

## Competition Law

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## Cartels

**Definition:** A cartel is an agreement between competitors not to compete with each other in some way.

**Effect:** Consumers do not receive the benefit of price competition between suppliers who would ordinarily compete / pay more for goods and services / transfer of wealth to cartel

**Firm Justification:** self interest / safety/ countervailing power / price stability

### Self interest

A major reason for participation as it allows firms to raise profit.

Restricting output = increased demand = increased prices = less competition

### AG v Adelaide Steamship (1913)

- Coal purchasers agreed to fix prices, allocate quotas and restrict opening of mines following rigorous competition – shipping agreement fixed min resale price
- Cth argued contravention of act which required agreement to 'be a detriment to the public' or 'injure any Australian industry'
- **Held:** Intended to preclude competition by raising price of coal. Disadvantageous to public but did not injure the public as there was still some competition.

### Re Yarn Spinners Agreement (1959)

- Agreement to fix min resale price - Yarn spinners argued this was necessary to maintain capacity in the industry
- There was excess capacity in the industry, but there was still sufficient reserve and there were other ways of maintaining adequate reserve.
- **Held:** there was no danger in removing the scheme, it would not amount to a monopoly because at least 5 mills would remain open

### Safety

Often used as a justification for cartel conduct on the basis that cutting costs to competitive levels would jeopardise business quality and endanger public safety.

Can involve the use of professional codes, which the ACCC have previously authorised

E.g. National Paint Product Stewardship Scheme was an agreement between paint manufacturers that a 15c levy is levied on consumers to address environmental harm

### National Society of Prof Engineers (US)

- Canon of ethics prohibited competitive bids, customer would only be informed of price after engaging engineers
- NSPF claimed that allowing competition at produce inferior work and risk public safety
- **Held:** anticompetitive and impeded ordinary market practice. Prevents all customers from making price comparisons.

### Countervailing Power

Some firms argue that cartel conduct prevents countervailing power such as a monopsony (purchaser has power)

Usually need to engage with another entity to collectively bargain

### Price Stability

Argument that creation of price stability encourages commercial activity as consumers are aware of what they are going to be charged - claimed in Yarn spinners

### Funding Across Subsidies

Funding research and development, cross subsidies or improvements in quality, allows wealth to be passed onto consumers.

### Statutory Prohibition

#### **Section 45AD - Cartel provisions**

- i. For the purposes of this Act, a provision of a contract, arrangement or understanding is a *cartel* if:
- (a) either of the following conditions is satisfied in relation to the provision:
    - (i) the purpose/effect condition set out in subsection (2);
    - (ii) the purpose condition set out in subsection (3); and
  - (b) the competition condition set out in subsection (4) is satisfied in relation to the provision

### Contract, Arrangement or Understanding

#### *Contract*

Meaning not defined in the act, given ordinary meaning although need not be enforceable at law

**ACCC v Leahy:** the result of acceptance by one party of an offer that is sufficiently certain and supported by good consideration and intention to create legal relations, a consensual dealing with a high degree of formality.

#### *Arrangement*

More informal and imprecise than a contract but requires meeting of the minds (not independently held beliefs) and some form of communication, consensus, consent or commitment.

**ACCC v Leahy:** More elastic in meaning than a contract and generally amounts to a consensual dealing lacking some of the essential elements that would otherwise make it a contract

#### *Understanding*

Difference to arrangement is most likely that mutuality is not required

**ACCC v Leahy:** Less precise and must be consensual dealing, must involve meeting of the minds and commitment, such that a party cannot feel free to do whatever they wish

#### News Ltd v ARL (1996)

- News wanted to start rival rugby competition but existing competition required clubs to sign agreement for 5 years, News said this breached cartel provisions
- **Held FC:** the clubs were consenting to carrying out a common purpose and therefore an agreement was established

### Parallel conduct or CAU

Not uncommon for prices to be set at the same level in a competitive environment

#### TPC v Email (1980)

- Email and WF were the only manufacturers and suppliers of kilowatt hour meters in Aus
- Both issued identical price lists and tenders, sent each other price lists but no agreement
- **Held:** must have been some meeting of the minds and consensus that can be inferred from circumstantial evidence, which explained it as parallel conduct rather than a cartel as there was no obligation
- There was competition in other areas such as quality, and court accepted this as a state of pure oligopoly with a homogeneous product and prices that could not diverge