

COMPETITION LAW

TOPIC 1: EVOLUTION OF AUSTRALIAN COMPETITION LAW

COMPETITION LAW IN AUSTRALIA:

- ✚ The CCA (and formerly TPA 1974) contains direct prohibitions on certain forms of conduct – in particular:
 - Contracts, arrangements or understandings in restraint of trade or commerce (s 45);
 - Monopolization (s 46);
 - Exclusive dealing (s 47);
 - Resale price maintenance (s 48);
 - Price discrimination (s 49); and
 - Mergers (s 50).

- ✚ *Competition and Consumer Legislation Amendment Act 2011 (mergers)* – The Act amended the definition of ‘market’ for the purposes of mergers.
 - The previous definition referred to a ‘substantial’ market – the reference to ‘substantial’ has now been removed.
 - The Act also makes clear that the prohibited ‘lessening of competition’ in **s 50** can be in ‘any market’ (it does not need to be a specific market in which the merging parties compete).
 - Neither has had, nor is expected to have, is expected to have a significant impact on the approach taken to mergers, but it does provide some clarity on the scope of the provision.

TOPIC 2: RESTRAINT OF TRADE

PROHIBITION:

- ✚ The common law prohibits contracts in restraint of trade (ROT).
 - A contract in ROT is one in which one party agrees with another to restrict their freedom to trade with other parties.
 - They are prohibited unless they are reasonable in the interests of the parties and the public.
 - The common law doctrine still applies where the CCA does not – most notably for employment contracts and sale of business.

Restraint of Trade: The test

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| <ul style="list-style-type: none">• Does the agreement restrain trade?<ul style="list-style-type: none">• If so, it falls within the doctrine, subject to a reasonableness test | <ul style="list-style-type: none">• Does the agreement merely regulate (and thereby promote) trade?<ul style="list-style-type: none">• If so, it falls outside the doctrine |
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DEFINITION & SCOPE:

- ✚ The courts have said that no exhaustive definition can be given of 'contracts in restraint of trade'.
 - Diplock LJ in *Petrofina (Great Britain) Ltd v Martin* gave a useful working definition: "A contract in ROT is one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in the future to carry on trade with other persons not party to the contract in such manner as he chooses."
- ✚ A difficulty exists between distinguishing ROT contracts from those that merely regulate normal commercial relations.
 - Compare, for example, the following contracts:
 - A agrees to sell his car to B in exchange for a sum of money.

- A agrees to work full time for B.
 - A agrees with B that A will not work for C.
- All restrict trade to some degree:
 - First example – the money committed by B to purchase A’s car cannot now be utilised elsewhere and A is restrained from selling his car to someone else and also agrees to terminate his proprietary rights in his car.
 - Second example – A’s agreement to work full time for B means she or he cannot work for someone else during that time.
 - Third example – A is more directly restricted from working for a defined party.
- The first two examples appear to incidentally impact on trade and are unlikely to be considered ‘restraints’ for the purpose of the doctrine – the third, more directly prohibiting trade, is likely to fall within the doctrine.

✚ The essence of the distinction is this – does the agreement restrain trade or does it merely regulate and thereby promote trade?

- If the latter, the agreement will not come within the doctrine and will not have to be justified.
- If the former, the agreement will be within the doctrine and will be unenforceable unless justified. Because of this distinction, parties seeking to uphold an agreement argue both:
 - (i) That it is not within the doctrine; and
 - (ii) If it is, then it is justified.

✚ ROT is preserved ‘in so far as that law is capable of operating concurrently’ with the CCA: **s 4M**. Also see s 51 below.

- Consequently, if the conduct involved is prohibited by the CCA then the CCA will apply and ROT will not.
 - If the CCA does not apply to the conduct the ROT doctrine can still operate.

✚ **S 51(2)(b), (d), and (e)** excludes from the operation of Part IV of the Act (other than **s 48** governing resale price maintenance) provisions relating to:

- Restrictions on employment;
- Restrictions between partners; and
- Restrictions in a contract for the sale of a business.

✚ Consequently it is in these areas that the ROT doctrine most commonly operates.

DEVELOPMENT OF THE DOCTRINE:

- ✚ All agreements in restraint of trade are prima facie unenforceable at common law.
 - However if such an agreement is reasonable having regard to the interests of the parties and those of the public, it will be enforceable.
 - The onus of proving reasonableness is on the party seeking to enforce the agreement.
 - The test of reasonableness is objective – the views of the persons in the particular trade concerning reasonableness are not admissible.

- ✚ First recorded ROT case is *Dyer's Case* (1414) – the Court held that an undertaking by the defendant not to carry on his trade for 6 months in a particular town was void; the concern in this case however was the fear the defendant would become a burden on society, rather than concern as to the anticompetitive nature of undertaking.

- ✚ ***Nordenfelt v The Maxim Nordenfelt Guns & Ammunition Co Ltd*** – Nordenfelt had a machine gun manufacturing business. He (effectively) sold the business to Maxim Nordenfelt. He entered into a restrictive covenant by which he could not engage in the trade of manufacturing guns, explosives or ammunition or engage in any competing business for a period of 25 years. Nordenfelt later entered into an agreement with another gun company.
 - Issue – Did the restrictive covenant breach the ROT doctrine?
 - Held – No. The restraint was reasonable.
 - *General rule:* 'All interference with individual liberty of action in trading, and all restraints of trade themselves are contrary to public policy and therefore void'.
 - *Exceptions:* if the restriction is justified because it is reasonable having regard to interests of the parties and the public, it is valid – generally 'area of restriction should correspond with the area in which protection is required'.
 - *Here, it was hardly disputed that the restraint was reasonable to the **interests of the parties** at the time* when the transaction was entered into. It enabled Nordenfelt to obtain the full value of what he had to sell; without it the purchasers could not have been protected in the possession of what they wished to buy.
 - The restraint was also reasonable in the **public interest** – No injury in fact that person is 'prevented from carrying on a trade in weapons of war abroad'. Also no injury in fact that N can no longer earn a living.

- ✚ ***Buckley v Tutty*** – Tutty was a professional footballer. He was a member of the Balmain Club which played matches organised by the NSWRL. Buckley was the president of the League. Both the League and Club were unincorporated so the TPA did not apply. The League rules (a) required players to be registered before they could play, (b) contained provisions relating to the transfer of players between clubs and (c) prevented a player

from playing for another club without the permission of the club with whom he was registered. Tutty claimed the rules constituted an unreasonable restraint of trade.

- Issue – Were the rules in violation of the ROT doctrine?
- Held – Yes. The restraints were "plainly a fetter on the right of a player to seek and engage in employment. Tutty will not be able to obtain employment as a professional footballer, either in NSW or in a number of other places.
 - There was no need for the relationship to be contractual – the ROT doctrine applies to restraints 'howsoever imposed, and whether voluntary or involuntary'.
 - The rules in this case were in ROT. 'Trade' extends 'to the exercise of a man's profession or calling' – including part time sport. The rules (1) Prevent professional players making the most out of their skills and (2) Prevent a member of one club playing for another (without approval) even if not contractually bound to play for the former.

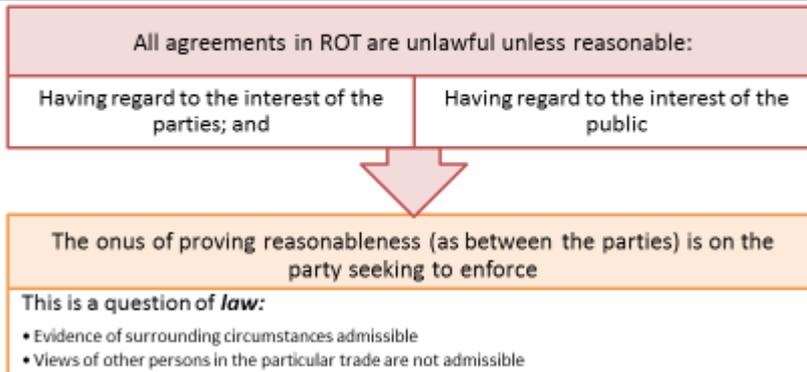
OPERATION OF THE DOCTRINE:

THE TEST OF REASONABLENESS:

- ✚ All restraints of trade within the doctrine are prima facie unenforceable.
 - However such restraints, whether partial or total, are enforceable if they are reasonable.
 - As in *Nordenfelt*, being reasonable is the only defence. According to Lord Macnaghton in that case, this involves a consideration of the **interests of the parties and the public interest**.

- ✚ ***Amaco Australia v Rocca Bros*** – A and R entered into an agreement. R was required to conduct a petrol station and purchase all petrol products for his service station from A. A subsequently refused to re-negotiate. R sought supplies elsewhere. A sought to prevent him, relying on the agreement.
 - Issue – Was the restraint unreasonable, as such preventing the ROT doctrine from applying?
 - Held – Yes. To be justified restraint must do (i) No more than afford adequate protection; and
 - There must be a 'legitimate interest' to protect;
 - Agreement of parties with equal bargaining power does not necessarily mean it is 'reasonable' (but is relevant)
 - (ii) Not be injurious to the public.
 - Here, the covenant went beyond what was necessary to protect Amaco.

The Doctrine



RESTRAINT OF TRADE SUMMARY:

- ✚ Agreements in restraint of trade are unenforceable.
 - (Restraining rather than merely regulating trade).
- ✚ Unless reasonable
 - Reasonable in the interests of the parties (onus of covenantee); and
 - Reasonable in the interests of the public (onus of covenantor)
 - Is there a 'legitimate interest' the covenantee is seeking to protect?
- ✚ Application
 - To restraints not captured by the CCA.
 - Largely employment contracts and sale of business.

APPLICATION OF RESTRAINT OF TRADE:

Approach to Restraint of Trade

- Does it restrain trade?
 - If no = enforceable
 - If yes = continue to step 2
 - Does it protect a legitimate interest?
 - If no = unenforceable
 - If yes = continue to step 3
 - Is it reasonable between parties? (onus on D)
 - If no = unenforceable
 - If yes = continue to step 4
 - Is it reasonable in the public interest? (onus on P)
 - If no = unenforceable
 - If yes = enforceable
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✚ Two things to consider here:

- The restraint does no more than is necessary to protect the interests of the covenantee; and
- The party being restrained is adequately compensated.

LEGITIMATE INTEREST:

✚ To be enforceable there must be a 'legitimate interest' in need of protection.

- Eg trade secrets, trade connections or goodwill.
- Courts have been generous in accepting a wide range of interests as 'legitimate'.

✚ It is the protection of this interest that justifies the restraint.

- The restraint must be no more than is needed to give protection to the interest.

✚ ***Vancouver Malt & Sake v Vancouver Breweries*** – Breweries paid Malt \$15k. Malt agreed not to manufacture alcohol for 15 years.

- Issue – Was this interest legitimate?
- Held – No. This is an attempt to protect against 'mere competition'.
 - Not ancillary to some main transaction (eg sale of business).
 - Restraint thus unenforceable.

REASONABLENESS BETWEEN THE PARTIES:

✚ The courts consider not only whether the restraint is no more than is necessary to protect the interests of the party seeking to invoke the restraint, but also whether the party restrained is fairly compensated for that restraint.

- The onus of proof is on the party wishing to enforce the restraint to prove the party being restrained was fairly compensated.

✚ ***Buckley v Tutty*** – On reasonableness of player transfer restriction:

- Onus on League to show reasonableness;
- League has legitimate interest in:
 - Ensuring teams are strong; and
 - Ensuring teams are equally matched.
- These restrictions went too far and could not be justified.
 - Transfer restrictions – clubs could prevent a player playing with another club (for any amount of time) even if he had stopped playing for them and no longer receives payment from them (even if Club refused to use player)
 - Transfer fees – these could:
 - Prevent a player reaping the financial rewards of his skill; and

- Impede a player in obtaining new employment.

✚ **Adamson v NSW Rugby Club** – A played rugby league with various NSWRL clubs. NSWRL internal draft rules provided that at expiry of contract, a player must specify terms upon which they were prepared to play. Club finishing last had first choice of player. If that club refuses, it goes up the line. Player must accept with first club that picks him up. Players claimed this was an unreasonable restraint of trade. TPA claim failed because players were ‘employees’.

- Issue – Was this restraint unreasonable?
- Held – Yes.
- Sheppard J: Should consider effect on players even though not parties to the agreement.
 - Focus should be on economic effect.
- Wilcox J: Non-economic affects can be considered.
 - Main focus on interests of covenantee.
 - But must also look at covenantor (restrained party).
 - In appropriate cases, TP interests are relevant.
- Gummow J:
 - Legitimate interest 1 (strong even comp):
 - Helped ensure clubs evenly matched; but
 - Not essential because League already competitive/
 - Legitimate interest 2 (financial viability):
 - Already a salary cap in place;
 - Draft not essential to protect financial viability.
 - Legitimate interest 3 (retention of players – preventing rich clubs ‘plundering’ the best)
 - No evidence that mid-season drafting successful.
 - Better solutions; eg, long-term contracts.

✚ **Lindner v Murdock’s Garage** – M owned garage business in 2 country towns 10 miles apart (Crystal Brook and Wirrabara). L was a motor mechanic (he managed the repair shop). M employed L and contract provided L must not, for 1 year after the termination of his employment with M, work in a garage business within M’s sales territory. L had worked only in the Crystal Brook garage. After 4 years, L left M and went to work in for another garage in Crystal Brook. M sought an injunction to restrain L working in CB

- Issue – Was this restraint reasonable?
- Held – No. Clause invalid as it was wider than required to afford protection.
 - Severability does not save it.
 - Did not know where L would be working at time of C.
 - To be valid, it should have been limited in respect of each area so ‘as not to operate therein unless (i) the appellant should be employed by the

respondents in their business in that area, and (ii) within some specified reasonable period preceding the termination of his service.

NOT CONTRARY TO THE PUBLIC INTEREST:

- ✚ Once the party seeking to enforce the restraint has established reasonableness in the interests of the parties, the burden of proof shifts to the party restrained.
 - The onus of proving that the restraint is contrary to public policy lies upon that party.
 - If reasonable between parties, restraint will be lawful unless contrary to the public interest.

✚ ***Lindner v Murdock's Garage*** –

- Held – Against the public interest (as determined at the time) to restrain D from working at his trade for a year.
 - Notorious labour shortage.
 - Current economic climate.
 - Shortage of homes.
 - Restraint would force L to move home to work.
 - This was unreasonable at the time.
- Other factors:
 - D was not employed for a fixed term.
 - Court stricter with employee restraints (less bargaining power) than sale of business restraints.

✚ ***AG v Adelaide Steamship*** – Cooperative buying agreement between coal producers (the vend).

- Issue – Was it in restraint of trade?
- Held –
 - Onus on party restrained to show against public interest.
 - Heavy burden if it is reasonable in the interests of the parties.
 - Example of against public interest might be if the restraint led to a pernicious monopoly.

SPECIAL RULES AND EXAMPLES:

TIME OF THE RESTRAINT:

- ✚ The validity of a restraint is to be determined by reference to the date on which the restraint was imposed: *Adamson v NSWRL*.