

## TOPICS:

### **Competition Regulation:**

1. Cartels
2. Misuse of Market Power
3. Exclusive Dealing and RPM
4. Mergers and Acquisitions

### **Consumer Regulation:**

5. Consumer protection (warranties and guarantees)
6. Misleading and deceptive conduct
7. Manufacturer's Liability
8. Unconscionable Conduct
9. Unfair Contract Terms

## **1. CARTELS**

Cartels: Competitors creating an agreement to cooperate together

- co-ordinated anti competitive conduct between parties.
- look for price fixing, output restrictions, market sharing and bid rigging
- competitors form a 'contract, arrangement or understanding'
- firms might agree to divide up the market into geographic areas

Cartels are at odds with OBJECT of CCA s2) cf Object of the act is to enhance the welfare of australians through the promotion and competition and fair trading and provision for consumer protection

Cartels harm consumers because they have to pay higher prices for goods/services than would be if those corps were competing.

QLD Wire Case:

Qld wire succeeded in claim that BHP had engaged in a misuse of market power by refusing to supply it with Y-bar necessary to make star picket fencing.

### **WHAT THE LAW APPLIES TO**

state process - application scheme (each legislatur has to be involved)

s5 applies competition code as law of aus

s25 breach of commonwealth offence regarded as an offence against commonwealth laws

s19 accc may enforce.

s48 competition and consumer act 2010

a **corporation** or other person shall not engage in the practice of resale price maintenance

OR

s48 schedule 1 - a **person** shall not engage in the practice of resale price management

Hilmer recommendations - all commercial activity should be subject to trade practices act -  
idea of shield of the crown

CARTEL ELEMENTS:

## 1. CORPORATION?

we need a corporation because we are in the commonwealth legislation.

Competition and Consumer Act is drafted in terms of corporations because of s51 - constitutionally only corporations may be regulated.

-all entities are subject to competition principles

part IV CCA

Competition code

do you have a corporation? because of s51 Constitution - the Commonwealth legislation only has power to bind corporations (not people)

s4 CCA defines corporation

a) is a foreign corp

b) is a trading corp formed within limits of aus or is a financial corp so formed usually part b

trading corp = Hughes v western aus cricket aus

financial corp = state superannuation board v trade

basically look for whether it engages in financial or trading activities in the course of carrying on its primary or dominant undertaking - state superannuation board v trade practices commission.

corporation = ACN shown or Pty Ltd / Ltd is indicator of corporation because liability is limited.

how does corp commit an offence - how does it engage in conduct?

s84/

s139

if prohibition/liability attaches to a corp is it only the corp which is liable?

ancillary liability s75B

Conduct by directors employees or agents.

s84(2) any conduct engage in on behalf of a body corporate

a)

if director acts within scope of his or her authority = conduct of the company.

does this mean director is not liable?

## Ancillary Liability

ss79 and 82 provide for individual liability through ancillary liability - must prove corporate liability first

s75B defines required connection with contravention

1) a person involved in a contravention shall be a person who

a) has aided, abetted, counselled or procured the contravention

b) has induced whether by threats or promises or otherwise the contravention

c) has been in any way directly or indirectly, knowingly concerned in, or party to the contravention

acc v rural press - necessary to find actual knowledge of the essential matters constituting the contraventions

yorke v lucas looked at whether agent was liable as well as company liable

1. must prove you have a corporation which is liable
2. can then trace out to directors etc through ancillary liability provision

possible because of ancillary provisions for individuals to be liable  
but can non-corporate conduct be caught?  
recall constitutional limitations.

extended operation s6  
act applies to natural persons:  
engaged in trade or commerce  
engaging in conduct involving the use of postal, telegraphic or telephonic services  
or taking place in a radio or tv broadcast

if we have a corp it is caught by the CCA.

Ancillary liability for individuals s75B

commonwealth owned corporation - s2A the Act binds the crown in right of the Commonwealth. this section deems a crown carrying on business either directly or by authority to be dealt with as if it were a corporation.

state owned corporation - ss2B-D the Act binds the state crowns (only to extent of competition provisions).

= national coverage after Hilmer (about competition)

\_\_\_\_\_ satisfies a corporation and is caught by Part IV Div 1 Cth Act - bc Constitution.

**CARTELS Part IV Div 1 creates** both criminal and civil regimes which prohibit corporations from making or giving effect to a cartel provision.

decide whether corporation has made or given effect to CAU.

**2. It needs to be established that a CAU exists. No stat def for CAU.**

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### **3. EXCLUSIVE DEALING AND RPM**

Why don't you ever see two mcdonalds next to each other?

Bc if it's a completely free market why cant they?

Essence of franchise –exclusive right to a particular geographical territory.

Phone bundal – internet and tv service all interconnected? Provided It does not  
'substantially lessen competition in the market' = not in breach of s47.  
Franchisor

Insurance – car insurance + home insurance Bundall arrangements.  
Whats so different from part 4 DIV 1 – subject to competition test.

### **S47(1) Exclusive dealing**

- Subject to this section, a corporation shall not, in trade or commerce, engage in the practice of exclusive dealing.

#### **Exclusive dealing - overview**

- s47(2) and (3) prohibit a supplier from engaging in exclusive dealing
- s47(4) and (5) prohibit a buyer from engaging in exclusive dealing
- s47(6) and (7) prohibit a supplier from engaging in third line forcing – **banned per se.**
- S47(8) and (9) prohibit exclusive dealing where the exclusive dealing is linked to an interest in land.
- S47(10) provides that – except for third line forcing -exclusive dealing will only be prohibited if the conduct has the **purpose or effect of substantially lessening competition.**
- S47(11) and (12) provide limited exemptions for trustees for a religious, charitable or public benevolent institution and related bodies corporate.
- S47(13) provides definitions for **'condition' and 'market'**. Both the market in which the corporation imposing the vertical restraint carries on business and the market in which the firm whose conduct is restricted carries on business should be considered.

\*nb 'subject to this section' = directs you to read rest of the section  
s47(10) gives us substantially lessening competition test

(2)-(9) – subsets of definitions of what constitutes exclusive dealing

47 2 & 3 – franchise – we will sell you special secret sauce if you acquire all your buns from us

47 (4) & (5) offer to buy crispy cream franchise from you in Macquarie centre if you agree not to offer another 4 & 5 franchise in north ryde centre

#### **Elements**

- Corporation
- Trade or commerce (not restrictive definition as found in s18)
- Practice of exclusive dealing
  - 47(2)-(9)

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## **7. MANUFACTURERS' LIABILITY FOR SAFE PRODUCTS**

ACL Ch 3 Part 3-5  
Parts 3-3-; 3-4

Old Part V Div 2A

- Warranties re quality of goods
- Now subsumed into consumer guarantees – ACL Chapter 3 Part 3-2

Old Part VA

- Manufacturers' liable for safety of product if certain types of damage or loss occur
- Essentially retained in ACL: Chapter 3 Pt 3-5

Old Part V Div 1A

- Product safety and information regime – obligations imposed on manufacturers
- Essentially retained in ACL: Chapter 3 Parts 3.3;3.4

Remember:

- Consumer guarantees – Ch 3 Part 3.2
- Enforceable against manufacturer or retailer
- Include (s59) compliance with any express warranties
- Additional to, not instead of ACL guarantees
- \*usually no contract between consumer and the manufacturer as usually buy goods from the retailer.

Express warranty: s2

- ...undertaking, assertion or representation...

"**express warranty**" , in relation to goods, means an undertaking, assertion or representation:

- (a) that relates to:
  - (i) the quality, state, condition, performance or characteristics of the goods; or
  - (ii) the provision of services that are or may at any time be required for the goods; or
  - (iii) the supply of parts that are or may at any time be required for the goods; or
  - (iv) the future availability of identical goods, or of goods constituting or forming part of a set of which the goods, in relation to which the undertaking, assertion or representation is given or made, form part; and
- (b) that is given or made in connection with the supply of the goods, or in connection with the promotion by any means of the supply or use of the goods; and
- (c) the natural tendency of which is to induce persons to acquire the goods.

12 months warranty on your phone – does this mean the period for damage to your phone/faulty etc

not necessarily – these warranties are in addition to s54 in relation to acceptable quality not instead of.

Consumer guarantees cant be excluded but can be modified

- May not be excluded (s64)
- But may be modified (s64A)
- Care required with statement of consumer rights
  - Interaction with law of false or misleading representations – e.g. S29(1)(m)

\*generally no refunds for change of mind but

faulty = 54

wrongly described = 55

different from a sample shown to you –

do not do what they are supposed to do 55

### **examples of breach**

- “this warranty is given in lieu of all other conditions and warranties, express or implied which might otherwise be binding on the company”
- “the company accepts no responsibility for loss or damage through any cause whatsoever”
- “no refunds”

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