

COMPETITION LAW

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TOPIC 1: EVOLUTION OF AUSTRALIAN COMPETITION LAW

Introduction

- **Competition Law**
 - Government policy affecting the **level** and **nature** of competition in a market
 - Main act is Competition and Consumer Act 2010 and key body is ACCC
- **Importance**
 - For consumers: More choice, lower prices, better quality
 - For businesses: Protect against anti-competitive practices causing unfair harm; rewards innovation
 - For society: Promoting efficiency (resources allocated to where they are most desired)
 - Competitive markets 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

Origins of Competition Law

1. Crown used to **allow monopolies** in certain lines of trade in exchange for royalties
2. Then in Darcy v Allein, the exclusive grant of patent rights was struck down as an **unlawful monopoly**
3. The **Statute of Monopolies** 1623 was then passed to make Crown monopolies void
4. **Restraint of Trade Doctrine** then developed providing that all unreasonable restraints of trade were prohibited unless they could be appropriately separated from the contract (Dyer's Case; Mitchell v Reynolds).

Limitations of the Common Law

- The focus was on the interest of the parties
- Contracts allowing price fixing were still allowed
- Courts took a laissez-faire approach – if markets were left to their own devices they would prevent undue exploitation of power
- **CASE EXAMPLES**
 - Mogal Steamship: Ship owners formed an association to secure trade for themselves. P (ship-owner) was excluded and his business suffered. Court **HELD** the object (to take away P's trade) was lawful and the means used to do this were also lawful. Would be struck down today.
 - Collins v Locke: Agreements to divide up stevedoring business were lawful even though they restrained trade. Suggested the CL doctrine was not effective in identifying conduct harmful to competition

Antitrust Statutes in the United States

- Price fixing was prohibited but problems arose in anti-competitive activity re railroads and trusts
- Led to the Sherman Act
 - S1: All contracts and combinations in restraint of trade are illegal
 - S2: Prohibits monopolization
- Clayton Act 1914 (in part)
 - S3: Exclusive dealing
 - S7: Mergers

European Union

- TFEU (previously 'Treaty of Rome')
 - Article 101: Agreements with the object or effect of restricting competition in the common market Price fixing, limiting production, market sharing
 - Article 102: Abuse of dominance position (Microsoft/Intel (2009 Intel fines exceeded 1 billion Euro))
 - EU Merger Regulation 139/2004: Prohibits mergers which SIEC, particularly as a result of creation or strengthening of a dominance position (pre-approval required))

Timeline of Acts in Australia

- Australian Industries Preservation Act 1906
- TPA 1965 (Highly restricted)
- RTPA 1971 (Relatively ineffective)
- TPA 1974 (First effective competition statute in Australia)
- CCA 2010

TOPIC 2: RESTRAINT OF TRADE

Development of the doctrine

- **Esso**
 - **FACTS:** Harpers entered into an agreement that it would only sell Esso petrol from their garages. Subsequently cheaper petrol became available to Harper and it stopped selling Esso petrol. Esso commenced proceedings for an injunction restraining Harper's from buying other petrol. Esso argued that the agreement did not stop Harpers selling other petrol from another location, or otherwise trading in any way they wished.
 - **HELD:** This contract fell within the doctrine of restraint of trade. Regulating a person's existing trade may be a greater restraint than prohibiting him from engaging in a new trade. The four year tie in respect of one Garage was reasonable but that the 21 year tie for the other was not.
- **Nordenfelt**
 - **FACTS:** N sold a **machine gun manufacturing business** to MN. N entered into a RC that he could not engage in manufacturing guns for 25 years unless if for MN.
 - **HELD:** Reasonable
 - In the interests of the parties because N obtained full value of the business for the sale
 - In the interest of the public as no injury that a person is prevented from carrying on a trade in weapons of war abroad or that N can no longer earn a living.
- **Buckley v Tutty**
 - **FACTS:** League rules required players to be registered before they could play and prevented transfer without permission of current club.
 - **HELD:** Unreasonable.
 - No need for a contract to be a ROT; applies to all restraints whether voluntary or not .
 - Rules were in ROT. Trade includes a part time sport.
- **Amoco**
 - **FACTS:** R required to conduct a petrol station and purchase all petrol products for his service station from A
 - **HELD:** The covenants in the lease go beyond what was reasonably necessary for the protection of Amoco. The fact they are equal bargaining power does not mean it is 'reasonable'. That makes is unnecessary to consider the public interest.

Scope of the doctrine

- **S4M: ROT preserved** 'in so far as that law is capable of operating concurrently' with the CCA
 - **S51(2)(b)(d)(e): Excludes from the CCA Part IV** (except **s48** (RPM))
 - Restrictions on employment
 - Restrictions between partners
 - Restrictions in a contract for the sale of a business

Reasonableness

- **Restraint must be reasonable:**
 - In the interest of the parties and the public (**Nordenfelt**)
 - Must not go beyond what is reasonable for protection of legitimate interests and not be injurious to the public (**Amoco**)
- **The onus of proving reasonableness is on the party seeking to enforce.**
- **Must consider the:**
 - Evidence of surrounding circumstances admissible
 - Views of other persons in the particular trade are not admissible

Legitimate interest

- **RULE: To be enforceable there must be a 'legitimate interest' in need of protection**
 - Protection of trade secrets or connections; and the
 - Protection of goodwill in the sale of a business

- To be valid, a restraint must be for the purpose of protecting this interest and do no more than protect this interest.
- **CASE:** Vancouver Malt
 - **FACTS:** Breweries paid Malt \$15k to not manufacture alcohol for 15 years
 - **HELD:** Unenforceable. This is an attempt to protect against 'mere competition' not a legitimate interest and is not based on any contract (like the sale of a business)

Reasonable between the parties

- **Relevant factors:**
 - Whether necessary to protect the interests of the covenantee
 - Whether adequate compensation received
 - Bargaining power held by the parties was equal or one party able to 'force' the other to agree
 - Whether the party was involved in formulating the restriction (eg sport players aren't)
 - The wider in scope or geographical location the restraint is, the less likely it will be considered reasonable
- Buckley v Tutty
 - **HELD: Unreasonable.** Restrictions went too far and could not be justified.
 - The transfer restrictions were too strict as it could prevent a player playing with another club even if he had stopped playing for his current club and no longer received payment from them.
 - The transfer fees could prevent a player reaping the financial rewards of his skills and impede a player in obtaining new employment.
- Adamson
 - **FACTS:** NSWRL internal draft rules: When a contract expired a player had no choice and had to accept offer.
 - **HELD: Unreasonable.** The **economic and personal effects on players** should be considered.
 - Strong even competition not essential because the League was already competitive.
 - Financial viability: Already a salary cap in place. Draft not essential to protect financial viability.
 - Retention of players: Prevented rich clubs 'plundering' the best **but** there was no evidence that mid-season drafting successful. There were also better solutions (eg long-term contracts).
- Lindner v Murdock's Garage
 - **FACTS:** M owned garage business in two country towns and employed L (motor mechanic). Contract provided L must not, for one year after the termination of his employment with M, work in a garage business within M's sales territory.
 - **HELD (minority): Reasonable.** Lindner was brought into 'close and intimate relations with the customers'. This would put him in a position to take away business from the plaintiff if he left. The restraint 'did not exceed what was reasonably necessary for the protection of the plaintiffs' interest in its business'.
 - Did not matter it covered both towns
 - Reasonableness determined at time of contract (he could have worked at either)
 - Even if unreasonable as to both areas, court would have severed the portion dealing with Wirrabara
 - **HELD (majority): Unreasonable.** Wider than required to afford protection. Severability does not save it.

Not contrary to the public interest

- Heavy burden to prove
- Extent to which the public is deprived of competition as a result of the restraint
- Lindner v Murdock's Garage
 - **HELD:** Against public interest as there was a notorious labour shortage and of homes. D was not employed for a long time. Court is stricter with employee restraints than sale of business.
- AG v Adelaide Steamship
 - **FACTS:** Cooperative buying agreement between coal producers ('the vend').
 - **HELD: Reasonable.** AG could not 'rely on the mere intention to raise prices as proving an intention to injure the public', but rather had to demonstrate that there was also an 'intention to charge excessive or unreasonable prices', which it couldn't. An example would be if the restraint led to a harmful monopoly.

Special rules and examples

- **Time of the restraint**
 - **Adamson**: Assessed at time restraint was imposed (contract entered into). Facts occurring after may still be relevant because they 'may throw light on the circumstances existing at that date'.
 - Reasonableness must be tested by what the restraint entitles or requires the parties to do, not by reference to what the parties have actually done or intend to do.
- **Severance**
 - **Ladder clauses provide several levels of protection** (eg restraint applies 6 and 12 months after termination)
 - Court can 'sever' those parts unreasonable while leaving the 'reasonable' restrictions in tact
 - **Must ensure there is no uncertainty**
 - *Austra Tanks*: 'The most favourable of many combinations to apply' was void as being uncertain because you couldn't determine which combination applied.
- **Lloyd's Ships Holdings**
 - **FACTS**: Restriction combined possible various times and areas. Intent was that any invalid combination would be severed.
 - **HELD**: Clause provided all restraints to apply. No uncertainty. Court not being asked to fix scope of restraint but a genuine attempt to define the need for protection (numerous variables as alternatives).

Types of Restraint

- **Employer and employee restraints**
 - ROT applies to all limits on freedom of employees to work after termination
 - Must be demonstrated that:
 - Employer has a **legitimate interest** (confidential info, trade secrets, client lists)
 - Restraint does **no more than protect** that interest (limits on time and space: *Lindner*)
 - Restraint is not against **public interest** (employee onus)
 - ROT's operation during employment may also fall within the doctrine
 - Are the ties normal and incidental?
 - Eg working for a rival company, engaging in respectful behaviour outside work is reasonable
- **Vendor and Purchaser**
 - More likely to be upheld than employee restraints
 - Goodwill is a recognised legitimate interest that cannot be protected without vendor restraint
 - Eg *Idameneo*: P purchased D's medical practice, including goodwill. D agreed to provide medical services only from premises operated by P and not to provide services within 8km of two of the practices where D had previously worked. Held **unreasonable** – greater than necessary and insufficient boundaries of restraint.
- **Partnerships**
 - More likely to be upheld than employee restraints
 - Even if no restrictive agreement
 - Former partners may carry competing business and may deal with former customers but:
 - must not canvass former clients; or
 - persuade them to deal with a new firm
- **Vertical restraints (Supplier and Purchaser of goods)**
 - Those relating to goods sold under the agreement, such as an undertaking in respect of resale prices or customers
 - Those relating to other goods – Eg an undertaking not to purchase similar goods from another supplier
 - Eg Rules of sporting bodies (restraining players)
 - *Adamson*: Note importance placed on interests of the players, and the distinction between 'involuntary' and 'voluntary' restraints re: reasonableness

TOPIC 3: OUTLINE OF AUSTRALIAN COMPETITION LAW

Lecture Summary

- **Constitutional basis**
 - Defining corporation
 - Application to Crown
 - Indirect application to natural persons
- **Competition Code**
- **Structure and Approach of CCA**
 - Prohibited conduct
 - Administration and Court structure

Constitutional Basis

- **Corporations power** (*s51(xx)*)
- **Trade and commerce power** (*s51(ii)*)
- **Extension provisions** in *s6(2)* to cover individuals involved in trade or commerce:
 - between Australia and another country
 - among the states
 - within a territory, between territory or between a state and territory
 - supplying goods or services to Cth or authority or instrumentality of Cth
 - **Replaced now by the Competition Code**

What is a corporation?

- **Defined** (*s4*) as:
 1. Foreign corporation
 2. **Trading** corporation (formed within Aust)
 3. **Financial** corporation (formed within Aust)
 4. Incorporated within a territory
 5. Holding company of any of the above
- **Trading Corporation**
 - **Judges of the Federal Court**
 - Whether trading or financial depends on the **current activities** not whether it was formed for **profit**
 - Insufficient if trading is 'slight and incidental' to the main activity (eg education (selling concert tickets))
 - It is a question of fact and degree (*Hughes*)
 - **Hughes**
 - **FACTS:** Cricketers involved in a 'rebel' SA cricket tour were boycotted and not able to play
 - **HELD:** Mere fact of trade does not = trading corporation. Purpose of corporation is relevant, not determinative. Focus is on current activities.
 - **Extent of trade required**
 - ❖ Substantial corporate activity
 - ❖ Sufficiently significant proportion of corporation's overall activities
 - ❖ Not insubstantial
 - ❖ On a significant scale
 - **Sporting body can be a trading corporation**
 - ❖ Incorporation under Associations Incorporation Act does not prevent it being a trading corporation
 - ❖ Trading = 'the activity of providing, for reward, goods or services'
 - ❖ Trading and financial corporations not mutually exclusive
- **Financial Corporation**
 - Includes **banking** and **insurance** (*s4(1)*)
 - Current activities test applies: finance need not be the predominant activity
- **Foreign & Territorial Corporations**
 - **Foreign:** Formed in external territory
 - **Territorial corporations:** Incorporated within an internal territory (ie ACT, NT)