2. Architecture of Authorisations

This chapter looks at the origins of the authorisation process, examining the period from the early twentieth century until 2010, when the new *Competition and Consumer Act 2010* (Cth) was introduced. The design of the authorisation process within the *Trade Practices Act 1974* (Cth) can only really be understood by looking at the extended context. We should look particularly to the early 1960s to glean a better understanding of the place and architecture of the authorisation process. This was the time that the business and general community began to engage in a discourse about restrictive trade practices, setting the stage for the introduction of the 1974 Act more than a decade later.

The Regulatory Landscape: Corporations, Clubs and Cartels

The role of corporations in Australia's economic development has been influential in shaping legislation regulating restrictive trade practices. The role of corporations can be traced back to the Australian Agricultural Company, incorporated by royal charter in 1824 and conferred with the power for the cultivation and improvement of wasteland in the colony of New South Wales. The company engaged in a variety of activities, including using convict labour in gold and coal mining, and in pastoral and agricultural activities, including wool-growing. Indeed, the sudden surge in incorporation of corporations during the gold rush years of 1875 to 1888 in Victoria and New South Wales is no coincidence, merely highlighting the important role of the corporate enterprise in economic development. Big corporations were important not just for economic development, as is demonstrated by the role played by the Colonial Sugar Refinery (CSR) company, the size and location of which in northern Australia went some way to assuaging the government's concerns over security and defence. CSR had monopoly status due to government protection; it was important to the government, which had the problems of a sparsely settled continent and the resulting concerns over how these areas were going to be defended. As is illustrated by the conclusions of a 1912 royal commission, in relation to the multifaceted roles of CSR:

> [I]t follows that the supreme justification for the protection of the Sugar Industry is the part that the industry has contributed, and will, as we hope, continue to contribute to the problems of the settlement and defence of the northern portion of the Australian continent.

> The recognition of the nature of this supreme justification is the first condition of a sound public policy in relation to the Sugar Industry. Relatively to it, all other issues are of minor importance.[1]

Cartels were a feature of Australian life, collusive practices were common and Australian industry was always highly concentrated.[2] It was estimated that the level of concentration of power in Australia 'is twice as great as it is in the United Kingdom and three times as great as it is in the United States'.[3] Many reasons were advanced for these levels of concentration. Particularly during the early years of Federation, governments favoured certain industries in return for support and loyalty. An example of this political dimension was illustrated by the appointment of Essington Lewis, the 'steel master' and head of the Broken Hill Proprietary Steelworks to the position of director-general of munitions in 1940 in the midst of World War II. Clearly the availability of steel was important to this position and it was remarked that, as director-general, 'Lewis controlled the production of all ordnance, explosives, ammunition, small arms, aircraft and vehicles and all materials and tools used in producing such munitions'.[4]

Prior to the introduction of statutes specifically dealing with competition, it was the common law that addressed such activity. The general rule at common law was that restraints of trade could not be enforced unless it 'is reasonable in the interests of the parties concerned and reasonable in the interests of the public and not injurious to the public'.[5] This position was established in the oft-quoted passage of Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*:

> The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable — reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and

---

1 Alan Birch and JF Blaxland, 'The Historical Background', in AG Lowndes (ed.), *South Pacific Enterprise: The Colonial Sugar Refinery Company Limited* (1956) 51.

2 For a discussion of the 14th Royal Commissions on Restrictive Trade Practices conducted in Western Australia, see Geoffrey de Q Walker, *Australian Monopoly Law: Issues of Law, Fact and Policy* (1967) 15.

3 Commonwealth, *Parliamentary Debates*, Senate, 8 December 1965, 2137, (Senator Lionel Murphy, New South Wales); Tony Freyer, *Antitrust and Global Capitalism 1930–2004* (2006) 318.

4 Geoffrey Blainey, *The Steel Master: A Life of Essington Lewis* (1981) 147.

5 Report from the Joint Committee, Parliament of Australia, *Constitutional Review* (1959) Chapter 17, para 843 116.

> so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities.[6]

This line of argument had been made to support cartel activity whereby cartel arrangements were considered reasonable and there was a public interest in avoiding cutthroat competition.[7] Even though the first statute regulating this area was introduced in the early nineteenth century, in the form of the *Australian Industries Preservation Act 1906*, it did little to alter the view that cartels may be in the public interest.[8] The main focus of the Act was the protection of Australian manufacturing industries from unfair competition from foreign companies, rather than promoting domestic competition.[9]

These public interest arguments were examined by the High Court in the *Coal Vend* case.[10] The claim was that numerous coal proprietors and shipping companies were part of a cartel engaged in price-fixing, as well as monopolising the coal trade in Newcastle and Maitland. These practices were described as conduct that was detrimental to the public because it involved the practical and persistent annihilation of competition on land and sea; excessive, arbitrary and capricious prices charged to consumers; restrictions on consumer choice; and, amongst other points, difficulties in obtaining particular classes or grades of coal.[11] The defendants claimed that the higher price could be offset by the advantages the cartel delivered to members of the community, other than consumers, in the form of the continuation of an industry.

The High Court saw the notion of public detriment as requiring the consideration of a wide cross-section of the public, including consumers as well as producers, and stated:

> It may be that the detriment, if it be one, of enhancement of price to the consumer is compensated for by other advantages to other members of the community, which may, indeed, include the establishment or continuance of an industry which otherwise would not be established or would come to an end.[12]

---

6 [1984] AC 535 at 554.

7 See David Meltz, 'Happy Birthday Mr Nordenfelt! — The Centenary of the Nordenfelt Case' (1994) 2 *Trade Practices Law Journal* 149, 153.

8 Bruce Donald and John Dyson Heydon, *Trade Practices Law* vol 1 (1978) 5.

9 David Merrett, Stephen Corones and David Round, 'The Introduction of Competition Policy in Australia: The Role of Ron Bannerman' (2007) 47(2) *Australian Economic History Review* 178; Andrew Hopkins, *Crime, Law and Business: The Sociological Sources of Australian Monopoly Law* (1978) 28.

10 *Adelaide Steamship Co Ltd v The King and the Attorney-General* (Cth) (1912) 15 CLR 65. This case rendered the *Australian Industry Preservation Act* (1906) nugatory.

11 *Attorney-General (Cth) v Associated Northern Collieries* (1911) 14 CLR 387, 399.

12 *Adelaide Steamship Co Ltd v The King and the Attorney-General* (1912) 15 CLR 65.

The court, however, did not accept that producers could be regarded as 'trustees for consumers'. The High Court found the prices had not been raised to an unreasonable amount and the conduct was not detrimental to the public. The case went to the Privy Council, which was sceptical about the value of competition, and regarded the agreement as an attempt at avoiding 'cutthroat' competition without the intention of charging unreasonable prices.[13] The efforts of the Privy Council can be contrasted to those of the American courts, which were strongly opposed to restrictive trade practices, leading to the formation of different types of business consolidation.[14]

Economic downturns, such as the depression of the 1930s, encouraged cartel activities and provided the breeding ground for trade restraints.[15] The role of trade associations in generating such practices was widely acknowledged and business did not view restrictive practices as improper; these practices were frequently termed 'orderly marketing' or, as it has been provocatively suggested, as just another consequence of Australian mateship.[16] It was stated that a club-like attitude existed and business was happy with their arrangements, which were based on a 'network of restrictive agreements'.[17] 'The rules were known to the members, but they did not want to talk about them to other people. Price agreements between competitors were common'.[18] Senator John Gorton declared that 'the growth of monopoly and restrictive trade practices has gone so far as to become a disease',[19] and it was evident any legislation overtly attempting to strike at cartels and collusions would not be supported by the business sector.

The Origins of the Authorisation Process

The postwar world introduced new issues, including industrial progress, global corporations and high levels of industrial concentration — a climate

13 *Attorney-General (Cth) v Adelaide SS Co* [1913] AC 781.

14 For a discussion contrasting the approaches, see Freyer, *Regulating Big Business: Antitrust in Great Britain and America: 1890–1990* (1992) 35.

15 See Report from the Joint Committee, Parliament of Australia, *Constitutional Review* (1959) 856; see also Walker (1967) 17. For the American experience during the depression years, see Eleanor Fox and Lawrence Sullivan, 'Antitrust — Retrospective and Prospective: Where are we coming from? Where are we going?' (1987) *New York University Law Review* 936, 941.

16 Maureen Brunt, 'Legislation in Search of an Objective', in John Nieuwenhuysen (ed), *Australian Trade Practices: Readings* (2nd edn, 1976) 240. See also Brunt, 'The Australian Antitrust Law After 20 Years — A Stocktake' (1994) 9 *Review of Industrial Organization* 483.

17 Interview with Ron Bannerman (Commissioner of Trade Practices Commission 1966–1974 and Chair of the Trade Practices Commission, 1974–1984) (Canberra, 27 September 2001) (Bannerman interview).

18 Ron Bannerman, 'Points from Experience 1967–84', in Trade Practices Commission, Commonwealth of Australia, *Annual Report 1983–84*, (1984) 157.

19 Commonwealth, *Parliamentary Debates*, Senate, Second Reading Speech (Trade Practices Bill 1965), 8 December 1965, 2198 (Senator John Gorton, Victoria, Minister for Works).

that encouraged cartels and anti-competitive conduct.[20] Different countries responded to these challenges in different ways.[21] The inadequacy of the common law in quelling such practices was recognised as evidenced by the report of the Western Australian honorary royal commission in February 1957, which stated that, among the trade associations studied, it had found in at least 111 of such associations there existed a standard pattern of restrictive practices, including exclusive dealing, price-fixing agreements and collusive tendering agreements.[22] Similar findings were made in the *Report of the Royal Commissioner on Prices and Restrictive Trade Practices in Tasmania* (1965), in which the commission asserted two thirds of the trade associations were involved in restrictive trade practices.[23] It was stated of this period:

> Resale price maintenance by suppliers was a way of life. The 'tied house' system in liquor retailing and petrol retailing was entrenched and thought to be essential. All these matters had been countenanced and indeed defended, by the common law and so they represented valuable 'rights'. The common law had preserved 'sanctity of contract' in the interests of the parties and largely put aside the interests of customers and the public.[24]

The growing dominance of neoclassical economics and the contributions of industrial economists who linked high levels of concentration to the firms' performance led many developed countries to introduce legislation aimed at controlling monopolies and collusive practices.[25] In Australia there had been numerous attempts at state level to regulate anti-competitive conduct.[26] These were by and large ineffective, particularly because state laws could not adequately regulate a corporation's conduct in another state.[27] The only federal statute on restrictive trade practices until this time had been the *Australian Industries Preservation Act 1906*, which had been weakened owing to the High Court

---

20 See Fox, 'The Modernization of Antitrust: A New Equilibrium' (1981) 66 *Cornell Law Review* 1141, 1149, for discussion on the increasing number of mergers in the wake of World War II; see also Freyer (1992) 269–71.

21 See Freyer (2006). See also Stephen Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (1999) 27; Helen Mercer, *Constructing a Competitive Order: The Hidden History of British Antitrust Policies* (1995) 3.

22 Alex Hunter, 'Restrictive Practices and Monopolies in Australia' (1961) 37 *Economic Record* 30–31.

23 Royal Commission on Prices and Restrictive Trade Practices in Tasmania, Parliament of Tasmania, *Report of the Royal Commissioner on Prices and Restrictive Trade Practices in Tasmania* (1965) 31.

24 Bannerman (1984) 157.

25 For example, Canada passed the *Combines Investigations Act 1951*; the United Kingdom passed the *Restrictive Trade Practices Act 1956*; New Zealand passed the *Trade Practices Act 1958*; six national parliaments in the European Union had ratified the Treaty of Rome, which gave some emphasis to antitrust. See also Freyer (1992) 278; John Kenneth Galbraith, 'The Development of Monopoly Theory', in Alex Hunter (ed), *Monopoly and Competition: Selected Readings* (1969) 19–23. See also Eugene V Rostow, 'British and American Experience with Legislation against Restraints of Competition' (1960) 23(4) *Modern Law Review* 477, 490.

26 See, for example, *Monopolies Act 1923* (NSW); *Fair Prices Act 1924* (SA); *Prices Act 1963* (SA); *Profiteering Prevention Act 1948* (Qld); *Unfair Trading and Profit Control Act 1956* (WA); *Trade Associations Registration Act 1959* (WA).

27 See Freyer (2006) on the efforts and effectiveness of state's attempts to regulate monopolistic practices, 318–20.

decision in *Huddart Parker* declaring parts of the Act as unconstitutional.[28] The need to have a national regulatory approach was appreciated by parliamentary committees in 1958 and 1959, which had recommended that the constitution be amended to give the federal government greater power to legislate.[29] There was a recognised need for another attempt, at the federal level, to regulate restrictive trade practices.

Two approaches to the control of restrictive trade practices, those of the United States and the United Kingdom, have informed the design of Australian competition statutes at different times. While the main US statute was a broadly worded one that relied on the courts for interpretation, the *Robinson-Patman Act 1936* allowed for administrative discretion to be exercised for protecting small business.[30] The British approach, however, relied on an administrative body, rather than the courts, to apply the legislation on a *case-by-case* analysis.[31] The first Australian statute, the *Australian Industries Preservation Act 1906*, was firmly based on the US approach, as is reflected in its language and the inclusions of treble damages.[32] The effect of this Act was severely limited by the High Court decision in the *Coal Vend* case and it fell into disuse.[33] Following this experience, the debate on the appropriate approach for Australia resurfaced. It was clear that, among both business groups and parliamentarians, there was little support for US-style legislation.

Antitrust, as a philosophy and body of law reflecting political democracy in the United States, had emerged from a tumultuous history.[34] There was much less certainty, however, about its place in Australia and it was noted by Neville Norman that the 1950s was a time when restrictive practices were rife and industry did not conceal such agreements because there was no public or political censure against them.[35] The prevailing view of the time is summarised by Maureen Brunt who was influential in the development of competition policy in Australia:[36]

---

28 (1909) 8 CLR 330.

29 Hopkins (1978) 33.

30 The main statutes were the *Sherman Act 1890* (US) and *Clayton Act 1914* (US).

31 *Monopolies and Restrictive Practices (Inquiry and Control) Act 1948* (UK); *Restrictive Trade Practices Act 1956* (UK).

32 Donald and Heydon (1978) 5.

33 See *Adelaide Steamship Co Ltd v The King and the Attorney General* (1912) 15 CLR 65. This decision denied the Commonwealth Government the power to legislate such corporate activity. See also Donald and Heydon (1978) 5.

34 Fox (1981) 1141.

35 Neville Norman 'Progress Under Pressure: The Evolution of Antitrust in Australia' (1994) 9 *Review of Industrial Organization* 527, 529; See also 'Brewery Keen to Protect Interests' *Australian Financial Review*, 22 November 1963, 4.

36 Maureen Brunt had a tremendous influence in shaping Australian competition law, sitting as part-time member of the Trade Practices on important appellant decisions, writing in scholarly journals and being an active participant in annual conferences and seminars. See Alan Fels, 'Distinguished Fellow of the Economic Society of Australia 2006: Maureen Brunt', (2006) 83, *Economic Record* 204.

> In the early days, when restrictive practices were so pervasive in Australia, it was unclear to legislators how many of them might be 'justifiable' (Barwick's word) — or why. While it was thought that in the small developing Australian economy, there might well be efficiencies that were dependent upon scale or agreements, this was not the only consideration. It was thought to be unwise to be doctrinaire. At the same time, it was thought to be appropriate to give business firms the opportunity to demonstrate that their acquisitions, practices and agreements were in society's interests.[37]

It was well understood by parliamentarians and government officials that, when discussing this issue, it was best not to associate with the US approach.[38] The ties with Britain were more influential.[39] The British approach to the control of anti-competitive practices had originated in more recent times, resulting in the passing of legislation in 1956,[40] and there was the opportunity to speak with British regulators on their experiences and successes. Further, the British legislation was more palatable to business[41] and, therefore, it had a greater influence on the shape of the Australian legislation, as evidenced by the two main statutes that followed, the *Trade Practices Act 1965* and the *Trade Practices Act 1974*.

It was the notion of a 'fair go' that provided the focal point for the early discussions of regulating restrictive trade practices and competition policy. The main protagonist in these early discussions was Garfield Barwick, the attorney-general, who was responsible for beginning the discussions on regulating anti-competitive practices in Australia. After examining the American, Canadian and British approaches and speaking with many aggrieved parties, Barwick, in December 1962, presented an outline of the proposed legislation and, in November 1963, published a talking paper.[42] Barwick came to this area with the support of government, as evidenced by the governor-general's comments to parliament in 1960 pointing to the need for legislation regulating restrictive trade practices.[43]

Andrew Hopkins has argued that the decision to legislate must be seen in the context of the policies developed by the Liberal government of Robert Menzies. Hopkins asserts that the government, in its fight against inflation, wanted to

---

37 Brunt (1994) 483, 506.

38 Bannerman interview. For different views on the goals of US antitrust and UK competition law, see Wilks (1999) 27; Freyer (1992) 7–8.

39 Bannerman interview; see also Garfield Barwick, *A Radical Tory. Garfield Barwick's Reflections & Recollections* (1995) 147.

40 Freyer (1992) 295; see also *Restrictive Trade Practices Act 1956* (UK).

41 See Mercer (1995) 6. Here, Mercer argues that the British legislation was shaped fundamentally by business.

42 Barwick (1995); Hopkins (1978) 36–7, Merrett, Corones and Round (2007) 181–82.

43 Hopkins (1978) 34.

show it opposed wage rises and price increases, which were often stimulated by price agreements between competitors.[44] Thus, he argues, inflation was the main reason behind the government's decision to consider legislation in this area.

In a paper titled 'Some Aspects of Australian Proposals for Legislation for the Control of Restrictive Trade Practices and Monopolies', Barwick indicated the need for such legislation and proposed the terms of a Bill.[45] Described as the musings of a 'nineteenth century individualist, applying the techniques of the twentieth century, to bring nearer to fruition, his own ideas of individualism in society',[46] this paper was clearly directed at the predicament of small businessmen, such as storeowners who were not able to acquire goods because of the restrictive trade practices that prevented their supply to individuals outside the network. Tony Freyer has succinctly described this approach as 'the conservative idea of competition defined as free enterprise versus socialism'.[47] This unique Australian flavour , supporting small businesses and ensuring a fair go, was summarised by Barwick, when he wrote that increased efficiency from so-called economies of scale may not always be the answer to the problem of restrictive trade practices and, rather, it was necessary to consider the manner in which small- or medium-sized enterprises will be more satisfactory, both humanly and economically facilitated.[48] It was small business that was identified as deserving special attention, rather than 'consumers', the idea of which became important a decade or so later.

Barwick delivered public addresses around the country elaborating on the Bill's philosophy and harnessing support.[49] This was intended to enable interested parties to make representations and promote debate.[50] Although the Bill and Barwick's paper were much debated, it did not form part of government policy at the time and there was little available detail about the legislation. But it is clear that Barwick favoured the British approach to legislation, and David Marr has argued:

> [T]he British system of setting up a register of all agreements in restraint of trade also appealed as a clean and relatively bloodless method of collecting information on the practices he was setting out to control.[51]

---

44 ibid, 34–35.

45 Barwick, 'Some Aspects of Australian Proposals for Legislation for the Control of Restrictive Trade Practices and Monopolies', Paper presented at 13th Legal Convention, Canberra, January 1963.

46 Bannerman interview; see also Freyer (2006) 323.

47 Freyer (2006) 324.

48 Barwick (1995) 147.

49 Bannerman interview; Hopkins (1978) 36.

50 Hopkins (1978) 35.

51 David Marr, *Barwick* (2005), 188.

Barwick, however, was keen to avoid the objectionable features of the UK legislation studied.[52] From the outset Barwick identified the manner in which the Australian proposal would be different to the British counterpart. For the purposes of my discussion, I want to emphasise two features. First, unlike the open register of the British, Barwick wanted the Australian scheme to incorporate a register of agreements that may constitute restrictive practices that would be absolutely confidential[53] and, second, the decision to investigate the matters contained in the register would depend on whether the actual practice carried on was 'inimical to the public interest'.[54] The two features were innovative, departing from the British scheme and placing considerable power in the hands of officials. In later years, Barwick was equivocal about these features saying:

> The suggestion was that if the trader did not disclose that he carried on a described restrictive practice he would lose the right to assert later that the [practice was in fact harmful to the public interest.
>
> This part of the scheme was not completely understood and caused considerable opposition. In retrospect, I think it would have been better to rely on heavy penalties … on non-disclosure while retaining the trader's right to justify the practice as not harmful to the public interest.[55]

These two features were to remain as part of the legislation, which was passed many years and many drafts later. In 1963, Barwick left the Attorney-General portfolio, and passed the regulation of trade practices into the hands of the newly appointed Senator Billy Sneddon, who shaped and reshaped the idea over a period of three years, until it was eventually passed as the *Trade Practices Act 1965*.

Factors that Shaped the 1965 Act

Regulatory measures must fit with the commercial landscape and this was foremost in the minds of legislators who determined the design of the 1965 legislation. Two factors were particularly important in shaping this Act. First, there was no clear support from business for legislation controlling anti-competitive conduct and business lobbied hard, fundamentally influencing the design of the Act. Thus, the Act was a result of considerable compromise. Second, there was greater support for matters of interpretation to be dealt

52 Barwick, (1995) 147.
53 ibid, 148.
54 ibid; see also Merrett, Corones and Round (2007) 182, for how the legislation made further concession to business interests by softening the adjudication process used in Britain.
55 Barwick (1995) 148.

with by an administrative body, rather than being placed in the hands of the judiciary. Accordingly, the administrator was given wide powers and a tribunal created to hear trade practices matters.

Parliamentarians were more accustomed to the notion of legislation regulating trade practices during the 1960s. Business attitudes, however, were harnessed in opposition to this idea. Business was 'happy with the way things were and did not see any reason for legislation'.[56] An example is the Chamber of Manufacturers, which queried the objectives of a competitive economy, arguing the benefits derived by the manufacturing industry and its participants from anti-competitive agreements should be recognised before benefits to others.[57] This view certainly influenced the design of the 1965 legislation and the Act was described as 'one of the most ineffectual pieces of legislation ever passed by Parliament'.[58] It is clear, however, that business support and successful transition from Bill to Act status was unlikely if the legislation had been more stringent. The process from first announcement to enactment took over five years and the content of the Act changed considerably during that time.

There was support for the Act from diverse quarters. Consumer groups were in their infancy in Australia during this period and had little voice during the early 1960s. There was, however, support for the legislation from other sectors. Farmers and primary producers, who had long bought machinery and pesticides at uncompetitive high prices set by cartels, supported the legislation.[59] Likewise, small business people, who had not been able to enter the market, favoured regulation of such practices. Labour organisations and public authorities, both of which were exempted from the Bill, supported the legislation.[60] Finally the press, too, entered the fray, expressing a diversity of views.[61]

The Barwick scheme had proposed that four practices be directly banned by legislation and subject to criminal prosecution. They were: collusive bidding, collusive tendering, monopolisation, and persistent price cutting at a loss. It was proposed that these practices were per se illegal.[62] Business opposition to this was clear and loud, saying it was a 'savage application of the concept of crime'[63] and 'that no business practice could be condemned per se'.[64] As Hopkins pointed out, the reason for the success of business representations in

56 Bannerman interview.
57 Brunt, 'The Trade Practices Bill II: Legislation in Search of an Objective' (1965) 41 *The Economic Record* 357, 364.
58 Brunt (1994) 491.
59 Hopkins (1978) 42. It is worth noting that the Bill did not catch those activities of government marketing boards that stabilised the prices of farmers and primary producers.
60 Hopkins (1978) 42.
61 ibid.
62 ibid, 54.
63 ibid, 55.
64 ibid, 56.

opposition to the scheme was because they were based on values that were shared by government, including the non-criminal nature of businessmen, the importance of not burdening business with compliance costs and the necessity of encouraging economic growth.[65] The Liberal government of the day was sympathetic to these arguments and the Act dropped many of the Barwick proposals. The compromise was effectively to remove the per se prohibitions from the Act and make them all examinable by the regulator.

The underlying philosophy of the Act was stated by Barwick, who emphasised the public interest in controlling restrictive practices.[66] The Bill proposed a list of practices that would be unlawful, subject to a public interest defence. This list underwent numerous drafts and the provisions in the final Act were a watered-down version, evidencing the strong impact of the business lobby. The Bill that went to parliament did not attempt to control mergers and takeovers, but concentrated on price-fixing and resale price maintenance. While in some quarters it was as weak,[67] the much-redesigned Bill did, however, address the most prevalent types of restrictive trade practices. Ron Bannerman, reflecting on the Bill, stated:

> In the end the legislation wasn't much more than an introduction and its life was principally in the areas of horizontal price fixes and resale price maintenance. There were some other sections, a section that dealt with price discrimination and a section that pretended to deal with monopolisation, but they weren't real. If you are to start competition law from nowhere, you had to start with price fixing and that is what we did in Australia and we did it quite effectively under that legislation.[68]

The Act, which received Royal Assent on 18 December 1965 and came into operation on 1 September 1967, contained four practices of examinable agreements within section 36: obtaining discrimination in prices or terms of dealing,[69] forcing another person's conduct,[70] inducing refusal to deal[71] and monopolisation.[72] The Act provided for the registration of such agreements in the Register of Trade Agreements by virtue of section 40(1). This was to be a secret register, unlike the British counterpart. It has also been stated that Barwick thought this may act as an inducement for business to register.[73] Barwick had always considered confidentiality as important:

---

65 ibid, 65.

66 See D Stalley, 'The Commonwealth Government's Scheme for the Control of Monopoly and Restrictive Practices — A Commentary' (1963) 37 *Australian Law Journal Reports* 85, 87.

67 See Brunt (1965) 357; Merrett, Corones and Round (2007) 181; Donald and Heydon (1978) 8.

68 Bannerman interview.

69 Section 36(1)(a) *Trade Practices Act 1965*.

70 Section 36(1)(b) *Trade Practices Act 1965*.

71 Section 36(1)(c) *Trade Practices Act 1965*.

72 Section 36(2) *Trade Practices Act 1965*.

73 Bannerman interview.

> The register would be absolutely confidential, protected by severe penalties for disclosure. Having been registered, the disclosed practice could be continued without restriction or penalty until it was found by the appropriate tribunal to be harmful to the public interest.[74]

The proposal merely asked for the registration of practices and was hailed as 'simple and certain' as well as avoiding 'tremendous administrative costs and harassment of business'.[75] The legality of the practice relied on whether the requirement to register had been complied with and the legislation acknowledged that many examinable agreements would be innocuous and should be allowed on the basis of public interest. It was compulsory to register such agreements and it was prosecutable if this was not complied with. The administrator had the power to view the register and decide whether the legality of certain practices was worth pursuing.

The Trade Practices Tribunal was to consider whether the restriction or practice was in the public interest. This was similar to the British legislation, which had been criticised as vague.[76] Section 50(3) provided that, in considering whether any restriction or practices were contrary to the public interest, the tribunal weigh the detriment against the needs and interests that may have resulted. Section 50(2) listed the matters that were to be taken into account and these included:

a. the needs and interests of consumers, employers, producers, distributors, importers, exporters, proprietors and investors
b. the needs and interest of small businesses
c. the promotion of new enterprises
d. the need to achieve the full and efficient use and distribution of labour, capital, materials, industrial capacity, industrial know-how and other resources
e. the need to achieve the production, provision, treatment and distribution, by efficient and economical means, of goods and services of such quality, quantity and price as will best meet the requirements of domestic and overseas markets
f. the ability of Australian producers and exporters to compete in overseas markets.

---

74 Barwick (1995) 148.

75 Barwick 'Administrative Features of the Legislation on Restrictive Trade Practices' (The Robert Garran Memorial Oration, speech delivered at the Australian Regional Groups Royal Institute of Public Administration, Canberra, 3 November, 1963) 32.

76 Wilks (1999) 36.

The definition of public interest in the legislation was imprecise. It had been much debated in Cabinet and had been 'added to and subtracted from', the final form being a compromise.[77] Ultimately, the definition was criticised on the basis that the criteria were couched in terms of benefits to sectional interests as well as competition and good performance.[78]

Brunt, one of the most longstanding scholars in trade practices regulation, wrote of this provision:

> What is the criteria of the 'public interest'? … It is true that we have s 50 that proposes to spell out such a criteria. But examination reveals that it consists of such vague and all embracing language as to delegate to the Tribunal virtually legislative powers. In rather less mellifluous language, it seems that the Government has passed the buck.[79]

It was also pointed out that it would have been difficult to specify in advance the manner in which the interests of the different groups could have been weighed.[80] The legislation, by virtue of section 47, gave the commissioner of the Trade Practices Commission (TPC) the power to bring proceedings, on the basis that the examinable agreements were contrary to the public interest, before the tribunal which, by virtue of section 51, could determine whether the practice was illegal or unenforceable.[81] Bannerman stated of this power:

> The Commissioner … had to decide what cases to put to the Tribunal, and had to decide personally, without the power to delegate, and couldn't do that until he had formed an opinion that what he wanted to refer to the Tribunal was against the public interest. He had to form that opinion after having conferred and consulted with the industry that was affected by it … And I am told that this was much debated in Cabinet and reached its final form as a compromise.[82]

The second important factor in the regulatory landscape was the decision about who would be the decision-maker: which body would interpret the legislation. There was a shift away from the courts to a 'dual enforcement system': a specialist commission and tribunal.[83] Whereas the *Australian Industries Preservation Act 1906* had given the courts power to interpret the legislation, the *Trade Practices*

---

77 Bannerman interview.

78 Brunt (1965) 357, 384.

79 ibid.

80 ibid.

81 The Tribunal decision in *Re Frozen Vegetables Marketing Agreement* 18 FLR 196 was important in considering the meaning of public benefit. See John Hatch, 'The Implications of the Frozen Case for Australian Trade Practices Legislation' (1978) 48 *Economic Record* 374.

82 Bannerman interview.

83 Robert Baxt and Maureen Brunt, 'The Murphy Trade Practices Bill: Admirable Objectives, Inadequate Means' (1973–74) 1 and 2 *Australian Business Law Review* 3, 58.

Act 1965 legislated for a shift of responsibility from the courts to the newly established Trade Practices Tribunal.[84] Again, Brunt described the rationale for the creation of the tribunal, in the context of the current Act, as:

> The Trade Practices Tribunal is an Australian invention, designed to take some of the pressure off the courts, in what is largely a court-centered antitrust system, by offering a quasi-judicial resolution of some of the more economically complex trade practices matters. So in the initial design of the *Trade Practices Act* it was sought to partition subject-matter between the courts and two administrative bodies — the Commission and the Tribunal.[85]

Although here Brunt was referring to the 1974 legislation, this rationale was true of the tribunal under the 1965 legislation. And, the tribunal was empowered to consider all proceedings brought by the commissioner.[86] This shift from the courts to the tribunal was pragmatically explained on the basis that the interpretation of 'public interest' was essentially an administrative task that could not be given to the courts[87] and it was stated as follows:

> It is of course a possibility that a rule of reason such as that developed in the United States might be adopted by our Courts and other administrative authorities in their interpretation of this new law, but traditionally our Courts have taken the view that their duty is to interpret, not to make the law.[88]

This shift was criticised soundly as an attempt to avoid responsibility, and it was argued that this placed on the tribunal 'the onus of making decisions which are more appropriately the responsibility of the legislature'[89] and of 'passing the buck'.[90]

This Act established a powerful and influential regulator, and the Bill contemplated an active and nimble commissioner who would be able to seek undertakings from the regulated parties on ways to vary behaviour, and still be able to prosecute them in cases of breach.[91] The extensive powers given

---

84 Section 9 *Trade Practices Act 1965*.

85 Brunt, 'Practical Aspects of Conducting a Hearing Before the Australian Competition Tribunal', paper presented at The New Era of Competition Law in Australia Conference, Perth, July 1995, cited in Stephen Corones, *Competition Law in Australia* (2006) 38.

86 Section 47 *Trade Practices Act 1965*.

87 Commonwealth, *Parliamentary Debates*, Senate, Second Reading Speech, Trade Practices Bill 1965, 8 December 1965, 2198 (Senator John Gorton, Victoria, Minister for Works).

88 Australian Development Industries Commission, 'The Trade Practices Bill 1973 — An Analysis, with Proposals for Amendment' (February 1974) 12.

89 J Hutton and John Nieuwenhuysen, 'The Tribunal and Australian Economic Policy' (1965) 41 *Economic Record* 2387, 2389.

90 Brunt (1965) 357, 384.

91 See JE Richardson, 'The 1965 Bill: The Legal Framework', in Nieuwenhuysen (1976) 220.

to the commissioner caused much debate, with many members of parliament expressing their concern over the extent of these discretionary powers.[92] The commissioner was required to mediate between interested parties and exercise skill in deciding the order in which practices should be challenged.[93] It was noted that the commissioner needed to be a man of the world, with a good appreciation of the industrial and business scene, approachable by business without being officious and having his finger on the pulse.[94] Indeed, one example of the characteristics of the nimble commissioner was the manner in which he was expected to be able to inform the public and bring about a shift in public opinion on the need for competition.

It has been persuasively argued that Bannerman, as the First Commissioner of Trade Practices, played a pivotal role in making the Act a success.[95] David Merrett, Stephen Corones and David Round highlight the commissioner's role in raising public awareness of restrictive trade practices. The authors emphasise Bannerman's personal traits in contributing to this, including his powerful ambition for the institution,[96] being a slave of duty[97] and possessing a good deal of political nuance.[98] They point out Bannerman's recognition that, in return for statutory independence, he must remain a neutral administrator,[99] maintaining government support before building respect for the legislation among the wider community.[100] This included building an effective regulatory agency and actively developing a corporate culture with a commitment to competition principles.

One example of the importance of these personal traits was the manner in which Bannerman was able to inform the wider community about the incidence of restrictive practices in the market. Even though the Register of Trade Agreements was secret, knowledge about existing webs of restrictive trade practices was made public and the commissioner was able to bring about a shift in public opinion. As to why the secret register did not protect business, as intended, Bannerman stated:

> It [the secrecy provisions] didn't work simply because of the power and duty that the Commissioner had to present Annual Reports to the Parliament. In those Annual Reports he detailed all the information about the agreements, without disclosing names to the Parliament. The picture became clear. It became very clear across the community that there

92 Merrett, Corones and Round (2007) 185.
93 Barwick, 'Administrative Features of the Legislation on Restrictive Trade Practices' (1963) 43.
94 ibid.
95 Merrett Corones and Round (2007).
96 ibid, 195.
97 ibid.
98 ibid, 194–95.
99 ibid, 194.
100 ibid.

> was a network of restrictive agreements, up and down and sideways all of industry. The types of them were detailed. The provisions, which were copied from one industry to another … became known in spite of the secrecy provisions. That meant that the Commissioner's reports were much used by the press and the professions and put pressure on parliamentarians and thinkers about the adverse effects on the economy, initiative and on efficiency.[101]

Section 48 of the Act required that, prior to instituting proceedings in the tribunal, the commissioner carry out consultations with persons who would be the other parties to the proceedings, or with representatives of those persons with a view to securing some undertaking, cessation or variation of the agreement. These powers were criticised and the commissioner was called a grand inquisitor and the great bottleneck, who had been interposed between the tribunal and the object of its statutory functions.[102] These powers did, however, encourage the commissioner to engage with business and to build up a staff who could work effectively and with a shared ethos.[103]

The choice of the commission, rather than the executive department, to deal with the competition regulation was a choice being made in other jurisdictions, including the United States and United Kingdom. Marver Bernstein, in 1955, listed the advantages of relying on a commission as a regulatory tool, and they remain applicable today.[104] Bernstein pointed out that, in the nineteenth century, there was a shift in the character of economic regulation away from the judiciary to a commission that may be better resourced and better skilled in dealing with such specific areas.[105] Commissions were often seen as a means of 'taking regulation out of politics'[106] and they could engage in creative regulatory responses.[107] Further, there has always been distrust in the judiciary's ability to handle complex areas of economic regulation,[108] whereas commissions were seen as having a significant input into the determination of public policy.[109] Choosing to delegate such activity to an agency was also part of the British tradition,

---

101 Bannerman interview.

102 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 1965, 3239 (Mr Reginald Connor, Member for Cunningham).

103 Bannerman interview. See also Merrett, Corones and Round (2007) 196.

104 Marver Bernstein, *Regulating Business by Independent Commission* (1955).

105 ibid, 26. This work is often quoted for the evolutionary lifecycle of an agency. I do not think that this is applicable today and agree with the views expressed in Michael Moran, 'Understanding the Regulatory State' (2002) 32(1) *British Journal of Political Science* 431, 433.

106 Bernstein (1955) 71.

107 For a contrary view see Paul Craig, 'The Monopolies and Mergers Commission: Competition and Administrative Rationality', in Robert Baldwin and Christopher McCrudden (eds), *Regulation and Public Law*, (1987), 197, 222, where he argues that an agency is a good way of retaining political control.

108 Bernstein (1955) 28. See also these sentiments expressed in Independent Committee of Inquiry into Competition Policy in Australia, Commonwealth of Australia, *National Competition Policy*, (1993) [Hilmer Report]. See also Craig (1987) 223.

109 Bernstein (1955) 66.

whereby such delegation was controlled in a framework of trust and the focus was on the interest of the public.[110] All these factors have been relied on from time to time in Australia and formed a part of the regulatory landscape, which resulted in the creation of the TPC as the powerful regulator.[111]

The Critical Juncture of the Authorisation Process in the *Trade Practices Act 1974*

The critical juncture for the public benefit test within the formation of the institutional support for the authorisation process, under the 1974 legislation, was the period between 1962 and 1965, before even, the passing of its predecessor, the 1965 Act. Here I use the definition of critical juncture, namely that there should be a significant change, this change took place in a distinct way, and it produced historical legacies.[112] The significant change in this case was the recognition that some attempt had to be made to control cartels, even though it may be unpopular in the electorate.

The change did indeed take place in a distinct way in Australia because of the adoption of a secret register, with wide powers granted to the independent regulator who could decide which agreements to query as being against the public interest. This choice to use a registration system handled by the independent regulator resulted in legacies that have shaped our current competition regulatory structures. It would be untrue to say these legacies were intended or, even, that Australia's current competition laws were intended or planned. This is clearly not the case. Many other factors influenced the path over the ensuing years. But the decisions to make the register secret, and to grant wide powers to the commissioner, including the power to discuss matters with business with a view to avoiding proceedings,[113] were important. Although widely regarded as weak legislation, these aspects were vital in determining the trajectory the institution took and its legacy.

The 1960s brought a change in attitude and an acknowledgement that cartels had to be controlled by legislation, as demonstrated by Barwick who stated:

> The regulation of restrictive trade practices and monopolies is a field into which most of the countries of the West who desire to maintain a

110 Stephen Wilks and Ian Bartle, 'The Unanticipated Consequences of Creating Independent Competition Agencies' (2002) 25(1) *West European Politics* 148, 153.

111 See John Warhurst, 'Exercising Control over Statutory Authorities: Study in Government Technique', in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (1980) 151.

112 Berins Collier and David Collier, *Shaping the Political Arena: Critical Junctures, the Labor Movement, and Regime Dynamics in Latin America* (1991).

113 See Merrett, Corones and Round (2007) 182; Richardson (1976) 90.

> free economy have felt themselves obliged to enter. They have entered it to varying degrees, and with varying fortunes, with quite divergent schemes.[114]

Any attempt at regulating collusive conduct, to be successful, had to be sympathetic to the existing market structure of Australian industry. It was the Liberal Country Party that had conducted the early enquiries into legislative design and proposed the legislation. The political ideology saw restrictive trade practices creating problems of both a sociological and economic nature: the sociological problems arose from activities that excluded persons from the market and limited free enterprise, while the economic problems were responsible for distorting the market and exploited consumers.[115] The proposed legislation made the link between free enterprise and competition and received bipartisan support from both the Liberal Country Party, who proposed the legislation, as well as the Labor Party, who proposed more severe legislation. Bannerman has described this Bill as providing the competition edifice that we see today.[116] Rather than being a top-down attempt to control businesses, it was recognised that, in order to survive and be successful, any regulatory approach had to be essentially a compromise that listened to and accommodated the concerns of business. This is evidenced by the comments made by Barwick addressing the Chamber of Manufacturing Industries in 1963:

> In the middle of all the harouche, we had last Monday discussions with the Industries Advisory Council. We had put to us the most balanced, sensible and impressive ideas on this matter that I have ever heard … We do not want to be doctrinaire on this matter. We, like you, want to preserve competition. We can with good sense eliminate unfairness and injustice. All I want to tell you is that what has been said to me and my colleagues in the last few days has been so helpful, and that it may well determine the future course of action.[117]

This sentiment was echoed in the long title of the *Trade Practices Act 1965*, 'An Act to preserve Competition in Australian Trade and Commerce to the extent required by the Public Interest'.[118]

The 1965 Act made similar concessions to business and the registration process was aimed at assuring business that change would not be sudden. Neither business interests nor governments wanted to rely on the courts to interpret the statute, as had been the case under the 1906 Act. Any successful attempt

---

114 Barwick 'Some Aspects of Australian Proposals for Legislation' (1963).

115 ibid.

116 Bannerman interview.

117 Marr (2005) 191.

118 For a discussion on the importance of workable competition as an important feature of Australian competition regulation and the manner in which it is consistent with the public interest, see Brunt (1994) 483.

to regulate collusive conduct had to find a distinct way, as demonstrated by Gorton's statement that 'the philosophy which runs throughout the Bill is that the agreements and practices to which it applies are lawful unless and until they have been determined by the Tribunal to be contrary to the public interest'.[119] The distinct way of embodying this philosophy was the creation of the commission to negotiate these issues, and an important feature, the sweetner, of this scheme was the secret register of anti-competitive practices.[120]

The choice of the independent regulator and the creation of the secret register produced historical legacies. A fundamental legacy of the Act was that it created an independent agency and a commissioner with the discretion to interpret the term public benefit. It recognised certain restraints of trade may be in the public interest and should be allowed — thus, what may be bad for competitors may be good for the public. This became the foundation for the authorisation process under the 1974 legislation. As time passed, this authorisation process was seen as a strength of competition regulation in Australia and it represented a recognition that there are instances in which anti-competitive conduct is of value to society.[121] This has been considered to be particularly relevant in small economies where pursuing efficiency considerations alone may not always result in optimal outcomes.[122]

Further there are three important and specific legacies. First, the creation of the secret register, which was the beginnings of the authorisation process that was to become an important aspect of the *Trade Practices Act 1974*. The authorisation process under the 1974 Act, unlike its predecessor, was not a secret process. It did, however, allow for the authorisation of certain anti-competitive processes, whereby the public benefit outweighed the public detriment. This was only possible because the business community had accepted the register under the 1965 Act with the commissioner as the referee and regulatory mechanism. The phrase 'public interest' under the 1965 Act was changed to 'public benefit' under the 1974 Act, but its meaning remains imprecise.[123] The meaning of the phrase relies considerably on the discretion of the regulator and the major discourses of the time. As stated by Bannerman:

---

119 Commonwealth, *Parliamentary Debates*, Senate, Second Reading Speech, 8 December 1965, 2133 (Senator John Gorton, Victoria, Minister for Works). For a discussion on the distinctive nature of the authorisation process, see Brunt (1994) 483.

120 Section 47 *Trade Practices Act 1965*; the commissioner only took two such cases to the tribunal. See Donald and Heydon (1978) 8.

121 See [Hilmer Report] (1993) 29; *Re 7-Eleven Stores Pty Ltd, Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR 41-357, 42,645, 42,677.

122 Michal Gal, *Competition Policy for Small Market Economies* (2003) 55.

123 See Robert French, 'Authorisation and Public Benefit — Playing with Categories of Meaningless Reference?' (Paper presented at 4th Annual University of South Australia Trade Practices Workshop, Barossa Valley Resort, 20–21 October 2006) for a discussion of the terms public interest and public benefit, <http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_frenchj21.rtf> at 1 September 2007.

> Public interest can never be a precise thing that people will be able to accept or predict. It affects foreign policy, political judgment in areas of fiscal policy, tax policy and so on. It will always include anything that appears relevant and will depend on who is making the judgment.[124]

The second important legacy was the creation of the commission empowered with a wide discretion, which continues to engage in a dialogue with regulated parties and uses a diverse set of regulatory tools, and the creation of the tribunal to hear appeals on authorisations. Under the 1965 Act, Bannerman worked hard persuading parties to discontinue many anti-competitive agreements, gaining support and facilitating a gentle acceptance of the notions of competition and competitive practices. This was important in bringing about a cultural shift among the regulated groups.[125] Bannerman recounted:

> The significance of the 1965 Act was that it survived and made the existence of competition law known through the community and the professions. The press became interested in it; the lawyers became interested in it; the lawyers talked about it; the Parliament has people in it who became interested in the topic. So it survived. It survived because it got bipartisan support in the Parliament and it survived because there were sufficient people within business who were prepared to use it or allow the Commissioner to use it with their support by becoming witnesses.[126]

It was successful in raising the concerns of the regulator and in beginning a dialogue between the regulator and businesses. It won acceptance from the commercial world for this type of regulation[127] and laid the groundwork for the passing of the *Trade Practices Act 1974*. As Bannerman stated, rather modestly of his role:

> The role of Commissioner was important. He was an initiator, consultant who talked with industry, who in a sense corresponded with the Parliament through his Annual Report, which became a political tool in the hands of parliamentarians and the administration; his administration was able to take on many matters on legislative development and other constitutional points.[128]

---

124 Bannerman interview.
125 See Bannerman (1984).
126 Bannerman interview.
127 John Nieuwenhuysen (1976) 34–35. See also Donald and Heydon (1978) 8.
128 Bannerman interview.

Indeed, the powers of the commissioners only increased under the 1974 Act, both in an informal and formal sense. One example of such powers has been the use of undertakings in influencing industry structure.[129] On the manner in which the commission has been able to use such powers, Bannerman stated:

> The role of the Commission changed in my time and has changed very much more since … [Under the 1974 Act] informal powers grew more and more and they are not found in the Act. Power of forbearance, for example, is very important in formalising industry structure. This is entirely non-statutory and was gathering pace in my time. Non-statutory power is now exercised by the Commission with consent and it delivers it relatively efficiently, quickly and in a semi-secret or secret manner. This is quite remarkable. This has meant that the Commission has become so important especially in the international arena. It has also become important in legislative policy because of its micro-knowledge of the industry. So the Commission has become an advisor in industry matters and does seem to hesitate to make its views known … That would never have happened years ago. A sharp distinction was drawn between administration and policy at a government level. Now it seems to have matured to be much more a partner of government.

Certainly, the commission plays a more proactive role today, as demonstrated by the successful conclusion to its calls for amendments to legislation to provide for criminal sanctions for cartel conduct.

The third legacy of the Act was the retention of the Trade Practices Tribunal. Many saw this as the government passing the buck by delegating virtually all its legislative powers to the tribunal to interpret and give effect to the Act's vague language.[130] The tribunal, whose membership was to include a federal judge as chair and two lay persons, which in practice became a business person and an economist, fleshed out the concept of public interest in an early decision, drawing the link between competition and public interest.[131] In a set of three decisions, namely *Frozen Vegetables Processors,*[132] *Fibreboard Container Makers*[133] and the *Book Trade* decision,[134] the tribunal made a significant impact, changing forever the way in which price agreements would be viewed. Here the tribunal fleshed out the concept of public interest in an early decision drawing the link between competition and public interest and demonstrated the manner in which such a regulatory approach could work.

---

129 ibid.
130 Brunt, *Economic Essays on Australian and New Zealand Competition Law* (2003) 53.
131 See *Re Frozen Vegetables Marketing Agreement*, 18 FLR 196.
132 ibid.
133 See: *Re Agreement of the Australian Fibreboard Container Manufacturers' Association* (1973) ATPR 8377.
134 See: *Re Books*, 20 FLR 256.

The *Frozen Vegetables Processors* case involved a price-fixing agreement between frozen vegetable processors and retailers in an effort to halt the intense price cutting in the industry following excess production of peas in the 1969–70 growing season. This agreement was registered with the Commissioner of Trade Practices who decided that it was anticompetitive and was maintaining the price at a level higher than a competitive market would have allowed, and was thereby contrary to the public interest. The matter proceeded to the tribunal, where 10 public benefits were put forth by the vegetable processors. They argued that the intention behind the agreement was to prevent a price war, by providing stability to the processors and to avoid social waste. The tribunal stated that, given the structure of the industry and the change in production patterns within this industry, the agreement to fix the price at the nominated level was unreasonable and contrary to the public interest.

In the *Fibreboard Container Makers* matter, the commissioner formed the view that members of the Australian Fibreboard Container Manufacturers' Association had agreed to a number of restrictions that were contrary to the public interest. Whereas some of these restrictions were connected directly to price, such as controlling the price charged or quoted by association members, others were less direct. They dealt with the standardisation of materials and designs of corrugated and solid fibre cartons, as well as the concerted efforts of the association in relation to research and development, all of which involved agreements between competitors. Citing the *Frozen Vegetables Processors* decision as good authority, the tribunal decided that the pricing provisions were contrary to the public interest and would result in denying the benefits of price competition to consumers. As to the non-price-related agreements, the tribunal stated that these practices were likely to continue without agreement as there would be strong incentives to adhere to industry standards and continue research and development activities.

The third tribunal decision was the *Book Trade* agreement, where the major book publishers and retailers had made an agreement about the resale price of books which the commissioner argued constituted a resale price agreement contrary to the public interest. The members of the Book Trade applied to the tribunal seeking exemption from the provisions of the Act. However the Tribunal agreed with the commissioner and in doing so took a significant step, that saw Australia take a different approach to England, where a similar agreement had been exempted under their legislation.

These three decisions should be regarded as providing support for a registration process in the hands of an independent commission and tribunal as an effective way to monitor and regulate cartels. Business saw the writing on the wall and the commissioner was able to flex his muscle and a number of price agreements involving various industries were queried and practices abandoned. Agreements

by bread manufacturers, concrete manufacturers, insulation manufacturers and beer breweries are some of the examples of price agreements that subsequently ceased. The tribunal decisions and subsequent actions by the commissioner laid down the groundwork for the 1974 legislation which retained a place for the tribunal. Later tribunal decisions have been able to articulate the theoretical basis of competition regulation, founded firmly on neoclassical principles while giving consideration to the context within which the conduct occurs. One example of such a decision is that in *Re Queensland Co-operative Milling Association Ltd*, which has informed all later discussion on the meaning of the term 'public benefit' within the authorisation process under the 1974 Act.The tribunal has continued to play a key role in shaping competition law developments.[135]

The critical juncture for the trajectory taken by Australian competition law was the period in the early 1960s which saw the need for a different form of regulation and which, after much compromise, settled on the *Trade Practices Act 1965*. Many events and individuals influenced this trajectory. Other key players during these early years, apart from Barwick and Bannerman, included politicians and important industry groups, and their influence led to the passing of the *Trade Practices Act 1974*, which retained an independent regulatory agency with wide powers and a registration process, albeit in a varied form.

The *Trade Practices Act 1974*

When the *Trade Practices Act 1974* was introduced, it was referred to as Austerican,[136] as it relied heavily on the British model, while also borrowing the American language and staunch belief in the importance of competitive markets.[137] The Act was introduced and passed by the Labor Party, which had won government in 1972 after 23 years in opposition. It brought with it a commitment to a host of policies on social welfare and equity, including commitment to making the consumer an important agent in the political arena. When introducing the 1974 Act, the government was set on introducing a composite package, making the link between consumer protection and restrictive trade practices.[138] It was stated that the 1974 Act was bringing together four fundamental rights: the right to be safe, the right to know, the

135 Some of these important decisions include *Re Media Council of Australia (No 2)*; *Re 7-Eleven Stores; Qantas*; *Re Rural Traders Cooperative (WA) Ltd*.

136 Baxt and Brunt (1973–74) 6.

137 See particularly sections 1 and 2 *Sherman Act 1890* (US) and Sections 2, 3, 7 *Clayton Act 1914* (US).

138 Commonwealth, *Parliamentary Debates*, House of Representatives, Trade Practices Bill, Second Reading, 16 July 1974, 573–4; see also Commonwealth, *Parliamentary Debates*, House of Representatives, 7 November 1973, 2918 (Mr Al Grasby, Minister for Immigration); see also Commonwealth, *Parliamentary Debates*, Senate, 27 September 1973, 1013 (Senator Lionel Murphy, Attorney General).

right to choose and the right to be heard.[139] Competition policy and consumer protection was to be in the hands of the same regulator. It made sense to have both consumer protection and competition in the same regulatory hands as they were linked. Investigating a consumer complaint was likely to uncover anti-competitive practices. It has also been suggested that making the regulatory institution answerable to both consumers and business has been a key factor in preventing it being captured by any particular group.[140]

Consumer groups were encouraged to participate in the debates over trade practices and the Labor government sought to introduce consumer groups into a number of debates, including pre-Budget consultations that, in the past, had been dominated by the private sector.[141] This Act was important in making the express link between consumer protection and competition regulation and gave rise to the consumer movement as a formidable force. The role of these groups in deliberations and decisions depends on the manner in which discretion is exercised by the regulatory agency.[142]

The changing tide of economic thought and political support for neoclassical economic thought meant the secret register could not continue.[143] The *Trade Practices Act 1974* put an end to the secret register, which had been largely ineffective in controlling anti-competitiuve practices and had come to be viewed, rather, as reinforcing the 'mateship–collusion ethos'. The annual report of the TPC provided a picture of the disenchantment with the legislation and the secret register. The first report gave an indication of how widespread cartel activity among Australian industry was and subsequent reports demonstrated the limitations of the 1965 Act. The number of agreements registered rose from 5186 on 1 November 1967, to 10,841 on 30 June 1968. The 1972–73 report supplied the 'epitaph for the 1965 Act'[144] and the commissioner stated:

> The current legislation, which is clearly coming towards the end of its time, has nevertheless served a valuable role. Among other things, it provided an entry into a field substantially untouched for many years, it brought the problems to public and business attention, and it became

139 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 July 1974, 575 (Mr William Morrison, Member for St George, Minister for Science).

140 Bannerman interview.

141 See *Australian Financial Review*, 18 June 1973, 3.

142 See Baxt, 'Consumer and Business Protection', in Frances Hanks and Philip Williams (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (2001) 172, for a discussion on the importance of consumer protection and small business unconscionability within Part V.

143 See Richard Ackland, 'Administration in public is a very fine discipline to have', *Australian Financial Review*, 8 October 1975, 5. For the support shown to the proposed Bill by the opposition Liberal Country Party, see Commonwealth, *Parliamentary Debates*, House of Representatives, Trade Practices Bill 1974, Second Reading Speech, 24 July 1974, 567 (Mr Robert Ellicott, Member for Wentworth).

144 See Bannerman (1984) 152.

> a means of moving towards principle and demonstrated the need for further legislation. It was also an important vehicle for the development of constitutional law in this field and beyond it.[145]

In 1973 there were more than 14,000 restrictive agreements on the register.[146] In 1965, Senator Lionel Murphy of the opposition Labor Party pointed out some of the obvious deficiencies of a secret register and stated in the second reading speech of the 1965 legislation:

> We are entitled to clear laws against the deleterious actions of monopolies and trade conspiracies. This Bill does not give us these. It is a pretence, a smokescreen. It will set up an administrative morass. By requiring the innocent as well as the guilty to register, it will no doubt arouse opposition to any attempt to deal with commercial misconduct. The Government has done all that it can reasonably do to make the Bill ineffective.[147]

Senator Ivor Greenwood's comments on the then proposed legislation moving to an open register makes some of these inherent reservations and consequences evident:

> [T]he co-operation of business was sought by inducing companies to hand over to the Commissioner of Trade Practices agreements into which they had entered on the basis that if the agreements were with the Commissioner they would be kept secret … But under this legislation, it appears that all those agreements will be able to be used as the basis for these quasi-criminal prosecutions which the legislation envisages. I imagine that many people would want to protest to see whether that could not be changed. These are areas in which the legislation is important and to which time for consideration ought be given.[148]

A registration process, be it via a secret or open register, was needed to gain the support of the business community, as recognised by the Minister for Manufacturing Industry, Kep Enderby, who stated:

> Special provisions are included in the Bill for no other reason than to remove uncertainty. These are the provisions for clearances and authorisations. In the great majority of cases the applicability of the provisions in this Bill will be clear. In those cases where some uncertainty

145 ibid, 153.

146 See Donald and Heydon (1978) 8. See also Richard Ackland, 'Trade Practices Bill Cracks Down on Business', *Australian Financial Review*, 18 September 1973, 1, 18.

147 Commonwealth, *Parliamentary Debates*, Senate, Second Reading Speech, 8 December 1965, 2137 (Senator Lionel Murphy, New South Wales).

148 Commonwealth, *Parliamentary Debates*, Senate, 24 October 1973, 1419, (Senator Ivor Greenwood, Victoria).

> does arise, particularly during the early years of its administration, there will generally be opportunity for the uncertainty to be removed by seeking a clearance or an authorisation.[149]

The proposed legislation, for which considerable credit should go to Murphy, echoed the philosophy but not the design of the US antitrust legislation. This was no accident. The historical legacy of the 1965 legislation meant the commission and tribunal would deal with these matters. The determination of authorisations was to become a large part of the work of the commission as the new Act of 1974 retained the central role of the commission in determining authorisations. It also established a much clearer authorisation process, which gave the commission wide discretion to consider a range of matters, including determining authorisation decisions under a public benefit test.

The Authorisation Process and the Role of Public Benefit

Authorisations can simply be described as immunities from Australian Competition and Consumer Commission (ACCC) prosecution for breaches of the specified anti-competitive provisions in Part IV. It is described by the ACCC as:

> A process under which the ACCC can grant immunity on public benefit grounds from the application of the competition provisions of the *Trade Practices Act* except for misuse of market power. The Commission will grant an authorisation only if it concludes that the proposed conduct will result in a benefit to the public that will outweigh the detriment from any lessening of competition.[150]

Section 88 provides that the ACCC can grant authorisations in relation to the following:

i. an anti-competitive agreement breaching section 45
ii. a secondary boycott provision breaching sections 45D, 45DA, 45DB, 45E and 45EA
iii. conduct that could constitute exclusive dealing
iv. resale price maintenance, or
v. an acquisition that occurs outside Australia.

Regulations provide the necessary forms that the applicant is required to complete. Guidelines with checklists are also provided to applicants making such applications. Before lodging such applications, the ACCC encourages

149 Commonwealth, *Parliamentary Debates*, House of Representatives, Trade Practices Bill, Second Reading, 16 July 1974, 228 (Mr Kep Enderby, Minister for Secondary Industry and Minister for Supply).
150 <http://www.accc.gov.au/content/index.phtml/itemId/3663> at 21 August 2007.

applicants to have informal discussions and obtain guidance from the adjudication branch.[151] Members of staff have at times advised parties that their conduct would not attract the provisions of the Act and that authorisation would not be necessary, the officers interviewed stating that they are conscious of the need to provide information to applicants and to save them the time and expense of making an application where there are clear indications that it may not be necessary.[152] There is a fee payable for such applications.[153] Due to policies introduced in 2007, the ACCC has undertaken to consider all applications for non-mergers within a six-month period, unless the ACCC has issued a draft determination or has obtained the applicant's agreement to an extension.[154]

The Act contains two tests for authorising different types of conduct.[155]

a. The first test, contained in section 90(6), applies to proposed or existing agreements that might substantially lessen competition and proposed exclusive dealing conduct, with the exception of third line forcing.[156] This test states the ACCC can only grant authorisation if it is satisfied that this conduct is likely to result in a public benefit that outweighs the likely public detriment.

b. The second test is contained in section 90(8) and applies to proposed exclusionary provisions, secondary boycotts, third line forcing, and resale price maintenance. This test states the ACCC can only grant authorisation if it is satisfied in all the circumstances that the proposed conduct is likely to result in such a benefit that the conduct should be permitted.

The ACCC is required to keep a public register of authorisation applications as well as applications for minor variations, revocations and substitutions of authorisations by virtue of section 89. The register also includes all documents relevant to the authorisation, such as documents submitted by the applicant in relation to an authorisation application,[157] any draft determination made by the ACCC,[158] record of conferences held by the ACCC in accordance with section 90(8A),[159] and oral submissions made to the ACCC,[160] as well as the determination

151 Australian Competition and Consumer Commission (ACCC), *Authorisations and Notifications: A Summary* (2007) 6.
152 Interview 3. See also the discussion in Chapter 3.
153 Currently this fee is A$7500 for non-merger applications and there is provision for waivers of such fees. The ACCC will take into consideration factors such as whether the applicant is a not-for-profit organisation or whether the applicant will incur financial hardship. See ACCC, *Authorisations and Notifications* (2007) 7.
154 ibid, 8.
155 There is a separate test for the authorisation of mergers, which is outside the ambit of this discussion.
156 Third line forcing is defined as the supplying of goods or services on the condition that the purchaser acquires other goods or services from a third party.
157 Sections 89(5), 89(4)(a).
158 Section 89(4)(aa).
159 Section 89(4)(ab).
160 Section 89(4)(b).

made by the ACCC.[161] All publicly available materials are available on the ACCC website.[162] This open process is motivated by the imperative 'that claims made by those supporting an application can be tested and interested parties have the opportunity to put their views to the ACCC'.[163]

Provision is made to ensure confidential information is excluded from the register, thereby recognising the property and commercial interests in certain types of information that may be submitted as part of the authorisation process.[164] The ACCC has provided guidelines on how such requests can be made.[165] It has stated that, under the Act, the ACCC must exclude information from the public register if it contains the details of: a secret formula; the cash consideration offered for the acquisition of shares or assets; or the current costs of manufacturing, producing or marketing goods or services.[166] Where the ACCC is of the view the request to exclude material is excessive, it will discuss the matter further with a view to narrowing the claim.[167] There is also provision made for the ACCC to refuse a request to exclude information from the public register, where the request is not accompanied by sufficient supporting information or where that information is necessary to identify the conduct or arrangements for which protection is sought.[168]

The onus is on the applicant to satisfy the ACCC that the public benefit test is satisfied. The 'future with or without test' has been used by the ACCC in its recent decisions to identify and weigh the public benefit and anti-competitive detriment generated by the arrangements for which authorisation is sought.[169] This is discussed further in Chapter 3 — Discourses on Public Benefit.

While making its determination in accordance with one of the tests in section 90, the ACCC seeks the views of interested parties on the application, including: 'competitors, customers, suppliers, regulators and other relevant government bodies, industry and consumer groups, unions and independent parties with

---

161 Section 89(4)(c).

162 See website for authorisations <http://www.accc.gov.au/content/index.phtml/itemId/314462> at 10 January 2008.

163 ACCC, *Authorisations and Notifications* (2007) 9.

164 See Sections 89(5), 89(5A), 89(5D).

165 ACCC, *Authorisations and Notifications* (2007) 10.

166 See ACCC, 'Guidelines for excluding information from the public register for authorisation, merger clearance and notification processes' (2007) <http://www.accc.gov.au/content/index.phtml/itemId/776053> at 23 August 2007, 1.

167 Russell V Miller, *Miller's Annotated Trade Practices Act* (2002) 986.

168 ACCC, 'Guidelines for excluding information' (2007) 2.

169 Adopted by the tribunal in *Re John Dee (Export) Pty. Ltd* (1989) ATPR 40-938, 50206 and regularly used in authorisation decisions. In *Medicines Australia* A90779, A90780, 14 November 2003, it was stated that the 'future with and without test' was first established by the ACT in *Australian Performing Rights Association (APRA)* A90918, A90919, A90922, A90924, A90925, A90944, A90945, 8 March 2006. For examples of where the test has been used, see, for example, *The Royal Australian College of General Practitioners* A90795, 19 December 2002, paras 5.5–5.9; *NSW Department of Health* A90754, A90755, 27 June 2003, paras 6.1, 6.2; and *Mortgage Industry Association of Australia* A90880, 18 February 2004, para 5.7.

an interest or expertise in the markets and subject matter involved.'[170] The ACCC has also stated that, where appropriate, it may also seek submissions from the community through advertisements in newspapers and trade journals. In addition, the ACCC conducts its own enquiries and research.[171] Furthermore, greater reliance is now being placed on experts to provide assistance with the interpretation of complex data and econometric evidence on various aspects, including market definitions or quantification of the various benefits and costs likely to be incurred by the proposed conduct.[172] All these submissions are generally placed on the public register unless a claim of confidentiality is made. These issues are discussed in detail in Chapter 5 — Discourses on Discretion.

Section 90A requires the ACCC to prepare a draft determination. Usually the commission distributes this draft determination to the applicant and all parties who made submissions. The commission then considers any further submissions that parties may make at this stage.[173] Section 90A also provides the opportunity to interested persons to request that a pre-determination conference be held. Section 90A(7)(a) provides for the procedure to be followed at such conferences.[174] While such pre-decision conferences are generally not transcribed, a record of the parties attending and the discussions undertaken are placed on the public register. These determinations are also forwarded to the applicant and other interested parties and the decisions are also available on the internet and copies are published by commercial legal reporting services.

Section 91 allows the ACCC to grant authorisations in a number of different forms. The authorisations can be in an interim form or for a limited duration. Section 91(2) allows the commission to grant an interim authorisation in certain cases, including where a minor variation and substitution is being considered or where there is an appeal for review to the tribunal. Of particular importance is the power given under section 90(3) to grant authorisations subject to conditions; this has been actively used in the recent past.[175]

---

170 Allan Fels, 'The Public Benefit Test in the *Trade Practices Act 1974*', paper presented at the National Competition Policy Workshop, Melbourne, 12 July 2001 3; see also section 90(2) which requires the commission to take into account any submissions made.

171 For example, see the early decision of *Hardware Retailers Association* A7102, 31 March 1976, where the TPC staff surveyed approximately 10 per cent of association members in order to check on the submissions made. The TPC did not accept the applicants' submissions. Similarly in *Port Waratah* A90906-A90908, 9 July 2004.

172 For example, see the econometric evidence submitted by the parties in *Qantas Limited and Air New Zealand Limited* A30221, A 90862, A90863, 9 September 2003.

173 Fels, 'The Public Benefit Test in the *Trade Practices Act 1974*' (2001) 4.

174 The pre-decision conference was introduced by amendments to the Act in 1977. These amendments abolished public hearings for the commission, substituting the requirement for the commission to issue a draft determination on an authorisation application and to hold a pre-determination conference on the draft if any of the parties required it. Interested parties and their lawyers could attend the conferences, although they could not participate. The commissioner stated that these changes stopped the commission looking like a court and allowed direct contact with business which increased confidence in the administration. See Bannerman (1984) 170.

175 See the discussion in Chapter 6 under Outcome-based Discretion.

Minor variations can be made to the authorisations under section 91A and they can also be revoked by the ACCC under section 91B. Under section 91C the applicant can apply to the ACCC for a revocation of the authorisation and the substitution of a new authorisation for the one revoked. Any party with a sufficient interest can appeal to the Australian Competition Tribunal (ACT) against the decision of the ACCC by virtue of section 101.[176]

The inclusion of the phrase 'public benefit' was not without controversy. The Bill, which was redrafted numerous times, had initially used the term 'public interest', later changed to 'public benefit'. It has been suggested this term had the 'advantage of enabling a fresh line of interpretation by the Commission and Tribunal, unencumbered by previous judicial pronouncements on "public interest"'.[177] The phrase 'public benefit' was subject to scrutiny, much of which remains relevant. The authorisation tests were said to be 'couched in language of very high generality which will require substantial elaboration in the course of their interpretations by Courts and Commission'.[178] It was also argued the use of 'loose terms like "the public interest" invites conflict between economics and the law, by indicating government unwillingness to specify clear economic objectives for anti-monopoly policy'.[179]

The discourses that shaped competition law in the United States did not operate as clearly in Australia. Two sets of discourse have been important in the United States: the Harvard and Chicago schools. While the Harvard School's contribution is often identified as the link between Structure–Performance–Conduct, the Chicago School sees the goal of antitrust as, distinct from other public policy objectives, rather focused on the promotion of market efficiency. The authorisation process, which brings public benefit into consideration, however, demonstrates the complexity of Australian competition policy. It was clear that economics was important to understanding the new legislation and economists and their writings had provided 'reasoned intellectual foundations' for it.[180] Economists would have preferred the use of the term 'efficiency' in the Act, so that the notions of consumer welfare could be imported into the Act and the consumer welfare standard could have been adopted in determining the public benefit.[181] Following on from this were concerns about the meaning of the word 'public'. Could a benefit to a sectoral group, such as producers, constitute a public benefit or did the benefit have to apply to a wider group, such as consumers?[182] Many of these concerns remain.

---

176 For the meaning of 'sufficient interest' see *Re Telstra Corporation Ltd* [2001] ACompT 1 (7 December 2001).

177 Allan Fels and Tim Grimwade, 'Authorisation: Is it Still Relevant to Australian Competition Law?' (2003) 11 *Competition and Consumer Law Journal* 187, 200.

178 Baxt and Brunt, 'A Guide to the Act', in Nieuwenhuysen (1976) 88, 98.

179 Geraldine Gentle, 'Economic Welfare, the Public Interest and the Trade Practices Tribunal', in Nieuwenhuysen (1976) 59.

180 Bannerman (1984) 165.

181 Gentle (1976) 76, 74.

182 ibid, 73.

Shifts in the Regulatory Landscape and to the Authorisation Process

There have been many amendments to the authorisation provisions since 1974. The test as originally enacted required that, to be authorised, the conduct had to result in a substantial benefit to the public that would not otherwise be available. Recommendations of the Swanson Committee that the test be made less onerous were adopted and the Act was amended in 1977.

The importance of the market economy in regulation became central to economic policy with microeconomic reform beginning in Australia in the 1980s, reflecting the growing importance of neo-liberal philosophies across the globe. A major stage of reform came as a result of the Hilmer Committee recommendations in 1993. This resulted in Australia's current national competition policy, which emphasises the importance of attaining a uniform national competition regime; deregulating government business entities in the pursuit of competitive neutrality; and, finetuning of the Act for improved efficiency, including the extension of the authorisation provisions to all forms of conduct with the exception of monopolisation.[183] Amendments followed that extended the reach of the Act to state government businesses as well as the professions.[184] The National Competition Council was created in 1995 to act as a policy advisory body to oversee the implementation of national competition policy.[185]

Further scrutiny of the Act was undertaken through the Dawson Committee in 2003, which conducted a review of the Act. This resulted in a number of amendments to the authorisation process, primarily aimed at making it more time efficient.[186] These amendments included section 90(10), which deems that if the commission has not determined an authorisation within six months it is taken to have granted the application. Section 90(10A) provides that this may be extended by not more than six months, where the commission has prepared a draft determination and the applicant agrees to the extension. In 2007 further amendments introduced a new notification process under which small business could collectively bargain with large businesses without breaching the Act, if the total price of goods or services to be supplied is expected to be under A$3 million in a 12-month period. Further, under sections 93AA – 93AF, small businesses must notify the ACCC of the proposed collective bargaining and if the ACCC does not object within 14 days of the notification, the business which has notified the ACCC receives immunity from legal action in respect of collective bargaining for three years.

183 See Brunt (2003) 35.
184 Section 6(4) *Trade Practices Act*.
185 See <http://www.ncc.gov.au>
186 The amendments to the merger authorisations are not discussed herein.