

CONTENTS

Introduction 1

- Defining the market 1
- Structural features 2
- Substantial lessening of competition 2

Cartel conduct 3

- Price-fixing 5
- Restricting output 6
- Allocating customers/suppliers/territories 7
- Bid-rigging 7

Catch-all provisions 10

Exclusive dealing 11

- Customer and territorial restrictions 12
- Solus agreement 12
- Full line forcing 13
- Tying and bundling 13
- Minimum quantity conditions 14
- Requirement arrangements 14
- Conditional discounts 14
- Most favoured nation clause 14
- Third line forcing 15

Resale price maintenance 16

- Where supplier makes it known they will not supply without agreement of minimum price 17
- Inducing or attempting to induce second person not to supply below minimum price 18
- Agreement with term not to sell below specified price 19
- Statement of price 19
- Supplier withholds supply given acts of second person 19
- Supplier withholds supply given acts of third person 20

Misuse of market power 21

- Refusal to supply 22
- Refusal to acquire 23
- Excessive charging for access to facilities 23
- Refusing access to essential infrastructure 24
- Predatory pricing 24
- Price discrimination 25

Mergers 28

Authorisation and notification 31

INTRODUCTION

- The CCA applies to government entities where they are carrying on a business: *NT Power Generation v PAWA* [2004].

Steps

- Identify the players.
 - Are they competitors at the same functional level?
 - How many competitors are there?
 - What geographical boundaries do they operate in?
 - What type of product or service do they supply?
 - Is anyone vertically integrated?
- Identify whether the conduct is horizontal or vertical.
 - If horizontal consider cartel conduct, s 45(1)(a)(b), s 45(1)(c) and s 50.
 - If vertical consider s 46, 47 and 50.

Defining the Market

- The product is ____.
- Apply the SSNIP test. That is, would a hypothetical monopolist be able to raise prices 5-10% above the relative price level for a significant period of time without demand or supply side substitution occurring: *Queensland Co-operative Milling* (1976).
- Consider impact on demand side: What would the consumer response be to an increase in prices (e.g. will they switch to another competitor's product or a different geographical source?): *Ibid.*
- Consider impact on supply side: Are sellers able to adjust their production process and substitute with another product in their output mix, or change from one geographic source of supply to another?: *Ibid.*
- Consider different dimensions.
 - **Product market.**
 - Function or use of the product. Example: *US v El Du Pont* (1956).
 - Concerned cellophane products. The function of these products was significant in defining the market: the court considered that they were not in a market of their own rather they were a part of the flexible packaging materials market.
 - Consider products who are close substitutes
 - Costs of switching to producing the other good.
 - **Geographic market.**
 - Perishable goods that can't be transported far?
 - Import cost constraints.
 - Does the firm only supply to NSW or is it capable of supplying all of Australia?

- Provided there is some impact on the Australian market, it does not matter if the conduct occurs overseas: *Air New Zealand v ACCC*.
- **Functional considerations.**
 - What functional level is the firm operating at on the supply chain?
Manufacturer? Distributor?
 - Evidence of vertical integration giving rise to a barrier to entry?
- **Temporal considerations.**
 - Perishable goods?
- If yes, that is the market.
- If no, may be because of demand side substitution (customers stop buying A and start buying B) or supply side substitution (suppliers of B begin producing A). Need to broaden the market.

Structural Features of the Market

- Indicators of market power: *Queensland Wire (1989)*.
 - Market concentration.
 - Does the firm have a large market share?
 - Height of barriers to entry.
 - Consider patents, intellectual property rights, exclusive government licenses, tariffs, economies of scale (e.g. BHP could always compete effectively with Queensland Wire as they would be able to produce Y bar at a much lower cost).
 - Product differentiation and sales promotion.
 - Characteristics of vertical relationships.
 - Existence of vertical integration, and whether this discourages inter-trading or new entrants.
- Offering different price, product or services packages to customers is often an indicator of rivalrous behaviour: *QCMA*.

Substantial Lessening of Competition

- 'Likely' means a real chance.
- 'Substantially' means meaningful or relevant to the competitive process: *Rural Press [2003]*.
- To determine whether there has been a substantial lessening of competition, the counterfactual test must be applied. This involves a comparison between the likely future market structure with and without the impugned conduct.
- Can also consider:
 - The state of competition in the upstream and downstream markets.
 - The duration of the arrangement.
 - The relative size of parties.
 - The degree to which the arrangement closes access to the market for other traders.