

FOOTNOTES

1. *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.
2. *Ibid.*
3. *Australian National Airways Pty Ltd v. The Commonwealth (No. 2)* (1945) 71 C.L.R. 115; *Nelungaloo Pty Ltd v. The Commonwealth* (1951) 85 C.L.R. 545; *Dennis Hotels Pty Ltd v. The State of Victoria* (1961) 104 C.L.R. 621 (P.C.)
4. Note 1 *supra*.
5. *Ibid.*

*The Right Honourable Sir Garfield Barwick, A.K., G.C.M.G., Chief Justice of the High Court of Australia 1964-1981.

Malpractice: The Administration of the Murphy Trade Practices Act, by V. G. VENTURINI. (Non Mollare, Sydney, 1980), pp. i-ix, 1-464, with Index. Paperback recommended retail price \$14.95 (ISBN 0 9594629 0 2).

Do the short history of the Trade Practices Act 1974 and the administrative record of the Trade Practices Commission under that Act merit the hyper-critical onslaught delivered against them by the former Commissioner, Dr Ventura Venturini, in this refreshingly extraordinary book published under the imprint "Non Mollare" or "Do not yield"? The book is a full bloodied and passionate account of episodes in that history, fleshed out with geo-political allusions and frequent pleas for what seems best described as a "Jeffersonian-Marxist" political philosophy. The evils of a plotting power elite are the same to Dr Venturini whether that elite is the Nixonian Watergate group of henchmen or members of the Trade Practices Commission (hereinafter referred to as T.P.C.) and staff deciding how to handle the application for authorization of standard form contracts by the Motion Picture Distributors' Association (hereinafter referred to as M.P.D.A.). The nobility of the free market and its inevitable exploitation at the hands of organised international oligopolists is as distressing a phenomenon to Dr Venturini as it has always been to those who have espoused the dignity of individual autonomy; the perceived soullessness of institutional conformism, whether of the governmental or corporate variety, are further evidence of the social loss deriving from oligopolistic "competition". The concluding chapter of the book is an extensive comparison of the ultimate in personal abuse of power; the abuses which took place in the United States under Richard Nixon are compared with the alleged complete breakdown of due administration of law in Australia as evidenced by the case of the Trade Practices Act.

This is heady stuff. Does Dr Venturini make out his case or does the book in the end seem to be a general rave by a dismissed public servant? (Dr Venturini was effectively dismissed from the T.P.C. by the complicated device of having the whole T.P.C. abolished upon amendment of the Trade Practices Act in 1977 and then reappointing all Commissioners except him.) My unfortunate conclusion is that, while the early chapters make good reading, the book falters in its analysis of the M.P.D.A. case¹ (pages 129-186) rallies in the section reviewing the T.P.C. investigation of advertising claims by soap-suds makers (pages 213-242) and then finally stumbles, bogging down in the comparison made between Canberra

post-1975 and Washington in the Watergate period (pages 413-438). Why unfortunate? Because the trade practices record deserves severe criticism in the context of a prevailing political philosophy preaching *laissez-faire*, but only a carefully documented criticism of administrators, business leaders, politicians, courts and lawyers recording the failure of much of the Act (perhaps with the exception of the consumer protection provisions in ss.52, 53), to be applied in support of whatever efficiencies the market system has in resource allocation.

Despite this conclusion, much of the book ought to be compulsory reading for all people, particularly students, involved in understanding why the Trade Practices Act 1974 (Cth), at least in its restrictive practices provisions, tends to be ignored by the business community.

The structure of the book is as follows: after an introduction entitled "On words", the five chapters are enticingly entitled "Folklore", "Cabal", "Charrada", "Pantouflage", "Poshlost". The Introduction sets the familiar scene in which the Trade Practices Act 1974 (Cth) was enacted with a flourish as one of the few legislatively based reforms of the Labour Government between 1972 and 1975. That scene is of a highly concentrated and regulated private sector in the Australian economy, where market forces seldom get a look in and smaller business and consumers are considered to be relatively powerless in market terms. The author then defines in the Introduction the intriguing chapter headings upon which the various chapters will be based in order to illustrate the failure of the Act to redress the balance in such a private sector. "Folklore" is simple — it is the accepted wisdom that market forces either do, or can be made to function in Australia and that restrictive trade practices and consumer protection laws can play a positive role in that process. A "Cabal" we all know as a secret plotting group in the body politic which is to serve its own ends. In this book "Cabal" is to be used to describe the alleged hidden conspiracy involving business, the T.P.C. and perhaps the Government as well, in protecting the lead and zinc cartels. The other chapter headings are far more obscure. "Charrada", defined as "speech or action of a clown" heads the chapter dealing with the pressure brought to bear on the T.P.C. to reopen the M.P.D.A.² ruling. "Pantouflage" refers to the donning by administrators of the most comfortable slipper, that is, the way in which government co-operates with business; and the chapter so headed deals with the success of the Life Offices in avoiding a public hearing, the structuring of the Swanson Committee of review of the Act being a committee alleged principally to represent big business and government, and then the T.P.C. review of claims in soap-suds advertisements. Despite this variety of items, the treatment given them by the author does comply with the category in which they are put, namely, co-operative regulation. Finally "Poshlost", a Russian word for "a frightening debasing and interminable vulgarity even of a metaphorical kind", heads a chapter which begins with further charges of T.P.C. inaction, this time in the phonograph record industry, then reverts to the lead and zinc cartel and then develops into a broad ranging assault on the politico-moral and institutional decline in Australia over the years 1975 to 1977, comparing them with the abuses of Watergate and using repeated references to the examples of T.P.C. conduct first introduced in earlier chapters. Overlaying the whole of the "Poshlost" chapter is the tension between Dr Venturini and the T.P.C., his personal confrontation with the Chairman Ron Bannerman, his alleged leak of data on the lead and zinc cartel and the ultimate extraordinary lengths taken to get rid of him.

The most successful chapter is "Cabal" which re-examines the revelations first made in the National Times concerning T.P.C. inaction over a lead and zinc price fixing cartel which seemed clearly to be maintaining price levels in Australia, even though it was nominally entered into as a world market price cartel. The evidence of a probable breach of the Trade Practices Act 1974 (Cth) was in the possession of the T.P.C. Its own staff, particularly the highly regarded Dr Geoffrey Walker, a former Assistant Commissioner, was critical of the failure of the T.P.C. to proceed against price fixers. In evaluating the charges against the T.P.C. both those by Dr Venturini and by the staff of the T.P.C., one must frankly acknowledge that a brutally realistic administrator could well have concluded an analysis of whether or not to commit valuable funds to such a prosecution by deciding that the breakup of the cartel, insofar as it related to the domestic market, would achieve little. Tight oligopoly conditions would simply replace the cartel with price leadership rather than effective competition. World market prices, which successive Australian Governments have been, and remain, eager for producers to keep up, would continue to control domestic prices and any T.P.C. attempt to attack an export cartel could be stopped by use of s.51(2)(g) or Government veto under s.29(1)(b) Trade Practices Act 1974 (Cth). These real issues are not explored by Dr Venturini who instead draws the conclusion of a conspiracy between the regulators and the regulated. Perhaps the real blame lies with the T.P.C. for not enunciating its reasons in greater depth but instead adopting a siege mentality in the face of a media assault.

The chapter "*Charrada*" reveals the intemperance of Dr Venturini in his dealings with a conservative and powerful business community in Australia, advised by relatively sophisticated lawyers who pursue their rightful task of trying to get the best for their clients. The motion picture industry in Australia has often been seen as having developed contrary to the best interests of the local industry. In that context Dr Venturini, acting as the Commissioner deciding the application for authorization of standard contracts in the industry, said that

In the best tradition of Hollywood — that inexhaustible mass production centre of fantasies and synthetic reputations — standard form contracts such as those submitted are a triumph of make-believe to disguise the substance. Having started out with the appearance of settling the terms between free agents, they are changed in character by the introduction of additional unexpected clauses which deal with something completely different. The deception of celluloid has ceased to be a mere propaganda device for the millions of hearts and minds around the world eager to be fed instant emotions and substitutes for thought. It has now become second nature; but the rhetoric and the reality draw ever further apart (page 162).

With such a statement on the record, any legal adviser can be assured of being "on a winner" in calling for a reconsideration of a decision, using whatever procedural argument is available. That is exactly what the M.P.D.A. succeeded in doing in its standard contract application. That success leads Dr Venturini to concentrate on the personal implications for him of being outmanoeuvred whereas he should have made much more play of the fact that, despite the great furore, his ruling on the M.P.D.A. standard contracts was not overturned by the full T.P.C. and shortly after the reconsideration, the M.P.D.A. notified abandonment of the standard contracts. Dr Venturini concludes with a passing reference to the failure of the T.P.C. to undertake follow-up monitoring. As to the structural problems within the film industry, the beginning of the chapter contains an excellent analysis of those

problems in terms of the linkages of overseas producers and distributors with the local exhibitors' chains. In terms of the exhibition of Australian films, it seems clear to this reviewer that the structure of the industry is not demonstrated to be functioning in the national interest. Indeed, earlier Tariff Board reports as Dr Venturini points out, have agreed with this analysis. The failure of Dr Venturini is that he becomes overly concerned with his personal confrontation and fails to address the possible inadequacy of the Trade Practices Act as a legislative regime for restructuring that industry in the national interest.

The chapter "*Pantouflage*" is intended to demonstrate that the regulators (being the Government and the T.P.C.) have, in administering the Act, usually chosen the easy solution favouring the people who are to be regulated. Three major examples are chosen:

First, the decision to relieve the Life Offices of a public hearing of their horizontal agreements. In my opinion, that was sensible economy and ought not to be seen as an act pandering to the life insurance industry. The public hearings that were held in other industries, for example those concerning petroleum distribution and tied houses in the brewery industry, tended to be blank cheques for the lawyers rather than useful investigations of the issues. In my view they were rightly abandoned at T.P.C. level when the Act was amended.

Secondly, the structure of the Swanson Committee as a business oriented committee and Dr Venturini's allegation that the report of that committee received very brief consideration by the T.P.C. This attack is not, in my opinion, convincing because there is no evidence that the Swanson Committee emasculated the Act except perhaps that its report led to the largely dead letter status of merger control under the amended and unsatisfactory s.50 Trade Practices Act 1974 (Cth); but that result is as much a failure of the language chosen by the drafter of the law and a failure of the Court in opting for one-party dominance as the only real case where mergers are prohibited, as it could be said to be a failure of the Swanson Committee. As for the short time available for the T.P.C. review of the report, that complaint seems quite valid.

Thirdly, the example is given of how the T.P.C. opted out of a head-on confrontation with the makers of soap-suds concerning claims made in their advertisements — the "whiter than white" variety of promotion. There are few people who do not find such advertisements ludicrous when they use devices like bus loads of lemons to endorse the lemon freshness of a product with no lemon extract in it at all. It seems unfortunate that the consumer has to pay for such massive advertising in the product price and it is not surprising that the 1974 Joint Parliamentary Committee on the industry recommended some structural action concerning promotion. Certainly it seems that the soap-suds makers could have been called to account over many of the product claims, at least in order that there might be some judicial weight behind the generally held view that the claims are excessive. Dr Venturini seems on good ground here, although again, one can imagine a realistic T.P.C. officer deciding that the cost-benefit of a settlement with the soap-suds makers might be better than protracted litigation over statements of the puff variety.

The final chapter, "*Poshlost*" is hard to assess and harder still to understand as an elucidation of vulgarity. Here the author goes well beyond his dismay with the Act and the T.P.C. and reveals his deep concern about the truly fundamental contradiction of secrecy in a democracy. One sympathises with his dread of bureaucratic concealment and abuse of power behind closed doors. However, in the end, the chapter constitutes overkill in a book principally set up to discuss the Act

and the T.P.C. Dr Venturini would, no doubt, reply that the whole fabric of government in Australia is typified by the administration of the Act and that it is perfectly legitimate to place other examples from that period (e.g. the Freedom of Information Bill with all its exceptions) alongside the Trade Practices Act as a warning against a state of affairs where the Watergate phenomenon becomes likely. Perhaps I should simply part company with Dr Venturini on the breadth of his attack rather than on his valid concern that laws be administered in favour of broad interests rather than special interests.

Nevertheless, to me, the last chapter is a disappointment because I should like to have seen a proper analysis of how the Courts have made the task of the T.P.C. and Government particularly difficult in respectively taking enforcement decisions and in drafting the law. Some reference to *Quadramin v. Sevastapol Investments Pty Ltd*³ and *T.P.C. v. Ansett Transport Industries (Operations) Pty Ltd*⁴ would have been in order; *T.P.C. v. Email Ltd*⁵ and *T.P.C. v. C.S.B.P. and Farmers Ltd*⁶ are subsequent decisions though continuing the same restrictive trend in the courts.

In addition, consideration could have been given to the limited effect of the law where many of the anticompetitive factors in Australia are structural to the economy and untouched by the Act. Principally, the tight oligopoly of our industries makes prohibitions of price fixing have little effect in terms of producing effective price competition rather than simply giving way to price leadership. Even if such an analysis led to serious questioning about the value of having an Act at all and induced the conclusion that our economy is not susceptible to market force regulation but must always involve close intervention by the Government in the public interest, that would be a more revealing analysis. Perhaps this book will induce someone like a Dr Walker to engage in the extended analysis that one had hoped for from Dr Venturini; or perhaps the very secrecy about which Dr Venturini complains will inevitably inhibit a Dr Walker or any other present or former T.P.C. officer!

An impressive aspect of the book is the collection of typically brilliant cartoons by Patrick Cook which illustrate the text. His skill in picking the style and mood of this area of economic and administrative life is inspired.

In summary, students of economic reform, public administration, commercial method, or even politics in the broad, should read this book, provided they exercise judgment about the analysis.

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FOOTNOTES

1. Motion Pictures Distributors Association Case (1975-6) A.T.P.R. 15-700.
2. *Ibid.*
3. (1976) 50 A.L.J.R. 475.
4. (1978) A.T.P.R. 17, 705.
5. (1980) A.T.P.R. 42, 154.

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