TRADE PRACTICES ACT 1974

LECTURE SYNOPSIS

November 2003

NOTE: APPLYING THE CASES IN THE SUBJECT GUIDE IS ESSENTIAL. CASE REFERENCES, IN THE SYNOPSIS, ARE EXAMPLES ONLY.

Topic A:

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

Issues:

Reason for TPA. Its effect on commerce, commercial activities and consumer/commercial transactions.

Structure:

Principal legislation aimed at ensuring:

- a high level of competition in the Australian economy ("Restrictive Trade Practices"); and
- "consumers" are given wide protection (Consumer Protection and Product Liability).


Increased competition is via sections on "Restrictive trade practices" (Part IV):
- anti-competitive agreements and exclusionary provisions (s45, 45(A))
- misuse of market power (s46)- exclusive dealing (s47)-retail price maintenance (s48)- mergers (s50 and 50A)

"Consumer protection" & product liability (Parts IVA, IVB, V, VA):
- Unconscionable Conduct (Part IVA)
- Unfair Practices (Part V Division I).
- Product liability (Conditions and Warranties under Pt V Div 2; actions against manufacturers and importers under Division 2A; liability of manufacturers and importers for defective goods under Part VA)

"Enforcement and Remedies" Etc – (Part VI)

Desired Outcome:

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

Constitutional Basis for TPA

Issues:

Heads of Power under 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 and Telegraph [s51 (v)], Executive power coupled with incidental power [s61, & s51 (xxxix)]

s 6 generally but for specific example see for example s6 (3) of TPA re application to persons (Smolonogov v O’Brien).

Acts Interpretations Act definition of “a person” 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 and other legislation.

Desired outcome:

Understanding the Constitutional basis for the TPA and consequential limitations of its application and the extended operation of the TPA including when it can apply to a person.
Topic C:

Government entities covered by the Act. Interpretations and definitions.

Issues:

Entities, including government entities, subject to the Act. When applicable?

Structure:

Binding on C’wealth, State & Territories govs when “carrying on a business” (see: JS McMillan Pty Limited, Fall Invest) via 2A, 2B and 2C by deeming them to be “corporations”. Shield of the Crown in right of State/Territory govs: pre & post 20/7/96 position.

“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).

"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 Demagogue Pty Ltd. v Ramensky, Costa Vraca, Metalcorp Recyclers), “consumer” (s4B).

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 and market power

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”?

Structure:

Basic understanding of theory of competition policy: Price Theory, Perfect Competition vs 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 accuracy.

Markets defined by product type (e.g., biscuits, abattoirs), by function – (e.g., manufacture, wholesale, retail), by geographical area. (e.g., Nth Qld). See Qld. Co-op Milling Assoc v Defiance Holdings, Tooth & Tooheys Ltd, TPC v Ansett Transport Industries (Operations) Pty Ltd, Queensland Wire Industries v BHP, QIW Retailers Ltd v Davids Holdings, TPC v Aust Meat Holdings, TPC v Arnotts.

Substitutability – the demand and supply side of the market and Potential Competition.

Connection between a “market” and “market power”.

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) containing exclusionary provisions [s 45] and in relation to price fixing [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 per se offences.

Determining those subject to “substantially lessening competition” test.

Structure:

Consideration of critical concepts, terms and threshold issues

Types of agreements – either c, a, u (which can involve the making of or giving effect to) between 2 or more competitors 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 containing 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 of substantially lessening competition.

Determining whether conduct has caused a substantially lessening of competition using competition test. Defining the market and market power.

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

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. Consider key elements of section and cases in which terms were discuss: “market” (e.g. Queensland Wire Industries v BHP); “market power” (See Boral Besser & Universal Music); “taking advantage” (see Melway Publishing); “purpose” (s4F) – 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: 2 HC cases – Melway Publishing v Hicks & Boral Besser Masonry v ACCC.

Part IIIA – statutory regime for gaining access to essential infrastructure crucial for the provision of a service.

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.

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 Coo & Sons), including tying and full line forcing (Nashua) and third line forcing, Castlemaine Tooheys v Williams and Hodgson)

**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 (ss48, 96 and 96A)

Issue

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

Structure:

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, TPC v Penfolds Wines).

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

“Recommended prices”

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

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” (Australian Meat Holdings v TPC).

Identifying the relevant market (applying usual principles) which must be a substantial market (s50 (6)).

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

9 factors which the Court must take into account in determining 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

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:**

Circumstances in which ss51AA and 51AB (unconscionable conduct effecting a consumer) and s51AC (unconscionable conduct effecting a business entity) can 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 Samton, ACCC v Barbatis). Advantages in having available remedies 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))

Remedies – s80 injunction & s87 orders

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

S51AD - Industry Codes

**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 generally (Part V – Division I); in particular ss51A and 52

Issues:

The types of practices that may be in contravention of sections of Division I. The threshold issues which must be initially considered. Circumstances in which the various sections be successfully applied.

Structure:

Misrepresentations as to future matters - S51A intended to facilitate proof. Burden of proof is shifted to the defendant. Defence of “reasonable grounds”. (see: Cameron v QANTAS Airways Ltd. Bowler v Hilda Pty Ltd; (1998) 153 ALR 95, ACCC v IMB, O’Neill v Medical Benefits Fund, Sydney Harbour Casino v Coluzzi)

Misrepresentations which amount to unfair practices - Division I (Sections 51AF to 65A)

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

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).

4 threshold elements, including “conduct” by silence, “other than by inadvertence”.

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

Importance of causation. “Erroneous assumption”: (see McWilliams Wines v McDonald's Systems 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,)

Particular types of conduct eg comparative advertising and effect of “disclaimers”

Desired outcomes

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

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);
- 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 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 or “inertia selling” (s64)

Conduct not requiring “misleading” conduct such as harassment, physical force (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) 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 and limitations as to liability applicable to certain obligations. Limitations issues re legal action (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. 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) and 2)] 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]; Contributory Negligence: [s75AN]; Limitation periods.

PtVA not to be excluded, restricted or modified [S75AP]

Measure of damages.

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 and civil remedies for breaches of Parts IV, IVA and V.

Structure:

Part VI applies to Parts IV, IVA and V

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 & penalties - S76 offences against Pt IV; s79 offences against Pt V. Limitation.

Defences including publishers defence (s85).

Factors Courts have taken into account in imposing penalties: (IPC v CSR, NW Frozen Foods Pty Ltd v ACCC)

Remedies:

injunction - final and interim (s80). Standing (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 (s81)

Damages - (s82). Limitation increased to 6 yrs. When does a cause of action arises? (Wardley v WA). Importance of causal connection – “by” the conduct.
Basis of calculating damages: (Marks v GIO, Wardley, Gates v City Mutual Life Assurance, Kenny & Good Pty Ltd v MGICA).

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 Ramensky).
- 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).

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.IV & V (s75B): 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.

Prepared by J. S. Mendel