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.

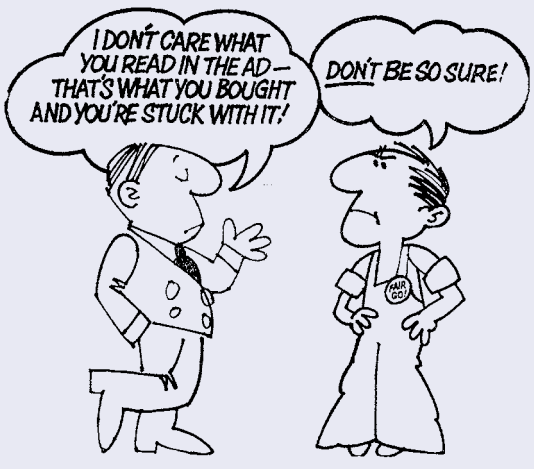
This Act survived High Court challenges and thus established the precedent that the Australian Government could legislate for corporations. Fortified by this, the newly elected Whitlam Government's Attorney General Lionel Murphy withstood fierce opposition to create the *Trade Practices Act 1974*, and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

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