

Week 3: Cartel Regulation

- Part 4 of the Act is about competition in the market
- Provisions apply where there is misuse of market power, concentrated market
- Exclusionary conduct: where 2 corps collude to exclude other corps from the market.

Cartel Conduct:

Businesses that make agreements with their competitors to fix prices, share markets or restrict outputs are breaking laws by inflating prices, reducing choices and damaging the economy.

- CCA requires business to compete fairly. Businesses struggling to compete fairly + maintain profits may deliberately + secretly set up or join cartel with competitors.
- A cartel exists when business agree to act together instead of competing. This agreement is designed to drive up profits of cartel members while maintaining illusion of competition.

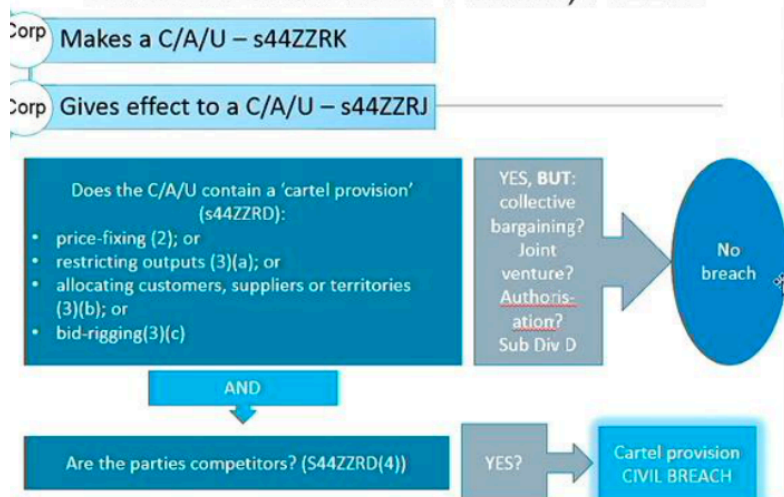
There are certain forms of anti-competitive conduct that are known as cartel conduct. They include:

- price fixing, when competitors agree on a pricing structure rather than competing
- sharing markets when competitors agree to divide a market so participants are sheltered from comp
- rigging bids then suppliers communicate before lodging their bids and agree among themselves who will win and at what price
- controlling output or limiting the amount of goods and services available to buyers.

Cartel Regulation: Part IV anti- competitive provisions

- In essence, a **meeting of the minds** for anti-competitive purposes
- **S 45(5), 45(6), 45(7)**
- *Visy Paper Ltd v ACCC* (2003) 216 CLR 1: V makes recycled paper + entered deal with N so N would sell V all its waste paper. Dispute arose as to where N could source its paper before it sold to V. Could it purchase it elsewhere? N approached V's clients to sell N paper which it then on sold to V. V objected. The agreement with N had an exclusionary provision to restrict this. Collusion by V + N for exclusionary conduct as its an agreement between V + to stop N from buying from someone else (coming together to stop someone operating freely). It is also exclusive dealing (**s 47**) as N can only deal with people who aren't V's clients + they must sell all produce to V. Which provision applies where 2 are breached?
- Exclusionary conduct (collusion)- no need to look at effect of the market, it's a per se provision, meaning collusion is automatically established; **s 45**.
- Exclusive dealing: must show there is an agreement, and then ask the question, does this substantially lessen competition? If so, its breached **S 47(10)**
- **S 45(6) says if there is a breach of both s 45 and s 47, s 47 will apply.**
- Part IV Div 1- Criminal, Part IV Div 2- Civil (**s 45(2)(a)(ii), s 45(2)(a)(i), ss 45B pre 2009 regime, 45C 45Dff**).
- Corp that *gives effect* to a contract/understanding with a cartel provision breaches **s 44ZZRJ**, + if it *makes* a contract/understanding with a cartel provision it breaches **s 44ZZRK**. Corps **must** be competitors in same market + can be working in more than 1 market (e.g. Visy).

Cartel Provisions ss44ZZRK,44ZZRJ



Criminal Cartel Provision →

- **s 44ZZRF requires element of fault, + s 84, which says fault element is knowledge or belief; *The Queen v Nippon Yusen Kabushiki Kaisha* (2016)**
- To establish *criminal* cartel conduct, must establish an individual/corp intended to enter a C/A/U + knew or believed the C/A/U contained a cartel provision beyond reasonable doubt.

Elements:

1. Establish it is a corporation (s 4(1) CCA)

2. **Is there a C/A/U** (no stat def)- C must be shown by legally binding doc, A or U can be proven if it's 'meeting of minds' or binding in honour not law. *British Basic Slag's Application* (1963) 2 All ER 807- parties shall have communicated in same way + as a result intentionally arouse in each other an expectation that he will act in that way. *TPC v Nicholas Enterprises Pty Ltd (No2)* [1978] 40 FLR 83 (beer discount war in SA)- Don't need direct evidence of meeting of mind, can be circumstantial.

Accc v CC (Nsw) Pty Ltd (1999): 4 construction companies- agreement to pay unsuccessful tender fee + fee to industry association. **S 45(2) with s 45A- ACCC alleged price fixing.** Arrangement + understanding are synonymous. Lindgren J said its not sufficient that expectations are aroused, more has to be provided. This was supported by *Rural Press v ACCC*- s 45 and 46.

ACCC v Leahy Petroleum [2007]- difficult to show breach. ACCC then issued public inquiry into petrol pricing. Must show meeting of mind + show parties are under pressure to act in a certain way, whether it be a moral or legal duty. Can show conversations/actions circumstantial evidence.

← Civil Cartel Provisions

If you can show behaviour is joint venture or was collective bargaining, there is no civil breach.

Cartel Provisions ss44ZZRF,44ZZRG

