

## *Proof of anti-trust markets*

By Caron Beaton-Wells

The Federation Press, 2003

## *Economic essays on Australian and New Zealand competition Law*

By Maureen Brunt

Kluwer Law International, 2003

The *Trade Practices Act 1974* (Cth) is coming up to its 30th anniversary. In recent years, the Australian Competition and Consumer Commission (principally under the stewardship of Professor Allan Fels) has done a lot to increase the awareness of the Act both amongst business persons, and the public generally. This has been due largely to a number of prosecutions of high profile companies for various market rigging activities.

In recent years, there have also been a number of significant cases heard by the High Court, dealing with the scope of the central anti-competitive provisions contained in the Act: see *Melway Publishing Pty Limited v Robert Hicks Pty Limited* (2001) 205 CLR 1; *Boral Besser Masonry Ltd v ACCC* (2003) 77 ALJR 623; *News Limited v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515; *Visy Paper Ltd v ACCC* (2003) 77 ALJR 1893; and *Rural Press Ltd v ACCC* (2003) 78 ALJR 274. The public awareness of the Act was also no doubt heightened by one of the decisions referred to above, being the *Souths* decision, involving the highly publicised decision to exclude South Sydney from the Rugby League Football competition.

Litigation under the Trade Practices Act has now become one of the principal sources of work for the Federal Court of Australia and the Federal Magistrates Court. As such, some knowledge of the provisions of the Act is almost essential for most practising commercial lawyers.

In keeping with this increased profile, two books have recently been published dealing with particular aspects of trade practices law. The first, entitled *Proof of anti-trust markets in Australia* by a Melbourne academic Caron Beaton-Wells deals with a relatively narrow aspect of the Act - namely market definition. The second book is by Australia's pre-eminent anti-trust economist, Professor Maureen Brunt, entitled *Economic essays on Australian and New Zealand competition law*, being a collection of essays previously individually published by Professor Brunt over a period of approximately 30 years, covering a number of aspects of the Act.

The first book by Beaton-Wells deals with the relatively narrow area of proof of market definition. For a number of the key provisions contained in Part IV of the Act - being the provisions dealing with anti-competitive conduct - market definition is the initial issue to be determined in considering whether there has been a breach of the Act. For a number of the prohibitions, it is only where the conduct has, or would be likely to have, the effect of substantially lessening competition in a market, that it is a breach of the Act. For sec 46 of the Act, the issue is whether the alleged contravener of the Act has a substantial

degree of power in the market. The issue of market definition is thus one of central importance in determining a breach of the Act. A narrow market definition tends to heighten the anti-competitive effect of particular conduct and the market power of the major participant. Those attempting to prove a contravention of the Act thus generally prefer narrow market definitions. The converse is generally true for those defending the actions.

The book proceeds on the traditional analysis of a purposive approach to market definition, which recognises that definition of a market is not an end in itself, but rather a means by which to facilitate resolution of the substantive issues with which the Act is concerned - namely the exercise of market power, and the effects on competition of specified conduct. The book is not simply a restatement of principles, but rather the focus is on the way in which the courts have, to date, handled the evidence relevant to the issue of market definition. The idea is to assist those involved in actually running a case which involves the issue of market definition, with working out how it has been approached in the past, so as to assist in the future.

The book is divided into four chapters, each of which tackles a different category of evidence involved in the definition of markets under Part IV of the Act. The four categories are as follows:

1. industry evidence - evidence that is derived from the industry to the case at hand and concerns, in broad terms, competitive dynamics in that industry;
2. consumer evidence - evidence that is derived from or concerns, broadly speaking the consumers to whom the products or services offered by the industry are supplied;
3. quantitative evidence - evidence that is derived from quantitative analyses of market data and intended to show, in broad terms, relationships between prices and the demand for or supply of products or services in the industry; and
4. expert opinion evidence.

Whilst there a number of general texts available in Australia which discuss, in broad terms, the relevant principles that have been laid down by the courts with respect to market definition, this book is the first comprehensive text dealing with market definition. For those practitioners involved in trade practices litigation, and in particular, involved in the consideration of market definition, the book is likely to be a very useful tool, providing a ready to hand source in answer to most of the problems that arise.

The final chapter, dealing with expert evidence, is particularly useful. In recent times, there has been a considerable focus in litigation generally on the way in which experts are used, and give their evidence. Most courts now have Practice Notes or Directions dealing with the form and substance of experts reports and the retainer of experts, and most now have particular rules dealing with the manner in which experts are to give evidence and providing for the experts retained by each side to meet prior to giving evidence in an attempt to narrow the issues between them. A number of these new principles derive from the use to which experts have been put in trade practices litigation, and in particular before the Trade Practices Tribunal (now the Australian Competition Tribunal). For a number of years, a practice has been observed in some trade practices cases whereby both experts give evidence at the same time, rather than being cross examined in the usual adversarial

fashion. This chapter provides a useful discussion of the development of expert evidence in trade practices litigation, and the current rules. It should be noted, however, that the Federal Court has recently, and since the publication of this book, revised and reissued its Practice Notes dealing with experts - see *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*, dated 9 March 2004.

The second book is a compilation of essays by Professor Maureen Brunt, who, for a great number of years, has been Australia's pre-eminent anti-trust economist. Professor Brunt served, for a number of years, as a lay member of the Trade Practices Tribunal, and was also a lay member of the High Court in New Zealand, sitting on competition cases. In these capacities she has been involved in a number of significant cases under the *Trade Practices Act 1974* and the *Commerce Act 1986* (NZ).

There are seven such essays that have been reproduced, and Professor Brunt has written an introduction, effectively updating all of the chapters. The seven essays (and when they

were first published) are as follows:

1. 'Legislation in search of an objective' (1965);
2. 'Lawyers and competition policy' (1976);
3. 'The use of economic evidence in anti-trust litigation: Australia' (1986);
4. 'Market definition issues in Australian and New Zealand trade practices litigation' (1991);
5. 'Australian and New Zealand competition law and policy' (1992);
6. 'The Australian anti-trust law after twenty years: A stock take' (1994); and
7. 'Anti-trust in the courts: The role of economics and of economists' (1999).

Both books are recommended to any trade practices practitioner.

*Reviewed by Ian Pike*

## Trusts law in Australia (2nd ed)

By Denis SK Ong

*The Federation Press, 2004*

As the author, an associate professor of Law at Bond University, notes in the introduction to his work, the most important institution in equity was, and is, the trust. And it is the trust and trust law in Australia which is the focus of this book.

The opening chapter provides a useful summary of the nature of the trust and compares it to other concepts, such as debt. The author recognises what he refers to as a dichotomy between trust and debt in certain circumstances, the most notable of which being the *Quistclose* trust. There can co-exist in the one transaction both legal and equitable rights and remedies, that is, remedies at law arising from the relationship of debtor/creditor but also remedies in equity arising from the mutual intention of the parties as to how the moneys the subject of a loan are to be utilised. The author provides a useful and easy to digest analysis of the judgment of Lord Wilberforce in *Quistclose*. The nature of a *Quistclose* trust is considered in the context of cases which have applied it both in Australia and England. The prevailing view in the authorities that a *Quistclose* trust is in the nature of an express trust was challenged by the House of Lords in *Twinsectra* in 2002 where Lord Millett held that such a trust was an entirely orthodox example of a default or resulting trust. The author incisively considers the conceptual incongruities which emerge from Lord Millett's view of the nature of the *Quistclose* trust which is at odds with the prevailing view.

In considering trusts in the context of other concepts, the author also examines the use of the *Romalpa* clause which, if effective, affords to an aggrieved supplier a right to trace either the property the subject of the clause or to trace the proceeds of sale. The book considers the development of the law in relation to retention of title and the position of *Romalpa* clauses after the High Court's consideration of them in *Associated Alloys* and, in particular, the danger that a retention

of title clause could be construed as either a trust or, of greater concern for suppliers, that it could be construed as a charge and fail for want of registration.

So whilst the focus of the book is on trusts, the comparison with other concepts such as the *Quistclose* trust and *Romalpa* clauses provides the reader with a multi-faceted manner of examining particular factual circumstances which could arise either as part of one's study of the law or its practice.

After the interesting and informative opening chapter, the author then deals in a comprehensive fashion with the 'compulsory' considerations in any work on trusts, namely, the 'Three certainties required for the creation of express trust', the 'Writing requirements for certain types of transactions', the 'Complete constitution of voluntary trust', the duties, liabilities, powers, rights, appointment, retirement and removal of trustees, an examination of charitable, resulting and constructive trusts, tracing and the rules against perpetuities and accumulations.

The chapter on tracing provides a useful summary of the general principles of tracing at common law and in equity including an examination of the topical issue as to whether the rule in *Clayton's Case* is of any application in determining the manner in which a mixed fund is to be distributed. In considering this issue, the author has considered the development of the law both in England and Australia since *Re Diplock* to come to the conclusion that there is no scope for the operation of *Clayton's Case* except in limited banking contexts. To the authorities considered in the book on this topic may be added in *Re: Global Finance Group Pty Ltd* (2002) 26 WAR 385 and in *Re French Caledonia Travel* [2003] NSWSC 1008 which expressed views consistent with those of the author.

The book is an informative and easy to read update on the law of trusts in Australia. Its content and style render it useful to both students of law and practitioners alike. It is a welcome addition to the corpus of works on trust law.

*Reviewed by Anthony Lo Surdo*