

Introduction

What is Competition Policy?

Competition Policy is government policy affecting the level and nature of competition in a market. This policy is contained in the *Competition and Consumer Act (2010)* and the *ACCC*.

The Harper Review Issues Paper said: 'Competition is the process by which rival businesses strive to maximise their profits by developing and offering desirable goods and services to consumers on the most favourable terms'.

In addition, they said: 'Competition policy is a set of policies and laws that protects, enhances and extends competition'.

The Joy of Competition

Studying competition law is useful as it is inter-disciplinary. It exposes you not only to competition law, but also economics.

Furthermore, competition law is an international issue. There has been lots of interesting developments overseas, for example Apple, Amazon, Intel, Google, online travel booking, global beer mega-mergers (BUD and SAB US\$105 billion). There is also lots of international cooperation (& conflict), and plenty of opportunity for study/practise abroad.

Furthermore, competition law is exciting and topical. It has been in the media of late as there was the Competition Policy Review reported in 2015, which was the first major competition policy review in 20 years.

Why is Competition Law Important?

Competition law is important to the following parties:

- For consumers – Competition provides them with more choice, lower prices, and better quality.
- For business – Competition protects against anti-competitive practices, and rewards innovation.
- For society – Competition law is important for promoting efficiency – resources allocated to where they are most desired.

The Harper Review Issues paper found that competitive markets can lead to:

- 'Lower resource costs and overall prices
- Better services and more choice for consumers and businesses
- Stronger discipline on businesses to keep costs down
- Faster innovation and deployment of new technology; and
- Better information, allowing more informed choices by consumers'.

Competition Law

Competition Laws:

- Implement competition policy
- Proscribe certain restrictive practices - such as cartels
- Regulate the acquisition and abuse of market concentration and power - Merger and abuse of power laws
- Make provision for market failure - Authorisation processes, access regime

Topic 1: Evolution of Australian Competition Law

Evolution of Australian Competition Law

Competition law generally has ancient origins, tracing back to the Babylonian Code of Hammurabi (C18 BC) which had references to conduct which may be deemed anti-competitive, and therefore prohibited. Furthermore, it dates back to the time where Roman Emperor Zeno was exiled for encouraging monopolists (483 AD).

At common law, Australian competition law traces back to the case of Monopolies (*Darcy v Allein* (1602)). Prior to this case it was common for the Crown to grant monopolies in exchange for certain grants of land. In *Darcy v Allein* however, the Court held that such grants were void.

Darcy v Allein (1602)

- The case involved the exclusive grant of patent rights regarding playing cards unlawful monopoly.
- Allein had imported cards in breach of this grant

Issue: Was the grant of the monopoly lawful in the first place?

Held: The Court held that the grant promoted a monopoly and anti-competitive behaviour, and therefore wasn't lawful. The Court said that monopolists consider only their own benefits, and not that of the whole community. As a result, those who are the sole price setters will increase their prices, which will be harmful to society.

The *Statute of Monopolies* in 1623 followed on from the finding in *Darcy v Allein*, and it made Crown monopolies void, ending the practice of the Crown granting monopolies. In addition, this statute provided that Crown grants were void and introduced the notion of treble damages (damages 3 times as much as normal – this practice has been retained in the US, but no longer exists in Australia or the UK). *However, Parliament retained the right to grant patent monopolies for true inventions (same right to patent as we have today – encourages innovation).

In addition to the *Statute of Monopolies*, we had the *Restraint of Trade Doctrine* which made all unreasonable restraints of trade prohibited (*Dyer's Case* (1414) and *Mitchell v Reynolds* (1711)). The early common law, exemplified by *John Dyer's* case, prohibited absolutely all contracts in restraint of trade. The law's concern here was that trade persons should not by contract prevent themselves from earning a living and thus become a burden on the rest of society.

However, the modern position derives from *Mitchell v Reynolds*. This case concerned a non-competition clause in a contract for the sale of a bakery whereby the vendor agreed not to compete with the purchaser in the local parish for five years. *The court held that this was a reasonable restraint and permitted by the common law. This position of reasonable restraint has carried over to the current position.

The common law also developed a doctrine relating to *conspiracy*, which made any concerted action to prevent competitive rivalry illegal. It involves price fixing which is captured but then watered down. The common law of conspiracy rendered illegal and liable to civil action attempts by groups of traders to preclude or inhibit competition from others. This was used against labour organisations and concerted action by traders to keep wages down or prices up. The nineteenth century doctrine of *laissez faire* saw this doctrine narrowed to cases where there was coercion and it has had little modern impact on anti-competitive activity by business (*Dyer's Case* (1414) and *Mitchell v Reynolds* (1711)).

Limitations of the Common Law

The limitations of the common-law position were exemplified in:

- *Mogal Steamship v McGregor* (1892); and
- *Collins v Locke*

Mogal Steamship v McGregor (1892)

- Ship owners formed an association to divide work, set freights, grant rebates to shippers, penalise suppliers who didn't give them work etc.
- P (ship-owner) was excluded from the association and as a result his business suffered
- P claimed damages on the ground of conspiracy

Held: The Court held that the associations objective (to take away P's trade) was lawful. That is, they said it wasn't unlawful to drive a competitor out of trade. The means used to do this were also held to be lawful.

Essentially, the Court said if there was one monopolist who could decide on their own rights and terms, then it should also be lawful for a group of people to get together and do the same thing. The Court said "I entertain no doubt that a body of traders whose primary motive is to promote their own trade can combine to acquire and thereby insofar injure competitors, provided they do no more than necessary to satisfy their own objectives and do so through lawful means."

Note: Nowadays this sort of case would certainly be disallowed by the Australian Competition law, and it demonstrates the issues with the old position.

Collins v Locke (1879)

- The relevant parties entered into an agreement to divide up a stevedoring business in Melbourne amongst themselves
- There was a dispute about the validity of this agreement

Held: The Court held that an agreement with the purpose of preventing competition among the parties and thereby keeping prices up was valid provided it was carried out by lawful means, even though they restrained trade.

The Court had to consider whether the means were lawful having regard to their objective, and in this case the means were held to be lawful.

Developments

Some of the limitations of the common law as discussed above led to developments in the US, Europe and in Australia.

Developments in the US

Dissatisfaction with the common law in the United States saw the enactment of the *Sherman Antitrust Act 1890* and the *Clayton Antitrust Act 1914* respectively. The *Sherman Antitrust Act 1890* is one of the first acts introduced, and is very important as parts of it are still in place today (penalties for breach have risen but the substance remains the same).