# *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

## 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

## 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

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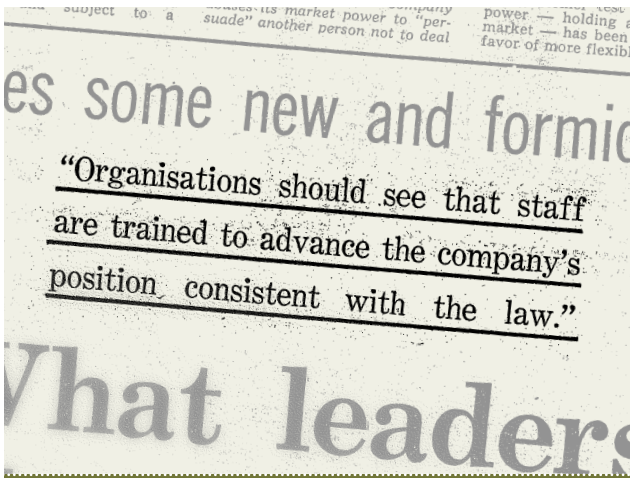


from *'The Age' Plain Man's Guide to Trade Practices, Special AGE Liftout'*, Monday 11 November 1974

## 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.

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