TOPIC 1 – THE EVOLUTION OF AUSTRALIAN COMPETITION LAW

Introduction

This topic deals with the evolution of Australian competition law. It is designed to set the scene for our treatment of competition law in Australia and, in particular, the competition law provisions of the Competition and Consumer Act 2010 (previously the Trade Practices Act 1974).

Learning objectives

At the completion of this topic you should be able to:

- outline the historical origins of the Competition and Consumer Act
- explain the limitations on the ability of the common law to protect competition
- describe the competition law statutes in operation in the United States and in Europe
- outline the history of competition law in Australia
- describe the evolution of the Competition and Consumer Act
- describe the changes to the Act brought about by the Competition Policy Reform Act
- 1995 and subsequent government agreements and amendments
- describe the changes to the Act following the Dawson Review in 2002–2003
- describe the recent changes to the Act relating to predatory pricing and the
- criminalisation of cartels
- understand the scope of the current Competition Policy Review and the potential
- changes it will bring to Australian competition law and policy.

The Origins of Australian Competition Law

Ancient origins

- Although it has only achieved prominence in Australia in (relatively) recent years, 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, three separate attacks on restrictive trade practices emerged in 17th century English common law. They have provided the origins of the modern law dealing with competition issues in Australasia, the USA and the UK.

The common law response to monopolies

- In the Case of **Monopolies—Darcy v Allen** it was held that a Crown grant of monopoly in playing cards was void.
- Before this case, the Crown had a practice of granting monopolies in certain lines of trade. These allowed the grantee to engage in a particular trade, without competition, in exchange for royalties paid to the Crown

Darcy v Allein (1602) 77 ER 1260 - Court of King's Bench

(page 1)

- Darcy held letters patent from the Crown granting him exclusive rights to import, make and sell playing 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 patents
- The first issue that arose was whether their grant was valid
- Propham CJ (for the Court) [at 1262]: the said grant to the plaintiff of the sole making of cards within the realm was utterly void, and that for two reasons:
    1. That it is a monopoly and against the common law
    2. That it is against divers Acts of Parliament
- Against the common law for four reasons:

1. All trades, as well mechanical as others, which prevent idleness (the bane of the Commonwealth), 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 to have the sole making of them is against the common law and [1263] 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 all these monopolies is for the private gain of the patentees;.. there are three inseparable incidents to every monopoly against the commonwealth:
    - That the price of the same commodity will be raised, for he who has the sole selling of any commodity, may and will make the price as he pleases…
    - After the monopoly is granted, the commodity is not so good and merchantable as it was before; for the patentee having the sole trade, regards only his private benefit, and not for the commonwealth
    - 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, when now will of necessary be constrained to live in idleness and beggary

➢ Reasons 3 and 4 are of no present relevance. Darcy's claim failed

- 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.
- See page 2 for further details (not required reading)

The 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 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.

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.
- 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.

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.

Collins v Locke (1879) 5 App Cas 674,(Privy Council) (pp 5–6)

➢ 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. The following extract deals only with that issue
- Sir Montague E Smith (for the Board) [at 685]: The objects which this 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, although the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade.
- [686] 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…
- [687]
- Applying the rule to be collected from the authorities, it appears to their Lordships that the provision contained in the second clause of the deed, viz, that if either of the named persons should refuse to allow the stevedoring of any ship to be done by the party entitled to it under the first clause, and should require one of the other parties to do it, such party so required should give an equivalent to the party who lost the stevedoring, to be determined by arbitrators, is not unreasonable, since it provides in a fair and reasonable way for each party obtaining the benefit of the stevedoring of the ships to which by the contract he was to be entitled. Each party might in turn derive benefit from this clause, and one of the four firms would always get the profit of the ship stevedored, though the work might be done by another of them. As regards the merchant, he can have his ships stevedored by the party whom he may require to do it, at least there is no prohibition against his having it so done
- [The Board concluded that an agreement of this nature was not invalid if carried into effect by provisions reasonably necessary for the purpose]

Developments in the United States (Antitrust statutes)

- 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.

Sherman Antitrust Act 1890 ss 1 and 2 (p 7)

Section 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of

a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding

$10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

- These two provisions are of special interest to Australia because of the influences on the Trade Practices Act 1974 (Cth). See further notes page 7

Clayton Antitrust Act 1914 ss 3 and 7 (p 8)

Section 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Section 7. No person engaged in commerce of any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce, or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stock or assets, or of the use of such stock by the voting or granting of proxies or otherwise may be substantially to lessen competition, or to tend to create a monopoly.

- See further notes on page 8

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.
- 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, 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.

TFEU Articles 101 and 102 (pp 23-24)

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

- The first attempt to enact competition laws in Australia at a federal level was the Australian Industries Preservation Act 1906. This Act largely followed the US 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.
- The first effective competition statute was the Trade Practices Act 1974 (**now called the Competition and Consumer Act 2010 ("CCA")**). 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 and, 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 signalling laws).
- Earlier this year the Competition Policy Review (Harper Review) reported and made significant recommendations relating to competition law; it is likely we will see further

changes arising from these recommendations, although the extent to which the Government will seek to implement the Harper recommendations remains unclear.

'Developments in Australia', pp 9-23

Early attempts to develop effective competition laws

Swanson Committee

- Extracts from the report of the Swanson Comitttee provide a useful summary of Australian attempts, prior to 1974, to enact competition laws (see page 9)

Trade Practices Act 1965

- Moves towards a new approach for dealing with restrictive trade practices gained momentum in the early sixties. Apart from conducting a review of comparative overseas legislation (notably USA and UK), the Cth Government considered the findings of various bodies of enquiry
  - See further details page 9-11

Restrictive Trade Practices Act 1971

- As a result of the decision in Strickland v Rocla Concrete Pipes Ltd (1970) the substance of the 1965 Act was re-enacted in reliance upon corporations head of powers as the Restrictive Trade Practices Act 1971
- See further details page 11

Trade Practices Act 1974

- A major public criticism of the Trade Practices Act 1965 and its related successors was that it was inefficient; its procedures were slow and costly and, until the appropriate restraining order was issued by the Tribunal, the examinable agreement or practice remained operative
- As a result, the **Trade Practices Act 1974 ("TPA")** was enacted (following significant amendment of its originating bill, the Trade Practices Bill 1973) in August 1974
- The Constitutional basis of the Act is chiefly the corporations power (section 51(XX)). However, the Act also relies on the trade and commerce, territories, postal and telegraphic services, banking, insurance, external affairs and incidental powers as well as the power with respect to dealing with the Cth
- The TPA is reminiscent of the Australian Industries Preservation Act 1906 (Cth) insofar as it adopts the approach taken in the Us antitrust legislation rather than that taken in the UK as the Trade Practices Act 1965 had done
- This approach is to prohibit various forms of conduct directly, rather than to do so only after some form of registration and official consideration of suspect conduct has taken place
- In the area of competition law, the forms of conduct prohibited by the TPA were originally:
  - Contracts, arrangements or understandings 'in restraint of trade' (s 45)
  - Monopolisation (s46)
  - Exclusive dealing (s47)
  - Price discrimination (s49)
  - Mergers (s 50)
- Although this Act has been amended substantially since 1974, its basic approach and structure have remained the same. It constitutes the principle source of Australian competition law
- The TPA also deals with consumer protection, secondary boycotts and international shipping. See page 12 for further details

The Swanson Committee and the Trade Practices Amendment Act 1977

- The Swanson Committee conducted an extensive review of the TPA in 1976. Most of the recommendations of the Committee were accepted and implemented by the Trade Practices Amendment Act 1977
- This Act repealed ss 45, 46 and 47 and re-enacted them in an amended form. In the process it incorporated the phrase "substantially lessening competition" in s 45 and introduced s 45A, which deems price fixing to be anti-competitive
- The Act also repealed s 50 and replaced it with a new section which, by adopting the requirement that a merger must lead to an acquisition of a position of market dominance before it was contravened, was narrower in scope

The 1986 amendments

- In 1986 the TPA was twice amended in important ways by the Trade Practices Revision Act 1986 (Cth) – amended s 46 so that it applied to companies which had substantial market power rather than just those which were in a position to control a market
- This Act also extended the TPA's merger provisions by inserting two new sections (ss 50(1A) and 50A)
- See page 12 for full details