

**Anti-cartel or Anti-foreign:**

**Australian Attitudes to Anti-competitive Behaviour before World War I**

**David Round and Martin Shanahan**

**Centre for Regulation and Market Analysis**

**University of South Australia**

## **Abstract**

More than a century elapsed between Australia's first legislative attempts to modify anti-competitive behaviour (the *Australian Industries Preservation Act 1906*) and its most recent efforts to criminalise price fixing (*Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009*). After a burst of activity in the first decade of Federation, the intervening years saw only sporadic interest by governments to promote competitive markets, with limited impact until the late 1960s. This paper assesses the first period of Australia's attempts to promote competition. It traces the political, economic and social environments of anti-competitive business behaviour in Australia from 1901 up to World War I. We suggest that Australia's initial forays into regulating cartels were motivated more by protectionist aims rather than efforts to increase competition, which in part also explains the next half-century of legislative apathy toward anti-competitive legislation.

## Introduction

By the end of the nineteenth century trusts, industrial monopolies and cartels were well entrenched throughout the world, but reactions to them varied. To counter their power and influence in the United States, the Congress introduced the *Sherman Act* in 1890 to prohibit the uncompetitive practices of trusts and combinations. By contrast, in Europe cartels were regarded more benignly. They were seen to protect smaller, less aggressive associations and family businesses from larger and/or more efficient enterprises and in the process prevent mass unemployment and social unrest.<sup>1</sup> In Australia, the attitude to cartels and restrictive trade practices fell between these two extremes — with politicians in the early years of the twentieth century railing against the evils of trusts on the one hand while in other circumstances promoting the advance of non-competitive structures such as tariffs and primary producer cooperatives.

Unlike their European and American counterparts, Australians' attitudes to cartels and anti-cartel policy over the late nineteenth and early twentieth century were influenced, we suggest, by their desire to nation build, and their distrust of foreign "monopolies". Accordingly, individuals and interest groups, including labour, generally held that price fixing and other collusive behaviour by business was acceptable, particularly where it helped the 'battler' — be they worker or business. Indeed, anti-cartel legislation in Australia can be seen as a component of the "protectionist" policies associated with early twentieth century development in Australia.<sup>2</sup>

This paper outlines Australian's attitudes towards cartels, from seeming accommodation in the late nineteenth century to a strong (but ultimately ineffective) US-

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<sup>1</sup> Lon L. Peters, *Cooperative competition in German coal and steel, 1893–1914*, PhD thesis, Yale University, quoted in *Journal of Economic History*, Vol. 42, 1 (1982), p. 227.

<sup>2</sup> While trusts did not form in Australia, cartelisation became common within certain industries, as did monopoly. Because of the intertwining of these two anti-competitive practices, this paper considers both monopoly, where a single firm dominates the market, and cartels, where firms cooperate, for example in setting prices and output but also in other ways, to decrease competition in the market. The words "trusts" and "combines" were used interchangeably in the contemporary debate and are also used in the discussion.

inspired anti-cartel approach early in the twentieth century. It examines the views of key stakeholders in the policy and public debates on cartels — politicians, who formulated or opposed the policies to control cartel behaviour; commentators, who expounded on and analysed the policies; pamphleteers, principally from the Left of politics, who were concerned about the economic consequences of cartels for the working population; the public, whose standard of living was affected; and primary producers, who feared an increase in prices of machinery.

### **Australian economic conditions in the late nineteenth and early twentieth centuries**

In 1891 the six independent colonies of Australia were only sparsely settled: Victoria and New South Wales each had a population of around 1.2 million while the other colonies had less than 1 million in total.<sup>3</sup> There was no large-scale industry and the small enterprises that had developed primarily serviced their local agricultural, pastoral, dairying and mining industries, which were the mainstays of the economy<sup>4</sup>

One of the drivers of federation into a single nation was the need to open up trade between the colonies. Yet, paradoxically, because of their individual colony's small population size, some politicians and businessmen felt the need to strongly protect their region's own industries. Thus, the governments of the two main colonies were opposed on tariffs.<sup>5</sup> New South Wales, heavily agricultural, strongly supported free trade, both between the colonies and with other countries. Victoria, more industrialised, championed protection as a means of preventing serious depopulation after the waning of the gold rush and the onset of

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<sup>3</sup> J.C. Caldwell, "Population", in Wray Vamplew (ed.), *Australians. Historical Statistics* (Sydney, 1987), p. 34.

<sup>4</sup> N.G. Butlin, "Australian National Accounts", in Wray Vamplew (ed.), *Australians. Historical Statistics* (Sydney, 1987), p. 133.

<sup>5</sup> However, Anderson and Garnaut suggest that, given their similarities, the reasons for this difference in approach are not easy to explain and probably come down to the leaders of the dominant political groups and their success in influencing public opinion through the press. See Kym Anderson and Ross Garnaut, *Australian Protectionism. Extent, Causes and Effects* (Sydney, 1987), p. 42.

severe depression in the 1890s; it was hoped that cushioning industries from imports would protect employment and ensure higher wages.<sup>6</sup>

The free traders won on the local front; the new federal Constitution enshrined free trade between the states and all local tariffs were abolished. But attitudes to trade with the outside world still differed and the argument over whether the new nation would follow free-trade or protectionist ideals was a main political difference between the federal political parties, although the protectionists were in the majority.

Distant from Europe and America, Australians' attitudes to restrictive business practices were influenced by their geography, climate and relatively undeveloped economy. Internal markets were small and disparate; wealth was drawn largely from the primary sector; manufacturing was minor; climate and soil conditions were variable and unpredictable and drought was frequent. Furthermore, travel time between capital cities and, to a greater extent, Great Britain, Europe and the United States, was lengthy; the availability of entrepreneurial capital was limited, and many of the larger enterprises, financial institutions and even much of the primary sector were controlled by "outsiders", principally from Britain.<sup>7</sup>

At the time of Federation in 1901 the nation was in the grip of a severe and long-lasting drought, the value of its rural wealth had shrunk and the country was in deep depression. Yet primary industry was still the major source of wealth, accounting for 30 per cent of GDP. Sectors that provided services to the import and export trades, including government, finance and distribution services, made up another third of the economy. Manufacturing, which was

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<sup>6</sup> T.A Coghlan, *Labour and Industry in Australia* (Melbourne, 1969 [1918]), Vol.II chapter VIII. Andrew Hopkins, "Anti-trust and the Bourgeoisie: 1906 and 1965", in E.L. Wheelwright and K. Buckley (eds), *Essays in the Political Economy of Australian Capitalism* (Sydney, 1983), p. 88.

<sup>7</sup> Simon Ville and Grant Fleming, "Desperately Seeking Synergy: Interdisciplinary Research in Accounting and Business History", *Pacific Accounting Review*, Vol. 11, 2 (2000), p. 175.

small-scale and was concentrated in low-value goods such as building materials, newspaper printing and food processing, accounted for around 12 per cent of GDP.<sup>8</sup>

While it was recognised that the pastoral and agricultural sectors had to be balanced by an expanded industrial base, technology was underdeveloped compared with Britain and the United States, whose modern machinery allowed goods to be manufactured more cheaply.<sup>9</sup> For the nascent Australian industries to succeed, they would need to be protected from the import of such goods by the imposition of heavy tariffs. Such tariffs were to sustain the “Australian Settlement” — an economy based on high terms of trade backed by highly priced primary commodities such as wheat, gold and wool, with workers receiving high and regulated wages that were achieved by a high tariff wall protecting local manufacturers.<sup>10</sup> Thus, despite the arguments of the free traders, the new nation was protectionist from birth and the average tariff on manufactured goods rose from 6 per cent in 1902 to 16 per cent in 1913.<sup>11</sup>

For local producers, foreign imports were not the only competition. Because of free interstate trade, industries small and large and often struggling had to contend with competitors both from other states and from within their own. Added to this was pressure for increased wages from employees and the vagaries of demand. In an economy with a small number of consumers and great transport and logistics costs, success was difficult. Collusion among competitors, and in particular agreements on quality control, buying and selling prices, and output agreements, was one obvious answer.<sup>12</sup>

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<sup>8</sup> Butlin, “Australian National Accounts”, p. 133; Simon Ville and D.T. Merrett, “The Development of Large Scale Enterprise in Australia, 1910–64”, *Business History*, Vol. 42, 3 (2000), p. 4.

<sup>9</sup> D.T. Merrett, “Business Institutions and Behaviour in Australia: A New Perspective”, *Business History*, Vol. 42, 3 (2000), p. 5.

<sup>10</sup> Hon. Joel Fitzgibbon, “New thinking for a new century — building on the Barton legacy”, [www.valuesineducation.org.au/pdf/fitzgibbon080703.pdf](http://www.valuesineducation.org.au/pdf/fitzgibbon080703.pdf) Accessed 2 June 2009.

<sup>11</sup> Anderson and Garnaut, *Australian Protectionism*, p. 7.

<sup>12</sup> Simon Ville, “Business Development in Colonial Australia”, *Australian Economic History Review*, Vol. 38, 1 (1998), p. 36.

Such collusion pre-dated Federation. For example, to guarantee a stable price for their product, coal producers in northern New South Wales had formed agreements to fix the price and output of coal from 1855. This collusion was made possible by the low price elasticity of demand for coal, the high entry costs into the industry and the concentrated ownership of the mines.<sup>13</sup> In the same period the major shipping companies divided up their markets and agreed not to compete on particular routes. As with most cartels, the coal and shipping cartels waxed and waned in their intensity and effectiveness and a great deal of effort periodically had to be expended to reactivate them. Banks, too, formed mutually beneficial pricing arrangements, but this collusion was not complete because not all banks participated.<sup>14</sup> Any real competition that did exist came to an end in 1906, when all banks agreed on uniform exchange rates.<sup>15</sup> Insurance companies too worked within agreed geographic and price “limits”.<sup>16</sup> Other agreements covered staple homogeneous goods that had few substitutes, such as dried fruit, brick making, mineral oil, fresh produce and tobacco.

Thus, by the early years of the twentieth century Australia’s industry and its primary producers were protected from external competition by a tariff wall instituted by the Federal government, which was generally sanctioned by manufacturers, employees and consumers, and from much internal competition by collusive arrangements that included the sharing of territories, exclusive brand agreements with retailers, full-line forcing (where a supplier requires a buyer to buy all of the supplier’s products) and resale price maintenance.<sup>17</sup> In addition, established firms often excluded new entrants who flouted such arrangements. Trade associations — groups of like industries that often divided territories, fixed prices and

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<sup>13</sup> Ville, “Business Development in Colonial Australia”, p. 36.

<sup>14</sup> Simon Ville and D.T. Merrett, “The Development of Large Scale Enterprise in Australia, 1910–64”, *Business History*, Vol. 42, 3 (2000), p. 27.; Ville, “Business Development in Colonial Australia”, p. 36.

<sup>15</sup> S.J. Butlin, *Australia and New Zealand Bank. The Bank of Australasia and the Union Bank of Australia Limited 1828–1951* (London, 1961), pp. 339–341.

<sup>16</sup> Monica Keneley and Tom McDonald “The nature and development of the general insurance industry in Australia to 1973”, *Australian Economic History Review*, Vol. 4, 3 (2007), pp. 278–299.

<sup>17</sup> Ville and Merrett, “The Development of Large Scale Enterprise in Australia”, p. 27.

controlled output — and primary producer cooperatives were other mechanisms that could be used to protect their members from competition.<sup>18</sup> Business owners and primary producers expounded that such arrangements were in the best interests of all — themselves, of course, but also their employees and the consumer. At times, even some trade unions accepted collusion between firms as a way to guarantee higher wages.<sup>19</sup>

However, concern by some individuals who supported the benefits of competition and were worried about the damage wrought from such external and internal protective arrangements prompted the establishment in 1904 of a royal commission on the Commonwealth tariff, in particular on agricultural machinery. Headed by noted constitutionalist and lawyer Sir John Quick, this enquiry was largely useless, producing several “voluminous and inconclusive reports”.<sup>20</sup> But one notable recommendation was that “in the trade between the states and with other countries combines and agreements between importers, manufacturers, and dealers in machinery and implements in restraint of trade, and fixing or regulating selling prices, be declared illegal, and made a criminal offence”.<sup>21</sup>

Despite this strong and unequivocal recommendation, attitudes to monopolies and collusive behaviour remained ambiguous, as detailed in the following sections.

## **Attitudes to collusive behaviour in the early twentieth century**

### **1. Federal politicians and political parties**

Although one of the prime reasons for Federation was the elimination of tariffs between the colonies, of equal importance was the institution of tariffs against foreign goods in part to protect Australian industries from American trusts and combines, which sought to sell their

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<sup>18</sup> Ville and Merrett, “The Development of Large Scale Enterprise in Australia”, p. 27.

<sup>19</sup> Brisbane *Courier Mail*, 3 April 1879.

<sup>20</sup> Michele Maslunka, “Quick, Sir John (1852–1932)”, *Australian Dictionary of Biography* (Melbourne, 1988), pp. 316–317.

<sup>21</sup> Report of the Royal Commission on the Commonwealth Tariff, Vol. IV, 1906, quoted in D.H. Borchartt, *Checklist of Royal Commissions Select Committees of Parliament and Boards of Inquiry Part I: Commonwealth of Australia 1900–1950* (Bundoora, 1958), p. 7.

goods below cost to gain market share and ruin their local competitors. In both 1903 and 1904 the Federal government promised to legislate against such “rings and trusts”.<sup>22</sup> In 1904 H.V. McKay, a manufacturer of agricultural machinery that was threatened by the cheap imports, led a campaign against the International Harvester Co. of Chicago, which he emotively referred to as the “American Octopus Trust”.<sup>23</sup> This campaign highlighted the demand from Australian industries to be protected from the anti-competitive practices of the large American combinations that, they argued, wished to dominate world production. The staunchly protectionist Prime Minister Alfred Deakin promised to defend Australia’s producers, workers and consumers by introducing “Protection in all its aspects — fiscal, industrial and against monopolies”.<sup>24</sup> To do this, his Protectionist/Labour coalition government introduced a package of legislation, all drafted by Attorney-General Isaac Isaacs.<sup>25</sup>

The first, the *Australian Industries Preservation Act 1906* (hereafter *AIPA*),<sup>26</sup> was modelled on the US *Sherman Act* of 1890. All parties agreed that monopolies could exist, but the protectionists were the most concerned about their effect. Free traders viewed them as the inevitable outcome of efficient business practices and that the exposure to foreign competition engendered by low tariffs would contain any abuses of power.<sup>27</sup> While there was no great opposition to the legislation, the wide divergence of opinion led to it being the “most thoroughly debated Bill of the 1906 session”; the leader of the conservative opposition, and an avowed free trader, considered it “one of the most interesting measures on the Statute

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<sup>22</sup> Hopkins, “Anti-trust and the Bourgeoisie: 1906 and 1965”, p. 88.

<sup>23</sup> John Lack, “McKay, Hugh Victor (1865–1926)”, *Australian Dictionary of Biography*, Vol. 10 (Melbourne, 1986), pp. 291–294. McKay had previously colluded with International Harvester, the Canadian combine Massey–Harris and other Australian manufacturers. It was the breaking down of this agreement, and not collusion, that prompted his actions. Hopkins, “Anti-trust and the Bourgeoisie”, p. 89.

<sup>24</sup> *Melbourne Age*, 22 December 1905.

<sup>25</sup> David H. Plowman, “A New Province for Law and Order. Protectionism and Labour Regulation”. <http://www.hrnicolls.com.au/archives/vol13-4.php> Accessed 2 September 2009.

<sup>26</sup> Its full title was “An Act for the Preservation of Australian Industries and for the Repression of Destructive Monopolies”. It was first introduced in 1905 but the Bill lapsed after Opposition protest; Geoffrey Sawer, *Australian Federal Politics and Law 1901–1929* (Melbourne, 1972), p. 46.

<sup>27</sup> Sawer, *Australian Federal Politics and Law 1901–1929*, p. 46, fn. 69.

Book of the Commonwealth”.<sup>28</sup> Much of the debate centred on how to word the legislation to stop only those industries whose anti-competitive aims were driven by greed (i.e., American firms), rather than as the outcome of enterprise (i.e., Australian firms). As its name implies, the *APIA* was primarily “directed ... against the extraordinary operations of those who wish to crush our industries at all hazards”.<sup>29</sup>

Isaacs saw the legislation in terms of nation building and the development of an egalitarian society. If Australia was to become “[a] great manufacturing country, a country that can hold its many millions of people as other continents do, a country that can have diversity of occupation and diversity of employment”, then it was “necessary to see that its manufacturing industries and its natural resources ... are not stifled ... by the power of numbers and the power of aggregated wealth wrongly used to the repression of honest individual effort properly directed”.<sup>30</sup>

Despite the protectionist motives of the *AIPA*, it was never actually used against US trusts. Protection of Australia’s industry fell to two other Acts introduced in the same year as part of a tripartite platform, the *Customs Tariff Act 1906* and the *Excise Tariff (Agricultural Machinery) Act 1906*.<sup>31</sup> In what was called New Protection, minimum wages and conditions were linked to the protection of local industries. Of particular notoriety was the American International Harvester combine whose predatory actions were seen as threatening Australia’s agricultural implements industry and destroying the country’s manufacturing base. Ingeniously, the Customs Act, which substantially raised tariffs and hence the price of imported machinery, was counterbalanced by the Excise Act, which imposed an equivalent excise on locally made agricultural machinery. While this raised the price an identical

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<sup>28</sup> George Houstoun Reid, *My Reminiscences* (London, 1917), p. 251.

<sup>29</sup> Commonwealth Parliamentary Debates (CPD), House of Representatives (House), 19 June 1906, p. 386.

<sup>30</sup> CPD, House, 19 June 1906, p. 376.

<sup>31</sup> D.J. Stalley, “Federal Control of Monopoly in Australia”, *University of Queensland Law Journal*, Vol. 3, 1959a, p. 260.

percentage on locally made machinery, if the manufacturer paid fair wages he was exempted from this excise and thus benefitted from the increased tariff.<sup>32</sup>

But the development of home-grown cartels in, for example, shipping, coal mining and brewing, continued, and the resulting consolidation of capital and economic power among a few individuals remained a problem that bothered many on the political left.<sup>33</sup>

In 1909 the *AIPA*, amended to allow the government to compel companies under investigation for anti-competitive behaviour to disclose information, was utilised to prosecute a shipping ring over its coal interests. This Joint Purse agreement was forged in July 1902 between six shipping companies and established a management committee to charter members' ships. Codenamed "Collins", it directed and controlled all the interstate general cargo and coal trade of the members around mainland Australia, divided expenses and shared profits.<sup>34</sup> In *Huddart Parker and Co Pty Ltd v. Moorehead*, the High Court upheld the challenge by one member of the Joint Purse agreement that two sections of the *Act* were unenforceable as they violated Section 51(xx) of the Constitution.<sup>35</sup>

The second prosecution under the *AIPA* was *Attorney-General v. The Associated Northern Collieries and Others*, commonly called the *Coal Vend* case. This was the first real test of the *Act*. It involved a complicated action against a cartel between coal mining firms that had arrangements with each other regarding prices, quotas and the entry of new firms,

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<sup>32</sup> Just seven months after its institution, the High Court upheld a challenge by the anti-protectionist Central Council of Employers of Australia and struck down the *Excise Tariff (Agricultural Machinery) Act* as being beyond the powers of the Commonwealth, Justices Isaacs and Higgins dissenting; John Rickard, "Higgins, Henry Bourne (1851–1929)", *Australian Dictionary of Biography*, Vol 9 (Melbourne, 1983), pp. 285–289.

<sup>33</sup> Stalley, "Federal Control of Monopoly in Australia", p. 261.

<sup>34</sup> Michael Page, *Fitted for the Voyage. The Adelaide Steamship Company Limited 1875–1975* (Adelaide, 1975), pp. 166–167; N.L. McKellar, *From Derby Round to Burketown. The A.U.S.N. Story* (St Lucia, 1977), pp. 220–221. When threatened with prosecution under Federal legislation, members of the Purse undertook "a wholesale burning of documents, probably not equalled until the famous evacuation of G.H.Q. at Cairo in the face of Rommel's advance in 1942". McKellar, *From Derby Round to Burketown*, p. 220. The case under which the prosecution was launched was *Huddart Parker and Co Pty Ltd v. Moorehead* (1909) 8 CLR 330

<sup>35</sup> Section 51(xx), granting powers to the Commonwealth to make laws with respect to corporations, was interpreted narrowly to prohibit the Commonwealth from penalising corporations that were engaged in restraint of trade. This power was considered to reside with the states. *Huddart Parker & Co. Pty Ltd. v. Moorehead* (1909) 8 C.L.R. 330; see Alexander C. Castles, "Australian Anti-monopoly Legislation", *American Journal of Comparative Law*, Vol. 8, 1 (1959), p. 83; Hopkins, "Anti-trust and the Bourgeoisie", p. 94; Stalley, "Federal Control of Monopoly in Australia", p. 266.

and who also had a close vertical association with the ring of interstate shipping companies that had faced the first prosecution.<sup>36</sup> The *Coal Vend* agreement further obligated the shipping companies to buy only Vend coal for their interstate sales. While other industries were involved in collusive arrangements, the agreement between the mining companies and shippers was blatant and would potentially have had the greatest effect on the economy because there was no real substitute for coal for either industrial or domestic use. The coal and shipping companies were the first to be prosecuted by the Commonwealth.

In both cases, the first action was successful but was overturned on appeal to a higher court. In the case of *Coal Vend*, the appeal judgment was subsequently affirmed by the Privy Council.<sup>37</sup>

These early legislative moves against collusion suggest that politicians objected to anti-competitive behaviour *per se*, and their intentions were to penalise such activities. On this reading, their efforts were thwarted by courts whose appreciation of the costs of anti-competitive behaviour was far lower than their estimates of the costs of giving more power to the Commonwealth to prevent such abuses. A closer analysis of the motivations and comments of the parties, however, reveals that the situation was not so straightforward.

In May 1910 Attorney-General Hughes prosecuted *Coal Vend* under the original 1906 Act rather than under the 1910 amended *AIPA* which had removed the need to prove intent to cause detriment to the public, and under which the Commonwealth would have had a greater chance of success. The suggestion from this action was that Hughes was not fully determined to prosecute the cartel. Hughes defended his actions, however, claiming that,

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<sup>36</sup> Geoffrey de Q. Walker, *Australian Monopoly Law. Issues of Law Fact and Policy* (Melbourne, 1967), pp. 31–32; Geraldine Gentle, *Australian competition policy 1900–1974: the political economy of the public interest*. PhD thesis, University of Queensland, 1978; Robin Gollan, *The Coalminers of New South Wales. A History of the Union, 1860–1960* (Melbourne, 1963), pp. 114–121.

<sup>37</sup> 8 C.L.R. 330 (1909); *R v. Associated Northern Collieries* 14 C.L.R. 387 (1911); *sub. Nom. Adelaide Steamship Co. Ltd. v. A.-G. (Cth.)* 15 C.L.R. 65 (1912); *aff'd.* 18 C.L.R. 30 (P.C. 1913). The first instance judge in the Vend case was Justice Isaac Isaacs, the Attorney-General who had introduced the *AIPA* and an avowed protectionist. He was also the only dissenter in the panel of four judges in *Huddart Parker and Co Pty Ltd v. Moorehead*, and concluded that sections 5 and 6 of the *Australian Industries Preservation Act* 1906 were a valid exercise of the Commonwealth Parliament's power to control the conduct of specified corporations.

because the offences were committed before the amendment was passed, the Vend could only be prosecuted under the version of the Act that was in force at the time of the offences, and because the Crown had evidence only for such offences. Hughes insisted that the Crown relied strongly on the 1910 Act to prove its case and in particular used two procedural sections (sections 14(c) and 14(d)). Indeed, said Hughes, the “conviction of the defendants was largely, if not entirely, due to the very evidence which the 1910 Act was passed to make available”.<sup>38</sup>

Another suggested reason for using the earlier Act is that Hughes, who had taken on the case from the previous government, doubted the efficacy of the legislation.<sup>39</sup> Unlike the *Sherman Act*, under which all contracts and combinations in restraint of trade and all monopolisation and attempts to monopolise were illegal, under *APIA* it was only those in which there was an *intent* to cause detriment to the public.<sup>40</sup> The purpose of the Act appeared to be to keep out the US trusts rather than to promote competition.<sup>41</sup>

Hughes made no secret of his opinion, claiming in Parliament that “The party to which I belong have no great faith in legislation to repress monopolies”.<sup>42</sup> He argued that it had not worked in the United States and thus would not work in Australia. In his regular newspaper column in the *Daily Telegraph* he expounded:

It is not only illogical and unfair to complain about the trusts; it is also very foolish. For the trust is really a labor-saving device, and the latest and most effective. The anti-Socialist who wishes to destroy trusts is like the old Luddites who wished to destroy machinery.<sup>43</sup>

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<sup>38</sup> *Daily Standard*, 6 May 1913.

<sup>39</sup> Walker, *Australian Monopoly Law*, p. 31; see also Hopkins, “Anti-trust and the Bourgeoisie”, p. 96; CPD, Senate, 6 September 1911, p. 72.

<sup>40</sup> Stalley, “Federal Control of Monopoly in Australia”, pp. 263–264.

<sup>41</sup> Hopkins, “Anti-trust and the Bourgeoisie”, p. 92; CPD, House, 19 June 1906, pp. 349–350.

<sup>42</sup> Quoted in CPD, House, 19 September 1911, p. 625.

<sup>43</sup> *Daily Telegraph*, 2 November 1907.

Indeed, he added, “[i]t substitutes order for chaos, and combination for competition. It takes cognisance of factors utterly ignored by the old barbaric ways of cut-throat competition”.<sup>44</sup>

The Labour Party, Hughes continued, viewed “with equanimity the development of the trust, regarding it as a necessary stage in industrial and social evolution”.<sup>45</sup> He saw no difference between the rapacity of the combines and the rapacity of individual businessmen. The only legislation that would work to “restrain all capitalists from sweating their employees and robbing the people” was New Protection.<sup>46</sup> And the only way to restrict cartels, monopolies and trusts was by amending the Constitution, because only then could the Federal government oversee intrastate trade.<sup>47</sup> This had to be achieved through a referendum.

Nevertheless, Hughes perhaps felt politically obliged to prosecute the Coal Vend to assuage the miners’ anger regarding a Vend decision to reduce the price of coal by one shilling per ton, which, as the hewing rate was linked to the selling price, reduced the miners’ wages. The Newcastle miners went on strike on 12 November 1909 and did not return to work until 15 March 1910,<sup>48</sup> a month before the Federal election that brought Labour to power and Hughes to the post of Attorney-General.

There was no doubt that in the first decade of Federation local cartels and combines were rife, and a series of royal commissions was established to examine the evidence against them and suggest remedies.

A royal commission in 1905 into an alleged tobacco monopoly found that “a Combine or Trust” of Australian-owned companies had formed in 1900 to regulate the manufacture, importation and wholesale distribution of both locally manufactured and imported tobacco products. These collusive arrangements intensified after Federation enshrined free trade between the States and the introduction of the Commonwealth tariff. The principal tobacco

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<sup>44</sup> *Daily Telegraph*, 2 November 1907.

<sup>45</sup> *Daily Telegraph*, 2 November 1907.

<sup>46</sup> *Daily Telegraph*, 9 November 1907.

<sup>47</sup> *Daily Standard*, 6 May 1913.

<sup>48</sup> McKellar, *From Derby Round to Burketown*, pp. 309–310.

firms were driven even closer after the British Tobacco Trust began to manufacture in Sydney. Both the local and imported trusts then decided that the best solution to potential ruinous competition was further collusion. By 1904 the major Australian tobacco, cigar and cigarette manufacturers had formed a combination with the British–American Tobacco Company, with each of the manufacturers holding a proprietary interest in each other and also in the distributor, Kronheimer Ltd. This merger of interests, centralisation of factories, and concentration of distributing agencies led to economies in production and no doubt greatly increased the profits of the participating firms.<sup>49</sup> The absence of competition, however, was not so good for the workers, who suffered reduced wages, job losses and poor working conditions.<sup>50</sup> The growers, too, were worse off, and consumers had to pay higher prices for lesser-weight plug tobacco.<sup>51</sup> The recommended solution was to nationalise both the manufacture and sale of tobacco, cigars and cigarettes and for the profits to fund old-age pensions for those in need.<sup>52</sup> But, as determined the previous year by the then Attorney-General, Isaac Isaacs, the only way the government could do this was to change the Constitution.<sup>53</sup>

The royal commission recommended that a law be passed to nationalise the tobacco industry.<sup>54</sup> This recommendation was referred to the Crown Solicitor for action. While he found that the Combine had “secured the greater part of the tobacco trade”, and that the “amalgamation of interests, the centralization of factories, and the concentration of distributing agencies ... must have consequently largely increased profits” to combine

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<sup>49</sup> CPD, House, 6 July 1906, p. 1118. The increase in profits is only assumed as none of the Combine witnesses would disclose such details.

<sup>50</sup> CPD, House, 6 July 1906, p. 1118.

<sup>51</sup> Report of the Royal Commission on Tobacco Monopoly, 16 June 1906, cited in Borchardt, *Checklist of Royal Commissions: Commonwealth of Australia*, p. 10.

<sup>52</sup> *Commonwealth Parliamentary Papers*, 1906.

<sup>53</sup> Report of the Royal Commission on Tobacco Monopoly, p. 11.

<sup>54</sup> CPD, House, 12 October 1911, pp. 1350–1351.

members, he determined that “evidence submitted is not sufficient to justify proceedings against [it]”.<sup>55</sup>

In 1906 a royal commission on ocean shipping between the United Kingdom and Australia recommended that the only way to overcome the dominance of the British Shipping Conference, which regulated Australian traffic, was to establish a national line of mail steamers to provide a service between Australia and England.<sup>56</sup> The same year a royal commission on shipping established by the Western Australian government similarly concluded that an agreement reached between the London shipping ring and the West Australian Shipping Company was responsible for the excessive freight rates between the UK and the State.<sup>57</sup>

Fears about the entry into Australia of the American Beef Trust resulted in the establishment of a royal commission in 1913.<sup>58</sup> Headed by NSW Supreme Court Justice P.W. Street, the commission found that three English companies representing three American firms that were prominently identified with the Beef Trust had extended their activities into Australia to increase their supplies of frozen beef. It found no evidence of any agreement to suppress competition or fix prices, but recommended that the formation of a cooperative meatworks would prevent any possible detriment to the local market.<sup>59</sup>

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<sup>55</sup> Quoted in CPD, House, 14 August 1913, p. 169.

<sup>56</sup> *Report from the Royal Commission on Ocean Shipping Service*, Parliamentary Paper (1906), Vol. III, Part 2, No. 36. While this recommendation was never adopted, in 1916 the Commonwealth government established the Commonwealth Government Line by progressively acquiring 28 enemy vessels commandeered during the course of the First World War, 1914–1918. Bob Bennett, Law and Bills Digest Group, ANL Sale Bill, *Bills Digest* No. 155, 1997–98.

parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/BH005/upload\_binary/bh00520.doc;fileType=application/msword Accessed 26 May 2009.

<sup>57</sup> K. Trace, “Australian overseas shipping 1900–1960. PhD thesis, University of Melbourne, 1967, pp. 43–47, quoted in M.L. McConnell, “Cabotage and the Colonial Corset: The Great Australian Bind”, *Australia and New Zealand Maritime Law Journal*, Vol. 5 (1988), p. 7.

<sup>58</sup> See, for example, a call four years earlier in the *Melbourne Age*, 21 July 1909.

<sup>59</sup> Royal Commission on the Meat Export Trade, established by Letters Patent on 5 June 1914. National Archives of Australia (NAA), CA 2133.

A royal commission on the sugar industry held 139 sittings and took evidence from 447 witnesses between 1911 and 1914.<sup>60</sup> The general manager of the Colonial Sugar Refining Company refused to produce documents or give evidence and CSR then brought an action against the commission and the Attorney-General, challenging the compulsion to cooperate. The matter went from the Full Court to the Privy Council, which determined that the Act was valid.

Two important premises underlay the royal commission's report: to maintain the White Australia policy to prevent a return to introduced black labour and to retain settlement in the north of Australia for strategic reasons.<sup>61</sup> It found that CSR had no effective competition (its only, and much smaller, rival simply followed its lead) and fixed the price of raw sugar. Additionally, the sugar mills fixed the price for sugar cane because each had a virtual monopoly within their growing areas, and in the few cases where this did not apply the mills had formed price agreements based on the price that the least efficient mill could afford to pay.<sup>62</sup> But it determined that this "monopolistic control" was (in the case of this Australian owned company) "the result, less of the pursuit of 'predatory' methods of certain American Trusts than of large scale industry, and a high efficiency of organization" and that any attempt to enforce competition would decrease efficiency, reinstate wasteful competition, and disregard the advantages of large-scale organisation to steady the market by preventing over-production.<sup>63</sup> The recommendation to regulate sugar prices in each State was never implemented.<sup>64</sup>

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<sup>60</sup> The initial chairman, Sir John Hannah Gordon, resigned from ill health and was replaced by W. Jethro Brown, professor of law at the University of Adelaide, who then wrote a theoretical text on monopolistic behaviour based on his work on the commission. See W. Jethro Brown, *The Prevention and Control of Monopolies* (London, 1914).

<sup>61</sup> Borchart, *Checklist of Royal Commissions: Commonwealth of Australia*, p. 17.

<sup>62</sup> Royal Commission on the Sugar Industry, NAA CA733; Report of the Royal Commission on the Sugar Industry, p. xxxix.

<sup>63</sup> Report of the Royal Commission on the Sugar Industry, p. xlvi. See also Robert F. McKillop, Australia's sugar industry [http://www.lrrsa.org.au/LRR\\_SGRa.htm#Colonial%20Sugar%20Refining%20Co%20Ltd](http://www.lrrsa.org.au/LRR_SGRa.htm#Colonial%20Sugar%20Refining%20Co%20Ltd).

<sup>64</sup> J. Alexander Gunn, *Trade Unions and Trusts (Monopolies of Labor and Monopolies of Capital)* (Papers in Economics IV) (Melbourne, 1925), p. 89.

Between 1906 and September 1911, twenty-six allegations of alleged collusion appeared in newspapers or were made directly to members of Parliament. These were forwarded to the Attorney-General's Department for investigation. As well as the coal and shipping combine, these included intrastate and interstate collusion in confectionery, flour milling, artificial fertilizer, meat, bricks, oil, tobacco, photographic equipment, bicycle parts, trucks, shoe machinery and jam.<sup>65</sup> In most instances the Crown Solicitor recommended against prosecuting, either because of lack of sufficient evidence, or they were confined within one State and thus fell outside the Federal jurisdiction, or they arose under the provisions of another Act, or it was deemed that the combine did not cause detriment to the public. In addition to *Coal Vend*, prosecution was recommended in only one case, involving confectionery, but this was not pursued (no reason was given).<sup>66</sup>

Only three years after stating that people should embrace trusts and monopolies, in 1910 Hughes fumed that, "There are monopolies of manufacture and monopolies of distribution. There are monopolies which say to a retailer, 'Unless you buy my articles and sell no other, you shall not have mine, and I shall prevent you from getting any other.'"<sup>67</sup> However, in the nature of politics, when the duty of an opposition is to oppose, when in opposition they argued against moves to control monopolies, when in government they railed against monopolies and proposed similar moves.<sup>68</sup> When the Australian Industries Preservation Bill was being debated several members of the Labour Party "pleaded for certain monopolies, combines, and trusts to be exempted from the operations of the Act". They "rose and defended all these combines, including the Sugar Trust, the Newcastle Coal

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<sup>65</sup> CPD, House, 14 August 1913, p. 167. Some industries had multiple complaints against them, for example Colonial Oil Company was brought to the Department's attention six times.

<sup>66</sup> CPD, House, 14 August 1913, p. 169.

<sup>67</sup> CPD, House, 18 October 1910. Reprinted in The Hon. W.M. Hughes, MP, *On the Constitution Alteration (Legislative Powers) Bill and Constitution Alteration (Monopolies) Bill in the House of Representatives* (Melbourne, 1910), p. 17.

<sup>68</sup> See Scott Bennett and Sean Brennan, "Constitutional Referenda in Australia", Research Paper 2, Parliamentary Library, 1999–2000, p. 22. <http://www.aph.gov.au/library/pubs/rp/199-2000rp02.htm> Accessed 6 April 2009.

Vend, the Shipping Combine, and the Tobacco Monopoly” because, they claimed, they were good for the workers.<sup>69</sup> But when in government, these same politicians opposed the very same trusts and charged those on the other side of politics with supporting trusts.<sup>70</sup>

## 2. Referendums

Following Isaac Isaac’s decision regarding nationalisation of the tobacco industry, the government determined to gain control over monopolies and trusts by changing the Constitution through a referendum. Even before the *Coal Vend* case had been prosecuted (and initially won) the Labour government initiated a referendum to give it greater power over, among other areas, combinations and monopolies and the power to nationalise monopolies. An equally strong reason for the proposed constitutional changes was a perceived need to reinforce the Federal system and thus for the Federal government to assume some of the powers that were currently held by the states.<sup>71</sup> And there was yet another ideological reason. In 1905 the Federal Conference of the Australian Labour Party had adopted in its objectives “[t]he securing of the full results of their industry to all producers by the collective ownership of monopolies and the extension of the industrial and economic functions of the State and Municipality”<sup>72</sup> — i.e., it believed in nationalisation rather than in enforced competition.<sup>73</sup> This view would doubtless have been reinforced by the 1909 confrontation between the coal miners and coal owners mentioned above.

However, the general population’s fear of nationalisation, and the concern of the State governments, even those that were Labour, about losing some of their constitutional powers,

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<sup>69</sup> It was no coincidence that all except the tobacco monopoly were also Australian owned companies.

<sup>70</sup> William Elliott Johnson, CPD, House, 19 September 1911, p. 625. Johnson was a Free Trade Liberal who strongly opposed the trusts. He asked a question regarding the prosecution of the *Coal Vend* in 1909, when the government was preparing the case, and so was perhaps instrumental in the *Vend*’s prosecution.

<sup>71</sup> CPD, House. Hughes, 1910. p. 4.

<sup>72</sup> Quoted in Brian Fitzpatrick, *The Rich Get Richer. Facts of the Growth of Monopoly in the Economic Structure of Australia before and during the War* (Melbourne, 1944), p. 53.

<sup>73</sup> Hopkins, “Anti-trust and the Bourgeoisie”, p. 97.

ensured the defeat of the referendum that was held on 26 April 1911 — only Western Australia supported the proposal.<sup>74</sup> As soon as the Full High Court's decision reversing the judgment against *Coal Vend* was released in October 1912 Hughes initiated moves in Parliament to hold another referendum to give the Federal government the means to control trusts and to nationalise monopolies. Held on 31 May 1913, the question relating to trusts lost by only the barest margin: it obtained a majority in three States (Queensland, Western Australia, South Australia) and had an overall minority of less than one per cent. Nationalisation of monopolies was supported by the same three states but this question had the smallest yes vote, reinforcing the claim that the states feared Federal control.<sup>75</sup> Protection of the Constitution was given as another reason for rejection of the changes.<sup>76</sup>

### 3. The State Governments

One reason for the majority vote against the Federal government's attempts to control monopolistic practices and trusts was because at this early stage of Federation the States were concerned with their own sovereignty and were reluctant to hand any of their powers to the Federal government. They believed that controlling monopolies was a matter that they could handle themselves. Certainly, the High Court decisions placed the onus on State governments to deal with monopolies. As the ardent free trader, W. Elliott Johnson, pointed out, trusts were not solely Commonwealth concerns and, as sovereign entities, the States had the "power to make laws for the welfare of the people within their boundaries." They even had sufficient

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<sup>74</sup> With regard to fear of Federal control, see, for example, *Adelaide Advertiser*, 21 April 1911, *Hobart Mercury*, 27 April 1911.

<sup>75</sup> [Federal Referenda: Finance and State Debts, 1910; Legislative Powers, 1910; Monopolies, 1910; Legislative Powers and Monopolies, 1913; Military Service, 1916; Military Service, 1917; Legislative Powers and Monopolies, 1919](#), *Year Book Australia*, No. 18, 1925, p. 88; *Adelaide Advertiser*, 31 May, 19 June 1913. <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22handbook%2Fnewhandbook%2F2008-12-19%2F0067%22> Accessed 14 September 2009.

<sup>76</sup> For example, "The Constitution had been framed after years of careful consideration, and there was a growing disinclination to tinker with it", D.F. Denham, Premier of Queensland, *Adelaide Advertiser*, 20 January 1913; *Adelaide Advertiser*, 21 April 1913.

power to nationalise any trust.<sup>77</sup> Amendments to the Act in 1907 gave State courts power to deal with offences and to call for evidence and documents from private individuals.<sup>78</sup> The New South Wales Premier, W.A. Holman, was aware of this when he countered the existence of a meat trust: “If there were a meat ring operation ... it would be a simple matter to get the necessary legislation from the State or Federal Parliament, as necessity arose, and end it”.<sup>79</sup>

But anti-competitive behaviour did not seem to be a major concern of State governments. During this first decade only New South Wales brought in any applicable laws. This legislation was introduced in haste on the last sitting day of the 1909 session of Parliament. The stimulus for the legislation was an anti-competitive move by a coal firm at the beginning of the coal strikes of 1909–1910 that the Federal Attorney-General had refused to act against.<sup>80</sup> Even though the conservative State government that introduced the measures favoured the mine owners during the strikes, and the aim of the amendments was to strengthen the penal provisions of the *Industrial Disputes Act 1908*, the new anti-trust measures prohibited particular monopolies, contracts, agreements and combinations. These prohibitions virtually emulated the corresponding provisions in the *AIPA* but were restricted to “necessary commodities” — coal, gas, water and essential foods.

Despite the Labour opposition’s accusation that the anti-monopoly provisions were added simply to deflect criticism from the other sections of the Act, the government was probably serious in its intent to curb monopolies.<sup>81</sup> However, the legislation was rushed and consequently proved to be ineffective. In 1912 a Labour government repealed the *Industrial*

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<sup>77</sup> CPD, House, 19 September 1911, p. 625.

<sup>78</sup> *Daily Telegraph*, 4 October 1907.

<sup>79</sup> The Premier (Hon. W.A. Holman, MLA) and the Attorney-General (The Hon. D.R. Hall, MLA). *Cost of Living. The State Policy as Outlined before the Trades and Labour Council* (Sydney, 1915), p. 9.

<sup>80</sup> D.J. Stalley, “The Control of Monopoly — New South Wales”, *University of Queensland Law Journal*, Vol. 3 (1959b), pp. 377–378; John M. Ward, “Wade, Sir Charles Gregory (1863–1922)”, *Australian Dictionary of Biography*, Vol. 12 (Melbourne, 1990), pp. 340–342. It had been alleged that A. Kethel & Co. had acquired coal before the threatened strike with the intention of selling this at a high price, to the detriment of the public. Paradoxically, A. Kethel & Co. had stayed out of the Newcastle Vend and failed in 1910 primarily because of the actions of the Vend. Stalley, “The Control of Monopoly”, p. 378.

<sup>81</sup> See Stalley, “The Control of Monopoly”, p. 378.

*Disputes (Amendment) Act 1909* and incorporated virtually unchanged the relevant anti-monopoly provisions into the *Industrial Arbitration Act 1912*.<sup>82</sup>

Premier Holman admitted that carcass butchers did have a “concealed combination” that disadvantaged the grower and the retailer, and hence the consumer, and promised to introduce legislation specific to the food industry to create a market authority to monitor prices and prevent such artificial rises.<sup>83</sup> The Government’s response to acknowledged anti-competitive practices by bakers, brought about by the introduction of new technology that favoured large manufacturers, was to accept that “bread competition is doomed to speedy extermination” and to suggest the formation of a state bread monopoly.<sup>84</sup>

At least politicians in New South Wales were aware of the need to curb monopoly power. In Victoria the only complaint against anti-competitive behaviour appears in a royal commission on the butter industry in 1904–1905 that strongly criticised monopolies in the shipping industry because they raised costs for farmers through high transport costs.<sup>85</sup> No action was taken on this.

No other state appears to have considered the problem during this period.

#### **4. The pamphleteers**

Some politically conscious individuals took up the task of condemning trusts and monopolies in the name of nationalism, and in 1904 the tobacco monopoly came under the scrutiny of the *Bulletin*, the stridently nationalistic, stridently protectionist and stridently left-wing weekly magazine. It fumed against that “hideous octopus” in what one parliamentarian referred to as a “most able series of articles”.<sup>86</sup> But these articles ceased when the magazine

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<sup>82</sup> Stalley, “The Control of Monopoly”, p. 378.

<sup>83</sup> Holman and Hall, *Cost of Living*, p. 16.

<sup>84</sup> Holman and Hall, *Cost of Living*, p. 33.

<sup>85</sup> D.H. Borchardt, *Checklist of Royal Commissions Select Committees of Parliament and Boards of Inquiry Part III Victoria, 1856–1960* (Sydney, 1970), p. 150.

<sup>86</sup> CPD, House, 7 October 1909, p. 4292.

published a full-page advertisement from the Tobacco Trust. Others to produce polemical tracts about the growing and selling of tobacco were the Tobacconists' Association, which objected to nationalisation of the industry, and George A. Carter, who supported nationalisation.<sup>87</sup>

In 1905 the *Bulletin* turned its attention to the International Harvester Company's control of Australia's agricultural machinery industry, charging that this would increase the price of such machinery and hence increase the price of bread. In alliterative prose the pamphlet suggested that "[t]o corner the world's bread is a tempting prospect for the militant millionaire of America, with his insane desire for abnormal wealth and power".<sup>88</sup> It defended the Australian businessmen who refused to sell their companies to the "Harvester Octopus", claiming they had the same "pigheadedness" that "made Alfred stand against the Danes, which set the puny English fleet sailing forth against the Spanish Armada ... it is a sort of "pig-headedness" which makes nations and shapes history".<sup>89</sup>

It fulminated about the evils of free trade and the import of goods from around the world. In verse it lampooned "The Australian ... As the Yankee Thinks of Him Now".

His clothes are West of England tweed:

His boots are from the Strand:

The bike which he propels with speed

Was made in Yankeeland.

He drinks a glass of Belgian gin,

Jamaican rum, perchance;

And smokes "the best Virginia" in

A pipe that's "made in France".

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<sup>87</sup> The Tobacconists' Association of Victoria Limited, *Objections to a Federal Tobacco Monopoly* (Victoria, 1904), p. 10; G.A. Carter, *Tobacco Monopoly and the State. Nationalisation the Only Remedy* (Melbourne, 1910), pp .6-7.

<sup>88</sup> *The Bulletin, On the Trail of the Trust* (Sydney, 1905), p. 11.

<sup>89</sup> *The Bulletin, On the Trail of the Trust* p. 12.

He looks at his imported watch to see the time of day,  
And hurries, for he wants to see a new imported play.  
The lamp is “made in Germany” that lights him on his way;  
He’s a patriotic, thoroughbred Australian.  
...<sup>90</sup>

Promoting nationalism, rather than competition, was the *Bulletin*’s clear objective.

## 5. The Public

Some retailers wished to dissociate themselves from any collusive behaviour and proudly proclaimed their part in defeating it. In 1905 James and Alexander Brown, colliery proprietors and ship owners, advertised that in the 18 months since they had opened offices in Melbourne, Adelaide and Fremantle, the decrease in the price of coal to the public was “without parallel in the Coal Trade of Australia”. The company claimed that Melbourne coal consumers had saved over £120,000 compared to prices charged two years before, with proportionate savings to consumers in South and Western Australia. They considered that “It is not to be supposed that the companies who hitherto controlled the inter-State Coal Trade have viewed with equanimity the advent of [our] firm into the inter-State business”.<sup>91</sup> George Hudson & Son Ltd. Timber Merchants too were proud of their actions in breaking up a collusive agreement, stating in 1908 that “The combine is broken. And we take the credit for having defeated it.”<sup>92</sup>

Other business proprietors thought differently. Those in the northern New South Wales mining regions welcomed the Coal Vend’s price agreement as it ensured that the miners would not strike and therefore their businesses would prosper.<sup>93</sup>

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<sup>90</sup> *The Bulletin, On the Trail of the Trust*, p. 42.

<sup>91</sup> Advertisement in *Table Talk*, 4 May 1905, p. 14.

<sup>92</sup> Advertisement in the *Daily Telegraph*, 26 December 1908.

<sup>93</sup> *Daily Telegraph*, 3 October 1907.

The press at times expressed concern about the predations of trusts and combines. No doubt not coincidentally, James and Alexander Brown's advertisement appeared in the same issue of the magazine *Table Talk* as an editorial against the shipping combine "composed of businessmen who will naturally charge the public with the amount the traffic can bear". It warned that if foreign competition was eliminated, "any steamship owner who might be foolish enough ... to remain outside the combine would be quickly ruined by heavy reductions in price and when he had gone under the people would pay through the nose for the expense that the wealthy ring had incurred in the ruin of him".<sup>94</sup>

In October 1907 the Sydney *Daily Telegraph* reported the Coal Vend's meeting to agree on the price its members would charge for coal. On the same page appeared an extract from Question Time in Federal Parliament when King O'Malley asked whether the Government intended to appoint a royal commission to enquire into the existence of an agreement between collieries and ship owners, and whether such a combination was in restraint of trade and thus against the law. Parliamentarians cheered when told that the Government intended to propose further legislation to deal with combines and trusts and to amend the current legislation to increase powers to obtain evidence.<sup>95</sup>

A series of articles on the Vend agreement and on amendments to the *AIPA* followed in this newspaper in October prompting responses from E.P. Simpson,<sup>96</sup> the lawyer representing several Vend members, and from W. Scott Fell, one of the few mine owners to remain out of the Vend, supporting the call for a royal commission into the existence of a coal cartel.<sup>97</sup> The newspaper was not concerned with the price that the Vend charged for coal, advocating in a manner consistent with modern economics that if it got 11s per ton from overseas purchasers

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<sup>94</sup> *Table Talk*, 4 May 1905, p. 1.

<sup>95</sup> *Daily Telegraph*, 2 October 1907.

<sup>96</sup> Interestingly, Simpson's clients also included CSR and the British-Australasian Tobacco Co. Ltd, so he was well versed in the workings of cartels. Andrew Moore, Caroline Simpson, "Simpson, Edward Percy (1858–1931)", *Australian Dictionary of Biography*, Vol. 11 (Melbourne, 1988), pp 609–610.

<sup>97</sup> *Daily Telegraph*, 4 October 1907.

then it should be able to charge that amount to local consumers. The paper's concern was the alleged boycott of non-members by the Vend.<sup>98</sup>

In *The Coalminers of New South Wales*, Robin Gollan claims that “public opinion ... was strong against monopoly of any kind”.<sup>99</sup> But he gives no evidence for this, and there really appears to have been little popular support among consumers for protection against monopolies and cartels. Indeed, in the 1911 referendum only 52 per cent of eligible electors bothered to vote on these questions.<sup>100</sup>

Purchasers accepted that prices were largely consistent between retailers, some even being confused with what little price cutting occurred.<sup>101</sup> There was seemingly no “general appreciation of the benefits that [would] flow from a strongly competitive economy”.<sup>102</sup> Indeed, the royal commission on the sugar industry concluded that “[c]onsumers are proverbially long suffering. The fact that the price of sugar in Australia is very materially enhanced owing to the existence of the present protective scheme fails to awaken any emphatic protest on the part of the Australian consumer in general.”<sup>103</sup> Consumers were ignorant of the self-serving motives of companies: “Simple-natured folk also sometimes express their admiration at the good feeling shown among these [shipping] companies, by the kindly way in which they advertise one another's steamers”.<sup>104</sup>

Coal miners were equally naïve about the pricing policy of the Coal Vend. While the pegging policy distributed revenue between the collieries in a transparent fashion and ensured worker loyalty, the miners appeared blind to the fact that the colliery owners gained a benefit, often unjustified and to the detriment of all consumers, whenever they increased the miners'

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<sup>98</sup> *Daily Telegraph*, 5 October 1907.

<sup>99</sup> Gollan, *The Coalminers of New South Wales*, p. 117.

<sup>100</sup> Federal Referenda, p. 87.

<sup>101</sup> G.deQ. Walker, “Competition Policy and the Corporation”, in J.P. Nieuwenhuysen (ed.), *Australian Trade Practices Readings* (2<sup>nd</sup> ed.) (London, 1976), p. 18.

<sup>102</sup> Stalley, “Federal Control of Monopoly in Australia”, p. 288.

<sup>103</sup> Report of the Royal Commission on the Sugar Industry, p. xxiii.

<sup>104</sup> *Table Talk*, 4 May 1905, p. 1.

wages. The miners also seemed unaware that any reduction in the price of coal to a reasonable level would have the possibility of lowering the costs of other mine owners, allowing them to pay better wages to their employees, which would benefit all miners and not just those employed by the Vend.<sup>105</sup>

## 6. The Unions

It would seem likely that workers would have railed against industrial collusion because of the resulting price rises and possible loss of jobs through greater efficiencies, but this was not always the case.

To end a series of strikes that broke out in the Newcastle coal fields in the 1870s, unionists and mine owners reached an agreement that any owner selling below an agreed price would be heavily penalised; if they produced over their allocation (thereby leading to pressure to cut prices) the miners would immediately strike: “The miners were to get the high wages, and the coal owners the large profits which they desired, by the simple expedient of compelling the consumer to pay a price sufficient to cover the demands of both.”<sup>106</sup> Thus “the war between the miners and coal owners was terminated by an alliance to plunder the consumer”. The Miners’ Union referred to this scheme to limit the output of coal as the “vend system”.<sup>107</sup>

In the renewed and much stronger Coal Vend formed by the mine owners, miners’ wages were pegged to the selling price of coal, and so every increase in the selling price resulted in an increase in the hewing rate. During the Vend’s internal negotiations to fix the price of coal in 1907 the miners threatened to strike if they could not combine with the mine

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<sup>105</sup> Martin P. Shanahan and David K. Round, “Serious Cartel Conduct, Criminalization and Evidentiary Standards: Lessons from the Coal Vend Case of 1911 in Australia”, *Business History*, forthcoming (2009).

<sup>106</sup> Brisbane *Courier Mail*, 3 April 1879. Collusion of coal mine proprietors has been recorded in Britain as far back as 1600. P.M. Sweezy, *Monopoly and Competition in the English Coal Trade, 1550–1850* (Westport, CT, 1938).

<sup>107</sup> *Courier Mail*, 3 April 1879.

owners to return the business to a “fair basis”.<sup>108</sup> Unionists had hoped it would be set at 12 s per ton so that they could get an increase of 8 d per ton. Hence, they were disappointed when it was set at 11 s per ton and began to suspect that the Vend was “actuated by a sinister design against the Miners’ Federation”.<sup>109</sup>

Seeking strength in unity, and seeing this as a way to tackle employers at their own game, in 1910 attempts were made to follow the ideals of the Industrial Workers of the World (IWW, the Wobblies) and amalgamate all trade unions in Queensland into “one big union”, particularly because “The formation of trusts to control markets shows clearly that our opponents are organising their forces into one composite body, and if we are to have a chance of success in resisting attacks and conserving our rights, we must have our forces organised likewise.”<sup>110</sup>

## 7. Primary Producers

Given the importance of primary production to Australia’s economy in the early years of the twentieth century it is surprising how few cooperative organisations of farmers were formed. Those graziers, farmers and other primary producers who did form such associations largely did so as a form of defence. In 1890, in response to threatened strikes by shearers as a result of the 1890s’ depression, graziers’ organisations were established in New South Wales, Victoria, South Australia and Queensland, which then united in the Pastoralists’ Federal Council. The graziers’ main concern was “freedom of contract”, i.e., the right to employ both unionists and non-unionists.<sup>111</sup> In Queensland, cane growers established the Australian Sugar

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<sup>108</sup> CPD, House, 3 July 1906, p. 936.

<sup>109</sup> *Daily Telegraph*, 5 October 1907.

<sup>110</sup> V.G. Childe, *How Labour Governs. A Study of Workers’ Representation in Australia* (London, 1923). <http://purl.library.usyd.edu.au/setis/id/p00052> Accessed 5 May 2009.

<sup>111</sup> G.D’A. Chislett, “Primary Producer Organizations”, in D.B. Williams (ed.), *Agriculture in the Australian Economy* (Sydney, 1967), p. 106.

Producers' Association in 1907 to protect and advance the industry.<sup>112</sup> Some farmers formed associations in response to predatory actions by the flour mills or the dairy factories.<sup>113</sup>

Wheat farmers in the north of South Australia tired of being exploited by buyers who they felt colluded to underpay for their produce and overcharge for wheat bags also began to cooperate with each other. In 1888 they formed a producers' union to combat the low agricultural prices and price fixing by the buyers. The move was successful; farmers received more for their grain and the South Australian Farmers Co-operative Union spread to other regions in the state.<sup>114</sup> Other cooperatives formed to provide farmers with a means to purchase supplies at a bulk discount price.<sup>115</sup> On the south coast of New South Wales dairy farmer cooperatives formed in the 1880s both to cooperatively buy expensive machinery and to overcome excessive and collusive prices charged by middle-men.<sup>116</sup>

These farmers' groups were concerned with countering restrictions placed on them. More akin to the actions of cartels, however, was the amalgamation in 1913 of local groups of cane growers to form the United Cane Growers' Association, which pressed the government to fix prices.<sup>117</sup>

Without citing any evidence, F.R. Beasley asserts that the reason for lack of collective marketing action by primary producers until after the First World War was that "[p]rivate enterprise on the whole treated the producer reasonably".<sup>118</sup> A more likely reason is that farms were small-scale, labour-intensive and often marginal operations run by individual families. In addition, the farms were often some distance from the nearest town and means of

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<sup>112</sup> Chislett, "Primary Producer Organizations", p. 113.

<sup>113</sup> Ville, "Business Development in Colonial Australia", p. 37.

<sup>114</sup> Eric Richards and Joan Hancock, "Mitchell, Thomas (1844?-1908)", *Australian Dictionary of Biography*, Vol. 10 (Melbourne, 1986), pp. 534-535.

<sup>115</sup> Simon Ville, "The Relocation of the Market for Australian Wool, 1880-1939", Working Paper, University of Wollongong, 2002. <http://www.uow.edu.au/commerce/econ/wplist.html> Accessed 18 September 2009.

<sup>116</sup> Gary Lewis, *The Democracy Principle. Farmer Co-operatives in Twentieth Century Australia* (Melbourne, 2006), pp. 3, 4.

<sup>117</sup> Chislett, "Primary Producer Organizations", p. 113.

<sup>118</sup> F.R. Beasley, "Produce Pools in Australia", *Journal of Comparative Legislation and International Law*, Third Series, Vol. 10, 1 (1928), p. 74.

transport were rudimentary. Thus, coordination and cooperation would have been difficult. Those producers that did form groups were either large and powerful, such as many of the graziers, or were in more closely settled areas, such as dairy farmers.

Many of the individual producers and the primary industry groups that did form favoured New Protection to shield them from the high prices of agricultural machinery.<sup>119</sup> They also feared the introduction of trusts such as the Beef Trust, which would squeeze their income while at the same time raise prices for the consumer. Cane growers in Queensland, though, had a particular reason to support the predatory practices of CSR: “were it not for the control which the aggressive monopoly, the Colonial Sugar Refining Company, exercised, the Australian market would be flooded with cheap black-grown sugar”.<sup>120</sup>

## **Conclusions**

The reasons for, and the impact of, the operation of cartels, combines and other non-competitive behaviour in the most of the important sectors of the Australian economy in the lead up to Federation and in the first decade after remains a relatively under-researched area of Australia’s economic history. The formal analysis of such combines and of the reactions of the many stakeholders in the operation of the markets involved is sparse. These activities and the lack of concerted attempts to curb them, in contrast to the strong anti-trust stance concurrently taken in the US, helped shape attitudes of indifference to cartels and their damaging impact on economic welfare in the next half century.

Yet Australian politicians could not be accused of having totally ignored the problem. From the beginning of the twentieth century both Federal and State governments moved to curb the formation of cartels and monopolies, even if at times they were half-hearted.

Members of the Labour Party were more active than those on the conservative side of politics

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<sup>119</sup> Hopkins, “Anti-trust and the Bourgeoisie”, p. 101.

<sup>120</sup> Quoted in Report of the Royal Commission on the Sugar Industry, 1912, p. xlvi. When CSR had faced competition from the Poolman refineries (before it absorbed this group) the price to cane growers dropped because Poolman imported cheap, black-grown sugar, even though this sugar had an impost duty of £6.

because of their concentration on the welfare of the worker. Their attempts to introduce anti-monopoly legislation involved changes that were more than constitutional — they were “social and economic and political in the most provocative way.”<sup>121</sup> Yet their ultimate aim was often aligned with the nationalisation of industry and the formation of government monopolies. Their impetus was, at times, triggered as much by political revulsion of the motivation of overseas combines and cartels as it was on the actual market outcomes of their activities. Fear of large foreign businesses dominating the small Australian economy appears to have been the most motivating element early in the twentieth century in unifying attitudes against cartels. When this fear evaporated — or was replaced by other concerns — so too did activities to prevent misuse of market power.

The conservatives, on the other hand, were concerned with supporting private enterprise and ensuring that businesses prospered, even if this meant turning a blind eye to anti-competitive practices. They too appear to have been motivated by fears — either of large international corporations controlling local businesses and retarding the independent development of Australian firms and markets, or fear that an incoming Labour government would bring in draconian restrictive legislation that would work to the detriment of the local businesses that constituted their prime support base. Their interventions therefore were also half-hearted, either in coverage or enforcement, evaporating when their fears declined.

Unsurprisingly, therefore, moves against collusive behaviour had mixed outcomes. Neither Federal nor State legislation curbed the practice. Indeed, after *Coal Vend* it seems that instead of colluding, the coal and shipping companies integrated and perhaps even increased their control over the coal trade.<sup>122</sup> Royal commissions were no more effective, with some, such as on the sugar monopoly, recommending non-competitive practices be

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<sup>121</sup> R.S. Parker, “The People and the Constitution”, in Geoffrey Sawer *et al.*, *Federalism in Australia* (Melbourne, 1949), p. 151.

<sup>122</sup> Stalley, “Federal Control of Monopoly in Australia”, p. 288.

encouraged as they were more efficient. In other instances, when commissions and enquiries recommended action, their recommendations were never carried out.

Perhaps this somewhat schizophrenic attitude towards cartels also reflected Australians' apparent lack of concern for the wider consequences of their immediate actions. For example, by actively participating in price fixing to ensure better wages, some unions were ultimately forcing higher costs on to their members and other consumers. Farmer organizations, by supporting external protection to lower farm machinery costs, were ultimately supporting higher costs for all imported goods. At this early and perhaps fragile stage of nation building, Australians were more concerned with raising local incomes than in reducing local costs.

The decision of the Privy Council in *Coal Vend* effectively brought to an end the first chapter in Australia's history of antitrust intervention, certainly at the federal level. It took another five decades, however, before federal politicians again took up the fight against cartels and other forms of anti-competitive conduct. Despite the national confidence that had built up in Australia after participation in two world wars and an era of post-war reconstruction, the interests and attitudes that were protected in the first decade of Federation persisted. Even then history has judged the next round of efforts to promote competition in the 1960s to be less than significant in bringing Australia into line with the attitudes and actions of other developed countries seeking to promote competition in their markets.<sup>123</sup> Ultimately, Australian consumers' interests were ignored for almost six decades, to the benefit of Australian business interests, no matter what their size.

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<sup>123</sup> See, for example, Ray Steinwall, "Tensions in the Development of Australian Competition Law", in Ray Steinwall (ed.), *25 Years of Australian Competition Law* (Sydney, 2000), pp. 19–20; M. Brunt, "Legislation in Search of an Objective", in J.P. Nieuwenhuysen (ed.), *Australian Trade Practices: Readings* (Melbourne, 1970), pp. 231–264.

Foreign policy 15 years ago forced Mexico into a war imposed by America to "fight" the cartels with American vehicles, training, guns and ammo. The "enemy" was being armed by illegal trafficking of American guns provided by the same government through different agencies in exchange for industrial amounts of drugs, mostly chemical (fentanyl, methamphetamine, crack, heroin, cocaine) cooked in the worst places imaginable in Mexico with Chinese precursors illegally imported into the country. The US has pressured Mexico in to an anti-cartel strategy (decapitation"going after the heads of the cartels), that after a decade, everyone agrees has failed. Current Antitrust Division Anti-Cartel Enforcement Program. Since 1890, the Sherman Act has reflected the United States' "abiding faith that the elimination of competition in business [is] morally and economically wrong." (5) Today, all aspects of our enforcement program against cartels are robust. We currently have approximately 100 grand juries investigating suspected cartel activity, with about 40 of those investigating suspected international cartel activity. Our cooperation with foreign antitrust authorities in cartel matters has never been better or more effective. In February of this year, for the first time ever, coordinated searches and drop-in interviews were conducted in an international cartel investigation by enforcement authorities from the United States, the European Union, Canada, and Japan. Most jurisdictions consider it anti-competitive behavior and have outlawed such practices. Cartel behavior includes price fixing, bid rigging, and reductions in output. The doctrine in economics that analyzes cartels is cartel theory. Cartels are distinguished from other forms of collusion or anti-competitive organization such as corporate mergers.

Contents. 1 Etymology. The FAS has already come up with numerous of anti-cartels bills to counter cartels and make criminal and administrative liability for cartel involvement more stringent 1 . These bills are in the focus of much discussion within the professional and business communities and have not been submitted to the State Duma yet. The Programme de facto fast-tracks their submission, tentatively scheduling this for September 2019. Programme also calls for a bill to reduce administrative fines for those involved in restrictive agreements yet prepared to pay the fine voluntarily and on time. The bill is expected

The concept of cartel conspiracies, or cartels, is often found in foreign literature. The element of an offense is the basis for the application of responsibility. The object of anticompetitive concerted actions is socio-economic relations arising from the operation of the market. Anti-competitive concerted actions can be classified according to different criteria. Conspiracy can be formal and informal, written or oral, secret or explicit; horizontal and vertical; conglomerate and mixed; national and international.

Conclusions of the research. Combating anti-competitive concerted actions are one of the priority tasks not only for the Antimonopoly Committee of Ukraine, but also for the antimonopoly bodies of the European Union and the United States of America.