

Step 1: Always identify which conduct and hence what provision!

Step 2: Apply accordingly!

Horizontal Restraints - Cartel Conduct (Part IV Div 1)

Civil Cartel Regime

S 44ZZRJ	This is for the making of the contract, arrangement or understanding containing the cartel provision.
S 44ZZRK	This is for the giving effect of the contract, arrangement or understanding containing the cartel provision.

1. Is there a contract, arrangement or understanding (CAU) between the parties that has been made, arrived at, or been given effect to?

From the case law, there are three elements which must be satisfied:

1. evidence of some form of communication b/w the parties;
2. evidence that the parties reached some 'consensus' or meeting of the minds' as to some course of action (for example, what was to be done or not done); and
3. evidence that the parties accepted some form of commitment or obligation to implement the course of action consensually agreed upon. (*Leahy Petroleum*)

Three forms of conduct which have been held not to be evidence of an 'understanding':

1. the mere hope or expectation that a party will act in a certain way;
2. parallel conduct that is the result of individual decision-making; and
3. independently held beliefs. (*Leahy Petroleum, Apco*)

In *ACCC v CC (New South Wales) Pty Ltd*, it was noted that the cases require that at least one party 'assume an obligation' or give an 'assurance' or 'undertaking' that it will act in a certain way.

Application

TPC v Email

This is the case where two manufacturers and suppliers of kilowatt hour meters were sharing price lists with one another. They even issued a joint submission to the Industries Assistance Commission

Held by Lockhart J: No CAU

1. Consideration of the evidence suggests otherwise:

- Email believed that it was the price leader and that the supply authorities held the same view.
- It thought that it was in competition with Warburton Franki → wasn't sure if it would win. It thought that there was a real risk that if it raised its prices, Warburton Franki wouldn't do the same.
- They competed on other bases: stability of meters, service, availability of supplies and deliveries.
- Both parties could readily find out about each other's prices.

- Tender procedure did not allow price bargaining.
 - Supply authorities req'd that there be > one supplier. Email would rather compete with Warburton Franki than with anyone else → if it drove Warburton Franki out of business, someone else would take its place b'cos of the policy.
 - Furthermore if there was no level tendering, then there would be price cutting which would drive one of the companies out of business.
 - It was assumed that Email wasn't obliged not to endeavour to obtain a competitive advantage.
2. Court also considered the joint action by both parties:
- Nothing sinister about two companies having a joint submission to the Industries Assistance Commission.
 - Because they had participated in development of Australian standards, it was assumed that both parties may have spoken about this. They denied this.
 - Commission alleged that they put their heads together to come up with the same price variation clause → no substance to the contention.
 - Note that Warburton Franki also bought parts from Email and hence needed the price list.

Apco Service Station v ACCC

This was the petrol market in Ballarat where the ACCC relied on price cycles and price increase calls with Anderson of Apco to prove that Apco was one of the parties to the CAU

Held by FCAFC: No CAU

1. Evidence was to the effect that Anderson was usually called when the increase had been made by one or another of the initiating respondents and had been matched or was in the process of being matched by other respondents.
2. Anderson was the recipient of price-increase calls from Bentley and Carmichael and follow-up calls from Carmichael and that he acted on those calls by instructing his franchisees to check and inform him of the price increases by Apco's main competitors so that he could determine whether and, if so, when to match the price increases, albeit with a discount.
3. Anderson was aware that the purpose of the price-increase and follow-up calls was to persuade or influence him to match the increase and that if he did not do so the price increase would collapse.
4. Trial judge said that while it 'may not matter' if the understanding he has found involves an expectation, rather than a commitment, as to what was to be done, the evidence did establish a commitment on the part of the initiating respondents.
 - There was no expectation by the other respondents that Anderson's readiness to receive calls from Bentley and Carmichael meant that Apco would substantially match the increased prices.
 - Apco received information about price increases, but it reserved to itself the decision, as a matter of commercial judgment, whether to follow those prices up. More often than not (40 out of 69 instances) it didn't.