The Profound Impact of the Trade Practices Act 1974 for Australian Consumers

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The Trade Practices Act 1974 (Cth) marked a turning point in Australia's legal, economic and political history. Following decades of heated debate between free marketeers and protectionists, and two failed attempts at antitrust reform, the Whitlam Government succeeded in passing an Act that was pivotal in protecting consumers from unfair commercial practices and laid the foundation for the Competition and Consumer Act 2010 (Cth). This article reproduces the keynote address delivered by Justice Jacqueline Gleeson at the Whitlam Institute symposium on Competition and Consumer Law on 21 March 2025. In it, her Honour examines the lasting impact of the Trade Practices Act for Australian consumers, starting with its predecessor Acts, the acknowledged need for consumer law reform leading to the Act's enactment and concluding with reflections on the legacy of that legislation.

INTRODUCTION

There are many vantage points from which the impact of the *Trade Practices Act 1974* (Cth) (*TPA*) and its successor, the *Competition and Consumer Act 2010* (Cth) (*CCA*), can be examined. One could conduct an overview of the whole statute (now a mammoth exercise), an overview of its parts; from the perspective of different industries; or different classes of consumer; by reference to the Australian economy; economic policy; the enforcement priorities of the regulator, or the interpretation and application of the statute by the courts. Across the past 50 years, a mountain of literature, written by regulators, lawyers, economists and academics offers a host of perspectives.

At the highest level, an important legacy of the *TPA* is a widespread, stable acceptance that the welfare of consumers is central to the regulation of trade practices in Australia. In 2021, former Chair of the Australian Competition and Consumer Commission (ACCC), Rod Sims explained that the transition from the *TPA* to the *CCA*"heralded a new era in Australian consumer protection … signalled by the very renaming of the *TPA* to the *CCA* in 2011. By including the word 'consumer' in the title of the Act, it symbolised that consumers would be put in their rightful place at the centre of a national competition and consumer laws."[1]

This evolution is remarkable, in contrast with the position in the decade before the *TPA* was enacted when, as economists Peter Karmel and Maureen Brunt remarked, "just about every restrictive trade practice known to man is used in Australia".[2] As Ron Bannerman, the first Chairman of the Trade Practices Commission, noted in 1982, "it should never be forgotten that competition is itself a prime, perhaps the prime, consumer protection".[3] The *TPA* has been instrumental in Australia's shift to a competitive economy, in the interests of Australian consumers.

Since this is an educated audience, my observations will be more in the nature of reminders than revelations. My hope is that you will find interesting, as I have, the perspectives of some of the important voices in trade practices regulation about the impact of the *TPA*, with a particular focus upon that impact for Australian consumers.

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* Justice of the High Court of Australia. I thank my Associate, Nicholas Pokarier, for his assistance in the preparation of this speech, and the staff of the Whitlam Prime Ministerial Collection at Western Sydney University for providing access to archival material.

[1] Rod Sims, "Reflections on the 10th Anniversary of the Competition and Consumer Act" (Speech, 3 March 2021).

[2] Peter Karmel and Maureen Brunt, *The Structure of the Australian Economy* (Cheshire, 1962) 94–95.

[3] Ron Bannerman, "Competition as the Regulator" (1982) 5 *UNSW Law Journal* 61, 79. See also *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177, 191.

The Impact Sought to be Achieved

As early as 1941, the Labor MP Charles Morgan, raged against monopolies, arguing that they would impoverish "the workers, the middle class and future generations".[4] His was a minority voice in a nation focussed on protection, nation-building and economic development.[5] However, by the late 1950s, into the 1960s, the modernisation of the Australian economy became increasingly important to both sides of politics.[6] Without antitrust reform, Earl Warren, the reforming Chief Justice of the Supreme Court of the United States, worried as to how Australia was "going to grow up".[7]

The story of the *Trade Practices Act 1965* (Cth) (*1965 Act*), and its successor, the *Restrictive Trade Practices Act 1971* (Cth) (*1971 Act*), has been told elsewhere.[8] The *1965 Act*, described by Gough Whitlam, then Deputy Leader of the Labor Party, as the "puny child" of Sir Garfield Barwick,[9] concerned five types of agreements and four types of potentially anti-competitive practices. The long title of the Act identified its scope, namely, "to preserve competition in Australian trade and commerce to the extent required by the Public Interest". In 1971, in *Strickland v Rocla Concrete Pipes Ltd*,[10] the High Court held that provisions of the *1965 Act* which required the particulars of restrictive arrangements to be supplied to the Commissioner of Trade Practices exceeded the legislative power of the Commonwealth. In particular, the Court unanimously held that the Parliament's power to legislate with respect to constitutional corporations did not support the relevant laws. That loss was, ironically, a great success for trade practices reformers: the Court overruled an earlier decision to hold that the corporations power could validly support properly drafted trade practices legislation.

The *1971 Act*, drafted to derive constitutional support from the corporations power as it was understood post-*Strickland*, restored the status quo under the *1965 Act* but its reach was limited: intrastate conduct remained beyond Commonwealth legislative power and penalties for breaching the Act were trivial.[11] The *1965 Act* has been described as a source of embarrassment for the Country-Liberal Government,[12] and the *1971 Act* was derided by Senator Lionel Murphy as "one of the most ineffectual pieces of legislation ever passed" by the Commonwealth Parliament.[13]

Even so, and while the *1965 Act* and the *1971 Act* might have been "false starts",[14] they embodied an important shift towards a competitive Australian economy.[15] The Acts identified "the principle that the preservation and encouragement of competition are desirable in the public interest", while providing for the effect of a restriction of competition on "the needs and interests of consumers" as a consideration that might tend to establish that the restriction was not contrary to the public interest.[16] Thus, there was a concern to protect consumers against the effects of unbridled competition. As the Member for Parkes, Tom Hughes, argued in the House of Representatives, "it is sometimes desirable to allow size to develop … because thereby economies of large scale operation with consequent

[4] Charles Morgan, *Monopolies and the War Effort* (United Electors, 1941) 3.

[5] Kerrie Round and Martin Shanahan, *From Protection to Competition: The Politics of Trade Practices Reform in Australia* (The Federation Press, 2015) 87.

[6] Round and Shanahan, n 5, 127.

[7] Earl Warren, Chief Justice of the United States, to Sir Garfield Barwick, National Archives of Australia (NAA) A432 1966/2098 Minutes, 15 September 1961.

[8] See, eg, Liza Carver, *Bathurst Lecture 2024* (Speech delivered at the New South Wales Bar Association Annual Bathurst Lecture on Commercial Law, 12 September 2024). See also Ron Bannerman, "Development of Trade Practices Law and Administration" (1985) 18(3) *The Australian Economic Review* 83.

[9] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 1965, 3225.

[10] *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

[11] Round and Shanahan, n 5, 185-186.

[12] Round and Shanahan, n 5,187.

[13] Commonwealth, *Parliamentary Debates*, Senate, 30 July 1974, 540.

[14] Carver, n 8.

[15] Round and Shanahan, n 5, 190.

[16] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 1965, 3245–3246.

benefit to consumers may ensue".[17]

In 1969, the Australian Labor Party's Platform, Constitution and Rules included two important proposals for law reform in the interests of consumers:[18] (1) Clear consumer protection laws against unjustifiable price rises and unfair methods in trade and commerce; (2) The Attorney-General of the Commonwealth would be empowered to initiate proceedings for enforcement of consumer protection laws where such an action lay beyond the resources of the citizen.

Consumers' rights were undoubtedly central to Senator Lionel Murphy's approach to trade practices reform. Murphy's views on trade practices reforms centralised the essential role of the state in a mixed economy as the protector of corporate competition and consumers. His faith overwhelmingly was in the capacity of the law to provide the mechanisms through which businesses and consumers could operate fairly.[19]

Following the election of the Whitlam Government in 1972, it was clear that Whitlam himself intended the new Act to prioritise the protection of consumers. In a statement released to the media in 1973, the Prime Minister emphasised that the primary approach of the Government would be to formulate and implement a "framework of standards designed to protect both the physical and economic interests of consumers".[20]

On 30 July 1974, Senator Murphy, took to his feet on the floor of the Senate to move that the *Trade Practices Bill 1974* be read a second time. In so doing, Murphy declared that restrictive trade practices had "long been rife in Australia" and unfair practices in consumer transactions were "widespread". Concerning the latter, the Attorney-General argued that the principle of "caveat emptor", or buyer beware, was no longer appropriate as a general rule and that "the consumer needs protection" by the law from "trained business executives" against whom "[t]he untrained consumer is no match".[21]

At that time, the Australian inflation rate was almost 16% per annum. It had earlier been argued,[22] and maintained by the Whitlam Government,[23] that restrictive trade practices contributed to the inflationary trend and reduced the likelihood that the benefit of tariff cuts would be passed on to the public; that increased competition from imports would be of little benefit if not accompanied by increased domestic competition and that consumer protection would also assist in the fight against inflation.

The opposition opposed the Bill's passage, arguing that its real objective was to control the "entrepreneurial and management side of business and commerce" while leaving the "union side of business and commerce to wreak havoc and inconvenience".[24] The consumer protection provisions were opposed on the basis that more thorough consideration was required, in the context of State fair trading and sale of goods legislation that might give rise to confusion, inconsistency and unnecessary cost.[25] In debate, Senator Murphy rebutted the opposition arguments, noting that the consumer protection provisions had the support of consumer bodies throughout Australia and were not opposed by bodies "on the other side of the fence like the Associated Chamber of Manufacture[r]s of Australia

[17] Commonwealth, *Parliamentary Debates*, (House of Representatives, 25 November 1965, 3234.

[18] Australian Labor Party, *Platform, Constitution and Rules* as approved by the 28th Commonwealth Conference (Melbourne, 1969), Whitlam Institute, Western Sydney University 31571:31585, August 1969, 32.

[19] Jenny Hocking, *Lionel Murphy: A Political Biography* (Cambridge University Press, 1997) 206–207.

[20] Gough Whitlam, "Statement by the Prime Minister: Standards for the Protection of Consumers" (1973), Whitlam Institute, Western Sydney University 15930:15946.

[21] Commonwealth, *Parliamentary Debates*, Senate, 30 July 1974, 540–541.

[22] Commonwealth, *Parliamentary Debates*, Senate, 24 May 1972, 1956.

[23] Statement by the Prime Minister and by the Minister for Overseas Trade and Secondary Industry on 18 July 1973, Whitlam Institute, Western Sydney University 15810: 15830.

[24] Commonwealth, *Parliamentary Debates*, Senate, 30 July 1974,) 540-541.

[25] Commonwealth, *Parliamentary Debates*, Senate, 15 August 1974, 972.

and the Australian Industries Development Association".[26]

So it was that, with the support of two crossbenchers, the TPA was enacted and commenced on 1 October 1974. The purpose of the Bill was not to promote competition *per se*. Rather, it was "to control restrictive trade practices and monopolisation and to protect consumers from unfair commercial practices".[27] This occurred in the context of a rapidly accelerating international movement towards increased cooperation and trade. The TPA brought Australia into line with international thinking and legislation concerning the promotion of competition.[28]

Early Reforms and Perspectives: 1976 to 1994

Less than two years after the enactment of the *TPA*, then Minister for Business and Consumer Affairs, John Howard, established the "Swanson Committee" to consider the operation and effect of the Act including what could broadly be described as the Act's impact. The Swanson Committee's report was published in August 1976. The report concluded that there is "widely expressed support throughout Australia for the central philosophy of the [*TPA*]", and that "[t]he idea of competition and its benefits has been embraced by the public, the business community and political parties alike".[29] The Committee observed that, in the short time that the *TPA* had been in operation, it had "affected a great many practices previously held, by the businesses concerned, to be legitimate and appropriate to the Australian market."[30] The Committee concluded, there was "little doubt that consumers feel they have gained substantial benefit from the Act, particularly from Part V",[31] although there was "real difficulty [in striking] the balance between the social costs involved in consumer protection and the social benefits derived from it".[32]

Reflecting general acceptance that the *TPA* was here to stay, the first edition of Miller's *Annotated Trade Practices Act* was published in 1979. Miller recorded that, although still in its infancy, the *1974 Act* had produced "more legal, administrative, business and political activity than even its strongest supporters could have anticipated,"[33] and therein lay the justification for a work, now in its 46th edition, that became an essential approximately annual purchase for any half-serious Australian trade practices lawyer.

As to legal activity, writing in 2021, former Chief Justice French noted that most judges appointed to the Federal Court in 1977 would not have had an education in antitrust law or particular issues raised by the intersection of law and economics.[34] The newly minted court was confronted with standards not necessarily legal in nature, referring to "a substantial degree of power in a market", "eliminating or substantially damaging a competitor" and so on. To adopt what Imelda Maher has said: "[o]ne of the most distinctive characteristics of competition law is its dependence on the discourse of economics".[35] Under the leadership of Allsop CJ, the Federal Court, by then well versed in the language of economics and its intersection with the law, developed a system of specialised judges hearing proceedings alleging contraventions of the *CCA*'s provisions, and drawing on the expertise of

[26] Commonwealth, *Parliamentary Debates*, Senate, 15 August 1974, 978.

[27] Commonwealth, *Parliamentary Debates*, Senate, 30 July 1974, 540.

[28] Round and Shanahan, n 5, 213.

[29] Swanson et al, *Trade Practices Act Review Committee: Report to the Minister for Business and Consumer Affairs* (Final Report, August 1976) 84.

[30] Swanson et al, n 29, 4.

[31] Swanson et al, n 29, 4.

[32] Swanson et al, n 29, 59.

[33] Russell Miller, *Annotated Trade Practices Act 1974* (The Law Book Company Limited, 1979) preface.

[34] Robert French, "The Courts in Competition Law" in Gvozdenovic and Puttick (eds), *Current Issues in Competition Law: Volume 1, Context and Interpretation* (The Federation Press, 2021) 25.

[35] Imelda Maher, "Regulating Competition" in Parker, Scott, Lacey and Braithwaite (eds), *Regulating Law* (Oxford University Press, 2004) 197–198.

economists.[36]

In 1982, Ron Bannerman, then Chairman of the Trade Practices Commission, authored an article "Competition as the Regulator" in which he argued that the impact of the *TPA* was deregulatory, rather than regulatory. That is, it was competition in the market itself, rather than the *TPA*, which regulated the marketplace. According to Bannerman, the *TPA*"encourages competition to stand in place of government regulation and industry restrictions and to compel adjustment in response to changes in technology and industry structure … The consumer protection provisions, although regulatory in the sense of prescribing standards of conduct, run parallel to the competition provisions and do not dilute their thrust".[37] For Bannerman, the consumer protection provisions of the *TPA* were "part of the framework in which competition has to proceed, for they stipulate basic standards of commercial probity for the benefit of consumers and ethical traders alike".[38] Focusing on misleading or deceptive conduct in the course of advertising or marketing, pyramid selling and charging for unsolicited goods and services, Bannerman argued that the consequences of the *TPA*'s prohibitions for consumers were "that they are better able to make their purchasing choices and to activate and take advantage of competition that stays closer to the fundamentals of price and quality. And very simply, every consumer who is not misled is that much better off".[39]

By 1994, Professor Maureen Brunt observed "These days it is not restrictive trade practices but competition that is regarded as the norm."[40]

Thirty Years On

In 1999, Allen Fels noted that a study reported in *The Economist* stated that "Australian laws are the best in the world at preventing unfair competition" and ranked Australia's competition laws as the fairest".[41] In 2004, Robert French, then a judge of the Federal Court of Australia was more critical, arguing that Australian competition law had evolved "to cover a multitude of sins".[42] Subject matter areas regulated under the *TPA*'s provisions by then included access to services, unconscionable conduct, industry codes, liability for defective goods, Goods and Services Tax price exploitation, price surveillance, the telecommunications industry and telecommunications access regimes.

French observed that, as enacted, it was "an Act of faith" in the absence of any prospective cost benefit analysis. That faith, French said, had endured. However, French argued, the original single consumer welfare purpose of the *TPA* (since affirmed by the introduction in s 2 of a statement of the object of the Act, as the enhancement of "the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection") had changed in favour of the protection of particular classes of competitor and protections for consumers going beyond protection against various species of misinformation. As examples, French referred to the authorisation process and the judicial broadening of the application of s 52 to cover large-scale corporate and commercial disputes, as a "universal norm of commercial behaviour applicable to corporations and, through the Fair Trading Acts of the States, to individuals, whether they are dealing inter se as traders or business people or with members of the public as consumers". His Honour also referred to s 65A by which the operation of s 52 (and other provisions) was limited in the case of prescribed information providers. French concluded by deriding the use of competition laws as business protection laws.

A few years earlier, Bob Baxt (who had been Chairman of the Trade Practices Commissioner between 1988 and 1991) and Edward Archibald had complained that the "relatively simple and

[36] French, n 34, 26–27.

[37] Bannerman, n 3, 79.

[38] Bannerman, n 3, 70.

[39] Bannerman, n 3, 71.

[40] Maureen Brunt, "The Australian Antitrust Law after 20 Years: A Stocktake" (1994) 9 *Review of Industrial Organisations* 493.

[41] Allan Fels, "The Trade Practices Act After 25 Years: Mergers and the Role of the ACCC" (1999–2000) 4(2) *Deakin Law Review* 39, 59.

[42] Robert French, "Competition Law – Covering a Multitude of Sins" (Speech delivered at the Competition Law Conference, Sydney, 15 May 2004).

uncomplicated"*TPA* as enacted had been "subjected to changes which do not deliver many, if any, of the benefits asserted by the proponents of those changes". The "destabilisation" of the original balance struck by the *TPA* was said to comprise injection of "excessive welfare concepts" and "some rather surprising decisions in the courts". For Baxt and Archibald, the outcome was "far too much emphasis on the protection of small business [and to a lesser extent on consumers) in situations where one would expect competition to provide them with their optimal protection".[43]

The CCA and the *Australian Consumer Law*: 2008 to 2010

In 2006, the then Treasurer, Peter Costello, requested the Productivity Commission to undertake an inquiry into Australia's consumer policy framework. The Commission's premise was that Australian consumers had benefited greatly from recent economic reforms, including reductions in trade barriers and competition policy reforms that put downward pressure on prices, enhanced product quality and increased consumer choice.[44] However, consumer markets were changing. For example, most Australian markets were much more competitive than in the past, particularly because of economic reforms and the growth of the Internet.[45] Of itself, this reduced the need for government intervention. A more nationally coherent approach was needed, including a single national generic consumer law.[46] The Commission proposed that the *TPA* should be the "stepping off" point for the new law.[47]

The Commission considered that the current range of enforcement tools in the *TPA* were inadequate to provide for effective and proportionate enforcement. Accordingly, the Commission proposed that the relevant regulators should be given greater enforcement powers, including the ability to seek the imposition of civil pecuniary penalties (with the recovery of profits earned by a supplier from illegal conduct), banning orders and substantiation and infringement notices.[48]

The result was the renaming and recasting of the *TPA* as the *CCA*, including the *Australian Consumer Law* in a Schedule to that Act, which came into effect on 1 January 2011. The *Australian Consumer Law* has been described as the "most significant development since Federation" in the consumer protection field[49] and the passage of the CCA as "the most far-reaching consumer law reform since the inception of the *Trade Practices Act*".[50]

The object of the *CCA* remains in the same terms as s 2 of the *TPA*. The *CCA* maintains the essential structure of the *TPA* in which competition and consumer protection policies are advanced in a single statute.

Conclusion

In March 2015, the *Harper Competition Policy Review* published its final report. The panel started with the familiar proposition that competition policy is aimed at securing the welfare of Australians and observed that "[a] focus on the competitive process, rather than individual competitors, and the interests of consumers is a well-established principle of competition policy across the globe".[51]

Noting that Australia had enjoyed continuous economic growth since the early 1990s and had weathered the global financial crisis of the late 2008 without a recession, the panel identified as key features of Australia's competition landscape: (1) the rise of Asia and other emerging economies; (2)

[43] Bob Baxt and Edward Archibald, "Consumer and Business Protection: Its Role in a Pro-competition Statute" in Hanks and Williams (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (The Federation Press, 2001) 171.

[44] Robert Fitzgerald et al, *Review of Australia's Consumer Policy Framework* (Report, Productivity Commission, 30 April 2008) 4.

[45] Fitzgerald et al, n 44, 6.

[46] Fitzgerald et al, n 44, 17.

[47] Fitzgerald et al, n 44, 19.

[48] Fitzgerald et al, n 44, 44.

[49] Carver, n 8.

[50] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 March 2010, 2719.

[51] Ian Harper et al, *Competition Policy Review* (Final Report, The Treasury, Commonweath of Australia, March 2015) 23.

Australia's ageing population and falling workforce participation; and (3) new technologies that were "digitally disrupting" the way many markets operate, the way business is done and the way consumers engage with markets.[52]

It would be obvious to anyone that the context in which the *Harper Review* was conducted is decidedly different to the context in which the TPA was enacted. Even so, in 2021, the then ACCC Chair Rod Sims observed that "[t]he *TPA*, in all its versions, has long served as a powerful instrument in ensuring the proper functioning of Australian markets."[53]

Last year, the current ACCC Chair Gina Cass-Gottlieb reflected:[54]

> The lawmakers of 1974 could not have imagined the products and services available in our technology-enabled global world of trade and commerce. They did envisage the ongoing importance of setting clear guidelines and principles for competitive and truthful business conduct.

The TPA remains the skeleton of the *CCA* and, consequently, the skeleton of Australian trade practices regulation. In particular, the maintenance, since 1974, of the prohibition against misleading or deceptive conduct has been, as Professor Stephen Corones noted, "not just a powerful weapon to protect consumers, but a powerful weapon to protect businesses, … providing work for battalions of lawyers over the past 50 years."[55] Its enduring impact is rightly the subject of satisfaction and pride by those remaining of the innovators whose efforts led to its enactment in 1974.

[52] Harper et al, n 51, 7.

[53] Sims, n 1.

[54] Gina Cass-Gottlieb, "After Half a Century, a New Era of Competition Law Begins", *Financial Review*, 23 October 2024.

[55] Meg McDermott, *Insights from Industry Experts to Mark 50 Years of Competition and ConsumerLaw in Australia*, LexisNexis (6 November 2024) <https://www.lexisnexis.com/blogs/en-au/insights/insights-from-industry-experts-to-mark-50-years-of-competition-and-consumer-law-in-australia>.