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Book Review

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BOOK REVIEW

Malpractice: The Administration of the Murphy Trade Practices Act. V. G. Venturini. Sydney, Australia: NON MOLLARE, 1980, Pp. ix, 465. \$14.95.

Heralded at its enactment in 1974 as the "most powerful antitrust act in the world," the Murphy Trade Practices Act was designed to improve dramatically existing Australian antitrust legislation. *Malpractice* examines the Murphy Act by documenting the author's tenure as a member of the commission administering the Act. Dr. Venturini served on the Trade Practices Commission (TPC) from February 1975 through June 1977, when the Government, under the guise of reorganization, significantly failed to reappoint him.

The Murphy Act was a product of the ill-fated Whitlam Government, whose election was, according to the Senate Opposition Leader, an aberration attributable to the "temporary electoral insanity of the two most populous Australian states." Whatever the sentiment, it was short-lived: the first labor government in twenty-three years was ousted less than three years later.

Though the Labor/Whitlam Government was frequently chided as "socialist," the goals of the Murphy Act were not anti-business, but rather, pro-competition. Much of its language on restraint of trade, mergers, monopolies, and price fixing relied "heavily" on the American anti-trust statutes—the Sherman and Clayton Acts—and the Commission regularly employed American precedents when administering the Act. Venturini contends that at its inception, however, the Act had a "fatal flaw": it was unknown whether the appointed administrators would have the willingness "to give the law its teeth."

Dr. Venturini's fears influenced his career and his perspective as a writer. During his term he was implicitly, if not openly, accused of being prejudiced against business, of leaking secret Commission documents, and of creating dissension within the Commission. His bitterness, particularly towards TPC Chairman Bannerman, is undisguised.

Bannerman was a holdover from the 1965 Restrictive Trade Practices Act, which the author notes was "one of the most ineffectual pieces of legislation ever passed by Parliament." (p.35) The conservative government adopting the 1965 Act was headed by Prime Minister Menzies, who

stated, "The whole essence of life [in Australia] is that there should be no hostility between public administration and business, but the utmost co-operation and mutual understanding." (p. 21) Bannerman, as a conservative appointee, probably shared Prime Minister Menzies' attitude towards business. As Commissioner under the former Act, Bannerman had the foresight to endorse, albeit cautiously, the new Labor-sponsored legislation. Senator Murphy, author of the Act which bears his name, was so convinced of Bannerman's qualifications for heading the new TPC, that he introduced him to the press as "Australia's number one trust buster." Dr. Venturini disagrees with that appraisal, and instead portrays Bannerman and other public servants as subverters of the public will through failure to enforce the Murphy Act.

Dr. Venturini's carefully selected chapter headings describe the TPC's work in terms of concepts. The title of Chapter One, *Folklore*, disposes of false hopes as to the TPC's performance by presenting statements made by Chairman Bannerman at the inauguration of the Murphy Act. Derived from Arnold's *The Folklore of Capitalism*, the "folklore" here is the view that "antitrust laws enabled men to look at a highly organized and centralized industrial organization and still believe it was composed of individuals engaged in buying and selling in a free market." (p. 23)

Chapter Two, *Cabal*, equates the TPC's action against the zinc cartels to ". . . a movement of profound mystical faith fused to, and steeped in, the superstitions and occult preoccupations of Pre-Middle Ages." (p. 24) Venturini demonstrates that two cartels—one domestic and one international—artificially controlled zinc production and distribution to stabilize prices. A Murphy Act proviso similar to the American Webb-Pomerene (Export Trade) Act allowed exemptions for companies whose agreement "relate[d] exclusively to the export of goods from Australia." The TPC found that the domestic agreement resulted in "market sharing" and thus denied it a clearance. Through misinterpretation of American precedent, however, the TPC concluded that the international agreement was exempt from the Act despite evidence showing that the cartel had resulted in higher prices on domestic zinc. Venturini's account of the Australian government's effort to block investigation of the cartel by the United States Justice Department will be interesting to American readers. Australia, according to the author, ignored its obligations under the Organization for Economic Co-Operation and Development Convention (OECD), which states that:

. . . member countries should co-operate in supplying information on the investigation and enforcement of restrictive business practices law as it affects each other, while agreeing to inform other member countries of restrictive business practices within their knowledge if their laws permitted disclosure. (p. 83)

Contrary to this principle, the Government allowed the cartel members to elude the U.S. investigation.

Chapter Three is titled *Charrada*, the “speech or actions of a clown.” (p. 25) This term symbolizes Venturini’s disgust with the TPC for failing to enforce its rulings. Under the Murphy Act, the Motion Picture Distributors Association (MPD) was required to submit its standard contract to the TPC for clearance. When Commissioner Venturini denied the application, his decision was overruled—without authority—by an assistant commissioner. Venturini maintains that the TPC improperly bowed to external pressures by allowing the MPD to present additional material to support its clearance request, especially since the material was available at the time of the initial application. Eventually the MPD agreed to discontinue its agreements with exhibitors, but the author doubts that they did. The TPC did not investigate further. While the TPC was clearly ineffective in this instance, one cannot avoid the impression that Dr. Venturini alienated other Commissioners through his abrasive behavior and thus contributed to its ineffectiveness.

Pantouflage, the title of Chapter Four suggests:

. . . the readiness of top public servants to wear whichever ‘slipper’ is most comfortable at any given time, a facility for moving in the direction most expedient for the moment, as well as a capacity for intertwining feet under the table with those of big business when it suits their purpose. (p. 25)

In this chapter Venturini recounts how the TPC was “taken to the cleaners” by the detergent manufacturers. Although the case against the soap companies’ deceptive advertising practices is well documented, much of *Pantouflage* is an attack on the Australian civil service: “experienced, knowall bureaucrats, wiser than politicians in the ways of the real (business?) world.” (p. 207) Dr. Venturini contends, with some justification that the legislative intent was subordinate to personal inclinations of the public servants managing the government.

Finally, the author concludes in Chapter Five:

. . . that antitrust, in the hands of such custodians as Australia has, is best characterized not with Arnold’s ‘folklore’ or Galbraith’s ‘charade’ but with the Russian word *poshlost*, which implies a frightening, debasing and interminable vulgarity—even of a metaphorical kind. (p. 245)

To support his characterization of antitrust in Australia as *poshlost*, the author analyzes the Fraser Government’s responsibility for the Trade Practices Amendment Act of 1977.

Under the Amendment Act, the TPC was reorganized as a corporate body, with a requirement that Commission members be reappointed. Of the six Commissioners, only Dr. Venturini had “not been appointed as a

member of the new Commission." No reasons were given by the government for his non-reappointment, but the press speculated that a 77-page memorandum describing the TPC's inaction on the zinc cartel matter was the chief cause. The memo was prepared by Venturini for the Commission's internal use; Bannerman accused Venturini of leaking the document to the press, a charge Venturini denied.

The same government introduced a Freedom of Information Bill with so many exceptions that Professor Howard of the Melbourne Law School commented, "The Bill may well make the acquisition of any information which is worth having even more difficult than is the case at present." (p. 392) Seven days after the Bill was presented to the Parliament, "the Treasurer, Mr. Howard [not the professor] ordered a ban on all official data about the level of foreign ownership and control of Australian industry. . . ." (p. 398) Other examples are presented to show how the government acted with Orwellian "Newspeak" duplicity. Bannerman is quoted as saying that the 1977 Amendment is a "general tightening up of the law," while another Commissioner, Dr. Walker, describes it as, "as pale a travesty as was the Act of 1965." (Pp. 352, 264)

While Venturini's comparisons of the Fraser government to the Watergate scandal are less than convincing, the author's basic charge—that the Murphy Act was unenforced—is substantiated by J. Edwards, a columnist for *The National Times*:

In the 33 months during which the Trade Practices Commission has been administering the new [Murphy Trade Practices] Act, it has taken no action in the courts over price discrimination, over attempts by monopolies or near monopolies to stop competition, or over mergers or takeovers.

The 1975 report said that 'the price discrimination area is a particular area that the Commission has so far left to private action, although not one has yet been brought.' No private action has yet made it to the state of litigation, and the Commission has never even begun the preliminary steps leading to an enforcement action.

Unfortunately, some of Venturini's petty charges begin to detract from the validity of the subject matter, making *Malpractice* appear as a personal vindication, rather than an expose of government omissions. Regardless, one can understand the author's frustration in watching the Murphy Act being dismantled.

From a technical standpoint, readers unfamiliar with the Australian political framework may find *Malpractice* difficult to follow, as Venturini fails both to elaborate on the governmental structure responsible for the TPC and to clarify the composition of the Commission and its staff. Some readers may object to the unnecessary length (about 100 pages too long, due primarily to anger towards the Commission) and to the obtuse style though neither detracts from the major emphasis of the book. *Malprac-*

tice does provide a penetrating analysis of Australian attitudes towards antitrust enforcement, both at home and abroad. The book would be particularly useful to anyone interested in a comparative analysis of antitrust laws, as the Australian act was modeled after American counterparts and regularly employed American precedents. Notwithstanding Dr. Venturini's apparent slant, *Malpractice* is recommended for students of antitrust enforcement interested in a foreign perspective.

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