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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 Austalia?

        - 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.