

**ANTI-OVERLAP PROVISIONS**

If caught by:	Don't talk about here:	Or here:
s 48	s 45(5)(c)	s 44ZZRR(1)(a)
s 47	s 45(6)	s 44ZZRS(1)
s 50	s 45(7)	s 44ZZRU(1)(a) shares or (b) assets
<b>* No anti-overlap for s46</b>		

**Key Economic Concepts**

- The primary objective of competition law to protect the welfare of Australians, through the enhancement of competition & fair trade.
- Competition = efficiency (Posner)

**A. Economic theory** is concerned primarily with how resources are allocated.

1. Productive Efficiency:
  - a. Costs of manufacturing – i.e. capital, technological & labour costs incurred during the process of production.
  - b. Achieved? When goods & services are being produced at minimum costs, by ensuring optimum output is achieved through the best combination of resources.
2. Allocative Efficiency
  - a. Assesses whether market processes allocate society's scarce resources in accordance with their most valuable use.
  - b. Achieved? When resources are allocated to producing goods & services for which consumers are prepared to pay the most
3. Dynamic Efficiency
  - a. Innovation attempting to do things as efficiently as possible. Competition provides an incentive to innovate, as if businesses don't, they'll be locked out of market
    - i. i.e. *Domino's success after introducing app vs. Pizza Hut*

**Market****Market Structure:**

- Market structure consists of the relatively stable features of the market environment, which influence the rivalry among buyers & sellers operating within it.
- Market structure impacts on the ability of firms to engage in anti-competitive conduct that distorts competition & threaten the achievement of economic efficiencies.

**B. Perfect Competition**

In a perfectly competitive market:

- There are many sellers of identical products;
- No one buyer or seller has control over price;
- Entry into the market is easy & costless; &
- Buyers & sellers have perfect knowledge.

*In such a market, market forces determine price. Each supplier maximises its profits by supplying goods or services up to the point where the marginal cost of supplying an additional unit exceeds the marginal revenue obtained from selling that unit.*

Productive efficiency is promoted, as it is very easy to price competitors out of the market. As v similar goods are being produced, therefore if have higher capital, labour etc. costs, output price will be higher – which will need to be borne by the consumer. Therefore consumers will stop buying those g + s.

**C. Monopoly**

A monopoly exists where there is a single source of supply. Monopolies occur because:

- The monopolist controls an input essential to production;
- The existence of economies of scale;
- The monopolist has a valuable patent or other intellectual property right; or

## Collusive Behaviour – Horizontal

By colluding with one another, competitors who do not individually have market power are able to distort the competitive process.		
<b>Div 1 of Pt IV</b> <ul style="list-style-type: none"> <li>• Cartel criminal offences: s 44ZZRF &amp; s 44ZZRG</li> <li>• Parallel civil penalty prohibitions: s 44ZZRJ &amp; 44ZZRK</li> </ul> <b>Div 2 of Pt IV</b> <ul style="list-style-type: none"> <li>• Civil prohibition against exclusionary provision: s 45(2)(a)/(b)(i)</li> <li>• Civil prohibition against provisions that have the purpose, effect or likely effect of SLC s 45(2)(a)/(b)(ii)</li> </ul>		
<b>Cartel Conduct</b> <ul style="list-style-type: none"> <li>• ss 44ZZRJ, 44ZZRK – cartel provision civil penalty provisions (<b>per se offence</b>) <ul style="list-style-type: none"> <li>▫ <b>Competitors</b></li> <li>▫ <b>Make or arrive at</b> (44ZZRJ) or <b>give effect</b> to (44ZZRK)</li> <li>▫ <b>Contract, arrangement or understanding</b></li> <li>▫ <b>Containing a cartel provision</b> (defined in 44ZZRD)</li> </ul> </li> </ul>		
<b>Competitors</b>	<b>44ZZRD(4))</b> <ul style="list-style-type: none"> <li>• The competition condition is satisfied if <u>at least</u> 2 of the parties to the CAU: <ul style="list-style-type: none"> <li>○ (a) Are or are likely to be; or</li> <li>○ (b) But for any CAU, would be or would be likely to be;</li> </ul> </li> </ul> in competition with each other in relation to: SEE s 44ZZRD(4)(c)-(e).	
<b>'Make or arrive at'</b>	S 4(1) <ul style="list-style-type: none"> <li>• 'Arrive at' to include, in relation to understandings, reach or enter into;</li> <li>• 'Give effect to' to include in relation to a provision of a C, A or U, doing an act or thing in pursuance of or in accordance with or enforce or purport to enforce.</li> </ul>	Gray J in <i>Leahy</i>
<b>Contract</b>	A consensual dealing with a high degree of formality. Essentially, but for the doctrine of illegality, contract would be legally binding.	
<b>Agreement</b>	A consensual dealing lacking some of the essential elements that would otherwise make it a contract. E.g. the parties may have intended not to create a legally binding relationship, but only to create a moral obligation to abide by the arrangement. Requires express communication, but acceptance by one party may be implicit in some act, rather than expressed in words	Gray J in <i>Leahy</i>
<b>Understanding</b>	A consensual dealing between parties of a less explicit, informal nature – 'broad & flexible'. Can be tacit, but must involve a <b>meeting of minds</b> . <b>Requires communication, consensus &amp; commitment</b> <p><i>Nb: In Leahy, each party to the alleged arrangement or understanding was free to do as it wished on every occasion when information on prospective price increases was passed to it.</i></p> <p>ALSO → NO NEED FOR ANY OF ABOVE TO BE IN WRITING/LEGALLY ENFORCEABLE</p>	Gray J in <i>Leahy</i>
<b>Evidence</b>	<ul style="list-style-type: none"> <li>• Direct &amp; equivocal evidence of an agreement is often unavailable.</li> <li>• The <i>Leahy</i> decision demonstrates that it may be difficult to establish the existence of an agreement by reference to circumstantial evidence.</li> </ul>	