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],

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

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

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

CANBERRA