Submission to the Trade Practices Act Review

(Dawson Enquiry)

"Excessive and erratic whistle blowing by the umpire destroys the game. Nobody wins –
*neither the players nor the public**."***

Dr Bruce Shepherd, AM
Chairman, Australian Doctors' Fund

"To sum up: The entire structure of antitrust statues in this country is a jumble of economic irrationality and ignorance. It is the product: (a) of a gross misinterpretation of history, and (b) of rather naïve, and certainly unrealistic, economic theories."
Dr Alan Greenspan
Chairman, US Federal Reserve

"The present legislation, built to a large extent upon the American pattern, was produced by an Attorney-General who did not favour free enterprise but espoused socialist planning. Also, it is grounded on a very wide view of the Commonwealth's corporate power under the Constitution which may yet invite challenge."
The late Sir Garfield Barwick
Former Chief Justice of Australia

"The future of competition policy is most likely to be shaped by many factors, of which the two most important elements are: First, recognition of errors and misconceptions in applications of what was thought to be a consistent, though undefined, set of so-called principles, apparently based on economic theory; and Second, belated recognition of the social and equity effects of this policy."
Professor HM Kolsen
Emeritus Professor of Economics
University of Queensland

"But games are not necessarily made fairer by multiplying the rules, and neither is life."
The Honourable Murray Gleeson
Chief Justice of Australia

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EXECUTIVE SUMMARY

The recent turmoil on world equity markets, the collapse of large corporations in the USA and Australia, and the revelation of accounting irregularities in large companies, despite internal and external audit requirements, has raised serious questions about business behaviour in competitive markets.

Chairman of the US Federal Reserve, Alan Greenspan, who has been described as *"…the world's most important banker and one of the world's most experienced economists"*[1] has defined the problem as not being one of insufficient regulation but a crisis of integrity. He has called on US corporate CEO's *"…to preserve their own integrity and that of their companies"*[2].

Greenspan's views on trade practices legislation have relevance for Australia and particularly any enquiry seeking to improve our regulatory system.

Greenspan describes US antitrust law as being *"…reminiscent of Alice's Wonderland"*[3] and based on misconceptions of what competition really is, namely, requiring action *"…to affect the conditions of the market in one's own favour"*[4]

His analysis of the flaws in US antitrust legislation are directly relevant to Australian trade practices legislation and regulation by agencies such as the ACCC since our current legislation is substantially derived from the US model.

It wasn't always the case. The late Sir Garfield Barwick examined and rejected US trade practices legislation when he foreshadowed a model for the Australian Trade Practices Act in the Federal Parliament on 6 December 1962.

The reasons for Barwick's rejection of the US approach should be closely examined if we are to improve our current competition regulation. As Barwick explains the US law *"…was necessarily expressed in universal terms, and often of ambiguous import"*.[5]

Barwick warns that generalised legislation has to be worked out in the courts.[6] He also warns against inappropriate intervention by competition regulators.

"There should be no exposure of business to needless harassment and vexatious action, whether by officials or by members of the public, particularly by those who may have mixed motives for their conduct."[7]

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[1] Overington, C. The economist who is calling companies to account. *Sydney Morning Herald*. 20-21 July 2002, p.18.
[2] Overington, C. *ibid.* p.18.
[3] Greenspan, A. Antitrust, in Rand, A. *Capitalism: The Unknown Ideal.* Signet. 1967. p.63.
[4] Greenspan, A. *ibid.* p.67.
[5] Barwick, G. *A Radical Tory. Reflections & Recollections*. The Federation Press. 1995. p.146.
[6] Federal Hansard. *Restrictive Trade Practices.* [6 December 1962]. p.3108.
[7] Federal Hansard. *ibid.* p.3105.

Ignoring Barwick's model, the 1974 Trade Practices Act, introduced by the then Commonwealth Attorney-General Senator Lionel Murphy, reverted to the US legislation as its parent. We failed to learn from the problems of the US approach and today we are confronted with this failure.

Significant sections of the Australian business and professional community have lost confidence in the ACCC. There are serious questions about its integrity and independence, particularly in relation to its use of the media.

"Certainly the charge against the ACCC's use of the media, which sometimes borders on outright lies, has merit even if there is general agreement that Fels has performed wonders in lifting the law's profile."[8]

The problems don't stop here.

The recent admission by Professor Fels of the ACCC's dealings with *The Daily Telegraph* newspaper in regard to a raid on Caltex, has raised serious allegations of deliberate "events management" against a legitimate business. Only a full independent enquiry into this affair will reveal the truth.

The ACCC has serious questions to answer. Being a self-styled champion of the consumer does not justify the lack of due process against any Australian individual, organisation or corporation. In a democratic society the ends do not justify the means.

The Australian Doctors' Fund (ADF) has examined the intervention of the ACCC into the affairs of the medical profession and is gravely concerned that individual practitioners have no ability to defend themselves against what are often allegations of technical breaches of the Act.

There is often a substantial asymmetry between the resources of the ACCC and those it targets. This is indeed the case with the ACCC's intervention against individual doctors in private practice.

The "targets" are often encouraged to confess and cooperate or face bankruptcy. Fear is the ACCC's weapon of choice.

The ADF rejects explanations by the ACCC that the authorisation process is a viable means of overcoming uncertainties. The expense involved in mounting a successful authorisation is prohibitive to any small business or independent sole practitioner.

In conclusion, the ADF does not support the addition of an effects test to Section 46 of the Trade Practices Act (1974), as this is again an attempt to generalise the law with the inherent problems of misinterpretation and retrospective judgment. Instead, the ADF recommends that other sections of the Act, which are generalised, should be brought in line with Section 46 ie the reverse of what the ACCC is now requesting.

Similarly, the ADF does not support the extension of criminal sanctions to other sections of the Act and is extremely concerned at the reasons given by the ACCC for their introduction. Namely, the generation of adverse publicity and the ability to

[8] Durie, J. The trade practices circus. *The Australian Financial Review.* 18 July 2002. p.52.

leverage against threats in order to obtain confessions ie to be able to get around existing law.

This submission should also be read in conjunction with a comprehensive submission the ADF presented to the *Wilkinson Enquiry* (see Appendix). Our *Wilkinson Enquiry* submission detailed many of the faults in the way competition practice is regulated in Australia. Some of these matters also went to the integrity of the ACCC and the role it has assumed for itself.

Although predominantly concerned with the ACCC's involvement in medical affairs, the ADF has used its resources to provide research and evidence on broader economic matters and hence make a contribution to the totality of the debate concerning sensible business regulation and due process.

The ADF believes that urgent action is required by government to remedy defects and to establish due process in trade practices legislation and regulation. Over the last two years we have outlined a reform agenda that will contribute to this outcome. Since then, it has been suggested that an independent Board be appointed to oversee the ACCC. We support this reform in addition to the others we have outlined.

The original aim of trade practices legislation was to protect the public interest. That interest involves having confidence that business regulation is just and reasonable and that regulatory authorities discharge their duties with integrity and intellectual honesty in the best traditions of our most respected public servants.

Stephen Milgate
Executive Director
Australian Doctors' Fund

26 July 2002

JUSTICE – ACCC STYLE

Following is a de-identified generalised example designed to demonstrate the ACCC's regulatory process.

1. You receive a letter from the ACCC telling you that you are under investigation for breaches of the Trade Practices Act. The investigation may have been as a result of an anonymous complaint or something that you have written or said which the ACCC has decided to act upon.

2. An article appears in the newspaper outlining the allegations against you.

3. You consult your local solicitor who shakes his/her head and tells you that under the Trade Practices Act the ACCC commissioner has unprecedented powers and that ultimately your only redress is to comply with his requests or go to court.

4. You protest your innocence, pointing out that you have not been guilty of any collusive behaviour and that as an independent practitioner or small businessman you have worked for years to build and maintain a good reputation.

5. Your local solicitor advises you that you need to seek the help of a large specialist legal firm and there will be considerable costs involved. You are also advised that you will need a lot of time off work to prepare your case if you decide to defend the matter. You know that the time off work will hurt your business severely and in particular, some of your patients or customers who depend on you.

6. Your spouse and family tell you that as a result of the newspaper article your children are being told by their peers that you are a bad person. Your spouse wants the matter settled. Your family is suffering because of the pressure.

7. You consult your doctor. You are angry and depressed. You feel you have done nothing wrong. Your doctor suggests that you seek redress through your local Federal member of parliament, which you do.

8. Your local Federal member of parliament tells you that there is nothing they can do because the matter is under investigation and it would be wrong for them to interfere at this stage.

9. Your specialist legal firm tells you that the estimate of fighting any charge brought against you will be in the vicinity of $300,000 to $400,000 and then, even if you win, the matter could go to appeal and you may be up for another $200,000 and subject to a personal fine if you lose, of $250,000 on top of that and the prospect of a fine of up to $10M for your business. And then there is the ACCC's costs which may also be awarded against you, not to mention your own loss of business earnings because of your absence. You calculate that you could be up for almost $1M in legal costs if the case goes to appeal.

10. You realise that you have no hope of defending yourself. To attempt to do so would drive you into bankruptcy and you have your family to think about.

11. You agree to make the ACCC an offer of $40,000 which is rejected.

12. You and your legal advisors attend a meeting with the ACCC where you are advised that the terms of settlement is a full confession of your alleged collusive behaviour in line with the ACCC allegations with costs and penalties of $150,000 in favour of the ACCC. Angrily and in desperation, with no other realistic options, you agree to these terms.

13. The ACCC issues media releases highlighting your confession and claiming success in bringing another bad person (you) to justice. You become part of the ACCC's historical and public record and you are regularly mentioned as one of their "scalps" in order to put fear into others who may want to defend their case.

14. You return home disillusioned and angry to find a bill for $50,000 from your legal firm for two months work.

15. You decide to leave the town where you are working and try to make a fresh start somewhere else and leave the stigma and the bitterness behind, even though in selling up you are walking away from everything you created and the customers, patients or clients who depend on you.

16. You visit your local member of parliament who advises you that since you have settled matter with the ACCC that there is nothing they can do.

Conclusion

There exists in Australian law an injustice so grave as to render it virtually impossible for any individual other than a medium to large corporation with the ability to incur hundreds of thousands of dollars in legal fees to defend itself against allegations and Federal Court proceedings brought by the ACCC under the powers given to it by the Trace Practices Act.

AN ANALYSIS OF U.S. ANTITRUST
THE SHAKY FOUNDATION OF AUSTRALIAN COMPETITION REGULATION

"The world of antitrust is reminiscent of Alice's Wonderland: everything seemingly is, yet apparently isn't, simultaneously. It is a world in which competition is lauded as the basic axiom and guiding principle, yet "too much" competition is condemned as "cutthroat." It is a world in which actions designed to limit competition are branded as criminal when taken by businessmen, yet praised as "enlightened" when initiated by the government. It is a world in which the law is so vague that businessmen have no way of knowing whether specific actions will be declared illegal until they hear the judge's verdict - after the fact."[9]
Alan Greenspan, Cleveland, USA, 25 September 1961

US antitrust legislation – The Australian parent
Australian competition regulation can trace its origins to the US model of antitrust law. Furthermore, justification for current changes to competition law include the desire to align our legislation with the USA.

"The current mergers test contained in s. 50 of the Trade Practices Act is in fact based on s. 7 of the Clayton Act of the United States."[10]

"s. 46 would be brought into line with similar prohibitions in overseas jurisdictions including in the US and Europe."[11]

The history of US antitrust
The origins of antitrust legislation in the US can be traced to the post-Civil War period, in particular the expansion of railroads into the western parts of North America.

The **exploitative behaviour of western railroad barons** impacted adversely on farmers. This mainly took the form of charging farmers freight rates that left little profit margin (for the farmers' efforts) in a market where no viable alternative transport system existed.

The farmers' protest against the western railroads took the form of **"The National Grange Movement"** and eventually led to the Interstate Commerce Act of 1887.

The Sherman Antitrust Act followed in 1890. It was designed to check **the growing power of the Standard Oil Trust**, (established in 1870 by John Davison Rockefeller Sr) and other large corporations which emerged prior to the turn of the century.

Other legislation followed, including the Clayton Antitrust Act 1914, the Federal Trade Commission Act 1914, and the Small and Medium Size Business Act 1958.

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[9] Greenspan, A. Antitrust, in Rand. A. *Capitalism: The Unknown Ideal*. Signet. 1967. p.63.
[10] ACCC: *Submission to the Trade Practices Act review*. June 2002, p.145.
[11] ACCC: *ibid.* p.79.

Greenspan explains that the **exploitative railroad monopolists**, namely, the western railroad barons, was **only made possible by government intervention** ie it was the government, not the market, which created them.

The **mechanism for establishing the railroads in the West**, (that the eastern state's transport suppliers believed was unprofitable to provide), **was by way of government land grants** to those who would build railroads. Indeed, many of the early railroad companies were more interested in acquiring land than they were in running railroads. Their business practices were unethical and their railroads were often shoddily built.

"The western railroads were true monopolies in the textbook sense of the word. They could, and did, behave with an aura of arbitrary power. But that power was not derived from a free market. It stemmed from governmental subsidies and governmental restrictions."[12]

Greenspan also points out that that there were valid economic reasons for trusts such as Standard Oil to seek market dominance, and in reality at the time of the Sherman Act, **Standard Oil was not in absolute terms a large corporation**.

"The most formidable of the "trusts" was Standard Oil. Nevertheless, at the time of the passage of the Sherman Act, a pre-automotive period, the entire petroleum industry amounted to less than one percent of the Gross National Product and was barely one-third as large as the shoe industry. It was not the absolute size of the trusts, but their dominance within their own industries that gave rise to apprehension. What the observers failed to grasp, however, was the fact that the control by Standard Oil, at the turn of the century, of more than eighty percent of refining capacity made economic sense and accelerated the growth of the American economy.

Such control yielded obvious gains in efficiency, through the integration of divergent refining, marketing, and pipeline operations; it also made the raiding of capital easier and cheaper. Trusts came into existence because they were the most efficient units in those industries which, being relatively new, were too small to support more than one large company"[13]

Barwick believes the perceived threat from Standard Oil was political.

"Indeed, one suspects that behind the original American legislation was the fear that industry, if it obtained sufficient dimension, would be a threat to government and likely to overawe and control the legislature."[14]

Why did US antitrust legislators get it so wrong? According to Greenspan they had a very **limited view on the real nature of competition** based mainly on their experience in the agricultural industry.

"Competition" is an active, not a passive, noun. It applies to the entire sphere of economic activity, not merely to production, but also to trade; it implies the necessity of taking action to affect the conditions of the market in one's own favour."[15]
[Underline and bolding added]

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[12] Greenspan, A. Antitrust, in Rand, A. *Capitalism, The Unknown Ideal*. Signet, 1967, p.64.
[13] Greenspan, A. *ibid.* p.65.
[14] Barwick, G. *Restrict Trade Practices*, 1962.
[15] Greenspan, A. Antitrust, in Rand, A. *Capitalism, The Unknown Ideal*. Signet, 1967, p.67.

Conclusion

US antitrust law originated because of exploitative behaviour made possible by government intervention. Furthermore, the emergence of companies like Standard Oil and their need to achieve market dominance in order to raise sufficient capital and create efficiencies, was misunderstood because of a failure to appreciate the economies of scale needed to successfully operate a modern corporation in a non-agricultural market.

THE AUSTRALIAN APPROACH

It was not until **1962**, when the then Attorney-General, **Sir Garfield Barwick, foreshadowed trade practices legislation** to the Federal Parliament, that Australia considered specific legislation concerning trade practices regulation.

Prior to this, despite the absence of a Federal Trade Practices Act, Australia had built a reputation for sound economic growth.

The **Broken Hill Proprietary Company Limited, founded in 1885** as a mining operation, progressed into steel making and then into oil and gas. It has become BHP Billiton Limited, a multinational resource company with **annual revenue of $36 billion** (2001).

The **Snowy Mountains Hydro-Electric Scheme**, which commenced in **1949** and took 25 years to complete, is often described as **one of the world's greatest engineering and social achievements**.

In preparation for the first Australian Trade Practices Act, **Barwick**, in collaboration with John **Richardson**, then of the Attorney-General's Department (later Professor of Law at ANU as well as an Australian diplomat), **examined American, Canadian and British trade practices law** before deciding on a unique Australian model.

"I did not care for the American method of control which imposed penalties on businessmen for infraction of the regime imposed by Congress. This law was necessarily expressed in universal terms, and often of ambiguous import. By its very nature, law on this subject was difficult to interpret and apply. It made illegal certain business activities described in the legislation in general terms, placing on business the need to form a judgment about the meaning and scope of the law on pain of a criminal penalty if an error of judgment were made. ***I also felt that the American system allowed the Justice Department too much opportunity to impel businessmen into making arrangements at times perhaps legally unnecessary but which were wise from a business point of view, given the great cost of litigation. I could see possible injustice arising from the departmental ability to apply such pressure.*** *I believed that when litigation resulted, far too much time was taken up, both by the Justice Department in its investigations and by the courts in contested cases, in establishing exactly what was being done in business."*[16] [Bolding added]

Barwick rejected the Canadian legislation on the same grounds as the US legislation and was **more favourably disposed towards aspects of the United Kingdom legislation**. In any event, it was hoped that an Australian model *"…would avoid what we thought were the objectionable features of the legislation we had studied."*[17]

Central to the problem of devising effective trade practices legislation was **how far a government should go.**

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[16] Barwick, G. *A Radical Tory. Reflections & Recollections.* The Federation Press. 1995. p.146.
[17] Barwick, G. *ibid.* p.147.

"The politician's problem is to restrict government intervention to what is reasonably necessary to protect free enterprise. But any tendency for government to plan or participate in business activities should be resisted." [18] [Bolding added]

Barwick decided that it was **harm to the public interest that was at issue** not harm to competition itself.

"In other words, the real question for examination and decision was what harm pursuit of the individual practices might do to the public."[19]

"My proposal therefore placed the main emphasis on the public interest. But it was also designed to avoid costly investigative processes and to avoid involving business people committing possible illegality before harm to the public interest of what they were doing had been established."[20]

This is **clear evidence** that Barwick and Richardson **foresaw the potential that trade practices legislation had for denying due process** ie ensuring that the legislation complied with the fundamental rights of individuals in a democratic society, namely, to be governed by the rule of formal rather than arbitrary law, as FA Hayek explains:

*"NOTHING distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand-rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge. Though this ideal can never be perfectly achieved, since legislators as well as those to whom the administration of the law is entrusted are fallible men**, the essential point, that the discretion left to the executive organs wielding coercive power should be reduced as much as possible, is clear enough**. While every law restricts individual freedom to some extent by altering the means which people may use in the pursuit of their aims, under the Rule of Law the government is prevented from stultifying individual efforts by* ad hoc *action. Within the known rules of the game the individual is fee to pursue his personal ends and desires, certain that the powers of government will not be used deliberately to frustrate his efforts.*

The distinction we have drawn before between the creation of a permanent framework of laws within which the productive activity is guided by individual decisions, and the direction of economic activity by a central authority, is thus really a particular case of the more general distinction between the Rule of Law and arbitrary government."[21] [Bolding added]

Barwick opposed using publicity against businessmen without due process.

*"**I did not, however, favour using the fear of publicity as a weapon in the control of restrictive practices.** I do not think those who engage in monopoly or trade practices ought to be regarded as common criminals. Granted that what they are doing may be*

[18] Barwick, G. *A Radical Tory. Reflections & Recollections.* The Federation Press. 1995. p.146.
[19] Barwick, G. *ibid.* p.147.
[20] Barwick, G. *ibid.* p.147.
[21] Hayek, FA. *The Road to Serfdom*. Routledge. 1997. p.54.

against the public interest and a source of undue private gain, ***I still think the fear of public disclosure should not be used against them before their activities are independently considered and passed upon.****"*[22] [Bolding added]

Barwick **warned of the creation of uncertainty for business**.

"…there must be certainty for businessmen as to what they may or may not do. This, to my mind, is important in relation to any economy, but it is imperative in our case. We are in a stage of development which calls for courage and initiative on the part of our businessmen. Our growth and the prosperity of all of us can only suffer, and suffer grievously, from uncertainty and resultant timidity on their part."[23]

Barwick **warned against the growth of a large and vexatious regulator**.

"There should be no exposure of business to needless harassment and vexatious action, whether by officials or by members of the public, particularly by those who may have mixed motives for their conduct."[24]

Sir Garfield Barwick failed in his attempt to introduce his version of trade practices legislation into the Australian parliament. After the Federal election of 1963 he was directed by Sir Robert Menzies to give up his Attorney-General portfolio and concentrate solely on his other portfolio, namely Foreign Affairs.

In **1974, the Trade Practices Act was introduced by the then Attorney-General, Senator Lionel Murphy**. Looking back in disappointment in 1995, Sir Garfield lamented.

"What has followed, I think, has been unfortunate. ***The legislation which my successor produced was inadequate. The present legislation, built to a large extent upon the American pattern, was produced by an Attorney-General who did not favour free enterprise but espoused socialist planning.*** *Also, it is grounded on a very wide view of the Commonwealth's corporate power under the Constitution which may yet invite challenge."*[25] [Bolding added]

Conclusion

The first attempts to establish a Trade Practices Act in Australia in 1962 rejected the US and Canadian model. Subsequently, the 1974 Act used the US antitrust legislation as its model. It is therefore important that the assumptions underlining the development of this legislation be reanalysed to test their current validity.

[22] Barwick, G. *A Radical Tory. Reflections & Recollections*. The Federation Press, 1995, p.150.
[23] Federal Hansard. *Restrictive Trade Practices.* [6 December 1962], p.3105.
[24] Federal Hansard. *ibid.* p.3105.
[25] Barwick, G. *A Radical Tory. Reflections & Recollections*. The Federation Press, 1995, p.151.

THE COST OF BAD REGULATION

While much has been made about the cost of no regulation, **very little is stated about the cost of regulation and in particular, bad regulation and over regulation**.

Today's consumer is the subject of numerous Federal and State laws and regulations designed to prevent exploitation. Business and professional governance regulation is at an all time high.

So great is the amount of regulation governing the legal profession that the current Chief Justice of Australia, **the Honourable Murray Gleeson, has stated**:

"During my time in the legal profession there has been a vast increase in the sheer bulk of the information needed by a lawyer to advise clients as to their rights and obligations. Statutes, regulations, and by-laws are rarely made simpler. ***But games are not necessarily made fairer by multiplying the rules, and neither is life****."*[26] [Bolding added]

But does consumer protection work?

Alan Greenspan believes there is a price to pay.

*"****Government regulation is not an alternative means of protecting the consumer****. It does not build quality into goods, or accuracy into information. Its sole "contribution" is to substitute force and fear for incentive as the "protector" of the consumer."* [Bolding added]

"To paraphrase Gresham's Law: bad "protection" drives out good. The attempt to protect the consumer by force undercuts the protection he gets from incentive."[27]

*"****Regulation-which is based on force and fear-undermines the moral base of business dealings****. It becomes cheaper to bribe a building inspector than to meet his standards of construction."*[28] [Bolding added]

In an attempt to protect the consumer from dishonest businessmen, the consumer may in fact be more exposed to exploitation.

"Protection of the consumer by regulation is thus illusory. Rather than isolating the consumer from the dishonest businessman, it is gradually destroying the only reliable protection the consumer has: competition for reputation."[29]

*"****The value of a reputation rested on the fact that it was necessary for the consumers to exercise judgment in the choice of the goods and services they purchased****. The*

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[26] Gleeson, M. *The Growth of Legislation and Regulation.* Parliament House, NSW. 9 July 2001.
[27] Greenspan, A. The Assault on Integrity, in Rand, A. *Capitalism: The Unknown Ideal.* Signet. 1967. p.119.
[28] Greenspan, A. *ibid.* p.120.
[29] Greenspan, A. *ibid.* p.120.

government's "guarantee" undermines this necessity; it declares to the consumer, the effect, that no choice or judgment is required - and that a company's record, its years of achievement, is irrelevant."[30] [Bolding added]

Meanwhile, as the US corporate governance debacle indicates any form of regulation does not remove the damage done through dishonesty, not only by businessmen but also by any person in a position of influence.

"Government regulations do not eliminate potentially dishonest individuals, but merely make their activities hard to detect or easier to hush up. ***Furthermore, the possibility of individual dishonesty applies to government employees fully as much as to any other group of men****. There is nothing to guarantee the superior judgment, knowledge, and integrity of an inspector or a bureaucrat - and the deadly consequences of entrusting him with arbitrary power are obvious."*[31] [Bolding added]

Finally, it is self evident that as far as competition regulation is concerned, no individual businessmen, let alone small businessmen, could possibly hope to read, let alone understand, the volume of consumer regulation, edicts, guidelines, media releases, submissions, directives and public statements produced by the regulator.

Hence, there is growing reliance on professional advisors who are themselves struggling to keep up with the growth and complexity of the law and subsequent regulations. All this is adding substantially to compliance costs, particularly for those businesses seeking to take additional risks, through merger and acquisition.

Nowhere is the growth of Australian competition regulation more evident than in an examination of the amount of tax payers' dollars being consumed by the regulator.

The cost of competition regulation to tax payers is now 146% greater in 2002 than it was in 1997 with an average growth rate of 20% per year.[32]

The Australia Competition & Consumer Commission's funding

YEAR	BUDGET ($M)	INCREASE (%)
1996-97	33.9	N/A
1997-98	37.4	10.3
1998-99	39.0	4.3
1999-2000	57.5	47.4
2000-01	75.6	31.5
2001-02	83.4	10.3

N/A Not available

SOURCE: FEDERAL GOVERNMENT

[30] Greenspan, A. The Assault on Integrity, in Rand, A. *Capitalism: The Unknown Ideal.* Signet, 1967, p.119.
[31] Greenspan, A. *ibid.* p.121.
[32] Thomson, J. Fels fights back, *Business Review Weekly*. 4-10 July 2002, p.55.

Part of the explanation of the **increased funding requirements** demanded by the ACCC may be found in its **underlying philosophy of wanting to apply a structuralist approach to the competition regulation.**

The structuralist approach seeks to examine in great detail, the strategy and tactics of business in order to decide if a particular business measure is, or is likely to be, anticompetitive. **It requires frequent and detailed interventions** which the taxpayer is called on to fund at an alarming rate.

The opposing approach (commonly known as the "Chicago school" of which the Chairman of the US Federal Reserve, **Alan Greenspan**, is a strong advocate), **maintains that trying to decide whether a company's actions are likely to damage competition, is largely futile and open to speculation**.

"…the economists of the Chicago school contend that markets only fail when governments fiddle with them. ***The advantage which companies may gain through predatory pricing or through monopoly is likely to be no more than a temporary gain****. The dynamics of the market will ensure that extraordinary profits soon attract competitors."*[33] [Bolding added]

Furthermore, the assumption that an individual firm can achieve market dominance and high profitability whilst maintaining barriers to entry, needs to be tested against the reality of history.

"Greenspan argued that anti-trust remedies were applied mainly to firms that were dominant in their industry, yet there were ***few cases in history where dominance was sustained****."*[34] [Bolding added]

> ***"The ultimate regulator of competition in a free economy is the capital market. So long as capital is free to flow, it will tend to seek those areas which offer the maximum rate of return."***[35] [Bolding added]

The ability of high profit to attract competitors is well understood by observing any market for long enough.

"*Industries with low growth rates (under 6% per annum) present few opportunities for new firms, but enable established firms to maintain profitability if they can protect their position. Modest growth rates (6-12% per annum) present opportunities for aggressive firms.* ***High growth rates (over 12%) present substantial opportunities, but they attract large numbers of new competitors and require that most competitors make substantial capital investments to keep pace****."*[36] [Bolding added]

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[33] *Competition Policy: the importance of.* (www.themanager.com.au) 25 May 2001.
[34] *Competition Policy. ibid.*
[35] Greenspan, A. Antitrust, in Rand. A. *Capitalism: The Unknown Ideal.* Signet. 1967, p.68.
[36] *Strategic Management. A Methodological Approach.* Third Edition. Addison-Wesley Publishing Company, 1990, p.151.

Conclusion

The alleged benefits delivered to Australians by current competition regulation need to be more critically analysed against the cost of growing regulation. The crisis of confidence on US stock markets may indicate that we have placed too much reliance on regulation and insufficient reliance on integrity of individuals in positions of responsibility. Consumer regulation needs more critical evaluation.

PROPOSAL TO INTRODUCE AN EFFECTS TEST

Proposals to change Section 46 (the addition of an effects test)

Section 46 of the Trade Practices Act states specifically, rather than generally, what purposes, namely (a), (b) and (c), are prohibited by use of market power.

46 Misuse of market power

(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:

(a) Eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;

(b) Preventing the entry of a person into that or any other market; or

(c) Deterring or preventing a person from engaging in competitive conduct in that or any other market.[37]

The ACCC wants the specific clauses (a), (b) and (c) removed and substituted with a broader catchall provision, namely, a purpose of substantially lessening competition.

It cites Section 45 and 47 of the Act, which has catchall provisions as justification for this change.

The ADF is opposed to any attempt to broaden or generalise the Trade Practices Act and believes such changes reduce certainty in the understanding and the application of the law.

As Barwick explains:

"*By its very nature, law on this subject* [competition law] *was difficult to interpret and apply. It made illegal certain business activities described in the legislation in general terms, placing on business the need to form a judgment about the meaning and scope of the law on pain of a criminal penalty if an error of judgment were made."*[38]

"By making a specific list of practices, as clearly defined as may be, and by avoiding a dragnet, I would endeavour to reduce the area in which such enlargement or diminution may occur."[39]

For this reason, the ADF believes that the Act should be reviewed and where possible, generalised words should be replaced with more definite and specific definitions to provide greater certainty.

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[37] *Trade Practices Act 1974*, p.119.
[38] Barwick, G. *A Radical Tory. Reflections & Recollections*. The Federation Press. 1995. p.146.
[39] Federal Hansard. *Restrictive Trade Practices.* [6 December 1962], p.3108.

Australians are entitled to the rule of law. That means knowing in advance as far as possible what specific legal obligations are placed on them. Generalised legislation adds to uncertainty, the potential for retrospective judgement, and denial of due process.

Conclusion

Rather than attempt to make Section 46 comply with Sections 45 and 47, reform is needed to bring Sections 45 and 47 in line with Section 46. Namely, to specify what conduct is unlawful rather than rely on generalised terms such as *"substantially lessening competition"*.

PROPOSALS TO INCREASE CRIMINAL SANCTIONS

The ADF notes that criminal penalties exist under the existing Act for certain offences, particularly in relation to the giving of evidence and the intimidation of witnesses (Sections: 44ZG, 44ZI, 44ZJ, 44ZK).

The ACCC seeks to widen its power to threaten criminal sanctions on both individuals and corporations for certain offences under the Act in relation to collusive behaviour.

The ADF believes this is particularly dangerous for the process of justice when these threats are being made in regard to regulations which are the subject of wide interpretation and where intent is often the issue rather than deed or action.

The ACCC justifies its request for criminal sanctions by explaining:

- *"the stigma attached to a criminal conviction, and consequently its deterrent effect, can be expected to be greater than for civil offences, even for a corporation, and there is likely to be **more negative publicity** associated with such a conviction, and*
- *there are likely to be efficiencies in the investigation phase and in prosecution because it will minimise **difficult evidentiary issues** that may arise in civil proceedings against a corporation if there are limits on the use of evidence obtained in the course of a criminal investigation of an individual (through which that corporation acts)."*[40] [Bolding added]

In summary, the ACCC wants criminal sanctions included in the Act in order to increase its ability to generate negative publicity through stigma and also to get around potential difficulties with court case evidence.

It is important that this request by the ACCC be considered in the light of its previously announced proposals associated with "leniency" and "co-operation".

Essentially the ACCC wants to leverage off criminal sanctions to obtain confessions and co-operation with its prosecution mechanism. The warnings of Sir Garfield Barwick need to be restated.

"I also felt that the American system allowed the Justice Department too much opportunity to impel businessmen into making arrangements at times perhaps legally unnecessary but which were wise from a business point of view, given the great cost of litigation. I could see possible injustice arising from the departmental ability to apply such pressure."[41] [Bolding added]

[40] ACCC: *Submission to the Trade Practices Act review*. June 2002. p.40.
[41] Barwick, G. *A Radical Tory. Reflections & Recollections.* The Federation Press. 1995. p.146.

What is not understood for those who have not experienced coercion by the ACCC is that faced with the financial consequences of attempting to defend personal and corporate reputation from allegations of criminality, many targets have no other viable defence but to make a confession to ACCC allegations, which in other circumstances they would defend.

It is for these reasons the ACCC should not be granted extended powers to threaten criminal sanctions against an individual. The Act should remain as it is.

Conclusion

The ACCC's primary purpose in requesting criminal sanctions for breaches of the Trade Practices Act is to boost its ability to generate adverse publicity and to overcome problems associated with gathering evidence against targets. The ADF believes this is not sufficient justification to introduce criminal sanctions.

THE ACCC'S BEHAVIOUR ANALYSED

Enron, WorldCom and the ACCC

The ADF is disturbed by comments made by the ACCC chairman, Professor Fels, in relation to the *Dawson Enquiry*.

On Monday, 15 July 2002, on the ABC News, Professor Fels stated:

"Surely the lesson of Enron and WorldCom and so on is that lobbying by big business to undermine regulation is very harmful to the economy."[42]

Professor Fels was responding to submissions to the Dawson Enquiry by certain business groups who were critical of the ACCC's performance.

These comments by Professor Fels would seem to suggest that those who are critical of the ACCC's performance are doing harm, which could result in the collapse of large Australian corporations, as had been the case with Enron and WorldCom in the USA.

The ADF believes this is a misinterpretation of the events in the US which could result in deterring submissions critical of trade practices regulation.

The facts are that in the US, despite the existence of the most draconian trade practices regulations and consumer protection laws in the western world, individual business executives and financial officers acted dishonestly. **All evidence suggests that the breaches have occurred in the basics of business,** namely, the presentation of financial accounts and the disguising of liabilities off balance sheet.

Ironically, it may be the demands placed on business to meet stringent competition requirements that have led to an incentive to distort their truthful financial performance.

The Caltex box affair

The corporate behaviour of the ACCC has recently been called into question in the Caltex box affair.

Following a recent "raid" by the ACCC on the offices of Caltex (allegedly in response to an anonymous complaint), subsequent media coverage was condemned with allegations emerging that the ACCC had contrived to paint Caltex in a bad light.

According to Business Review Weekly:

"Sydney's Daily Telegraph *newspaper carried a photograph on page one with the caption 'ACCC officers carry boxes of documents from Caltex's headquarters'. But the caption was misleading. As Fels later acknowledged, the officials were carrying boxes containing ACCC property. No evidence was removed from Caltex's offices on that*

[42] Fels, A. *ABC News.* 15 July 2002.

day. The chairman of Caltex, Dick Warburton, cried foul and accused Fels of using a 'trumped-up photograph' to destroy Caltex's reputation.

Fels' critics claim that the raids on the oil companies – and the ACCC's use of the media to publicise them – highlight everything that is wrong with the way the ACCC works. Big business argues that, with scant evidence, Fels has used the media to ruin the reputations of Caltex, Shell and Mobil. Fels defends his use of the media. He says the whistleblower wrote to the Daily Telegraph *before the raids, and the newspaper approached the ACCC to say it was going to publish the letter.* ***Fels says this forced the ACCC's hand: it sought an assurance from the newspaper that it would not publish the letter until after an ACCC raid and, in return, the ACCC would not mention the raid to other media outlets. When the* Daily Telegraph *said it wanted a picture to accompany its story, Fels told the newspaper when a group of officials would be leaving Caltex's Sydney office."***[43] [Bolding added]

The ADF believes there are serious issues concerning due process arising from the Caltex box affair and that only a full official independent enquiry is capable of ascertaining whether or not the ACCC has deliberately abused its power and prejudiced the legitimate rights of an Australian company. It would seem appropriate that Professor Fels should step down as chairman of the ACCC until the matter is resolved.

When a company or individual's reputation is unjustly maligned, their ability to compete is reduced. This must certainly be prejudicial to the public interest and likely to lessen competition in the individual marketplace in which that organisation or individual operates.

The Rockhampton obstetricians' case

The ACCC has made public allegations against three Rockhampton obstetricians who have been threatened with Federal Court action unless they comply with the ACCC's demands.

The ADF intends to make further comment on this matter once it is settled. For other specific cases concerning the profession and the ACCC refer to the ADF submission to the *Wilkinson Enquiry*, which outlines, The Anaesthetist's Case, The Western Australian AMA Case, The Royal Australasian College of Surgeons Authorisation, and the Mildura and Hopetoun rural doctors matters.

Conclusion

An independent enquiry into the Caltex box affair needs to be undertaken to establish whether or not the ACCC abused its powers in regard to the legitimate rights of an Australian company to due process. The conduct of the ACCC in relation to the Rockhampton obstetricians' cannot be commented on publicly at this stage, although the ACCC is able to publish allegations in newspapers on its part.

[43] Thomson, J. Fels fights back, *Business Review Weekly*. 4-10 July 2002. p.54.

ADF RECOMMENDATIONS FOR REFORM

The ADF believes that the following reforms will assist to improve the balance between competition policy regulation and the democratic rights of Australians in their business, commercial and professional conduct. It is a plea for sanity.

REFORM: Public Allegation Prohibition

The prohibition of public allegations, comments, threats, and media releases by the ACCC on any matter, which has not been determined, by the ACCC or the Federal Court.

Explanation

The ACCC, part of the public service, has continually issued media releases and made allegations against parties it is seeking to prosecute. This behaviour would never be sanctioned in any other jurisdiction where an individual's right of being innocent until proven guilty, is strictly protected. The practice of trial by media by an organisation with the resources and authority of a government institution is an abuse of power which should not be tolerated in a democratic society. The minister responsible for competition regulation will always have the ability to raise in parliament any matter of public interest identified by the ACCC. The parliament allows for free speech, scrutiny and right of reply in matters of public interest.

REFORM: Collective Representation

Express recognition in legislation of the right of negotiators to collectively represent small business, sole traders, and independent professionals in the same commercial or professional activity on any matter providing individual consent is provided to the negotiator by those being so represented.

Explanation

It is time to end the situation where an individual representing a group of competitors against a much more powerful acquirer of services can only represent one client at a time. Providing there is no collective price fixing agreement between clients, a negotiator should be able to present all views at once.

REFORM: Fee Schedule Legalisation

Express recognition in legislation removing the threat of legal prosecution against associations who publish fee or price schedules provided there is no attempt by those associations or publishers to coerce association members to adhere to the published fee.

Explanation

The ACCC claims that price or fee schedules are not illegal but warns against their use or their publication without authorisation from the ACCC. Fee Schedules are an important way of informing the market as to what one organisation believes a service is worth as opposed to hidden pricing which denies consumers price information about that service. Providing that there is no attempt to enforce a schedule on its members, associations should not be prosecuted and should even be encouraged to publish fee schedules which will provide consumers with price information in order to make informed decisions.

REFORM: The Right to Sue for Damages

The right of an individual to sue the ACCC for damages incurred to personal and/or commercial reputation and trade where it can be shown that the ACCC's actions have misrepresented an individual or organisation.

Explanation

At present, an injured party has to prove fraud and dishonesty against the ACCC in order to seek redress if the ACCC has caused damage through misrepresentation. What about the business or individual whose reputation and economic viability is damaged by media comments alleging wrong doing when it is later found, on the facts, that the public comments by the ACCC were unsubstantiated?

REFORM: ACCC Ombudsman

The establishment of an independent ACCC Ombudsman and Complaints Commissioner with mandatory time limits for reporting.

Explanation

Who regulates the regulator? Currently complaints about the ACCC are dealt with by ACCC internal processes, even though the Commonwealth Ombudsman has the power to investigate ACCC complaints. This area is so contentious, specialised, and demanding that it requires a full time watchdog with powers to impose penalties and demand redress to complaints upheld.

REFORM: Fee Discussion Legalisation

The legalisation of discussions, meetings, conversations, expressions of opinion or exchange of documents or dissemination of information about fees or prices falling short of price fixing.

Explanation

At the moment there is mass confusion about what so-called competitors can do when raising matters about fees and pricing. On one hand, the ACCC warns that it is best not to discuss fees with competitors. Others advise that you can discuss fees but not come to an agreement about fees.

REFORM: Independent Authorisations Body

Establishment of a separate independent body solely responsible for authorisations.

Explanation

The ACCC has at times made public its view on matters which are later subject to authorisation. How can any organisation objectively assess, let alone authorise, behaviour which it has already publicly condemned, criticised or questioned? The ACCC cannot be allowed to be the police force, the judge, the jury, and gaoler.

REFORM: Non-Renewable Commissioner Terms

A four-year non-renewable term for ACCC commissioners and senior staff.

Explanation

A four-year non-renewable term will help safeguard against the potential use of the office and its powers to impose a personal or political agenda. By renewing senior staff every four years, policy positions adopted by the ACCC can themselves be reviewed by those coming into office.

SUMMARY OF CONCLUSIONS

Conclusion

There exist in Australian law an injustice so grave as to render it virtually impossible for any individual other than a medium to large corporation with the ability to incur hundreds of thousands of dollars in legal fees to defend itself against allegations and Federal Court proceedings brought by the ACCC under the powers given to it by the Trace Practices Act.

Conclusion

US antitrust law originated because of exploitative behaviour made possible by government intervention. Furthermore, the emergence of companies like Standard Oil and their need to achieve market dominance in order to raise sufficient capital and create efficiencies, was misunderstood because of a failure to appreciate the economies of scale needed to successfully operate a modern corporation in a non-agricultural market.

Conclusion

The first attempts to establish a Trade Practices Act in Australia in 1962 rejected the US and Canadian model. Subsequently, the 1974 Act used the US antitrust legislation as its model. It is therefore important that the assumptions underlining the development of this legislation be reanalysed to test their current validity.

Conclusion

The alleged benefits delivered to Australians by current competition regulation need to be more critically analysed against the cost of growing regulation. The crisis of confidence on US stock markets may indicate that we have placed too much reliance on regulation and insufficient reliance on integrity of individuals in positions of responsibility. Consumer regulation needs more critical evaluation.

Conclusion

Rather than attempt to make Section 46 comply with Sections 45 and 47, reform is needed to bring Sections 45 and 47 in line with Section 46. Namely, to specify what conduct is unlawful rather than rely on generalised terms such as "*substantially lessening competition*".

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