The Evolution of Australian Competition Law

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The origins of competition law

Competition law can be traced back to ancient times. Thus, for example, the first attempt to comprehensively codify the law, the eighteenth-century BCE Babylonian Code of Hammurabi, contains rules that can be interpreted as curtailing the power of monopolists to engage in price gouging, and in the fifth century CE the East Roman Emperor Zeno prohibited and exiled monopolists in terms remarkably similar to those used in modern statutes. More recently, and closer to the source of modern Australian law, it is possible to discern in the early English common law at least three lines of attack on anti-competitive conduct.[1]

Attacks on monopolies

Before the *Case of Monopolies—Darcy v Allein* (1602) 77 ER 1260, 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 Kings Bench

[Darcy held letters patent from the Crown granting him the exclusive right 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 patent. The first issue that arose was whether their grant was valid.]

1 For a more detailed examination of this topic, see Letwin, 'The English Common Law Concerning Monopolies' 21 *University of Chicago Law Review* 355 (1954).

Popham 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.

1. 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 ...

The 2d incident to a monopoly is, that after the monopoly 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 the commonwealth.

3. It tends to the impoverishment of divers artificers and others, who before, by the labour of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary;

[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. Section 1 of this statute declared that Crown grants of monopoly were void, and s 4 provided that anyone damaged by a grant could recover treble damages in respect of their loss. However, recognising the importance of rewarding invention, Parliament retained the right to grant patent monopolies for new inventions. Furthermore, the Act did not prohibit monopolies as such and through other exceptions they could still be granted to guilds and corporations, and by Parliament. Then, in *East India Company v Sands* (1685) 10 St Tr 371, it was held that the restriction on granting monopolies applied only to those operating within the realm and not to those operating outside. This distinction, it was argued, was necessary as businesses needed to be especially strong to successfully operate overseas—a distinction between domestic and international markets that has modern overtones in the argument that domestic merger laws should be relaxed to allow 'national champions' to be created that are able to compete internationally, and the exception for exports that commonly exist in competition law regimes.[2]

2 See, for example, the Australian *Competition and Consumer Act 2010*, s 51(2)(g) and the US *Export Trading Company Act 1982*.

The restraint of trade doctrine

The early common law, famously exemplified by *Dyer's Case* (1414) YB 2 Hen 5, fo 5, prohibited absolutely all contracts in restraint of trade. Indeed, in that case, Hull J went so far as to suggest that had he been in court, the plaintiff, Dyer, would have been imprisoned until he paid a fine to the King, for seeking to enforce the bond at issue, as he had given no consideration for the defendant's promise not to exercise his trade. However, as trade expanded in nature and geographic reach, the common law adopted a more accommodating stance to such restrictions so that, for example, in *Mitchel v Reynolds* (1711) 24 ER 347 it was held that a 'reasonable' restraint was permitted. As we shall see in the following chapter, with some elaboration, this remains the law today.

Conspiracy

The early common law of conspiracy rendered illegal and liable to civil action concerted action by traders designed to prevent their rivals from engaging in competitive activity.[3] The law also used this device against labour organisations and concerted action by traders to keep wages down or prices up. For example, in *R v Norris* (1759) 96 ER 1189, an agreement between salt producers to fix their prices above the prevailing level was held unlawful, Lord Mansfield declaring that this was so regardless of whether the price fixed was high or low. According to his Lordship (at 1189), such agreements 'were of bad consequence and ought to be discountenanced'. However, towards the end of the nineteenth century, under the influence of the doctrine of laissez-faire, the courts narrowed this doctrine to instances where unlawful means were used to carry out the conspiracy, or where the action was designed to injure the target rather than to advance the lawful interests of the conspirators. Thus, as the following extracts show, the doctrine had no impact on anti-competitive activity engaged in by firms in order to advance their own commercial interests.

Limitations of the common law

Despite, on occasions, having been prepared to respond aggressively to anti-competitive conduct, by the turn of the twentieth century the common law had chosen not to play any significant role in this area. True, the doctrine of restraint of trade retained some vitality. However, despite the presence of a 'public interest' limb in the reasonableness test used to decide the validity of restraints, the focus of attention was on the interests of the parties: if this dimension of the restraint was reasonable, then almost all manner of restrictive agreements would be upheld, even those fixing prices.[4] Furthermore, this doctrine did not allow third parties to challenge the restraint or recover damages should it cause them loss. Similar limitations applied to conspiracy. As indicated above, the courts essentially adopted a laissez-faire approach, taking the view that markets, if left to their own devices, would prevent the undue exploitation of any power gained by anti-competitive practices. This attitude was epitomised by Lord Parker in *Attorney-General v Adelaide Steamship Co Ltd* (1913) 18 CLR

3 See, for example, *The Poulters' Case* (1611) 77 ER 813; but compare *R v Daniell* (1704) 87 ER 856.

4 See, for example, *Attorney-General v Adelaide Steamship Co Ltd* (1913) 18 CLR 30 (PC); *Palmolive Co (of England) Ltd v Freedman* [1928] 1 Ch 264.

30 (PC), who said at [48] in relation to coal 'vend'[5] price-fixing agreements entered into by certain New South Wales coal producers:

> If the vend fixes the prices too high, it would inevitably lead to the trade of its members being lost to competitors outside the vend. It might also lead to the development of further pits or shafts, and the consequent creation of new competitors.

Mogul Steamship Co v McGregor Gow & Co

[1892] AC 49
House of Lords

[A number of ship owners, in order to secure trade for themselves, formed an association to regulate their trade. This association divided work among members, set freight rates, granted rebates to shippers who shipped only with members, and penalised agents who dealt with other ship owners. The plaintiff was a ship owner who was excluded from the association and whose business suffered as a result of its actions. The plaintiff claimed damages on the ground that it was the victim of a conspiracy. The plaintiff failed at first instance and on appeal to the Court of Appeal. It then appealed to the House of Lords.]

Lord Morris [at 49]: My Lords, the facts of this case demonstrate that the defendants had no other, or further, object than to appropriate the trade of the plaintiffs. The means used were: firstly, a rebate to those who dealt exclusively with them; secondly, the sending of ships to compete with the plaintiffs' ships; thirdly, the lowering of the freights; fourthly, the indemnifying of other vessels that would compete with the plaintiffs'; fifthly, the dismissal of agents who were acting for them and the plaintiffs.

The object was a lawful one. It is not illegal for a trader to aim at driving a competitor out of trade, provided the motive be his own gain by appropriation of the trade, and the means he uses be lawful weapons. Of the first four of the means used by the defendants, the rebate to customers and the lowering of the freights are the same in principle, being a bonus by the defendants to customers to come and deal exclusively with them. The sending of ships to compete, and the indemnifying other ships, was 'the competition' entered on by the defendants with the [50] plaintiffs. The fifth means used, viz, the dismissal of agents, might be questionable according to the circumstances; but in the present case, the agents filled an irreconcilable position in being agents for the two rivals, the plaintiffs and the defendants. Dismissal under such circumstances became, perhaps, a necessary incident of the warfare in trade.

All the acts done, and the means used, by the defendants were acts of competition for the trade. There was nothing in the defendants' acts to disturb any existing contract of the plaintiffs, or to induce any one to break such. Their action was aimed at making it unlikely that any one would enter into contracts with the plaintiffs, the defendants offering such competitive inducements as would probably prevent them. The use of rhetorical phrases in the correspondence cannot affect the real substance and meaning of it.

5 In relation to the Newcastle coalfield in New South Wales, the term 'vend' referred to an agreement between certain coal producers that fixed their minimum selling price for coal and allocated to each producer a certain proportion of their total output.

Again, what one trader may do in respect of competition, a body or set of traders can lawfully do; otherwise a large capitalist could do what a number of small capitalists, combining together, could not do, and thus a blow would be struck at the very principle of co-operation and joint-stock enterprise. I entertain no doubt that a body of traders, whose motive object is to promote their own trade, can combine to acquire, and thereby in so far to injure the trade of competitors, provided they do no more than is incident to such motive object, and use no unlawful means. And the defendants' case clearly comes within the principle I have stated.

Now, as to the contention that the combination was in restraint of trade, and therefore illegal. In the first place, was it in restraint of trade? It was a voluntary combination. It was not to continue for any fixed period, nor was there any penalty attached to a breach of the engagement. The operation of attempting to exclude others from the trade might be, and was, in fact, beneficial to freighters. Whenever a monopoly was likely to arise, with a consequent rise of rates, competition would naturally arise.

I cannot see why judges should be considered specially gifted with prescience of what may hamper or what may increase trade, or of what is to be the test of adequate remuneration. In these [51] days of instant communication with almost all parts of the world competition is the life of trade, and I am not aware of any stage of competition called 'fair' intermediate between lawful and unlawful. The question of 'fairness' would be relegated to the idiosyncrasies of individual judges. I can see no limit to competition, except that you shall not invade the rights of another.

But suppose the combination in this case was such as might be held to be in restraint of trade, what follows? It could not be enforced. None of the parties to it could sue each other. It might be held void, because its tendency might be held to be against the public interests. Does that make, *per se,* the combination illegal? What a fallacy would it be that what is void and not enforceable becomes a crime; and causes abound of agreements which the law would not enforce, but which are not illegal; which you may enter into, if you like, but which you will not get any assistance to enforce.

[His Lordship concluded that the appeal should be dismissed. In separate speeches, the other members of the House of Lords arrived at the same conclusion and did so on substantially similar grounds.]

[*Held*, Appeal dismissed]

Collins v Locke

(1879) 4 App Cas 674
Privy Council

[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, though 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, also, he can have his ship 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.]

Antitrust statutes in the United States

In the early nineteenth century, at least in some jurisdictions in the United States, the common law was applied with more vigour than it was in England. As a result, price fixing and market division were generally prohibited.[6] Nevertheless, the common law proved to be inadequate to deal with either the anti-competitive activity of the railways as they expanded westwards after the end of the Civil War, or the trusts[7] that developed in this period seeking to control markets across the most important sectors of the economy. The rise of the trusts and the behaviour of the railways caused great popular resentment, with the result that in the 1888 presidential elections, all major parties had 'antitrust' platforms. This movement led to the passage in 1890 of the *Sherman Antitrust Act*, named after Senator John Sherman, who introduced it. Two of the Act's main provisions, as amended, are extracted below.

6 See *Craft v McConoughy* 79 Ill 346 (1875); *Morris Run Coal Co v Barclay Coal Co* 68 Pa 173 (1871).

7 A trust was an arrangement by which various shareholders transferred their securities to trustees in return for certificates entitling them to a share of pooled earnings. They were accused of absorbing existing businesses and of being impersonal and monolithic, engaging in predatory pricing and unfair business tactics generally.

The Sherman Antitrust Act 1890

15 USC§§1, 2

1. 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 $100 000 000 if a corporation, or, if any other person, $1 000 000, or by imprisonment not exceeding ten years, or by both said punishments, in the discretion of the court.

2. 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 $100 000 000 if a corporation, or, if any other person, $1 000 000, or by imprisonment not exceeding ten years, or by both said punishments, in the discretion of the court.

Notes

1 These two provisions are of special interest in Australia because of their influence on the *Trade Practices Act 1974* (Cth). The original s 45 in that Act was essentially an abbreviated version of s 1 of the *Sherman Act*. Although s 45 was reworded in 1977 and now uses different terminology, the two sections still prohibit substantially the same forms of conduct. Similarly, s 2 of the *Sherman Act* has influenced the content of s 46 of the *Trade Practices Act*. In both cases, broadly speaking, the current Australian provisions put into statutory form the effect of United States decisions interpreting these provisions.

2 Early interpretation of the *Sherman Act* varied. One view was that it was radical new legislation that should be interpreted widely; another view was that it did no more than codify the English common law. However, in *Standard Oil Co of New Jersey v United States* 221 US 1 (1911) the Supreme Court adopted what has become known as the 'rule of reason'. According to this rule, restraints of trade would only violate the *Sherman Act* if they reduced competition to an unreasonable extent. The effect of this rule is reflected in those provisions in the *Trade Practices Act* that require conduct to 'substantially lessen competition' before they will be contravened.

3 Early in its history, there was concern about the apparent vagueness of the rule of reason. This led to pressure for a new Act that would make the law more certain. The *Clayton Act 1914* was one response.

Clayton Antitrust Act 1914

15 USC §§14, 18

3. 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.

…

7. No person engaged in commerce or in 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 stocks 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.

Notes

1 Section 3 of the *Clayton Act* deals with what in Australia is called 'exclusive dealing'. It has influenced the form of s 47 of the *Trade Practices Act*, most of the provisions of which can, likewise, only be contravened by conduct that substantially lessens competition.

2 Section 7 of the *Clayton Act* prohibits mergers in terms that resemble those used in s 50 of the *Trade Practices Act*. Section 8 of the *Clayton Act* also prohibits interlocking directorships—the practice of one person being a director of two or more companies at the same time. There is no equivalent provision in Australia.

3 Note that s 2 of the *Clayton Act* prohibits price discrimination—the practice of a seller charging different customers different prices. The terms of this section were copied almost identically by s 49 of the *Trade Practices Act*. However, this section of the latter was repealed in 1995.

Developments in Australia

Early attempts to develop effective competition laws

The following extract from the report of the Swanson Committee provides a useful summary of Australian attempts, prior to 1974, to enact competition laws.

Swanson Committee

Report of the Trade Practices Act Review, AGPS, Canberra, 1976

The Australian Industries Preservation Act 1906

[7] The Commonwealth Government entered the field of restrictive trade practices in 1906 with the enactment of the *Australian Industries Preservation Act*. That Act, being influenced largely by the US *Sherman Act* of 1890, adopted a proscriptive approach. Sections 4 and 7 prohibited combinations and monopolies relating to trade or commerce with other countries and among the States. Sections 5 and 8 prohibited combinations in restraint of trade or commerce engaged in by foreign corporations or trading or financial corporations formed within the limits of the Commonwealth.

As the Australian Constitution does not give the Commonwealth Parliament an express head of power relating to restrictive trade practices, the Act relied for the most part upon the trade and commerce power (section 51(I)) and the corporations power (section 51(XX)).

In 1909, sections 5 and 8 of the Act were declared invalid by the High Court of Australia, as being beyond the constitutional power of the Commonwealth—*Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

In 1913, the Privy Council, in the case of *Attorney-General of the Commonwealth v The Adelaide Steamship Co Ltd* (1913) 18 CLR 30, held that in order for an offence to be committed under the Act, it was necessary to establish a specific intent to injure the public. As the necessary intent was not proved in that case, the action by the Commonwealth failed.

The Act was amended in 1906, 1907, 1909, 1910 and 1930. The Act was repealed in 1965 after a relatively ineffectual lifespan of 60 years.

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 Commonwealth Government considered the findings of various bodies of enquiry including the then Tariff Board, the Royal Commission on Restrictive

Trade Practices (WA) 1958 and the Royal Commissioner on Prices and Restrictive Trade Practices (Tasmania) 1965.

In 1965, the proscriptive approach of the *Australian Industries Preservation Act* was replaced by a prescriptive formula along the lines of the UK *Restrictive Trade Practices Act 1956*. The preamble to the Australian *Trade Practices Act 1965* read as follows: 'To preserve Competition in Australian Trade and Commerce to the extent required by the Public Interest'.

[8] Apart from collusive tendering and bidding, and later resale price maintenance, there were no absolute prohibitions in the *Trade Practices Act 1965*, as in the earlier legislation. The Act made five categories of agreements and four types of practices examinable. The agreements, but not the practices, were to be registered with the Commissioner of Trade Practices. Non-registration constituted an offence. The Register of Trade Agreements was not open for public inspection. ...

The Commissioner of Trade Practices was empowered to examine such agreements and practices to ascertain whether they were, in his opinion, contrary to the public interest.

If the Commissioner concluded that the agreement or practice was contrary to the public interest, he was required to consult with the relevant parties with a view to obviating the need for further proceedings. If the consultative process failed to achieve its objective the Commissioner could refer the matter to the Trade Practices Tribunal. The Tribunal was then required to consider whether or not the agreement or practice was 'examinable' within the context of the Act and, if so, whether or not it was contrary to the public interest. In such a case the Tribunal was empowered to make an appropriate restraining order.

Only the Commissioner could bring matters before the Tribunal. However, the Attorney-General could direct the Commissioner to investigate examinable agreements and practices in order to ascertain whether there were any grounds for bringing the matter before the Tribunal, but he had no power to order the institution or non-institution of proceedings by the Commissioner, nor could he himself institute proceedings.

The Commonwealth Industrial Court settled questions of law referred to it by the Tribunal. It also dealt with prosecutions for offences under the Act and proceedings for contempt of the Tribunal, neither of which could be brought without the consent of the Attorney-General. Jurisdiction was also conferred upon the Court to hear actions for damages brought by private individuals.

[9] ...

By amendment to the Act in 1971 the practice of resale price maintenance was prohibited. However, it was possible to obtain an exemption from this prohibition, for particular goods, if the Tribunal determined that such an exemption was appropriate, having regard to factors enumerated by the Act.

The Act did not control mergers at all nor did it deal generally with price discrimination or exclusive dealing. Neither were there any consumer protection provisions.

Restrictive Trade Practices Act 1971

As a result of the decision in *Strickland v Rocla Concrete Pipes Ltd* (1970) 123 CLR 361 the substance of the [1965 Act] was re-enacted in reliance upon the corporations head of power as the *Restrictive Trade Practices Act 1971*.

In October 1972 the Government introduced two bills into Parliament; the Restrictive Trade Practices Bill (No. 2) 1972, which proposed a number of amendments to the existing legislation, and the Monopolies Commission Bill 1972, which proposed a separate authority to deal with monopoly. Following the change in government in December 1972 these bills lapsed.

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.

In September 1973 the Government introduced the Trade Practices Bill 1973 which adopted a general proscriptive approach to restrictive trade agreements and practices, thus moving away from the case-by-case approach.

The Trade Practices Bill 1973, following significant amendment, formed the basis of the present Act, the *Trade Practices Act 1974*, which was enacted in August 1974. That Act came into operation in large part on 1 October 1974 and, with one [10] exception, the remaining provisions came into operation on 1 February 1975. The exception, section 55, came into operation on 27 September 1975.

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 dealings with the Commonwealth.

Trade Practices Act 1974

The *Trade Practices Act 1974* (the TPA) is reminiscent of the *Australian Industries Preservation Act 1906* (Cth) in so far as it adopts the approach taken in United States antitrust legislation, rather than that taken in the United Kingdom as the *Trade Practices Act 1965* had done.[8] 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 (s 46);
- exclusive dealing (s 47);
- price discrimination (s 49);
- mergers (s 50).

Although, as we shall see, this Act has been amended substantially since 1974, its basic approach and structure have remained the same. It constitutes the principal source of Australian competition law.

8 One area in which UK legislation was influential was resale price maintenance. The TPA retained the approach taken in the *Trade Practices Act 1971* (Cth), which was modelled on the *Resale Prices Act 1964* (UK). The approach taken in this legislation was proscriptive, in line with the rest of the TPA.

The TPA also deals with consumer protection, secondary boycotts and international shipping. Its consumer protection provisions, especially those relating to unfair business practices contained in Part V, Division 1, have had enormous impact on commercial activity and have given rise to considerable litigation. As a result, the Act plays a significant role in this area. However, as this work is concerned only with its competition law provisions, the following outline does not deal with the developments that have occurred since 1974 in other areas.

The Swanson Committee and the Trade Practices Amendment Act 1977

The Trade Practices Act Review Committee, chaired by TB Swanson (the 'Swanson Committee'), conducted an extensive review of the TPA in 1976. Most of the recommendations of this Committee were accepted and implemented by the *Trade Practices Amendment Act 1977* (Cth). 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 (the 1974 Act had used it only in relation to ss 47, 49 and 50) 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 the acquisition of a position of market dominance before it was contravened, was narrower in scope.

The 1986 amendments

Between 1977 and 1986 the competition law provisions of the TPA remained substantially unaltered. However, in 1986 the Act was twice amended in important ways.

The *Trade Practices Revision Act 1986* (Cth) substantially 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 widened the reach of the section considerably. This Act also extended the TPA's merger provisions by inserting two new sections:

- A new s 50(1A) applied those provisions to acquisitions by natural persons in order to prevent companies circumventing s 50 by engaging in merger activity using natural persons, rather than their corporate structure.
- A new s 50A provided for mergers occurring outside Australia to be considered by the Trade Practices Tribunal (now the Australian Competition Tribunal) and the companies involved prevented from operating in this country if the merger would lead to their acquiring, or enhancing, a position of market dominance.

The *Trade Practices (Transfer of Market Dominance) Act 1986* (Cth) also dealt with mergers by excluding from the scope of the section the acquisition of a company that was in a position to dominate a market where the acquisition did not add to its dominance.

The Griffiths and Cooney Reports

In 1988, the House of Representatives Standing Committee on Legal and Constitutional Affairs (the 'Griffiths Committee') inquired into the adequacy of ss 46 and 50. As far as s 46 was concerned, the inquiry was largely overtaken by the decision of the High Court in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Company Ltd* (1989) 167

CLR 177. The Court interpreted sympathetically the 1986 amendments to s 46, which suggested to the Committee that the section would thereafter operate effectively. As a result, it recommended that s 46 not be altered.[9]

In relation to s 50, the Committee considered whether a pre-merger notification procedure should be introduced and whether the test for contravention should be lowered. The former would have required firms to give advance notice of certain mergers so that the application to them of s 50 could be considered before the merger was completed. The introduction of such a procedure would have brought the TPA into line with s 7A of the *Clayton Act*. Regarding the test for contravention, the Committee examined a proposal that mergers should contravene the Act when they would result in a 'substantial lessening of competition' in a market (as s 50 originally provided), and not just when they resulted in the acquisition of a position of 'market dominance' (as they did following the 1977 amendments of the TPA).

The Griffiths Committee recommended against amending the TPA to provide for pre-merger notification or to reinstate within s 50 the substantial lessening of competition test.[10] However, concern about these matters remained, and in 1991 they were the subject of a report by the Senate Standing Committee on Legal and Constitutional Affairs (the 'Cooney Committee'). In its report, the Committee recommended that s 50 be amended to prohibit mergers that substantially lessened competition and that pre-merger notification be required of 'substantial' mergers.[11] The first of these recommendations was accepted by the Australian Government and implemented by s 6 of the *Trade Practices Legislation Amendment Act 1992* (Cth).

Closer Economic Relations with New Zealand

Pursuant to Australia's Closer Economic Relations agreement with New Zealand, which is designed to harmonise the commercial law of the two countries, the *Trade Practices (Misuse of Trans-Tasman Market Power) Act 1990* (Cth) amended the TPA in a number of respects. Most importantly, it introduced s 46A to prohibit a corporation with substantial market power in a 'trans-Tasman market' from taking advantage of that power for a number of prescribed anti-competitive purposes. The effect of this amendment is discussed further in Chapter 9.

The Hilmer Report

The most comprehensive review of Australian competition law was conducted in 1992–93 by the Independent Committee of Inquiry into National Competition Policy (the 'Hilmer Committee', so named after its chair, Professor Frederick Hilmer AO). The scope of this inquiry, the Committee's case for developing a national competition policy and its approach are contained in the following extract from its report (the *Hilmer Report*). Other extracts from this report are peppered throughout the following chapters.

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9 *Mergers, Takeovers and Monopolies: Profiting from Competition?*, Report by the House of Representatives Standing Committee on Legal and Constitutional Affairs (the *Griffiths Report*), AGPS, Canberra, 1989, para 4.6.34.

10 Ibid, paras 5.3.15 and 5.4.62.

11 *Mergers, Monopolies and Acquisitions—Adequacy of Existing Legislative Controls*, Report by the Senate Standing Committee on Legal and Constitutional Affairs (the *Cooney Report*), AGPS, Canberra, 1989, paras 3.131 and 4.40.

Hilmer Report

National Competition Policy, Report by the Independent Committee of Inquiry, AGPS, Canberra, 1993

Towards a National Competition Policy

[1] If Australia is to prosper as a nation, and maintain and improve living standards and opportunities for its people, it has no choice but to improve the productivity and international competitiveness of its firms and institutions. Australian organisations, irrespective of their size, location or ownership, must become more efficient, more innovative and more flexible.

Over the last decade or so, there has been a growing recognition, not only in Australia but around the world, of the role that competition plays in meeting these challenges. Competition provides the spur for businesses to improve their performance, develop new products and respond to changing circumstances. Competition offers the promise of lower prices and improved choice for consumers and greater efficiency, higher economic growth and increased employment opportunities for the economy as a whole.

For much of this century, competition policy was seen as limited to laws dealing with the anti-competitive conduct of firms. Particularly over the last decade, however, competition policy has been understood in a wider sense, embracing a range of laws and policy actions that influence the role of competition in the economy. Recent examples of pro-competitive reforms of these kinds range from the introduction of competition into telecommunications to the deregulation of egg marketing.

Competition policy has been increasingly recognised as a key element of national economic policy …

The Need for a National Competition Policy

[13] The case for developing a national competition policy rests on a number of related considerations.

First, the pro-competitive reforms advanced to date have largely been progressed on a sector-by-sector basis, without the benefit of a broader policy framework or process. Reforms undertaken in this way are typically more difficult to achieve, with the ground rules—including the respective roles of Commonwealth, State and Territory Governments—having to be negotiated on a case-by-case basis. A national policy presents opportunities to progress reforms across a [14] broader front, promote nationally consistent approaches and reduce the costs of developing a plethora of industry-specific or sub-national regulatory arrangements. It also presents important opportunities to increase the pace of reform, which is a question of considerable interest to businesses and consumers.

There is also increasing acknowledgment of the reality that Australia is for most significant purposes a single national market. The economic significance of State and Territory boundaries are diminishing rapidly as advances in transport and communications permit even the smallest firms to trade around the nation. ...

The increasing national orientation of commercial life has been recognised by a series of significant cooperative ventures by Australian Governments. The 1990s have already seen national progress on a range of matters including the National Rail Corporation,

road transport regulation, non-bank financial institutions, the Corporations Law and the mutual recognition of product standards and occupational licensing. Developing a nationally consistent approach to competition policy issues presents opportunities to further integrate the national market, reduce complexity and possibly achieve savings through reduced duplication.

At present the nearest Australia comes to nationally consistent competition policy principles are the competitive conduct rules contained in Part IV of the TPA. In this regard, the progress that has been made is readily illustrated by a comparison of the manner in which business was conducted in the early 1960s with the manner in which most business is conducted today. As one commentator recently observed of the Act, 'this one piece of legislation has wrought a revolution in the way commerce is carried out in Australia'. (Butler A, 'The Quiet Revolution—Assessing the Impact of the *Trade Practices Act*' (1993) 7 *Commercial Law Quarterly* at 4.)

[15] But the most pressing deficiency in the Act is that it remains limited in its application, with coverage often depending on questions of ownership or corporate form rather than considerations of community welfare. While the Act applies to Commonwealth businesses, the exemption of some State- and Territory-owned businesses appears increasingly anomalous in light of commercialisation and similar reforms. The continuing exemption of some agricultural marketing arrangements also affects efficiency, and runs counter to efforts to increase our export income through further processing of primary products in Australia. Similarly, the costs to consumers and the community generally of anti-competitive practices engaged in by professions such as lawyers has been receiving increasing attention.

Inconsistent application of competitive conduct rules can allow exempted firms to engage in anti-competitive behaviour with effects reaching across State borders to the economy generally. For example, immunity in one State from, say, a merger rule could allow a business to acquire sufficient market power to deter competitive entry from firms located in neighbouring States. Similarly, allowing rural producers in one jurisdiction to engage in anti-competitive agreements can distort the operation of markets to the detriment of consumers and other producers wherever they may reside. Exemptions arising through constitutional limitations also harm consumers and firms within the same State; for example, intrastate unincorporated businesses can engage in price-fixing or other anti-competitive behaviour with impunity, to the detriment of consumers and other firms.

The absence of a consistent national approach to the other main areas of competition policy … can also act as a source of inefficiency.

Regulatory restrictions on competition imposed by State and Territory law can have important inter-state and national implications. Firms enjoying statutory protection from competition in [16] one State can impose extra costs on consumers and businesses, including businesses that must contend with international competition, thus ultimately influencing the trading success of the nation as a whole.

The *structural reform of public monopolies* is also becoming a matter of inter-state and national interest, with the work of the National Grid Management Council on an inter-state electricity grid providing a recent example. Inter-governmental cooperation is required to allow open competition into the grid system. However, structural reform issues may remain important even once the market has been opened up to competition. For example, failure

of an electricity utility in one State to undergo appropriate structural reform may allow that utility to cross-subsidise competition against utilities from other States, with consequent distortions in the emerging inter-state market.

Questions of *third-party access to facilities* which cannot economically be duplicated—such as major pipelines, electricity grids or rail tracks—are also increasingly raising issues at the inter-state and national level. Regulation of access arrangements to inter-state facilities at the State level would create administrative duplication and raise concerns over regulatory overlap.

Responses to *monopoly pricing issues* can also involve inter-state or national implications in some circumstances. Even where the pricing issues are predominantly within a single State, there may be advantage in developing nationally-consistent approaches to many issues, as well as in progressing pricing reforms in particular sectors in a coordinated way.

Government businesses sometimes enjoy special advantages when competing with private firms, giving rise to concerns over *competitive neutrality*. Inconsistent approaches to this issue between jurisdictions may distort inter-state markets, and may raise particular difficulties if government businesses from different jurisdictions engage in direct competition. This may be a feature of inter-state competition in electricity generation, for example.

Taken together, these considerations suggest significant benefits from developing nationally consistent approaches to competition policy issues.

[17] The Committee's Approach

The need for a national competition policy has been agreed by all Australian Governments. The Governments have further agreed that a national competition policy should give effect to the principles set out in Box 1.2.

Box 1.2. Agreed Principles for a National Competition Policy

a No participant in the market should be able to engage in anti-competitive conduct against the public interest;

b As far as possible, universal and uniformly applied rules of market conduct should apply to all market participants regardless of the form of business ownership;

c Conduct with anti-competitive potential said to be in the public interest should be assessed by an appropriate transparent assessment process, with provision for review, to demonstrate the nature and incidence of the public costs and benefits claimed;

d Any changes in the coverage or nature of competition policy should be consistent with, and support, the general thrust of reforms:

- **i** to develop an open, integrated domestic market for goods and services by removing unnecessary barriers to trade and competition; and
- **ii** in recognition of the increasingly national operation of markets, to reduce complexity and administrative duplication.

These principles comprise an important part of the terms of reference for this Inquiry

…

[18] The Committee's task raised three main challenges.

- How should a national policy address cases where the benefits of competition are seen to be out-weighed by other factors? The Committee has not taken a blinkered or dogmatic view over the role of competition in society; in some cases competitive market outcomes will not meet the national interest, because they fail to deliver either efficiency or some other valued social objective. However, the Committee is satisfied that the general desirability of permitting competition was so well established that those who wish to restrict or inhibit competition should bear the burden of demonstrating why that is justified in the public interest. This principle is already reflected in the agreed principles dealing with anti-competitive market conduct, and the Committee proposes that it should apply equally to the actions of governments.
- How should a national policy address the challenges of implementing micro-economic reform, recognising possible equity issues and that smaller and more concentrated groups often have powerful incentives to resist reforms that deliver substantial but sometimes more dispersed benefits to the wider community? The Committee responded to this issue by recommending processes that would increase the transparency of the costs of restricting competition: more closely aligning policy with the reality of the national market, giving more explicit priority to national interests; and placing particular emphasis on transitional measures where appropriate. In the case of extending the application of market conduct rules, where transitional impacts will be modest, currently exempt businesses will have time to adjust to new regulatory requirements. In the case of other reforms that may have more significant implications, the Committee's proposals include the establishment of an independent and expert body able to guide the transitional process.
- [19] How should the interests of nine governments be accommodated in a single national policy? The Committee approached this issue by supporting cooperative approaches between governments wherever these were considered capable of achieving the important national interests at stake. In some cases, principles are proposed that would be implemented by individual governments. In other cases, a single legal and administrative regime is seen as required, but cooperative processes for applying these regimes are given high priority. Importantly, the Committee also proposes participation of all Australian governments in the key policy-making institutional arrangements.

[Footnotes omitted]

Competition Policy Reform Act 1995

The Hilmer Committee made a number of recommendations regarding the TPA and other areas falling within the scope of its inquiry. Most of these were accepted by the Australian Government and the state and territory governments. This led, on 11 April 1995, to the execution of two inter-governmental agreements—the *Conduct Code Agreement* and the *Competition Principles Agreement*. These were designed to achieve 'consistent and complementary competition laws and policies which will apply to all businesses in

Australia'[12] and resulted in the passage of the *Competition Policy Reform Act 1995* (Cth). This made a number of significant changes to the content and administration of the TPA, which are dealt with in later chapters. Some of the benefits of these reforms are noted in the following extract.

National Competition Council, 2003

Annual Report 2002–2003, AusInfo, Canberra
Competition policy: the Future

[1] In 1995, the Council of Australian Governments (CoAG) agreed to introduce the National Competition Policy (NCP) in anticipation of the benefits that it would bring:

> [CoAG] emphasised that the competition policy reform package would enhance the national economic interest by improving Australia's international competitiveness as well as enhancing the interests of Australian consumers. Consumers will benefit from lower prices for government services as a result of the implementation of the package over time. …

In 2003, the Organisation for Economic Cooperation and Development (OECD) was among the Australian and international commentators that recognised that these benefits are being realised:

> The implementation of Australia's ambitious and comprehensive National Competition Policy over the past seven years has undoubtedly made a substantial contribution to the recent improvement in labour and multifactor productivity and economic growth. The Productivity Commission estimates that Australia's GDP is now about 2 per cent higher than it would otherwise have been, and Australian households' annual incomes are on average around A$7000 higher as a result of competition policy. …

The benefits of reform are being delivered through a stronger more flexible economy, lower prices and greater choice for consumers and better business management … Australia is recognised for its strong economic performance within an international environment in which many countries have experienced difficulties. A sequence of international events have had the potential to adversely affect Australia, including:

- the Asian financial crisis, the contraction in the Japanese economy and the further fall in Asian economic activity caused by the sudden acute respiratory syndrome (SARS) outbreak;
- the downturn in the United States' economy, combined with the fall in business confidence following the 11 September 2001 terrorist attacks; and
- the continued slow economic growth in Europe …

12 *Conduct Code Agreement*, p 1; *Competition Principles Agreement*, p 2.

In previous world downturns, the Australian economy contracted as a consequence of the decline in other economies. The Reserve Bank of Australia [2] noted that the current strength in the Australian economy, in the face of poor economic performance internationally, diverges from past experience:

> In past periods of global downturn, Australia has rarely outperformed the major countries; historically, our tendency was to have a period of weakness that was, if anything, more pronounced than those of the G7 group. This time it has been different …

Australia's sustained strong economic performance in recent years is notable when compared with its history and current international experience. The National Competition Council's 2001–02 annual report discussed this economic performance in detail. The following section illustrates Australia's economic performance and its link with the benefits of implementing competition policy reforms.

Unshackling the Australian economy: the gains from competition policy reform

Despite recent international events and the effects of the drought, Australia maintained an impressive rate of increase in gross domestic product (GDP) and labour productivity … Australia's performance is significantly better than most other OECD countries.

…

Australia is one of only three developed countries that experienced a strong acceleration in productivity growth in the 1990s. It ranked second behind Finland and above Ireland … [3] …

It is difficult to prove conclusively which factors drive economic performance. … The Productivity Commission's [2002] examination of productivity growth identified three factors that could contribute to Australia's strong productivity growth …

- education and skills development; [4]
- the take-up of information and communications technologies; and
- reform initiatives.

The Productivity Commission concluded that these factors are interrelated and the first two, while they can explain some of the productivity growth, have made a relatively modest contribution to that growth. It stated:

> Policy reforms have been major drivers and enablers. Reforms have enhanced competitive pressures: opened the economy to trade, investment and technology; and allowed greater flexibility to adjust all aspects of production, distribution and marketing. In broad terms, reforms have released the shackles of the economy and have both forced and allowed business to modernise. …

The OECD supported these conclusions:

> There are compelling indications that the combination of sound macroeconomic policies and long-standing structural reforms have greatly enhanced the Australian economy's capacity to grow more quickly and respond more flexibly to shocks. …

… these general observations are supported by a closer look at many of the sectors that have been subject to reform (box A.1). ...

Box A.1: Specific benefits from competition policy reforms

Electricity

The benefits of electricity reform are large. The Australian Bureau of Agriculture and Resource Economics estimated that the benefits from electricity reform by 2000—three years after the commencement of the national market—were equivalent to a A$1.5 billion rise in Australia's gross domestic product ...

Many electricity prices have fallen. The Productivity Commission showed that household electricity prices in Brisbane, Melbourne and Sydney fell in real terms by 1–7 per cent between 1990–91 and 2000–01, representing real savings to households in 2000–01 of some A$70 million ... In Melbourne, the average real price for small businesses consuming 12 000 kilowatt hours per year decreased by 23 per cent in 2002 and the average real price for medium businesses using 40 000 kilowatt hours per year fell by 17 per cent ...

Gas

Gas reform under the NCP has transformed the gas industry in Australia. The introduction of the national gas code (particularly in relation to gas distribution pipelines) has increased competition in gas exploration and stimulated gas production and pipeline development. Since 1995 more than A$1 billion has been invested in upstream, transmission and distribution assets each year. Total transmission pipeline infrastructure grew from 9000 kilometres in 1989 to over 17 000 kilometres in 2001 ...

The Australian Gas Association (1999) expects the proportion of Australia's energy supplied by gas to grow to 22 per cent by 2005 and to 28 per cent by 2014–15. [5]

Water

Water reform is affecting all aspects of the provision and use of water. Progressively governments are preparing water management arrangements that identify and allocate water to meet the needs of users and of the environment.

Consumption-based pricing has encouraged efficiencies in water consumption, leading to a real reduction of 2.7 per cent in customers' combined water and sewer bills. Per person water use in the 10 years to 2001 fell in Sydney by 7 per cent, in Melbourne by 12 per cent, and in Newcastle by 14 per cent ... In the ACT, changes to the structure of water prices reduced annual consumption by a typical household from 150–500 kilolitres to 150–300 kilolitres ...

Water trading is increasing. The Victorian Government estimated that the ongoing return from irrigation is increasing by as much as $12 million each year due to water trading ... In the Murray–Darling Basin since early 1998, States traded over 10 000 megalitres of water. These trades were valued at over A$10 million. The trades have been predominantly from low value irrigation uses such as pasture, citrus trees and annual crops to higher value uses (mainly vines for the production of wine) ...

Other reforms

Deregulation of grain marketing has resulted in innovation in growers' approach to selling their crop. Growers can now effectively manage their price risk and price their harvest up to three years in advance. The Australian Stock Exchange is developing a futures market for milling wheat, feed wheat, canola and sorghum ... Consumers are taking advantage of

> the convenience offered by extended retail trading hours. Growth in retail turnover in Victoria has exceeded national growth since deregulation in December 1996 ... In Sydney and Melbourne, where supermarkets can trade on Sundays, around 35 per cent of consumers shop for food and groceries on Sunday. In Perth, however, where only smaller food stores can trade on Sunday, only 7–8 per cent of people shop for food on that day ...

The greatest risk now is complacency. Failure to advance reform could undo many of the benefits that have been achieved. Australia's rate of productivity growth is high but its absolute level of productivity is below that of many OECD countries. There is scope for further productivity improvements. Previous reforms have generated considerable growth in productivity, but they cannot be relied on to maintain growth indefinitely. Further improvements are needed to sustain the economy. Economic pressures domestically and abroad may inhibit Australia's productivity growth. Once Europe, the United States and Asia recover from the international economic downturn, Australia will need to continue to improve to avoid falling behind.

Dawson Report

In 2002–03 a committee, chaired by Sir Daryl Dawson, conducted a review of the competition provisions of the TPA. The report of the Committee (the *Dawson Report*)[13] was released in April 2003 and recommended significant change to the TPA, including the introduction of criminal penalties for hard-core cartel conduct, the removal of the *per se* prohibition on third line forcing and the introduction of a formal (but voluntary) pre-merger notification scheme. As noted below, most of these recommendations have, eventually, been implemented. Their significance will be addressed in the relevant chapters that follow.

Senate Committee Inquiry 2004

Dissatisfaction in some quarters with the Dawson Committee's consideration of s 46 and the small business sector's general unhappiness with the TPA's protection of its members resulted in a 2004 Senate Committee Inquiry into the section's operation.[14] Most of the recommendations resulting from this inquiry were not accepted by the Australian Government. However, the following recommendations were accepted, and were incorporated into the Act by the *Trade Practices Legislation Amendment Act (No 1) 2007* (Cth):

- s 46 should be amended to ensure courts can consider below cost pricing when determining whether there has been a misuse of market power;
- s 46 should be amended to ensure courts can consider whether a corporation has a 'reasonable prospect or expectation of recoupment' when determining whether there has been a misuse of market power;

13 *Review of the Competition Provisions of the Trade Practices Act* (the *Dawson Report*), Commonwealth of Australia, 2003.

14 *Inquiry into the Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*, Senate Economics References Committee, AGPS, Canberra, 2003–04.

- s 46 should make clear that leveraging of substantial market from one market to another is prohibited;
- s 46 should make clear that courts may take into consideration power that a corporation has resulting from contracts, arrangements or understandings with others when determining whether they have substantial market power.

Trade Practices Legislation Amendment Act (No 1) 2006 (Cth) (the Dawson Act)

The *Dawson Act* implemented many of the Dawson Committee's recommendations. In particular, this Act:

- substantially increased the pecuniary penalties for competition law contraventions;
- gave the Federal Court the power to exclude individuals implicated in a contravention from being a director, or being involved in the management, of a corporation;
- introduced a formal, optional, pre-merger notification scheme, including an appeal mechanism;
- altered the merger authorisation procedure so that parties can proceed directly to the Australian Competition Tribunal without the opportunity for further appeal;
- introduced a collective bargaining notification system for the benefit of small business;
- increased the accountability requirements of the Australian Competition and Consumer Commission.

Amendments affecting s 46: misuse of market power

As stated above, the *Trade Practices Legislation Amendment Act (No 1) 2007* implemented some of the recommendations of the 2004 Senate Committee Inquiry relating to s 46. Notably, however, this Act passed the Senate only after a last-minute amendment that introduced a radical change to predatory pricing law. This will be discussed in Chapter 9, dealing with misuse of market power.

Further guidance in relation to s 46—in particular, concerning what it means to 'take advantage' of market power—was introduced by the *Trade Practices Legislation Amendment Act (No 1) 2008* (Cth).

Cartel conduct

Perhaps the most significant change to Australian competition law in recent years was brought about by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth). This created a new cartel offence for which there are, for the first time in Australia, criminal penalties including imprisonment. As part of this reform, one the best-known provisions of the TPA—s 45A, relating to price fixing—was repealed, as conduct of that nature is now to be governed by the new cartel provision.

Competition law changes and proposals in 2010

A distinctive feature of Australian competition law is the inclusion, in Part IIIA of the TPA, of access provisions. These provisions allow businesses to gain access to the facilities of other

operators where those facilities cannot readily be duplicated and where, without access being granted, competition will not occur. Not surprisingly, these provisions are contentious.

One area of particular concern was that the potential for access being granted was hindering investment in new infrastructure. Responding to this concern, the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) allows a person with a material interest in a new infrastructure facility to obtain from the relevant minister, in certain specified circumstances, a decision that a facility cannot be a 'declared service' for the purposes of Part IIIA, thereby insulating the facility from being the subject of an access claim.

The Competition and Consumer Legislation Amendment Bill 2010 seeks to alter the definition of 'market', for purposes of the merger provisions of the TPA, by removing the reference to a 'substantial' market. This proposal responds to concerns about 'creeping acquisitions'; that is, a number of small acquisitions occurring over time which, together, may substantially lessen competition but which individually may not do so. At the time of writing, this Bill had not been revived following its lapsing due to the August 2010 federal election.

2010 also saw sweeping changes to Australia's consumer protection laws through amendments to the TPA. These changes create a single, nationwide regime covering fair trading, consumer protection and product safety, thereby replacing the various state and territory acts dealing with these matters. The first part of these reforms was introduced by the *Trade Practices Amendment (Australian Consumer Law) Act 2009* (Cth), which came into effect on 15 April 2010; and the second part was introduced by the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth).

The latter Act has great symbolic significance for competition law purposes because in s 1 of Schedule 5 it renames the *Trade Practices Act 1974* (Cth) the *Competition and Consumer Act 2010* (Cth). However, the competition law provisions of the Act remain the same. Accordingly, references to the *Trade Practices Act 1974* (or TPA) are now references to the *Competition and Consumer Act 2010* (CCA).

European Union

The Treaty of Rome 1957, which established the European Economic Community (EEC), adopted a competition law regime that was originally contained in articles 85 and 86. As the EEC has transmogrified into the European Union (EU), these provisions have been renumbered: initially as articles 81 and 82 by the Treaty of Amsterdam and then as articles 101 and 102 by the Treaty on the Functioning of the European Union or, more elegantly, the Treaty of Lisbon, which came into effect at the end of 2009. While not as influential in Australia as United States legislation and case law, there are similarities between these provisions and Australian law that are worthwhile noting.

This provision clearly covers cartel conduct (including price fixing and market sharing) and other forms of restrictive conduct, including discrimination and forcing:

Article 101

1 The following shall be prohibited as incompatible with the common 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 common 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 common market or in a substantial part of it shall be prohibited as incompatible with the common 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 limited 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.