Competition law and policy – MLL409

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Topic 1: Evolution of Australian Competition Law

Topic 2: Restraint of trade

Topic 3: Outline of Australian competition law

Topic 4: The goals of competition law

Topic 5: Competition law economics

Topic 6: Cartel conduct

Topic 7: Anti-competitive agreements

Topic 8: Boycotts (exclusionary provisions)

Topic 9: Misuse of market power

Topic 10: Exclusive dealing

Topic 11: Resale price maintenance

Topic 12: Mergers

Topic 13: Authorisation, notification, remedies, procedure

Topic 14: Access regime

Topic 15: International competition law

EXAM STRUCTURE

Question 1: 30 marks
  • Part A (presumed 25 marks): 50 minutes
  • Part B (presumed 5 marks): 10 minutes

Question 2 (20 marks): 40 minutes

Question 3 (10 marks): 20 minutes
1. Evolution of Australian Competition Law

1. Introduction

• Competition policy: Government policy that effects the level and the nature of competition that exists in the market

• In Australia it is principally contained in the Consumer and Competition Act 2010 (previously called TPA 1974) → it is the same act, just renamed
  o This Act is administered largely by the ACCC

• There is huge current review of competition law in Australia

• Competition defined: The process by which rival businesses strive to maximise their profits by developing and offering desirable goods and services to consumers on the most favourable terms
  o Competition policy defined: That set of policies and laws that protect, enhance and extend competition in this way

• Competition law varies throughout Australia – however increasingly it is becoming more streamlined

Why is competition in the market important?

• It generally leads to choice, lower prices and better quality products as firms seek to compete with each other

• It can help to protect businesses from anti-competitive practices → it seeks to prevent firms from engaging in anti-competitive practices

• It also generally promotes efficiency within society

• They also make provisions for market failure

2. The origins of Australian competition law

Ancient origins

• Competition (aka restrictive trade practises) has ancient origins
  o Babylonian Code of Hammurabi (C18 BC)
  o In 483AD, the East Roman Emperor Zeno prohibited and exiled monopolists

• These ancient origins have provided the origins of the modern law dealing with competition issues in Australia, the USA and the UK

The common law response to monopolies

• More recently, the common law developed competition law policies

• Case of Monopolies – Darcy v Allen (1602): A Crown exclusive grant of patent rights in relation to playing cards was void = constituted an unlawful monopoly
  o Prior to this case, it was common for the Crown to grant monopolies in certain lines of trade in exchange for royalties

<table>
<thead>
<tr>
<th>Darcy v Allen (1602)</th>
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<td>Case of monopolies</td>
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Fact summary:

• Darcy had exclusive patent rights to make and import playing cards
• All made, imported and sold these cards – in breach of Darcy’s rights

Issue: Whether the Crown grant of monopoly was lawful?

Held:

• The exclusive grant was an unlawful monopoly contrary to the common law
• Sole traders damage others in the trade (loss of jobs) and consumers (prices raised) → Sole
traders have regard only to their own profit and not to the benefit of the Commonwealth

- **Statute of Monopolies 1623**: Crown monopolies were attacked by Parliament in this – this was passed to end the practice of the Crown granting monopolies
  - This Statute provided that *Crown monopolies were void*. It also introduced the notion of treble damages
  - Parliament, however, still kept the right to grant patent monopolies for new inventions → they wanted to encourage innovation

**The restraint of trade doctrine**
- The early common law prohibited all *unreasonable restraints of trade* (Dyers case (1414)). This strict duty was modified in Mitchell v Reynolds
  - Issue: Was that trade persons shouldn’t by contract prevent themselves from earning a living and thus becoming a burden on the rest of society

<table>
<thead>
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<th>Mitchell v Reynolds (1711)</th>
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<tr>
<td><strong>Modern position</strong>: Reasonable restraints on trade are permissible</td>
</tr>
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</table>

**Fact summary:**
- This case was about a *non-competition clause* in a contract for sale of a bakery whereby the vendor agreed not to compete with the purchaser in the local parish for five years

**Held:**
- In this case, the clause was a *reasonable restraint* and permitted by the common law

**The doctrine of conspiracy**
- **Common law doctrine of conspiracy**: Attempts by groups of traders to *preclude or inhibit competition* from others *was made illegal and liable* to civil action
  - Concerted action to prevent competitive rivalry was illegal
  - This doctrine was used against labour organisations
  - The 19th century doctrine of *laissez faire* saw this doctrine restricted to cases where there was coercion → it has thus had *little modern impact on anti-competitive* activity by businesses
  - It was ultimately watered down to the point of being ineffectual

**Limitations of the common law**
- The common law has proved to have *severe limitations* in preventing restraints on competition – despite the potential it has displayed

<table>
<thead>
<tr>
<th>Mogal Steamship v McGregor (1892)</th>
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<tr>
<td><strong>Highlights the limitations of the common law</strong></td>
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**Fact summary:**
- Ship owners formed an association to divide work, set freights, etc re other agreements between people that would have otherwise been competitors
- P (ship owner) was excluded because he didn’t form part of this association and his business subsequently suffered
- P claimed damages based on *conspiracy*

**Held:**
- The *object of the association*, to appropriate P’s trade, was *lawful* → it was held not to be illegal for a trader to try and drive a competitor out of trade
The means used to do this (an association) were also lawful → it was lawful for a set of traders (here the association), to do what an individual with sufficient power could do

NOTE – under the current CCA: This type of agreement would almost certainly constitute an unlawful cartel

Collins v Locke (1879)

Fact summary:
• A, R and others entered into an agreement to divide between themselves a stevedoring business in Melbourne
• Following a dispute, an issue arose as to the validity of this agreement

Held:
• Agreements to divide up stevedoring business were lawful, even though they restrained trade
• An agreement with the purpose of preventing competition among the parties and thereby keeping prices up, was valid as long as it was carried into effect by proper means → this meant provisions reasonably necessary for the purpose, even though the result might be restraint of trade

Developments in the United States
• The Sherman Antitrust Act 1890 and the Clayton Antitrust Act 1914 were enacted in the United States due to dissatisfaction with the common law
  o These acts were developed because there were huge monopolies over trusts
• Sherman Antitrust Act 1890: The basis of modern competition laws – these provisions remain today
  o Section 1: All contracts and combinations in restraint of trade are illegal
  o Section 2: Prohibits monopolisation
• The Sherman Act provisions had a big influence in the development of restrictive trade practices in Australia → Australia’s legislation incorporates in most of the restrictive trade practices prohibitions, a requirement that the conduct substantially lessen competition before it contravenes the Act
• Clayton Antitrust Act 1914:
  o Section 3: Exclusive dealing type conduct prohibited when anti-competitive
   → this includes conduct whereby a supplier essentially forces you to deal only with them by preventing you from dealing with their competitors
  o Section 7: Directed at anti-competitive mergers → this is prevented by s 50 CCA in Australia in similar terms

Developments in Europe
The key instruments of EU Competition law:
• Treaty on the Functioning of the European Union (TFEU): formally the Treaty of Rome – there are similarities between this and Australia law, but not as closely related as US legislation and case law
  o Article 101: Agreements with the object or effect of restricting competition in the common market (price fixing, limiting production, market sharing…)
    • Previously s 85 Treaty of Rome
    • This provision covers cartel conduct (including price-fixing and market sharing) and other forms of restrictive conduct, including discrimination and forcing
Article 102: Abuse of dominance position → this prohibits similar conduct to that prohibited by Australia’s misuse of market power provision (s 46)
- Microsoft/Intel: 2009 Intel fines exceeded 1 billion Euro
- Previously s 86 Treaty of Rome

- Associated regulations that regulate anti-competitive agreements and abuses of market dominance within the internal European market
  - EC Merger Regulation 139/2004: Prohibits mergers which substantially impede effective competition (SIEC), particularly as a result of creation or strengthening of a dominance position
  - Mergers require pre-approval required by the Competition Authorities
- References to the ‘common market’ should be replaced with the ‘internal market’

3. Competition law in Australia
- Australian Industries Preservation Act 1906: The first attempt to enact Australian competition laws at a federal level
  - This act largely followed approach of the Sherman Act
  - Restrictive judicial interpretation deprived it of substantial effect → it subsequently made little contribution to the development of Australian law
- Trade Practices Act 1965: Replaced the above act BUT was highly restrictive
- Trade Practices Act 1971: Relatively ineffective so was replaced quickly
- **Trade Practices Act 1974 – now called Competition and Consumer Act 2010:** First effective Australian competition statute
  - This Act was given power through more expansive interpretation given to the legislature. It also had fairly broad bipartisan support
  - This is still Australia’s main piece of competition law legislation
  - This Act contained (still contains) direct prohibitions on certain forms of conduct – in particular:
    - Contracts, arrangements or understandings in restraint of trade or commerce (s 45)
    - Monopolisation (s 46)
    - Exclusive dealing (s 47)
    - Resale price maintenance (s 48)
    - Price discrimination (s 49)
    - Mergers (s 50)
- It has been amended numerous times since 1974:
  - Swanson Committee: 1977 Amendment – Substantial lessening of competition (SLC) test in s 45/s 50 converted to a dominance test
  - 1986 amendments: S 46 test changed from misuse of market power provision to one of substantial control of a market power
  - Griffith Report 1988: Recommended against changes to ss 46 and 50
  - Cooney Report 1991: Recommended changes to s 50 (merger provision).
    Resulted in return to a competition test from the dominance test (resulted from the Swanson Report)
  - **Hilmer Report 1993:** Key reform was the Competition Policy Reform Act 1995. This expanded the scope of the Act considerably – created a National Competition Policy
    - A comprehensive review of Australian competition law was undertaken in 1992-1993 by an Independent Committee headed by Professor Hilmer
Dawson 2003: *Trade Practices Legislation Amendment 2006* – introduced a suite of changes to the Act. Key changes included:

- Substantially increasing pecuniary penalties for competition law contraventions
- Introducing a formal, optional, pre-merger notification scheme (including an appeal mechanism)
- Increasing accountability requirements of the ACCC...

TP Legislation Amendment 2007: major changes regarding predatory pricing laws. Many have recommended the appeal of this provision

TP Legislation Amendment Act 2008: Misuse of market power. Made changes to s 155 which relates to the power of the ACCC

TP Legislation Amendment Act 2009: Criminal penalties for cartels introduced for the first time *(topic 6)*

### Mergers and market definition - more detailed in Topic 12

*Competition and Consumer Legislation Amendment Act 2011*: This has altered the definition of market for the purposes of merger provisions – it has removed the word ‘substantial’ – theoretically to deal with creeping acquisitions

- This largely involves an aesthetic change to the Act and *hasn’t altered* existing provisions

### Price signalling - more detailed in Topic 10

*Competition and Consumer Amendment Act (No 1) 2011*: This remains a controversial law – argued whether price signalling is illegal or not

- It was introduced because there were concerns about anti-competitive signalling of prices between petrol retailers which aren’t captured by existing cartel provisions because they require an agreement of some sort
  - **Basically:** They do not capture the situation where one retailer announces a proposed future increase in the hope that others will do the same, but with no agreement that they will do so

- This Act was introduced as the big four banks announced future intentions regarding increasing or lowering interest rates – **price signalling laws currently only apply to the banking industry**
  - Competition in the Banking sector 2010-2011: Inquiry – included price signalling
  - The industry specific nature of price signalling laws is heavily criticised

*Milk Wars inquiry 2011*: Coles reduced the price of their milk to $1 a litre. This resulted in others reducing the prices of their milk and lots of outcry ensued. Lots of possible recommendations were made – some a little nutty

- No significant action has been taken (possible industry code of conduct however in relation to the supermarket industry)

### On-going and proposed reviews

**Root and branch review** – Harper Review

- The Liberal Party said that it would conduct a root and branch review of Australia’s competition policy if it won the 2013 lecture
- Professor Ian Harper was then appointed the head of the *Competition Policy Review 2014-2015*: the final terms of reference were released 27 March 2014
- The review is broad ranging
• It is a major policy review and it’s likely that it will lead to significant changes to Australian competition law and policy – however not until next year

**National Access Regime Review 2012-2013**
• The access regime form a significant portion of the regulatory competition policy in Australia
• **Only need an overview of this for the course:** Focus is on Part IV of the Act – anti-competitive conduct provision
• **Reform:** In 2014 the Productivity Commission conducted a review into the National Access Regime. This is now being considered as part of the Competition Policy Review

**Supermarkets Root and branch review**
• Supermarkets are important in current Competition Policy Review
• **2011:** The Senate Economics Committee conducted an extensive review of the impacts of supermarket price decisions on the dairy industry
  o A final report was produced with various recommendations, although nothing substantial has come from this
2. The doctrine of restraint of trade (ROT)
Unique area of competition law because it’s governed by the CL (not the CCA)

1. Introduction

Definition
- There is no exhaustive definition of ‘contracts in restraint of trade’ however a working definition is one in which a party (covenantor) agrees with any other party (covenantee) to restrict his liberty in the future to carry on trade with other persons not party to the contract (Petrofina (GB) Ltd v Martin)

- **Key question to ask:** Does the agreement restrain trade or does it merely regulate and thereby promote trade?
  - If the agreement restrains trade, the agreement will be within the doctrine and will be unenforceable, unless demonstrated to be reasonable
  - If the agreement merely regulates, it won’t come within the doctrine and will not have to be justified

Justification: Public interest (economic and social)
- It’s against public interest to restrict ability of people to engage in trade/employment

Not all restraint are captured: Agreements concerning trade fundamentally restrain (Chicago Board of Trade)
- Have to distinguish contracts in restraint of trade from those that simply regulate normal commercial relations

Scope of the doctrine in Australia
- Competition and Consumer Act (CCA) preserves the doctrine – but only insofar as it can operate concurrently with the Act
  - Section 4M: ROT preserved in so far as that law is capable of operating concurrently with the CCA
    - Basically: If the conduct is prohibited by the CCA, then the CCA will apply and the ROT will not. If the CCA doesn’t apply to the conduct, the ROT doctrine can still operate
  - Section 51(2)(b)(d)(e): Excludes from the CCA part IV (except s 48 (RPM)) → it is in these areas that the ROT doctrine is most likely to operate
    - Restrictions on employment
    - Restrictions between partners
    - Restrictions in a contract for the sale of a business

2. Restraint of trade summary

- General rule: 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)

- Application: To restraints not captured by the CCA → largely employment contracts and sale of business
Approach to restraint of trade

1. Does it restrain trade?
   ⇒ If no – it is enforceable
   ⇒ If yes – continue to step 2

2. Does it protect a legitimate interest?
   ⇒ If no – it is unenforceable
   ⇒ If yes – continue to step 3

3. Is it reasonable as between the parties? Onus on defendant
   ⇒ If no – it is unenforceable
   ⇒ If yes – continue to step 4

4. Is it reasonable in the public interest? Onus on plaintiff
   ⇒ If no – it is unenforceable
   ⇒ If yes – it is enforceable

3. Development of the doctrine

- Ancient restraint of trade case – Dyer’s Case (1414): Concern focused on restrained party as a burden on society, rather than concern about the anti-competitive nature of the undertaking
- More modern statements in below two cases:

<table>
<thead>
<tr>
<th>Fact summary:</th>
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<tr>
<td>• N had a successful machine gun manufacturing business</td>
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<td>• N (effectively) sold the business to MN</td>
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<tr>
<td>• N entered into a restrictive covenant by which he could not (except for MN) for 25 years:</td>
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<tr>
<td>o Engage in the trade of manufacturing guns, explosives, ammunition; or</td>
</tr>
<tr>
<td>o Engage in any competing business</td>
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<tr>
<td>• N later entered into an agreement with another gun company</td>
</tr>
<tr>
<td>• NM sought to prevent N through an injunction</td>
</tr>
<tr>
<td>• N claim: The whole covenant is void as being in restraint of trade</td>
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| Issue: Was the restrictive covenant valid or void in restraint of trade? |

<table>
<thead>
<tr>
<th>Held:</th>
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<tr>
<td>In age of Queen Elizabeth 1, all restraints of trade’s were void as against public policy → all interference</td>
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<tr>
<td>o This was relaxed to focus on only general restraints</td>
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<tr>
<td>• General rule (in 1894): the view is that all interference with individual liberty of action in trading, and all restraints of trade themselves, are contrary to public policy and therefore void</td>
</tr>
<tr>
<td>• Exceptions: If justified because it is reasonable, having regard to the interests of the parties and the public. Generally the area of restriction should correspond with the area in which protection is required</td>
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<table>
<thead>
<tr>
<th>Present case:</th>
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<tr>
<td>• Restraint was reasonable in the interests of parties → N obtained full value for the sale</td>
</tr>
<tr>
<td>• Restraint was reasonable in the interests of the public → No injury, in fact that person is prevented from carrying on a trade in weapons of war abroad</td>
</tr>
<tr>
<td>o Also no injury because N could no longer earn a living (he received 200,000 pounds – it was far fetched that he would become a public burden)</td>
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**Buckley v Tutty (1971)**

**ROT applies to all restraints – do not need a contract to exist**

### Fact summary:
- Tutty was a professional footballer with Balmain Club.
- His Club played matches organised by the NSWRL. Buckley was the League’s president.
- League and the Club were *unincorporated* – thus the TPA didn’t apply.
- League rules:
  - Required players to be registered before they could play.
  - Contained provision relating to the transfer of players between the club – prevented transfer without permission of the current club.
- Tutty sought declaration rules were an unreasonable restraint of trade.
- League’s claim: Court did not have jurisdiction as the League and Club were voluntary associations + the rules had no contractual effect.
  - The rules were not in restraint of trade.
  - If the rules were in restraint of trade, the restraint is no more than is reasonable.

### Held:
- **No need** for the relationship to be contractual → ROT (restraint of trade) applies to all restraints howsoever imposed, and whether voluntary or involuntary.
- The League’s Rules were in ROT → Trade extends to the exercise of a man’s profession or calling (including part time sport).
  - The doctrine applies to employment generally + it is irrelevant that football is a sport – a person paid to play is engaged in employment.
  - It is still employment if the person doesn’t work full time.
- The rules:
  - Prevent professional players making the most out of their skills.
  - Prevent a member of one club playing for another (without approval), even if not contractually bound to play with the former.

## 4. Operation of the doctrine

**THE TEST – restraint of trade**

**a.** Does the agreement restrain trade?

⇒ If so, it falls within the doctrine, subject to a reasonableness test *(below)*

**b.** Does the agreement merely regulate (and thereby promote) trade?

⇒ If so, it falls outside the doctrine

- **All agreements in restraint of trade are prima facie unenforceable at common law** UNLESS the agreement is *reasonable*:
  - Having regard to the interests of the parties; and
  - Those of the public.
- **Onus of proving reasonableness** (as between the parties): The party seeking to enforce the agreement (the person who’s protected by it)
  - Reasonableness: This is a question of law ⇒ this means that while evidence of surrounding circumstances* is admissible, the views of the persons in the particular trade concerning reasonableness are not
  - Example of circumstances: Character of the business to be protected.

**The test of reasonableness**
- All restraints of trade within the doctrine are prima facie unenforceable HOWEVER restraints, whether partial or total, are enforceable if they are reasonable.

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*Italic text reflects emphasis from the original document.*
• Being **reasonable** is the ONLY defence → this involves a consideration of the interests of the parties and the public interest (Nordenfelt)

<table>
<thead>
<tr>
<th>Amoco Australia Ltd v Rocca Bros Motor Engineering Co P/L (1973)</th>
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<tbody>
<tr>
<td>An agreement restraining purchasing</td>
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**Fact summary:**
- 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

**Held – re reasonableness:** To be justified, a restraint must -
   a. Do 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 it is relevant)
   b. Not be injurious to the public

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**Factor to consider #1: Legitimate Interest**
- To be enforceable, there must be a legitimate interest that the courts recognise as worthy of protection by a restriction
  - Example: Protection of trade secrets or connections + business goodwill in the sale/purchase of a business
  - Courts have been generous in accepting a wide range of interests as legitimate
- Once a legitimate interest has been identified, the covenantee must show that the restriction does **no more** than provide it with adequate protection
  - The courts are required to scrutinise the content, duration and geographical dimensions of a restriction and invalidate any aspect that goes beyond what this requires
  - The longer the duration of a restriction or the wider the scope or geographical operation, the more difficult a clause is to be justified as reasonable
  - Esso: A 4 year tie was held to be valid but the 21 year tie was struck down

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<thead>
<tr>
<th>Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd [1934]</th>
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<td>NB: This wouldn’t arise as much now – it would be a cartel arrangement (CCA)</td>
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**Fact summary:**
- Breweries paid Malt $15,000
- Malt agreed not to manufacture alcohol for 15 years. They subsequently announced that they would not honour the agreement
- **Breweries:** Sought a declaration that the agreement was binding

**Held:** This was **not a legitimate interest** thus the restraint was **unenforceable**
- This is an attempt to protect against ‘mere competition’
- **Not ancillary** to some main transaction (eg sale of business)

**Factor to consider #2: Reasonableness between the parties**
- In assessing whether a restraint agreement is reasonable, courts consider:
  - Whether the restraint is **no more than is necessary to protect** the interests of the party seeking to invoke the restraint; and
Whether the party restrained (covenantor) is fairly compensated for that restraint

- **Onus of proof**: On the party wishing to enforce the restraint

- **Relevant factors** (but not decisive ones) in determining reasonableness:
  - The *wider in scope or geographic location* the restraint is, the *less likely* it will be considered reasonable
  - The *compensation* received by the covenantor
  - The *bargaining power* held by the parties → was it equal or could one party force the other to agree to the restraint?
  - Whether or not the person/people restricted are *party to the restriction*
    - **Example**: Members of sporting associations may not have the restriction forced upon them when they become members of the association and may not have been involved in creating the restriction

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**Buckley v Tutty (1971)**

**Fact summary**: Facts above in development of the doctrine

- Case about football player restraints – restricted player transfer

**Held**:

- On *reasonableness* of player transfer restriction:
  - **Onus** on the League to show reasonableness
  - League has a *legitimate interest* in ensuring that the 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 received a payment from them (even if the Club refused to use the player)
    - **Transfer fees**: These could prevent a player reaping the financial rewards of his skill and impede a player from obtaining new employment

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**Adamson v NSW Rugby League (1991)**

**The restraint was unreasonable**

**Fact summary**:

- A played rugby league with various NSWRL clubs
- NSWRL internal draft rules provided that at the expiry of the 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
  - The player must accept with the first club that picks him up
- **Player’s claim**: Players claimed unreasonable restraint of trade
  - The TPA claim failed because the players were employees

**Held (Sheppard J)**: The restraint was *unreasonable*

- Should consider the *effect on players*, even though they weren’t parties to the agreement
- The focus should be on the *economic effect*

**Held (Wilcox J)**: The restraint was *unreasonable* – took a broader view than Sheppard

- **Non-economic effects** can be considered
- Main focus is on the *interest of the covenantee*
  - **BUT** must also look at the *covenantor* (restrained party)
  - In appropriate cases, *third party* interests are relevant
Held (Gummow J): The restraint was unreasonable
- **Legitimate interest 1** – strong even competition: Helped ensure clubs evenly matched, but not essential because the League was already competitive
- **Legitimate interest 2** – financial viability: Already a salary cap in place. The draft wasn’t essential to protect financial viability
- **Legitimate interest 3** – retention of players – preventing rich clubs from getting the best: No evidence that mid-season drafting was successful. There were better solutions (like long term contracts)
- About the adequacy of protection of internal draft: To be assessed in the light of the degree of danger presented to those interests when the internal draft was adopted
- At that time, the League was prospering: Any danger to legitimate interests was not immediate or significant
- In assessing whether the restraint was reasonable, the League must show that it was:
  - Reasonably related to the objects of the League or the clubs; and
  - Afforded no more than adequate protection

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### Lindner v Murdock’s Garage (1950)

**Clause restricting L from working in the relevant business**

**Fact summary:**
- M owned a garage in two country towns 10 miles apart (Crystal Brook and Wirrabara)
- L was a motor mechanic who managed the repair shop
- M employed L and the *contract provided* that L must not work in a garage business within M’s sales territory for one year after his employment termination with M
- After 4 years, L left M and went to work for another garage in Crystal Brook
- M sought an injunction to restrain L working in Crystal Brook

**Held (majority reasons – Kitto J):** The clause was an INVALID restraint of trade
- The clause was *wider than required* to afford protection
- *Severability* did not save it: did not know where L would be working at the time of the contract
- To be valid, it should have been *limited* in respect of each area so as not to operate therein unless:
  - The appellant should be employed by the respondents in their business in that area
  - Within some specified reasonable period preceding the termination of his service

**Held (minority reasons – Latham CJ):** Clause was reasonable
- L 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 *didn’t exceed what was reasonably necessary* for the protection of the plaintiffs’ interest in its business
  - Didn’t matter the restraint covered both towns and L only worked in Crystal Brook
  - Validity (reasonableness) determined at the time of contract when he could have worked at either
  - Even if invalid to cover both areas, the Court would have severed the portion dealing with Wirrabara and kept Crystal Brook

**Factor to consider #3: Not contrary to the public interest**
- If reasonable between parties (above factor), the restraint will be lawful unless contrary to the public interest
- **Oonus:** The onus of proving that the restraint is contrary to public policy lies upon the other party
o The burden of proof shifts to the party restrained, once the party seeking to enforce the restraint has established reasonableness in the interests of the parties.

### Lindner v Murdock’s Garage (1950)

**Facts in ‘factor 2’ above. Employee restraints**

**Held:**
- **Against the public interest** (as determined at the time) to restrain the defendant 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:**
  - Defendant was not employed for a fixed term
  - Court stricter with employee restraints (less bargaining power), than sale of business restraints

### AG v The Adelaide Steamship Co Ltd (1913)

**Fact summary:**
- Coal producers entered into an agreement which established a cooperative buying agreement between the NSW coal producers
- **Issue:** Was it in restraint of trade at common law? Did it also contravene the Australian Industries Preservation Act 1906? This was an earlier form of the CCA

**Held:**
- **Onus on the party restrained** to show it was against public interest
- **Heavy burden** if it is reasonable in the interests of the parties
- **Example** of against public interest: If the restraint led to a pernicious monopoly

### Texaco v Mulberry Filling Station [1972]

**The courts are reluctant to examine the economic impact of a restriction to determine whether it’s contrary to public interest**

**Fact summary:**
- Texaco financially assisted Mulberry in developing a petrol filing station
- A charge was placed over the property for the benefit of Texaco, which included a tie requiring M to purchase all its petrol from Texaco
- M acquired petrol from a third party
- **Texaco claim:** Texaco sought an injunction to prevent further breaches
- **Mulberry claim:** The agreement was contrary to public interest
- **Issue:** Did this solus agreement constitute an unreasonable restraint of trade?

**Held:**
- The judge showed a reluctance to look at the general notions of public interests because business and economic judgments are prima facie matters for policy decisions by business administration, government or parliament
- The public interest in the ROT doctrine was narrower than the public interest at large → it was about the interests of the public as recognised in a principle or proposition of law and not to the interests of the public at large
**Factor to consider #4: Time of restraint**

- The validity of a restraint is to be determined by **reference to the date** on which the **restraint was imposed** (Adamson)

<table>
<thead>
<tr>
<th>Adamson v NSW Rugby League Ltd (1991)</th>
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</thead>
<tbody>
<tr>
<td><strong>Facts above</strong></td>
</tr>
<tr>
<td><strong>Held:</strong></td>
</tr>
<tr>
<td>- Time for testing validity is the <strong>date at which the restraint was imposed</strong></td>
</tr>
<tr>
<td>- Facts occurring after the relevant date may be relevant because they may throw light on the circumstances existing at that date</td>
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**Factor to consider #5: Severance**

- **Ladder clauses:** It’s common for restraint clauses to be drafted to give rise to various levels of restraint (example clause page 69 tb)
  - **Rationale:** While some levels o may be struck down on the ground of unreasonableness, others will survive → it provides several layers of protection
- **Uncertainty =** must ensure that there’s no uncertainty: If these ladder clauses are drafted to **contemplate a single restraint**, the are liable to be **struck down** on the grounds of **uncertainty UNLESS** the provide a means to choose which of the combinations is to apply (Austra Tanks P/L v Running)
- **No uncertainty:** If the clause contemplates **ALL of the combinations applying** with severance of those found to be unreasonable, **no uncertainty exists** (Lloyd’s Ships)

<table>
<thead>
<tr>
<th>Austra Tanks P/L v Running</th>
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</thead>
<tbody>
<tr>
<td><strong>The contract was void for uncertainty</strong></td>
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<tr>
<td><strong>Fact summary:</strong></td>
</tr>
<tr>
<td>- The most favourable of a possible 82,000 + combinations was to apply</td>
</tr>
<tr>
<td><strong>Held:</strong> This was void as being uncertain. They couldn’t determine which combination applied</td>
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<thead>
<tr>
<th>Lloyd’s Ships Holdins v Davros (1987)</th>
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<tbody>
<tr>
<td><strong>Certainty of clauses = contract was valid</strong></td>
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<tr>
<td><strong>Fact summary:</strong></td>
</tr>
<tr>
<td>- D sold ‘Lloyd’s Ships’ (shipbuilding company) to LSH</td>
</tr>
<tr>
<td>- D agreed to refrain from engaging in shipbuilding of any description, so as to protect the goodwill of the business</td>
</tr>
<tr>
<td>- The restriction combined various times and areas → the intent was that any invalid combination would be severed</td>
</tr>
<tr>
<td>- D commenced shipbuilding business in competition with LSH</td>
</tr>
<tr>
<td>- <strong>LSH claimed:</strong> Alleged breach of contract (amongst other things)</td>
</tr>
<tr>
<td>- <strong>D claimed:</strong> Contract was void for uncertainty and restraint of trade</td>
</tr>
<tr>
<td>- There were 120 possible combinations of restraints combining the type of conduct, time of restraint and geographical reach</td>
</tr>
</tbody>
</table>
| **Issue:** Was the contract uncertain because it provided no stipulation as to the priority combinations?
Held:
- In Austra Tanks, the problem was that the clause contemplated only one combination would apply but it was impossible to know which one.
- In JQAT, Austra Tanks was distinguished as it wasn’t the intention of the parties that only one of the possible combinations would operate.
  - It didn’t matter that the clauses overlapped → As long as all the clauses were to apply (subject to some being severed in ROT), there was no uncertainty.

In this case:
- The clause provided restraints should apply as if each were separate covenants (all applied unless some were severed or unenforceable) → this meant it wasn’t uncertain.
- Public policy issue: Was the court being asked to fix the scope of restraint?
- In this case there was a genuine attempt to define the need for protection → the more numerous the variables, the less likely there has been some genuine attempt.

5. Employer and employee restraints
- This doctrine of restraint of trade applies to agreements that limit the freedom of employees to work after the termination of their employment.
  - Need to apply the reasonableness test.
    - It must be demonstrated that, if any of these things can’t be proved, the restraint will be unenforceable (Lindner).
      - Employer onus: The employer must be able to prove that it has a legitimate interest that needs protection.
        - Example: Use of confidential information, trade secrets...
      - Employer onus: The restraint does no more than protect this interest.
        - Key factor in determining whether the restraint is reasonable: The limitations it imposes are over time and space → the longer the period of restriction and the greater the area over which it operates, the more difficult it is to prove the restriction is reasonable.
      - Employee onus: The restraint also must not be against the public interest.

- Breach of confidence: An employer can rely upon the doctrine of restraint regarding a breach of confidence → this prohibits former employees from using confidential information belonging to their employers for their own benefit or that of a new employer.
  - Trade secrets are often protected by such an agreement through agreements not to compete with the employer + not to solicit former clients.
- A restraint that operates during the period of employment can also come within the doctrine: this is likely only to apply when the agreement impedes trade, rather than promotes it.
  - Important factor: Whether the ties are merely incidental and normal to the contract of employment.

6. Vendor and purchaser of a business
- Restrictive agreements between a vendor and purchaser are more likely to be upheld than employee restraints.
  - Rationale: Goodwill is recognised as a legitimate interest. This cannot be protected without vendor restraint.
• If the goodwill of a business is sold and there is **no express restraint** in the contract of sale, the vendor can establish a rival business **BUT he can’t canvass** the customers of the old firm

• **S 51[2](e) CCA:** A provision in contract for the sale of a business, which operates **solely for the protection** of the purchaser in relation to goodwill, can’t contravene a provision in Part IV other than ss 45D, 45E and 48
  - **IRAF P/L v Graham:** This provision only applies to restraints that are **valid at common law.** → this means restraints from the above sections are exempted, as long as the restraint in question was solely for the protection of goodwill

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### Idameneo (No 123) P/L v Dr Teresa Angel-Honnibal [2002] NSWSC

#### Sale of goodwill of a business

**Fact summary:**
- The plaintiff purchased the defendant’s existing medical practice and paid $239,000 for goodwill in exchange for her agreement to render medical services from premises operated by the plaintiff
  - The plaintiff owned and operated a number of medical centres in which doctors could use the facilities in exchange for a portion of their fees
- The agreement provided, in part, that to protect the purchaser, the doctor couldn’t render medical services any place within an 8 km radius of the premises during the restraint period
- The defendant worked at both the Burwood + Leichhardt premises before resigning. She then commenced working at another Medical Centre within the 8 km radius
- **Plaintiff argument:** Brought an action seeking a number of remedies, including orders restraining the defendant from rendering medical services within the 8 km radius
- **Defendant argument:** The contractual restraint constituted an unlawful restraint of trade

#### Held:
- Some **geographic restriction** was legitimate **BUT not to the extent provided for in the contract** **HOWEVER** ultimately they found that it was **reasonable for the plaintiff to restrain** the defendant from practicing at the new medical centre for a period of 5 years
- The court **read down the contract** so as to prohibit the defendant from working there → the **Restraint of Trade Act 1976 (NSW)** applied so that the Court could read down and enforce the contract, so long as it wasn’t contrary to public policy
  - **This reading down wouldn’t be possible in Victoria UNLESS** the plaintiff could have established that the **contract was severable**

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**7. Partners**
- A restrictive covenant that operates upon the **dissolution of a partnership** is valid, as long as it is reasonable in the circumstances (Brown v Cunich)
- If there is **no restrictive agreement,** former partners can carry on a similar competing business and deal with former customers or clients
  - **BUT** they cannot canvas these former customers or persuade them to deal with the new firm instead of the old one
8. Agreements between the supplier and the purchaser of goods: vertical restraints

- Vertical restraints broadly cover two kinds of agreements:
  a. Those relating to the goods sold under the agreement such as an undertaking in relation to the resale price or the persons to whom the goods will be resold
  b. Those relating to other goods such as an undertaking that the purchaser won’t acquire similar goods from another supplier.

  ⇒ Example: Solus purchasing agreements in relation to petrol and alcoholic beverages
  ⇒ Solus agreements*: These require purchasers to acquire all their requirements from the other party thereto

- Important issue: Does the agreement require the restrained party to give up a freedom it would otherwise have?
  o If an agreement only relates to the goods supplied, it may fall outside the doctrine. This is because before the agreement was entered into, the purchaser had no right to deal with those goods at all.
  o These agreements will now normally fall for consideration under the CCA

9. Restraints in horizontal agreements

- The two most common horizontal restraints are:
  a. Agreements between the vendor and purchaser of a business, regarding competition by the former [see above]
  b. Cartel agreements whereby two or more producers/suppliers agree to accept restrictions on the prices, quantities or terms upon which they sell their goods or upon the areas in which, or persons to whom, they do so

  ⇒ Examples: Price fixing agreements between suppliers where a minimum selling price is agreed to
  ⇒ These agreements will fall for consideration under the CCA

- At common law, horizontal agreements are enforceable as long as they are reasonable in the interests of the parties and public

10. Non-contractual restraints

- Restraints can be imposed non-contractually
  o Example: The rules of a sporting association

<table>
<thead>
<tr>
<th>Adamson v NSW Rugby League Ltd (1991)</th>
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<tbody>
<tr>
<td>Sporting restraints. Facts above</td>
</tr>
</tbody>
</table>

**Held:** See above
- Note the importance placed on the interests of the players and the distinction between involuntary and voluntary restraints

11. Criticism of the doctrine

- This doctrine is frequently criticised for vagueness and potential harm to the sanctity of contract
- Maggbury – Callinan J (dissenting): The doctrine continues to operate despite no universal test being developed as to the situations to which it will apply. It’s time
to consider whether the doctrine should have any application, or a much more limited application, in modern times

12. Relationship with the Competition and Consumer Act

- The scope of the ROT doctrine is preserved, but curtailed, by s 4M CCA → however ROT’s operation in three key areas continues due to them being exempt from the operation of key provisions of the Act by s 51(2)(b), (d) and (e)
- **S 4M(a) CCA** provides that the Act *doesn’t affect the operation of the law* relating to the restraint of trade, so far as it can operate *concurrently* with the Act
  - MEANING: Conduct that is neither prohibited or sanctioned by the Act remains *governed by the common law* and could thus, be held void on the ground that it’s in restraint of trade
  - NB: Just because conduct in restraint of trade is reasonable and thus not void at common law, *doesn’t exempt it* from the operation of the Act (*Hollywood Premire Sales P/L v Faberge; TPC v Allied Mills Industries P/L*)
- **S 4M(b) CCA** provides that the CCA doesn’t affect the law relating to *breach of confidence*
- **Exemptions created by s 51(2)(b), (d) and (e):** Certain types of restrictions aren’t caught by the key provisions of the Act and their legality remains governed by the ROT doctrine

<table>
<thead>
<tr>
<th>Peters (WA) Ltd v Petersville Ltd [2001] Relationship between the (then) TPA and ROT</th>
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<tbody>
<tr>
<td><strong>Fact summary:</strong></td>
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<tr>
<td>• Peters purchased the WA ice-cream business of AUF, operated by Petersville</td>
</tr>
<tr>
<td>• AUF agreed not to sell, supply or distribute ice-cream products in WA for 15 years and granted Peters licences to certain brands and other marketing information</td>
</tr>
<tr>
<td>• <strong>AUF claim:</strong> This covenant was in restraint of trade</td>
</tr>
<tr>
<td><strong>Held:</strong> The restraint of trade was unreasonable</td>
</tr>
<tr>
<td>In discussing the relationship between the (then) TPA and ROT the majority noted:</td>
</tr>
<tr>
<td>• Developments in the common law <em>do not affect the interpretation</em> of the TPA</td>
</tr>
<tr>
<td>• The common law may develop <em>independently of statute</em> (as long as it can operate concurrently with the statute). This means the common law can strike down a restraint falling <em>outside the operation</em> of the TPA</td>
</tr>
<tr>
<td>• In deciding how the common law should develop, consideration should be given to <em>Parliamentary intent</em> in relation to trade practices policy</td>
</tr>
</tbody>
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