

The Moving Finger Writes and, Having Writ, Rewrites

Bannerman Lecture

Chief Justice Robert French AC

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My thanks to the Law Council of Australia Business Law Section and the Australian Competition and Consumer Commission for establishing the Ron Bannerman Competition Lecture and for inviting me to deliver the first lecture in what, I hope, will become a significant annual event. It is a privilege to be able to honour the memory of such an important figure in the history of Australian competition law and a person with whom I worked directly in the 1980s. I am also delighted that so many members of the Bannerman family are present for this occasion.

I hope in this lecture to place Ron Bannerman's role as the first Commissioner of Trade Practices and the first Chairman of the Trade Practices Commission in its historical perspective and to draw from it some conclusions about his contribution and his example as a public officer charged with the administration of an important national law.

The 'Moving Finger' in Edward Fitzgerald's translation of the *Rubáiyát of Omar Khayyám* wrote, and, having writ, moved on and, as the poet said:

[N]or all thy Piety nor Wit
Shall lure it back to cancel half a Line,
Nor all thy Tears wash out a Word of it.

Unlike the inexorable digit of the *Rubáiyát*, the Moving Finger of the Commonwealth Parliament does, from time to time, respond to tears, piety and supplication and having written, erases and rewrites, among other things, the tablet of competition law in Australia. While major changes have been informed by thoughtful reports into the policy, objectives and operation of competition law, some provisions of the legislation suggest purposes in tension. There is neither uniqueness nor novelty in that phenomenon. Sir Owen Dixon remarked in 1933, that the methods of a modern representative legislature and its

pre-occupations are an obstacle to scientific or philosophical reconstruction of the legal system. So much we may lament, but must accept as a price of representative democracy. And although we may complain about particular aspects of contemporary competition law, the Parliament has generally been well-informed about desirable change even if it has not always responded to that information, as everybody would wish. There have been many reviews, parliamentary and external, of competition legislation particularly since the 1974 Act. Many of them bear names well known in the history of competition law over the past 50 years — Swanson, Blunt, Griffiths, Cooney, Hilmer, Reid, Baird, Hawker, Wilkinson, Dawson and Harper. Significant new areas of regulation were introduced into the 1974 Act during its lifetime and following its rebadging as the *Competition and Consumer Law Act 2010* (Cth).

Shortly prior to that rebadging the Act was amended to redefine cartel conduct and to provide for criminal penalties for it. Since then, there have been amendments to the definition of 'market' for the purpose of mergers,¹ price signalling laws,² and provision for infringement notices and pecuniary penalties in connection with franchise codes.³ Continued political interest in the legislation is evidenced by the Private Member's Bill recently before the Senate which, if enacted, would have given the court power to direct a corporation found guilty of a breach of s 46, to reduce its market share.⁴ The Draft Report of the Harper Committee has attracted submissions prior to its finalisation, a process vaguely redolent of the draft authorisation and pre-determination conference mechanism. Much debate surrounds the proposition that misuse of market power should encompass conduct which would have, or be likely to have the effect of substantially lessening competition. Newspaper headlines about the test reflect the underlying excitement. Words like 'chill', 'economically dangerous', 'distraction' and 'tough ACCC rule' whirl around the online and print media.

The development of competition law in Australia to the present day has been a complex function of the contributions of many actors, including politicians, economists, lawyers, legal academics, courts and participants in markets within Australia for goods and services. An essential part of the development and the durability of the law that was the

¹ *Competition and Consumer Legislation Amendment Act 2011* (Cth).

² *Competition and Consumer Amendment Act (No 1) 2011* (Cth).

³ *Competition and Consumer Amendment (Industry Code Penalties) Act 2014* (Cth).

⁴ Competition and Consumer Amendment (Misuse of Market Power) Bill 2014 (Cth). Senate Standing Committee on Economics, Parliament of Australia, Competition and Consumer Amendment (Misuse of Power) Bill 2014 (2015) 23.

platform for that development was the regulator. Initially that was the Commissioner for Trade Practices under the *Trade Practices Act 1965* (Cth) and under its replacement the *Restrictive Trade Practices Act 1971* (Cth). With the enactment of the *Trade Practices Act 1974* (Cth), it was the Trade Practices Commission, later renamed as the Australian Competition and Consumer Commission, which continues as the regulator under the *Australian Competition and Consumer Act 2010* (Cth). In this lecture I want to acknowledge the pivotal role of Ron Bannerman who was the first regulator under the 1965 and 1971 Acts and headed the Commission created under the 1974 Act.

The history of competition law in Australia before Ron Bannerman's time, which began about 1965, would not have been of much comfort to the proponents of legal regulation in this area. Interestingly, competition policy had been placed on the national agenda very soon after the formation of the Commonwealth. In the Governor-General's Address to the Parliament of the Commonwealth on 7 June 1906, His Excellency said:

You will be asked to give immediate attention to a Bill for the Preservation of Australian industries, and the Repression of Destructive Monopolies.⁵

So it was that the *Australian Industries Preservation Act 1906* (Cth) was enacted, modelled in part on the United States *Sherman Act*. Broadly speaking, it prohibited monopolisation⁶ and conduct intended to restrain trade or commerce to the detriment of the public or intended to destroy or injure Australian industry.⁷ In the Second Reading Debate, the Attorney-General, Isaac Isaacs, defended the proposed Act from parliamentary criticisms which might have a familiar ring. He explained that the term 'to the detriment of the public' had been inserted in the Act to improve on the US legislation which did not discriminate between injurious and non-injurious conduct. That observation attracted a barrage of rhetorical questions — what injury? — what public? — who is to decide?⁸ When he suggested that the question of detriment or injury would be a matter for a jury, he was met with the riposte that a jury in one

⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 June 2006, 3.

⁶ *Australian Industries Preservation Act 1906* (Cth) ss 7 and 8.

⁷ *Australian Industries Preservation Act 1906* (Cth) ss 4 and 5.

⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 1906, 387 (Isaac Isaacs, Attorney-General).

part of the Commonwealth might have a different idea of what constituted an injury to the public than a jury in another part of the Commonwealth.

Five years later, in 1911, as a Justice of the High Court, Sir Isaac Isaacs wrote the first instance judgment in a price fixing case. That was the *Coal Vend Case*.⁹ It was the only significant primary judgment delivered under the 1906 Act. Ironically, Isaacs was reversed on appeal on the basis that the evidence before him did not establish detriment to the public or intent to cause such detriment. A rather negative attitude to competition law might have been detected in the observation of the Full High Court on appeal that:

Cut throat competition is not now regarded by a large portion of mankind as necessarily beneficial to the public.¹⁰

It is a measure of how much things have changed that, 77 years later in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*,¹¹ decided in 1989, a case concerning misuse of market power under s 46 of the *Trade Practices Act*, two Justices of the High Court said:

Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to 'injure' each other in this way. This competition has never been a tort ... and these injuries are the inevitable consequence of the competition s 46 is designed to foster.¹²

The difference in sentiment between the High Court in the *Coal Vend Case* and the High Court in *Queensland Wire* with so many years and so much history, including legal history, separating them, reflected a difference in legal culture. It may also have reflected the difference between a competition law with a strong effective regulator on the one hand, and a court centred regime without an effective regulator on the other. Of course, the 1906 Act was

⁹ *R v Associated Northern Collieries* (1911) 14 CLR 387.

¹⁰ *Adelaide Steamship Co Ltd v The King* (1912) 15 CLR 65, 76.

¹¹ (1989) 167 CLR 177

¹² *Ibid* 191 (Mason CJ and Wilson J).

not assisted by the decision of the High Court in *Huddart Parker & Co Pty Ltd v Moorhead*¹³ in 1909 that the provisions of that Act covering the conduct of corporations were not valid in so far as that conduct concerned domestic trade within a State. That decision, over the dissent of Justice Isaacs, was an application of the reserved powers doctrine exploded 11 years later in the *Engineers' Case*¹⁴ in which he wrote the principal judgment.

There were early State competition laws which dated back to the 1920s and generated a few decisions. Professor Geoffrey de Q Walker in his 1967 text on *Australian Monopoly Law and Policy* described one of those decisions by the Chief Justice of New South Wales, under the *Monopolies Act 1923* (NSW) as importing into the Act 'all the preconceived policy notions of the nineteenth century English judges'.¹⁵ Professor Walker concluded about the State competition laws generally that:

Like the federal statute of 1906, these have remained largely unenforced owing to restrictive interpretation, apathy in government and ignorance among the people ...¹⁶

The position under competition law today is radically different and the regulator must take a substantial share of the historic responsibility for that fact. Despite his relatively diminutive build, nobody stood taller than Ron Bannerman among those who discharged leadership responsibilities for making Australia's competition law work. As Commissioner for Trade Practices he ushered in the modern era of Australian competition law beginning with the *Trade Practices Act 1965*, which replaced the *Australian Industries Preservation Act 1906*. The 1965 Act was described by Senator Lionel Murphy in 1974 as 'one of the most ineffectual pieces of legislation passed by this Parliament'.¹⁷ Ron Bannerman described it more realistically and pragmatically as 'toe in the water' legislation which despite its manifest weaknesses and omissions did 'provide a starting point'.¹⁸ In that opinion he was supported

¹³ (1909) 8 CLR 330.

¹⁴ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

¹⁵ G de Q Walker, *Australian Monopoly Law: Issues of Fact and Policy* (FW Cheshire, 1967) 36 citing *Attorney-General v Brickworks Pty Ltd* (1941) 41 SR (NSW) 72.

¹⁶ Walker, above n 15, 35.

¹⁷ Commonwealth, *Parliamentary Debates*, Senate, 30 July 1974, 540 (Lionel Murphy, Attorney-General).

¹⁸ David Merrett, Stephen Corones and David Round, 'The Introduction of Competition Policy in Australia: The Role of Ron Bannerman', (2007) 47 *Australian Economic History Review* 178, 197.

by Professor Maureen Brunt who described the 1965 Act as a necessary precursor to the 1974 Act. She said:

The [1965] Act gave rise to the systematic documentation of horizontal agreements through its registration requirements; it enabled the testing and rejecting of public interest claims of some specific price fixing and RPM Agreements in the Trade Practices Tribunal; and the stage was set for a less ambivalent approach.¹⁹

As inaugural Chairman of the Trade Practices Commission, Ron Bannerman was responsible for the first ten years in the implementation of a competition law whose time had come, the *Trade Practices Act 1974* (Cth). There were of course important political actors — Garfield Barwick, who promoted the 1965 legislation and Lionel Murphy, who promoted the 1974 Act. Then there were the economists, including the legendary Maureen Brunt and the lawyers who contributed to the architecture of the Act and its unique blend of economic and legal concepts. In the Second Reading Speech, the Attorney-General, Senator Lionel Murphy, referred to the broad terms in which the Act was drafted. He acknowledged that the economic considerations with which it was concerned could not be transmuted into legal concepts capable of precise expression. He said:

The present Bill recognises the futility of such drafting. Many matters have, of course, had to be stated in detail. But other provisions, particularly those describing the prohibited restrictive trade practices have been drafted along general lines using, wherever possible, well understood expressions. I am confident this will be more satisfactory. The courts will be afforded an opportunity to apply the law in a realistic manner in the exercise of their traditional judicial role.²⁰

Professor Brunt reflected somewhat nervously about the new creation to which she had contributed:

¹⁹ Professor Maureen Brunt, 'The Australian Anti-trust Law After Twenty Years — A Stocktake', (1994) 9 *Review of Industrial Organisations* 483, 491.

²⁰ Commonwealth, *Parliamentary Debates*, Senate, 30 July 1974, 542 (Lionel Murphy, Attorney-General).

We begin with a statute; it is to be interpreted and enforced by courts of law; necessarily we are in the hands of lawyers.²¹

It was right to say that the Act was in the hands of lawyers, but they were not to be found only in and on the courts and the law firms advising business and consumers. The role of the regulator was to be critical. It was the lawyer, Bannerman, who was appointed to lead it. At the time of his appointment it is probably fair to say that he would have had much more experience of the operation of competition law in practice under the 1965 and 1971 Acts than the first judges with the responsibility for the interpretation and application of the 1974 Act in particular cases which came before the courts.

There were of course judges, sitting with economists and business people, who became involved in the work of the Trade Practices Tribunal and its successor, The Australian Competition Tribunal. The Trade Practices Tribunal was established by the 1965 Act. It became operative on 1 September 1967, when the Act came into force. It heard its first matter in 1969 involving an allegation by the Trade Practices Commissioner, Ron Bannerman, that Tasmanian Breweries Co Ltd had engaged in monopolisation as defined in s 37 of the Act. Tasmanian Breweries unsuccessfully challenged the validity of the Tribunal's establishment in the High Court on the basis that the Tribunal was purporting to exercise the judicial power of the Commonwealth.²² The Tribunal thereafter began to hear a steady stream of matters on the merits. With the implementation of the 1974 Act, Justice Woodward became the first President of the Tribunal under that Act and was succeeded by Justice Deane in 1977. One of the most important early decisions of the Tribunal under the Chairmanship of Justice Woodward, with members Brunt and Shipton, was *Re Queensland Co-Op Milling Association Ltd and Defiance Holdings Ltd*.²³ The concept of market as explained in that decision became part of the new testament of Australian competition law:

We take the concept of a market to be basically a very simple idea. A market is the area of close competition between firms or, putting it a little differently, the field of

²¹ Professor M Brunt, 'Economic Overview', (Speech delivered at the 1975 Monash Trade Practices Lectures, Melbourne, 1975).

²² *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361.

²³ (1976) 8 ALR 481.

rivalry between them (if there is no close competition there is of course a monopolistic market). Within the bounds of a market there is substitution — substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.²⁴

The judicial involvement in the Tribunal sitting with accomplished economists and particularly Professor Brunt was essential to the early development of a proper understanding of how economic concepts could be used in the application of the 1974 Act.

The body of case law and the expertise of the judges in dealing with economic concepts embedded in Pt IV of the Act developed over decades. The Federal Court had to become sensitive to economic issues and to the need for procedures which would enable those issues properly to be addressed against the background of a useful but sometimes tense relationship between economists, advocates and judges. There was a learning curve. That does not mean that the most important working out of competition law or consumer protection law in Australia occurred in the courts. In the administration of any public statute, the involvement of the courts is episodic. The courts can only interpret a statute and apply its provisions in determining concrete cases before them for decision. The courts do not decide which cases will come before them, nor the issues with which they will deal. The courts develop interpretations which guide the regulator and others affected by legislation. But it will generally be the case in any regulatory statute that the authority charged with its administration will deal with a vastly greater volume of transactions and make decisions under the statute vastly greater in number than those made by the courts. Subject to judicial interventions from time to time, the operation of the regulator is, to all intents and purposes, the law in action on the ground. While the courts and the Trade Practices Tribunal were an important part of the evolution of Australia's competition law from the 1970s, it was always the work of the Commission that would determine its acceptance, durability and development and, indeed, many of the important cases which would be taken to court. As we will see a little later in this lecture, Ron Bannerman knew that and said as much.

²⁴ Ibid 517. See also *Queensland Wire Industries Pty Ltd v Broken Hill Co Pty Ltd* (1989) 167 CLR 177, 188, 210; *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 [133].

I met Ron Bannerman for the first time when I responded to an advertisement in late 1982 calling for expressions of interest in the position of Associate Member of the Trade Practices Commission. We had interacted previously, without meeting, when I had initiated proceedings against him in the Federal Court challenging the issue to my then client, WA Pines Pty Ltd, of a notice under s 155 of the *Trade Practices Act*. The notice required the company to answer a number of intrusive questions about its operation of a pine plantation in Western Australia. The challenge to the validity of the notice was founded upon the Chairman's recital at the beginning of it. He recited that he believed that the company '[was] capable of furnishing information and producing documents relating to matters that constitute or may constitute contraventions of the Act'. Our argument was elegantly characterised by Brennan J in the Full Court of the Federal Court, which dismissed an appeal against a decision of a primary judge refusing discovery and striking out part of our statement of claim. His Honour said:

the argument ... sought to expose what were said to be two contradictory beliefs: that the matter constitutes a contravention and that the matter may constitute a contravention. Thereby the argument sought to expose a kind of schizophrenia in credence...²⁵

It may be therefore that when I travelled to Melbourne to be interviewed for the position of Associate Member of the Trade Practices Commission, one of the few things the Chairman of the Commission would have known about me was that I had accused him of having a bifurcated and disempowering mental state. On the credit side, albeit with more than a little bit of help from the Commonwealth and its Solicitor-General, Sir Maurice Byers QC in *Fencott v Muller*,²⁶ I had defended the accessorial liability provisions of the Act from an attack on their validity.

Doubts about the prospect of my application for Associate Membership began to emerge when I found that I had been put up by the Commission in Melbourne at what I think might just have qualified as a three star hotel. My secretary was assured, by someone from the Commission, that it was a place 'where all our people stay'. I still remember the bedroom.

²⁵ *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175, 178–9.

²⁶ (1983) 152 CLR 570.

It was narrow with a high barred window and a particular tone of green paint which I had last seen in the death cell at Fremantle when visiting a client there. Breakfast at the hotel was an interesting social experience. Guests were required to fill up tables and not permitted to sit alone. I found myself sitting next to a farmer from the Western Districts who told me over his cereal that he had come to the city to have a carbuncle on his back lanced. It was with that conversation fresh in my mind that I went to the interview, which was conducted in a not very plush office, by a panel chaired by Ron Bannerman. The questions from the Chairman explored the possibility that as a practising barrister and as an Associate Member I might have a problem with conflicts of interest. Perhaps he had a lingering memory of *WA Pines v Bannerman*. I remember assuring him that for so long as I was an Associate Member of the Trade Practices Commission I would neither take briefs against the Commission, nor accept briefs from it. I reserved the right to appear in proceedings between private parties under the Act.

In the event, I was offered the position and served as an Associate Member from February 1983 to November 1986, when I resigned to join the Federal Court. The other appointments of Associate Members announced in late 1982 were John Pascoe, a lawyer who was then an Executive Director of George Weston Foods and who is now the Chief Judge of the Federal Circuit Court, Denis Turner, a Visiting Professor at the Australian Graduate School of Management and Ernest Tucker, who was the Chair of the Administrative Review Council. The appointments were made in the shadow of a federal election by the then Attorney-General, Senator Peter Durack. They attracted some criticism from the Shadow Attorney-General Gareth Evans on account of their proximity to the federal election and a negative press release was put out by the Australian Federation of Consumer Organisations. I was damned with not even faint praise as 'a barrister from Perth not known to AFCO'. The two full time members of the Commission under the chairmanship of Ron Bannerman were Bill Coad, who later became Deputy Chairman of the Commission, and Professor John Grant, formerly Professor of Economics at the University of Tasmania and a former member of the Trade Practices Tribunal.

The term of my appointment from February 1983 to November 1986 encompassed the last two years of Ron Bannerman's tenure as Chairman of the Commission from which he retired in 1984. Working with him was a delight and a revelation. He had a very engaging way of expressing himself which sometimes had theological overtones. In the years after his

retirement in 1984, we came to hear from the Commission such expressions as contravention, disclosure, compliance, and leniency applied to corporate transgressors who thought it prudent to make a clean breast of their anticompetitive misdeeds in order to minimise the inevitable sanctions. The same idea was around in the early 1980s. However, Ron Bannerman used to speak more evocatively of sin, confession, repentance and forgiveness. He probably used the word 'penance' but I have no direct recollection of that. He also had a fine judgment about what counsel should be briefed in contemplated litigation involving the Commission. His observations about the positive and negative characteristics of counsel at the Australian Bars were frighteningly precise.

I remember Ron Bannerman as a calm and rational man, worldly in the ways of government and business, a man of great integrity focussed upon the purpose and function of the Commission in implementing the policy of the Act. He was sensitive to the small 'p' political environment with its public and private sector dimensions in which the Commission had to discharge its functions. He was aware of the forces and pressures that could be brought to bear in relation to the workings of the Commission. If I can appropriate the term 'demeanour' and apply it in a metaphorical way to his posture with respect to business, large and small, the public as consumers, and government, he seemed to me to have just the right 'demeanour' for the task he had to undertake. And it was vital that the first Chairman of the Trade Practices Commission should have that quality.

His example served me well. In 1994, ten years after Ron had retired from the Commission, I was appointed to head a newly established public authority, the National Native Title Tribunal, charged with the administration of a highly contentious statute — the *Native Title Act 1993* (Cth). The role of the President of the Tribunal included public education and dealing with a large array of different and conflicting interest groups. Many of the actors in the process were, in varying degrees, apprehensive, uncertain, or just plain angry about the disturbance that the Act and its precursor the *Mabo* decision had worked in their worlds. There were few guidelines on how to do the job. One which I think was probably embedded in my unconscious was the calm, professional approach of Ron Bannerman in administering his Act, in raising public awareness about it, and in dealing with the competing interests of businesses, big and small, which did not coincide, and of consumers.

My direct interaction with Ron Bannerman on the Commission was in my capacity as an Associate Member. Associate Members were allocated to particular matters, attended meetings of the Commission concerning those matters and dealt with officers of the Commission who had the carriage of them. Broadly speaking, they concerned authorisation applications and enforcement issues under Pts IV and V of the Act. Bannerman was a great guide to the industry cultures exposed by the authorisation process. One, in which I was involved early in my term, was an application by the Motor Traders' Association of New South Wales seeking authorisation to negotiate collectively with insurance companies for hourly rates on behalf of the motor body repair industry. The Commission granted the application on the basis that there was a public benefit in redressing an imbalance of power between the repairers and the powerful purchasers of their services who effectively set the rates. As field investigations indicated, and as emerged in the pre-determination conference however, the power wasn't all on one side. There seemed to be six different ways of carrying out any given repair job on a motor vehicle between a short way and a very long way, each of which would yield a range of possible prices. The pre-determination conference was a delight with grey suited insurers and their grey suited lawyers on one side and the repairers in sports coats on the other. Dialogue took place across a cultural divide but was nevertheless achieved. The authorisation experiences were fascinating and educational and much enhanced by Bannerman's insights. It may be that those experiences caused me to give close attention to industry evidence, as well as economic evidence, in later years when I was a Federal Court Judge hearing Pt IV cases.

A major part of the Act and a major part of the work of the Commission was concerned with consumer protection. The prohibitions in Pt V of the Act against various species of misleading or deceptive conduct might well be thought to have had a greater impact on the commercial life of the nation than Pt IV. Nevertheless, some legal practitioners regarded it as an area of less intellectual interest than that generated by the intersections of law and economics in Pt IV. Section 52, prohibiting corporations from engaging in trade or commerce in conduct that was misleading or deceptive or likely to mislead or deceive, became known rather slightly as the 'running down jurisdiction of the Federal Court'. That, perhaps, was because of the great number of cases in private litigation which invoked it. I remember one prominent barrister at a seminar which I attended in the late 1980s or early 1990s, who said that when the talk turns to Pt V the serious lawyers go out

and play tennis. The provisions of that Part as applied by the Commission and as interpreted and applied over thousands of cases in Federal and State Courts established new standards for commercial dealings and conduct in markets for goods and services in Australia generally. They were the vehicles for the further growth of the development of the accrued jurisdiction in its application to the Federal Court. Under the accrued jurisdiction embedded in the constitutional concept of a 'matter' the Federal Court hearing a claim for damages for misleading or deceptive conduct under the Act, could also entertain and decide claims arising at common law or under State or Territory laws or other federal laws forming part of the matter before it. The growth of that aspect of the Court's jurisdiction was an important part of its evolution from the original vision of it as a court which would have a narrow band of specialised jurisdictions, to something approaching a court of general civil jurisdiction.

Ron Bannerman showed no less interest in Pt V than he did in Pt IV. He remarked in 1984 that the consumer protection provisions of the Act had succeeded in lifting significantly the responsibility of advertising and promotion of consumer goods and services. He said:

They have done this by taking a near absolute standard against misleading or deceptive conduct. That means that moral guilt is not an essential ingredient of offences; companies have to see to it that offences do not occur. ... Companies thus have a positive obligation to train staff and to introduce and supervise systems aimed at preventing consumers being misled, even innocently.²⁷

In my work as an Associate Member of the Commission, I participated in meetings chaired by Ron Bannerman in which the Commission assessed evidence gathered in relation to complaints of contraventions of Pt V. I remember the alleged misdescription of fish as barramundi was a matter of ongoing concern to the Commission in 1983–1984. This was before the days of DNA testing and subtle enzyme analysis was needed to identify the fish. Another issue was the alleged dilution of orange juice products. A large part of fresh orange juice is water anyway, so how do you decide whether it has been diluted? Fish and orange juice were among many food products which were the subject of complaints of misdescription or misleading advertising. Again, each of those investigations provided a

²⁷ RM Bannerman, 'Points from Experience 1967–1984' in Trade Practices Commission, *Annual Report 1983–1984*, 184–5, par A.5.7.

window into a particular industry and the way participants in the industry tried to deal with competitive pressures.

It is perhaps too easy today to look at the received reality of our competition laws and not appreciate that their strong presence in the Australian legal landscape was never assured. As David Merrett, Stephen Corones and David Round wrote in 2007 in an interesting history of competition policy in Australia,²⁸ the path to the present was not easy. Ron Bannerman played a central role in placing the law upon that path. He did not see the Commission as being there just to give effect to the existing law. It had a part to play in the improvement of the law. In his lengthy paper entitled 'Points from Experience 1967–1984', which was appended to the 1983–1984 Report of the Trade Practices Commission, he described how he used Annual Reports as 'an instrument of progress'. He said:

The Parliament has ultimate responsibility for the legislation and for its continuance, amendment or repeal; thus the Parliament needs to know what really is emerging from the experience of administration. This means that it is not sufficient just to provide information without the analysis or comment that the statutory authority is in the best position to make. Any discussion offered must, however, be seen to derive from experience. That way reports can fairly become involved in the process of development of the law, and may hope to gain a degree of bi-partisan acceptance as a necessary part of the material for debate in the Parliament and outside it.²⁹

He was acutely conscious of the need to establish public acceptance of the law. The role of the regulator in that respect was critical. He said:

It is a fundamental mistake to regard the mere passage of law as curing problems. Law gathers respect only through acceptance or enforcement. Acceptance of course assists enforcement. Conversely, sufficient enforcement may eventually bring acceptance, but that can be slow and expensive. Therefore a law needs to have or to acquire a sufficient constituency of support. It is a task for public administration in a new field to build support for the law and to develop acceptance for it from those directly affected.³⁰

²⁸ Merrett Corones and Round, above n 18, 179.

²⁹ RM Bannerman, above n 27, 151, par A.1.5.

³⁰ RM Bannerman, above n 27, 157, par A.2.1.

An interesting illustration of his judgment about the politics of his Act was his observation that the basic principle inherent in it, namely freedom to compete, was attractive to the legal profession. He observed with hard-nosed pragmatism just a little short of cynicism:

Principle runs parallel with self-interest in seeing trade practices law as a challenging and rewarding field for legal professional skills. This support by lawyers tends to encourage acceptance of the principles of the law by commercial interests also, since the lawyers most concerned are those who act for commercial interests.³¹

We see in these remarks a combination of clear vision about his purpose as a public administrator and a practical awareness of the social and political environment in which he was operating.

The law and the regulator have moved on. Each successive Chairman of the Commission has put his own stamp on the way in which it has engaged with the administration of the Act. After Ron Bannerman retired, I continued to serve as an Associate Member under the new Chairman, Bob McComas. He was a lawyer with a strong commercial background. He was intelligent, worldly and charming, and I enjoyed working with him very much. Each of his successors, Bob Baxt, Allan Fels, Graeme Samuel and Rod Sims has made his own mark but the Commission has never significantly faltered in its trajectory as an important and influential business regulator.

There has been from time to time debate about the purposes which the Act should serve. Section 46 was at one time said to be a provision protective of small business. The Blunt Committee in 1979 proposed that while the primary thrust of the *Trade Practices Act* was efficiency, there should be a degree of protection of small firms from the predatory conduct of others with a substantial degree of market power. In the Second Reading Speech for the 1986 amendments, which recast s 46, the Attorney-General referred to the importance of an effective provision for controlling the misuse of market power to ensure that small business was given protection from the predatory actions of powerful corporations. The section, however, did not speak in those terms. As *Queensland Wire* made clear, it was

³¹ RM Bannerman, above n 27, 164, par A.2.19.

concerned with the protection of competition and not competitors, a principle reaffirmed subsequently in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*³² and again in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*³³ in which Gleeson CJ and Callinan J reiterated that:

The purpose of the [Trade Practices] Act is to promote competition, not to protect the private interests of particular ... competitors. If the damage is sufficiently serious, competition may eliminate a competitor.³⁴

It is not particularly useful to explore the merits and demerits of recent or proposed or possible amendments to competition law and whether any of them give rise to potentially conflicting purposes. It is important, I think, to make the point that the various functions conferred on the regulator should fall within a coherent policy framework and that it not be allowed to become a convenient repository for politically attractive initiatives.³⁵ In the real world concerns about the complexity of the law and the variety of its purposes are chronically with us. That real world environment was reflected in Sir Owen Dixon's remark in 1933, which I quoted at the beginning of this lecture. They are nevertheless concerns to which those engaged in the field of competition law whether as regulators, policy makers, legal and economic advisers and advocates should attend to to ensure that the normative clarity of competition and consumer protection provisions is not obscured by the manner of their expression or the variety of subjects with which they deal. A law whose normative purpose is clear is more likely to be understood and accepted by those affected by it. Undue complexity may obscure the purpose of the law and thus make compliance more difficult. I note that the question of simplification is referred to in the Draft Report of the Harper Committee.³⁶

Ron Bannerman was an outstanding public official of his time. His remarks appended to the 1983-1984 Report of the Trade Practices Commission repay reading by any public

³² (2001) 205 CLR 1, 13.

³³ (2003) 215 CLR 374.

³⁴ Ibid 411 [87].

³⁵ See, RS French, 'Competition Law — Covering a Multitude of Sins', (2004) 12 *Competition and Consumer Law Journal* 125; Rex Ahdar, 'An antitrust decalogue: The ten commandments of Australasian competition law' (2009) 37 *Australian Business Law Review* 324, 340.

³⁶ Competition Policy Review Panel, Competition Policy Review, Draft Report (September 2014) 39.

administrator today. The role of the regulator in fields populated by contending and competing interests is not to allow itself to be captured by any of them. It should not be in comfortable proximity nor chronically antagonistic to any of them. It must be fairly open to their concerns and have an understanding of them. That understanding, as Bannerman appreciated, should inform the regulators' communication with legislators which should be measured, thoughtful and practical, with a consciousness of what should be done and an awareness of what can be done.

It has been an honour to remember Ron Bannerman and to deliver this lecture in his memory. For those who pay attention to what he did and how he did it, his example endures.