



Lecture

Growing up competitive: The influences of Barwick and Murphy on Australian competition regulation

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In his second Bannerman Competition Lecture, Chief Justice Gageler traces the roles and influences of Sir Garfield Barwick and Lionel Murphy, mainly as politicians but partly as judges, in the development of Australian trade practices legislation. That history shows important commonalities and convergences of view. Each of Barwick and Murphy, in his own way, recognised the importance of tackling monopolistic and anticompetitive conduct and the relevance of international approaches to inform the Australian approach to regulating anticompetitive conduct, whilst maintaining a distinctively Australian character to that regulation. Through the work of Barwick, in building political momentum for trade practices legislation and embarking on a thorough and worldly approach to its design, and the work of Murphy, in crafting and successfully enacting the Trade Practices Act 1974 (Cth), the essentials of Australian trade practices regulation have now stood for more than half a century.

Having served as the one and only Commissioner of Trade Practices under the *Trade Practices Act 1965* (Cth) (1965 Act) and as the first Chairman of the Trade Practices Commission under the *Trade Practices Act 1974* (Cth) (1974 Act), Ron Bannerman is fittingly honoured in this lecture series as the regulatory pioneer of modern trade practices legislation in Australia. As Chief Justice Robert French noted in the inaugural Bannerman Lecture in 2015,¹ the political pioneers of modern trade practices legislation in Australia were Garfield Barwick and Lionel Murphy.

Barwick and Murphy both served as Attorney-General of the Commonwealth. Both were Senators for New South Wales. Both were senior members of the New South Wales Bar. Both would go on to be appointed to the High Court. There, with few exceptions, the similarities ended.

Barwick and Murphy did not, to put it lightly, agree on very much. When Murphy was proposed to be appointed a Justice of the High Court, Barwick as Chief Justice informed the Prime Minister — Gough Whitlam — that Murphy was ‘neither competent nor suitable for the position’.² Their time on

* Chief Justice of Australia. This is a revised version of the 2025 Bannerman Competition Lecture, hosted by the Australian Competition and Consumer Commission and the Business Law Section of the Law Council of Australia, which was delivered on Wednesday 30 April 2025. Priyanka Banerjee gave invaluable assistance in its preparation and revision.

1 R French, ‘The Moving Finger Writes and, Having Writ, Rewrites’, Bannerman Lecture, 26 February 2015.

2 G Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections* (Federation Press, 1995) p 232.

the Court together would prove to be fractious with Barwick refusing to speak to Murphy³ and the two often taking opposing sides in the outcomes of cases which came before the Court.

On the issue of restrictive trade practices, however, Barwick and Murphy agreed that national regulatory intervention was necessary in an Australian economy which had too long been replete with cartels and other anticompetitive practices. It was one agreement that certainly did nothing to lessen the competition between its parties whose rivalry amounted to ingrained antagonism.

The subject of this lecture is the roles and influences of Barwick and Murphy, mainly as politicians but partly as judges, in the development of Australian trade practices legislation. That history shows important commonalities and convergences of view.

Barwick and Murphy, each in his own way, recognised the importance of tackling monopolistic and anticompetitive conduct. In September 1961, Chief Justice Earl Warren of the United States Supreme Court wrote to Barwick who was then Attorney-General: 'I do not know how Australia is going to grow up without anti-trust [legislation].'⁴ Barwick agreed. He had long held the view that markets had to be fair and free so that individuals could test themselves in those markets and reap their own rewards. Murphy, on the other hand, saw restrictive trade practices as a vice that enabled the accumulation of corporate power, to the detriment of consumers.

Each of Barwick and Murphy was also focused on looking to international approaches to inform the Australian approach to regulating anticompetitive conduct, whilst maintaining a distinctively Australian character to that regulation — both to conform with constitutional limits on legislative power, and to manage the translation of economic concepts to legal and legislative expression, having regard to the usual methods of interpretation of Australian courts. The challenge of judicial interpretation of trade practices legislation would be one that both would feel keenly as politicians when designing that legislation, and then again in their later judicial offices on the High Court responsible for considering the constitutionality of, and other issues arising from, such legislation.

This is the story of how Barwick and Murphy shepherded Australia to its adoption of the robust 1974 Act, the blueprint for the contemporary *Competition and Consumer Act 2010* (Cth).

Barwick and the development of the 1965 Bill

By Federation, cartels, monopolies and restrictive trade practices more broadly were well-entrenched in Australia as they were across most parts of the world. The antitrust movement which had particularly swept the United States reached Australian shores by 1905 when the Second Deakin Government enacted the *Australian Industries Preservation Act 1906* (Cth)

3 D Marr, *Barwick: The Classic Biography of a Man of Power* (Allen & Unwin, 2nd ed, 1992) p 247.

4 Earl Warren to Sir Garfield Barwick, National Archives of Australia A432 1966/2098 Minutes, 15 September 1961 at 84.

(1906 Act), legislation spearheaded by Isaac Isaacs, then Attorney-General, and which was modelled on the *Sherman Act 1890* in the United States.

The 1906 Act took aim particularly at foreign anticompetitive practices which impacted domestic firms. But the 1906 Act was left largely as a paper tiger following the decision of the High Court in *Huddart Parker and Co Pty Ltd v Moorehead*,⁵ which restricted the reach of the corporations power in s 51(xx) of the Constitution, and the subsequent decisions of the Full Court of the High Court and the Privy Council overturning the first instance decision of Isaacs J the *Coal Vend Case*,⁶ which denied the relevance of jurisprudence developed by the Supreme Court of the United States decisions on the *Sherman Act* and declared an agreement to raise the price of a commodity not necessarily ‘to the detriment of the public’ on the basis that ‘the public’ was to be understood as not limited to the consumers of the commodity, but to include also the producers of that commodity.

A series of proposed laws for the alteration of the Constitution to enhance Commonwealth legislative power over corporations, monopolies, trusts and combinations were put to electors in referenda in 1911, 1913, 1919 and 1926 but on each occasion failed to obtain the majority required for constitutional amendment.⁷ Not until the 1950s in the aftermath of World War II was there renewed attention to cartels and anticompetitive behaviour,⁸ and what government could do to combat it.

As David Marr describes in his biography of Barwick, it was in early 1960 that Barwick, as Attorney-General in the Menzies Government, persuaded Menzies that ‘something had to be done’ about cartels and monopolies.⁹ By this time, around 400 cartels or ‘trade associations’ existed in Australia.¹⁰ Barwick negotiated directly with Menzies about including a general reference at the Governor-General’s opening of Parliament to the government ‘giv[ing] consideration to legislation to protect and strengthen free enterprise’ against monopoly and restrictive practices. The broader Cabinet was taken unawares about this agenda.¹¹

Barwick forged ahead despite the misgivings in Cabinet. He was driven by the clarity of his conception of a fair economy, drawn at least in part from his experience at the Sydney Bar where he had confronted exclusion from the ‘closed club of Phillip Street’, to rise to be its undisputed leader. The

5 (1909) 8 CLR 330.

6 *R v Associated Northern Collieries* (1911) 14 CLR 387; *Adelaide Steamship Co Ltd v R* (1912) 15 CLR 65; *Attorney-General (Cth) v Adelaide Steamship Co Ltd* (1913) 18 CLR 30 (*Coal Vend Case*).

7 *Constitution Alteration (Monopolies) Bill 1910* (Cth); *Constitution Alteration (Nationalisation of Monopolies) Bill 1912* (Cth); *Constitution Alteration (Corporations) Bill 1912* (Cth); *Constitution Alteration (Nationalisation of Monopolies) Bill 1919* (Cth); *Constitution Alteration (Industry and Commerce) Bill 1926* (Cth). See generally *Parliamentary Handbook of the Commonwealth of Australia* (2014) pp 380–387.

8 K Round and M Shanahan, *From Protection to Competition: The Politics of Trade Practices Reform in Australia* (Federation Press, 2015) p 124.

9 Marr (n 3) p 184. See also A Heger, J Kwong and A Leigh, ‘Bumps and Breakthroughs: The Journey of Australia’s Merger Reforms’ (2024) 31 *Competition and Consumer Law Journal* 1, p 2.

10 Marr (n 3) p 185.

11 Above p 184.

marketplace, Barwick believed, was where one had to test oneself to get ahead. To ensure that success was a virtue worth pursuing, the marketplace itself must be fair and free.¹² For Barwick, free enterprise was the singular virtue, the moral force, to which the market ought to give effect and it was focused on the individual, the 'little man'.¹³ He was acutely aware of the societal problem that 'arises out of the trend for small businesses ... to disappear and be replaced by businesses owned by large-scale organisations'.¹⁴

Menzies went on to announce that a restrictive trade practices Bill would be before Parliament that same year, being 1960. But Barwick was not one to rush into such a topic. He was focused on closely studying international approaches to trade practices regulation. He travelled to North America where he met with the United States Attorney-General, leading American antitrust lawyers, as well as the Canadian Minister of Justice to discuss antitrust legislation.¹⁵ Those discussions illuminated the complexity of the task, Barwick remarking that 'the further one goes the more complex this problem is, and the more difficult it is to fasten on the right criteria so that free enterprise can be assured'.¹⁶ Contributing to the complexity was the constitutional landscape as Barwick wanted to introduce more than 'a federal law of substantial impact' but to cover 'the whole range of trade and commerce in Australia'.¹⁷ To achieve that result would not only involve significant intellectual creativity in undertaking the legislative design; it would also involve navigating a political thicket planted over a constitutional minefield.

Barwick was intent on comparative international study being an integral part of his process. Following his own return from discussions with United States, British and Canadian public officials regarding their antitrust legislative approaches, Barwick asked the Solicitor-General, Kenneth Bailey, to travel to the United Kingdom, the United States, Canada and New Zealand. After Bailey reported back to Barwick on his return to Australia in June 1960,¹⁸ Barwick in September 1960 dispatched a senior officer in the Attorney-General's Department, Jack Richardson, to the United States, Canada and the United Kingdom.¹⁹

That international survey revealed some of the options that were available for any such Australian legislation.

The British approach was enshrined in the *Restrictive Trade Practices Act 1956* (1956 Act).²⁰ That Act established the office of the Registrar of Restrictive Trading Agreements who was responsible for maintaining a public

¹² Above p 185.

¹³ Above p 186.

¹⁴ Round and Shanahan (n 8) p 130.

¹⁵ Marr (n 3) p 187.

¹⁶ Above.

¹⁷ Round and Shanahan (n 8) p 129. See G Barwick, 'Divining the Legislative Intent' (1961) 35 *Australian Law Journal* 197, p 197; D Merrett, S Corones and D Round, 'The Introduction of Competition Policy in Australia: The Role of Ron Bannerman' (2007) 47 *Australian Economic History Review* 178.

¹⁸ 'Sir Kenneth Bailey Back', *Canberra Times*, 27 June 1960, p 2.

¹⁹ 'Officer to Study U.S. Laws on Monopolies', *Canberra Times*, 17 September 1960, p 3.

²⁰ 4 & 5 Eliz 2, c 68.

register of agreements to fix prices, to fix quantities, to divide markets and to set terms of supply. The Registrar could require a person, with respect to whom the Registrar had reasonable cause to believe was party to an impugned agreement, to provide further information. Failure to provide such information was a criminal offence. Registered agreements could be removed from the register if they were of 'no substantial economic significance'. The 1956 Act also established a Restrictive Practices Court which had jurisdiction to declare any registered restrictive trade practice as being 'contrary to the public interest' with the consequence that the agreement would be void in respect of such practices. It was this focus on the public interest, rather than competition as such, that was the defining feature of the British approach. The only restrictive practice that was deemed to be outright unlawful was resale price maintenance.

The Americans had long taken a different approach. By 1960, the legislative response to restrictive trade practices spanned the *Sherman Act*, the *Clayton Act 1914*, the *Federal Trade Commission Act 1914* and the *Robinson-Patman Act 1936*. The legislation was supplemented by a rich body of case law concerning the judicial interpretation of those statutes — most notably through the judicially-led development of per se contraventions and rule of reason analysis. Unlike the United Kingdom, which only made resale price maintenance unlawful, the American statutes made horizontal agreements between unrelated firms, such as for price fixing, output restrictions and boycotts, per se illegal and subject to both civil and criminal sanctions. The statutes also subjected unilateral conduct like predatory pricing and vertical agreements such as resale price maintenance and exclusive dealing to rule of reason review which involved a judicial balancing exercise between anticompetitive effects and procompetitive justifications such as efficiency, and subjected mergers to rule of reason analysis which involved the weighing of anticompetitive concerns such as the creation of unilateral market power against offsetting factors such as efficiencies. The focus of American antitrust law was therefore squarely on the effect of restrictive trade practices on competition, rather than the general public interest as in the United Kingdom, and relatedly featured a keen incorporation of economic theory.

The Canadian approach featured the *Anti-Combines Act 1889* (Can),²¹ which had pioneered competition law in the world and had inspired the enactment of the *Sherman Act* a year later. The focus of the Canadian legislation was the criminalisation of arrangements among suppliers to eliminate competition over a substantial part of any market by price fixing, output restrictions or distribution restrictions.²² The reach of the Canadian legislation was hampered by the need to rely on criminal prosecutions for its enforcement and by a string of cases in which Canadian courts had narrowly interpreted the law leaving it to be 'largely ineffective' in the face of monopolisation and mergers.²³

21 An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade, SC 1889, c 41.

22 See TD MacDonald, 'Canadian Anti-Combines Legislation' (1955) 13 *School of Law Review* 4, pp 4–5.

23 See M Trebilcock and F Ducci, 'The Evolution of Canadian Competition Policy: A Retrospective' (2018) *Canadian Business Law Journal* 171, p 172.

Back in Australia, while Barwick undertook his study of antitrust legislation, opposition was fomenting in the Menzies Cabinet spearheaded by John McEwen who was the Minister for Trade.²⁴ Over the next two years, opposition to Barwick's attempt at reining in restrictive trade practices continued to build within the coalition parties. But in Barwick's corner were Harold Holt and Billy Snedden.²⁵

Two years after the international survey had been started by him, Barwick was still uncertain whether to follow the American approach of a hard stick in the form of absolute prohibitions on certain anticompetitive practices which could be backed up by criminal sanctions, or the British approach of setting up a public register for such practices and evaluating them in light of the public interest.²⁶

Finally, in November 1962, after an intense period of work, Barwick had formulated what he regarded as a 'sensible and workable scheme' to regulate harmful restrictive practices. Rather than presenting a Bill, Barwick instead tabled for discussion a White Paper that outlined what any legislation would cover. The White Paper was presented in Barwick's absence (who was overseas in his role as Minister for External Affairs) by the Acting Attorney-General Gordon Freeth to the House of Representatives on 6 December 1962. The White Paper envisaged a path between the American and British approaches. Four practices were to be prohibited outright: collusive marketing, collusive tendering, predatory pricing and misuse of monopoly power, echoing the American approach. Other horizontal and vertical arrangements and practices such as resale price maintenance, discriminatory dealing and certain mergers were required to be registered on a private register, rather than the British public register, and where failure to register would be a criminal offence. Registered practices were allowed to continue but could be challenged to be deregistered by a member of the public or the Attorney-General, although various defences were available including where a practice worked 'no public detriment or is otherwise justified' most strongly echoing the British public interest test and having traces of the American rule of reason-style analysis.²⁷ The Labor opposition, which included one Lionel Murphy, was impressed. But this moment of success for Barwick would prove to be fleeting.

In the new year of 1963, Barwick's opponents within government seized on the 'paper mountain' that would attend the proposed register, with every business in Australia being expected to reduce their anticompetitive practices and arrangements to writing and have it filed on the register.²⁸ Barwick remained obdurate in the face of such criticism, which was mounting by the day as, although the proposal was there to see in the White Paper, no draft legislative text was forthcoming. In fact, there had been no formal direction at all to prepare any Bill.²⁹ An editorial in *The Sydney Morning Herald* remarked that '[a]t present there is a mass of confused promises with no leads

24 Marr (n 3) pp 187–188.

25 Above p 188.

26 Above.

27 Above p 188.

28 Above p 190.

29 Above p 191.

on what actually will appear in the legislation when it makes its long-delayed appearance'.³⁰

A stalemate had resulted. The tide was turning against Barwick.³¹ Yet he continued to fight for his trade practices reforms, campaigning for his original White Paper proposals during the 1963 election campaign. When the Menzies Government was re-elected, however, Menzies was no longer willing to return Barwick as Attorney-General. Confronted by continued opposition within the coalition parties to Barwick's proposals and powerful lobbying by cartels, yet simultaneously pressured by the public's expectation of legislation, Menzies elevated Billy Snedden to be Attorney-General, one of Barwick's few allies back in the 1960 Cabinet on trade practices legislation and who would now have to shepherd any such legislation through Parliament. In April 1964, Barwick was appointed Chief Justice.³²

The Trade Practices Act 1965

The political drama around restrictive trade practices legislation then cuts briefly away from our two protagonists Barwick and Murphy to Billy Snedden. Following Barwick's appointment to the High Court, Snedden was tasked with getting the legislation drafted and ready to present to the House of Representatives. This was no mean feat. Snedden himself was sympathetic to legislating to curb restrictive trade practices, but he was confronted with hostility to the idea within the Cabinet, which had not eased since Barwick's time as Attorney-General, and the antagonistic chorus from the trade association lobby groups.

When, in May 1965, the Bill for what would become the 1965 Act was finally prepared, it reflected how far Snedden had to walk back from Barwick's proposals in capitulation to the political pressures from within and without. A few aspects of 1965 Act bear mention.

First and most immediately, the 1965 Act only created offences for collusive tendering and collusive bidding, rather than for monopolisation and predatory pricing as well, all four having been suggested to be outlawed by Barwick.

Next, the 1965 Act established a private Register of Trade Agreements, similar to what Barwick had suggested in his White Paper, where 'examinable agreements' — agreements between competitors which imposed cartelising restrictions, involved price discrimination, full or third-line forcing, refusal to deal or monopolisation — had to be registered after any agreement was made.³³ Failure to register such agreements was an offence.³⁴ Resale price maintenance did not feature expressly among restrictions which were to be registered, running against what Barwick had presented.

The 1965 Bill also created the office, which would come in practice to be occupied with distinction by Bannerman, of the Commissioner of Trade Practices who was to be responsible for bringing restrictive practices and

30 *Sydney Morning Herald*, 27 August 1963, p 2.

31 Marr (n 3) p 192.

32 Above pp 207–209.

33 Section 35 and Pt V of the *Trade Practices Act 1965* (Cth).

34 Section 43 of the *Trade Practices Act 1965* (Cth).

agreements (whether registered or not) before the Trade Practices Tribunal, if the Commissioner considered the practice or agreement to be contrary to the public interest³⁵ and had undertaken consultations with the prospective parties.³⁶ The Tribunal would then be required to determine if the restrictive practice or agreement was contrary to the public interest, echoing the British registration model.³⁷ The consequence of the Tribunal determining that a restrictive practice or agreement was contrary to the public interest was that the relevant restriction was unenforceable but only from on and after that date of being so determined.³⁸ Other relief was also available such as any order to restrain a person from giving effect to the impugned agreement or from further engaging in that impugned practice.³⁹ Those who suffered loss or damage from contravention of orders of the Tribunal declaring a restrictive practice or agreement to be contrary to the public interest could recover that amount of loss or damage.⁴⁰ The Commissioner could also provide ‘negative clearance’ to a restrictive practice or agreement if he was satisfied that the practice or agreement was not contrary to the public interest.⁴¹

In his Second Reading Speech, Snedden stated that the legislative purpose was ‘to preserve competition in Australian trade and commerce to the extent required by the public interest’ and that competition is an ‘essential ingredient’ for a free enterprise economy.⁴² Snedden paid homage to Barwick’s White Paper presented in December 1962 but went on to say that the Bill contained a ‘number of changes’ from Barwick’s proposals to ensure that the legislation ‘will be effective without constituting any unnecessary interference to business’.⁴³ Snedden acknowledged that the Bill did not have any provisions about mergers or takeovers, describing the issue to be ‘one of great complexity’. Snedden did not mention the *Clayton Act* in the United States which was directed to mergers which could substantially lessen competition. Indeed, the turn away from Barwick’s contemplation of the American model was marked. The 1906 Act, having been based on the US *Sherman Act*, had recently been given ‘teeth’ by the decision in *Redfern v Dunlop Rubber Australia Ltd*,⁴⁴ in which the High Court under Barwick CJ had held provisions in the 1906 Act which provided for criminal and civil remedies against the making of cartelising contracts to be valid exercises of the trade and commerce power in s 51(i) of the Constitution. And yet the Government was moving to repeal this revitalised 1906 Act and replace it entirely. Snedden merely commented that the Bill for the 1965 Act ‘provide[d] for more appropriate machinery’ — namely the private register — rather than the American-influenced 1906 Act.

35 Section 47(2) of the *Trade Practices Act 1965* (Cth).

36 Section 48(1) of the *Trade Practices Act 1965* (Cth).

37 Section 49 of the *Trade Practices Act 1965* (Cth).

38 Section 51 of the *Trade Practices Act 1965* (Cth).

39 Section 52 of the *Trade Practices Act 1965* (Cth).

40 Section 88 of the *Trade Practices Act 1965* (Cth).

41 Section 59 of the *Trade Practices Act 1965* (Cth).

42 Commonwealth, *Hansard* (House of Representatives, 19 May 1965, p 1654, B Snedden).

43 Commonwealth, *Hansard* (House of Representatives, 19 May 1965, pp 1654–1655, B Snedden).

44 (1964) 110 CLR 194.

Subsequent debate on the Bill resumed in November 1965, when the Leader of the Opposition — Gough Whitlam — colourfully remarked that its ‘period of gestation has been so excessive that the father of the legislation has left the House to become Chief Justice of Australia’ and that ‘[t]he foster father — the present Attorney-General (Mr. Snedden) — has had to accept responsibility for a much more puny child than numerous progress bulletins had led members of the Parliament and the community to expect’.⁴⁵ But while the Opposition highlighted the deficiencies of the Bill, it agreed that legislative action was necessary. The 1965 Act was passed in December 1965, and the 1906 Act was thereby repealed. Australian trade practices regulation was firmly in the mode of emulating the United Kingdom, though in a distinctively Australian flavour with the private register system.

Despite the 1965 Act shying away from Barwick’s vision, it was still bold in one aspect. That aspect was how the 1965 Act represented the first attempt to use the corporations power under s 51(xx) of the Constitution as one of the supports for this kind of legislation⁴⁶ since *Huddart Parker*. But the manner of the taking of that one bold step would prove to be the unravelling of this modest piece of legislation.

The unravelling came six years later, in 1971, at the hands the High Court under Barwick CJ in *Strickland v Rocla Concrete Pipes Pty Ltd* (the *Concrete Pipes* case).⁴⁷ The *Concrete Pipes* case involved a defendant who had been charged with offences against the 1965 Act, having not furnished necessary particulars relating to its agreement concerning the supply of concrete pipes within Queensland. Although a majority of the Court, including Barwick, contemplated a wider vision of s 51(xx) and considered that *Huddart Parker* was wrongly decided,⁴⁸ the majority nonetheless held the 1965 Act incapable of being supported by the corporations power having regard to the manner in which it had been drafted. Writing alone, as was his characteristic, Barwick CJ said that he was ‘clearly of opinion that the Parliament could have made a valid law in the terms of the Act’ but that ‘because of the manner in which the Parliament ... expressed its enactment’, the Parliament had not done so.⁴⁹ Barwick was no doubt convinced that, had he drafted the Bill for the 1965 Act, the outcome would have been different. As it was, the 1965 Act had been gutted.

I will return to the role of the Barwick Court on trade practices law in Australia, but the 1965 Act having been so gutted in 1971, the scene then turns to Lionel Murphy.

Murphy and the development of the 1974 Bill

Even before assuming office as Attorney-General upon the election of the Whitlam Government in 1972, Murphy said in an interview that he intended to tackle the fact that ‘the government has no effective Trade Practices Laws,

45 Commonwealth, *Hansard* (House of Representatives, 25 November 1965, p 3225, G Whitlam).

46 See s 7 of the *Trade Practices Act 1965* (Cth).

47 (1971) 124 CLR 468.

48 Above at 488–489, 499, 513, 515.

49 Above at 498–499.

[and] never coped with the problems of monopolisation'. Murphy considered that meaningful action on restrictive trade practices was a part of the 'law and order' mandate in the 'economic field'.⁵⁰

To add economic heft to his vision of doing more against restrictive trade practices, Murphy sought the assistance of Ted Wheelwright,⁵¹ one of the pioneers of Australian political economy. Wheelwright worked as a consultant for Murphy and in early April 1973 he prepared what would become an influential memorandum. Entitled 'A new province for law and order — a possible rationale', the memorandum outlined that the public interest is reflected in the fact that every person is a consumer and that the 'main function of all economic activity is to provide the community with the goods and services it requires, at the lowest possible cost'.⁵²

This rationale marked the reinvigoration of Australian restrictive trade practices regulation, according strongly with the American antitrust approach. The Whitlam Government rewrote its version of trade practices legislation in the form of the Bill for what would become the 1974 Act to include much tougher economic controls modelled on the 1906 Act and influenced not only by the *Sherman Act* but also by the *Clayton Act* and the *Robinson-Patman Act*. Its regulation of restrictive trade practices was contained in a set of seven provisions in Pt IV, invoking the simplicity of §§ 1 and 2 of the *Sherman Act*. Those provisions encompassed prohibitions (but not criminal offences as in the United States) on non-price-fixing contracts, arrangements and understandings which involved restraints of trade,⁵³ monopolisation practices such as taking advantage of market power to eliminate or substantially damage a competitor,⁵⁴ exclusive dealing⁵⁵ and resale price maintenance;⁵⁶ prohibited price discrimination⁵⁷ and mergers⁵⁸ if it would substantially lessen competition in a market; and prohibited price-fixing contracts, arrangements and understandings in restraint of trade if they had or were likely to have a significant effect on competition.⁵⁹ Pecuniary penalties could be ordered by a court for each contravening act or omission,⁶⁰ among other remedies such as divestiture for contraventions of the anticompetitive merger prohibition.⁶¹

Akin to the United States Federal Trade Commission, a new Trade Practices Commission was to be set up (instead of the single Commissioner of Trade Practices under the 1965 Act) to be responsible for granting any authorisations for contracts, arrangements and understandings in restraint of trade and clearances for contracts, arrangements and understandings, any proposed exclusive dealing or merger if such authorisation or clearance would result in

50 J Hocking, *Lionel Murphy: A Political Biography* (Cambridge University Press, 1997) p 203.

51 Above p 204.

52 Above.

53 Section 47(2) of the *Trade Practices Act 1974* (Cth).

54 Section 46 of the *Trade Practices Act 1974* (Cth).

55 Section 47(3)–(4) of the *Trade Practices Act 1974* (Cth).

56 Section 48 of the *Trade Practices Act 1974* (Cth). See also s 96.

57 Section 49 of the *Trade Practices Act 1974* (Cth).

58 Section 50 of the *Trade Practices Act 1974* (Cth).

59 Section 45 of the *Trade Practices Act 1974* (Cth).

60 Section 76 of the *Trade Practices Act 1974* (Cth).

61 Section 81 of the *Trade Practices Act 1974* (Cth).

‘substantial benefit to the public’,⁶² as well as instituting proceedings against contraventions of the Act.⁶³ The Commission also was to have responsibilities to make information available about the Commission and information and relevant matters to consumers, conduct research into matters affecting the interests of consumers, and publicise the rights and obligations of persons under trade practices legislation to guide consumers.⁶⁴ This again mirrored the public-facing role of the Federal Trade Commission in the United States. Consumers could also now seek compensatory damages for contraventions.⁶⁵

The Bill for the 1974 Act also included measures to protect consumers from a wide range of unfair commercial practices, including misleading or deceptive conduct, thereby creating one of the world’s most comprehensive pieces of consumer protection legislation.⁶⁶

In his Second Reading Speech, with more than a hint of gloating, Murphy said:

The purpose of the Bill is to control restrictive trade practices and monopolisation and to protect consumers from unfair commercial practices. The Bill will replace the existing Restrictive Trade Practices Act, which has proved to be one of the most ineffectual pieces of legislation ever passed by this Parliament. The Bill will also provide on a national basis long overdue protection for consumers against a wide range of unfair practices.⁶⁷

He went on to remark that:

Legislation of this kind is concerned with economic considerations. There is a limit to the extent to which such considerations can be treated in legislation as legal concepts capable of being expressed with absolute precision. Such an approach leads to provisions which are complex in the extreme and give rise to more problems than they remove.

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 that 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.⁶⁸

Unsurprisingly given its scope and potency, the Bill faced strenuous opposition and difficulties in mustering sufficient votes to pass. But when the Labor Party was returned to government following the double dissolution, debate on the proposed legislation resumed and finally, on 23 August 1974 following a special sitting, the 1974 Act passed.⁶⁹ The Attorney-General’s Department placed print advertisements and cartoons in various newspapers

⁶² Part VII of the *Trade Practices Act 1974* (Cth).

⁶³ Section 77 of the *Trade Practices Act 1974* (Cth).

⁶⁴ Part II of the *Trade Practices Act 1974* (Cth).

⁶⁵ Section 82 of the *Trade Practices Act 1974* (Cth).

⁶⁶ Part V of the *Trade Practices Act 1974* (Cth). See also Round and Shanahan (n 8) p 189.

⁶⁷ Commonwealth, *Hansard* (Senate, 30 July 1974, p 540, L Murphy).

⁶⁸ Commonwealth, *Hansard* (Senate, 30 July 1974, p 542, L Murphy).

⁶⁹ Round and Shanahan (n 8) p 190.

around the country to inform the public about this new Act.⁷⁰ One such advertisement gave several tips to the reader on how to find the answers to questions they might have had about the 1974 Act. The first tip was: ‘by purchasing a copy of the Act and studying it.’

Murphy’s vision for the 1974 Act reflected that of Isaacs in his championing of the enactment of the 1906 Act, more so than the free enterprise focus of Barwick. Isaacs had seen the 1906 Act as a piece of nation-building legislation which would contribute to the development of an egalitarian society. If Australia was to become, Isaacs said, ‘a country that can hold its many millions of people as other continents do, a country that can have diversity of occupation and diversity of employment’, then it was ‘necessary to see that its manufacturing industries and its natural resources ... are not stifled ... by the power of numbers and the power of aggregated wealth wrongly used to the repression of honest individual effort properly directed.’⁷¹

Though notable for its strong turn to the American antitrust approach which involved judicial interpretation and application of otherwise brief and flexible statutory text, the 1974 Act adopted a distinctively Australian approach to the problem of restrictive trade practices. It was in that way ‘Austerican’, as Bob Baxt and Maureen Brunt described it at the time.⁷² Baxt and Brunt were, of course, luminaries of Australian competition law keenly attuned to the possible influence of American antitrust law and economics in Australia, having both undertaken postgraduate study in the United States in law and economics, respectively. Baxt and Brunt observed that the statutory text in the 1974 Act was ‘pitched at a somewhat lower level of generality than the American legislation’ perhaps precisely because a different body of law was desired by the government, but that it remained the case that ‘some knowledge of American interpretation [was] essential background.’⁷³ A few years later, following a visit to Australia, Stephen Breyer — then a Professor at Harvard Law School — squarely considered the question of how American antitrust principles and law might be relevant in Australia.⁷⁴ Breyer acknowledged that there were differences between the Australian and American antitrust systems. Yet Breyer considered that the ‘virtually identical’ objectives of Australian and American antitrust law meant that ‘economically-oriented analysis in interpreting the anti-trust laws’ would be useful for Australian judges to adopt, as American judges had.⁷⁵ He highlighted various aspects of the 1974 Act which called for considered reflection, all of which were prescient and many of which remain extant,⁷⁶ including how to interpret ‘significant effect on

70 Australian Competition and Consumer Commission, ‘Celebrating 40 Years of Making Markets Work’ (2014) p 2.

71 Commonwealth, *Hansard* (House of Representatives, 19 June 1906, p 375, I Isaacs).

72 B Baxt and M Brunt, ‘The Murphy Trade Practices Bill’ (1974) *Business Law Review* 3, p 6.

73 Above pp 10–11.

74 S Breyer, ‘Five Questions about Australian Anti-Trust Law: Part 1’ (1977) 51 *Australian Law Journal* 28; S Breyer, ‘Five Questions about Australian Anti-Trust Law: Part 2’ (1977) 51 *Australian Law Journal* 63.

75 S Breyer, ‘Five Questions about Australian Anti-Trust Law: Part 1’ (1977) 51 *Australian Law Journal* 28, p 28.

76 See generally Heger, Kwong and Leigh (n 9) p 5.

competition', the issue of market definition, the scope of the prohibition on price discrimination, and how to discern anticompetitive agreement from interdependent or parallel conduct.

The success of the 1974 Act is said to have rankled Barwick in illustrating what he had failed to produce a decade before.⁷⁷ With the appointment of Murphy to the High Court in February 1975, the two former political antagonists were set to become judicial antagonists.

It is the lives of Barwick and Murphy in their judicial capacities, sitting together on the High Court, to which I turn finally, considering how the two engaged with cases arising from the 1974 Act, in light of their shared political commitment to legislating against restrictive trade practices.

Barwick and Murphy on the High Court

During the six years of overlap of Barwick and Murphy on the bench, the Court heard 11 cases raising issues about the 1974 Act.⁷⁸ As had become the practice in the Barwick Court, judgments were largely authored individually by the judges with indications of any concurrence with the reasons and conclusions of other Justices noted there. Though Barwick and Murphy agreed with each other in the outcome in all but three of those cases, Barwick never concurred with the reasons of Murphy, nor Murphy with the reasons of Barwick.

The difference between them lay not in their appreciations of the substantive area of restrictive trade practices or of the constitutional underpinning of the 1974 Act. Indeed, one of the key commonalities between Barwick and Murphy was on the scope of s 51(xx) of the Constitution, the corporations power, which Barwick had contributed to broadening in the *Concrete Pipes* case and upon which Murphy had relied in crafting the 1974 Act.⁷⁹ Personal antagonism aside, the difference lay rather in the legal method which each adopted.

The first trade practices case which came before them — *Quadramain Pty Ltd v Sevastapol Investments Pty Ltd*⁸⁰ — heralded the first sign of this methodological rather than substantive difference. At issue in *Quadramain* was a restrictive covenant which ran with a lot of land and required that the land would not be the subject of an application for a liquor licence, in

⁷⁷ Marr (n 3) p 245.

⁷⁸ *Quadramain Pty Ltd v Sevastapol Investments Pty Ltd* (1976) 133 CLR 390; *R v Australian Industrial Court*; *CLM Holdings Pty Ltd* (1977) 136 CLR 235; *R v Credit Tribunal*; *Ex parte General Motors Acceptance Corporation (Australia)* (1977) 137 CLR 545; *Interstate Parcel Express Co Pty Ltd v Time-Life International (Netherlands) BV* (1977) 138 CLR 534; *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120; *R v Federal Court of Australia*; *Ex parte WA National Football League (Inc)* (1979) 143 CLR 190; *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216; *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107; *Trade Practices Commission (Cth) v Tooth & Co Ltd* (1979) 142 CLR 397; *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457.

⁷⁹ See, eg, *R v Australian Industrial Court*; *CLM Holdings Pty Ltd* (1977) 136 CLR 235; *R v Federal Court of Australia*; *Ex parte WA National Football League (Inc)* (1979) 143 CLR 190.

⁸⁰ (1976) 133 CLR 390.

circumstances where the adjoining lot was used as a hotel. Barwick, who was in the majority, held that a restrictive covenant running with land did not constitute a restraint of trade,⁸¹ while Murphy, in dissent, agreed with Jacobs J who considered that the restrictive covenant there at issue had the purpose and effect of the protection of the business of the covenantee from competition.⁸² *Quadramain* illustrated that Barwick tended to legalism while Murphy tended to legal realism, being influenced in this area in particular by the jurisprudence of William O Douglas of the United States Supreme Court.

The difference in legal method was shown more starkly still a few years later in *Interstate Parcel Express Co Pty Ltd v Time-Life International (Nederlands) BV*,⁸³ a parallel importing case involving the bookseller Angus & Robertson. In that case, Barwick agreed entirely with the reasons of Stephen J who had said that '[a]ny undesirable economic or cultural effects which some may discern as flowing from this aspect of copyright protection are a matter for the legislature.'⁸⁴ Murphy, though agreeing on the dispositive copyright law issue that there was no requisite licence to sell imported books, said that once 'the facts of a case disclose the reasonable possibility of a serious breach of the *Trade Practices Act* or injury to the public interest by a party, the court can and should require the party to negate this before exercising discretion in its favour'⁸⁵ thus effectively seeking to set up the 1974 Act as a condition precedent to any sanction a court might otherwise give conduct which is otherwise made lawful by other legislation.

In the vein of legal realism, Murphy sometimes invoked what Parliament had done in legislating the 1974 Act, implicitly bringing to bear his close political experience with the legislation. Murphy noted, for instance, how Parliament had not 'legislated comprehensively or exhaustively for consumer protection' but rather had 'adopted selective regulatory measures'⁸⁶ which therefore allowed for other protective State legislation, as well as how the words 'trade or commerce' in s 52 in Pt V of the 1974 Act, being part of the consumer protection provisions of which Murphy had been especially proud as a politician, were 'extremely wide' in their scope and were not to be limited or qualified by the heading of the Part being 'Consumer Protection'. When it came to a provision of the 1974 Act which had been subsequently inserted by the Fraser Government,⁸⁷ namely s 45D which prohibited secondary boycotts by trade unions unless the dominant purpose of the conduct was substantially related to remuneration, employment conditions, or work hours or termination, Murphy was strident in his critique. He described the law as the 'converse' of the legislation at issue in *Australian Community Party v The Commonwealth*,⁸⁸ and that Parliament was 'not authorized under the trade and

81 *Quadramain Pty Ltd v Sevastapol Investments Pty Ltd* (1976) 133 CLR 390 at 394.

82 Above at 412 and see at 420.

83 (1977) 138 CLR 534.

84 *Interstate Parcel Express Co Pty Ltd v Time-Life International (Nederlands) BV* (1977) 138 CLR 53 at 536, 555.

85 Above at 560.

86 *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation (Australia)* (1977) 137 CLR 545 at 565.

87 *Trade Practices Amendment Act 1977* (Cth).

88 *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 157.

commerce power to introduce or enforce some form of serfdom'.⁸⁹ Barwick, in contrast, stated simply and curtly that s 45D was a 'valid exercise of the power granted to the Parliament by s 51(i) of the Constitution.'⁹⁰

Conclusion

The story I have chosen to tell is a story of rivalrous behaviour undertaken out of differing motivations combining to contribute to the common good. I have drawn attention to the pioneering efforts of Barwick, in building political momentum for trade practices legislation and embarking on a thorough and worldly approach to its design. I have drawn attention to the role of Murphy in crafting and successfully enacting the 1974 Act. With that Act, the essentials of which have now stood for more than half a century, Australia had, indeed, 'grown up'.

⁸⁹ Above.

⁹⁰ Above at 127.