Topic A:

Background and outline to the Trade Practices Act (TPA).

Issues:

General purpose of and its effects on commercial activities and consumers.

Structure:

TPA aimed at ensuring:

- a high level of competition in the Australian economy, by prohibiting anti-competitive conduct/ restrictive trade practices ("RTP"); and

- “consumers” & others are given protection against deceptive trade practices ("DTP") & inadequate/defective products/services (product liability).

RTP- (refer to sections in Part IV):

- anti-competitive agreements including those containing exclusionary provisions or involve the fixing of prices (s45, 45 (A))
- misuse of market power (s46)
- exclusive dealing (s47)
- resale price maintenance (s48)
- mergers/acquisitions (s50 and 50A)

Protecting “consumers” and others from DTP, refer to sections in:

- Unconscionable Conduct (Part IVA),
- Industry Codes (Part IVB) &
- Unfair Practices (Part V Division 1).

Product liability provisions refer to sections in:

- Conditions and Warranties (Pt V Div 2);
- actions against manufacturers and importers (Division 2A)
- liability of manufacturers and importers for defective goods (Part VA)
“Enforcement and Remedies” Etc – refer to sections in Part VI, also VIA & B

Desired Outcome:

Appreciation of broad objectives and structure of the Act.
Topic B:

Constitutional Basis for TPA

Issues:

Extended jurisdiction of TPA via Heads of Power under Australian Constitution

Structure:

Main head:

Corporations Power. [S51 (XX)] –

provides for the making of laws concerning “trading” activities of “trading corporations” (defined in s4 of TPA.)

Other heads of power extending the operation of TPA to include “persons”:-

via Trade & Commerce power [s51 (I)],

Territories power, [s122],

Posts & Telegraph [s51 (v)],

Executive power coupled with incidental power [s61, &s51 (xxxix)]

Refer to s6 generally. For specific example see for example s6 (3) of TPA re application to persons: (Smolonogov v O’Brien, Dataflow v Goodman).

“A person” defined in Acts Interpretations Act to include a “body corporate”.

TPA not meant to cover everything so gaps are filled by the Fair Trading Acts of the various states & territories, ASIC Act, Corporations Act and other legislation.

Desired outcome:

Understanding the Constitutional basis for the TPA, and consequential limitations of its application and the extended jurisdiction of the TPA including its application to “persons”.
**Topic C:**

Government entities covered by the Act.

Interpretations and definitions of terms.

**Issues:**

When entities, including government entities, are subject to the Act.

**Structure:**

Binding on C’w, State & Territories govts “in so far as they are carrying on a business” (see: JS McMillan Pty Limited, RT. Fall Invest, Village Building, Village Building v Canberra Airport (as it pertains to Air Services Australia), NT Power Generation) via s2A and s2B by deeming them to be “corporations”. Shield of the Crown in right of State/Territory govts: pre & post 20/7/96 position. Note exclusions under s2C

"Business" (ss2C and 4(1)).

“Corporations” (s4) can be either “trading” (see Hughes v WA Cricket Assoc, R v Fed Ct of Aust ex parte: WA National Football League) or “financial” (see State Super Board of Victoria v TPC)

A "corporation": activities test” (e.g. Adamson case (WA Football Club, State Super Board of Victoria, E v Australian Red Cross Society, Fencott v Muller).

"Financial corp" (e.g. State Superannuation Board of Vic., Bourke, SGIC v GIO).

"Acquire", “acquisition, supply and resupply” (s4C),

“acquisition of shares” (s4(4)) which is relevant to s50

Terms: "goods", “services”,

"in trade or commerce" (see Glorie v WA Chip & Pulp, , Nelson v Concrete Constructions, Pritchard v Racecage, AFCO v Tobacco Institute, Pears v Balzer, Martin v Tasmanian Development, McCormick International, Dataflow Computer Services v Goodman),

“conduct” including by silence (see Henjo v Collins Marrickville Demagogue Pty Ltd. v Ramensky, Costa Vraca, Metalcorp Recyclers),

“consumer” (s4B)

“injury loss or damage including personal injury” (s4K & s4KA)
Extended Application of Part V (5(1))

Additional operation (s6) (eg O'Brien v Smolonogov, Dataflow v Goodman)

**Desired Outcomes:**
Understand when a government entity may be the subject to the TPA. and be able to identify and discuss key threshold issues as to the application of TPA.
Topic D:

Competition policy.

Markets

Market power

“Substantially lessening competition” (s45, 46, 47 & 50)

Issues:

Why regulate to (a) promote, (b) procure and (c) maintain competition in the economy?

The role and desirability for efficiency within markets

What are “markets” and how are they derived?

Structure:

Basic understanding of theory of competition policy:

Price Theory, Perfect Competition v Monopoly, Kaldor-Hicks Efficiency, Industrial Organisation Theory.

Implications and connection of theories to Part IV (see Corones on competition policy).

“Markets” and “market power”.

Defining a market (s4E).

Importance of including “close substitutes”.

Markets defined by product type (eg biscuits, abattoirs), by function – (eg manufacture, wholesale, retail), by geographical area. (eg TPC v Aust Meat Holdings - Nth Qld).


Substitutability - the demand and supply side of the market and potential competition.
Sub-markets (Taprobane v Singapore Airlines)

Connection between a “market”/ “market power” and the substantially lessening of competition.

**Desired outcomes:**

To understand the connection between competition policy and the TPA & apply principles in identifying the characteristics of a “market” for the purpose of TPA.
**Topic E:**

Contracts, Arrangements or Understandings ("c/ a/ u",) between competitors, which contain an exclusionary provision or that has the purpose or effect of substantially lessening competition [s 45] and/or in relation to the fixing of prices [s 45A]

**Issues:**

Application to anti-competitive conduct of the collusive type involving more than one corporation such as exclusionary conduct and price fixing.

Determining c/ a/ u which contain an “exclusionary provisions” (see s4D). Otherwise assessment of c/ a/ u as to whether and to what extent it has the purpose or effect or likely effect of “substantially lessening competition”.

Application of “substantially lessening competition” test.

**Structure:**

Consideration of critical concepts, terms and threshold issues.

C/ a/ u – see Top Performance Motors, TPA v Nicholas, Apco

Types of c/ a/ u between 2 or more competitors (which can involve the making of or giving effect to) to refuse to deal, or limit dealings with another supplier or particular customer, or class of competitor or customer (eg Top Performance Motors).

Can involve both “vertical” and “horizontal” conduct.

Steps in determining any breaches.

Identifying agreements which contain an Exclusionary Provisions (s4D). Illegal per se.

If agreement does not contain an exclusionary provision then determine whether agreement involves the making of or giving effect to agreements between 2 or more competitors which has the purpose or effect or likely effect of substantially lessening competition.

Determining whether conduct has caused a substantially lessening of competition using competition test.

Requires defining the market and market power.

Identifying c/a/u involving price fixing (s45A) (e.g. Service Station Assoc, ACCC v CC (NSW)).
Meaning of “price”. They are deemed to have the purpose or effect of “substantially lessening competition” - illegal per se.

**Desired outcomes:**

To determine the threshold issues and elements when considering whether there has been a breach of ss45 and 45A.
**Topic F:**

Misuse of market power (s46)

**Issues:**

Corporations with market power.

Misusing/taking advantage of *that power* for a prescribed anti-competitive purpose.

Establishing the *causal connection* between the corporation’s market power and its anti-competitive conduct.

**Structure:**

Consideration of critical concepts, terms and threshold issues.

To find market power must 1st find the ”market” (e.g. QWI v BHP etc); “market power” (eg Munroe Topple v Institute of Chartered Accountants Boral Besser & Universal Music); “taking advantage of that power” (eg Melway Publishing); “purpose” (refer to s4F) – apply subjective test (Pont Data)

Proscribed purposes which constitute “forms of anti-competitive” conduct including:

a. damaging a competitor

b. preventing entry of a person into a market

c. deterring or preventing a person from engaging in competitive conduct in a market.

Identifying actual types of conduct:

- predatory pricing
- refusal to deal.

Note: H C cases – Melway Publishing v Hicks & Boral Besser Masonry v ACCC.

**Desired outcomes:**

To be able to determine the threshold issues and elements when considering whether there has been a breach of s46.
Topic G:

Exclusive dealing (s47)

Issue

Vertical practices which place restrictions on parties in the distribution chain which amount to exclusive dealing.

Structure:

The rationale for prohibitions under s 47.

Types of conduct which can constitute exclusive dealing including:

- solus agreements - subject to the competition test
- requirements contracts - subject to the competition test
- full line forcing - per se offences

Consideration of critical concepts, terms and threshold issues.

Third line forcing – per se offence otherwise competition test applies subject to the existence of an “anti competitive purpose.”

The relevant market when applying the competition test.

What constitutes a “substantial lessening of competition”?

The meaning of solus agreements (Re Tooths, Dandy Power, Outboard Marine), requirements contracts (O’Brien Glass v Cool & Sons), including tying and full line forcing (Nashua).

What constitutes third line forcing? see. Paul Dainty, Castlemaine Tooheys v Williams and Hodgson)

See also ACCC v Health Partners, ACCC v Safeway, Universal Music

Desired outcomes:

To be able to determine the threshold issues and elements when considering whether there has been a breach of s47.
**Topic H:**

Resale price maintenance (s94 to s100)

**Issue**

Practices of establishing minimum resale prices for goods and services as a condition of supply.

**Structure:**

Applies to vertical price restrictions.

The rationale for the prohibition (per se offence) of resale price maintenance.

6 types of conduct which constitute resale price maintenance (s96 (3) (a) – (f)).

Consideration of critical concepts, terms and threshold issue.

“Specified price” – s96 (4)

The manner in which “specified price” is determined (TPC v Bata Shoes, TPC v Mobil Oil, Heating Centre v TPC, 2UE v Stereo FM, TPC v Penfolds Wines).

“Inducing or attempting to induce”. (Bata Shoes).

“Recommended prices”

The defence of ‘loss leader’ selling (TPC v Orlane)

See also ACCC v Safeway (No 2), ACCC v Dermatalogica Pty. Ltd [2005] FCA 152

**Desired outcomes:**

To be able to determine the threshold issues and elements when considering whether there has been a breach of s48.
**Topic I:**
Mergers and takeovers (s50)

**Issue**
Prevention of aggregation of market power by means of mergers and takeovers.

Acquisitions (shares and/or assets) which would have the effect of “substantially lessening competition” in a market which is a substantial market.

**Structure:**
The rationale for prohibiting or restricting certain mergers/takeovers.

Consideration of critical concepts and terms including:
- “acquisition” (s 4(4) and TPC v Australian Iron and Steel)
- “directly and indirectly” (Bowral Bricks, Australian Meat Holdings).

Identifying the relevant market (applying usual principles) but must find that there is a substantial market (s50 (6)) in Australia, States or Territories or a region.

What is the “substantially lessening competition” test? (TPC v Ansett, Arnotts v TPC

The Court must take into account 9 factors when considering if there is a “substantially lessening competition (s50 (3)) including:
- level of actual and potential import competition
- the height of barriers to entry
- the level of concentration in the market
- the dynamic characteristics of the market etc

What do these factors mean?

Note divestiture powers under s81.

**Desired outcomes:**
To be able to determine the threshold issues and elements when considering whether there has been a breach of s50.
**Topic J:**

Unconscionable conduct (*Part IVA*)

**Issues:**

When can ss51AA (general unconscionability), 51AB (unconscionable conduct effecting a consumer) and s51AC (unconscionable conduct effecting a business entity) be relied upon?

Benefits of relying on Part VA vs. equity.

**Structure:**

51AA - Unconscionability, within the meaning of the unwritten law” (see Bromley v Ryan, Commercial Bank v Amardo, Yerky v Jones, Gregg v Tasmanian Trustee Ltd, ACCC v Barbatis).

Advantages of remedies (s80 injunction & s87 orders) for unconscionable conduct under the TPA which are not available under in equity.

S 51AB “unconscionable conduct” involving consumers (see Zoneff v Elcom Credit Union, NAB v Nobile & Anoth., Qantas Airways Ltd v Cameron)

5 factors which court may have regard to when considering -S51AB (2). Not an exhaustive list.

Definition of “consumer transactions” - (S51AB (5) & (6)). Contrast with s4B.

Issue of foreseeability ((s51AB (4) (a))

Unconscionable conduct in “small” business transactions (S51AC) - up to value of $3m.

11 factors which court may have regard.

Application of Part IVB- Industry Codes (s51AD) and Franchising Code of Conduct

**Desired outcomes:**

To be able to discuss the operations of ss51AA, AB and AC, including the circumstances in which they can be used.

To be able apply the sections to a given set of facts.
**Topic K:**

Unfair practices (Part V Div 1) in particular 52, 53, 53 B and harassment & coercion (s 60) Representations as to future matters (promises & predictions) - ss51A

**Issues:**

The types of practices that may contravene relevant sections. Threshold issues. Circumstances in which the various sections can be successfully applied.

**Structure:**

Misrepresentations as to future matters (S51A) (Digitech) - intended to shift burden of proof to defendant. “Reasonable grounds” defence. (see: Cameron v QANTAS Bowler v Hilda Pty Ltd, ACCC v IMB, O’Neill v MBF, Sydney Harbour Casino v Coluzzi)

Non-application to “financial services” (s51AF) – use ASIC Act.

Misrepresentations which amount to DTP- (Sections 52 to 65A)

Misleading & deceptive conduct (s52) - establishes a norm of conduct.

Proof of I intent is not necessary: (see Brown v Jam Factory P.L.).

Not confined to “consumers”: (see Concrete Construction v Nelson) Can be relied upon to protect commercial interests (Parkdale, Hornsby Building Information Centre, Campomar Sociedad v Nike).

4 threshold elements, including “conduct” (see Cassidy) which may be by silence (Metal Corp), “other than by inadvertence” (Costa Vraca).

Determining breach where conduct is aimed at group: (see Taco Bell factors).

Causation – concept of “erroneous assumption”: (see McWilliams Wines v McDonald’s and Taco Bell) vs. intention to confusion: (see Murray Goulburn Co-op, Telmak).

Exclusion clauses: (see Henjo v Collins Marrickville). Wrong Information passed on: (see Yorke v Lucas, Acohs v Bashford Consulting, Costa Vraca,) Effect of “disclaimers” (Butcher v Lachlan Elder). Particular types of conduct eg comparative advertising and

**Desired outcomes**

To be able to determine and discuss the basis for s52 action, including where conduct is based on a promise or prediction and/or is directed towards a group vs. an individual.
**Topic L:**

Sharp practices–ss53 to 53C and improper business practice - ss54 to 65A

**Issues:**

Specific types of practices may be in contravention of ss54 to 65A. The threshold issues.

Circumstances in which various sections can be successfully applied.

**Structure:**

Consider specific types of misrepresentations under:

- ss53 (11 types applicable to many circumstances – consider specific types by reference to cases);
- 53A (applicable to land transactions);
- 53B (applicable to employment); and
- 53C (applicable to price).

Who may contravene sections? Consider key elements of the sections including threshold issues. Contravention may be subject to prosecution by ACCC.

Types of improper business practices involving forms of misleading conduct, including:

- bait advertising (s56);
- referral selling (s57);
- accepting payment where no intention to supply as initially represented (s58);
- claiming payment where no reasonable cause to do so ("inertia selling") and placement of entry in a directory without proper authority (s64)

Conduct not requiring “misleading” conduct such as harassment, physical force (s53A (2) and s60).

**Desired Outcome:**

To be able to determine and discuss the basis for an action under various sections given certain circumstances. To be able to apply more that one section under Division1 given particular facts i.e. ss52, 53 and 60.
Topic M:

Product Liability (Part V - Divisions 2 & 2A)

Issues:

Protecting “consumers” by proscribing certain non-excludable conditions and warranties (Div 2) into “consumer” contracts and imposing on “manufacturers” certain non-excludable obligations (Div 2A).

Structure:

Conditions and warranties in contracts (e.g. E v Red Cross)

“Consumer” defined in s4B.

Non excludable (s68) conditions and warranties as to title of goods (s69), description of goods (s70 (1), merchantable quality of goods (s71 (1) etc and due care and skill in provision of services (s74 (1) etc.

Liability of linked credit providers (s73)

Actions against manufacturers/importers of goods (Div 2A). Non-excludable (s74K) obligations of manufacturers including re merchantable quality of goods (see Medtel v Courtney & Ryan v Great Lakes Council).

Defences (Effem Foods v Nicholls). Limitations as to liability applicable to certain obligations.

Limitations issues re legal action; 10 year repose period (s74J).

Desired Outcome:

To be aware of product liability provisions and to be able to identify and apply Divisions 2 & 2A.
**Topic N:**

Liability of manufacturers and importers for defective goods (Part VA)

**Issue:**

A strict product liability regime applied to goods *supplied* by a manufacturer

**Structure:**

Right to compensation for the amount of loss or damage suffered.

Recovery by action against the corp. that manufactured the good/s. Strict liability whereby a person who is injured or suffers property damage as a result of a defective product has a right to compo against the Mf [bearing in mind ss75AC (1) and2)] without having to prove negligence against the m’f.

4 basic conditions:

1. Threshold conditions as per s75AD: corp. [s 4] in t or c [s 4] supplies goods [s 4] manufactured by it [see s75AA]

2. Defect [s75AC] in the goods supplied (See Glendale Chemical Products v ACCC)

3. Loss or damage suffered by a person [s75AD] &/or by a person other than the injured person [s75AE] &/or, in relation to other goods [s75AF] &/or, in relation to buildings [s75AG]

4. Causal connection between the defect and the loss.

Importers deemed as manufacturers [S75AB]. Unidentified manufacturers [S75AJ]

Defences which erode the “strict liability” approach [s75AK] (see Effem Foods); Contributory Negligence: [s75AN]; Limitation periods; 10 year repose period.

Pt VA not to be excluded restricted or modified [S75AP]

Measure of damages. See Part VIA re application of civil liability type restrictions.

**Desired outcomes**

To identify causes of action, remedies and defences under Part VA.
**Topic O:**

Enforcement and remedies (Part VI)

**Issues:**

Extension of remedial action and prosecution to certain persons.

Prosecution & penalties for breaches of Part IV and V (via Pt VC) and civil remedies for breaches of Parts IV, IVA and V.

**Structure:**

Part VI applies to Parts IV, IVA and V (and VC)

s75B - interpretation

s84 - conduct of directors, servants, and agents imputed to corporation which applies to ss46, 46A and Pt IVA, Pt IVB, Pt V.

Offences against Pt IV & penalties –

- S76 offences & penalties

- Limitation issues.

Offences against Pt V (Pt VC) & penalties -

s79 offences. Penalties see Part VC. Limitation

Defences including publishers defence (s85).

Factors Courts have taken into account in imposing penalties: (TPC v CSR, NW Frozen Foods Pty Ltd v ACCC). See also George Weston.

**Remedies:**

Injunction - final and interim (s80).

Interim injunctions: 1. serious question to be tried 2. balance of convenience.

Standing apart from ACCC. (Hornsby Building Information Centre, Phelps v Western Mining, Glorie v Chip & Pulp, Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Incorporated, World Series Cricket v Parish, Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Limited). Discretion: (ACCC v CG Berbatis). Interloc. injunction. to preserve assets (s87A).

Order to disclose information or publish advertisements (s80A)
Divestiture of assets (s81)

Damages - (s82). Right to and limits on damages. Contributory negligence (s82 (1B) re economic loss and property damage.

Limitation period 6 yrs from when cause of action arises. (Wardley v WA).

Importance of causal connection – “by” the conduct.

Basis of calculating damages: see Marks v GIO, Wardley, Gates v City Mutual Life Assurance, Kenny & Good Pty Ltd v MGICA, Murphy v Overton.

Other orders (s87). Not against 3rd parties: (Krambousanos v Jedda). Limitation 6 years.

Types of order:

- Rescission: (Henjo v Collins Marrickville).
- Setting aside guarantee: (Nobile v NAB).
- Restraining order against further proceedings to recover outstanding rent where lessees proved that they had been induced to enter the lease by false representations by the leasing agent: (Brown v Jam Factory).
- Declaring void ab initio a contract for the sale of a unit where there had been a misrepresentation by silence: (Demagogue v Ramenesky).
- Agreement void ab initio and order that respondent supply on terms which previously applied: (ASX Operations Pty Ltd v Pont Data Australia Pty Ltd).
- Vary agreements - Court obliged to exercise power with caution so as not alter essential bargain that parties would have reached: (Kizbeau v W G & B Pty Ltd).

Right to and limits on damages.

Limitation issues.

Measure of damages.

Proof of “state of mind of body corporate (s. 84): (TPC v Sun Alliance Aust Limited: Gregg v Tasmanian Trustees Ltd (1997) 73 FCR 91)

Interpretation of "a person" involved in a contravention of both Pt.1V & V (s75B): see York v Lucas, applied in Achos v Bashford Consulting.
Desired outcomes

To be able to determine against whom a prosecution and penalties can be applied for a breach of Part IV and Part V (other than s 52)

Applying various remedies in relation to a civil action bought for breaches of Parts IV, IVA and V.
Topic P

PART VIA (PROPORTIONATE LIABILITY FOR MISLEADING AND DECEPTIVE CONDUCT)

Application:

Section 82 damages for contravention of section 52.

Desired outcome:

General understanding of new provisions.

PART VI B (CLAIMS FOR DAMAGES OR COMPENSATION FOR DEATH OR PERSONAL INJURY)

Issue

Adoption of civil liability legislation.

Application:

Unconscionable conduct and product liability.

Desired outcome:

General understanding of new provisions.

Prepared by J. S. Mendel