). The Examiner had considered these paragraphs and concluded they had no application. To move beyond the matters raised by the Examiner would be illogical legally and beyond the intent, spirit and direction of the Act. The Act should not be interpreted to allow the Commission to embark on its own witchhunt, for that would be a breach of

natural justice. This limitation was important, as the Examiner's report, which is the foundation of the Commission's jurisdiction to conduct an inquiry, was, in accordance with section 40(5), provided to each party to the practice who were then required to supply an answer to it. There would be little point in this procedure if it were open to the Commission at the subsequent inquiry to reject the Examiner's opinion and consider other grounds which he had not thought fit to raise and which other parties had had no prior opportunity to consider or comment upon.

89. The Commission will now move to consider these arguments. The Examiner's report alleged that the introduction of "... Visa and Bankcard schemes ... are likely to have effects ... in terms of subsections 21(1)(a) and (b) of the Commerce Act ...", whilst the CSU alleged these effects would also extend to subsections 21(1)(h). The Consumer Council submitted that the practice of bank cards would have effects not only to (a) and (b) above, but also in terms of subsections (c), (d), (e), (f), and (h).

90. As a result of these arguments, the banks countered that the Commission had no jurisdiction to go outside the criteria which the Examiner had used. (The substance of this argument is set out in paragraph 88.) The Commission considers that the Examiner, in forming his opinion, has appeared to ignore the application of the Commission's Decision No. 30 (paragraphs 71-78 inclusive refer) where the Commission stated that its interpretation of section 21(1) is that it is not possible to extend the effects of section 21(1) criteria beyond the confines of the trade practice itself and to take into consideration the effects on goods and services at large. The "effects" must be related to the goods or services which are the subject of the trade practice. There is, however, no doubt in the Commission's mind that all section 21(1) effects can be called in aid in the context of whether or not it should make an order against any trade practice. The wording of the section, offering, as it does, alternatives for the Commission on which to ponder and base its decision when coming to its opinion, seems to the Commission to be expressly intended for that exact purpose. The Commission is to be of the opinion that the effect of the practice would be (a) or (b) or (c) and so on through to (h). The section does not require the Commission to merely accept or reject the Examiner's opinion. This was

recognised by the Examiner himself, on page 15, paragraph 8.4 of his report, when, after discussing the possible application of section 23(1)(k), he said "The Commission may however consider the practice does come within the ambit of subsection 23(1)(k) and, if so, should consider the need or otherwise to make an order under section 22. I have preferred to recommend that action should be taken in terms of subsection 23(1)(n)".

91. Two preliminary issues stem from the paragraph above, but in the event the Commission considers that they do not arise in this case for reasons that will be given later. Nevertheless, it now refers to these as they may have relevance at some future time and on some future occasion.

92. The Commission adopts the view that in forming its opinion in any inquiry under Part II of the Act, it can not be bound exclusively by the paragraphs relied on by the Examiner. The plain wording of section 21 entitles the Commission to look for itself at the section in total, for not to do so could hamper it in the discharge of its statutory obligations. It is "the opinion of the Commission", not of the Examiner, which deems any practice contrary to the public interest, and that opinion is formed by reference to the (a) to (h) public interest criteria detailed in section 21. Indeed, it has been the custom of the Commission, in coming to its opinion as to whether an order should be made against a trade practice, to take each paragraph (a) to (h) individually and to relate those effects to the trade practice under inquiry. This procedure acts as both a testing of the Examiner's opinion and satisfies the Commission itself that all pertinent factors are adequately assessed in arriving at an opinion on a trade practice under inquiry.

93. The reasons for the Commission adopting this procedure are many and obvious. For instance, a report from the Examiner may be deficient in part or whole; or an original complainant, subsequently admitted as a party, may consider that a main issue had been either wrongly interpreted, or even overlooked, by the Examiner during his investigations and reporting. Also, other effects may have come to light subsequently. The Commission considers it should not place itself in the position of refusing to hear argument or evidence on any matter which may have substantial bearing on the inquiry, and its outcome, simply because the Examiner had not seen fit to raise it, or had given it passing reference only, in his report.

94. Under section 14(1) of the Act the Commission is empowered to admit to its proceedings not only parties who are directly affected by those proceedings and their outcome and who "justly ought to be heard" (section 14(1)(a)), but also parties "... whose appearance or representation will assist the Commission ..." (section 14(1)(b)) but who have no rights directly affected by any decision. It would not appear to be appropriate to grant party status to persons "to assist" if they could not, if they wished, raise any matters of importance and relevance to the issue under inquiry, if the inquiry was confined exclusively to the opinion of the Examiner and his recommendation.

95. In this instance the banks argued that no widening of the scope of the inquiry was possible beyond that recommended by the Examiner. Both the CSU and the Consumer Council made representations that the effects went wider than those foreseen by the Examiner. The CSU was a party under section 14(1)(b) and was there "to assist", whilst the Consumer Council was a section 14(1)(a) party, who "justly ought to be heard". The Commission considers it would not be acting "justly" if it refused to hear the Consumer Council's submissions as to other effects of bank cards simply because these effects went wider than the effects seen by the Examiner.

96. Counsel for the National Bank also argued that the Examiner's report recommendation was an important limitation, for that report had to be sent to all parties who were then required to answer it and that such procedures would be futile if, at the inquiry, other parties raised other matters of which the banks had no prior knowledge. If the CSU and the Consumer Council had raised these other issues at the inquiry itself then the banks' counsel could have sought an adjournment of the hearing to allow time to provide an answer. But this was not the case here. The other effects introduced by both CSU and the Consumer Council were presented in their opening submissions, which were circulated to all parties by the beginning of May. The banks had one month's notice of these and, hence, ample time to provide an answer.

97. The Commission rejects the application of counsel as to its being confined to the public interest effects referred to by the Examiner in his report.

98. At this point the Commission would like to comment on one other matter relating to the Examiner's report and recommendation.

99. The Examiner, in his recommendation on bank cards, referred to "other schemes of comparable purpose or effect" and, at the preliminary hearing on 13 February 1979, considerable argument was advanced as to what, and to whom, that phrase referred. The Commission sought assistance from all parties to the inquiry to provide an alternative wording for the Examiner's recommendation (as quoted in paragraph 1 of this Report). The terminology was, in the Commission's view, unsatisfactory, as it was worded in a too general and vague way to be acceptable. Also, the effect of the Commission's Decision No. 37, meant that, by inference, "comparable purpose or effect" related to cards operated by banking institutions only, although not precluding other card schemes from later investigation by the Examiner.

100. The Commission notes that, under examination at the substantive hearing, the Examiner, in response to a question from counsel, attested that his intention by use of the words "comparable purpose or effect" was meant to include American Express and Diners Club cards, as well as other cards, and that it seemed to him that it was "a reasonably comprehensive description" which would encompass other cards and even the "possibility of cards issued by ... savings banks". The Commission is of the view that the Examiner should have stated that opinion more precisely at the preliminary hearing prior to the Commission issuing its Decision No. 37.

101. As a consequence of the Commission's Decision No.37, and its request for alternative phraseology to describe the practice of issuance by the New Zealand trading banks of bank cards, the Examiner and the CSU submitted alternative wordings.

102. The Examiner proposed the words "third party payment mechanisms" and, after applications by counsel for both the BNZ and the National Bank, the Commission decided this phrase was unacceptable also. The Commission was disappointed to note that, in his closing submissions, counsel for the Examiner reverted to his original description of the practice by referring to "comparable purpose or effect".

103. The CSU was the only other party to the inquiry who addressed itself to this problem, and in its closing submissions offered the suggestion that the practice concerned "the issuing of bank credit cards and the operation of a payment settlement mechanism involving

the use of bank credit cards". Although this description of the scheme is perhaps not perfect, it is more acute in its scope and intent, and the Commission thanks the CSU for its assistance in this matter.

104. The majority of the Commission has come to the view, after considering all the evidence and submissions in terms of the provisions of the Act, that the balance of probability indicates that the bank-based credit card systems could give rise to the kinds of mischief which are designated in Part II of the Act, as interpreted in the light of the long title, section 2A and section 20. This leads the majority to the opinion that it should make a recommendation pursuant to section 23(1)(n) which, if adopted, would have the effect of adding such systems to the list of categories of examinable trade practices set out in section 23(1). If, at some future time the Examiner, acting either on a complaint or on his own motion, formed the opinion, after investigation, that mischiefs in terms of the Act did then actually exist, he would have the power to report to that effect to the Commission, which would then be obliged to conduct a full inquiry "de novo" pursuant to paragraphs (b) or (d), as the case might be, of section 41(2).

105. Mr Tipping dissents from the view expressed in the first two sentences of paragraph 104 above and his dissenting opinion is attached to this Report. He agrees with the majority up to and including paragraph 103 and also in respect of the attached Appendices.

106. The Commission, before discussing the various arguments presented to it about bank operated credit card systems, proposes to make some general observations on the statutory provisions of the Act under which this inquiry proceeded. In other words, what factors are to be taken into account and what directives are given in the Act to enable the Commission to determine whether or not it should make a recommendation for the purposes of section 23(1)(n).

107. The inquiry was conducted pursuant to section 41(2)(c), which provides that, "where the Commission is of the opinion ... it shall make a recommendation ...", but the section does not spell out the matters which should be taken into account in coming to that opinion. Section 23(1)(n) itself is also silent as to any guidelines or criteria to be contemplated or canvassed by the Commission in the process of coming to that opinion.

108. The Long Title to the Act must therefore be the starting point. This sets out the spirit, intent and scope of the Act and is normally taken into account when interpretation of an Act is being considered. In the Commerce Act 1975 the Long Title reads:-

> "An Act to promote the interests of consumers and the effective and efficient development of industry and commerce through the encouragement of competition, to prevent the mischiefs that may result from monopolies, mergers, and takeovers and from trade practices, to prevent strikes and lockouts against the public interest, and to provide for the regulation, where necessary, of the prices of goods and services."

109. Therefore it is incumbent on the Commission to consider, in forming its opinion to make a recommendation under section 23(1)(n), whether the trade practice in question has the potential to:-

(a) promote the interests of consumers,

(b) promote the effective and efficient development of industry and commerce,

(c) encourage competition,

(d) create a mischief,

(e) affect the prices of goods and services.

The Commission is also required to take into account the similar objects included in section 2A(1).

110. Under section 2, a "trade practice" is defined as meaning "any practice related to the carrying on of any trade; and includes any thing done or proposed to be done by any person which affects or is likely to affect the method of trading of any trader or class of traders or the production, supply, or price, in the course of trade, of any property, whether real or personal, or of any services; and also includes a single or isolated action of any person in relation to any trade;" which is an extremely broad net indeed. The word "trade" has a similar wide definition and embraces "any trade, business, industry, profession, occupation, or undertaking relating to the sale of land or goods or the performance of services." The Commission must therefore also ask itself, in formulating its opinion on a 23(1)(n) recommendation, whether the practice will, or will be likely to, have an effect on:-

(a) the methods of trade,

(b) the production or supply or price of goods or services.

111. Further guidance can then be sought from Part II of the Act, which is the trade practices section. Section 20 introduces the provisions of the Act covering trade practices generally, and it is worth recording that the section reads:-

> "The provisions of this Part of this Act relate to trade practices of the following classes -
>
> (a) Trade practices which are described in section 23 or section 23A of this Act and in respect of which the Commission may make orders, if it finds that the introduction or continuation or repetition of the practice would be contrary to the public interest:
>
> (b) Trade practices in respect of which the Commission may make a recommendation under section 23(1)(n) of this Act:
>
> (c) Trade practices which are prohibited unless approved by the Commission, being practices dealt with in sections 27 to 37 of this Act under the headings of Pricing Agreements and Pyramid Selling Schemes:
>
> (d) Prohibited practices which are referred to in sections 48 to 54 of this Act and which constitute offences against this Act."

112. Subsections (a) to (d) above are four separate and distinct types of practices. They are either prohibited in toto, (d); prohibited unless approved, (c); those listed in sections 23 and 23A which are examinable, (a); and those in respect of which the Commission may make a recommendation under section 23(1)(n), (b).

113. It is, as the Commission has ruled in paragraph 59, the intent of the section that trade practices, of some sort, not conceived of at the time of the legislation's enactment, provided the Commission came to the opinion that they conflicted with the objects of the Act, are within the Commission's jurisdiction,

thus enabling it to take action against the introduction, continuance or repetition of those practices. The action to be taken is to be in the form of a recommendation to the Minister for an Order in Council specifying that the trade practice concerned be made examinable by including it in the list of trade practices under section 23.

114. It is also worthy of comment at this point that a section 23(1)(n) recommendation, if adopted, is of equal consequence with all other classes of trade practice covered in section 20. The provision has merited special mention in the Act alongside prohibited, approvable or examinable trade practices.

115. Section 22 empowers the Commission to inquire into the various trade practices as specified in section 23 and, provided the Commission "is of the opinion" that the "introduction or continuance or repetition" of the practice "would be contrary to the public interest", the Commission may make orders against them. The section also establishes the powers vested in the Commission to permit, prohibit or attach conditions to those practices.

116. Section 23(1) lists the various classes of examinable trade practices against which the Commission may make orders. It is under subsection (n) of this section that the Commission is empowered to make a recommendation.

117. In the categories of trade practices listed in this section (and there are 14 actually described, plus the (n) recommendation), there appears to be a diversity of action which could give rise to possible mischiefs. Ten of the practices listed cover agreements or arrangements between traders and suppliers of goods and services, one relates to a refusal to supply goods and services, another a refusal to lend money on mortgage except on certain conditions, yet another to an unjustifiable exclusion from membership of a trade association, while the other listed practice deals with excessive payments for services such as royalties, commissions etc. They are, taken as a whole, a heterogeneous list.

118. What clearly emerges from this section is that, although the Commission should take cognisance of the "mischief" of the practices, it can not rely on the character of the practices as listed in section 23(1) when coming to its opinion. This has already been commented upon in paragraphs 56-59, when discussing counsel

for the National Bank's application referred to in paragraph 41.

119. The Commission considers it can find some assistance in coming to an opinion as to whether to make a recommendation under 23(1)(n), from section 21(1) which reads:-

> "... a trade practice shall be deemed contrary to the public interest only if, in the opinion of the Commission, the effect of the practice is or would be -
>
> (a) To increase the costs relating to the production, manufacture, transport, storage, or distribution of goods, or to maintain such costs at a higher level than would have obtained but for the trade practice; or
>
> (b) To increase the prices at which goods are sold or to maintain such prices at a higher level than would have obtained but for the trade practice; or
>
> (c) To hinder or prevent a reduction in the costs relating to the production, manufacture, transport, storage, or distribution of goods, or in the prices at which goods are sold; or
>
> (d) To increase the profits derived from the production, manufacture, distribution, transport, storage, or sale of goods, or to maintain such profits at a higher level than would have obtained but for the trade practice; or
>
> (e) To prevent competition in the production, manufacture, supply, transportation, storage, sale, or purchase of any goods; or
>
> (f) To reduce or limit competition in the production, manufacture, supply, transportation, storage, sale, or purchase of any goods; or
>
> (g) To limit or prevent the supply of goods to consumers; or
>
> (h) To reduce or limit the variety of goods available to consumers or to alter, restrict, or limit, to the disadvantage of consumers, the terms or conditions under which goods are offered to consumers."

The Commission notes, however, that the assistance to be found is limited, as the section is drafted in the context of an inquiry being held into a practice already declared to be examinable or approvable. In effect, section 21(1) criteria are not binding in the context of a section 23(1)(n) inquiry.

120. By virtue of the provisions of section 123 of the Act, all of the above effects apply equally to the performance of "services" and any charges therefor, so that all of the above subsections can be read as affecting "goods and services".

121. The Commission has been vested with very broad discretionary powers in the exercise of its functions pursuant to section 23(1)(n), and in coming to its opinion, it cannot fetter itself by relying solely on the Examiner's report and his recommendations. It must find out for itself and come to its own opinion, based on all the evidence and submissions placed before it and, where applicable, the knowledge and expertise of its own members. Subsection (6) of section 3 of the Act makes provision for a background of experience in trade, industry, commerce, law, accountancy, economics, etc. before appointment as a member of the Commission, and it must therefore follow that this knowledge and experience is meant to be used in the course of the Commission exercising its discretionary powers, and especially in forming its opinion on matters placed before it.

122. In the matter of a recommendation under section 23(1)(n) the Commission is not acting in a judicial capacity, nor even in a "quasi-judicial" way. It is inquiring into some matter with a view to deciding whether to make a recommendation that the law be amended in some way to protect the public interest. It is therefore acting in a preliminary "quasi-legislative" manner. The Commission only makes a recommendation, the final decision to amend the law rests with the Governor-General in Council, acting on the advice of his Ministers.

123. The Commission cannot, in this case, find any precedent established by any prior proceedings, for this is the first time that this paragraph has been invoked since the enactment of the Trade Practices Act in 1958 which contained an analogous provision. Despite inquiries made by the Commission before, during and after the hearing, nobody has been able to point to similar proceedings anywhere else at any time.

124. The Commission is conscious of the fact that the seeking, by the Examiner, of a recommendation by the Commission, under section 23(1)(n), relates to making a practice examinable, and not to examining it with the object of deciding whether an order should be made under section 22(1). A recommendation by the Commission, if accepted, will then allow that practice to be subject to the scrutiny of the Examiner either on his own motion, or acting following a complaint lodged with him by a member of the public. It could well be that any practice, after investigation by either the Examiner or, subsequently, the Commission, may be found to be innocent of all mischief in terms of the Act, and consequently no restraints need ever be placed upon it. But that "clearance" may only be given after it has been thoroughly tested against the public interest criteria of section 21.

125. At this stage, in an investigation by the Commission under section 41(2)(c) the issue is simply this:- Does the evidence and associated submissions suggest the likelihood or possibility, that, at sometime in the future, the practice may have effects creating mischiefs contrary to the public interest and as a consequence now be made examinable? If the answer is "no" that is the end of the matter. If the answer is in the affirmative, as the Commission has decided in paragraph 104 above, then it should proceed to make a recommendation.

126. The Commission now turns to the basic issue of why it is recommending, as stated in paragraph 104, that bank operated credit card systems should be made an examinable practice under section 23 of the Act. In the process it will discuss the matters raised by the parties and also, where considered relevant, the relative merits of the arguments presented at the hearing.

127. The provision of bank credit (or debit) cards is not a service of a completely new genus. Indeed, this was admitted by the Australian based banks when they said, "The member banks regard the scheme as a natural and necessary development of the banking system in the provision of consumer credit... The scheme is seen as a natural extension of the banker-customer relationship", whilst the BNZ expressed it this way, "The decision (to introduce bank cards) was seen in part as a long-term measure towards the development of an alternative and less cumbersome system of money transmission", and, further, "With

banks closely involved with most forms of payment settlements it was inevitable that banks would also provide for their customers and participate in payment by means of cards."

128. The banks, obviously, consider that the cards provide a supplementary and additional facility for customers, within the normal course of business, providing alternative cash and payment methods, with that facility being made available to both "merchants" and card holders.

129. In advertising matter released by the BNZ, and made available to the Commission, it was stated that a charge of .75c per month (or $9 per annum), would be made for the Visa card service to a card holder, and that interest at the rate of 1½% per month would be charged on all credit purchases outstanding on a Visa account after the 25 day "free" period.

130. At the time of the substantive hearing neither the National Bank nor the Australian based banks had introduced their schemes and the Commission was advised that their charges had not been set. Both services have been launched since the hearing, and from information now publicly available, the National Bank charges customers who join its Visa scheme, either $8 per annum or $12 per annum, depending on the amount of credit balance normally held by that customer in his current and/or savings account. The Australian based banks make no charge to customers who join their scheme. Both the National Bank and the Australian based banks said, at the hearing, that they would charge interest of 1½% per month on all balances unpaid after the 25 day period, similar to the BNZ. However, in an introductory pamphlet issued by the BNSW on its "Bankcard" scheme, it states "If you decided to extend repayment of your purchases beyond 25 days, there is an initial fee of 1½% on the amount outstanding and then a continuing credit charge calculated daily at the current rate (1½% per month or 18% per annum) until full repayment." As the Commission understands this later information, the full charge is equivalent to interest at some effective rate, which it cannot establish, greater than 18% per annum.

131. The actual rates of the "merchant service charge" are not public knowledge but are paid by the retailer on goods sold in his store through the scheme. (Details of approximate charges are set out in Appendix "B" to this Report.) The banks maintained that the extra

cost to be borne by the merchant, through paying the charges, was more than offset by the increased sales which would eventuate and, as a consequence, the extra profit generated by those additional sales. Another defence was that the service would substitute, either in whole or in part, for other costly services currently provided by stores. Examples given were "in-house" credit, and security costs attendant on the risks of holding cash, etc. In the case of a smaller retailer, the cards would constitute a marketing tool, allowing that store to compete more effectively.

132. The Commission recognises that all extra services provided by stores to attract customers, be it by means of free delivery, distinctive packaging, advertising, free parking and so on, have a cost, and agrees with one BNZ witness, Dr R. W. Johnson, who stated "The costs of all extra services are necessarily covered in the selling prices of the retailers' merchandise". It seems, to the Commission, inescapable that costs and prices must increase in relation to the service itself, no matter how infinitesimally. This admission was, in fact, made by another BNZ witness, Mr R. N. Taylor, who provided the Commission with his calculations of the impact the merchant commission would have on the Consumer Price Index.

133. It is also undeniable, to quote a Consumer Council witness, Mr R. J. Smithies, "that there are no free lunches" and that any cost eventually becomes another's price. It was the magnitude of the cost which was disputed. As was mentioned earlier, the Commission's Decision No. 30 ruled that the effects of a trade practice should not be extended beyond the practice itself. If these card systems are ever inquired into in the future, the application of that Decision may well be arguable. For the purposes of this Report, the Commission has only to consider the possibility of increased costs and prices sufficient to justify a recommendation under section 23(1)(n) of the Act.

134. A considerable volume of evidence presented to the Commission was on the costs and prices effects of bank cards. Calculations based on statistical data and also from individual retail stores own estimates of the cost of "in-house" credit were offered in evidence. So was a comprehensive survey carried out by IBRO in the United Kingdom into retail prices. It became clear that the cost of providing credit and, consequently, the level of prices prevailing in stores

depended on the size of the store, the volume of business conducted and the percentage of that business transacted by cash or credit. A store offering no "frills" has less overhead and administration costs than one providing all manner of services, but that does not necessarily mean that the former can sell the same merchandise for less than the latter. The first may only be a small trader and not able to avail himself of bulk purchase discounts and so on which the other could. Also, the "mix" of merchandise offered by a large department store bears no comparison to the specialist store which offers one type of goods only. The Commission accepts the evidence of Mr Taylor that "... prices and gross margins are subject to many factors which ... can cause significant variations between retailers."

135. As to the matter of cards increasing turnover, this has not been proved or disproved to the Commission's satisfaction. One of the BNZ witnesses, Mr T. R. Froggatt, quoted, in his evidence, an extract from submissions to the United Kingdom Monopolies Commission inquiry on this matter as follows:

"It is not, however, an unreasonable inference from the data to suggest that a significant number of traders must have experienced some growth in turnover as a result of Barclaycard. To argue otherwise would be to assume that the increase in Barclaycard turnover merely displaced an equal volume of transactions financed by other means. Given the scale of the figures illustrated ... this is hardly likely. The above hypothesis is borne out by the reactions of a number of individual merchants of different sizes and in different trades. These reactions cannot prove definitively that credit cards increase turnover ... Merchants clearly perceived that their experience with credit cards accorded with these views, namely that credit encouraged sales of a higher level than would otherwise be the case."

136. The Commission is in no doubt, however, that, in so far as credit card transactions substitute for cash and cheque transactions, the retailer bears an additional cost. This is especially true of a store which has not previously provided any credit system for its customers, and now joins a bank card system. Whether there are increased sales generated sufficient to offset those additional costs has not been proved to the Commission's satisfaction.

137. It is not necessarily an answer to say that customers are at present totally free to elect to use or not use the cards. The future may reveal an incidence

of "leverage", or a pattern of inducing customers to move to "extended credit" more costly than overdraft or personal loans, or the much canvassed "domino effect". The "evidence" tendered on such points and others, although extensive in quantity, was lacking in the strength and substance which would be needed if the Commission was considering whether to invoke section 22. But that is not the present issue, which is whether power should be taken now by Order in Council to enable the practice to be examined at some future date. By way of comment in passing, the Commission ventures the opinion that the various schemes should have been in operation for some time before they are the subject of further investigation, if any. Among other things, mischiefs foreseen or unforeseen may or may not become obvious and should be capable of proof or disproof.

138. The retailers were concerned at "leverage" being exerted on their members to take the cards. This too is a matter which may only be revealed in the future. The banks themselves submitted that they would be "actively", "directly", and "fiercely" competing for customers to join the schemes. How far this "fierce" and "active" and "direct" competition will extend is a matter, at this time, for speculation only. It was suggested that any "leverage" exerted would infringe against either sections 50 or 23(1)(ka) of the Act and this could well be so. What is evident is that the possibility of a mischief is there in so far as "leverage" is concerned. Whether the mischief manifests itself is a matter for some future time.

139. It may be that the best way of dealing with the present situation would have been to grant a kind of provisional approval, that to be then reviewed by the Commission after a period of time or the occurrence of some event or events. However, such a power is not vested in the Commission by its Act in relation to these proceedings, while, even in relation to other sections of the Act, the power granted is in terms of "conditional approvals" only.

140. Overseas experience, the Commission considers, should be noted to the extent that it has relevance, but it is cautious in applying it willy nilly to New Zealand. Statutes of other countries are differently worded, have different objectives and operate in different social and economic climates. For one thing the size of other countries' economies differ markedly. To discuss, as was done, the sales policy of one

company in the United States of America, which has an annual turnover in excess of New Zealand's G.N.P., and translate that sales policy to this country, is an illustration of the point that caution is necessary when making overseas comparisons. The IBRO report was another example of comparisons needing to be treated with care. The survey included a large number of mail order houses and petrol resellers. New Zealand does not have many businesses specialising in mail ordering, and neither is petrol a competitively priced commodity. Similar comments could also, no doubt, be made regarding the numbers of outlets offering similar goods in the United Kingdom market, and the range of goods offered, as compared to the number and variety in New Zealand stores. It is worth recording that the two current overseas inquiries, in Australia and the United Kingdom, have still not reported, although both have been under way for approximately two years each. The United Kingdom Monopolies Commission investigations stemmed from complaints made, in the main, by petrol resellers, and the terms of reference of that inquiry were submitted at the substantive hearing. Since then the Commission has learned that the United Kingdom Monopolies Commission has sought approval to broaden its terms of reference to probe further into bank card schemes. The Australian inquiry was, as far as the Commission is aware, solely into an alleged collective pricing arrangement operated by all the Australian banks jointly involved in the "Bankcard" scheme in that country. Neither of those inquiries bears any comparison to the inquiry of this Commission under section 23(1)(n) of the Act.

141. New Zealand has only three million people, but three competing bank card schemes. Two competing schemes operate in the United Kingdom and the U.S.A. and one only in Australia, this last not being an international one at the time of the hearing. One concern that does emerge is how the establishment and promotional costs of the five New Zealand trading banks are going to be recouped, and from whom. Only one of the banks provided to the Commission, on a confidential basis, details of budgeted costs of, and projected income from, the schemes. This information is sufficient to reinforce its concern on this issue. From the documents it has, it seems to the Commission obvious that, unless the schemes prosper with exceptional rapidity, the banks are going to carry considerable losses which will either have to be absorbed, or else the charges for participation in the schemes will be increased. As the banks conceded that their

respective bank card schemes would be independent operations within the bank system, it seems likely that proper businesslike performance will be required of them within a specified time period. It should also be noted that the Databank system operated by the five trading banks appears to be unique, as no other country offers a national computerised system available for the processing of all banking transactions but also possessing spare capacity to handle credit card transactions as well. It appears that the use of this system will have an off-setting effect in reducing costs in a way not available in any other country.

142. In passing, the Commission would like to comment that it is close to impossible to start a brand new trading bank in New Zealand and, if one were to be proposed an amendment to the Reserve Bank Act 1964 would be needed plus, probably, special empowering legislation. The importance of this is that the five trading banks in this country are consequently confident that no new competition can appear on the scene offering traditional banking facilities only. The banks, in New Zealand, fall within the "oligopoly" definition of the Commerce Act, and the Commission is the appeal authority under the Financial Services Regulations 1979 which control certain charges specified in the Schedule to the Regulations. Whilst the Commission agrees with the BNZ that it is not the proper authority to examine credit contracts in general, it has certain powers which could affect banking operations pursuant to the provisions of Parts II and III of the Act. Indeed, the New Zealand Bankers' Association has registered certain agreements with the Commission in order to have them approved, but the Examiner has not yet reported on all of them.

143. The Commission did appreciate the efforts made by some parties to produce experts in the field of bank card operations to provide evidence to the inquiry. Other parties, however, made no real effort to produce any hard evidence to support the assertions they made of the effects which the cards would be likely to have. Having said that, the Commission acknowledges that a lot of the evidence was, of necessity, of a theoretical and speculative nature. The Commission realises that this is inevitable when an inquiry arises from complaints made to the Examiner, and investigated by him, concerning a practice newly introduced, or likely to be introduced, and which, in the terminology of section 2 of the Act, "is likely to affect" trading patterns, supply,

prices, etc. of goods or services available to the community.

144. In general, the Commission considers that the power to exercise surveillance should be taken now to guard against the future possibility of mischief arising, even if there is little evidence now of mischief and this latter situation may be the case for some time in the future.

145. What has been proved to the Commission's satisfaction is that the costs to the banks for services to their customers will increase, and that the prices to be charged to customers for certain services may also increase, as a direct effect of the introduction of the practice of issuing bank cards. What other future consequences of the practice directly affecting the prices of other goods and services cannot, at this stage of the practice's operations, be evaluated. Mr Taylor's estimate of .061% increase in the Consumer Price Index, as a "flow on" effect of the cards, may, or may not, be accurate, and may, or may not, be capable of proof. With the "Bankcard" scheme a customer requiring a cash advance at a bank branch will now have to pay 1½% interest per month for the use of his or her own money, if his or her current account is in credit, should he or she use the card as a means of cheque substitution, at a branch other than where the current account is held, instead of presenting a cheque and using the "Bankcard" merely as a means of identification.

146. In formulating a recommendation to the Minister, the Commission is not confined to a mere acceptance or rejection of the Examiner's recommendations, or the wording selected by him. To adopt the Examiner's words would create an impossible position in the light of the Commission's Decision No. 37. But apart from that aspect of the matter, the Commission considers that to import the words "of comparable purpose or effect" into what is intended to become a statutory description of a category would be unacceptable, being altogether too loose and too vague. Such a definition could cover a wide range of activities legitimately carried out by persons who did not present themselves at the inquiry, and consequently, whose views were not heard, simply because they did not consider themselves affected. To now make a recommendation possibly impinging upon such persons would be a breach of natural justice and in particular the "audi alteram partem" rule. Another consequence of the inclusion of the phrase "of comparable purpose or effect" could lead, at some

future time, to lengthy hearings and protracted legal debate to determine the meaning of the phrase and what it purported to include. For these reasons the proposed wording as submitted by the CSU, and as mentioned in paragraph 103, will be used.

Recommendation:

147. The Commission therefore recommends that a new trade practice be prescribed for the purposes of section 23(1)(n) of the Commerce Act 1975 to encompass the issuing by trading banks of bank credit or debit cards and the operation of any payment settlement mechanism involving the use of such cards.

148. This is the Report of the majority of the members of the Commission, namely Mr K. B. O'Brien (Chairman), Mr H. C. Sadgrove (Deputy Chairman), Miss C. E. Dewe and Mr G. McK. Fraser (Members).

149. The minority Report of Mr J. R. Tipping (Member) is appended in so far as he dissents from the Commission from paragraph 104 onwards, exclusive of the Appendices.

THE COMMISSION HEREBY RECOMMENDS

That a new trade practice be prescribed for the purposes of section 23(1)(n) of the Commerce Act 1975 to encompass the issuing by trading banks of bank credit or debit cards and the operation of any payment settlement mechanism involving the use of such cards.

Dated at Wellington this 14th day of February 1980.

The Seal of the Commerce Commission
was attached hereto in the presence of:

K. B. O'Brien Chairman

H. C. Sadgrove Deputy Chairman

C. E. Dewe Member

G. McK. Fraser Member

APPENDIX "A"

BANK CARD INQUIRY

SCHEDULE OF PARTIES

PARTY	REPRESENTED BY
Bank of New Zealand (BNZ)	Mr W. G. Clayton Mr J. D. Lynch Counsel
Australian & New Zealand Banking Group Limited, Bank of New South Wales, The Commercial Bank of Australia Limited (Australian Based Banks)	Mr L. H. Southwick Q.C. Mr M. C. Walls Counsel
The National Bank of New Zealand Limited (National Bank)	Mr D. A. Webb Counsel
New Zealand Retailers' Federation (Inc.) and joined Retail Associations (Retfed)	Mr T. A. Currie Miss M.F.L. Larsen Agents
Consumer Council	Mr R. J. Smithies Agent
Combined State Unions (CSU)	Mr P. S. Harris Agent
New Zealand Shop Employees Industrial Association of Workers (Shop Employees)	Mr P. S. Harris Agent
N.Z. Bankers' Association	Mr L. M. Greig Counsel
Examiner	Mr B. M. Hill Mr D. J. Watson Counsel

APPENDIX "B"

BANK CARDS

Mode of Operation

The five trading banks established in New Zealand, namely, Bank of New Zealand, National Brank of New Zealand Limited, Bank of New South Wales, Commercial Bank of Australia Limited, and Australian and New Zealand Banking Group Limited, were all operating bank card systems by the end of 1979. Those cards issued by the Bank of New Zealand and the National Bank are known as "Visa", and those issued by the three Australian based banks are known as "Bankcard". "Visa" is an international card which is accepted in over 120 countries throughout the world, whilst "Bankcard" is of Australian origin and did not, at the time of the hearing, operate worldwide. In addition there are other cards issued and operated by banking institutions throughout the world, such as "Access" and "Eurocard" but to date none of the New Zealand banks have become affiliates of these. Banks who participate in these schemes pay an affiliation fee to that international organisation. All of these cards are "credit" cards (which means they offer a form of credit for personal spending), although some banks may offer their system as a "debit"card (which does not involve a short term free credit facility and which works on the same system as the issuance of a cheque). For the purposes of this Appendix it is proposed to deal with the "credit" card operation only.

Credit cards have been accepted for a number of years as a means of payment by a customer in a retail store for the purchase of goods and services. A wide range of merchants, hoteliers, restaurateurs, shopkeepers and others, have signed individual contracts with the credit card operating organisations to enable card holders to obtain goods and services on credit by presentation of their card. "American Express" and "Diners Club" are two well known credit card companies operated by franchise holders in New Zealand. Neither of these cards is associated with what, in New Zealand, would be described as a trading bank. This appendix, however, is concerned only with those systems to be operated by the New Zealand trading banks. Although there are variances within the individual schemes, the basic principles of operation are common to all.

The schemes involve the following parties:-

(a) The issuing bank

(b) The card holder

(c) The merchant

(d) The processing company (or the servicing company)

and this appendix outlines how the schemes work.

Card Holder's Operation:

A bank customer can apply, or the bank may invite a customer, to join the scheme, which involves the following:-

1. Customer signs a contract with the issuing bank agreeing to comply with the terms and conditions governing the use of the card. The contract sets out the legal rights and obligations of both parties.

2. The customer receives a personalised plastic card showing customer's:-

   (a) name and signature

   (b) account number

   (c) expiry date of card

   (d) local bank identification

   which can be used at any establishment displaying the system's "decal" (identifying sign) to purchase goods or services up to the total value of an agreed limit. This limit is arranged by the issuing bank with the customer. These credit limits are confidential between the card holder and bank and the limits must not be exceeded without the written authority of the bank.

3. Card holders receive an automatic credit card overdraft limit, of say, $100, and may apply for a special overdraft limit also arranged by agreement. In addition, the card may provide for an automatic cashing facility at any branch of that bank in New Zealand up to, say, $100.

4. When purchases are made the customer receives a copy of the sales docket to enable purchases to be checked off against a monthly statement of account. That monthly account must be paid to the bank, within 25 days from the end of the month during which purchases are made, otherwise it becomes liable to interest charges. An extended credit facility is available, in that the card holder may elect to pay, at the expiration of the 25 day period, a percentage of the balance due. Thereafter the interest charge is payable on any unpaid portion of the account. The rate of interest charged is 1½% per month and this interest rate is also applicable to the overdraft facility arranged under the scheme.

5. In some schemes a card holder who uses his cashing facility will have those amounts debited directly to his current account and they will not appear on the monthly account, others debit the cash withdrawals in a similar manner to purchases.

6. Charges for the service to the card holder vary between the different banks.

The Merchant Operation:

A retailer, hotelier, motelier, etc., who agrees to become a participating merchant in any (or every) scheme follows these courses:-

1. Signs a formal written agreement with the operating bank and agrees to abide by the terms and conditions as set out in that agreement. Clauses in the agreement stipulate procedures to be followed when a transaction is made in every case when a card holder presents a card. The merchant must first satisfy himself that the card is valid and that the customer's signature on the sales docket is the same as that shown on the card. Other clauses cover the issuing of credit notes, prohibition of cash refunds, multiple sales vouchers, special sales authorisations, lost cards, recourse on sales vouchers, etc.

2. The merchant also agrees to pay to the operating bank a service charge calculated as a percentage of the value of sales transacted, calculated on a sliding scale, from, say, 1.5% to 5.5% according to the total volume of sales and the average value of individual transactions. The scale of charges

is alson the following lines, but the actual rates charged are arranged independently by the bank with the merchant:-

AVERAGE MONTHLY VOLUME	AVERAGE TICKET SIZE			
	Under $15.00	$15.00 to $29.99	$30.00 to $49.99	$50.00 and over
$1 - $499	5½%	5%	4½%	3½%
$500 - $999	5¼%	4 3/4%	4%	3¼%
$1,000 - $2,499	5%	4½%	3 3/4%	3%
$2,500 - $4,999	4 3/4%	4¼%	3½%	2 3/4%
$5,000 - $14,999	4½%	4%	3¼%	2½%
$15,000 - $49,999	4%	3½%	3%	2¼%
$50,000 - $149,999	3½%	3%	2½%	2%
$150,000 and over	3%	2½%	2%	1½%

3. The bank also advises the participating merchant of his "Floor Limit" which is the amount, in the opinion of the bank, necessary to cover an average transaction in that merchant's place of business. For any sale within that limit the bank guarantees payment to the merchant, but for any transaction in excess of the limit the bank's special authorisation must be obtained. If this special authorisation is not obtained, payment to the merchant in respect of that sale is not guaranteed beyond the floor limit.

4. The merchant is responsible to deliver to the bank within 3-10 days from the date of the transactions, all sales and credit vouchers on card holders accounts, and these are lodged with the bank in a similar manner to an ordinary bank deposit.

5. On receipt of these vouchers, the bank credits to the merchant's account the total of that lodgement, first deducting the sum of the agreed commission and any other appropriate deductions as covered in the "Recourse on Sales Vouchers" clause in the written agreement.

<u>The Processing and Servicing Company</u>:

To reduce costs and to speed up the recording of transactions both within a particular country and world-wide, the card issuing banks in each country or in a specific area

normally combine to establish a central service company (clearing house) which processes all vouchers both debit and credit and ensures that details of these are entered in the appropriate control records of each participating bank.

Details of all transactions are transmitted as quickly as possible to the card issuing bank to enable it to record the relevant transactions in the card holder's account or accounts of that bank. In New Zealand Databank will provide this service and participating banks will usually be charged an initial service fee and a quarterly service fee calculated as a percentage of total sales volume with a minimum per quarter.

International transactions are transmitted from the service company in the country where the card has been used, to the service company in the country where the card holder's account is domiciled. To cover operating expenses the overseas service companies arrange either directly or indirectly with the card issuing banks to retain an agreed percentage of the commission charged to each contracting retailer in respect of the card sales made by him.

APPENDIX "C"

LIST OF WITNESSES WHO APPEARED AND GAVE EVIDENCE AT THE INQUIRY HELD INTO VISA AND OTHER BANK CARD SYSTEMS

Name of Witness	Occupation	Party on whose behalf Witness Appeared
The Examiner		Self
Mr T. E. Currie	Secretary	N.Z. Retailers' Federation and others
Mr S. M. Locke	Accountancy Lecturer	
Mr R. J. Smithies	Director	Consumer Council
Mr S. T. Beanland	Motel Proprietor	
Mr P. S. Harris	Research Officer	Combined State Unions and Shop Employees Industrial Association of Workers
Mr D. B. Synott	General Manager	Australian Based Banks
Mr J.V.T. Baker	Statistician	
Mr T. D. Sullivan	Bank Executive	
Mr D. B. Sheward	Bank Executive	
Mr P. D. Bearsley	Economist	
Mr I. K. Pullar	Bank Administration Manager	National Bank
Mr R. N. Taylor	Chartered Accountant	Bank of New Zealand
Mr R. E. Mead	Bank Marketing Manager	
Dr R. W. Johnson	University Professor (Purdue)	
Mr T. R. Froggatt	Barclaycard Manager	
Mr W. J. Shaw	Deputy General Manager	
Written Evidence Only:		
Mr L. C. Bayliss	Economist	Bank of New Zealand

DISSENTING OPINION OF MR J. R. TIPPING

1. INTRODUCTION

1.1 I am obliged to disagree with my colleagues in their determination that the Examiner's recommendation be adopted and that the Commission should recommend to the Minister that bank cards be prescribed as a trade practice for the purposes of section 23(1).

1.2 In my opinion the basis upon which the Examiner founds his recommendation, and hence his recommendation, are in conflict with the intent and purpose of the Act in two fundamental respects.

1.3 As a result of his investigation the Examiner states in his report that, in his opinion, the bank card systems -

> "constitute trade practices which, in the language of the Commerce Act, are deemed contrary to the public interest in that the effect of the practices would be 'To increase the costs relating to the distribution of goods and services' (S21(1)(a)). Moreover with the eventual removal of price control over many goods and services (which is a reasonable expectation in view of the policy statements of the Government) the practices would have the effect of increasing the prices at which goods and services are sold within the meaning of section 21(1)(b)."

1.4 His recommendation, stated again here for ready reference, is -

> "Recommendation
>
> In that I have formed the opinion that the Visa and Bankcard schemes, which have either been introduced or will probably be introduced into New Zealand, are likely to have effects which are deemed to be contrary to the public interest in terms of subsections 21(1)(a) and (b) of the Commerce Act and in view of my opinion that these practices do not avoid being deemed contrary to the public interest in terms of section 21(2), I recommend that:
>
> > The Commission recommend for the purpose of subsection 23(1)(n) of the Commerce Act, the making of an Order in Council which will have the effect of specifying Visa Card, Bankcard

and other schemes of comparable purpose or effect as trade practices against which the Commission may make orders."

1.5 The Examiner's reasons for his recommendation are that, in his opinion, bank cards will have the effects, in terms of section 21, of increasing the costs, and thence the prices, of retailers who accept the cards as a payment mechanism.

1.6 The first fundamental flaw in his reasons is that he overlooks that there must first be a trade practice specified by the Act for its mischievous implication. It is only a practice so specified which may be examined in terms of section 21 to see whether the inherent mischief promotes any of the effects of section 21 which make the specified practice contrary to the public interest. The flaw in the Examiner's reasoning is that he assumes that what he surmises will be the effects of the trade practice constitute the mischievous implication of the practice which causes it to be specified.

1.7 The second fundamental flaw is that the Examiner has considered the effects and provisions of section 21 in application to retailers' costs and prices whereas, in the Commission's interpretation of section 21, the effects and provisions of the section are to be considered in application to the goods or services which are the subject of the trade practice itself, in this case the bank card services rendered by the banks.

2. IT IS FUNDAMENTAL TO THE SCHEME OF THE ACT THAT A TRADE PRACTICE TO WHICH THE DISCIPLINARY PROVISIONS OF PART II APPLY MUST FIRST BE SPECIFIED FOR ITS INHERENT MISCHIEVOUS IMPLICATION: THE EFFECTS DETAILED IN SECTION 21(1) DO NOT CONSTITUTE THE MISCHIEF OF THE PRACTICE, THEY ARE THE EFFECTS OF THE MISCHIEF.

2.1 The first section, No. 20, of Part II, Trade Practices, provides -

> 20. APPLICATION OF THIS PART - The provisions of this Part of this Act relate to trade practices of the following classes -
>
> (a) Trade practices which are described in section 23 or section 23A of this Act and in respect of which the Commission may make orders, if it finds that the introduction or continuation or repetition of the practice would be contrary to the public interest:

(b) Trade practices in respect of which the Commission may make a recommendation under section 23(1)(n) of this Act:

(c) Trade practices which are prohibited unless approved by the Commission, being practices dealt with in sections 27 to 37 of this Act under the headings of Pricing Agreements and Pyramid Selling Schemes:

(d) Prohibited practices which are referred to in sections 48 to 54 of this Act and which constitute offences against this Act.

2.2 The first point to note in relation to section 20 is that, while the definition of "Trade practice" in section 2 is very wide indeed and would appear to encompass any act done in the course of trade, the provisions of Part II which, of course, include section 21 which contains the public interest criteria, relate only to the relatively restricted range of those trade practices which are specified and defined in Part II.

2.3 The second point to be noted in a study of the trade practices specified in Part II is that in all instances the practices specified are defined according to the objectionable or mischievous element, feature, or implication which accounts for their being so specified (I shall use the term mischief, or mischievous implication, generically).

2.4 This is an early manifestation of what might be described as the two-tier structure which is fundamental to the Act in relation to trade practices (other than the "forbidden" practices which are proscribed out-of-hand) viz. the practice must first be shown to be one of those specified because of its implication of mischief and, if and only if that is established, it must still be shown to be contrary to the public interest in terms of section 21 before it may be impugned by Examiner or Commission.

2.5 Now to consider the individual paragraphs of section 20. Paragraph (d) refers to the "prohibited" practices. The Legislature has condemned these out-of-hand as offences against the Act and they are not of concern here.

2.6 Paragraph (c) refers to what are commonly referred to as the "approvable" practices. Any person who wishes to carry on one of these defined practices must apply to the Commission for its approval of the practice and before the Commission can approve the practice it has to be satisfied the effect of the practice is not and is not likely to be contrary to the public interest in terms of the provisions of section 21. Again the "approvable" practices are not of concern here.

2.7 That leaves for consideration paragraphs (a) and (b). Paragraph (a) refers to practices described in sections 23 and 23A and these are commonly referred to as the "examinable" trade practices (with the exception of those defined in paragraphs (b), (d), and (e) of section 23(1) which constitute the "approvable" trade practices). Although these "examinable" trade practices are specified in the two sections, with definition of the mischievous implication of each, they may be carried on despite the mischievous implication but may be subjected to examination at any time to ascertain whether the effect of the practice is contrary to the public interest in terms of section 21.

2.8 Section 23A defines the practice it refers to ("multiple wholesaling") and the Commission may exercise the powers conferred on it by section 22(1) if it is of the opinion that the practice is or would be contrary to the public interest.

2.9 I now come to section 23 and it is this section which is in primary concern. The section starts as follows:-

> 23. Trade practices against which Commission may make orders -
>
> (1) The categories of trade practices referred to in section 22(1) of this Act are:

There then follow paragraphs (a) to (m) each specifying a trade practice by definition of its mischievous implication or implications. The subsection concludes with paragraph (n) which reads -

> (n) Any agreement or arrangement or action not referred to in the foregoing provisions of this subsection prescribed for the purposes of this subsection by an Order in Council which is published in the Gazette and which is made pursuant to a recommendation in that behalf by the Commission.

It is pursuant to that paragraph (n), of course, that the Examiner has made his recommendation to the Commission. I leave the paragraph aside for the moment to return to it later.

2.10 The opening words of section 23(1) are -

> (1) The categories of trade practices referred to in section 22(1) of this Act are:

and section 22(1) provides -

> 22. Orders of Commission against certain trade practices -
>
> (1) Subject to the provisions of this Part of this Act, where the Commission after either holding an inquiry or dispensing with one as permitted by section 40(4) of this Act is of the opinion that a trade practice is substantially within one or more of the categories specified in section 23 of this Act and that the introduction or continuance or repetition of the trade practice would be contrary to the public interest, the Commission may make an order -
>
> (a)) Here are set out the types
> (b)) of order the Commission may
> (c)) make against the trade practice.

2.11 Here, in sections 22 and 23, is found plainly manifested the fundamental two-tier structure. The Commission may act pursuant to section 22 to make an order against an "examinable" practice only if it is of the opinion, firstly, that it is a practice which is substantially within one or more of the categories defined in section 23 (that is the first tier) and, secondly, that the practice is or would be contrary to the public interest in terms of section 21 (that is the second tier).

2.12 Obviously, if the first tier were not fundamental there would be no need for a section 23 with specification and definition of the "examinable" trade practices in subsection (1) and twelve other subsections of explanation and qualification. Section 22 would provide simply that the Commission may make an order against a trade practice solely on the ground that it is of the opinion that the practice is, or would be, contrary to the public interest in terms of section 21.

2.13 The "Investigations and Inquiry into Trade Practices" part of Part II follows, and exhibits the essentiality of the two-tier structure. This part starts with section 38, which provides -

38. Investigations by Examiner -

(1) The Examiner shall investigate -

(a) On complaint that may be made direct to the Examiner or to the Department or on his own motion, any trade practice which appears to be contrary to the public interest:

(b) Every application referred to him by the Commission under this Part of this Act.

(2) (This subsection refers to the Examiner's powers of obtaining information for the purpose of his investigation.)

2.14 Paragraph 1(b) of section 38 refers to the Examiner's investigation of applications made to the Commission for approval of an "approvable" trade practice and is not relevant here.

2.15 In respect of paragraph 38(1)(a) it might be thought there appears to be conflict with section 20 quoted earlier in my paragraph 2.1. Section 20 provides that the provisions of Part II which, of course, include section 38, relate to trade practices of the classes referred to in section 20, which are the various practices specified and defined in Part II, plus any practice not presently specified but in respect of which a recommendation may be made under section 23(1)(n). Section 38(1)(a) now provides that the Examiner shall investigate any trade practice which appears to be contrary to the public interest. It might be thought the words "any trade practice", and hence the Examiner's jurisdiction to investigate, apply only to the practices referred to in section 20. However, since the Commission has power under sections 20(b) and 23(1)(n) to recommend that further practices be specified for the purposes of section 23(1), and since such a recommendation can only be made on a report by the Examiner following investigation, it must be taken that the Examiner is intended to have jurisdiction to investigate a trade practice not already specified to enable him to form an opinion on whether or not he should recommend that it be added to section 23(1). Nevertheless, even though the Examiner's attention may be caught by an appearance of contrariness to the public interest in terms of section 21 he is still bound, in his reporting to the Commission, and the Commission in any action it may take on the report, to observe the fundamental two tiers.

2.16 Having conducted his investigation, and having paid attention to the conciliation provisions of section 39, the Examiner must report to the Commission, whereafter the Commission must consider the matter. The relevant provisions of the Act in these regards are the following.

2.17 Section 40 provides inter alia:-

> 40. Report by Examiner -
>
> (1) The Examiner shall furnish a report to the Commission -
>
> (b) On any trade practice investigated by him on complaint made direct to him or to the Department or on his own motion which, in his opinion, comes substantially within one or more of the categories set out in section 23(1) of this Act and which, in his opinion, has or is likely to have effects contrary to the public interest:

Section 41 provides, inter alia:-

> 41. Inquiry by Commission -
>
> (1) Where a report is made to the Commission under section 40(1) of this Act, the Commission, unless it decides under subsection 4 of that section to dispense with an inquiry, shall conduct an inquiry into the matter.
>
> (2) Subject to the provisions of this Act, at any inquiry under this section the Commission shall determine -
>
> (b) Where the Examiner has furnished his report under section 40(1)(b) of this Act, whether the trade practice to which the report relates does in fact exist; and if so -
>
> (i) Whether it comes substantially within one or more of the categories referred to in section 23(1) of this Act; and if so
>
> (ii) Whether or not the trade practice is contrary to the public interest; and
>
> (iii) Whether an order should be made under section 22 of this Act in respect of that practice and whether other action should be taken additional to or instead of the making of an order:
>
> (Underlining added for emphasis)

2.18 The provisions quoted in the preceding paragraph state the Act's requirements in relation to investigation and report by Examiner, and inquiry and determination by Commission, in the case of the "examinable" trade practices specified in section 23(1). The two essential conditions apply, i.e., it is necessary that the practice

be substantially one of those specified in section 23(1) and only if so can it be submitted to the public interest tests of section 21 (Although the requirements are a little different in a case "conciliated" under section 39 the essential two-tier structure still applies there).

2.19 Coming now to the case with which the Commission is here concerned, i.e., the case where the Examiner finds a practice which he considers to be contrary to the public interest in terms of section 21, which, however, does not fall substantially within any of the categories specified in section 23(1), but which, in his opinion, should be added to the list of section 23(1) by action under paragraph (n) of that section. The following provisions are relevant here.

2.20 In relation to investigation and reporting, section 40 provides:-

> 40. Report by Examiner -
>
> (1) The Examiner shall furnish a report to the Commission -
>
> (d) On any trade practice which, in his opinion, has or is likely to have effects contrary to the public interest and does not come substantially within any of the categories set out in section 23(1) of this Act but which, in his opinion, is a practice in respect of which the Commission should consider making a recommendation for the purposes of paragraph (n) of the said section 23(1).

In relation to the Commission's consideration of such a report section 41 provides:-

> 41. Inquiry by Commission -
>
> (1) Where a report is made to the Commission under section 40(1) of this Act, the Commission, unless it decides under subsection (4) of that section to dispense with an inquiry, shall conduct an inquiry into the matter.
>
> (2) Subject to the provisions of this Act, at any inquiry under this section the Commission shall determine -
>
> (c) Where the Examiner has furnished a report under section 40(1)(d) of this Act, or where

> the Commission is of the opinion that the practice does not come substantially within any of the categories set out in section 23(1) of this Act, whether or not it should make a recommendation for the purposes of section 23(1)(n) of this Act:

2.21 Manifest again is the two-tier structure. While the Examiner has to form the opinion that the practice has or is likely to have effects contrary to the public interest, that in itself is not enough. He has, in addition, to form the opinion that the practice does not come substantially within any of the categories listed in section 23(1) but is such that the Commission should recommend to Government that it be added to that list.

2.22 Section 41(2)(c), relating to the Commission's determination, appears to have two limbs with the apposite limb here -

> (c) When the Examiner has furnished a report under section 40(1)(d) of this Act ... whether or not it should make a recommendation for the purposes of section 23(1)(n) of this Act:

The Commission is not directed as to the considerations it should take into account in determining whether or not it should make a recommendation. However, following the fundamental structure of the Act, and in correspondence with the opinions to be formed and reported on by the Examiner, I consider it must be taken that the Commission has to consider two matters:-

> (i) Firstly, and primely, whether the practice is of such a nature, with such an implication of mischief, that it should be added to the list of section 23(1).
>
> (ii) Secondly, whether the practice has or is likely to have effects contrary to the public interest in terms of section 21. Although the Commission is not directed to have regard to this aspect the Examiner is required to form an opinion and, in his report to the Commission, to state his grounds for his opinion (section 40(2)(c)(ii)). That appears plainly to indicate that the Commission is required to consider, and to form its opinion on, this aspect.

2.23 In my opinion it is clear beyond doubt that, apart from the prohibited practices which the Legislature has forbidden out-of-hand, the two-tier structure is fundamental.

To be "examinable", a trade practice must have a mischievous implication and that mischievous implication be defined. That is the first tier. Only such a practice may be submitted to the tests of section 21 to determine whether it is, as well as having a mischievous implication, in fact contrary to the public interest. That is the second tier. The effects contrary to the public interest listed in section 21(1) are not the mischiefs or mischievous implications of a trade practice by reason of which the practice is specified; they are the effects of the mischief or mischievous implication.

2.24 It is pertinent to draw attention again to the corroborative argument that if the two-tier dichotomy did not apply there would be no need for the list of section 23(1) and no need for section 23(1)(n) enabling the Commission to make a recommendation for addition. Section 22 would simply authorise the Commission to make orders against a trade practice on the sole ground that its introduction or continuance or repetition would be contrary to the public interest in terms of section 21.

2.25 I believe the reason or reasons for specifying and defining the mischievous trade practices are not difficult to find. Firstly, I think it could be said that the Legislature has considered it fair and proper to define for traders those practices which may be impugned for mischievous implication. The second tier, i.e., that the mischievous practice must, in addition, fail to pass the tests of section 21 appears to be a further reasonable protection for the trader.

2.26 However, the basic reason would be, I am sure, that if a practice were to be "examinable" simply because it had one of the effects listed in section 21(1), then those trade practices which could be impugned would be virtually limitless and the commercial community would not know where it stood. Bearing in mind that the definition of trade practice in section 2 is so wide as to comprehend almost any action undertaken in the course of trade, a few examples, limited to the two section 21(1) effects dealt with by the Examiner, will illustrate the point:

(i) Many retailers provide monthly credit which adds to their costs in the capital cost of the total amount of credit supplied, in bookkeeping and clerical staff salaries, in stationery, postage, etc. (Mr J.V.T. Baker, a former Government Statistician now in private practice, gave evidence that as the result of a survey based on the 1973 Census of Distribution he estimated that the average

cost of retail credit in New Zealand could lie between $6.62 and $8.62 per $100 of credit sales.) Those costs enter into the totality of the retailer's costs upon which his prices are based. Since the effect is to increase the costs relating to the distribution of goods and to increase the prices at which goods are sold, the provision of credit would have to be deemed to be contrary to the public interest in terms of section 21(1)(a) and (b). Yet is was not suggested, nor ever would be I think, that selling on credit is a mischievous trade practice which should be added to the list of section 23(1).

(ii) Many traders spend large sums in advertising in various media. The substantial cost adds to the trader's costs and so would have to be deemed to have an effect contrary to the public interest in terms of paragraph (a), if no other, of section 21(1). Yet it would never be suggested, I think, that advertising is a mischievous trade practice which should be added to the list.

(iii) A manufacturer, either in the face of competition or of his own free volition, might add a new component to his product, or improve the quality of the product, with an increase in his costs and possibly in his price. Yet it could not possibly be contended that his action constitutes a mischievous practice which should be added to the list.

Examples could be given endlessly of trade practices, within the wide definition of section 2, which would have to be deemed contrary to the public interest in terms of one or other of the paragraphs of section 21(1) yet could not possibly be thought of as mischievous practices. Clearly, to make a trade practice "examinable", and therefore subject to impugnment, simply on the ground that it had one or more of the effects of section 21(1) would be intolerable despite the alleviating provisions of section 21(2).

2.27 The Examiner gave as his reason for his recommendation his opinion that bank cards would increase participating retailers' costs and prices and so would be contrary to the public interest in terms of section 21(1)(a) and (b). In doing that he ignored the essential first tier. He did not advance and substantiate a mischief inherent

in the bank cards trade practice which is essential as the basis of a recommendation under section 23(1)(n). Contrariness to the public interest in terms of section 21 is the effect of a mischief; it is not the mischief itself. Even so, in endeavouring "to deal effectively with the matter" before the Commission (in terms of section 13) I believe it would be appropriate to consider whether he, or any of the parties who supported him, substantiated any criticism of bank cards which, although not specifically so advanced, could nevertheless properly be regarded as a mischief such as to warrant definition for the purpose of section 23(1)(n). To that end it is requisite initially to see what guidance can be drawn from the Act itself as to types of mischief appropriate for addition to section 23(1).

2.28 The long title to the Act states (in relationship to trade practices) that it is an Act -

Firstly - "To promote the interests of consumers and the effective and efficient development of industry and commerce through the encouragement of competition ..."

Thus the two important objectives of "the interests of consumers" and "the effective and efficient development of industry and commerce" are to be promoted "through the encouragement of competition".

Secondly - "to prevent the mischiefs that may result from monopolies, mergers, and takeovers and from trade practices ..."

It would be right to say, I think, that the mischief most prominently common to monopolies, mergers, and takeovers and to trade practices, is the possibility of their deleterious effect on competition in industry and commerce. Again an indication of the Act's prime concern with actions or practices which may restrict competition.

2.29 Proceeding to the "general objects" of the Act, those which are relevant being stated in section 2A as -

(a) The promotion of the interests of consumers:

(b) The promotion of the effective and efficient development of industry and commerce:

(c) The need to secure effective competition in industry and commerce in New Zealand:

These three "general objects" have already been comprehended in the long title where objects (a) and (b) were to be promoted by means of (c), the encouragement of competition. Next is -

> (d) The need to encourage improvements in productivity and efficiency in industry and commerce in New Zealand:

This fourth general object appears to be largely complementary to the first two (a) and (b) which, according to the long title, are to be promoted through object (c) the encouragement or securing of competition.

2.30 Thus, it appears that the primary concern of the Act, in relation to trade practices as to monopolies, mergers, and takeovers, is with competition and with practices and arrangements which are likely to restrict effective competition. That primary concern need not, of course, indeed should not, exclude concern about any other hindrance or obstruction to the objectives which a mischievous trade practice might promote.

2.31 With that background in mind I proceed to scrutiny of the practices defined in section 23(1). Excluding paragraph (n) there are 14 specifications -

10. Paragraphs (a) to (h), (j) and (m) relate to "agreements or arrangements" between two or more persons, i.e. collective action, for various purposes but in all cases having the common purpose of imposing restriction on the free, competitive flow of trade.

1. Paragraph (l), the "unjustifiable" exclusion from a trade association, is a collective restriction without just grounds of what appears to be a reasonable right of a bona fide trader.

1. Paragraph (i), the "unjustifiable" refusal to sell or supply, while not necessarily a collective practice, is a restriction without just grounds on the free, competitive, flow of trade.

1. Paragraph (ka), is again a restriction on the free, competitive flow of trade in preventing the borrower from "shopping round" to his advantage for the "other services".

1. Paragraph (k), the payment of an excessive royalty, licence, fee, retainer, or otherwise. This paragraph may be a little difficult to understand in the context of section 23(1). One thinks of excessive prices as having profiteering connotations but the paragraph refers to paying and not to receiving. ("Profiteering" is one of the prohibited practices - section 54). It could, perhaps, be intended to apply to a case where the charger and recipient is beyond the jurisdiction as in the case of the overseas parent of a New Zealand subsidiary company. In any case, the word "excessive" must, I think, mean a price which is greater than would apply in a normal, competitive, situation.

2.32 Thus, it appears to me that all the trade practices defined in section 23(1), with the possible exception of (k), have the common characteristic of imposing deliberate restrictions either on the free competitive flow of trade or on the correlated free, competitive exercise of a person's rights in the field of trade. Even (k) may be considered to relate to a situation in which a free, competitive climate does not exist. The practices defined in the section exemplify the Legislature's prime concern with practices which are designed to restrict the free, competitive flow of trade.

2.33 Now, in the light of the above, to consider whether the Examiner, or any of the parties who supported him, advanced any criticism which could properly be considered as a mischief such as to warrant its being defined for the purposes of section 23(1). Those which, it appears to me, might warrant consideration, and my comments on them, follow.

2.34 The Examiner voiced three criticisms which might be considered for this purpose. The first he referred to in the terms "even though many of the public decide not to participate in the scheme they will still have to bear any increases in prices, thus subsidising those who participate"; the second he referred to as the "domino" effect; the third was referred to as the "leverage" effect.

2.34(a) The "subsidising" criticism is based upon the Examiner's opinion that the fees payable for their use by retailers who accept bank cards will oblige those retailers to increase their prices for goods and services and that those increases in price

will be borne by all customers, those who do not use cards as well as those who do. In the first place, that possibility depends on participating retailers raising their prices; if they do not do so the criticism will not be valid. The Examiner's opinion that card-accepting retailers will increase their prices is based solely on surmise; he could not advance any evidence based on experience with bank cards in New Zealand. He advanced no evidence based on overseas usage of bank cards. It was the banks who produced relevant evidence drawn from overseas experience, in the U.S.A., the United Kingdom, and Australia. The gravamen of that evidence was that there is no reason to believe that bank cards have led directly to increased retail prices in those countries. I think it will be only after the cards have been in use in this country for a number of years that it will be possible to ascertain what their effect on retail prices may have been. In the meantime, I find the evidence from those overseas countries more satisfactory than mere surmise. In the second place, there are many aspects of business in which costs are not borne exclusively by the customers for whose benefit they may appear to have been directly incurred. I have already referred to monthly credit, the costs associated with which fall into the totality of costs on which prices are based so that the cash customer shares those costs with the credit customer. If a retailer delivers and does not charge for the service the cost is shared by the customer who takes goods in her own car or on foot. A retailer may provide a parking area for customers without levying a charge for parking; the associated costs of invested capital, rates, maintenance, are borne by the foot and public transport customer as well as the carriage customer; and I am sure many other instances could be cited. Yet none of these are regarded as mischiefs for the purposes of the Act. The ramifications of this subject are complex. Retailers may claim they provide these facilities to attract custom and increase turnover so as to secure economies of scale with the result of reducing, not increasing, the overall unit impact of costs; others may say competition compels them to provide the services and to levy a direct charge on users would be likely to drive that custom elsewhere. The following statement in Retfed's closing submission under the sectional heading "Impact of Bankcards on Retail Costs/Profits" is illustrative of the complexity of the subject:-

"22.01 The Federation considers that it is impossible to accurately state the impact (beneficial or negative) that bankcards will have on retail costs and profits. Apart from the infinite number of variables which must be considered, such as card sales to total sales, eroded sales versus new sales, the ratio of cash, cheque, charge, T. & E. and bankcard sales, turnover size of store, etc., a retailer lives in a dynamic environment and therefore, in most cases, results cannot be attributed to specific action. The cause and effect approach in terms of attracting customers is almost irrelevant in the retail context unless the 'cause' is obvious, i.e., closing down sale."

Even if the Examiner's surmise as to increases in retail prices could be accepted - in my view it clearly cannot - I would still consider there would be no justification for singling bank cards out in this respect.

2.34(b) By the "domino" effect he meant that some retailers who would not otherwise want to do so would find themselves obliged to accept payment by bank cards to avoid losing custom to competitors who do accept the cards. I cannot see this as a mischief. No trader can be compelled to accept the cards. It is within his volition to decide whether accepting them will be in his interests or not, like any other service he may or may not offer or action he may or may not take to attract or protect custom. If he finds himself obliged to do so against his will it will be only because a significant number of his customers want to use their cards sufficiently to go elsewhere if he will not take them. He need accept them only if he thinks it will pay him to. I do not see anything here which would restrict the free, competitive flow of trade nor any other sort of mischief. On the contrary, I see the cards as another and convenient facility for the customer and an effective and efficient development in commerce.

2.34(c) By "leverage" is meant the possibility that bank managers may apply pressure, or "leverage", to retailer customers who are in overdraft, or who may seek overdraft accommodation, to agree against their will to accept the cards as a quid pro quo for the accommodation. The banks firmly repudiated this

suggestion. They stated that such conduct would be contrary to banking ethics and that, on practical considerations, it would tend to make bank cards unpopular with retailers which would be the last thing the banks want. However, it is not necessary to pursue consideration of this question for, in my opinion, such pressure or "leverage" is already comprehended by provisions of the Act. Firstly, as one of the "prohibited" practices, by section 50, which reads -

"50. Refusal to sell goods or services unless other goods or services are also purchased.

(1) Every person commits an offence against this Act who, whether as principal or agent, and whether by himself or his agent, refuses to sell any goods or services except on the condition that other goods or services are also purchased from him or from any other person nominated by him, or attempts to impose any such condition."

Secondly, even if it were not a prohibited mischief, I consider it could be caught by paragraph (i)(iv) of section 23(1) which reads -

"23. Trade practices against which the Commission may make orders -

(1) The categories of trade practices referred to in section 22(1) of this Act are:

(i) Subject to subsections (5) and (6) of the section, any unjustifiable refusal -

(iv) By a supplier of services to supply, or to continue to supply, services to a wholesaler, a retailer, a manufacturer, or a supplier of services."

Counsel for the National Bank suggested it could be caught as well under paragraph (ka) of section 23(1) but, while not having heard argument on the point, I am a little doubtful whether the "other services", i.e., the bank card services, could be considered to be "associated" with the loan or overdraft.

2.34(d) Thus, with the exception of the "leverage" factor which, I am satisfied, is already provided against (my paragraph 2.34(c)) the Examiner did not, in my opinion, substantiate any mischief in bank cards which could possibly be considered to conflict with the Act's basic objective of promoting the free, competitive, flow of trade or with any other objective of the Act and so would qualify for addition to the list of section 23(1).

2.35 Retfed, in its submission, said "... the Federation believes that the system of charging should be clearly established now as a flat fee per entry" and "A flat fee will overcome much of the retailer sector's criticism towards bankcards". When asked by the Commission what other criticism would remain if the system of charging were on a flat fee basis, the Retfed agent referred to the matters mentioned in paragraph 1.9 of Retfed's submission. Finally, in its final submission, Retfed said -

"21.04 While the Federation's main objection relates to the cost of bankcards to retailers the submissions of the banks have failed to satisfy our concern on other aspects of the scheme raised in para. 1.9 of the Federation's case."

I quote here in full that paragraph 1.9.

"1.9 An individual retailer, member or non-member, is fully entitled and is encouraged by the Federation to evaluate bankcards and decide on their merits whether or not he wants to become a bankcard merchant. However, it is highly unlikely that that same retailer will consider the implications of committing the industry to various money transfer systems with commission based fees, the macro-economic effects of the creation of consumer credit, the implications for the retail trade if a significant volume of trade can be "shutoff" by controls being imposed on bankcard credit, the legal aspects of third party intrusions into contracts for the sale of goods, the invasion of privacy etc with full "Electronic Funds Transfer Systems", some problems associated with automated teller machines, the unsolicited dispatch of bankcards and other implications for the existing cheque system. The individual retailer is more likely to be influenced by the sales ability

of the bank officer promoting bankcards, the nature of his relationship with his bank and the state of his overdraft, term loan or advances, or whether other stores in the immediate neighbourhood or of a similar store type have joined or are said to have joined. The Federation has the responsibility to look beyond the immediate aspect of bankcards and try to safeguard the longer term interests of the industry."

2.35(a) Retfed's criticisms as summarised in its paragraph 1.9 appear to be as follow, with my comments on them:-

(i) "The commission based fees". I must say I find ambivalent, and debilitating of the Federation's objection to bank cards, the association of the statements "the Federation's main objection relates to the cost of bankcards to retailers" and "a flat fee will overcome much of the retailer sector's criticism". It appears to me to be reasonable to expect that, whether the charge is on a flat fee or a percentage basis, each bank will endeavour to obtain from retailers in total what it considers it needs as remuneration for its services. In that case, it would appear there should be little or no difference in total cost to the retail sector and thus I find it difficult to understand why a flat fee basis should overcome much of the sector's criticism. The incidence of the charge would alter, of course, on a flat fee basis with the small-value transaction bearing a proportionately higher charge than the high-value transaction. In my view the percentage fee is a fairer method of charging as between retailers and as between goods of different value. It is to be expected that there will be a higher profit mark-up on the highly priced good out of which to bear the higher percentage fee to the bank, while out of the low profit mark-up on the low priced good has to come only the lower percentage-based fee. It is for the retailer to decide whether he will or will not accept bank cards. If he does he must expect to pay for the facility and I can see, in the percentage basis of charging, no mischief whatever to the objectives of the Act.

(ii) "the macro-economic effects of the creation of consumer credit, the implications for the retail trade if a significant volume of trade can be "shut-off" by controls being imposed on bankcard

credit". The "implications" of such considerations as these are, in my opinion, outside the jurisdictional ambit of the Commission. They fall within the province of the national financial authorities and Reserve Bank. I cannot see how they can be linked with mischiefs of the type comprehended by, or intended to be comprehended by, section 23.

(iii) "the legal aspects of third party intrusions into contracts for the sale of goods". This subject was adverted to in a general way only with no specifications of "legal aspects". Moreover, it is my view that the Commission is not the body to consider and rule upon technical legal questions; that, I consider, is the function of the Courts and of the law-making authorities. Section 23 does not appear to me to be concerned with legal technicalities but with matters of principle in promoting a freely flowing, competitive, economy.

(iv) "the invasion of privacy etc. with full "Electronic Funds Transfer Systems" some problems associated with automated teller machines". These appear to be possible developments of the future whose implications are, as yet, not capable of dependable assessment. They could just as well prove to be beneficial developments. There was no satisfactory evidence to link them with mischiefs within the ambit of section 23.

(v) "other implications for the existing cheque system." This appears to have relevance to the extent, if any, to which payment by bank cards may replace payment by cheques. Nothing in the evidence persuaded me to the view that the addition of another means of payment to those already available, at the volition of both customer and retailer, could amount to a mischief in terms of section 23.

(vi) "the nature of his relationship with his bank and the state of his overdraft, term loan or advances, or whether other stores in immediate neighbourhood or of a similar store type have joined ..." These aspects have already been dealt with in discussion of the Examiner's report under the headings respectively of "leverage" (my paragraph 2.34(c)) and "domino" effect (my paragraph 2.34(b)).

2.35(b) In my opinion, Retfed did not substantiate any mischief which could be considered to conflict with the Act's

basic objective of promoting the free, competitive, flow of trade or with any other objective of the Act.

2.36 The gravamen of the Consumer Council's support of the Examiner's recommendation was that it considered bank cards would have certain effects contrary to the public interest in terms of section 21(1).

2.36(a) The Council's view may, I think, be fairly summarised in the following extract from its final submissions:-

> "The Consumer Council has submitted (page 306) that bankcards are a trade practice which is likely to have the following effects in terms of S.21(1) of the Act:
>
> "(a) To increase the costs relating to the production, manufacture, transport, storage, or distribution of goods, or to maintain such costs at a higher level than would have obtained but for the trade practice; or
>
> "(b) To increase the prices at which goods are sold or to maintain such prices at a higher level than would have obtained but for the trade practice; or
>
> "(c) To hinder or prevent a reduction in the costs relating to the production, manufacture, transport, storage, or distribution of goods, or in the prices at which goods are sold; or
>
> "(f) To reduce or limit competition in the production, manufacture, supply, transportation, storage, sale, or purchase of any goods; or
>
> "(h) To ... alter, restrict, or limit, to the disadvantage of consumers, the terms or conditions under which goods are offered to consumers."
>
> The main thrust of the Consumer Council's submission is that the proliferation of bankcards is likely to lead to increases in costs and prices; prevention of reduction in costs; lessening of competition; and disadvantageous restrictions on the terms under which goods are offered to consumers. The likely effects of the trade practice are therefore of kinds that are contrary to the public interest."

2.36(b) The Council falls into the same error as the Examiner.

It overlooks the fundamental two-tier structure. It overlooks that, to be "examinable", a trade practice must be a mischievous one with the mischief or mischievous implication defined; that is the first tier. The effects contrary to the public interest listed in section 21(1) are only the second tier; they do not constitute the mischief or mischievous implication of a trade practice by reason of which the practice may be specified for the purposes of paragraph 23(1)(n); they are the effects of the mischief.

2.37 The CSU appeared, similarly, to be primarily concerned with its opinion of the effects bank cards could have contrary to the public interest in terms of section 21(1).

2.37(a) It appeared to perceive the fundamental two-tier structure in stating in its submission:-

"10. This process leads to a consideration of the types of trade practice specified in S.23. The recommendation of the Examiner seeks to add one type of trade practice to an existing list of trade practices. It is important to note that inclusion on the list in S.23 does not establish that a trade practice is, or is likely to be, contrary to the public interest. It merely establishes that such a trade practice may be contrary to the public interest, depending on how it is operated. Establishing that a trade practice is contrary to the public interest is a quite separate exercise.

11. That separate exercise involves two steps. These are itemised in S.22 of the Act. Firstly, the Commission must form the opinion that a trade practice falls within one of the categories in S.23. (This is the necessary condition, but it is not a sufficient condition.) The second step is to establish that the introduction or continuance or repetition of the trade practice would be contrary to the public interest ..."

2.37(b) A little later on, however, it went on to state -

"15. A decision on whether or not a trade practice should be added to the list in S.23 can only be made by reference to the definition of

> what effects are contrary to the public interest in terms of the Act. Thus, if it is likely that a practice may have any of the effects listed in S.21(1) of the Act, it is advisable to include the practice in the list in S.23."

It then proceeded to develop that view to support its opinion that bank cards should be specified for the purposes of section 23. I have already, in my paragraph 2.26, pointed to the intolerable situation which would be produced by making a trade practice "examinable" by reason only of its having one of the effects of section 21(1).

2.37(c) Thus, despite what it says in its paragraphs 10 and 11, the CSU appears to fall into the same error of assuming that one or more of the effects of section 21(1) may serve as the mischief by reason of which a practice may be listed in section 23(1).

2.37(d) However, CSU did voice some other criticisms which could be considered to see whether they might qualify as mischiefs for the purposes of section 23(1).

2.37(e) One such criticism relates to the subsidising of card users by non-users. "The cash customer is an unwitting victim of a scheme that is of advantage to retailer, card operator and card customer." I have, in my paragraph 2.34(a), considered this subject at some length. I cannot recognise it as a mischief.

2.37(f) Another criticism was that, if the banks' costs of operating their bank card schemes should increase, the banks could seek to recover the increased costs by such means as reducing the interest-free period of credit, perhaps even eliminating the interest-free period by changing from credit card to debit card; by making a monthly charge on customers who clear their balances during the interest-free period; or by other means. This criticism is surmise and in my opinion surmise cannot be recognised as a present mischief even if the criticism could otherwise be recognised as a mischief for the purposes of section 23(1); a bona fide increase in price which does not amount to profiteering does not constitute a mischief.

2.37(g) Again, CSU stated there was a trend overseas to introduce "point of sales terminals from a baseline

which allows all aspects of the customer's credit worthiness to be assessed" which "will constitute a serious erosion of personal privacy regarding financial details". As I have said in my paragraph 2.35(a)(iv) in commenting on a similar criticism by Retfed, this appears to be a possible development of the future whose implications would presently be incapable of dependable assessment. If it should come about it could just as well prove, on balance, to be a beneficial development. There was no satisfactory evidence to link it with mischief to the objectives of the Act.

2.37(h) In my opinion the CSU did not substantiate any mischief in bank cards which would conflict with any objective of the Act and so qualify for addition to section 23(1).

2.38 To conclude under this heading, neither the Examiner nor any of the parties who supported him satisfied me that (leaving aside "leverage" against which, however, the Act already provides) there is in the bank cards trade practice any mischief which would conflict with any objective of the Act and so justify the addition of the practice to those already specified and defined in section 23(1).

3. THE EFFECTS AND PROVISIONS OF SECTION 21 ARE TO BE CONSIDERED IN APPLICATION TO THE GOODS OR SERVICES WHICH ARE THE SUBJECT OF THE TRADE PRACTICE.

3.1 In the Commission's interpretation of section 21, the effects and provisions of the section are to be considered in application to the goods or, as in this case, the services which are the subject of the trade practice. That means that, in the Commission's interpretation, the effects and provisions of the section should have been considered in application to the bank card services which are the subject of the bank cards trade practice.

3.2 The Commission expressed itself on this subject in some detail in its Decision No. 30 of 2 August 1978. That Decision related to the charges made by members of the New Zealand Woolbrokers' Association for their services in selling wool. It is appropriate to repeat here what the Commission said in explanation of its interpretation of the section:-

"71. Counsel for the Examiner in his closing submission invited the Commission to give its view and to state whether section 21(1)(a) of the Act is capable of interpretation and application "as referring to the "costs" of the goods or services which are the subject of the practice or, whether "costs" relates to other goods and services at large or, whether both interpretations are available". Specifically counsel contended the practice under inquiry was capable of being caught within section 21(1)(a) as having "by inference, detrimental effects on the costs of wool production".

72. To judge the intent of this section and determine its scope and limitations the Commission considers it is first necessary to examine all of the paragraphs of section 21(1) and the relationships between them. In its total context this section sets out to encompass all facets of a commercial operation step by step, devoting one or more paragraphs to each of the various sectors ranging from costs through prices, profits, competition and supply, to finally, terms and conditions. In each it provides against manipulations which would act to the detriment of consumers.

73. It appears to the Commission that each paragraph of 21(1), including paragraph (a) cited by counsel, is intended to be specific to the operations contained within the practice and not to a related activity outside or remote from the practice.

74. This ruling is perhaps made apparent if in the particular practice of the Woolbrokers, the provisions of section 123 are applied to section 21(1)(a). Section 123 provides that, "all the provisions of this Act, as far as they are applicable and with the necessary modifications, shall apply with respect to the performance of services ... and the rates or fees charged therefor and the costs of providing the services in the same manner as they apply in respect of the sale of goods and the prices charged for goods and the costs of the production, manufacture, transport, storage and distribution of goods".

75. The Commission particularly notes the requirement to substitute "performance of services" for "sale of goods"; "rates of fees charged" for "prices charged"; also "costs of providing services" for "costs of production", and applies these to section 21(1) in

" the instance of the Woolbrokers agreement so that it then reads:-

> "To increase the costs relating to the provision of services or to maintain such costs at a higher level than would have obtained but for the trade practice."

76. Such substitution leaves for consideration only "the costs relating to the provision of services", and the Commission is firmly of the view it is not intended to relate these costs to a prior or subsequent remote activity, such as "the costs of wool production", as suggested by counsel. Neither would such an interpretation be necessary as ample provision exists in the collective force of section 21(1) for a practice to be caught effectively within one or more paragraphs and by the natural flow-on effects from costs to prices etc., within the practice itself.

77. Further strength is given to this opinion when considering the effects of a practice under section 21(2) and whether under subsection (b) the effect or effects are not unreasonable using the criteria set out in section 21(3)(a) and (b). This latter subsection provides that in considering the effect described in paragraph (a), amongst others, of section 21(1), for the Commission to use the comparison of the price that would obtain for "the goods" as if they were subject to price control and, in the case of a collective pricing practice the price in respect of "the goods" for "each individual party to the practice" and on an industry or group basis. Likewise section 21(4)(b) provides that in considering paragraphs (e) and (f) of section 21(1) the Commission have regard to the demand for "the goods in question".

78. These provisions are quite specific to "the goods", or in this case "the services", of an individual party, and the parties collectively to the practice, as to the prices which would pertain to them and to the demand "for the goods (or services) in question". It is therefore not possible in applying these criteria to extend consideration of the effects of section 21(1) beyond the confines of the practice itself. "

3.3 Pursuant to section 40(1)(d) the Examiner is required to form the opinion that the trade practice has or is likely to have effects contrary to the public interest and, pursuant to section 40(2)(c)(ii), to show in his report to the Commission, "By reference to section 21(1) of this Act", the grounds for his opinion. In terms of section 21 a trade practice shall be deemed contrary to the public interest only if, in the opinion of the Commission, its effect would be any of those detailed in paragraphs (a) to (h) of subsection (1) of that section. In the Commission's interpretation of section 21, as set out in my preceding paragraph, the Examiner should, in forming his opinion, have considered the effects and provisions of the section in application to the bank card services which are the subject of the trade practice. But he did not do that. Instead, he considered the effects and provisions of the section in application to goods and services sold by retailers.

3.4 So did all the other parties. As I have said, some criticisms were expressed of the bank cards themselves, in contradistinction to their surmised effects on the retail sector, but in no case were the provisions of section 21, in particular the effects detailed in subsection (1) of the section, considered in specific applicability to the bank card services themselves. Thus, even if it were possible to consider any of those criticisms a mischief for the purposes of section 23, it would still remain that no argument or evidence was advanced directed to demonstrating that any of the effects of section 21(1) would apply to the bank card services.

3.5 In the circumstances I consider the only possible conclusion is that the Commission was provided with no evidence which it can consider is related to the question of whether the trade practice has or is likely to have effects contrary to the public interest.

4. CONCLUSION

4.1 In my opinion the Examiner's recommendation must fail because -

(a) Apart from "leverage", which is already provided against, no mischief has been shown in the bank cards trade practice

which would conflict with the Act's basic objective of promoting the free, competitive, flow of trade or with any other objective of the Act. Without that essential ingredient of mischief the trade practice cannot be prescribed for the purposes of subsection (1) of section 23.

(b) No evidence was presented to the Commission which could be considered to be related to the question of whether the trade practice has or is likely to have effects contrary to the public interest.

(J. R. TIPPING)