Topic 1 – The Evolution of Australian Competition Law

Origins of Australian Competition Law

- Restrictive trade practices or 'competition law' has ancient origins.
  - For example, the Babylonian Code of Hammurabi contained rules about monopolies and in 483 the East Roman Emperor Zeno prohibited and exiled monopolists.
- More recently, it is possible to discern in the early English common law at least three lines of attack on anti-competitive conduct.

Common law response to monopolies

- In the Case of Monopolies—***Darcy v Allein*** **(1602)** it was held that a Crown grant of monopoly in playing cards was void.

Darcy v Allein **(1602)**

Facts

- Darcy had letters ptent from the Crown granting him the exclusive right to import, make and sell palying cards in England for 21 years.
- Contrary to this grant, Allein made and imported playing cards and sold them to consumers.
- Darcy thereupon took proceedings against Allein for infringing his letters patent.

Issue

- Was the grant to Darcy valid?

Held

- Popham CJ held that the **grant to Darcy was void** for two reasons:
  - First, that it is a monopoly, and against the common law; and
  - Second, that it is against diverse Acts of Parliament.
- It was held to be against the common law for 4 reasons (reasons 3 and 4 are of no present relevance)
  - First, all trades, as well mechanical as others, which prevent idleness and exercise men and youth in labour, for the maintenance of themselves and their families, and for the increase of their substance, to serve the Queen when occasion shall require, are profitable for the cth, and therefore the grant to the plaintiff to have the sole making of them is against the common law, and the benefit and liverty of the subject…; and
  - Second, the sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects, for the end of all these monopolies is for the private gain of the patentees; … there are three inseparable incidents to every monopoly against the Cth:
    - That the price of the same commodity will be raised;
    - That after the monopoly is granted, the commodity is not so good and merchantable as it was before;
    - It tends to the impoverishment of divers artificers and others, who before, by the labour of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary.

- Crown monopolies were also attacked by Parliament in the ***Statute of Monopolies 1623***, which was passed to end the practice of the Crown granting monopolies.
  - This **statute provided that Crown grants were void** and **introduced the notion of treble damages**.
  - However, **Parliament retained the right to grant patent monopolies** for true inventions.
- Furthermore, the Act did not prohibit monopolies as such and through other exceptions they could still be granted to guilds and corporations and by Parliament.
- Then, in ***East India Company v Sands*** **(1685)**, it was held that the restriction on granting monopolies applied only to those operating within the realm and not to those operating outside.

- This distinction, it was argued, was necessary as businesses needed to be especially strong to successfully operate overseas –
    - a distinction between domestic and international markets that has modern overtones in the argument that domestic merger laws should be relaxed to allow 'national champions' to be created that are able to compete internationally and the exception for exports that commonly exist in competition law regimes.

Restraint of trade doctrine

- The early common law, exemplified by ***John Dyers case***, prohibited absolutely all contracts in restraint of trade.
- The law's concern 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*** which 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.

Conspiracy

- 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.
    - E.g., in ***R v Norris*** **(1759)**, an agreement between salt procuders to fix their prices above the prevailing level was held unlawful, Lord Mansfield declaring that this was so regardless of whether the price fixed was high or low.
        - According to his Lordship, such agreements 'were of bad consequence and ought to be discountenanced'.
- The nineteenth century doctrine of laissez faire saw this doctrine narrowed to cases in which there was coercion and it **has had little modern impact on anti-competitive activity by business**.
    - As the courts narrowed this doctrine to instances where unlawful means were used to carry out the conspiracy, or where the action was designed to injure the target rather than to advance the lawful interests of the conspirators.

Limitations of the common law

- Despite the potential it sometimes displayed, the common law proved to have severe limitations as a vehicle for promoting competition.
- The courts essentially adopted a laissez-faire approach, taking the view that markets, if elft to their own devices, would prevent the undue exploitation of anu power gained by anti-competitive practices.
- This attitude was epitomized by Lord Parker in ***Attorney-General v Adelaide Steamship Co Ltd*** **(1913)** who said that in relation to coal vend price-fixing agreements entered into by certain NSW coal producers:
    - *If the vend fixes the prices too high, it would inevitably lead to the trade of its members being lost to competitors outside the vend. It might also lead to the development of further pits or shafts, and the consequent creation of new competitors.*

Collins v Locke **(1879)**

Note that the Court was acting as the Privy Council rather than HoL

Facts

- A, R and others entered into an agreement to divide between themselves stevedoring business in Melbourne
- Agreement was intended to prevent competition between competitors and keep prices up.
- Following a dispute an issue arose as to the **validity of this agreement**.

Held

- The Court considered that an **agreement** with the **purpose** of **preventing competition among the parties** and thereby keeping prices up, was **valid provided carried into effect by proper means**; by this they meant 'provisions reasonably necessary for the purpose', even though the effect might be restraint of trade.
- Thus, the question became whether the provisions were reasonable having regard to their object.
- The Board concluded that the provisions in this case were reasonable.

Developments in the United States

- 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

- The provisions of the *Sherman Act* had a substantial influence on the development of restrictive trade practices legislation in Australia.
- Despite the apparent breadth of **s 1** of the ***Sherman Act*** in preventing 'every' combination in restraint of trade, US courts have applied a '*rule of reason*' test to most forms of conduct so that certain combinations will only be illegal under this section if they reduce competition to an 'unreasonable' level.
    - ***Standard Oil Co of New Jersey v United States*** **(1911)** the Supreme Court adopted what has become known as the *rule of reason***.** According to this rule, restraints of trade would only violate the ***Sherman Act*** if they reduced competition to an unreasonable extent.
        - Effect of this rule is reflected in **ss 45** and **46** of the ***TPA 1974*** **(Cth)**
- This case law has influenced Australian legislation which incorporates, in most of the restrictive trade practices prohibitions, a requirement that the conduct '*substantially lessen competition*' before it will contravene the Act.
    - The two provisions influence on the ***Trade Practices Act 1974*** **(Cth)** is apparent as **s 45** of that Act was essentially an abbreviated version of **s 1** of the ***Sherman Act***.
        - Although **s 45** has since been reworded, the two sections still prohibit substantially the same forms of conduct.
    - Similarly, **s 2** has influenced the content of **s 46** of that Act.
    - In both cases, the current Australian provisions put into statutory form the effect of the USA decisions interpreting thee provisions.

Clayton Antitrust Act 1914

- **S 3** of the ***Clayton Act*** is directed at forms of conduct classified as 'exclusive dealing' in the Australian **CCA**.
- It includes conduct whereby a supplier essentially forces you to deal only with them by preventing you from dealing with the supplier's competitors.
- **S 7** is directed at **anti-competitive mergers** which, in Australia, are prohibited by **s 50** of the **CCA** in similar terms.

Developments in Europe

- The principal instruments of EU competition law, **Articles 101** and **102** of the ***Treaty on the Functioning of the European Union (TFEU)***, and associated regulations, which regulate anti- competitive agreements and abuses of market dominance within the internal European market.
    - These provisions were originally **articles 85** and **86** of the ***Treaty of Rome*** and then, as a result of the ***treaty of Amsterdam 1999***, **Articles 81** and **82** of the ***Treaty of Rome (Treaty of Amsterdam 1999)***.
    - ***The Treaty of Lisbon*** renamed the Treaty and renumbered the relevant provisions again (now referred to as articles 101 and 102 of the Treaty on the Functioning of the European Union), effective December 2009, but the content remains essentially the same.
- Consequently, when you see references to these numbered provisions in competition law texts they should now be replaced with **articles 101** and **102** of ***TFEU*** respectively.

- In addition, references to the 'common market', with which you may be familiar, have now been replaced with the 'internal market'.
- Although European cases are not often cited in Australia, there have been recent references to European competition law and practice, particularly in the area of **cartel penalties**,7 and in relation to the recent introduction of **price signalling laws**, so that it is important to be familiar with the similarities between some of the concepts used in **Articles 101** and **102** and those used in the ***Competition and Consumer Act***.
    - E.g. comments of Justice Finkelstein in ***ACCC v Bridgestone Corporation*** **[2010]**, where his Honour discussed the process of imposing cartel penalties in Europe and observed that, by comparison with other jurisdictions 'Australian penalties are very much on the low side'.
- **Article 102** clearly covers cartel conduct (including price-fixing and market sharing) and other forms of restrictive conduct, including discrimination and forcing.
- **Article 102** prohibits similar conduct to that prohibited by Australia's misuse of market power provision (**s 46**).
- There is also a merger regulation which governs notification of mergers (mandatory in the EU) and sets out the test upon which mergers will either be approved or prohibited; the test is now similar, though not identical, to the test in Australia.

Article 101

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

*This article prohibits similar conduct to that prohibited in Australia by **s 46** of the **CCA**.*

Article 102

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

EU law also contains a specific merger regulation that governs notification of mergers (which is mandatory) and sets out the test upon which mergers will either be approved or prohibited; the test is now similar, although not identical, to the test used in Australia.

Competition law in Australia

Early Legislation

- The first attempt to enact competition laws in Australia at a federal level was the ***Australian Industries Preservation Act 1906***.
- This Act was largely influenced the ***Sherman Act***.
    - However, restrictive judicial interpretation **deprived it of substantial effect** so that, although it lingered on until 1965, it made **little contribution** to the development of our law.
    - In 1909 **ss 5 & 8** were declared invalid by the HC as beyond the constitutional power of the Cth (***Huddart Parket & Co Pty Ltd v Moorehead* (1909)**.
    - In 1913, the Privy Council in ***Attorney-General of the Cth v The Adelaide Steamship Co Ltd* (1913)** held that in order for an offence to be committed under the Act, it was necessary to establish a **specific intent to injure the public**.
- The ***TPA 1965*** was replaced in 1971 by the ***Restrictive Trade Practices Act 1971***.
    - A major public criticism of the ***TPA 1965*** was that it was inefficient; its procedures were slow and costly and, until the appropriate restraining order was issued, the examinable agreement or practice remained operative.
- It was **replaced** by the first effective Australian competition statute, the ***Trade Practices Act 1974*** (now called the Competition and Consumer Act 2010).

The *CCA 2010*

- Unlike the 1965 TPA, the 1974 Act contained (and contains!) direct prohibitions on certain forms of conduct – in particular:
    - Contracts, arrangements or understandings in restraint of trade or commerce (s45);
    - Monopolization (**s46**);
    - Exclusive dealing (**s47**);
    - Resale price maintenance (**s48**);
    - Price discrimination (**s49**);
    - Mergers (**s50**);
- This Act was made possible by more expansive interpretation given to Commonwealth legislative power and has enjoyed a large measure of bipartisan support.
- This Act has been **amended substantially since 1974**:
    - Most notably by the Competition Policy Reform Act 1995 (implementing recommendations made in the Hilmer Report), which expanded the scope of the Act considerably;
    - More recently, by amendment legislation introduced in 2006 (implementing the 2003 Dawson Report recommendations);
    - 2007 (making modifications in relation to predatory pricing);
    - 2008 (making more misuse of market power amendments);
    - 2009 (introducing new cartel laws – including criminal penalties);
    - 2010 (re-naming the Act the ***Competition and Consumer Act 2010***);
    - 2011 (Changes definition of market for purposes of mergers); and
    - 2012 (introduction of price signaling laws).
- In 2015 the Competition Policy Review (Harper Review) reported and made significant recommendations relating to competition law.
- In late 2015 the Government accepted most of these recommendations and initiated a further inquiry about the misuse of market power provision (in particular, the proposal to introduce an effects based test (the test currently focusses on the purpose of dominant firm conduct)).
- Earlier **last year** (**2016**) the Government accepted the Harper recommendation on misuse of market power.
- The ALP has, however, indicated that it opposes to the proposed change.

- The outcome of the election is, therefore, likely to determine whether that provision changes; however, most other recommended changes enjoy bipartisan support.

Post 2010 Developments

Milk wars

- Shortly after the text was published the 'milk wars' erupted in January 2011 (they have continued, with significant renewed interest in the price of milk in May-June 2016).
  - Australia Day 2011, however, was when home brand milk first dropped to $1 per litre – Coles was the first to cut their milk price with Woolworths following very soon thereafter.
- This sparked community debate following complaints from dairy farmers which led to a Senate Inquiry on the 'impacts of supermarket price decisions on the dairy industry'.
  - This also followed an earlier (2010) report by the Senate Economics Reference Committee – '*Milking it for all it's worth - competition and pricing in the Australian dairy industry*'.
  - The 2011 Report observed, in part (at xiii):
    - The circumstances which gave rise to this inquiry appear unusual in many respects.
    - In recent years, public debate about the competitiveness of the supermarket sector has been focused on concerns about food price inflation and grocery prices being too high.
    - In conducting this inquiry, the committee has been troubled that the benefits gained by consumers have not received sufficient attention in the debate about milk prices.
    - In general, price discounting is likely to be pro-competitive and of benefit to consumers.
    - Provided it does not constitute predatory pricing, a retail price cut should not be discouraged.
    - The January 2011 price cuts in a staple product is undoubtedly good news for consumers in the short-term. Attempting to predict with any certainty any longer-term impact on overall consumer welfare is difficult, if not impossible.
- The Report included a number of recommendations which were subsequently 'noted' by the Government. Neither the 2010 nor the 2011 report prompted legislative change – but, as you have no doubt observed during the last few months, supermarket competition and the price of milk continues to garner considerable public and political attention.

Competition and Consumer Legislation Amendment Act 2011 (mergers)

- This bill was originally introduced on 27 May 2010 where it passed through the House and the Senate Economics Committee recommended its passage; however, it lapsed at the end of Parliament.
  - On 15 May 2011 the bill was reintroduced and later passed through Parliament and came into operation in February 2012.
- The Act amended the definition of market for purposes of mergers – the current definition refers 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, or 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.

Competition and Consumer Amendment Act (No 1) 2011

- Late in 2010 the (then) opposition (coalition) introduced a bill designed to prohibit certain forms of 'price signalling', largely in response to concerns that banks were 'signalling' rate rises.
  - The (then Labor) Government responded and introduced its own – industry specific (banking) – price signalling bill in March 2011 (the Competition and Consumer Amendment Bill (No 1) 2011).
  - The House Economics Committee recommended that the Government bill be passed.