

MLL409 COMPETITION LAW AND POLICY

TOPIC 1

EVOLUTION OF COMPETITION LAW & POLICY

- Competition law policy seeks to reduce the economic inefficiencies and inequities often caused by monopolies and collusive business practices
- Designed to facilitate maintenance of a competitive environment
 - o Competitive environments are considered to be favourable for the consumer
- the Harper Review noted the following:
 - o ‘*Competition* is the process by which rival businesses strive to maximise their profits by developing and offering desirable goods and service to consumers on the most favourable terms’: para 1.1
 - o ‘*Competition policy* is a set of policies and laws that protect, enhance and extend competition’: para 1.7
 - o ‘Lower resource costs and overall prices, better services and more choice for consumers and businesses, stronger discipline on business to keep costs down, faster innovation and deployment of new technology, and better information, allowing more informed choices by consumers’, is the result of competitive markets
- the purpose of the CCA is set out in s 2 as being
 - o to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection

ORIGINS OF AUSTRALIAN COMPETITION LAW

Ancient origins

- restrictive trade practices or ‘competition law’ has ancient origins
- Babylonian Code of Hammurabi contained rules about monopolies

Common law response to monopolies

Darcy v Allein (1602) 77 ER 1260

FACTS: D had letters patent from the Crown granting the exclusive right to import, make, and sell playing cards in England for 21 years. Contrary to the grant, Allein made and imported cards and sold them to consumers. D took proceedings against A for infringing his letters patent.

ISSUE: Was there a valid grant of monopoly?

HELD: The **grant was void** for two reasons: it is a monopoly, and against the common law; and it is against divers Acts of Parliament.

It is against the common law for four reasons:

1. All trades, 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 commonwealth, and therefore the grant to the plaintiff... is against the common law, and the benefit and liberty of the subject...
 2. 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 these monopolies is for the private gain of the patentees; ... there are three inseparable incidents to every monopoly against the commonwealth.
- Crown monopolies were also opposed by Parliament in the *Statute of Monopolies 1623*, which was passed to end the practice of the Crown granting monopolies
 - o Crown grants of monopoly were void: s 1
 - o Anyone damaged by a grant could recover treble damages in respect of their loss: s 4
 - o **But** Parliament retained the right to grant patent monopolies for new inventions, to promote innovation

- The Statute did not necessarily **prohibit** monopolies, as they can still be granted to guilds and corporations by Parliament

The restraint of trade doctrine

- The early common law prohibited absolutely all contracts in restraint of trade
 - *John Dyer's case*
- Trade persons should not by contract prevent themselves from earning a living and thus become a burden on the rest of society
- The modern position derives from *Mitchell v Reynolds*
 - A non-competition clause in the contract for the sale of the bakery whereby the vendor agreed not to compete with the purchaser in the local parish for five years, was held to be 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 a concerted action by traders to keep wages down or prices up
- The nineteenth century doctrine of laissez faire saw this doctrine narrowed to cases in which there was coercion and it had a little modern impact on anti-competitive activity by business

Limitations on the common law

Collins v Locke (1879) 5 App Cas 674

FACTS: the appellant, respondent, and other firms entered into an agreement to divide stevedoring business in Melbourne between themselves. The agreement was designed to prevent competition between the parties and keep prices up. When a dispute arose between the parties the question of the validity of the agreement arose.

SMITH LJ: 'The objects which is agreement has in view are to parcel out the stevedoring business of the port amongst the parties to it, and so to prevent competition, at least amongst themselves, and also, it may be, to keep up the price to be paid for the work. Their Lordships are not prepared to say that an agreement, having these objects, is invalid if carried into effect by proper means, that is, by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint on the power of the parties to exercise their trade.'

The questions for consideration appear to them upon the authorities to be, whether and how far the prohibitions of this deed, having regard to its objects, are reasonable'

HELD: '...having regard to the objects of the agreement, **the clauses of the deed are not unreasonable**, since it provides in a fair and reasonable way for each party obtaining a benefit of the stevedoring of the ships to which the contract he was to be entitled.'

Developments in the United States

- Dissatisfaction with the common law in the US, saw the enactment of the *Sherman Antitrust Act 1890* and the *Clayton Antitrust Act 1914*
- See pages 7, 8 CB
- These sections had significant influence on the development of restrictive trade practices in Australia
 - Section 3 of the Clayton Act → 'exclusive dealing' in the CCA
 - Section 7 of the Clayton Act → s 7 CCA: anti-competitive mergers

Developments in the EU

- 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 market dominance within the internal European market