ATTACHMENT B.

A LITTLE SOJOURN INTO COMPETITION LAW HISTORY

In his submission to Cabinet on 23 March 1962, the late The Honourable Sir Garfield Barwick, then Attorney- General and later to become Chief Justice of the Australian High Court, said the following:

> "I have had enough material put in front of me to satisfy me that there are practices of the following kinds being carried on in Australia at the present time to a substantial degree in each case. Amongst the more important practices are wholesale and resale price maintenance agreements and other agreements on uniform, and therefore non-competitive, terms of dealing; restriction of outlets to a limited number or class of dealers; other systems of exclusive dealing; economic pressure, in the form of expulsion or threat of expulsion from a trade association, or of refusal to deal, on dealers who refuse to observe a fixed price or other non-competitive practice, or on suppliers of such dealers (in all these instances, the practice or the agreement sometimes forms part of the structure of a trade association); price discrimination, usually in the form of discriminatory discounts; and collusive tendering and bidding.
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> I have myself formed the view that the maintenance of competition is, in the broad, indispensable to our economic growth. It seems to me that the pattern of trading in this community should be set on a competitive basis now, at what is in reality the threshold of our economic development, before the restrictive tendencies now present become entrenched to the point where their dislodgment would entail too great a business upheaval. At the present time, within the scheme I propose, no sudden or unbearable upheaval or dislocation would be involved."

The above quote from Sir Garfield Barwick preceded the 1965 restrictive trade practices legislation. That legislation and the activities of the Office of the Commissioner for Trade Practices lead to the creation of the still current 1974 Trade Practices Act (the Act). Although the Act has been reviewed and changed many times since 1974, the fundamentals of the 1974 Act still constitute the current law.

However this seemingly bold experiment was many years after the Canadian Combines Act 1889 and an earlier 1906 Australian law that mirrored the US Sherman and that was declared largely unlawful by the Australian High Court in 1912.

The 1974 Act saw a move from British style restrictive trade practices legislation with examination by an enforcement agency, somewhat like the current notification process (albeit secret), to an outright prohibition regime but with the opportunity for authorisation. The Act also saw the introduction of consumer protection law, merger law and mandatory implied conditions and warranties.

The 1974 Trade Practices Act was introduced with a big bang. It was highly publicised in the media and a major advertising campaign using comic strips was used.

Industry was apprehensive and claimed that it would be the end of the world as they knew it - to a large degree they were right. The 1974 Act posed an even greater threat to the myriad of inter-locking anti competitive agreements that had existed in the Australian economy since the Depression and had been consolidated by the war and post-war eras than the 1965 Act.

The initial response by business to the 1974 Act was to lodge some 20 000 applications for authorisation. Many were agreements that had previously been registered and hence exempted under the old law. These were re-lodged in the hope that they would be exempted under the public benefit test.

To some extent the new Trade Practices Commission (TPC) encouraged business to lodge applications for authorisation by indicating that anyone who lodged by February 1975 would be given automatic interim authorisation. As a result, around 20 000 interim authorisations were granted.

Consequently, the early days of the Australian Competition and Consumer Commission (the Commission) were those of authorisation. In many cases, authorisations were appealed to the then Trade Practices Tribunal (now the Australian Competition Tribunal).

The Commission also conducted a number of court cases. While court success as in the competition area was limited, the Commission was highly successful in consumer protection cases.

The authorisation process dominated the early days. There were many public hearings and landmark decisions.

It is sometimes said that in Australia little has been done in relation to the competition cases. This view overlooks the authorisation role and the role of the Trade Practices Tribunal. In the early days, the matters that went to authorisation in Australia were often the subjects of court cases in other jurisdictions, especially in North America. Authorisation is the converse of breach.

The Commission's authorisation work continued for many years. It is a slow process by its very nature and there were some dramatic discussions in relation to issues such as: -

- Newsagents
- Stock Exchanges

- Motion Picture distributors
- IATA

In those early days there were also clearances for mergers and non-mergers. The Commission was required to assess whether the conduct was in breach of the competition provisions before any public benefit aspect could be considered. This resulted in a huge workload for the Commission and a number of internal divisions were created to handle the workload. Merger clearances had to be done in 30 days. Even shopping centre leases had to be "cleared" by the Commission.

Ironically in its early days the Commission's role was somewhat more regulatory as most of its work was not responding to market place conduct but to applications for approval of specific conduct.

At around the same time the Prices Justification Tribunal was formed and this compounded the fears of industry. There were arguments that the Prices Justification Tribunal removed the need to be concerned about competition issues because the Prices Justification Tribunal would keep prices down. From time to time there were tensions between the TPC and the Prices Justification Tribunal about their respective activities.

In the TPC's First Annual Report for the year ended 30 June 1975, the then Chairman of the TPC, Mr Ron Bannerman said:

> "The possibility of conflict between the objectives of the Trade Practices Commission and the Prices Justification Tribunal arises more in a long-term or philosophical sense. A wholly competitive economy would not need prices justification, and a wholly regulated economy would not need competition legislation. Of course, our economy is partly competitive and partly regulated. The *Prices Justification Act* began with large firms which were thought to have considerable freedom from price competition, and it has spread its net since. Notwithstanding the initial value judgment, most of the firms had had some experience or part in agreements restricting competition, and it was the role of the *Trade Practices Act* to move them towards greater competition at the same time as the *Prices Justification Act* was directly controlling their prices. The long-term dilemma is that lack of competition leads to price control, but price control leads to lack of competition. Competition policy and price control policy, where both exist, can probably best exert their influence independently. If they were brought together and compromised, the risk would be of the doctrine of the so-called 'reasonable price' gaining currency throughout industry and eroding the principle of price competition now firmly fixed in our legislation."[1]

[1] Trade Practices Commission First Annual Report Year Ended 30 June 1975 at p8-9.

The 1970s were a rocky time for Trade Practices law. It was the era of the Swanson Committee[2] and the generally unsupportive Fraser Government which issued formal directions on what the Commission could do. The political environment at the time was generally hostile towards Trade Practices law, particularly within the Commonwealth and State Bureaucracies. Business was also opposed the law.

Nevertheless, the Act stayed alive and there were continuing major authorisation issues such as Stock Exchanges[3] and IATA[4] in the early eighties. Major court cases such as Glucose case[5] and the first TNT case[6] were conducted. The Act's consumer protection provisions had been so successful that States and Territories adopted them in a mirror fashion in the early 1980's.

The heady days of 1974 were long gone and there was a clear fight to survive.

The 1980s were a period of consolidation and reconsideration of some of the previous ideas and influence. The 1980s saw a review of the merger test.[7] The 1980s also saw consolidation in the consumer protection area through mirror state legislation and consolidation in relation to the Commission's enforcement and adjudication role generally.

A new merger wave emerged in the 1980s and the Commission was heavily involved in a number of significant cases. In 1977 the merger test had been changed from substantial lessening of competition to dominance or increased dominance. In the 1980s, the Commission assessed a number of well-known cases using this new test.

Not only was the merger test changed but the Commission lacked the power to seek enforceable undertakings or other methods of controlling merger outcomes.

Yet the 1980s set the foundation for the future developments. It was late in the 1980s that discussions started which eventually resulted in the formation of the Hilmer Committee which reported on National Competition Policy.

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[2] Australia. Committee to Review the Trade Practices Act 1974 (1976), *Report to the Minister for Business and Consumer Affairs*, Australian Government Publishing Service, Canberra.

[3] Trade Practices Commission Annual Report 1981-82 at p48-50.

[4] Trade Practices Commission Annual Report 1980-81 at p52-53.

[5] Allied Mills Industries Pty Ltd (1980) ATPR 40-178; (1981) ATPR 40-204; (1981) ATPR 40-241; (1981) ATPR 40-252.

[6] TNT Management Pty Ltd & Ors (1983) ATPR 40-366, (1984) ATPR 40-446, (1984) ATPR 40-483.

[7] Australia. Parliament. House of Representatives. Standing Committee on Legal and Constitutional Affairs (1989), *Mergers, takeovers and monopolies: profiting from competition?*, Australian Government Publishing Service, Canberra.

Australia. Parliament. Senate. Standing Committee on Legal and Constitutional Affairs (1991), *Mergers, monopolies and acquisitions: adequacy of existing legislative control*, Australian Government Publishing Service, Canberra.

It is somewhat ironic that in the late 1970s the then Minister for Business and Consumer Affairs, John Howard, now the current Australian Prime Minister, wrote to the States seeking a dialogue on the possibility of universal application of the Trade Practices Act. One model raised for discussion was the Tasmanian situation under the 1965 Trade Practices Act whereby Tasmania referred power to the Federal Government for a period of 5 years. It is hardly surprising that the response from the States to Mr Howard's suggestion was less then enthusiastic.

The 1980s did not have the drama of the previous decade. It was a period of more sympathetic political support for the Commission's role. A number of reviews enhanced some of the Act's and the Commission's powers.

The 1980s prepared the Act and the Commission for the enormous leap forward in the 1990s.

It also was a period where the community, and business in particular, was more familiar and comfortable with the role of competition and consumer law.

THE 1990s

The 1990s saw a considerable deepening and broadening of the Trade Practices Act. Indeed, the scope of competition policy was broadened significantly to include issues which went well beyond the application of the Trade Practices Act.

During the 1990s, the Commission (both as the TPC and the Australian Competition and Consumer Commission) took a number of successful landmark actions.

In particular, two cartel cases stand out as being significant. The first concerned the TNT/Mayne Nickless/Ansett Freight Express market sharing agreement. In preparing for this case, the Commission was mindful of its ultimate failure in the Tradestock case in the mid 1980s. Consequently, in the freight case the Commission made extensive preparations taking several years and eventually launched the case with 165 witness statements ready to prove the existence of a major market sharing arrangement, between TNT and Ansett Freight Express and Mayne Nickless. The Commission alleged that the arrangement had existed for many years and had been sanctioned by high level staff in each organisation. TNT and Mayne Nickless did not oppose the Commission's action. Moreover, the TPC and the parties presented agreed penalties of around $6 million for TNT and around $7 million for Mayne Nickless to the Federal Court which accepted them as reasonable.[8] The Court also clearly indicated that it was prepared to countenance agreed penalty proposals and to accept them if they were within a range that the Court judged to be reasonable. The magnitude of the fines (levied when the maximum penalty per offence for companies was $250 000) had a significant deterrent effect on anticompetitive behaviour by many firms in Australia and indeed alerted corporate Australia to the far-reaching implications of the vigorous application of the Act.

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[8] Trade Practices Commission Annual Report 1993-94 at p12-13 and Trade Practices Commission Annual Report 1994-95 p13-15.

The second cartel case involved the concrete industry. In 1995 the newly formed Australian Competition and Consumer Commission secured a total of $21 million in penalties against Boral, CSR and Pioneer for market sharing and price fixing arrangements[9], reinforcing the significance of the provisions of section 45 for the whole of corporate Australia and, incidentally, putting the newly formed ACCC on the maps of both corporate and consumer Australia.

There were also landmark cases under Part V (consumer protection) of the Act. Prior to the 1990s, there had not been a great deal of litigation under Part V of the Act. The Commission's first substantial consumer protection action was against life insurance companies which had sold life insurance policies in an unconscionable and deceptive and misleading fashion to approximately 3000 aboriginal consumers in far north Queensland and the Northern Territory.[10] This high profile case was followed by the AMP case in 1994, in which the Commission secured refunds of around $100 million for over 275,000 consumers who had purchased life insurance policies on the basis of misleading and deceptive promotional material.[11] The promotional material claimed that 80 per cent of their investment would be guaranteed against any adverse movement in the stock market when in fact none of the investment was so protected.

The 1990s also saw some high profile cases concerning the telecommunications industry. Telstra was required to publish major corrective advertising for misleading price comparisons[12] and in another case, the Commission obtained refunds for consumers from Telstra of $45 million for a misleadingly marketed wire repair plan which imposed charges (to the magnitude of $45 million) on many hundreds of thousands of consumers and small businesses without their consent.[13]

These and other actions sharply lifted the profile of both the Commission and the Trade Practices Act. This in turn had significant deterrent effects on businesses which otherwise would have ignored the Act. Public support for the Act and the Commission was strengthened. The actions also had some political side effects in that they helped generate greater public support for competition policy. This eased the way for the general public acceptance of the work of the Hilmer Committee.

The Commission made no secret of its interest in having a high profile. It believed that this would contribute to effective enforcement of the law and better compliance because few firms like negative publicity. The Commission's high profile was clearly justified by the benefits of educating the business community, as well as the general community, about the Act and its requirements.

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[9] ACCC Annual Report 1995-96 at p11-13.

[10] Trade Practices Commission Annual Report 1992-93 at p27-29.

[11] Trade Practices Commission Annual Report 1994-95 at p26-28.

[12] Trade Practices Commission Annual Report 1993-94 at p27.

[13] ACCC Annual Report 1996-97 at p59-60.

In 1993 Parliament steeply increased the penalties under Part IV of the Act from a maximum of $250,000 per offence for companies to a maximum of $10 million per offence, Since 1993 there have been a number of cases conducted under the new penalty provisions and penalties in the millions are now commonplace.

Another important change in the first half of the 1990s was the change in the merger law from a test of dominance to a test of substantial lessening of competition. The criteria to be considered to establish a substantial lessening of competition were incorporated into section 50.

From July 1991 the Commission strongly and unambiguously had supported a change in the merger law at every opportunity. The Commission believed that a change to the merger test made economic sense and was especially appropriate in the forthcoming era of the deregulation.

The first major case under the new merger test concerned Coles/Myer's attempt to acquire Foodland in Western Australia via Rank Commercial, a New Zealand company.[14] Although the case did not proceed beyond the early procedural stages, there were signs that the Federal Court attached great importance to the fundamental aim of the merger law which was to protect the public interest in competition.

Another very important set of changes arose following the decision of the Heads of Government (the Prime Minister, State Premiers and Chief Ministers of Territories) to establish the Hilmer Review of National Competition Policy. Broadly speaking, the Hilmer Committee reviewed the Trade Practices Act and concluded that while it was soundly based it did not extend to important areas of the economy and it did not provide for appropriate access to "essential facilities" (although that term was eschewed in the report).[15]

The Hilmer report also strongly emphasised the fact that the Act only applied to private sector anti-competitive behaviour and not to many government operated business, particularly those embodied in legislation. Further, the Act did not apply to the numerous forms of Federal and State legislation which had anti-competitive effects.

The main proposals in the Hilmer report were adopted by the Commonwealth, States and Territories and enacted in November 1995. The first outcome of the Hilmer report was a great broadening of the scope of competition policy. All governments agreed to a major independent reviews of all laws that affected competition, carried out over a five-year period with the results to be reviewed by the National Competition Council. A competitive neutrality regime was introduced, to be ultimately administered at Federal level by the Productivity Commission and at State level by appropriate agencies. Emphasis was also placed upon the need for structural

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[14] Trade Practices Commission Annual Report 1993-94 p37-39.

[15] Independent Committee of Inquiry into Competition Policy in Australia 1993, *National Competition Policy,* Australian Government Publishing Service, Canberra.

reform of many public utilities. At the institutional level the National Competition Council was established.

There were three main impacts upon the Trade Practices Act:

- the scope of the Act was extended so that it applied to all forms of business activity in Australia whether public or private, whether interstate or intrastate and whether incorporated or unincorporated.
- a law regarding access to certain infrastructure facilities was enacted; and
- at the institutional level, the TPC and the Prices Surveillance Authority (PSA) were merged to form the Australian Competition and Consumer Commission.

That basically is the current position.