David M Meltz, *The Common Law Doctrine of Restraint of Trade In Australia*, Sydney: Blackstone Press 1995.

This book is "a good read". A good read is something which is refreshing in any law text. It is even more refreshing to see in relation to what many (not including this reviewer) would undoubtedly regard as a boring subject.

What is often the most interesting thing about restraint of trade cases is not so much the decisions of the courts but the differing backdrops against which these decisions are made. Equally interesting is the way in which judges can take the one test and apply it to reach completely different conclusions. Therefore, we find that arrangements in restraint of commercial trade (now largely covered by the *Trade Practices Act*) were, by and large, untouched by the common law. However, when arrangements between the same parties had an employment context, the common law hackles rose and slavery aversion came to the fore.

So, at common law, I could agree with you, my competitor, as to prices and the law was untroubled. If I agreed with you that neither or us would hire each others' employees, condemnation resulted. The artisan, it was said, should be allowed to seek employment elsewhere. This was basic to the freedom of the subject. The consumer, however, had to suffer price fixing. The common law protected the freedom of traders to engage in this activity. The same word "freedom" came to exactly opposite results. In one context, the arrangement was condemned. In the other, it was untouched. Much of this result depends upon a highly subjective view of what is meant by freedom and the economic philosophy in the ascendancy at the time.

David Meltz's book is written in a way which should interest even the non-interested. It is divided into short chapters. Unlike many texts, you do not have to read every chapter and wonder where you are and where you are going. You can read a chapter a night and be safe in the knowledge that each chapter deals with a clearly articulated and distinct subject.

The story starts with the Tudors, the *Statutes of Artificers* of 1536 and the *Case of Monopolies* [Darcy v Allen (1602) " Co. Rep. 84b]. We quickly move to New South Wales and the Rum Corps. Chapter 4 discusses the classic decisions of *Mogul Steamship Company v McGregor Son & Co* [1892] AC 25 and *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1894] AC 535. An analysis of these cases is fundamental to any discussion of common law restraint of trade. The author does it well. He adds to this analysis, in chapter 5, Newcastle's unique contribution to the law of restraint of trade — *The Coal Vend Case* [*AG v Commonwealth v Adelaide Steamship Co.* (1913) 18 CLR 30 (PC)]. Subsequent chapters deal with the "right to work", "reasonable restraints" in employment contracts; "reasonable restraints" to preserve goodwill and "reasonable restraints" in trade ties.

Of course, it is now fashionable to regard the *Trade Practices Act* as having replaced the common law doctrine of restraint of trade. This, of course, is simply not so. Meltz is quite right in his preface when he says:

> "Whilst the main failures of the common law doctrine of restraint of trade have been remedied by the Trade Practices Act 1974, it will still have a continuing part to play in those areas not covered by the Act, particularly in the field of employment. It is suggested that a revitalised common law test could still act as a guardian of economic liberty."

In the second last page of his text Meltz attempts to re-write the 1894 *Nordenfelt Test* of restraint of trade in light of the subsequent decided cases and the passage of a century. This re-write, as Meltz himself recognises, may be open to the criticism of not offering any clearer guidance than the original. However, as Meltz claims, his re-write does encompass the concept of unfairness and unconscionability and would permit the reception of economic evidence in evaluating public interest. Whether anyone will adopt Meltz's test remains to be seen. However, it is in accordance with some of the case authority and it does take into account changes of economic approach and public benefit evaluations in statutes such as the *Trade Practices Act*. His test is appropriate to modern times. We could do much worse than throw out *Nordenfelt* and introduce *Meltz* as the common law test of common law restraints of trade.

I liked this book. I commend it to anyone who might like to read about the topic in a way which gives all the law but none of the drudgery of the turgid text which lawyers usually use. It is well researched. I was of the arrogant view that I thought I knew most of the cases in this area. The author has, however, cited cases which I had never read nor heard of.

But no reviewer would feel that she or he had done a proper job unless some points of criticism could be found. I make these criticisms in order to prove that I have, in fact, read the text in detail, more than for any other reason. Whatever criticisms I make are minor and must be taken within the context of my above fulsome praise of the author's efforts.

My first comment is related to format. I found the format irritating in one major respect. The notes are at the end of chapters. This is fair enough but, because the cases are so spread in terms of time, it was somewhat difficult to know in some cases even the century in which the case was decided without constantly flipping pages. This is particularly annoying when the sociological background against which the case is decided is of significant relevance in understanding the decision. The author himself stresses this in his commentary. I understand the argument that footnotes on the bottom of pages distract from a "good read". However, if they are at the bottom of the pages, one can at least readily locate the year when the case was decided. If each case could have had the year of decision stated somewhere in the main text, this would have helped considerably. If this could not be done, then the main text could perhaps better have

indicated where in history we were at various points. The "good read" of which I have spoken was disturbed a little by my being, at times, quite chronologically disorientated.

There were some cases whose absence surprised me. If the Privy Council decision in the *Coal Vend Case* (above), is quite correctly to be regarded as economists' collectors' piece, their Lordships really sunk to the bottom of the barrel in the subsequent decision in *Crown Milling Company v The King* [1927] AC 394 (on Appeal from New Zealand). In *Coal Vend*, their Lordships simply assumed that there was no public detriment caused by the Newcastle coal cartel involved. In *Crown Milling*, the New Zealand government positively demonstrated detriment in the flour arrangements there being prosecuted. The prosecution affirmatively proved that the arrangements resulted in increased prices, decreased quality and supply difficulties. The Privy Council's advice consisted of ten pages of factual recitation and five lines of judgement. The case was dismissed because the Privy Council said, quite contrary to the actuality, that the prosecution had not discharged its burden of proof. I regard this case as the nadir of the common law of restraint of commercial trade. After *Coal Vend*, it was theoretically (and I stress the word "theoretically") still possible to prove public detriment. *Crown Milling* killed this possibility. I think *Crown Milling* deserves a mention in any discussion of common law restraint of trade.

I was also surprised that there was no treatment of *Amoco v Rocca Bros* [1975] AC 561. This important Privy Council decision, decided on Appeal from the Supreme Court of South Australia was, in my opinion, an important case on restraint of trade and, probably more importantly, on the question of severance. This case was a litigation lawyers' dream in view of the many fora in which it appeared. Meltz deals with it on various matters in the High Court [(1973) 47 ALJR 681] but goes no further. I think the Privy Council decision to which I have referred is important and its absence from the analysis in the text is a pity.

One's overall conclusion is that the text should be given many stars. Above all I liked the clarity of expression and the clear and concise arrangement of subject matter. The text is highly recommended to the reader wishing to be informed of the law in this area by way of a text which is not encrusted with double negatives and proliferating alternatives so frequently present in legal narratives. The text has a novelesque style whilst capturing everything which is important.

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