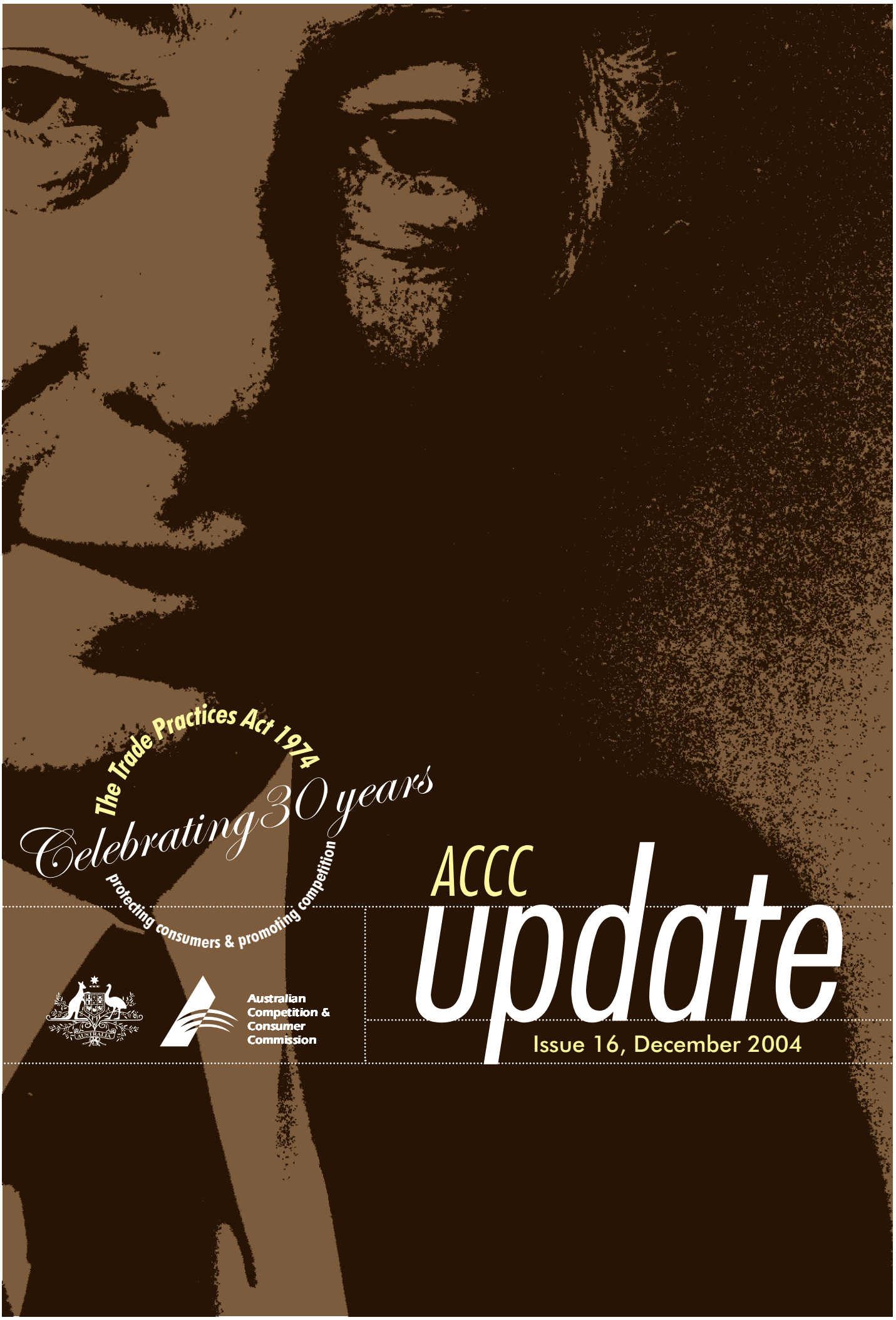

ACCC update

Issue 16, December 2004

Australian Competition & Consumer Commission

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Mr Justice Lionel Murphy
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CLARIFICATION

In the July edition of *ACCC update*, we published a consumer case study about a QANTAS/ British Airways brochure offering around the world tickets, which triggered an action by a customer against the airlines for misleading or deceptive conduct. The case was decided by the Federal Court in 1988. The ACCC apologises for any misunderstanding that any person may have had about the currency of the matter referred to in that case study.

editorial:

'Mr President, it will be apparent to honourable senators that the Bill is of great importance. It represents a great advance in areas of restrictive trade practices and consumer protection and attends to a wide variety of problems. This is intended to promote efficiency and competition in business, to reduce prices and to protect all Australians against unfair practices. I commend the Bill to the Senate.'

With these words Lionel Murphy concluded the second reading of the Trade Practices Bill 1974 on 30 July 1974. The Bill was similar to the one Senator Murphy introduced into the Senate on 27 September 1973 except that on that occasion Opposition senators were not prepared to debate it. Indeed, the Bill is credited with being the major provocation for constitutional considerations relating to the double dissolution of parliament in May 1974.

With the return of the Whitlam Labor government, Murphy's legislation was passed into law and the Trade Practices Act commenced on 1 October 1974. It was accepted that the effectiveness of the law would depend on the existence of a strong administrative agency and the Bill legislated for the creation of the Trade Practices Commission to replace the Commissioner of Trade Practices. It, too, came into effect on 1 October 1974.

Four months later, while visiting the High Court at Melbourne in his new capacity as a Justice of the High Court, Lionel Murphy observed:

'There is no doubt that in the rest of this century Australia is going to face great changes; in fact the rate of change seems to be accelerating. There is no doubt that this court and other courts will be faced with the development of new principles in consumer protection, in environmental law, in the various questions of human rights, in giving persons more access to the courts of Australia—many of these problems will arise and will be solved by the courts of Australia and principally by this court by the application of judicial principles within the judicial process.'

The truth of Lionel Murphy's prediction is amply demonstrated in the history of the Trade Practices Act reflected in this 30th anniversary commemorative issue of *ACCC update*.

Australian Competition & Consumer Commission

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The Trade Practices Act— the first 30 years

For more than a decade Australia has experienced consistently strong rates of economic growth, outstripping that of most other OECD countries by a significant margin.

Graeme Samuel, ACCC Chair, credits this performance to the introduction, 30 years ago, of the *Trade Practices Act 1974*.

Unemployment is at a 20 year low, interest rates remain close to their lowest levels in over 30 years, and spurred by innovations in communications, financial services and information-based technologies, Australian firms now compete successfully against the rest of the world.

A key factor in this has been decades of work to make the Australian economy more open and more competitive, the genesis of which can be traced back to the introduction, 30 years ago, of the *Trade Practices Act 1974*.

Before the introduction of this Act, Australia's relatively small and closed economy was riddled with bid-rigging, cartels, price fixing, anti-competitive practices and deception in marketing and advertising.

An attempt had been made from the earliest days of Federation to outlaw such practices with the *Australian Industries Preservation Act 1906*. But the legislation was shot down by the High Court in its very first challenge in 1909 in *Huddart Parker & Co Pty Ltd v Moorehead* and was effectively rendered unworkable by a further successful challenge in 1913 by *Re Coal vend*.

It wasn't until 1965 that a further attempt was made with the *Trade Practices Act 1965* creating a Trade Practices Tribunal to examine agreements and practices to determine whether they were contrary to the public interest.

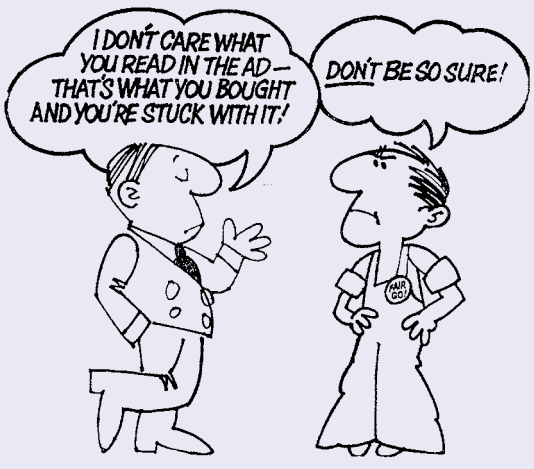
This Act survived High Court challenges and thus established the precedent that the Australian Government could legislate for corporations. Fortified by this, the newly elected Whitlam Government's Attorney General Lionel Murphy withstood fierce opposition to create the *Trade Practices Act 1974*, and thus began the modern era of competition law.

While the legislation was long overdue, the delay did allow Australia to learn from the experiences of the US and Europe. It struck a sensible balance that recognised the need for strong competition laws, while acknowledging the need in a relatively small economy like Australia for some forms of anti-competitive behaviour to be authorised on the grounds of public benefit.

But the Act was a huge shake-up for many business figures who saw it as the absolute antithesis to the way they thought business should be done in Australia. And—crucially—it also provided for the first time a federal body of consumer protection law which prohibited misleading and deceptive conduct and provided extensive protection for consumers by imposing obligations on business to ensure goods met appropriate safety standards and were fit for the purpose for which they were sold.

The Act has gone through various forms since then, and at last count, had been subjected to at least 16 major reviews in its first 30 years. Notwithstanding these reviews, the fundamental structure and content of the Act have remained intact.

Changes to the Act in 1996 as a result of National Competition Policy were undoubtedly the biggest reforms of those 30 years as they extended the Act to previously off-limits or protected areas of the economy such as the professions, public utilities, agricultural marketing boards and many small businesses.



Attorney General's Department newspaper campaign, 1974

In short, they completed the picture as they meant that the full breadth of the Australian economy was finally exposed to the full disciplines of competition law and policy under the watchful eye of the new Australian Competition and Consumer Commission.

National Competition Policy did not then, and nor does it now, require privatisation. Neither does it require that all legislation restricting competition be scrapped. What it does require is that any restrictions on competition now have to be justified as having an overwhelming public benefit if they are to remain.

While the 1996 changes may have been the most substantial, all of the reviews and changes have contributed to four consistent features:

- strengthening of the competition policy culture that is now a fundamental part of the Australian economy
- development of consumer protection laws, including criminal prosecutions for those who breach the laws; still, only civil proceedings can be brought for misleading and deceptive conduct in breach of s. 52
- development of specific competition regimes for key areas such as telecommunications and shipping
- development of regulatory regimes to enable access to, and the opening up of, competition in essential national infrastructure such as gas pipelines, electricity grids and rail lines.

Fundamentally the role of the ACCC and the *Trade Practices Act 1974* is to enhance the interests of Australian consumers by promoting fair, vigorous and lawful competition, whether it be between big, medium and/or small businesses.

It is not now, and never has been, the mandate of the ACCC to preserve competitors or protect any sectors of the economy from competition.

The High Court recognised this in the 2003 Boral case:

> The purpose of the Act is to promote competition, not to protect the private interests of particular persons or corporations.[1]

As did the 2003 Dawson Committee Review into the Competition Provisions of the Act:

> Of course, concentrated markets should attract scrutiny to ensure that competition is maintained, but the purpose of the competition provisions of the Act is to promote and protect the competitive process rather than to protect individual competitors.[2]

This is not to say that small business has no protection under the Act.

The difficult bit of course is getting the balance right and ensuring that regulations that help small business to compete on a more equal footing don't do so at the expense of consumers.

The ACCC has long recognised that when it comes to dealing with big business—as both a customer and supplier—small business often starts behind the eight ball with little or no bargaining power.

But while tough bargaining is perfectly legal under the Act, small business has a right to be protected from bullying or harsh and oppressive conduct.

And to improve the bargaining process, the ACCC enables small businesses to band together to bargain collectively if there is a clear public benefit. In coming months we are likely to see new legislation to make this process easier for small business.

The challenges for the future are fourfold:

- to ensure Australia does not turn back from the fundamental culture of promoting competition and a vigorous competitive environment as enshrined in the Act by seeking to protect certain sectors from competition
- to develop the regulatory framework, particularly for telecommunications, to protect emerging new technologies and enable them to develop and promote competition
- to protect access to crucial national infrastructure and so promote competition in areas like gas, electricity and rail
- to extend the reach of competition and consumer protection law through international cooperation to ensure both consumers and business taking advantage of the globalisation of trade through the internet continue to receive the same level of protection from the Act.

After 30 years the *Trade Practices Act 1974* is still Australia's principal legislative weapon to ensure that the Australian community reaps the benefits from a vigorous, lawful, competitive business environment.

In March last year the OECD for example concluded that:

> The implementation of Australia's ambitious and comprehensive National Competition Policy over the past seven years has undoubtedly made a substantial contribution to the recent improvement in labour and multi-factor productivity and economic growth. The Productivity Commission estimates that Australia's GDP is now about 2.5% higher than it would otherwise have been, and Australian households' annual incomes are on average around $7000 higher as a result of competition policy.[3]

This is not to say that everyone has benefited equally, or that some have not suffered as a result of having their formerly protected business opened up to competition, but any fair summary of the last three decades would have to conclude that the Trade Practices Act has been a key factor in Australia's economic success story.

Graeme Samuel | Chair, ACCC

CANBERRA

Privy to the Act

All shades and colour of comment passed between legislators, administrators, captains of industry and lobbyists in the formulation and implementation of the 1974 Act. No one group of people outside the cabinet room had a more privileged ear to this exchange than the chairmen of the Trade Practices Commission. Here, they share their privy thoughts on the most provocative statements they encountered in this political volley.

Ron Bannerman was the first (and only) Commissioner of Trade Practices before becoming the first chair of the Trade Practices Commission. He reminds us that while many criticised the 1965 Act as toothless, it legislated for a type of information disclosure that was critical in giving shape to Murphy's 1974 Bill.

who: Ron Bannerman

POSITIONS: Commissioner of Trade Practices 1966–1974
Chair, Trade Practices Commission 1974–1984

Web of anti-competitive restriction

'In Australia, agreement between competitors is remarkably pervasive.'[4]

The above short sentence has been quoted many times in the mass media and elsewhere. It was incontrovertibly true, and it was news. It was a pithy summary of what the Commissioner had already said in his very first annual report in 1968. His seven annual reports from the first in 1968 to the last in 1974 (when the current 1974 Act took over) showed between them, convincingly, that a web of anti-competitive restriction was spread across Australian industry. The detail published in those reports proved that point to the parliament, to the community at large and to industry itself. The reports divided the thousands of restrictive agreements into categories, explained their operation, and provided statistical back-up.

bound by secrecy

How did the Commissioner know about all these agreements? The parties told him. They did that by lodging with him particulars of their agreements as the Act required them to do. There was no great risk in lodging an anti-competitive agreement, because that did not make it illegal, and anyway there was no presumption that it was against the public interest. The parties could carry on as before, while the Commissioner was bound by his statutory obligation of secrecy for the affairs of companies or individuals. The Commissioner could challenge an agreement and it might eventually be brought to public hearing, but it had to be shown in each case that the agreement was, on balance, against the public interest. So it looked as if active and widespread competition in Australia had a long time to wait.

annual reports changed the ball game

Well, the 1965 Act was just 'toe in the water' stuff, wasn't it? Maybe, but the Act did show an unexpected strength. As explained above, it obtained for the Commissioner information hitherto hidden and scattered in industries all round Australia. Also the Act required the Commissioner to furnish annual reports on his operations to the parliament. This could not be done credibly (*1968 Annual Report,* page iii) without giving a factual appreciation of the trade practices position in Australia as the Commissioner now knew it to be. Therefore the annual reports stated that position, but without naming companies or individuals. Those annual reports, not alone of course but with other factors at work too, changed the ball game. In effect, they showed that the position on the ground was so serious that much more effective legislation than the 1965 Act was needed to deal with it. Thus they contributed to the eventual repeal of the 1965 Act and its replacement by the 1974 Act.

It is odd that there was no requirement for annual reports in the 1965 Bill when it was introduced. After public criticism, the requirement was inserted by government amendment before the Bill was passed. Would history have been different without that amendment?

Ron Bannerman

CANBERRA

chronology

OF TRADE PRACTICES REGULATION IN AUSTRALIA

1906 **Australian Industries Preservation Act**

This was the earliest attempt by the Australian Government to legislate in the field of restrictive trade practices. Inspired by the United States Sherman Antitrust Act of 1890, the Act attempted to cover businesses engaged in interstate, overseas trade or commerce.

In *Huddart Parker & Co Pty Ltd v Moorehead* (1910), the High Court found that sections of the Act intruded into the area of purely intrastate trade and commerce. The Act fell into general disuse after this case although the sections based on trade and commerce powers were upheld in 1964 in *Redfern v Dunlop Rubber Australia Ltd* (1964).

1913 **Referendum**

In this, and similar referenda in **1919**, **1929**, **1944**, the Australian Government sought the power to deal directly with monopolies, combinations and trusts. It was unsuccessful at each ballot.

1921 **Tariff Board Act**

This empowered the Tariff Board to inquire and report on manufacturers taking undue advantage of tariff protection by charging unnecessarily high prices to consumers or acting in restraint of trade to the public detriment. The Tariff Board could recommend the reduction or removal of the protection, but this limited avenue of monopoly control was rarely used.

1956 **Western Australia Unfair Trading and Profit Control Act**

Before 1956, spasmodic and generally ineffectual provisions on restrictive trade practices had accompanied price and profit control legislation in Western Australia, New South Wales, Victoria and Queensland. The 1956 Western Australian Act's first important conviction failed on appeal to the WA Supreme Court.

1959 **Western Australia Trade Association Registration Act**

This was a weaker version of the 1956 Act compelling trade associations to register their constitution, regulations and penalties, but it made no attempt to control practices by injunction, criminal prosecution or otherwise.

1962 Attorney General Sir Garfield Barwick placed before Parliament detailed proposals for federal control of trade practices along the general lines of British legislation.

1965 **Trade Practices Act**

Federal Parliament passed an amended version of the Barwick proposal. The Act became operative on 1 September 1967. Complementary legislation was also passed by one state—Tasmania.

1965 **Victorian Collusive Practices Act**

A limited Act applying mainly to collusive tendering for government contracts.

1967 **Trade Practices Act of 1965 commences**

Businesses had to lodge their existing agreement registration with the office of the Commissioner of Trade Practices.

1969 **Consumer Protection Act (New South Wales)**

The Act is mainly concerned with collusive tendering.

Trade Practices Commission took action on 49 cases in a total of 11 882 agreements on the register and in four cases the parties decided to end their agreements after consultations with the Commissioner's office.

who: W Robert McComas

POSITION: Chair, Trade Practices Commission 1985–1988

Insightful, indeed prescient

In 1963 the then Attorney General, the late Sir Garfield Barwick, produced a table of the basic forms of business practices. His purpose was to alert the Australian business community to reasons why the government had formed an intention to legislate for the regulation of restrictive trade practices.

In his introduction he acknowledged that the need for such legislation had been questioned, but asserted that the practices noted were perceived to 'destroy or reduce freedom of action and distort the competitive pattern of our system of free enterprise'.

In the course of delivering the Robert Garran Memorial Oration on 13 November 1963, Barwick said:

> In truth, of course, the proposed legislation is intended to ensure that businessmen are freed from those privately imposed restraints, whether arising from contracts, combinations or informal agreements, which Lord Macnaghten characterized as long ago as 1894 as 'interfering with individual liberty of action in trading'.[5]

As events transpired, however, those proposals were vacated in the form envisaged and found their way onto the statute books in a much watered form in the *Restrictive Trade Practices Act 1965*, which, on being found to be beyond the constitutional reach of the Commonwealth Government[6] was replaced by the *Restrictive Trade Practices Acts 1971* and *1972*.

Those replacements provided for a system of registration and examination by the new Commissioner of Trade Practices of restrictive agreements (or details of like arrangements) under a strict regimen of confidentiality in what the then Attorney General, the late Lionel Murphy, described in his second reading of the Bill for the Act in the Senate on 15 November 1973 as 'the most ineffectual pieces of legislation ever passed by this Parliament'.[7]

However, with regard to the *Trade Practices Act 1974*, I believe the most insightful statements are found in the submissions made on behalf of the business community.

The business community's reaction to the Act can only be described as shock. Traditionally normal, widespread conduct such as exclusive dealing, would now be examined to determine its impact upon competition and could no longer be justified as reasonably necessary to protect the property and goodwill of manufacturers wishing to ensure that their distributors directed their attention to promoting that property and goodwill without the distraction which would inevitably follow were the distributors free to handle competing products.

This reaction is best summarised in a short commentary such as appeared in *Analysis (of the 1973 Bill for the Act) With Proposals for Amendments* published by the Australian Industries Development Association in Canberra in February 1974.

The association (known as AIDA) was the main predecessor of the present Business Council of Australia. It represented all major business houses in Australia and established a committee of corporate lawyers well advised and knowledgeable in commercial as well as legal circles. It was lead by a partner of a leading Melbourne firm jointly with a leading Sydney corporate lawyer.

laws … need to be brought in gently and gradually though a process of evolution

They settled the draft *Analysis* and it was presented to the Attorney General in Canberra by the Sydney corporate lawyer and two members of a major Sydney law firm when, over two very full days, the amendments it proposed were debated. The Attorney General was receptive and some of the proposals were accepted.

In my view, the Foreword to that *Analysis* succinctly represents the concerns which the business community had as evident from the following extracts:

> Laws affecting business activity need to be brought in gently and gradually through a process of evolution. Sudden changes in trade customs and practices can produce widespread results economically detrimental to the nation. A law such as that set out in the Bill will take a long time to be understood and absorbed in business practices at all levels.

The *Analysis* acknowledged that

> business practices detrimental to the public interest—as represented by the interests of consumers, employees, producers and proprietors and the overall welfare of the economy as a whole—should be debarred. But the legislation should be appropriate to the Australian situation, and not a copy of the United Kingdom legislation, as proposed by the previous Government, nor of the USA, as proposed by the present Government.

In my opinion, these extracts demonstrate that this *Analysis* represented the most insightful, indeed prescient, of all submissions on the 1973 Bill.

W Robert McComas

SYDNEY

chronology

OF TRADE PRACTICES REGULATION IN AUSTRALIA

1969

Statement of intention by states governments

Attorney Generals of states other than Tasmania confirmed their intention not to pass state legislation to parallel the 1965 Federal Act.

***Tasmanian Breweries* case**

The first trade practices hearing was brought before the Trade Practices Tribunal. The matter concerns Tasmanian Breweries Pty Ltd.

1970

High Court finds in favour of the Tribunal

Tasmanian Breweries subsequently gave undertakings under s. 79 of the Trade Practices Act that it would not indulge in a wide range of restrictive practices.

1971

***Concrete Pipes* case**

Various concrete pipe manufacturers successfully challenged the Act in the now famous *Concrete Pipes* case (*Strickland v Rocla Concrete Pipes Ltd*).

The High Court held that the 1965 Trade Practices Act cannot operate intrastate; that the Act was invalid.

Resale price maintenance amendments are made to the Trade Practices Act.

Restrictive Trade Practices Act

Following the decision of the *Concrete Pipes* case, the government repealed the 1965 Act and passed the *Restrictive Trade Practices Act 1971*. The Act contained provisions similar to its predecessor but its constitutional basis was the corporations power of the Commonwealth alone, subject to one exemption in relation to Part X which was founded (and still is founded) on the overseas trade and commerce power.

1973

Detailed proposals for a new trade practices legislation

Based partly on US provisions, new legislative proposals were placed before the Australian Parliament in the form of a Trade Practices Bill by the Labor Government's Attorney General Senator Lionel Murphy.

1974

Trade Practices Act

After the federal election in May 1974, the Murphy Bill, as modified, was passed. The *Trade Practices Act 1974* contained prohibitions with the possibility of clearances and authorisations as well as consumer protection provisions.

1976

The Swanson Committee

A detailed review of the Trade Practices Act was undertaken by the Trade Practices Review Committee, chaired by Mr T Swanson.

Section 46 as enacted in 1974 did not adopt a terminology of 'purpose' or 'effect'. Following the committee's recommendations, the words 'for the purpose of' were introduced to s. 46. This amendment was designed to emphasise that it was not necessary that the proscribed purpose actually be achieved. Conduct could be ineffectual and fail to achieve one of the proscribed purposes, but could still be unlawful.

The changes to s. 46 were part of a wider set of changes seen as weakening the impact of the Act. Certain of the Swanson Committee recommendations were not adopted, including those relating to the rights of franchisees and the call for the repeal of s. 49, dealing with price discrimination. Section 49 was repealed in 1995 following the recommendation of the Hilmer Committee.

who: Professor Bob Baxt

POSITION: Chair, Trade Practices Commission 1988–1991

Mischievous or misguided views about the impact of the Act

While the Trade Practices Act has only been in force for 30 years, it has achieved a number of successes thanks to its fearless administration by the relevant regulator—the Trade Practices Commission until 1995 and now the Australian Competition and Consumer Commission. In these short observations I comment on the mischievous and misguided views about the impact and importance of the Act, some of which regrettably still remain part of our culture.

Because the penalties for breaching the competition provisions of the Act (Part IV) were so low when the Act was introduced—a maximum of $250 000 civil penalty for corporations and $50 000 maximum for individuals—companies and their officers for many years paid inadequate attention to the potential impact of the legislation. Despite vigorous enforcement of the Act by successive chairmen of the relevant commission, my experience as chair from April 1988 to June 1991, was that the relatively nominal penalties often led to a cost benefit analysis being undertaken by companies (and their officers) as to whether they could 'get away with' certain cartel or similar behaviour. Much of this concerned price fixing and related market practices.

compliance should be part and parcel of every corporation

Despite the fact that the penalties have been significantly increased since 1993, regrettably—and this is based not only on my own first hand experience but that of others—there is still inadequate attention being given to compliance with the Act. There remains a belief in many sections of the community that compliance with this type of legislation (as well as other legislation of a similar nature) is of lesser importance than trying to make as much money as possible for the relevant organisation. The lack of appropriate application in the context of corporate governance and related matters surrounding the operation of the Corporations Act (and the corresponding common law) highlights and emphasises that this observation is a justified one—refer in particular to the remarks of Justice Owen in the HIH Royal Commission. The promulgation of the Commonwealth Criminal Code from December 2000 (bringing into effect the Criminal Code Act of 1995) has also enhanced a greater need for compliance to be part and parcel of the life of every corporation that operates under Commonwealth law.

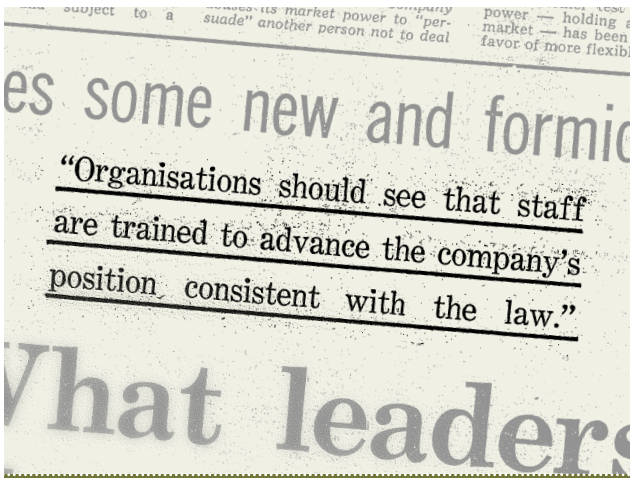
The recently 'lapsed' Trade Practices Legislation Amendment Bill 2004, if enacted in its current form, will increase the penalties under the current legislation beyond their already high thresholds. However, it is at least arguable that until our courts start to impose penalties close to the maximum available for breaches of Part IV of the Act, that businesses will continue to take a rather sceptical view about the impact of the legislation. Furthermore, with the introduction of possible criminal sanctions, we may see quite a different philosophy being adopted by the community.

Another failing of the legislation, leading to either mischievous or misguided views, is the fact that it still does not apply fully to all range of business and commercial activities. There are still sections of government activity, for example, that are protected from the operation of the Act. There is still successful lobbying being achieved by special interest groups to exclude the operation of the Act for sections of our business economy (for example, Overseas Cargo Shipping—Part X of the Act). If there is to be exemption from operation of the Act, that exemption should be evaluated through the authorisation process. This carries with it the right to review the determination of the ACCC. The Australian Competition Tribunal has shown that it will not necessarily rubber stamp the views of the ACCC in dealing with authorisations. However, that is the appropriate process for determining whether special interest groups deserve exemption from the operation of the Act.

Until the community understands that the Act applies universally across all sections of business, the professions and government commercial activity, scepticism about the full application of the Act, its operation and the consequences of breaches of specific provisions will continue to impact on the way in which the ACCC administers the legislation and how it is received in the community.

Bob Baxt | Partner, Allen Arthur Robinson

MELBOURNE



from *'The Age' Plain Man's Guide to Trade Practices, Special AGE Liftout'*, Monday 11 November 1974

chronology

OF TRADE PRACTICES REGULATION IN AUSTRALIA

1979 The Blunt Committee

Chaired by Gaire Blunt, the committee had been set up to assist the government to maintain current information on the operation of the Act.

In December 1979 the committee completed the report *Small business and the Trade Practices Act*. Like the Swanson Committee, this report recommended the repeal of s. 49. The Blunt committee also recommended two amendments to s. 46:

- the 'position to substantial control' threshold should be altered to 'substantial degree of power in the market', and
- 'take advantage of the power' should be altered to 'use that power'.

On 15 November 1981 the Trade Practices Consultative Committee was discontinued.

1984 Green Paper

In February the Attorney General Senator Gareth Evans QC released a discussion paper called *The Trade Practices Act—Proposals for Change* (Green Paper). Although the Exposure Draft was never formally introduced into Parliament, two of the amendments proposed were introduced under the Statute Law Revision Amendments in 1984. One of these granted certain exceptions to prescribed information providers (s. 65A). The other dealt with the enforcement of payment of fines, but was never proclaimed to commence and was later repealed by the *Trade Practises Revision Act 1986*.

1985 Trade Practices Amendment Bill

Introduced in October 1985, this Bill proposed a number of substantial amendments to the Act including lowering of the threshold test in s. 46, regulating certain overseas mergers under s. 50A, prohibiting of unconscionable conduct under s. 52A and rewriting the Product Safety and Information provisions under Part V, Division 1A.

1986 Trade Practices Revision Bill

This Bill superseded the 1985 Amendment Bill and commenced substantially on 1 July 1986.

Trade Practices (Transfer of Market Dominance) Act

The second amending Act introduced in 1986, amended the mergers provision under s. 50 and came into operation on 1 June 1986.

(Section 52A was renumbered as s. 51AB and relocated in Part IVA by the *Trade Practices Legislation Amendment Act 1992*.)

1989 The Griffiths Committee

In 1988 the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Griffiths Committee) inquired into the adequacy of existing legislative controls over mergers, takeovers and monopolies under the Act.

In May 1989 the Committee issued the report *Mergers, Takeovers, and Monopolies: Profiting from Competition?* On 22 August 1991 the Attorney General accepted the committee's recommendations but indicated that they would be examined in the light of any contradictory recommendations of a Senate Committee then inquiring, among other things, also into the adequacy of existing legislative controls into mergers, monopolies and acquisitions—the Cooney Committee.

1991 The Cooney Committee

In December 1991 the Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee) issued the report *Mergers, Monopolies, & Acquisitions. Adequacy of Existing Legislative Controls.*

The Trade Practices Commission's submission to the Cooney Committee recommended a change of the test in the mergers provisions to enable it to examine all major mergers that substantially lessen competition and for compulsory pre-notification of mergers.

continued pg. 14

who: Professor Allan Fels

POSITIONS: Chair, Trade Practices Commission 1991–1994
Chair, ACCC 1995–2003

Prices policies come and go

The quote which I always remember was by Mr Ron Bannerman, the first Trade Practices Commission Chairman, when I spoke in Canberra to the Economic Society in 1974. At that time I was a newly appointed, part time academic member of the Prices Justification Tribunal and it was receiving a great deal of media attention, much more than the Trade Practices Commission. Price regulation seemed more important than a competition law. After my speech Ron introduced himself and quietly mentioned to me that prices policies come and go, that at times they get more publicity and seem more important, but in the longer term the Trade Practices Act would have the bigger and more beneficial effect.

Over the years, as I have watched the fortunes of the two wax and wane, I began to see more the truth of his observation.

In the period from 1974 until about the end of 1975, the Prices Justification Tribunal had enormous power and effect. It had to approve nearly all big business prices in advance. Then it was cut back. In 1978 there was a comeback when Mr John Howard, then Minister for Business and Consumer Affairs, was the Minister who presided over an Australia-wide price freeze for a few months. Then the fortunes of the Prices Justification Tribunal and its successor the Petroleum Products Pricing Authority began to recede.

The Prices Surveillance Authority was established in 1984 by the Labor government and probably was regarded as significant as the Trade Practices Commission for a time, if only because the Commission was not especially active. After that there were two more occasions when prices policy seemed more important. The first was when the price of crude oil rose sharply during the Iraq/Kuwait war in 1991 and the government froze the price of petrol. The second was during the period when the Goods and Services Tax was introduced in the year 2000.

I spent most of my time during these periods of price regulation trying to ensure that no great harm was done by the pricing controls and this was achieved by generally making sure that they did not have too big an effect. I think it is hard to see general price controls or the like coming back. But price policy is not dead. The ACCC and state regulators now spend a great deal of time on access prices. 'The King is dead: long live the King', as the saying goes. But the more basic competition provisions of the Act are more important.

Trade Practices Act … a big bang effect in 1974

In the meantime the Trade Practices Act became more important and effective. There was a big bang effect in 1974 when it was introduced. Many cartels and anti-competitive practices ceased. Then the commission became somewhat tied down dealing with numerous authorisation applications, but it made some further progress. During the 1980s, things happened but the atmosphere was one in which governments did not seem to want the commission to do too much and this was reflected in its limited budget and in various legislative changes that softened the law.

During the 1990s there was more of a pick-up. Fines increased, both at the behest of the courts and the parliament; more cartels were caught and more consumer protection cases conducted. The Act was extended to cover all forms of business, including the professions and agricultural marketing boards; an access regime was introduced; other forms of public utility regulation were introduced; and there was enhanced protection for small business from unconscionable conduct. The Act has a powerful and beneficial effect on all areas of business. Thirty years after Ron Bannerman's statement there is no doubt about the correctness of his observations.

Allan Fels | Dean, The Australian and New Zealand School of Government (ANZSOG)

MELBOURNE

The development of a modern Australian consumer movement

On the 30th anniversary of the Trade Practices Act, Louise Sylvan, Deputy Chair of the ACCC, offers a portrait of the development of the modern Australian consumer movement and raises questions about the ability of the 1974 Act to grapple with the new consumer products of the 21st century.

The modern Australian consumer movement dates from 1959. Although consumer issues were tackled by labour and women's organisations since the end of World War I, single issue collective activism on consumer protection began with the foundation of the Australian Consumers' Association (ACA). Ruby Hutchinson was the founder of the ACA and her vision is recognised each year with the presentation of the Ruby Hutchinson Memorial Lecture on 15 March, World Consumer Rights Day.

Countervailing power—feminist, firebrand and MLC

A Western Australian MLC, feminist and Labor Party activist, Ruby was born the eldest girl in a family of ten children. At the turn of the 20th century, her family moved from Victoria to the gold fields of Western Australia where she grew up among committed activists in the socialist movement.

An unstoppable firebrand, Ruby was elected to the WA Legislative Council in 1954 and announced her first task would be to support Labor policy and work to have the Upper House abolished on the grounds that it was undemocratic. Every year Ruby moved a motion to abolish the Upper House and, consequently, she holds the distinct honour of being the first woman suspended from an Australian parliament as well as the first woman elected to the WA Legislative Council.

In 1957 WA Premier Bert Hawke organised a Trades and Industries Protection Council to patrol the scoundrel practice of exporting WA manufactured goods to the eastern states and then reimporting them at higher prices. Ruby was appointed to the council and Chair of the Women's Sub-committee where she saw an increasing number of complaints against poor quality goods and lack of consumer choice. On an overseas trip she visited the offices of the British product testing and publishing organisation, *Which?,* and the American publications, *Consumer Reports* and *Consumers Research Magazine*. She returned determined to start a similar independent consumers' association and publishing group in Australia.

Behind every great piece of legislation…

Ruby contacted Edna Roper, a Labor Member of the Upper House in NSW, and suggested they approach the Lord Mayor of Sydney, Harry Jensen, who reputedly had an interest in consumer issues. Alderman Jensen called a public town hall meeting, hundreds of people turned up and the ACA was founded in August 1959.

The foundation of ACA and the publication of *Choice* magazine is the first instance in Australia of citizen-based intervention in consumer markets with respect to information and education, product safety and other consumer protection advocacy. ACA is still, as it was in 1959, the only national consumer research and product testing organisation in Australia.

The populism of Ruby's mission and the ACA provides an insight to the changes occurring in Australian society that would support such a radical piece of law reform as the *Trade Practices Act 1974*. But 30 years in, it is time to question whether markets have developed in ways that take them outside the scope of the Act and the ability of regulators to deal with the issues confronting consumers in the 21st century.

Since time immemorial multiple rules have been imposed on the marketplace controlling some aspects of buying, selling and trader behaviour. Such written rules can be found as early as 4000 years ago. Hammurabi, King of Babylon (Mesopotamia) who ruled between 1792–1750 BC, addressed terms of credit, rents, quality of foods and services, prices, and weights and measures in the famous Code. While we debate whether cartel thieves should spend a term in jail in Australia, Babylon was not so gentle. The Code declares, for example, that builders are responsible for their work: if a building collapses and someone is killed, the builder was executed.

Since the very earliest days of Australian colonisation as well, laws regulated trade in essential goods and services. Bakers, publicans and butchers were licensed as early as 1806 and the British Weights and Measures Act in 1832 established standards and penalties for supplying incorrect or underweight goods. These early codes of conduct were

grounded in moral reasoning, cloaked in ideas of goodness, fairness and rightness. But they came with the caveat of 'buyer beware'.

The distinguishing characteristic of modern consumer law is, firstly—all the multiple and disparate rules of common law have been codified into one major piece of legislation; and secondly—that the modern code of conduct is based in economic reasoning, not moral reasoning.

The central tenet of this consumer protection—which is also a competition protection—holds that markets will only operate fairly and efficiently if businesses do not mislead consumers in those markets. If competition is to be fair and efficient, businesses cannot enter into price fixing agreements, use bait advertising or engage in other types of deceptive advertising. Among the many merits of the 1974 Act argued by Senator Murphy in his Second Reading of the Bill to parliament, was its anti-inflationary effect. Senator Murphy reasoned that restrictive trade practices—maintaining prices at levels higher than would otherwise prevail—contributed directly to the inflationary trend and therein reduced the likelihood that the benefits of the government's tariff cuts would be passed on to the public. These economic principles are a sophisticated overlay on the moral axioms of the old common law.

Raise the bar

The quintessential virtue of the *Trade Practices Act 1974* is that it has made the marketplace a safe place for consumers. It has enshrined in law that consumers do not like to be deceived. It also enshrines a number of statutory obligations such as warranties and refunds for consumer products. We don't have to worry if a product doesn't work because, if it doesn't you can take the product back and it will be replaced. The Act has, in fact, lifted the entire standard of retail trader behaviour in Australia. Many retailers now operate at a level of consumer protection that goes well beyond the basics of the law and continue to 'raise the bar' through customer services in a quest for customer loyalty.

Ruby Hutchinson, founder of the ACA

Thirty years in—is the Act enough?

However, in the global marketplace we have an interesting situation in relation to the newly deregulated products like financial services, telecommunications, energy and other types of services. They're not things you can hold and examine. In Australia, we find that although the markets are becoming much more competitive, many consumers don't feel that they can shop or 'figure out' these products with confidence.

Health services, for example, have a number of parameters that make it difficult for appropriately competitive markets to exist because consumers are often in no position to judge. Micro-economic reform of this sector would need to be handled with great sensitivity. Telecommunication contracts are often so complicated that many people are not sure exactly what they are buying—they can be hit with nasty surprises post purchase. Energy contracts can be equally difficult to evaluate when, for example, you are offered bundled packages of electricity, gas and internet services. Banking is a prime example of how these new service products arrive in the market without the same consumer confidence in refunds and warranties applying. Consumers don't believe they can 'send it back' if the product doesn't suit their purposes or meet their needs. In fact, one of the possible results of serious, unaddressed information asymmetry problems of this type is a market where consumers don't believe they **can** get a much better deal, so shopping around is not seen as worthwhile (e.g. retail bank accounts). With some lock-in contracts and switching costs producing a pricing pattern resulting in a 'bargains-then-ripoffs' market, consumers find they have little ability to activate more and better competition.

The issues presented by the new service products are no longer solely misleading conduct issues. They are contractual issues of bundling and blocking and the 1974 Act doesn't address these matters directly. And wherever consumers don't feel confident about their likelihood of choosing well in a market, or their ability to avoid potential problems, one often sees a sector with high consumer complaints, consumer mistrust and, in many cases, a market which is not as fully competitive as it could be. Competitive markets exist when consumers can drive them.

These developments pose very significant challenges for consumer activists, regulators and legislators. These new markets demand cutting edge consumer leadership today.

Louise Sylvan | Deputy Chair, ACCC

CANBERRA

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OF TRADE PRACTICES REGULATION IN AUSTRALIA

1992 **The Trade Practices Legislation Amendment Act**

Some of the Cooney Committee recommendations were given effect on 21 January 1992 by the Trade Practices Legislation Amendment Act. The most important changes were:

- the amendment of s. 50 to provide for the substantially lessening of the competition test
- substantially increased maximum pecuniary penalties for Part IV unconscionable conduct contraventions
- making the giving of undertakings legally enforceable under s. 87B.

1993 **The Hilmer Committee**

In October 1992 the Independent Committee of Inquiry into National Competition Policy (the Hilmer Committee) was established following agreement between federal, state and territory governments.

On 25 August 1993 the Hilmer Committee issued the report *National Competition Policy* and on 29 March 1995 the legislative package to implement the new policy was introduced into Federal Parliament. It was agreed to by the Commonwealth and state and territory governments at the Council of Australian Governments meeting on 11 April 1995.

1993 **Senate inquiry into ss. 45D and 45E**

In October 1993 the Senate Standing Committee on Employment, Education and Training reported on the operation of ss. 45D and 45E of the Act relating to secondary boycotts and recommended that:

- as a general principle, industrial disputes should be dealt with in the first instance under industrial relations legislation
- ss. 45D and 45E be repealed and the Act revised to deal with boycotts involving competitors where they have the purpose of reducing competition in a given market or otherwise restricting the trade of particular enterprises.

It recommended the Industrial Relations Act be amended to provide, among other things, a mechanism to deal with boycotts and other industrial action of the kind which has hitherto been subject to action under ss. 45D and 45E.

The recommendations were implemented by the *Industrial Relations Reform Act 1993* on 30 March 1994.

The Brazil Committee

In April 1993 the government commissioned an independent review of Part X of the Act which regulates international line cargo shipping. The Brazil Committee recommended the continuation of the regulatory regime embodied in Part X and the extension of Australia's regulatory influence to inwards liner trades. The committee also recommended the establishment of the Liner Cargo Shipping Authority to carry out all of the functions currently entrusted under Part X to the Trade Practices Commission, the Trade Practices Tribunal and the Administrative Appeals Tribunal.

1995 **Competition Reform Bill 1995** was assented to on 20 July 1995. It amended the Act to provide for:

- the creation of a new regulator, the Australian Competition and Consumer Commission (ACCC) on 6 November 1995, following the merger of the Trade Practices Commission and the Prices Surveillance Authority
- the creation of the access regime under Part IIIA
- amendments to Part IV
- facilitating the application of the competitive conduct rules under Part IV of the Trade Practices Act (and related provisions) to areas within state and territory jurisdiction
- removal of the shield of the Crown on 21 July 1996 in relation to the states and territories in so far as the Crown in those capacities carried on a business.

The *Competition Policy Reform Act 1995* also amended the *Prices Surveillance Act 1983* to formalise the monitoring powers of the ACCC and to bring state and territory owned business under the scrutiny of the ACCC.

Bring it on—180 years of service

In anticipation of the immense task facing the Trade Practices Commission, a journalist asked John McKeown, the First Assistant Commissioner of Trade Practices, how the new commission would be staffed. McKeown replied 'We are recruiting from inside and outside the Public Service. People are available, especially in state capitals, to fill the jobs. We are getting enquiries from young lawyers, people with experience in merchant banking and share analysts, for example, who are looking for this sort of work.'

Six of those initial recruits continue to work with the ACCC today. In the following pages, they share their observations on the shape of the Trade Practices Act 30 years on, crafted in the swings and roundabouts of enforcement and legislative reviews.

who: David Smith

POSITION: Commissioner, Australian Competition and Consumer Commission

I think I was blessed …

In June 2004 David Smith was appointed to serve five years as a Commissioner of the ACCC, specialising in enforcement. His appointment caps 30 years of work in all areas of the commission's regulatory activity—a public service career with absolutely no regrets.

I think I was blessed in the way I was given opportunities and challenges in our work. I don't see that as a sense of personal achievement alone, I simply see it as being a very fortunate person having landed somewhere when a piece of very important legislation took off and I had the privilege to work with some great staff and commissioners.

The whole point of the 1974 Act was to greatly strengthen a mild piece of legislation, to bring a modern trade practices law into force in Australia, encompassing both competition and the consumer protection. It established a unique Australian exemption model and applying it was an exciting challenge.

It could always have gone off the rails politically if the Trade Practices Commission (TPC) had not handled its introduction sensibly. Looking back at the early period, recognising the amount of work we had in adjudication and with clearances—the need to get our internal thinking and principles on competition 'right'—it was a challenge and I think the TPC and the Trade Practices Tribunal did a great job.

It's been a fantastic journey…

In the late 70s and early 80s we had some very significant results in the Tribunal, including *QCMA*[8], *Consulting Engineers*[9] and *Shell*[10]. We also learned from some very significant court losses: the *Ansett Avis*[11] merger case—the first contested mergers case—and the *Tradestock* cartel case[12]. For a small agency, as the TPC was then, the *Tradestock* case was immensely resource intensive and costly and we lost it. But we bounced back. It didn't take long in mergers, for example, before we were running injunction cases—*Nutt and Muddle*[13] and *Monier Wunderlich*[14] come to mind. We moved forward in relation to other price fixing matters. Success followed in the *Freight* case[15]; *Concrete* case[16]; in more recent times *Transformers*[17] and, of course, our first international cartel case, *Vitamins*[18]. We attacked resale price maintenance very vigorously. This was a great area of work in terms of getting good early results and ending much of the then resale price maintenance in Australian markets.

On the consumer protection side we were active early on and achieved great success in enforcement activities, building good precedents for Part V and the misleading and deceptive conduct provisions of the Act. We were so successful that the states quickly recognised those achievements and introduced mirror legislation (1987–1990).

The misuse of market power provisions were always going to be difficult as were the merger provisions. We had different tests imposed on us through legislative changes. Misuse of market power had changes following the *CSBP* case[19] which we lost. We have had a long and chequered history here. There has always been an argument in concentrated markets that you need a strong and effective abuse of dominance law. The *Queensland Wire* case[20],

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OF TRADE PRACTICES REGULATION IN AUSTRALIA

1996 The National Competition Council (NCC) was established under Part IIA of the Competition Reform Act and the Trade Practices Tribunal was renamed the Australian Competition Tribunal.

1997 **Reid Committee**

In May 1997 the House of Representatives Standing Committee on Industry Science and Technology (the Reid Committee) chaired by Senator Bruce Reid issued the report *Finding a balance—Towards fair trading in Australia*. The government's response *New Deal, Fair Deal* was released in September 1997 and the Trade Practices Amendment (Fair Trading Bill) 1997 was introduced and passed by Parliament in April 1998. The legislation inserted new provisions into the Act, improving protection for small business with enhanced protection against unfair trading and including:

- section 51AC providing a specific statutory remedy for small business from unconscionable commercial conduct
- sections 51AD and 51AE enabling the introduction of the mandatory Franchising Code of Conduct.

A designated commissioner with a primary focus on small business was also appointed to the ACCC.

1998 **Financial Sector Reform (Amendments and Transitional Provisions) Act 1998**

This Act gave the Australian Securities and Investment Commission (ASIC) primary responsibility for consumer protection and market integrity in the financial services sector.

1999 **Review of ss. 51(2) and 51(3) of the Trade Practices Act**

On 5 March 1999 the National Competition Council released its report examining the exemption of certain conduct from the restrictive trace practices provisions of Part IV of the Act.

In its report titled *Review of Sections 51(2) and 51(3) of the Trade Practices Act 1974* the NCC recommended that various exemptions be amended including removal of protection of price and quantity restrictions and horizontal agreements; and extending the exemption to cover intellectual property rights.

The NCC also recommended that the ACCC formulate guidelines for industry on intellectual property licensing and assignment conditions under the Act.

The Baird Committee

In August 1999 the Joint Select Committee on the Retailing Sector (the Baird Committee) chaired by the Hon. Bruce Baird released its report *Fair Market or Market Failure? A review of Australia's retailing sector.* The committee's recommendations led to the voluntary Retail Grocery Industry Code of Conduct and a new mediation office—the Retail Grocery Industry Ombudsman—funded by the Office of Small Business.

The Baird Committee also reiterated the Reid Committee's recommendations on extending the ACCC's power to take representative actions under the Act to Part IV matters (restrictive trade practices).

2000 **ACCC and US FTC Cooperation Agreement**

On 17 July 2000 the ACCC and the US Federal Trade Commission signed a bilateral cooperation agreement for information exchange and enforcement cooperation on consumer protection matters.

The ACCC has entered into 21 cooperation and operating agreements with domestic and international agencies. These agreements set out the circumstances where information can be exchanged by agencies, when matters should be referred to another agency and generally affirming aspirations for enhanced coordination and cooperation in enforcement, training and technical assistance.

a private action, was instructive here, it being the first time the High Court had looked at s. 46 and it resulted in some good jurisprudence.

We are still facing difficult issues with s. 46 with the *Rural Press*[21] and *Boral*[22] High Court decisions. With the Dawson Committee Review, we have a whole range of issues on the horizon regarding collective negotiation and the ability of small business to come together and negotiate in the face of strong buying power. That to me is the first run of challenges for the next period. Further challenges will be the likely introduction of criminal sanctions for cartel conduct and the broad range of international enforcement issues the ACCC will face.

those cases built you, built the organisation…

Overall I think the framework law has worked well and adapted well. The Act always had tension between being reviewed too much, creating uncertainty, and the need to have effective reviews to keep up with best practice in terms of how our law looked in relation to the conduct addressed; how it might benchmark with overseas jurisdictions; and how it was being applied through the courts. Put all that together and we had some very significant reviews in the late 70s, early 80s and 90s which moved the legislation forward. Unfortunately, I am not so certain of the recent Dawson Review and the government's proposed legislative package particularly in relation to the proposed merger processes.

The Cooney Committee Report (1991) was one of the key changes of the 90s, resulting in the mergers test moving from 'dominance' to 'substantial lessening of competition'. This was very important given the difficult issues the TPC faced in the 1980s with major mergers reviewed under the dominance test; for example, *Coles Myer* and *Weekly Times* were controversial. However, with the dominance test major cases were fought and won such as *AMH*[23] and *Arnotts*[24] and *Santos Sagaso*.[25] The new threshold led to our new merger guidelines and the injunction in relation to *Rank Coles FAL*[26] demonstrated our resolve to apply the new mergers law. Bedding down that test in the face of business opposition was a real challenge for the ACCC in the 1990s when the ACCC blocked a number of high profile mergers.

Of course, difficult merger cases are still being fought, with *AGL*[27] being a recent example.

From a personal perspective, I mention some of the early Part IV and tribunal matters because while some were long and energy sapping, there have always been rewards at the end. Fighting those cases built you; it built the organisation. You were always working with and learning from some extremely committed and dedicated fellow workers, some very professional commissioners, some great lawyers. Put all that together…it's been a fantastic journey.

David Smith

CANBERRA

who: Lee Hollis

POSITION: General Manager Enforcement & Coordination Branch

The jewel in the crown …

Lee commenced with the Trade Practices Commission in September 1974 and has worked in various enforcement and management positions including Regional Director in Western Australia and Queensland and Queensland Director for Restrictive Trade Practices, handling a number of large cartel matters. Lee has undertaken placements as Special Counsel in a national law firm and with the New Zealand Commerce Commission.

Before the *Trade Practices Act 1974* was passed, Australian competition law was very weak. The Act revolutionised our competition law, and the joining of consumer protection and competition provisions in the Act was a stroke of mastery. The first chair of the Trade Practices Commission, Ronald Bannerman, described the consumer protection provisions as the 'jewel in the Commission's crown'. It added an extra dimension to what the ACCC could achieve for Australians.

And of course, with the ACCC also being given more regulatory functions over time, there is a greater opportunity to understand market dynamics and issues in the round, and usefully coordinate different activities to administer the law in a more sophisticated way.

A major expansion of the ACCC's sphere of influence occurred with National Competition Policy reform and passing of the state and territory competition codes. That was an extraordinary development, and quite remarkable that all governments agreed to go down the path of universal application of competition law.

Now 30 years on we are entering a new era. The Australian Energy Regulator is being established within the ACCC, and there is an array of possible amendments to the Act on the horizon. From an enforcement perspective, it is satisfying to anticipate changes such as increased penalties, improved information acquisition powers and—very much so—the criminalisation of hard core cartel conduct.

objectives of enforcement crystalised

It is interesting to reflect on how the ACCC's approach to enforcement has developed over the years. The commission has always vigorously enforced the law and its strategies and objectives have matured. It pioneered

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OF TRADE PRACTICES REGULATION IN AUSTRALIA

2001

Financial Services Reform Act 2001

This Act gave the Australian Securities and Investment Commission additional responsibility for consumer protection matters involving foreign exchange contracts, credit and unconscionable conduct under ss. 51AA and 51AB of the Trade Practices Act.

The ACCC retained its administration of consumer protection matters involving health insurance—and for enforcing the competition provisions of the Trade Practices Act in the whole of the financial services sector.

The Financial Services Reform Act commenced on 11 March 2002.

Trade Practices Amendment Act (No. 1) 2001 (No. 63 of 2001)

On 26 July 2001 amendments to the Trade Practices Act relating to small business and strengthening the enforcement provisions came into effect. These included:

- raising penalties for breaches of the consumer protection provisions to $1.1 million for corporations and $220 000 for individuals
- extending the protection for small businesses from unconscionable conduct by a stronger party to transactions up to $3 million in value
- broadening the powers for the ACCC to take representative actions and seek declarations
- altering the 'market' definition in the mergers and acquisition test to include a substantial market in a region in Australia.

2002

Fiji MoU

On 30 April 2002 the ACCC and the Commerce Commission of the Fiji Islands signed a memorandum of understanding (MoU) to promote cooperation and coordination of enforcement, training and technical assistance activities on consumer protection and competition issues.

The ACCC is party to 18 MoUs with both domestic and government agencies and international competition and consumer agencies. The domestic MoUs are with a diverse range of agencies including the Australian Greenhouse Office, the Department of Workplace Relations and Small Business, the Health Care Complaints Commission and each of the state and territory consumer affairs organisations.

Wilkinson Review

The Wilkinson review of the impact of Part IV of the Trade Practices Act on recruiting and retaining medical practitioners in rural and regional Australia made comprehensive recommendations to help doctors and others in the health and medical sectors better understand the implications of the Act generally.

The ACCC consulted closely with the Health Services Advisory Council to publish the A*CCC Info kit for the medical profession* (October 2004).

Parer Review

The Council of Australian Governments (CoAG) energy market review released the report *Towards a Truly National and Efficient Energy Market* (Parer Review) in December 2002. It was asked to examine the current state of the energy market in terms of its depth, efficiency, liquidity, and examine the regulatory and other structures that could contribute to further reform.

The review made a number of recommendations about the regulatory structure of the industry, chief among these being establishing a national energy regulator.

The Ministerial Council on Energy (MCE) was then asked to develop a reform program to address the issues raised by the Parer Review.

and became very creative in using the civil regime in consumer protection, rather than criminal. More disciplined thoughts about the objectives of enforcement crystallised and were able to be articulated. For example, the enforcement hierarchy of outcomes: stop the conduct; restitution; deterrence; and sometimes, punishment. Also, enforcement has become an international challenge. The legal environment and our collaboration with international counterparts needs to be as seamless as the borderless commerce we seek to keep fair and free.

At this juncture, on my 30th anniversary of working with this piece of legislation, I have to say what an enjoyable time I have had so far with the commission and wonderful colleagues, and I record my optimism about the worthwhile outcomes the ACCC can achieve for the community in the future. Whatever has been occurring in the marketplace or in government, the commission has always gone ahead and not been daunted. There is a great deal of merit in the ACCC's independence and its resolve, and I am privileged to be part of this organisation.

Lee Hollis

CANBERRA

who: Alan Ducret

POSITION: ACCC Regional Director, Queensland

None of this was going to be very easy …

Alan walked into the Melbourne office of the Trade Practices Commission on 14 October 1974. He missed out on the start of the commission by a fortnight, something, he says, 'I've always been crook about'. After 10 years in the Melbourne office, Alan moved to Townsville to head up a new regional office and in 1989 was appointed Regional Director of the ACCC Brisbane office.

I started with the commission as a base grade clerk. I was doing project work, so I would be on the telephones, taking complaints, looking at matters as they came to us, writing correspondence to traders and complainants but also conducting investigations—taking witness statements, interviewing defendants, much the same as we do today. I was very lucky to learn under some very good people. Geoff Eva was my mentor. Geoff taught me an enormous amount about investigations and clear thinking.

I was lucky to be involved in one of the very first consumer protection cases taken by the commission. The case was against a company called *Vaponordic*.[28] They were supplying a 'fuel saving device' for motor vehicles; you installed this on your engine and the representation was that you would save up to 40 per cent on your fuel bill. As a very junior investigator, my task was very easy. I had to go to Vaponordic, buy four of these devices and deliver them to four different testing labs. The scientific tests all showed that the device saved no fuel whatsoever—that it was a complete sham. We took the company to the old Industrial Court, and found ourselves before a bench of three judges, which is a bit different from today where we have a single judge. After hearing the case they dismissed it. The company's defence was 'we say we save *up to* 40 per cent, we don't say you save *exactly* 40 per cent'. And that was enough for the court—they said our case was not made. I believe that by today's standards, no court would decide that case in the same way. But, that's the sort of approach we got from the courts in the beginning. It was a real eye opener to what was ahead of us. None of this was going to be very easy.

Shortly after that there was an appeal case that became known as *Thompson v Riley McKay.*[29] Riley McKay was charged with making false representations and they appealed to the Full Federal Court saying, in effect, that a representation is not made until it is proven that someone has actually *read* the representation. This appeal took two to three years to get through the system and while it was in the court, the commission's litigation program was hobbled. In order to ensure we did not suffer dismissal of our cases if Riley McKay was ultimately successful, we had to identify individual consumers who would testify. This added a dimension to the cases that many have forgotten. Eventually the *Riley McKay* decision came down in the commission's favour; we did not have to show a representation was actually read by someone—the fact that it was made was enough. But for two or three years that really hampered our litigation program.

They want to force me out…

Another very important case that gave shape and vigour to the legislation happened in about 1989. It was the *Queensland Wire Industry* case.[30] It was a private action, not a Commission action, but this case breathed life into s. 46 of the Act in the same way the recent *Boral* case[31] knocked some of the life out of it. In this matter BHP had refused to supply Queensland Wire Industries with Y bar because if they did Queensland Wire Industry would be able to compete effectively with BHP's subsidiary Australian Wire Industries. The High Court held that the withholding of supply in those circumstances was an abuse of market power.

I can remember the time very well. I was in the Northern Territory the day that the decision was handed down and the very next day I received a call from a concrete supplier in Alice Springs. The concrete supplier said 'Look, I've been buying my aggregate from a major supplier for some years and now they are refusing to supply me with aggregate simply because I am competing with them too

2003

MCE Report to Council of Australian Governments: Reform of Energy Markets

The MCE submitted its report in December 2003. It proposed restructuring the regulatory framework for electricity and gas infrastructure, and called for two new statutory commissions to be established:

- the Australian Energy Market Commission (AEMC), responsible for rule making and market development, and
- the Australian Energy Regulator (AER), responsible for the regulation of distribution and retailing following the development of an agreed national framework.

The AER is to be a constituent part of the ACCC, but will operate as a separate legal entity.

This program is now largely in the implementation stage, with the establishment of the AEMC and AER.

Dawson Review

In May 2002 the government commissioned a review of the competition provisions of the Act. Chaired by retired High Court Judge Sir Daryl Dawson, the Committee recommended:

- giving courts the option of applying criminal sanctions for serious or hard core cartel behaviour, including imprisonment for implicated individuals
- maximum pecuniary penalties for corporations should be raised to be the greater of $10 million or three times the gain from the contravention
- for assessing mergers, the s. 50 test and the public benefit test did not need to be changed
- introducing an additional formal clearance process for mergers, and allowing companies to apply directly to the Australian Competition Tribunal for authorisation
- a notification process to allow collective bargaining by small business dealing with big business, as proposed by the ACCC.

In April 2003 the Treasurer released the government's response, endorsing the report.

2004

ACCC FSANZ MoU

A Memorandum of Understanding to facilitate cooperation and coordination between the ACCC and Food Standards Australia New Zealand was signed on 29 April 2004.

Spam MoU

On 2 July 2004 the ACCC signed an MoU with Australian, US and UK agencies to counteract spam. Parties to the memorandum are the US Federal Trade Commission, Her Majesty's Secretary of State for Trade and Industry, the UK Information Commissioner, the UK Office of Fair Trading and the Australian Communications Authority. The MoU provides a framework for the agencies to work together to tackle cross border spam violations and brokered increased discussion and practical actions by the agencies to better enforce their respective laws against spam.

1 October 2004

30TH ANNIVERSARY OF THE TRADE PRACTICES ACT

vigorously in the concrete market. They want to force me out'. One of the great concerns with s. 46 issues, is that if you cannot act quickly the victim dies—this supplier only had days left. I phoned the corporate solicitors for the major company and pointed out 'You've got a problem. You're refusing to supply this guy in Alice Springs and by the looks of the *Queensland Wire* decision this is going to create legal problems for you.' It was about a half an hour later when the solicitor rang back and said 'You're right and we will guarantee supply'. That is an example of, literally, within a day of the decision of *Queensland Wire Industry*, it being used to actively promote competition and stop anti-competitive behaviour. It was fantastic.

responsible for s. 87B enforceable undertakings …

Another case that I think has been really important over the years is the Aboriginal insurance case—which was actually a series of cases—handled by the commission's Queensland and the Northern Territory offices.

The first and largest of these was the *Colonial Mutual* court case.[32] This case was fantastic for a number of reasons. It was interesting because of the challenges it posed to investigators, suddenly dealing with people in remote communities in outback Australia. It gave us incredible logistical issues to deal with—how do you actually get out to the communities? How do you take affidavits and get written consents under s. 87 of the Act and do all the things that are needed to put a case together? There were language issues. There were literacy issues. We enlisted the help and support from a number of people in the Aboriginal communities to make the whole system work. We built the case in a very, very short time and in the end we had a very comprehensive win. It was a fantastic outcome. This was one of the cases ultimately responsible for the inclusion of s. 87B in the Act which now provides for enforceable undertakings.

I treasure my time with every one …

If I had to choose a number of things that always appealed to me greatly, it would have to be the cartel activity that we have had in Brisbane. We've had some great cases. The Brisbane concrete case, the fire protection case, the foam industry case, the foundry case, and even to a smaller extent, the ice case. I mean they were all great cartels, and a lot of fun (as well as hard work) was had by the investigators.

And through all of this work, through all the variety of investigations and cases, the ACCC has grown in ways that people didn't expect. The legislation and the regulator have had problems where people didn't expect them. It has faced major challenges throughout these 30 years. One of the great things throughout this whole time has been the opportunity to work with some truly great people and I treasure my time with every one of them.

Alan Ducret

BRISBANE

who: Nick Ellis

POSITION: Director Enforcement & Compliance
Sydney regional office

Nothing short of amazing …

Nick Ellis was a labourer, digging ditches and putting up fences around Canberra when he received a telegram from the Public Service Board inviting him to an interview to discuss employment opportunities. He immediately entertained ideas of international travel with Foreign Affairs or Immigration. There were no seats available on that bus but there were in the vehicle being powered up to drive the new Trade Practices Act.

My first day with the commission was on 23 September 1974. I recall being early and was waiting at reception where I was approached by this large white haired, bearded gentleman. He took me away and gave me a cup of tea, chatting about the office and work. I thought 'this was a friendly place'. It turned out he was the First Assistant Commissioner, John McKeown.

It was extraordinary …

I worked for a week with the Commissioner of Trade Practices before the Act came into effect. I started in registry. Everything was fairly new. And nobody really knew what would happen with the moratorium period for seeking clearance of authorisation under the new Act. Those of us working in registry were doing all the things that good registry people do: indexing, making up files and making sure nothing gets lost. The amount of interim clearance work was so overwhelming that we had to pull in officers from each of the regional offices. We had the likes of John McKeown sitting down making up files, taking directions from registry clerks. It was extraordinary. It is extraordinary. We received some 20 000 clearance and authorisation applications between 1 October 1974 and 1 March 1975. When the commission finally got through the back log in the late 1980s, it was all there—which is nothing short of amazing given the mayhem at the time.

I quickly became interested in the economics of it all—how the market worked and how players in a particular industry played off competitors. I enrolled in tertiary studies and pretty soon moved into the mergers area. I used my newly acquired education to count taxis and hire cars in the *Ansett Avis* case.[33]

But the case that is a real benchmark is the *Express Freight* case[34] in the 1990s. Corporations and companies, particularly those we engaged with in the mergers area, were always willing to talk and present their position on policy or proposals. But the respect of the business community was hard won and was only fully secured after the *Express Freight* case. This case had baggage—pardon the pun—in the *Tradestock* case[35] of the 1980s and the commission's resounding loss in that matter.

After *Tradestock* there was a feeling that the commission was a bit gun shy of the large corporations. Then in 1990 an allegation came in about misuse of market power but the investigation quickly examined a price fixing and market share arrangement between the major freight forwarders.

The respondents in the *Freight* case were three of the largest corporations in Australia which between them had market shares of 92 to 93 per cent of the express freight industry. We knew when we started that we had to have overwhelming evidence if we were to beat these interests; that all our evidence would be vigorously tested and the case would be hard fought.

We ended up with a Statement of Claim that was in excess of two hundred pages. We filed over 150 statements. Some of these statements went back six years and we had very senior executives in Mayne Nickless, TNT and Ansett implicated. When the executives at TNT looked at this they were overwhelmed by the weight of the evidence and approached the commission to settle the matter. That was 10 years ago this August.

$12 million in penalties…

When that result hit the media, business firmly took notice of the strength of the Trade Practices Act and the diligence and ability of the commission. We stopped getting comments about being gun shy. We also stopped getting comments about 'not picking on the big guys'. We could point to $12 million in penalties against three of Australia's largest corporations. I believe it indirectly resulted in a number of other matters settling. The Sydney office at the time was investigating AMP and when the *Freight* case headlines rolled off the press, the insurer immediately came in and started negotiating. The outcome there was very good for consumers, very good for AMP policy holders.

I worked on the *Freight* matter for more than 4 years—that's about 10 per cent of my working life. No wonder it's left a mark on me, but it also encapsulates the reason why I have never considered working for any other organisation. At the end of the day, everyday, I know without a doubt that I have contributed to an organisation that achieves real, tangible benefits for the community and has a direct effect on the operation of fair play and justice for consumers.

Nick Ellis

SYDNEY

who: Bob Alexander

POSITION: General Counsel for the ACCC

You couldn't get anything more interesting …

When Bob became involved in trade practices law, it was a 'curious, niche area which hardly anyone knew anything about'. Bob certainly didn't foresee a career in it when he joined the Commonwealth Crown Solicitor's Office, but there was—a rich and fascinating area of law giving him a lively and challenging legal career. In Bob's view 'you couldn't get anything more interesting than this'.

I don't think anyone had any idea where trade practices law would come to. I joined the Commonwealth Crown Solicitor's Trade Practices Sub Office in 1972. We were then working under the predecessor of the current Trade Practices Act. It was a very novel, very new area of the law. We were all very cautious about the cases we took on and the procedures we entered into.

In 1972 I came in on the end of the *Frozen Vegetables* case[36] and worked on the *Fibre Board Containers* case.[37] In both cases we had to prove that a price fixing agreement was contrary to the public interest. They were hotly contested cases. When the 1974 Act came in, the proposition that a price fixing agreement was contrary to the public interest didn't need to be proven any more. It was accepted that price fixing agreements were contrary to the public interest and that led to the deeming provision in the current s. 45A of the Act.

constitutional foundations challenged …

An important point about those early years is that the constitutional foundation of trade practices legislation was uncertain and consequently we were marking time, in a sense, while the constitutional basis was under challenge. But at the end of the day the High Court decided that trade practices legislation based on corporations law would be valid and that was how the 1974 Act was drafted.

I often reminisce about the old *Glucose* case.[38] That was the first big price fixing case. It was hard fought and there were some very prominent barristers on the other side. The current Chief Justice of the High Court, Anthony Murray Gleeson, was appearing for one of the respondents in that case and Michael Hudson McHugh, who is now a High Court judge, also appeared for a respondent in that case. The commission ended up winning the case and I think that gave the legislation a lot of respectability. By the early 80s trade practices law was no longer seen as a curiosity.

The Keating government competition law reform had a great impact on the public's acceptance of the Act and growing recognition of the public interest benefits of trade practices regulation. This reform argued that the Australian economy isn't confined to corporations. The professions—such as doctors, dentists and sole traders—make up an important part of the economy. In addition, the activities of the states themselves and their statutory corporations form a significant part of the economy. We have had some important investigations, particularly into doctors' activities, following this reform.

concentration on cartel behaviour …

Looking to the future, certainly we've become aware that the conduct of international corporations has an impact in Australia. The ACCC's current concentration on cartel behaviour, which includes international cartels, is an example of this recognition. This new area will have exciting challenges for us.

Bob Alexander

CANBERRA

who: Ian Searles

POSITION: Project manager Enforcement Coordination Branch

Very new and strong law …

Ian arrived in Canberra from Queensland in the middle of May 1974 to start work with the Office of the Commissioner of Trade Practices. Armed with a university degree in economics—and a smattering of law—this was his first job in the public service. On induction day he found himself among a sea of young, keen people, full of enthusiasm for the job ahead.

It was especially exciting because the 1974 Act was very new and strong law. On my first day with the Office of the Commissioner, and for some months after, I worked in the registration area of the old secret register, going through the secret register looking for price and market sharing agreements. We were writing to various companies, reviewing their registered trade practices arrangements and starting to educate and prepare industry for the changes on the horizon.

over twenty thousand applications …

When the new law began in October 1974 the Trade Practices Commission got swamped with applications for exemption from the competition provisions. There were over twenty thousand applications made. There was a deluge of paper in all offices of the commission and we were working overtime just getting documents into files and making sure things weren't lost.

Certain parts of the Act did not come into effect until 1 February 1975 and the commission did grant blanket interim authorisations to enable due consideration to be given to the applications. That upset some people—not of course the businesses who were getting interim exemption nor their legal representatives—but certainly businesses and customers who were affected by the conduct and academics who took exception.

A major highlight of the new legislation was its general level of acceptance in the community and at a bi-partisan political level. This occurred within the first three or four years. Certainly, I believe, the commission's business education efforts and its careful handling of the authorisation process was instrumental in gaining this acceptance.

introduction of the GST

In more recent times a major boost for the legislation and the ACCC developed around the introduction of the GST in July 2000. The ACCC had responsibility for a prices oversight regime to ensure price exploitation did not occur following the implementation of the new tax system. The ACCC wrote to every household in Australia providing them with information packages. The ACCC's name came up as a competition watchdog more and more. This period with the GST and the development of the ACCC Infocentre had a critical influence on our profile in the community.

Thirty years in one job is a long time but then again this area of law and public administration is very fresh, exciting and extremely satisfying work. Looking back, my time in adjudication has perhaps been the most enjoyable—with the analysis and writing determinations—but I also enjoyed the investigation side of our work immensely. It's all been pretty enjoyable.

Ian Searles

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