CRIME LAW & BUSINESS

The Sociological Sources of Australian Monopoly Law

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aic Australian Institute of Criminology • Canberra 1978

Published and printed by the Australian Institute of Criminology,
10-18 Colbee Court, Phillip, A.C.T., Australia. 2606.

First published 1978

The J.V. Barry Memorial Library has catalogued this work as follows:

HOPKINS, Andrew 343.94072

Crime, law and business; the sociological sources of Australian monopoly law. Canberra, Australian Institute of Criminology, 1978.

123p.

Bibliographical references

1. Antitrust law – Australia. 2. Restraint of trade – Australia. 3. Sociological jurisprudence. 4. Commercial crimes – Australia. I. Australian Institute of Criminology. II. Title.

ISBN 0 642 91814 7

Foreword

Business malpractice is criminal only if society chooses to treat it as such. Thus, one facet of the study of business crime is the investigation of why society has chosen to criminalise the behaviour concerned and which interests are served by such legislation. This book is such a study. It investigates the social and political processes which lie behind the decision to prohibit restrictive trade practices in Australia.

The book was written while the author was a Research Fellow in Sociology at the Australian National University. He is now with the Australian Institute of Criminology and is continuing his work in the general area of white collar and corporate crime.

WILLIAM CLIFFORD
Director
Australian Institute of Criminology **January 1978**

Preface

This book is intended as a sociological study. Yet it is, in many respects, interdisciplinary, for it is concerned with matters of potential interest to lawyers, economists, and political scientists as well as sociologists. It is appropriate to address a few remarks to each of these audiences. I begin with sociologists.

The relationship between law and society was an important theme in the writings of early sociologists. Max Weber and Emile Durkheim, perhaps the most influential of the founding fathers of sociology, were both trained in law and both emphasised law in their sociological writings. Yet modern sociology, although greatly influenced by the work of these men, has largely ignored their concern with the law. Within the sociological establishment today, the sociology of law tends to be regarded as an area of specialisation, of interest in its own right, but peripheral to core sociology. It is necessary therefore to re-emphasise here that the study of law can be used to elucidate fundamental sociological problems.

This is not to say that law can usefully be treated as an independent variable capable of providing causal explanations of other social phenomena. The moment one cites law as a source of social change the question arises as to how that law came to be formulated and the answer necessarily involves prior social changes. The law thus becomes an intervening variable, mediating between one set of social factors and another, and not in itself a sociologically satisfying explanation of the phenomenon of interest.

The real value of law to sociology lies not in treating the relationship between law and society as one of cause and effect but in viewing law as a **manifestation** of social phenomena which are not otherwise clearly apparent. Law reifies at one level social processes which occur at another. Put yet another way, law can often serve as an **index** of phenomena in which a sociologist is interested.

Probably the most explicit use of this approach is to be found in Emile Durkheim's *Division of Labor in Society*. Durkheim was interested in the extent to which the division of labour is the basis of social cohesion in modern societies. To specify his problem he defined two polar types of social cohesion or social solidarity as he called it. The first of these, mechanical solidarity, was based on the similarity of individuals in a given society and their espousal of common sets of values and beliefs. This form of solidarity was characteristic of primitive peoples. The second, organic solidarity, was based on the mutual interdependence of individuals which develops as a division of labour develops.

Modern societies exhibited both a division of labour and, in each society, certain common values. Solidarity in modern societies was thus in part mechanical and in part organic. Durkheim's hypothesis was that organic solidarity was predominant, but in order to demonstrate this he had to devise some way of measuring the relative importance of these two forms of social cohesion. His solution was to use the law as an index of social solidarity. Here are his words:

> . . . social solidarity is a completely moral phenomenon which, taken by itself, does not lend itself to exact observation nor indeed to measurement. To proceed to [the measurement and comparison of different types of solidarity], we must substitute for this internal fact which escapes us an external index which symbolizes it and study the former in the light of the latter. This visible symbol is law. . . Social life, especially where it exists durably, tends inevitably to assume a definite form and to organize itself, and law is nothing else than this very organisation . . . The general life of society cannot extend its sway without juridical life extending its sway at the same time and in direct relation. We can thus be certain of finding reflected in the law all the essential varieties of social solidarity.[1]

Durkheim went on to argue that mechanical solidarity was characterised by repressive penal sanctions and organic solidarity by restitutive sanctions which seek not to punish but merely to repair a wrong, for example by awarding damages in the case of breach of contract. He then showed that restitutive law predominates in modern societies and so was able to conclude that organic solidarity is their principal source of social cohesion.

There has been some dispute about details of this argument which need not concern us here.[2] For present purposes the

importance of Durkheim's work is that it demonstrates the potential use to sociology of treating law as a manifestation of underlying social processes.

Such is the motivation for this book. I shall not follow Durkheim in treating law as a formal index with which to measure and compare various social phenomena. The relationship between law and society posited here is far less precise. It is simply this: antitrust law regulates capitalist economic arrangements. A study of its sources and changing character can thus be expected to provide some understanding of the social processes at work in this society and perhaps of advanced capitalist societies generally.

The term 'antitrust' is probably less familiar to sociologists than to the lawyers and economists who may read this book and it should perhaps be explained at this point. The trust is a legal device which became popular in the United States towards the end of last century as a means of eliminating competition among rival firms.

> To form a trust, majority stockholders of a number of independent companies turned over their shares, carrying voting control over the affairs of their companies, to a single group of 'trustees'. They received in return trust certificates entitling them to share in the profits of the companies operated by the trustees as a group. The trustees could then run the formerly competing firms as a single enterprise, extracting whatever monopoly profits might be available.[3]

The term 'antitrust' is loosely used to describe legislation not only against trusts but also against single firm monopolies, price rings (price agreements among competitors) and various other collusive and restrictive trade practices. Such legislation is also known as monopoly law and, particularly in Australia, trade practice or restrictive trade practice law.

To avoid misunderstanding it is probably desirable to indicate at the outset what this book is not about. Lawyers should be warned that the book is not primarily about Australian trade practice law as such but rather about its sociological sources. The concern is not with law but with what can be learned about the nature of society from the law. Consequently there is no attempt here to provide an exhaustive account of the many provisions of the Acts under consideration nor any detailed discussion of how they have been or might be interpreted.

Nor is there any attempt to evaluate Australian trade practice

law according to philosophic or economic criteria. Details of the legislation and of its interpretation will be discussed only in so far as they are relevant to the sociological themes of the study.

It should be mentioned, too, that the book deals only with Federal law and not with the enactments of various State legislatures. Present purposes require the detailed study of the circumstances surrounding particular enactments rather than a comprehensive account of them all. Finally, although some mention will be made of the constitutional problems that have beset Federal trade practices legislation, the emphasis will be on the use which various groups have made of constitutional ambiguities to further their own interests rather than on the strictly legal or technical aspects of these problems.

Economists should also be warned that the subject of this book is the sociological sources of trade practice law and not of the trade practices dealt with by that law. This does not mean that the practices themselves will be ignored but reference to them will occur only when relevant to the general purposes of the study.

The book thus offers no account of the structure of the Australian economy, nor of the reasons for the growth of monopoly and restrictive trade practices in Australia. Admittedly, a complete account of the advent of trade practice law in Australia would necessitate a study of changes which have occurred in the economy but, desirable though that would be, it is beyond the scope of this work. Nor, finally, does the book deal systematically with the effect the law has had on the economy, a notoriously difficult problem.[4]

Although I have conceptualised this as a sociological study of the law, it is also to a considerable degree a study of pressure group politics. Political scientists may feel that the study would have been improved by being cast in these terms. Perhaps this is true. However, in my limited reading of the literature on pressure groups, I have not seen raised the kinds of questions which are posed in sociological writing about the law and which it seems to me profitable to pursue.

I have not been able to gain access to records of Government decision-making processes for the purposes of this study. Nor would the Government allow me to see any of the submissions made by vested interests. Fortunately, a number of the most important organisations which made submissions were happy to

provide me with copies, where these were still available. I am particularly grateful to the Associated Chambers of Manufactures of Australia and the Associated Chambers of Commerce of Australia for allowing me ready access to their files.

Nevertheless the information on which the study is based is obviously incomplete. It is my belief, however, that the story I have been able to piece together from the various sources available to me is not too far from the truth.

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1. E. Durkheim, *The Division of Labor in Society* (The Free Press, Glencoe, 1960), pp.64-65.

2. For example, R.D. Schwartz & J.C. Miller, 'Legal Evolution and Societal Complexity', in D. Black & M. Mileski (eds), *The Social Organization of Law* (Seminar Press, New York, 1973).

3. R. Caves, *American Industry: Structure, Conduct, Performance* (Prentice-Hall, 1967), p.57, quoted in J.P. Nieuwenhuysen (ed.), *Australian Trade Practices: Readings* (Cheshire, Melbourne, 1970), p.139.

4. See, for example, Nieuwenhuysen's discussion of the effect of trade practice legislation on inflation, in J.P. Nieuwenhuysen & N.R. Norman, *Australian Competition and Prices Policy* (Croom Helm, London, 1976) pp.41-2.

The Author

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Chapter 1

Issues in the Sociology of Law[1]

This study of Australian monopoly law is oriented to certain theoretical issues which arise in the sociology of law, issues which have to do with the nature of law in general and criminal law in particular. Debate on the nature of criminal law has, in many respects, paralled the well-known sociological debate between conflict and consensus theorists over the nature of the wider social order. In one view, the criminal law is a product of value-consensus, an expression of societal values which transcend the immediate interests of individuals or groups. In the other, the criminal law is simply an expression of the interests of the powerful.

Emile Durkheim, one of the founding fathers of sociology, was an early exponent of the value-consensus position. For Durkheim, crime was an action that shocked the collective consciousness of a community by violating some widely and strongly held societal value.[2] Criminal law, which prohibits such actions, was thus a specification of the sentiments of the collective consciousness, that is, of the values held by the community as a whole.

Durkheim's point of view was characteristic of much of the early sociological thinking about the law. Savigny, writing in the early 19th century, argued that the law was simply a product of the national spirit, the *Volksgeist*, of a particular people.[3] And Sumner, in his *Folkways*, argued that: 'acts of legislation come out of the mores . . . Legislation . . . has to seek standing ground on the existing mores and it soon becomes apparent that legislation, to be strong, must be consistent with the mores'.[4] Sumner recognised that legislatures might pass laws which were not consistent with the mores but argued that such 'state-ways' were likely to be ineffective or harmful if not consistent with the 'folkways' of the people. Similarly, Ehrlich, who is sometimes referred to as the founder of the sociology of law, emphasised

what he called 'the living law' as growing out of the life and experience of a people.[5]

The value-consensus theory of criminal law is not without contemporary exponents. Wolfgang Friedmann in his influential *Law in a Changing Society* asserts that:

> . . . the state of criminal law continues to be – as it should – a decisive reflection of the social consciousness of a society. What kind of conduct an organized community considers, at a given time, sufficiently condemnable to impose official sanctions, impairing the life, liberty or property of the offender, is a barometer of the moral and social thinking of a community.[6]

And in a current introductory law text we find the following statement:

> . . . in general the prohibitions of the criminal law correspond with the moral sense of the community, and with few exceptions crimes are acts from which every man knows he ought to refrain.[7]

This view is also implicit in Paul Bohannan's notion of 'double institutionalization' as the defining characteristic of law. He suggests that law is best regarded as custom which has been restated or 'reinstitutionalized within the legal institution so that society can continue to function in an orderly manner on the basis of rules so maintained'.[8] Bohannan admits that processes of social change ensure that law is never entirely in step with custom but asserts that there are always tendencies at work to bring them into phase.

Yet another subtle expression of the value-consensus viewpoint can be found in the work of lawyer, Geoffrey Sawer. Sawer argues that the tendency of sociologists to conceptualise law as a form of social control prejudges the question of whether law is imposed on some people by others or is rather an expression of value-consensus. He suggests that to speak of law as social control implies that it is not the object of consensus. Sawer's own view is that law is in fact widely accepted and is thus better viewed as an expression of social order than of control. He agrees that many laws may come into existence as instruments of social control but points out that they rapidly 'become aspects of the social order'.[9] He admits, too, that the law becomes an instrument of control when it is breached. Nevertheless, he says, although 'the criminal

feels himself controlled . . . the process viewed as a whole is the expression rather than the imposition of order'.[10]

Sawer does not use the concept of 'social control' in quite the way that sociologists have used it. He equates it with external or coercive control, whereas sociologists allow that social control may be internalised, sometimes to the point that the individual is not aware of the external or social origin of the constraint.

However this is a terminological difference of no importance; the substance of Sawer's distinction between social control and social order is clear. In stressing 'the identification of law with social order rather than with social control',[11] he is championing a value-consensus as opposed to an interest-group theory of law.

In sharp contrast to the value-consensus viewpoint is the conflict model, which sees law as an expression of the interests of the powerful. Marx and Engels, for example, see law as part of the superstructure of institutions and ideas created by the ruling class to further its own common interests. They stress that it is the common interests of the whole capitalist class and not the interests of any particular section of it which find expression in the law.

> [The capitalists'] personal rule must at the same time be constituted as an average rule. Their personal power is based on conditions of life which as they develop are common to many individuals, and the continuance of which they, as ruling individuals, have to maintain against others and, at the same time, maintain that they hold good for all. The expression of this will, which is determined by their common interests, is law.[12]

Indeed, according to Marx and Engels, the law may actually operate against the interests of particular sections of the capitalist class in order to iron out intra-class conflicts in the best interest of the bourgeoisie as a whole.[13]

Outside the Marxist tradition, however, legal sociologists have paid little attention to conflict models of the law until recently. The most systematic contemporary statement of this point of view is Quinney's interest theory of criminal law. According to Quinney:

> ... [the criminal law] describes behaviours that conflict with the interests of segments of society that have the power to shape public policy . . . [Criminal laws] exist, therefore, because some segments of society are in conflict with others... [L]aw incorporates the interests of specific persons and groups; it is seldom the product of the whole society.[14]

It should be noted that Quinney does not claim that the criminal law invariably reflects the interests of any one group or class. He recognises that there are competing interests involved in the creation of law and that the enshrinement in law of the interests of any particular group is the outcome of a political contest. Thus, for example, early antitrust legislation in the United States reflected the interests of small businessmen, organised labour, the Populist Party and farmer organisations. In combination, these groups proved to be more powerful than the monopolists and the result was legislation inimical to the interests of big business.[15]

This example brings out the real difference between Quinney's interest theory and the Marxist account. Whereas according to the latter, the power to shape legislation resides with a particular class, the bourgeoisie, Quinney emphasises that the locus of power shifts, depending on the issues involved.

Another recent statement of this interest-group theory comes from Chambliss and Seidman who put their position as follows:

> . . . the enforcement of any law necessarily involves certain benefits and costs. The particular laws which comprise any given legal system will be those which certain groups ranging from small professional associations to the amorphous 'middle class', see as primarily benefiting themselves. Whatever the interest groups may strive to achieve, of course the stance taken will invariably be to defend the legislation in terms of its intrinsic beneficient consequences for 'all' society. But 'all' of society never really includes everyone but necessarily excludes that group whose behaviour the law is intended to control . . . Legislation arises to further the interests of one group or another, against other interest groups and, sometimes, the entire society . . . [Thus] the legislature becomes a weapon in the inter-group and class struggles of a society.[16]

These, then, are the two major and competing perspectives on the nature of the criminal law: a conflict model postulating that law is a reflection of the interests of the powerful; and a value-consensus model postulating that the criminal law is merely a codification of widely accepted values. There is, however, a third view of the nature of the criminal law which in some respects represents a compromise between the two models I have discussed. Quinney captures the compromise nature of this third view by describing it as a 'consensus theory of interests'.[17]

The name most closely associated with this theory is that of

Roscoe Pound, founder of the American school of sociological jurisprudence. Pound recognised the existence of a variety of individual, group and general social interests, which frequently conflicted one with another. But for Pound, the law was not the means by which the dominant group in any particular situation furthered its own interests. Instead the law stood above the interests involved and attempted to reconcile their competing claims.

> Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands, either through securing them directly and immediately or through securing certain individual interests or through delimitations or compromises of individual interests, so as to give effect to the greatest total of interests or to the interests that weigh most in our civilization, with the least sacrifice of the scheme of interests as a whole.[18]

More recently the same point has been made as follows:

> [Law functions] first, to establish the general framework, the rules of the game so to speak, within and by which individual and group life shall be carried on, and secondly, to adjust the conflicting claims which different individuals and groups of individuals seek to satisfy in society.[19]

According to this conception the law is not simply an expression of the interests of the powerful but an attempt to give weight as far as possible to all the interests involved. For this reason it is frequently referred to as a pluralist theory of law.[20]

Because of the emphasis on consensus inherent in the pluralist model, contemporary sociologists of law have tended to view the difference between the pluralist and value-consensus perspectives as relatively minor. They have focused instead on the discrepancy between conflict theory on the one hand and consensus theories on the other. Concerning this discrepancy some writers have suggested that there is really no contradiction at all; that conflict and consensus theories are simply different ways of looking at the same legal phenomenon.

Nevertheless, a number of legal sociologists have lately devoted considerable effort to trying to resolve the issue in favour of one or the other, usually in favour of the conflict model. They have sought to do this by studying the emergence or the operation of some particular law. Thus Chambliss has shown how vagrancy laws

emerged in the 14th century and evolved in succeeding centuries in response to the needs of certain vested interests.[21] Similarly, Gunningham has shown that the ineffective nature of anti-pollution legislation in Britain, despite the manifest need for strong legislation, is a reflection of the interests of certain manufacturing groups.[22]

Unfortunately, though, demonstrations of the applicability of the conflict model in certain cases settle nothing. Proponents of the consensus model can point just as persuasively to the widespread acceptance of laws such as those prohibiting murder or rape. Such argument leads only to the conclusion that each model is appropriate in some situations but not others. Sutherland and Cressey put the matter like this:

> No positive conclusion can be reached about the comparative efficiency of the various theories concerning the origin of the criminal law. Certainly some criminal laws – such as those prohibiting sacrilege, witchcraft, and possibly, murder – are expressions of consensus. But just as certainly criminal laws prohibiting vagrancy, cattle rustling, automobile theft and discrimination against Negroes and women are expressions of special interests. Research on social aspects of criminal law is greatly needed.[23]

Time and again in the literature one comes across this plea for more research. But it seems to me that much of the recent effort to adjudicate between the two models of criminal law is misconceived. Neither model has been formulated unambiguously by its proponents and neither is sufficiently specific in its predictions to be testable. The fact is that the outcome of the debate depends more on definition and the way terms are used than it does on empirical research.

For example, if we allow that the interests of the powerful may on occasion coincide with the interests of less powerful groups, or alternatively that the community itself is a powerful interest-group, then even laws which reflect widespread consensus can be interpreted as expressions of the interests of the powerful.

But such a formal resolution of the issue is trivial and unenlightening. Rather than setting them up as competing models and attempting to judge between them, it may be more productive to attempt to reconcile the conflict and consensus theories of the law, or at least to minimise their points of disagreement. This would bring into focus questions which do not receive attention

the way the issue is currently dealt with and which are likely to stimulate more productive research than has so far been done. Such is the aim of the remainder of this chapter.

A first step in the direction of reconciliation is to make a distinction between theories about the creation of criminal law and descriptions of it once it is in operation. We can then entertain the possibility that law may be created in a situation of interest-group conflict but subsequently become an object of consensus. Sawer has argued that this is, in fact, a common pattern and other writers have suggested that the very existence of a law may generate over time a belief in its moral worth.[24] Indeed it has been said about the wider social order that 'coercive power can often be used to create a new consensus'.[25] To identify the conditions under which such consensus develops thus becomes a matter for empirical investigation.

Once we have made the distinction between the genesis and nature of criminal law, it is immediately apparent that interest-group theorists are concerned primarily with the processes by which criminal law comes into existence and evolves, while consensus theorists are more concerned with the analysis of existing law.

Let us deal first with the analysis of existing law. While one may agree with consensus theorists that existing law in simple societies represents a widespread value-consensus, this description hardly fits more complex societies such as our own. Certainly, many of our existing laws do express a consensus; but just as certainly many criminal laws, drug laws, for example, reflect merely the dominant values of the society and are at variance with the values of significant sections of the community. Furthermore, criminal laws which are regulatory in purpose, such as business or pollution regulations, do not represent the strongly held values of any section of the community. This situation is hardly consistent with the claims of consensus theorists that 'criminal law represents a sustained effort to preserve important social values' and is a 'barometer of the moral and social thinking of a community'.[26]

The inconsistency appears to hinge on definition. Criminal law is defined in the authoritative *International Encyclopedia of the Social Sciences* as 'a body of norms, formally promulgated through specified governmental organs, contravention of which warrants the imposition of punishment through a special proceed-

ing maintained in the name of the people or the state'.[27] The important points in this definition are that the criminal law prohibits certain behaviour and that it provides for punishment by the state in the event of violation. The definition does not require that criminal law be in accordance with widely held social values.

On this definition, then, law which prohibits certain kinds of business activity and lays down penalties is clearly criminal law. However, consensus theorists are inclined to argue for a distinction between criminal law and administrative law such as that designed to regulate business activity. Friedmann argues that violations of the law by companies are not as 'grave' as more traditional crimes and that the concept of crime should not be 'diluted' by the inclusion of such violations.[28]

It is not my intention here to debate the merits of the various definitions of crime and criminal law. The point I want to make is that the claim by some consensus theorists that criminal law is an expression of basic social values is a consequence of their narrowly defined notions of crime and criminal law rather than of faulty empirical observation. They tend to argue that laws which are not backed by strong community sentiment are by definition not criminal but rather civil or administrative laws. Once this is understood, any disagreement one might have with the proponents of a value-consensus viewpoint can be seen to be a terminological dispute rather than an issue capable of empirical resolution.

But to conclude that a dispute is terminological is not necessarily to conclude that it is trivial. It is obviously a matter of some interest that certain offences punishable by the state are not regarded as criminal by consensus theorists, nor indeed by the society at large. One of the arguments sometimes raised against legislation which prohibits harmful business practices is that it 'makes criminals out of businessmen', and the very fact that there is controversy over the appropriateness of treating dishonest or predatory businessmen as criminals is something to be studied rather than dismissed as merely a matter of definition. As Aubert comments in his discussion of white collar crime:

> For purposes of theoretical analysis it is of prime importance to develop and apply concepts which preserve and emphasize the ambiguous nature of the white-collar crimes and not to 'solve' the problem by classifying them as either 'crimes' or 'not crimes'. Their controversial nature is exactly what makes them so interesting from a sociological point of view

and what gives us a clue to important norm conflicts, clashing group interests, and maybe incipient social change.[29]

Let us move now to the question of how legal change takes place. It occurs in two ways: by judicial decision and interpretation, and by legislation. However the debate between interest-group and value-consensus theorists has been concerned essentially with only one of these, legislative change, and has largely bypassed the issue of judge-made law. There are a number of reasons for this. Generally speaking, judges must work within the interstices of the framework of laws laid out by the legislature. They may modify, specify and adapt existing law to meet new and changing circumstances but they cannot create new statutes.

The courts, then, can induce only incremental change; major legal change in modern societies is a result of the law-making activities of legislatures. An important exception to this rule is the United States Supreme Court which, as a result of its jurisdiction in constitutional matters, has brought about far-reaching change, particularly in the field of civil rights. But exceptions aside, legislatures are the major source of legal change and consequently recent theorising has been principally concerned with legislative innovation.

A second reason for the relative lack of attention which conflict and consensus theorists have paid to judge-made law is that there appears to be a fair measure of agreement about the dynamics of judicial decision-making. When a case comes before an appellate court it is, of its nature, a 'trouble' case in which the law is ambiguous and in which there is a real clash of interests and important social values.[30] The judge, in settling the case, must decide in favour of one party and against the other and in so doing he makes a fundamental value choice. Whichever choice he makes, the opinion he writes in support of it will be reasoned and logical, but the fundamental choice is not.

This is most apparent in the case of multi-judge courts: the opinion of the majority will be reasoned and logical as will be the expression of dissent, if there is one. In such a situation the choice between opinions must transcend reason and logic; it depends to a large extent on the value premises on which the various judges operate. This realisation provides the rationale for the numerous studies which have sought to relate judicial decision-making to the

personalities, sociological backgrounds and political allegiances of judges.

In summary, then, because there is basic agreement on the nature of judicial decision-making and because it is in any case a secondary source of legal change in modern societies, the debate between conflict and consensus theorists has been largely concerned with legal change initiated by legislatures.

In discussing change initiated by legislatures, it is useful to start with the proposition that **most legislation can be seen at the time of enactment to represent certain group interests.**[31] It is important to recognise that this is neither a particularly informative nor controversial proposition since it leaves open nearly all the questions about which there might be some difference of opinion. For example, it does not assume that those whose interests are embodied in a particular piece of legislation play any part in initiating it. Nor does it assume that legislation which is advantageous to one group is necessarily opposed by others, but allows for the possibility that legislation beneficial to a specific group might be enacted with tacit community support or at least indifference. In other words it assumes neither conflict nor consensus.

The proposition advanced above is deliberately vague. It is intended not as factual statement but as a methodological starting point, provoking a number of questions to be answered by empirical investigation. Who, if any, are the beneficiaries of a particular enactment? What role do interest-groups play in the enactment of the legislation? To what extent does the success of an interest-group initiative depend on community indifference or tacit support? When organised opposition exists, is a compromise worked out or does one group prevail? Are there interest-groups which regularly prevail despite opposition? If so, which are these consistently powerful groups? Answers to these questions really would advance our understanding of the processes of legal change. Unfortunately, though, such questions have not been raised, or not raised with sufficient clarity, because of the preoccupation of most recent writers with adjudicating between the conflict and consensus viewpoints.

The perspective advanced here helps clarify the almost paradoxical formulations of some writers who have defended interest-group theory. It is obvious that legal change or the lack of it in

any given legislative situation will reflect the interests of whichever group happens to be most powerful in that situation. In this sense, the proposition that criminal law reflects the interests of the powerful needs little or no defence.

It is not surprising therefore that those who have sought to defend the proposition at length have, in fact, and without explicitly recognising it, been arguing two additional propositions: that there are particular interests which regularly prevail; and that these are, roughly speaking, business interests. They have thus treated the claim that law represents the interests of the powerful as synonymous with the claim that law represents the interests of business.

This has given rise to the problem of how to account for criminal laws which are 'inimical to powerful interests', that is, inimical to the interests of business – pure food Acts, antitrust laws and so on. Sometimes, of course, it can be shown that laws which appear to be contrary to powerful economic interests are in fact designed to promote such interests. It has been shown, for example, that laws regulating the railroad and meatpacking industries in America were promoted and shaped by the largest companies in the field in an effort to control competition from smaller companies and to ensure better markets for the products of the large companies.[32]

There are numerous pieces of legislation, however, the provisions of which are indeed contrary to powerful interests. Various explanations for this have been proposed. Carsons suggests that while in theory these laws are contrary to business interests, in practice they are either not enforced or intended to be ineffective. In practice, therefore, the operation of these laws is not contrary to the interests of the powerful.[33] A second argument that is sometimes made is that laws which run counter to particular powerful interests in fact reflect the interests of business in some more general way.

Thus Chambliss and Seidman claim that the anti-monopoly laws passed in America around the turn of the century must be seen as defensive measures designed to dampen public hostility which had been aroused by the irresponsible and callous behaviour of the 'captains of industry'.

> Without some affirmative gesture which would allay public hostility there appeared to be a very real possibility that the entire free-enterprise

> system as practiced by the owners and managers of industry might well have been destroyed. The anti-trust laws, then, were tantamount to giving up a room in the basement to the servants in order to save the castle.[34]

But there is something curiously artificial about these explanations. The fact is that from time to time big business is forced to give ground. To be sure, business may organise its retreat rather skillfully in order to give as little ground as possible, but give ground it does. Yet the above-mentioned authors interpret such retreats as victories. It seems to me that they are trapped into making this argument by their assumption that business interests are always and necessarily the most powerful groups in the legislative arena. The way out of the trap is to drop the assumption and to allow that there may well be situations in which consumer groups or other interests are actually more powerful than business. The conditions under which this occurs and the frequency with which business interests are in fact over-ridden then become open questions inviting empirical research.

Implicit in what I have been saying is that instead of trying to adjudicate between models of legal change we should treat them as sources of imspiration, sensitising us to the importance of certain lines of investigation. One of the issues to which the value-consensus model draws attention is the extent to which values enter into the legislative process. One might investigate, for example, whether those seeking to change the law appeal to dominant social values as their justification, and whether or not a group's ability to relate its particular interest to some more general value affects its chances of success.

Possibly one of the best ways of illuminating the interrelationship of interest and value is to examine situations where the interests of normally powerful groups run counter to dominant values. This situation is exemplified by America's first anti-monopoly Act, the Sherman Act of 1890. Business of course paid lip service to the value embodied in the legislation, namely, competition. Yet the real interests of big business were clearly jeopardised by such legislation.

Unfortunately, though, we cannot treat this as a simple case of conflict between a dominant value and the interests of the powerful. Although competition was contrary to the interests of monopolists, it was consistent with the interests of a number of

other organised groups – consumers, farmers, small businessmen and workers. The passage of the Sherman Act can thus be seen as a demonstration of the power of these groups rather than of the influence of dominant social values.

It is obviously going to be difficult to locate clear-cut cases of conflict between general values and powerful interests, especially since, given the existence of a variety of sometimes inconsistent values, we would expect powerful interests to be able usually to find some general value to legitimate their position. Nevertheless, it is important that we do identify and study cases where values are in unambiguous opposition to normally powerful interests since the results will add significantly to our knowledge of the extent to which values as distinct from interests enter into the processes of legal change.

How these issues shape the study

The aim of this study is two-fold. At one level, the aim is simply to explain the advent of antitrust laws in Australia. Given the issues raised in this chapter, such a development is obviously problematic. Whose interests were served by the various enactments? How did these interests prevail over presumably well-organised and forcefully expressed monopoly interests? What role did the beneficiaries of the legislation actually play in precipitating it? How important were values in determining legislative outcomes? These are some of the questions which the book will seek to answer. At this level, then, Australian antitrust law is the object of inquiry and the theoretical issues discussed above serve to indicate the scope of this investigation into its sociological sources.

At a second level, the aim of the study is to suggest some partial answers to the general questions raised in this chapter about the role of interests and values in the creation of law. The Trade Practices Act of 1965 is particularly useful for these purposes. An important feature of this Act was that there were few, if any, organised interest groups lobbying for its introduction. On the contrary, there was a formidable array of business interests opposed to it. This would seem to be a case, then, where legislation embodying a dominant social value (competition) but contrary to the particular interests of major business groups, was enacted without pressure from other interest groups. The earlier-

mentioned ambiguity involved in interpreting the introduction of the American Sherman Act does not arise here, and the significance of values in the legislative process should thus be more apparent here than it was in the American case. Consequently, this Act will be examined in greater detail than the other federal enactments to be considered.

There have been three landmark antitrust Acts of Parliament since Federation – the Australian Industries Preservation Act of 1906, the Trade Practices Act of 1965 and the Trade Practices Act of 1974. All were designed to regulate restrictive and monopolistic practices and are thus similar in the interests they affect. If there are particular interests which dominate the law-making process we would expect to find them consistently favoured by these Acts. If we find that there are no such consistently favoured interests we shall be able to deny the dominance of particular interests in Australia, or at least to argue that the dominant groups in one period are not necessarily dominant in another. We shall then need to account for the changing pattern of interests served by antitrust law. The book thus deals with each Act in turn and attempts to draw comparative conclusions in the last chapter.

It must be admitted, finally, that a study such as this cannot provide firm answers to quite general questions about whose interests the law represents and whether values as such are important. A case study can seldom be expected to yield conclusions which go beyond the case itself. Nevertheless, case studies do have wider implications. Conclusions about a particular case may be taken as hypotheses about what is generally true, to be tested in other contexts. Or a case study can sometimes be used as a counter-example to show that some previously asserted generalisation is not universally true. Such wider implications will be drawn from the present study.

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1. Much of this chapter was first published in an article 'On the Sociology of Criminal Law', *Social Problems* 22 (June 1975), pp.608-619.

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3. See W. Chambliss & R. Seidman, *Law, Order and Power* (Addison-Wesley, Reading, Mass, 1971), pp.22-3.

4. Quoted in G. Sawer, *Law in Society* (Oxford, Clarendon Press, 1965), p.172. *Folkways* was first published in 1906.

5. E. Ehrlich, *Fundamental Principles of the Sociology of Law* (Harvard University Press, Cambridge, Mass, 1936), p.493. First published 1913.

6. W. Friedmann, *Law in a Changing Society* (University of California Press, Berkeley, 1959), p.165.

7. W. Geldart, *Elements of English Law* (8th Edn, Oxford University Press, 1975), p.170.

8. P. Bohannan, 'The Differing Realms of Law', in D. Black & M. Mileski, (eds), *The Social Organization of Law* (Seminar Press, New York, 1973), p.310.

9. Sawer, *Law in Society*, *op. cit.*, p.135.

10. *ibid.*, p.137.

11. *ibid.*, p.136.

12. K. Marx & F. Engels, *The German Ideology* (ed. C.J. Arthur, International Publishers, New York, 1970), p.106.

13. See M. Cain, 'The Main Themes of Marx and Engels' Sociology of Law', *British Journal of Law and Society* 1, Winter (1974), p.143.

14. R. Quinney, *The Social Reality of Crime* (Little Brown, Boston, 1970), pp.16, 17, 35.

15. *ibid.*, p.74.

16. Chambliss & Seidman, *op. cit.*, p.72.

17. Quinney, *op. cit.*, p.33.

18. R. Pound, 'A Survey of Social Interests', *Harvard Law Review* 57, October (1943), p.39, quoted in Quinney, *op. cit.*, p.33.

19. C.A. Auerbach, 'Law and Social Change in the United States', *U.C.L.A. Law Review* 6, July (1959), pp.516-532, quoted in Quinney, *op. cit.*, p.33.

20. Quinney, *op. cit.*, p.33; N. Gunningham, *Pollution, Social Interest and the Law*, (Martin Robertson, London, 1974), p.18.

21. W. Chambliss, 'A. Sociological Analysis of the Law of Vagrancy', *Social Problems* 12, Summer (1964), pp.67-77.

22. Gunningham, *op. cit.*

23. E. Sutherland & D. Cressey, *Criminology* (8th edn) (Lippincott, New York, 1970), p.12.

24. Sawer, *Law in Society*, *op. cit.*, p.135; W. Carson, 'The Sociology of Crime and the Emergence of Criminal Laws', in P. Rock & M. McIntosh (eds), *Deviance and Social Control* (Tavistock, London, 1974), pp.78-9.

25. G. Lenski, *Power and Privilege* (McGraw-Hill, New York, 1966), p.53.

26. J. Hall, *General Principles of Criminal Law* (Bobbs-Merrill, New York, 1947), p.1; Friedmann, *op. cit.*, p.165.

27. B.J. George, 'Criminal Law', in Vol.3 of *The International Encyclopedia of the Social Sciences* (1968), p.459. See also Sutherland & Cressey, *op. cit.*, p.4.

28. Friedmann, *op. cit.*, pp.200,202; on this point see also E.M. Lemert, *Human Deviance, Social Problems and Social Control* (Prentice-Hall, Englewood Cliffs, 1967), pp.10-11.

29. V. Aubert, 'White-collar Crime and the Social Structure', *American Journal of Sociology* 58 November (1952), p.266.

30. Chambliss & Seidman, *op. cit.*, p.85.

31. The question of whose interests are represented by the enactment of

legislation is quite different from the question of who actually benefits from its implementation. This latter question is not central to an understanding of the genesis of law, although it may frequently be relevant.

32. See G. Kolko, *The Triumph of Conservatism* (The Free Press, Glencoe, 1963), and G. Kolko, *Railroads and Regulation* (Princeton University Press, 1965). For a good summary of these see W. Chambliss, 'The State, the Law, and the Definition of Behaviour as Criminal or Delinquent', Chapter 1 in D. Glaser (ed.), *Handbook of Criminology*, (Rand McNally, Chicago, 1974).

33. Carsons, *op. cit.*

34. Chambliss & Seidman, *op. cit.*, p.66.

Chapter 2

The 1906 Act: Protecting Australian Manufacturers

Introduction

The Australian Industries Preservation Act, with antitrust provisions consciously modelled on the American Sherman Act of 1890, was passed in the national Parliament in 1906, five years after Federation. The principal sections of the Act made it an offence to enter into a contract or combine 'with intent to restrain trade or commerce to the detriment of the public'. It was likewise an offence to enter into a contract or combine 'with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth'. Monopolisation was prohibited in similar terms.[1] The Act specified penalties of up to 500 pounds and, for a second offence, imprisonment for up to one year.

At the time of this enactment monopolies, or effective monopolies brought about by agreements among competitors, existed in a number of industries, most notably, sugar, shipping, coal and tobacco, and in 1904 a Senate Committee was set up to enquire into the tobacco monopoly.[2] Twice in 1903 and again in 1904 the Government promised to legislate against 'rings and trusts'.[3] On the basis of such evidence, some writers have concluded that the 1906 Act was simply the response of a democratic parliament to public concern about the growth of monopoly in Australia.[4]

But this is not an adequate explanation. In order to understand the apparent defeat of monopolistic interests entailed by the passage of the Australian Industries Preservation Act of 1906 we must examine in greater detail the genesis of the legislation and the interests which it in fact represented. To begin with, we need some knowledge of the political groupings in the early Federal Parliament.[5]

Prior to Federation, the Australian States had protected their

local industries to varying degrees by erecting tariff barriers against imports from interstate and overseas. Federation meant the end of tariffs between States but it also meant that the new Parliament now had responsibility for determining tariff policy for Australia as a whole and deciding on levels of tariff protection for Australian industries which would be common to all States. This was the issue which dominated the early years of the Parliament.

On the one hand, the protectionists, representing local manufacturing interests, argued for tariffs which would restrict overseas competition and allow the development of Australian industries. On the other, the free traders, who represented both commercial (more specifically importing) interests and farmers, concerned to buy their argicultural machinery in the cheapest market, argued against the imposition of barriers to foreign trade.

The early Parliament was divided into three roughly equal groupings: the protectionists, the free traders and the Labor Party, most of whose members advocated a protectionist tariff policy as a means of safeguarding the jobs of workers in Australian industries. This identity of interests allowed the protectionists to govern with Labor support and, although the tariff issue was largely settled by 1905, the alliance between protectionists and Labor remained the normal basis for government until towards the end of the decade.

In what follows, I hope to show that the 1906 Act was an expression of this dominant protectionist philosophy rather than of any serious concern to strike at the anti-competitive practices of rings and trusts in Australia.

The 1905 Bill

The Bill which became the Australian Industries Preservation Act was introduced in Parliament in June 1906. It was a substantially revised version of an earlier Bill which had been introduced in December 1905 following representations made to the Government by, among others, Mr H.V. McKay, Australia's largest manufacturer of harvesting machinery. McKay had until 1905 been a party to a price fixing agreement which included not only other Australian manufacturers of harvesters but also the huge American International Harvester trust and the Canadian Massey-Harris combine which were selling their harvesters on the Australian market. It

was not the operation of this ring but rather its breakdown which had prompted McKay's representations.

With the breakdown of the agreement, International Harvester, which already claimed 90 per cent of the world market, had decided to capture the Australian market. It had made McKay an offer, which he had refused, and so the trust set out to destroy him by lowering its prices and selling harvesters on the Australian market at a price which McKay said he could not afford to match. Evidence of the trust's intention to destroy McKay was given before a Royal Commission enquiring into the harvester industry by a witness who recounted the following conversation with a travelling representative of the International Harvester Company.

> The representative said, 'The International Harvester Company is determined to get hold of the trade in harvesting machinery, and it's only a matter of a little time before we knock out all the local men.' I said, 'You can't beat McKay.' 'Yes', he replied, 'We'll beat McKay. We have unlimited money behind us, and even if we worked at a loss for three years we are bound to beat him . . . We don't care what money it costs, we shall secure the trade. McKay had an offer from us to buy him out, and he will live to regret the day that he refused that offer. We are going to close him up.'[6]

Not only was a native industry threatened but so also were the jobs of 150 of McKay's workers, a fact which he made sure was widely publicised.[7] The protectionists and their Labor supporters were thus convinced of the need for government intervention and the 1905 Bill was their response.

Introducing the Bill to Parliament, the Minister responsible for it said the measure was needed to deal with 'rings and trusts (which) dump their various productions on our shores, with the absolute intention of destroying the industries of our country'.[8] He made much of the 'enormous octopus trusts' in the United States which were menacing Australia, a metaphor subsequently elaborated by one Government supporter who warned that the International Harvester combine 'has fastened one of its long tentacles upon the heart of Australia and threatens the very existence of industries which have been established at considerable cost'.[9]

Much of the Minister's speech was devoted to the harvester issue and he referred to a rumour that 2,000 harvesters were, even as he spoke, 'on the water', bound for Australia. He added:

'(Although there is no authentic verification of this rumour), I have no doubt that a large number of orders have or will be given, and that unless we pass this legislation, the machines will be here before next spring.'[10] Referring again to the harvester threat he said: 'This Bill has been introduced to prevent the possibility of serious, important trouble occuring during the next nine or twelve months.'[11]

Given this motivation it is not surprising that the principal provisions of the 1905 Bill were designed to prevent overseas business interests, be they trusts or otherwise, from engaging in unfair competition with the intention of destroying Australian industries. These were the so-called anti-dumping provisions.

Although predominantly an anti-dumping Bill, then, there were, as has been indicated, specific antitrust sections, modelled on the Sherman Act, which might have been used to deal with trusts of local origin. But the government was so little concerned with the activities of local monopolies that the Minister in charge of the Bill was unsure of whether it would even affect them. When challenged in Parliament he was doubtful about whether the shipping ring, perhaps the most notorious of the local monopolies, would come under the Act. Similarly, the sugar monopoly, he thought, would be untouched.[12] Reading the debates one is left with the impression that the antitrust sections of the Bill were an afterthought, added for no more rational reason than that the unfair competition from overseas about which the Government was concerned happened at the time to be mounted by trusts.

Further evidence of the Government's lack of any serious commitment to an anti-monopoly policy can be gained by a closer examination of the antitrust sections of the Bill. Section 1 of the Sherman Act provides that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal.

This was the model for section 10 of the Australian Bill.[13] However, the Australian provision differed from the American in a number of ways. First, the American section applies regardless of who the parties to the restraint of trade are; the Australian section applied only when at least one of the parties was a trust or its agent. Why this change was made is not clear, but it does not

seem to have been made with any deliberation because when it was pointed out in debate that the Colonial Sugar Refining Company, whose control of the market had often been criticised, was a single firm monopoly and not a trust, the Attorney-General conceded that the section would not apply to it. When asked if it could be made to apply, he replied: 'Certainly. We can do that without any difficulty whatever. It can be accomplished by the insertion of a few words.'[14] The Government did modify the Bill accordingly, but its failure to insert these 'few words' in the first place illustrates its lack of interest in the issue of local monopolies.

A second departure from the American model was that, in Australia, restraint of trade was to be illegal only if it was 'to the detriment of the public' and if this detriment was 'wilful', that is, intentional. It was widely recognised at the time that this would make it more difficult to secure a conviction and critics argued that the difficulty of proving, in particular, intent was notorious. But the Government was more interested in protecting those whom it felt ought not to be caught up in its legislation. As the Attorney-General explained, it would be wrong to prosecute those who inadvertantly restrained trade to the detriment of the public.[15] It was an important principle of law, he said, that a defendant was guilty of an offence only if he intended to commit it.[16]

A final significant addition to the section was that it banned not only certain actions in restraint of trade but also unfair competition by trusts aimed at destroying or injuring Australian industries. Since unfair competition by overseas trusts was already banned by the anti-dumping provisions, the function of this addition was to extend the prohibition to cover unfair competition by Australian trusts. Thus even this antitrust section of the Bill was made to serve a protectionist purpose. It was not so much the existence of, or even the monopolistic profits extracted by, local trusts but their occasional predatory actions against other Australian industries which roused the Government's ire.

A second section of the Sherman Act copied in the Australian Bill was its prohibition of monopolisation. This, too, was weakened by modifications similar to those discussed above and need not be dwelt on here.

One other feature of the antitrust sections of the 1905 Bill deserves comment. The American Constitution gives the Federal Government power to legislate with respect to trade and

commerce between the States and with foreign nations. It does not permit the regulation of trade that takes place entirely within State boundaries. Hence the American antitrust laws apply only to interstate and overseas trade. The Australian Constitution gives the Federal Government similar powers and, in conformity with the American model, the Australian Bill of 1905 aimed solely at interstate and overseas trade.

However the Australian Constitution also gives the Federal Government power to legislate with respect to 'trading or financial corporations formed within the limits of the Commonwealth'. Although this power might appear to allow the Government to control monopolistic practices engaged in by corporations within State boundaries, no attempt was made to invoke it in the 1905 Bill.

Since the majority of trade combinations which had given rise to public concern in Australia did not extend beyond State limits[17], this oversight seriously restricted the effectiveness of the measure. The difficulty was drawn to the Government's attention during debate on the 1905 Bill and in the 1906 revision the relevant provisions were extended to cover the purely intra-state operations of corporations (although intra-state practices engaged in by unincorporated firms and individuals necessarily remained untouched).

This examination of the antitrust provisions of the 1905 Bill shows that the Government was not motivated by any serious concern to promote competition. Although modelled on the rather stringent Sherman Act, the Australian provisions were altered in such a way as to render successful prosecutions most unlikely, and, in addition, the Government's failure to make full use of its constitutional powers meant that the majority of combines would, in any case, have been immune from prosecution. The fact that the Government incorporated a prohibition on unfair competition in the antitrust provisions of the Bill is symptomatic of the philosophy of protectionism rather than of competion which underlay the measure.

The fundamentally protectionist character of the legislation infuriated the opposition free traders. One spoke of it as 'protection run stark staring mad'.[18] Another argued that the departures of the Australian Industries Preservation Bill from the Sherman Act made it quite opposite in its effects. The Sherman Act sought to

promote competition, he said, while the Australian Bill would diminish it.[19] From this it followed that the proposed legislation would encourage higher prices and was thus contrary to the consumer interest, which Opposition members saw themselves as representing. In the words of one:

> We should pay some attention to . . . the interests of the general consumers, who have not been consulted in regard to this measure, although they comprise the great body of the electors. I admit that the manufacturers must be fairly considered, but the consumers, who far outnumber them, and particularly the consumers of machinery in connection with the primary industries, are entitled to be remembered.[20]

Sensitivity to the consumer interest led one free trader to ask why consumers were placed last in one of the Bill's clauses which spoke of the need to have 'due regard for the interest of producers, workers and consumers', to which the Minister replied: 'One must come last – goods cannot be consumed until they are produced.'[21] This response was obviously lighthearted and no great weight can be placed upon it, but it is symptomatic of the producer rather than consumer orientation which lay behind the Bill.

Government members did not reject the Opposition's characterisation of the measure as protectionist rather than antitrust. The Attorney-General declared that both the antitrust and the anti-dumping sections were designed to protect Australian industry. The Bill as a whole was a necessary accompaniment to a protective tariff, he said, since tariffs alone could not deter foreign trusts which were prepared to suffer temporary loss in order to ruin a local competitor.[22]

But while the Government could afford to ignore the protests of the free traders it was obliged to deal more circumspectly with the Labor Party upon which it relied for its parliamentary majority. The Labor Party supported the legislation generally but was critical of the many weaknesses in the antitrust provisions of the Bill. It was concerned to make the Bill effective against local combines and monopolies such as the shipping combine and the sugar monopoly.[23]

Actually, however, the very concept of American-style antitrust legislation was not particularly to Labor's liking. At its federal conference earlier in 1905, the Party had adopted a policy of nationalisation of monopolies.[24] Indeed, the earlier-mentioned

Senate Committee of enquiry into the tobacco monopoly had been initiated by a short-lived minority Labor Government in 1904 for the purpose of enquiring into the desirability of nationalising the tobacco industry. But out of government, the Party was prepared to accept antitrust legislation as a compromise and to work for the most effective legislation it could win from the protectionists. Thus it was largely Labor's obvious determination to strengthen the antitrust sections of the measure that forced the Government to defer action on its Bill at the end of 1905 and to submit a substantially revised version in June 1906.

The 1906 Bill

The Australian Industries Preservation Bill of 1906 laid considerably more stress on the monopoly problem than did its predecessor. The antitrust sections now preceded the anti-dumping provisions. They had been rewritten, moreover, so as to strike at single firm monopolies and at the purely intra-state activities of corporations. The Minister saw the new Bill as affecting the tobacco combine, the sugar monopoly and the shipping ring. In fact he announced the legislation was now urgently needed in order to deal with the shipping combine.[25]

But although it had been prodded into action against local monopolies, the Government still saw its task as one of protecting local enterprises against the predatory behaviour of monopolists rather than of promoting competition in the interest of the consumer. For example, the Minister's principal objection to the tobacco combine was not that it raised the price of tobacco paid by the consumer, which it did, but that it imported its tobacco from overseas to the detriment of the local tobacco growing industry. 'I believe that the operations of the trust are proving injurious to the industry in Australia, and that they will utterly destroy it', he said.[26]

And in the case of the shipping combination, the Government's prime concern was the high freight rates which the combine imposed on the various commercial and industrial interests which relied on the coastal shipping service for the transport of their goods and raw materials.[27] Particularly objectionable, from the point of view of a government committed to the protection of Australian industries, was the high price which industries in the

southern States were forced to pay to have their coal shipped from the northern coal fields.[28] Moreover, the shipping ring was known to have forced out of business at least one ship owner who had not joined the ring. This might have been expected to anger almost any government.[29]

These concerns, then, coupled with the need to accede to Labor Party demands for strong anti-monopoly legislation, account for the apparently quite stringent antitrust provisions of the Australian Industries Preservation Act as it was finally passed by Parliament towards the end of 1906.

The fate of the 1906 Act

The mere passage of antitrust legislation does not in itself usher in an era of 'trust-busting' and enhanced competition. The subsequent fate of the legislation suggests that none of those responsible for the administration and interpretation of the Act paid much more than lip service to the value of competition which the legislation, on the face of it, embodied.

Part of the reason for this lack of enthusiasm was that the Government's original purpose in introducing the legislation, the protection of Australian harvester manufacturers, had been achieved by other means. Despite its earlier claim that tariff barriers were ineffective against foreign enterprises intent on dumping their products on Australian shores, the Government proposed to Parliament in 1906 a new form of tariff which was indeed sufficient to protect local harvester manufacturers against dumping.[30] Its interest in the legislation as a whole might thus have been expected to wane.

But with antitrust legislation on the books and constant demands from the Labor Party that it be enforced, particularly against the tobacco combine and the restrictive practices engaged in by coal mining companies in association with the shipping ring[31], the Government did launch several investigations. It was hampered, however, by the difficulty of obtaining information on the activities of trusts which could be used as evidence in prosecutions, and in 1907 the Government amended the Act so as to allow it to compel companies under investigation to disclose information.

Armed with this new power it sought information from one

of the companies in the shipping ring concerning its coal trade. The company refused to provide the information and challenged the constitutional validity of the legislation on the grounds that its particular restrictive arrangements were on an intra-state basis and that, despite appearances, the corporation power in the Constitution did not allow the Federal Government to regulate the purely intra-state activities of corporations. Judges of the Australian High Court were generally more concerned to protect the rights of States against federal encroachment than they were to ensure the effectiveness of the Government's antitrust legislation[32], and accordingly upheld the challenge. This deprived the Government of the ability to control the intra-state activities of corporations and severely restricted the scope of the Act.

Nevertheless the Government went ahead with its investigations and in 1909, in an effort to strengthen the Act and simplify the procedures of proof, made further amendments specifying two new classes of offence. One was the use of rebates, refunds, discounts and other rewards to induce exclusive dealing and the other was the refusal to sell to a buyer for the reason that he did not belong to a ring or trust. Both these techniques were used by the shipping and coal combines to maintain their monopoly.

But it was left to the Labor Party, which assumed office in 1910, to begin the first substantive prosecution under the Act: against the coal mining and interstate shipping firms whose various agreements had kept the price of coal higher than it would otherwise have been. The companies were convicted on charges of combining with intent to restrain the interstate trade in coal to the detriment of the public and of monopolising that trade with similar intent. Each company was fined and injunctions were issued against the continuance of these practices. For a moment it appeared that, six years after the introduction of the legislation in Parliament, Australia was finally to embark on an era of government-sponsored competition.

That appearance was short-lived, however, for on appeal the convictions were overturned. The appeal judges were quite unconcerned about the preservation of competition. On the contrary, they pronounced on the evils of 'cut-throat competition', and argued that the agreements were necessary to prevent 'unlimited and ruinous competition'. The fact is, however, that there was no evidence of ruinous competition before the shipping and coal

combination came into existence, leading one student of the judgments to conclude that 'if the Full Court found cut-throat competition, it was because a common law training had led its members to expect that all competition would be ruinous'.[33]

Moreover, the appeal judges tended to interpret the public interest as synonymous with the interest of producers. According to the same commentator:

> . . . since in the court's view the only alternative to restriction and monopoly was the total dislocation of the industry by cut-throat competition, it followed that entrepreneurs who combined to guarantee themselves an income (and so ensure the survival of the industry), could not be regarded as acting with intent to injure the public. Even if the combination raised its prices, restricted output, excluded new entrants and forced inferior coal on the consumer, the public was better off accepting such inconveniences than losing the industry altogether.[34]

In the face of this complete lack of sympathy displayed by the appeal court judges for the antitrust principles embodied in the legislation, the Government capitulated and made no further efforts to enforce the Act.

It is of some interest that while the case against the shipping and coal companies was in progress, the Labor Government amended the Act removing the need to prove intent to cause public detriment and modifying the need to prove public detriment itself. Despite these amendments the Government proceeded with the case on the basis of the old legislation and thereby failed to maximise the chance of conviction.[35]

But even had the Government made use of its amended legislation, it is doubtful whether the final outcome would have been materially different. First, it is obvious from the reasoning of the appeal court judges that the question of intent was not the crucial factor in their decision because public detriment itself had not been established. Second, while the amended legislation did specify some offences for which it was not necessary to establish public detriment, it seems quite probable that, given their belief in the evils of competition, the appeal court judges would have introduced some such test at their own initiative.

After all, although the Sherman Act banned restraint of trade and monopolisation without regard to whether in any particular case public detriment was involved, the United States Supreme Court modified the law in 1911 by adopting a 'rule of reason'

which construed the statute as prohibiting only those restraints of trade and monopolies which were 'unreasonable'. Australian judges of the day might have been expected to follow this lead and modify the Australian legislation in a similar manner.

Nevertheless, Labor's failure to give the prosecution the best chance of success and its subsequent failure to seek further amendments which might have strengthened the Act, do provide evidence of its lack of enthusiasm for such legislation. As Labor's Attorney-General expressed it, proceeding against trusts in this way was 'like endeavouring to divert a cataract with a straw'.[36]

The Party's preferred policy of dealing with the problem of monopolies was to nationalise them, and even before the prosecution under the Act began, Labor had initiated moves to change the Constitution so as to allow nationalisation. In 1911 and again in 1913, referenda seeking such powers were held but both were lost. There was thus an insuperable constitutional obstacle in the path of nationalisation and although Labor maintained its commitment to a policy of nationalising monopolies, its initiative was spent. So ended an era of antitrust in Australia.[37]

Conclusion

It is evident that the Australian Industries Preservation Act, although modelled in part on an Act which gave expression to a philosophy of competition, was never itself intended to promote competition. Rather, the aim of the Government which introduced the measure was to protect Australian industries against unfair competition engaged in by overseas enterprises, many of which were trusts, and to a lesser extent to protect certain Australian enterprises against victimisation by other Australian businesses. There was little explicit recognition of the consumer interest and the Government certainly did not see the legislation as enforcing competition for the benefit of the consumer. The Act was designed to regulate the affairs of business in the interests of certain sections of business.

The Labor Party, upon whose support the Government depended and at whose instigation the specifically antitrust sections of the legislation were strengthened, was, paradoxically, never committed to the philosophy of competition which those sections embodied. It opposed monopoly in the interests of the consumer and, given its general hostility towards a system of

private enterprise, it believed this purpose was best served by a policy of nationalisation rather than enforced competition. Its support for an antitrust measure modelled on the Sherman Act was necessitated by its minority position in Parliament.

The passage of strong antitrust legislation through the early Federal Parliament was thus a result of political compromise. The Act expressed principles of competition which neither party responsible for it endorsed. Moreover, as we have seen, the judiciary was generally opposed to the notion of competition. In the absence of any climate of opinion in favour of competition in Australia, it was almost predictable that an Act to enforce it would be ineffective.

The fact is that antitrust legislation was imported into Australia to serve a purpose for which it was not originally intended, the preservation of local industries against foreign competition. When it became evident that this purpose could be achieved by other means[38], interest in the legislation wained and, but for the equivocal efforts of Labor, the Act would have become a dead letter even sooner than it did.

A further set of conclusions prompted by the issues raised in Chapter One will be drawn later, but one additional observation seems appropriate here. As promised in Chapter One, this analysis has been couched in terms of the interests served by the legislation and the role played by those interests in initiating it. But it is also true that the Act gave expression to a value shared by large sections of the electorate as well as by a majority of members of Parliament, namely, protectionism. The dominance of this value is a vital explanatory factor. Government members were not simply held to ransom by manufacturing interests; nor is the enactment to be explained as an attempt by legislators to protect their own individual vested interests, although such a motivation may perhaps have been present in the minds of some.

The fact is that the Government was concerned to uphold a value it adhered to in the face of a threat to that value posed by an overseas trust. However, this is not to concede that values rather than interests are the determinants of legislative innovation. Values frequently serve particular interests. In this case, the value of protectionism served most directly the interests of Australian manufacturers. Interests and values do not therefore compete with each other as explanations of this legislation; they are simply

different aspects of the same explanation. As argued previously, any attempts to adjudicate between them would be futile.

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1. For constitutional reasons these prohibitions applied only to foreign corporations, locally formed trading and financial corporations, and individuals trading beyond State boundaries.

2. This Committee was subsequently converted into a Royal Commission and its report presented in 1906.

3. *Commonwealth Parliamentary Debates* (CPD) Vol.13, p.6; CPD 18, p.9.

4. See for example, D.B. Copland & J.G. Norris, 'Some Reciprocal Effects of Our Antitrust Laws, with Special Reference to Australia', *The Annals of the American Academy of Political and Social Science* 147, January (1930), p.117; and H.L. Wilkinson, *The Trust Movement in Australia* (Critchley Parker, Melbourne, 1914), p.188.

5. The following information on the early Federal Parliament is taken from J. Jupp *Australian Party Politics* (Melbourne University Press, Melbourne, 1964); L.F. Crisp *Australian National Government* (Longmans, Melbourne, 1968); L.C. Webb, 'The Australian Party System', In C.A. Hughes (ed.), *Readings in Australian Government* (Queensland University Press, Brisbane, 1968); J.A. La Nauze *Alfred Deakin: A Biography* (Vol.2, Melbourne University Press, Melbourne, 1965).

6. Report of the Royal Commission on Stripper-Harvesters, *Parliamentary Papers of the Commonwealth of Australia* 1906, Vol.4, pp.138-9.

7. See CPD 31, p.1097.

8. CPD 30, p.6820.

9. *ibid.*, p.6989. Octopus imagery was frequently invoked during the debate. In one speech by an Opposition Member the following interchange took place.

Opposition Member :. . . if Ministers only seek to clip the claws of a few large octopus combinations –

Minister :An octopus would not have claws!

Opposition Member :To cut away the suckers of these octopus combinations, shall I say; to cut away their grip, . . . (CPD 31, p.991).

Again, according to one speaker, 'the Rockefeller trust is an octopus, and if we catch hold of one of its tentacles the responsibility is at once removed to another, and another, and yet another, until it is impossible to say where is the centre. In other words, if we get hold of a trust of this kind by one leg, as the saying is, it hops away on another'. (CPD 33, p.3404).

10. CPD 30, p.6821.

11. *ibid.*, p.6826.

12. *ibid.*, p.6820.

13. Section 10 of the 1905 Bill read as follows:

10. (1) Any person who wilfully –

(a) being a Commercial Trust makes or enters into any contract, or is a member of or engages in any combination to do; or

(b) makes or enters into any contract with or conspires or engages in any combination with a Commercial Trust to do; or

(c) as an officer member or agent of a Commercial Trust does or makes or enters into any contract to do

any act or thing in restraint of trade or commerce among the several States or with other countries to the detriment of the public or any act or thing with the design of destroying or injuring any Australian industries by means of unfair competition with respect to such trade or commerce, is guilty of an indictable offence against this Act.

Penalty: Five hundred pounds, or one year's imprisonment, or both.

(2) Every contract made or entered into in contravention of this section shall be absolutely illegal and void.

14. CPD 30, p.7013.
15. CPD 31, p.1006.
16. The problem of proving intent did not arise in quite the same way in the case of the anti-dumping provisions. The 1905 Bill did not require that intent be established (clause 8.2). The Act as finally passed in 1906 did require that intent be established but the Justice before whom proceedings were to take place was instructed by the Act as follows: 'The Justice shall be guided by good conscience and the substantial merits of the case, without regard to legal forms or technicalities, or whether the evidence before him is in accordance with the law of evidence or not'. Moreover, neither the 1905 Bill nor the Act of 1906 envisaged criminal proceedings. In any case, therefore, the procedural safeguards available to defendants charged with anti-trust violations would not have applied.
17. Wilkinson, *op. cit.*, p.189.
18. CPD 31, p.349.
19. CPD 30, p.7020.
20. *ibid.*, p.7018.
21. *ibid.*, p.6822.
22. CPD 31, p.1086; CPD 31, p.1018.
23. CPD 30, pp.7031-2.
24. Crisp, *op. cit.*, p.146.
25. CPD 31, p.671.
26. *ibid.*, p.249.
27. CPD 33, p.3057.
28. CPD 31, p.943.
29. CPD 33, p.3058.
30. *ibid.*, p.3443.
31. CPD 38, p.2032; CPD 39, p.3684.
32. G. Walker, *Australian Monopoly Law* (Cheshire, Melbourne, 1967), p.49.
33. *ibid.*, p.33.
34. *ibid.*, pp.33-4. The case actually went to two appeal courts – the Full High Court of Australia and the Privy Council in England. The opinions expressed by the two courts were substantially similar. For a detailed analysis of the judgments see D.J. Stalley, 'Federal Control of Monopoly in Australia', *University of Queensland Law Journal* 3, (1958), pp.258-289.

35. According to recent legal commentary proceedings could indeed have been brought under the amended Act. See J.E. Richardson, 'Constitutional Power', *Canberra Times*, 12 November 1965 and G. Sawer, *Australian Federal Politics and Law 1901-1929* (Melbourne University Press, 1956), p.109.

36. CPD 59, p.6041.

37. The Act remained a virtual dead letter for more than fifty years. It gained new life in 1965 when the Attorney-General successfully prosecuted a number of wine wholesalers for engineering a group boycott of a retailer who had bought supplies from a price cutting wholesaler, see G. Walker, 'Competition Policy and the Corporation', in K.E. Lindgren *et al, The Corporation and Australian Society* (Law Book Co., Sydney, 1974), p.201; J.E. Richardson, *Introduction to the Australian Trade Practices Act* (Hicks Smith, Sydney, 1967), p.23. But this revival of the Act was merely a prelude to its repeal to make way for the Trade Practices Act of 1965.

The anti-dumping provisions of the Act were completely inoperative, partly because the government of the day was able to use protective tariffs to achieve its purposes. Subsequent governments were apparently deterred from invoking the provisions by the belief that it would be almost impossible to convince a Justice that an importer intended to damage an Australian industry (CPD 96, p.9731). In 1921, the Government passed anti-dumping legislation of a somewhat different character – a Customs Tariff (Industries Preservation) Act – making the anti-dumping provisions of the Australian Industries Preservation Act redundant.

38. That is, by a new type of tariff, see CPD 33, p.3443.

Chapter 3

The 1965 Act: Promoting Competition

The decision to legislate

It was half a century before the Federal Government again ventured into the field of monopoly control with the Trade Practices Act of 1965. The intervening years had seen some spasmodic legislative activity in various States but no serious enforcement effort had been mounted anywhere and restrictive trade practices had remained effectively uncontrolled.[1]

In the late 1950s, however, official evidence of the existence and harmful effects of restrictive trade practices in Australia began to accumulate. The Tariff Board, in its investigations of the need for tariff protection in various industries, had found evidence of price fixing agreements in several of them. A judicial inquiry into the timber industry in New South Wales in 1955 concluded that the various sections of the industry – importers, merchants and box and case manufacturers – were welded by a joint agreement into one huge combination under the direction of a joint committee of management, effectively eliminating all competition from the industry. A Royal Commission into restrictive trade practices in Western Australia reported in 1958 that there were at least 111 trade associations in the State, the majority of which were engaged in price fixing and other restrictive trade practices. In 1959 a judicial inquiry found that wool buyers at auctions were engaging in collusive bidding (wool pies) in order to depress prices paid to growers.[2]

Moreover, in 1958 and again in 1959, a Parliamentary Committee set up to review the Constitution recommended that it be amended to give the Federal Government greater power to deal with anti-competitive practices.

It should also be mentioned that the man appointed Attorney-General in 1958, Garfield Barwick, had previously 'shown himself

an enthusiastic and even doctrinaire believer in the virtues of maximum competition in a private enterprise system'.[3] It was predictable, therefore, that as Attorney-General he would be anxious to initiate action against practices which inhibited competition.

These, then, were what we might call the 'background factors' which lead to the Governor-General's announcement in his speech at the opening of Parliament in March 1960 that:

> The development of tendencies to monopoly and restrictive practices in commerce and industry has engaged the attention of the government which will give consideration to legislation to protect and strengthen free enterprise against such a development.

But background factors alone do not provide a sufficient explanation of the Government's decision to legislate. In particular, they do not explain why the government chose to act when it did. The factor which actually precipitated the decision to legislate was inflation. At the time, inflation was seen as a serious problem, and the Government had announced a number of anti-inflationary measures in February 1960. Although trade practice legislation was not foreshadowed in this announcement, perhaps because it was not a measure which could have had any immediate effect, Cabinet nevertheless decided at about this time to pursue the idea of anti-monopoly legislation for its presumed longer term anti-inflationary impact.[4]

The Prime Minister, Mr Menzies, gave some indication of the rationale behind this decision in various public speeches. In a management conference address he spoke of inflation as 'perhaps the greatest challenge to management in Australia'. He appealed for what he called a two-pronged attack on inflation: employers should try to absorb costs and they should try to improve the efficiency of their productive processes. He went on: 'getting costs down does not mean cutting wages. It means getting better value for wages by increasing production and improving processes and skills . . .'[5] In a later speech he made it clear that the proposed legislation was designed to promote such increased efficiency.

> We are for competitive free enterprise (he said) because it is dynamic; because it tackles new problems and creates new industries and makes progress and profit by efficiency and the spirit of adventure . . . We desire in cooperation with the state governments, to do something to protect and strengthen free productive and business enterprise against monopoly or restrictive practices.[6]

Two other considerations entered into Government thinking. First, as part of its anti-inflationary policy announced in February 1960, the Government had decided to intervene before the Conciliation and Arbitration Commission to argue against any rise in the basic wage. Its intervention had been successful. But, as Barwick privately told a group of business leaders in December 1960[7], to avoid political embarrassment the Government had to show that in combatting inflation it was prepared to take action against prices as well as wages. Hence the need for legislation against, among other things, price fixing agreements.

Secondly, at the time of the Government's decision, the report on collusive bidding in the wool industry had just been published and Country Party Ministers[8] were anxious to take action against this practice on behalf of their constituents.[9] But these were in a sense secondary matters. Inflation was the principal factor precipitating the decision to legislate against restrictive trade practices.

The Barwick proposals

Translating the Government's intent into firm legislative proposals proved to be a time-consuming process. The Attorney-General spent almost three years studying trade practices in Australia and examining ways in which other countries had legislated to control them, and it was not until December 1962 that he was ready to present to Parliament a detailed outline of the proposed legislation.[10] His purpose in providing Parliament with an outline was to enable interested parties to make representations before the legislation was finalised, and it was almost three more years before the Trade Practices Bill was presented to Parliament in 1965.

In the scheme, as outlined in 1962, certain practices were to be declared illegal. These were: persistent price cutting at a loss to drive a competitor out of business (predatory pricing); collusive tendering; collusive bidding; and monopolisation (defined as the abuse, not mere possession, of monopoly power).

But these so called 'inexcusably unlawful' practices were the exception. Most of the practices covered by the proposals – price fixing among competitors, resale price maintenance and collective boycotts, for example – were not directly prohibited but were to be registered with a trade practices office and subject to examination by an independent Tribunal for determination in individual

cases as to whether or not they were contrary to the public interest. The continuation of any such practice after it had been found contrary to the public interest would be unlawful.

Following the presentation of his proposals, Barwick delivered a number of public addresses around the country elaborating the philosophy behind the scheme. Although the need to combat inflation had precipitated the decision to legislate, Barwick made no mention of inflation in discussing his proposals. Instead he concentrated on the victimisation of specific business enterprises which restrictive practices frequently entailed. This was perhaps not surprising. Inflation had by this time been brought under control by the Government's other policies. In any case, the relationship between anti-competitive practices and inflation is tenuous at best; it is difficult to ascertain what, if any, inflationary impact they actually have. By contrast, the harmful effects of restrictive practices on the individual trader, subject, say, to a collective boycott by his suppliers, are far more direct and dramatic.

Moreover, Barwick had received numerous complaints about the hardship suffered by individual traders as a consequence of the restrictive practices of others. For example, following the Governor-General's announcement in 1960, the Victorian Automobile Chamber of Commerce, representing the retail motor trade – service station operators, car dealers, etc. – wrote to the Attorney-General complaining of the practices of the large companies from which they received their supplies. They were particularly critical of a certain agreement which service stations were required to enter into before oil companies would supply them with petrol. They had to agree to obtain supplies of tyres, batteries and other motor accessories sold on the premises from suppliers designated by the oil company.[11] The effect of this agreement was to prevent service station operators from buying these items from the cheapest supplier.

Another practice about which the Attorney-General received complaints involved traders being unable to obtain supplies or access to channels of distribution because they were not members of an appropriate trade association, and being denied membership of the association for an apparently arbitrary reason designed in reality to keep the membership of the association exclusive and limited. Barwick gave the following illustration.

A Dutch-born furniture manufacturer in South Australia, unable to dispose of his furniture through normal retail outlets because he was not a member of the manufacturers' association and unable to join the association because of a rule which made migrants ineligible to join until ten years after naturalisation, set fire to his factory in a fit of depression in order to claim the insurance. After convicting him of fraud, the judge concerned called for legal action against such restrictive practices and declared that as he understood it, 'a migrant to this country is eligible to become Prime Minister the day after he is naturalized . . . It seems very harsh indeed that a migrant should not be eligible (for membership of a trade association) . . . until ten years after naturalization'. He sentenced him, nevertheless, to 18 months imprisonment.[12]

Many of the cases which came to Barwick's attention would have involved the victimisation of relatively small businessmen such as the Dutch furniture manufacturer and the members of the Victorian Automobile Chamber of Commerce. Indeed Barwick saw the protection of small business as one of the purposes of his scheme.[13] Yet not all the victims were small. In one case, which received widespread publicity in 1960, a large retail house, Mark Foys, had been deprived of the opportunity to market television sets as a result of a boycott initiated by the Radio, Electrical and Television Retailers' Association.[14]

Even public authorities could be victimised. Their attempts to obtain requirements by public tender had been 'held up to public mockery', as Barwick put it, 'by the submission of identical tenders, in one instance from nineteen suppliers each quoting the quite improbable sum of 27,578 pounds, fourteen shillings and twopence'.[15]

The Attorney-General also made mention of the consumer interest in the legislation, and in listing the potentially harmful effects of various restrictive practices that had come to his attention, he was careful to include the higher prices which consumers might be forced to pay.[16] Yet consumer protection was not central to the philosophy underlying the proposals. 'Consumers do not really form a separate group. Everyone in the community is a consumer at one time or another', Barwick said. 'The community is not divided into separate compartments of manufacturers and suppliers on the one hand, and consumers on the other.'[17] For

Barwick, then, the consumer was somewhat of an abstraction, and consumer protection was more an incidental benefit flowing from his proposals than a fundamental purpose.

A final, very general, benefit of the legislation to which Barwick drew attention was its potential for strengthening the economy. Restrictive trade practices 'tend to remove or to suppress incentive – the incentive to be more efficient, to be more enterprising . . . Restrictive practices and a sluggish economy go together. On the face of it, therefore, as a general proposition, restrictive practices are not conducive to the development of a free-enterprise economy'.[18] But the potential effect of the legislation in this respect was again more an incidental benefit than a motivating purpose; harm to the economy was somewhat remote from the very specific kinds of harm to which the Attorney-General was primarily reacting.

Business attitudes

Barwick's proposals provoked a storm of reaction from business. Four major organised business lobbies found themselves sufficiently in agreement to produce a joint submission to Government opposing many of the fundamental features of the proposed legislation. The groups concerned – the Associated Chambers of Manufactures of Australia, the Associated Chambers of Commerce of Australia, the Australian Council of Retailers and the Federal Chamber of Automotive Industries – represented a wide range of manufacturing, importing, wholesale and retailing interests. In addition to these 'peak' organisations, a number of other influential business groups stated their opposition to the proposals, among them, the Manufacturing Industry Advisory Council, the Metal Trades Employers' Association, the Hardware and Allied Trades Association, the New South Wales branch of the Institute of Directors, the Australian Bankers' Association and the Pharmacy Guild.[19]

Superficially, then, it would seem that on this occasion business exhibited the kind of unity which is usually evident only when governments threaten the foundations of the private enterprise system, as for example when the Labor Government tried to nationalise the banks after World War II.[20]

But of course a number of business interests did stand to benefit from the legislation and expressed themselves in favour of

it, although not nearly as vocally as the opponents. Among those favouring the proposals were various retailer organisations which felt that their members were victimised by distributors – the Queensland Retail Traders' Association, the New South Wales Retail Tobacco Traders' Association, the National Association of Retail Grocers of Australia and the Victorian Automobile Chamber of Commerce, to mention just a few. Individual retail companies also supported the legislation. For example, Franklins, a food chain store, expressed the hope that the legislation would break up a price agreement among chocolate manufacturers which had forced the store to pay high prices for the chocolate it retailed.[21]

Moreover, although the major business organisations expressed opposition to the proposals, this was not necessarily the view of those they claimed to represent. Thus while the South Australian Chamber of Manufactures opposed the legislation, one of its members – a firm of manufacturing engineers – supported it because of a price agreement among the ball-bearing distributors from whom it bought ball-bearings. And a Queensland manufacturer of footballs, although a member of his State's Chamber of Manufactures, supported the idea of legislation because he was excluded from the Victorian market in footballs by the Victorian Sports Goods Federation.

But ACMA simply ignored this diversity of opinion within its ranks. It replied, for instance, to one of its members seeking stronger legislation that it was not the policy of the Chamber to make any representations to strengthen the Act. The diversity of opinion within the ranks of some business organisations was so great, however, that at least one organisation, the New South Wales branch of the Employers' Federation decided that it could neither oppose nor support the legislation.[22]

It is evident, then, that despite the united opposition of leading national business organisations, there was considerable support within the business community for legislation against restrictive trade practices.[23] But it is difficult to characterise the business interests which supported the legislation. The Attorney-General saw his proposals as benefitting small businessmen, as did some small businessmen themselves. However in some circumstances, trade practice legislation favours large corporations at the expense of small and medium business since large corporations can stand

alone whereas it is often in the interests of small business to act collectively to restrict competition. The Franklin chain, for example, was one large business which obviously stood to gain. And in 1971 a discount chain store, Sydney Wide, was able to use the legislation to force a distributor to supply it with Mikasa chinaware.[24]

These examples suggest that perhaps it was retailers who as a group were the principal beneficiaries of the legislation. But again this is inaccurate. While a number of specialised retailer organisations supported the legislation, the major such organisation, the Australian Council of Retailers, did not.

The fact is that the legislation aimed to keep the competitive arena open to new entrants and to prevent established businesses from organising their business environment in such a way as to exclude new or aspiring competitors. It is therefore probably nearest the truth to say that it was the new or expanding business which had most to gain from the proposed legislation, be it a large discount retailer or a small football manufacturer. In as much as new business ventures usually start small, it was the small man who stood to benefit, not simply because he was small, but because he was a newcomer obstructed by the 'orderly marketing' arrangements with which established business protected its interests.

But even this characterisation oversimplifies the complexity of business attitudes. The proposals themselves were far-reaching, with different provisions affecting different interests. Many businesses stood to gain from some provisions and lose from others, making it impossible to characterise them as unreservedly for or against.

This ambiguity of attitude is documented in the case of the Victorian Automobile Chamber of Commerce (VACC).[25] Well prior to 1960, there was a considerable body of opinion within the Chamber in favour of government legislation to protect the small retailer against the continual attempts by large suppliers to assert economic control over them. However, the majority view was that although big business practices were reprehensible, the automobile industry should attempt to solve its own problems without government intervention. In 1960, when the Governor-General announced the Government's intention to legislate, the Chamber re-examined its position and advised the Attorney-General that while it did not seek the introduction of legislation it was not opposed to it in

principle. In addition, the Chamber urged that the particular practices of the big suppliers which it found so objectionable should be banned.

VACC was alarmed, however, by the proposals announced in 1962. In a submission to the Attorney-General concerning the proposals, the Chamber was principally concerned about the possibility that its practice of issuing guidelines to members as to prices they should charge for goods and services might be construed as price fixing and banned as contrary to the public interest. The Chamber was also concerned that the proposals did not explicitly prohibit the practices about which it had previously complained. Thus while on balance VACC supported the proposals, it remained apprehensive about the shape the legislation would ultimately take. No doubt many sections of business and individual businesses responded to the Barwick proposals with similar ambivalence.

Attitudes of other groups

Business was the only group outside the parliamentary arena to voice opposition to the proposals. Other interests supported the Government, the most prominent among them being the primary industry lobby. Ironically, price fixing and other orderly marketing arrangements are the norm in this sector of the economy. But there are good economic reasons for this. Individual primary producers are often in a very weak bargaining position vis-a-vis the large organisations to which they sell, and it is usually only by acting collectively that they can ensure adequate or stable prices for their products. Many of the orderly marketing schemes in primary industry are in fact implemented by marketing boards established by governments. Because the practices of such boards were already controlled by statute, they were explicitly excluded from the scope of the Barwick proposals.

Apparently, therefore, farmers had nothing to fear from any legislation. On the contrary, feeling themselves exploited by agreements among manufacturers which kept the price of farm machinery and pesticides higher than it would otherwise be, they had what amounted to a consumer interest in seeing the proposals enacted. Accordingly, a wide range of grazier, stockowner and other farming organisations expressed themselves strongly in favour of the proposals and pressed for their early implementation.[26]

Labour organisations too, through their parliamentary spokesmen, supported the proposals, arguing only that they did not go far enough. Unions, of course, monopolise the supply of labour and might thus have been caught up in the scheme but for the fact that union activity was explicitly excluded from the scope of the proposals on grounds that it, too, was already regulated by law. Labour could thus support the legislation without reservation, largely on the grounds of consumer protection.

Public authorities also added their voice in support of the proposals, particularly local government associations. Local government in New South Wales was so concerned about the collusive tendering to which it was subject, that it had established a select committee in 1960 to inquire into price fixing among manufacturers supplying power cables to county councils. The committee's report, which appeared in 1961, complained of the lack of any federal legislation covering such practices. Local government officials were thus enthusiastic about Barwick's proposals.[27]

A final group from which the legislation received general support was the press. Admittedly some expressions of editorial opinion were hostile. The Adelaide *Advertiser*, for example, asserted on one occasion that 'Barwick's proposals treat virtually every businessman as a potential criminal' and the *Sydney Morning Herald* opposed the scheme as 'too comprehensive'. However, the *West Australian*, the Hobart *Mercury*, the Melbourne *Age*, the *Australian*, the *Financial Review* and the *Bulletin* all at one time or another gave qualified support to the legislation.

Editorial writers who supported the proposed legislation did so primarily because they saw it as being in the consumer interest. For example, writing on the Trade Practices Bill introduced in Parliament in 1965, the *Australian* declared the consumer to be the principal beneficiary, while the *Age* asserted that the aim of the legislation was 'to protect the (buying) public against the sharp and shady practices in commerce and industry'. According to the *West Australian*, the Bill served notice on manufacturers that 'the public comes first'.[28]

But consumers themselves had little to say. Consumer organisations were in their infancy in Australia and there were no representations made to government by consumer groups.

Conflict in the Liberal Party

The proposed anti-monopoly legislation produced a deep rift within the dominant partner of the governing coalition. Senior Liberals favoured the legislation but a large and vocal group of backbenchers was implacably opposed to it. The argument emphasised most often by those favouring the legislation was the one which Barwick had stressed in talking about his proposals – the need to protect individual enterprises, usually small businesses, from victimisation by other sections of business. In his 1963 policy speech, the Prime Minister, Mr Menzies, expressed this position as follows:

> It is of the essence of competitive enterprise that there should be real competition and that the road to advancement in any business should be open to all. This is the system we wish to protect. Privately imposed restraints which are against the public interest or submit the small trader to oppressive limitations should be eliminated . . . (We shall introduce) in the new parliament a bill to deal with restrictive trade practices and to protect the small trader . . .

Moreover, the Attorney-General at the time of the legislation's enactment, Mr Snedden, had long been on record as sharing this general perspective on the need for government intervention to protect individual enterprises. Following the Governor-General's announcement in 1960, Mr Snedden had headed a small group of Liberals in an informal investigation of restrictive trade practices and had expressed the view to Parliament that there might well be a case for banning two practices – boycotts against individual traders, and collusive tendering, also practised at the expense of individual, albeit usually governmental, enterprises.[29] Several other Liberal members of Parliament also supported the measure as necessary for the protection of small business.[30]

A second argument used by those in the Liberal Party who supported the legislation was that it would preserve the free enterprise system against the threat of socialism. It was clear that the economy was undergoing long-term change and it was feared that, if the trend towards monopoly continued unabated, public opinion might demand far more drastic measures. In Snedden's words:

> As the twentieth century has unfolded, and has developed the concept of control within reason, it has become crystal clear that untrammelled liberty cannot be allowed to disadvantage the majority. Democracy must

> protect itself to survive. Laissez-faire will be replaced either by socialism or control within reason . . . The surrender of absolute freedom in the commercial field, which restrictive trade practice legislation involves, is no more than 'control within reason' . . . The alternative is socialism, which appals me . . . Were [the Labor Party] to draft legislation it would undoubtedly be criminal in nature, absolute in terms and extreme in penalty.[31]

And a future Prime Minister, Malcolm Fraser, expressed the following view:

> [The Labor Party's] solution to the problems the government is trying to tackle would be diametrically opposed to the kind of solution the government would hope to achieve. I believe it would be their intention to let abuses develop until they had an opportunity to build up a case for either nationalization, if that were permitted under the constitution, or a socialist cure of one kind or another which would bring industries much more directly within government control. That is something we certainly do not want to see and something which I believe industry should not want to see. Industry should understand and appreciate the government's motives from this point of view.[32]

Other Liberals expressed similar views, during debate on the 1965 Bill.[33]

Parliamentary opposition to the proposed legislation came, as has been said, not from the official Opposition, the Labor Party, but from a section of the Liberal back bench. At least five back-benchers spoke out against their party leadership on the matter. Some produced detailed arguments against the measure but others rejected it on the general ground that it was an interference with free enterprise. As one said, the legislation is objectionable because 'it opens up the way for unjustifiable intrusion into the normal business affairs of secondary industry and tertiary industry . . . (It) is an intrusion into the affairs of private enterprise . . . Businesses know best what is good for themselves and for the community at large'.[34]

Beyond the federal sphere, State Liberal Party Governments in Victoria, South Australia and Western Australia all expressed themselves opposed to the proposed legislation.

Conflict in cabinet – McEwenism

Major government policy decisions in Australia are usually made by Cabinet. It was thus ultimately for Cabinet to decide whether the Barwick proposals would be modified to take account of

representations by interested parties. Accordingly, the Bill which was finally introduced in Parliament represented 'a very sound decision by the collective wisdom of the cabinet of this government', as the Attorney-General put it.[35]

But this declaration obscures the conflict which is known to have existed in Cabinet over the desirability of anti-monopoly legislation. Some members of Cabinet were on record as favouring such legislation; others, at least two or three according to ACMA, were known to be sympathetic to the Chamber's objections.[36] Chief among these was John McEwen, Deputy Prime Minister and Leader of the Country Party.

Representing as it did Australia's primary producers, the Country Party might have been expected to support the legislation, as at least one Country Party Minister did in debate on the 1965 Bill.[37] McEwen, however, was pursuing other policies. Aware of the gradual erosion of the Party's rural election base, McEwen had for some years been seeking to widen the appeal of the Party, specifically by courting manufacturers. There were, of course, fundamental conflicts of interest between manufacturers and primary producers, most notably over tariff policy. Manufacturers wanted protection from overseas competition and primary producers wanted to be able to buy the industrial goods required for agricultural production in the cheapest markets. Predictably, therefore, sections of the Country Party were unhappy with McEwen's policies. But McEwen's personal prestige and influence was such that he was able to hold his uneasy alliance together.[38]

McEwen's portfolio was trade and, reflecting his policy, the Department of Trade became increasingly involved with manufacturing industry. In 1958, in his capacity as Minister for Trade, McEwen established a Manufacturing Industries Advisory Council (MIAC) consisting of prominent industrialists and serviced by a Trade Department secretariat, to advise him on the needs and wishes of manufacturing industry. MIAC was totally opposed to the Barwick proposals and it is an indication of McEwen's own opposition to the proposed legislation that this body was invited to outline its views to the inner Cabinet.[39]

The somewhat anomolous nature of McEwen's policies is not relevant here. What is important is that he represented a powerful force opposing the Barwick scheme, within Cabinet. Thus, the division of opinion which the Barwick proposals had created

within the society as a whole and within the Liberal Party was to be found even at the highest level of government.

The campaign by vested interests

Following the unveiling of the Barwick scheme a number of organisations made representations to government and obtained interviews with the Attorney-General to express views both for and against his proposals. The groups favouring the proposals appear to have done relatively little lobbying and their views received so little publicity that one Liberal backbench supporter of the 1965 Bill was led to deplore 'the absence of public clamour' for the legislation.[40] By contrast, groups opposed to the legislation mounted an intense campaign, under the leadership of the Associated Chamber of Manufactures of Australia (ACMA), the biggest and most influential of the Canberra based pressure groups.[41]

ACMA did not wait for Barwick to formulate his proposals before beginning its campaign. In August 1960, a few months after the Government's intention to legislate was first announced, ACMA established a standing trade practices committee to formulate its own policy on trade practices legislation and to mobilise public opinion against the Government's intention by publicising 'the national benefits resulting from orderly marketing'. Committee members met with Barwick on at least two occasions and were privileged to be given an outline of the Barwick scheme some months before it was presented to Parliament. Following the presentation of the Barwick proposals in 1962, ACMA, in conjunction with other opponents of the scheme, conducted a seemingly endless series of discussions with Barwick and other members of the Government to ensure that its views were always to the fore.

Apart from making its presence felt as frequently as possible, ACMA adopted a number of specific campaign tactics. Shortly after the announcement of the Barwick proposals, the Chamber's president made a press statement in which he said:

> (ACMA is) not convinced of the need for any legislation and rejects entirely the present proposals as going far beyond what may be necessary to curb practices which can be proved harmful . . . (In any case,) manufacturers have yet to be convinced that there are practices existing that are harmful.

The aim of such public criticism, an ACMA official said privately[42], was to 'compel the government to accept – almost gratefully – major amendments to the existing proposals' which ACMA would suggest. The tactic backfired, however, for a number of newspapers ran editorials critical of ACMA's absolutist stand.

Having condemned the Barwick proposals, ACMA attempted to seize the initiative by proposing an alternative scheme. In a letter to the Prime Minister it recommended a 'tariff board' approach to the problem of restrictive trade practices.[43] The plan was that the Tariff Board, or some similar body, would examine particular cases of restrictive trade practices referred to it by the appropriate Minister. The Board would then recommend action to the Minister who would take the recommendation to Cabinet for a decision. This was the procedure by which decisions on levels of tariff protection for Australian industries were made.

ACMA's partiality for the Tariff Board approach stemmed from the fact that it was McEwen who, as Minister for Trade, was responsible for the Tariff Board. He had already shown himself capable, in tariff cases, of directing the Board to find in favour of manufacturers through the technique of 'writing the policy into the reference'.[44] If restrictive trade practice hearings were held by the Tariff Board, or some similar body under McEwen's direction, manufacturers had little to fear.

The Tariff Board approach involved not just a modification of the Barwick scheme but its total abandonment. The Government, however, was committed to the Barwick proposals, or some variant of them[45], and the suggestion was therefore unacceptable. This ACMA rapidly recognised. Accordingly, the Chamber decided not to press its alternative approach but to concentrate instead on seeking amendments which were consistent with the basic Barwick framework.

ACMA believed that it was important for the success of its campaign that business groups critical of Barwick's proposals present a united front of opposition to the Government. It pursued this strategy on every possible occasion. For example, on the afternoon of 18 March 1963, the Attorney-General was to meet with a number of representatives of commerce and industry, both primary and secondary, to answer questions on his proposals. Earlier that day, several of those who were to attend the afternoon session met together at ACMA's initiative to 'seek to establish

common policy'. Primary industry representatives were not present at this preliminary meeting, presumably because it was recognised that their general support for the legislation made a united front with them an impossibility.

Events arising out of the afternoon meeting with the Attorney-General provide a second example of ACMA's desire to achieve business unanimity. One of the questions raised at the meeting concerned the fact that under the scheme, when an agreement was examined by the tribunal, the onus of proof appeared to be on those engaged in it to justify it. Barwick was able to explain this to the satisfaction of at least one organisation represented at the meeting, the Australian Council of Retailers (ACR). Because of this, ACMA's director subsequently recommended that in the interests of unity with ACR 'ACMA should refrain from further representations demanding that "onus of proof" be placed on the Crown'. Such compromises rapidly led to a common ACMA-ACR policy, despite differences of opinion which might have been expected between manufacturing and retailing interests, and the result was a joint submission to government giving details of amendments sought.[46]

The united front strategy was pursued further and in October, ACMA was able to send to the Prime Minister a submission representing the common views of four major organisations; ACMA, ACR, the Associated Chambers of Commerce of Australia and the Federal Chamber of Automotive Industries. To emphasise the significance of the submission, ACMA's director requested each of the other organisations to write to the Prime Minister confirming that the submission represented its views. The Government was to be left in no doubt about the unanimity of business opposition.

As Minister responsible for the proposed legislation, Barwick was the appropriate member of government to receive submissions. But manufacturing industry recognised that the architect of the proposals could not be expected to view with sympathy its requests for major alterations. Consequently, much of the lobbying activity was aimed directly at the Prime Minister and Cabinet, thus bypassing the Attorney-General. For example, the ACMA-sponsored joint submission of October 1963 was directed to the Prime Minister and on at least two occasions the groups responsible for the submission expressed their views directly to Cabinet. The first of these occasions was at a meeting specially arranged for

the purpose and the second was at one of the periodically scheduled consultations on the economy between the economic sub committee of Cabinet and selected pressure groups.[47]

Manufacturing industry's ability to bypass the Attorney-General was greatly facilitated by the existence within McEwen's Department of Trade of the Manufacturing Industry Advisory Council (MIAC). As mentioned earlier, in September 1963 this body was invited to meet with senior Cabinet Ministers to express its opposition to the Barwick proposals, after which Menzies announced that MIAC's views 'were the most balanced and constructive that we had had presented to us'.[48] So flagrant was this tactic of bypassing Barwick that one observer has seen fit to describe it as consciously aimed at 'subverting the Attorney-General'.[49]

A final tactic employed by ACMA can without doubt be described as subversive in intent. Because of constitutional limitations on the power of the Federal Government to legislate in the area of restrictive trade practices, the Bill, as introduced in 1965, relied for its full effect on the passage of 'complementary' legislation by State Governments. ACMA quickly recognised this for the major weakness it was and wrote to State branches of the Chamber to suggest that they exploit it. The letter read in part:

> [The necessity for complementary state legislation] may, if all States do not agree, cause the Trade Practices Bill to become still born which in the opinion of many people including manufacturers would be in the best interests of the Commonwealth as a whole.
>
> Our thought in writing this letter is to bring to your notice a method of upsetting the proposed legislation through the Sovereign powers of the States to legislate within their own boundaries on matters affecting trade and commerce. According to our reasoning, the Commonwealth should not attempt to dragoon the States into passing complementary legislation after the Bill has become Commonwealth Law, but by persuasion and negotiation and placing all the facts squarely before the States prior to any attempt to obtain approval of the Federal Parliament.
>
> A certain Pro State feeling would require to be aroused. People at the moment are rather apathetic about the Trade Practices Bill because they do not understand it, nor do they know in what manner they may be affected.
>
> If the people could be made to realise that the Commonwealth Government proposed indirectly to rob the States of their Sovereign rights, by the introduction of Federal trade legislation which in some large degree

> affects each State individually, then they could force the Federal Government to drop the legislation and call for a Referendum.
>
> The States could be 'talked into' believing that they have been grossly overridden by the Federal Government because they have not been given the opportunity to study the Bill in all its ramifications and to pass State complementary legislation if they saw fit. They could say the costs of the Tribunals would bear heavily in the States.
>
> **Without appearing to spearhead the attack against the Trade Practices Bill, the State Chambers by quiet propaganda in the right places could induce the Premier of each state to say to the Prime Minister 'call off your Trade Practices Bill until we see what it means to the States'.** (emphasis added)

Most State Premiers needed little urging and in the event only Tasmania passed the requisite complementary legislation. The Trade Practices Act would certainly have been doomed to ineffectiveness had it not been for a subsequent High Court decision which reinterpreted the Constitution as giving the Federal Government far greater power to legislate in this area than it had previously been thought to have.[50]

Business arguments – the appeal to values

The campaign by vested interests against the Barwick proposals was sustained, well organised, and tactically skilful. To a considerable degree it was successful. The Trade Practices Bill introduced in Parliament in 1965 represented a substantial retreat from Barwick's position although it was still much more far-reaching than its opponents would have wished.

To understand why business[51] was successful in some of its representations and not others it will be necessary to analyse the arguments which were made in submissions to government. I shall hope to demonstrate that the success of various business arguments depended largely on the extent to which they were grounded in general values shared by business and government alike.

Opponents of trade practice legislation were normally careful not to argue on the basis of their own self interest. The Victorian Chamber of Manufactures, for example, wrote to ACMA advising it to 'take precautions against giving the impression that it is solely interested in protecting manufacturers' interests and not in

the well being of the public . . . (S)uch an impression could cause opposition to the manufacturers' case, both in ministerial circles and on the part of the public'.[52] A similar concern to avoid the appearance of self-interest led at least one large manufacturer to channel its representations through ACMA rather than directly to the Attorney-General.

Government response to a submission by the Perth Chamber of Commerce suggests that business was correct in its perception that arguments based purely on self-interest would not be favourably received. Typical of many of the points made in the submission was the following transparently self-interested attack on the tribunal envisaged in the legislation.

> Can any tribunal the members of which have (a) no financial investments in an industry and (b) no knowledge or experience of its particular problems, many of which differ so widely in so many different industries, be more able to conduct its affairs more competently than those people who are presently engaged in it, have a life-long experience of the industry and have their major assets invested in it?

To which the Minister who received the submission replied:

> I have read this document and can hardly credit that a body such as yours comprised of responsible members in the Perth business community can genuinely subscribe to the ideas expressed in this document. A great deal of it is demonstrably false. Most comments are intemperate and irrational and it is hard to find any objective criticism. It largely consists of propaganda statements which to say the least are arguable.[53]

For good reason, then, business normally sought to argue on the basis of general values which transcended the immediate interests of the individuals or groups involved. Most prominent among these values was that of orderly marketing. Price fixing, resale price maintenance, restriction of outlets and other such practices, business argued, were all part of the process of orderly marketing and as such beneficial to producers and consumers alike. According to ACMA:

> The practice of resale price maintenance (for example) confers substantial benefits on the customer. It avoids the need to shop around, and prevents individual rapacious retailers selling above the set price. It brings orderly marketing which benefits manufacturer, distributor and purchaser.[54]

A Chamber of Commerce conference resolution echoed this sentiment in the following terms:

> The conference is firmly convinced of the virtue of procedures of marketing in an orderly manner and the way in which they protect the consumer, and therefore recommends to the Commonwealth Government to confine the application of any proposed legislation to practices inimical to the public interest.[55]

A one time president of the Chamber submitted that:

> Without exception (the practices complained of) were justified. These practices were nothing more nor less than orderly marketing in secondary industry and were in the public interest. During the last fifty years I doubt whether there has been a single occasion when the public has been defrauded by any of these practices.[56]

But orderly marketing was not a value with which the Government had much sympathy. It was in fact the principal target of the proposed legislation, as the Attorney-General made clear in introducing the Bill to Parliament.

> The purpose of this Bill (he said) is to preserve competition in Australian trade and commerce to the extent required by the public interest. Competition is an essential ingredient of any free enterprise economy. In Australia there has been a tendency for some years for businesses to be conducted on a non-competitive basis in a number of important respects. This non-competitive form of trading is commonly referred to as 'orderly marketing', under which the terms and conditions on which businesses are conducted in an industry are determined by anti-competitive agreements or practices, designed to serve the interest of the members of the industry itself, or of some of its members, without necessarily having regard to what is, or is not, desirable in the interest of our community as a whole.[57]

Orderly marketing, then, was the very antithesis of the value which the Government sought to promote – competition. Accordingly, any appeal to it as an argument for abandoning the proposed legislation was bound to be ineffective.

Another attitude which was widespread among businessmen was that the legislation was unjustified because it was an interference with free enterprise. According to the director of the NSW Chamber of Manufactures:

> (The proposals create the requirement that) even businesses of modest scope must hold government licences to continue operations. You must

> secure registration, and if registration is refused you put the shutters up. This is an extraordinary condition for the Government to create, for its electoral policy was the advancement of free enterprise . . .[58]

But the Government rejected this argument although it was firmly committed to the value of free enterprise. Its ability to do so stemmed from an ambiguity in the concept of free enterprise itself. Government saw the legislation as promoting free enterprise because it promoted competition; business saw it as interfering with free enterprise because it restricted the right to enter into contractual arrangements, for example, to fix prices. Barwick recognised these 'two "liberal" principles – freedom of trade and competition on the one hand, and freedom of contract and association on the other – (as) principles which are in fundamental and continuous conflict with each other for ideological mastery of a "free" or "open" industrial society'. He argued that it was necessary to curtail one for the sake of the other. Restrictive trade practice legislation was intended to curb freedom of contract for the sake of freedom of competition. Other Liberal Party spokesmen made the same point.[59] The Government was thus on firm ideological ground in rejecting any appeal by business to the value of free enterprise as a justification for abandoning its legislative proposals.

One argument sometimes made in submissions to government involved an appeal to fairness. Statutory primary produce marketing boards, whose function is to intervene in the free operation of the market and stabilise prices in such a way as to ensure a reasonable return to producers, were exempted from the legislation, as were anti-competitive practices in relation to employment, such as uniform wage fixation by arbitration and union monopolisation of the supply of labour. If anti-competitive practices were allowed in these areas of the economy, why not in secondary industry? 'It would be unfair (ACMA claimed) to subject secondary industry to a harsher form of treatment to that accorded to the various primary industries'.[60] And a Chamber of Commerce submission made the following sarcastic comment:

> (Supporters of the legislation) whole-heartedly agree with the fixed margins of income for employees but disagree with the same principle being applied to the industry in which they are employed. They also agree in monopolistic legislation for primary products but not for secondary products. They say that there should be orderly marketing for raw pineapples but not for the canned product.[61]

There were, however, political reasons why such an argument was bound to be ignored. The Liberal Party depended on the support of the Country Party to govern and could not have enacted legislation contrary to the interests of primary producers. As for employment practices, it is obvious that any attempt to legislate for a totally free labour market would have provoked industrial chaos. But in any case, the Government was not convinced by the appeal to fairness. Statutory marketing boards and employment conditions were already regulated by law, and anti-competitive practices which existed in these areas could thus be presumed to be in the public interest.[62] Subjecting the anti-competitive practices of secondary industry to similar legislative scrutiny and control was thus perfectly equitable.

The values discussed so far, if accepted by the Government, would have required the virtual abandonment of the proposed legislation. The Government was thus obliged to repudiate them, or at least to deny the particular interpretation placed on them by business, as indeed it did. But business quickly realised the futility of asserting values which, in the context, were directly antithetical to those of the Government, and most of the arguments made to government in submissions were based on a secondary set of values which implied nothing about the desirability or otherwise of competition but had to do with the manner in which the Barwick scheme was to be implemented. Prominent among them was the view that it was inappropriate to treat any kind of business behaviour as criminal.

The Barwick scheme proposed a system of examination under which most restrictive practices would be legal unless and until they were examined by a tribunal and found to be contrary to the public interest. Only then would they be prohibited. Four practices, however, were to be directly banned by the legislation and subject to criminal prosecution: collusive bidding; collusive tendering; monopolisation; and persistent price cutting at a loss to drive a competitor out of business. These practices were felt to be inherently harmful and incapable of justification before a tribunal. They were thus to be illegal *per se*, regardless of the circumstances.

Business was horrified that any of its practices should be regarded as 'inexcusably unlawful'. Time and again submissions to government made the point that 'no trade practice should be condemned *per se*'. The argument was that there were circumstances

in which each of the practices concerned might be justified.

But behind this argument was the strongly held conviction that regardless of the detriment caused by any particular business practice, businessmen were not by nature criminals and it was therefore inappropriate to stigmatise any business practice as criminal or to seek to prevent it with criminal sanctions. As one business leader said: 'The criminal aspects are repugnant to us . . . An employer accused of these practices could be charged in a criminal court without any right of justification and if found guilty, jailed or fined'. It was obviously beyond this man's comprehension that a government might view certain trade practices as reprehensible and seek to apply sanctions against those who engaged in them. A second business leader said: 'This is a savage application of the concept of crime and the stigma of criminality', and a third deplored the fact that 'the scheme will create a new brand of criminal law with every businessman an unwitting and potential criminal'.[63] The director of ACMA had this to say: 'ACMA contends that no trade practice should carry a criminal taint. If a practice is to be declared unlawful then the appropriate action is an injunction in restraint'.

The implications of this last comment need to be drawn out a little. Much of America's antitrust legislation, though prohibiting various business practices, does not provide specific penalties for violations. The authorities must therefore rely on other enforcement techniques. One such technique is to issue the offender with a 'cease and desist' order or a court injunction restraining him from continuing or repeating the offence. Violation of this order or injunction renders the offender liable to punishment, not for the practice itself, but for contempt of court. Court hearings which result only in cease and desist orders or injunctions are usually conducted using rules of evidence and standards of proof which are appropriate in civil cases but not criminal; they are civil rather than criminal proceedings. One of the consequences of this is that convictions in such proceedings are not recorded as crimes.[64] So by using the injunction as a method of enforcement, not only are violators effectively given a second chance but they also avoid the criminal taint, about which ACMA's director expressed concern.

It must be recognised that, in arguing as it did, business was voicing an attitude which is held widely throughout society.

Violations of law designed to regulate business activity are usually felt to be not as grave or as harmful as violations of traditional criminal law. In one sense this is certainly true. The consumer may be the victim of a price fixing conspiracy without being aware of it, whereas the individual victim of burglary may suffer substantial loss and emotional turmoil. On the other hand, the total financial cost of white collar crime is orders of magnitude greater than that of conventional crime: a single price fixing conspiracy among 29 companies supplying electrical equipment to public utilities in the United States is estimated to have cost the public more money than is reported stolen by burglars in an entire year.[65]

But quite apart from any 'logical' argument about the relative seriousness of white collar crime is the fact that businessmen do not conform to the popular stereotype of the criminal as a virtual social outcast, belonging to the lowest stratum of society. 'Typical businessmen in appearance, men who would never be taken for lawbreakers' was the way one newspaper reporter described the defendents at the electrical equipment conspiracy trial.[66] It was the general social perception that businessmen are not the criminal type which underlay the protest of Australian businessmen against the treatment of any of their practices as criminal.

Moreover, the Government generally, and Barwick in particular, shared this attitude. On one occasion Barwick told his audience: 'All of us would agree that so far as the businessman is concerned it is better that there be a minimum use of the criminal law'.[67] And in his parliamentary statement he said: 'I do not think every breach of legislation in this field should brand the businessman a criminal. No doubt there are some events in which there must be a criminal penalty for breach of the law, but this should not be the general consequence'. Indeed the reason the Government gave for introducing new legislation rather than reinvigorating the old Australian Industries Preservation Act was that the old legislation was based on a 'criminal form of control' over industry which, it was felt, was 'not desirable'.[68]

Thus, in arguing that no business practice should be condemned *per se*, business was appealing to government on the basis of a value which the Government itself espoused. Moreover, the argument could be accepted without condoning the practices in question, for the alternative was to treat them, like the other practices covered by the legislation, as examinable and subject to

cease and desist orders in particular cases found contrary to the public interest. The Government could thus afford to accede to business demands without abandoning altogether its legislative intent.

It is not surprising, therefore, that the 1965 Bill departed substantially from the Barwick proposals in this matter. Almost all the practices which Barwick had intended to condemn *per se* were treated as examinable in the final legislation. The only exceptions were collusive tendering and bidding not done subject to an agreement registered with the Government. Since most collusive tendering and bidding was carried out as part of a continuing agreement among the parties, and could thus be registered like any other restrictive trade agreement, this meant that for the most part collusive bidding and tendering too would escape *per se* prohibition.

I have argued here that the virtual elimination of *per se* offences from the legislation reflected the Government's view that it was inappropriate to treat businessmen as criminals. This is not intended as a judgment on the validity or otherwise of the claim by business that there were circumstances in which every business practice might be justified, and that therefore no business practice should be prohibited *per se* without allowing those engaged in it an opportunity of justifying it in particular cases.

The fact is, however, that other governments have not been persuaded by this argument. The United States has long treated predatory pricing and other forms of monopolisation as *per se* offences and the Australian Labor Government followed suit in its 1974 Act. In 1965 the Victorian Government banned collusive tendering and bidding. Evidently, not all governments are responsive to the argument that every restrictive business practice may be justifiable in certain circumstances.

We cannot, therefore, simply invoke this argument to account for the Liberal Government's retreat from *per se* offences. The real determinant of the Liberal Government's behaviour in this respect was its reluctance to treat businessmen as criminals and its consequent vulnerability to the steady stream of business representations pointing out that this was exactly what it was proposing to do.

A second value to which business appealed with considerable success was the importance of avoiding an anti-business, pro-

consumer bias. Government spokesmen indicated on various occasions that the proposed legislation was designed to regulate business, for the benefit of all concerned and was certainly not intended to promote the consumer interest at the expense of business.

Yet it was possible to interpret Barwick's proposals as having that intent. As well as setting up a tribunal which would determine whether trade practices were contrary to the public interest, the proposals also defined the public interest in considerable detail by specifying a number of ways in which a business might seek to justify its restrictive practice. One of these was by showing 'that without the restriction, the public, as consumers, would be denied specific and substantial benefits and advantages' (emphasis added). Business resented this specification of public interest as consumer interest and argued that the wording should be widened 'so as to embrace the interests of all sections of the community – consumers, employees (and) shareholders – and in addition should be widened so as to allow industry to argue its own health and stability for this certainly must be in the public interest'.[69]

The Government was predisposed to accept this view and the result was that in the final legislation the public interest was specified to include the needs and interests of consumers, employees, producers, distributors, importers, exporters, proprietors, investors and small businessmen. In addition, the legislation listed numbers of other criteria concerned with the health of Australian industry which could be used to justify a practice. This was clearly a substantial modification representing, according to many commentators, a major weakening of the Barwick proposals and a tribute to the effectiveness of business lobbying. Yet it was possible only because business perceived and was able to exploit the Government's sensitivity to any accusation of anti-business bias.

Two other values to which business appealed successfully concerned administrative details. The first of these was the need to avoid placing any unnecessary administrative burden on business. Barwick himself had admitted the 'undesirability of business being deflected from its task by the need to accommodate itself to, or to avoid, constant suspicion, investigation and inquiry'.[70] Recognising this as a point of leverage, business complained bitterly about the burdensome nature of the legislation, and in

particular, about the difficulties businessmen would face in registering all of their restrictive practices. The Attorney-General admitted that he was partially convinced of the validity of this argument.[71]

The result was that, in the final legislation, the requirement that all restrictive trade practices be registered was limited to so-called multi-lateral practices; bilateral and unilateral practices remained examinable, should the tribunal choose to deal with them, but not registrable.[72] In this way the paper work required of business was considerably lessened.

It is noteworthy that business had argued that unilateral and bilateral practices should be eliminated from the scheme altogether in order to minimise the burden. As the ACMA-sponsored joint submission put it:

> There are many thousands of such agreements made in the ordinary course of business in day to day transactions and their elimination from the scheme would greatly reduce its scope and so relieve the business community of the harassment and administrative burden of having to examine and register a very large number of arrangements which are not contrary to the public interest.

However, the Government recognised that the burden was a consequence of the blanket requirement of registration and not of the fact that some of those practices would be examined by the tribunal. It was thus able to meet business's objection, with which it sympathised, without accepting the solution proposed by business that a whole range of practices be excluded entirely from the scope of the Act.

The second value relating to the way the Act was to be administered concerned the need for certainty as to exactly which practices were within the scope of the Act. Business required certainty so that it could plan for the future without fear of unexpected legal consequences. Barwick referred to this frequently. One of the main aims of his scheme, he said, was to provide 'certainty for businessmen as to what they may or may not do'.[73] 'A businessman, in doubt as to whether what he does or proposes to do (is legal, can) protect himself . . . by registering his practice. He thus achieves certainty.'[74]

But business submissions pointed out that the businessman still had to live with the possibility that his practice might at some future date be examined by the tribunal and declared unlawful

thenceforth. The Government agreed that this could inhibit business initiative and so accepted a request by business for a 'clearance' procedure whereby restrictive practices associated with proposed new investment could be examined beforehand and, if found acceptable, 'cleared', thus enabling the investment to go ahead without fear of legal interference at some future date.

Less successful was an ACMA argument that the need for certainty required the total abandonment of the proposals because of doubt as to the constitutional validity of federal legislation against restrictive trade practices. ACMA's argument was that such legislation was 'likely to draw extensive legal challenge which will add greatly to litigation costs, uncertainty and apprehension'. But it was clear that any such uncertainty would have been the responsibility of business alone for business was under no obligation to challenge the legislation. Government spokesmen therefore felt no need to respond to this particular appeal.

Another administrative matter on which business sought to influence government concerned the powers of the registrar, the official with whom details of restrictive agreements were to be registered and who, on the strength of this information, would be empowered to initiate proceedings before the tribunal. ACMA warned of the 'danger of the legislation, if enacted, being pursued with unwarranted and undesirable zeal' and suggested that 'to overcome the danger of the registrar becoming over-zealous, ACMA believes that the registrar should have no right to initiate proceedings as a result of his own investigations'.[75] But this was not an appeal to any value with which the Government might have been expected to sympathise and was in fact no more than a self-interested attempt to limit the effectiveness of the legislation. Accordingly it went unheeded.

One other value to which business appealed, the desirability of economic growth, is of interest because of its special relationship with the value embodied in the legislation, competition. It will be remembered that one of the reasons Barwick gave for introducing his proposals was that restrictive trade practices tend to hinder the development of the economy and that by attacking these practices his legislation would promote economic growth. From this point of view competition was not an end in itself but a means to the goal of economic growth. In a sense it was a subsidiary value. It followed from this that in any cases of conflict between the values

of competition and economic growth, economic growth should take precedence.

Business was able to utilise this situation to convince the Government that it should not seek to legislate against mergers as was proposed in the Barwick scheme. Its argument was that mergers were often for the purpose of achieving greater efficiency through increased scale and rationalisation of operations. Mergers thus promoted economic growth rather than retarding it. The Government accepted this argument and, principally for this reason[76], decided to abandon Barwick's original intention of controlling mergers and takeovers.

It should be mentioned that one of the reasons Barwick had given for wanting to control mergers and takeovers was that when firms are prevented from entering into agreements to limit competition among themselves, they can achieve the same effect by merging into a single firm. Thus legislation which aims to control anti-competitive agreements must also encompass mergers and takeovers.

This became obvious after the first decision of the Tribunal against an anti-competitive price agreement, when various of the companies concerned merged, thereby defeating the Tribunal's intention.[77] Confronted with this evidence of what Barwick had foreseen, the Government belatedly introduced proposals for the control of mergers and takeovers in 1972. But in 1965, by appealing to the value of economic growth, business was able to open up a major loophole in the Act.

Other modifications

Not all the modifications to the Barwick proposals were the result of appeals by business to values shared by government. At least two restrictive practices falling within the scope of the Barwick scheme were excluded from the final legislation, apparently because business was able to persuade the Government that there was simply no argument for including them since they resulted in no significant harm to any section of the community. In a sense, of course, this involved an implicit value appeal: practices which are harmless ought not to be subject to legislative control. But this value could only come into play because business was able to convince the Government that the practices concerned were

indeed harmless. This was the crucial determinant of the Government's decision to exclude the practices from the scope of the Act.

The first of the practices excluded in this way was resale price maintenance (RPM). Under a system of RPM, manufacturers specify to retailers the price at which their articles are to be sold. The price is usually set in consultation with retailers, sometimes at such a level as to enable the least efficient retailers to stay in business. Manufacturers, wholesalers, and retailers all benefit from the system. Admittedly, RPM does operate to the disadvantage of high turnover discount houses which seek to increase the volume of trade by cutting profit margins, but the development of discount houses was in its infancy at the time and it can be presumed that business representations were virtually unanimous in their condemnation of the Government's proposals to regulate RPM.

Moreover, business argued strongly that RPM was in the consumer interest for it enabled retailers to make sufficient profit to sustain services to customers such as the fitting of shoes, the provision of a complete range of stock, and the delivery or installation of certain types of commodities. Consumers themselves were not well organised and there was no one to call attention to the higher prices which customers are forced to pay as a result of RPM. There was in short no significant dissent from the business view that RPM benefitted all sections of the community and the Government accordingly dropped it from the list of practices to be controlled.

A second practice dropped was that of 'exclusive dealing', the essence of which is an undertaking the reseller gives the supplier not to handle the goods of any competing supplier. In return, the supplier may agree to grant the reseller the sole right to distribute his products in a particular area. Although it has not been possible to examine any business submissions on this point, it is probable that the Government was persuaded that, provided the supplier was not in a monopolistic position, in which case such agreements were covered by the monopolisation provisions, exclusive dealing resulted in no significant detriment to any section of the community and so ought not to be included within the scope of the Act.

The reasoning was somewhat different in the case of one parti-

cular instance of exclusive dealing, the tie-up between petrol stations and their supplying companies. Service stations are often the property of the petroleum company and are leased to the operator for the purpose of selling the company's products. The rights of private property were thus involved and the Government felt that the companies concerned had a proprietorial right to prevent service station operators from selling the products of competitors. (However, proprietorial rights were not so extensive as to allow the petroleum companies to require their service station operators to sell other specified products. The oil company practice of compelling retailers to sell the tyres, batteries and other motor accessories of nominated companies remained within the scope of the Act).

Of the many changes made to Barwick's scheme, only one can be fairly clearly identified as having been made for reasons of political expediency, that is, without regard to the merits of any arguments involved and aimed simply at appeasing important sectional interests. The Barwick proposals had excluded from their ambit the practices of primary produce marketing boards established by statute, on the grounds that such practices were already subject to statutory control. Primary produce marketing bodies established by the producers themselves, without government sponsorship, remained within the scope of the proposals. This aspect of the scheme remained unchanged in the Bill introduced in Parliament in 1965.

It may be surmised that it was only at this point that farming interests and their parliamentary representatives really became aware that not all their practices were to be excluded from the scope of the Act. The result was a last minute amendment to the Bill introduced by the Attorney-General to allow the Government to make regulations at any time to exempt groups of primary producers from the operation of the Act. The effect of this amendment was seen in 1967 when regulations were introduced to exempt five primary producing organisations and an association of fruit canners.

The exemption of the canners was particularly controversial. The press argued that canning was a secondary industry and therefore not entitled to exemption under the regulations, regardless of the circumstances, and the National Association of Retail Grocers opposed the exemption on the grounds that the activities of the

canners discriminated against small independent grocers and should be subject, like other trade association practices, to examination by the Trade Practices Tribunal for determination as to whether they were contrary to the public interest.[78]

In justification of its decision the Government argued that the canners were involved in the marketing of primary produce and that the stability of the fruit growing and marketing industry was sufficiently important to warrant explicit parliamentary approval of the restrictive practices involved. It is certainly true that there are sound economic arguments for many of the orderly marketing practices found in primary industry. However, it was clearly the Government's original intention that such arguments be subject to evaluation by the Trade Practices Tribunal, except where the practices concerned were already controlled by statute. The last minute amendment which made possible the exemption of all primary produce marketing organisations must thus be seen as a relatively unprincipled capitulation to Country Party interests.

One other substantial modification to the Barwick proposals must be mentioned, although it has proved impossible to gain any information on why it was made. The original proposals provided for the registration of restrictive agreements in relation to the provision of both goods and services; in the final legislation only agreements in relation to goods were registrable. Thus, for example, restrictive practices in connection with banking services were not required to be registered. It is known that the Australian Bankers Association made representations to the Government but the details of those representations have been kept secret and it has not been possible to investigate how the Government was persuaded to exempt such an important area of business activity from the requirement to register restrictive agreements.

The role of values in weakening the Act – a summary

As we have seen, business normally argued on the basis of general values rather than on self-interest. It is true that those values were consistent with self-interest and since a distinction is being made here between value and interest it is perhaps worth indicating briefly the sense in which the values concerned actually went beyond self-interest. Some, such as the values of economic growth and orderly marketing, were said to be in the public interest; that ...

is, in the interests not just of business but of the community as a whole. Others, such as the unfairness of controlling the restrictive practices of secondary industry while condoning those of labour and primary industry, involved a moral or normative element. Still others combined both. Free enterprise, for example, tended to be asserted both as an ethical imperative and as being in the public interest. Whichever the case, it is this quality of going beyond particular self-interest that forms the basis of the distinction between interest and value in the present context.

The conclusion which emerges from the preceding sections, then, is that business representations were successful to the extent that they were based on values shared by the Government. The non-criminal nature of businessmen; the need for certainty in the law; the importance of not burdening business; the need to avoid any anti-business bias in the legislation; and the desirability of economic growth were all values which the Government accepted from the outset. By appealing to them, business was able to achieve major modifications in the legislation, some of which weakened it substantially. Certain other values, orderly marketing and free enterprise (as interpreted by business), were inconsistent with the Government's objective of promoting competition, and business achieved nothing by stressing their virtues. Similarly unsuccessful were representations based purely on self-interest, such as the criticisms of the tribunal by the Perth Chamber of Commerce and the attempt by ACMA to limit the powers of the registrar.

There were however some exceptions to this pattern. For instance, the critical factor leading to the exclusion of RPM from the scope of the legislation was the absence of any complaints about its practice and the consequent ability of business to convince the Government that RPM was detrimental to no section of the community. And again, the amendment giving the Government the power to exclude all primary produce marketing organisations from the scope of the Act was not the result of any appeal to values but of a capitulation to rural interests made necessary by the power they wielded in Parliament.

Because of difficulties in obtaining access to government records, the information on which this analysis is based is far from complete and there are no doubt further instances of modifications made to the Barwick proposals for other than value-related

reasons. Nevertheless it is generally true that the crucial factor determining the success or otherwise of representations by business was its ability to identify and argue on the basis of values shared by the conservative Liberal-Country Party Government.

Safeguarding capitalism

Analysis so far has shown that the legislation is not readily identifiable with any sectional interest. True, the Act protected the interests of individual businesses attempting to establish themselves or expand in ways that defied traditional orderly marketing arrangements, and a number of disparate groupings did stand to gain on balance from its enactment. But these various beneficiaries had little in common other than that they were disadvantaged or hindered by the restrictive practices of others. To assert, however, that the beneficiaries of restrictive trade practice legislation are those who are inconvenienced by restrictive trade practices is tautologous.

If my introductory proposition that legislative enactments represent the interests of certain groups is to be given substance in the present context, we need to be able to specify the beneficiaries in a somewhat less tautologous fashion. This is best done by examining the **potential functions** of the legislation – the consequences which might have been expected to flow from it had it operated effectively. (It should be recognised that in practice the Act was largely ineffective, mainly because of constitutional difficulties and the very cumbersome enforcement procedures it relied on. In any case it was replaced by more stringent legislation before it had had time to work).

It can be argued I think that, potentially, the over-arching function of the Act was to protect the free enterprise system as it existed in Australia from various factors endangering its stability. Several of the Government's reasons for introducing the legislation were consistent with this function. The effect on inflation, for example. Unchecked, inflation can destroy business and consumer confidence and strengthen the hand of those advocating alternative socio-economic systems. Legislation which promotes competition, and thus productivity, aids the fight against inflation and thereby contributes to the stability of the system.

Related to this was Barwick's argument that restrictive trade

practices are conducive to a sluggish economy. A system which fails to deliver the goods, or more accurately fails to deliver them in ever-increasing quantities, might well be called into question. For this reason too, legislation which promotes economic growth serves to safeguard the system against radical social change.

Again, one of the more obvious functions of the legislation was the protection of individual traders who fell victim to the restrictive practices of others. For Barwick this was its principal purpose. Traders subjected to collective boycotts suffered an injustice and, in the name of justice, deserved protection from the practices concerned. But it can also be argued that preventing such injustice protects the free enterprise system against potential social disruption. The allegiance of voters to free enterprise parties depends in part on their belief that the system is one in which an individual with initiative can succeed. If small traders trying to establish themselves are squeezed out by the unfair practices of those already established, this belief might be called into question and the system itself threatened. This argument was put very clearly by one supporter and subsequent administrator of the legislation who wrote as follows:

> If monopolists or other commercial interests are allowed to prevent other citizens from entering trade and commerce, they perpetrate a major social injustice; widespread injustice leads to widespread discontent, and to disillusionment with free enterprise as a socio-economic system. From then on, social and political changes can be needlessly sudden and ill-considered.[79]

The beneficiaries of the 1965 Act, then, were simply the beneficiaries of the free enterprise system, namely, the owners of capital. Of course other groups benefit from the free enterprise system as it exists in Australia, but these would continue to do so in almost any alternative socialist system. The salaried managers of large-scale enterprises are well off whether the enterprise is privately or publicly owned and a privileged professional class exists in almost all socialist societies. The private ownership of capital, however, would be severely curtailed if not entirely eliminated under such alternative arrangements. For this point of view, property interests – by which I mean, more specifically, owners of productive or income-generating property – are the real beneficiaries of the free enterprise system and so of any legislation which potentially strengthens it.

It should perhaps be made clear that in specifying property interests as beneficiaries of the existing system and hence the Act, we are not committed to the existence of a clearly delineated property-owning or capitalist class. Any one individual may combine various interests; he may be simultaneously a shareholder and employee of a company and a consumer of its products. The extent to which a particular individual can be said to be a member of a capitalist class is a variable, with only the small minority whose income is derived predominantly from the ownership of capital clearly identifiable as capitalists.

With these provisos in mind, the 1965 Trade Practices Act can be interpreted as restraining the behaviour of certain propertied interests for the benefit of property as a whole. It was the interests of capital as a whole and not the interests of any particular section of it which found expression in the law.

In asserting that the Act served the interests of property I am not claiming that it can be explained as a conscious attempt by government to protect those interests. We saw earlier that Government members were well aware of the system-safeguarding function of their legislation and regarded this as one of its purposes. But this does not amount to an explanation of why the legislation was enacted.

Nor am I asserting that the Government was led by forces over which it had no control to enact legislation favourable to propertied interests. On the contrary, the Government exhibited a marked degree of independence from all the forces which were brought to bear on it. The Act did represent a compromise, but not between competing interests. It was a compromise between the competing values espoused by the Government. It is a measure of the Government's relative autonomy from particular interests that it was able to enact legislation expressing a fundamental value to which it was committed – competition – and to accept or reject representations made to it on the basis of other values to which it subscribed.

There is a crucial qualification which must be made to the preceding comment. As we have seen, the Government was not free to ignore the interests of primary producers and in fact capitulated to them on the issue of non-statutory primary produce marketing boards. The Liberal Party's ability to govern depended on a coalition with the parliamentary representatives of rural

interests and this constituted an over-riding political factor limiting the Government's independence of action. Minor though this limitation was in the circumstances, it does highlight the fact that the Government's freedom to enact the kind of legislation it judged best and to accept or reject representations as it saw fit, was contingent on the absence of any political pressures perceived to be irresistible. Had the political circumstances been different the Government might well not have been free to follow its own inclinations to the extent that it did. The contingent nature of the independence exhibited by the Government in relation to its 1965 Act is further emphasised by the fact that in 1971 if felt constrained to over-ride a previous judgment and amend the Act so as to prohibit resale price maintenance, as we shall see in the next chapter.

Explaining the Act

The Trade Practices Act of 1965 cannot be adequately explained as a response to the interests which it in fact represented. It was neither forced on the Government by property-owning interests, nor was it simply the result of a desire on the part of Government to protect those interests. Its explanation is, I think, more complex, involving two stages: first an explanation of why, in 1960, the Government took the decision to legislate; and second, why, having taken that decision, it proceeded, despite changed circumstances and strenuous opposition, to enact legislation in 1965.

The decision to legislate was taken as a result of a number of factors which happened almost fortuitously to coincide. The Government was under strong pressure to take some action against inflation and in taking such action it felt constrained, in order to buy industrial peace, to move against price as well as wage increases. Moreover, Country Party Ministers were concerned about restrictive practices in the wool industry which were operating to the disadvantage of growers. These factors, coupled with the enthusiastic advocacy of trade practice legislation by the then Attorney-General, Garfield Barwick, prompted the Government's decision to legislate.

The Government's other anti-inflationary policies soon had their effect and the inflation rate declined dramatically in 1961 removing much of the original impetus for trade practices legisl-

ation. But the wheels were already in motion. Investigations by the Attorney-General and his department and indeed by parliamentarians themselves generated a considerable amount of information on the extent of restrictive practices and of their harmful effects, particularly on individual businesses and on government. Moreover, following the Government's announcement, restrictive trade practices became a matter of public debate.

Government members consequently became increasingly aware of the social injustice which restrictive practices entailed and of the way in which such practices contravened basic liberal principles. Some came to the view that the social discontent caused by these practices could jeopardise the whole free enterprise system and that the legislation was therefore necessary in order to safeguard the system against radical social change.

Thus the interest in restrictive trade practices which had been aroused by the Government's decision to legislate, in turn generated new motivations which to a large extent superseded the motives for the original decision. No longer was the legislation seen as a necessary anti-inflationary measure. It was now seen as a matter of upholding basic values – social justice, competition and free enterprise. The decision to legislate stimulated a new concern to uphold the values violated or threatened by restrictive practices and it was this new concern which accounts for the Government's perseverance with the course of action it had announced.

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1. See J.E. Richardson, *Introduction to the Australian Trade Practices Act* (Hick & Smith, Sydney, 1967), pp.24-27.

2. G. Barwick, 'Australian Proposals for Legislation for the Control of Restrictive Trade Practices and Monopolies (a Table of Practices)'. Accompaniment to his 1963 Wood Memorial Lecture, 'Trade Practices in a Developing Economy'.

3. G. Sawer, 'Controlling Restrictive Trade Practices', *Management Report* (May 1961).

4. *Sydney Morning Herald*, 9 March 1960.

5. The *Age*, 1 March 1960.

6. 1961 policy speech.

7. Associated Chamber of Manufactures of Australia (ACMA), internal memo, 16 January 1961.

8. The Government of the day was the conservative Liberal-Country Party coalition. The Prime Minister and most of the Cabinet were drawn from the Liberal Party, the larger of the coalition partners.

9. *Sydney Morning Herald*, 9 March 1960.

10. The proposals were actually read to Parliament by the Acting Attorney-General, Mr Freeth, on 6 December 1962. *Commonwealth Parliamentary Debates* (CPD) H. of R.37, pp.3102-3113.

11. The so-called TBA agreements. See the proceedings of a seminar on restrictive trade practices held by the Victorian Employers Federation on 30 April 1964, p.9.

12. 'Trade Practices in a Developing Economy', *op. cit.*, p.10; Adelaide *Advertiser*, 30 May 1963, p.3.

13. 'Trade Practices in a Developing Economy', *op. cit.*, p.11.

14. CPD H. of R.28, p.720.

15. 'Trade Practices in a Developing Economy', *op. cit.*, p.2.

16. 'Australian Proposals for Legislation for the Control of Restrictive Trade Practices and Monopolies (a Table of Practices)', *op. cit.*

17. 'Trade Practices in a Developing Economy', *op. cit.*, p.11.

18. *ibid.*, pp.12, 14.

19. Much of this information is taken from the files of ACMA and ACCA. See also W. Pengilley, Price Fixing Agreements, M.C. thesis, University of Newcastle, 1972.

20. See R.W. Connell and T.H. Irving, 'Yes Virginia, There is a Ruling Class', in H. Mayer & H. Nelson (eds), *Australian Politics: A Third Reader* (Cheshire, Melbourne, 1973).

21. For QRTA, see *Courier Mail*, 31 January 1967; for NSWRTTA, see *Australian*, 21 May 1965; for NARGA, see A. Hunter, 'The Australian Monopolies Legislation', in T.N. Robertson (ed.), *Monopolies and Management* (Cheshire, Melbourne, 1964), p.21; for VACC, see footnote 11; for Franklins, see *Sydney Morning Herald*, 14 September 1965.

22. Unless otherwise indicated, information about ACMA activities and attitudes is taken from ACMA files and will not always be documented in detail. For NSWEF, see *Sydney Morning Herald*, 21 May 1965.

23. It should also be recognised that while various groups spoke forcefully both for and against the legislation, most businessmen paid little attention to the matter. In 1971 when stronger legislation was being discussed, the NSW Chamber of Manufactures surveyed its members on their attitudes to the proposals. Only three percent responded to the questionnaire mailed to them. There is no reason to think that the general level of concern among businessmen would have been dramatically different prior to the introduction of the 1965 legislation.

24. Commissioner of Trade Practices, *6th Annual Report 1972-1973*, p.16.

25. Proceedings of the Victorian Employers' Federation seminar, see footnote 11.

26. For example, National Farmers Union, *Daily Telegraph*, 8 November 1963; Woolgrowers and Graziers Council, *Financial Review*, 19 March 1963; South Australian Stockowners Association, Adelaide *Advertiser*, 23 April 1963.

27. *Sydney Morning Herald*, 8 December 1962.

28. *Advertiser*, 20 August 1963; *Sydney Morning Herald*, 21 August 1963; *West Australian*, 22 August 1963, 22 May 1965, 2 December 1965;

Age, 22 February 1963, 4 May 1965, 30 August 1965; *Mercury*, 16 February 1963; *Australian*, 4 June 1965; *Bulletin*, 29 May 1965.

29. CPD, H. of R.28, pp.718-22.

30. For example, Bowen, CPD, H. of R.49, p.3243; Fox, CPD, H. of R.49, p.3279.

31. CPD, H. of R.36, p.422.

32. CPD, H. of R.49, p.3299.

33. For example, Bowen, CPD, H. of R.49, p.3247.

34. Whittorn, CPD, H. of R.49, pp.3269-71. Dissent was also expressed by Haworth, Buchanan, Wentworth and Killen, CPD, H. of R.49, pp.3247, 3251, 3310, 3334.

35. CPD, H. of R.49, p.3354.

36. Menzies had supported anti-monpoly legislation in various public speeches. McMahon chaired a Liberal Party policy research group in 1960 which recommended 'effective' legislation against exploitation by monopolies and harmful restrictive trade practices (The *Age*, 5 July 1960). The ACMA claim is made in minutes of an ACMA Executive Meeting, 27 February 1964.

37. Sinclair, CPD, H. of R.49, p.3282.

38. A good discussion of McEwenism can be found in the opening chapters of A. Reid, *The Power Struggle* (Shakespeare Head, Sydney, 1969).

39. Press statement by Menzies, released 15 September 1963. See also *Financial Review*, 19 September 1963.

40. Kelly, CPD, H. of R.49, p.3345.

41. On ACMA generally, see T. Mathews, 'Australian Pressure Groups', in H. Mayer & H. Nelson (eds), *Australian Politics: A Third Reader* (Cheshire, Melbourne, 1973), p.474.

42. Letter from the director to the president, 13 March 1963.

43. Letter dated 27 February 1963. The scheme is set out in ACMA's Canberra Letter, No.912, 1 May 1963.

44. S. Encel, *Equality and Authority* (Cheshire, Melbourne, 1970), p.361.

45. See Barwick, 'Administrative Features of Legislation on Restrictive Trade Practices', Garran Oration, November 1963, p.17.

46. 'Legislating for Restrictive Practices', *Current Affairs Bulletin*, 10 June 1963, p.30.

47. *Financial Review*, 18 February 1964, p.3; ACMA files.

48. Press release, 15 September 1963.

49. W. Pengilley, 'The Politics of Antitrust in Australia', *Australian Quarterly* 45 (June 1973), p.55.

50. The Concrete Pipes Case. See Commissioner of Trade Practices, *Fifth Annual Report, 1971-72*, p.3.

51. In what follows, unless otherwise indicated, the term 'business' is to be understood as referring to those sections of business which opposed the proposed legislation.

52. Letter dated 3 August 1962.

53. ACCA files.

54. ACMA analysis, January 1963, p.25.

55. *61st Annual Report, 1964-65*.

56. Sir Leon Trout, submission on the 1965 Trade Practices Bill, ACCA files.

57. CPD, H. of R.46, p.1654.

58. Letter to the *Sydney Morning Herald*, 4 March 1963.

59. Barwick, 'Trade Practices in a Developing Economy', *op. cit.*, p.17; Snedden, CPD, H. of R.36, p.422; Wright, CPD, S.30, p.2154; E. St John, 'Restrictive Trade Practices and Monopolies', *The Chartered Accountant in Australia* (August 1963).

60. ACMA submission to Attorney-General, 21 February 1961.

61. Submission on the 1965 Bill prepared by Sir Leon Trout and adopted by Brisbane and Perth Chambers of Commerce.

62. Snedden, Victorian Employers Federation seminar, *op. cit.*, p.32.

63. MTEA President, *Courier Mail*, 4 June 1965; Chairman of NSW Branch of Institute of Directors, *Sydney Morning Herald*, 28 June 1963; Sir Henry Bolte, private memo.

64. See G. Spivak, 'Antitrust Enforcement in the United States: a Primer', *Connecticut Bar Journal* 37 (1963), pp.375-389; E.H. Sutherland, *White Collar Crime* (Holt, R. & W., New York, 1961), pp.42-3.

65. President's Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society* (Avon, New York, 1968), p.24.

66. See D. Cressey & D. Ward (eds), *Delinquency, Crime and Social Process* (Harper and Row, New York, 1969), p.215. For a general discussion of the resistance to applying criminal labels to businessmen, see Sutherland, *White Collar Crime, op. cit.*, chapter 3 and D. Newman, 'White Collar Crime', *Law and Contemporary Problems* 23 (1958), pp.735-753.

67. 'Some Aspects of Australian Proposals for Legislation for Control of Restrictive Trade Practices and Monopolies', a speech delivered in January 1963 to the 13th Legal Convention of the Law Council of Australia, p.4.

68. CPD, H. of R.49, p.3419.

69. Victorian Employers Federation Seminar, *op. cit.*, p.15. See also the ACMA sponsored submission of October 1963.

70. CPD, H. or R.37, p.3105.

71. Victorian Employers Federation seminar, *op. cit.*, p.28.

72. An example of a multilateral (or horizontal) practice would be an agreement among competitors to fix prices; an example of a bilateral (or vertical) practice would be a resale price agreement between a manufacturer and a distributor; predatory pricing would be an example of a unilateral practice.

73. CPD, H. of R.37, p.3104.

74. 'Some Aspects of Australian Proposals for Legislation for Control of Restrictive Trade Practices and Monopolies', *op. cit.*, p.7.

75. ACMA examination of the Barwick proposals, p.7.

76. Snedden, CPD, H. of R.46, p.1656.

77. Commissioner of Trade Practices, *5th Annual Report, 1971-2* pp.7-8; see also *7th Annual Report, 1973-4*, p.5.

78. The *Australian*, 22 July 1967, 7 September 1967; *Courier Mail*, 7 September 1967; *Age*, 1 September 1967.

79. G. Walker, *Australian Monopoly Law* (Cheshire, Melbourne, 1967), p.4.

Chapter 4

The Growth of a Consumer Orientation

The passage of a Trade Practices Act through Parliament was one thing; its implementation was quite another. Six years elapsed before the legislation really began to take effect with an order by the Trade Practices Tribunal prohibiting a price agreement among frozen vegetable processors.[1]

One of the factors which contributed to this delay was the constitutional attack on the Act mounted by some of the companies affected. Probably the most critical of these challenges concerned the Government's ability to legislate with respect to the intra-state activities of corporations.

In 1968 the Commissioner for Trade Practices had begun examining a nationwide price agreement among the manufacturers of concrete pipes. He informed the companies that in his view their agreement was against the public interest and that unless it was terminated he would take the matter before the Tribunal. The companies thereupon terminated the agreement but substituted a series of State-wide agreements which achieved precisely the same effect. When challenged, the companies defended these agreements on the grounds that each was purely intra-state and therefore beyond the constitutional scope of the Act.

The High Court had accepted this argument in the constitutional challenge of the Australian Industries Preservation Act in 1909. But in 1971 when the issue arose again, the Court reversed its 1909 ruling and declared that the Government could legislate validly with respect to the trade practices of corporations whether they operated within or across State boundaries. The strategy of the concrete pipes companies was thus to no avail.

The Concrete Pipes Case, as it came to be known, together with certain other High Court cases[2], established a firm constitutional basis for federal trade practices legislation and paved the way

for the much stronger legislation which was to follow.

But although it was several years before the Act began to have any impact on business activities, pressures were building up for its effective implementation. Inflation had again become a political issue and consumer organisations were voicing criticism of rising prices. Such were the circumstances in which the Tribunal handed down its first decision, against a price fixing agreement among frozen vegetable processors.

Frozen vegetable processors had engaged in a severe price war in 1969-70 and in 1970 had formed an association for the purpose of instituting a price fixing agreement in order to terminate what they regarded as ruinous competition. The result was a rise in prices of the order of 30 per cent.[3]

Public reaction was intense. A citizens group, Campaign Against Rising Prices (CARP), called for a boycott of frozen vegetables, and shortly afterwards the chain supermarket, Woolworths, announced that it would henceforth require its suppliers to justify any price rises or face the loss of Woolworths' business.[4]

However, the Leader of the Country Party, Mr Anthony, urged members of Parliament not to react hastily. Vegetable growers would benefit from the scheme, he said; it would bring 'sanity' back into the market.[5] But on this occasion primary producers were impotent. Following the announced price rises the Commissioner for Trade Practices began an immediate investigation which culminated in the Tribunal order of 1971 prohibiting the price agreement. The consumer's star was rising.

The Trade Practices Act, 1971

The inflationary situation was also causing the Government to look again at the practice of resale price maintenance (RPM) which Barwick had originally sought to control but which had been excluded from the scope of the 1965 Act. In October 1970, the Attorney-General suggested publicly that the Act might have to be amended to deal with RPM[6] and in January 1971 the Prime Minister, in an address to the nation, stated that the Government was looking for ways of combatting inflation and would be taking steps to improve the Trade Practices Act.

The Attorney-General had already put proposals to Cabinet for the control of RPM when the much publicised confrontation

between the Australian Council of Trade Unions (ACTU) and Dunlop erupted. Like a number of other companies, Dunlop had refused to supply its goods to the ACTU's recently established discount store in Melbourne because of the latter's refusal to charge the price stipulated by Dunlop. In retaliation, the ACTU imposed a black-ban on the company and Dunlop capitulated immediately, abandoning its practice of RPM. There was considerable public support for the actions of the ACTU and the result was widely hailed as a victory for the consumer.

The political popularity of action against RPM was obvious and the Government clearly felt constrained to act at once, for on 19 March, just one day after Dunlop's capitulation, Cabinet approved the Attorney-General's proposals for legislation against RPM.[7] The Government's decision was announced publicly shortly afterwards. ACMA protested vigorously in private audiences with the Attorney-General, but to no avail; in April a Bill to prohibit RPM was introduced in Parliament.

Time and again during debate on the Bill, Government spokesmen referred to the need to restrain prices in the interest of the consumer, and to the role which RPM legislation could play in this process. Backbench opponents of the Bill pointed out, however, that RPM frequently operated to the advantage of the small retailer who, without the economies of scale available to larger retailers, could not hope to compete with them in any price cutting war. The Government did not deny this, but its concern now was not primarily with the welfare of small business, but with the need to combat inflation, in the interests of the consumer.

Outside Parliament the new legislation was generally seen as consumer-orientated and as such received widespread support. An editorial in the Melbourne *Age*, for example, referring to a claim by the Chamber of Manufactures that the new Bill spelled doom for many small businesses, agreed that a few small businessmen might suffer. But this was inevitable it thought.

> The consumer is entitled to all the benefits . . . of unrestricted competition. That is what free enterprise is all about. The puzzle is why, having preached it so long and so fervently as a theory, the Liberal Party has been so reluctant to translate it into practice.[8]

Concern for consumer welfare was written very explicitly into the Act. Provision was made for exemption from the prohibition

of RPM if those practising it could convince the Trade Practices Tribunal that in their particular case, the practice was to the advantage of the 'public as users or consumers'. Any advantages to the manufacturers or the distributors of the goods were irrelevant.

An application for such an exemption was lodged by book publishers the day the Act came into effect. Their contention was that unrestrained competition would reduce the profitability of book selling and lead to a reduction in the number of retail outlets, to the disadvantage of the consumer. The Tribunal decided, however, that the consumer interest was better served by the reduction in prices which could be expected to follow the abolition of RPM, and the application for exemption was refused.

The case was interesting in that it demonstrated some of the difficulties involved in deciding exactly where the consumer interest lies. In the first place the publishers' argument that the abolition of RPM would lead to a reduction in the number of retail outlets, to the disadvantage of the consumer, had to be considered.

Secondly, matters were complicated by the fact that the case involved at least two distinct consumer groups whose interests were in conflict. RPM enabled book publishers to set high prices on educational books in order to subsidise the sale of general interest books. The general reader thus had an interest in RPM while students and their parents were disadvantaged. Accordingly, in deciding against RPM, the Tribunal was making a decision against one group of consumers and in favour of another. But it remains the case that only consumer interests were taken into account and weighed against each other; the interests of publishers and distributors were ignored.[9]

An interesting aspect of the new legislation was the procedure by which it was to be implemented. Public demand for action against rising prices made it clear that the examination procedures of the 1965 Act were inappropriate. A case by case investigation of particular instances of RPM to determine in each instance whether or not it was contrary to the public interest would have been intolerably slow. The appropriate procedure was simply to declare all RPM unlawful. But, just as in 1965, the Government was loath to brand as criminals the businessmen who engaged in such behaviour. In the words of one Government spokesman, RPM 'is not felt to be a practice of the inherent character which attracts

criminal penalties'.[10]

The Government was thus caught between opposing imperatives: the need to take action against RPM which would be rapidly effective, and the desire to avoid criminalising business behaviour. There had been no similar dilemma in 1965 for then there had been no perceived need for quick action against restrictive practices and the leisurely procedure of case by case examination could be countenanced. But in the present climate of opinion such a procedure was impossible.

Faced with this problem, the Government adopted one of the techniques by which American antitrust law is enforced. It declared RPM to be unlawful but made no provision for any penalty to be imposed on those against whom charges of RPM were proved. Moreover a clause in the Act specifically stated that those accused of RPM were not to be dealt with in criminal proceedings. Rather, enforcement was to be by means of injunction. The Attorney-General, the Commissioner of Trade Practices or any person affected by RPM was entitled to seek a court injunction against the continuance of the practice. Any further efforts to impose RPM would then be punishable as contempt of court.

The Government was thus able to have it both ways: RPM was unlawful, but not criminal. Moreover, business was grateful for this manoeuvre. The Melbourne Chamber of Commerce expressed the following view in its newsletter.

> It is of some comfort to note that despite the emotional atmosphere and haste surrounding the legislation, criminality has been excluded. It should always be kept in mind that, in the future, any attempt to introduce criminal convictions as a form of punitive action should be resisted by business with all the resources it can muster.[11]

Consumers were not the only beneficiaries of the new legislation. Retailers who attempted to increase their share of the market by undercutting other retail outlets also stood to gain. Thus it was that the first application for an injunction against RPM was made by the Sydney Wide discount chain store against the supplier of Mikasa dinnerware, the latter having refused to supply Sydney Wide because of its discount policy. The court issued the required injunction and, after some delay, Mikasa complied.[12]

Consumers, of course, benefitted from this decision but they

did so only because their interests coincided with those of a discount retailer who was prepared to take the initiative in having the law enforced. Subsequent injunctions, however, were taken out by the Commissioner for Trade Practices himself and represented a direct expression of the consumer interest, being prompted by consumer complaints about the operation of RPM.

The pressure for stronger legislation

The office of the Commissioner for Trade Practices was not just an enforcement agency. With the passage of time it became an independent entity in the interest-group arena and began itself to exert pressure on the Government for stronger legislation. The case by case examination of registered agreements was proving inordinately slow. By 1972, over 13,000 industry agreements had been registered but during that year the Commissioner's staff had been able to examine, even in a preliminary way, only 49 such agreements. At this rate it would have been many years before the Act could begin to have any impact on the Australian economy.

However, the examinations which the Commissioner had been able to carry out suggested that in nearly every case, restrictive agreements would be found to be contrary to the public interest. The implication was that instead of presuming all agreements to be in the public interest unless proved otherwise, a more efficient approach would be the presumption that all agreements were contrary to the public interest unless proved otherwise. This would involve a *per se* prohibition of restrictive agreements with provision for exemption in special cases.

Furthermore, the absence of any merger control provisions in the legislation had enabled companies to mock the Commissioner's efforts. Following the frozen vegetables decision, one of the major processors involved acquired two of the other processors and, in addition, agreed with a New Zealand processor to merge their frozen vegetable interests in Australia.[13] And following the Concrete Pipes Case, one of the parties to the price fixing agreement announced a takeover offer of another. Other mergers were to follow.[14]

What Barwick had foreseen was now a reality. Companies whose anti-competitive agreements had been found contrary to the public interest and consequently prohibited were achieving the

same anti-competitive effect by merging. The enforcement activities of the Commissioner thus demonstrated the need for much stronger legislation.

Moreover, the Commissioner was active in urging new legislation. In his annual report for 1970-71 he complained of the time consuming examination procedures he was required to follow and warned that the case by case examination would take many years to produce a general impact on the anti-competitive behaviour of Australian business. He spoke approvingly of the *per se* prohibition which the Government had applied to RPM in its 1971 Act and suggested that the price agreements which he was so painstakingly examining should be subject to a similar *per se* prohibition. On at least one occasion he expressed these views directly to legislators when he addressed a joint Liberal-Country Party committee on trade.[15]

In short, the regulatory agency established by the 1965 legislation was itself functioning as a pressure group for more effective legislation. In this respect it differed dramatically from similar regulatory agencies in the United States which typically have been 'captured' by the vested interests they are supposed to regulate.[16]

Apart from the pressure generated by the activities of the Commissioner of Trade Practices, the problem of inflation remained an impetus to stronger legislation. The Government was convinced that consumer reaction to rising prices necessitated stronger measures. In addition, the Government believed that unionists would not long accept adverse decisions by the Arbitration Commission on their applications for wage increases if prices were not subjected to similarly effective controls.[17] Accordingly, in September 1971, the Prime Minister announced to Parliament that the Government intended to introduce a Bill to strengthen the Act.[18]

The political popularity of tougher legislation was dramatised a few weeks later in a way that was somewhat embarrassing for the Government. The concrete pipes decision, although validating the 1965 Act in essentials, had declared it unconstitutional on a drafting technicality. It was imperative that new legislation be enacted immediately in order that there might be some legal basis for the continuing activities of the Commissioner of Trade Practices. Accordingly the Government chose to re-enact the old legislation with minor amendments to take account of the Court's decision.

In so doing, it made it clear that the re-enactment was simply holding legislation designed to maintain the status quo until such time as new and more effective legislation could be drawn up.

However, the Labor Opposition in the Senate chose not to accept this procedure and moved amendments aimed at strengthening the Act by imposing outright prohibitions on predatory price cutting and monopolisation, practices which were merely examinable in the existing legislation. The Democratic Labour Party, a minor party holding the balance of power in the Senate, although it usually voted with the Government, on this occasion sided with the Opposition to carry the amendments.

This was unacceptable to the Government. It reiterated that tougher legislation along the lines suggested by the amendments would indeed be forthcoming and asked the Senate to vote again on the matter. This time the DLP, noting the Government's assurances, reversed itself and voted with the Government to re-enact the existing legislation without major amendment. The Government was now committed more firmly than ever to more effective legislation.

The new proposals

By May 1972 the Government was ready with a detailed statement of its proposals for new legislation. They were read to Parliament, as had been the Barwick proposals, with the intention that interested parties would be given time to react before the final legislation was drafted. The proposals envisaged a monopolies commission which would inquire into and report to government on anti-competitive mergers and on instances of monopolisation which were thought to be contrary to the public interest. The Government would then decide on an appropriate course of action. In this way the loophole through which the frozen vegetable processors had escaped would be narrowed if not entirely closed. In addition, the existing legislation was to be strengthened by restricting the grounds on which businesses might seek to justify certain practices before the tribunal.

The new grounds placed far greater emphasis on the consumer interest than did the existing public interest test and in particular made no mention of the interests of employees, producers, distributors, importers, exporters, proprietors, investors and Australian

industry which the existing legislation required the Tribunal to take into account in determining where the public interest lay. Apart from this, the examination procedures were streamlined so as to enable cases to come before the Tribunal more rapidly.

But although these proposals would have strengthened the Act substantially they did not include the *per se* prohibition on price fixing agreements which the Commissioner had recommended.

In justifying the new proposals, the Attorney-General spoke of the need to combat inflation in the interests of the consumer and he alluded to the political necessity for action against prices as well as wages in any anti-inflationary campaign. Here are his words:

> The greatest menace confronting the Australian economy today is inflation. Excessively rising wages have been highlighted, correctly, as contributing greatly to the inflationary trend and the Government has acted, within its powers, to try to alert community consciousness to the problem and to persuade wage-fixing tribunals and employers to act responsibly when confronted by excessive wage demands. The balanced decision of the Commonwealth Conciliation and Arbitration Commission in the national wage case gives ground for hope that some headway can be made in resisting the inflationary tide.
>
> The proposals outlined in this statement are an earnest of the Government's intentions to attack the basic causes of inflation wherever they may be found. Restrictive practices and monopolization contribute importantly to inflation. There is no question about that. A competitive environment keeps businessmen on their toes, encourages innovation and trying to do better than the other fellow, and, it should be emphasized, through making the automatic passing on of increased costs more difficult, discourages soft attitudes towards excessive wage demands. Conversely, where practices severely limiting competition prevail, the resulting market power is, in effect, a power to pass on to consumers, through increased prices, costs which would not in a more competitive situation have been incurred at all. In addition, restrictive practices and monopolization can of course lead to high price levels through their effect on the efficiency of the industries concerned or through profit levels that are higher than they otherwise would be.
>
> Among other things, therefore, these proposals give the lie to those who say that the Government's anti-inflationary policies are directed only at the wage earner.[19]

Speaking on another occasion the Attorney-General reiterated the consumer orientation of his proposals. 'Practically all restrictive trade practices legislation is, on its face, consumer orientated.' The public interest was ultimately the consumer interest, he said.[20]

Reaction to the proposals was generally favourable, with newspaper editorials urging that lobby groups not be given a chance to 'water down' the proposals as they had the Barwick scheme.[21] Business, too, was considerably less vocal in its opposition than it had been following the announcement of the Barwick proposals, many businessmen having realised that an era of regulation was inevitable.[22] Indeed, prior to the announcement when the New South Wales Chamber of Manufactures surveyed its members on their attitudes to stronger legislation, only three per cent felt sufficiently motivated to respond. Among those who did respond, there was considerable support for strong trade practices legislation.[23] Nevertheless, some sections of industry did react strongly against the proposals, mainly on the grounds that they were so overwhelmingly consumer oriented and that they gave no weight to the needs and interests of business.[24]

Towards the end of the year the Government gave effect to its proposals by introducing two Bills to Parliament, one to establish a monopolies commission and the other to strengthen examination procedures as proposed. The consumer orientation of the proposals remained unchanged in the Bills, indicating that business protests had been without effect. A third Bill for the control of mergers was promised for the near future. The Bills lapsed with the defeat of the Liberal-Country Party Government in elections held at the end of 1972, but it is clear that the Government was on the point of enacting legislation going far beyond its 1965 Act and giving much greater emphasis to the interests of consumers than had the earlier legislation.

Conclusion

The acceleration in the inflation rate, which began about 1970, heightened consumer consciousness and increased consumer pressure for any legislation which promised to curb price rises. Consumer organisations, however, did little or no lobbying for a stronger Trade Practices Act. The role played by consumers in promoting legislation in their own interests was far less direct. The Government believed that voters had become concerned with their well-being as consumers; the pressure exerted by the consumer interest was thus an electoral pressure.

This last conclusion has not been clearly demonstrated. It is

difficult to find direct evidence of the consumer interest operating as an electoral pressure. But there is evidence of a more indirect nature. The popular support for the ACTU's attack on RPM, the 'responsible' attitude adopted by Woolworths towards passing on price increases, the formation of citizens' groups to fight rising prices, all suggest the existence of widespread public concern about inflating prices and the popularity of any government action which could be seen as anti-inflationary. Moreover, it could hardly be coincidence that the Government decided to proceed with RPM legislation at a time when the popularity of action against RPM had just been demonstrated by the activities of the ACTU.

More generally, inflation is widely believed to be one of the most important issues in the minds of voters. Whether this is true or not, politicians would certainly have perceived it to be the case or at least feared that it might be. It is therefore reasonable to conclude that consumer reaction to rising prices operated as an electoral pressure.

Two other factors influenced the Government. One was the fear that industrial unrest might result if action against rising wages was not accompanied by some action against rising prices. The other was the pressure for stronger legislation generated by the enforcement activities of the Government's own regulatory agency.

While these various pressures made it virtually inevitable that the Government would move towards stronger, more consumer-oriented legislation, it is not necessarily the case that Government members felt themselves compelled against their wishes to move in this direction. The view that competition was desirable in the interests of the consumer, and that in these matters the public interest meant ultimately the consumer interest, had always been an aspect of Liberal Party philosophy, although perhaps not a dominant aspect. But the increasing electoral significance of the consumer interest reinforced this view. For many Government members, no doubt, stronger legislation was not simply a political necessity but a means of implementing the now dominant value to which they adhered.

Nevertheless, in the last analysis it was the increased electoral significance of the consumer interest which lead the Government to give priority to consumer welfare and to dismiss the previously accepted argument put to it by business that exclusively consumer-

oriented legislation was unfair to business.

But the Liberal Government's commitment to consumer welfare must not be over-stated for it was by no means total. Although the 1971 Act and subsequent legislative proposals specified the consumer interest as paramount, the enforcement procedures were designed to treat business interests with as much consideration as possible. Apart from resale price maintenance, the approach remained one of case by case examination rather than *per se* prohibition, and any imputation of criminality was carefully avoided. Far more aggressive consumer-oriented legislation was in store.

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1. Where not otherwise acknowledged, factual information presented in this and the subsequent chapter is drawn largely from the annual reports of the Commissioner of Trade Practices.
2. See Commissioner of Trade Practices, *Annual Report, 1971-2*, pp.3-4.
3. The *Australian*, 24 September 1970.
4. *Sydney Morning Herald*, 23 September 1970; The *Age* 28 September 1970.
5. *Financial Review*, 23 September 1970.
6. Address to the Tasmanian Bar Association, 10 October 1970.
7. *Sydney Morning Herald*, 1 April 1971.
8. The *Age*, 3 May 1971.
9. It has been argued by one commentator that this was not a clear-cut consumer victory since the Tribunal did not accept that the price agreement was in the real interests of the parties and so, in striking it down, was not ignoring the interests of producers in favour of consumers (G. Gentle, 'Economic Welfare, the Public Interest and the Trade Practices Tribunal', *The Economic Record*, 51 (June 1975)). Nevertheless, the decision was contrary to the asserted interests of the producers and was consistent with the interests of consumers.
10. Senator Greenwood, CPD, S.48, p.2066.
11. See The *Age* 27 August 1971.
12. Commissioner of Trade Practices, *Annual Report, 1972-3*, p.16.
13. Commissioner of Trade Practices, *Annual Report, 1971-2*, pp.7-8.
14. Commissioner of Trade Practices, *Annual Report, 1973-4*, p.5.
15. *Financial Review*, 17 March 1971.
16. See L.M. Friedman and S. Macaulay, (eds), *Law and the Behavioural Sciences* (Bobbs-Merrill, New York, 1969), pp.455-471.
17. See *Financial Review*, 30 March 1971.
18. CPD, H. of R.73, p.804.
19. CPD, S.52, pp.1957-8.
20. Address to the Tasmanian Chamber of Manufactures, 18 August 1972.
21. *Sunday Independent*, 28 May 1972; The *Age*, 26 May 1972.
22. See *National Times*, 29 May 1972.

23. ACMA files.

24. See for example the statement issued by the Australian Industries Development Association, entitled 'The Government's Proposed Amendments to the Restrictive Trade Practices Legislation'.

Chapter 5

The 1974 Act: Consumer Protection

The election of a Labor Government in 1972 paved the way for the much stronger trade practice legislation enacted by Parliament in 1974. The new Government felt no need to make concessions to the needs and interests of business and was free to adopt an uncompromising philosophy of consumer protection. Speaking on the Bill in Parliament, Labor's Attorney-General made it clear that the basic aim of the new legislation was to protect the consumer against undesirable business practices.[1]

The new Act reflected this over-riding commitment to consumer protection in various ways. First, the case by case examination of questionable practices, a fundamental feature of the 1965 Act, was replaced by *per se* prohibition. Restrictive trade practices which previously had been lawful until declared otherwise by the Tribunal were now to be automatically unlawful. The Trade Practices Commission did have the power to authorise certain of these practices in particular cases if it felt them to be in the public interest, but no such exemptions were possible in the case of price fixing agreements for goods, discriminatory dealing, resale price maintenance or monopolisation. These practices were unlawful under all circumstances.

Moreover, enforcement procedures bore more harshly on offenders than previously. The earlier legislation had provided no automatic penalties for companies engaging in restrictive trade practices.[2] Even RPM, though unlawful, could be engaged in without fear of punishment[3] until a court issued an injunction restraining the practice, after which its continuance was punishable as contempt of court. However, the new legislation provided for an automatic 'pecuniary penalty' of up to $250,000 for any company and $50,000 for any individual found to have engaged in one of the prohibited practices. Proceedings for the imposition of

such a penalty could be instituted by either the Attorney-General or the Trade Practices Commission.

The use of the term 'pecuniary penalty' for what was in effect a fine is significant. The term 'fine' is generally reserved for the financial penalty which can be imposed following conviction for a criminal offence. The Government, however, wished to treat restrictive trade practices as civil rather than criminal offences and the legislation specifically declared that these offences could not be the subject of criminal proceedings. The term 'pecuniary penalty' symbolised this fact.

No public explanation was provided for this choice of enforcement technique, but certain practical considerations very probably influenced the decision. Criminal proceedings safeguard the rights of defendants in ways which make it more difficult than in civil proceedings to prove a case. For example, in criminal proceedings, rules of evidence are more restrictive of the kinds of evidence which a court can consider. Moreover, the facts have to be established 'beyond reasonable doubt' whereas in civil proceedings they need only be established 'on the balance of probabilities'.

Many of the restrictive practices with which the Act was concerned involved agreements not to compete. Where all the parties to such an agreement are willing participants, prosecutors may have considerable difficulty in obtaining the necessary evidence of the existence of the agreement. To have treated such behaviour as criminal would thus have made the task of enforcement more difficult. Heavy 'pecuniary penalties' could, however, be imposed without invoking the procedural safeguards available to defendants in criminal trials. Businessmen supported the use of civil proceedings in order to avoid the stigma of criminality, but ironically, the procedure they supported made it easier to secure their own conviction and punishment.

Not only did the new legislation strengthen the provisions of the previous Acts in relation to restrictive trade practices, but it also included a number of quite new explicitly consumer protection provisions. Certain of these provisions required suppliers to provide warranties in relation to all the goods and services they sold. Other provisions specifically prohibited a number of unfair business practices such as misleading advertising, pyramid selling, undue harassment by door-to-door salesmen and failure by manufacturers to comply with prescribed consumer product safety

standards.

These practices were not only declared unlawful; they were treated as crimes, punishable in the case of a corporation by a fine of up to $50,000 and in the case of an individual by a fine of up to $10,000 or six months imprisonment. The consumer protection provisions of the Act thus represented the full flowering of the consumer interest. The law unambiguously declared the practices concerned to be criminal offences; businessmen who engaged in them were to be treated as criminals.

It has been pointed out[4] that in criminalising the practices covered by the consumer protection provisions but not those covered by the restrictive trade provisions, the Government was acting in accordance with legal traditions. Many of the practices covered by the consumer protection provisions, misleading advertising, false pretences and so on, involved an element of fraud, long recognised by the law as a criminal offence. On the other hand there was little precedent in English law (though more in American) for classifying the practices covered by the restrictive trade provisions as criminal offences.

But to point out that the Government proceeded in accordance with tradition is not necessarily to explain why it did so. The fact that the Government chose to employ criminal sanctions in the case of the consumer protection provisions but not in the case of the trade practice provisions is very likely a result of the relative ease with which violations of the consumer protection provisions could be proved. It is far easier to establish that an advertisement is misleading than to establish the existence of a price fixing conspiracy. Why the Government should wish to use criminal sanctions at all is something to which I shall return in the next chapter.

In view of the fact that the Liberal Party, while in Government, had been moving towards tougher legislation, it is not surprising that in opposition it found itself in agreement with aspects of the new legislation. The Leader of the Opposition and one time Attorney-General, Mr Snedden, conceded that there were now grounds for the outright prohibition of certain practices. 'The opposition parties would support proscription of horizontal price agreements', he said.[5] And a former Prime Minister, Mr McMahon, expressed his support for the *per se* prohibition of restrictive trade practices, arguing that such an approach was quite consistent with

Liberal Party philosophy.[6]

The Opposition's attack on the Government seemed to be largely confined to procedural matters: the fact that the legislation had been drawn up without consulting business, the haste with which it was introduced to Parliament, and the carelessness with which it was drafted.[7]

Reaction to the legislation outside Parliament was predictable. The major business lobbies again argued strongly, but to no effect, that the legislation ignored the interests of business, while newspapers tended to support the legislation on the grounds of consumer protection.

The administrative agency established by the 1965 Act was reconstituted in the new legislation as the Trade Practices Commission (TPC) and the attitude of this body ensured that the new Act would be enforced as effectively as possible. In its first annual report the Commission wrote: 'Since the 1965 entry into this field of legislation, the intervening events, debates and publicity (have) shown the need for its replacement by legislation that is effective, comprehensive and consumer-oriented.'[8]

In the Commission's view, both sets of provisions in the new Act were designed to benefit consumers. The restrictive trade practices sections would strengthen the competitiveness of private enterprise to the benefit of the public as consumers, and the consumer protection provisions would protect consumers from unfair business practices.

Indeed, when the Labor Government subsequently announced its intention of separating the two and creating a new Consumer Affairs Commission to administer the specifically consumer protection provisions of the Act, the chairman of the Trade Practices Commission argued strongly against this policy on the grounds that the provisions aimed at promoting competition and those aimed at consumer protection were both oriented to the needs and interests of consumers and were most appropriately administered by a single authority.[9] Moreover the Commission's stated priorities for enforcing the new law made it clear that this consumer orientation would be given practical effect.

> Priorities start with price (it said). Anti-competitive activities in regard to price attract the Commission's special attention. It may be price itself that is directly fixed or it may be control of distribution having price consequences. Horizontal price-fixing by agreement between competitors

> is illegal, and vertical price-fixing (resale price maintenance) has been illegal for four years. There ought to be no back-sliding in these fundamental areas and the Commission moves to see that there is not.[10]

The priority given to consumer interests by the Commission was clearly demonstrated in at least one area of its activity. The Act specified that certain practices might be authorised by the Commission if they resulted 'in a substantial benefit to the public, being a benefit that would not otherwise be available'. Parliament did not explicitly state whose interests were to be taken into account in determining where the public interest lay, but the Commission took the view that the consumer interest was all-important while the interests of those who engaged in the practice were largely irrelevant.

This attitude was exemplified by the Commission's response when Associated Products and Distribution (APD) Ltd attempted to acquire the ailing potato chip operations of Marrickville Holdings. Marrickville's operations were unprofitable and the company had decided to cease production of potato chips if the proposed acquisition did not succeed. APD sought to justify its bid to acquire Marrickville's operations on the grounds that it would ensure better plant utilisation, smoother expansion of APD, a better sale price, benefits to distributors and the prevention of unemployment.

But the Commission considered that none of these was a benefit to the public. Not even the prevention of unemployment could be considered a benefit sufficiently substantial to warrant the takeover, since only 87 people, spread over four States, were involved. The Commission's view was that the acquisition would be likely to have the effect of substantially lessening competition in the market because it would add more to the acquiring company's already dominant market share than the company would otherwise get by competition with the remaining companies. None of the benefits claimed for the proposed acquisition could outweigh the presumed consumer benefit which flowed from keeping the market as competitive as possible.[11]

Labor's dilemma

The vigour with which the Trade Practices Commission was carrying out its task of consumer protection was beginning to pose

something of a dilemma for the ALP. The Party had somewhat unreflectingly assumed that, in the area of trade practices, the interests of labour and of consumers were compatible, perhaps even identical. On this assumption, and recognising the increasing electoral significance of the consumer movement, the ALP was happy to champion the consumer interest. Labor's Minister for Science and Consumer Affairs declared at one point that governments ignored the consumer interest at their peril and that he had only recently realised how many votes there were in consumer protection.[12]

The Australian Council of Trade Unions, too, appeared to assume the identity of labour and consumer interests, arguing in a submission to the Prime Minister, prior to the 1974 enactment, that:

> Restrictive trade practices should be generally regarded as illegal and any grounds for exemptions to this law should be specified in the legislation. Exemptions should only be allowed if the restrictive trade practice is in the interest of consumers.

But events were beginning to demonstrate that the two interests were not always in harmony. The Act gave the Attorney-General the power to direct the Commission to authorise mergers regardless of its own views on their appropriateness. The Attorney-General had twice used this power to authorise mergers in cases where the company to be acquired would otherwise have gone out of business leaving workers unemployed. In one case, the merger of the potato chip manufacturers, the direction was issued after the TPC had refused to authorise the merger. In the other case, a takeover of Peak Frean by Arnotts, the direction was issued before the TPC had had time to come to its own decision on the matter.

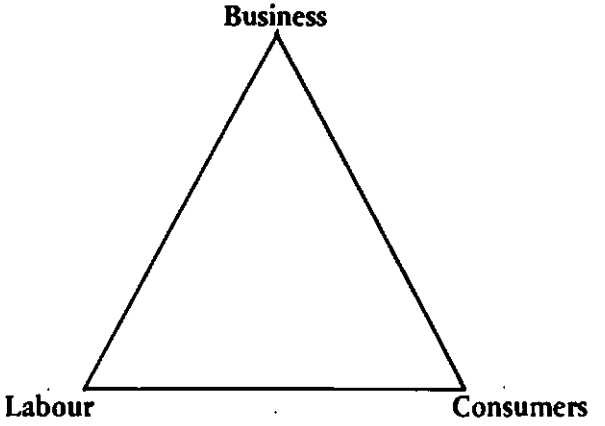
The conflict between the interests of labour and those of consumers was also manifested in the attempt by certain unions to prevent price discounting. A supermarket chain that was undercutting the price of bread attracted a union boycott because there was apprehension that bread carters' jobs might be threatened by price competition. And again, the Transport Workers Union banned deliveries of petrol to Sydney service stations displaying discount signs because of fears that tanker drivers for the established oil companies might lose their jobs.[13]

The TPC was critical of such union attempts to restrain competition but was unable to move against them because of the

fact that worker and trade union activity generally was exempted from the Act. Indeed, the Commission's annual report for 1974-5 suggested, in effect, that the Act should be amended so as to cover restrictive trade practices of unions insofar as these interferred with competition in the prices at which goods were sold.[14]

The general dilemma in which the Labor Party found itself can be illustrated by reference to Figure 1.

Figure 1: Axes of interest-group conflict



The sides of the triangle represent axes of conflict between the various interests. Traditionally, the conflict between business and labour has been the most politically significant with the Liberal-Country Party and its predecessors representing business interests and the ALP, labour. The other axes of conflict have not been politically relevant.

However, with the increasing importance of the consumer interest, the conflict of interests between consumers and business has now become more salient. The Labor Party, perceiving the consumer interest as a new vantage point from which to wage its fight against business, has sought to expand its electoral base by championing the consumer interest. But in so doing it has ignored the potential conflict of interests between labour and consumers.

This third axis of conflict has not yet become of major importance but there are a variety of issues on which the interests of consumers and of labour are at odds. For example, apart from the instances already mentioned, the activities of environmentalists

and anti-pollution groups (which, if not strictly consumer movements, are closely related) frequently threaten the jobs of workers in polluting or environmentally destructive industries and thus encounter the opposition of organised labour.

Evidently, then, in seeking to represent both consumers and labour, the ALP was attempting to combine potentially incompatible interests. While the conflict of interests between these two groups remained dormant, the ALP could afford to champion the consumer interest whole-heartedly, but when the activities of the TPC began to highlight cases of actual conflict between the two interests the Party found itself embarrassed by the unequivocal consumer orientation of the administrative agency it had created.

Interests and the Act – a conclusion

The 1974 Act was intended to serve consumer interests. However, as with the previous consumer-oriented enactment of 1971, consumer organisations played very little part in shaping it. The major such organisation in Australia, the Australian Consumers' Association, although it welcomed the Act, made no attempt to influence its content.[15] As before it was the consumer as voter who influenced the legislators.

This statement needs elaboration. Although the Government had promised consumer-protection legislation during the election, consumer-protection was only one aspect of the program which brought Labor to power in 1972. It cannot be said that in voting for Labor, the electorate was specifically voting for strong consumer-oriented trade practice legislation. Nevertheless, many of Labor's policies were oriented to the voter in his capacity as consumer rather than in his capacity, say, as employee or taxpayer. For example, Labor's health, education and welfare policies, which together constituted an important aspect of the Party's appeal, were directed at the public as consumers of health, education and welfare services respectively. It seems fair to say, therefore, that Labor's election demonstrated the electoral popularity of broadly consumer-oriented policies.

But the Labor Government's enactment of consumer-oriented trade practice law was not determined merely by electoral considerations. Rather, because of the very considerable overlap between the interests of workers and consumers in relation to restrictive

trade practices, the Party was naturally enthusiastic about consumer-oriented trade practice legislation. It thus took the initiative in introducing far stronger legislation than its opponents would have felt politically necessary had they been in office.

As with the Australian Industries Preservation Act, it is not profitable to attempt to disentangle the separate effects of interests and values in this context. Consumer-protection had become a dominant social value, which nevertheless served a certain interest – the consumer interest. In enacting consumer-protection legislation, the Labor Government was giving expression to a value it itself espoused, while at the same time responding to an electorally significant interest.

No mention has so far been made of the 'system-preserving' function of the 1974 Act. It can be argued that, like the Act passed by the Liberal-Country Party Government in 1965, the Labor Government's Act was ultimately to the advantage of property-owning interests. Like the earlier Act, Labor's legislation served, at least potentially, to mollify those who might otherwise become disaffected with the existing system and demand radical social changes thus jeopardising the rights of private property. In fact, however, property interests played no part in bringing about the new legislation. Nor, certainly, was it the Government's intention that its Act should contribute towards stabilising the capitalist system. Indeed had they perceived this as one of the consequences of their Act, many Government members would no doubt have been considerably less enthusiastic about supporting it.

To the extent that the Act has actually had such an effect, it exemplifies a point often made in Marxist writing about the role of social democratic parties in capitalist societies: intervention in the economy by such parties, regardless of their intentions, tends to weaken the forces of revolution. Those who make this argument claim further that social democratic parties fulfil this function even more effectively than conservative parties because of the latter's general commitment to the principle of *laissez-faire* which makes them reluctant to intervene more than is immediately necessary.[16]

It is ironic, then, that one of the potential consequences of the 1974 Act was to stabilise a system which at least some of those who supported the Act were committed to overthrowing.

The 1977 amendments

The conservative Liberal-Country Party coalition was returned to power in an election at the end of 1975. The coalition promised during the election to retain the Labor Government's Act, but it promised also that it would review the Act and amend it if necessary. It was concerned, however, not to be seen as retreating from Labor's commitment to the consumer, and on various occasions Government spokesmen stated that the consumer orientation of the existing legislation would remain unchanged. According to one: 'The Government will ensure that business activity is regulated by law to prevent the exploitation of consumers'. And, in the words of another, amendments would be made 'without watering down the protection given to consumers by the Act'.[17]

Despite these assurances there was no doubt that the Government proposed some retreat from the commitment to consumer welfare manifested by the previous administration. A review committee set up by the Government was instructed among other things to consider 'whether the Act is causing unintended difficulties or unnecessary costs to the Australian public, including Australian business'. It was also asked to consider 'whether small businesses could and should be accorded special treatment by the Act'. Any amendments resulting from these considerations could hardly have been to the advantage of consumers.[18] It was clearly the Government's intention, as the Minister later explicitly said, to take the 'harshness' and 'comprehensiveness' out of the Act.[19]

But at least one amendment foreshadowed in the committee's terms of reference was potentially beneficial to consumers. The committee was directed 'to give particular attention to the application of the Act to anti-competitive conduct by employees, and employee or employer organisations'.

Under the 1974 Act the TPC had been unable to take action against unions engaging in resale price maintenance. For example, it had been unable to proceed against members of the Transport Workers Union who had prevented the sale of discount petrol in Sydney. Indeed, the chairman of the Commission had requested the Government to amend the legislation to give the TPC power to deal with such cases.[20] Consumer groups and the press had also advocated such an amendment. Whereas the Labor Government would have had great difficulty in acceding to this request, the Liberal-Country Party Government was predisposed to move

in this direction, to the benefit of consumers.

Numerous submissions were made to the review committee by individual companies and by various business, consumer and employee organisations, as well as by government and semi-governmental organisations.[21] On the basis of submissions made public, it appears that business confined its attention largely to the restrictive trade practice provisions of the Act, urging in most cases that the provisions be weakened. The Australian Automobile Chamber of Commerce, however, wanted the provisions strengthened, to deal more effectively with discrimination against small retailers by dominant suppliers.

Business generally had little to say about the consumer protection provisions of the Act, appearing to be quite happy to live with them. Just why is not clear. It is sometimes suggested that consumer protection legislation benefits the 'ethical trader' by preventing the unethical – those prepared to defraud and mislead the consumer – from gaining an unfair commercial advantage. If business groups making submissions were of this view, and assuming they perceived themselves to be ethical traders, this might well account for their acceptance of the consumer protection provisions.

In contrast to business, the Australian Consumers' Association concentrated in its submission on the consumer protection provisions, suggesting a number of ways in which they might be strengthened. It said almost nothing about the restrictive trade provisions.

The report of the review committee, published in August 1976, did not suggest the dismantling of the Act as some had feared. In relation to the consumer protection provisions the committee recommended a considerable number of changes beneficial to consumers. This general strengthening of the consumer position was offset to some extent, however, by certain other recommendations. The penalty of imprisonment was to be removed for offences against the consumer protection provisions, although such offences would remain criminal and subject to fines.

Moreover, the defences available to companies charged with violating the consumer protection provisions were to be altered. The existing Act could be read for most purposes as imposing a form of strict liability on those violating the consumer protection provisions.[22] For example, if a retailer, relying uncritically on the

information supplied by a manufacturer, falsely claimed that a product had certain performance characteristics (for example, fuel consumption, in the case of a car), he was guilty of an offence. He was guilty, in other words, even though the offence was unintended. The committee recommended that in such circumstances the trader should not be held responsible.

In the restrictive practices area, the recommendations did amount to a general weakening of the Act. The committee stood firm on the prohibition of price fixing (both vertical and horizontal), but it suggested that the prevailing prohibition against anti-competitive exclusive dealing be repealed and that the practice be allowed until, in any particular instance, the TPC ruled it to be contrary to the public interest. Similarly, the committee recommended that the prohibition on price discrimination be repealed and that the general prohibition on anti-competitive mergers be restricted so as to apply only to companies above a certain threshold size. One recommendation in this area which was of potential benefit to consumers was that the Act be extended to cover anti-competitive behaviour of trade unions, government agencies and professional groups. These are some of the changes proposed; in all the committee recommended over 60 amendments.

The Trade Pracitces Commission was highly critical of the proposed weakening of the Act, and said so publicly[23], but the Government lost no time in preparing a Trade Practices Amendment Bill, based on the report, which it introduced in Parliament in December 1976. The Minister indicated that the Bill would not be enacted immediately and invited public comment on the proposals. In the event the measure was allowed to lapse and a second amending Bill, taking account of public reaction, was put to Parliament in May 1977.

Two features of the December Bill proved particularly controversial: the repeal of the prohibition on price discrimination and the proposed extension of the Act to cover the anti-competitive behaviour of employees. I shall deal with these in turn.

Broadly speaking, price discrimination occurs when a supplier charges resellers different prices, in order to force small retailers out of the market. Naturally, the practice is bitterly resented by small businessmen. Organisations of small businessmen were deeply concerned about the proposed repeal and expressed their views in numerous submissions to government. In debate on the

Bill speakers from both sides of the House spoke against the change[24], referring to representations they had received from small business organisations and urging that the interests of small business be taken into account. As indicated in its election policy and again in the terms of reference of the review committee, the Government was sympathetic to small business and could hardly fail to respond to this appeal. Accordingly, in the amending Bill of May 1977, the prohibition against price discrimination was retained, in the Minister's words, 'in the interests of assisting the competitive position of small businesses'.[25]

The fact that the Government found it necessary to over-ride the recommendation of the review committee in this respect deserves comment. The committee consisted of a public servant, a lawyer in private practice, an economist and two businessmen. The latter, however, were associated with large manufacturing companies.[26] The committee was thus inclined to treat the small business viewpoint as only one of the factors involved and to canvas contrary agruments, such as were put to it by the Chamber of Manufactures and the Australian Industries Development Association. The Government and the review committee thus approached the issue of price discrimination somewhat differently, and when the strength of small business feeling became known the Government chose to heed it.

But it was the proposed extension of the Act to cover the anti-competitive conduct of unions that dominated all public discussion of the December Bill, both inside and outside Parliament. The Bill prohibited 'secondary boycotts', that is, collective actions by employees aimed at preventing an employer doing business with some third party. Such behaviour was to be treated, like other restrictive practices, as a civil offence, punishable by pecuniary penalties of up to $250,000. The original motivation for this, it will be remembered, was the refusal by Sydney petrol tanker drivers to deliver petrol to discount service stations, clearly an anti-competitive action and detrimental to the consumer interest.

But the provision of the Bill went far beyond such situations, apparently covering all black bans in which unions might wish to engage. As one Government Member pointed out with approval, it would apply to the black ban placed for environmental reasons by Melbourne trade unionists on the construction of the Newport power station.[27] Similarly illegal would be any black bans placed

by the trade union movement on a manufacturing establishment which refused to employ union labour.[28]

Labour was irate and union leaders threatened massive action if any attempts were made to implement the measure. Union and Government leaders met on several occasions in an effort to resolve this conflict, but while the Government was prepared to make some modifications it stood firm on its basic intention to outlaw trade union black bans of the type instanced above. On this matter, then, the second amending Bill did not depart in any major way from the first.

Although the December Bill gave effect to the review committee's recommendation that the Act should apply only to mergers in which the companies involved were above a certain threshold size, the Minister continued to have doubts as to whether there should be any control on merger activity at all.

> In view of the size of the Australian market (he said in January) I am tossing up whether it is reasonable to have restrictions on company take-overs. In order to achieve a greater rationality of Australian business, possibly there should be no restrictions on mergers.[29]

Thus, in the May Bill, there was a further retreat from merger control, although the Government decided not to repeal altogether the anti-merger provision. The provision was now to apply only when the takeover would lead to one company dominating the market; previously it had applied to mergers which resulted in a substantial reduction in competition, say by decreasing the number of firms in a field from four to three. During debate on the May Bill the provision was again weakened when the Government further amended it so as to apply only when the merger resulted in a company dominating 'a substantial market for goods or services in Australia or in a State'.[30] Thus mergers which resulted only, say, in city-wide dominance were apparently to be excluded. Prohibited mergers were still authorisable by the TPC, if, in individual cases, they were found to be in the public interest.

One other way in which the second Bill differed significantly from the first was on the question of price agreements. Resale price maintenance (vertical price fixing) remained unconditionally prohibited, as did price fixing agreements among competitors. Price recommendation agreements, such as are embodied in the recommended price lists circulated by various trade associations,

were also prohibited if they amounted in practice to price fixing and if there were fewer than 50 members of the association. Where there were more than 50 members the Government took the view that this was an association of small businessmen and therefore entitled to special treatment. In these circumstances, price recommendation agreements which in practice fixed prices and thus diminished competition, were prohibited in the first instance but authorisable by the Trade Practices Commission if the Commission found them to have public benefit outweighing their detrimental effect on competition.

The Minister explained the rationale for this concession to small business in his second reading speech:

> The Government has also given close attention to the problems of small businesses in relation to the Trade Practices Act. It has made a number of decisions as a consequence of this consideration. It has decided that both the present Act and the previous Bill gave insufficient attention to the problems of small businesses in making pricing decisions. Small businesses often do not have the managerial support staff necessary to make informed individual pricing decisions, particularly in multi-product situations. They tend to rely for this support upon trade associations. However, the present Trade Practices Act has often hindered the issuing of recommended price lists by trade associations. In the view of the Government, this has worked against the interests of small businesses.[31]

The Government was having it both ways in making provision for the authorisation of price fixing agreements sponsored by associations of small businessmen. Writing the provision into the legislation would appease to some extent the Government's small business constituency; at the same time the Government knew that the Trade Practices Commission was in fact most unlikely to authorise such agreements. In practice, therefore, the consumer interest would remain paramount.

The amendments finally enacted in mid-1977 thus represented a substantial change to the 1974 Act. To a considerable degree, however, the Government achieved its aim of 'taking the harshness out of the act' without diminishing the protection afforded consumers. The specifically consumer protection provisions were, if anything, strengthened, and the prohibition on price fixing, perhaps the single most important provision from the consumer viewpoint, remained essentially unchanged. Yet, the amendments did represent a substantial withdrawal from the field of merger

control. The Government declared itself not opposed to the trend towards monopoly; it was concerned only when this trend actually culminated, in particular instances, in the establishment of a monopoly or near monopoly.

It can be argued, of course, that the trend toward monopoly is detrimental to the consumer interest in the long term, and that for this reason the amendment was disadvantageous to the consumer. Nevertheless, the effect of merger activity on the consumer is far less direct than the effect of, say, price fixing or misleading advertising. It is probably fair to say that the retreat from the 1974 Act was greatest in areas which least directly affected the consumer interest. The 1977 amendments were an attempt to accommodate various business interests, without at the same time compromising the fundamentally consumer orientation of the Act.

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1. CPD, S.57, pp.1014, 1414.
2. With the very minor exception of collusive tendering and bidding not engaged in as part of an on-going agreement. These were criminal offences.
3. However parties which felt themselves disadvantaged could take civil action to recover damages.
4. See G.Q. Taperell, R.B. Vermeesch and D.J. Harland, *Trade Practices and Consumer Protection: A Guide to the Trade Practices Act 1974 for Businessmen and Their Advisors* (Butterworths, Sydney, 1974), p.31.
5. CPD, H. of R.86, p.2910.
6. *ibid.*, p.2925.
7. *ibid.*, pp.2925, 2913.
8. *Trade Practices Commission Report, 1974-5*, p.1.
9. Speech to Australian Legal Convention in Canberra, *Financial Review*, 8 July 1975.
10. *TPC Report, 1974-5*, pp.11, 12.
11. *TPC Report, 1974-5*, pp.28,41.
12. CPD, H. of R.97, pp.1856, 1859.
13. *TPC Report, 1974-75*, p.10; *Financial Review*, 13 August 1975.
14. p.10.
15. Letter to the author, 23 June 1975.
16. See for example, B. Warren, 'Capitalist Planning and the State', *New Left Review* 72, March-April 1972.
17. The Governor General, CPD, H. of R.98, p.14; The Minister for Business and Consumer Affairs, see *Financial Review*, 24 February 1976.
18. See the Report of the Trade Practices Act Review Committee (AGPS, Canberra, 1976), p.1.
19. *Financial Review*, 5 November 1976.

20. Letter to the Minister, see *Financial Review*, 24 June 1976.
21. Report of the review committee, *op. cit.*, p.2.
22. See Taperell, *et al*, *op. cit.*, pp.230-2.
23. See the Commission's comments on the report, dated 21 September 1976.
24. A. Whitlam, CPD, H. of R.102, pp.289-90; Neil, CPD, H. of R.102, pp.306-7; Jacobi, CPD, H. of R.102, pp.310-11.
25. CPD, H. of R.104, p.1478.
26. Review committee report, *op. cit.*, p.1.
27. Shipton, CPD, H. of R., pp.1751-2.
28. See Harradine, CPD, S.73, pp.1893-5.
29. *Financial Review*, 21 January 1977.
30. See CPD, H. of R.104, p.1870.
31. CPD, H. of R.104, p.1477-8. For a persuasive counter-argument see W. Pengilley, 'Small Business and the Trade Practices Act', *Management Forum* 2, (1976), pp.75-82.

Chapter 6

The Sources of Antitrust in Australia

Explanation in terms of interests?

One of the major aims of the preceding chapters has been to identify the potential beneficiaries of Australia's various antitrust enactments. In the case of the 1906 and the 1974 Acts, this amounted to providing an explanation of why these laws were introduced; they were enacted in order to serve the interests concerned – producers in 1906 and consumers in 1974.

The 1965 Act, however, cannot be so simply explained in terms of the interests it served. This Act, as we saw, was ultimately to the advantage of property-owning interests. Yet not all those responsible for it saw this as its prime purpose. For many the motivation was simply the sense of injustice aroused by the way in which certain traders were victimised by the anti-competitive practices of others. The fear that a Labor Government might seek to remedy these injustices in ways which jeopardised unnecessarily the rights of private property, though perhaps paramount in the minds of some, was probably, in overall terms, a subsidiary motivation. In any case, these motivations do not account for the Government's original decision to legislate. That decision was made for somewhat different reasons, principal among them being the need to combat inflation. The motivations mentioned above were generated subsequently by the heightened awareness of restrictive trade practices which developed following the decision to legislate.

This analysis demonstrates an important point not sufficiently appreciated by the interest-group theorists discussed in Chapter 1. **Identifying the potential beneficiaries of a particular enactment is not necessarily equivalent to providing an explanation of why it was enacted.** In many cases it is. But when the argument is that the legislation serves propertied interests by stabilising an existing

capitalist order, explanation in terms of interests becomes very problematic. Such explanations are likely to encounter one of two problems.

On the one hand, if the protection of private property is really uppermost in the minds of those initiating such legislation, it is usually so for the very good reason that property is under serious attack from forces demanding radical change. This was the context of some of the economic regulations enacted in the United States around the turn of the century. The predatory behaviour of big business had given rise to a widely expressed demand for government action, and legislation was inevitable. The only question was how far such legislation would go. If the defenders of private property took the initiative in framing legislation they did so because they felt obliged to in order to forestall more far-reaching changes.[1] But without the demands of farmers, workers, consumers and others there would have been no such legislative innovation. Any explanation purely in terms of the interests of property is therefore inadequate.

On the other hand, when the threat to existing social arrangements is more remote and the anti-revolutionary potential of the legislation less obvious, the defence of property may not be an issue in the minds of legislators and explanation in these terms is again untenable. The problem is exemplified in the influential American work, *Regulating the Poor*.[2] The authors of this book explain the 'great society' legislation (and the expansion of other welfare programs) of the 1960s as an attempt by a propertied ruling class to forestall a revolutionary explosion that was brewing in the ghettos. But although that may have been one of the consequences of the legislation, the authors provide no evidence that it was in fact the government's purpose. On the contrary, their discussion seems to suggest that the real explanation of the great society legislation was that the Democratic Party, faced with a declining vote in the south and decreasing enthusiasm on the part of labour, two of its traditional sources of support, was trying to remake its electoral base by cultivating the allegiance of urban black voters.[3]

Any attempt to explain the 1965 statute in terms of the defence of property against a potential revolutionary upheaval would encounter this second type of problem: no such threat was imminent. As a result, the desire to pre-empt the possibility of

more radical change was not the dominant factor in government thinking, although, as we have seen, it was one of the motives involved. The legislation cannot, therefore, be said to have been enacted in order to serve the interests of private property. To reiterate, the 1965 Act is one piece of legislation which cannot be explained simply in terms of the interests it represents.

The fact that identifying interests served by a piece of legislation is not necessarily equivalent to providing an explanation of its enactment is illustrated even more sharply by the 1974 Act. This Act was intended to benefit consumers. Potentially, therefore, it pre-empted the possibility of any build up of consumer pressure for more radical measures. The Act was thus ultimately beneficial to property interests. It would be absurd, however, to suggest that such an analysis amounted to an explanation.

Further conclusions on the role of interests

Certain additional conclusions can be drawn about the role of interests in shaping the various antitrust enactments in Australia since Federation. I shall state them here as the conclusions of this particular study but they can also be regarded as hypotheses about what is generally true. Whether they in fact hold true as generalisations cannot be determined on the basis of a single study such as this.

First, on the whole, interests were able to determine legislative outcomes only to the extent that they operated as electoral pressures. In 1906 the preservation of Australian industries was an electorally popular policy. Labor was protectionist and non-Labor candidates were elected largely on the basis of their stance on the issue of free trade versus protectionism. The fact that the Government of the day was protectionist was thus an expression of the protectionist leanings of the electorate at large. Under these circumstances legislation inevitably reflected the interests of Australian industry. Analagously, the climate of electoral opinion in 1974 favoured consumer protection.

By contrast, electoral pressures were weak in relation to the 1965 Act. The most obvious pressures in this case were those exerted by business interests opposed to the legislation. But although highly organised, articulate and tactically skilful, these interests were not backed by popular opinion and were of little

electoral significance. So it was that the Government was able to respond to their arguments as it saw fit, accepting some and rejecting others, and to persist with its announced intention to legislate, despite the most vigorous political campaign by business in recent years.

A second and related conclusion is that there was no consistent relationship between the amount of lobbying and legislative outcomes. On occasion, lobbying was extremely effective: representations by a single manufacturer were all that was needed to trigger a protectionist legislative reflex in 1906. On the other hand active lobbying by business interests failed to prevent the passage of the 1965 Act.[4] Admittedly, the original Barwick proposals were substantially modified as a result of lobbying, but modications were made only where lobbyists were able to persuade the Government that its proposals were contrary to its own purposes. Finally, a strong consumer-oriented Act was passed in 1974 although consumer organisations did little or no lobbying for its introduction.

Third, in relation to the 1965 Act we have seen that where lobbyists did succeed in persuading the Government to modify its intentions they did so by appealing to values accepted by the Government and demonstrating the inconsistency of the Government's proposals with those values. Similarly, the success of small business lobbying in relation to the 1977 amendments is attributable to an ideological commitment by government to the welfare of small business. It may well be true more generally that, where electoral considerations do not intrude, pressure groups can influence the legislative process only by appealing to values already espoused by government.

Further conclusions on the role of values

Although in 1906 and 1974 legislators were responding to interests which they could scarcely ignore, this was not how they saw themselves as acting. They saw themselves as giving expression to values to which they adhered – producer-protection in the first case and consumer-protection in the second. But men with these values were in power only because their attitudes accorded with those of the electorate, and it is therefore wrong to view the legislation as nothing more than an expression of the values of

legislators. The value commitments of legislators were, in a sense, mechanisms by which electoral pressures were transformed into legislative outcomes.

In 1965, however, values played a far more autonomous role. Although the decision to legislate, taken in 1960, was triggered by political considerations, there were no significant electoral pressures for the comprehensive trade practices legislation ultimately enacted. The commitment of Liberal Party politicians to notions of free enterprise and economic justice exerted an independent influence on the legislative process. We see, then, that values can indeed act as independent sources of legislative innovation, but only in the absence of significant electoral pressures. When such pressures exist, they are likely to over-ride any opposing value orientations and ensure the dominance of values with which they are consistent. This was convincingly demonstrated by the Liberal Party's conversion in 1971 to the view that the public interest meant ultimately the consumer interest, a conversion which occurred at a time when the consumer interest was becoming of increasing electoral significance.

The relative autonomy with which the Government acted in 1965 was possible only because of the absence of any over-riding political constraints. The enactment took place just prior to the emergence of consumer-protection as a significant electoral force, and long after the protection of Australian industries had ceased to be an issue of any electoral significance. The 1906 and 1974 enactments, however, were the product of the dominant concerns of the day – producer-protection in the first case and consumer-protection in the second. It is to this quite dramatic shift in the purposes served by Australian competition policy that I now wish to turn my attention.

From producer to consumer protection

At the outset it must be recognised that the reorientation of anti-trust law to the service of the consumer interest has been by no means complete. We have already seen that, for a variety of reasons, neither side of politics is wholeheartedly committed to the consumer interest. Indeed, in other areas of governmental activity, such as tariff policy, the interests of consumers remain subordinate to those of producers. Despite these qualifications,

the fact remains that the major thrust of Australian monopoly law has switched from producer to consumer protection.

How are we to account for the reorientation of Australian antitrust law to the service of the consumer? Inflation is obviously an important part of the answer. Consumer reaction to rising prices was the most immediate stimulus to the enactment of consumer-oriented legislation. But the matter is more complex than this. The 1974 Act was far more than an anti-inflationary device. Moreover, it was part of a broader legislative movement for consumer-protection which was occurring at the State level at about this time.

The first specifically consumer protection statute in Australia was passed by the Victorian Government in 1964. It was a half-hearted measure, setting up a five member council to investigate and make recommendations on consumer matters referred to it by government. Legislative momentum for consumer-protection really began to develop in 1969 with the passage of a second consumer protection Act, this time in New South Wales, and by 1974 consumer protection legislation had been enacted in every State of Australia.[5] None of these Acts was in any way concerned with combatting inflation. There must have been other reasons, therefore, for this widespread development of legislative concern for consumer well-being and hence, more specifically, for the movement from producer to consumer protection in Australian antitrust law. In the following pages I shall attempt to elucidate some of these reasons.

To begin with we need to identify the relevant difference between producers and consumers. Consider first the producer, and in particular the individual owner of a relatively small scale productive enterprise. He is in a position to be seriously harmed by the monopolistic practices of others. Predatory pricing or exclusion from a trade association can ruin him financially. In such circumstances he is an individual and identifiable victim of the practices concerned. So, too, are his employees, if he is forced to close his business. Victimisation may thus extend beyond the entrepreneur to those whose livelihood is dependent on his economic well-being, but it remains highly specific, for it is an individual enterprise which is threatened with extinction.

Detriment to consumers, on the other hand, is more generalised. The effects of restrictive practices are not confined to

particular consumers but apply to consumers in general. Moreover the detriment suffered by any one consumer is often insignificant. For instance, although the total cost to consumers of a price fixing agreement may be many millions of dollars, the cost to any one consumer is slight, so slight that he may be unaware of it. The changing emphasis of Australian monopoly law is thus a change in the kind of victim which the law seeks to protect. Once concerned to guard against the victimisation of specific individuals or enterprises, antitrust law is now concerned to protect a whole class of individuals from practices which victimise them collectively rather than individually.

The place of the 1965 Act in this progression deserves some comment. Although concerned with business interests generally and not just producers, it was, like its predecessor, aimed at protecting individual enterprises. In this sense it was closer in spirit to the 1906 Act than to the 1974 legislation. Its enactment in 1965 was thus something of an anachronism, made possible by the fact that it was not firmly anchored by electoral considerations to the social conditions of its time but was rather the freely floating product of autonomously operating Liberal Party values.

Legal change since the 19th century

When the movement from producer to consumer protection is formulated as above, it can be seen to be part of a broader pattern of a legal change which has been occurring since the 19th century. One of the most useful accounts of this change is that provided by Professors Kamenka and Tay.[6] Their discussion makes use of a distinction between two models or types of law – so called *Gesellschaft* law and bureaucratic-administrative law. The concept of *Gesellschaft* refers to a society made up of atomic individuals whose interactions with each other are motivated by considerations of self-interest and who submit to government only in order to ensure that the pursuit of self-interest is carried on in an orderly fashion. The paradigm case of *Gesellschaft* is the *laissez-faire* economic order of 19th century England.[7]

Gesellschaft law is the product of such a society. It is law 'attuned to the needs of the individual house or property-holder, the entrepreneur, the settled citizen living on the terms of equality with those around him'.[8] It treats individuals as formally equal,

interchangeable units, bearing certain rights, to property for example, and it is concerned to protect those rights and to adjudicate between citizens when the rights they assert are in conflict. It conceives of human relationships as regulated by a multitude of privately negotiated contracts which it is the law's responsibility to uphold in the interests of social stability. The actual content of these contracts – what it is the parties are agreeing to – is not the law's concern.

Bureaucratic-administrative law, on the other hand, aims not to protect individual rights but to regulate social activity for the benefit of whole classes of individuals or the public as a whole. It recognises the existence of disadvantaged groups within the society whose interests are not served by the formal protection of individual rights and whose well-being requires state intervention and indeed the abrogation of the rights of more powerful or privileged groups.

Since the 19th century law has been moving, hesitantly and unevenly, but on the whole unmistakeably away from the *Gesellschaft* towards the bureaucratic-administrative model. This has involved the progressive limitation of property rights and of contractual freedom. Thus, for example, employment contracts can no longer be negotiated freely but must conform to various minimum wage and hours of work statutes. And illustrative of the restrictions placed on property rights: a company may be required to use its private property in such a way as to conform to certain health and safety standards laid down by government; and price controls may interfere with the company's freedom to dispose on its own terms of commodities it produces. Even the right to exclude others from being on private property is limited. For instance, the United States Supreme Court has ruled that a company does not have the right to ban evangelists from the streets of a town owned by the company.[9]

The trend toward bureaucratic-administrative law is also evident in the growth of welfare legislation and in the enactment of laws designed to regulate broadcasting, transport, fisheries, share trading and insurance. All such law seeks to protect the public as users, or as consumers, or workers, or policy holders, or investors. Individuals are relevant not as bearers of rights but as members of a class of people whose interests are to be protected.

The increasing concern with social rather than private interests

has also been called 'the socialization of law'.[10] One of the advantages of this formulation is that it enables us to see as part of the general pattern, a particular process to which we shall have occasion to refer later, namely, 'the socialization of enforcement'. This aspect of the movement from *Gesellschaft* to bureaucratic-administrative law is discussed by American writers Ball and Friedman in their account of the law of usury in the State of Wisconsin.[11] In 19th century Wisconsin, usury, though considered a socially dangerous and immoral practice, was not a crime. It was dealt with as a matter of civil law: those who felt themselves victimised by the practice could sue for damages. But in 1895, usury was made a crime, punishable by a fine. The state rather than the individual was now responsible for the enforcement of the law. The law of usury had been socialised. Ball and Friedman explain this as follows:

> In the Middle West of the 19th century, usury had been primarily a problem of the rate of interest on farm mortgages. By the turn of the century it became preeminently a problem of urban consumption loans. Those who suffered from usury were unable to handle enforcement themselves because of their social and economic status. Loans were small; the borrowers were in large measure landless urban workers, many of them foreign born. By contrast, the farmers in the 1850s and 1860s had had a larger voice in the affairs of the community and had been willing, to judge from court records, to enforce the usury laws. Making usury a crime was thus a legislative judgment that it was best to socialize remedial action...because under existing social conditions civil enforcement had failed.

Leaving aside for the moment this issue of the socialisation of enforcement, it seems to me that Australian monopoly law reflects the change which Professors Kamenka and Tay have described. The 1906 Act was evidently motivated by the spirit of *Gesellschaft*, concerned as it was to protect the rights and interests of individual entrepreneurs from the unfair tactics of others. Of course, being designed to regulate economic activity, it was far from typical of *Gesellschaft* law and in itself represented a shift away from *laissez-faire*. But the Act of 1974 went very much further. Emphasising as it did the welfare of the public as consumers it was a clear example of bureaucratic-administrative law.

Explaining the change

The general movement from *Gesellschaft* to bureaucratic-administrative law in capitalist societies[12] is a consequence of change occurring in society itself. A multitude of factors are therefore involved. But perhaps the most significant factor, a change to which most other changes are somehow related, has been the growth in the scale of capitalist enterprise. Industrialisation, technological advances, the increasing bureaucratisation of organisation, the progressive division of labour and the processes of capital accumulation have together resulted in an enormous increase in the scale of industrial and commercial property. Today, a single industrial corporation may operate factories in several countries and a banking corporation may have branches in every city of a nation. Property, once something which might meaningfully be said to be in the possession of its owners and of primary concern only to its owners, has become an organising principle by which work forces are coordinated and some men assume the right to control the lives of others.

Moreover, the operations of large scale private property often affect the public at large. Towns may prosper or decay as a result of investment decisions made by a single business enterprise, and the activities of oil companies can bring about artificial fuel shortages to the discomfort of entire societies. The activities of large corporations are thus matters in which the public has a vital interest.

When private property becomes private power over the lives of citizens, democratically influenced governments are under strong pressure to intervene to ensure that this power is not wielded in socially irresponsible ways. Such intervention is facilitated by the difficulty which modern man has in thinking of large scale property as private.

> The oil company is felt to be as 'public' as the state electricity utility, the private hospital and the private school, with their growing need for massive state subsidies, as public as the municipal hospital and state school.[13]

Governmental intervention has been further facilitated by the changing significance of ownership which is associated with the changing scale of private property. Ownership today is typically spread across a large group of shareholders most of whom have

little knowledge of or interest in what they own beyond the dividend it produces and its value on the share market. The typical shareholder has lost all control over his company (although the managers and directors who exercise control of a company may themselves hold large parcels of shares in it). Given this situation, government efforts to curb the power of private property by subjecting it to regulation in the public interest involve negligible interference with the rights of the typical owner. Provided the shareholder retains the right to any income generated by the property concerned and provided the capacity of the company to generate income is not too seriously curtailed, government regulation affects only those ownership rights which the average owner has long ago forfeited. The increasingly tenuous and impersonal link between the owner and his property has thus contributed to the development of government regulatory activity. These, very briefly, are some of the factors which have lead to a general movement from *Gesellschaft* to bureaucratic-administrative law.

Let us look in a little more detail at how these factors have contributed to the particular development with which we are concerned here – the emergence of consumer protection law. As technologies become more sophisticated, products become more complex. Consumers are thus not in a position at the time of purchase to evaluate the quality of what they are buying or to verify that machinery on sale works as claimed. Defects in cars or in automatic washing machines may not be evident at the time of purchase even to the most careful buyer. In the case of goods marketed in sealed containers, consumers have no chance of inspecting what they buy. The need for consumer protection policies is therefore obvious.[14]

Moreover, the scale of modern enterprise is such that producers are in a financial position to assume responsibility for their products. The result has been a shift in judicial and legislative thinking away from the principle of *caveat emptor* (let the buyer beware), dominant in the early 19th century, towards a policy of *caveat venditor* (let the seller beware). For a while this movement was inhibited by the common law which held that since there was (normally) no direct contractual relationship between the consumer and the manufacturer, the negligent manufacturer was not in breach of contract and could not be held responsible for his faulty products. But in time judges moved away from this

strict contractual approach and began to protect the interests of consumers in various ways. And today, (though not yet in Australia), numerous statutes impose on the manufacturer the responsibility for ensuring that his products are of merchantable quality.[15]

The growth of a consumer orientation in Australian monopoly law is an instance of the growth of the principle of *caveat venditor* and more generally of the development of bureaucratic-administrative law. As such it is ultimately attributable to the factors I have been discussing.

Socialism and the socialisation of the law

It is of interest to note that Marx foresaw something of this general movement from *Gesellschaft* to bureaucratic-administrative law although he conceptualised the process somewhat differently. He argued that there was a tension in advanced capitalist societies between the social nature of large scale property and the fact that it was privately owned; a contradiction, in his terminology, between the forces of production (in this case collective labour) and the relations of production (private ownership). The working out of this contradiction would lead, ultimately, to socialism. In a famous passage in the preface to the *Critique of Political Economy* he writes as follows:

> At a certain stage of their development, the material productive forces of society come into conflict with the existing relations of production, or – what is but a legal expression for the same thing – with the property relations within which they have been at work hitherto. From forms of development of the productive forces these relations turn into their fetters. Then begins an epoche of social revolution.[16]

In certain respects the socialisation of the law we have been discussing can be regarded as an outcome of the contradiction which Marx described. Yet the change does not amount to the socialist revolution which Marx predicted. The essence of private property, the private appropriation of any income which it generates, remains intact, and private profit is still the motor of the economy. Moreover, the power of property, although somewhat curtailed by regulation, remains in private hands and remains considerable. This was demonstrated, to mention just one

instance, when in 1975 Australian car manufacturers were able to force the Government to reduce sales tax on cars by threatening to lay off large numbers of workers.[17] The socialisation of the law has not meant the advent of socialism.

This observation has an important implication for the interpretation of the rise of consumer-oriented trade practice law in Australia. The movement from producer to consumer protection represents a shift in the interests favoured by legislation. But it does not necessarily reflect any overall shift of power away from producers and towards consumers. On the contrary, the changing legislative emphasis has been prompted by a growth in the power of productive enterprise and its ability to dictate terms to the consuming public. Consumer protection legislation merely checks this trend; it can hardly be said to have reversed it. If the changing function of Australian trade practice law is an indication of the growth of a concern at the legislative level for consumer protection, it is similarly an indication of the growth of the power of producers in their market place interactions with consumers.

The criminalisation of restrictive trade

One respect in which the history of Australian monopoly law does not appear to have been a movement from *Gesellschaft* to bureaucratic-administrative law is in the area of enforcement. Based on our earlier discussion of the socialisation of enforcement, we might have expected Australian antitrust law to display a steadily increasing reliance on criminal sanctions. But, as I shall demonstrate in what follows, this has not been so.

The 1906 Act was a criminal statute specifying restraint of trade and monopolisation as criminal offences, punishable by fines of up to five hundred pounds. A second offence was punishable by up to a year's imprisonment. Civil actions for the recovery of damages[18] were also possible, but only with the consent of the Attorney-General. Thus, although the Act allowed for the possibility of civil action by individual victims, the state assumed full responsibility for its enforcement.

Generally speaking, however, the 1965 Act was not a criminal statute. It set up a procedure for the examination of questionable practices which could then in individual cases be declared unlawful by order of a Trade Practices Tribunal. Any person contravening

such an order could then be prosecuted, not for the practice in question but for contempt of the Tribunal. In addition, individuals harmed by practices declared unlawful in this way could take civil action for damages. But here again, enforcement was largely the responsibility of the state, despite the fact that the Act was not a criminal statute: no remedy was possible until after the state declared a particular practice unlawful, after which observance of the law was guaranteed by the threat of state-initiated prosecution for contempt of court.

The 1971 Act declaring resale price maintenance unlawful was similarly non-criminal in nature. Civil action for damages was possible but again the state could enforce the law in any particular instance by first seeking a court injunction after which any continuation of the practice by the party concerned would be punishable as contempt of court.

The 1974 Act, as we have seen, adopted differing approaches to the enforcement of its two sets of provisions. Restrictive trade practices themselves were not declared crimes but were nevertheless prohibited and directly punishable with 'pecuniary penalties', while the misleading and deceptive conduct covered by the consumer protection provisions was criminal and punishable by heavy fines and imprisonment. In the case of both sets of provisions, individuals harmed by the practices concerned could take civil action to recover damages.

Finally, the amendments made by the Liberal-Country Party Government in 1977 removed the penalty of imprisonment for violations of the consumer protection provisions. Such violations remained, however, criminal offences.

Several conclusions emerge. First, although there has been variation in the extent to which Australian antitrust legislation has criminalised the behaviour concerned, this variation does not amount to a unidirectional trend. The law was at first criminal, later civil and finally, in relation to certain offences, criminal again. Second, there has been little or no variation in the extent to which the state was prepared to assume responsibility for enforcement. Individual actions for damages were always possible, but in every case the state itself was prepared to enforce the law. And third, it is an obvious corollary of this analysis that while the criminalisation of illegal behaviour is one way of ensuring socialised enforcement, it is not the only way. Injunctions and pecuniary

penalties are alternative devices with which the state can relieve the individual of the responsibility for enforcing the law.

How then are we to explain the fact that the enforcement of Australia's antitrust laws, always a matter for the state, has sometimes been by means of criminal sanctions and sometimes not? The answer, I think, is largely a matter of the extent to which legislators identified with or were able to imagine themselves in the place of the law violator. We all tend to view the criminal as someone who is 'not like me', someone who violates laws which we cannot imagine ourselves violating. If we can imagine ourselves in the position of the law breaker we are less willing to regard him as a criminal even though we may concede that his behaviour is reprehensible (witness the relatively lenient community attitude towards drunken driving).

Let us consider from this point of view the attitudes of those responsible for the various enactments. The 1906 Act was an attempt by a Government sympathetic to certain business interests to regulate the behaviour of other businessmen. This way of putting it might lead us to expect a considerable degree of sympathy on the part of legislators for those whose behaviour they sought to regulate. But the crucial feature of the interests to be regulated was not that they were business interests but that they were, by and large, overseas business interests. Given the nationalistic climate of opinion of the day, there was no possibility of identification with such interests. Those at whom the law was directed were essentially 'not like us', so much so that it seemed natural to invoke octopus imagery to describe them. The offenders concerned were 'enormous octopus trusts' which were fastening their 'long tentacles upon the heart of Australia'. With such imagery in mind there could be no doubt about the appropriateness of criminal sanctions.

The 1965 Act, too, was an attempt by a Government sympathetic to business to regulate the behaviour of certain businessmen. But here the businessmen affected were Australian, and very much 'like us' as far as the Government was concerned. Such men could not be criminal and it was inappropriate to criminalise their business behaviour. Other enforcement techniques had therefore to be employed. The same holds true for the 1971 legislation.

As for the 1974 Act, members of the Labor Party were far less inclined than the Liberals to imagine themselves in the position of

businessmen. Their basic impulse, therefore, was to criminalise the behaviour with which their Act was concerned. This impulse received expression in the case of the consumer protection provisions. But in the case of the restrictive trade provisions the Government stopped just short of full criminalisation by adopting the technique of the pecuniary penalty. Though just as onerous as a fine, the pecuniary penalty was technically a civil rather than a criminal punishment.

There were, as we saw, sound practical reasons for this difference in enforcement technique within the same Act. Much of the behaviour covered by the restrictive trade provisions was conspiratorial in nature (for example, agreements not to compete), making conclusive evidence difficult to obtain. Under these circumstances the safeguards available to defendants in criminal prosecutions would have made enforcement of the law more difficult. Practical considerations therefore dictated the use of civil procedures. But Labor's failure to employ criminal sanctions was hardly to the advantage of businessmen who violated the law. Restrictive business practices were criminal in all but name.

This analysis of the 1974 Act provokes a question: why was it that the protectionists failed to employ a similar non-criminal but nevertheless punitive strategy for the enforcement of the 1906 Act? After all, they were presumably just as concerned as the Labor Government in 1974 to secure the effective enforcement of their Act, at least against overseas trusts. One reason, perhaps, is that antitrust law generally was in its infancy in 1906 and the difficulties of relying on criminal sanctions for its enforcement had not become fully apparent. Moreover, the distinctions between civil and criminal law were clearer then than they are today and the idea that the state might employ civil proceedings to punish an offender for violating the law would have seemed almost a contradiction in terms. Given the intention of the Government of the day to prohibit and punish restraint of trade, there could be no alternative but to criminalise it.

Moving, finally, to the 1977 amendments, the Liberal-Country Party, given its business sympathies, was clearly unhappy about the criminal sanctions in the 1974 Act. However, as we have seen, the Government was also sensitive to the consumer viewpoint, and the Australian Consumers' Association, in its submission to the

review committee, had expressed strong opposition to any moderation of the penalties for consumer protection offences. Removing the possibility of imprisonment was thus a compromise solution.

To summarise, then, variation in the extent to which Australia's antitrust laws have relied on criminal sanctions for their enforcement is to a considerable degree a function of the differing propensity of legislators to identify with those who might violate the law. Such at any rate would seem to be the explanation of the dramatic difference between, on the one hand, the civil enforcement techniques employed by the conservative Government in 1965 and 1971 and, on the other hand, the criminal and semi-criminal sanctions specified in the 1906 and 1974 Acts. In the case of the restrictive trade provisions of the 1974 Act, practical considerations dictated the use of sanctions which, though effectively criminal, were technically civil. In a sense however, this is an exception which proves the rule.

It is appropriate to consider here an alternative explanation which may have occurred to the reader. Obviously the degree to which a legislator can identify with an offender is closely related to whether or not he regards the behaviour in question as morally wrong. It might seem simpler therefore to explain the use of criminal sanctions in terms of the degree to which the behaviour concerned violates the legislator's own sense of morality. But the advantage of the explanation provided here is that it highlights the fact that the degree of perceived immorality depends on the extent to which the legislator is able to identify with the offender and may have little to do with the characteristics of the behaviour itself. The 1906 Act, the 1965 Act and the restrictive trade practices provisions of the 1974 Act were all concerned with the same kind of behaviour. If perceived immorality were simply a function of the behaviour itself, we would not expect the attitude of legislators to have varied greatly from one Act to another and we would consequently not have expected much variation in the extent to which they were prepared to invoke criminal sanctions. Only when we recognise that the degree of immorality perceived depends on who the offenders are and on the ability of legislators to identify with them, can we account for variations in the extent to which restrictive trade practices have been criminalised in Australian monopoly law.

Law as an index of change

I should like to conclude with some brief remarks about the broader sociological implications of the present work. This has been a sociological inquiry into the sources of antitrust law in Australia. In the course of the study, changes occurring in society at large have been invoked to account for particular changes which have occurred in the law. But this perspective can be reversed. If we regard law as an index or manifestation of more general social phenomena, then the sociological study of the law illuminates these more general phenomena.

From this point of view, the study of interests served by Australian antitrust law reveals a change which is occurring in the dominant values or concerns of the society – a decline in concern for the welfare of producers in favour of a more serious concern for consumer welfare. The law embodies these shifting concerns and provides evidence that such a change is taking place. What is more, without this kind of evidence, value changes occurring over extended periods of time would be difficult to perceive, for although we might hope to measure present day value orientations directly, by means of questionnaire techniques, there is no way we can interrogate populations of the past. Their attitudes must be inferred from the cultural products which they leave behind. Law is such a cultural product. And in circumstances where law can be seen to have been shaped by electoral forces (as in the case of the 1906 and 1974 Acts), law is a particularly suitable cultural product from which to infer the basic value orientations of the day. In this way the sociological study of the law yields insights into not only the law but also the society which gives rise to that law.

I have argued that the law can be treated here as an index of value change; I have not argued that it is necessarily indicative of changing relationships of power. Of course the shift from producer to consumer protection in antitrust law reflects a changing balance of power between producers and consumers at the legislative level. But we cannot automatically infer from this any more general shift in the balance of power between these two groups. On the contrary, as suggested earlier, the increasing consumer emphasis at the legislative level is a response to and an indication of the increasing power of producers relative to consumers in the market place. Consumer-oriented trade practice legislation does not reverse this trend, for although it places limits on business behav-

iour, it does not aim to restructure capitalist economic relationships in any fundamental way.

The adjustments which businesses need to make in their commercial practices in order to comply with consumer-oriented trade practice law are sometimes relatively minor. For many of the larger companies the most serious disadvantages which antitrust law imposes on them are the cost of monitoring their own activities to ensure they comply with the law and the legal costs involved in justifying their practices and plans to the agencies administering the law. The enactment of consumer-oriented antitrust law cannot therefore be taken as evidence of any significant growth in the power of consumers relative to producers in their market place interactions. It is evidence, merely, of the growing power of consumers in the legislative arena and of the emergence of consumer welfare as a major concern of the society.

Furthermore, any general analysis of power relationships would need to take into account the extent to which laws are enforced in practice. It is well known that the enforcement of antitrust law is beset by technical and political difficulties and that anti-competitive behaviour prohibited by legislatures may often be engaged in with relative impunity. Since this has not been a study of the enforcement of antitrust law, no conclusion can be drawn as to the extent to which changes in the law have actually affected the balance of power between consumers and producers.

Finally, it should be recognised that the value shift identified here is a continuing process which is by no means completed. In tariff matters, as already mentioned, the interests of consumers remain subordinate to those of producers. But if the shift in interests served by Australian monopoly law is indeed indicative of a more general value change occurring in the society, as I have suggested, we should expect to see in the years ahead some reduction in the level of tariff protection afforded Australian producers.

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1. This is discussed more fully in Chapter 1.

2. F.F. Piven and R.A. Cloward, *Regulating the Poor* (Random House, New York, 1971).

3. This point is developed by W.A. Muraskin, in a review of the book. See *Contemporary Sociology* 4, (November 1975), pp.607-13.

4. Lobbying by organised interests opposed to the 1906 Act was similarly ineffective. See T. Matthews, Business Associations and Politics: Chamber of Manufactures and Employers Federation in N.S.W., Victorian and Australian National Politics to 1939. Ph.D. Thesis, Univ. of Sydney, 1971, p.180.

5. See L.W. Maher, Aspects of Consumer Protection Legislation in Australia 1964-74, Master of Laws Thesis, Australian National University, 1975, p.317.

6. E. Kamenka and A. Tay, 'Beyond Bourgeois Individualism: The Contemporary Crisis in Law and Legal Ideology', in E. Kamenka and P.S. Neale (eds), *Feudalism, Capitalism and Beyond* (ANU Press, Canberra, 1974).

7. *Gesellschaft* is usually contrasted with the concept of *Gemeinschaft* or community, where individuals are subordinated to the group and are bound together by notions of fraternal solidarity, by common values and by traditional obligations. See for example the discussion by R.A. Nisbet, *The Sociological Tradition* (Heinemann, London, 1970), pp.71ff.

8. Kamenka and Tay, *op. cit.*, p.129.

9. P. Selznick, *Law, Society and Industrial Justice* (Russell Sage, New York, 1969), pp.263-4.

10. By American jurist Roscoe Pound. See P. Selznick, 'The Sociology of Law', in the *International Encyclopedia of the Social Sciences*, vol.9, p.57. Other writers speak of a movement from private to public law, for example, W. Friedmann, *Law in a Changing Society*, (2nd edn, Harmondsworth, Penguin, 1972), pp.375ff; and a movement from adjudicative to administrative law, see J. Skolnick, 'The Sociology of Law in America: Overview and Trends', *Social Problems*, supplement to the summer 1965 issue, p.15.

11. H. Ball and L. Friedman, 'The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View', *Stanford Law Review* 17, (January 1965), pp.197-223.

12. The present discussion is concerned with capitalist societies only. Soviet law is also strongly bureaucratic-administrative in character for reasons broadly comparable with those to be given in the text.

13. Kamenka and Tay, *op. cit.*, p.133.

14. On these points generally see M.J. Trebilcock, 'The Consumer in the Post-Industrial Market-Place', in K.E. Lindgren, H.H. Mason & B.L. Gordon (eds), *The Corporation and Australian Society* (Law Book Co., Sydney, 1974), pp.318-334.

15. This account of the retreat from *caveat emptor* is taken from F.J. Davis, *et al.*, *Society and the Law* (The Free Press, Glencoe 1962), pp.117-9.

16. *Selected Works*, vol.I, (Foreign Language Publishing House, Moscow, 1951), p.329.

17. The *Age*, 29 January 1975.

18. In fact, following its American model, the Act allowed for the recovery of treble damages.

Crime, law and business – how were these themes linked in the development of Australia's trade practices law?

Why did early politicians refer to overseas business interests as 'enormous octopus trusts' that had 'fastened their long tentacles upon the heart of Australia'?

Whose interests were served by Australian legislation against restrictive trade practices? Producers? Consumers? Politicians? Businessmen? Workers?

How did these interest groups influence developments?

Why is it hard for Australians to think of businessmen who violate trade practices laws as criminals?

What fundamental changes in Australian society have shaped the nation's trade practices laws?

These are some of the questions which sociologist Dr Andrew Hopkins attempts to answer in his investigation of the sociological sources of Australian monopoly law from the time of Federation to the present day.

Although principally a sociological study, *Crime, Law and Business* will also be of interest to students and practitioners in the fields of law, criminology, economics, and political science.

ISBN 0 642 91814 7
Australian Institute of Criminology